HJR

19

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR19

Revision Date		Dept. Affected	Office of the Governor
Title	Const. Amdt.: Election of the Attorney General	BRU	Elective Operations
		Component	General and Primary Elections
Sponsor	Representative Green		
Requester	House Judiciary	Component Serial No.	#22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Personal Services						
Travel						
Contractual		3.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	3.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						

CHANGE IN REVENUES [ ]						

FUND SOURCE (Thousands of Dollars)

	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF		3.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	3.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: none

POSITIONS

	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Full-time		0				
Part-time		0				
Temporary		0				

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by	Dana LaTour	Phone	465-5347
Division	Division of Elections	Date	4/14/97
Approved by Co	Lt. Governor Fran Ulmer	Date	4/14/97
Agency	Office of the Lieutenant Governor		

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 19

Revision Date:
Title: "Proposing Amendments to the Constitution ... relating to the election and duties of the attorney general."
Sponsor: Representatives Green, Barnes
Requester: House Judiciary

Dept. Affected: Office of the Governor
BRU: Executive Operations
Component: Executive Office
COMPONENT SERIAL NO. 6

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	******
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF						******
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	******

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

POSITIONS	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
FULL-TIME						3
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This analysis emulates the organizational structure of the states of Washington, Oregon and Arizona. Each of these states has an elected attorney general, and each Governor has on-staff counsel to respond to general legal questions, public policy issues, internal matters, open meeting laws, ethics laws, revocation of appointments, handle extraditions and petitions, prepare administrative orders, deeds relating to the state's natural resources, etc., and to carry-out the constitutional requirements of the Governor (i.e., executive clemency, messages to the Legislature, executive orders)

The contitutional amendment proposed by this resolution would be on the ballot in 1998. If approved by the voters, the first election of an attorney general would be with the next gubernatorial election in November, 2002. Fiscal impact to Office of the Governor would begin in FY03. The fiscal analysis is attached.

Prepared by: Michael A. Nizich, Administrative Director
Division: Administrative Services
Phone: 465 3876
Date: 4/11/97

Approved by Commissioner: Jim Ayers, Chief of Staff
Agency: Office of the Governor
Date:

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HJR 19 fiscal anaysis:

This fiscal impact in below is for **illustration purposes only** and is based on 1997 costs and salaries. The fiscal impact associated with an elected attorney general would not be realized until FY03, and accurate costs will need to be identified then. Additionally, if the voters approve the constitutional amendment calling for an elected attorney general, the functions and duties of the attorney general will need to be defined which may result in further fiscal impact.

This note assumes an increase in Governor's staff by three positions -- an attorney, rg. 26, a paralegal, rg. 19, and an executive secretary, rg. 14. Fiscal note further assumes existing state-owned office space would be available and does not include lease costs.

Personal services:	three PFTs	199.5
Contractual:	comm., phones, postage, tolls courier svcs., subscripts, etc.	18.6
Supplies:	office/library supplies	9.6
Equipment:	office furniture, DP and communication equipment	39.2 *
	Total first year costs:	266.9

* 39.2 first year set-up costs only and not required in subsequent years.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 19

Revision Date:		Dept. Affected:	Department of Law
Title:	"Proposing amendments to the Constitution . . . relating to the election and the duties of the attorney general."	BRU:	Criminal Division/Civil Division
		Component:	All
Sponsor:	Representative Green		
Requester:	House Judiciary Committee	COMPONENT SERIAL NO.	2085-2092

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	*******	*******	*******	*******	*******
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	*******	*******	*******	*******	*******

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	*******	*******	*******	*******	*******
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

HJR 19 proposes an amendment to the Constitution of the State of Alaska making the attorney general an elected office. Further, the proposed amendment describes the duties of the attorney general, and prohibits the governor from making a change in organization or function of a unit of the executive branch headed by the attorney general. Assuming this constitutional amendment were approved by the voters of the State of Alaska in the November 1998 general election, the first elected attorney general would take office in January 2003, FY 03. However, it appears that changes in the duties of the attorney general would take place upon passage of the amendment, as early as January 1999.

The Department of Law cannot accurately quantify a fiscal impact from this resolution. However, it is clear that the impact on the state would be significant. In addition to the impacts on the Department of Law discussed below, another major cost that may 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. In other

Prepared by: Joan M. Kasson — Phone: 465-5370
Division: Administrative Services Division — Date: 4/17/97

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 4/17/97
Agency: Department of Law

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ANALYSIS CONTINUATION:

states with elected attorneys general, agency counsel have been employed to give department heads a "second" opinion in controversial matters. These counsel usually do not have the authority to litigate, but they 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 a single special counsel, including secretarial assistance, total approximately $150,000 per year in 1997 dollars. Although it is highly speculative at this time to accurately say how extensive the use of in-house counsel will be if there is an elected attorney general, over time, it could easily exceed $1,500,000 per fiscal year.

The greatest potential fiscal impact on the Department of Law from the proposed constitutional amendment comes from expanded duties as described in Section 28 (c). This language is broader than the language currently in AS 44.23.020 in two ways. By inclusion of the language "state public corporation", the proposed amendment appears to include the Alaska Railroad Corporation and University of Alaska as entities that the attorney general shall defend in civil actions. Both of these organizations currently maintain their own counsel.

Secondly, Sec. 28 (c) requires the state "prosecute violations of State criminal law, including infractions and violations". The department assumes that the courts would continue to allow the attorney general broad discretion over the initiation, prosecution and disposition of cases, both civil and criminal. For example, under present law, district attorneys do not appear in court for most minor traffic violations. The charging police officer presents the state's case to the judge. If this language were to cause the court to rule otherwise, the expense to the state to have district attorneys appear in every case involving a minor infraction or violation would be substantial.

However, the department cannot make a similar assumption about the addition of state corporations to its workload. The Alaska Railroad Corporation (ARRC) has on staff three full time attorneys, and currently expends approximately $200,000 a year on contract outside counsel. The University has a legal staff of four attorneys, and estimates their annual expenditures on outside counsel varies year-to-year between approximately $500,000 and $1,500,000. Presumably, legal services could be provided to these agencies through reimbursable services agreements, and the Department of Law would require sufficient interagency receipt authority to take over these functions. Practically, whether there would be additional costs (or savings) in implementing such a transfer would require a more detailed analysis to determine.

In addition, the proposed amendment removes the governor's organizational and supervisory controls over any function or unit headed by the attorney general. These controls are normally maintained through executive branch procedural requirements imposed on other executive branch agencies by the Department of Administration and the Office of Management and Budget on behalf of the governor.

It is anticipated that the Department of Law would continue to use centrally provided services such as accounting, purchasing, leasing and supply, professional services contracting, information management, and duplicating services on a "service bureau" basis and still maintain the attorney general's functions free from the governor's supervision. Personnel administration, however, is more problematic. To use the Department of Administration's classification system would retain an element of control by the governor over the Department of Law in terms of imposing functional changes in position descriptions and duties. The department assumes it would have to do its own classifications, create and maintain position eligibility lists, and maintain a more in-depth records system for personnel than it now does. The department estimates it would require 2 new PFT Personnel Assistant I (R12) positions, and 1 PFT Administrative Clerk III (R10)

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 19

ANALYSIS CONTINUATION:

position, at an estimated cost of $217,000 per year to perform these functions (using FY 98 salaries for illustration purposes).

As discussed in the narrative above, outside counsel costs for the University can vary widely and actual transfer of these legal service responsibilities to the Attorney General would require a more detailed analysis to identify specific costs and/or savings from the transfer. The following summarizes the potential fiscal impact to the Department of Law that we can identify at this time using the department's 1997 standard attorney cost schedule for a full-time equivalent attorney position, including standard overheads (clerical support, communications, space, supplies, data processing, *etc*.), and 1997 salaries and costs for non-cost schedule positions.

ARRC Legal Services Transfer (beginning mid-FY99)	
3 FTE Attorneys @ $127.0	$381.0
Direct case costs @ $5.0 per attorney	$15.0
1.5 PFT Legal Secretary position authorizations	$0.0
One-time equipment purchases for new positions @ $6.5	$32.5
Contract outside counsel/experts @ estimated $200.0	$200.0
	$628.5
University of Alaska Legal Services Transfer (beginning mid-FY99)	
4 FTE Attorneys @ $127.0	$508.0
Direct case costs @ $5.0 per attorney	$20.0
2 PFT Legal Secretary position authorizations	$0.0
One-time equipment purchases for new positions @ $6.5	$39.0
Contract outside counsel/experts @ estimated $500.0 to $1,500.0	$500.0
	$1,067.0
Administration & Support Personnel Classification System (beginning mid-FY03)	
2 Personnel Assistant I @ $49.6	$99.1
1 Administrative Clerk III @ $45.5	$45.5
One-time equipment purchases for new positions @ $6.5	$19.5
	$164.2
Total, Including One Time Equipment Purchases	$1,859.7
Less One-time items	($91.0)
Department of Law Estimated Minimum Annual Cost	$1,768.7

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STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 19

Revision Date:
Title: "Proposing amendments to the Constitution . . . relating to the election and the duties of the attorney general."
Sponsor: Representative Green
Requester: House Judiciary Committee

Dept. Affected: Department of Law
BRU: Criminal Division/Civil Division
Component: All
COMPONENT SERIAL NO. 2085-2092

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	*******	*******	*******	*******	*******
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	*******	*******	*******	*******	*******

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

POSITIONS	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
FULL-TIME	0.0	*******	*******	*******	*******	*******
PART-TIME						
TEMPORARY						

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Division: Administrative Services Division Date: 4/17/97
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Legislative Research Agency

·ka State Legislature

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March 14, 1995

MEMORANDUM

TO: Representative Gail Phillips

FROM: Linda Brooks
Legislative Analyst

RE: **Comparing the Duties of Elected and Appointed Attorney Generals**
Research Request 95.128

You asked how the duties of an elected attorney general differ from those of an attorney general who is appointed by and serves at the pleasure of the governor. In particular, you asked us to compare state statutes that define the powers and duties of attorneys general for states with elected and appointed attorneys general. Attachment A lists some duties of the appointed attorney general in four states and in seven states with elected attorneys general. In reviewing the statutory duties of elected and appointed attorneys general, we found no stark differences. Indeed, the National Association of Attorneys General states that:

> There is no 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 the attorney general has control over all legal and prosecutorial functions. A "strong" department of justice can be developed under either system of selection.[1]

However, we assume that you are interested in learning whether the method used to select the attorney general has any bearing on the attorney general's independence from the governor, and that your inquiry is about the responsiveness of the attorney general to the governor rather than the power he or she wields. The statutory structure of an attorney general's office alone does not reveal the degree of independence an attorney general has from a governor. The relationship between a governor and an attorney general depends on each state's constitution, statutes, and

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[1]Lynne M. Ross, *State Attorneys General: Power and Responsibilities,* National Association of Attorneys General, 1990, p. 20.

The ruling of the California Supreme Court may not represent how other state courts would resolve a similar conflict. We found several court cases where an attorney general filed suit against a governor alleging the governor's use of the line item veto, grant of clemency or other conduct was unlawful or an abuse of authority. There do not appear to be as many cases that address conflict between a governor and attorney general over policy issues clearly within the boundaries of lawful conduct. More plentiful are cases where state executive officials other than the governor and the attorney general have come into conflict. In *Feeney v. Commonwealth*, the Massachusetts Supreme Court ruled that the attorney general could prosecute an appeal to the U.S. Supreme Court over the objections of state officials represented by the attorney general.[6] Similarly, in *State of Florida ex. rel. Shevin v. Exxon Corp.*, the court upheld the Florida attorney general's power to bring an antitrust action against major oil companies on behalf of state agencies and political subdivisions without the express consent of those entities.[7] The Kentucky Court of Appeals also rejected the contention that the attorney general's duties are limited to representing state officials and permitted the attorney general to question the constitutionality of a state law in *Commonwealth ex. rel Hancock v. Paxton*. The Kentucky Court of Appeals expressed the view that an attorney general's foremost duty is to represent the "public interest" as opposed to specific state officers:

> It is true that at common law the duty of the Attorney General was to represent the King (of England), he being the embodiment of the state. But under the democratic form of government now prevailing the people are King, so the Attorney General's duties are to that sovereign (the people) rather than to the machinery of government.[8]

Therefore, the interpretation of an attorney general's common law powers appears to play a much bigger role in determining the independence an attorney general has to act than do the actual statutes of a state. Indeed, the National Association of Attorneys General describes the common law as the "fountainhead" of an attorney general's authority to represent, defend, and enforce the legal interest of state government and the public. Not all state courts, however, have interpreted the powers of their attorneys general as including common law powers. In *Gilles v. Schmidt* (556 P.2d 82) the Colorado court ruled that the attorney general does not have powers beyond those

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[6]*Feeney v. Commonwealth*,. 373 Mass. 359, 366 N.E.2d 1262 (1977), as cited in Ross, p. 38.

[7]*State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), as cited in Matheson, p. 4.

[8]*Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865 (Ky. 1974) as cited in Ross, p. 36.

matters?" In the remainder of this memorandum we describe the following:

- methods used by the fifty states to select their attorneys general;
- universal duties of all state attorneys general;
- practice of hiring "in-house" counsel by state agencies, departments, boards, and commissions;
- common methods used by attorneys general to cope with competing state interests; and
- attorneys general's relationships with their governors and legislatures.

Following the overview of the offices of state attorneys general, we present public policy arguments about whether or not a state attorney general should be elected.

Methods Used by the Fifty States to Select Their Attorneys General

Forty-three states popularly elect their attorneys general. The governor appoints the attorney general in only five states: Alaska, Hawaii, New Jersey, New Hampshire, and Wyoming. The legislature or judicial council must approve of the governor's appointee in all states except Wyoming. In Wyoming the governor may appoint an attorney general without any confirmation proceedings. Of all the states, however, Maine and Tennessee are the most unusual. In Maine the legislature elects the attorney general, and in Tennessee the justices of the highest court select the attorney general. We include a table that presents each state's method of selecting the attorney general as Attachment B.

Universal Duties of All State Attorneys Generals

All state attorneys general share some common responsibilities. In all states the attorney general defends state law when challenged on federal constitutional grounds, prosecutes actions against another state in the U.S. Supreme Court, and conducts litigation on behalf of the state in federal court.[10] All attorneys general issue legal advice to administrative agencies except in New York.[11] Attorneys general in every state also interpret statutes or regulations and conduct litigation on behalf of executive agencies.[12]

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[10] *Book of the States, 1994-1995*, The Council of State Governments, p. 93.

[11] Ibid.

[12] Ibid.

Common Methods Used by Attorneys General to Cope with Competing State Interests

Consolidation of state legal services in the office of the attorney general promotes uniformity in a state's legal policies. However, governments with their many responsibilities inevitably must deal with internal conflicts. One agency's efforts to promote economic development may collide with another agency's efforts to protect the environment. At times state attorneys general may find themselves in the middle of these conflicts, expected to provide legal counsel to opposing state agencies. In other cases the attorney general must simultaneously represent a state board and a state agency appearing before it. The National Association of Attorneys General report that:

> When the conflicts of representation are ultimately unavoidable and irreconcilable, representation is generally provided either by attorneys working for the attorney general whose independent legal judgment is guaranteed by some administrative insulating barrier or "wall," by attorneys hired or authorized but not directly supervised by the attorney general, or by attorneys entirely outside the control for the attorney general. Several attorneys general, including those of Arizona, Colorado, Minnesota, Nevada, and West Virginia, have developed internal guidelines for handling such conflict issues. In addition, the vast majority of jurisdictions occasionally employ outside counsel in irreconcilable conflict situations.[16]

Some states also provide mechanisms for conflict resolution through their statutes. For example, whenever the attorney general of Colorado is unable or has failed or refused to provide legal services to an agency of state government, as determined by the governor if the agency is in the executive branch or by the chief justice if the agency is in the judicial branch, the agency may employ counsel of its own choosing to provide such legal services, [Colorado statute 24-31-101(e)]. Oregon statute 180.060(8) states that the attorney general *cannot* appear on behalf of any state officer, department, agency, board or commission without its consent. Furthermore, while the attorney general in Oregon must assign an attorney to each agency, the chief administrator of the agency must approve the assignment. The chief administrator may also withdraw his or her approval of the attorney assigned to the agency at any time, forcing the attorney general to assign a replacement attorney [Oregon statute 180.060(7)].

Attorneys Generals' Relationships with their Governors and State Legislatures

Unlike other executive officers, attorneys general have relationships with both the governor and the legislature. As members of the executive branch, attorneys general usually interact more with the governor than the legislature. More contact with the governor's office, however, does not

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[16] Ibid., p. 49.

legislation. An elected attorney general, on the other hand, would be free to act as the "people's attorney" and to operate as a watchdog and ombudsmen for them.[19]

Nevertheless, switching to an elected attorney general may further politicize, rather than depoliticize, the office. An elected attorney general would be subject to interest group electoral politics and all the potentially compromising influences that entails, including reliance on financial support to be elected and re-elected to office.[20] The fact that an elected attorney general may represent an opposing political party or be using the office as a stepping stone to the governorship could hinder cooperation between the attorney general's and governor's offices and handicap the efficiency of executive branch of government. The governor and commissioners of other executive agencies will likely refrain from seeking legal advice from an "independent" attorney general. In lieu of consulting the attorney general, they will probably seek to hire their own "in-house" counsel, and this extra layer of attorneys would not only cost a state more money but also further impair the efficiency of the executive branch.

An appointed attorney general permits a governor to have "a philosophically compatible, cohesive, and unified team to carry out the responsibilities of the executive branch of government."[21] With the governor as the undisputed head of the executive branch, he or she cannot blame others such as an elected attorney general for the failures of the administration. As such, the public may more easily hold the governor accountable for actions of the executive branch. Granting power to an independently elected attorney general may in fact reduce accountability to the public. Certainly, in states with elected attorneys general, voters almost always know more about an incumbent governor than an incumbent attorney general. The public closely scrutinizes a governor but may know little about what an attorney general has done. Thus, the paradox is created where the appointment of an attorney general by the governor may in fact achieve greater accountability to the public than would a popular election.

Proponents of an appointed attorney general also note that appointed attorneys general are usually more competent. A study of elected and appointed attorneys general found that appointed attorneys general had slightly stronger educational records, more experience in law practice and

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[19]Norm Gorsuch, "The Alaska Attorney General: Elected or Appointed?" *The Alaska Public Affairs Journal*, Spring 1988, p. 39. (Norm Gorsuch served as attorney general under the Sheffield Administration.)

[20]Matheson, p.23.

[21]Gorsuch, p. 40.

ATTACEMENT A

Some Duties of Attorneys General who are appointed by the Governor

Some Duties of Attorneys General Who Are Popularly Elected

Colorado
Serves as legal counsel and advisor of each department, division, board, bureau, and agency of state government other than the legislative branch.
Prosecutes and defends all actions and proceedings, civil and criminal, in which the state is a party or interested *when required to do so by the governor.*
Prosecutes and defends for the state all causes in the appellate courts in which the state is a party or is interested when required.
At the request of the governor, the secretary of state, the state treasurer, the executive director of the department of revenue, or the commissioner of education, prosecutes and defends all suits relating to matters connected with their departments.
Prepares legal opinions when requested by the legislature, the governor, lieutenant governor, secretary of state, executive director of the department of revenue, state treasurer, state auditor, or commissioner of education.
Prepares drafts for contracts, forms, and other writings which may be required for the use of the state.

Idaho
Attends the supreme court and prosecutes and defends all causes to which the state or any officer thereof, in his official capacity, is a party.
Prosecutes and defends all causes to which any county may be a party, unless the interest of the county is adverse to the state.
Prosecutes and defends any causes to which the state, its officers, or political subdivisions are parties in the United States courts.
Exercises supervisory powers over prosecuting attorneys.
Prepares legal opinions for the legislature, governor, secretary of state, treasurer, state controller, and the trustees or commissioners of state institutions.
Supervises nonprofit corporations, corporation, charitable or benevolent societies, persons or persons holding property subject to any public or charitable trust.

Indiana
Consults with and advises the several prosecuting attorneys of the state.
Has concurrent jurisdiction with prosecuting attorneys in certain types of crimes.
Prosecutes and defends all suits that may be instituted by or against the state of Indiana, the prosecution and defense of which is not otherwise provided by law.
Represents the state in all criminal cases in the Supreme Court.
Defends all suits brought against state officers in their official relations, except suits brought against them by the state.
Prepares legal opinions for the governor, state officers, either house of the legislature, or to any legislative agency.
Has charge of and directs the prosecution of all civil actions that are brought in the name of the state or any state agency.
Must give written consent before any agency, except as provided by law, may hire an attorney to perform any legal service on behalf of the agency and the state.

Prepared by Legislative Research Agency, March 1995 (95.128)

ATTACHMENT B

Some Duties of Attorneys General who are Popularly Elected

THE FOLLOWING PAGES MAY NOT FILM LEGIBLY BECAUSE OF THE POOR QUALITY OF THE ORIGINAL.

ATTACHMENT C

"Attorneys General: Prosecutorial and Advisory Duties", *The Book of the States, 1994-95*

"The Alaska Attorney General: Elected or Appointed", by Norman Gorsuch, *The Alaska Public Affairs Journal,* Spring 1988

"Constitutional Status and Role of the State Attorney General", by Scott Matheson, Jr. *University of Florida, Journal of Law and Public Policy,* Volume 6, 1993

Table 2.18
ATTORNEYS GENERAL: PROSECUTORIAL AND ADVISORY DUTIES

State or other jurisdiction	Authority in local prosecutions: Authority to initiate local prosecutions	May intervene in local prosecutions	May assist local prosecutor	May supersede local prosecutor	Issues advisory opinions: To state executive officials	To legislators	To local prosecutors	On the interpretation of statutes	On the constitutionality of bills or ordinances	Reviews legislation: 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	B,D	B	★	★	★	★	★	★	...
Arkansas	...	D	D	...	★	★	★	★	★	...	...
California	A,B,D,E,F	A,B,D,E	A,B,D,E	A,B,D,E	★	★	★	★	★	★	★
Colorado	B,F	B	D,F (b)	B	★	★	★	★	★	★	★
Connecticut	...	...	...	...	★	(c)	...	★	★	★	★
Delaware	(a)	(a)	(a)	(a)	★	★	(a)	★	★	★	★
Florida	F (b,d)	D (b,d)	D	...	★	★	★	★	...	★	★
Georgia	A,B,F	A,B,D,G	A,B,D,F	B	★	(e)	★	★	...	★	★
Hawaii	E	A,D,G	A,D	A,G	★	★	★	★	★	★	★
Idaho	A,D,F	A	A,D	A	★	★	★	★	...	★	★
Illinois	D,F	D,F	D,F	F	★	★ (f)	★	★	★	(g)	(g)
Indiana	F (b)	...	A,D,E	G	★	★	★	★	★	...	★
Iowa	D,F	D	D	...	★	★	★	★	★	★	★
Kansas	A,B,C,D,F	A,D	D	A,F	★	★	★	★	★	(g)	(g)
Kentucky	A,B,D,E,F,G	B,D,G	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	A	A,D	A	★	★ (h)	★	★	★	(g)	(g)
Michigan	A	A	D	A	★	★	★	★	★	★	★
Minnesota	B	B,D,G	A,B,D	B	★	★ (h)	★	★	...	...	(g)
Mississippi	B,D,E,F	D	B,D,F	E	★	★	★	★	★	(g)	(g)
Missouri	F	G	B	...	★	★	★	★	...	★	★
Montana	B,C,D,E,F	A,B,C,D,E	A,B,C,D,E,F	A,B,E,F	★	★ (c)	★	★	...	★	★
Nebraska	A	A	A,D	A	★	★	★	★	★	...	...
Nevada	D,F,G (d)	D (d)	(d,j)	★	★	...	★	★	★ (j)	...	...
New Hampshire	A	A	A	A	★	...	...	★	★	★	★
New Jersey	A	A,B,D,G	A,D	A,B,D,G	★	★	★	★	★	★	★
New Mexico	A,B,D,E,F	...	D	...	★	★	★	★	★	★	★
New York	B,F	B	D	B	★	★ (h)	...	★	...	...	★
North Carolina	...	D	D	...	★	★	★	★	★	★	...
North Dakota	A,G	A,D	A,D	A	★	★	★	★	...	(f)	(g)
Ohio	B,C,F	B,F	F	B,C	★	★ (k)	★	★	...	...	...
Oklahoma	B,C,F	B,C	B,C	...	★	★	★	★	★ (l)	★ (a)	★ (a)
Oregon	B,F	B,D	B,D	B	★	★	★	★	★	(g)	(g)
Pennsylvania	A,D,F,G	D,G	D	G	★	...	...	★	...	★	★
Rhode Island	A	A	A	...	★	★	...	★	★	...	...
South Carolina	A,D (b)	A,D	A,D	...	★	★	★	★	★	★	★
South Dakota	A (m)	A,D	A,D	A,E	★	★	★	★	...	...	...
Tennessee	D,F,G (b)	D,G (b)	D	...	★	★	★	★	★	(g)	(g)
Texas	F	...	D	...	★	★	★	★	★	★	★
Utah	A,B,D,E,F,G	E,G	D,E	E	★	★ (n)	★	★	★	(g)	(g)
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	...	★	(c)	★	★	★	(e)	(e)
Wisconsin	B,C,F	B,C,D	D	B	★	★	★	★	★ (l)	(e)	(e)
Wyoming	B,D (d),F	B,D	B,D	...	★	★	★	★	...	★	★
American Samoa	A,E	A,E	A,E	A,E	★	★	...	★	★	★	★
Guam	A	...	...	...	★	★	...	★	★	(g)	B
No. Mariana Islands	A	...	...	...	★	★	...	★	★	★	★
Puerto Rico	A,B,E	A,B,E	A,E	A,B,E	★	★	...	★	★	★	★
U.S. Virgin Islands	A (o)	(o)	(o)	(o)	★	★	...	★	★	...	★

Source: The Council of State Governments' survey, February 1994.
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.
★ — Has authority in area.
. . . — Does not have authority in area.
(a) Local prosecutors serve at pleasure of attorney general.
(b) Certain statutes provide for concurrent jurisdiction with local prosecutors.
(c) To legislative leadership.
(d) In connection with grand jury cases.
(e) No legal authority, but sometimes informally reviews laws at request of legislature.
(f) Opinion may be issued to officers of either branch of General Assembly or to chairman or minority spokesman of committees or commissions thereof.
(g) Only when requested by governor or legislature.
(h) To legislature as a whole not individual legislators.
(i) Will prosecute as a matter of practice when requested.
(j) On the constitutionality of legislation.
(k) To either house of legislature, not individual legislators.
(l) Bills, not ordinances.
(m) Has concurrent jurisdiction with states' attorneys.
(n) Only when requested by legislature.
(o) The attorney general functions as the local prosecutor.

Table 2.20
ATTORNEYS GENERAL: DUTIES TO ADMINISTRATIVE AGENCIES AND OTHER RESPONSIBILITIES

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: On behalf of agency	Conducts litigation: Against 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)	★	★	★	★	★	(b)	(b)	★
Alaska	A,B,C	★	★	★	★	★	★	...	★	★
Arizona	A,B,C	(c,d)	★	★	★	★	★	...	★	★
Arkansas	A,B,C	★ (a)	★	★	★	(b)	★	★	★	★
California	A,B,C	★ (a)	★	★	★	★	★	...	...	...
Colorado	A,B,C	(b)	★	★	★	★	★	(e)	★	★
Connecticut	A,B,C	(b)	★	★	★	(b)	★	(b)	★	★
Delaware	A,B,C	★ (a)	★	★	★	★	★	★	★	★
Florida	A,B,C	★ (a)	★	★	★	...	★	★	★	...
Georgia	A,B,C	(b,c)	★	★	★	★	★	...	★	★
Hawaii	A,B,C	(b,c)	★	★	★	★	★	★	★	★
Idaho	A,B,C	★ (a)	★	★	★	★	★	...	★	★
Illinois	A,B,C	(b,c,f)	★	★	★	★	★	★	...	...
Indiana	A,B,C	★ (a)	★	★	★	...	★	...	★	★
Iowa	A,B,C	★ (a)	★	★	★	★	★	...	...	★
Kansas	A,B,C	★ (a)	★	★	★	★	★	...	...	★ (a)
Kentucky	A,B*,C	★	★	★	★	★	★	(e)	(b)	(b)
Louisiana	A,B,C	(c)	★	★	★	★	★	...	★	★
Maine	A,B,C	(d)	★	★	★	(b)	★	(b)	★	★
Maryland	A,B,C	★	★	★	★	(b)	★	★	★	★
Massachusetts	A,B,C	(b,c,d)	★	★	★	★	★	★	★	★
Michigan	A,B,C	(b,c,d)	★	★	★	★	★	★	...	★
Minnesota	A,B,C	(c,d)	★	★	(a)	★	★	★	★	★
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)	...	★	★	(b)	★	(b)	...	...
North Carolina	A,B,C	★	★	★	★	★	★	(b)	★	★
North Dakota	A,B,C	(b)	★	★	★	...	★	...	★	★
Ohio	A,B,C	(b)	★	★	★	★	★	★	★	...
Oklahoma	A,B,C	(b)	★	★	★	(b)	★	(b)	★	★
Oregon	A,B,C	★	(a)	★	★	...	★	...	★	★
Pennsylvania	A,B,C	★	★	★	★	★	★	...	★	★
Rhode Island	A,B,C	★ (a)	★	★	★	★	★	★	★	★
South Carolina	A,B,C	★ (d)	★	★	★	...	★	...	★	★
South Dakota	A,B,C	★ (a)	★	★	★	...	★	...	...	...
Tennessee	A,B,C	★ (a)	★	★	★	...	★	...	...	★
Texas	A,B,C	(c)	★	★	★	★	★	...	★	★
Utah	A,B,C	★ (a)	★	★	★	★	★	(b)	★	★
Vermont	A,B,C	★	★	★	★	★	★	★	★	★
Virginia	A,B,C	★ (a)	★	★	★	★	★	★ (g)	★	★
Washington	A,B,C	(c,g)	★	★	★	★	★	★	★	★
West Virginia	A,B,C	★ (a)	★	★	★	(g)	★	★	★	...
Wisconsin	A,B,C	★	★	★	★	(b)	(b)	(b)	(b)	(b)
Wyoming	A,B,C	★ (a)	★	★	★	...	★	...	★	★
American Samoa	A,B,C	★ (a)	★	★	★	...	★	...	★	★
Guam	A,B	★	★	★	(b)	...	(b)	...	★	★
No. Mariana Islands	A,B,C	★	★	★	★	...	★	...	★	★
Puerto Rico	A,B,C	★	★	★	★	...	★	...	★	★
U.S. Virgin Islands	A,B,C (h)	★	★	★	★	★	★	...	★	★

Source: The Council of State Governments' survey, February 1994.

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.

★ — Has authority in area.

. . . — Does not have authority in area.

(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) Public Service Commission only.

(f) In certain courts only.

(g) If authorized by the governor.

(h) Except in cases in which the U.S. Attorney is representing the Government of the U.S. Virgin Islands.

The Alaska Attorney General: Elected or Appointed?

by Norman C. Gorsuch

The office of state attorneys general can either strengthen or check the executive branch. The Alaska attorney general plays a significant role in public policy-making. Currently, Alaska's governor appoints the state attorney general, and until the argument about the range of executive power is settled, the controversy about the the office's election or appointment will persist.

A History and Description of the Office of the Attorney General

The first office of the attorney general was created in 1461 when the King of England appointed a person to direct all of his representatives who appeared in the royal courts. The common law decisions of these courts defined the attorney general's duties, which, in essence, were to protect the royal property, prerogatives, and revenue, and to prosecute those persons accused of committing crimes. Examples of these duties included recovering for damages done to royal property, regulating public charities and trusts, repealing grants and patents, and prosecuting misdemeanor and felony crimes. By 1700, the attorney general was accorded membership in Parliament to explain crown legislation. [1]

When the American Colonies were settled, colonial attorneys general were appointed by the royal governors and were deemed to exercise all of the common law powers inherent in the office of the attorney general of England. After the Revolutionary War, the new state courts decided that the common law powers exercised by the Attorney General of England and discussed above were an inherent part of the office of state attorney general. In addition, most states ratified this grant of powers in state constitutions or statutes. [2]

The method of selecting state attorneys general evolved in stages. Prior to Andrew Jackson's presidency, most states provided for the appointment of the attorney general by the governor or legislature. With the advent of Andrew Jackson's presidency, the concept of sovereign democracy emerged. The people were seen as the source of sovereign power, and they exercised it through popularly elected officials. In the late nineteenth century, states began to require the election of the attorney general. Today, 44 states elect the attorney general. Of the six states that appoint the attorney general, most provide for appointment by the governor, and some by the legislature or the state supreme court. [3]

With the evolution of sovereign democracy, state courts decided that state attorneys general now represented the rights, prerogatives, and interests of the general public in carrying out their common law duties of office. In effect the courts substituted the public for the king as the client of the attorney general, thus giving the attorney general the power to protect public prerogatives, property and revenue. Indeed, there are several state supreme court opinions which hold that an attorney general may bring any action in court deemed necessary to enforce or protect any public right or interest and as a corollary power may exercise virtually plenary discretion in the disposition of such action. However, while state attorneys general possess these common law powers, state constitutions or statutes may limit or preclude the exercise of some or all of them. [4]

Another development in the United States has been the expansion of the

In Support of Election:
"An elected attorney general would be 'the people's attorney' and function as an ombudsman and watchdog for them."

mum of highly centralized, exclusive authority to provide legal counsel to the state, litigate on behalf of the state and prosecute crimes to a minimum of shared state legal authority with no statewide criminal prosecution jurisdiction. For example, state attorneys general do not possess statewide criminal prosecution jurisdiction with the excep-[illegible]n of Delaware, Rhode Island, and [illegible]ka. In other states criminal prosecution is conducted by elected or appointed municipal, county or city district attorneys.

In addition, attorneys general usually do not have exclusive authority to represent the state in litigation or to be the exclusive legal advisor to state agencies. In many states, the governor's office has its own general counsel and many state agencies have their own house counsel. In those states, the attorney general represents the governor or agencies only in court. Legal advice to the governor or agency prior to litigation is furnished frequently by house counsel. In most states, while the attorney general issues official opinions upon request and thus, can influence public policy decisions; frequently, the attorney general does not play a significant policy making role within the state administration because the attorney general is a competing elected official. Exceptions to this situation exist when governor and attorney general are political allies, share the same philosophy, or are personal friends. [8]

The Powers, Duties and Role of the Attorney General of Alaska

In Alaska, the attorney general is a member of the governor's cabinet. As such, the office functions as the general counsel to the governor and state officials. Thus, the attorney general plays a constant role in the development and formulation of public policy on a wide range of issues.

In addition, the Alaska Supreme Court has stated that the attorney general has the exclusive authority in the state government to make any and all decisions relating to the disposition of any state litigation and the exercise of this discretion by the attorney general within constitutional bounds is not subject to judicial review. However, in order to maintain good attorney-client relations, the attorney general rarely exercises such authority without consultation with and concurrence by the state agencies involved. In major cases, the attorney general also consults with the governor and, if necessary, the legislature. [9]

The Alaska attorney general is appointed by the governor, confirmed by the legislature, and serves at the pleasure of the governor. In Sections 44.23.010-060 of the Alaska Statutes, the legislature created the Office of the Attorney General as Chief of the State Department of Law and vested that department with certain powers. Those powers are as follows:

1. Possession of authority as the exclusive legal advisor to the state executive branch of government, exercising this power through the drafting or reviewing of all executive branch legal instruments and legislation, and the rendering of legal opinions;
2. Representation of the state in all civil litigation;
3. Prosecution of all violations of state criminal laws;
4. Initiation of actions to collect state revenue;
5. Recommendation to the legislature of necessary changes in the laws;
6. Promotion of uniform laws adoption;
7. Preparation of information on landlord and tenant rights;
8. Possession of exclusive authority to enforce the consumer protection and anti-trust laws; and
9. Possession of all common law powers generally inherent in the office of the attorney general. Thus, the Alaska attorney general is an example of the highly centralized exclusive legal authority model.

Arguments In Support of Electing the Attorney General

The theme in the arguments supporting the election the attorney general is a simple one focusing on the independence that direct election would give the office. An elected attorney general would be "the people's attorney" and function as an omsbudsman and watchdog for them. Independent

In Support of Appointment:
"Good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive and unified team . . . "

will insist on a general counsel and house counsel for agencies that are responsible to the governor's office. Thus, it will be necessary to pay for an additional layer of attorneys in the executive branch. Second, in order to maximize the perceived benefits of election, the elected attorney general must have additional, duplicate, independent support staff, not answerable to the governor, to execute personnel, budget, and other administrative policy or the governor could unfairly infringe on the attorney general's independence of action.

In response to the argument that only an elected attorney general can investigate and prosecute wrongdoing in state government with the appropriate degree of independence, proponents of the appointment process argue that the attorney general is not the governor's personal lawyer but the attorney for the institution of the governor's office.

Also, they point out that as a member of the legal profession, the attorney general is affiliated with the judiciary and functions as an officer of the court. Thus the appointed attorney general possesses the prerequisite professional independence from the governor. They believe that the appointed attorney general is capable of investigating all officials of the executive branch of government, including the governor, and prosecuting wrongdoing if necessary.

This is because of constraints placed upon the holder of the office by the statutes, regulations, rules of court, and canons of professional and prosecutorial ethics which require the attorney general to act in these criminal matters based only upon the evidence, the law, and the canons. They also believe that to make decisions in these matters based upon personal and political reasons exposes the appointed attorney general to charges of obstruction of justice and the possibility of suspension or disbarment from the legal profession.

Subsidiary arguments in support of appointing the attorney general can also be made. Some argue that appointed attorneys general do "represent the public" and the misperception that they do not is created because they have no need to generate favorable publicity by constantly calling attention to external achievements in order to create an image as "the people's attorney." It is also argued that the appointed attorney general acts just like an omsbudsman through the rendering of legal advice to state officials as a member of the governor's team. This advice helps to ensure that these officials comply with the statutes and regulations governing their programs, and enforce fairness and impartiality in government dealings with the public.

Another argument in support of appointment is that an elected attorney general must allocate time to fund raising and other political activities, thus detracting from that required to manage the attorney general's office and resulting in a reduced credibility for the office because it will be perceived to be too "political." Legal opinions issued by an appointed attorney general are likely to be more professional because there is no need to pay attention to political polls when considering legal issues.

Some argue that interpreting the law and running a large law office are essentially technical tasks and it is not necessary that the official charged with these duties be elected. Also, it is believed that highly qualified attorneys would not become attorneys general if they had to run in a statewide election.

Finally, those who argue for appointment also have some tradition on their side. They state that no one has ever seriously suggested electing the United States attorney general. They believe that the people do participate in the selection of the appointed attorney general through their legislator when the legislature conducts the confirmation process, not unlike the advice and consent of the U.S. Senate over presidential nominees for attorney general. [16]

Conclusion

The underlying issue in these arguments is how the election of the Alaska attorney general affects the balance of power among the branches of state government and the policy-making process within the executive branch of government. In essence the argument revolves around whether one believes in a strong or weak executive branch

"In essence the argument revolves around whether one believes in a strong or weak executive branch of government."

before a grand jury; 14) Institute and dismiss criminal proceedings; 15) Supercede the local district attorneys in criminal prosecutions; 16) Make any bona fide disposition of these actions that in his or her judgment would be in the best interest of the public. A. Sills, *supra*, at 8-9.

(3) NAAG, *supra*, at 77-79.

(4) 7 Am. Jur. 2d *Attorney General* S. , at 7-8; Sec. 18, at 22-23. See Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975); State ex rel. Shevin v. Yarborough, 257 S.2d 891 (Fla. 1972); State v. Finch, 280 P. 910, 911-12 (Kan. 1929); Board of Public Utilities Commissioners v. Lehigh Valley Railway Co., 149 A. 263 (N.J. 1930).

(5) *See, e.g.*, AS 45; *see generally* National Association Of Attorneys, *Powers, Duties and Operations of State Attorneys General* (1977)

(6) *See generally* T. Morris and W. Thompson, *The Attorney General as Public Advocate* 2 (1985).

(7) National Association of Attorneys General, *Representing State Agenies* (1979); 7 AM. Jur. 2d *Attorney General* Sec. 11, at 10-12.

(8) *See generally* National Association of Attorneys General, *The Structure of State Legal Services* 20-38 (1977)

(9) Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975).

(10) Report of Maryland Attorney General Francis B. Birch to the Constitutional Convention of Maryland (Sept. 29, 1967); Position Paper by New York Attorney General Lewis J. Lefkowitz, Constitutional Convention Committee on the Executive Branch (June 1, 1967); *Attorney General Should Be Elected—Not Appointed*, Attorney General Clarence A.H. Meyer, Outline of Remarks, Nebraska Constitutional Convention. *See generally* National Association of Attorneys General, *Powers, Duties and Operations of State Attorneys General* (1977); transcript of testimony House State Affairs Committee on HB 456 ("an Act authorizing an advisory vote by the qualified voters of the state on the question of the election of the attorney general") (Jan. 20, 1984).

(11) *See* note 10, *supra*.

(12) National Municipal League, *Model State Constitution* 65-66 (6th ed. 1963.

(13) *See generally* letter from Attorney General Norman C. Gorsuch to Senator Patrick Rodey, Chairman of Senate Judiciary Committee, discussing SJR 9 ("Elected Attorney General") (Apr. 23, 1985); transcript of testimony, House State Affairs Committee, on HB 456 (Jan. 20, 1984).

(14) National Governors Conference, Center for Policy, Research, and Analysis, *Legal Advice for the Governor* (1976).

(15) *See* note 13, *supra*.

(16) *Id.* 4

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-APAJ-

CONSTITUTIONAL STATUS AND ROLE OF THE STATE ATTORNEY GENERAL

*Scott M. Matheson, Jr.**

INTRODUCTION 2

I. CONSTITUTIONAL STRUCTURE AND ROLE 3
- A. *Duties of the State Attorney General* 3
- B. *Unitary Versus Divided Executive Power* 5
- C. *Separation of Powers* 6
  - 1. Liberty and Efficiency Objectives 6
  - 2. Hybrid Separation of Powers Role of the State Attorney General 7
  - 3. Separation and the Administrative State 10
- D. *Checks and Balances—The Watchdog Function* 10
- E. *Representative of the People or of the State* 12
  - 1. Representation and Delegated Sovereign Power 12
  - 2. Representation and Multiple Roles 12
  - 3. Representation and Defining the Public Interest 14

II. GOVERNMENT PERFORMANCE 15
- A. *Accountability* 15
  - 1. Gubernatorial Authority and Responsibility 15
  - 2. Unity, Plurality, and Accountability 17
- B. *Stalemate* 19
- C. *Divided Loyalty* 20
- D. *Politicization* 23

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al.[6] State attorneys general represent the diverse interests of numerous agencies and departments, mediate conflicts among them, and attempt to achieve coordination and consistency in litigating the positions of their states.[7]

As noted previously, the powers and duties of state attorneys general are defined in state constitutions, statutes, and common law. In many states the common law supplies authority for the attorney general to represent the state and the public.[8] For example, in *Florida* ex rel. *Shevin v. Exxon Corp.*,[9] the court upheld the Florida attorney general's power to bring an antitrust action against major oil companies on behalf of state agencies and political subdivisions without express consent of those public entities. In the absence of legislative restriction to the contrary, the attorney general "may exercise all such authority as the public interest requires," including initiation of the antitrust litigation in federal court, if he determines that the public interest so required.[10] Courts have recognized the authority of state attorneys general to assume primary responsibility to represent the state in litigation.[11] Many state constitutional provisions and statutes concerning the attorney general simply restate common law principles.[12] It is well-established in most states that the legislature may restrict or withdraw common law authority vested in the attorney general.[13]

Even this brief summary underscores the breadth and complexity of state attorney general activities. Some of those activities, such as decisions about criminal investigation and prosecution, call for independent judgment free of political influence from the governor. Other duties, such as advising a state agency on implementation of a major policy initiative, may call for close

6. NAAG, *supra* note 2, at 40.

7. *See* Roger C. Cramton, *On the Steadfastness and Courage of Government Lawyers*, 23 JOHN MARSHALL L. REV. 165, 165 (1990) (describing similar functions for the federal attorney general).

8. The position of attorney general in two states expressly lacks common law authority. *See* NAAG, *supra* note 2, at 38. *See, e.g.*, Manchin v. Browning, 296 S.E.2d 909, 919 (W. Va. 1982) (West Virginia attorney general does not possess common law powers).

9. 526 F.2d 266 (5th Cir. 1976).

10. *Id.* at 268-74. Many cases recognize the common law powers of state attorneys general. *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMON LAW POWERS OF THE STATE ATTORNEYS GENERAL (rev. ed. 1980) [hereinafter COMMON LAW POWERS].

11. *See, e.g.*, Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977); *see also* Michael B. Holmes, Comment, *The Constitutional Powers of the Governor and Attorney General: Which Officer Properly Controls Litigation Strategy When the Constitutionality of a State Law is Challenged?*, 53 LA. L. REV. 209 (1992) (arguing that attorney general properly controls litigation strategy for the state).

12. COMMON LAW POWERS, *supra* note 10, at 4. Courts have recognized common law powers to represent and defend the state and its agencies, Martin v. Thornburg, 359 S.E.2d 472, 479 (N.C. 1987), to control litigation and appeals involving the state, Memorial Hosp. Ass'n v. Knutson, 722 P.2d 1093 (Kan. 1986), to intervene in legal proceedings on behalf of the public interest, State *ex rel.* Allain v. Mississippi Pub. Serv. Comm'n, 418 So. 2d 779 (Miss. 1982), to determine the state's legal policy, Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977), and State v. *Jimenez*, 588 P.2d 707 (Utah 1978). *See* NAAG, *supra* note 2, at 37-38.

13. *See, e.g.*, Johnson v. Commonwealth, 165 S.W.2d 820 (Ky. 1942).

collaboration and accommodation with the governor and agency officials to serve the public interest. This essay attempts to frame the constitutional structure and role issues to advance the debate on how this complex set of responsibilities and relationships should be reconciled in the state constitutional scheme.

B. *Unitary versus Divided Executive Power*

Most states have adopted a constitutional structure for the executive branch that differs significantly from the federal constitution. The distinguishing feature of the federal model is the unitary executive.[14] The President is politically accountable for the executive branch.[15] No other executive branch government official represents a constituency that could remove that person from office.[16] The office of United States Attorney General was created by statute and is filled through presidential appointment with the advice and consent of the Senate.[17]

14. "The executive power shall be vested in a *President*." U.S. CONST. art. II, § 1, cl. 2 (emphasis added); *see* Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 994-99 (1993). However, the federal executive branch is not strictly unitary since Congress has the power to establish independent agencies that are insulated from presidential control, *see* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958), and to provide for an independent counsel to investigate and, if appropriate, prosecute certain high ranking executive branch officials for violations of federal criminal laws, Morrison v. Olson, 487 U.S. 654 (1988). The debate over the scope of legislative control over the executive branch, especially as it affects intra-executive checks and balances, efficiency, and accountability, is relevant though not central to the focus here on the selection of, role of, and control over principal executive branch officials. In this sense, the federal executive does serve as a unitary model, where a single electorally accountable official—the President—appoints and directs the activities of executive branch officers in carrying out executive functions. For analysis of the issue of presidential appointment or removal authority over executive branch agencies and individuals, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

15. The federal executive branch also is arguably not entirely unitary in the sense of political accountability because the Constitution calls for election of a Vice-President as well as a President. Indeed, recent scholarship concludes that nothing in the text or history of the presidential and vice-presidential selection process of Article II or the Twelfth Amendment requires members of the electoral college or the voters who elect them to vote for a President and a Vice-President of the same party. *See* Akhil R. Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 918-24 (1992). However, as Professors Amar and Amar point out, the Constitution bestows little authority on the Vice-President, *id.* at 939, and "the voters know that the *President*, and not his Vice, is ultimately responsible for all executive policy." *Id.* at 941.

16. Congress established the office of United States Attorney General in the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92. The Attorney General is not mentioned in the United States Constitution. But to say that the federal Attorney General's power and control of that power is in the hands of Congress is an overstatement. *See* Robert E. Palmer, Note, *The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 PEPPERDINE L. REV. 331, 348 (1984). The President's appointment and removal authority and the constitutional directive to "take care that the laws be faithfully executed," U.S. CONST. art. II, § 3, establish independent executive power for a President with respect to an Attorney General.

17. Judiciary Act of September 24, 1789, ch. 20, § 35, 1 Stat. 93. Though not mentioned in the United States Constitution, the federal Attorney General has been a cabinet officer in American constitutional government from the beginning of the republic. Article III of the Constitution contemplates an Attorney

an executive branch official; and many state constitutions classify the position in this way. For example, the Utah Constitution provides that "[t]he elective constitutional officers of the Executive Department shall consist of Governor, Lieutenant Governor, State Auditor, State Treasurer, and Attorney General."[28] However, even though generally regarded as an executive branch official, the attorney general is a member of the governor's cabinet in only six states.[29]

Although considered mainly executive officials, state attorneys general perform some legislative and judicial functions. Having a significant administrative official exercise quasi-legislative and quasi-judicial chores has implications for separation of powers considerations. To the extent the attorney general is responsible to the legislature for certain functions and to the extent her judicial-like functions call for judicial-like insulation, the argument for gubernatorial control weakens because the attorney general is performing other than pure executive tasks. Gubernatorial control of such legislative and judicial functions may undermine the constitutional balance contemplated in a system of separation of powers. The United States Supreme Court recognized this principle when, for example, it relied on an FTC commissioner's having independent responsibilities as the basis to uphold congressional limitations on the President's power of removal.[30] In this same the functional role of the attorney general is important in assessing the degree of independence she should have from gubernatorial influence.

The traditional separation of powers is not strictly followed in many states where the attorney general is called upon to provide legal advice for the legislature and the judiciary.[31] To the extent the attorney general advises the legislature and the legislators rely on that advice, and in many states they do,[32] the separation principle is blurred.[33] In states where the attorney general has responsibility to review legislation either before passage or prior to signing, this can have an impact on the governor's role in achieving a legislative agenda.[34]

All state attorneys general render advisory opinions to the governor and

28. UTAH CONST. art. VII, § 1.
29. NAAG, *supra* note 2, at 46.
30. Humphrey's Executor v. United States, 295 U.S. 602 (1935) (President prohibited from removal of FTC Commissioner before end of statutory term set by Congress). The President's unrestricted power to remove postmasters recognized in Myers v. United States, 272 U.S. 52 (1926), was limited to "purely executive officers." 295 U.S. at 631-32.
31. *See* Thornburg, *supra* note 2, at 356-57. Until it was rewritten in 1974, the Louisiana Constitution placed the attorney general in the judicial branch. *See* Holmes, *supra* note 11, at 211, 214.
32. Morris, *supra* note 5, at 135. This role is diminishing as most legislatures now have their own legal staffs. NAAG, *supra* note 2, at 55.
33. "[The attorney general] occupies a unique position. A part of neither the executive nor the legislative branch, he is legal advisor to both." Arlen C. Christenson, *The State Attorney General*, 1970 WIS. L. REV. 298, 300.
34. *See* Winder, *supra* note 4, at 73-76, 87.

executive departments, and many issue such opinions to the legislature and local prosecutors.[35] Their opinions can shape policy and development of the law, in part because they may be the only guidance on state constitutional and statutory issues that are infrequently or never litigated.[36] Some have discerned, including attorneys general, that the attorney general performs a judicial function in this role of opinion renderer, which again clouds the separation principle.[37] Certainly it is quasi-judicial if the advisory opinion serves as an expeditious alternative to securing a declaratory judgment.[38] "[T]he attorney general tends to act where there is a need for explanation of a particular area of the law, where judicial review is absent, and where no legislative provision has been made for defining proper state practice."[39]

Although the trend has been away from early court decisions holding attorney general opinions as binding on the recipients,[40] as a practical matter the opinions work a prescriptive effect on state government administration and therefore carry legal force comparable to a court decision.[41] Some courts hold that good faith reliance on an attorney general's opinion may be a defense in a suit against a public official.[42] In most states the attorney general serves as counsel for judges who are sued in their official capacity and in some represents the court system.[43] Unlike state counterparts having strong ties to the judicial and legislative branches, the federal attorney gener-

35. *See* William A. Saxbe, *Functions of the Office of Attorney General of Ohio*, 6 CLEV. MARSHALL L. REV. 331, 333 (1957).
36. Morris, *supra* note 5, at 133-35 (1987); William N. Thompson et al., *Conflicts of Interest and the State Attorneys General*, 15 WASHBURN L.J. 15, 18 (1976). A doctoral study of the Michigan Attorney General's use of advisory opinions concluded that this process afforded the attorney general substantial potential to influence state public policy. James E. Jordan, *The State Attorney General's Use of Legal Opinions to Influence Public Policy: An Empirical Analysis of the Politics of Legal Advice in the State of Michigan* (1975) (unpublished Ph.D. dissertation, University of Michigan).
37. Abernathy, *supra* note 18, at 41-42; Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 797-98 (1969); Morris, *supra* note 5, at 139. The Florida Supreme Court declared in 1925 that "the office of attorney general is in many respects judicial in character." State *ex rel.* Landis v. S.H. Kress & Co., 155 So. 823 (Fla. 1925). The quasi-judicial character of this role is rendered more problematic because the process leading to these advisory opinions bears little resemblance to judicial procedure. No legal briefs are required, no adversary proceedings are conducted, and there is no avenue for appeal outside the office. Morris, *supra* note 5, at 136; Thompson, *supra* note 18, at 34-35.
38. *See* Dan A. Akers, *The Advisory Opinion Function of the Attorney General*, 38 KY. L.J. 561, 571 (1950).
39. Abraham & Benedetti, *supra* note 37, at 805.
40. Morris, *supra* note 5, at 140-41.
41. *Id.* at 140-42; Jordan, *supra* note 36, at 12-13, 157-58; Thompson, *supra* note 18, at 34-35. Attorney general advisory opinions "are customarily regarded as having the force of law unless and until tested in court." Abraham & Benedetti, *supra* note 37, at 798-99.
42. *See, e.g.*, State v. Spring City, 260 P.2d 527 (Utah 1953).
43. NAAG, *supra* note 2, at 58.

B. *Representative of the People or of the State*

A distinction is sometimes drawn as to whether the attorney general, as a lawyer, represents the people or state government; and it is drawn more sharply when the attorney general achieves office as a state-wide elected representative of the people.[53] This issue is conceptually more subtle than the simple distinction suggests, and guidance initially should be sought through notions of sovereignty and representation.

1. Representation and Delegated Sovereign Power

The office of attorney general is rooted in seven hundred years of Anglo-American history. Since the mid-thirteenth century, specially appointed lawyers have represented the sovereign's legal interests.[54] In England the role of the attorney general to the present day is based upon representation of the sovereign, which is the principle supporting the attorney general as representative of the public interest.[55] American constitutional developments during the revolutionary period shifted sovereignty to the people, who select their representatives to exercise delegated sovereign authority.[56]

Accordingly, when an attorney general provides legal services to a state officer or agency, she does so to facilitate the officer or agency in exercising delegated sovereign power. When an attorney general enforces consumer, environmental, or health legislation, she does so to implement public policy adopted pursuant to the delegated sovereign authority of the legislature. In both instances, the attorney general is representing the public interest. As one attorney general put it, "[I]t is imperative that the Attorney General simultaneously represent both the state agency and the public interest."[57]

2. Representation and Multiple Roles

The attorney general's office must play several roles and serve multiple interests. As Professor and former Assistant United States Attorney General for the Civil Division Barbara Babcock describes it, the government lawyer represents the client agency, she further represents the state as a litigant in court, and she must take account of the public.[58] Perhaps a more workable dichotomy than representation of the state or the public is to view the attorney general's role as combining loyalty to the executive with loyalty to the

53. *See* Holmes, *supra* note 11, at 214 n.25.
54. NAAG, *supra* note 2, at 3-6; Thornburg, *supra* note 2, at 346.
55. NAAG, *supra* note 2, at 30.
56. GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 372-83 (1969).
57. Thornburg, *supra* note 2, at 35?; *see* Stube, *supra* note 33, at 334.
58. Barbara A. Babcock, *Defending the Government: Justice and the Civil Division*, 23 JOHN MARSHALL L. REV. 18? (1990).

law. The attorney general, appointed or elected, fulfills responsibilities to the executive and the public by maintaining the obligation to respect and follow the law.[59]

In areas such as antitrust or consumer protection, the attorney general typically is authorized to assume the role of advocate for the state and represent the public interest consistent with the scope of discretion the legislative mandate allows. The attorney general appears in such litigation as a result of enforcement discretion and acts as the legal representative of the state and the public interest. The role can be different when the attorney general is advising or representing a state official or agency. In litigation on behalf of a state agency or official, the attorney general does not appear as a party to the action.[60] In this context of agency representation, the representative role tension can become most acute.

The problem arises, of course, when the attorney general has a different conception of the public interest than the governor or the state agency and claims that her primary responsibility is to the people (her view of the public interest) and not to an agency (the governor's or the agency's view of the public interest).[61] The problem is resolved if the attorney general confines her role to that of a lawyer providing legal services to a client agency. The client's view of the public interest, if not in violation of state law, would prevail.[62] This resolution is more easily achieved when accountability for executive branch performance is clear. At the federal level, the presumption is that the President is acting in the public interest, and government lawyers are expected to support that position subject to adherence to law and professional bounds of honesty and advocacy.[63]

Even when the attorney general is elected, resolution is possible if the authority of the office is understood to extend only to serving in a lawyer's role to those delegated sovereign powers of the executive branch.[64] Howev-

59. *See* PHILIP B. HEYMANN, THE POLITICS OF PUBLIC MANAGEMENT 63-66 (1987).
60. *See* Manchin v. Browning, 296 S.E.2d 909, 918-19 (W. Va. 1982).
61. *See* McCreevy, *supra* note 46, at 316-17. The pressure on the attorney general-client agency relationship "is especially so when the Attorney General and the agency-client are headed by policy makers of different partisan persuasions." Thornburg, *supra* note 2, at 358.
62. "The Attorney General's role and duty is to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in litigation." *Manchin*, 296 S.E.2d at 920.
63. *See* Thomas E. Kauper, *Politics and the Justice Department: A View from the Trenches*, 9 J.L. & POL. 257, 266 (1993).
64. When Pennsylvania voters decided in 1978 to convert from an appointed to an elected attorney general, the commission charged with making recommendations to implement this change declared: "The elected Attorney General is not to function as a policymaker. Instead, the Attorney General's role is intended to encompass only the traditional role of lawyers in society. . . ." JOINT STATE GOVERNMENT COMMISSION, GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ELECTED ATTORNEY GENERAL—FINAL REPORT 5 (1978).

As one commentator put it with respect to federal government attorneys, "Ultimately, however, the

particularly discriminating when it comes time to assign the blame for inaction. Other elected officials may well have caused the foot-dragging, but as the 'head' of state government the governor must bear the consequences."[78]

A multi-headed executive branch contains a built-in tension between the attorney general's role as counsel for the state and the attorney general's independent electoral accountability. The conventional arrangement is that the governor appoints cabinet or department officials to administer state agencies. The attorney general serves as the lawyer for the governor and the agencies, and therefore owes a duty of loyalty to these clients. However, when the attorney general is elected independently of the governor, the governor cannot remove the attorney general from office on grounds of disloyalty or poor performance. And if the attorney general's actions cause poor performance from an executive branch agency or interference with implementation of the governor's policy objectives, the governor may nonetheless be held politically accountable as the leading political figure in the executive branch. "The fact is that people look to the *governor* to get the job done."[79] That would be more appropriate if the governor or her appointed agency officials were responsible for the hiring and supervision of legal advisors, but that is not the system in most states.

The result is that "[e]very official accused of incompetence places the blame at another's door. . . . Officers will not cooperate, and there is no way of compelling them to do so."[80] The critical question is: who is in charge, or where is accountability placed?[81] That question must be answered if the constitutional theory underlying separation of powers is to be realized.[82] The principle at stake is that the person who is ultimately held responsible for the operation of the executive branch should be able to count on the cooperation of advisors, including legal advisors.[83] Or, to put it in terms of well-established government organization theory, authority must be commensurate with responsibility.[84] This has been a problem with state government organization generally.

2. Unity, Plurality, and Accountability

Especially before World War I, the long ballot for state elected officials rendered it very difficult for governors to coordinate and direct administration. The state government reorganization movement that has been ongoing for much of the last seventy-five years has called for strengthening the governor's control over administration by shortening the ballot, including appointment of the attorney general.[85] The widely accepted principle of administrative organization supporting this prescription is the need for clear lines of authority and responsibility.[86] "Concentration of authority in the hands of the governor would enhance accountability because the voters would know who to blame for administrative failures, as the governor became chief executive in fact and not just name."[87]

At the Philadelphia Constitutional Convention in 1787, Pennsylvania delegate James Wilson stressed that a single executive would provide the "most energy dispatch and *responsibility* to the office."[88] Alexander Hamilton stressed the accountability problem of a plural executive in *The Federalist Papers*. He contended that

> one of the weightiest objections to a plurality in the Executive . . . is that it tends to conceal faults and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall.[89]

In sum,

> [T]he plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of

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78. SABATO, *supra* note 24, at 63.

79. *Id.* (quoting former Governor Reubin Askew of Florida).

80. AUSTIN F. MACDONALD, AMERICAN STATE GOVERNMENT AND ADMINISTRATION 357-58 (1960). "In Michigan, it has become impossible as a practical matter to unequivocally charge the Governor with full responsibility for his administration. If projects fail, it is simple to 'pass the buck,' whereas, a focusing of accountability on a single chief executive results in greater accomplishment." Marie H. Kamberg, *Should the Governor Appoint the Secretary of State and Attorney General? Yes!*, 27 MICH. ST. B.J. 33 (1948).

81. Beyle, *infra* note 97, at 192.

82. *See* text at notes 44-47, *supra*.

83. As one commentator puts it:

> If the governor is to be held responsible for the handling of all the state's business . . . it follows almost inescapably that he must have control over the staff service of providing legal aid and advice to his other subordinates, as well as control over the line function of prosecuting offenders against the state laws and representing the state in all other litigation. . . . The popular election of the attorney general with his responsibility being directly to the people produces a division and a diffusion of the basic responsibility of the governor to see that the laws are fairly executed, and flies in the face of accepted principles of good administrative organization.

Abernathy, *supra* note 18, at 44-45. Or, more simply, Al Smith asserted: "The attorney general is the state's lawyer, and the governor should select the lawyer. He is responsible." A.E. BUCK, REORGANIZATION OF STATE GOVERNMENTS 23 (1938) (quoting a speech by Alfred E. Smith).

84. HAROLD SEIDMAN, POLITICS, POSITION, AND POWER 5 (1970); *State Government Reorganization: The End of the Beginning*, PAR ANALYSIS, Oct. 1978, at 7.

85. PHILLIPS, *supra* note 18, at 205-11.

86. *Id.* at 212-13; Abernathy, *supra* note 18, at 33-34.

87. Elling, *supra* note 76, at 251.

88. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1966) (emphasis added).

89. THE FEDERALIST No. 70, at 427-28 (Alexander Hamilton) (Clinton L. Rossiter ed., 1961).

tract the plans and operation of those whom they divide, . . . [and] they might impede or frustrate the most important measures of the government [and] split the community into the most violent and irreconcilable factions. . . .'"[105] Multiple executive authorities "serve to embarrass and weaken the execution of the plan or measure to which they relate, . . . [and] counteract those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition. . . ."[106]

As a modern commentator explained,

> [S]ome of our state governments' most interesting legal and political infighting has been between the governor as the chief executive officer of the state and the attorney general as the chief legal officer. It is clear that these two offices do have the potential for built-in conflict at several levels, from politics to policy to administration. . . . And not the least of these is over conflicting ambitions.[107]

As another commentator concluded: "A government of inaction is not a responsible government. A governor without power is not a responsible governor."[108] The fragmented executive hampers the governor from shaping and directing executive branch policies. Although the number of statewide elected officials has diminished slightly during the last thirty years, this area of governor-attorney general relations is where progress toward effective gubernatorial leadership has been the slowest.[109]

C. *Divided Loyalty*

The basic attributes of the attorney-client relationship—client employs the attorney and the attorney serves as representative and agent of the client—are reversed with many elected state attorneys general. The attorney general in many states assigns a lawyer to a state agency client and can provide or withhold services. The client agency, unlike other clients, cannot discharge the attorney without the cooperation and support of the attorney general or extraordinary relief from the legislature. The traditional rule giving the client the final decision in all important aspects of representation and

105. *Id.* at 426.

106. *Id.* at 427.

107. Boyle, *supra* note 97, at 192. As one governor told Professor Sabato: "I have had some problems with my attorney general. . . . *My* perception is that the attorney general essentially serves as counsel to the governor, and his perception is that he is an autonomously elected public official and solely represents the interests of the public, and the office of governor when he has adequate time and staff." SABATO, *supra* note 24, at 64-65.

108. RANSONE, *supra* note 98, at 402.

109. SABATO, *supra* note 24, at 63.

litigation is compromised. Perhaps the biggest problem is the need for the client to have total confidence in counsel. A governor cannot have that confidence in a person she did not select and who not only is a political rival of the governor but may even have designs on her job.

A divided loyalty problem permeates the representation of state agencies, especially when the attorney general is independently elected. If a deputy or assistant attorney general is assigned to provide legal counsel to a state agency, that attorney's duty of loyalty should be exclusively to that agency. However, if the attorney general disagrees with the policies of the agency, the subordinate attorney faces the dilemma of adhering to the lawyer's duty of loyalty to a client versus furthering the policy preferences of his employer, the attorney general. The tension between legal policy and program policy is not easily resolved with appeals for cooperation and, where applicable, bipartisan support to make the system work or through reliance on the governor to calm executive branch disputes.[110] On the other hand, it has been suggested that an independent attorney general may provide more objective advice.[111]

One outgrowth of the divided loyalty problem is the temptation of state agencies to hire law-trained people who are accountable to the agency head.[112] This practice is prevalent in governors' offices, where in-house counsel commonly are employed.[113] Whether these law-trained individuals are hired as lawyers or not, agency staff may rely on and have more confidence in them than in attorneys assigned by the elected attorney general.[114]

The in-house attorneys may have both centralizing and decentralizing tendencies on the legal policy of the state. On the one hand, the agency-hired lawyers are accountable to the agency head and ultimately to the governor, largely eliminating the potential conflict between policy implementation and legal counseling functions. On the other hand, the "closet attorney" phenomenon exacerbates the potential for conflicting legal advice and undermining

110. *See* Dave Frohnmayer, *Representing the State: Public Interest Comes First*, 61 ST. GOV'T 91, 93 (1988).

111. *See* N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 96.

112. In North Carolina, for example,

> [T]he practice of having a legal advisor or in-house legal counsel within the agency-client represented by the Attorney General has become widespread. This fact has complicated the role of the Attorney General as much as, or more so, than any other one factor during the evolutionary process of this office over the past twenty years.

Thornburg, *supra* note 2, at 358 (footnote omitted).

113. NAAG, *supra* note 2, at 44; RANSONE, *supra* note 98, at 332-33; N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 96.

114. A survey of public institutions of higher education regarding delivery of legal services revealed some interesting responses in this regard. Of the 18 major research universities responding to the survey, six relied upon "quasi-representation," defined as "legal advice given by an employee who is an attorney but who is not in a legal position." It is "unavoidable" not to receive such advice, according to one respondent. UTAH SYSTEM OF HIGHER EDUCATION, STATE BOARD OF REGENTS, RESPONSE TO LEGAL SERVICES QUESTIONNAIRE, Aug. 30, 1990, at 1 (on file with author).

an example.[126]

E. *Counseling versus Prosecution*

Perhaps the problems discussed in this section are the price states are willing to pay for the benefits of an independently elected attorney general serving a check and balance watchdog role in the executive branch. However, there is another aspect to the tension between structure and role that cannot be balanced in this way. Although the duty is shared in a variety of ways with local government prosecutors, most state attorneys general have as one of their responsibilities the investigation and prosecution of state criminal offenses.[127] The conflict arises when the attorney general can both counsel state agencies and prosecute them for criminal wrongdoing. The attorney-client relationship is built on trust, loyalty, and confidentiality. That foundation is precarious if not impossible when the attorney general is both advocate and potential adversary.

This role conflict creates both the risk of ineffective legal counseling for the agency due to agency caution or distrust and ineffective investigation and prosecution due to attorney loyalty to the agency. For some, the answer may be that agency wrongdoing should be handled by an independent prosecution team separated by "walls" within the attorney general's office or referred to an outside local or federal prosecutor. In many states, the majority of criminal investigation and prosecution through trial is carried out at the local government level with the state attorney general's office handling most of the criminal appeals. At the federal level, Congress created the office of independent counsel because it was concerned about conflicts that could develop when the executive branch is called to investigate its high-ranking officers.[128]

F. *Rogue Agency*

An attorney general should not interfere with an agency's policy choice so long as the policy is legal.[129] However, whether a policy decision is legal is not always clear. When it is unclear, an independently elected attorney general could unnecessarily frustrate public policy. When it is clear, however, and the agency is intent on acting illegally, the attorney general, elected or appointed, faces a practical challenge.

Two commentators who have confronted this problem advise that "the attorney general can use persuasion, seek support through the media, apply political pressure, and, as a last resort, litigate."[130] It would not be uncommon in such a conflict situation for the attorney general to withdraw as counsel for the state agency client and authorize employment of special counsel.[131] The problem with the attorney general suing the agency is that the agency official will protest that a suit for failure to follow the attorney general's advice is a betrayal because the attorney general is the agency's lawyer.[132] Indeed, the California Supreme Court held that the state attorney general could not withdraw from representation of state officers and agencies and then take a position opposed to those same clients.[133] Cases in other jurisdictions allow their attorneys general to sue state officers or agencies.[134] Nonetheless, the problem of the rogue agency is a pronounced example of the conflict of loyalty and counseling versus prosecution issues discussed previously.

G. *Resources and Management*

One of the problems in assessing these issues is the difficulty of separating constitutional structure and role from management efficiency and availability of resources. In other words, if there are deficiencies in legal representation of the executive branch generally or certain agencies particularly, they may stem from lack of sufficient lawyer personnel in the attorney general's office or failure of that office and the state agencies to manage available attorneys as productively as possible. Indeed, although not unrelated, resource and management issues may be as critical to the quality of executive branch legal representation as questions involving constitutional structure and role. Fulfilling the promise of the desired constitutional structure and role requires adequate resources and organization to facilitate the attorney general's responsibilities.

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126. *See, e.g.*, Crouton, *supra* note 7, at 171-74 (describing how Attorney General Richard Kleindienst could have effectively investigated and prosecuted the Watergate burglary but for his personal loyalty to at least President Nixon and former Attorney General John Mitchell).

127. The attorney general "is the most visible and influential state official in the fight against crime." [illegible], *supra* note 2, at 378.

128. *See* Morrison v. Olson, 487 U.S. 654, 677 (1988) (upholding independent counsel provisions in Ethics in Government Act of 1978); Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 Geo. L.J. 1, [illegible]1 (1990).

129. *See* Fishmeyer, *supra* note 110, at 72.

130. Charles M. Oberly III & Fred S. Silverman, *When Worlds Collide: Avoiding Public Showdowns*, 61 J. St. Gov't 94, 95 (1988).

131. *See* People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1207 (Cal. 1981).

132. Oberly & Silverman, *supra* note 130, at 95.

133. *See* People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981).

134. *See, e.g.*, Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n, 387 A.2d 533 (Conn. 1978); Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977); E.P.A. v. Pollution Control Bd., 372 N.E.2d 50 (Ill. 1977). In Superintendent of Ins. v. Attorney General, 558 A.2d 1197 (Me. 1989), the court held that the Maine Attorney General who disagrees with a state agency is not disqualified from participation in litigation "affecting the public interest merely because members of his staff had previously provided representation to the agency at the administrative stage of the proceeding." *Id.* at 1204.

Between 1965 and 1987, the "golden era of state reorganization," gubernatorial appointment power was expanded in each of the twenty-two states where the executive branch was overhauled.[143]

This arrangement would diminish the problems of constitutional stalemate, accountability, and divided loyalty. However, it would not eliminate and may aggravate the counseling versus prosecution problem because the attorney general would be beholden to the governor and perhaps less likely to take seriously the investigation and prosecution of state agencies or officials for criminal violations. This problem at the federal level has led to the appointment of independent counsel to investigate and prosecute alleged wrongdoing on the part of high level executive branch officials. It has further led to the development of offices of Inspector General, situated throughout the federal government, to audit and investigate their respective agencies.[144]

A strong barrier to reform in this direction is the historical experience and popular expectation of electing state attorneys general.[145] Opposition comes from elected attorneys general, legislators who do not wish to strengthen the governor's hand over state agencies, agency heads who see a threat to established legislative and client group relationships, and interest groups with a stake in the status quo.[146] Most proposals to shorten the statewide elected official ballot meet with public resistance.[147] No state has changed from election to executive appointment of the attorney general.[148] It appears unlikely that, apart from the experts on state executive branch reform, any movement will develop in this direction.

143. *Id.* at 194-95.

144. *See* PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993).

145. A West Virginia poll resulted in 24% in favor and 63% opposed to abolishing the state elected office of attorney general. THE GALLUP OPINION INDEX: POLITICAL, SOCIAL AND ECONOMIC TRENDS (reporting the West Virginia Poll of March 1989, poll information no. WVA31989). *See generally* JAMES L. GARNETT, REORGANIZING STATE GOVERNMENT: THE EXECUTIVE BRANCH 51 (1980).

146. Elling, *supra* note 76, at 252-53. Some fear giving the governor too much power. *See* Emmanuel B. Rosse, *Should the Governor Appoint the Secretary of State and Attorney General? No!*, 27 MICH. ST. B.J. 33 (1948).

147. Voters resist appointment because they think direct election is more democratic. CHARLES R. ADRIAN, STATE AND LOCAL GOVERNMENTS 202 (1976); SABATO, *supra* note 24, at 56.

148. *Id.* at 64; Thompson, *supra* note 10, at 10. Since New York changed from an appointed to an elected attorney general in 1846, numerous attempts have been made to go back to an appointed attorney general, but none has succeeded. *See* N.Y. CONSTITUTIONAL CONVENTION, *supra* note 1, at 195-96. Several factors have been identified that impede administrative reorganization, including opposition of vested interests within the organization, special interest groups supportive of the status quo, the difficulty of effectuating constitutional change, the persistence of Jacksonian theories of popular democracy, and the need for compromise. Phillips, *supra* note 18, at 219. Indiana in the early 1940s and Pennsylvania in 1980 changed from executive appointment to popular election. NAAG, *supra* note 2, at 20.

C. *Elected Prosecutor/Public Advocate Attorney General*

The public, whether accurately or not, generally considers the attorney general to be primarily the prosecutor for the state.[149] If the elected attorney general were limited in authority to criminal investigation and prosecution in certain specified areas, some of the problems with structure and role would be alleviated.[150] This would continue to be the case if the role were defined broadly as one of law enforcement. In addition to criminal law enforcement, the elected attorney general's authority could also embrace, for example, civil enforcement of antitrust, civil rights, consumer, and environmental laws. The governor would appoint a separate counsel for the state who would be responsible for providing legal services to state agencies, or the state agencies themselves would employ attorneys on their staffs.

Under this system, the attorney general/prosecutor-public advocate, as an independently elected official, would have some insulation from gubernatorial overreaching. Moreover, the checking or watchdog function of the attorney general would be preserved with respect to criminal wrongdoing in the executive branch. The power to investigate may concentrate on "government misconduct, malfeasance, or individual criminal activity."[151] Indeed, the watchdog role may be enhanced because the conflict between the advising and prosecuting functions carried out by the same office would be substantially eliminated.

With a gubernatorially-appointed counsel for state agencies, the accountability of executive branch agencies would not be confused with the quality of performance of attorneys loyal to an independently elected employer. Moreover, the lawyers themselves would not face the tension between agency direction and attorney general policy agendas, thereby alleviating the stalemate and divided loyalty problems discussed earlier. The governor or agency head would have the authority to act as legal employer in this context and would not be constrained to rely on the independently elected attorney general to do so. Although potential remains for conflict in policy objectives insofar as law enforcement decisions carry policy implications, the risk of gridlock would be lessened.

This approach receives support by analogy from the view among public administration experts that the state auditor responsible for post audits and

149. NAAG, *supra* note 2, at 13.

150. A recent article on the federal Attorney General argues that "The Attorney General's role as the nation's chief law enforcement officer has the potential for clashing with the Attorney General's White House role as the President's legal advisor." Mitchell Rogovin & Wendy M. Rogovin, *The Office of Attorney General: Not Properly Political*, 9 J.L. & POL. 317, 318 (1993). The Rogovins conclude that "a President must select two people to fulfill these positions." *Id.* at 321; *see also* Whitney N. Seymour, Jr., *United States Attorney: An Inside View of "Justice,"* in AMERICA UNDER THE NIXON ADMINISTRATION 229-32 (1975) (proposing to divide functions between a presidential advisor and a chief prosecutor).

151. NAAG, *supra* note 2, at 14.

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March 9, 1995

MEMORANDUM

TO:

FROM: Gordon S. Harrison, Director

RE: **Issue of An Elected Attorney General In Alaska**
Research Request 95.150

You asked for background information on the issue of electing the attorney general in Alaska, in contrast to the present practice of the governor appointing the attorney general. This memorandum briefly discusses the existing constitutional structure of the executive branch and the attorney general as an appointed department head; past efforts to change this constitutional scheme; a summary of the case for and against an elected attorney general; and the current controversy of the role of the attorney general in the recent withdrawal of the state's appeal in the *Babbitt* lawsuit against the federal government.

Constitutional Structure of the Executive Branch, and the Appointed Attorney General

Article III, Section 24 of the Alaska Constitution states, in full:

> Each principal department shall be under the supervision of the governor.

Article III, Section 25 states, in pertinent part:

> 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 . . . .

These two brief constitutional provisions create in Alaska a unified executive branch of government. Unlike the situation in most other states, in Alaska the heads of major executive

branch agencies are appointed and serve at the governor's pleasure: only the governor and lieutenant governor are popularly elected.[1]

The constitution gives to the legislature the power to determine the number of principal departments and the duties of each. It established the Department of Law as one of 16 principal departments in the executive branch, including the Office of the Governor (AS 44.17.005). The attorney general is the head of the Department of Law (AS 44.23.010), and therefore, the person serving in that position is appointed by the governor and serves at the governor's pleasure as do the other department heads.[2] The state constitution would have to be amended to select the attorney general by popular election.

This constitutional scheme was adopted by the delegates to the constitutional convention to avoid the fragmentation of executive authority that results from independently elected department heads. They wanted the executive branch to be *efficient* in its operation and the governor to be *accountable* to the voters for the performance of the executive agencies. They gave the governor the power necessary to manage the administrative agencies, and they expected the governor to answer for his or her management. The delegates were firmly committed to the principle of a strong and accountable governor, and they rebuffed several efforts to weaken the governor's control over the attorney general, including proposals to elect the attorney general. Speaking on the floor of the convention against such a proposal, delegate McLaughlin stated:

> 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 [of the strong executive]. . . .[3]

Delegate Ralph Rivers, who said he was initially inclined to support the idea of an elected attorney general, argued strenuously against it. He said he came to realize that:

> . . . 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 general of his own choice. Under [the proposal for an elected

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[1]The lieutenant governor has no constitutional powers and few statutory powers.

[2]The Department of Education is an exception to this scheme. Under the grant of authority in Article III, Section 25, to determine *by law* whether the head of each department shall be a single executive or otherwise, the legislature has decided to place a board at the head of this department. The method of selecting the executive officer of this department is provided in Article III, Section 26.

[3]*Proceedings of the Alaska Constitutional Convention*, p. 2196. Both Delegate Rivers and McLaughlin were attorneys.

> attorney general] 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. . . .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."[4]

This proposal for an elected attorney general, which took the form of an amendment to the committee recommendation for appointed department heads, was defeated on the floor of the convention by a vote of 40 to 12. A subsequent proposal to have the judicial council screen candidates for the post of attorney general was defeated by a vote of 36 to 18. The delegates clearly wanted the state attorney general to be appointed by, and serve at the pleasure of, the governor.

Proposed Constitutional Amendments Creating an Elected Attorney General

Although the matter was settled in the constitution, it was not settled in the minds of some people, and support for an elected attorney has lingered. A resolution was introduced in the first state legislature to amend Article III of the constitution to elect the attorney general, and some 26 resolutions have been introduced over the years to the same end.[5] However, none of these measures has received the necessary two-thirds majority vote to be placed on the ballot for ratification.

Arguments For and Against An Elected Attorney General

Proponents of an elected attorney general believe that the independent legal judgment of an appointed attorney general is compromised by his or her political ties to the governor. Accordingly, an elected attorney general is thought to bring an objective legal perspective to the office. There are at least two sources of "political" pressures to which the appointed attorney general is susceptible. These are the pressures (tacit if not expressed) to treat favorably campaign contributors, special interests aligned with the governor, and various electoral allies, and the less insidious but more pervasive pressures to provide contrived legal support for the governor's

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[4] *Proceedings*, p. 2198

[5] The most recent resolution proposing an elected attorney general was Senate Joint Resolution 12, 14th legislature (1985-86). At least one bill was introduced to hold a statewide advisory vote on the question of electing the attorney general (House Bill 456, 13th legislature, 1983-84). Resolutions have also been introduced from time to time to provide for the election of district attorneys.

programs, policies, and legislation. It should be noted that sensitivity of legislators to these concerns was far more acute in earlier years when the legislature did not have its own counsel and relied exclusively on the attorney general for legal advice. In this situation, when questioning the legality of a bill proposed by the governor, or when seeking defense of a legislator's bill that the governor alleges is illegal, legislators would have preferred to hear from an elected attorney general rather than a lawyer from the governor's cabinet. With their own legal staff to turn to, legislators today are no longer dependent upon legal advice from a source that has conflicting interests.

Defenders of the constitutional status quo point out that an elected attorney general would not be free from political influences but merely substitute his or her own for those of the governor. An elected attorney general is a politician no less than the governor, and must raise campaign funds for a statewide contest and cultivate electoral favor wherever it can be found. Furthermore, experience shows in states with an elected attorney general that the office is often a stepping stone for the governor's office. Thus, the elected attorney general is very likely to be an ambitious politician, and it is not unusual for an attorney general to run against the governor in whose administration he serves. Under these circumstances there is no reason to expect more objective and independent legal judgment from an elected attorney general than from an appointed one.

Defenders of the status quo also see wisdom in the original constitutional design of the executive branch, which does in fact result in efficient administration and political accountability. Under the current system, when things go awry the governor cannot dodge responsibility by blaming others. Finally, advocates of an appointed attorney general argue that the state is more likely to be served by a person of legal competence and talent if that person is appointed rather than elected.

An Elected Attorney General and the *Babbitt* Lawsuit

We presume that the current interest in the role of the attorney general in Alaska has been generated by the decision of Governor Knowles to withdraw the state's appeal in the lawsuit *Alaska v. Babbitt*. Questions arose about the duties and responsibilities of the attorney general in this case because the same person, Bruce Botelho, both filed the suit as attorney general for Governor Hickel and withdrew it as attorney general for Governor Knowles. It has been suggested by people who [illegible]eed with the decision to drop the appeal that an elected attorney general would have bee[illegible]pelled to defend the state's vital interest and continue the appeal, notwithstanding the governor's desires. This proposition deserves some discussion, even though a definitive response is not possible. It is conceivable that an elected attorney general would have acted differently from Attorney General Botelho in the *Babbitt* suit, but there are strong reasons to think he might not have. The outcome in any particular hypothetical case would, of course, depend on many factors, including the political values of the elected attorney general as well as the precise terms of the constitutional and statutory provisions that established the elected office of attorney general in Alaska. Generally speaking, however, it is understood that elected attorneys

general defend the positions of executive officers and agencies if those positions are reasonable and formulated by a defensible process. In matters of public policy, where the best interests of the state are at issue rather than the legality of a position, the attorney general is usually expected to defer to the governor:

> There is no reason to assume that the attorney general can ascertain the public interest better than the governor, who is elected in the same statewide election but indisputably attracts more interest and attention than the attorney general.[6]

The California Supreme Court, in *The People ex rel. George Deukmejian v. Brown*, 624 P 2nd. 1206 (1981), held that, under state constitutional provisions similar to those in Alaska regarding the governor's supervisory powers over the executive branch:

> . . . if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest; the Attorney General may act only "subject to the powers" of the Governor.

The court's decision in this case is attached. The majority decision and the dissent, although presented in the context of California constitutional law, are suggestive of the broader issue of the extent of the common law powers of attorneys general to safeguard the public interest.

One must bear in mind that governors and elected attorneys general have a mutual interest in avoiding public spats. Therefore, as a practical matter, potential for conflict over the *Babbitt* appeal would doubtless have been perceived by the governor and the elected attorney general and a contest between them avoided by negotiation (tacit or overt). Thus, the outcome in the *Babbitt* controversy under our hypothetical situation could have gone either way--appeal or not appeal--on the basis of political judgments by the two key players.

Questions concerning the powers and duties of elected attorneys general, and the advantages and disadvantages of an elected position versus an appointed position, are very complex, and they are treated only in cursory fashion in this memorandum. If you would like additional information, or additional reading material on the subject, please let us know.

Attachments

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[6]Scott M. Matheson, Jr., "Constitutional Status and Role of the State Attorney General," *University of Florida Journal of Law and Public Policy*, Fall, 1993, p. 15.

172 Cal.Rptr. 478

The PEOPLE ex rel. George DEUKMEJIAN, as Attorney General, etc., Petitioner,

v.

Edmund G. BROWN, Jr., as Governor, etc., et al., Respondents;

California State Employees' Association et al., Interveners.

S.F. 24252.

Supreme Court of California, In Bank.

March 12, 1981.

Rehearing Denied April 22, 1981.

Attorney General sought peremptory writ of mandate to compel State Personnel Board, Public Employment Relations Board, Governor, and Controller to perform their statutory and constitutional duties with regard to recently enacted State Employer-Employee Relations Act. The Supreme Court, Mosk, J., held that Attorney General could not seek judicial determination of legality of State Employer-Employee Relations Act which was purportedly in derogation of California Constitution where Attorney General had represented state clients, given them legal advice with regard to pending litigation, and then withdrawn and sued same clients on next day on cause of action arising out of identical controversy.

Petition dismissed.

Richardson, J., dissented and filed an opinion.

See also Cal., 172 Cal.Rptr. 487, 624 P.2d 1215.

1. Attorney General ⇐6

Attorney General could not seek judicial determination of legality of State Employer-Employee Relations Act which was purportedly in derogation of California Constitution where Attorney General had represented state clients, given them legal advice with regard to pending litigation, and then withdrawn and sued same clients on next day on cause of action arising out of identical controversy. West's Ann.Gov. Code, § 3512 et seq.

2. Attorney General ⇐6

Attorney General cannot be compelled to represent state officers or agencies if Attorney General believes them to be acting contrary to law, and may withdraw from statutorily imposed duty to act as their counsel, but may not take position adverse to those same clients. West's Ann. Gov.Code, §§ 11040, 12512.

3. Attorney General ⇐6

Where a conflict between Governor and Attorney General develops over faithful execution of laws of the state, Governor retains supreme executive power to determine public interest: Attorney General may act only subject to powers of the Governor. West's Ann.Const. Art. 5, §§ 1, 13.

4. Attorney General ⇐6

Governor could raise issue of violation of rule of professional conduct by motion in case before court to enjoin adverse representation of Attorney General; overruling *People v. Johnson*, 6 Cal. 499.

George Deukmejian, Atty. Gen., Willard A. Shank and N. Eugene Hill, Chief Asst. Attys. Gen., L. Stephen Porter and Richard D. Martland, Asst. Attys. Gen., Talmadge R. Jones, George J. Roth, Robert Burton, Paul H. Dobson and M. Anthony Soares, Deputy Attys. Gen., for petitioner.

John C. Wakefield, Los Angeles, Larry C. Larsen, Gilles Attia, A. J. Weiglein, Sacramento, A. Roger Jeanson, Haas & Najarian, San Francisco, Thomas A. Farr and Rex H. Reed, Springfield, Va., as amici curiae on behalf of petitioner.

Tuttle & Taylor, Raymond C. Fisher, Barbara L. Stocker, Jeffery M. Hamerling, Los Angeles, J. Anthony Kline, San Francisco, Byron S. Georgiou, San Diego, Barbara T. Stuart, Sacramento, Jerome B. Falk, Jr., Steven L. Mayer, Howard, Prim, Rice, Nemerovski, Canady & Pollak, San Francisco, Barry Winograd, Salinas, Kristin Jensen, Robert Miller, William P. Smith, Terry

Filliman, Sacramento, Gerald Becker, Martinez, and Ronald Blubaugh, Sacramento, for respondents.

Loren E. McMaster, Bernard L. Allamano, Gary P. Reynolds, Sacramento, Richard Lobel, Van Bourg, Allen, Weinberg & Roger, Stewart Weinberg and Robert J. Bezemek, San Francisco, for intervenors.

Reich, Adell, Crost & Perry, Hirsch Adell, Charles P. Scully, Donald C. Carroll, Charles P. Skully, II, Donald H. Wollett, Ronald Yank, Franklin Silver, Carroll, Burdick & McDonough, Bodkin, McCarthy, Sargent & Smith, Timothy J. Sargent, Kevin W. Horan, Los Angeles, Gillin, Jacobson & Wilson, Ralph L. Jacobson and Cynthia T. Podren, Berkeley, as amicus curiae on behalf of intervenors.

MOSK, Justice.

Before reaching the merits of this litigation in either this case or the companion case of *Pacific Legal Foundation v. Brown*, 29 Cal.3d 168, 172 Cal.Rptr. 487, 624 P.2d 1215, we address a motion of the Governor to dismiss the petition of the Attorney General herein.

The chronology of events is significant. The 1977 Legislature adopted a State Employer-Employee Relations Act (SEERA). (Gov. Code, §§ 3512-3524.) While the Governor had the measure under consideration the then-Attorney General wrote to him under date of September 20, 1977, urging him to sign what he described as "a standard, well-accepted, existing method of resolving labor/management disputes ... a good step forward." Ten days later the Governor signed the measure into law, and it became effective on July 1, 1978.

On January 23, 1979, the Pacific Legal Foundation and the Public Employees Service Association filed in the Court of Appeal an original petition for a writ of mandate to compel the Governor, the Controller, the Public Employment Relations Board, and the State Personnel Board to perform their constitutional and statutory duties without regard to provisions of SEERA, contending the legislation was unconstitutional.

On January 30, 1979, the present Attorney General, acting through two deputies, met with members of the State Personnel Board, which had been served with summons in the Pacific Legal Foundation suit. At the conference the Attorney General, as counsel to the board, outlined the legal posture of the board and described four legal options available to it. This was a classic attorney-client scenario.

At all times up to that point, the Attorney General was by law the designated attorney for the Governor and the State Personnel Board, as well as for the other state officers and agencies involved herein. Government Code section 12511 provides that the "Attorney General has charge, as attorney, of all legal matters in which the State is interested ...." Section 12512 provides that the "Attorney General shall ... prosecute or defend all causes to which the State, or any State officer is a party in his official capacity; ..." (See also Gov. Code, § 18656.)

On February 7, 1979, however, the Attorney General initiated the present proceeding by filing an independent petition for writ of mandate in the Court of Appeal against the Governor and other state agencies, asking for relief comparable to that sought by Pacific Legal Foundation.

[1] There is no question that at such time as he believed a potential conflict existed, the Attorney General could, as he did, properly withdraw as counsel for his state clients and authorize them to employ special counsel. (Gov. Code, § 11040; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 15, 112 Cal.Rptr. 786.) The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy. We can find no constitutional, statutory, or ethical authority for such conduct by the Attorney General.

The rules of professional conduct to guide attorneys in their relationship with clients

and former clients are well established and generally understood by all attorneys in this state. Rule 5–102 of the State Bar Rules of Professional Conduct (3B West's Ann. Bus. & Prof. Code (1974 ed., 1980 cum. supp.) foll. § 6076, at p. 92) requires that before an attorney may represent interests adverse to a client, he must obtain his client's consent in writing. For violation of this principle with regard to a *former* client, an attorney has been disciplined by the State Bar. (*Galbraith v. State Bar* (1933) 218 Cal. 329, 23 P.2d 291.) This court declared in *Galbraith* that "the subsequent representation of another against a former client is forbidden not merely when the attorney *will* be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he *may* be called upon to use such confidential information." (Italics in original; *id.* at pp. 332–333, 23 P.2d 291.)

We took similar disciplinary action in *Hawkins v. State Bar* (1979) 23 Cal.3d 622, 629, 153 Cal.Rptr. 234, 591 P.2d 524, despite the attorney's claim that his conflicting relationship with another person arose subsequently to the initial legal consultation with his client. The relationships, we found, "arose contemporaneously"; this is comparable in time span to the chronology here between the Attorney General's legal consultation with the Personnel Board and his filing of a lawsuit against the same board.

Conduct of attorneys has also been discussed in contexts other than State Bar discipline. In *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573–574, 15 P.2d 505, this court declared that "an attorney is forbidden to do *either* of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (Italics added.) While the record here does not reveal whether the Attorney General acquired any knowledge or information from his clients, the prohibition is in the disjunctive: he may not use information *or* "do anything which will injuriously affect his former client." Unquestionably the Attorney General is now acting adversely to the position of his statutory clients, one of which consulted him regarding this specific matter.

In *Grove v. Grove Valve & Regulator Co.* (1963) 213 Cal.App.2d 646, 653, 29 Cal.Rptr. 150, the court enjoined an attorney from appearing against his former clients because "there can be no reasonable doubt that Flehr's present employment as attorney for appellant in this action is adverse to the interests of his former clients, since appellant is suing them over matters which are related to and which Flehr became conversant with during the period in which he represented respondents as their attorney." Here, too, the Attorney General is suing former clients over matters that arose during the period when by law he was counsel for those same clients.

To the same effect is *Earl Scheib, Inc. v. Superior Court* (1967) 253 Cal.App.2d 703, 706, 61 Cal.Rptr. 386, in which the court declared "The rules which underlie our decision have long been written in the books so that he who runs might read. 'It is the duty of an attorney: . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.' (Bus. & Prof. Code, § 6068.) 'A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.'" (See also *Anderson v. Eaton* (1930) 211 Cal. 113, 116, 293 P. 788.)

In *State of Ark. v. Dean Foods Products Co., Inc.* (8th Cir. 1979) 605 F.2d 380, 384, it was held that the "attorney-client relationship raises an irrefutable presumption that confidences were disclosed." Disqualification of the Attorney General was upheld because of his prior representation of a litigant; whether he "did in fact receive

confidential information is irrelevant, the policy considerations of the Code precluding that inquiry." (*Id.*, p. 386.) The same doctrine was enunciated in *General Motors Corporation v. City of New York* (2d Cir. 1974) 501 F.2d 639, 648, and *Emle Industries, Inc. v. Patentex, Inc.* (2d Cir. 1973) 478 F.2d 562, 571. Also see Kramer, *Appearance of Impropriety* (1980) 65 Minn.L. Rev. 243, 255.

[2] But, contends the Attorney General, he is not bound by the rules that control the conduct of other attorneys in the state because he is a protector of the public interest. We have acknowledged "the Attorney General's dual role as representative of a state agency and guardian of the public interest." (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d at p. 15, 112 Cal.Rptr. 786.) The Legislature has impliedly recognized that a conflict might arise because of that duality by giving the Attorney General the right to withdraw from representation of his statutory clients and to permit them to engage private counsel. (Gov. Code, § 11040.) We find nothing in that circumstance, however, to justify relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients, particularly in litigation that arose during the period of the attorney-client relationship. In short, the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients.[1]

The Attorney General insists nevertheless that he has a common law right, undefined and unrestrained, to sue in his role as "the People's legal counsel" the Governor and other public officials and agencies. This claim presupposes that the Attorney General may determine, contrary to the views of the Governor, wherein lies the public interest. While there is no question that we may consider common law practices, we may do so only if they are not superseded by or in conflict with constitutional or statutory provisions. (*People v. New Penn Mines, Inc.* (1963) 212 Cal.App.2d 667, 28 Cal.Rptr. 337.) In this instance the Constitution—the highest indicator of the public interest—is both apposite and unambiguous.

[3] Article V, section 1, of the California Constitution provides that "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." Article V, section 13, defines the powers of the Attorney General inter alia in this manner: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." The constitutional pattern is crystal clear: if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest; the Attorney General may act only "subject to the powers" of the Governor.

Consistent with the Constitution, Government Code section 12010 provides: "The Governor shall supervise the official conduct of all executive and ministerial officers." (*Spear v. Reeves* (1906) 148 Cal. 501, 504, 83 P. 432.) The Attorney General is an executive officer who "shall report to the Governor the condition of the affairs of his office" (Gov. Code, § 12522).

We recognize there are cases in other jurisdictions that permit their attorneys general to sue any state officer or agency, presumably without restriction. Such opinions arise, however, under the peculiarities of the prevailing law in those several states, and are not persuasive here. (See, e. g., *Conn. Com'n. v. Conn. Freedom of Information* (1978) 174 Conn. 308, 387 A.2d 533); *Feeney v. Commonwealth* (1977) 373 Mass.

1. *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 138 Cal.Rptr. 532, is not to the contrary. There the lawsuit was brought by the assessor but not as a public official; he sued the county supervisors "individually and as a taxpayer." (*Id.* at p. 27, 138 Cal.Rptr. 532.) Therefore the court held the county counsel could represent the supervisors in defending the lawsuit.

359, 366 N.E.2d 1262; *E.P.A. v. Pollution Control Bd.* (1977) 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50; *Commonwealth ex rel. Hancock v. Paxton* (Ky.1974) 516 S.W.2d 865.)

On the other hand, several jurisdictions have prevented the attorney general from acting without constitutional or statutory authority. A federal court found it incongruous for an attorney general, purporting to act for the people, to mount "an attack by the State upon the validity of an enactment of its own legislature." (*Baxley v. Rutland* (D.Ala.1976) 409 F.Supp. 1249, 1257; see also *Hill v. Texas Water Quality Bd.* (Tex.Civ.App.1978) 568 S.W.2d 738; *Motor Club of Iowa v. Dept. of Transp.* (Iowa 1977) 251 N.W.2d 510, 515; *People ex rel. Witcher v. District Court, etc.* (1976) 190 Colo. 483, 549 P.2d 778; *Garcia v. Laughlin* (1955) 155 Tex. 261, 285 S.W.2d 191, 194; *State v. Hagan* (1919) 44 N.D. 306, 175 N.W. 372, 374; *State v. Huston* (1908) 21 Okl. 782, 97 P. 982, 989.)

Arizona, the constitution of which, like ours, declares that its governor "shall take care that the laws be faithfully executed" (Ariz.Const., art. V, § 4), reached the same conclusion as we do herein. In *Arizona State Land Department v. McFate* (1960) 87 Ariz. 139, 348 P.2d 912, 918, the supreme court of that state declared in an unanimous opinion, "Significantly, these powers are not vested in the Attorney General. Thus, the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed."

The Arizona court further observed, with regard to a suit by the attorney general against a state agency: "Two propositions flow generally from this conception, embodied in our statutes, of the basic role of the Attorney General as 'legal advisor of the departments of the state' who shall 'render such legal services as the departments require' [citation]: the assertion by the Attorney General in a judicial proceeding of a position in conflict with a State department is inconsistent with his duty as its legal advisor; and the initiation of litigation by the Attorney General in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department, is not a concomitant function of this role." (*Id.* 348 P.2d at p. 915)

We are not unmindful that the Attorney General may have injected himself into the litigation initiated by Pacific Legal Foundation with the public interest in mind as he perceives it. We discussed a comparable circumstance in *Anderson v. Eaton*, supra, 211 Cal. at page 116, 293 P. 788: "Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."

[4] Finally, we conclude that Governor has chosen a proper remedy. It has been held that one way "in which the issue of a violation of the rule [of professional conduct] may be raised is by a motion by the former client in the case before the court to enjoin the adverse representation." (*Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 Cal.App.2d 919, 927, 75 Cal.Rptr. 580, and cases cited.) To the extent *People v. Johnson* (1856) 6 Cal. 499, permitted the Attorney General to sue the Governor, it is disapproved.

For the reasons stated, we enjoin the Attorney General from proceeding in this matter and order that the alternative writ be discharged and the petition be dismissed.

BIRD, C. J., and TOBRINER and NEWMAN, JJ., concur.

RICHARDSON, Justice, dissenting.

I respectfully dissent, and regret today's majority opinion. It may well serve to de-

prive the office of the Attorney General of its traditional authority to initiate judicial proceedings which challenge the constitutional basis for procedures which are undertaken or threatened to be undertaken by public officials, including the Governor, when the Attorney General reasonably and in good faith believes such procedures to be defective. The Attorney General's traditional watch-dog function and his power to challenge questionable official conduct are important and necessary tools to assure the continued integrity of our system of government. Their loss would deprive the people of a first line of protection against improper executive conduct in appropriate cases. I trust that courts, including ours, will in the future narrowly limit the applicability of today's decision.

In the consolidated proceedings presently before us, petitioners have challenged the constitutional basis for the State Employer-Employee Relations Act (SEERA). (Gov. Code, § 3513.) In the instant cause—one of the consolidated proceedings—the Attorney General appears as petitioner on behalf of the People of the State of California. The majority do not reach in their opinion the substantive merits of the Attorney General's petition, but examine only a motion by respondent Governor to dismiss the petition on the ground that Attorney General is disqualified from filing it. Only that same limited issue is addressed in this dissenting opinion. After the relief sought by petitioners in the consolidated cases was ordered by the Court of Appeal, the Governor petitioned this court for hearing and simultaneously moved "to have the Court ... dismiss the Attorney General's petition and to disqualify the Attorney General from any further participation in those proceedings." This issue was argued before the court in conjunction with argument on the substantive merits.

SEERA purports to provide for collective bargaining for state civil service employees as to wages, hours and other terms and conditions of state employment. However, it is also provided in California Constitution, article VII (formerly art. XXIV) that the State Personnel Board (SPB) shall administer a civil service system of appointments and promotions, the fixing of probationary periods and classifications, the adoption of rules authorized by statute, and the review of disciplinary actions affecting employees of the state. The substantive question thus at issue but not here examined is whether the constitutional role of the SPB preempts the setting of salaries of civil service employees and, if so, whether SEERA infringes on such constitutionally vested authority. It is the Attorney General's position that the jurisdiction of the SPB to prescribe classifications for civil service positions is so integrally bound up with the setting of salaries that the legislative attempt through SEERA to subject the salary-setting function to the bargaining process conflicts with article VII.

We have said recently that, "The Attorney General ... is the chief law officer of the State (Cal.Const., art. V, § 13). As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. [Citations omitted.] '[H]e represents the interest of the people in a matter of public concern.' [Citation omitted.] Thus, 'in the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest.' [Citation omitted.] Conversely, he has the duty to defend all cases in which the state or one of its officers is a party. (Gov.Code, § 12512.) In the course of discharging this duty he is often called upon to make legal determinations both in his capacity as a representative of the public interest and as statutory counsel for the state or one of its agencies or officers." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14–15, 112 Cal.Rptr. 786.)

In view of our foregoing description of the Attorney General's unique representative capacities which clearly distinguishes him from attorneys generally, no claim is

now made by anyone that the Attorney General cannot seek a judicial declaration of the invalidity of SEERA on constitutional or other grounds. In fact, the Attorney General not only has the right but an obligation to present what he deems to be in the public interest in the face of potential conflicts with state agencies which he nominally represents. "In the exceptional case the Attorney General, *recognizing that his paramount duty to represent the public interest cannot be discharged without conflict may consent to the employment of special counsel by a state agency or officer.* (See Gov.Code, § 11040.)" (*D'Amico, supra*, at p. 15, 112 Cal.Rptr. 786, italics added.) Nor can there be any question but that the Governor is the chief executive officer of the state and that in the performance of the Governor's executive function the Attorney General is his subordinate.

However, a state Attorney General is more than a mere appendage to a Governor's office. As our description in *D'Amico* makes abundantly clear, the Attorney General is an independent constitutional officer vested with very broad powers derived from both common law and statutory origins. He is far more than a tail on the Governor's kite. It would be a serious breach on the part of an Attorney General if he or she failed to challenge a legislative enactment which he or she believed with good cause to lack constitutional basis, even though the enactment was then actively supported by a Governor. Such a challenge is not an act of insubordination proscribed by the language of article V, section 13 of the Constitution providing that as "chief law officer of the state" the Attorney General is "[s]ubject to the powers and duties of the Governor." All powers and duties, including those of the executive, are limited by the lawful exercise thereof, and the Attorney General cannot be constrained in seeking a judicial pronouncement of the lawfulness of legislation which the Governor would implement. If the Governor could impose such limitations on the Attorney General—as in this case by precluding a constitutional challenge to SEERA—then the Attorney General would not be able to test or challenge any enactment without executive approval, and the system of checks and balances envisioned by the Constitution would fail. Such a conceptual paralysis is unthinkable, of course, and the majority, fortunately, do not urge this position.

Notwithstanding the foregoing, the majority concludes that in the particular circumstances of this case the Attorney General has conducted his office in a manner which disqualifies him, thus leaving the public interest without any representation in these proceedings. The disqualifying conduct is said to deny respondents a fair opportunity to litigate issues on the merits because of advantages gained by the Attorney General through his relationships to some or all of respondents. The challenged conduct consists of (1) a letter sent by the Attorney General on September 20, 1977, to the Governor urging him to sign the legislation (Sen. Bill No. 839) enacting SEERA into law, (2) a conference between deputy attorneys general and representatives of the SPB on January 30, 1979, at which the deputies urged the invalidity of SEERA and sought SPB support in seeking a judicial declaration thereof, and (3) utilization of those same deputies who had previously represented SPB to prosecute the instant proceedings.

The letter is of little significance. Although former Attorney General Younger urged the Governor to sign Senate Bill No. 839, it is clear that because the Governor had been active in procuring the legislation he would sign it independently of the Attorney General's recommendation. The content of the letter deals with continuing efforts by public employees to gain some participation in the determination of their working conditions and compensation, noting that "some public employees tend to believe their only effective tool to get proper attention is to strike." While the letter does not address constitutional or other legal issues, it concludes that the "bill will assist greatly in resolving [existing] grievances."

The letter may well be viewed as an effort finally to confront issues which must

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be resolved in the event that collective bargaining by state employees is implemented. These proceedings are a step in such resolution. The Attorney General's letter seeks to move these long-standing issues toward a final resolution without addressing the issue of constitutional infirmities, if any, in the legislation.

The Attorney General-SPB conference of January 30, 1979, was called by the Attorney General's office following commencement by Pacific Legal Foundation (PLF) of the proceedings now consolidated with the instant cause. Present at the meeting were members of SPB and its executive officers. The Attorney General was represented by Deputies Talmadge Jones and Stephen Porter. Mr. Jones noted the PLF action in which SPB was named a respondent, and stated SPB had four options in response thereto: (1) to join PLF in urging the unconstitutionality of SEERA, (2) to remain a respondent but to agree nonetheless that SEERA is unconstitutional, (3) to remain a respondent but to take a "noncommittal" position as to the constitutionality of SEERA, or (4) to defend the constitutionality of SEERA. The deputies recommended the first option. They asserted this was the unanimous view of those in the Attorney General's office who had considered the matter, and that SPB's concurrence would add weight to that view in court proceedings because of SPB's administrative expertise in concerned areas.

SPB deliberated the matter in executive session. It unanimously concluded to remain a respondent and to continue to assert the constitutionality of SEERA. When so advised, the deputies suggested the Attorney General might initiate an independent action challenging the constitutionality of SEERA. While representatives of the Attorney General's office did not meet with other respondents, within a few days of the meeting with SPB the Attorney General informed by letters to the Governor, the Controller and the SPB that in the Attorney General's view SEERA was unconstitutional and that he would commence an independent action for a judicial declaration. The Attorney General consented in the letters to the use of other counsel by the addressees. (Gov.Code, § 11040.)

There was no impropriety in the conduct of representatives of the Attorney General in meeting with SPB. The representatives did no more than inform SPB of the Attorney General's opinion concerning the constitutional invalidity of SEERA, seek the support of SPB and advise of the possibility of an independent action by the Attorney General. Indeed, the Attorney General acted well within his duties and responsibilities in asserting an opinion that SEERA was unconstitutional. His nonjudicial opinions are "accorded great respect by the courts." (*Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 752, 493 P.2d 1154.) The most relevant court decision then appeared to support his conclusion. (See *Fair Political Practices Com. v. State Personnel Bd.* (1978) 77 Cal. App.3d 52, 56, 143 Cal.Rptr. 393.) The merits of the constitutional issue were neither stated nor discussed. The Attorney General sought no information from, and none was given by, SPB other than its status as a party in the action or actions. The Attorney General forthrightly stated his position and reasons for approaching SPB. He gained no advantage and SPB suffered no disadvantage or prejudice. This has been conceded by all parties to the action.

The final claim of misconduct is likewise wholly without significance. The fact that deputies who had earlier represented SPB are active in prosecuting the Attorney General's action against SPB and others raises no issue of a breach of confidence. The Attorney General's position on the merits in these proceedings was made clear at the outset and we are referred to neither specific advantage gained nor confidence breached. Again, this has been conceded by the parties.

In asserting disqualification the Governor relies on rules 4-101 and 5-102(B), Rules of Professional Conduct. Rule 4-101 provides: "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client,

relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client." Certainly no one can claim in good faith that the Attorney General obtained confidential information by directing his September 20, 1977, letter to the Governor. In requesting and attending the January 30, 1979, conference with SPB, and in utilizing the deputies who had participated in that conference to conduct these proceedings, the Attorney General neither sought to gain nor gained, directly or indirectly, any confidential information.

The reason for the foregoing meeting becomes clear from a communication to the Court of Appeal by the Attorney General four days before the meeting with SPB. In seeking an extension of time to respond to the PLF petition, the Attorney General stated that the petition raised potential conflicts of interest among the various respondents, and that neither these conflicts nor representations by the Attorney General of the various respondents, had been resolved. The SPB meeting was essential to the Attorney General's determination of which, if any, agencies and offices he could represent. The office of the Attorney General approached SPB first as most likely to agree with PLF because SPB had only one year earlier forcefully argued its exclusive constitutional right to deal with the fixing of salaries for state employees. (See *Fair Political Practices Com. v. State Personnel Bd.*, supra, 77 Cal.App.3d at p. 56, 143 Cal. Rptr. 393.) The Attorney General thus had sound reason to believe SPB would join him in rejecting SEERA.

I find it significant that SPB itself raises no claim that—because of the conference or the prior representation by certain deputies—a confidence has been breached or that there is any impropriety in the Attorney General's conduct and participation in these proceedings. The Governor's reliance on cases dealing with disqualification of private attorneys pursuant to rule 4-101, is misplaced. When a public attorney is required by law to fulfill his legal duty of representing public officials or agencies in exercising exclusive control of civil litigation, the usual attorney-client relationship does not prevail within the reasonable meaning of rule 4-101. (*Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 34, 138 Cal. Rptr. 532.) In similar fashion it has been held that a county counsel was not disqualified from representing in their official capacities county officials sued by the county assessor—whom the county counsel had previously represented—for defamation and violation of civil rights. (*Ward v. Superior Court*, supra, at p. 34, 138 Cal.Rptr. 532.)

As an *alternative ground* for the holding in *Ward* that "no attorney-client relationship existed between the county counsel and [the county assessor] within the meaning of rule 4-101," the court further observed: "The purpose of rule 4-101 forbidding an attorney from accepting employment adverse to a former client is to protect the former confidential relationship. Thus the rule does not apply where an attorney accepts employment adverse to a former client if the matter bears no relationship to confidential information acquired by the attorney as a result of the former attorney-client relationship." (*Id.*, at p. 34, 138 Cal.Rptr. 532.) Accordingly, the Governor's complete failure to establish that any confidences obtained by the Attorney General in his former attorney-client relationships bear on the merits in these proceedings is thus fatal to the motion for disqualification pursuant to rule 4-101. In fact, the issues raised on the merits of these proceedings are pure issues of law, the only question being whether a legislative enactment infringes on a constitutional proscription. There is no "confidential information" in the possession of respondents which—whether or not conveyed to the Attorney General—might have any bearing on resolution of these constitutional issues.

For reasons similar to those which render inapplicable rule 4-101 in the circumstances of these proceedings, rule 5-102(B) is also not controlling. This latter rule provides that a "member of the State Bar shall not represent conflicting interests, except with the written consent of all parties con-

cerned." The Attorney General is not, of course, representing conflicting interests in these proceedings. While it is true that he has represented or now represents clients whose interests are in conflict with those of the Attorney General as representative of the public interest, such conflicts are inherent in the applicable law pursuant to which the Attorney General must conduct himself. In his "dual role as representative of the state agency and guardian of the public interest" (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d 1, at p. 15, 112 Cal.Rptr. 786), he may be called upon to make determinations and decisions which, while consistent with the interests of one "client," are in conflict with those of another. In such a case he must serve "his paramount duty to represent the public interest," withdraw from his other representations and consent to their employment of special counsel. (*Id.*) The Attorney General has conducted himself accordingly. Indeed, it is difficult to chart a course of conduct more consistent with legal requirements than that engaged in by the Attorney General whom the Governor seeks to disqualify.

The Governor's assertion that rule 5-102(B) is applicable to the Attorney General in these circumstances, if correct, would result in the disqualification of the Attorney General in every instance where he had—prior to taking action against a public official or agency guilty of some mal- or misfeasance—represented or counseled that official or agency on an independent matter. It is manifest that rule 5-102(B) is not intended to so handcuff the official who is constitutionally described as the "chief law enforcement officer of the state" and who frequently is the sole representative of the public interest. The Attorney General's role, being grounded in the common law (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d, at p. 14, 112 Cal.Rptr. 786), is thus similar to that role fully recognized in sister states. Thus, the Supreme Court of Massachusetts has held that the Attorney General, in exercising his "'common law duty to represent the public interest'" in a manner contrary to dictates of a public agency he normally represents, is not to be "constrained by the parameters of the traditional attorney-client relationship." (*Feeney v. Com.* (1977) 373 Mass. 359, 366 N.E.2d 1262, 1266; see also *Conn. Com'n v. Conn. Freedom of Information* (1978), 174 Conn. 308, 387 A.2d 533, 537 ["This special status of the attorney general—where the people of the state are his clients—cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office."]; *E. P. A. v. Pollution Control Bd.* (1977), 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50; *Commonwealth ex rel. Hancock v. Paxton* (Ky.1974) 516 S.W.2d 865.)

The record establishes that the Attorney General has conducted himself with the professionalism required of his office, particularly in view of the usual difficulties attending a transition which occurred in that elective office in January 1979. No cause appears for his disqualification, which would thereby deprive the people of any legal representation in these important proceedings.

The Governor's motion should be denied.

Rehearing denied; RICHARDSON, J., dissenting.

172 Cal.Rptr. 487

PACIFIC LEGAL FOUNDATION et al., Petitioners,

v.

Edmund G. BROWN, Jr., as Governor, etc., et al., Respondents;

California State Employees' Association et al., Interveners.

S.F. 24168.

Supreme Court of California, In Bank.

March 12, 1981.

Rehearing Denied April 22, 1981.

Public interest law organization and employee organization sought peremptory

Alaska State Legislature

Representative Joe Green
District 10

Sponsor Statement

HJR 19 - Election of the Attorney General

HJR 19 proposes to amend the Alaska Constitution to elect the state attorney general.

The notion of electing, rather than appointing, the state's chief legal officer is not new. Presently, 44 other states elect their attorney general. Several resolutions proposing to do so have been introduced in preceeding Alaska legislatures. In fact, the subject was considered by the Alaska Constitutional Convention. Fairbanks delegate Frank Barr proposed a resolution to the convention that would have allowed Alaskans to elect their attorney general, but was voted down.

My arguements for direct selection of the attorney general by the voters are: Election provides for greater autonomy for the attorney general and the department of law; election provides for freedom from political manipulation; and, election provides for a stronger link between the attorney general and his or her real clients -- the people of Alaska.

Current law defines the attorney general as "the legal advisor of the governor and other state officers" (AS 44.23.020). By definition, the relationship between the governor and his attorney precludes autonomous, independent action. Under the current arrangement, the attorney general, as a political appointee and member of the governor's cabinet, is obligated to take into account the same political considerations as other cabinet officers. While the attorney general may not necessarily interpret the law to satisfy the political needs of the governor, it is difficult to imagine that he would not take potential political consequences into consideration during his deliberations.

In summary, the question is: should the attorney general of Alaska represent the governor or be the chief legal officer representing the people of Alaska? If you believe, like I do, that the attorney general should represent the people, then I urge your support of HJR 19.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

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April 17, 1997

Honorable Joe Green
Representative
Alaska State Legislature
State Capitol Room 118
Juneau, Alaska 99801-1182

Re: HJR 19 - Proposing a constitutional amendment to elect the attorney general

Dear Representative Green:

I am sending this memorandum for the record to accompany my testimony on HJR 19 (proposing a constitutional amendment to elect the attorney general).

In order in ensure that all of the debate at the constitutional convention is before the Judiciary Committee, I have attached a copy of the debate for the committee files. The debate includes discussion of whether to have elected officers other than the governor and lieutenant governor (then secretary of state), and specifically whether to elect an attorney general. Two strong points were made in favor of the concept of an appointed attorney general. The first point concerned the nature of the office of attorney general. Those in favor of an elected attorney general characterized the office as the "attorney for the people." In that connection, it was argued that the attorney general needed a franchise to office granted by the people rather than by the governor. This concept was strongly refuted by delegate McLaughlin when he said:

> 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.

Minutes of the Alaska Constitution Convention at 2196.

The attorney general is the governor's chief legal advisor. In this capacity, he advises not only the executive, but the principal department heads and state agencies under the governor's

supervision. By enjoying the confidence of the governor, the public interest is benefited by a consolidated law office that is both efficient and economical.

The second point made related to accountability of the government to the people. Convention delegates were prepared to make drastic changes from the diffused form of government provided through the Territory of Alaska. You will recall that many basic state responsibilities were under federal agency jurisdiction. The governor, collector of customs, adjutant general, U.S. marshal, judges, district attorneys, and other officials were federal appointees. To dilute the authority of these federally appointed officials, the territorial legislature provided for a number of locally elected officials including the attorney general, treasurer, highway engineer, and commissioner of labor. As a result of this fragmentation of authority, no single officer was accountable for the performance of government. The rationale for a minimum number of elected officials was expressed by Delegate Lundborg as follows:

> We in our committee felt that it would be the wishes of the majority of the Convention to have a strong executive. By that we did not mean a dictator, one who would get into power and be the absolute power in the state, but one who through appointive powers would be able to select his co-workers down through the various offices so that when the state's functions would be successful, we could say that we had a good governor, and when they would not be successful we would know who to blame and could vote accordingly at the next election.

Minutes of the Constitutional Convention at 2217. I submit that these reasons have continued viability over 40 years after they were expressed. I have also enclosed a copy of a transcript of testimony on a senate resolution on this subject, and a copy of an article that appeared on the Opinion Page of the Anchorage Daily News.

I offer the following comments concerning specific provisions of the resolution:

(1) The Judiciary Committee should carefully consider sec. 2, which prohibits the governor from reorganizing the Office of the Attorney General. This would leave organization of the office entirely up to the attorney general and to a lesser degree, the legislature, which can influence organization by prescribing certain duties by law. This insulation of the attorney general may be desirable to preserve independence, but it may also create a wall between the governor and his lawyer that cannot be crossed. This could cause the governor to establish separate counsel within the Office of Governor and other principal departments.

(2) Section 5 of the resolution provides that the legislature may prescribe additional qualifications for the Office of the Attorney General. Proposed sec. 28(a). This provision is exceedingly broad, and tends to hand to the legislature a power that is not given for other statewide

officeholders. This provision needs some discussion in committee to develop the intent of the sponsor.

(3) Section 5 also contains a provision that will fundamentally alter the responsibilities of the attorney general. In proposed sec. 28(c), the attorney general is required to defend the state, state agencies, public corporations, or a state public enterprise. No mention is made of the power of the attorney general to bring suits on behalf of the state. This omission should be remedied. If the legislature fails to prescribe other non-litigation related duties for the attorney general, the office will devolve into an agency exclusively engaged in litigation on behalf of public agencies. This would be similar to the U.S. Department of Justice, which may have the unintended effect of hastening the establishment of agency counsel in the various principal departments who would be responsible for general advice to agencies not involving litigation.

(4) The resolution may have the unintended effect of expanding the powers of the attorney general concerning representation of public entities in civil matters. The list of entities to be represented by the elected attorney general mentioned in sec. 28 (c) could be interpreted to include state special service areas, and state chartered corporations not currently represented in litigation by the Office of the Attorney General. For example, the Alaska Railroad Corporation and the University of Alaska are typically represented by separate counsel.

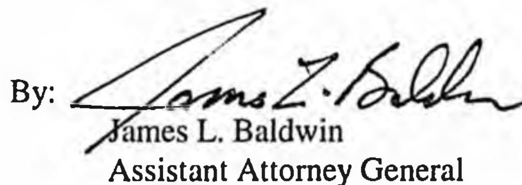
(5) The requirement to defend violations of state criminal law including infractions and violations may have the unintended effect of shifting to the attorney general the burden of prosecuting motor vehicle, traffic and other minor offenses charged by municipal peace officers. This would have a significant fiscal effect on the budget of the Office of the Attorney General.

The department has prepared and will separately submit a fiscal note outlining the increased appropriations needed to implement the resolutions.

Thank -you for the opportunity to comment on the resolution.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 
James L. Baldwin
Assistant Attorney General

JLB:clh
Enclosures

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File: Attorney General
Anchorage Daily News - March 14, 1997
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AN ELECTED ATTORNEY GENERAL IS A BAD IDEA

By HERB BERKOWITZ

The framers of the Alaska Constitution, with the benefit of 150 years of American experience, provided for an attorney general appointed by the governor. This choice comes under periodic attack from those who, like The Voice of The Times, believe that an elected attorney general would better "represent the people."

That definitely has a nice ring to it, but actually how would the state's chief lawyer go about representing the people?

When you talk about any lawyer "representing" any client you are using a term of art which describes a relationship of absolute loyalty. Lawyers worry a lot about "conflicts of interest" because they face significant professional and legal sanctions if they find themselves attempting to simultaneously represent interests which cannot be reconciled. For example, a lawyer who attempts to represent both the husband and wife in a divorce action is begging for trouble and deserves it when it comes.

It may be too much to expect your lawyer to give you the right answer 100 percent of the time, but you have the absolute right to expect your lawyer to be loyal 100 percent of the time.

Now consider again an elected attorney general who supposedly represents the people. What people?

Use of that word is very stylish (as in People's Republic) but it denotes an abstraction which does not really exist. The "people" in Alaska are several hundred thousand individuals whose interests sharply conflict. Some are pro-life and some are pro-choice. Some lean toward economic development and some toward environmental protection. Some benefit from big government and some benefit from small government.

It is impossible for the attorney general to represent all those people since no one can be loyal to all those conflicting interests. An elected attorney general who theoretically represents everyone actually represents no one.

Under our current system it is crystal clear who the attorney general represents, namely, the executive branch of state government. When the attorney general takes a public stance on a legal issue it reflects the views of the incumbent governor. When a new governor takes over and, as now, retains the same highly competent attorney general, the attorney general has a new client and is duty-bound to reflect the new client's views.

No one should expect the attorney general to be "neutral" since it is not a lawyer's job to neutral. If you don't agree with what emanates from the attorney general's office the solution is not a different lawyer, but a different governor.

I am not saying that lawyers cannot be neutral, only that they cannot be neutral when representing a client. When we need a neutral legal opinion we turn to the judicial branch. Just as it is a lawyer's job to take sides, it is a judge's job not to.

If you disagree with the attorney general's legal opinion the proper way to overturn that view is either wait for the next gubernatorial election or take the matter to court. Those who whine about the attorney general not representing the people really mean that the governor is not representing them. When they agree with the governor then the attorney general seems to represent the people just fine.

The drafters of the Alaska Constitution knew what they were doing. They saw that in states with an elected attorney general you get a politician with a law degree rather than a competent practicing attorney.

Experience shows that with an elected attorney general you face pointless conflict in the conduct of government with the attorney general spending as much time posturing (and often looking to be the next governor) as lawyering.

What is most surprising to me as a conservative is that The Voice of The Times is one of the major proponents of an elected attorney general. It is liberals who love to hide behind amorphous concepts like the "public" (e.g. Alaska Public Interest Research Group) to further their own agenda. A conservative who talks about Alaska's wonderfully diverse population as the people gives aid and comfort to those who believe in group rights rather than individual rights.

Finally, one of the most important conservative credos is that if something ain't broke don't fix it. Alaska's method of choosing an attorney general ain't broke. So let's not fix it.

Herb Berkowitz is a lawyer in Anchorage.

COPY

ALASKA CONSTITUTIONAL CONVENTION

January 13, 1956

FIFTY-SECOND DAY

been the function of all secretaries of state and that is the implication of the title. It is a broad general policy-making situation and also a program-arranging situation, and it is second in command to the governor. Now I think that you could either make that office as effective or as ineffective as the legislature and the governor desire it to be, but in the concept of the strong executive, we had the concept of a strong efficient second-in-command.

BUCKALL.W: One more question. Don't you feel that you would get a better secretary of state if the governor was allowed to appoint the secretary of state subject to approval by the senate?

V. RIVERS: Well, Mr. President, there we come back again to that problem of just how strong should a strong executive be. Theory and the ideal say that the strong executive should be a governor elected with the appointive power of all other officials. That has, we believed in the Committee or some of us did, there are exceptions, that that had a disadvantage in that there was no particular individual known to the people who had been exposed to the elective process being prepared to succeed to the governor, and we also felt that the people wanted an expression in the matter of just more than one individual as their elected representative. We also felt that an elected representative would make a better second-in-command in the absence or the death of the governor, that he would have then been elected by the popular will. So whether I believe or not that the lieutenant governor should be appointed -- personally, my stand was against just the one single elective head of government, the governor.

HELLENTHAL: I hesitate to talk on this because I think this is a wonderful enactment, and this is the only amendment that I have to offer to the entire matter, but I think it is basic. Now, therefore, I should like the indulgence of the delegates. Now, at the outset I favor a strong executive, never an absolute executive, and I don't think that the amendment would call for an absolute executive. I favor that the attorney general be appointed, that all other department heads be appointed, and I have no other amendment to offer. I do not intend to follow this up, to use this as a play to get the attorney general elected, no. I believe in a strong executive. Now, this proposed proposal has many implications. Mr. Buckalew used the word "deal" several times, and the political implications are not encouraging in this proposal.

PRESIDENT EGAN: Do you mean in this section?

HELLENTHAL: In the committee section, yes. I dispute the fact that the secretary of state would be elected by the people, which was stressed. It would not be exactly by the people. It would be a package deal. You would have to take him along with the governor, kind of a "buddy" system in the state, and the people would have nothing to do other than to elect their delegates at a caucus to the political convention, which would choose the "buddy", and I don't think that is very good. I don't think that is very good at all. Another point is this: It is a unique plan. Only one state in the entire United States seems to favor this system. Now, seven or eight, it is true, elect their secretary of state, but the "buddy" system is only found in one state. Now, why not just simply, and I don't think language is even necessary in the constitution, why don't we just let our governor hire someone to help him and fire him when he does not want him. Let him hire such other administrative assistants as he wants. What is wrong with that? It is conceivable that these pals might split up some time, that has happened before in politics, and go in different directions. Then where would we be? I don't particularly like this amendment, rather this section, and I don't think the alternative is despotism. I think that if we permit the governor to hire his assistants that we will secure

efficiency; we will eliminate a tendency towards a rather undesirable political scheming process, and I think that we will bring about much better government.

PRESIDENT EGAN: Is there anyone else who has not been heard who wishes to be heard? Mr. Harris.

HARRIS: Being on the Committee that helped devise this plan, that we are now working over, we took quite a few things into consideration before adopting this particular plan. In the first place, under our apportionment article, which we knew something of before we adopted this plan, there has to be some succession.

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NORDALE: Mr. President, I feel too that this should be given a little more thought, but I would like to say this: When we started, and I think the Committee members will agree with me, we were quite pleased with New Jersey because we felt it was a modern constitution and in New Jersey the governor is the only elected official. No other official is mentioned, I believe, except for perhaps a limitation on his being removed from office or something of that sort. But feeling that perhaps there were people in Alaska who felt that they wanted to elect the lieutenant governor or the succeeding officer, we introduced this idea of having two people who would run together, and so we devised this particular system to try to keep from weakening the governor and still please the people who might want to vote for his successor.

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NORDALE: Mr. President, I seem to be doing a lot of the talking. One of the reasons we called this particular official a secretary of state was that we did not want to have a lieutenant governor sitting and doing nothing. Now if you don't let the legislature prescribe something for him to do, he is going to be, in effect, a lieutenant governor, and the legislature could very well set up a department under somebody who is not called a secretary of state who would do all the work that a secretary of state normally does, and we would be right back with a lieutenant governor that most states are saddled with.

McLAUGHLIN: Mr. President, I'm in favor of Mr. Buckalew's motion to strike that on the theory that if we are going to have a strong executive, I believe that the executive should not be burdened with a crown prince who substantially would be dictated by the
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2091
body that runs or supports the governor. Normally, that second-in-command is someone who is picked, not because of ability, but because of political considerations. He inevitably will come from a different part of the state, or

appeal to that class of voters which the candidate for governor does not appeal to. It's a history of the Vice Presidency, and I suspect it would be the history here. We would not have as a successor a strong secretary of state; he would make a poor governor largely because the consideration of his selection would be political. On the other hand, I believe that the governor has a right, after election, to appoint him; I also believe in conformity. I also believe that if we are going to have an elective governor that he should appoint every member of his cabinet, and that includes the attorney general. That is, you give him the power, if you vote for him and him alone, and not on the basis of the man who is supporting him, I believe that you will get an independent strong governor. And if you give him the power to appoint all of his cabinet, then in effect what you have done, you make him run on his record, but if we are going to talk about a strong executive and then dilute the thing by permitting every other cabinet member to run, you haven't got a strong executive at all, and apparently many of the decisions that we made here prior to this have been based upon the assumption that we should have a strong executive. I will vote for Mr. Buckalew's amendment on the theory that it will make the executive strong.

Judge Stewart: Gentleman, this is a subject that I've contemplated and been concerned about for at least 50 years and in the course of that time I have become adamantly opposed to the idea of electing the attorney general. In order to express adequately my views, it's desirable to go back to the very roots of the scheme of American government, both state and national: the idea of three separate branches with checks and balances among and between them. I propose to address the subject at several levels: the basic theory; Alaskan governmental history; personal and practical experience with the alternative systems; leading opinions of prominent students of the subject; observation on consequences of such a scheme; explanations of examples from other states; and miscellaneous observations.

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The basic theory is set out in The Federalist, in the papers written by Alexander Hamilton, primarily No. 70, dated March 18, 1788.

> "There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. The enlightened well wishers to this species of government must at least hope that the supposition is destitute in foundation; since they can never admit its trials without at the same time admitting condemnation of their own principles...."

It is worth noting that word "republican" with a small "r". Ours is a government of representatives, not a true democracy, which would be like a New England town meeting, where all the townspeople gather to discuss and vote on the issues. Obviously, this is not possible at the national level, nor in large cities, nor in the whole State of Alaska. The critical complex decision, such as on the structure of the executive branch, must be made by the representatives of the people, and that is you.

"...Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: it is not less essential to the steady administration of the laws, to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, effaction and of anarchy.

A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution: and a government ill executed, whatever it may be in theory, must be in practice a bad government.

The ingredients which constitute energy in the executive are unity - duration - an adequate provision for its support - competent powers. The ingredients which constitute safety in the republican sense are, a due dependence on the people - a due responsibility.

Those politicians and statesmen, who have been the most celebrated for the soundness of their principles, and for the justness of their views, have declared in favor of a single executive and a numerous legislative. They have with great propriety considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have with equal propriety considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people, and to secure their privileges and interests.

> This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others, in the capacity of counsellors, to him. Of the first, the two counsels of Rome may serve as an example; of the last we shall find examples in the constitutions of several of the states."

The Constitutional Convention delegates debated this issue intensely. It was the single focus of the committee on the executive branch. In addition, the full Convention itself intensely scrutinized it for at least one full day. Committee debates during the Convention could not be recorded, therefore Mr. Baldwin's transcript is of the debate by the full Convention. The delegates were lead by George McLaughlin who said:

> 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 (I think there was an omission here -- "barely") 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.

The concept of an attorney general's opinion must not be confused with a judicial opinion. A judicial opinion covers two sides - and reviews adversarial treatment of an issue, and is binding. That does not happen in an AG's opinion - no one is bound by an attorney general's opinion.

There is a good example of the exercise of energy by the Governor. Alaska spent millions pursuing claims against oil companies. Governor Hickel and Attorney General Cole settled those cases through an energetic exercise of authority. That kind of energy would be frustrated if the two positions were at odds. The decision to settle was a policy decision and a loyal attorney general executed it for the Governor.

The Governor is the person charged by the people to fix and carry out state policy. The Governor is accountable to the people. An elected attorney general could undercut the Governor and hinder his ability to execute policy. If an attorney general cannot support the governor's policy, he must resign.

There are many authorities opposed to electing the attorney general. Thomas Dewey, a friend of Ernest Gruening, was defeated by Harry Truman in 1948. He came to Alaska to visit Gruening and knew statehood was sought. His advice was, from his experience as Governor of New York, "Whatever you do, do <u>not</u> elect the attorney general." Jay Hammond is adamantly opposed to the election of the attorney general. Recently, he was my houseguest for several days, and we discussed this matter. He said that although he was a Republican, he appointed Av Gross, a Democrat, as Attorney General, knowing of his abilities. Republicans objected, but Gross was one of the best attorneys general.

There is a good analogy. A corporation, such as IBM, hires a CEO to fix and carry out the policies of the Board of Directors. The CEO can be likened to the Governor, while the Board of Directors to the Legislature, and the stockholders to the general public. If the chief counsel to the CEO were to be elected by the stockholders, it wouldn't work because

stockholders are simply not able to determine who should be in that position.

TAPE 97-13, SIDE B

We have this big enterprise of the State:- to have its chief counsel elected by thousands upon thousands of people who can't possibly know the merits of the individual candidates for elected attorney general and could not possibly be a reliable determinant of who ought to be the Governor's counsel.

I hear it said, "But there are 40 states that elect the Attorney General." In order to understand that, we need to look at history. Those provisions were put there in the 19th Century. It may be that there are one or two in the early part of the 20th Century but the modern Constitutions of the 20th Century do not do that, because they have the benefit of hindsight and saw the problems that evolved from this kind of a governmental structure. Probably the leading Constitutional Convention was that of New Jersey, which I think was in 1946, and New Jersey did exactly what we subsequently did, and structured an executive branch with a single unified head who can choose who should be his associates and who then is held accountable, responsible to the electorate for what he does. As I said earlier, it's a mistaken notion somehow of democracy - that somehow the people are going to get a representation that is more democratic - small "d" - if they elect the attorney general. Believe me, it's not so. That's a failure to understand the role of the attorney general. Citizens from the street can't go in and ask the attorney general for an opinion. He would say, "That's not my job." Surely, he represents the people but he only does that through his boss, the Governor, who likewise represents the people, more broadly than he does.

There's another aspect to it. If you elect the attorney general, that cuts across the entire spectrum of the executive branch.

It affects the opinions that are given to each and every department, each and every functionary in the executive branch. When I was an assistant attorney general - there were two of us at the time - a gentleman named John Dimond and I were the assistant attorneys general. And we saw our boss, J. Gerald Williams, interpose his own policy ideas, inject them into the operations of the departments he was giving advice to without any regard for what the Governor's ideas might be on that subject. Such a person is just as likely to adopt his own ideas, his own philosophy, and be no more representative of the people than the Governor is.

There's a corollary to this that I don't know whether you've ever looked at. The history of Alaska, the government of Alaska, has been that the Legislature looks to the Attorney General for opinions. I'm here to suggest to you that that's wrong. You should have your own counsel. The Senate should have its own counsel; the House should have its own counsel, because sometimes the ideas of the Senate and the ideas of the House are not commensurate. You need independent legal advice. You should not be looking to the opinions of the attorney general as your authority on the law that you want to deal with. Even if you don't create a full time position, even if you only had contract counsel, you should have counsel whose loyalty is to you as his client. Any of you that have reason to consult with attorneys know that your attorney must be loyal to you, and this proposition, this SJR 10, would render the Governor having an attorney who is not loyal to him, and that simply doesn't work. It would be, in my view. one of the single most damaging things that you could possibly

do to the structure of our state government, which I think has been highly successful since we became a state in 1959. That would be disrupted forever.

It's not the kind of a proposition you can put out to the people. We have a republican form of government. It's your responsibility to make this decision. It's the kind of thing, maybe I have suggested to you, the degree of sophistication, historical knowledge, philosophical concepts, if you will, that are required to penetrate this maze, to get beyond that simplistic, naive statement: the attorney general represents the people. Surely he does, but through the medium of his governor, not directly. This kind of a proposition, as I say, put out to the voters at large; how can you adequately explain it? The newspapers wouldn't do it for you. The Anchorage Times had an editorial on this proposition about three weeks ago and I read it, and I became immediately, deeply concerned. It's come up not infrequently over the last 35 years.

I happened to get well acquainted with a gentleman named Bill Allen, who is the CEO of VECO, also the owner of the Anchorage Times. I called - (I sat with him through several days of meetings on the Governor's Advisory Task Force on Tort Reform during the fall). I had never known him before and I got acquainted with him, so I called him and said, "Bill, I need to talk with you about this editorial. I think that you may not really understand all of the implications of what's being proposed." And so I have an appointment to sit down with him next Monday. I hope to enlighten him a little bit on all that's involved here.

There's another danger, and having sat, as you people do, on a legislative committee, I'm extremely sensitive of it, and aware of it. This proposition goes to the very heart of the structure of our government. You cannot possibly adequately

consider it, unless you reject it, as I hope you do, in the course of an afternoon, in the course of listening to two or three bozos like me. You cannot just talk about it. It requires careful thought and study.

Let me divert for a moment. About four years ago, a little more than four years ago, there was a proposition put before the Legislature, to amend the Constitution by the initiative. This, likewise, was deeply disturbing to me because initiatives do not get the crucible of treatment that you people are able to give to legislative measures. You get bad law from the initiatives. You get bad constitutional amendments. Look at the Budget Reserve amendment. Have you tried to read that and make sense of its language? That's the kind of thing that emanates from inadequate, surface treatment of this kind of a subject. Ramona Barnes was the Speaker at the time that was introduced, and she asked Gail Phillips, and me, and a gentleman from Anchorage named Ken Jacobus, and Fran Ulmer, who was the Minority Leader of the House at the time, and I think there was maybe one other person, to sit on a committee to advise the Legislature what they should do about this proposal to amend the Constitution by the initiative. And we spent - this committee spent a lot of time considering that and we came up with a recommendation. I'm not suggesting that you take up that subject again, but I do think that you might be interested in the recommendation that we made, and that is that if there is a proposition like this, seriously to amend the constitution, that it should never be acted upon by the first session of the Legislature. It should be referred to a, if you will, an ad hoc committee, or maybe a standing committee if you want, to consider in the interim, between the two sessions. Take it to the public, study it, scrutinize it in depth. Don't act upon it until the second session of the Legislature. If you have inclination to move this forward, and I hope you don't, I would suggest that you consider that

kind of an approach in order that it get truly in-depth consideration and treatment before you willy-nilly go into restructuring what I think has been a pretty successful state government.

I've talked too long, but I hope, maybe, I might have given some insight that might not ordinarily appear to the people that, I think, are making a shallow motion, here, as it were -- haven't really looked into what the history has been. Can you imagine the uproar that would occur if it were proposed on the national level - to elect the attorney general of the United States - to the President - an attorney that was not loyal to his program? There's no more reason to elect our attorney general than there is to elect the Attorney General of the United States. When Hamilton wrote what I quoted to you, and I think it's well worth your time to read The Federalist paper #70, if you really want to understand the concepts that went into this. The sound foundation for our executive branch was laid. We should not abandon it. Thank you.

SENATOR TAYLOR: Thank you Judge Stewart, I appreciate you being here. I know, because you and I have discussed this many times in the past, your comments and thoughts have always been, and are mine, on this subject, and I know you were disappointed to see my name there as a co-sponsor. And I share the reverence that you have for the framework of our government and the work that our forefathers put into it, and you specifically put into it. However, Judge Stewart, in my wildest dreams, I never would have conceived of electing a governor, who by slight of hand, would prevent a Legislature from exercising its power of confirmation. That's another significant power that we have over the Governor's selection of an attorney general, and that did occur. And then to watch, and have that Attorney General appear before both joint

house and senate committees, and individual committees, and admit that cases significant to the organic base of this State, the very Constitution that protects him, and the Attorney General, and to admit that those cases were dismissed, or claims not brought solely for political purposes, so motivated me that I introduced legislation over the last two years to create what I called a Constitutional Defense Council - a group of people, that when and if the Governor and his Attorney General abandon our State Constitution, that they could step in and act to protect that document. I figure that was kind of a halfway ground, at least, that might pick up, what I would hope would be rare instances. And I submit to you that this measure will do the damage that you are suggesting. I don't doubt that, but our constitutional framework in this State, in my opinion, all of that hard work that was done, and all of its predecessors, were based upon an assumption that the people who occupied that position would have integrity toward the office and the Constitution they were sworn to protect. You made reference to a statement that an Attorney General, finding himself in a compromising position between the Constitution and his Governor, should resign. And I submit to you that's correct. People of integrity would resign rather than dismiss cases for political purposes. Instead, I find today our Constitution is being used as a shield and a mirror in what appears to be a tragic game of smoke and mirrors where the Governor hides behind the AG and the AG hides behind the law. As a former attorney general told me, specifically, he said the current Attorney General loves his job more than he loves the Constitution and that frightens me greatly. I remember arguing these points with Dick Randolph, who almost 20 years ago, was trumpeting around the State with basically the same concept and I was going out front and carrying some of the same arguments that you've carried so beautifully before the committee today. But for those actions, I would never even

have contemplated this desperate step because I consider it a very desperate step. And yet, to suggest that this Governor and this Attorney General will somehow be held accountable - I don't know how much more of our constitutional framework we can afford to have sold down the drain in one federal court case after another or how much of it will even be retrievable by the next Administration. How many of these decisions will become precedent against our State as we attempt to exercise the very same framework of concepts that we had. There was testimony given by this Governor before bodies of Congress in just the last year where he pledged that he would not bring any suit against Congress should they destroy the 90/10 split - one of the most organic concepts that this State was based upon in its relationship with the federal government. How long could you allow that forfeiting of that exercise of this State's rights to go on before latch is attached, before precedent is developed to the extent where no future governor could ever go back and revisit that and attempt to protect the future heritage of the State? I don't know - I don't know the answers to those questions. I consider this desperate action. I really do, and I keep in mind your comments and I really thank you so much for taking the time you have today to bring those words to us because I don't do this, or don't suggest this form of legislation lightly, but I am fearful of where we will be without it should we ever elect similar people to office.

JUDGE STEWART: I can't argue with you about the particular cases. I'm not familiar with them. I'm surprised if there weren't some judicial remedy, if indeed the Attorney General, or the Governor, is violating those constitutional concepts.

SENATOR TAYLOR: I think there is, but I think the only judicial remedy that is left at this point is also a desperate act, and that would be impeachment.

JUDGE STEWART: And then I would say if you were to do this, this carries on...

SENATOR TAYLOR: much longer than an impeachment would - I appreciate it.

JUDGE STEWART: I'd be glad to answer any questions if ...

SENATOR TAYLOR: Are there any questions? Yes, Senator Parnell...

SENATOR PARNELL: I think I just would join you and speak for the committee in saying that you have provided some of the most thoughtful and most clear testimony of anybody I've ever heard in these committee rooms and I just want to say thank you and we appreciate hearing you.

JUDGE STEWART: I appreciate your consideration.

9

Grants Pass, Oregon
February 19, 1983

TO MY FRIENDS IN THE ALASKA LEGISLATURE:

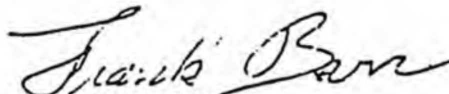
Almost thirty years ago I proposed that the state of Alaska elect its attorney general. Although my proposal was finally rejected by the Constitutional Convention in 1956, I have never abandoned my conviction that the attorney general should be "the people's attorney," elected by and responsible to the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

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

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

Thank you for your attention.

Respectfully,



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

Ak. Con Con. Proceedings
Part 3

Subject: Attorney General

22

counter to the experience of most states in deliberately doing that. That is, I don't think the adjutant general should be any different from the head of a department, as he would be in the state, and I think that he should be ratified, and I believe that Mr. Hellenthal's objection largely is to an expression such as "flag officers". If that is an objection, it can be cleared up by generic words in Style and Drafting. I oppose the amendment as being contrary to what we have done here in the past as to other officers.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Hellenthal be adopted by the Convention?" All in favor of the adoption of the proposed amendment will signify by saying "aye", all opposed "no". The "noes" have it and the proposed amendment has failed of adoption. Are there other amendments to Section 10 or Section 11? If not, are there amendments to Section 12? Section 13? Section 14? Section 15? Section 16? Mr. Metcalf.

METCALF: May I ask Mr. Rivers a question?

PRESIDENT EGAN: You may, Mr. Metcalf.

METCALF: Mr. Victor Rivers, you say the head of each principal department, does that include the attorney general?

V. RIVERS: By specific mention of the will of this body the attorney general is not included in this section.

METCALF: Does he have to be confirmed by the senate at all, or the legislature?

V. RIVERS: Insofar as he would fall under the head of one of the principal departments, I assume he would.

METCALF: You assume he would be one of the heads of the principal departments?

V. RIVERS: It is merely an assumption.

PRESIDENT EGAN: Mr. Metcalf.

METCALF: The attorney general question worries me very much, and I would like to submit a small amendment. It is three words, that is all.

PRESIDENT EGAN: Would you submit it please, Mr. Metcalf.

CHIEF CLERK: "Section 16, page 7, line 14, immediately following the word 'Department', insert the phrase 'including the attorney general'."

PRESIDENT EGAN: Mr. Metcalf, what is your pleasure?

METCALF: I move that it be adopted and ask unanimous consent.

BUCKALEW: Objection.

DOOGAN: Point of order.

PRESIDENT EGAN: Objection is heard. Your point of order, Mr. Doogan.

KNIGHT: I second the motion.

DOOGAN: My point of order is that we have already considered this matter once, and I take exception to the remarks by the Chairman of the Legislative Committee in that this body by their action implied that the attorney general would not be one of those principal departments. I take exception for this reason: that is, as it was so aptly pointed out by Mr. Davis, the thing they did not want to do was to set up the attorney general's office in the constitution but it could be set up as one of the principal departments.

PRESIDENT EGAN: As to the point of order raised by Mr. Doogan, we did consider spelling out that there be an attorney general once before in this section, did we not? Mr. Ralph Rivers.

R. RIVERS: I was about to offer an amendment so I got talked out of it, so it is the first time it has come up.

PRESIDENT EGAN: If this is the first time, the point of order would not be well taken at this time. Mr. Taylor.

TAYLOR: I was going to raise the same point of order as Mr. Doogan, but I think I am going to go even further because there was a specific amendment offered to provide for the establishment of an elected attorney general.

PRESIDENT EGAN: This does not say though, Mr. Taylor, that he would have to be an elected attorney general.

TAYLOR: Mr. Barr's motion to adopt an amendment to that effect would be.

PRESIDENT EGAN: But Mr. Metcalf's amendment does not include anything of that nature, so the amendment would be in order at this time, Mr. Taylor. Is there discussion of the proposed amendment as offered by Mr. Metcalf? Mr. Metcalf.

METCALF: I feel that mention of the attorney general's office should be made because we have mentioned it in the proposal under direct legislation, and in initiative and referendum, I think we mentioned it once or twice there. I am confused as to whether the senate is to ratify the nomination once every two years or once every four years. I am in a state of confusion

and I would like to have this spelled out a little more as far as this important office is concerned. That's my feeling on the matter.

PRESIDENT EGAN: Mr. Taylor.

TAYLOR: May I speak on this matter now. I don't believe that it is necessary to put an attorney general in there. If you do that you might as well put all the branches you are going to have, all the principal branches of the executive department in because it naturally falls into the category of one of the principal branches of the legislature, and I think we considered that the other day. It was felt that it was a legal department of the executive branch and should not be necessarily named because the governor would have the right under our present article to appoint the attorney general who sets up the legal department of the executive department, and I can't see whether if you add that attorney general on there including the attorney general, you had better put it including the highway department and all other things. I think we should leave it the way it is, and the other things will naturally follow and fall into the proper category.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Metcalf be adopted by the Convention?" All those in favor of the adoption of the proposed amendment will signify by saying "aye", all opposed by saying "no". The "noes" have it and the proposed amendment has failed of adoption. Are there other amendments to Section 16? If not, are there amendments to Section 17? Amendments to Section 18? Mr. Sundborg.

SUNDBORG: Mr. President, I have an amendment.

PRESIDENT EGAN: The Chief Clerk may read the proposed amendment as offered by Mr. Sundborg.

CHIEF CLERK: "Strike Section 18 and substitute the following: 'Section 18. The Governor may make ad interim appointments to fill vacancies occurring during a recess of the legislature in offices requiring confirmation of either or both houses of the legislature. The duration of such appointments shall be prescribed by law.'"

SUNDBORG: Mr. President, I move the adoption of the amendment.

R. RIVERS: I second the motion.

PRESIDENT EGAN: Mr. Sundborg moves the adoption of the proposed amendment, Mr. Rivers seconds the motion. The motion is open for discussion. Mr. Sundborg.

SUNDBORG: Mr. President, a little while ago I submitted another

Subject: Election of AG.

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 6, 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.

on a matter that is far removed from Convention business.

PRESIDENT EGAN: Mrs. Hermann, if there is no objection.

(Mrs. Hermann spoke on a matter of privilege.)

PRESIDENT EGAN: Thank you, Mrs. Hermann. Did we have two reconsiderations of amendments that had been adopted, pending or was there one? The Chair only brings it up at this time inasmuch as it might be best if we consider any reconsiderations on this proposal as quickly as we can. That is, it would be up to the maker of the motion actually, but were there two reconsider tions or one?

CHIEF CLERK: One, I think.

PRESIDENT EGAN: If the Chair remembers it, Mr. Kilcher I think reconsidered on the last proposed amendment, but I had the feeling there had been another notice given during the day. If not, we will continue. Mr. Victor Rivers.

V. RIVERS: I have an amendment.

PRESIDENT EGAN: You have an amendment by the Committee?

V. RIVERS: By a minority group of the Committee, myself and Mr. Harris.

PRESIDENT EGAN: Mr. Victor Rivers, you may present your proposed amendment. The Chief Clerk may present the proposed amendment.

CHIEF CLERK: "After Section 14, page 7 of Committee Proposal No. 10/a, insert a new section as follows: 'Section 15.

The Attorney General shall be appointed by the Governor from two or more qualified persons nominated in the same manner as judges by the judicial council. He shall have been admitted to practice law in the State and shall have the other qualifications prescribed herein for heads of principal departments and shall be subject to approval by the Legislature in a similar manner.

The Attorney General may be removed by the Governor with the consent and approval of both houses of the Legislature meeting jointly.' Renumber successive sections to conform to the above insertion."

V. RIVERS: I move the adoption of the amendment.

PRESIDENT EGAN: Mr. Victor Rivers moves the adoption of the amendment. Are there copies available for the delegates? Is there a second to Mr. Rivers' motion?

HARRIS: I second the motion.

PRESIDENT EGAN: Mr. Harris seconds the motion. The matter is open for discussion. Mr. Victor Rivers.

V. RIVERS: Mr. President, this matter of the office of attorney general came up for a good deal of discussion in connection with the strong executive and in connection with the matter of having some screening for the man who would be the attorney general. Some of the Committee felt that it would interfere with the strength of the executive. Others of the Committee felt they wanted to see the attorney general elective and not removable by the governor. It seemed that the only thing that was of main concern to a great many of us was that while we recognize the value of the strong executive, we are not naive enough to think that the governor who is elected will not have certain obligations, commitments, endorsements to meet when he goes into office. We realize that on all the other department heads there may have to be on his part some compromise with his desires under this plan as we have it. We did, however, want to try to eliminate any matter of the return favors or endorsements or obligations to the man who he appointed as attorney general. We are trying to remove that particular office by a screening process we have set up here, so the man who went in there, his appointment would be based on merit and not on any other consideration. As you will note, we have recommended that the attorney general be screened by the Legislative Council in regard to his qualifications, that two or more be screened in accordance with the requirements to fill the job satisfactorily both on the basis of qualifications and on the basis of the governor's desires. The only intent in this is that the attorney general shall be one who is appointed not from the point of view of any obligations from the governor to him, and also the other intent is that the attorney general cannot be removed by the governor without also the approval of the legislature meeting jointly as they approved the appointment of the attorney general at the time he was actually put into office. He would be removed in the same manner, and by that manner only. There has been a good deal said here about diluting the power of the strong executive. I am of the opinion that perhaps a governor going into office where he had to make a large number of appointments, where he had been supported in his campaigns by many individuals who might be men of high degree of competence or average competence, I would be of an opinion that a governor in that position would probably welcome the possibility of the chance of appointing one office in such a manner that he would not have to repay any obligations or indebtedness or favors in that particular appointment. I for one feel the attorney general's office should have removed from it the need for making any concession to competence or qualifications because of political support on the part of the applicant to the governor in seeking election. That is my opinion and I feel there is sound justification for that opinion. I realize there are many divergent opinions here on that subject.

Legislative Reference Library

PRESIDENT EGAN: Is there further discussion? Mr. Buckalew.

BUCKALEW: Mr. President, from the beginning I would like to state that I don't like this proposal. The first objection I see is that we are shoving off on the judicial council a function that is not one of their duties. The judicial council was created by Mr. McLaughlin's department. He set up a judiciary. Now we are going to let Mr. McLaughlin's department select an attorney general. Not only does the attorney general have to be approved by the judicial council, the attorney general then has to be approved by the legislature. If the governor wants to remove him he has to get the consent of the legislature. Now, I don't think this matter would even have come up if we had not discovered that the initiative and referendum article referred to the attorney general. The reason I bring that up is that I think Mr. Sundborg had an excellent suggestion that we just insert the words "secretary of state". That is probably one of his functions. That is the only reason I think this business came up. We decided yesterday that we were not going to elect the attorney general. The argument put up by the Committee was they wanted to have a strong executive and today they are going to water it down a little. I think we ought to be consistent and vote this amendment down.

V. RIVERS: I rise to a point of order. I stated this matter had been discussed some time ago in Committee. It did not arise yesterday. This amendment was prepared during the time of that discussion. I also object to referring to any department of this constitution as being the department of some one individual. I don't believe it is either Mr. McLaughlin's or mine or anybody else's; it is the constitution of all the people of Alaska.

PRESIDENT EGAN: Mr. Harris.

HARRIS: I was going to correct Mr. Buckalew, but since Mr. Rivers has already done so, I will only state that I would favor this amendment. We talked about this quite a bit in Committee, and it is a check on the governor. It makes a bit of difference when the attorney general's word becomes law. It actually is law, unless it is disputed in court and found to be not exactly as it is supposed to be, then it is used as law. Therefore, we feel the attorney general should be a qualified man and in order to insure that his qualifications are up to par we needed some type of screening process. Now, we did not screen the man because we wanted to connect him with the judicial department as Mr. Buckalew suggests. The only reason for using the judicial council we feel is that the judicial council is qualified to screen the attorney general. Therefore, that was the reason for bringing up this amendment.

PRESIDENT EGAN: Mr. McLaughlin.

MCLAUGHLIN: I agree with Mr. Victor Rivers that the judicial

council is not the idea that it was limited to one person; it was the product of the Judiciary Committee's combined thought. I am personally opposed to such a method of selection. Within my knowledge there is only one equivalent method of selection of the attorney general, and that is probably in New Hampshire where the attorney general is selected by the justices of the supreme court. I believe that Mr. Buckalew is right in that he says that the attorney general is not otherwise mentioned in the constitution except in the initiative and referendum, and if you can recall, the only reason he was mentioned in the article on the initiative and referendum was originally they had a proposal as it came out of committee, my recollection is, that the 10 qualified voters could submit a proposition to the attorney general, and secure his opinion as to its legality. That is why the attorney general was mentioned. We chopped the portion requiring an opinion of legality from the attorney general, we chopped the portion, if I recall, requiring review of his opinion, and in substance what we did is we made it a function as it stands now, the true function of the secretary of state. The attorney general is in there by happenstance and no other reason. Yesterday we determined that the attorney general should not be elected and implicitly what we determined was it should be within the discretion of the governor subject possibly to confirmation that the governor alone in his discretion would select the attorney general and would be responsible for him. The attorney general, apparently, under the concept that we have implicitly accepted, is an attorney largely for the executive department. In any event, he is a political appointee, he is an executive appointee. I don't believe that we should be putting him through a means test and running him in substance through the judicial council. Under such circumstances, the governor may well say when the attorney general proves unsatisfactory to the electorate at large, the governor should have the direct responsibility, he should not be able to evade it by saying, "It was not my selection." I am opposed to it. The judicial council was designed in the constitution deliberately for one reason. That was for the selection of the justices of the superior and supreme courts, when in substance we are now utilizing them to provide a rather cathartic attorney general. I think that this is a mere compromise, it is not a majority opinion of the Committee on the executive and certainly it has not been considered by the Judiciary Committee. I cannot speak for them, but I feel sure that the majority would feel the same way. Our choice is not a compromise. He is either elected or he is appointed. If he is appointive and if he is going to be one of the consorts of the governor and one of his confidants, he should be selected directly by the governor and the governor should be responsible. If we accept this, then in premise we should accept a screening of every other public official appointed by the governor in his cabinet. I believe the attorney general, if he has to be mentioned, and I don't think it necessary, I don't think he should be embodied in the constitution. The attorney general should be like the attorney general of the

United States, appointed by the executive and the executive is responsible for him. This is, frankly, I think on its face, a compromise measure and I believe the attorney general is without our sphere, and in substance should not even be mentioned in the constitution, let alone nominated by the judicial council.

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: May I ask a question of Mr. McLaughlin? Would we gather from your statements that the judicial council is limited only in its purpose to the selection or the recommendation of judges?

MCLAUGHLIN: That is not so, Mr. Rivers, because we have a specific provision in there saying that they shall perform such other duties as are provided by law. I am sure it was the intent of the Convention that their functions would be limited to the judicial. In fact, I think by error you did remark that the attorney general was selected by the Legislative Council when you supported this matter, but I would oppose it just as I would oppose the judicial council selecting the sites of the court houses. I think they are participating now in the executive functions of government and I believe the judicial council should be limited as it has been historically to judicial affairs and not to executive affairs.

V. RIVERS: Do you agree with the judicial council in the matter of screening this man as to qualifications, would be doing the same thing as if he were screening a judge? Isn't it for qualifications and to remove the judge from direct political election or appointment that we put up the judicial council? Isn't the process of screening identical in the two cases?

MCLAUGHLIN: Yes, the process of screening is identical except for this one thing. A judge is supposed to be dispassionate. He is not supposed to be acceptable to the people who appear before him. In the case of the attorney general the attorney general will have a client-attorney relationship to the governor and frankly I believe the governor should have wider choice and discretion. It is like selecting the presidential physician by vote of a selection board. The relationship is something that is intimate, and there is an intimacy of relationship that does not exist between the judiciary and the general public. We are selecting an attorney for the governor and saying, that's it, without regard to personality or anything of the sort.

V. RIVERS: I would like to ask another question, and that is, do you think the attorney general should also be removable at will by the governor at any time after he has been appointed and confirmed?

MCLAUGHLIN: I think that is so, yes.

V. RIVERS: Do you think the attorney general represents the people of the Territory in the matter of his interpretations of law, or does he represent the administration? I realize the interests at most times are coincidental and the same, but at times when there is any divergence would you also say he represents the people?

MCLAUGHLIN: Frankly, I think the attorney general represents the executive department of the government.

PRESIDENT EGAN: Mr. Taylor.

TAYLOR: Mr. President, I cannot follow the reasoning either of Mr. McLaughlin or Mr. Buckalew. I think the screening set up in this proposed amendment to Article 10/a is I think a happy choice. It may be a compromise, but I think it is a very fine compromise, in between the two propositions that have been advanced in choosing the attorney general. I believe the judicial council is the proper body to, what you call, screen the attorney general. The duties if given to the judicial council will be the same as they are in regard to the justices of the supreme court and the judges of the superior court. It is to select a competent lawyer to fill the office of attorney general just as they are duty bound to select the best men they can for judicial office. The office of attorney general is a very important office. There has been numerous times in the history of the Territory of Alaska when we have had an extremely weak attorney general and the Territory has suffered by it. If we have a capable attorney general I think we will be a great deal better off if the attorney general is vigorous and follows out the instructions of the governor in fulfilling his office. I feel the attorney general is only, his duties should primarily be the attorney for the executive branch of the state government. In the past there has been times that the attorney general has had to be the legal officer for the executive, Legislative Council, and the counsel for all departments of the Territory. That was extremely a difficult position. I know Mr. Rivers had it for a number of years and he can explain, perhaps better than I can, the difficulties of filling of positions such as that, but I believe primarily the attorney general is the attorney for the governor and the department heads, the departments established by this constitution and who would be under the direct supervision of the governor. I feel that some provision maybe should be made here or the legislature should make one for the employment of a legislative counsel during the sessions of the legislature, and so the attorney general would not have to take a part in that particular matter. I feel that the adoption of this amendment with the governor being given the right to remove the attorney general without the consent of the legislature would be a happy choice.

PRESIDENT EGAN: Mr. Davis.

DAVIS: Mr. President, it seems to me from the arguments

we have heard that probably we are going at this backwards. The arguments have been as to how we should select an attorney general. Now it is my thought on the basis of the bill that we have here that probably what we want to decide is whether we want a constitutional attorney general or not. It seems to me on the executive department, as we have outlined it here so far, that we probably don't want a constitutional attorney general at all; that that matter should be left to the legislature as to whether we do or don't and to what his powers are when the legislature decides to set up an attorney general, and accordingly it seems to me pointless to discuss as to how the attorney general is to be selected. If it is wise in the view of the legislature when they set up an attorney general that he should be screened by the judicial council, these arguments could be made at that time, but at the minute we have not mentioned an attorney general, and it seems to me that the executive department is going to be a whole lot more what the Committee had in mind if we don't set up an attorney general as such in this article. Now I realize that if we don't set up an attorney general we are going to have to do something to the initiative, but that is a different problem and no problem from my standpoint.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: It has been said that perhaps we could omit mentioning an attorney general in this article and that the secretary of state could take over the function of the attorney general with regard to the initiative and referendum. In the initiative and referendum article we said that the initiative should consist of a petition with a proposed bill that the sponsors wished to have made into law and that the attorney general would scrutinize it as to sufficiency for form and the attorney general would condense the matter for appropriate petition heading so that the people that sign it would have an adequate draft as to what they are signing. Afterwards the attorney general shall prepare the ballot title, assuming that enough signatures were obtained and that this bill were to go before the voters. It is a little difficult I think for the secretary of state to engage in all of those legalities, and I think as far as the initiative and referendum is concerned, we ought to have that in the hands of the attorney general just as the initiative and referendum article suggests. However, I see difficulties with this proposed amendment. The judges are banned from politics. They are picked on an absolutely nonpartisan basis. The attorney general presumably should be a member of the same party as the governor. The attorney general, if he is a member of the same party, as attorney general, would take the normal part in politics. but if he is picked on a nonpartisan basis as the judges are, then we have to ban him from engaging in politics and he also could turn out to be somebody of the opposite party. So I believe we are getting crossed up if we try to put the attorney general through legislative council. I think we are getting -- the judicial

council I mean -- I think we are getting the judicial council into some little difficulties, etc., and from the political standpoint we want to keep them out of it. They can't hold any position or be active on the political scene. So if this particular amendment does not pan out, I am going to propose one as follows: The department heads appointed by the governor shall include an attorney general. Then we can leave the initiative and referendum functions right where they are.

PRESIDENT EGAN: Mr. Londborg.

LONDBORG: Mr. President, as it has been mentioned, this is a minority report from the Committee, and I think it is only right you hear from some of the rest of the Committee regarding this. We in our Committee felt that it would be the wishes of the majority of the Convention to have a strong executive. By that we did not mean a dictator, one who would get into power and be the absolute power in the state, but one who through appointive powers would be able to select his co-workers down through the various offices so that when the state's functions would be successful we could say that we had a good governor, and when they would not be successful we would know who to blame and could vote accordingly at the next election. Mention has been made not only here on the floor but also the same argument in the Committee that the governor would have certain obligations and would be expected to lean toward that obligation in the appointing of an attorney general, but I can't help but feel that that same trend of thought would run right down through the other departments, and I believe that there are other departments under the governor that are of equal importance and if the governor is going to bow to party obligations or other obligations in selecting of the attorney general, he will do the same thing all the way through his other department heads, and we won't have a man in there that we can be fully proud of, and I think we are going to want to elect a governor who will be able to stand on his own two feet and appoint the men that he feels should be in the office. I think if he is that type of man he will not only be respected by one party but by all of the people of the state. As far as the removal is concerned, if we worry that the governor may remove the man at will, if that is not best, we can always insert that he be removed with the consent of the legislature, that is another matter, but as far as the appointing is concerned, I think that is vital right now. As far as screening is concerned, I can see that it might have been good in the past to have the nominations for attorney general screened some way before they even face election by the people. Be that as it may, I think if we elect a governor it is his duty to screen and select a good attorney general. That is part of his job. We are electing him to do that very thing, and if he fails to select a good attorney general then he is that much more a failure as a governor, and he will stand that test in the coming election. If we feel that the attorney general must be screened so that we have the best possible attorney general, I think it is also

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necessary that the head of the department of education, head of the department of welfare, health and labor, and all the other department heads be screened by somebody so that this governor gets the right men in his cabinet, so to speak. I certainly feel that he should be able to screen and select a good attorney general as well as select the other department heads. But I think there is one thing that is even more important and we discussed that in the Committee, and that is the matter of compatibility. We have felt in the past that we have not had attorney generals who have been entirely in sympathy with the governor and it has been due to the way the two have gotten to their office. We elect the one and the other is appointed out of Washington, and we have seen certain cases where they have not worked out in harmony. Now, if the attorney general is to represent the people alone, then of course he should be elected, but as he is to work under the executive department we want a man who is compatible with the governor and with his type of program that he wants to put over in the state, one that understands the governor, one that will work with the governor and ask the judicial council as set up, not to honor party politics but to work in a nonpartisan capacity. Yet I feel they will not be able to do that as far as the attorney general is concerned, and I don't believe there is any more reason to feel that a judicial council nominee would be any more compatible than one elected by the people of the state; if they are going to ask the governor, "Will this man work with you or will that man work with you, do you want this one or that one?" You might as well say, "Let the governor pick the man in the first place." If they are going to have the liberty to put up a man that will not work with a governor, then we spoil our whole plan for an effective administration. I believe, as Mr. Ralph Rivers mentioned, if we want the attorney general's office mentioned at all in the constitution, it would be very simple on Section 16, line 14, after "department" to insert the words "including the attorney general's office." That would make it very clear that the governor would have the appointive powers and that the attorney general's office would be one that he would have direct control over. That gives you, I believe, some of the Committee thinking regarding the attorney general being appointed by the governor.

PRESIDENT EGAN: Mrs. Nordale.

NORDALE: I would like to ask Mr. Rivers a question, if I may. Mr. Ralph Rivers, are the services of the attorney general available to the secretary of state in case he needs them?

R. RIVERS: Yes.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: Mr. President, I would like to ask Delegate Rivers a question through the Chair, if I may.

PRESIDENT EGAN: You may ask your question, Mr. Buckalew, if there is no objection.

BUCKALEW: Mr. Rivers, I notice that the proposal, that the caption is by Delegate Rivers. My question was whether this was a committee proposal or your separate individual proposal?

PRESIDENT EGAN: Mr. Rivers has already answered that question, Mr. Buckalew. He said that it was actually a proposal of his and of Mr. Harris. Mr. Victor Rivers.

V. RIVERS: In closing this discussion, I will make it brief. I just want to say, in my opinion it is no compromise opinion. If it had been a compromise we would not have this discussion on the floor. It has been pointed to as a compromise. Those of us who submitted this proposal honestly and actually think the attorney general should be screened. Now I wanted to clear up a point that Mr. McLaughlin made. He pointed out that certain appointive methods were used in the State of New Hampshire. They are. The attorney general is appointed by the governor and a council of five. In the State of Tennessee the attorney general is appointed for a period of eight years by the justices of the supreme court. In four states, as I am able to count, the attorney general is appointed by the governor by and with the consent of the legislature. In three states the attorney general is appointed by the governor and in the balance he is elected by the people. So if you add that up you will find about 38 states in which he is elected; in these two states I have mentioned, Tennessee and New Hampshire, he is appointed under a similar plan, and in the balance of the states he is appointed by the governor with or without the approval of the legislature, as the case may be. It is my thought, and I have observed this rather closely from some contact with the legislature, that while the attorney general is in essence not a judge, he does interpret the law which governs people until somebody challenges his interpretation, and then his decisions oftentimes and most of the time do have the force of law until they are upset or turned over or otherwise disturbed by having somebody appeal to the courts. It does not seem to me to be a bit out of line that the attorney general should be properly screened as to competence, and in the selection of the attorney general the governor should be relieved of the obligation to repay any favors or to make any particular discrimination in favor of any individual. It has been stated here that we tie the hands of the strong executive. Read this amendment over again. It does not say who the governor shall appoint. It says, "Two or more shall be screened by the judicial council and submitted to the governor for his appointment." He is not limited to the one man or two men or three men. If he can't make his choice he might even have four men, but he does have any obligation removed in making that appointment to any individual. It would be entirely free of a political aspect insofar as it affected the attorney general's competence. There is nothing in here that is counter to common practice, I refer

to the State of New Hampshire, the State of Tennessee, and others, but it costs you money if you go to court to upset an attorney general or any other similar official's opinion. That opinion as I have seen it many times, that opinion has the force of law and interpretation of any laws the legislature may have passed. While you might not view him as a judge, in essence he is a judge of what that law says until it's determined otherwise by the courts. In essence he is a judge of what certain things do that apply to the people. For that reason I think that he should be screened as to competence. I see nothing in that which weakens the strong executive. The governor might say of the first two appointees named, "I am unable to make a choice; submit me another name." There is nothing that stops him from doing that in the proceedings of the council. It seems to me that some determination which would relieve this office of having to be filled by any repayment of political favor or obligation should be set up, and that is why we have introduced this amendment. It is no compromise.

PRESIDENT EGAN: Mr. Victor Rivers had stated he was closing. No one objected. Unless there is someone who has not spoken -- Mr. McLaughlin.

MCLAUGHLIN: I wanted to ask Mr. Rivers a question. Mr. Rivers, when you say the council in New Hampshire, you mean that five elected executive council who are elected by the people together with the governor?

V. RIVERS: I stated the council of five. The council of five is elected for two-year terms along with the governor and they determine with the governor the appointment of the attorney general.

MCLAUGHLIN: But that is not a judicial council at all, is it?

V. RIVERS: I don't know what their duties are. They are a council of five, but whether they are constituted as ours is, I do not know.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Victor Rivers and Mr. Harris be adopted by the Convention?"

HARRIS: I request a roll call.

PRESIDENT EGAN: Mr. Harris asks that we have a roll call. The Chief Clerk will call the roll on the question.

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

Yeas: 18 - Barr, Collins, Cross, H. Fischer, Harris, Hinckel, Kilcher, Metcalf, Nerland, Nolan, Peratrovich, Reader, V. Rivers, Robertson,

Rosswog, Smith, Taylor, VanderLeest.

Nays: 36 - Armstrong, Awes, Boswell, Buckalew, Coghill, Cooper, Davis, Doogan, Emberg, V. Fischer, Gray, Hellenthal, Hermann, Hilscher, Hurley, Johnson, King, Knight, Laws, Lee, Londborg, McCutcheon, McLaughlin, McNees, Marston, Nordale, Poulsen, Riley, R. Rivers, Stewart, Sundborg, Sweeney, Walsh, White, Wien, Mr. President.

Absent: 1 - McNealy.)

CHIEF CLERK: 18 yeas, 36 nays, and 1 absent.

PRESIDENT EGAN: So the "nays" have it and the proposed amendment has failed of adoption. Are there other amendments to Section 14? Mr. Ralph Rivers.

R. RIVERS: I have an amendment.

PRESIDENT EGAN: Mr. Ralph Rivers, you may offer your amendment. The Chief Clerk may read the proposed amendment.

R. RIVERS: May we have about a two-minute recess? I would like to consult with Mr. Londborg.

PRESIDENT EGAN: If there is no objection the Convention will stand at recess for two minutes.

RECESS

PRESIDENT EGAN: The Convention will come to order. The Chief Clerk will please read the amendment as proposed by Mr. Ralph Rivers.

R. RIVERS: It hasn't been introduced yet, I was going to withdraw it.

PRESIDENT EGAN: No, it has not been introduced.

R. RIVERS: I won't even do that.

PRESIDENT EGAN: Are there amendments to Section 13 or 14 or 15? Mr. Sundborg.

SUNDBORG: Mr. President, I have a question about Section 14. May I be permitted to address it to Mr. Rivers?

PRESIDENT EGAN: You may, Mr. Sundborg, if there is no objection.

SUNDBORG: Mr. Rivers, I am a little bit bothered about these

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR 19

ANALYSIS CONTINUATION:

position, at an estimated cost of $217,000 per year to perform these functions (using FY 98 salaries for illustration purposes).

As discussed in the narrative above, outside counsel costs for the University can vary widely and actual transfer of these legal service responsibilities to the Attorney General would require a more detailed analysis to identify specific costs and/or savings from the transfer. The following summarizes the potential fiscal impact to the Department of Law that we can identify at this time using the department's 1997 standard attorney cost schedule for a full-time equivalent attorney position, including standard overheads (clerical support, communications, space, supplies, data processing, *etc.*), and 1997 salaries and costs for non-cost schedule positions.

ARRC Legal Services Transfer (beginning mid-FY99)	
3 FTE Attorneys @ $127.0	$381.0
Direct case costs @ $5.0 per attorney	$15.0
1.5 PFT Legal Secretary position authorizations	$0.0
One-time equipment purchases for new positions @ $6.5	$32.5
Contract outside counsel/experts @ estimated $200.0	$200.0
	$628.5
University of Alaska Legal Services Transfer (beginning mid-FY99)	
4 FTE Attorneys @ $127.0	$508.0
Direct case costs @ $5.0 per attorney	$20.0
2 PFT Legal Secretary position authorizations	$0.0
One-time equipment purchases for new positions @ $6.5	$39.0
Contract outside counsel/experts @ estimated $500.0 to $1,500.0	$500.0
	$1,067.0
Administration & Support Personnel Classification System (beginning mid-FY03)	
2 Personnel Assistant I @ $49.6	$99.1
1 Administrative Clerk III @ $45.5	$45.5
One-time equipment purchases for new positions @ $6.5	$19.5
	$164.2
Total, Including One Time Equipment Purchases	$1,859.7
Less One-time items	($91.0)
Department of Law Estimated Minimum Annual Cost	$1,768.7

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HJR19

Revision Date		Dept. Affected	Office of the Governor
Title	Const. Amdt.: Election of the Attorney General	BRU	Elective Operations
		Component	General and Primary Elections
Sponsor	Representative Green		
Requester	House Judiciary	Component Serial No.	#22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Personal Services						
Travel						
Contractual		3.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	3.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES [ ]						

FUND SOURCE (Thousands of Dollars)

	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF		3.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	3.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: none

POSITIONS

	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Full-time		0				
Part-time		0				
Temporary		0				

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by	Dana LaTour	Phone	465-5347
Division	Division of Elections	Date	4/14/97
Approved by Co	Lt. Governor Fran Ulmer	Date	4/14/97
Agency	Office of the Lieutenant Governor		

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FISCAL NOTE

STATE OF ALASKA **BILL NO.** HJR 19
1997 LEGISLATIVE SESSION

Revision Date:
Title: "Proposing Amendments to the Constitution ... relating to the election and duties of the attorney general."
Sponsor: Representatives Green, Barnes
Requester: House Judiciary

Dept. Affected: Office of the Governor
BRU: Executive Operations
Component: Executive Office
COMPONENT SERIAL NO. 6

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	******
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF						******
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	******

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

POSITIONS	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
FULL-TIME						3
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This analysis emulates the organizational structure of the states of Washington, Oregon and Arizona. Each of these states has an elected attorney general, and each Governor has on-staff counsel to respond to general legal questions, public policy issues, internal matters, open meeting laws, ethics laws, revocation of appointments, handle extraditions and petitions, prepare administrative orders, deeds relating to the state's natural resources, etc., and to carry-out the constitutional requirements of the Governor (i.e., executive clemency, messages to the Legislature, executive orders)

The contitutional amendment proposed by this resolution would be on the ballot in 1998. If approved by the voters, the first election of an attorney general would be with the next gubernatorial election in November, 2002. Fiscal impact to Office of the Governor would begin in FY03. The fiscal analysis is attached.

Prepared by: Michael A. Nizich, Administrative Director Phone: 465-3876
Division: Administrative Services Date: 4/11/97

Approved by Commissioner: Jim Ayers, Chief of Staff Date:
Agency: Office of the Governor

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Table 1—Qualifications, Selection, and Term of Attorneys General

Jurisdiction	Qualifications			Selection and Term		
	Minimum age	Citizenship & State Residency	Bar Admission Required	Elected	Appt'd By, With Consent Of	Term[a] (yrs.)
Alabama	25	U.S., 5 yrs.	Yes	x		4
Alaska	—	U.S., 1 yr.	No		Gov., Legis.	—[c]
Am. Samoa	—	U.S.	No		Gov., Legis.	—[c]
Arizona	25	U.S. (10 yrs.), 5 yrs.	No	x		4
Arkansas	21	U.S., elector,[b] 1 yr.	No	x		4
California	—	U.S., state	5 yrs.	x		4
Colorado	25	U.S., 2 yrs.	Yes	x		4
Connecticut	—	Elector	10 yrs.	x		4
Delaware	—	—	No	x		4
District of Columbia	—	D.C.	No		Mayor, D.C.	—
Florida	30	U.S., elector, 7 yrs.	5 yrs.	x		4
Georgia	25	U.S. (10 yrs.), 4 yrs.	7 yrs.	x		4
Guam	—	—	No		Gov., Legis.	—[c]
Hawaii	—	U.S., 1 yr.	Implied		Gov., Sen.	—[d]
Idaho	30	U.S., 2 yrs.	Yes	x		4
Illinois	25	U.S., 3 yrs.	Yes	x		4
Indiana	21	State	Yes	x		4
Iowa	—	Elector	No	x		4
Kansas	—	—	Yes	x		4
Kentucky	30	U.S., 2 yrs.	8 yrs.	x		4
Louisiana	25	U.S., elector, 5 yrs.	5 yrs.	x		4
Maine	—	—	No	Legis.		2
Maryland	—	U.S., 10 yrs.	10 yrs.	x		4
Massachusetts	—	5 yrs.	Yes	x		4
Michigan	21	Elector, 6 months	No	x		4
Minnesota	21	U.S. (3 mos.), elector	Implied	x		4
Mississippi	—	U.S., elector	5 yrs.	x		4
Missouri	—	U.S., 1 yr.	No	x		4
Montana	25	U.S., 2 yrs.	5 yrs.	x		4
Nebraska	—	—	No	x		4
Nevada	25	Elector, 2 yrs.	No	x		4
New Hampshire	—	—	Yes		Gov., Exec. Council	4
New Jersey	—	State	Implied		Gov., Sen.	4
New Mexico	30	U.S., 5 yrs.	Yes	x		4
New York	30	U.S., 5 yrs.	Implied	x		4
North Carolina	21	Elector	Yes	x		4
North Dakota	25	Elector, state	Implied	x		4
N. Mariana Is.	—	—	5 yrs.		Gov., Sen.	
Ohio	18	Elector	Implied	x		4
Oklahoma	31	U.S., elector, 10 yrs.	No	x		4
Oregon	18	Elector	No	x		4
Pennsylvania	30	State, 7 yrs.	Yes	x		4
Puerto Rico[e]	21	U.S.	Yes		Gov., Sen.	—[c]
Rhode Is.	21	Elector	Yes	x		2
South Carolina	—	U.S., elector	Implied	x		4
South Dakota	—	State	Yes	x		4
Tennessee	—	—	Implied		Supreme Ct.	8
Texas	—	—	No	x		4
Utah	25	U.S., elector	Yes	x		4
Vermont	21	U.S., elector	Implied	x		2
Virginia	30	U.S., state	5 yrs.	x		4
Virgin Is.	—	U.S.	Yes		Gov., Sen.	—[d]
Washington	21	Elector	Yes	x		4
West Virginia	25	U.S., 5 yrs.	Yes	x		4
Wisconsin	—	U.S., elector	Implied	x		4
Wyoming	21	Elector	4 yrs.		Gov.	—[c]

[a]Note that all jurisdictions except Kentucky and New Mexico allow the Attorney General to serve successive terms. Beginning in 1991 New Mexico will also allow the Attorney General to serve successive terms.
[b]For a definition of "elector," see the constitution of the specific state that has this requirement.
[c]The term may run for an indefinite number of years.
[d]The term runs concurrently with the state governor.
[e]There are no statutory requirements in Puerto Rico for the office of Attorney General. Historically, qualifications related to U.S. citizenship and admission to the bar are required.

The Alaska Attorney General: Elected or Appointed?

by Norman C. Gorsuch

The office of state attorneys general can either strengthen or check the executive branch. The Alaska attorney general plays a significant role in public policy-making. Currently, Alaska's governor appoints the state attorney general, and until the argument about the range of executive power is settled, the controversy about the the office's election or appointment will persist.

A History and Description of the Office of the Attorney General

The first office of the attorney general was created in 1461 when the King of England appointed a person to direct all of his representatives who appeared in the royal courts. The common law decisions of these courts defined the attorney general's duties, which, in essence, were to protect the royal property, prerogatives, and revenue, and to prosecute those persons accused of committing crimes. Examples of these duties included recovering for damages done to royal property, regulating public charities and trusts, repealing grants and patents, and prosecuting misdemeanor and felony crimes. By 1700, the attorney general was accorded membership in Parliament to explain crown legislation. (1)

When the American Colonies were settled, colonial attorneys general were appointed by the royal governors and were deemed to exercise all of the common law powers inherent in the office of the attorney general of England. After the Revolutionary War, the new state courts decided that the common law powers exercised by the Attorney General of England and discussed above were an inherent part of the office of state attorney general. In addition, most states ratified this grant of powers in state constitutions or statutes. (2)

The method of selecting state attorneys general evolved in stages. Prior to Andrew Jackson's presidency, most states provided for the appointment of the attorney general by the governor or legislature. With the advent of Andrew Jackson's presidency, the concept of sovereign democracy emerged. The people were seen as the source of sovereign power, and they exercised it through popularly elected officials. In the late nineteenth century, states began to require the election of the attorney general. Today, 44 states elect the attorney general. Of the six states that appoint the attorney general, most provide for appointment by the governor, and some by the legislature or the state supreme court. (3)

With the evolution of sovereign democracy, state courts decided that state attorneys general now represented the rights, prerogatives, and interests of the general public in carrying out their common law duties of office. In effect the courts substituted the public for the king as the client of the attorney general, thus giving the attorney general the power to protect public prerogatives, property and revenue. Indeed, there are several state supreme court opinions which hold that an attorney general may bring any action in court deemed necessary to enforce or protect any public right or interest and as a corollary power may exercise virtually plenary discretion in the disposition of such action. However, while state attorneys general possess these common law powers, state constitutions or statutes may limit or preclude the exercise of some or all of them. (4)

Another development in the United States has been the expansion of the

powers of state attorneys general through the delegation of direct statutory grants of authority by the various state legislatures. For example, in most states, there are anti-trust and consumer protection trade regulation laws and the power to enforce them is delegated by most legislatures to the attorney general. [5]

Finally, the office of the state attorney general has been strengthened as an advocate for the people on a broad range of issues for reasons relating to its institutional characteristics. First, the office possesses a firm place in the tradition of English and American institutions; second, the office is a statewide one and, therefore, it has the advantages and disadvantages of statewide exposure and argument; third, the office is also closely connected to the state's political chief executive through the powers to give legal counsel to state agencies and to represent them in litigation; fourth, the office has a close connection to the judicial system; and fifth, the office is staffed by attorneys, and thus, a natural power base exists in the legal community of the state based upon the professional relationship among members of the Bar. [6]

The Role of State Attorneys General in Public Policy Decisions

It is practically impossible to make any public decision without knowing first, the legal parameters within which the agency or public official may act; and second, the adverse legal consequences of proposed courses of action within those parameters. For example, actions outside the scope of a public official's statutory powers could expose the official to personal liability for any damages caused as a result of the action.

Frequently, the practical boundaries of these legal parameters are determined by political constraints. Thus, in many public decisions involving legal issues, attorneys general play a significant indirect role through furnishing legal advice to help public officials balance the adverse legal consequences of their decisions within those politically imposed parameters. An example of this balancing occurs when deciding what can constitutionally be done to ensure local Alaskan hire by out-of-state companies when the most direct way to do so through mandating it by statute is unconstitutional based on cases decided by the Alaska and U.S. supreme courts. In this area, the legislature enacted a bill allowing the Alaska commissioner of labor to designate economically distressed zones based on economic and employment characteristics and require local hire on public projects within those zones. The bill was drafted with the state attorney general's advice. It was not totally politically acceptable, but was the best legal position constitutionally permitted based upon U.S. Supreme Court opinions. Even this new one has been challenged by a contractor as unconstitutional. Therefore, this issue will once again be reviewed by the appellate courts.

The legal advice given to state officials engaged in making these public decisions is frequently found in advisory opinions, a written memorandum from the attorney general which answers a question of law posed by any public official in the state executive or legislative branch of government. This mechanism, next to oral advice, is the most frequently utilized tool in public legal practice and plays an important role in policy decisions.

The legal status of opinions by attorneys general has been interpreted frequently by the courts. This status varies from state to state. The judiciary and the legislature generally treat them as persuasive, but not controlling on the legal issues they address. Several state courts and some state statutes provide that public officials of the executive branch are bound by them. Even where they are not recognized as binding on executive branch officials, most recipients follow them. The advantages in complying with them are, first, it can shield the official from the political consequences of a decision; and second, it allows the public official to retain official immunity from any personal liability for actions taken in reliance on the opinion. [7]

The Powers, Duties and Role of the Attorney General in Other States

The powers and duties of other state attorneys general range from a maxi-

> *In Support of Election:*
> *"An elected attorney general would be 'the people's attorney' and function as an ombudsman and watchdog for them."*

mum of highly centralized, exclusive authority to provide legal counsel to the state, litigate on behalf of the state and prosecute crimes to a minimum of shared state legal authority with no statewide criminal prosecution jurisdiction. For example, state attorneys general do not possess statewide criminal prosecution jurisdiction with the exception of Delaware, Rhode Island, and Alaska. In other states criminal prosecution is conducted by elected or appointed municipal, county or city district attorneys.

In addition, attorneys general usually do not have exclusive authority to represent the state in litigation or to be the exclusive legal advisor to state agencies. In many states, the governor's office has its own general counsel and many state agencies have their own house counsel. In those states, the attorney general represents the governor or agencies only in court. Legal advice to the governor or agency prior to litigation is furnished frequently by house counsel. In most states, while the attorney general issues official opinions upon request and thus, can influence public policy decisions; frequently, the attorney general does not play a significant policy making role within the state administration because the attorney general is a competing elected official. Exceptions to this situation exist when the governor and attorney general are political allies, share the same philosophy, or are personal friends. [8]

The Powers, Duties and Role of the Attorney General of Alaska

In Alaska, the attorney general is a member of the governor's cabinet. As such, the office functions as the general counsel to the governor and state officials. Thus, the attorney general plays a constant role in the development and formulation of public policy on a wide range of issues.

In addition, the Alaska Supreme Court has stated that the attorney general has the exclusive authority in the state government to make any and all decisions relating to the disposition of any state litigation and the exercise of this discretion by the attorney general within constitutional bounds is not subject to judicial review. However, in order to maintain good attorney-client relations, the attorney general rarely exercises such authority without consultation with and concurrence by the state agencies involved. In major cases, the attorney general also consults with the governor and, if necessary, the legislature. [9]

The Alaska attorney general is appointed by the governor, confirmed by the legislature, and serves at the pleasure of the governor. In Sections 44.23.010-060 of the Alaska Statutes, the legislature created the Office of the Attorney General as Chief of the State Department of Law and vested that department with certain powers. Those powers are as follows:

1. Possession of authority as the exclusive legal advisor to the state executive branch of government, exercising this power through the drafting or reviewing of all executive branch legal instruments and legislation, and the rendering of legal opinions;

2. Representation of the state in all civil litigation;

3. Prosecution of all violations of state criminal laws;

4. Initiation of actions to collect state revenue;

5. Recommendation to the legislature of necessary changes in the laws;

6. Promotion of uniform laws adoption;

7. Preparation of information on landlord and tenant rights;

8. Possession of exclusive authority to enforce the consumer protection and anti-trust laws; and

9. Possession of all common law powers generally inherent in the office of the attorney general. Thus, the Alaska attorney general is an example of the highly centralized exclusive legal authority model.

Arguments in Support of Electing the Attorney General

The theme in the arguments supporting the election the attorney general is a simple one focusing on the independence that direct election would give the office. An elected attorney general would be "the people's attorney" and function as an ombudsman and watchdog for them. Independent

election would mean that the attorney general was not the creature of a particular administration. As such, the attorney general would be free to render legal opinions solely on the basis of the law and not as a legal advocate for the administration. In addition, it is argued that an elected attorney general would be free to oppose policies of the state government that are considered inconsistent with the law and to investigate and prosecute apparent wrongdoing both in and out of government without fear or favor. [10]

Also, it is argued that the attorney general is elected in 44 states and the concept appears to be working in those jurisdictions. Some also argue that the attorney general's work is in areas where the governor has little or no interest, such as consumer protection, antitrust enforcement, and criminal prosecution. Thus, much of the work does not interfere with the executive responsibilities of the governor's office so that the results of the electoral competition are not as severe as supporters of the appointment process argue. It is also argued that if a governor wants house counsel to furnish legal advice to the governor's office, most governors can appoint such staff counsel. Furthermore, proponents of election argue it is not even necessary for the attorney general to act as general counsel to the governor's office. In addition, some also argue that because of the legal power of the office, an attorney general's duties are of a higher order, similar to that of a judge, and therefore, the attorney general should have the elected independence of a judge. [11]

Arguments in Support of Appointing the Attorney General

The arguments in opposition to the election of the attorney general and in support of appointment by the governor are more complex because of the need to discuss how an appointed attorney general impacts the structure and relationships within the executive branch of state government. The focus of the argument is based upon the need to strengthen the executive branch of government through the appointive power of the chief executive. [12]

Proponents of the appointment process believe that good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive, and unified team to carry out the responsibilities of the executive branch of government. Thus, the political accountability for actions of the executive branch and the executive responsibility for those actions are lodged in the office of the governor. It is clear where the responsibility lies and the governor is the one answerable to the public. [13]

In addition, they argue that when governors are forced to deal with a competing elected attorney general, there may be some question as to whether or not the advice, no matter how wise or legally sound, will be taken or looked upon with suspicion and hostility, thus giving rise to conflict. This is because the governor and attorney general would be bringing different policy perspectives to the same public issue. These perspectives may be rooted in different constituency bases. As both are elected, neither one can be considered a final authority to resolve the issue.

Some argue that electing the attorney general can delay the policy resolution process. They point out that in many states with an elected attorney general, governors appoint their own general counsel and, in addition, house counsel are appointed frequently by state agencies accountable to the governor. These house counsel may provide conflicting legal advice to that of the elected attorney general. The effect of this conflicting advice can be to delay resolution of those issues within the executive branch. In addition, whenever there is litigation involving state agencies, house counsel may file friend of the court briefs or otherwise intervene in court asserting a position on legal issues different from

that of the elected attorney general. Proponents of the appointment process argue that those different positions can confuse the legislature, the public, and the courts on the executive branch policy. [15]

Advocates of appointing the attorney general also argue that electing the attorney general will increase state operating budgets. First, the governor

In Support of Appointment: "Good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive and unified team . . . "

will insist on a general counsel and house counsel for agencies that are responsible to the governor's office. Thus, it will be necessary to pay for an additional layer of attorneys in the executive branch. Second, in order to maximize the perceived benefits of election, the elected attorney general must have additional, duplicate, independent support staff, not answerable to the governor, to execute personnel, budget, and other administrative policy or the governor could unfairly infringe on the attorney general's independence of action.

In response to the argument that only an elected attorney general can investigate and prosecute wrongdoing in state government with the appropriate degree of independence, proponents of the appointment process argue that the attorney general is not the governor's personal lawyer but the attorney for the institution of the governor's office.

Also, they point out that as a member of the legal profession, the attorney general is affiliated with the judiciary and functions as an officer of the court. Thus the appointed attorney general possesses the prerequisite professional independence from the governor. They believe that the appointed attorney general is capable of investigating all officials of the executive branch of government, including the governor, and prosecuting wrongdoing if necessary.

This is because of constraints placed upon the holder of the office by the statutes, regulations, rules of court, and canons of professional and prosecutorial ethics which require the attorney general to act in these criminal matters based only upon the evidence, the law, and the canons. They also believe that to make decisions in these matters based upon personal and political reasons exposes the appointed attorney general to charges of obstruction of justice and the possibility of suspension or disbarment from the legal profession.

Subsidiary arguments in support of appointing the attorney general can also be made. Some argue that appointed attorneys general do "represent the public" and the misperception that they do not is created because they have no need to generate favorable publicity by constantly calling attention to external achievements in order to create an image as "the people's attorney." It is also argued that the appointed attorney general acts just like an omsbudsman through the rendering of legal advice to state officials as a member of the governor's team. This advice helps to ensure that these officials comply with the statutes and regulations governing their programs, and enforce fairness and impartiality in government dealings with the public.

Another argument in support of appointment is that an elected attorney general must allocate time to fund raising and other political activities, thus detracting from that required to manage the attorney general's office and resulting in a reduced credibility for the office because it will be perceived to be too "political." Legal opinions issued by an appointed attorney general are likely to be more professional because there is no need to pay attention to political polls when considering legal issues.

Some argue that interpreting the law and running a large law office are essentially technical tasks and it is not necessary that the official charged with these duties be elected. Also, it is believed that highly qualified attorneys would not become attorneys general if they had to run in a statewide election.

Finally, those who argue for appointment also have some tradition on their side. They state that no one has ever seriously suggested electing the United States attorney general. They believe that the people do participate in the selection of the appointed attorney general through their legislator when the legislature conducts the confirmation process, not unlike the advice and consent of the U.S. Senate over presidential nominees for attorney general.[16]

Conclusion

The underlying issue in these arguments is how the election of the Alaska attorney general affects the balance of power among the branches of state government and the policy-making process within the executive branch of government. In essence the argument revolves around whether one believes in a strong or weak executive branch

of government. The current strength of the Alaska executive in exercising its authority is its ability to speak with one voice. When the attorney general is elected, the ability of the executive branch to speak with one voice to the legislature, the judiciary and the public is altered and the accountability for executive branch actions is split. If one believes that the power of the executive branch should be divided or decentralized through direct electoral accountability of some of its parts, then one generally supports election of the attorney general.

An elected attorney general has specific constitutional and statutory duties of an executive nature. Those duties may include litigating civil law suits to enforce compliance with state law and to protect state interests and prosecuting violations of state criminal law. Both civil and criminal enforcement are based on the police power to protect the health, welfare and safety of society. These enforcement functions are a key element of executive authority, in essence, the power to force compliance with the law.

If the attorney general is elected, this power to enforce state law will be split between two elected officials. Those who support election believe this split serves to check potential abuses of executive power and makes the executive more responsive. Those who support appointment believe this system leads to frustration, delay, and a lack of responsiveness by the executive branch of government. Thus, depending on one's philosophy of government, the same facts are viewed quite differently. As the discussion demonstrates, this debate is really about two different views of state government and is not new in our history. The historical development of state constitutions in the country reflects this quandary of a strong versus a weak executive. Debate over the election of the attorney general is only a part of this larger issue. *-APAJ-*

References and Notes

(1) *See generally* State v. Finch, 280 P. 910 (Kan. 1928); A. Sill (Attorney General of New Jersey), *Common Law Powers of the Attorney General* 1-6 (1967); 7 Am. Jur. 2d *Attorney General* Sec. 9, at 7-8 (1980). In addition, the common law powers of the attorney general eventually were summarized in Blackstone. Blackstone concluded that the attorney general could investigate and prosecute actions necessary to protect the real property of the King, review lands and chattels that should be held by the King, repeal royal grants or patents, recover for damages done to royal property, possess unclaimed property, examine the basis of an individual's claim to office, franchise, or privilege, compel admission and remission of a properly appointed official to his office, ensure proper maintenance of public charities and trusts, and initiate, without prior indictment by grand jury, misdemeanor criminal prosecutions and, after grand jury indictment, felony prosecutions. W. Blackstone, *Commentaries* 27, 257-64, 427; *see* A. Sills, *supra.*

(2) People v. Kramer, 68 N.Y. Supp. 383, 386 (1900); National Association of Attorneys General, *Powers, Duties and Operations of the State Attorneys General* 77-79 (1977). A partial listing of the common law powers found to be inherent in the office of the attorney general by several state court decisions can be summarized.

Attorneys general have the power to: 1) Recover damages for unlawfully removed sand and gravel from [illegible] tidewater lands; 2) Abate public nuisances through equitable actions; 3) Intervene in lawsuits over contested wills when the state has a possible interest; 4) Challenge a reduction of state tax assessments; 5) Institute actions to collect unpaid taxes and premiums for [illegible] state worker's compensation fund; 6) Seek removal of public officials for misconduct in office; 7) Proceed in equity to cancel the fraudulent registration of voters; 8) Enforce the restricted provisions of a deed from the state; 9) Enforce public and charitable trusts; 10) Bring suit to cancel a fraudulently procured United States patent for either land or an invention; 11) Intervene when the constitutionality of a state statute is attacked; 12) Challenge the constitutionality of a state statute; 13) Investigate criminal activities and [illegible]

"In essence the argument revolves around whether one believes in a strong or weak executive branch of government."

before a grand jury; 14) Institute and dismiss criminal proceedings; 15) Supercede the local district attorneys in criminal prosecutions; 16) Make any bona fide disposition of these actions that in his or her judgment would be in the best interest of the public. A. Sills, *supra*, at 8-9.

(3) NAAG, *supra*, at 77-79.

(4) 7 Am. Jur. 2d *Attorney General* Sec. 9, at 7-8; Sec. 18, at 22-23. See Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975); State ex rel. Shevin v. Yarborough, 257 S.2d 891 (Fla. 1972); State v. Finch, 280 P. 910, 911-12 (Kan. 1929); Board of Public Utilities Commissioners v. Lehigh Valley Railway Co., 149 A. 263 (N.J. 1930).

(5) *See, e.g.*, AS 45; *see generally* National Association Of Attorneys, *Powers, Duties and Operations of State Attorneys General* (1977)

(6) *See generally* T. Morris and W. Thompson. *The Attorney General as Public Advocate* 2 (1985).

(7) National Association of Attorneys General, *Representing State Agenies* (1979); 7 AM. Jur. 2d *Attorney General* Sec. 11, at 10-12.

(8) *See generally* National Association of Attorneys General, *The Structure of State Legal Services* 20-38 (1977)

(9) Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975).

(10) Report of Maryland Attorney General Francis B. Birch to the Constitutional Convention of Maryland (Sept. 29, 1967); Position Paper by New York Attorney General Lewis J. Lefkowitz, Constitutional Convention Committee on the Executive Branch (June 1, 1967); *Attorney General Should Be Elected--Not Appointed*, Attorney General Clarence A.H. Meyer, Outline of Remarks, Nebraska Constitutional Convention. *See generally* National Association of Attorneys General, *Powers, Duties and Operations of State Attorneys General* (1977); transcript of testimony House State Affairs Committee on HB 456 ("an Act authorizing an advisory vote by the qualified voters of the state on the question of the election of the attorney general") (Jan. 20, 1984).

(11) *See* note 10, *supra*.

(12) National Municipal League, *Model State Constitution* 65-66 (6th ed. 1963.

(13) *See generally* letter from Attorney General Norman C. Gorsuch to Senator Patrick Rodey, Chairman of Senate Judiciary Committee, discussing SJR 9 ("Elected Attorney General") (Apr. 23, 1985); transcript of testimony, House State Affairs Committee, on HB 456 (Jan. 20, 1984).

(14) National Governors Conference, Center for Policy, Research, and Analysis, *Legal Advice for the Governor* (1976).

(15) *See* note 13, *supra*.

(16) *Id.* 4

Mr. Gorsuch is a visiting Associate Professor at the University of Alaska Southeast, School of Business and Public Administration.

-APAJ-

HJR 19 fiscal anaysis:

This fiscal impact in below is for **illustration purposes only** and is based on 1997 costs and salaries. The fiscal impact associated with an elected attorney general would not be realized until FY03, and accurate costs will need to be identified then. Additionally, if the voters approve the constitutional amendment calling for an elected attorney general, the functions and duties of the attorney general will need to be defined which may result in further fiscal impact.

This note assumes an increase in Governor's staff by three positions -- an attorney, rg. 26, a paralegal, rg. 19, and an executive secretary, rg. 14. Fiscal note further assumes existing state-owned office space would be available and does not include lease costs.

Personal services:	three PFTs	199.5
Contractual:	comm., phones, postage, tolls courier svcs., subscripts, etc.	18.6
Supplies:	office/library supplies	9.6
Equipment:	office furniture, DP and communication equipment	39.2 *
	Total first year costs:	266.9

* 39.2 first year set-up costs only and not required in subsequent years.

ALASKA CONSTITUTIONAL CONVENTION

January 14, 1956

FIFTY-THIRD DAY

it appeared that, at least the feeling was drawn out th (original copy illegible) whole proposal had almost been wrecked. I believe that (original copy illegible) tion can be changed so it will be acceptable and for tha (original copy illegible) I would like to have the reconsideration at this time with (original copy illegible) possible amendment afterwards if the section is retained.

PRESIDENT EGAN: Is there further discussion? Section 6 is now before us once more. Mr. Boswell.

BOSWELL: I would like to trace the evolution of this particular article through the Committee. Our first decision was, should we have a lieutenant governor? We decided that was a luxury which we could not afford in this new state. So our second decision was to try to set up a working successor to the governor, and it seemed a logical choice would be the secretary of state. Our third decision was regarding the election, whether this secretary of state should be elected or appointed, and we felt it would be a little more democratic,

more acceptable to the public, give them more to say, if he were elected. Then the question was, how can we elect a secretary of state and be certain he would be compatible with the governor and be of the same party as the governor. I asked Mr. Cooper this question on his previous amendment, how he could expect this elected secretary of state to be of the same party and he could not answer. I realized I was tossing him a curve at the time because we could not answer it; so that was why we came up with this particular section and we decided then that we could accomplish the purpose we were after by nominating the secretary of state and the governor separately and pairing them to run in the final election so that we would at least be certain that they would be of the same political party, and I think that is the important thing on it. It would be obvious to all that if we had a governor of one party and a secretary of state of another party that they could not only not work together, but there would be terrific confusion if that secretary of state ever succeeded to the governor. I think when the people of Alaska have this opportunity to nominate a secretary of state and realize the important position that he holds, they are going to be very careful of the man they nominate, and I don't think he will be the type of man that Mr. Buckalew would have us think he would be. Now if you think the Committee approach has been illogical or if you want to "buy a pig in a poke", support Mr. Buckalew's amendment. If not, I think the committee proposal has merit.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: I seconded Mr. Buckalew's motion and I have always felt that Section 6, as worded for the reasons that we stated yesterday, injects an undesirable element in our constitutional government, and as far as a "pig in a poke", and I want to direct my remarks solely to that. There is an amendment on the desk

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which reads as follows: "That Section 6 be stricken and the following substituted: 'There shall be a secretary of state who shall have the same qualifications as the governor. He shall be appointed by the governor. He shall perform such duties as may be delegated to him by the governor. He shall

perform such administrative functions as are prescribed by law'." The amendment goes on and deletes the words "person elected" in line 12 of Section 7, and that is all there is to it. Now that amendment prescribes a constitutional secretary of state. The reason for that is so that the order of succession is preserved. It makes him an appointee of the governor, so the objection as to political faith is immediately removed. He will be of the same political party. It makes him a working secretary of state, because as far as executive duties are concerned the governor may delegate some to him. Administrative duties which of course do not infringe upon the executive may be prescribed by law. That avoids any conflict between a secretary of state working contrary to his governor, so this amendment preserves the order of succession exactly as it was in the original proposal, except only that the secretary of state is an appointive official, but the order of succession is preserved. Everything of the original proposal is preserved, and it is not "a pig in a poke". There are other equally, I think, desirable alternatives. There is no magic about this thing. It is very simple. In answer to Mr. Marston's statement, I am quite sure by 12 noon we will be all through with this thing. We could adopt many healthy proposals in that time, too, all of them better than the present Section 6. I have talked to other people who have equally sound alternative methods, none of which require huddles or delay, very simple, very clear and generally unobjectionable, so I say that if we do reconsider this matter, there are sound alternates and I do think though, that the present section or the section that was submitted to us must be improved.

PRESIDENT EGAN: Mr. Davis.

DAVIS: Mr. President, it appears to me that the only difference between Mr. Hellenthal's proposal as he has talked about it here, and the committee proposal is the point as to whether the secretary of state is going to be elected or whether he is going to be appointed. I am afraid we are going to get ourselves in a box here if we vote on the motion to reconsider. I am afraid we may be foreclosing the possibility of considering Mr. Hellenthal's amendment. I am wondering if it might not be more orderly to hold the matter of the reconsideration until after we have heard Mr. Hellenthal's

amendment. I am afraid we will be in the same position we were in yesterday where we struck certain language and then we had to have an amendment to put the same language back in. As it now stands, we have stricken Section 6. If we take the motion to reconsider and if that

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2130

motion to reconsider is against Mr. Buckalew's amendment, we will be in the position then of having failed to strike the section and then we have another motion come along to strike the section over again. It seems to me that the primary question at the minute is whether the body does or does not want an elective secretary of state.

PRESIDENT EGAN: Mr. Londborg.

LONGBORG: Mr. President, I would like to speak another word for the committee proposal as we drew it up. As I see the difference in the remarks now of Mr. Hellenthal and his would-be secretary of state, and the one that the Committee provided for, is this, of a time element as far as when the governor picks his partner. In other words, has the Committee made it possible that the governor would have a perfectly compatible working partner; he would choose that man or the party would work together and pick that man before the election, or if the law so provided, he may be picked in the primary to be the running partner of the successful nominee of the primary for governor. Now, as I see it, the pressure that is going to come upon the governor in selecting a secretary of state will be just the same as the pressure if he were to pick him before he was elected as governor. This man that will be selected as secretary of state after the governor is elected, will be a man who can take over the governor's office for a period of three or three and one-half years, maybe even more should the governor die. You can be sure there is going to be just as much pressure on the governor to attach on to him somebody the people don't want but somebody to whom the party owes a debt; but if you have the secretary of state as just a working man and not succeeding to the governor's chair, that would be a different thing, but if he is to fall in line for the governorship, then we stand the chance of having a person become governor for a period of one. two, three, three and one-half, and a day short of four years. The people would as

a whole perhaps reject just because of some pressures put upon the governor to put that man in as his secretary of state. I think the fair way to the people would be to have that man along with the governor on the general election ticket. Then if we don't feel that the governor chose wisely or the party chose wisely, they can both be rejected. The people have a choice. I can see that the strong executive would be one that would just pick all of his own men and those he doesn't want, he just throws away, but I think there are going to be pressures upon him in the selections, and that is one pressure that can be revealed before we take the whole "poke". We are going to know what we are getting and they can be accepted or rejected as a team.

becoming governor? For your information Mr. Rivers, I'll give you the names. Thomas Dewey, Alfred E. Smith, Herbert Lehman and Franklin Delano Roosevelt.

PRESIDENT EGAN: Mr. Armstrong, would you take the Chair? (Mr. Armstrong took the chair at this time.)

EGAN: Mr. Chairman, I would like to say that I realize that the Committee on the Executive has put in a lot of days, a lot of hours, just simply a lot of time on this particular question. What they have come up with they feel is the best that is possible. I know that and give them every credit and I have respect for their feelings, but I have not been completely in favor of this type of provision at any time since it was under Committee discussion. I am opposed to having the man who would be next in line in succession to the governorship not actually elected in some manner by the people of the new state. I would like to say as to that that I also have that feeling with relation to the Vice Presidency of the United States, that I am not in agreement with that particular means that we now use and have used all along through our history in providing for the Vice President of the United States. This feeling does not conflict at all with my feeling

on the national level relative to that question. I feel that as Mr. Victor Rivers has stated, that if such an amendment -- I voted for the deletion of Section 6 -- with that feeling in mind, that actually a secretary of state won't be running for any office. The people won't have one thing to say about who shall be secretary of state under Section 6 as I read it. Someone will choose that particular man and he will become as Section 6 reads, "the governor of the State of Alaska." Now, if as Mr. Victor Rivers has stated, he will offer an amendment that will definitely guarantee to the people of Alaska that the man who will become secretary of state will be elected by the people in a primary election, then I would agree with going along with Section 6 if I knew that that particular amendment was going to be offered, and that we were going to have a chance to vote upon that. I also don't agree with the line of succession, with the secretary of state being appointed. I can see no reason why we should not have Section 6 as it is as well as accepting an amendment that would allow the governor to pick his own successor. I am not any more in agreement with that than I am with Section 6 as it is written now. In thinking this over, I am also not in agreement with having an amendment produced that will let the direct line of succession go from the governor, say in the manner that was suggested, that the secretary of state if the governor died, would call the legislators into session and then they would select the governor. I am not in agreement with that because the people do not elect the representatives to the legislatures and their senators with the idea that one of their number will become the governor of Alaska. I think that the best idea so

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far that I have heard is this particular proposal that we nominate, at least give the people some choice in the matter, it will be a real choice. Let them nominate the man who will run in the package with the candidates for governor in the general election. I think that that would be a proper means of allowing the people to elect their governor and also the successor to the governor. I would go along wholeheartedly with such a proposed amendment. That is my feeling on this question, and if I knew that that amendment was going to be adopted, I would then vote against the motion to strike Section 6 from the proposal.

Another thing is that the voters become apathetic as time goes on and pretty soon you
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2137

have a small percentage of people electing your officials, whoever they may be. One reason I don't think we should be too fearful of the governor's making a bad appointment is that we are giving him the authority to make all the other appointments. The secretary of state is actually an administrative official, really. Normally he has a lot of administrative functions, just as our present Secretary of Alaska has. He does not have to necessarily have the qualities that would make him a good governor, although he should be in very close touch with the governor as he would be under our thinking here, so that in the event of an emergency the executive department would continue to run smoothly when the governor was absent. So there is a good deal to be said on both sides, and so it seems to me it does boil down to just one thing, do we want the people to elect this man or do we want him appointed?

GRAY: I'll speak once and forever more on this subject. To me, I feel that the Committee's plan is the best. We are talking about one thing, we are talking about the governor and his successor. The probability of a successor is possible but

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in general we can assume that the elected governor will carry out his term. There is a great deal of emphasis placed on the secretary of state becoming the governor. Now what we are talking about is efficiency in the state government, and we are selecting our man by the voice of the people and they are selected on a popularity basis with efficiency as a second regard. We try to get the most efficient man that is popular. In the Committee plan I do believe that you will receive the most efficient secretary of state, because if he is selected and if he is unpopular, it will be a detriment to the man running as governor. I believe like Mr. Nerland, I believe that in selecting a secretary of state we must select him for popularity but primarily for efficiency, which is the purpose of the whole executive department.

PRESIDENT EGAN: Mr. Coghill.

COGHILL: Mr. President, I support the Buckalew amendment and in turn the proposed amendment which Mr. Hellenthal is trying to submit. I feel that this issue is entirely a political issue within parties. I can see that under the particular system that we have here that we are just trying to pull a veil over the voters' eyes as to allowing them to elect a secretary of state because it ties them too closely to the governor. I could see that in a political convention that this Section 6, as written, would enable a party to set up a fairly strong piece of political machinery. I can't see where the primary election would do so good because we all know there are factions in political parties, and you know that from time to time in our past history we have had very strong feelings and splits in both major parties in Alaska, so I can see where we would have a strong man of one faction running for secretary of state and a strong man of the other faction running for governor, and if they were tied together
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2140

in the general election it would not give you your Utopia of a strong executive. I feel that by appointing, that your governor-elect or your governor that becomes elected, would be more or less the leading figure of the political party that gained control of our government, and feel that to this end he should have the prerogative of choosing his own cabinet or major officials.

NORDALE: Mr. President, I think that Mr. Davis put his finger on the problem when he said it was a matter of do we want to elect a secretary of state or do we want to appoint him. I am not too sure just how strong my convictions are, but I would like to say this, that one of the problems that has faced most of the states, and I think one of the reasons why there has been a swing away from elected officials is that for one thing, as the years go by the ballots become cluttered with elected officials. Of course, ours does not look as if it would be in much danger, except we do have our election of senators, representatives, and at least three members of Congress to elect plus initiatives and referendum and all that sort of thing, but the swing toward the appointment of officials has been to keep some sort of coordination in government. Any man elected by the people is pretty independent, and that is why you have a lack of coordination in government where you have a lot of elected officials.

SWEENEY: I just wanted to say that I want to have a secretary of state elected. I want him compatible with the governor. I want him nominated in the primary and I want him teamed with the governor in the general election. That is all I want, and I do not believe that it is destroying the strong executive. To talk about splinters in either party, I think if you did happen to get one from one faction or one from another, it might be just the thing that would cement your party, and I hope you vote down the Buckalew amendment.

AWES: I have an amendment, Mr. President.

PRESIDENT EGAN: You may present your amendment, Miss Awes. The Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Line 18, page 2, strike the words 'secretary of state' and substitute 'lieutenant governor'; line 21, strike from 'and' through word 'governor' ending on line 2, page 3; line 2, page 3, strike 'secretary of state' and substitute 'lieutenant governor'; lines 4, and 5, page 3, strike words 'secretary of state' on both lines and in each case substitute 'lieutenant governor'."

AWES: I move the adoption of the amendment.
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2146

PRESIDENT EGAN: Miss Awes moves the adoption of the proposed amendment.

BUCKALEW: I second the motion.

AWES: Some of the delegates here were perhaps surprised at the amendment thinking that the idea of a lieutenant governor had been completely buried. That is what bothered me. I am afraid that the idea of a lieutenant governor was buried perhaps too soon. The only argument I have heard is that the lieutenant governor does not play too important a role and it costs money; therefore we should do away with him. Yes, it does cost something to have a lieutenant governor; you have to pay him a salary; you have a few extra lines on the ballot; you have to provide an extra room in the statehouse. When you come down to it, it costs only a drop in the bucket for the total cost of running a state. Therefore, I think the question is not what does he cost, but does he serve a purpose? I think he would serve one very real purpose. I

agree we should elect a successor to the governor. I think Alaskans have been so fed up in the last 50 or 75 years with appointive governors that they don't want to hear the word again. However, it bothers me considerably to elect the secretary of state. I don't think we should put over what some people call a package deal and give the people the form of electing a secretary of state without the choice. On the other hand, to elect the secretary of state independently, we know there are not only different parties in Alaska but there is a lot of factionalism in the parties, and if you get a lieutenant governor who is of a different faction than the governor, because he isn't too effective while serving as lieutenant governor it would not make too much difference, but the secretary of state is right-hand man to the governor, and if you get a secretary of state who is of a different party or of a different faction in the same party, he can hamstring the governor and make our whole government ineffective for the whole four years he is in office, and I think the fact that we want a strong executive makes the problem even more pressing, and therefore I suggest that we consider or reconsider, as the case may be, the idea of having a lieutenant governor in the State of Alaska.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Miss Awes be adopted by the Convention?" Mr. McLaughlin.

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2147

McLAUGHLIN: I am a bit confused. Would the secretary read the section as it would read if it were amended.

PRESIDENT EGAN: Would the secretary read the section as it would read if it were amended.

CHIEF CLERK: "There shall be a lieutenant governor who shall have the same qualifications as the governor. He shall be nominated in the manner provided by law for nominating candidates for other elective offices. He shall be elected at the same time and for the same term as the governor. The candidate for lieutenant governor who runs jointly with a successful candidate for governor shall be elected lieutenant governor. The lieutenant governor shall perform such duties

as may be prescribed by law and as may be delegated to him by the governor."

PRESIDENT EGAN: Mr. Riley.

RILEY: I would like to address one question to Miss Awes. In distinguishing between the two titles did you mean to distinguish between duties in your discussion, Miss Awes?

AWES: Yes, I did. I was proposing a lieutenant governor in the traditional sense and then have the usual appointment of secretary of state by the governor to perform the duties of a secretary of state.

CHIEF CLERK: "There shall be a secretary of state who shall have the same qualifications as the governor. New material. "He shall be nominated in the manner provided by law for nominating candidates for other elective offices. He shall be elected at the same time and for the same term as the governor and the procedure prescribed by law." Delete the word "election". "The procedure prescribed by law for general elections shall provide that the electors in casting their vote for governor shall also be deemed to be casting their vote for the candidate for secretary of state shown on the ballot as running jointly with the respective candidate for governor. The candidate for secretary of state who runs jointly with the successful candidate for governor shall be elected secretary of state. The secretary of state shall perform such duties as may be prescribed by law and as may be delegated to him by the governor."

PRESIDENT EGAN: The Chair feels that the question that was asked by Mr. Kilcher was, are there any other necessary amendments to the following sections in order to make them conform completely with Section 6 as it is now written. Is that right?

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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 6, 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 --
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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 semi-judiciary 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.
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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.

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,
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2196

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.

2201

PRESIDENT EGAN: If there is no objection, the rules will be suspended and Mr. Barr may have the floor on personal privilege.

BARR: I want to explain that since it is very clearly the intention of this body to have two elected officials, there is no point in me introducing this other amendment and holding up proceedings. I never intend to hold up proceedings at all. I realize the shortness of time here, so I will not introduce that amendment at this time, although in my own heart, I believe that we should have an attorney general and commissioner of labor elected.

SUNDBORG: I would like to know if we are creating anywhere in this constitution the office of the attorney general? And I ask it because in our article on direct legislation there is a provision that petitions for referendum and recall and the like, shall be filed with the attorney general who shall certify it to its sufficiency as to form, etc. Since we have not created that office, and I don't believe we should do it by indirection by assigning duties to the man whose office has not been created, I would like to be recognized at the end of this statement under the item of personal privilege, to make a motion and the motion would be that the rules be suspended and the Committee on Style and Drafting be instructed to make a substantive amendment in the article on direct legislation to provide that wherever the words "attorney general" appear, that they be changed to "secretary of state". I wonder if all of you recognize what the problem is. I think we have now agreed that in the executive department we are going to have one other officer at least besides the governor. He will be called the secretary of state. I wonder if all of you recognize what the problem is. I think we have now agreed that in the executive department we are going to have one other officer at least besides the governor. He will be called the secretary of state. It occurred to us in Style and Drafting that it would be entirely proper that the secretary of state should be the officer of the state with whom petitions under the initiative and under the referendum should be filed, that if he required legal services in order to satisfy himself that they were sufficient as to form, etc., he could get them from whatever officer of the state might be provided by

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legislation or otherwise for that purpose, but I think we are

probably being inconsistent and maybe we are making a mistake if we set up duties for an official called the "attorney general" and don't set up the office itself in the constitution.

ALASKA CONSTITUTIONAL CONVENTION

January 14, 1956

FIFTY-THIRD DAY

it appeared that, at least the feeling was drawn out th (original copy illegible) whole proposal had almost been wrecked. I believe that (original copy illegible) tion can be changed so it will be acceptable and for tha (original copy illegible) I would like to have the reconsideration at this time with (original copy illegible) possible amendment afterwards if the section is retained.

PRESIDENT EGAN: Is there further discussion? Section 6 is now before us once more. Mr. Boswell.

BOSWELL: I would like to trace the evolution of this particular article through the Committee. Our first decision was, should we have a lieutenant governor? We decided that was a luxury which we could not afford in this new state. So our second decision was to try to set up a working successor to the governor, and it seemed a logical choice would be the secretary of state. Our third decision was regarding the election, whether this secretary of state should be elected or appointed, and we felt it would be a little more democratic,

more acceptable to the public, give them more to say, if he were elected. Then the question was, how can we elect a secretary of state and be certain he would be compatible with the governor and be of the same party as the governor. I asked Mr. Cooper this question on his previous amendment, how he could expect this elected secretary of state to be of the same party and he could not answer. I realized I was tossing him a curve at the time because we could not answer it; so that was why we came up with this particular section and we decided then that we could accomplish the purpose we were after by nominating the secretary of state and the governor separately and pairing them to run in the final election so that we would at least be certain that they would be of the same political party, and I think that is the important thing on it. It would be obvious to all that if we had a governor of one party and a secretary of state of another party that they could not only not work together, but there would be terrific confusion if that secretary of state ever succeeded to the governor. I think when the people of Alaska have this opportunity to nominate a secretary of state and realize the important position that he holds, they are going to be very careful of the man they nominate, and I don't think he will be the type of man that Mr. Buckalew would have us think he would be. Now if you think the Committee approach has been illogical or if you want to "buy a pig in a poke", support Mr. Buckalew's amendment. If not, I think the committee proposal has merit.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: I seconded Mr. Buckalew's motion and I have always felt that Section 6, as worded for the reasons that we stated yesterday, injects an undesirable element in our constitutional government, and as far as a "pig in a poke", and I want to direct my remarks solely to that. There is an amendment on the desk
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which reads as follows: "That Section 6 be stricken and the following substituted: 'There shall be a secretary of state who shall have the same qualifications as the governor. He shall be appointed by the governor. He shall perform such duties as may be delegated to him by the governor. He shall

perform such administrative functions as are prescribed by law'." The amendment goes on and deletes the words "person elected" in line 12 of Section 7, and that is all there is to it. Now that amendment prescribes a constitutional secretary of state. The reason for that is so that the order of succession is preserved. It makes him an appointee of the governor, so the objection as to political faith is immediately removed. He will be of the same political party. It makes him a working secretary of state, because as far as executive duties are concerned the governor may delegate some to him. Administrative duties which of course do not infringe upon the executive may be prescribed by law. That avoids any conflict between a secretary of state working contrary to his governor, so this amendment preserves the order of succession exactly as it was in the original proposal, except only that the secretary of state is an appointive official, but the order of succession is preserved. Everything of the original proposal is preserved, and it is not "a pig in a poke". There are other equally, I think, desirable alternatives. There is no magic about this thing. It is very simple. In answer to Mr. Marston's statement, I am quite sure by 12 noon we will be all through with this thing. We could adopt many healthy proposals in that time, too, all of them better than the present Section 6. I have talked to other people who have equally sound alternative methods, none of which require huddles or delay, very simple, very clear and generally unobjectionable, so I say that if we do reconsider this matter, there are sound alternates and I do think though, that the present section or the section that was submitted to us must be improved.

PRESIDENT EGAN: Mr. Davis.

DAVIS: Mr. President, it appears to me that the only difference between Mr. Hellenthal's proposal as he has talked about it here, and the committee proposal is the point as to whether the secretary of state is going to be elected or whether he is going to be appointed. I am afraid we are going to get ourselves in a box here if we vote on the motion to reconsider. I am afraid we may be foreclosing the possibility of considering Mr. Hellenthal's amendment. I am wondering if it might not be more orderly to hold the matter of the reconsideration until after we have heard Mr. Hellenthal's

amendment. I am afraid we will be in the same position we were in yesterday where we struck certain language and then we had to have an amendment to put the same language back in. As it now stands, we have stricken Section 6. If we take the motion to reconsider and if that

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motion to reconsider is against Mr. Buckalew's amendment, we will be in the position then of having failed to strike the section and then we have another motion come along to strike the section over again. It seems to me that the primary question at the minute is whether the body does or does not want an elective secretary of state.

PRESIDENT EGAN: Mr. Londborg.

LONGBORG: Mr. President, I would like to speak another word for the committee proposal as we drew it up. As I see the difference in the remarks now of Mr. Hellenthal and his would-be secretary of state, and the one that the Committee provided for, is this, of a time element as far as when the governor picks his partner. In other words, has the Committee made it possible that the governor would have a perfectly compatible working partner; he would choose that man or the party would work together and pick that man before the election, or if the law so provided, he may be picked in the primary to be the running partner of the successful nominee of the primary for governor. Now, as I see it, the pressure that is going to come upon the governor in selecting a secretary of state will be just the same as the pressure if he were to pick him before he was elected as governor. This man that will be selected as secretary of state after the governor is elected, will be a man who can take over the governor's office for a period of three or three and one-half years, maybe even more should the governor die. You can be sure there is going to be just as much pressure on the governor to attach on to him somebody the people don't want but somebody to whom the party owes a debt; but if you have the secretary of state as just a working man and not succeeding to the governor's chair, that would be a different thing, but if he is to fall in line for the governorship, then we stand the chance of having a person become governor for a period of one. two, three, three and one-half, and a day short of four years. The people would as

a whole perhaps reject just because of some pressures put upon the governor to put that man in as his secretary of state. I think the fair way to the people would be to have that man along with the governor on the general election ticket. Then if we don't feel that the governor chose wisely or the party chose wisely, they can both be rejected. The people have a choice. I can see that the strong executive would be one that would just pick all of his own men and those he doesn't want, he just throws away, but I think there are going to be pressures upon him in the selections, and that is one pressure that can be revealed before we take the whole "poke". We are going to know what we are getting and they can be accepted or rejected as a team.

becoming governor? For your information Mr. Rivers, I'll give you the names. Thomas Dewey, Alfred E. Smith, Herbert Lehman and Franklin Delano Roosevelt.

PRESIDENT EGAN: Mr. Armstrong, would you take the Chair? (Mr. Armstrong took the chair at this time.)

EGAN: Mr. Chairman, I would like to say that I realize that the Committee on the Executive has put in a lot of days, a lot of hours, just simply a lot of time on this particular question. What they have come up with they feel is the best that is possible. I know that and give them every credit and I have respect for their feelings, but I have not been completely in favor of this type of provision at any time since it was under Committee discussion. I am opposed to having the man who would be next in line in succession to the governorship not actually elected in some manner by the people of the new state. I would like to say as to that that I also have that feeling with relation to the Vice Presidency of the United States, that I am not in agreement with that particular means that we now use and have used all along through our history in providing for the Vice President of the United States. This feeling does not conflict at all with my feeling

on the national level relative to that question. I feel that as Mr. Victor Rivers has stated, that if such an amendment -- I voted for the deletion of Section 6 -- with that feeling in mind, that actually a secretary of state won't be running for any office. The people won't have one thing to say about who shall be secretary of state under Section 6 as I read it. Someone will choose that particular man and he will become as Section 6 reads, "the governor of the State of Alaska." Now, if as Mr. Victor Rivers has stated, he will offer an amendment that will definitely guarantee to the people of Alaska that the man who will become secretary of state will be elected by the people in a primary election, then I would agree with going along with Section 6 if I knew that that particular amendment was going to be offered, and that we were going to have a chance to vote upon that. I also don't agree with the line of succession, with the secretary of state being appointed. I can see no reason why we should not have Section 6 as it is as well as accepting an amendment that would allow the governor to pick his own successor. I am not any more in agreement with that than I am with Section 6 as it is written now. In thinking this over, I am also not in agreement with having an amendment produced that will let the direct line of succession go from the governor, say in the manner that was suggested, that the secretary of state if the governor died, would call the legislators into session and then they would select the governor. I am not in agreement with that because the people do not elect the representatives to the legislatures and their senators with the idea that one of their number will become the governor of Alaska. I think that the best idea so

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far that I have heard is this particular proposal that we nominate, at least give the people some choice in the matter, it will be a real choice. Let them nominate the man who will run in the package with the candidates for governor in the general election. I think that that would be a proper means of allowing the people to elect their governor and also the successor to the governor. I would go along wholeheartedly with such a proposed amendment. That is my feeling on this question, and if I knew that that amendment was going to be adopted, I would then vote against the motion to strike Section 6 from the proposal.

Another thing is that the voters become apathetic as time goes on and pretty soon you
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2137

have a small percentage of people electing your officials, whoever they may be. One reason I don't think we should be too fearful of the governor's making a bad appointment is that we are giving him the authority to make all the other appointments. The secretary of state is actually an administrative official, really. Normally he has a lot of administrative functions, just as our present Secretary of Alaska has. He does not have to necessarily have the qualities that would make him a good governor, although he should be in very close touch with the governor as he would be under our thinking here, so that in the event of an emergency the executive department would continue to run smoothly when the governor was absent. So there is a good deal to be said on both sides, and so it seems to me it does boil down to just one thing, do we want the people to elect this man or do we want him appointed?

GRAY: I'll speak once and forever more on this subject. To me, I feel that the Committee's plan is the best. We are talking about one thing, we are talking about the governor and his successor. The probability of a successor is possible but

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in general we can assume that the elected governor will carry out his term. There is a great deal of emphasis placed on the secretary of state becoming the governor. Now what we are talking about is efficiency in the state government, and we are selecting our man by the voice of the people and they are selected on a popularity basis with efficiency as a second regard. We try to get the most efficient man that is popular. In the Committee plan I do believe that you will receive the most efficient secretary of state, because if he is selected and if he is unpopular, it will be a detriment to the man running as governor. I believe like Mr. Nerland, I believe that in selecting a secretary of state we must select him for popularity but primarily for efficiency, which is the purpose of the whole executive department.

PRESIDENT EGAN: Mr. Coghill.

COGHILL: Mr. President, I support the Buckalew amendment and in turn the proposed amendment which Mr. Hellenthal is trying to submit. I feel that this issue is entirely a political issue within parties. I can see that under the particular system that we have here that we are just trying to pull a veil over the voters' eyes as to allowing them to elect a secretary of state because it ties them too closely to the governor. I could see that in a political convention that this Section 6, as written, would enable a party to set up a fairly strong piece of political machinery. I can't see where the primary election would do so good because we all know there are factions in political parties, and you know that from time to time in our past history we have had very strong feelings and splits in both major parties in Alaska, so I can see where we would have a strong man of one faction running for secretary of state and a strong man of the other faction running for governor, and if they were tied together
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2140

in the general election it would not give you your Utopia of a strong executive. I feel that by appointing, that your governor-elect or your governor that becomes elected, would be more or less the leading figure of the political party that gained control of our government, and feel that to this end he should have the prerogative of choosing his own cabinet or major officials.

NORDALE: Mr. President, I think that Mr. Davis put his finger on the problem when he said it was a matter of do we want to elect a secretary of state or do we want to appoint him. I am not too sure just how strong my convictions are, but I would like to say this, that one of the problems that has faced most of the states, and I think one of the reasons why there has been a swing away from elected officials is that for one thing, as the years go by the ballots become cluttered with elected officials. Of course, ours does not look as if it would be in much danger, except we do have our election of senators, representatives, and at least three members of Congress to elect plus initiatives and referendum and all that sort of thing, but the swing toward the appointment of officials has been to keep some sort of coordination in government. Any man elected by the people .s pretty independent, and that is why you have a lack of coordination in government where you have a lot of elected officials.

SWEENEY: I just wanted to say that I want to have a secretary of state elected. I want him compatible with the governor. I want him nominated in the primary and I want him teamed with the governor in the general election. That is all I want, and I do not believe that it is destroying the strong executive. To talk about splinters in either party, I think if you did happen to get one from one faction or one from another, it might be just the thing that would cement your party, and I hope you vote down the Buckalew amendment.

AWES: I have an amendment, Mr. President.

PRESIDENT EGAN: You may present your amendment, Miss Awes. The Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Line 18, page 2, strike the words 'secretary of state' and substitute 'lieutenant governor'; line 21, strike from 'and' through word 'governor' ending on line 2, page 3; line 2, page 3, strike 'secretary of state' and substitute 'lieutenant governor'; lines 4, and 5, page 3, strike words 'secretary of state' on both lines and in each case substitute 'lieutenant governor'."

AWES: I move the adoption of the amendment.
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2146

PRESIDENT EGAN: Miss Awes moves the adoption of the proposed amendment.

BUCKALEW: I second the motion.

AWES: Some of the delegates here were perhaps surprised at the amendment thinking that the idea of a lieutenant governor had been completely buried. That is what bothered me. I am afraid that the idea of a lieutenant governor was buried perhaps too soon. The only argument I have heard is that the lieutenant governor does not play too important a role and it costs money; therefore we should do away with him. Yes, it does cost something to have a lieutenant governor; you have to pay him a salary; you have a few extra lines on the ballot; you have to provide an extra room in the statehouse. When you come down to it, it costs only a drop in the bucket for the total cost of running a state. Therefore, I think the question is not what does he cost, but does he serve a purpose? I think he would serve one very real purpose. I

agree we should elect a successor to the governor. I think Alaskans have been so fed up in the last 50 or 75 years with appointive governors that they don't want to hear the word again. However, it bothers me considerably to elect the secretary of state. I don't think we should put over what some people call a package deal and give the people the form of electing a secretary of state without the choice. On the other hand, to elect the secretary of state independently, we know there are not only different parties in Alaska but there is a lot of factionalism in the parties, and if you get a lieutenant governor who is of a different faction than the governor, because he isn't too effective while serving as lieutenant governor it would not make too much difference, but the secretary of state is right-hand man to the governor, and if you get a secretary of state who is of a different party or of a different faction in the same party, he can hamstring the governor and make our whole government ineffective for the whole four years he is in office, and I think the fact that we want a strong executive makes the problem even more pressing, and therefore I suggest that we consider or reconsider, as the case may be, the idea of having a lieutenant governor in the State of Alaska.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Miss Awes be adopted by the Convention?" Mr. McLaughlin.

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2147

McLAUGHLIN: I am a bit confused. Would the secretary read the section as it would read if it were amended.

PRESIDENT EGAN: Would the secretary read the section as it would read if it were amended.

CHIEF CLERK: "There shall be a lieutenant governor who shall have the same qualifications as the governor. He shall be nominated in the manner provided by law for nominating candidates for other elective offices. He shall be elected at the same time and for the same term as the governor. The candidate for lieutenant governor who runs jointly with a successful candidate for governor shall be elected lieutenant governor. The lieutenant governor shall perform such duties

as may be prescribed by law and as may be delegated to him by the governor."

PRESIDENT EGAN: Mr. Riley.

RILEY: I would like to address one question to Miss Awes. In distinguishing between the two titles did you mean to distinguish between duties in your discussion, Miss Awes?

AWES: Yes, I did. I was proposing a lieutenant governor in the traditional sense and then have the usual appointment of secretary of state by the governor to perform the duties of a secretary of state.

CHIEF CLERK: "There shall be a secretary of state who shall have the same qualifications as the governor. New material. "He shall be nominated in the manner provided by law for nominating candidates for other elective offices. He shall be elected at the same time and for the same term as the governor and the procedure prescribed by law." Delete the word "election". "The procedure prescribed by law for general elections shall provide that the electors in casting their vote for governor shall also be deemed to be casting their vote for the candidate for secretary of state shown on the ballot as running jointly with the respective candidate for governor. The candidate for secretary of state who runs jointly with the successful candidate for governor shall be elected secretary of state. The secretary of state shall perform such duties as may be prescribed by law and as may be delegated to him by the governor."

PRESIDENT EGAN: The Chair feels that the question that was asked by Mr. Kilcher was, are there any other necessary amendments to the following sections in order to make them conform completely with Section 6 as it is now written. Is that right?

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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 6, 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 --
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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 semi-judiciary 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.

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2195

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.

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,

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2196

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.

2201

PRESIDENT EGAN: If there is no objection, the rules will be suspended and Mr. Barr may have the floor on personal privilege.

BARR: I want to explain that since it is very clearly the intention of this body to have two elected officials, there is no point in me introducing this other amendment and holding up proceedings. I never intend to hold up proceedings at all. I realize the shortness of time here, so I will not introduce that amendment at this time, although in my own heart, I believe that we should have an attorney general and commissioner of labor elected.

SUNDBORG: I would like to know if we are creating anywhere in this constitution the office of the attorney general? And I ask it because in our article on direct legislation there is a provision that petitions for referendum and recall and the like, shall be filed with the attorney general who shall certify it to its sufficiency as to form, etc. Since we have not created that office, and I don't believe we should do it by indirection by assigning duties to the man whose office has not been created, I would like to be recognized at the end of this statement under the item of personal privilege, to make a motion and the motion would be that the rules be suspended and the Committee on Style and Drafting be instructed to make a substantive amendment in the article on direct legislation to provide that wherever the words "attorney general" appear, that they be changed to "secretary of state". I wonder if all of you recognize what the problem is. I think we have now agreed that in the executive department we are going to have one other officer at least besides the governor. He will be called the secretary of state. I wonder if all of you recognize what the problem is. I think we have now agreed that in the executive department we are going to have one other officer at least besides the governor. He will be called the secretary of state. It occurred to us in Style and Drafting that it would be entirely proper that the secretary of state should be the officer of the state with whom petitions under the initiative and under the referendum should be filed, that if he required legal services in order to satisfy himself that they were sufficient as to form, etc., he could get them from whatever officer of the state might be provided by
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legislation or otherwise for that purpose, but I think we are

probably being inconsistent and maybe we are making a mistake if we set up duties for an official called the "attorney general" and don't set up the office itself in the constitution.

Table 1—Qualifications, Selection, and Term of Attorneys General

	Qualifications			Selection and Term		
Jurisdiction	Minimum age	Citizenship & State Residency	Bar Admission Required	Elected	Appt'd By, With Consent Of	Term[a] (yrs.)
Alabama	25	U.S., 5 yrs.	Yes	x		4
Alaska	—	U.S., 1 yr.	No		Gov., Legis.	—[c]
Am. Samoa	—	U.S.	No		Gov., Legis.	—[c]
Arizona	25	U.S. (10 yrs.), 5 yrs.	No	x		4
Arkansas	21	U.S., elector,[b] 1 yr.	No	x		4
California	—	U.S., state	5 yrs.	x		4
Colorado	25	U.S., 2 yrs.	Yes	x		4
Connecticut	—	Elector	10 yrs.	x		4
Delaware	—	—	No	x		4
District of Columbia	—	D.C.	No		Mayor, D.C.	—
Florida	30	U.S., elector, 7 yrs.	5 yrs.	x		4
Georgia	25	U.S. (10 yrs.), 4 yrs.	7 yrs.	x		4
Guam	—	—	No		Gov., Legis.	—[c]
Hawaii	—	U.S., 1 yr.	Implied		Gov., Sen.	—[d]
Idaho	30	U.S., 2 yrs.	Yes	x		4
Illinois	25	U.S., 3 yrs.	Yes	x		4
Indiana	21	State	Yes	x		4
Iowa	—	Elector	No	x		4
Kansas	—	—	Yes	x		4
Kentucky	30	U.S., 2 yrs.	8 yrs.	x		4
Louisiana	25	U.S., elector, 5 yrs.	5 yrs.	x		4
Maine	—	—	No	Legis.		2
Maryland	—	U.S., 10 yrs.	10 yrs.	x		4
Massachusetts	—	5 yrs.	Yes	x		4
Michigan	21	Elector, 6 months	No	x		4
Minnesota	21	U.S. (3 mos.), elector	Implied	x		4
Mississippi	—	U.S., elector	5 yrs.	x		4
Missouri	—	U.S., 1 yr.	No	x		4
Montana	25	U.S., 2 yrs.	5 yrs.	x		4
Nebraska	—	—	No	x		4
Nevada	25	Elector, 2 yrs.	No	x		4
New Hampshire	—	—	Yes		Gov., Exec. Council	4
New Jersey	—	State	Implied		Gov., Sen.	4
New Mexico	30	U.S., 5 yrs.	Yes	x		4
New York	30	U.S., 5 yrs.	Implied	x		4
North Carolina	21	Elector	Yes	x		4
North Dakota	25	Elector, state	Implied	x		4
N. Mariana Is.	—	—	5 yrs.		Gov., Sen.	
Ohio	18	Elector	Implied	x		4
Oklahoma	31	U.S., elector, 10 yrs.	No	x		4
Oregon	18	Elector	No	x		4
Pennsylvania	30	State, 7 yrs.	Yes	x		4
Puerto Rico[e]	21	U.S.	Yes		Gov., Sen.	—[c]
Rhode Is.	21	Elector	Yes	x		2
South Carolina	—	U.S., elector	Implied	x		4
South Dakota	—	State	Yes	x		4
Tennessee	—	—	Implied		Supreme Ct.	8
Texas	—	—	No	x		4
Utah	25	U.S., elector	Yes	x		4
Vermont	21	U.S., elector	Implied	x		2
Virginia	30	U.S., state	5 yrs.	x		4
Virgin Is.	—	U.S.	Yes		Gov., Sen.	—[d]
Washington	21	Elector	Yes	x		4
West Virginia	25	U.S., 5 yrs.	Yes	x		4
Wisconsin	—	U.S., elector	Implied	x		4
Wyoming	21	Elector	4 yrs.		Gov.	—[c]

[a]Note that all jurisdictions except Kentucky and New Mexico allow the Attorney General to serve successive terms. Beginning in 1991 New Mexico will also allow the Attorney General to serve successive terms.
[b]For a definition of "elector," see the constitution of the specific state that has this requirement.
[c]The term may run for an indefinite number of years.
[d]The term runs concurrently with the state governor.
[e]There are no statutory requirements in Puerto Rico for the office of Attorney General. Historically, qualifications related to U.S. citizenship and admission to the bar are required.

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 17, 1997

Honorable Joe Green
Representative
Alaska State Legislature
State Capitol Room 118
Juneau, Alaska 99801-1182

Re: HJR 19 - Proposing a constitutional amendment to elect the attorney general

Dear Representative Green:

I am sending this memorandum for the record to accompany my testimony on HJR 19 (proposing a constitutional amendment to elect the attorney general).

In order in ensure that all of the debate at the constitutional convention is before the Judiciary Committee, I have attached a copy of the debate for the committee files. The debate includes discussion of whether to have elected officers other than the governor and lieutenant governor (then secretary of state), and specifically whether to elect an attorney general. Two strong points were made in favor of the concept of an appointed attorney general. The first point concerned the nature of the office of attorney general. Those in favor of an elected attorney general characterized the office as the "attorney for the people." In that connection, it was argued that the attorney general needed a franchise to office granted by the people rather than by the governor. This concept was strongly refuted by delegate McLaughlin when he said:

> 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.

Minutes of the Alaska Constitution Convention at 2196.

The attorney general is the governor's chief legal advisor. In this capacity, he advises not only the executive, but the principal department heads and state agencies under the governor's

supervision. By enjoying the confidence of the governor, the public interest is benefited by a consolidated law office that is both efficient and economical.

The second point made related to accountability of the government to the people. Convention delegates were prepared to make drastic changes from the diffused form of government provided through the Territory of Alaska. You will recall that many basic state responsibilities were under federal agency jurisdiction. The governor, collector of customs, adjutant general, U.S. marshal, judges, district attorneys, and other officials were federal appointees. To dilute the authority of these federally appointed officials, the territorial legislature provided for a number of locally elected officials including the attorney general, treasurer, highway engineer, and commissioner of labor. As a result of this fragmentation of authority, no single officer was accountable for the performance of government. The rationale for a minimum number of elected officials was expressed by Delegate Lundborg as follows:

> We in our committee felt that it would be the wishes of the majority of the Convention to have a strong executive. By that we did not mean a dictator, one who would get into power and be the absolute power in the state, but one who through appointive powers would be able to select his co-workers down through the various offices so that when the state's functions would be successful, we could say that we had a good governor, and when they would not be successful we would know who to blame and could vote accordingly at the next election.

Minutes of the Constitutional Convention at 2217. I submit that these reasons have continued viability over 40 years after they were expressed. I have also enclosed a copy of a transcript of testimony on a senate resolution on this subject, and a copy of an article that appeared on the Opinion Page of the Anchorage Daily News.

I offer the following comments concerning specific provisions of the resolution:

(1) The Judiciary Committee should carefully consider sec. 2, which prohibits the governor from reorganizing the Office of the Attorney General. This would leave organization of the office entirely up to the attorney general and to a lesser degree, the legislature, which can influence organization by prescribing certain duties by law. This insulation of the attorney general may be desirable to preserve independence, but it may also create a wall between the governor and his lawyer that cannot be crossed. This could cause the governor to establish separate counsel within the Office of Governor and other principal departments.

(2) Section 5 of the resolution provides that the legislature may prescribe additional qualifications for the Office of the Attorney General. Proposed sec. 28(a). This provision is exceedingly broad, and tends to hand to the legislature a power that is not given for other statewide

officeholders. This provision needs some discussion in committee to develop the intent of the sponsor.

(3) Section 5 also contains a provision that will fundamentally alter the responsibilities of the attorney general. In proposed sec. 28(c), the attorney general is required to defend the state, state agencies, public corporations, or a state public enterprise. No mention is made of the power of the attorney general to bring suits on behalf of the state. This omission should be remedied. If the legislature fails to prescribe other non-litigation related duties for the attorney general, the office will devolve into an agency exclusively engaged in litigation on behalf of public agencies. This would be similar to the U.S. Department of Justice, which may have the unintended effect of hastening the establishment of agency counsel in the various principal departments who would be responsible for general advice to agencies not involving litigation.

(4) The resolution may have the unintended effect of expanding the powers of the attorney general concerning representation of public entities in civil matters. The list of entities to be represented by the elected attorney general mentioned in sec. 28 (c) could be interpreted to include state special service areas, and state chartered corporations not currently represented in litigation by the Office of the Attorney General. For example, the Alaska Railroad Corporation and the University of Alaska are typically represented by separate counsel.

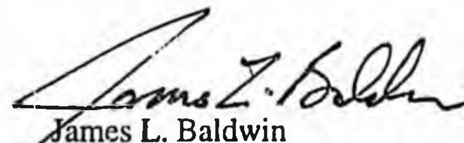
(5) The requirement to defend violations of state criminal law including infractions and violations may have the unintended effect of shifting to the attorney general the burden of prosecuting motor vehicle, traffic and other minor offenses charged by municipal peace officers. This would have a significant fiscal effect on the budget of the Office of the Attorney General.

The department has prepared and will separately submit a fiscal note outlining the increased appropriations needed to implement the resolutions.

Thank -you for the opportunity to comment on the resolution.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 
James L. Baldwin
Assistant Attorney General

JLB:clh
Enclosures

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. HJR 19

Revision Date (Note if correction):
Title: "Proposing amendments to the Constitution relating to the election and the duties of the attorney general"
Sponsor: Representative Green
Requester: House Judiciary

Dept Affected: Law
BRU: All
Component: All
Component Serial No:

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	*****	*****	*****	*****	*****
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	*****	*****	*****	*****	*****

Estimate of any current year (FY98) cost: 0.0

POSITIONS

	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Full-time	0	*****	*****	*****	*****	*****
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HJR 19 proposes an amendment to the Constitution of the State of Alaska making the attorney general an elected office. Further, the proposed amendment describes the duties of the attorney general, and prohibits the governor from making a change in organization or function of a unit of the executive branch headed by the attorney general. Assuming this constitutional amendment were approved by the voters of the State of Alaska in the November 1998 general election, the first elected attorney general would take office in January 2003, FY 03. However, it appears that changes in the duties of the attorney general would take place upon passage of the amendment, as early as January 1999.

The Department of Law cannot accurately quantify a fiscal impact from this resolution. However, it is clear that the impact on the state would be significant. In addition to the impacts on the Department of Law discussed below, another

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Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 2/2/98
Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. HJR 19

ANALYSIS CONTINUATION

major cost that may 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. In other states with elected attorneys general, agency counsel have been employed to give department heads a "second" opinion in controversial matters. These counsel usually do not have the authority to litigate, but they 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 a single special counsel, including secretarial assistance, total approximately $150,000 per year in 1997 dollars. Although it is highly speculative at this time to accurately say how extensive the use of in-house counsel will be if there is an elected attorney general, over time, it could easily exceed $1,500,000 per fiscal year.

The greatest potential fiscal impact on the Department of Law from the proposed constitutional amendment comes from expanded duties as described in Section 28 (c). This language is broader than the language currently in AS 44.23.020 in two ways. By inclusion of the language "state public corporation", the proposed amendment appears to include the Alaska Railroad Corporation and University of Alaska as entities that the attorney general shall defend in civil actions. Both of these organizations currently maintain their own counsel.

Secondly, Sec. 28 (c) requires the state "prosecute violations of State criminal law, including infractions and violations". The department assumes that the courts would continue to allow the attorney general broad discretion over the initiation, prosecution and disposition of cases, both civil and criminal. For example, under present law, district attorneys do not appear in court for most minor traffic violations. The charging police officer presents the state's case to the judge. If this language were to cause the court to rule otherwise, the expense to the state to have district attorneys appear in every case involving a minor infraction or violation would be substantial.

However, the department cannot make a similar assumption about the addition of state corporations to its workload. The Alaska Railroad Corporation (ARRC) has on staff three full time attorneys, and currently expends approximately $200,000 a year on contract outside counsel. The University has a legal staff of four attorneys, and estimates their annual expenditures on outside counsel at approximately $1 million. Presumably, legal services could be provided to these agencies through reimbursable services agreements, and the Department of Law would require sufficient interagency receipt authority to take over these functions. Practically, whether there would be additional costs (or savings) in implementing such a transfer would require a more detailed analysis to determine.

In addition, the proposed amendment removes the governor's organizational and supervisory controls over any function or unit headed by the attorney general. These controls are normally maintained through executive branch procedural requirements imposed on other executive branch agencies by the Department of Administration and the Office of Management and Budget on behalf of the governor.

It is anticipated that the Department of Law would continue to use centrally provided services such as accounting, purchasing, leasing and supply, professional services contracting, information management, and duplicating services on a "service bureau" basis and still maintain the attorney general's functions free from the governor's supervision. Personnel administration, however, is more problematic. To use the Department of Administration's classification system would retain an element of control by the governor over the Department of Law in terms of imposing functional changes in position descriptions and duties. The department assumes it would have to do its own classifications, create and maintain position eligibility lists, and maintain a more in-depth records system for personnel than it now does. The department estimates it would require 2 new PFT Personnel Assistant I (R12) positions, and 1 PFT Administrative Clerk III (R10) position, at an estimated cost of $217,000 per year to perform these functions (using FY 98 salaries for illustration purposes).

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. HJR 19

Revision Date		Dept. Affected	Office of the Governor
Title	"Proposing Amendments to the Constitution... relating to the election and duties of the attorney general"	BRU	Executive Operations
		Component	Executive Office
Sponsor	Representatives Green, Barnes		
Requester	House Judiciary	Component Serial No.	6

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	******	******

CAPITAL EXPENDITURES						

CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	******	******

Estimate of any current year (FY98) cost: 0.0

POSITIONS

Full-time					3	3
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This analysis emulates the organizational structure of the states of Washington, Oregon and Arizona. Each of these states has an elected attorney general, and each Governor has on-staff counsel to respond to general legal questions, public policy issues, internal matters, open meeting laws, ethics laws, revocation of appointments, handle extraditions and petitions, prepare administrative orders, deeds relating to the state's natural resources, etc., and to carry out the constitutional requirements of the Governor (i.e., executive clemency, messages to the Legislature, executive orders)

The constitutional amendments proposed by this resolution would be on the 1998 ballot. If approved by voters, the first election of an attorney general would occur in November 2002. Fiscal impact to the Office of the Governor would begin in FY03. The fiscal analysis is attached.

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Division	Administrative Services	Date	2/3/98
Approved by	Jim Ayers, Chief of Staff	Date	2/3/98
Agency	Office of the Governor		

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HJR 19 fiscal anaysis:

This fiscal impact in below is for **illustration purposes only** and is based on FY98 costs and salaries. The fiscal impact associated with an elected attorney general would not be realized until FY03, and accurate costs will need to be identified then. Additionally, if the voters approve the constitutional amendment calling for an elected attorney general, the functions and duties of the attorney general will need to be defined and may result in further fiscal impact.

This note assumes an increase in Governor's staff by three positions -- an attorney, rg. 26, a paralegal, rg. 19, and an executive secretary, rg. 14. Fiscal note further assumes existing state-owned office space would be available and does not include lease costs.

Personal services:	three PFTs	196.0
Contractual:	comm., phones, postage, tolls courier svcs., subscripts, etc.	21.6
Supplies:	office/library supplies	10.1
Equipment:	office furniture, DP and communication equipment	39.2 *
	Total first year costs:	266.9

* 39.2 first year set-up costs only and not required in subsequent years.

Alaska State Legislature

Representative Joe Green
District 10

Sponsor Statement

HJR 19 - Election of the Attorney General

HJR 19 proposes to amend the Alaska Constitution to elect the state attorney general.

The notion of electing, rather than appointing, the state's chief legal officer is not new. Presently, 44 other states elect their attorney general. Several resolutions proposing to do so have been introduced in preceeding Alaska legislatures. In fact, the subject was considered by the Alaska Constitutional Convention. Fairbanks delegate Frank Barr proposed a resolution to the convention that would have allowed Alaskans to elect their attorney general, but was voted down.

My arguements for direct selection of the attorney general by the voters are: Election provides for greater autonomy for the attorney general and the department of law; election provides for freedom from political manipulation; and, election provides for a stronger link between the attorney general and his or her real clients -- the people of Alaska.

Current law defines the attorney general as "the legal advisor of the governor and other state officers" (AS 44.23.020). By definition, the relationship between the governor and his attorney precludes autonomous, independent action. Under the current arrangement, the attorney general, as a political appointee and member of the governor's cabinet, is obligated to take into account the same political considerations as other cabinet officers. While the attorney general may not necessarily interpret the law to satisfy the political needs of the governor, it is difficult to imagine that he would not take potential political consequences into consideration during his deliberations.

In summary, the question is: should the attorney general of Alaska represent the governor or be the chief legal officer representing the people of Alaska? If you believe, like I do, that the attorney general should represent the people, then I urge your support of HJR 19.