

ALASKA LEGISLATURE

1734

HOUSE and SENATE FINANCE COMMITTEE FILES, 1997-1998

how closely districts come to meeting that goal. There are two basic forms of compactness requirements, apart from the informal eyeball reaction that people have to what they see. The first is area based and the second is population based.

An area-based measure is concerned only with the shape of a district (Young, 1988). There are a number of ways of defining such a criterion. Certain irregular shapes will pass the compactness test if one kind of measure is used but fail if another is used instead, and vice versa. For instance, a common form of an area compactness criterion is a perimeter test. One such test is to draw two concentric circles, the first wholly containing every part of a district and the second wholly contained within the district; a reasonably compact district is one in which the area of the second circle is at least 50 percent that of the first. Figure 3.7a shows a rectangular shaped

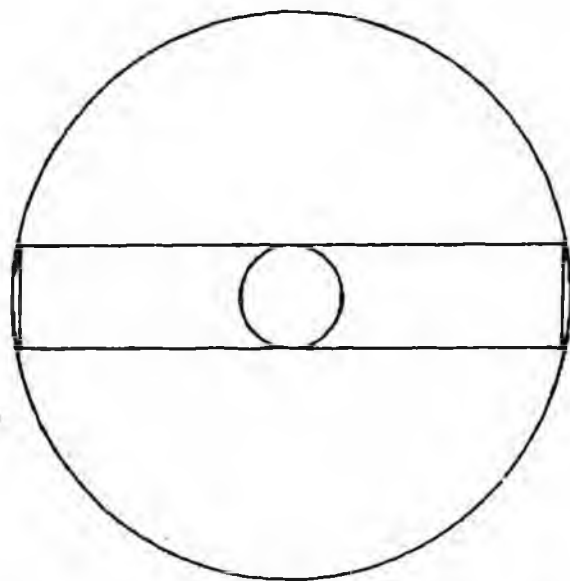


Figure 3.7a Rectangle fails perimeter/area-based compactness.

district that fails this test. However, Figure 3.7b shows a district with a number of dips and jagged edges that passes the concentric circles test and yet would seem intuitively to be noncompact. A smallest square criterion, by comparison, does a better job of catching jagged edges, but not smooth, rectangular forms.

Another less frequently employed compactness measure is population based. The intuition behind this is that compactness is important only where there are people: Oddly shaped lines that are caused by natural features (e.g., the contours of the coast or a mountain range) should not be judged in the same way as oddly shaped lines in populated areas. One procedure is to specify that the ratio of the population inside a district to the population inside a polygon just enclosing the whole district should be above a certain level. Unfortunately, a by-product of using such a measure is that it establishes a double standard of compactness for urban versus rural areas. Areas that are densely and uniformly populated face a more

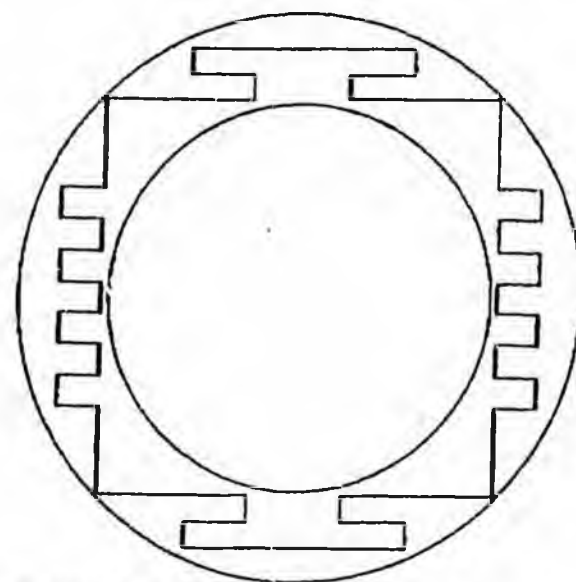


Figure 3.7b The jagged form passes.

Butler & Cain

stringent compactness requirement in effect than unevenly settled and less populated areas. Since groups that are protected under the Voting Rights Act tend to live in the urban areas, a criterion that restricts options to give fuller representation to their communities might well be challenged in court.

Conclusion

The technical aspects of redistricting are made necessary by the quantitative nature of the task and the immense volume of data that is needed to assess the racial and political effects of various proposals. However, the technical appearance of redistricting is somewhat deceptive. Redistricting choices are about more than mere numbers and shapes — they concern political power, fairness, and values of representation. Problems with reconciling these often conflicting values and choices are what we shall consider next.

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199 Md. 458

In the Matter of the LEGISLATIVE DISTRICTING OF the STATE.

Misc. Nos. 2-11, Sept. Term, 1982.

Court of Appeals of Maryland.

June 4, 1983.

Opinion May 29, 1984.

On petitions filed with the court, and following hearings before special master, the Court of Appeals, Murphy, C.J., held that no violation of any state or federal constitutional provision was shown in the Maryland legislative districting plan.

Plan declared to comply with all provisions of State and Federal Constitutions, and affirmed as enacted.

1. Constitutional Law § 226.3(3)

It was necessary that Maryland's legislative districting and apportionment plan comply not only with State Constitution but also with federal constitutional constraints imposed by equal protection clause of the Fourteenth Amendment and with the Fifteenth Amendment. Const. Art. 3, §§ 2-5, U.S.C.A. Const. Amends. 14, 15.

2. Constitutional Law § 226.3(4)

Cardinal principle that equal protection clause of Fourteenth Amendment requires that seats in both houses of bicameral state legislature be apportioned on substantially equal population basis is the sine qua non of fair representation, assuring that vote of any citizen is approximately equal in weight to that of any other citizen in the state. U.S.C.A. Const. Amend. 14.

3. Constitutional Law § 226.3(8)

State legislative districts may be substantially equal in population and still be in violation of Fourteenth Amendment because of invidious discrimination against racial or ethnic minorities in apportionment process, but it is basic principle of federal constitutional law that only if discrimination is purposeful can there be violation of

equal protection clause. U.S.C.A. Const. Amend. 14.

4. Constitutional Law § 226.3(6)

Claim of unconstitutional dilution of racial or ethnic voting strength requires proof that challenged plan has intentionally discriminatory effect, and it is not enough to show that those allegedly discriminated against did not obtain legislative representation in proportion to their numbers, and racially discriminatory motivation is also necessary ingredient of Fifteenth Amendment violation. U.S.C.A. Const. Amends. 14, 15.

5. Constitutional Law § 226.3(8)

Multi-member legislative district is not per se unconstitutional under equal protection clause but may violate Fourteenth Amendment if purpose is invidiously to minimize or cancel voting potential of racial or ethnic minorities, and proof of such illegal purpose must be more than mere showing that group allegedly discriminated against has not elected representatives in proportion to their numbers. U.S.C.A. Const. Amend. 14.

6. Constitutional Law § 226.3(3)

Legislative districting to minimize contests between incumbents does not establish per se invidiousness in violation of Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

7. Constitutional Law § 226.3(8)

Drawing of legislative districts in such manner as to intentionally enhance chances for election of sensible representatives does not constitute per se violation of equal protection clause, nor does intentional effort to district so as to create balance between two primary partisan political groups. U.S.C.A. Const. Amend. 14.

8. States § 27(6)

The "overriding objective" in state legislative districting is substantial equality of population among the various districts. U.S.C.A. Const. Amend. 14.

9. States § 27(3)

Contiguity requirement for legislative districting mandates that there be no division between one part of district's territory and the rest of the district, and, in other words, contiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory, but, on other hand, idea of compactness, in geometric terms, is circle, with perimeter of district equidistant from its center. Const. Art. 3, §§ 3, 4; U.S.C.A. Const. Amend. 14.

10. States § 27(3)

Contiguity and compactness are not federal constitutional requirements. U.S.C.A. Const. Amends. 14, 15.

11. States § 4

In view of supremacy clause of the Federal Constitution and Maryland Declaration of Rights provision, federal constitutional requirement of population equality in districting process is the predominant constraint on compactness provision of the Maryland Constitution. U.S.C.A. Const. Art. 8, cl. 2; Const. Declaration of Rights, Art. 2; Const. Art. 3, § 4.

12. States § 27(3)

It cannot ordinarily be determined by mere visual examination of electoral map whether compactness requirement has been violated, but in some instances involving districts of extremely irregular size or shape a glance at districting map may permit conclusion that district is not constitutionally compact. U.S.C.A. Const. Art. 8, cl. 2; Const. Declaration of Rights, Art. 2; Const. Art. 3, § 4.

13. States § 27(3)

State constitutional provision that due regard shall be given to natural boundaries and boundaries of political subdivisions is integrally related to compactness and contiguity requirements, and all involve the physical configuration of district lines. Const. Art. 3, § 4.

14. States § 27(3)

Primary intent of state constitutional requirement that due regard be given to natural boundaries and boundaries of political subdivisions in districting is to preserve those fixed and known features which enable voters to maintain orientation as to their own territorial areas, and such requirement is of mandatory application. Const. Art. 3, § 4.

15. States § 27(3)

Goal underlying enactment of legislative districting plan of having no deviation from ideal population greater than 10 percent was plainly achieved, and districts were therefore well within permissible limits for state legislative districts permitted by judicial precedent, as found by special master. Const. Art. 3, §§ 2-5, U.S.C.A. Const. Amends. 14, 15.

16. States § 27(5)

Notwithstanding disparity between certain subdistricts, legislative districting plan represented honest and good-faith effort to construct districts as nearly of equal population as was practicable under circumstances. Const. Art. 3, §§ 2-5, U.S.C.A. Const. Amends. 14, 15.

17. States § 27(10)

Petitioners failed to carry strong burden imposed upon them under cited cases to support their claims of invidious discrimination in legislative districting plan. Const. Art. 3, §§ 2-5; U.S.C.A. Const. Amends. 14, 15.

18. States § 27(2)

Residents of two municipalities had no right, constitutional or otherwise, to placement in different districts in order that their voting strength might be maximized at expense of other voters within the county. Const. Art. 3, §§ 2-5; U.S.C.A. Const. Amends. 14, 15.

19. States § 27(4)

Construction of certain districts in legislative districting plan had rational purpose, and record showed no indication that division of residents within unincorporated

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(Case No. 775 A. Md. Cir. (Md. 1982))

town of Columbia was hideously calculated to dilute their voting strength. Const. Art. 3, §§ 2-5; U.S.C.A. Const. Amends. 14, 15.

20. States — 27(3)

Politically fair consideration of incumbency in redistricting process does not offend Constitution, absent showing that districts were unfairly fashioned to favor or hinder either incumbents or nonincumbents. Const. Art. 3, §§ 2-5; U.S.C.A. Const. Amends. 14, 15.

21. States — 27(10)

Charge of invidious discrimination could not be sustained in absence of supporting evidence that political processes leading to election were not equally open to those challenging the districting plan on constitutional grounds. Const. Art. 3, §§ 2-5; U.S.C.A. Const. Amends. 14, 15.

22. States — 27(3)

Mathematical formulation for determining whether particular election district is unconstitutionally noncompact was not within contemplation of constitutional framers when they proposed adoption of state constitutional provision requiring that legislative districts consist of adjoining territory, be compact in form and of substantially equal population and that due regard be given to natural boundaries and boundaries of political subdivisions. Const. Art. 3, §§ 3, 4.

23. States — 27(3)

Compactness requirement in State Constitution is intended to prevent political gerrymandering, and therefore oddly shaped or irregularly sized districts of themselves do not ordinarily constitute evidence of gerrymandering and noncompactness, but, rather, affirmative showing is ordinarily required to show that such districts were intentionally so drawn as to produce unfair political results by diluting or enhancing voting strength of discrete groups for partisan political advantage or other impermissible purposes. Const. Art. 3, § 4.

24. States — 27(3)

Requirement of compactness of legislative districts is a requirement for close union of territory, conducive to constituent-representative communication, rather than requirement independent upon district being of any particular shape or size, although in determining whether there has been compliance with the mandatory compactness requirement, due consideration must be afforded to "mix" of constitutional and other factors making some degree of noncompactness unavoidable, i.e., concentration of people, geographic features, convenience of access, means of communication and the several competing constitutional mandates. Const. Art. 3, §§ 2-5; U.S.C.A. Const. Amends. 14, 15.

25. States — 27(10)

As to compliance with compactness requirement, as with compliance with other constitutional criteria, legislative redistricting plan enjoy presumption of validity. Const. Art. 3, §§ 2-5; U.S.C.A. Const. Amends. 14, 15.

26. States — 27(3)

Montgomery county districts, including district 17, as provided for in legislative districting plan, were in compliance with compactness requirement of the State Constitution. Const. Art. 3, § 4.

27. States — 27(2)

Petitioners showed no violation of compactness requirement in any of Baltimore City's districts as provided for by legislative districting plan. Const. Art. 3, § 4.

28. States — 27(3)

Compactness requirement was not ignored in constructing election district, in legislative districting plan, in view of fact that size and shape of district resulted from generally low density of population as well as its irregular and elongated geographical configuration. Const. Art. 3, § 4.

29. States — 27(3)

The "due regard" constitutional provision which seeks to preserve well-recog-

nized boundary lines to aid voters in orienting themselves to territory of their districts does not encompass protection for concept as nebulous and unworkable as "communities of interest," involving as it does concentrations of people sharing common interests. Const. Art. 3, § 4.

30. States — 27(1)

Record showing that numerous public hearings were conducted by governor's advisory committee throughout the state as well as fact that two hearings were personally conducted by the governor to receive comment on recommended legislative districting plan before its final adoption refuted contention that public hearing requirement of State Constitution was violated. Const. Art. 3, § 5.

C. Lawrence Wiser, petitioner, Kensington, in pro. per.

Stanley D. Abrams, Chevy Chase, for Druse A. Goldenson and amici curiae, City of Gaithersburg.

Roger W. Titus, Sp. Counsel, Rockville, for amici curiae, Mayor and Council of Rockville.

W. Shepherdson Abell and Marianne K. Resjlian, Chevy Chase, for amici curiae, Montgomery County Legislative Delegation.

Reed K. McGaffrey, Baltimore, for Carlisle L. Collins et al., petitioners.

Robert B. Ostrom, County Atty., Upper Marlboro, for amici curiae, Prince George's County.

Richard L. Andrews, petitioner, Baltimore, in pro. per.

Charles K. Graham, petitioner, Baltimore, in pro. per.

M. Albert Figinaki, Baltimore, for amici curiae, Gerald J. Curran.

Frank G. Libinsky, Baltimore, for Joseph T. Landers, III, et al., petitioners.

Thomas W. Chamberlain and Michael H. Weir, Baltimore, for amici curiae, themselves.

Linda H. Lamone, Diana G. Metz, Mary N. Humphries, James L. Shea and Robert A. Zernoch, Asst. Atty. Gen., Baltimore, for the State.

Argued before MURPHY, C.J., and SMITH, ELDRIDGE, COLE, DAVIDSON, RODOWSKY and COUCH, JJ.

PER CURIAM ORDER

WHEREAS, petitions were filed by various registered voters of the State with this Court as authorized by Section 5 of Article III of the Constitution of Maryland challenging the constitutionality of the 1982 Legislative Districting Plan which was approved and became law on February 26, 1982; and

WHEREAS, this Court appointed a Special Master to schedule hearings and to submit his findings of fact and conclusions of law to the Court; and

WHEREAS, this Court has considered the findings and conclusions of the Special Master, the exceptions filed thereto and the oral arguments of the parties and amici curiae presented in support of their respective positions; now, therefore, it is this 4th day of June, 1982

ORDERED, by the Court of Appeals of Maryland, a majority of the Court concurring, that for reasons to be set forth in an opinion later to be filed, the petitions challenging the 1982 Legislative Districting Plan (House Joint Resolution No. 32) having failed to establish any violations of the federal constitution or the Constitution of Maryland, the exceptions to the Special Master's report taken by the State and they are hereby, sustained and all other exceptions are hereby overruled, and the legislative districts of the State shall be as established in and by House Joint Resolution No. 32; and it is further

ORDERED, that pursuant to the provisions of Section 5 of Article III of the Constitution of Maryland, the provisions of Section 9 of Article III of the Constitution shall govern the age, citizenship and residency requirements for election of Sena-

(The No. 433 A-24 430 (1962, 1963))

tion and Delegates to the General Assembly of Maryland except that for the primary and general elections of 1982, only, any person seeking election as a Senator or Delegate must have resided in the district which he or she seeks to represent not later than July 11, 1982.

MURPHY, Chief Judge.

This case involves a number of challenges to the constitutionality of Maryland's Legislative Districting and Apportionment Plan (the Plan), as enacted by House Joint Resolution No. 32 (H.J.R. 32) at the 1982 session of the General Assembly.

§

[1] Under the Constitution of Maryland, Article III, § 5, the Governor is required, after each federal decennial census, and after public hearings, to prepare a Plan setting forth the boundaries of the legislative districts for electing members of the Senate and House of Delegates. The Plan is required to conform to the dictates of §§ 2, 3 and 4 of Art. III of the Maryland Constitution, which respectively provide:

Section 2: "The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates."

Section 3: "The State shall be divided by law into legislative districts for the election of members of the Senate and House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of

electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-member delegate district and one (1) multimember delegate district."

Section 4: "Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions."

The Plan is also required to comply with federal constitutional constraints imposed by the equal protection clause of the fourth amendment, see *Reynolds v. Sims*, 377 U.S. 633, 84 S.Ct. 1362, 12 L.Ed.2d 601 (1964),¹ and with the fifteenth amendment, see *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 6 L.Ed.2d 110 (1960).²

Following completion of the 1980 federal census, Governor Harry Hughes, on April 13, 1981, appointed a five member Advisory Committee on Reapportionment and Redistricting to assist him in developing a new legislative districting and apportionment plan.³ The Committee conducted numerous public hearings throughout the State and submitted its recommendations to the Governor on December 8, 1981. Two public hearings were held by the Governor later that month to permit comment on the recommended plan. The Governor thereafter made several changes in the Committee's proposal, and submitted the Plan to the General Assembly on January 13, 1982; it was introduced as H.J.R. 32 and after legislative hearings were conducted, the resolution was approved by the General Assembly and became law on February 26,

1. The equal protection clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

2. The fifteenth amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

3. The Committee was chaired by William S. James, State Treasurer, and included then Senate President James Clark, Jr., Speaker of the House Benjamin I. Cardin, Dr. C. Vernon Gray, a Democrat from Howard County and a professor at Morgan State University, and Barbara Feuerhoff, a Republican from Washington County and a member of the League of Women Voters.

1982 pursuant to Art. III, § 5 of the Maryland Constitution.⁴

Under the provisions of Art. III, § 5 of the State Constitution, the Court of Appeals of Maryland is vested with original jurisdiction, upon petition filed by any registered voter, "to review the legislative districting of the State and [to] grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland." A petition challenging H.J.R. 32 was filed on March 2, 1982, by Montgomery County registered voter and former State Senator, C. Lawrence Wiser, thereby invoking our original jurisdiction. Recognizing the likelihood of additional challenges, and the need for a Special Master to conduct hearings and submit findings of fact and conclusions of law to the Court, we designated the Honorable W. Albert Menckins, a retired Associate Judge of the Court of Special Appeals, to act in that capacity. By order dated March 5, 1982, we directed that any registered voter who claimed that the 1982 Legislative Districting Plan, or any part thereof, was invalid should "intervene in these proceedings by petition filed . . . [by] March 31, 1982 setting forth his objection to said plan and containing the particular part or parts of the plan claimed to be unconstitutional and the factual and legal basis for such claims, and the particular relief sought, including any alternative district configurations suggested or requested by the petitioner."

Ten petitions in all were filed in opposition to H.J.R. 32. The Wiser petition, Misc. No. 2, was consolidated with Misc. No. 6, which was brought by Bruce Goldensohn, Mayor of Gaithersburg, since both petitions challenged the districting of Montgomery County, i.e., Districts 14-20, inclusive. It was alleged that several of these districts

violated the state constitutional requirement of compactness (District 17 being designated as the chief offender). Other principal claims were that H.J.R. 32, as it divided Montgomery County, (1) disregarded "communities of interest," in violation of the state constitutional requirement of due regard for natural boundaries and political subdivisions; (2) that it violated the equal protection clause by improperly treating incumbent candidates, 89 of whom, lived in the southern portion of Montgomery County; and (3) that it violated the equal protection clause by diluting the voting strength of residents of the incorporated municipalities of Gaithersburg and Rockville by including both cities in District 11.⁵ Both petitions provided alternative districting configurations.

Miscellaneous No. 3, brought by Carville S. Collins, et al., challenged H.J.R. 32 because of the way in which Howard County was divided. The principal charges were that the Plan (1) violated the requirement of due regard for natural boundaries and the boundaries of political subdivisions by dividing Columbia, a large unincorporated residential business area of the county in half and by crossing county lines with House of Delegates Subdistricts 4B, 13B and 14B, and (2) that the voting strength of blacks in western Columbia was invidiously diluted, in violation of the equal protection clause.

Miscellaneous No. 4, brought by Richard L. Andrews, was consolidated with two other challenges involving the districting of Baltimore City, Misc. No. 8 (filed by Vernon L. Morris, et al., and Misc. No. 9, by Joseph T. Landers, III, et al. Taken together, these petitions alleged (1) that Districts 4E and 4F were unconstitutionally noncompact; (2) that the use of three-member at-large delegate districts invidiously diluted the voting strength of blacks, in

4. Three maps delineating the approved legislative districts are set forth in Appendix A to this opinion.

5. Amicus Curiae briefs were submitted by the Mayor and Council of Rockville and the City of

Gaithersburg, primarily contending that the legislative districts in Montgomery County were not compact in form as required by § 4 of Article III of the Maryland Constitution.

violation of the equal protection clauses of the federal and state constitutions; (3) that district lines were intentionally drawn to divide Republicans among several districts, diluting their voting strength in violation of the equal protection clause; (4) that the boundary between Districts 47 and 48 did not give due regard to the natural boundary of Frederick Avenue; (5) that the inclusion of the predominantly black Morgan State University community in District 43, which is predominantly white, rather than in District 41, which is racially balanced, invidiously diluted black voting strength and divided a black "community of interest," in violation of the equal protection clause; and (6) that the lines between Districts 43 and 41 failed to give due regard to natural boundaries.

Miscellaneous No. 6, brought by William Rush, related principally to the districting of Baltimore County. It was the petitioner's claim that Districts 8 through 9, and particularly District 8, failed to abide by the constitutional requirements of compactness and due regard for natural boundaries or the boundaries of political subdivisions. The petitioner also asserted that H.J.R. 32, as a whole, did not provide for apportionment of substantially equal population, and that the Plan's enactment was not preceded by public hearings adequate to satisfy state constitutional requirements. An alternative configuration for districting Baltimore County was submitted with this petition.

Miscellaneous No. 7, brought by Sarah Boyd and George M. Nutwell, challenged the manner in which H.J.R. 32 districted the counties in Southern Maryland. It was contended (1) that Southern Anne Arundel County was severed from the northern portion of the county and combined with all of Calvert and part of St. Mary's County, in Senatorial District 29, without due regard for natural boundaries and the boundaries of political subdivisions; (2) that District 29 was unconstitutionally noncompact; (3) that the creation of two House single-member districts, 29H and 29C, rather than one

two-member delegate district, resulted in population inequalities violative of the equal protection clause, and the state constitutional requirement of apportionment in substantially equal numbers; and (4) that the division of Anne Arundel, Calvert, Charles and St. Mary's Counties, in creation of Districts 28 and 29 and their respective subdistricts, violated requirements of compactness and due regard for natural boundaries and the boundaries of political subdivisions. The petitioners offered an alternative districting configuration which, *inter alia*, combined Calvert and St. Mary's Counties into a single district, and reunited southern Anne Arundel County with the rest of that county's territory.

Miscellaneous No. 10, filed by Thomas R. Falcinelli, challenged H.J.R. 32 in its entirety. Two issues were raised, namely, (1) that the use of multi-member House delegate districts violated the equal protection clause, and (2) that the hearings held before the Advisory Committee were insufficient to satisfy the constitutional requirement of public hearings precedent to the preparation of the Governor's plan.

Miscellaneous No. 11, brought by Victor H. Laws, et al. (all members of the Wicomico County Council), challenged the districting of the southern Eastern Shore. Their claims were that the lines between Districts 37 and 38 failed to give due regard to natural boundaries and the boundaries of political subdivisions, and divided constitutionally protected communities of interest in and around the municipality of Salisbury; and that the division of the black community of interest located around Salisbury was invidious and violative of the equal protection clause. These petitioners sought a single district comprising solely of Wicomico and Worcester Counties, and the combining of all of Somerset and Dorchester Counties with parts of Talbot and Caroline Counties.

Pursuant to our order of March 6, 1962, the State filed timely answers to the petitions, evidence was taken by the Special Master on April 14, 1962, and he heard oral

arguments on April 28, 1963. The Special Master, in a detailed and thorough report to the Court, found no merit in any of the petitions except Misc. No. 9, as to which he concluded that Baltimore City District 44 violated the compactness requirement of § 4 of Art. III of the Maryland Constitution. In his report, the Master proposed alterations to Districts 43 and 44 which he believed would remedy the asserted constitutional defect in District 44.

Exceptions were taken both by the State and the petitioners to the Special Master's report, as to which we heard oral argument on June 1, 1962. By per curiam order dated June 4, 1962, a majority of the Court concurring, we concluded for reasons to be set forth in an opinion later to be filed, that none of the petitions established any violations of the state or federal constitutions. We therefore sustained the State's exceptions to the Special Master's report and overruled all other exceptions. Accordingly, we concluded in the per curiam order that "the legislative districts of the State shall be as established in and by Joint House Resolution No. 32." We now give our reasons for so holding.

II

A brief review of fundamental state and federal constitutional principles governing the legislative districting and apportionment process is prerequisite to a proper understanding of our disposition of the various contentions raised by the parties.

[2-4] The equal protection clause of the fourteenth amendment requires that the seats in both houses of a bicameral state legislature be apportioned on a substantially equal population basis; this cardinal principle is the sine qua non of fair representation, assuring that the vote of any citizen is approximately equal in weight to that of any other citizen in the State. *Reynolds v. Sims*, 377 U.S. 633, 84 S.Ct. 1082, 12 L.Ed.2d 648 (1964); *Maryland Committee for Fair Representation v.*

Tauva, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 696 (1964). Of course, state legislative districts may be substantially equal in population and still be in violation of the fourteenth amendment because of invidious discrimination against racial or ethnic minorities in the apportionment process. *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Waltcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1866, 29 L.Ed.2d 343 (1971). It is, however, a basic principle of federal constitutional law that only if the discrimination is purposeful can there be a violation of the equal protection clause. *Mobley v. Bolden*, 446 U.S. 65, 100 S.Ct. 1460, 64 L.Ed.2d 47 (1980); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 397 (1975); *Hornbeck v. Somerset Co. Bd. of Educ.*, 293 Md. 507, 456 A.2d 758 (1983). Thus, a claim of unconstitutional dilution of racial or ethnic voting strength requires proof that the challenged plan has an intentionally discriminatory effect; it is not enough to show that those allegedly discriminated against have not obtained legislative representation in proportion to their numbers. *Mobley v. Bolden*, *supra*; *White v. Regester*, *supra*. In other words, it must be shown that the districting plan was conceived or operated as a purposeful device to further racial or ethnic discrimination. *Mobley v. Bolden*, *supra*; *Waltcomb v. Chavis*, *supra*.

[5-7] A multi-member legislative district is not per se unconstitutional under the equal protection clause. *Burns v. Richardson*, 384 U.S. 73, 85 S.Ct. 1288, 16 L.Ed.2d 376 (1966); *Porton v. Dorsey*, 379 U.S. 403, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). However, such legislative apportionments may violate the fourteenth amendment if their purpose were invidiously to minimize or cancel the voting potential of racial or ethnic minorities. *Mobley v. Bolden*, *supra*; *White v. Weiner*, 412 U.S. 763, 93 S.Ct. 2348, 37 L.Ed.2d 336 (1973);

6. A racially discriminatory motivation is also a necessary ingredient of a Fourteenth Amendment

violation. *McMillen v. Meacham*, 466 U.S. 48, 100 S.Ct. 2147.

White v. Regeater, supra. To prove such an illegal purpose requires more than a mere showing that the group allegedly discriminated against has not elected representatives in proportion to their numbers. *Mobile v. Bolden, supra*, 404 U.S. at 65, 100 S.Ct. at 1199. Nor does legislative districting to minimize contests between incumbents establish per se involuntariness in violation of the fourteenth amendment. *White v. Miller, supra; Coffney v. Cummings*, 412 U.S. 736, 93 N.Ct. 2321, 37 L.Ed.2d 295 (1973); *Davenport v. Appointments Comm'n*, 66 N.J. 126, 319 A.2d 714 (1974). Neither does the drawing of legislative districts in such a manner as to intentionally enhance the chances for election of nonwhite representatives constitute a per se violation of the equal protection clause. *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 956, 51 L.Ed.2d 220 (1977). Similarly, an intentional effort to district so as to create a balance between two primary partisan political parties does not violate the fourteenth amendment. *Coffney v. Cummings, supra*.

(8) While the "overriding objective" in state legislative districting is substantial equality of population among the various districts, *Reynolds v. Sims, supra*, 377 U.S. at 579, 81 S.Ct. at 1300, the Supreme Court recognized in that case that other valid considerations, which do not significantly impair equality of apportionment, may be taken into account in the districting and apportionment of state legislative bodies. It said:

7. Prior to 1970, the Maryland Constitution did not contain any provision in compliance with federal constitutional requirements for reapportionment of the state legislature. Section 301 of the 1968 draft Constitution of Maryland, proposed for adoption by the Maryland Constitutional Convention of 1967, provided in pertinent part that the population represented by each senator and delegate "shall be substantially equal"; and that each district "(a) shall consist of adjoining territory and be compact in form [and] (b) no regard shall be given to natural boundaries and the boundaries of political subdivisions." While the draft Constitution was rejected by the people of Maryland upon referendum held on May 16, 1968, the substantial

"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivisions or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or federal districts." *Id.* at 678-679, 81 S.Ct. at 1309 (footnotes omitted).

(9) Consistent with these principles from *Reynolds*, § 3 of Article III of the Maryland Constitution, as already observed, permits both single-member and multi-member delegate districts; and § 4 directs that legislative districts "shall consist of adjoining territory, be compact in form, . . . of substantially equal population [and] (a) no regard shall be given to natural boundaries and the boundaries of political subdivisions." Of these constitutional requirements, that which mandates that legislative districts consist of adjoining territory (i.e. contiguity) and be compact in form have in a considered by other states having similar provisions in their constitutions. These courts have held that the contiguity and compactness requirements, and particularly the latter, are intended to prevent political gerrymandering.⁹ See, e.g.,

equality of population, "adjoining territory" and "compact in form" provisions of that document were later included in a constitutional amendment proposed by ch. 783 of the Acts of 1969 and ratified by the people on November 3, 1970. By ch. 263 of the Acts of 1972, ratified on November 7, 1972, the Constitution was again amended to include the provision, first included in the 1968 draft Constitution, that "no regard shall be given to natural boundaries and the boundaries of political subdivisions."

8. The word "gerrymander" was given birth in 1812 following a cartoonist's drawing of a Massachusetts legislative district that he described as appearing like a "salamander." An author

Chas. at 234 400 (1962)

Schrage v. State Board of Elections, 85 Ill.2d 87, 68 Ill.Dec. 461, 430 N.E.2d 683 (1981); *Prinster v. Doberty*, 385 Mo. 640, 284 S.W.2d 427 (1955); *Schneider v. Kocherfellow*, 31 N.Y.2d 420, 340 N.Y.S.2d 859, 293 N.E.2d 67 (1972); *Opinion to the Governor*, 101 R.I. 203, 221 A.2d 799 (1966). The contiguity requirement mandates that there be no division between one part of a district's territory and the rest of the district; in other words, contiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory. See, e.g. *Schneider, supra; In re Sherrill*, 108 N.Y. 185, 81 N.E. 124 (1907). On the other hand, the ideal of compactness, in geometric terms, is a circle, with the perimeter of a district equidistant from its center. See, e.g., *Schwartzberg, Reapportionment, Gerrymandering and the Notion of "Compactness"*, 40 Minn.L.Rev. 643 (1954); *Reuch, Measuring Compactness as a Requirement of Legislative Apportionment*, 6 Midwest J.Pol.Sci. 70 (1961). With the possible exception of Colorado, however (see *Acker v. Love*, 178 Colo. 175, 196 P.2d 76 (1972)), no jurisdiction has defined or applied the compactness requirement in geometric terms. On the contrary, most jurisdictions have concluded that the constitutional compactness requirement, in a state legislative redistricting context, is a relative rather than an absolute standard.

(10) *People v. Thompson*, 156 Ill. 451, 40 N.E. 307, decided in 1886, was the first case to discuss compactness authoritatively under a state constitutional provision requiring contiguous and compact districts apportioned on a population basis.¹⁰ The court there eschewed adopting a standard dictionary definition of the word "compact" as meaning "dense," "pressed together,"

observes suggested that the district might more properly be described as a "gerrymander" after then Governor of Massachusetts Elbridge Gerry who had a role, albeit a minor one, in the construction of the district. See *Handy, Classifying the Gerrymander*, 4 Pepperdine L.Rev. 243, 259 (1977).

or "close, near to a common center," 40 N.E. at 316. It recognized that the most compact district territorially would be a circular plane, every point on the boundary of which would be equidistant from the center; and that the next most compact district would be a square. *Id.* The court held, however, that "anything like close approximation to perfect compactness of territory, in the sense of equal distances of its points to a common center, could not have been meant." *Id.* After noting that the compactness provision, in application, was effected and influenced by the requirement of equality in population among the various districts, the court concluded that, as used in the Illinois Constitution, the term "compact" meant "closely united, territoriality." *Id.* Later Illinois cases have adhered closely to the principles of *Thompson*. See *Schrage v. State Board of Elections*, 85 Ill.2d 87, 68 Ill.Dec. 451, 430 N.E.2d 683 (1981); *People ex rel. Scott v. Grivetti*, 60 Ill.2d 164, 277 N.E.2d 881 (1972); *People ex rel. Heffernan v. Carlock*, 190 Ill. 180, 45 N.E. 109 (1907). While other cases are generally in accord with *Thompson*, some have expanded or enlarged upon its rationale. In *Opinion to the Governor*, 101 R.I. 203, 221 A.2d 799 (1966), the court said that the term "compact" has no precise or exact meaning within the context of that state's constitutional provision requiring that legislative districts be "as compact in territory as possible." Instead, the court held that the term had reference to a principle, rather than to a definition, and had meaning "only within an appropriate factual context." 221 A.2d at 802. Referring to Rhode Island's irregular boundaries, its bays, inlets, islands, rivers, lakes and other geographical features, and to the overriding requirement that districts be comprised of substantially

9. Equal apportionment, contiguity and compactness have been referred to as the triad of equitable representation. *Hacker, Congressional Districting*, Brookings Institution, 49 (1964). Contiguity and compactness are not, however, federal constitutional requirements. See *Coffney v. Cummings, supra*.

equal population, the court said that the compactness requirement did not mean that the state had to be divided into districts comprised of circular planes or squares. *Id.* The compactness requirement, the court explained, is an anti-gerrymandering safeguard to provide the electorate with effective representation, rather than with a design to establish an orderly and symmetrical pattern of electoral districts; it was proper, therefore, to consider natural, historical and geographical boundaries, as well as political lines, in drawing districts so long as the purpose was not to achieve a political gerrymander prohibited by the compactness provision. *Id.*

Virtually the same views were expressed in *Schwartz v. Rochester*, 31 N.Y.2d 420, 340 N.Y.S.2d 849, 293 N.E.2d 67 (1972). Within the context of New York's constitutional provision that districts be compact in form, the court said that the requirement was a "practical" one, without a precise meaning. 340 N.Y.S.2d at 896, 293 N.E.2d at 72. The compactness requirement, the court said, must be interpreted and applied so as to accommodate the overriding goal of equality of population among the various districts; and it did not violate the constitutional compactness mandate to take account of existing political subdivision lines, topography, the irregularity of state and municipal boundaries, means of transportation and lines of communication. *Id.*¹⁰

Commonwealth ex rel. Spetler v. Levin, 448 Pa. 1, 283 A.2d 16 (1972), in interpreting Pennsylvania's constitutional compactness requirement, concluded "that there is a certain degree of unavoidable noncom-

pliance in any apportionment scheme." 293 A.2d at 23. The court recognized that the paramount objective of achieving substantial equality of population, the unevenness of population densities within the state, and efforts to maintain the integrity of boundaries of political subdivisions, ordinarily result in the drawing of districts that are not models of geometric compactness. An odd shaped district is not, therefore, necessarily a reliable sign of a political gerrymander, the court said; rather, the compactness of legislative districts must be evaluated objectively and with allowance for the elements of unavoidable noncompactness for reasons similar to those outlined in *Opinion to Gov. and Schwesler*, *supra*.¹¹

Preisler v. Kirkpatrick, 608 S.W.2d 428 (Mo.1976), also recognized that a degree of unavoidable noncompactness would be present in some apportionment schemes because of uneven population densities, the need for population equality among districts, and the desire to preserve natural boundaries; and that consequently district lines might not be aesthetically pleasing models of geometric compactness. *Id.* at 426.¹² The court in *Davenport v. Apportionment Comm'n*, 66 N.J. 126, 319 A.2d 718 (1974), described compactness as an "elusive concept," one of limited utility in view of the overriding goal of substantial equality of population, and the irregularity and odd configurations of the state's boundaries and the boundaries of its political subdivisions.¹³

A more precise definition of compactness was attempted in *Acker v. Lewis*, 178 Colo. 175, 486 P.2d 76 (1972), involving a state

constitutional requirement that districts be "as compact in area as possible." The court said that, as used in the Colorado Constitution, compactness was concerned with "a geographic area whose boundaries are as nearly equilateral as possible from the geographic center of the area being considered, allowing for variances caused by population density and distribution, census enumeration districts, and reasonable variations necessitated by natural boundaries and by county lines." *Id.*, 486 P.2d at 76. In a later Colorado case, *In re Interregatories by Gen'l Assembly*, 178 Colo. 311, 497 P.2d 1024 (1972), the court held that there had been "substantial compliance" with the compactness requirement where consideration was given to the "geography of the state, population concentrations and their location, the various sizes and shapes of census enumeration districts, and the absence of census blocks in many instances, plus the various sizes and shapes of counties, all of which militate against one particular or ideal solution to the reapportionment problem." 497 P.2d at 1026.

[11, 12] The cases generally recognize that the compactness requirement is subservient, in application, to the dominant federal constitutional requirement of substantial equality of population among districts.¹⁴ See, e.g., *Schwartz*, *Davenport*, *Barrett* and *Girelli*, all *supra*. As indicated, the cases also recognize that the compactness requirement must be applied in light of, and in harmony with, the other legitimate constraints which interact with and operate upon the constitutional mandate that districts be compact in form. Thus, it cannot ordinarily be determined by a mere visual examination of an electoral map whether the compactness requirement has been violated. *Spetler*, *Richardson* and *Downing*, all *supra*, although in some in-

stances involving districts of extremely irregular size or shape a glance at the districting map may permit the conclusion that a district is not constitutionally compact. See *Schwartz*, *supra*. The cases hold that compliance with the state constitutional compactness requirement is mandatory; indeed, a number of jurisdictions have found legislative districts to be unconstitutional for failure to observe the compactness standard. See, e.g., *In re Legislative Districting of Gen'l Assembly*, 193 N.W.2d 784 (Iowa 1972); *Acker*, *Thompson*, *Barrett*, and *Preisler v. Doberty*, all *supra*. On the other hand, the cases also recognize that it is not for the judiciary to determine whether a more compact district could have been drawn; that under challenge; the court's province is solely to determine whether the principles underlying the requirement of compactness of territory have been considered and properly applied considering all relevant circumstances. See, e.g., *Schwartz*, *Davenport*, *Opinion to the Governor* and *Thompson*, all *supra*.

[13, 14] The provision of § 4 of Article III of the Maryland Constitution that "[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions" is integrally related to the compactness and contiguity requirements; all involve the physical configuration of district lines.¹⁵ The primary intent of the "due regard" provision is to preserve those fixed and known features which enable voters to maintain an orientation to their own territorial areas. Like compactness and contiguity, the "due regard" requirement is of mandatory application, although by its very verbiage it would appear to be the most fluid of the constitutional components outlined in § 4.

14. In view of the Supremacy Clause of the Federal Constitution, Article VI, and Article 2 of the Maryland Declaration of Rights, the federal constitutional requirement of population equality in the districting process is the predominant constraint on the compactness provision of § 4 of Article III of the Maryland Constitution.

15. We construed incorporated municipalities as being "political subdivisions" within the contemplation of § 4 in *In re Legislative Districting*, 279 Md. 320, 317 A.2d 677 cert. denied sub. nom. *Thibault v. Governor of Md.*, 419 U.S. 840, 95 S.Ct. 70, 42 L.Ed.2d 67 (1974).

10. Unlike New York cases we generally consider with the *Thompson* and *Schwartz* cases. See *In re Richardson*, 307 N.Y. 709, 121 N.E.2d 217 (1954); *In re Downing*, 279 N.Y. 41, 113 N.E. 545 (1940); *In re Sherrill*, 188 N.Y. 163, 81 N.E. 126 (1907).

11. A later Pennsylvania case is in accord with *Spetler*. See *In re Apportionment Plan for Penna. Gen'l Assembly*, 671 Pa. 523, 442 A.2d 661 (1981).

12. Either Missouri cases are in accord with *Thompson* and *Preisler v. Kirkpatrick*, *supra*. See, e.g., *Preisler v. Doberty*, 363 Mo. 460, 264 S.W.2d 427 (1953); *State ex rel. Davis v. Rosenblatt*, 193 S.W.2d 617 (Mo.1946); *State ex rel. Barrett v. Hancock*, 261 Mo. 473, 166 S.W. 40 (1912).

13. Either New Jersey cases are consistent with *Davenport*. See *Schwartzinger v. Schwesler*, 60 N.J. 483, 296 A.2d 134 (1972); *Archman v. Boardman*, 49 N.J. 606, 231 A.2d 193 (1967).

nation in the districting process. Indeed, a politically fair consideration of incumbency in the redistricting process does not offend the constitution, absent a showing that the districts were unfairly fashioned to favor or hinder either incumbents or nonincumbents. It is incongruous in our view to profess the virtues of constituent-representative communication while at the same time endorsing the practice of permitting the voters to decide whether an incumbent is to continue as an elected representative. See *Harris v. Richardson*, *supra*, 384 U.S. 569 n. 10, 86 S.Ct. at 1296 n. 10. See also *White v. Weiser*, 412 U.S. 783, 91 S.Ct. 2143, 37 L.Ed.2d 335 (1972); *Quinn v. Cammings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973).

(21) Those petitions which claimed dilution of voting strength of blacks or minority political groups in Howard County, Baltimore City and in the southern Eastern Shore Counties are wholly unsubstantiated by evidence. Indeed, there is nothing in the record to show a discriminatory effect by reason of any of the challenged districting or, if there was such an effect, that it was intended to be invidiously discriminatory. As already observed, the controlling Supreme Court cases make it clear that a claim of invidious discrimination cannot be sustained in the absence of supporting evidence (and there is none here) that the political processes leading to election were not equally open to those challenging the districting plan on constitutional grounds.¹⁹

None is there anything in the record to show that H.J.R. 32, by utilizing multimember districts, sought to minimize or cancel out the voting potential of any racial or political group.²⁰ And neither was there

substantiation of the bare allegations, for some petitions that "communities of 'interest'" were divided in the districting process for intentionally discriminatory purposes.²¹

IV

ALLEGED STATE CONSTITUTIONAL VIOLATIONS

(A)

Compactness

Petitions Nos. 2, 4, 5, 6, 7 and 8 allege violations of the compactness requirement of the State Constitution, the principal challenges being against District 17 in Montgomery County and District 14 in Baltimore City. See Appendix A. In addition, an amicus curiae brief submitted by the Mayor and City Council of Rockville urged that District 17 was unconstitutionally noncompact.

(22) In considering the validity of these challenges, we note at the outset that Maryland's straight line borders to the north (Pennsylvania), to the west (West Virginia) and to the east (Delaware) are joined by a southern border of contorted convolutions, giving the State a bizarre geographic configuration. The State's westernmost counties are almost severed from the rest of the State by the protruding northern boundary of West Virginia; the easternmost counties are severed by the waters of the Chesapeake Bay; and the southwest border is warped by the winding waters of the Potomac River. The State's internal structure is further fragmented by numerous other rivers, water bodies and topographic irregularities. Clearly, the State's geography inhibits the geometric

as being invidiously discriminatory based on a clear evidentiary showing that there was a racially discriminatory purpose in constructing a multimember district.

20. Communities of interest, in the sense contemplated by the petitioners, would appear to be identifiable concentrations of population which share one or more common interests.

fashioning of districts of asymmetrical compactness and it was hardly the purpose of the compactness requirement to promote aesthetically pleasing district configuration forms. We therefore think it obvious that a mathematical formulation for determining whether a particular district is unconstitutionally noncompact was not within the contemplation of the constitutional framers when proposing adoption of § 4 of Article III of the Maryland Constitution.

(23) As the cases so plainly indicate, the compactness requirement in state constitutions is intended to prevent political gerrymandering. Oddly shaped or irregularly sized districts of themselves do not, therefore, ordinarily constitute evidence of gerrymandering and noncompactness. On the contrary, an affirmative showing is ordinarily required to demonstrate that such districts were intentionally so drawn to produce an unfair political result, that is, to dilute or enhance the voting strength of discrete groups for partisan political advantage or other impermissible purposes. Thus, irregularity of shape or size of a district is not a *litmus* test proving violation of the compactness requirement.

(24, 25) We are essentially in agreement with those cases which view compactness as a requirement for a close union of territory (conducive to constituent-representative communication), rather than as a requirement which is dependent upon a district being of any particular shape or size. Of course, in determining whether there has been compliance with the mandatory compactness requirement, due consideration must be afforded, as the courts almost uniformly recognize, to the "razz" of constitutional and other factors which make some degree of noncompactness unavoidable, i.e., concentration of people, geographic features, convenience of access, means of communication, and the several compelling constitutional restraints, including contiguity and due regard for natural and political boundaries, as well as the preponderant constitutional requirement that districts be comprised of substantially

equal population. As to compliance with the compactness requirement, as with compliance with the other constitutional criteria, H.J.R. 32 enjoys a presumption of validity, and it is not the province of the judiciary to strike down a district as being noncompact simply because a more geometrically compact district might have been drawn. Essentially, the districting process is a political exercise for determination by the legislature and not the judiciary; the function of the courts is limited to assessing whether the principles underlying the compactness and other constitutional requirements have been fairly considered and applied in view of all relevant considerations.

(26) The Special Master found, and we agree, that the Montgomery County districts, including District 17, are in compliance with the compactness requirement of the State Constitution. In addition to containing the municipalities of Rockville and Gaithersburg, District 17 (See Appendix A) includes a fingerlike appendage to the south of Rockville, giving the district a shape which the petitioners assail as lacking in compactness. The challenged portion of District 17 contains sufficient population, in addition to that within the two municipalities, to bring the district into compliance with the constitutional requirement of substantially equal population apportionment. One petition, in faulting this configuration, urges that a more compact district could have been achieved if the needed population had been obtained from the north of Gaithersburg rather than from the south of Rockville. Another petition suggests that the additional population requirement should have been satisfied by looking to the west of Rockville. That these suggestions, if implemented, might have achieved a greater measure of geometric compactness only begs the question of whether the district, as actually drawn, violates the compactness requirement. The petitioners champion various objective measurements of shape as determinative of compactness, while largely ignoring the

19. The Special Master's finding that District 14 in Baltimore City was unconstitutional as drawn was based on his view that the district was noncompact, although he gave some indication that a better racial equality could be achieved if his suggested alteration of the district's boundaries was accepted.

20. Compare *White v. Registrar*, 412 U.S. 753, 93 S.Ct. 2142, 37 L.Ed.2d 314 (1973), where the Supreme Court struck down a legislative district

principle that a degree of noncompactness is unavoidable. We think the petitioners, using their shape analysis upon us, lost sight of the fact that considerations other than compactness are involved in shaping each individual district, as well as the overall districting process.

27) In arguing that District 17 is facially compact, the amici *Rockville Place v. State of Maryland* upon *Schryer v. State of Elections*, 38 Md. 217, 68 Md. (Dec. 1, 42) N.E. 31 483 (1981). That case involved a challenge to a state legislative district of extremely irregular size, measuring across of 125 miles through 29 towns, 6 counties, parts of 4 congressional districts, 2 Appellate Court districts, and 5 formerly appointed state delegate districts. The district was not served by either a single commercial television station or a single common newspaper. The court *Schryer* found the district to be noncompact, not because of its shape but because its unwieldy size, stating, "The creation of a representative district which is extremely elongated and not 'closely united' significantly impedes vital constituent-representative communication, thus preventing the achievement of a legislative process which is, in fact, representative." 430 Md. at 489.

District 17 is but a fraction of the size of a district involved in *Schryer* and we see no parallel between the two districts. Moreover, we note that District 17 is widest at its center, while the district concerned in *Schryer* was most narrow at its center (typical of the so-called dumbbell shape).

As to the Baltimore City districts, the Special Master concluded that there was no violation of the compactness requirement, except as to District 44. In his report, he observed that under H.J.R. 32 Baltimore City was divided into nine districts of substantially equal population; that the city was intentionally districted to reasonably assure four white and four black majority districts, with District 44 being a "swing" district in which the black-white population

was substantially equal, that precincts 38 and 40 had been excluded from District 44 and placed in District 43, which had an 80 percent white population; that the placement of these two precincts thereby excluded the predominantly black Morgan State University community from "swing" District 44; and that the exclusion of those two precincts from District 44 was accomplished by "cutting a wide swath from the northern outline of the District and by adding a hook-like appendage to its southeast corner." The Special Master recommended altering Districts 43 and 44 by moving three precincts from District 44 to District 43 and compensating for the loss of that population by adding precincts 39 and 40, and three others, from District 43 to District 44. The recommended change, the Special Master said, "promotes an improved configuration of both Districts; and promotes a better racial equality in the 'swing district' . . ."

District 44 (see Appendix A2) is undoubtedly the most irregularly shaped of any of the challenged Baltimore City districts. The Special Master's finding of noncompactness as to this district appears based on his belief that the district's odd shape was attributable, in some part at least, to an invidious racial motivation—a finding with which we have already expressed disagreement, in that there was no evidence that any racial group was invidiously denied its fair share of representation. Indeed, the population in the precinct that includes Morgan State University actually consists of more whites than blacks, hardly an indicia of invidious discrimination.

We find no violation of the compactness requirement in any of the city's districts. Like the State itself, the straight line north, east and west boundaries of Baltimore City are connected by an extremely ragged southern boundary resulting from the interdiction of navigable waters so essential to the city's life. This circumstance alone is a constraint upon formulation of districts of simple geometric design.

The 1980 census disclosed that Baltimore City's population had declined in relation to the population of the State as a whole. As a result, the city's seven districts were reduced to six. It having been decided that the geographic borders of the city should remain intact in the redistricting process, a massive reorganization of district lines was essential and the districts were drawn with an average population within 2.5 percent of the statistically ideal.¹¹ Since Baltimore City would thereby lose two seats in the Senate and six seats in the House of Delegates, the rational goal of avoiding additional loss of senior legislators by reducing the number of contests between incumbents was adopted, as was the legitimate achievement of racial balance among the nine districts. See *United Jewish Organizations v. Carey*, 430 (U.S. 144, 87 S.Ct. 996, 61 L.Ed.2d 229 (1977)). Necessarily these goals required careful adjustment of district lines and resulted in some sacrifice of ideal geometric compactness and due regard for natural boundaries, although the requirement for substantial equality of population among the districts was in no way compromised. We thus conclude that the legislature, in adopting H.J.R. 32, did construct districts in Baltimore City, all of which were "compact in form" in the light of the constraints upon geometric form imposed by other constitutional commands and the geography of the city itself.

[20] Even as an element of compactness is involved in the challenge to District 29 (see Appendix A). While that district extends approximately one-half of the length of Maryland's Western Shore, its size (and shape) results from the generally low density of population in Southern Maryland, as well as its irregular and elongated geographical configuration. The compactness requirement has not, therefore, been ignored in constructing this district but only

22. H.J.R. 32's maintenance of the city's boundaries represents a configuration of a long process of preserving the city's integrity as a discrete and insular jurisdiction—a practice which cannot be denied on constitutional grounds as

reconciled with those considerations which naturally counteract ideal compactness.

Finally, we conclude that other challenges based on an alleged lack of compactness are equally without merit.

(B)

Due Regard for Boundaries

All but one petition raised questions as to compliance with § 4's requirement that due regard be given to "natural boundaries" and the boundaries of "political subdivisions." In this regard, some of the petitioners have argued the issue in the context of a disregard of "communities of interest" in the districting process. The Special Master found no merit in any of the claims. Nor do we after careful consideration of the claims made in the various petitions.

[21] The "due regard" provision, as we have heretofore explained, seeks to preserve well-recognized boundary lines to aid voters in orienting themselves to the territory of their districts. The provision does not, in our view, encompass protection for a concept as nebulous and unworkable as "communities of interest," involving as it does concentration of people sharing common interests. We think it apparent that the number of such communities is virtually unlimited and no reasonable standard could possibly be devised to afford them recognition in the formulation of districts within the required constitutional framework.

(C)

Public Hearings

[22] There is no merit to the contention raised in Petition No. 10 that the public hearing requirement of § 5 of Article III of the Maryland Constitution was violated in

long as it does not insure equality in opportunity, or violate principles of compactness and continuity or disregard natural or political boundaries.

Author: tim.storey@ncsl.org (Tim Storey) at CC2MHS1
Date: 3/4/98 3:59 PM
Priority: Normal
TO: Mike Tibbles at LAA_HTHR
Subject: Redistricting Language
Mike,

"Contiguity

The contiguity requirement-that no part of one district be completely separated from any other part of the same district-has been universally accepted and poses no enforcement problem or serious challenge to districting flexibility pursuit of other fair representation values.

Compactness

The requirement of compactness specifies that the boundaries of each district shall be as short as practicable. Although there is no federal constitutional requirement of compactness, such a requirement may present a certain restraint on gerrymandering and may seem innocuous on its face. Rigid adherence to a compactness, however, phrased, should be avoided. A district pattern of symmetrical squares, although conceivable, well can operate to submerge a significant element of the electorate. As a practical matter, absolute compactness (districts forming perfect circles that are even shorter lines than squares) is an impossibility. Furthermore, a benign gerrymander, in the sense of some asymmetrical districts, may well be required to assure representation of submerged elements within a larger area. Shape requirements focus on form rather than the substance of effective political representation."

I hope this is of some assistance.

Best Regards,
Tim Storey
NCSL staff



NATIONAL CONFERENCE OF STATE LEGISLATURES

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Alaska State Legislature



Official Business

State Capitol
Juneau AK
99801-1182

JOINT SPONSOR STATEMENT FOR

HJR 44: A RESOLUTION PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF ALASKA RELATING TO REAPPORTIONMENT AND REDISTRICTING OF THE LEGISLATURE; AND PROVIDING FOR AN EFFECTIVE DATE.

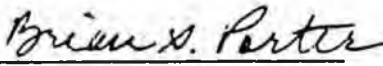
The reapportionment and redistricting provisions of the Alaska Constitution have been outdated for more than 25 years. U.S. Supreme Court decisions have struck down state law provisions excluding military personnel from reapportionment population bases, and have extended the one-person, one-vote requirement of the equal protection clause of the XIVth Amendment to senate districts as well as to house districts. The Alaska Supreme Court has been inviting the legislature to amend the constitution since at least 1972 in these areas.

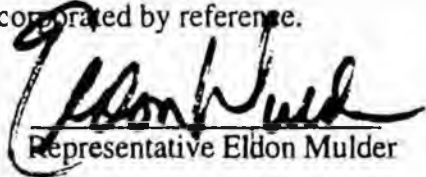
Alaska is only one of two states in the Union which places the reapportionment power in the office of the Governor. In the other state, Maryland, the senate has the right to ratify the governor's appointees. No such check exists in Alaska. This situation has produced reapportionment plans which have been subject to criticism of being borne in the crucible of politics, rather than creating a reapportionment plan based on bipartisan fairness and objectivity. The existing system of constitutional provisions has spawned litigation after every decennial census since statehood, the most recent of which was exceptionally contentious.

This proposal creates a five-member reapportionment board. Four members are individually appointed by the Speaker of the House, House Minority Leader, Senate President and Senate Minority Leader respectively. The fifth member, who will chair the board, is selected by the first four appointees, or in the event of deadlock, by the Chief Justice of our supreme court. While no reapportionment mechanism can be completely free of political influences, the one proposed in this legislation is intended to produce balanced, professionally drawn apportionment plans. Many other states have adopted this approach.

Probably due in part to the inherent political bias of the existing mechanism, and the delays inherent in legal challenges, the Alaska Supreme Court has had to take an increasingly activist approach in deciding reapportionment disputes. The most recent legal challenge caused two of the Justices to dissent regarding what they perceived to be an "abuse of power" by the majority of the court. The court majority sent the final reapportionment task to the superior court and special masters to rewrite the plan, rather than remand the case to the reapportionment board. The proposed changes to the constitution will remove the basis for the court to consider this kind of remedy.

There are other changes proposed, such as clarifying that representatives and senators shall be elected from single-member districts. A more detailed analysis of other sections of HJR 44 appears in the sectional analysis, which is incorporated by reference.


Representative Brian Porter


Representative Eldon Mulder

	1991 2001												1992 2002											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
HICKEL CASE	①	②		④								⑤	⑥											
HJR 44	①	②		④								⑤	⑥											
			③																			⑦	⑧	

- ① = BOARD IS APPOINTED.
- ② = BOARD ORGANIZES & ADOPTS REDISTRICTING POLICIES.
- ③ = DECENNIAL CENSUS DATA RELEASED.
- ④ = FORMULATE PROPOSED PLAN; HOLD HEARINGS; FORMULATE FINAL PLAN AND ISSUE PROCLAMATION.
- ⑤ = 30 DAY PERIOD BEFORE SUITS CAN BE FILED.
- ⑥ = LITIGATION UP TO COURT APPROVAL OF INTERIM PLAN.
- ⑦ = AUGUST PRIMARIES.
- ⑧ = NOVEMBER FINAL ELECTIONS.

⊕ NOTE HICKEL CASE TOOK 9 MONTHS TO LITIGATE. HJR 44 ALLOWS 12 MONTHS.

⊕⊕ IN HICKEL CASE, SUPREME COURT ORDERED EXTENSION OF DEADLINES FOR PRIMARY ELECTION FILINGS ON 6/25/92.

Sectional Analysis for CS FOR HJR 44(JUD) 0-LS0528\W
2/16/98

Section Number of HJR 44.	Changes Made to Existing Section of Constitution Article VI	Reasons for Changes and Intent
Section 1 and Section 2.	<p>Language is added to Section 1 and Section 2 of Article VI that boundaries of house election districts and senate districts are to be established after decennial censuses, as provided in the framework spelled out in the changes to Article VI.</p> <p>Old language is deleted which referred to Article XIV. Article XIV is no longer necessary, and is repealed in Section 11 of HJR 44.</p>	<p>The proposed language changes clarify that boundaries of house and senate districts are to be redrawn after every decennial census of the United States. This amendment requires that senate districts, as well as house districts, be subject to reapportionment to achieve equal representation. This change brings the constitution into line with the U.S. Supreme Court's decision 34 years ago in <u>Reynolds v. Sims</u> (1964), 377 US 533, and companion Alaska Supreme Court decisions in <u>Wade v. Nolan</u> (1966), 414 P.2d 689, and <u>Egan v. Hammond</u> (1972), 502 P.2d 856.</p> <p>Article XIV is a lengthy description of existing house and senate districts, which changes every 10 years. The intent in eliminating Article XIV is to eliminate the need for unnecessary amendment of the constitution every ten years.</p>
Section 3.	<p>The power to reapportion in Section 3 of Article VI is changed from the Governor to a Reapportionment Board.</p> <p>Language is added to make clear that both house districts and senate districts are reapportioned, and not just the house districts.</p>	<p>Alaska and Maryland are the only two states we are aware of where the Governor has reapportionment authority. In Maryland, the senate has ratification power over the appointments to the board; in Alaska there is no such check and balance over the executive branch. This change is intended to remove reapportionment and redistricting as far as possible from the political arena by creating a bipartisan Reapportionment Board.</p> <p>At the time the Alaska Constitution was drafted, The U.S. Supreme Court had not yet ruled that the one-person, one-vote equal protection requirement applied to senate districts as well as to house districts in state legislatures. As discussed above, this change is intended to conform the constitution to controlling federal and state case law.</p>

	<p>Language is added to make clear that reapportionment is based on the entire state's population base, including military population, and not just the civilian population.</p>	<p>Citing controlling U.S. Supreme Court case law, twenty six years ago the Alaska Supreme Court held that eliminating military personnel as a class from the reapportionment population base is unconstitutional. <u>Egan v. Hammond</u>, 502 P. 2d 856 (1972), at 871.</p> <p>The issue then arose as to whether it is constitutionally required to exclude non-resident military personnel from the population base. In <u>Hickel v. Southeast Conference</u> (1992), 846 P.2d 38, at 55, the Alaska Supreme Court held that exclusion is not constitutionally required if it is not possible to accurately identify non-resident military personnel, after finding that it was "methodologically impossible" to accurately identify them.</p> <p>There has been much discussion about changing "reapportionment" to "redistricting" in many places in Article VI. The Alaska Supreme Court has stated by way of dicta that there is little difference between the two words, and that reapportionment is inseparable from redistricting. <u>Egan v. Hammond</u> (1972), 502 P. 2d 856, at 873. For that reason and because "redistricting" has not yet received acceptance in legal treatises and dictionaries, "reapportionment" has been retained.</p>
<p>Section 4.</p>	<p>Language is added to Section 4 of Article VI to create forty single-member house election districts, which contain "as nearly as practicable" one-fortieth of the reapportionment population base.</p> <p>Language is added to create twenty single-member senate districts, which consist of two contiguous house districts.</p>	<p>The intent is to confirm single-member house districts. Since Alaska Supreme Court and U.S. Supreme Court decisions make clear that minor deviations from an ideal one-fortieth reapportionment per district are permissible, the "as nearly as practicable" language is added.</p> <p>The intent is to confirm single-member senate districts, each coinciding with the boundaries of two contiguous house districts. This language is specifically intended to overrule the supreme court's decision in <u>Kenai Feninsula Borough v. State</u> (1987), 743 P.2d 1352, at 1364-1365, in so far as the inapplicability of Article VI, section 6 factors to</p>

Sectional Analysis for CS FOR HJR 44(JUD) 0-LS0528\W
2/16/98

	Language is deleted about civilian population and creating forty equal election districts.	<p>reapportionment of senate districts, with the result that here shall never again be another "Donut" district.</p> <p>The deleted language refers to "civilian" population, which, as discussed above, has been struck down by the Alaska Supreme Court on constitutional grounds. The concept of forty equal election districts is retained in restated form in this section.</p>
Section 5.	Language is added to Section 6 of Article VI to clarify that the Reapportionment Board, and not the Governor, will do the reapportionment.	Self-explanatory. See discussion in Section 3.
Section 6.	<p>(a) Language is added to Section 8 of Article VI to clarify that the Reapportionment Board shall consist of five members, all of whom shall be residents of the state and none of whom may be public employees or officials at the time of and during the tenure of appointment.</p> <p>Language is added to clarify that compensation to be paid to board members is "as provided by law".</p> <p>Language is deleted which previously required board members to be from certain geographic areas of the state, and which required that appointments be made without regard to political affiliation.</p> <p>(b) New language is added which requires board members</p>	<p>This language is intended to establish that the Reapportionment Board will have five members who must be Alaska residents, in addition to the existing limitation against having public employees or officials serving on the board</p> <p>It is intended that the board members be compensated for per diem and travel expenses. If the constitutional amendment is approved by the voters, a bill will be drafted to provide for compensation.</p> <p>It would be unnecessarily restrictive to allocate one board member to be from a certain geographic area of the state, considering how the board members are appointed. The intent of deleting the language referring to appointments "without regard to political affiliation" is to be consistent with the method by which the first four board members are appointed. Two are appointed by the majority party, and two by the minority party.</p> <p>it is the intent of this language to have at least the first four board members</p>

	<p>to be appointed after, but not later than 15 days after, the election of the Speaker of the House and of the President of the Senate in the year following the decennial census.</p> <p>New language is added to require the board members to serve until a final reapportionment plan and proclamation has been adopted, including all legal challenges and remands by the Alaska Superior Court or Alaska Supreme Court.</p> <p>(c) New language is added which requires the Speaker of the House, the House Minority Leader, the President of the Senate, and the Senate Minority Leader to each select one board member. The appointments are to be made after the election of the Speaker of the House and the President of the Senate at the beginning of the legislative session following the decennial census.</p> <p>Language is added provide for the rare instance where the senate or house organize as one majority. In such a case, the minority appointing officer of that house shall be appointed by the members of that house who are not members of the political party with the greatest number of members in that house.</p> <p>(d)The fifth board member is appointed by a majority vote of the other four members. If there is a deadlock, the Chief Justice of the Alaska Supreme Court appoints the fifth member. The fifth member</p>	<p>appointed within 15 days after the Speaker of the House and the President of the Senate have been elected. The minority caucuses will organize and appoint two of the four board members within the same period of time.</p> <p>It is the intent of this language to require board members to serve until a plan and proclamation have been adopted, and to continue to serve through any remands following superior court or supreme court decisions.</p> <p>This language is intended to simply set out that the presiding officers and minority leaders of both bodies each appoint one board member. The rather obfuscatory and convoluted language is the result of drafting rules which do not allow the use of words not found and defined elsewhere in the constitution, such as "caucus" and "minority". The intent is to ensure that a fair balance is achieved by allowing the majority and minority two seats each on the board.</p> <p>Several years ago the senate organized as on majority, with no ostensible minority leader to appoint a board member. This language provides for that rare contingency.</p> <p>If the four board members cannot agree on the fifth member, a procedure is in place to avoid deadlock. The Chief Justice makes the appointment.</p>
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Sectional Analysis for CS FOR HJR 44(JUD) 0-LS0528\W
2/16/98

	<p>shall automatically become the chair.</p> <p>The fifth member may not have held an elected state office or an elected office of a political party in Alaska in the five years preceding the appointment.</p> <p>(e) New language is added which requires the legislature to pass a law determining the order in which each of the appointing legislators makes his or her appointment.</p> <p>(f) New language is added which allows for removal of any of the first four board members, with or without cause. However, removal may only be made the appointing legislator or that person's successor. All vacancies created by the removal, resignation, death or incapacity of any of the first four board members are filled by the appointing legislator or that person's successor.</p> <p>The fifth board member may be removed only for good cause shown, as determined by a majority vote of a group consisting of the other four board members and the Chief Justice of the Alaska supreme Court. The vacancy due to removal, resignation, death, or incapacity of the fifth board member is filled by the appointing procedure set forth in (d) of this section.</p>	<p>This provision is taken almost verbatim from New Jersey, and is intended to make the fifth member as politically neutral as possible. The phrase "political party" is defined in AS 15.13.400(10). It cannot be overemphasized that the intent behind the fifth board member's appointment is to find a person as politically neutral as possible, for only such a person could lead the other four members to a fair and well thought out reapportionment plan.</p> <p>The intent of this language is to allow for a random process for appointing the first four board members. A bill should be introduced to take care of this detail, upon approval of HJR 44 by the voters of the state. The bill should also provide for compensation of board members, as mentioned in Section 6(a).</p> <p>The appointing legislators or their successors will control the discharge and appointment of the first four appointees.</p> <p>As to the fifth member, who is the chair, removal must be for good cause shown. The requirement of showing good cause for removal applies only to the fifth member because a politically neutral chair should not be removable without cause. It is the intent that "good cause shown" is to be determined by case law. Vacancies for any reason are filled first by a majority vote of the other four members, or, in the event of deadlock, by the Chief Justice.</p>
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Sectional Analysis for CS FOR HJR 44(JUD) 0-LS0528\W
2/16/98

	<p>(g) New language is added that precludes board members from seeking elected legislative office in the general election following adoption of the final reapportionment plan.</p>	<p>This provision is intended to avoid the appearance of impropriety on the part of a board member who might otherwise be accused of reapportioning a district for self serving reasons. The over-all goal of the changes to Article VI is to have as far as possible, a reapportionment plan that is fair, rational, objective, and free from undue political influence.</p>
Section 7.	<p>Language is deleted from Section 9 of Article VI by which the board previously elected its own chairman.</p> <p>Language is added by which "actions of the board" require a majority vote, but ambiguous language is deleted about "a ruling or determination" and "or otherwise act for the board".</p> <p>New language is added which requires the board to "employ or contract for services of independent legal counsel".</p>	<p>This is intended as a consistency deletion.</p> <p>The language in the existing constitution creates ambiguities about the legal effect of a majority of only three board members meeting somewhere and taking unspecified "rulings or determinations". Two members in this scenario should not be able to bind a five member board.</p> <p>The board will need independent legal counsel, and should not be allowed to utilize legal services from any of the three branches of state, local or federal government.</p>
Section 8.	<p>New language is added to Section 10 of Article VI which requires the board to agree on one or more proposed plans within 30 days of release of the decennial census population data. The board then has 60 more days to hold hearings and agree on a final reapportionment plan and to issue a proclamation of reapportionment.</p> <p>If the census data is released before the board is duly appointed, language has been added to clarify that the clock starts to run for coming up with a plan after the board is duly appointed and the census data has been released.</p>	<p>The assumed time line concludes that the board has been appointed and is fully organized by the end of January 2001. The decennial census data likely will be available a month or two later. The board then will have 30 days to agree on one proposed plan, if it can. If it cannot, it will have hearings on multiple proposed plans instead of just one, over the next 60 days. By the end of the 90 day period following the release of the decennial census data, the board is to adopt a final single plan and proclamation.</p> <p>In the remote event the census data is released before the board is duly appointed, it is the intent of this language that the board has 30 days after it is appointed to come up with one or more proposed plans, and a total of 90 days after it is appointed to come up with the final plan.</p>

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2/16/98

	<p>Language is deleted about the board reporting to the Governor, and the Governor submitting the final plan and proclamation.</p> <p>New language is added by which the final plan is to set out boundaries of house election districts and senate districts.</p> <p>New language is added to clarify that an existing reapportionment plan will remain effective until a new plan has been fully adjudicated in time for the next primary or general election. Existing language in Section 10 of Article VI states that reapportionment plans expire "after the official reporting of the next decennial census". The new language makes the old plan fully effective until the new plan has been litigated to a final decision, and 60 days remain for election officials to prepare registration lists and other materials after the final adjudication before the next election.</p> <p>(b) New language is added to clarify that adoption of a final plan of reapportionment requires at least three votes of the board.</p>	<p>This deletion is for consistency reasons. It is the Reapportionment Board which develops and adopts the proposed and final plans of reapportionment.</p> <p>This provision is intended to clarify that the final plan sets out the boundaries of senate districts as well as of house election districts, as discussed above.</p> <p>This language is intended to deal with the possible scenario where, because of protracted litigation, a general election cannot be held on time. Under the language found in existing Section 10 of Article VI, the presently existing reapportionment plan expires the minute the year 2000 decennial census is officially reported, which likely will be about April 1 of 2001. If a new reapportionment plan were not fully litigated in time for the 2002 elections, there would be no legal house and senate districts in which to hold an election: the old reapportionment plan would have expired, and the new plan would be snarled in litigation. The new language allows the old reapportionment plan to be used for primary and general election purposes until the new plan is litigated through a final judicial decision, plus 60 days to allow election authorities to prepare registration lists and other materials for the election.</p> <p>This language is self-explanatory.</p>
Section 9.	The enforcement provisions of Article VI, Section 11, now provide that any qualified voter can compel the board to perform its duties in formulating a final plan and proclamation, or to correct any error in redistricting or	This is a consistency change which substitutes the board for the Governor.

Sectional Analysis for CS FOR HJR 44(JUD) 0-LS0528\W
2/16/98

	<p>reapportionment.</p> <p>A lawsuit to compel performance of the duty to formulate a final reapportionment plan and proclamation at the end of 90 days must be filed not later than 30 days after the 90 day period. A lawsuit to correct any error in redistricting or reapportionment must be filed within 30 days after adoption of the final plan and proclamation by the board.</p> <p>New language is added to require the courts to dispose of cases arising under Article VI on an expedited basis.</p> <p>If any reapportionment remands are ordered by the courts, the matter shall be remanded directly to the board for correction and development of a new plan, and not to the superior court or to special masters.</p>	<p>Self-explanatory, and is consistent with recent supreme court handling of such cases.</p> <p>This language is intended to avoid the situation which arose in Hickel v. Southeast Conference, in which the court system in effect rewrote the reapportionment plan. The approach was criticized by two of the justices in a dissenting opinion in that case.</p>
<p>Section 10.</p>	<p>The effective date of these amendments to the constitution is January 1, 2001.</p> <p>Language is added to ensure that the reapportionment plan in effect on December 31, 2000, will be the fall back reapportionment plan in the event the reapportionment process which will follow the 2000 decennial census is not fully completed in time for the 2002 primary and general elections.</p>	<p>Self-explanatory.</p> <p>This applicability of amendments language is intended to protect against the scenario spelled out in section 8 of this sectional analysis, which discusses section 10 of Article VI.</p>
<p>Section 11.</p>	<p>Article VI, sections 5 and 7, and Article XIV of the constitution are repealed.</p>	<p>These sections of Article VI and Article XIV are repealed because they are no longer necessary in light the changes made in HJR 44.</p>

Legislative Research Report 98.027

January 27, 1998

Nonresident Military Personnel and Reapportionment in California, Georgia, and North Carolina

Legislative Research Services
Division of Legal and Research Services
Legislative Affairs Agency
Alaska State Legislature

Prepared for Representative Brian Porter
Prepared by Paul Brandt, Legislative Analyst



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NONRESIDENT MILITARY PERSONNEL AND REAPPORTIONMENT IN CALIFORNIA, GEORGIA, AND NORTH CAROLINA

You asked if laws in California, Georgia, or North Carolina exclude nonresident military personnel from population estimates when reapportioning election districts. In order to determine this, we reviewed pertinent sections of each state's constitution and statutes and contacted elections officials from each state.

Neither California, Georgia, nor North Carolina exclude nonresident military personnel when reapportioning election districts. According to Ed Arnold with the California Division of Elections, population estimates for reapportionment in California are taken strictly from the decennial U.S. Census and are not modified in any way. Mr. Arnold indicated that in addition to including nonresident military personnel, other groups that may be excluded in other states, such as felons, nonresident aliens, and refugees, are counted in California.

We found a similar situation in Georgia and North Carolina. According to Linda Maggers with the Georgia Division of Elections, population estimates from the U.S. Census Bureau are not modified to exclude nonresident personnel. She indicated that excluding these individuals would be difficult because of fluctuating populations of military personnel and the unavailability of records identifying the residency of these individuals.

Michelle Wyatt, Voter Registration Director for the North Carolina State Board of Elections, reported that nonresident military personnel are not excluded from population estimates when reapportioning election districts in North Carolina. She indicated that the legislature's research division reviewed the U.S. Census Bureau population estimates prior to the most recent reapportionment. According to Bill Gelkenson with the North Carolina Legislative Research Division, his division reviewed data on the percentage of registered voters in each election district. He indicated that although those districts with large military installations had significantly lower percentages of registered voters, the legislature did not attempt to exclude nonresident military personnel when reapportioning election districts.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 3, 1998

SUBJECT: Legislative redistricting (HJR 44)

TO: Representative Gene Therriault, Co-chair
House Finance Committee
Attn: Mike Tibbles

FROM: Richard A. Glover - *RAG*
Legislative Counsel

Enclosed is the requested CS for HJR 44. As I discussed with your staff, the change to the provision specifying the geographic regions that members of the redistricting board are to be appointed from is ambiguous, so this draft should be considered incomplete. The judicial districts are established by law, so there is no constitutional requirement that there be 5 or fewer districts. If your intent is to allow the legislature to affix the geographic regions as they exist on a given date, it would be constitutionally inconsistent to allow the legislature to establish by law different districts that apply to this section of the constitution. I recommend either specifying the date directly ("At least one board member shall be appointed from each judicial district that existed on 1/1/99") or specifying a different term to define the geographic regions the board members are to be appointed from. ("At least one board member shall be appointed from each geographic region that the legislature may establish by law") I would also recommend you consider if the term "appoint from" is specific enough for your purposes: this term most likely refers to the residence of the board member, but other meanings are possible.

RAG:glc
98-136.glc

Enclosure

HJR 44

Alaska Population Overview 1996 Estimates

HD	SD	Representative	Senator	Population April 1 1990	Deviation from Average	Population July 1, 1996	Deviation from Average	Percentage of Growth
				550,043	13,751	607,800	15,195	10.50%
1	A	Bill Williams(D)	Robin Taylor(R)	13985	1.70%	14908	-1.89%	6.60%
2	A	Ben Grussendorf(D)		14541	5.75%	14857	-2.22%	2.17%
3	B	Kim Elton(D)	Jim Duncan(D)	13427	-2.36%	14702	-3.24%	9.50%
4	B	Bill Hudson(R)		13492	-1.88%	15008	-1.23%	11.24%
5	C	Albert Kookesh(D)	Jerry Mackle(D)	13544	-1.51%	14643	-3.63%	8.11%
6	C	Alan Austerman(R)		13309	-3.21%	14028	-7.68%	5.40%
7	D	Gail Phillips(R)	John Torgerson(R)	13661	-0.65%	15688	3.24%	14.84%
8	D	Gary Davis(R)		13547	-1.48%	16197	6.59%	19.56%
9	E	Mark Hodgins(R)	Jerry Ward(R)	13331	-3.05%	14650	-3.59%	9.89%
10	E	Joe Green(R)		13589	-1.18%	15761	3.72%	15.98%
11	F	Norman Rokeberg(R)	Drue Pearce(R)	13833	0.60%	15943	4.92%	15.25%
12	F	Mark Hanley(R)		13663	-0.64%	15265	0.46%	11.73%
13	G	Ethan Berkowitz(D)	Loren Leman(R)	13801	0.36%	15642	2.94%	13.34%
14	G	Terry Martin(R)		14207	3.32%	13227	-12.95%	-6.90%
15	H	Eric Croft(D)	Johnny Ellis(D)	14023	1.98%	15762	3.73%	12.40%
16	H	Allen Kempler(D)		13920	1.23%	15401	1.36%	10.64%
17	I	John Cowdery(R)	Sean Parnell(R)	14131	2.76%	16948	11.54%	19.93%
18	I	Con Bunde(R)		13758	0.05%	16483	8.48%	19.81%
19	J	Jerry Sanders(R)	Dave Donley(D)	14029	2.02%	17462	14.92%	24.47%
20	J	Brian Porter(R)		13892	1.03%	15954	5.00%	14.84%
21	K	Joe Ryan(R)	Tim Kelly(R)	13971	1.60%	15825	4.15%	13.27%
22	K	Ramona Barnes(R)		14031	2.04%	16109	6.02%	14.81%
23	L	Eldon Mulder(R)	Randy Phillips(R)	14129	2.75%	11963	-21.27%	-15.33%
24	L	Pete Kott(R)		13510	-1.75%	15776	3.82%	16.77%
25	M	Fred Dyson(R)	Rick Halford(R)	13695	-0.41%	16057	5.67%	17.25%
26	M	Vic Kohring(R)		13950	1.45%	16276	7.11%	16.67%
27	N	Scott Ogan(R)	Lyda Green(R)	14993	9.03%	18590	22.34%	23.99%
28	N	Beverly Masek(R)		14895	8.32%	20583	35.46%	38.19%
29	O	John Davies(D)	Gary Wilken(R)	13247	-3.67%	14334	-5.67%	8.21%
30	O	Tom Brice(D)		13242	-3.70%	14547	-4.26%	9.86%
31	P	Pete Kelly(R)	Bert Sharp(R)	13395	-2.59%	13565	-10.73%	1.27%
32	P	Al Vezey(R)		13793	0.31%	13955	-8.16%	1.17%
33	Q	Gene Therriault(R)	Mike Miller(R)	13138	-4.46%	14503	-4.55%	10.39%
34	Q	Jeannette James(R)		12806	-6.87%	13491	-11.21%	5.35%
35	R	Gene Kubina(D)	Georgianna Lincoln(D)	12808	-6.86%	13350	-12.14%	4.23%
36	R	Irene Nicholia(D)		12776	-7.09%	13168	-13.34%	3.07%
37	S	Reggie Joule(D)	Al Adams(D)	12889	-6.27%	14558	-4.19%	12.95%
38	S	Richard Foster(D)		13565	-1.35%	15284	0.59%	12.67%
39	T	Ivan Ivan(D)	Lyman Hoffman(D)	14507	5.50%	16280	7.14%	12.22%
40	T	Carl Moses(D)		15020	9.23%	11057	-27.23%	-26.38%

Source: Alaska Department of Labor
Research Analysis Section
Demographics Unit.

HJR

44

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

DATE: 5/6/98

FURTHER: 5/08/98

DATE TURNED IN TO OFFICE: 5/08/98

Finance Committee considered CS FOR HOUSE JOINT RESOLUTION NO. 44(RLS) am

Proposing amendments to the Constitution of the State of Alaska relating to redistricting and reapportionment of the legislature; repealing obsolete language setting out the apportionment schedule used to elect members of the first state legislature.

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous 5 CS CS HB 44 (JUD)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to the _____ Committee

- Senate Bill:**
- same title
 - new title
- House Bill:**
- same title
 - technical title
 - new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>[Signature]</i>	→	<i>[Signature]</i>		X	
<i>[Signature]</i>					
<i>[Signature]</i>					
<i>[Signature]</i>	✓				
Co-Chair: <i>[Signature]</i>	✓	Co-Chair:			
Co-Chair: <i>[Signature]</i>	✓	Co-Chair:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
Law/Gov Aff.	5/7/98		637

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
Gov/Elections	5/6/98		30

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

FISCAL NOTE

REPORTED OUT OF
5/08/98

**STATE OF ALASKA
1998 LEGISLATIVE SESSION**

BILL NO. SCSCS HJR 44 (JUD)

Revision Date (Note if correction) _____	Dept. Affected _____	Law _____
Title <u>Proposing amendments to the Constitution of the</u>	BRU _____	Civil Division _____
<u>State of Alaska relating to redistricting and reapportionment ...</u>	Component _____	Governmental Affairs _____
Sponsor <u>Representative Porter</u>	Component Serial No. <u>2207</u>	
Requester <u>Senate Finance Committee</u>		

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	20.1	9.4				
Travel	0.1	0.0				
Contractual	43.2	1.5				
Supplies	0.3	0.2				
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	63.7	11.1	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF	63.7	11.1				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	63.7	11.1	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

SCSCS HJR 44 (JUD), would amend the Alaska Constitution to change the method of redistricting legislative election districts, and create a Reapportionment Board appointed by the governor, the legislature, and the chief justice of the Alaska Supreme Court to do the redistricting.

Passage of the resolution itself would have no cost to the Department of Law. However, if the constitutional amendment were adopted by the people of the State of Alaska, the new law would require preclearance by the United States Department of Justice (DOJ) before implementation because it changes a voting law. The preclearance process would require the Department of Law to document and present the state's position to the DOJ. We anticipate that 3 months of in-house attorney time would be required for preclearance, 20 hours of paraprofessional time, and \$40,000 for expert opinions, assuming that the process remains an administrative one. Should the new law be challenged, and referred to a

Prepared by <u>Joan M. Kasson</u>	Phone <u>465-5370</u>
Division <u>Attorney General's Office</u>	Date <u>5/7/98</u>
Approved by Commissioner <u>Bruce M. Botelho, Attorney General</u>	Date <u>5/7/98</u>
Agency <u>Department of Law</u>	

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FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. SCSCS HJR 44 (JUD)

ANALYSIS CONTINUATION

three-judge panel in the District of Columbia Circuit, costs would increase dramatically. The department has not included those speculative costs in this fiscal note, and would request a supplemental appropriation should that eventuality occur.

In addition, Section 7 of the resolution requires the new Redistricting Board to employ or contract for the services of independent legal counsel. It is anticipated that contractual legal services, which vary in cost from \$175 to \$200 an hour, would be approximately \$150,000 in FY00 to assist the board in plan development, and \$250,000 in FY01 to defend against the inevitable litigation arising over the board's plan. Since it is unclear in which branch of government the funding for this purpose would be budgeted, the Department of Law has not added these costs to its fiscal note.

In-house costs for preclearance are based on the department's FY98/99 standard attorney cost schedule (\$92.72/hour per for attorney time and \$71.94/hour for paraprofessionals). The schedule includes clerical support, lease costs, communications, and other standard overhead costs. Expert fees and costs are added separately. If the resolution passes this session, preclearance would begin 30 days after certification of the 1998 election, the next general election. The department is assuming that most of the work can be completed in FY99, and has included two months of in-house costs, and all expert costs, during that year, with the remaining one month of in-house costs to be incurred in FY00.

COST SUMMARY

Attorney				
	FY99	\$92.72	240 hrs	\$22,253
	FY00	\$92.72	120 hrs	\$11,126
Paraprofessional				
	FY99	\$71.94	20 hrs	\$1,439
Expert Costs				
FY99				\$40,000
Total				
	FY99			\$63,692
	FY00			\$11,126

FISCAL NOTE

REPORTED OUT OF
 No. 23 5/08/98
 Bill Version: SCS CSR 44(200)
 (S) Publish Date: 5/16/98

STATE OF ALASKA
 1998 LEGISLATIVE SESSION

Revision Date (4/24/98) Dept. Affected Office of the Governor
 Title Const. Amend: Relating to redistricting BRU Elective Operations
 of the legislature Component General and Primary
 Sponsor Representatives Porter and Mulder
 Requester Senate Judiciary Committee Component Serial No #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

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 Gail Fenuniar Phone 465-3935
 Division Division of Elections Date 4/24/98
 Approved by Gov. Governor Fran Ulmer Date 4/24/98
 Agency Office of the Lieutenant Governor

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HJR

47

HFIN

FILE

4/30/98

0-LS1091VE.1
Luckhaupt
4/24/98

7-3 adopted

AMENDMENT 1

OFFERED IN THE HOUSE

BY REPRESENTATIVE GRUSSENDORF

TO: HJR 47

- 1 Page 1, lines 1 - 5:
- 2 Delete all material.
- 3 Insert "Proposing an amendment to the Constitution of the State of Alaska
- 4 requiring legislative confirmation"

- 5 Page 1, line 8, through page 2, line 29:
- 6 Delete all material.

- 7 Page 2, line 30:
- 8 Delete "Sec. 3."
- 9 Insert "Section 1."

- 10 Renumber the following bill section accordingly.

- 11 Page 3, line 12:
- 12 Delete "amendments"
- 13 Insert "amendment"

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: March 11, 1998

FURTHER REFERRALS:

Date of Committee Action: 4/30/98

The FINANCE Committee considered:

HJR 47

HOUSE JOINT RESOLUTION NO. 47

CONST. AM: APPELLATE JUDGES

Proposing amendments to the Constitution of the State of Alaska relating to the nomination, selection, appointment, and public approval or rejection of justices of the supreme court and of judges of courts established by the legislature that have as an exclusive purpose the exercise of appellate jurisdiction over judicial acts and proceedings, and requiring legislative confirmation of those justices and judges and of the appointed members of the judicial council.

recommends it be replaced with the following committee substitute CS HJR 47 (FIN) the same title a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____ APPROVES PREVIOUS: (Dept/Date) _____
 fiscal note(s) _____ fiscal note(s) of of 900 3/11/98
 zero fiscal note(s) _____ zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
<i>Gene Thernau</i>	Thernau			X	
<i>Mark Hanley</i>	Hanley			X	
<i>Edo Muel</i>	Muel				X
<i>Larry Martin</i>	Martin	X			
<i>Ben Grussendorf</i>	Grussendorf			X	
<i>David Davis</i>	Davis			X	
<i>Walter Kelly</i>	Kelly	X			
<i>John J. Davis</i>	J. Davis		X		

CHAIR'S SIGNATURE *Gene Thernau* *Mark Hanley*
Thernau Hanley

FISCAL NOTE

No: 1

**STATE OF ALASKA
1998 LEGISLATIVE SESSION**

Bill sion: HJR 47
(H) Publish Date: 3/11/98

Revision Date (Note if correction) _____ Dept. Affected _____ Office of the Governor _____
 Title Const. Amend. Appellate Judges BRU Elective Operations
 Component Elections
 Sponsor Representative Cowdery
 Requester House Judiciary Committee Component Serial No. #21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
 This figures 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 Gail Fenumiai Phone 465-3935
 Division Division of Elections Date 2/12/98
 Approved by C Lt. Governor Fran Ulmer Date 2/12/98
 Agency Office of the Lieutenant Governor

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(7)

Date Referred to Committee: January 16, 1998

FURTHER REFERRALS:

Finance

Date of Committee Action: 3/9/98

The JUDICIARY Committee considered:

HJR 47

HOUSE JOINT RESOLUTION NO. 47

CONST. AM: APPELLATE JUDGES

Proposing amendments to the Constitution of the State of Alaska relating to the nomination, selection, appointment, and public approval or rejection of justices of the supreme court and of judges of courts established by the legislature that have as an exclusive purpose the exercise of appellate jurisdiction over judicial acts and proceedings, and requiring legislative confirmation of those justices and judges and of the appointed members of the judicial council.

recommends it be replaced with the following committee substitute _____ [] the same title [] a new title

[] additional referral to _____ Committee

[] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____

APPROVES PREVIOUS: (Dept/Date) _____

[] fiscal note(s) _____

[] fiscal note(s) _____

[] zero fiscal note(s) _____

[] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Debra S. Hartley</i>		✓		
<i>Ann Kelly</i>	✓			
<i>John Mark</i>		✓		
<i>Christina</i>			✓	
<i>Debra J. James</i>		✓		
<i>Van D. Cook</i>		✓		
<i>J. H. A. R. ...</i>		✓		

CHAIR'S SIGNATURE _____

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Toll Free: 1-888-269-3879

Representative
John J. Cowdery

HJR 47

WHAT'S SO BROKE THAT WE NEED HJR 47

1. What's so broke is public **EXCLUSION**.

- a> The Public has no direct access to the judicial system. Our courts are for people who have money and can afford the best attorneys. The only opportunity for a public glimpse of what a judge is like will be if they can participate in a legislative hearing during the hearing process. Once a judge is confirmed, he or she is not subject to any public inquiry.
- b> The Supreme Court is the governor of the Rules of Civil Procedure that govern all administration and conduct of legal proceedings. The court system is not user friendly to the lay person. They are exclusionary because the administrative decisions made over time by the leaders of the Court System don't consider public sensitivity a high priority.

2. What's so broke is **COMMUNICATION**.

- a> The Legislature has no opportunity to dialogue with the Court. The Chief Justice makes an annual speech to the legislature but does not make himself available to questions. He has a Chief Administrator and lobbyist whose chief functions are to procure what the Courts want from the Legislature. I believe the opportunity to dialog with the court will mutually benefit both of us. Confirmation hearings represent a new channel of communication. Communication never hurts.

3. What's so broke is **JUDICIAL RESTRAINT**

a> The courts overstep their bounds when they use legal conclusions to invoke sweeping changes in public mores. The infamous decisions to protect partial birth abortions, to promote same sex marriages, to require private hospitals and their employees to perform abortions, to disallow parental consent requirements for abortion for minor children, to allow four ounces of marijuana for personal consumption, etc., etc., should not be the result of court invoked public policy. These issues are just as alive in other states. But, their courts haven't been as aggressive in re-writing the gospel of public morals. Alaskan courts have not learned to write narrow opinions. They use legal issues to wedge their own mandates into Alaska's laws.

Most of these decisions have come from lower court judges who would not be confirmed under HJR 47. However, by requiring public preview of the top-most judges, who are the leaders of the court system, a tenor will be set that should pervade throughout the court system. If not, then incremental expansion of legislative confirmation to lower courts may be considered.

Ninth Circuit Court of Appeals Judge, Andrew Klienfeld, an Alaskan, is quoted in his successful minority opinion, which was subsequently upheld by the U.S. Supreme Court, as saying:

"The founding fathers did not establish the United States as a Democratic Republic so that elected offices would decide trivia, while all great questions would be decided by the judiciary."
(Compassion in Dying v. State of Washington)

4. What's so broke is **CHECKS AND BALANCES**

a> There aren't any. Alaska's constitution is great but it's not perfect. Our experience has shown that the imbalance of checks on the judiciary branch leads to the problems we have. Currently, the lawyers who practice before judges have the primary input into their selection. The governor has little more than a rubber stamp role in the selection process. The legislature and the public have none. The current checks are out of balance.

HJR 47

Relating to Legislative Confirmation of Appointees to the Supreme Court, Court of Appeals and the Judicial Council

SPONSOR STATEMENT

HJR 47 provides for the legislative confirmation of judges appointed to Alaska's Supreme Court and the Court of Appeals. It also provides for legislative confirmation of all members of the Judicial Council.

The Supreme Court was created in Alaska's constitution and therefore a constitutional amendment is necessary to change the process for selection of Supreme Court Justices.

Presently, the constitution says, at Article 4, Section 5:

"The governor shall fill any vacancy in an office of Supreme Court justice or superior court judge by appointing one of two or more persons nominated by the judicial council."

The Court of Appeals was established by statute, A.S. 22.07. It is a court of record with appellate jurisdiction in actions commenced in the superior court.

A.S. 22.07.70 says,

"The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of judge of the court of appeals within 45 days after receiving nomination from the judicial council, by appointing one of two or more persons nominated by the council for each actual or impending vacancy."

HJR is crafted to apply to appointments to both the Supreme Court and the Court of Appeals. It does so by adding constitutional language referencing courts of record with appellate jurisdiction that are established by the legislature, and, requiring all such appointments to be presented for legislative confirmation.

An additional feature of the HJR 47 is that also requires confirmation of all members of the Judicial Council. This council is also created in the constitution at Article 4, Section 8. It provides that three public members appointed by the governor shall be confirmed by the legislature. However, it also provides that three attorney members appointed by the Alaska Bar Association do not have to be confirmed. HJR 47 requires all members of the Council to be confirmed by the legislature.

The motivation for the constitutional amendment is to include the public in the process of appointing judges. The public has less input into the judicial branch of government than in either the executive or legislative branches. These other branches have elections and compulsory public input in their decision-making processes. Even the governor's cabinet appointees are subject to legislative confirmation. By providing for legislative confirmation of judges, the public will be able to participate in confirmation hearings. Judicial candidates will be able to present their philosophical approach to jurisprudence. The public will have a voice in their selection.

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Representative
John J. Cowdery

March 3, 1998

Honorable Joe Green, Chairman
House Judiciary Committee
118 State Capitol Building
Juneau, Alaska 99801

Dear Mr. Chairman and Members of the House Judiciary Committee:

I would appreciate your vote to move and pass HJR 47 from committee. The issues involved in this Resolution are apparent to all. In fact, if you will review my testimony, attached, you will see that I anticipated the primary arguments against the bill and effectively answered them.

All testimony from the public was in favor of HJR 47, except for two organized lawyer/judge groups and former Senator Vic Fischer who was voted out of office in favor of a more conservative senator. Those who spoke or left written statements supporting HJR 47 include former Lieutenant Governor and Constitutional Convention Delegate, Jack Coghill, former Anchorage Mayor Tom Fink, Attorneys Ken Jacobus, Rob Reiman and Wayne Anthony Ross, Mr. Jerald Des Jarlais, Ms. Sue Fischetti, Mr. Ross Dunfee and many others who came to the LIO's but departed before we could get to them.

HJR 47 is so popular with the public that I can fill many hours of hearings with favorable testimony. But it would be redundant because the issues are few and fundamental. I would like to recap them for your consideration.

First, I need to address the extraordinary testimony of Chief Justice Warren Matthews. Chief Justice Matthews' personal participation was intended to

convey the considerable influence of his high office against HJR 47. He wanted to make a statement and he did it twice. He made his statement at the committee hearing and again in the Joint Session on the State of the Judiciary. His testimony lacked in both form and substance. I will elaborate.

As to form, Chief Justice Matthews had the opportunity to apprise himself in advance of the contents of the legislation, the sponsor statement and the supporting testimony which preceded his. Yet, he chose to not engage the arguments presented. Instead he offered parallel arguments that did not intersect with information already on the record.

As legislators, we publish our sponsor statements. We lay bare our reasoning and motivation in public testimony. We endure the slings and arrows of debate, sometimes contentious debate, to arrive at the truth and value of the premises contained in our legislation. We do this as a necessary part of the democratic process. We are not especially trained in the fine points of rhetoric and debate. But we are driven by our public responsibility to test ourselves, our thoughts and our principles in a crucible of diverse and public argument.

The judiciary, unlike the legislature, is especially trained in the art of rhetoric, argumentation and debate. There are few who can hold their own against the Judiciary's superior education, training and acumen. And, one must suppose, too, that members of the Supreme Court are the supreme representatives of their craft. Having regard for the safety of my own ego, I do not relish being pitted against someone who is so much better trained than I. Yet, legislative accountability demands that I answer all arguments on the issues that I adopt. The Chief Justice is not so obligated. He is free to pick and choose which issues to engage, which to ignore, which venues to participate in and which ones to ignore; all in all a royalist approach to public responsibility.

Chief Justice Matthews advanced no argument that was not, or could not be, advanced by other officials of the Bar Association, Judicial Council, his lobbyist or administrative staff. Why, then, was it necessary for him to take the extraordinary step to personally testify against HJR 47? If he brought no unique information to the debate, then his only purpose could have been to see what legislative mettle might wither under the influence of his high

office. It was a political stroke through and through! For all his argument against politicizing the process, it seems he is quite willing to be political on his own terms.

Further, as to error of form, whenever a member of the Judiciary pre-judges a legislative issue, the integrity of the judicial forum is compromised if the issue is thereafter litigated. It is simply bad judgement for the judiciary to directly advocate in the legislative process. The Judicial Council's Executive Director testified. The Chief Justice is Chairman of the Judicial Council. There is a variety of ways for the Judiciary to get their arguments on record without compromising the public process they administer.

As to substance, Chief Justice Matthews presented three lines of argument against HJR 47. First, he contends that legislative confirmation of judges will politicize the selection process. As evidence, he offered the parallel of the federal system's judicial appointments. He says whenever the President and the U.S. Senate are controlled by different political parties there is always a controversial vote that goes down party lines. He pointed to the Clement Haynesworth, Robert Bork and Clarence Thomas nominations as examples. He says a judge who is championed by one political party and opposed by the other could be suspected of being partisan in cases with political issues at stake.

Two key flaws exist in his "politicization" argument. First, he assumes politics is necessarily bad. Second, he totally mischaracterizes the federal judicial confirmation system.

This argument, that legislative confirmation equates to politicization of the judicial selection process, is true. Black's Law Dictionary helps us define our terms:

"Political. Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its

public policy; having to do with organization or action of individuals, parties, or interests that seek to control appointment or action of those who manage affairs of a state.”

“Politics: The science of government; the art or practice of administering public affairs.”

If “politicization” means exposing judicial candidates to the rough and tumble that sometimes results from a public process, then it is of course true. It is true and it is GOOD!

There is nothing inherently evil or untoward in politics. Politics, like justice, is as good as the people who administer it. Politics is simply a shorthand word for going about the public business. Surely, it is easier to be aloof from the public, as is the judiciary. They are the closest thing to royalty we have in our society.

However, the Chief Justice must have a different meaning in mind for the word ‘politics’. His meaning has a degrading meaning, suggesting something sinister about the political process. Any suggestion that public involvement inherent in the legislative process is somehow debasing, is too royalist a view for our democratic society. It is further testimony that the Judiciary is out of touch with the people of Alaska. Public confirmation hearings would be an in-touch experience for judicial nominees.

Apparently, CJM only recognizes ‘politics’ as occurring in the legislative branch. He admits to no political considerations being played out in the executive branch during the appointment process. Does not the White House look for judicial candidates who are philosophically compatible and supportive of its major precepts? Aren’t there special interest groups, politicians and people of influence who advocate to the White House for or against certain candidates? The point here is that politics does indeed play a prominent role in the executive branch’s appointment process, and it largely excludes the public. Public involvement doesn’t occur until an appointment becomes a nomination and is sent to the legislative branch, i.e., the U.S. Senate. Public involvement is the key difference between the executive and legislative branch’s appointment processes. This is the step missing in Alaska’s current system that HJR 47 will remedy.

The Judiciary and the Alaska Bar Association have their own, rich history in judiciary politics. A former Chief Justice tied up Bar Association funds. In retribution, the Bar Association actively worked to defeat the 1964 Supreme Court Justice Arend, who was up for retention election. (See Bar Rag..date)

Chief Justice Matthews advanced the Haynesworth, Bork and Thomas appointments as examples of politicization of the federal process that we should avoid at the state level. He selected these three appointments from a span of about 25 years. In fact, they are not representative of the federal appointment process. During the past 25 years, they are the nominations which commanded the most news coverage. After Clarence Thomas's appointment, another Justice was appointed to the U.S. Supreme Court. Most people can't remember his name because no controversy attended his confirmation. Haynesworth, Bork and Thomas are not typical of the federal process. There are about 800 federal judgeships. About 68, on average, are politically confirmed each year, routinely and without fanfare

Contrary to Chief Justice Matthews' argument about 'politicization,' politics smooths out the confirmation process. By no written rule, but only as a matter of political expediency, the Senate and the White House have an informal arrangement whereby the senior U.S. Senator from each state concurs in the federal judicial nominees from their respective states. This process is a political compromise that results in the overwhelming preponderance of federal nominees to be confirmed without controversy. Politics, it is shown, facilitates the appointment process.

Further analogizing the federal system with HJR 47, CJM said that when the executive and legislative branches are controlled by different parties, the vote always tends to go down party lines. Again, the votes on Haynesworth, Bork and Thomas are simply not indicative of the pattern of congressional approval. In fact, party line votes are rare in the appointment process, both at the federal and state level. One need only review the President's and the Governor's cabinet and other political appointments submitted for legislative confirmation. The overwhelming preponderance of their appointees are confirmed without regard to party considerations. Legislative confirmation is not the bugaboo that CJM claims it is.

In answer to a query from a member of the committee, CJM said,

"I don't accept the premise that there is partisanship inherent in the appointment of Alaskan judges."

He offered that his own appointment by Governor Hammond was an example of a cross-party, therefore non-partisan, appointment. The Chief Justice presumes that party affiliation is the only basis for partisanship. In fact, we know a variety of bases for partisanship including conservative vs. liberal, urban vs. rural, development vs. no-growth, pro-governor vs. anti-governor, etc. CJM's appointment by Governor Hammond would have been much less likely if his client list included aggressive development interests in ~~stead~~ of the Sierra Club. His main benefactor for the appointment was the Governor's Administrative Assistant who also was his former law partner. Some would say he had 'political' connections. CJM would have us believe that politics is something that happens in the legislature's back yard, never in the governor's or the judiciary's.

If appearance of partisanship is an issue that truly concerns CJM then perhaps he should resign and revisit the appointment process without political support. As one member of the Judiciary Committee said, "politics is inherent in the process." To deny this fact is extremely naive. To contend that it is base, is an insult to the body-politic in general and to the legislature in particular.

As for his concern that a judge could appear to be obligated to the legislative party that champions his confirmation, why is it not a concern to him that a judge could appear to be obligated to a governor who appoints him. Uncontested partisanship should not be confused with non-politicization.

The second line of argument employed by CJM against HJR 47, was that it could result in confirmation delays and bottleneck the courts' work flow. He noted that he was appointed in the month of May. If he could not take office until after legislative confirmation seven months later, it would prolong the vacancy and impede the court's productivity.

This argument is somewhat disingenuous because it ignores the adaptability of people and organizations. With legislative confirmation in place, most

resignations and retirements will simply schedule themselves around the legislative calendar. As a matter of administrative efficiency the Court System could require a one-year notice for judgeships that require confirmation. It can be argued that unforeseen vacancies due to accidents or death could still present a problem. The record shows that these occurrences are rare. And, inasmuch as the Judicial Council's process takes from three to six months, the risk of being out of sync with the legislature is statistically insignificant.

Also, although CJM expressed reluctance to use temporary fill-in appointments for the high court, the Constitution gives him the authority to do so. Alaska has a repository of retired judges who can perform this temporary function. The Chief Justice need only exercise the power given to him in the law.

Finally, Chief Justice Matthews third argument against HJR 47 was that it would "degrade" the "merit system" now in place. Nothing could be further from the truth. HJR 47 maintains the current system in total. The Judicial Council and the Bar Association will still go through the same polling and grading processes. They will still interact with the governor in the same way they do now. When all their work is done, and after the governor makes his decision. HJR 47 simply gives the legislature and public a role to play in the appointment process.

However, CJM warned that if the legislature rejected the top two nominees, working down the list to other candidates would result in inferior quality of judges. One can only note that this argument is built on an inflated opinion of the precision and objectivity of the selection process. In all probability, a different set of raters would yield a different set of results. Many attorneys refrain from submitting their applications for judgeships because they believe the selection panel as biased against them.

In summary, HJR 47 retains the existing merit selection system. It adds public participation via the legislative forum. It requires legislative approval of attorney members of the Judicial Council and judges for the Court of Appeals and the Supreme Court. Confirmation will result in appointees who are acceptable to a broader segment of the public than only the narrow constituency of the appointing authority. In effect, legislative confirmation

Rep. Joe Green, Chairman
House Judiciary Committee
Page 8

adds a "whole man" review of the nominee's suitability for appointment. This is a proposition that we can recommend to the General Election ballot for final determination by the voters of Alaska.

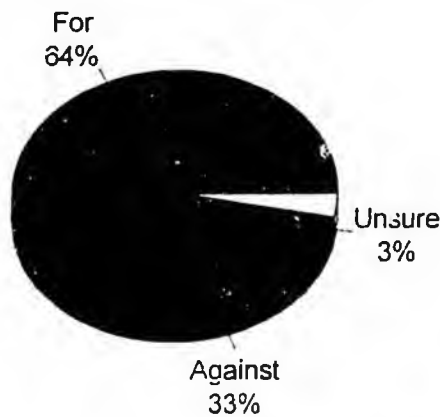
Yours truly,

John J. Cowdery
Representative

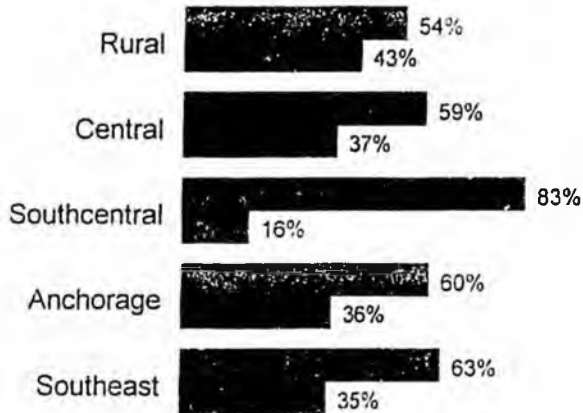
Legislative Confirmation of Judicial Appointments

Similarly, approximately two out of three Alaskans (64%) report they support legislative confirmation of judicial appointments...

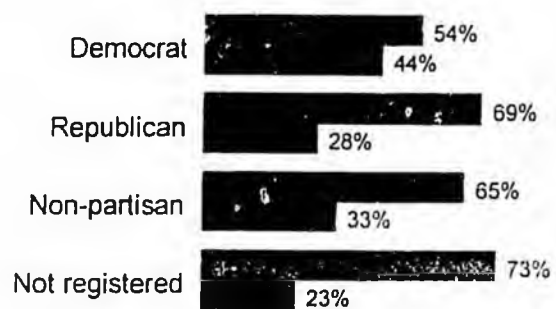
"At the present time in Alaska, judges on the Supreme Court and Courts of Appeal are nominated by a judicial council and appointed by the Governor. If there were a constitutional amendment on the ballot that would require a majority vote of the Legislature to confirm judicial appointments, do you think you would vote for or against that constitutional amendment?"



REGION



REGISTRATION



■ For ■ Against

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

March 31, 1998

SUBJECT: Testimony regarding the drafting of constitutional amendments
(HJR 47)

TO: Representative John Cowdery

FROM: Tamara Brandt Cook
Director *TBC*

You have sent me an excerpt from testimony from Vic Fischer, former Senator and member of the constitutional convention, in which he objects to the drafting of recently proposed constitutional amendments in general and of HJR 47 in particular. He recommends that the legislature establish a style in drafting process to ensure that proposed constitutional amendments are in "proper shape." You have asked for my reaction to that testimony.

I believe that I understand Vic Fischer's concern, but, on reflection, I fear that the difficulty with the constitutional language that Mr. Fischer has identified has to do with the complexity of the purposes that are sought to be achieved and the reluctance of legislators to leave the details of proposed constitutional amendments to the courts to sort out. Obviously, to the extent that the constitution is used to address specific rather than general situations in precise ways the language needed to achieve the desired result becomes less simple.

For example, the reason that section 1 of HJR 47 is so complicated is that several things are added to what is now a very simple provision:

- (1) the appointment and confirmation of judges with appellate jurisdiction is addressed;
- (2) not only is legislative confirmation required of supreme court justices and appellate judges, but the question of presentment is addressed along with the question of when a nominee may assume office to fill a vacancy;
- (3) what happens when a nominee fails to be confirmed is addressed in a very specific way--the same person may not again be appointed until a new legislature is elected at a general election and convened;
- (4) the requirement is added that appointees for other judicial offices that may be established by law be selected from nominees of the judicial council.

Representative John Cowdery

March 31, 1998

Page 2

If, as a substantive matter, all of these items are to be addressed, I do not think that it is possible to also keep that constitutional section simple. Perhaps I am wrong and I would certainly welcome suggestions for better language that achieves the same results.

I wonder, however, if the style in drafting process envisioned by Mr. Fischer would be limited to suggesting drafting changes that do not change the substance of a constitutional amendment proposal or whether Mr. Fischer suggests that the style in drafting process include the substantive simplification or alteration of proposals. I also wonder how the style in drafting process would be accomplished. Should a new style in drafting standing committee be created? It might be well worth while to get Mr. Fischer's thoughts on these points.

TBC:jdr:pl

98-218.jdr

From the office of . . . Representative John J. Cowdery

State Capitol Bldg., Room 416

Juneau, AK 99801

907-465-3879 phone

907-465-2069 fax

MEMORANDUM

TO: Tam Cork, Legislative Legal Services 465-2029
FROM: Representative Cowdery J.C.
DATE: March 20, 1998
RE: testimony on bill drafting

Notes: House Judiciary 2/20/98 HJR 47 Vic Fisher:

The following is an excerpt from testimony on HJR 47, from Vic Fisher, former Senator and member of the constitutional convention. I would like to offer some defense for the drafters in this case. Please advise on what course of action you recommend.

Technically and in terms of style, with all due respect to my ol' friend John Cowdery, the drafting of the proposed amendment is an inexcusable abomination. I have hardly ever seen anything this poorly drafted. This is not constitutional language that it has proposed. It is the worst of legislative drafting. Compare the drafts of the amendments with the judicial article on the judiciary. Look at section 1, section 2, section 3, section 4, section 5, it is clear and claritable, positive, simple straightforward understandable sentences. You do not have conductive language that just doesn't fit into a constitution. The only part of HJR 47 that is properly drafted is section 3. It is clean, its understandable, it do does not make a mess. I would say almost the same thing about HJR 4. I signed up to testify on both. I think HJR 4 is not significant. I don't think it is an important proposed amendment. I think it would tilt the balance of the powers at the constitutional level somewhat from the legislature to the executive, but not significant. Again you do not have quite an abomination, but again it is an example of lousy drafting. I will not go into detail, but I would be glad to work with anyone who wants to. Or right now I would be glad to give examples. I think that the legislature should establish a style in drafting process. Like what came to be in existence in the Constitutional convention to get proposed amendments into proper shape. So that # 1) it fits into the constitution in constitutional language and they don't end up with a hodge podge that you have in HJR 47. Or like in legislature drafted amendments that became section 16 and 17, of the finance articles that have to do with expenditure limit and budget reserve account.



STEPHANIE J. COLE
Administrative Director

303 K STREET
ANCHORAGE, ALASKA
99501

(907) 294-0548
FAX (907) 264-0881

THE ALASKA COURT SYSTEM OPPOSES HJR 47

The Alaska Legislature is currently considering HJR 47, which would require legislative confirmation of appellate court judges. The changes proposed in HJR 47 would erode the balance of power among the three branches of government and weaken Alaska's nationally-recognized system of merit-based selection of judges. The proposed system could add months to the selection process, creating a real danger that extended judicial vacancies will result in delays in the resolution of court cases. The changes would also pull judicial candidates into the realm of partisan politics and threaten judicial independence.

Alaska's Merit-based Selection Process is Rigorous and Nonpolitical

Unlike the federal court system, Alaska's current structure for selection of judges is a rigorous, merit-based process. The drafters of the Alaska Constitution resoundingly rejected the idea of electing judges by a vote of 51-2, in favor of a method with a minimum of political consideration or partisanship. Alaska was only the third state to use merit selection, but today 35 states have some method of merit selection. The national movement is toward judicial selection processes that are less political, not more.

Under our current selection system, the Alaska Judicial Council recruits applicants for judicial vacancies, investigates and screens those applicants on the basis of their demonstrated abilities to perform judicial duties, and forwards names of qualified applicants to the Governor, who must make a final selection from only

those names sent by the Council. The Judicial Council is a nonpartisan commission of lawyers and non-lawyers, who examine each applicant's education, employment history, activities, credit and criminal history, bar discipline history, client grievances and conflicts of interest. Only those candidates who are deemed most qualified after this extensive investigation are forwarded to the Governor. This process does not involve any consideration, or even identification, of the partisan political affiliations of the judicial candidates.

In the final step of the process, the Governor may only choose from the applicants found most qualified by the Council. Prior governors who have been unhappy with choosing only from among the applicants sent forward by the Judicial Council have requested additional names, but the Council has consistently declined to add applicants at a Governor's request. In the past, there has been no consistent tradition of the Governor appointing on a partisan basis; judges have been appointed who have had different political affiliations than the Governor.

Retention Elections Allow the Voters to Retain or Remove Judges

The people of Alaska have the opportunity to approve or reject judges at periodic retention elections. Alaska has the nation's most extensive system for seeking public input on retention. The Judicial Council surveys lawyers, law enforcement officers, jurors, court employees and children's caseworkers. It looks at a judge's disciplinary record, disqualifications from assigned cases, appellate record, and the evaluation by the CourtWatch program. The Judicial Council holds public hearings to allow people to testify about their experiences with judges who are standing for retention. Most of this information is made available to the voters. A judge will be voted out of office if enough voters are unhappy with the judge's performance.

HJR Would Increase Judicial Vacancy Periods and Aggravate Court Delay

The provisions of HJR 47 undermine the current process, and would have a negative impact on both court operations and service to the public. Currently,

approximately six months pass between the time applications for the judgeship are solicited and the Governor's selection of the successful candidate. Under the changes set forth in HJR 47, the Governor's appointee will not be able to take office until after legislative confirmation. Depending upon the time of year of appointment (which might be when the legislature is not in session) and upon the willingness of the legislature to act swiftly in holding confirmation hearings, many months could be added to the period of judicial vacancy.

An extended judicial vacancy has a high impact on any court's ability to do its work. In the federal system, legislative reluctance to hold hearings and to confirm judicial appointments has created a crisis for the federal judiciary, as cases are backlogged because of the lack of judicial resources to decide them. In the Ninth Circuit, approximately one-third of the positions are vacant, and two have been empty for more than two years. Historically, appointment delays have been aggravated in the fourth year of a presidential term, when confirmation is often withheld by a Senate controlled by an opposition party. At the state level, should the legislature decide to disapprove an appointment, a lengthy period of delay would result, as an entirely new selection process might be required.

HJR 47 May Affect the Pool of Judicial Applicants

Lengthening the time between application and assumption of judicial office will also have a disproportionate impact on attorneys in the private sector. Applying for a judgeship is already a disruptive process for private sector attorneys, who must make hard decisions about pursuing cases and accepting new clients during such an extended period of uncertainty. Public sector attorneys, who do not have to worry about maintaining a client base, and sitting judges who are seeking appointment to a higher judicial seat, will have a great advantage. An often-expressed goal is that our judges should have histories which reflect both private and public sector experience, and this goal would not be promoted by the changes proposed in this legislation.

HJR 47 Erodes Judicial independence

But by far the greatest danger in this proposed legislation is its erosion of judicial independence. As has been seen in much-publicized federal confirmation hearings in recent years, judicial candidates who enter the legislative realm are often subject to the currents of partisan politics. The Canons of Judicial Ethics do not allow judicial candidates to "...make pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office," nor may a judicial candidate, "make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court." It is a fundamental principle of the law that a judge has the responsibility to weigh the facts of each case impartially, and to apply the law to those facts, to reach a decision. To the extent that demands are made in a confirmation process, as they often are, that a judicial candidate commit to a particular view of controversial issues, a judge who emerges from the process can easily be perceived as biased towards a particular point of view. If a judicial candidate is championed by one political faction, and opposed by another, the judicial candidate's ability to handle controversies involving those parties later in the courtroom is severely compromised.

Edward W. Madiera, Jr., the chair of the ABA's Commission on Separation of Powers and Judicial Independence, has noted that "Judicial independence is not for the protection of judges, but for the protection of the public." Each person who brings a case in Alaska's courts should feel that his or her case will be measured on its individual merits, by a judge who is free from bias and political obligation. Our current merit-based system, which keeps judicial candidates out of partisan politics and yet empowers the voters to remove judges in retention elections, is one of the best in our country. It encourages the appointment of well-qualified, independent, and courageous judges. The changes proposed in HJR 47 would be a step backward for justice in Alaska.

Alaska Constitutional Convention Minutes

Selection of Judges concerning Legislative Confirmation

*** Page 694 ***

....[Coghill has moved that attorney Judicial Council members be confirmed by the legislature]

MCLAUGHLIN: I presume Mr. Coghill submitted this motion merely for the purpose of getting this on the floor coldly and calculatingly. If this motion is passed, you might as well tear up the whole proposal and provide for the election of juries because then it would be more efficacious and more democratic. The whole theory of the Missouri Plan is that in substance, a select and professional group, licensed by the state, can best determine the qualifications of their brothers. The intent of the Missouri Plan was in substance to give a predominance of the vote to professional men who knew the foibles, the defects and the qualifications of their brothers. It is unquestionably true that in every trade and every profession the men who know their brother careerists the best are the men engaged in the same type of occupation. That was the theory of the Missouri Plan. The theory was that the bar association would attempt to select the best men possible for the bench because they had to work under them. If you require a confirmation of your attorney members you can promptly see what will happen. The selection is not then made by the organized bar on the basis of a man's professional qualifications alone. The determination of the selection of those people who are on the judicial council will be qualified by the condition, are they acceptable to a house and a senate or a senate alone, which is essentially Democratic or essentially Republican. No longer is the question based solely on the qualification

*** Page 695 ***

of the candidate for the bench. The question is, will those people whom we set up here on the judicial council, that we send from the bar, will they be acceptable in terms of political correctness? If political correctness enters into the determination of the selection of those professional members who are to be placed upon the judicial council, the whole system goes out the window. All you have is one other political method of selection of your judges. The theory, and it is the only way it can possibly work, is that the lawyers are put on there to get the best man and not to take a man on the basis of his politics. But if we require confirmation, then the material consideration to be made by the Alaska Bar Association is, are we sending our best representative--no. But are we sending a good Democrat acceptable to both members to both houses or are we sending a good Republican acceptable to both houses. If we permit that determination to enter into our consideration, then in substance we should provide for an initial election or initial appointment by the governor or some other body. Qualifications go out the window as soon as you have confirmation. The theory on the lay members on the confirmation, they represent the public and they represent the predominant political thought. The theory on the lawyer members of the council, they represent the profession, they represent the best interests of the profession. They represent a desire to have the best judges on the benches. I beg of you, please don't vote for the amendment.

**LEGISLATIVE CONFIRMATION OF JUDGES
AND ATTORNEY MEMBERS OF THE JUDICIAL COUNCIL**
Position paper of the Alaska Judicial Council, February 1998

HJR 4 and SJR 34 propose a constitutional amendment to require legislative confirmation of appellate judges and attorney members of the Judicial Council. The Alaska Judicial Council strongly opposes this amendment.

Alaska's System of Merit Selection and Retention Elections Is Fair and Thorough

Alaska uses the merit selection system for choosing judges, asking a nonpartisan commission of lawyers and non-lawyers to recruit, investigate, and evaluate applicants for judgeships. The Alaska Judicial Council has seven members: three non-lawyer members nominated by the Governor and confirmed by the Legislature, three lawyer members elected on a regional basis by members of the Alaska Bar Association, and the Chief Justice of the Alaska Supreme Court.

SELECTION: The Judicial Council conducts an extensive evaluation of all judicial applicants, investigating their education, employment, activities, credit and criminal history, bar discipline, client grievances, and conflicts of interest. It surveys bar members about the applicant's suitability to be a judge, conducts public hearings, and interviews each applicant. The Judicial Council carefully reviews all of this information and passes the names of only the most qualified applicants to the Governor for appointment.

RETENTION: Unlike federal judges, who are appointed for life, Alaska judges must come before the voters periodically to determine if they should continue in office. Alaska has the nation's most extensive system for seeking public input on retention. The Judicial Council surveys lawyers, law enforcement officers, jurors, court employees, and children's caseworkers. It looks at the judge's disciplinary record, disqualification from assigned cases, appellate record, and evaluation by the CourtWatch program. It holds public hearings to allow people to testify about their experiences and concerns. The Council makes the great majority of this information available to the voters. If enough voters are unhappy with the judge's overall performance, the judge is voted out of office.

The Amendment Is at Odds With the Goals of the Alaska Constitutional Convention

WHY MERIT SELECTION WAS ADOPTED: The drafters of the Alaska Constitution wanted to avoid the politics that plague elective judiciaries in other states. They resoundingly rejected the idea of electing judges by a vote of 51-2, in order "to select the method with the minimum of political consideration or partisanship." Alaska was the third state to use merit selection; today 35 states have some form of merit selection of judges. As other states become disenchanted with the caliber of their elected judges, they have made the selection process less political, not more.

WHY LAWYER MEMBERS ARE SELECTED ONLY BY THE BAR ASSOCIATION: The drafters felt strongly that attorneys should be allowed to select their own representatives to the Judicial Council, on the theory that they were the best judges of the professional competence and integrity of their peers. The delegates were emphatic that lawyer members should not be selected for their partisan affiliation, their political correctness, or their acceptability to the Legislature. They rejected legislative confirmation of lawyer members by a vote of 49-2. The drafters required legislative confirmation of non-lawyer members of the Judicial Council to ensure that lay members could operate independently of the Governor.

Response to the assertion that the **Judicial Conduct Commission** and the **Judicial Council** are adequate public representation:

Ombudsman Investigation Summary, May 23, 1997

Concerning allegations filed against Judge Carlson; after the conclusion of the Frank Feichtinger case:

"...the [Judicial Conduct] commission waited another 16 months to begin investigation." (page 2)

*"...the ombudsman's investigation determined that the [Judicial Conduct] commission failed to pursue two relatively specific and readily verifiable allegations of misconduct."
(page 3)*

"However, the ombudsman is concerned that public confidence in the [Judicial Conduct] commission process is not enhanced when attorney members hear complaints about judges who preside over a high percentage of cases handled by the attorney."

"Commission members do not currently view these professional interactions as automatic grounds for recusal." (page 3)

"...the [Judicial Conduct] commission takes the position that a constitutional amendment would be required to either change membership or provide alternatives" (to the current system.) – (page 3)

Support for the assertion that the Judicial Commission investigates ineffectually and minimizes misconduct when discovered.

When the then Chief Justice Compton was stricken with the George Jacko syndrome, merely stepped down as Chief but continues to serve. I have serious concerns about someone essentially convicted of sexual harassment sitting in judgement over similar offenders.

Isabel Traugott, the sexually harassed employee, said,

"It's both a judicial ethical violation and a violation of the law. . ."

"I don't feel it's appropriate for him to remain as a judge, given those factors. . ."

"I feel that there's a big concern about somebody presiding over sex harassment cases that commit sexual harassment toward his employees."

Compton Steps Down – July 3, 1997 Juneau Empire

And this is all the public was told:

**Alaska Commission on Judicial Conduct
Public Notice of Private Admonishment**

After an extensive investigation and consideration of the nature of the conduct involved, the Alaska Commission on Judicial Conduct has issued a private admonishment to Chief Justice Allen T. Compton. The admonishment addresses two incidents of conduct by the justice in 1995 and 1996 concerning two court system employees. The Commission concluded that this conduct constituted sexual harassment in violation of the Alaska Code of Judicial Conduct.

The Commission is authorized by statute and its own rules of procedure to issue a private admonishment. Chief Justice Compton has agreed to this public notification of the private admonishment.

*Alaska Commission on Judicial Conduct, 310 "K" Street, #301, Anchorage, AK 99501
272-1033 or In Alaska 1-800-478-1033*

"This is the only information that the Commission may publicly release concerning the matter." – Marla N. Greenstein

*Sealed
Records*

TABLE 8
ACTIONS TAKEN
1993 - 1997

Actions Taken	1993	1994	1995	1996	1997
Complaints investigated	27	33	20	15	15
Judges asked to respond in writing to alleged misconduct	1	1	0	0	2
Judges summoned before Commission to explain alleged misconduct	0	0	0	0	2
Cases dismissed before formal hearing	0	0	0	0	1
Cases dismissed as unsubstantiated (complainant unavailable)	0	0	0	0	0
Cases dismissed for lack of jurisdiction	28	18	28	16	26
Cases dismissed for insufficient evidence after investigation	23	30	20	14	13
Private censures, admonishments, reprimands and cautionary letters	0	2	5	1	1
<i>Total Complaints</i>	<i>57</i>	<i>74</i>	<i>53</i>	<i>30</i>	<i>79</i>

More Complaints than was Filed AGAINST Leg

Confirmation process would curb judicial abuse

By REP. JOHN COWDERY, District 17

I am responding to the Compass piece written against HJR 47 by William Cotton, executive director of the Alaska Judicial Council (Daily News, Opinion, March 28). If passed by the voters, HJR 47 would make the governor's nominees to the Supreme Court, the Court of Appeals and the attorney members of the judicial council subject to legislative confirmation as the three public members of the judicial council are now.



Cowdery

Mr. Cotton feels that the judicial council sends only the most qualified applicants to the governor. He didn't mention that many attorneys refuse to apply for judgeships because of the council's perceived liberal bias. Mr. Cotton would have us believe that politics occurs only in legislative provinces but never in the executive or judiciary branches. Indeed, bar association politics in Alaska, like elsewhere, is legendarily robust.

The judicial council brandishes the real judicial selection power in Alaska. If the governor does not like the two or more candidates selected by the council, too bad. If you go to buy a car and there are only two on the lot, someone has effectively made your choice for you. In Alas-



ka, that someone is the judicial council. With so much power at stake, you can bet your bottom dollar that legislative confirmation — public accountability — is the last thing it wants.

HJR 47 is the best of both worlds. It keeps the current merit system in place while adding the crucial step of legislative review to the appointment process. Through legislative hearings, judicial nominees would be given the opportunity to discuss their views on taxation, private property rights, child abuse, crime and punishment, environmental protection, etc. Some sitting judges are adamantly against this idea because they would not have been confirmed if the public knew what they stood for in advance of their appointment.

Mr. Cotton said that judges are accountable directly to the voters through "retention elections." When was the last time you reviewed a judge's record before voting? Retention elections are uncontested. They are a formality. There is no adversarial debate, no platform and no competition for ideas. Information is scarce. It is scantily distributed.

For instance, did you know that

The judicial council brandishes the real judicial selection power in Alaska. If the governor does not like the two or more candidates selected by the council, too bad. If you go to buy a car and there are only two on the lot, someone has effectively made your choice for you. In Alaska, that someone is the judicial council.

Chief Justice Allen Compton was found guilty of sexual harassment incidents in 1995 and 1996? Yet, Justice Compton was retained in November 1996 by a margin of 2 to 1. Voters did not have all the facts because the full story wasn't released until mid-1997 — after the election. When Justice Compton was found guilty he stepped down as chief justice, but stayed on the bench. It will be 10 years before he comes up for retention again. No one responsible for administering the law should enjoy that level of elite privilege.

Mr. Cotton asserted that we are just trying to "control judges." This is the classic bogeyman tactic. Once a judge is confirmed, the Legislature would be out of the picture forever. I began work on HJR 47 in August of last year, months before the courts began their latest assault on publicly made law. The only thing I want to contain is the unfettered

power of the judicial council to which Mr. Cotton is, understandably, very attached.

Mr. Cotton wrote that those who accuse the courts of "lawmaking" are just complaining because they do not agree with the decisions. This statement is based on the premise that justices have the authority to create constitutional law with a wave of their pen. Isn't the constitution supposed to be written by the people and interpreted by the judiciary? Mr. Cotton's attempt to trivialize our assertions is counterproductive to a meaningful discussion. I refuse to be painted into a corner.

No matter what side of the issue one is on, when the Alaska Supreme Court says that the privacy provision in Alaska's constitution guarantees a person's right to possess marijuana, despite statutes passed by the Legislature, that is lawmak-

ing (Ravin vs. State).

When the judiciary specifies the dietary, educational and space needs of Alaska's criminals down to the food group, class and square foot, that is lawmaking (Cleary vs. Smith).

When the Alaska Supreme Court says that we cannot lease off-shore lands because the state did not consider the effect on caribou, that is bad judgment, not lawmaking (Trustees for Alaska vs. State).

There are many decisions I may not agree with; sometimes they are lawmaking, sometimes they're not. Mr. Cotton would have us blindly follow black robes and gavels all the way to judicial domination.

Alaska is a new state. Our judicial selection process is largely unproven by the test of time. The processes in 12 other states, as well as the federal confirmation process, do not violate the separation of powers doctrine. Neither would HJR 47. The Alaska judiciary's capricious use of authority and failure to appropriately censure the conduct of its members reveal a recurring pattern of power abuse. Legislative confirmation is not a panacea for all of Alaska's judicial ills, but I believe it is a measured step in the right direction.

Rep. John Cowdery of Anchorage is serving his third term in the state House of Representatives.

HJR

50

HFIN

FILE

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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KEY BANK BUILDING
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P.O. BOX 110300-DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE (907) 465-3600
FAX (907) 465-6735

February 11, 1998

Hon. Jeanette James
Chair, House State Affairs Committee
State Capitol, Room 102
Juneau, Alaska 99801-1182

Re: HJR 50 (Alaska Permanent Fund)

Dear Representative James:

At the last hearing of HJR 50 by the State Affairs Committee, you requested that I provide to you a copy of a letter sent by the governor under AS 37.13.070(a). Please find enclosed the letter of Governor Knowles. I am still searching for a version of the letter sent by former Governor Hickel. These letters were archived, so it will take some time before a version is located.

Your aide Patrick Lounsberry asked if I could provide a compromise version of a removal for cause provision. The following approach might be considered by the committee

AMENDMENT

TO: HB 81

“Page 2, lines 8 - 20 : delete all material and insert the following new material to read:

*Sec. 4. AS 37.13.070(a) The governor may remove a member of the board from office when in the governor's judgment it is in the best financial interests of the Alaska Permanent Fund and the citizens of the state. A removal by the governor must be in writing and must state the reason for the removal. [rest of section unchanged].”

Please do not consider this letter to constitute an endorsement of the amendment set out above. I am merely describing an amendment that would fall somewhere between removal at pleasure and removal for cause. Consistent with my prior testimony, the administration believes that existing

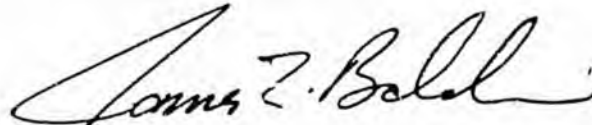
Hon. Jeanette James
HJR 50

February 11, 1998
Page 2

law provides accountability for the actions of the board of trustees by requiring the governor to formally exercise his removal powers. I hope this will assist the committee in its deliberations.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL



By: James L. Baldwin
Assistant Attorney General

JLB:jn
Enclosure

cc: Pat Pourchot, Legislative Director
Office of the Governor

Chrystal Smith, Legal Administrator
Deborah E. Behr, Assistant Attorney General
Department of Law

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. HJR50

Revision Date (Note if correction) _____ Dep: Affected _____ Office of the Governor
 Title Const Amend Relating to a public BRU Elective Operations
corporation to manage the permanent fund Component Elect ons
 Sponsor Representative James
 Requester House State Affairs Committee Component Serial No #21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	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	3.0					
1005 GF/Program Receipts						
1037 GF/Menta Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

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 Gail Ferrera Phone 465-3935
 Division Division of Elections Date 1/23/98
 Approved by Governor Fran Ulmer Date 1/23/98
 Agency Office of the Lieutenant Governor

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

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Alaska State Legislature

REPRESENTATIVE
JEANNETTE JAMES

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Juneau, Alaska 99801

207-486-1846

FAX: 207-486-4271



Office of the
Speaker
1000 North
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Juneau, Alaska
99801
207-586-1743
FAX: 207-586-1747

House Of Representatives

House District 34

Statement of Intent

HJR 50, "Proposing amendments to the Constitution of the State of Alaska relating to a public corporation established to manage the permanent fund."

HJR 50 is in direct response to the Administration's constitutional concerns regarding HB 81, "An Act relating to the board and staff of the Alaska Permanent Fund Corporation."

The Department of Law explained that the Permanent Fund Board was created by statute to administer a constitutionally established fund, thus the only way to provide removal for cause would be through a constitutional amendment.

HJR 50 addresses this matter on point while striving for the goal of continuity, a reasonable practice to pursue when dealing with the State of Alaska's largest and most important asset.

HJR

53

HFIN

FILE

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: January 28, 1998

FURTHER REFERRALS:

Date of Committee Action: 2/18/98

The FINANCE Committee considered:

HJR 53

HOUSE JOINT RESOLUTION NO. 53

FEDERAL UNIVERSITY LAND GRANT BILL

Relating to support for federal legislation providing for the continuation of the University of Alaska by the conveyance of federal land to the university.

recommends it be replaced with the following committee substitute _____ the same title a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____ APPROVES PREVIOUS: (Dept/Date) _____
 fiscal note(s) _____ fiscal note(s) _____

zero fiscal note(s) HFC for UA zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
<i>Gene Therriault</i>	Therriault	X			
<i>Edwin Mulder</i>	Mulder	!			
<i>Terry Martin</i>	Martin	X			
<i>Vivian Kohring</i>	Kohring	X			
<i>John DAVIS</i>	DAVIS	X			
<i>Ben Grossendorf</i>	Grossendorf	X			
<i>Blaine Moses</i>	Moses	X			
<i>John DAVIS</i>	DAVIS	X			
<i>John Foster</i>	Foster	X			

CHAIR'S SIGNATURE *Gene Therriault*

 Therriault

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill NO. HJR 53

Revision Date: _____
 Title: Relating to support for federal legislation providing for the continuation of the U. of A. by the conveyance of federal land.
 Sponsor: Kelly
 Requester: _____

Dept. Affected University
 SRU _____
 Component _____
 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	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES []						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1091 Designated Program Receipts						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: _____

POSITIONS

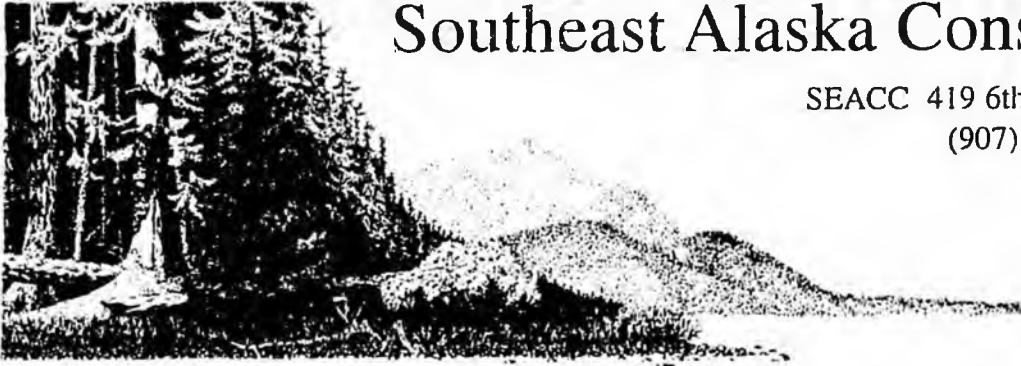
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by

Mark Hanley
 Rep. Mark Hanley, Co-Chair
Gene Therrin
 Rep. Gene Therrin, Co-Chair

Phone 465-4939
 Phone 465-4797
 Date 2/18/98



Southeast Alaska Conservation Council

SEACC 419 6th Street, Suite 328, Juneau, AK 99801
(907) 586-6942 phone (907) 463-3312 fax
info@seacc.org

**Statement of Marc Wheeler for the
Southeast Alaska Conservation Council
on HJR No. 53 before the House Finance Committee
Alaska State Legislature
February 18, 1998**

Mr. Chairman, members of the House Finance Committee, my name is Marc Wheeler and I represent the Southeast Alaska Conservation Council (SEACC). Thank you for the opportunity to testify before you today. I respectfully request that my written statement and accompanying materials be entered into the official record for this Committee Hearing. I am also submitting a copy our statement made before the U.S. Senate Energy and Natural Resources Committee on September 11, 1997.

Founded in 1970, SEACC is a coalition of fifteen local community, volunteer conservation groups in twelve Southeast Alaska communities, from Ketchikan to Yakutat. SEACC's 1200 individual members include commercial fishermen, Native Alaskans, hunters and guides, tourism and recreation business owners, value-added wood product manufacturers, and Alaskans from all walks of life. SEACC is dedicated to safeguarding the integrity of Southeast Alaska's unsurpassed natural environment while providing for balanced, sustainable use of our region's resources.

SEACC strongly objects to this proposed resolution.

While we support adequate funding of the University of Alaska by the Alaska State Legislature, SEACC strongly opposes S.660.

As amended by the Senate Energy Committee in September, 1997, S.660 would allow the University of Alaska to select at least 250,000 acres of National Forests and other federal land within Alaska that are not "conservation system units" (as defined in ANILCA (Public Law 96-487), these include National Parks, National Wildlife Refuges, National Monuments, and Wilderness Areas) or Legislated LUD II areas protected by the Tongass Timber Reform Act of 1990 (TTTRA). Up to 250,000 additional acres of National Forest and other federal land could be selected if matched by an equal acreage from State lands. Under this bill, half a million acres of public lands, including lands within the Tongass and Chugach National Forests, could be selected for clearcutting and other damaging uses.

Forced to squeeze as much revenue from their lands as possible, the University has never acted as careful stewards. The University will select lands which they can turn into fast cash -- they will target Tongass old-growth timber lands and level them as quickly as possible. The University

LYNN CANAL CONSERVATION, Haines • FRIENDS OF GLACIER BAY, Gustavus • FRIENDS OF BERNERS BAY, Juneau
WRANGELL RESOURCE COUNCIL • ALASKA SOCIETY OF AMERICAN FOREST DWELLERS, Point Baker • PELICAN FORESTRY COUNCIL
ALASKANS FOR JUNEAU • NARROWS CONSERVATION COALITION, Petersburg • TONGASS CONSERVATION SOCIETY, Ketchikan
CHICHAGOPE CONSERVATION COUNCIL, Tenakee • JUNEAU GROUP SIERRA CLUB • SITKA CONSERVATION SOCIETY
TANKU CONSERVATION SOCIETY, Juneau • PRINCE OF WALES CONSERVATION LEAGUE, Craig • YAKUTAT RESOURCE CONSERVATION COUNCIL

does not manage for multiple use, instead they manage their lands much like private lands -- laying down massive clearcuts and exporting round logs, while placing the absolute minimum protections on fish and wildlife habitat. Furthermore, the University of Alaska doesn't even employ many Alaskans in its logging operations. The University hired Wasser and Winters, an out-of-state firm, to log its timber holdings near Cape Yakataga. According to the Alaska Department of Labor, over 70 percent of Wasser and Winters employees in 1995 were non-residents.

This bill threatens all parts of the Tongass not permanently protected by Congress including:

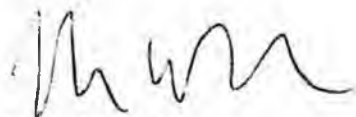
Unprotected Tongass wildlands important to Southeast Alaska communities, such as *Cleveland Peninsula, Port Houghton, Mansfield Peninsula, Honker Divide, East Kuiu, Ushk Bay, Deep Bay, and Upper Tenakee Inlet.*

So far, 10 Southeast Alaskan communities and 2 tribal governments have gone on record opposing this legislation. ** See attached **

The Morrill Act of 1862 created the land grant system of colleges and universities. This Act granted lands based on states' population, not size. While it is true that Alaska ranks 48th in the size of federal land grants given to its University, it also ranks 49th in terms of population. The University currently holds roughly 140,000 acres of fee simple land, and 173,326 acres of investment property in all. With this ample land grant and adequate funding from the State of Alaska, our University system should be able to provide quality education for all Alaskans.

In conclusion, we urge you to withdraw this resolution.

Yours,



Marc Wheeler