

**HB**

**486**

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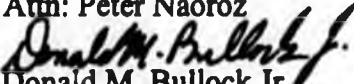
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## MEMORANDUM

March 14, 2005

**SUBJECT:** Codification of the rule of necessity relating to the disqualification of judicial officers (Work Order No. 24-LS0781\A)

**TO:** Representative Max Gruenberg  
Attn: Peter Naoroz

**FROM:**   
Donald M. Bullock Jr.  
Legislative Counsel

Enclosed is a draft bill that would amend AS 22.20.020 by adding a new subsection that codifies the rule of necessity for a judge in a civil action.<sup>1</sup> AS 22.20.020 relates to the disqualification of a judicial officer for cause. The draft bill also amends Rule 42(c), Alaska Rules of Civil Procedure, by incorporating the rule of necessity.

Do you want to further define what "judge available" means? Is a judge "available" if the judge is too busy but could not be disqualified for cause?

Who should decide if there is an available judge? Under the court rule, the presiding judge decides whether there is an available judge in the district, and if not, the chief justice assigns the case to another judge. Is this okay?

Please let me know if you want to incorporate the rule for criminal proceedings. I did not include criminal actions within this bill draft because of the limited peremptory challenges under Rule 25, Alaska Rules of Criminal Procedure, and the strong likelihood of finding an impartial judge from within all judges in the state.

The two cases in Alaska in which the rule or doctrine of necessity was discussed by the Supreme Court involved a challenge to the law requiring judges appointed after July 1, 1978 to contribute to a judicial retirement system,<sup>2</sup> and a disciplinary case against a lawyer before the Alaska Supreme Court.<sup>3</sup> In the first case, the decision noted that the

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<sup>1</sup> The "rule of necessity" is sometimes referred to as the "doctrine of necessity." See, for example, *In the Matter of Neil S. MacKay*, 416 P.2d 823, 838, n. 18 (Alaska 1964).

<sup>2</sup> *Hudson v. Johnstone*, 660 P.2d 1180, 1183 (Alaska 1983).

<sup>3</sup> *MacKay*, *supra*.

Representative Max Gruenberg

March 14, 2005

Page 2

resolution of the case "[was], indirectly at least, of financial interest to the members of [the] court."<sup>4</sup> In the latter case, the lawyer sought to disqualify the court because the Alaska Supreme Court was involved in litigation in federal court against the lawyer and the bar association over the issue of whether the Alaska Supreme Court had the authority to establish the procedure for and conclude disciplinary action against an attorney.<sup>5</sup>

The chronology provided by Mike Barnhill to you, concerning the Amerada Hess litigation and the issue of whether the eligibility to receive an Alaska Permanent Fund Dividend should disqualify a judge, presents a situation in which the rule of necessity could have been applied. However, the doctrine apparently was not considered because the basis for the disqualification was arguably removed and the case settled.

One interesting aspect of the Amerada Hess litigation and the doctrine of necessity was the attempt by the oil companies to go to federal court because of perceived bias in state court. Although the issue of bias was never fully litigated in Amerada Hess, there is a possibility that a party seeking disqualification for cause in state court may move a case to federal court, providing the requirements for federal jurisdiction are met.

If I may be of further assistance, please advise.

DMB:med  
05-177.med

Enclosure

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<sup>4</sup> *Hudson*, 660 P.2d at 1183.

<sup>5</sup> *MacKay*, 416 P.2d 835, n. 1.

Westlaw

660 P.2d 1180  
 660 P.2d 1180  
 (Cite as: 660 P.2d 1180)

Page 1

C

West Headnotes

Editor's Note: Additions are indicated by <<+Text  
 +>> and  
 deletions by <<-Text->>.

Supreme Court of Alaska.  
 William HUDSON, Commissioner of  
 Administration and the State of Alaska,  
 Appellants,

v.

Karl JOHNSTONE and Richard Avery, Appellees.  
 No. 5938.

March 4, 1983.

A Superior Court judge who was appointed to the bench after July 1, 1978, and who thus had a percentage of his salary deducted as his contribution to the judicial retirement system, brought suit challenging the constitutionality of statute requiring justices and judges appointed after July 1, 1978 to contribute seven percent of their base annual salary to the retirement system. The Superior Court, Third Judicial District, Anchorage, S.J. Buckalew, Jr., J., entered summary judgment in favor of plaintiff, and the State appealed. The Supreme Court, Matthews, J., held that justices and judges do not commence new "terms of office," for purposes of the Alaska Constitution's compensation clause, upon gaining the electorate's approval in a retention election, and it follows that the legislature, in implementing a contributory judicial retirement system, cannot constitutionally require members of the judiciary already in office to contribute to such a system via a salary deduction; accordingly, statute requiring only those justices and judges appointed after July 1, 1978 to contribute a percentage of their base annual salary to the judicial retirement system was constitutional under the equal protection clause.

Reversed.

Rabinowitz, J., filed a concurring opinion.

[1] Judges ⇨22(2)

227k22(2) Most Cited Cases

Were the legislature to implement a contributory judicial retirement system by exacting salary deductions from justices and judges "during their terms of office," it would clearly run afoul of the compensation clause of the Alaska Constitution, providing that "Compensation of Justices and Judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State." Const. Art. 4, § 13.

[2] Judges ⇨22(11)

227k22(11) Most Cited Cases

If there is to be a contributory retirement system for justices and judges, exempting those justices and judges already in office from the duty of contribution during their terms of office would be constitutionally compelled by the compensation clause of the Alaska Constitution. AS 22.25.011; Const. Art. 4, § 13.

[3] Constitutional Law ⇨238.5

92k238.5 Most Cited Cases

[3] Judges ⇨22(2)

227k22(2) Most Cited Cases

Since no suspect classifications or fundamental rights are involved, Alaska statute requiring contribution by justices and judges to a retirement system does not violate either the federal or state equal protection clauses. AS 22.25.011; U.S.C.A. Const.Amend. 14.

[4] Judges ⇨42

227k42 Most Cited Cases

It may become necessary for a court to render a decision notwithstanding that the court has a financial interest in the matter; under the rule of necessity, a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case.

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660 P.2d 1180  
660 P.2d 1180  
(Cite as: 660 P.2d 1180)

Page 2

[5] Judges ↩8  
227k8 Most Cited Cases

[5] Judges ↩22(7)  
227k22(7) Most Cited Cases  
Phrase "terms of office," as used in provision of the Alaska Constitution stating that compensation of justices and judges "shall not be diminished during their terms of office," means the period during which a justice or judge is entitled to hold office; a justice or judge commences office when appointed by the governor to fill a vacancy and the office does not become vacant until 90 days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself; between such times, the office is not vacant and the justice or judge appointed to the office is thus entitled to hold it. Const. Art. 4, § 13; AS 22.25.011

[6] Constitutional Law ↩238.5  
92k238.5 Most Cited Cases

[6] Judges ↩22(2)  
227k22(2) Most Cited Cases  
Justices and judges do not commence new "terms of office," for purposes of the Alaska Constitution's compensation clause, upon gaining the electorate's approval in a retention election, and it follows that the legislature, in implementing a contributory judicial retirement system, could not constitutionally require members of the judiciary already in office to contribute to such a system via a salary deduction; accordingly, statute requiring only those justices and judges appointed after July 1, 1978 to contribute a percentage of their base annual salary to the judicial retirement system was not unconstitutional under the equal protection clause. Const. Art. 4, § 13; AS 22.25.011.  
\*1181 David T. LeBlond, Asst. Atty. Gen., Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellants.

Robert H. Wagstaff, D. John McKay, Wagstaff, Middleton & Pope, Anchorage, for appellees.

Before BURKE, C.J., and RABINOWITZ, MATTHEWS, and COMPTON, JJ.

#### OPINION

MATTHEWS, Justice.

This case involves a constitutional challenge to AS 22.25.011 requiring contribution by justices and judges to a retirement system. We find that the lower court erred in declaring the statute unconstitutional on equal protection grounds, and therefore reverse.

AS 22.25.011 states that "[e]ach justice and judge appointed after July 1, 1978, shall contribute seven per cent of the base annual salary received by the justice or judge to the judicial retirement system." [FN1] Justices and judges appointed prior to that date are not required to contribute, even though the criteria for eligibility (AS 22.25.010) and the retirement pay (AS 22.25.020) are the same for both categories.

FN1. AS 22.25.011 has been amended since this case was argued by Ch. 137, § 30, SLA 1982. It now reads, with 1982 additions underlined and deletions in brackets:

Each justice and judge appointed after July 1, 1978, shall contribute seven percent of <<+the+>> <<-[HIS]->> base annual salary <<+received by the justice or judge +>> to the <<+judicial+>> retirement system. Contributions shall be made for all creditable service under this chapter to a maximum of 15 years. This contribution is made in the form of a deduction from compensation, and is made <<+even if+>> <<-[NOTWITHSTANDING THAT]->> the compensation paid in cash to the justice or judge is reduced <<-[THEREBY]->> below the minimum prescribed by law. Each justice and judge is considered to consent to the deduction <<-[MADE]->> from <<-[HIS]->> compensation. Payment of compensation less the deduction constitutes a full <<-[AND COMPLETE]->> discharge <<-[AND ACQUITTANCE]->> of all claims and demands for the services rendered by <<+the justice or judge+>> <<-[HIM]->> during the period covered by the payment, except as to the benefits provided for under <<+this chapter+>> <<-[AS

660 P.2d 1180  
 660 P.2d 1180  
 (Cite as: 660 P.2d 1180)

Page 3

22.25.010-22.25.090]->>. The contributions shall be credited <<+to the retirement fund established in accordance with AS 22.25.048+>> <<-[INTO THE GENERAL FUND OF THE STATE]->>. The 1982 changes have no bearing on the equal protection issue raised in this case.

Superior court judge Karl Johnstone was appointed to the bench after July 1, 1978, and thus has seven per cent of his salary deducted as his contribution to the judicial retirement system. On August 7, 1980 he filed a complaint in superior court against William Hudson, the Commissioner of Administration, and the State of Alaska (hereinafter collectively referred to as "the state"). Judge Johnstone sought a declaratory judgment that AS 22.25.011 was unconstitutional and an injunction restraining the state from making further deductions under that statute. [FN2]

FN2. The action was originally brought by Judge Johnstone and district court judge Richard Avery. Judge Avery has since resigned from the judiciary and is therefore no longer an active party in this case.

\*1182 On March 5, 1981 the lower court entered summary judgment in favor of Judge Johnstone. The basis for its decision was as follows:

It is declared that AS 22.25.011 is unconstitutional as a denial of equal protection under the law for it creates two separate classes of judges doing identical work and the first class appointed before July 1, 1978, can never be subject to the requirements of the statute even though they may commence new terms or new judicial positions after July 1, 1978.

The lower court directed the state to cease deducting seven per cent from Judge Johnstone's salary and further ordered it to return to him all amounts previously collected. It also awarded Judge Johnstone \$1,500 in attorney's fees. The state has appealed.

It is clear from the record below that had AS 22.25.011 read, "Each justice and judge commencing a new term of office after July 1, 1978 shall contribute seven per cent," the lower court would have found the statute constitutionally valid.

Article IV, section 13 of the Alaska Constitution provides:

Justices, judges and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. *Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.*

(Emphasis added).

[1][2] Were the legislature to implement a contributory judicial retirement system [FN3] by exacting salary deductions from justices and judges "during their terms of office," it would clearly run afoul of the compensation clause of article IV, section 13. Requiring a judge to contribute via a salary deduction to a retirement system diminishes a judge's compensation. See *Carper v. Stiffel*, 384 A.2d 2, 6-7 (Del.1977); *Wilson v. Marsh*, 162 Neb. 237, 75 N.W.2d 723, 730 (Neb.1956). If there is to be a contributory retirement system, exempting justices and judges already in office from the duty of contribution during their terms of office would therefore be constitutionally compelled by article IV, section 13.

FN3. That the state may validly implement a contributory judicial retirement system is clear. Alaska Const. art. IV, § 11 provides in relevant part:

Justices and judges shall be retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law.

[3] Institution of a contributory retirement system, rather than one which is noncontributory, will substantially further a legitimate economizing purpose. Since no suspect classifications or fundamental rights are involved, AS 22.25.011 does not violate either the federal or the state equal protection clauses. See *Rose v. Commercial Fisheries Entry Commission*, 647 P.2d 154, 158-59 (Alaska 1982); *Pharr v. Fairbanks North Star Borough*, 638 P.2d 666, 669-70 (Alaska 1981). Differences in compensation between otherwise similarly situated judges which result from a state's compensation clause have readily withstood federal equal protection scrutiny. See *Kavanagh v. Brown*,

660 P.2d 1180  
660 P.2d 1180  
(Cite as: 660 P.2d 1180)

206 F.Supp. 479, 482-85 (E.D.Mich.), *aff'd per curiam*, 371 U.S. 35, 83 S.Ct. 143, 9 L.Ed.2d 112 (1962); *Taylor v. State*, 360 Mich. 146, 103 N.W.2d 769, 773-74 (Mich.1960); *Shubat v. State*, 157 Mont. 143, 484 P.2d 278, 284-86 (Mont.1971). Furthermore, if the disparate treatment occasioned by AS 22.25.011 is mandated by article IV, section 13 of the Alaska Constitution, a state equal protection challenge will similarly be of no avail. *Cf. Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974) ("It is a well accepted principle of judicial construction that whenever reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized").

AS 22.25.011 states, however, that justices and judges "appointed" after July 1, 1978 must contribute. As is evident from the trial court's memorandum of decision, it is the legislature's use of that word which the court found repugnant. The lower court reasoned that since justices and judges appointed prior to July 1, 1978 "may \*1180 commence new terms" after that date, article IV, section 13 does not require that the legislature forever exempt such justices and judges from having to contribute to the retirement system. The lower court obviously construed the phrase "terms of office" in article IV, section 13 as referring to the ten year and six year intervals between retention elections for justices and judges, respectively, established by article IV, section 6 of the Alaska Constitution. [FN4] Judge Johnstone argues that this is the proper construction of that phrase. The state, on the other hand, maintains that for purposes of article IV, section 13 justices and judges serve a single term of office until rejected by the electorate.

FN4. Alaska Const. art. IV, § 6 provides:  
Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

→ Before addressing this issue, we think it

appropriate to note that its resolution is, indirectly at least, of financial interest to the members of this court. For example, were we to construe the phrase "terms of office" in article IV, section 13 as urged by Judge Johnstone, and hold AS 22.25.011 unconstitutional, it is conceivable that the legislature might enact a statute requiring justices and judges presently on the bench to contribute to the retirement system upon gaining approval at their next retention election. The existence of such a financial interest calls into question the propriety of this court deciding the case. *See* Code of Judicial Conduct, Canon 3(C)(1). While article IV, section 16 of the Alaska Constitution confers authority on the Chief Justice to "assign judges from one court or division thereof to another for temporary service," all such judges likewise have a financial interest in the outcome of this case.

[4] Fortunately, this dilemma has been dealt with before. In cases such as this, the law recognizes that it may become necessary for a court to render a decision notwithstanding that the court has a financial interest in the matter. *See, e.g., United States v. Will*, 449 U.S. 200, 213-16, 101 S.Ct. 471, 480-81, 66 L.Ed.2d 392, 405-06 (1980); *Atkins v. United States*, 556 F.2d 1028, 1035-40 (Ct.Cl.1977); *Olson v. Cory*, 27 Cal.3d 203, 164 Cal.Rptr. 217, 220, 609 P.2d 991, 994 (Cal.1980). Under the rule of necessity "a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case." *Atkins v. United States*, 556 F.2d at 1036. To hold otherwise "would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 622, 143 P.2d 652, 655 (Kan.1943) (quoted with approval in *United States v. Will*, 449 U.S. at 214, 101 S.Ct. at 480, 66 L.Ed.2d at 405). The rule of necessity is applied in cases where "[i]f to disqualify one would disqualify all...." *Olson v. Cory*, 164 Cal.Rptr. at 220, 609 P.2d at 994. That being the situation here, we conclude that this case is a proper one in which to invoke the rule.

Turning to the merits, both parties rely heavily on *Buckalew v. Holloway*, 604 P.2d 240 (Alaska 1979) in support of their respective positions concerning the meaning of "terms of office" for purposes of article IV, section 13. In that case the court was

660 P.2d 1180  
 660 P.2d 1180  
 (Cite as: 660 P.2d 1180)

Page 5

called upon to construe the meaning of the word "terms" as used in article IV, section 4 of the Alaska Constitution. That section states:

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

(Emphasis added). At issue was the validity of AS 22.15.170(c), which in pertinent part provides that "[e]ach magistrate serves \*1184 at the pleasure of the presiding judge of the superior court in the district for which appointed." (Emphasis added). Holloway, a magistrate who had been terminated pursuant to this statute, claimed that "at the pleasure of" did not comport with the requirement of article IV, section 4 that "[j]udges of other courts shall be selected ... for terms ... prescribed by law." According to Holloway, the word "terms" as used in that section referred to a period of service fixed in time. We disagreed, stating that: "[W]e do not believe it was intended to imply such a precise limitation. A broader definition of the word, 'the time for which something lasts' ... is in closer accord with the apparent purposes of article IV, section 4." 604 P.2d at 244 (footnote omitted).

In reaching our decision in *Buckalew*, we did note in passing that article IV, section 6, governing judicial retention elections, "specifies the 'terms' of the justices and judges of the supreme and superior courts." *Id.* According to Judge Johnstone, this statement is dispositive of the issue raised here. However, that sentence must be read in its proper context. For we went on to explain that "[t]he 'terms' thus delineated constituted a rejection of the federal judicial system, in which federal judges serve no 'term', but remain in office for life unless impeached." *Id.* (footnote omitted). By no means were we purporting to say that the word "terms" for purposes of article IV, section 13 necessarily refers to the intervals between retention elections set forth in article IV, section 6. Indeed, we suggested that the word "terms" as used in article IV, section 13 had a different meaning:

As originally adopted, the constitution ... used "term" generally to describe the period in office of all justices and judges, art. IV, § 13.

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

604 P.2d at 244 nn. 13, 14.

[5] In our view, the phrase "terms of office" as used in article IV, section 13 means the period during which a justice or judge is entitled to hold office. Under our constitutional framework, a justice or judge commences office when appointed by the Governor to fill a vacancy. Alaska Const. art. IV, § 5. The office does not become vacant until "ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself." *Id.* art. IV, § 7. Between such times the office is not vacant and the justice or judge appointed to the office is thus entitled to hold it.

To hold otherwise would, in our judgment, vitiate the proscription against diminishing the compensation of justices and judges during their terms of office. In discussing the compensation clause found in article III, section 1 of the federal constitution, the United States Supreme Court has noted:

The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government... Hamilton, in *The Federalist* No. 79, p. 491 (1818) (emphasis deleted), emphasized the importance of protecting judicial compensation:

\*1185 "In the general course of human nature, a

660 P.2d 1180  
 660 P.2d 1180  
 (Cite as: 660 P.2d 1180)

Page 6

power over a man's subsistence amounts to a power over his will."

*United States v. Will*, 449 U.S. 200, 217-18, 101 S.Ct. 471, 482, 66 L.Ed.2d 392, 407-08 (1980). That the drafters of Alaska's constitution sought to insulate the judiciary from political pressure that might interfere with its impartiality is clear: "There is no doubt that judicial independence was a paramount concern of the delegates...." *Buckalew v. Holloway*, 604 P.2d 240, 245 (Alaska 1979) (footnote omitted); see 1 Proceedings of the Constitutional Convention 586-602. Were we to construe article IV, section 13 as urged by Judge Johnstone, the legislature could diminish a justice's or judge's compensation every ten or six years, respectively. Such a construction, we believe, would be contrary to the underlying purpose of the compensation clause.

[6] Accordingly, we hold that justices and judges do not commence new "terms of office" for purposes of article IV, section 13 upon gaining the electorate's approval in a retention election. It follows that the legislature, in implementing a contributory judicial retirement system, could not constitutionally require members of the judiciary already in office to contribute to such a system via a salary deduction. That being the case, the legislature's use of the word "appointed" in AS 22.25.011 of necessity passes muster under equal protection. See, e.g., *Kavanagh v. Brown*, 206 F.Supp. 479, 482-85 (E.D.Mich.), *aff'd per curiam*, 371 U.S. 35, 83 S.Ct. 143, 9 L.Ed.2d 112 (1962). The lower court therefore erred in holding AS 22.25.011 unconstitutional on equal protection grounds.

Judge Johnstone also has argued that the judgment of the superior court can be affirmed on another ground. His argument is that AS 22.25.011 violates article XII, section 7 of the Alaska Constitution [FN5] because the statutory requirement that judicial contributions be credited into the general fund rather than a separate account constitutes an impairment of accrued benefits. This argument has, however, been mooted by the 1982 amendments to AS 22.25.011 [FN6] and by related legislation establishing a judicial retirement system. AS 22.25.048.

FN5. Art. XII, § 7 of the Alaska Constitution states:

*Retirement Systems.* Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

FN6. See note 1 *supra*.

The judgment of the superior court is REVERSED.

CONNOR, J., not participating.

RABINOWITZ, Justice, concurring.

I disagree with the court's conclusion that justices and judges do not commence new "terms of office" for purposes of article IV, section 13 upon gaining the electorate's approval in a retention election. Thus, I would hold that article IV, section 13 does not compel the use of the word "appointed" in AS 22.25.011.

My reasons for disagreeing with the court's holding that the phrase "terms of office," as used in article IV, section 13, refers to the periods which a justice or judge is entitled to hold office are as follows:

In *Buckalew v. Holloway*, 604 P.2d 240 (Alaska 1979), we said in part:

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

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

The "terms" thus delineated constituted a rejection of the federal judicial system, in \*1186 which federal judges serve no "term", but remain in office for life unless impeached. The framers of the Alaska Constitution expressly sought a system in which justices and judges would be accountable for their performance in office.

660 P.2d 1180  
 660 P.2d 1180  
 (Cite as: 660 P.2d 1180)

Page 7

604 P.2d at 744 (footnote omitted).

In my view, this language supports Judge Johnstone's contention that the *Buckalew* court concluded that judicial terms delineated by article IV last from one retention election to the next. The rejection of the federal scheme essentially repudiated a system in which it was presumed that a judge sat on the bench indefinitely once appointed. Furthermore, a judge had a right to stay on the bench for life unless impeached. Alaska adopted a compromise between "elective" and "appointive" methods of selection of the judiciary, creating a system in which a judge has a right to remain on the bench only until the next retention election, barring impeachment. Thus, he has a definite "term of office," which may be renewed but is not his by right thereafter. Cases interpreting constitutional clauses limiting the power of the legislature to alter official salaries during a "term of office" almost unanimously construe "term" to refer to the period during which an officer occupies his position by right. [FN1]

FN1. See the following cases construing "term" as used in constitutional clauses prohibiting decreases or increases in compensation during the terms of office of designated officials. *Bayley v. Garrison*, 190 Cal. 690, 214 P. 371 (Cal.1923):

"The general rule, however, seems to be that this constitutional prohibition against changing the salary of a public officer during his term of office applies only to officers who have a fixed and definite term, and does not apply to appointive officers, who hold only at the pleasure of the appointing power."

214 P. at 872, quoting 37 L.R.A.(N.S.) 389. *Kratzer v. Commonwealth*, 228 Ky. 684, 15 S.W.2d 473 (Ky.App.1929):

As applied to office the word "term" speaks with reference to the office itself, and not to the tenure of the incumbent .... It means the fixed period of time during which an officer or appointee is entitled to hold the office, perform its functions, enjoy its privileges and emoluments.

15 S.W.2d at 474-75 (citation omitted). *State v. Board of Commissioners*, 29 N.M. 209, 222 P. 654 (N.M.1924):

It has been many times held that such a provision does not apply to an office held during the pleasure of and subject to removal of the appointing power .... This is due to the fact that such persons have no "term of office" within the intendment of such constitutional provision. To come within its terms an office must have a fixed and definite tenure of office.  
 222 P. at 655.

The conclusion that judges and justices serve a single term during their tenure on the bench is belied by the words of George McLaughlin, Chairman of the Constitutional Judicial Committee. After explaining the rationale for the proposed article IV compromise between "appointive" and "elective" judicial systems, he set out the scheme for retention elections:

I might carry on a bit and point out *what happens in terms after the governor does appoint from the list presented to him* as under the Missouri Plan. Roughly, three and one-half or four years later, the judge is required, every judge without exception, is required to go on the ballot for approval by the voters. Does he have to spend any money? No sir. What is the requirement?

The only requirement on a nonpartisan ballot could be, "Shall Judge 'Blank' be retained in office?" The Missouri Plan provides and the New Jersey Plan in substance provides (my figures are rough), that roughly a year and one-half after appointment the judge will be put on the ballot to determine whether or not the public desires to retain him. It was the view of the Committee that in order to attract good men to become candidates, the only way we could assure the attraction of good candidates was to assure them they would be in office at least for a period of three and one-half years.

1 Proceedings of the Constitutional Convention 585-86 (emphasis added).

In discussing particularities, he again referred to the interval between retention elections as a "term":

As I presume, the question is, why did we determine that the judges of the supreme \*1187 court should serve ten years. I personally voted for twelve. The Committee decided that ten was the average, and the Committee when it decided

660 P.2d 1180  
 660 P.2d 1180  
 (Cite as: 660 P.2d 1180)

Page 8

that ten was the average, followed the recommendation of the conference of the Chief Justices of the United States, at which they recommended that *the term of judges of the appellate courts be not less than ten years*. In fact, as I say, I reduced it two years, and Mr. Robertson decreased his an intangible amount, from lifetime to ten years. As the practice is in other courts, that is those which have revised their judiciary article in recent years, California, *the supreme court has a term of twelve years*. All justices of the supreme court, district court—that is the intermediate appellate courts—is twelve years, and the superior court, which is the trial court, is six years. In New Jersey, the supreme court judges *hold for seven years* ... It is the feeling of the Committee, because of the selective process, that is, screening for initial appointment and the fact that four years thereafter, every judge, that is, a maximum of four years, every supreme court judge and every superior court judge would be up for re-election, that there would be enough of a public control over them that *long terms* would be more desirable.

*Id.* at 611-12 (emphasis added).

Delegate Victor Rivers, also used "term" to refer to that interval:

Now we ask that the judge sit inviolate in that position for ten years. If he is a good judge, a fair and just judge, it is my opinion that he should have no fear in going before the electorate, because it has been my observation that a man who sticks to his principles and does not compromise principles with expediency and is generally known to be honest will even be elected and re-elected to political office. Six years is a *term* for which we elect a senator.

*Id.* at 613 (emphasis added). From these excerpts, it is clear that the framers conceived of the "terms" of judges and justices enduring until the electorate expressed its opinion at scheduled retention elections.

Despite my conclusion that article IV, section 13, does not furnish justification for the use of "appointed" in AS 22.25.011, I concur in the court's holding that the statute "passes muster under equal protection."

Article XII, section 7 of the Alaska Constitution provides:

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. *Accrued benefits ... shall not be diminished or impaired.* (emphasis added)

In my view, the existence of this constitutional provision justifies the use of the word "appointed" in AS 22.25.011. For under the provisions of article XII, section 7, justices and judges appointed on or before July 1, 1978, are constitutionally entitled to receive benefits under the non-contribution retirement system established prior to the enactment of AS 22.25.011. Thus the legislature is precluded from requiring such judges to contribute toward their retirement benefits even when they commence new "terms of office."

In *State v. Allen*, 625 P.2d 844 (Alaska 1981), we considered whether officials who were participating in the Elected Public Officers Retirement System (EPORS) at the time of its repeal by referendum, but who were not then entitled to benefits, would be entitled to benefits under that system upon retirement. Although the system had remained in effect for only 9 1/2 months, this court concluded, on the strength of article XII, section 7, that they would. In reaching this holding we further concluded that "rights accrued by [public officials] under EPORS were not subject to any implied condition subsequent to repeal by the electorate and that those rights remain fully enforceable." [FN2]

FN2. See *Allen*, 625 P.2d at 849.

In *Hammond v. Hoffbeck*, 627 P.2d 1052 (Alaska 1981), we again addressed the requirements of article XII, section 7. The issue was the validity of certain amendments \*1188 to Public Employees Retirement System << [PERS] >> which reduced disability and death benefits. We held that an employee's rights in a system such as PERS vest upon employment and enrollment in the system, rather than at the time an employee became eligible for benefits. We further held the amendments unconstitutional as to those employees which had been hired prior to the amendments and who did not elect to be covered by the system as amended. [FN3]

660 P.2d 1180  
660 P.2d 1180  
(Cite as: 660 P.2d 1180)

Page 9

FN3. See *Hammond*, 627 P.2d at 1055-57, 1059.

In my view, *State v. Allen* and *Hammond v. Hoffbeck* preclude the legislature from requiring the members of the judiciary appointed on or before July 1, 1978, from contributing toward their retirement benefits, absent some offsetting comparable new advantage. [FN4] Therefore, I concur with the court's holding that the superior court erred in ruling AS 22.25.011 unconstitutional on equal protection grounds.

FN4. In *Hammond*, we said that article XII, section 7 "does not preclude modifications of the system; [it] does, however, require that any changes in the system that operate to a given employee's disadvantage must be offset by comparable new advantages to that employee." 627 P.2d at 1059.

660 P.2d 1180

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LEXSEE 32 F3D 1399

**EXXON CORPORATION, Plaintiff-Appellant-Cross-Appellee, v. HAROLD C. HEINZE; CHARLES E. COLE, Attorney General for the State of Alaska; RONALD SWANSON, Director of the Division of Lands; JAMES E. EASON, Director of the Division of Oil and Gas, Defendants-Appellees-Cross-Appellants.**

Nos. 92-35266, 92-35323

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*32 F.3d 1399; 1994 U.S. App. LEXIS 21908; 94 Cal. Daily Op. Service 6273; 94 Daily Journal DAR 11467*

November 2, 1993, Argued, Submitted, Seattle, Washington  
August 17, 1994, Filed

**PRIOR HISTORY:** **[\*\*1]** Appeal from the United States District Court for the District of Alaska. D.C. No. CV-91-543-JKS. James K. Singleton, District Judge, Presiding.

**DISPOSITION:** VACATED and REMANDED

**LexisNexis(R) Headnotes**

**COUNSEL:** Thomas Gibbs Gee and David D. Sterling, Baker & Botts, Houston, Texas; and Joseph R. D. Loescher, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, Alaska, for the plaintiff-appellant-cross-appellee.

Bruce M. Botelho, Deputy Attorney General, Juneau, Alaska; and Deborah L. Williams, Hellen, Partnow & Condon, Anchorage, Alaska, for the defendants-appellees-cross-appellants.

**JUDGES:** Before: Eugene A. Wright, Alfred T. Goodwin, and Procter Hug, Jr., Circuit Judges. Opinion by Judge Goodwin.

**OPINIONBY:** ALFRED T. GOODWIN

**OPINION:** [\*1400] OPINION

GOODWIN, Circuit Judge:

Exxon Corporation ("Exxon") n1 appeals an order dismissing its 42 U.S.C. § 1983 lawsuit and denying its prayer to enjoin certain Alaska state court litigation over state oil and gas royalties. Exxon contends that the state court litigation violates its due process right to an unbiased forum. Because a partial settlement has substantially changed the posture of the case, we vacate the fac-

tual record is now insufficient to review Exxon's claims on their **[\*\*2]** merits, we dismiss for lack of ripeness, vacating the district court's order.

n1 Chevron U.S.A., Inc. ("Chevron") was originally a coparty to Exxon's appeal; however, Chevron and Alaska settled, agreeing to dismiss Chevron's appeal, No. 92-35389, and to dismiss Chevron as a party to the State's cross-appeal, No. 92-35323. For convenience, we refer to Exxon as the sole appellant and cross-appellee throughout.

I.

In 1977, the State of Alaska filed a state court action against Exxon and eighteen other companies producing gas and oil on Alaska's North Slope ("the producers"). See *Alaska v. Amerada Hess Corp. et al*, Civil No. LJU-77-847 (hereinafter "the *ANS Royalty Litigation*"). The State sought a declaration of its rights under certain mineral leases which require the producers to pay [\*1401] royalties on the gas and oil they extract from state lands.

In 1983, the State amended its complaint to add a claim for underpayment of past royalties, alleging that the producers had systematically underestimated the value of certain **[\*\*3]** gas and oil. The producers counterclaimed for overpayment of royalties. The parties agreed to sever the gas royalty and other gas claims from the oil royalty claims and to litigate the oil royalty claims first.

In 1987, after extensive discovery on the oil royalty claims, several producers, including Exxon, filed suit in federal court, contending that the pending *ANS Royalty Litigation* violated their due process rights and requesting injunctive and declaratory relief under 42 U.S.C. § 1983. *Standard Alaska Production Co. v. Schaible*, No.

87-621 (D. Alaska, Nov. 2, 1987). The complaint alleged that the outcome of the *ANS Royalty Litigation* would substantially affect the Alaska Permanent Fund, and, consequently, the annual Permanent Fund dividends Alaska residents receive each year. n2 Because Alaska state judges and potential jurors are eligible to receive Permanent Fund dividends, the producers argued, they had a financial interest in the case, rendering them unconstitutionally biased.

n2 The Alaska State Constitution requires state administrators to place 25% of all state oil and gas royalties in the Alaska Permanent Fund which is used only for income-producing investments. Alaska Const. Art. IX § 15. Under the Permanent Fund Dividend Program, enacted in 1982, the State pays Alaska residents approximately 50% of the income received each year from these investments. *Alaska Stat. §§ 43.23.045(b)*, 37.13.140. Each person who has resided in Alaska for a year or more - and thus all Alaska state judges, potential jurors, and their family members - are eligible to receive these payments or Permanent Fund dividends. In fact, since Alaska judges must have resided in Alaska for five years and Alaska jurors are selected from a list of Permanent Fund recipients, see *Alaska Stat. § 09.20.050(b)*, jurors and judges are, by definition, eligible to receive Permanent Fund dividends. Between 1988 and 1992, the annual Permanent Fund dividend paid to each resident ranged from \$826.90 to \$952.63, or approximately \$3,600 for a family of four.

[\*\*4]

Then-District Judge Kleinfeld, an Alaska state resident, recused himself from the federal case, agreeing that one might question the impartiality of a judge who receives Alaska Permanent Fund dividends, but expressly declining to reach the due process issue or rule on the fairness of the state court forum. R.T. March 8, 1988. The Chief Judge of the Ninth Circuit then appointed Judge Belloni, a non-Alaskan, to hear the case.

Judge Belloni ultimately dismissed the producers' § 1983 complaint without prejudice, rejecting the State's Eleventh Amendment defense, but holding that the controversy was not ripe for federal review because the producers had not raised the bias issue in a state court motion to disqualify. Judge Belloni challenged the State to provide a fair forum, and invited the producers "to re-open this federal case" if "the State Officials fail to provide an unbiased forum within a reasonable time." *Standard Alaska Prod. Co. v. Schraible*, No. 87-521, Unpublished Opinion at 7 (D. Alaska June 20, 1988). We affirmed,

agreeing that "until a proper motion for disqualification is made in the state court, the disputed factual questions concerning the alleged bias of all Alaska [\*\*5] judges and jurors cannot be reviewed by any federal court." *Standard Alaska Prod. Co. v. Schraible*, 874 F.2d 624, 630 (9th Cir. 1989), cert. denied, 495 U.S. 904 (1990).

After we decided *Schraible*, the Alaska legislature amended the Permanent Fund dividend legislation to provide that "income earned on money awarded after trial" in the *ANS Royalty Litigation* would "not [be] available for distribution to the dividend fund." *Alaska Stat. § 43.23.045(b)* (1989) (repealed 1991). In addition, the Alaska Supreme Court amended Alaska Rule of Civil Procedure 47(c) to provide that an Alaska juror's eligibility to receive Permanent Fund dividends did not constitute grounds for challenging the juror for cause. n3

n3 The amended rule allows challenges for cause when the juror "has a financial interest, other than that of a taxpayer or a permanent fund dividend recipient in the outcome of the case." Alaska R. Civ. P. 47(c)(12) (1989).

After the Supreme Court denied [\*\*6] certiorari, *Schraible*, 495 U.S. 904 (1990), and the state court imposed [\*\*1402] a deadline for filing a motion to disqualify, Exxon moved to disqualify Alaska Superior Court Judge Carpeneti, who was presiding over the state court litigation. n4 Exxon argued that the 1989 amendment had not cured the bias problem because it did not address: (1) payments received pursuant to a declaratory judgment; (2) payments received as a result of a settlement or summary judgment; or (3) payments received as a result of royalty-in-kind adjustment clauses. Judge Carpeneti issued a "Notice of Intention to Grant Motion for Disqualification," concluding that judges who receive Permanent Fund dividends have a "direct financial interest or another interest which strongly resembles a direct interest in the outcome of this case," and ruling that the 1989 amendments had not eliminated that interest. *In re ANS Royalty*, No. LJU-77-847, Order No. 91-9 at 9 (Sup. Ct. Alaska March 14, 1991). Judge Carpeneti also found that the "Rule of Necessity" did not apply. *Id.* He gave the state seventy days to remedy the bias problem.

n4 Exxon contends that this motion was based exclusively on state law and argues that it expressly reserved its "right" to have federal courts decide federal constitutional issues. Appellants' Br. at 14 n.6 (citing *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964)).

[\*7]

In response, in May 1991, the Alaska legislature again amended *Alaska Stat. § 43.23.045*, replacing the 1989 amendment with an amendment requiring any award received as a result of the *ANS Royalty Litigation* (including royalty-in-kind adjustments from third parties and interest earned on such funds) to be deposited into the Permanent Fund principal and not made available for distribution as dividends. *Alaska Stat. § 43.23.045(e)* (1991) (current version at *Alaska Stat. § 37.13.145(d)* (1992)).<sup>n5</sup> The legislature also enacted a section providing that the amendment would be automatically repealed if the Alaska Supreme Court held that eligibility to receive Permanent Fund dividends under the unamended statute would not disqualify a judge or juror from hearing the *ANS Royalty Litigation*. *Alaska Stat. § 43.23.045(e)* (1991) (current version at *Alaska Stat. § 37.13.145(d)* (1992)).

<sup>n5</sup> The amended statute provides that

... income earned on money awarded in or received as a result of [the *ANS Royalty Litigation*], including settlement, summary judgment, or adjustment to a royalty-in-kind contract that is tied to the outcome of this case, or interest earned on the money, or on the earnings of the money shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund, and shall be annually deposited into the principal of the Alaska permanent fund.

[\*8]

Judge Carpeneti ruled that these amendments cured the bias problem and denied Exxon's motion to disqualify. Exxon filed a motion to reconsider, arguing that the newest amendments did not eliminate the bias problem because they did not address the producers' counterclaims and because the repeal provision "reinforced" each Alaskan's interest. Judge Carpeneti denied the motion to reconsider, ruling that the producers had waived any challenge based on the counterclaims and rejecting Exxon's reliance on the repeal provision on its merits. A second superior court judge affirmed, and the Alaska Supreme Court summarily denied Exxon's petition for review and motion for an expedited appeal. *BP Exploration v. Alaska*, No. S-4654, S-4662, S-4689 (Alaska filed Aug. 23, 1991).

Exxon and Chevron then filed the instant § 1983 action in federal court, again seeking to enjoin the *ANS Royalty Litigation*. Exxon moved to disqualify Judge Singleton, the Alaska District Judge assigned to the federal case. Judge Singleton denied Exxon's motion to disqualify, rul-

ing that a citizen's eligibility to receive Permanent Fund dividends is a "bare expectancy," not a financial interest, and noting that even [\*9] if justification for recusal existed, the Rule of Necessity might require him to hear the case. *Exxon Corp. v. Heinze*, 792 F. Supp. 72, 76 (D. Alaska 1992) (citing *United States v. Will*, 449 U.S. 200, 212-16, 66 L. Ed. 2d 392, 101 S. Ct. 471 (1980)). Chief Judge Holland, reviewing Judge Singleton's ruling pursuant to 28 U.S.C. § 144, affirmed. *Exxon Corp. v. Heinze*, 792 F. Supp. 77, 79 (D. Alaska 1992).

Judge Singleton then denied the producers' motion for a preliminary injunction and [\*1403] dismissed the complaint with prejudice, relying on the Rule of Necessity. R.T. March 12, 1992 at 17. Exxon and Chevron appealed. Thereafter, in April 1992, Chevron and Exxon settled the oil royalty claims and counterclaims. The severed gas claims and counterclaims remain.

II.

Both parties agree that the posture of this case has changed significantly since Judge Singleton dismissed it. Both parties, however, urge us to reexamine Judge Singleton's orders in light of the facts as they then existed. We decline to do so. Because of the settlement, the [\*10] correctness of Judge Singleton's rulings, on the facts as they then existed, is moot. *Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986). We will not issue an advisory opinion on the merits of Judge Singleton's various orders regarding the settled oil claims.

However, Exxon urges that its appeal is not entirely moot, as the severed gas claims and counterclaims remain. It asks us to decide if the same bias problems apply to the remaining claims and notes that Judge Singleton's dismissal with prejudice may preclude it from returning to federal court. Exxon also emphasizes that litigation before financially interested judges and jurors raises fundamental issues of due process, even when the judges' financial interest is relatively small. See *Connally v. Georgia*, 429 U.S. 245, 251, 50 L. Ed. 2d 444, 97 S. Ct. 546 (1977) (paying magistrates a \$5 fee for granting a search warrant application, but nothing for denying warrant applications, violates due process); *Tumey v. Ohio*, 273 U.S. 510, 523, 532, 71 L. Ed. 749, 47 S. Ct. 437 (1927) [\*11] (paying adjudicator \$12 per conviction, but nothing for acquittals, violates due process).

We agree that "the Due Process Clause entitles a person to an impartial and disinterested tribunal," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 64 L. Ed. 2d 182, 100 S. Ct. 1610 (1980), and that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 79 L. Ed. 942, 75 S. Ct. 623 (1955).

n6 Moreover, like the more stringent federal judges' disqualification statute, 28 U.S.C. § 455, the Constitution is concerned not only with actual bias but also with "the appearance of justice." *Id.* Thus, the question is not whether the Alaska judges and jurors are actually biased or even whether they "would do their very best to weigh the scales of justice equally between contending parties," *Id.*, but whether the alleged pecuniary interest is sufficiently "direct, personal, [and] substantial" that it "would offer a possible temptation to the average man." *Tumey*, 273 U.S. at 523, 532. [\*12] n7 Regardless of his personal integrity, "no man can be the judge in his own case [or] try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136.

n6 See also *Aetna Life Ins. Co. v. Laviole*, 475 U.S. 813, 822, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986); *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975) (The "probability of actual bias on the part of a judge or decision-maker is too high to be constitutionally tolerable" when "the adjudicator has a pecuniary interest in the outcome."); *Gibson v. Berryhill*, 411 U.S. 564, 36 L. Ed. 2d 488, 93 S. Ct. 1689 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972).

n7 But see *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980) (reversing judge's decision to recuse himself from a case which might reduce state residents' utility bills); *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976) (same).

[\*\*13]

However, as Alaska emphasizes, this case also implicates other serious issues, such as a state's sovereign interest in its courts, the need to prevent the federal system from being used as a strategic forum for delay, and litigants' interest in the speedy resolution of cases. Federal courts have long hesitated to interfere with on-going state litigation, and have repeatedly recognized the dangers of doing so. See, e.g., *Younger v. Harris*, 401 U.S. 37, 43, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). Given the disruptive effect of allowing parties to transform every challenge to a state tribunal into a federal due process claim, we will not lightly interfere with pending state litigation. *Schaible*, 874 F.2d at 629.

[\*1404] Balancing these interests, and examining the case as it currently exists, we conclude that Exxon's due process claim is not ripe for federal review. See *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). Whether a dispute is ripe de-

pends on "the fitness of the issues for judicial decision and [\*14] the hardship to the parties of withholding court consideration." *Id.* at 149; *Assiniboine & Soutx Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas*, 792 F.2d 782, 789 (9th Cir. 1986). A claim is "fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Schaible*, 874 F.2d at 627.

Here, Exxon's bias claims require further factual development. The parties have filed no pleadings and conducted only limited discovery on the remaining gas claims and counterclaims. Without any information on these claims' value or their potential impact, if any, on Permanent Fund dividends, we cannot weigh intelligently the potential bias of Alaska judges and jurors or determine whether their alleged interest has "sufficient substance to disqualify them, given the context in which this case arose." *Gibson*, 411 U.S. at 579.

Moreover, Exxon concedes that the settlement and Alaska's curative legislation have eliminated much of the bias [\*15] problem. It argues that bias remains (1) because the gas counterclaims might reduce the funds available for dividend distribution and (2) because the repeal provision implies that State litigation proceeds might ultimately be distributed as dividends and has a subjective impact on jurors.

However, on the counterclaims, Exxon has shown only that the curative legislation does not mention the counterclaims by name. It has not shown that state courts will interpret the law in such a way that the counterclaims will actually affect the Permanent Fund dividends. State courts might, for example, rule that any recovery on the counterclaims will simply reduce the State's recovery on other claims, such as the settled oil claims. We cannot tell, based on the record, whether state courts will interpret state law so as to eliminate the counterclaims' potential impact on Permanent Fund dividends. Nor can we determine whether any of Exxon's counterclaims have merit: The State argues that, on some claims, Exxon has paid no royalties, and thus cannot counterclaim for overpayment of royalties. Such issues require further factual development.

Exxon's arguments about jurors' subjective perceptions of [\*16] the Fund or lack of understanding of the curative legislation do not apply to ongoing discovery and will have no impact unless and until the case goes before a jury. Exxon concedes that Alaska judges will understand the curative legislation, and will not be confused about the litigation's capacity to increase their dividends. Moreover, as the State emphasizes, any "subjective" juror bias might be addressed by a properly conducted voir dire. *Los Angeles Memorial Coliseum Comm'n v. NFL*,

32 F.3d 1399, \*1404, 1994 U.S. App. LEXIS 21908, \*\*16;  
94 Cal. Daily Op. Service 6273; 94 Daily Journal DAR 11467

726 F.2d 1381, 1400 (9th Cir.), cert. denied, 469 U.S. 990 (1984).

Exxon has not shown that withholding review will cause it substantial hardship. *Abbott Lab.*, 387 U.S. at 148. Extensive discovery must occur before the case is ready for trial. Exxon does not allege that any remaining bias problems affect Alaska judges' fitness to rule on discovery issues and does not object to Alaska judges ruling on discovery issues. In fact, Exxon emphasizes that, if necessary, the case can be removed to another forum after discovery is complete.

Because the parties have not yet developed a factual [\*\*17] record on the value of the remaining claims or their potential impact (if any) on Alaska Permanent Fund dividends, we cannot evaluate Exxon's bias claims on

their merits. Exxon does not object to state judges presiding over discovery, and many of its arguments pertain to jurors, not judges. This case may never go to a jury, and, if it does, the State may be able to remedy any problems of subjective juror bias with a properly conducted voir dire. Thus, the case is not ripe for review.

We express no opinion on the merits of the parties' arguments regarding abstention and [\*1405] the Rule of Necessity. The district court order dismissing Exxon's complaint with prejudice is VACATED, and the case is REMANDED to the district court to dismiss without prejudice.

VACATED and REMANDED, neither party to recover costs on appeal.

# LEGAL SERVICES

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## MEMORANDUM

February 16, 2006

**SUBJECT:** No disqualification of judges and jurors when no other juror is available (Work Order No. 24-LS1711A)

**TO:** Representative Lesil McGuire,  
Chair of the House Judiciary Committee  
Attn: Shalon

**FROM:** Dennis C. Bailey *DCB*  
Legislative Counsel

This memo accompanies a draft House Judiciary Committee Bill related to disqualification of judges or jurors when no other judge or juror is available. Please note the following.

The phrase "personal interest in the matter" in both sections of the bill is not defined and may create future difficulties.

### **Disqualification of jurors**

Civil Rule 47 uses the term "for cause" and extensively defines the grounds for a challenge for cause. I suggest that in AS 09.20.020 proposed by the bill, "for cause" replace "because of a personal interest in the matter at issue" or that the boundaries of that phrase be defined.

### **Disqualification of judges**

AS 22.20.022 creates a substantive right of preemptory disqualification of judges; Civil Rule 42(c) controls the procedure and scope of such disqualification. *Staso v. State, Dept. of Transportation*, 895 P.2d 988, 990 (Alaska 1995).

AS 22.20.020 addresses disqualification of judicial officers for cause. Civil Rule 42(c)(10) allows a presiding judge to allow an additional change of judge to a party whose interests in the action are hostile or adverse to the interests of another party on the same side. You may wish to consider eliminating the reference to "personal interest in the matter" at issue and just use the existing phrase, may not be disqualified, if no other judge is available. Alternatively, a definition of the boundaries of "personal interest in the matter" is advisable.

A judicial rule of necessity was applied with approval by the Alaska Supreme Court in *Hudson v. Johnstone*, 660 P.2d 1180, 1183 (Alaska 1983). The court noted that:

Representative Lesil McGuire  
February 16, 2006  
Page 2

... [T]he law recognizes that it may become necessary for a court to render a decision notwithstanding that the court has a financial interest in the matter. Under the rule of necessity, "a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case." To hold otherwise "would result in a denial of a litigant's constitutional right to have a question properly presented to such court, adjudicated." The rule of necessity is applied in cases where "to disqualify one would disqualify all ...."

*Id* (cites omitted), see also *In re Discipline of McKay*, 416 P.2d 823, 838 n. 18. (Alaska 1964). Since the judicial rule addresses the issue, particularly with regard to judges, it may not be necessary to pass sec. 2 of the bill.

Creation of a statutory rule of necessity demonstrates the tension between the need to adjudicate a case when there may not be a judge available with the principal of having a fair and unbiased judge. Any party might call foul if a judge were allowed to hear a case under the necessity rule even though the judge is clearly biased. Depending on the case or the degree of the bias, assigning an otherwise disqualified judge, may be constitutionally challenged as a due process violation of fundamental fairness under Article I, Section 7, of the Alaska Constitution.

It may be advisable to define when a judge is "available." Geographically, the pending bill says that the rule applies if no judge is available in any court in the state, but no other parameters defining availability are included. Currently, if a judge is disqualified, the presiding judge in each judicial district makes judicial assignments of new judges. If all the judges in a judicial district are disqualified, the Chief Justice makes the assignment. Rule 42(c)(5), Alaska Rules of Civil Procedure. Presumably these judges are making a discretionary determination of whether a judge is available.

If I may be of further assistance, please advise.

DCB:med  
06-133.med

Enclosure

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB486-Courts-2-21-06  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title Disqualifying Judges/Jurors From Cases RDU Alaska Court System  
 Component Trial Courts  
 Sponsor House Judiciary Committee  
 Requester \_\_\_\_\_ Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

The court system does not anticipate any fiscal impact from the passage of HB 486.

Prepared by: Doug Wooliver, Administrative Attorney Phone 463-4750  
 Division: Alaska Court System Date/Time 2-21-06 @ 1:40 pm  
 Approved by: Doug Wooliver for Stephanie Cole, Administrative Director Date 2/21/2006  
 Agency: Alaska Court System