CITY OF KETCHIKAN

334 FRONT STREET P. O. BOX 1110 – KETCHIKAN, ALASKA 99801 TELEPHONE 907-225-3111

February 7, 1969

The Honorable Stan Cornelius
Alaska House of Representatives
Juneau, Alaska

Sir:

I have been informed by Don Berry that you have been appointed to study the Department of Public Safety regulations.

We have had some correspondence with Commissioner Personett on this matter. I am enclosing a copy of my letter to the Commissioner, and his answer to me.

As explained in our letter, we are not trying to "shoot down" his program. Since it does contain some objectionable items, we believe that these regulations should not be allowed to become law, at least until after the Chiefs Association meeting in June. The Association has not had an opportunity to act as a group. We believe that several of the regulations usurp the powers of Municipal Chiefs and in effect makes the Commissioner of Public Safety a commissioner of municipal departments.

We also believe that, since these regulations will affect our budgets, the League of Alaska Cities should have the opportunity to review them and make their recommendations before they become law.

We, therefore, respectfully request that these regulations not be allowed to become law during this session of the legislature.

Very truly yours,

T. H. Miller

T. H. Miller
Chief of Police
Ketchikan Police Department

THM:ld

cc: Brad Phillips
W. K. Boardman
Robert Ziegler

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

POUCH N, CAPITOL BUILDING
JUNEAU 99801

December 17, 1968

Our File #332

Chief T. H. Miller
Ketchikan Police Department
Ketchikan, Alaska 99901

Dear Chief Miller:

I have received your letter regarding criminal and identification records and the proposed regulations to implement the procedure. (Chapter 107, SLA 1968)

We are well aware of the budgetary problems that would be involved if an early compliance date were suggested. We are, however, bound by the language of the statute: ". . . regulations proposed by the department shall be submitted to the presiding officer of each house on the day the house convenes." Delay until June would, therefore, be impossible.

However, budgetary and implementing problems (both yours and ours) have been taken into consideration. These problems have been discussed at both previous Chiefs gatherings and in comments received on this and previous proposed regulations. For this reason, it is planned that implementation should be on a step by step basis with full implementation several years away.

As an example, we feel that we should furnish most, if not all, of the necessary forms, etc., and that a system of retrieval and dissemination of the information must be available. It would seem extremely doubtful if this would happen overnight.

Chief, I know that you as a professional peace officer agree on the need for a statewide centralized criminal justice information system. You can rest assured that this Department will do nothing to make it impossible for all agencies to take part. I would hope that not only at the June meeting, but continuously, we are able to discuss its progress and suggest changes to make it a more valuable tool.

Very truly yours,

Mel J. Personett
Commissioner

cc: Chief J. L. Rhines
Chief Paul Mullenix
Captain R. L. Burton

December 13, 1968

Mel J. Personett, Commissioner
Department of Public Safety
Pouch K, Capitol Building
Juneau, Alaska

Re: Your File #334

Dear Commissioner:

In your letter of November 12, 1968, you ask for comments concerning your proposed rules and regulations regarding Criminal and Identification records.

This program is of such magnitude that it would affect the budgets of, at least, the smaller departments. It would require the addition of personnel, additional copies of our present forms, and in some cases, new forms. Since most of us work on a calendar year budget and our budgets have already been presented, it would be impossible to add these items for 1969.

Also, I believe that proposed changes and additions of this magnitude should be presented to the Chiefs Association for their consideration before it is presented to the Legislature.

In view of the above, it is requested that you do not present this to the Legislature until after the next Chiefs meeting, which will be held in June.

I have talked to Chief Mullenix of Sitka and Chief Rhines of Kodiak. They both agree with the above approach and have authorized me to speak for them in this matter.

Yours very truly,

T. H. Miller
Chief of Police
Ketchikan, Alaska

ld

cc: Chief Mullenix
Chief Rhines
Captain Burton, President
Alaska Association Chiefs of Police

FORM SA-1B

MEMORANDUM State of Alaska

File

TO: Representative Barry Jackson, Chairman
House Judiciary Committee
Sixth State Legislature

DATE : March 4, 1969

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: Requested Information
Our File #151 - 1969

The following is submitted in answer to the February 26 request of your committee.

#1. "Stop & Frisk" -- Law or regulation?

As previously stated, I feel that departmental regulation and policy should satisfactorily solve any problem that may arise.

In reviewing "Terry vs Ohio", U. S. Supreme Court, we find that permissive legislation is not necessary since Ohio had no such law.

Departmental regulations which we are drafting follow, to a great extent, the New York State law and the New York State Police regulations.

I would propose that these regulations be used for one year by this Department before a final choice of statute vs regulation is made.

Attached is the first draft of those departmental regulations.

#2. Retirement Plan for State Troopers.

Although at the present time most of the thinking seems to lean toward something comparable to the Anchorage Police Department plan, I personally feel that other state and city plans and fiscal problems should be researched thoroughly prior to any final decision. I would not suggest that legislation be introduced prior to this study.

#3. Priority Needs of Law Enforcement in Alaska (not limited to State Troopers).

A. Improved and expanded training capabilities.

B. Centralized information, and the ability to gather, store and retrieve it instantaneously. This includes, of course, communications.

C. Specialized or technical groups for certain types of investigations. This includes criminal evidence lab capabilities, either by contract, state-owned, or a combination of both.

D. Modern equipment.

CHAPTER 320

STOP & FRISK

Sec. 320.010 Introduction

A. Alaska laws do not include provisions authorizing the arrest of persons on the so-called "Open Charge" or "Suspicious Person" as is allowed in some other jurisdictions. Such laws were intended to provide the police with a means of holding a person, while at the same time conducting an investigative inquiry into the circumstances which reasonably brought that person under suspicion.

These laws, in their application, have generally been ruled unconstitutional; however, the courts have at the same time recognized the need for the police to inquire into a person's actions under certain circumstances, and the very practical need for the police to be able to protect themselves from bodily harm at the hands of the person stopped.

Toward this end, court decisions indicate that whenever possible the court will uphold the officer's right to approach, interrogate and conduct a street search of a suspicious person, and that such action does not conflict with the Fourth Amendment prohibition against unreasonable search and seizure. (People vs Rivera, 14 NY 2d. 441; People vs McErlean, 38 Misc. 2d 634; People vs Russo, 38 Misc. 2d 957; People vs Peters, 18 NY 2d 238; United States vs Vita, 294 F. 2d 524; Rios vs United States, 364 US 253; People vs Marendi, 213 NY 600; People vs Entrialgo, 19 App. Div. 2d 509; Sup. Ct., Terry vs Ohio 6-10-68).

B. State Troopers will continue to stop and question a person, for a reasonable time, whom they observe in public under suspicious circumstances or who is acting in a manner which reasonably makes that person suspect.

They will also search that person for dangerous weapons, if the member reasonably suspects he is in danger of life or limb.

C. The limiting guidelines within which a member may conduct a "stop and frisk" are as follows:

1. The person is abroad in a public place; and

2. The member reasonably suspects the person:

   (a) Is committing; or
   (b) Has committed; or
   (c) Is about to commit a crime.

The member may demand the person's name, address, and proof of same, and an explanation of his actions, and, if he reasonably suspects he is in danger, he may conduct a search of that person within the following guidelines:

1. The member may take weapons or anything, the possession of which may constitute an offense, and keep them until he completes the questioning of the person, and then:

   (a) Return them if they were possessed lawfully; or
   (b) If not, he must arrest the person.

D. For purpose of interpretation of the various phrases and wording applicable to "stop and frisk", members shall be guided by the following:

1. "Public place", should be considered a place to which the general public has a right to resort, not necessarily a place devoted solely to the use of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the public. This would include, for example, the hall and stairs of an apartment house (People vs Whitman, 178 App. Div. 193; People vs Peters, 18 NY 2d 228).

2. "Reasonable" suspicion or suspect is less than would be required to constitute grounds for arrest. When facts and circumstances existing at the time make it not unreasonable for an alert member to suspect a person, he may stop the person and interrogate him in detail as to his actions. Such things as the hour, the neighborhood, the actions of the person, items he might be carrying which are out of place, actual resemblance to wanted person, clothing matching description of wanted suspect, etc.

3. "Reasonable" belief of danger to the member must be based upon facts and circumstances existing at the time which do not make the search unreasonable. Such things as the neighborhood, absence or presence of assistance, time of day, apparent character of the person, person's actions, crime for which person is suspect, etc. will be considered.

4. "Reasonable time" during which a person may be stopped and questioned should generally not extend beyond fifteen minutes without substantial justification for delay.

E. Members must keep in mind that a "stop and frisk" situation is not an "in custody" situation, and does not constitute an arrest. However, the person may be temporarily detained, even against his will, for a brief time, even though he need not answer questions. This can include returning to the near scene of the suspected crime or a survey of the surrounding area for evidence of the crime suspected.

In view of the fact that the "stop and frisk" does not constitute an arrest, members may not conduct a search of the person or his belongings merely for evidence of a crime, but by the same token, the "Miranda" warning is not required, even though the provisions of the fifth amendment do apply.

Mr. Harris
Here is a copy
you requested
Larry Fulton
File -
State Police

GRAND JURY SUPPLEMENTAL REPORT TO
THE SESSION COMMENCING MAY 18, 1970

Upon formal request and by virtue of information coming to the attention of this Grand Jury, an inquiry was made into the activities of the Alaska State Troopers. As a result of our investigation and the evidence presented to us, we find that the rumors concerning criminal activities of the State Troopers committed by either individuals or in concert, are vicious, irresponsible, and malicious attacks without merit or foundation of any kind. We have found in connection with this investigation that the case load of the investigators of our law enforcement agencies is appalling. That under the existing circumstances, the ratio of criminal acts to available law enforcement personnel is such as prohibits detection of the perpetrator, proper investigation, and punishment of offenders, encouraging criminal activities in the Third Judicial District of this State. Throughout the week we have heard many witnesses, and there were many people not heard who requested to be heard. Because of their number, a spokesman for the group was requested and did appear before the Grand Jury. Because of the nature of their request and the explanation of their spokesman as to the general content of their testimony, the Grand Jury determined that the subject thought to be related to the Grand Jury was outside the scope of its investigation.

The Grand Jury was honored by the appearances of the Honorable James M. Fitzgerald, Presiding Judge of the Superior Court, the Honorable Eben H. Lewis, the Honorable C. J. Occhipinti, the Honorable Ralph E. Moody, Judges of the Superior Court, and the Honorable Paul B. Jones, Presiding Judge of the District Court in and for the Third Judicial District, State of Alaska. We express our appreciation for their explanation concerning this

I sent the list of lawyers who were
not heard Thursday to Tom Brown

Grand Jury's supplemental report of May 1, 1970. In connection therewith, the Grand Jury compliments those judges and the court system in this judicial district for the application of philosophical ideals applied to sentencing. We believe, however, that those concepts adopted by the court are many years ahead of the physical facilities now available to make such sentencing practice practical and functional. We note the extreme case load of the parole and probation officers is such as to make their efforts and assistance in the rehabilitation processes practically ineffectual. The physical detention facilities are extremely inadequate and therefore do not lend themselves to the separation of those persons convicted of crime in any manner which would allow any effective rehabilitation practices to be effected during confinement. It is with unanimous consent that we urge the courts to adopt a more stringent sentencing practice looking to the protection of the public and giving effect to the constitutional guarantee of our citizenry that they indeed be secure in their persons, houses, papers, and effects.

We would further recommend a more substantial bail be required on persons charged with the commission of crime and more particularly on those who have demonstrated, by prior offenses, their danger to persons and property in the community and their unwillingness to comply with the laws of the community. We appreciate the difficult problems in the administration of justice and readily recognize that sentencing and bail is a matter of which the minds of reasonable men regularly differ, and that those persons charged with the most serious responsibility of sentencing their fellow man to incarceration for a term of years is not and has not been a matter taken

lightly by the judiciary of this judicial district. While we accord these judges our highest respect, we believe that the sentence and bail practice adopted by them should conform to the needs and demands of our community in these times. We have given serious consideration to the impediments to the administration of justice as well as administration of the courts by the statute allowing disqualification of judges. It is our belief that the preemption of judges, not being subject to question, is seriously abused. We conclude that the statute is invoked not for those purposes contemplated by the statute but rather to disqualify a judge whose sentencing practice differs from that believed to be in their clients best interest. We seriously urge the amendment of this statute to allow opposing counsel to challenge the good faith of the disqualification and require its use in conformance with the statutory purpose. The Grand Jury has found that the general public is not well informed as to the convictions of criminals or the punishment meted out by our courts for criminal acts. This, we believe, results in a lack of trust and loss of faith in law enforcement as well as the administration of justice. We strongly recommend that the news media adopt a reporting practice that will provide the public with a complete and accurate reflection of sentence and punishment by the court without selecting particular cases of interest. Such reporting practice will be an added contribution by the news media to public service which, we feel, will have a strong, deterrent effect on further crime.

DATED at Anchorage, Alaska, this 22nd day of May, 1970.

_____

GRAND JURY FORMAN

TAPS -

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
308 "G" STREET, SUITE 313
ANCHORAGE, ALASKA 9950
TELEPHONE 272-9431

WILLIAM H. JACOBS
EXECUTIVE DIRECTOR

PHILIP B. BYRNE
DEPUTY DIRECTOR
JOHN S. HEDLAND
LITIGATION SUPERVISOR

May 7, 1970

The Honorable G. Kent Edwards
Attorney General
Department of Law
Pouch "K"
Juneau, Alaska 99801

Dear Mr. Edwards:

On May 6, 1970, you spoke with me about the propriety of our submission to the Judiciary Committee of a memorandum giving our views as to the legality of state construction of the TAPS road. This memo was submitted at the request of the Judiciary Committee and fully disclosed the fact that we represented persons with partisan views on the matter. You suggested that this was improper because of pending litigation involving the same issues. Mr. Price of your office also contacted Mr. Regan in the same vein. So as to clear up any possible misunderstanding, I would like to refer you to the appropriate provisions in the Code of Professional Responsibility and Canons of Judiciary Ethics of the American Bar Association, effective January 1, 1970.

DR 7-107 (G) and (4) of the Code provides as follows:

> (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to . . .
>
> > (4) [h]is opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

DR 7-107 (I) provides as follows:

> (I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or

from participating in the proceedings of legislative, administrative, or other investigative bodies.

Under the circumstances, I think you will agree that our actions were not calculated to prejudice the impartiality of the pending litigation, and are plainly proper under ethical standards.

Sincerely,

ALASKA LEGAL SERVICES CORPORATION

/s/ William H. Jacobs

William H. Jacobs
Executive Director

WHJ/dp

cc: Representative Barry Jackson ✓
Chairman
House Committee on the Judiciary
Pouch "V"
Juneau, Alaska 99801

Dickerson Regan, Esq.
Alaska Legal Services Corporation
Juneau, Alaska 99801

Vital Statistics

JOHNSTON JEFFRIES
ATTORNEY AT LAW
P. O. BOX ~~XXX~~ 2940
~~SOLDOTNA, ALASKA 99669~~
Kenai, ~~A~~laska 99611
TELEPHONE ~~XXXXXX~~ 283-7838

April 16, 1969

Mr. Peter LaBate
Anchorage Bar Association
731 I Street
Anchorage, Alaska

Re: Divorce Fees and Vital Statistics

Dear Pete:

Would you please give this letter to the proper Committee of your Association.

No doubt you, like other attorneys, have had to contend with Statute No. 18.50.280, which requires the plaintiff in a divorce case to furnish the court with a lot of confidential information on a blank form. Frankly, some of my clients feel they should not have to furnish this information because it is confidential and not absolutely necessary for the granting of a decree of divorce. I usually end up having to fill out the forms myself, and this takes a lot of time.

We still adhere to the $300.00 minimum for an uncontested divorce, which I feel is too low in view of having to furnish this additional paper work for the Bureau of Vital Statistics. I very frankly feel that we should not have to do free work for the Bureau of Vital Statistics and I think this is an imposition upon the lawyers as well as the clients.

I am, therefore, suggesting as an individual attorney that we increase our fees accordingly or that proper action be taken to repeal this law which I think imposes upon attorneys and may be very questionable from the standpoint of its constitutionality.

In other words, I question that there is any reasonable relationship between the exercising of this police power (if so it may be called) and the furnishing of this confidential information.

Very truly yours,

Johnston Jeffries

JJ/blk

cc: Mr. James E. Fisher
Fisher & Hornaday
Attorneys at Law
P. O. Box 397
Kenai, Alaska 99611

Chairman of the Judiciary Committee
Alaska State Legislature
Juneau, Alaska

NO.1

HB

JUDICIARY COMMITTEE REPORT

1-31-70 ad

ON

HOUSE CONCURRENT RESOLUTION NO. 1

The reasons and need for this resolution are set out in the "whereas" clauses. The committee amendment would add the words "for a full day's service" in the last line. This amendment is to suggest that the court's rule dealing with jurors' fees be flexible enough to allow for various situations but without creating an undue administrative burden for the courts. The maximum fee would be $35 per day. Some factors to consider in determining a person's fee are the amount of time spent as a member of a panel or in reporting to the court and the fact that such service for any portion of a day may make it impossible for the person to pursue his regular livelihood that day.

Barry W. Jackson, Chairman

1-31-70
(Judiciary)

A M E N D M E N T

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: HOUSE CONCURRENT RESOLUTION NO. 1

Page 1, Line 24: After the "$35" and before the period insert "for a full day's service".

5/22/70

FREE CONFERENCE COMMITTEE REPORT

ON

FCCS SCS CSHJR 11

The need for and the reasoning behind this resolution are set out at page 427 of the 1969 House Journal. In its amendment of Art. IV, Sec. 2 of the Alaska Constitution, the free conference committee substitute makes clear that a justice serving as chief justice may not succeed himself in that office although he may again serve as chief justice after one or more intervening terms. It is understood that when a "vacancy" occurs in the office of chief justice this is not a vacancy to be filled by the governor under Art. IV, Sec. 5, but simply a situation that requires the remaining justices to again select one of their number to serve as chief justice; the man selected begins a new three-year term and does not serve only the remaining portion of his predecessor's term. In this situation the governor will follow the normal procedure to appoint a new justice, leaving the selection of the chief justice to the members of the court.

Senator Terry Miller, Chairman

Rep. Barry W. Jackson, Chairman

Senator Robert H. Ziegler

Rep. Wendell P. Kay

Senator Edward A. Merdes

Rep. Tom Fink

Supreme Court
State of Alaska
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

File
HJR 11

February 27, 1969

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Capitol Building
Juneau, Alaska 99801

Dear Chairman Jackson:

You have asked that I comment on House Joint Resolution No. 11 which proposes amendments to the Alaska Constitution making the office of Chairman of the Alaska Judicial Council elective among the members of the Council and rotating the office of chief justice among the justices annually.

In my opinion these amendments would not be in the public interest. The Alaska Court System is a unified court system patterned after that of New Jersey which was in turn created after the pattern developed by the American Bar Association to be the ideal court system for a state of the United States.

The main concept of the unified court system is that all of the courts of the state are tied together as an administrative unit under the supervision of the supreme court which is given rule-making power and headed by a permanent chief justice. The unified court system eliminates the traditional inefficient court pattern where each layer of courts from the justices of peace up through the district court judges, superior court judges, as well as the supreme court operates as an independent entity. In fact, each of the judges, being elected, is totally independent of any central administrative or budget control. The unified court system not only ties all of the courts together administratively, it places them under one budget and under one set of rules promulgated by the supreme court.

Before going further let me make it clear that objection is not based on a desire on my part to retain the office of Chief Justice or the chairmanship of the Alaska Judicial Council per-

manently. I will have reached retirement age by June of next year and it has for some time been my intention to retire at that time. This would be before the proposed constitutional amendment would have been voted on at the next general election in 1970, even if it were approved by this legislature.

My real concern is to see that the modern constitutional provisions that are a substantial part of the reason why the Alaska Court System has in a period of ten years become one of the most modern and advanced court systems in the United States are not destroyed.

First, consider the proposal that would remove the Chief Justice as permanent chairman of the Alaska Judicial Council and make the chairmanship elective among the members of the Council. The Council is composed of three members appointed by the Alaska Bar Association and three lay members appointed by the governor and approved by the legislature. The Chief Justice of the Supreme Court, who by the constitution is also made the head administrator of the court system, is the permanent chairman.

If the chairmanship of the Council is made elective there seems to be little doubt but that in most years the chairmanship would go to a lawyer member of the Council. With a membership of three out of seven, including the chairmanship, the Council would be weighted and oriented to the Bar. The objection to this is that the Judicial Council was intended to be judicially oriented. This can be best accomplished by having a judge as chairman. In the event a lay member was elected he would be considerably handicapped in attempting to discharge the duties of that constitutional office in view of his unfamiliarity with the administrative problems of the Alaska Court System, not to mention the other intr cate problems connected with the evaluation of a court system d recommending studies and changes to improve its efficiency. .th only one judge on the Council it is not likely that he woul. see much service as the elected chairman.

The constitutionally stated purpose of the Judicial Council is to sponsor studies designed to lead to the improvement of the administration of justice by the courts. The reason the constitution makes the permanent head administrator of the court system the permanent chairman of the Judicial Council is because he is the person best suited because of his intimate knowledge of the court system to advise the Council as to the needs of the courts.

My experience as chairman of the Alaska Judicial Council for the past ten years convinces me that the balance in the membership of the Council is too delicate. It has been my observation

that with respect to questions which affect the members of the Bar the three attorney members of the Council will generally vote as a block. This is understandable since the main sphere of their interest is the common welfare of the members of the association which appointed them. It has also been my observation that the three lay members are not committed to a point of view or school of thought and try to approach each problem with the objective intent of doing what is in the best public interest. The seventh member of the Council, the Chief Justice, under the theory of the constitutional article, is supposed to act as the swing vote. However, the fine balance of the Council is immediately upset if a lay member of the Council is absent from any given meeting, or, for that matter, if a law member is absent from any given meeting.

In my opinion the membership of the Alaska Judicial Council should be broadened along the lines of the membership of similar councils in other states. For example, the Judicial Council of California has 21 members. Fifteen are judges, four are lawyers and two are legislators. The Judicial Council of Washington has 17 members. Thirteen are judges and laymen and four are lawyers. The Judicial Conference of New York has 15 members, most of whom are judges. The Chief Justice is the permanent chairman in each state.

I think the Alaska Judicial Council should include three judges instead of one. Three legislators should be added and the lay membership increased to six. Since it is supposed to be a judicial council, there is every reason why, in addition to the Chief Justice, there should be a judicial member representing the superior and the district courts. In order to create and maintain a better understanding of the functions of the Council by the legislature, legislators should also serve on the Judicial Council as they do in most other states. I am proposing such expansion at this time.

The most important duty of the Alaska Judicial Council is the selection and nomination of candidates for judicial office to the governor. There is nothing technical about the selection of candidates for judicial office. The education and experience of every applicant is established by the known facts of his life. The applicant's integrity, character and reputation in the community, as well as his reputation as a practitioner, are matters that are well known to everyone in the community or can be determined with small effort. It is not necessary that the selection and nomination of judicial candidates be confined to a body which is entirely dominated by judges and lawyers.

The Missouri Plan of judicial selection has now been adopted by the states of New Jersey, Kansas, California, Iowa, Illinois, North Carolina, Colorado and Nebraska. Many other states are attempting to amend their constitutions to adopt this plan. Under the plan state bar associations have always, and understandably, been given representation on the nominating body. For example, in California thereare 4 lawyers of 21 members and in Washington 4 lawyers of 17 members. In no state has the Bar been given as many as 3 out of 7 seats, not to mention the chairmanship which is invariably retained in the Chief Justice. Alaska should make a change but it should be in a direction opposite from that proposed by House Joint Resolution No. 11.

With respect to rotating the office of Chief Justice, as has been mentioned, Alaska has adopted the unified plan for its court system. Under the present functioning of the judicial article the Alaska Judicial Council selects the nominees for the office of Chief Justice. Since he is to be the head administrator of the courts the Council is naturally charged with the responsibility of nominating only those candidates for judicial office who not only have judicial ability but also have administrative ability to the end that they could perform both important functions. Many candidates for judicial position on the Supreme Court with excellent qualifications to be a justice of that court are nevertheless not particularly qualified to be head administrator of the court system. In fact, many have no interest in any part of the function of the Supreme Court except the traditional duty of hearing and deciding cases and writing opinions expressing the views of the court.

To be concerned with the annual budget, with the problems connected with justifying the budget to the finance committees and the legislature, with the overall efficient administration of all the layers of the court system including keeping calendars current, requiring that all of the judges of the courts comply with all of the rules of administration in connection with their day to day operations is not a task that would appeal to every person who might otherwise be qualified to be a justice of the court. It was with this in mind that the American Bar Association recommended the concept of the permanent head administrator of the court system, who was to be the chief justice, who was to be a man selected for his dual abilities and on the basis that he desired to be the permanent head administrator of the court system.

The proposed constitutional amendment would make it mandatory that the office of Chief Justice be rotated among the five justices of the supreme court of Alaska annually. Under such a provision a justice of the court would have no choice but to be-

come Chief Justice for a period of one year when his turn came under the rotation plan. He may be interested in performing the administrative duties of the Chief Justice or he may not be. Upon assuming the duties of that office under the rotation system he would be required to spend a major part of his time for his first year in office learning all the details of administration with which he had not been concerned prior thereto. He would always be administering a budget which he had no part in preparing. It would not be possible for the judge to carry his regular judicial duties as well as spend the time required in order to familiarize himself with his new administrative duties before his term of office as Chief Justice would have expired. The next Chief Justice would then assume office under the same circumstances and would again be administering a budget with which he had absolutely no part in the preparation. No Chief Justice under these circumstances would be in a position to obtain a good perspective of the administrative problems of the Alaska Court System in time to effect any needed improvement, not to mention the planning of any overall improvement program.

Under a rotation plan there would be no continuity of policy and more important, there would be no continuity of responsibility. There would undoubtedly be a tendency by some to put off the tough administrative decisions since the term of office is short. The Administrative Director of Courts cannot make the tough decisions which affect judges and highly classified employees. The authority of the office of Chief Justice as well as his affirmative backing is necessary. The Chief Justice is made the head administrator by the constitution, not the Administrative Director. If the budget is administered in a given year to a deficit, it is the Chief Justice who is responsible to the legislature, not the Administrative Director. Furthermore, administrative directors come and go. Alaska has had four since statehood. All have resigned to accept better positions. It requires a minimum of one year for a new Administrative Director to become familiar enough with the system to assume the full responsibility of the office in every area of its responsibility.

While, as has been mentioned, many of the justices of the Supreme Court may have no particular interest in assuming the administrative duties of Chief Justice, nevertheless it is not likely that any justice would decline to assume those duties in view of the honor and prestige the position can reflect.

It has been said that the practice of rotating the office of chief justice has been quite successful in the state of Washington and in other states. The fact is that the state of

Washington does not have a unified court system. The supreme court of that state does not have supervisory control of all of the other courts of the state and does not have the constitutional rule-making power. That court does not budget for the entire court system and has no direct responsibility for example, for the efficient operation of the superior courts or the justice courts of that state. In short, the state of Washington does not have a unified court system although at least two members of that court have mentioned to me on occasion that it would be extremely desirable from their point of view if the state of Washington did have the unified court system.

The unified court system, with respect to administration has been adopted in whole or in part in the states of New Jersey, Kansas, California, Iowa, Illinois, North Carolina and New York. The office of chief justice is not rotated in any of these states. In fact, the office of chief justice is not rotated in 30 states. In 20 states the office is either elective by the voters, elective by the court, or rotated by court rule. In less than 5 states is rotation required by statute or constitution.

The chief justice is not, as is sometimes alleged, the administrative ruler of the court system. He can only act through rules of administration which are promulgated by the supreme court as a body.

It is my view that amending the Alaska Constitution to make the office of Chairman of the Judicial Council elective among the members of the Council and providing that the office of Chief Justice be rotated annually among the members of the Supreme Court would strike at the very heart of the concept upon which the unified court system is based.

Sincerely yours,

Buell A. Nesbett

Buell A. Nesbett
Chief Justice

BAN:eb

HJR 11

HJR 11

Supreme Court
State of Alaska
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

February 25, 1969

The Honorable Jalmar M. Kerttula
Speaker of the House
Alaska House of Representatives
Capitol Building
Juneau, Alaska 99801

Dear Speaker Kerttula:

In a recent communication from me to the Chairman of the House Judiciary Committee expressing my views on the merits of pending House Joint Resolution No. 11, I pointed out in some detail, why, in my opinion, that resolution is not in the public interest. The resolution proposes that the office of Chief Justice of the Supreme Court be rotated annually among the justices of the Supreme Court; that the Chief Justice be removed as permanent chairman of the Alaska Judicial Council and that the chairman be elected annually by the members of the council.

Without repeating the detail contained in my letter to the chairman of the House Judiciary Committee as to why House Joint Resolution No. 11 should not be adopted, I will only reiterate that if the present proposed constitutional amendment is effected the chairmanship of the Alaska Judicial Council would, in most years, go to a law member of the Council. The objection to this is that the Judicial Council was intended to be judicially oriented. This can be best accomplished by having a judge as chairman. In the event a lay member was elected he would be considerably handicapped in attempting to discharge the duties of that constitutional office in view of his unfamiliarity with the administrative problems of the Alaska Court System, not to mention the other intricate problems connected with the evaluation of a court system and recommending studies and changes to improve its efficiency.

I have served as Chairman of the Alaska Judicial Council for approximately ten years. Based on this experience it is my opinion that the present membership of the Council is too finely balanced.

The constitution provides that the Council be composed of three attorney members appointed by the Alaska Bar Association; three non-attorney members appointed by the governor and confirmed by the legislature. The seventh member is the Chief Justice.

It has been my observation that with respect to questions which affect the members of the Bar the three attorney members of the Council will generally vote as a block. This is understandable since the main sphere of their interest is the common welfare of the members of the association which appointed them. It has also been my observation that the three lay members are not committed to a point of view or school of thought and try to approach each problem with the objective intent of doing what is in the best public interest. The seventh member of the Council, the Chief Justice, under the theory of the constitutional article, is supposed to act as the swing vote. However, the fine balance of the Council is immediately upset if a lay member of the Council is absent from any given meeting, or, for that matter, if a law member is absent from any given meeting.

In my opinion the membership of the Alaska Judicial Council should be broadened along the lines of the membership of similar councils in other states. For example, the Judicial Council of California has 21 members. Fifteen are judges, four are lawyers and two are legislators. The Judicial Council of Washington has 17 members. Thirteen are judges and laymen and four are lawyers. The Judicial Conference of New York has 15 members, most of whom are judges. The Chief Justice is the permanent chairman in each state.

The most important duty of the Alaska Judicial Council is the selection and nomination of candidates for judicial office to the governor. There is nothing technical about the selection of candidates for judicial office. The education and experience of every applicant is established by the known facts of his life. The applicant's integrity, character and reputation in the community, as well as his reputation as a practitioner, are matters that are well known to everyone in the community or can be determined with small effort. It is not necessary that the selection and nomination of judicial candidates be confined to a body which is entirely dominated by judges and lawyers.

It is my recommendation therefore, that the membership of the Alaska Judicial Council be broadened and that instead of three non-attorney members there be six non-attorney members and that there be included in the membership three members of the legislature who are not lawyers or retired judges and that the judicial membership be increased from one to three. This would create a Council of 15 members which is more in line with the type membership which exists in other states.

It is recommended that the following resolution be approved by this session of the legislature:

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

Sec. 8 of Art. IV of the Constitution of the State of Alaska is amended to read:

Section 8. The judicial council shall consist of fifteen (SEVEN) members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Six (THREE) non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Three members of the legislature who are not lawyers or retired judges shall be selected for year terms by the legislature. One superior court judge and one district judge shall be appointed for six-year terms by the chief justice. Vacancies shall be filled for the unexpired term in like manner. The appointment of lay members shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the fifteenth (SEVENTH) member and chairman of the judicial council. No member of the judicial council, except the chief justice, the superior court judge, the district judge, and the members of the legislature, may hold any other office or position of profit under the United States or the state. The judicial council shall act by concurrence of eight or more members and according to rules which it adopts.

It had been my intention to propose the above amendment to the next Constitutional Convention. However, since House Joint Resolution No. 11 has come before this session of the legislature I have decided to act before the next Constitutional Convention.

Therefore, in the utmost sincerity, and believing it to be in the best interests of the State of Alaska, I ask that this resolution be introduced and approved by this session of the legislature.

Sincerely yours,

Buell A. Nesbett

Buell A. Nesbett
Chief Justice, Supreme Court
of Alaska

BAN:eb

FORM FG-74
(REV. 2-67)

HJR 15

MEMORANDUM

State of Alaska

DEPARTMENT OF FISH AND GAME

TO: Honorable Eugene Miller
House of Representatives
State Capitol, Juneau

FILE NO:

DATE : April 5, 1969

FROM: Wallace H. Noerenberg WHN
Deputy Commissioner of
Commercial Fisheries

SUBJECT: HJR ~~13~~ 15

In response to your request of yesterday for specific information on Continental Shelf problems, and Alaska's specific involvement, I regret that I have not had time to do a thorough research job. Documentation of the precise volume and value of all fisheries of the Alaskan Shelf areas has only recently been attempted.

I will briefly summarize the latest estimates of the key species which are found on Alaska's Coastal and Shelf areas: (Alaska has 65% or 550,000 square miles of the Nation's Shelf areas -- giving us a very special interest in obtaining exclusive use!)

1. Halibut. 1967 catch 58 million pounds; resource is presently thoroughly utilized by U. S., Canadian and Japanese fishermen; a drop in catch to less than 50 million pounds in 1968 reflects losses due to incidental catches by U. S. S. R., Japanese and South Korean trawlers on other fisheries.

2. Salmon. 263 million pounds caught in 1968; about 500 million pounds available if runs rehabilitated; presently all taken inside territorial waters by U. S. fishermen except for about 15 million pounds of Alaskan stocks intercepted by Japanese in Central and Northern Bering Sea and Aleutians. Massive movement of most of this resource into high seas zones, Shelf and beyond during ocean life means Alaska's principal fishery resource would be susceptible to destruction by foreign fleets if treaty arrangements failed.

3. Sablefish or black cod. Average present catch 1 million pounds per year in Alaska, Japanese presently catching many times this amount (12 thousand metric tons or 26 million pounds in 1968) off Alaska. This valuable resource estimated at 60 million pounds potential annual catch. Distributed all along Alaska's Shelf area and in places to great depths beyond.

4. Pacific Ocean perch. No Alaskan catch at present by Alaskans; 300 million pound catch by Japan in 1968; USSR catch not known; estimated annual yield of resource nearly 1 billion pounds if managed properly. Distributed at edge of Shelf from Ketchikan to tip of Aleutians.

5. Herring and other fish suitable for industrial use (meal production). Only a few million pounds of herring presently caught by Alaskans; annual production of all Alaskan areas might reach 1 billion pounds if fully utilized. Japan caught 23,000 metric tons in the Bering Sea alone in 1968. Other ground and flatfish, i.e., yellow fin sole, rock sole, turbot, flathead sole, are very abundant, especially in the Bering Sea. Estimated annual catch could reach 1.5 billion pounds; the codfish group adds another 500 million annual potential at least. Japan managed a catch of 1.4 billion pounds of Alaska pollock in the Bering Sea in 1968 -- mostly caught by fish sausage fleets just off the Shelf north of Unimak Island.

6. The various shellfish potentials are also impressive:

   a. King crab. 1966-68 U.S. catches have ranged from 80 to 167 million pounds; with Bering Sea stock added, sustained yield should be over 125 million pounds per year.

   b. Dungeness crab. 1966-68 U.S. catches in Alaska of 8-12.5 million pounds. New grounds off Peninsula are just being developed. Annual production may reach 25-30 million pounds.

   c. Tanner crab. About 3 million pounds taken in 1968 by Alaskans in first attempt. USSR and Japan caught over 30 million crab incidentally in eastern Bering Sea king crab tangle nets in 1968. Sustained yield for Alaska Shelfs estimated to be nearly 200 million pounds.

   d. Shrimp. Biggest potential of any shellfish -- e.g., about 400 million pounds annually. Present U.S. catch in Alaska 35-45 million pounds annually; Japan 29 million pounds in 1968; USSR probably more than Japan?

   e. Scallops. 1.8 million pounds of meats (equivalent of 20 million pounds of live scallops) landed in Alaska in 1968 -- was 15 percent of U.S. total production. Look for 10 million pounds in 1969 (fleet tripling, 1st full season). Potential yield not established but probably at least 15 million pounds of meats annually.

f) Clams. Health problems (potential poisoning) have temporarily stopped industry except for bait. Potential yield from several species is about 50 million pounds if means can be found to clear beaches (testing) for operations.

Gene, this hopefully gives you some examples to work with. The fisheries, if fully developed, would be worth many times the $219 million wholesale value of 1968. Extension of the contiguous fishing zone beyond 12 miles -- to at least the edge of the Continental Shelf -- would certainly assist U. S. development which at present is stymied not only by price and market problems (70% imports consumed by U. S. public) but by shear competition of foreign fleets for fishing space adjacent to our coasts. Many of the stocks mentioned -- i.e., Pacific Ocean perch, yellow fin flounder, Bering Sea halibut -- are in serious biological condition due to too much foreign fishing.

I also enclose copies of three Continental Shelf conventions developed in Geneva in 1958 and gradually being adopted by ratification by various nations.

Enclosures (4)

JUDICIARY COMMITTEE REPORT

ON

HOUSE JOINT RESOLUTION NO. 51

This resolution proposes to amend the Alaska Constitution so that no one can be deprived of his right to vote because he is unable to read or speak the English language. At the constitutional convention, the opinion which evidently prevailed was that "regardless of whether they are intelligent or informed, the very nature of the mechanics by which we set up our means of voting, which is by the written word, they must be able to read what that word is."

However, with today's transportation facilities and communications media, all Alaskans can be well informed as to the candidates, the issues, and the mechanics of voting, although the language may vary from one community to another. Communication need not be in English to be effective; justice decries such arrogance. And with today's understanding of the requirements of the United States Constitution, there is serious question as to the validity of our state provision which, on the basis of ability to read or speak English, deprives citizens of the right to vote even though that language is not the language of their community.

Barry W. Jackson, Chairman

HJR 51

TO JOHN HEDLAND February 13th, 1969

FR JIM SPILLANE

RE VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

PROPOSED AMENDMENT TO THE ALASKA CONSTITUTION

Replace Article V, paragraph 1, sentence 3 which reads:

"He shall be able to read or speak the English language as prescribed by law, unless prevented by physical disability." with

"Any person who speaks a language which is spoken in common in the community in which he was born, raised or lives shall not be required to read or speak the English language as a requirement to vote in any national, state, or local election."

Replace A.S. 15.05.010(5) which requires a voter be able to speak or read English, with

"Any person who speaks a language which is spoken in common in the community in which he was born, raised or lives shall not be required to read or speak the English language in order to vote in any national, state or local election."

Repeal A.S. 15.15.200, Sents. 3 & 4 which reads:

"If an election judge is doubtful as to the ability of the person to speak the English language, a satisfactory showing is made with the person briefly conversing with the election judge by the use of simple English words. If an election judge is doubtful as to whether there is a physical disability preventing the speaking or reading of the English language, a satisfactory showing is made by a written statement by a licensed physician that a person is so disabled."

February 13th, 1969

RE VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

In the alternative, change the constitution and statute to read

"No person born in the United States or its territories shall be required to read or speak English as a requirement to vote in any national, state or local election. ~~Other persons~~ (Those not born in U.S. territories) shall be able to speak the language which is spoken in common in the community in which they live."

The requirement that a voter be able to read or speak English is unconstitutional because it was intended as a means for determining who was an informed voter, but when applied to communities in which another language is spoken in common, it lacks any rational connection to that purpose and it causes these natives who satisfy that purpose to be discriminated against.

Requiring that all voters speak English goes beyond assuring that the voters are informed. It disqualifies natives that become informed through communication in another language.

The criteria for being informed is not whether you can speak English but whether you can speak the language that is commonly spoken around you.

The notion that information is only communicated in English is based on our own background of having everyone around us speak in English. We could communicate and thereby be informed, not because we could speak English but because we would speak the language everyone else was speaking. This helps to explain how a native could be informed even though he could not speak English. This is because he is in a different situation. For him to be informed, he must be able to communicate in the language which

February 13th, 1969

RE: VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

All criteria for measuring must relate to what they are measuring.

The rational between speaking English and being informed only applies to those people who cannot speak English and who are in English speaking communities. There is no reason for requiring a native speak English when he can become informed, and, thus, satisfy the purpose of the statute, by speaking the common native language of his community.

Without a rational connection between the requirement and the purpose, the requirement is invalid and unconstitutional if it denies someone his constitutional right.

The English requirement does not accomplish what it was intended to accomplish but does discriminate against informed voters, just the opposite of what was intended. The English requirement is an ineffective test of who is informed because information is not only communicated in English but in any language that is spoken in common in the community. Therefore the better test would be whether a voter can speak the language that is spoken where he lives.) The English requirement makes sense in a state where English is spoken in common throughout the state. But the rational connection between being informed and speaking English does not exist in a state like Alaska where there are whole communities in rural sections of the state which speak another language in common. This language is not only native to Alaska but is the language of the natives of this land.

February 13th, 1969

RE VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

When a requirement does not fulfill the purpose for which it was intended, it is susceptible to being used for purposes for which it was not intended. Because the terms of the requirement are broad, they leave a broad area of discretion in the election officer, and a broad area for abuse of that discretion. The problem is it is difficult to measure who is qualified to vote in a state where people become informed through different native languages. Any attempt to say who is informed falls either on its face as being too restrictive or, if the terms are broad enough, it falls for granting the election official too much discretion.

The only voting requirement which would have a rational connection to its purpose would be that a voter understand a language. This would be too difficult to apply without multilingual election officers in every village. Therefore, no speaking or reading requirement is better than one which cannot be applied and leans itself to discriminatory application. Our experience with the English requirement is that it is used to discriminate against people the election officer doesn't like.

Cases have held that where too much discretion is placed in the election officer's hands, the law is unconstitutional.

Louisiana's requirement that a voter be able to understand and interpret the Constitution was declared unconstitutional in Louisiana v. United States, 380 U.S. 145, 13 L. Ed 709 (1965), because it bore no relationship to a reasonable voting requirement as it was administered

and because it made the registrar the sole judge without setting standards for him to decide if a person was qualified to vote. The Court said the state constitution vest discretion in the registrars of voters to determine the qualifications of applicants for registration while imposing no definite and objective standards upon registrars of voters for the administration of the interpretation test. The Court found that Louisiana provides no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or recressed. 380 U.S. 152-153.

Mississippi required the voter to demonstrate his ability to interpret and understand the state constitution. The court in United States v. Mississippi, 380 U.S. 128 (1965) held that a statute, fair on its face, vested uncontrolled discretion in the county registrars in selecting the provisions to be interpreted and was therefore unconstitutional.

The Court in Davis v. Schnell, 93 L. Ed 1093, (195_) held that a statute that required a voter to be able to understand and explain the Constitution was unconstitutional because it vested too great a discretion in the registrar. The Court said the statute became a device in which the registrar could discriminate.

Katzenbach v. Morgan, 384 U.S. 641 (1966) held that the state must apply voting requirements in a non-discriminatory fashion. State of South Carolina v. Katzenbach, 383 US. 301 (1966) held that whenever a voting requirement which appears fair on its face is used in a discriminatory manner to disenfranchise potential voters, the

particular use of the voting requirement can no longer be constitutionally tolerated.

With United States v. Guest, 383 U.S. 745 (1966) holding that discrimination by an individual as well as by a state is prohibited by the Fourteenth Amendment, the two Katzenbach cases can be applied to discrimination by an individual.

The Katzenbach decisions did not have to resort to Constitutional law because the Voting Rights Act of 1965 (42 USC 1973b(e)(2)) covered the situations. However, the cases do show the Supreme Court is willing to consider discrimination in practice as well as discrimination on the face of a statute.

Besides cases that held literacy tests to be discriminatory in their application, Justices Douglas and Fortas have said that such English reading requirements are unconstitutional on their face. Cardona v. Power, 384 U.S. 672 (1966). The majority did not decide if such a requirement was a denial of equal protection, but remanded the case to the state court to decide. 384 U.S. 674.

The United States Constitution does not require a voter speak English. The only places literacy tests have been upheld are in states in which English is the only native language to that state. What may be a reasonable measurement of who a qualified voter is in one state may not be a reasonable measurement in another state.

Because the English speaking requirement does not measure what it was intended to measure, that is who is informed, it becomes an inadequate measurement of the use of the election officer's discretion. Without an adequate

standard to check the election officer's decisions of who is qualified to vote, the officer is left with an opportunity to apply his own standards and discriminate against whomever he wishes.

These then are the two reasons the Alaska requirement that all voters be able to read or speak English is a denial of equal protection. It does not measure who is an informed voter, nor is it an adequate standard on which to measure the election officer's decisions on who is informed to vote.

Because no reason exists for the classification of English-speaking people in villages which communicate in another native language in common, the classification of English-speaking people is discriminatory.

Last November, pre-registration of voters became law. Now for the first time we have an alternative method for determining who is an informed voter. The informed voter will have to know about the pre-registration requirement. This is an added reason why we do not need a second safeguard, such as the English requirement, to determine who is an informed voter, especially when this English requirement has the harmful side effect of disenfranchising informed native Alaskans who were here before Alaska ever became a state.

Exhibit A - map of native communities

February 13th, 1969

RE: VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

Other alternative wording include:

1. He shall be required to read or speak English or a language which is common to the community in which he lives (is from, or is born).
2. Or speak a language which is native to Alaska.

English Literacy Requirement for Voting in Alaska.

I. Present law.

Alaska Constitution Article 5, Section 1.

"Every citizen of the United States who is at least 19 years of age, meets the registration requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. He shall have been, immediately preceding the election, for one year a resident of Alaska and for 30 days a resident of the election district in which he seeks to vote. He shall be able to read or speak the English language as prescribed by law, unless prevented by physical disability. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions."

Alaska Statutes Section 15.15.200. Questioning A Voter of Doubtful Qualifications.

"An election judge may question any person of doubtful qualification attempting to vote and may require identification. Upon a satisfactory showing that the person is qualified to vote, the election judge shall allow the person to vote. If an election judge is doubtful as to the ability of a person to speak the English language, a satisfactory showing is made by the person briefly conversing with the election judge by the use of simple English words. If an election judge is doubtful as to whether there is a physical disability preventing the speaking or reading of the English language, a satisfactory showing is made by a written statement made by a licensed physician that the person is so disabled."

II. Proposed Changes.

Delete from Article 5, Section 1, Alaska Constitution sentence reading:

"He shall be able to read or speak the English language as prescribed by law, unless prevented by physical disability."

Delete from A.S. 15.15.200 sentence beginning:

"If an election judge is doubtful as to the ability of a person to speak the English language, a satisfactory showing is

made by the person briefly conversing with the election judge by the use of simple English words. If an election judge is doubtful as to whether there is a physical disability preventing the speaking or reading of the English language, a satisfactory showing is made by a written statement made by a licensed physician that the person is so disabled."

HJR-63

Arguments for bi-cameralism:

The original reasons for dividing the legislature into two houses, basdd upon class or religion, has completely disappeared. For a time, one house represented the people, and the other represented geographical areas. With the "one man, one vote" decision of the Supreme Court, this reason has evaporated. Both houses now represent the same people.

It is sometimes argued that the two houses are a part of our system of "checks and balances". This is an incorrect application of the term. "Checks and balances" is properly used to apply to the three branches of the government, the legislative, the executive, and the judicial. It does not apply within one branch. It is sometimes argued that x bi-cameralism protects against error by providing a double check on legislation. In actual practice, however, legislation often receives casual condideration in one house because "if there is anything wrong the other house will catch it." One conscientious, careful, deliberate consideration should be enough, as it is in our city councils and borough assemblies.

Arguments for Unicameralism:

The primary job of the legislature is to legislate. Obviously a one house system avoids unnecessary duplication of effort, reduces expenses, and promotes legislative efficiency.

A one house legislative system wquarely fixes responsibliiy, and avoids passing the buck. It enables the voters to accurately and fairly assess the conduct of the representatives, and to reward the good legislators and punish the bad.

In order to resolve differences between the two houses of a bi-cameral legislature, it has been necessary to devise the conference committee system. The conference committee is undemocratic and eases the work of the lobbyist. Of course with a one house legislature the conference committee disappears.

In this century the role of the state legislature with respect to the executive has been stedily diminished. The "strong executive" concept, and the calibre of work performed by the average state legislature, have combined to reduce many legislative bodies to the proverbial "rubberstamp" position. With a strong one house legislature, this trend may be reversed.

Details of the resolution:

CSHJR 63 would vest the legislative power of the state in a single house of 61 members, elected for four year terms, one half each two years.

To ensure deliberation, no final vote on a bill could be taken until the 6th dax legislative day after introduction, and after appearing on a public calendar for at least one day. 47 xxxxxx or more members could shorten the period of time.

With the passage of this resolution and its approval by the people in the general election of 1970, Alaska would be the first state to join Mebraska in a unicameral legislature. England, and eitht of the provinces of Canda, Finland, and the Phillipppine Islands, have had a single house legislature.

Report on H.J.R. 63:

This resolution seeks to amend the state constitution to abolish our bicameral system and establish a legislature consisting of a single house.

The bicameral legislature is a product of history and ingrained custom. The historical reason, distinction of class, has long since disappeared, leaving the 2nd house ~~hanging~~ perched on our political system like a wart on the nose of progress.

Historical Background:

Early legislative bodies were assemblies called by the monarch to ratify his orders, usually to collect more taxes. As these bodies became representative and assumed some genuine legislative functions, they gradually turned into groups representing various social interests. Thus an early four-part Parliament consisted of four houses, representing the clergy, nobility, cities, and people. England evolved the House of Commons and the House of Lords. Such was the historical background at the time of the American revolution.

HJR 79
SJR 7

THOMAS F. EAGLETON
MISSOURI

COMMITTEES:
LABOR AND PUBLIC WELFARE
PUBLIC WORKS
DISTRICT OF COLUMBIA
APPROPRIATIONS COMMITTEE,
EX OFFICIO MEMBER

re HJR 79

United States Senate

WASHINGTON, D.C. 20510

March 17, 1970

To Chris Johnson

Honorable Jalmar M. Kertula
Alaska State House of Representatives
P. O. Box 2199
Juneau, Alaska 99801

Subject: Electoral Reform --
The Federal System Plan

Dear Mr. Speaker:

As you know, the subject of electoral reform has received a considerable amount of attention in the 91st Congress. The House has passed a direct election resolution, and Senator Bayh's S. J. Res.1, which would establish essentially the same system, is now before the Senate Judiciary Committee.

While it is difficult to deny the essential rightness of the one-man, one-vote concept embodied in the direct election plan, it has seemed to many in the Senate that this principle requires a more stable institutional framework than a nationwide direct election would provide.

We have therefore introduced a modified direct election formula. Our "Federal System Plan" would work, very briefly, as follows:

1. A President would be elected if he (1) won a plurality of the national vote and (2) won either pluralities in more than 50% of the States and D. C., or pluralities in states with 50% of the voters in the election.

2. If no candidate qualified, the election would go to an Electoral College where the states would be represented as they are today, and each candidate would automatically receive the Electoral votes of the States he won.

3. In the unlikely event that no candidate received a majority of the Electoral votes, the Electoral votes of states which went for third-party candidates would be divided between the two leading national candidates in proportion to their share of the popular votes in those states.

We see several advantages in the Federal System Plan:

.It would give far greater weight to the one-man, one-vote principle than does our present system.

.It would help legitimate presidents by compelling them to show widespread support throughout the country, rather than just winning big in a few areas.

.It would avoid the uncertainties and horsetrading of a runoff.

.It would discourage the formation of ideological splinter parties, and encourage continued compromise within a broadly-based two-party system.

We are enclosing a portion of the Congressional Record containing the text of our amendment and a more complete explanation of it.

Since the Judiciary Committee does not at this time plan to hold further hearings before it reports a bill to the floor, we would doubly appreciate having your comments on our proposal so that we may share them with our colleagues before this matter reaches the floor.

Sincerely,

Robert J. Dole
United States Senator

Thomas F. Eagleton
United States Senator

TFE/acc
Enclosures

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 91st CONGRESS, SECOND SESSION

Vol. 116 WASHINGTON, THURSDAY, MARCH 5, 1970 No. 33

Senate

SENATE JOINT RESOLUTION 181—INTRODUCTION OF A JOINT PRESIDENTIAL ELECTION PROCESS REFORM

Mr. EAGLETON. Mr. President, one of the most urgent challenges before the 91st Congress is to reform the presidential election process.

During the 1968 election, doubts that had accumulated over the years about the adequacy of the electoral college were transformed into very real fears—fears that a President might be elected who had not received a plurality of votes, fears of a deal for votes within the electoral college, fears of an election thrown into the House of Representatives.

Of all the legislative work before us now, none is of greater importance than finding a new and better electoral process which will measure up to the intent of our democratic Constitution and at the same time give new stability and durability to our governmental institutions.

Under the leadership of the distinguished junior Senator from Indiana, (Mr. BAYH), this Congress has responded to the demonstrated need and growing demand for electoral reform. On September 18, 1969, the House of Representatives took the historic step of approving a constitutional amendment to abolish the electoral college and replace it with the direct election of the President. Hearings have been held before a subcommittee of the Senate Judiciary Committee on that amendment and the Judiciary Committee will soon begin its own consideration of the best method of changing the presidential election process.

Of the four major alternatives that have been advanced in the Congress—the district plan, the proportional plan, the automatic electoral college plan, and the direct election plan—the latter has seemed to me to be preferable. It is the only option which respects the principle of popular sovereignty and adheres to the general proposition that the President of the people should be the choice of those people. Therefore I have cosponsored and supported Senate Joint Resolution 1—the direct-election plan introduced by Senator BAYH in this body and enacted in substance by the House of Representatives.

In recent months, however, a number of troubling problems have been raised about possible consequences of the proposed direct election plan—questions that I believe cannot be ignored.

First, under the direct election plan it would be possible that a candidate could be elected President who lacked a broad base of support throughout the country. For example, in a multiparty race, the victorious candidate could receive 40.1 percent of the popular vote without being the popular choice of the voters in any State. Or a candidate in a two-way race could lose the contest in most of the 50 States and the District of Columbia by a close margin and yet be elected President by piling up a substantial margin in only one or two States.

Would either of these results be any more acceptable to the American public than the election, under our present system, of a candidate who had won in the electoral college but had lost the popular vote? I doubt it. In my judgment, a President of the United States who hopes to govern effectively must be able to demonstrate not only that he has a plurality in the popular vote, but also that he has widespread support throughout the entire country.

Second, the runoff which is a necessary ingredient of the direct-election plan would, I believe, lead inevitably to the proliferation of political parties. These parties would not necessarily be national or even regional parties. They would probably be ideological parties formed around a particular issue or based on a "personality cult" centered on a particular individual. And if these parties were formed it does not require much imagination to foresee the kind of bargaining for endorsements, withdrawals and votes that could occur, both prior to a close election and between an election and a runoff.

Why should people not "vote their conscience" in a first election when the system will probably permit them a later opportunity to vote for a so-called compromise choice? Why should blacks, or farmers, or doctors, or conservationists, or feminists bother to compromise within the two-party context when their most direct route to influence would appear to be through running candidates who can toss presidential elections into a runoff situation?

I, for one, am concerned about these possibilities. In my judgment, the well-being of this country would suffer if its presidential elections were marked by a multitude of splinter parties, each appealing for votes on particular questions. Our political system would become factionalized, with numerous groups taking uncompromising stands and rejecting the realistic compromises which are so essential in a democratic society. At a time when the tendencies toward political fragmentation and ideological division are all too evident in this country, we must view with the gravest concern any change in our electoral processes that may aid and accelerate these tendencies.

Third, the direct-election plan raises awesome problems relating to vote recounts and the possibility that fraud

committed in isolated precincts throughout the United States might taint an entire national election.

Let us remember that there are over 150,000 polling places in the United States. In 1960, the miscounting of a single vote in less than half of these polling places could have altered the entire election outcome. In 1968, a change of less than two votes in every polling place would have changed the outcome. Are we prepared to deal with an electoral system in which local decisions as to the counting of certain incorrectly marked ballots may be the crucial factor in determining whether a particular candidate has attained 39.9 percent of the popular vote or 40.1 percent of the popular vote? And are we ready to adopt a presidential election system in which the actual outcome may not be known for weeks or even months, even in the absence of a runoff?

Today, on behalf of myself and the Senator from Kansas (Mr. DOLE), I wish to introduce an alternative proposal in the form of a new joint resolution.

Our proposal, which we call the "federal system plan," has been developed by a Washington attorney, Mr. Myron Curzan, in conjunction with my staff. It has been reviewed and approved by several constitutional law scholars who view it as a substantial improvement over the proposed direct-election plan.

The federal system plan embodies the essential rightness of the one-man, one-vote principle, but modifies the direct-election plan in an effort to eliminate some of its dangers.

It provides that the popular vote winner will be declared President so long as there is also a showing that his victory is based upon widespread national support.

It eliminates the need for a runoff, thereby removing the paralyzing effect which third parties may have under the present system and could have under the proposed direct election plan.

It insures that the results of a presidential election will be known as soon as the count is completed, with no period of uncertainty and no opportunity for the kind of horse-trading that is possible either under the present system or under the direct election plan.

The federal system plan would operate as follows:

First. A candidate who had won a plurality of the total popular vote would be declared President if he had also won either a plurality in States—including the District of Columbia—which contain more than 50 percent of all voters participating in the election, or a plurality in more than 50 percent of the States—including the District of Columbia. We call this second initial qualification the "50 percent rule."

Second. If the popular vote winner failed to satisfy one or the other of the 50 percent rule requirements, then the President would be selected on the basis of electoral votes. The presidential candidate with the most popular votes in a particular State would be automatically awarded the State's electoral vote, which would equal the number of Senators and Representatives to which that State is entitled in the Congress. The District of Columbia would be treated as if it had three congressional votes. A candidate with a majority of electoral votes would win.

Third. If no candidate received a majority of the electoral votes, the federal system plan would then eliminate all but the two national candidates with the most electoral votes and redistribute the electoral votes of the others. The electoral votes won by third party candidates would be awarded on a State-by-State basis to the two national candidates in proportion to their relative share of the popular vote in the respective States. The candidate receiving a majority of the electoral votes following this redistribution would be elected President.

In this proposal, we have attempted better to mesh two of the concepts upon which our governmental structure is based—the concepts of popular sovereignty and federalism.

In my judgment, this proposal adds an essential ingredient lacking in a simple nationwide popular victory—a legitimating factor. It provides the means for insuring that any popular vote winner will have the backing of the people of both large and small States and of States distributed throughout the country. No man would be able to attain the Presidency by merely winning an overwhelming popular vote in one or two States, or in a particular region. Rather, he would have to show that his support is sufficiently broad to give him a true mandate to be the Chief Executive of the entire Nation.

Aside from providing this legitimating factor, the federal system plan should have a number of other salutary effects:

It should, I believe, reinforce and strengthen the two-party system. For under its provisions, the objective of each of the major parties would not only be to win the national popular vote, but also to win in each State. In addition, the power of third parties to affect the outcome of an election, and hence their appeal to the electorate, would be substantially reduced.

The significance of swing States would be retained and minority groups within those States would continue to have power to affect the result of a presidential race within the two-party framework.

The federal system plan would permit recount and fraud problems to be contained and dealt with on the State level.

The possibility of qualifying by winning States with 50 percent of the votes would be a new and powerful incentive to get out the vote.

Mr. President, I am aware that the proposal I am introducing today on behalf of myself and the Senator from Kansas (Mr. DOLE) comes late in the debate on electoral reform. I am also aware that it is a complex proposal and one that must be subjected to close scrutiny. I believe, however, that it is essential that it be given the most serious consideration. The step we are about to take in electoral reform is a momentous one, and it should not be taken without first examining all of the alternatives.

I ask unanimous consent that the joint resolution embodying the federal system plan be printed in the RECORD at this point. I also ask unanimous consent that a detailed memorandum explaining both the federal system plan and the problems with which it is meant to deal be printed as a supplement to my remarks and the resolution. I send to the desk the joint resolution and ask that it be appropriately referred.

The PRESIDING OFFICER. The joint resolution will be received and appropriately referred; and, without objection, the joint resolution and memorandum will be printed in the RECORD.

The joint resolution (S.J. Res. 181) proposing an amendment to the Constitution to provide for the direct popular election of the President and Vice President of the United States and for the determination of the result of such election introduced by Mr. EAGLETON, for himself and Mr. DOLE, was received, read twice by its title, referred to the Committee the Judiciary, and ordered to be printed in RECORD, as follows:

The material submitted by Mr. EAGLETON is as follows:

S.J. RES. 181

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. The people of the several States and the District constituting the seat of Government of the United States shall vote directly for the President and Vice President. In such elections, each voter shall cast a single vote for two persons who shall have consented to the joining of their names on the ballot for the offices of President and Vice President. No persons shall consent to their name being joined with that of more than one other person.

"SEC. 2. The voters in each State shall have the qualifications requisite for the voters of Members of the Congress from that State, except that any State may adopt less restrictive residence requirements for voting for President and Vice President than for Members of Congress and Congress may adopt uniform residence and age requirements for voting in such elections. The Congress shall prescribe the qualifications for voters from the District of Columbia.

"SEC. 3. The persons joined as candidates for President and Vice President having the greatest number of votes in the election shall be declared elected President and Vice President if such persons have also obtained the greatest number of votes among the candidates running for President and Vice President in States containing more than 50 per centum of the total number of voters in such election or in more than 50 per centum of the States.

"If the pair of perrons joined as candidates for President and Vice President who received the greatest number of votes throughout the United States failed to obtain the greatest number of votes in States containing more than 50 per centum of the total number of voters in the election or in more than 50 per centum of the States, then the votes received by each pair of persons joined as candidates for President and Vice President shall be separated according to the States in which they were received and in each such State, the pair of persons joined as candidates for President and Vice Presi-

dent who received the greatest number of votes therein shall be automatically credited with a number of electoral votes which shall be equal to the whole number of Senators and Representatives to which such State is entitled in the Congress, and if any pair of candidates for President and Vice President shall have received a majority of the electoral votes of all of the States they shall be declared elected President and Vice President.

"If no pair of candidates for President and Vice President shall have received a majority of these electoral votes, then all but the two pairs of such candidates receiving the greatest numbers of electoral votes of all of the States shall be eliminated, and the electoral votes which any of these eliminated pairs of candidates received in any State shall be credited to the two leading pairs of candidates in proportion to the numbers of people who voted for these two pairs of candidates in such State. In making this computation, fractional numbers less than one one-thousandth shall be disregarded. The pair of candidates receiving the greatest number of electoral votes after such crediting of electoral votes shall be declared elected President and Vice President.

"SEC. 4. The days for such elections shall be determined by Congress and shall be the same throughout the United States. The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations. The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed by the Congress for such elections in the District of Columbia.

"SEC. 5. The Congress shall prescribe by law the time, place, and manner in which the results of such elections shall be ascertained and declared.

"SEC. 6. If, at the time fixed for declaring the results of such elections, the presidential candidate who would have been entitled to election as President shall have died, the vice-presidential candidate entitled to election as Vice President shall be declared elected President.

"The Congress may by law provide for the case of the death or withdrawal of any candidate or candidates for President and Vice President, for the case of the death of both the President-elect and Vice-President-elect, and for the case of a tie.

"SEC. 7. The Congress shall have power to enforce this article by appropriate legislation.

"SEC. 8. The District of Columbia shall be treated as a State for purposes of this Amendment.

"SEC. 9. This article shall take effect on the 1st day of May following its ratification."

ELECTORAL COLLEGE REFORM—A CASE FOR THE FEDERAL SYSTEM PLAN

As Congress considers reforming the electoral process through which this country selects its Presidents, both the simplicity and the apparent fairness of the "one man, one vote" principle constitute strong arguments in favor of a direct election system. Certainly, these considerations appealed to the House of Representatives when it adopted a resolution calling for the direct election of the President on September 18, 1969.

DIRECT ELECTION PITFALLS

There are, however, at least seven serious pitfalls in the direct election (winner must have at least 40% of the total votes cast) system which the House adopted and which is now before the Senate Judiciary Committee. These pitfalls are as follows:

1. A Presidential Candidate could be elected even though he failed to receive a plurality of the popular votes in most—or conceivably in any—of the states. In 1968, Hubert Humphrey was the popular choice of only 13 states plus the District of Columbia. Had he simply carried New York State by half the popular vote margin by which Lyndon Johnson carried it in 1964 and lost the seven states which he won by relatively close margins, he would have been elected President by approximately 250,000 votes. He would, however, have been the preferred choice of the voters of just six out of 50 states and the District of Columbia. In a federal system such as ours, it would certainly seem no more acceptable that a man should be President when he is the popular vote winner but the choice of only a handful of states than when he is the winner in the electoral college but the loser in the popular vote. A Chief Executive who hopes to govern effectively in the United States must be able to show that he is not simply the choice of the people, but rather that he is also the choice of the people of a number of states.

SPECIAL INTEREST PARTIES

2. An electoral system involving possible runoffs inevitably invites a proliferation of special interest, sectional, and charismatic figure parties.

Professor Maurice Duverger has written about the United States: "The absence of a second ballot . . . in the Presidential election constitutes in fact one of the historical reasons for the emergence and the maintenance of the two-party system." Under the proposed direct election system, many racial, ethnic, and interest groups would feel that they had lost all power in the election process since their ability to influence the outcome in key swing states with large blocs of electoral votes would no longer be relevant. Their only hope for regaining leverage under a direct election system would be through the creation of new Presidential parties. These parties would then solicit votes to promote their parochial causes—the National Gun Party, the National Dairy Farmers' Protective Party, the National Students' Party, the Black Welfare Rights Party—with considerable certainty that they would have an opportunity to trade off their votes in either a runoff election or immediately before the initial election when surveys indicated the closeness of the vote between the two major party candidates or the uncertainty that either of these candidates would obtain 40% of the popular vote. To quote Richard Scammon of the Elections Research Center:

"If you really want to stop proliferating candidates under any system you give people one vote. This is really why we have two parties operating in this country in November. You only get one shot at voting. Once you allow people a second shot under any conditions you give the opportunity, for example, for Mr. Wallace to in effect say to his electorate, 'Now, on the first ballot vote your convictions. Stand up for what you really believe in. You will get another chance on the second ballot if you have to. Besides, we might make second place.' . . . [The direct election with a runoff] is why in some parts of the South in primaries you get the first ballot loaded up with candidates, sometimes enormous numbers . . . because everybody knows, though, they are going to have a second shot at this." (Hearings on Electoral College Reform Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. at 341.)

A multiplicity of Presidential parties taking ideological positions—often irresponsibly—could only produce the tragic effect of polarizing this country on a wide variety of issues, and leaving our polity without the underlying harmony which makes it governable.

Moreover, a direct election system built upon a 40% plurality requirement could lead to the creation of new parties centered on specific individuals, which in turn might have the effect of ensuring the election of comparatively unpopular candidates. For example, let us assume that in a direct election system, Party A were to select a candidate whose ideological position on a number of issues made it appear to many in Party B that Party A's candidate could never hope to win more than about 45% of the popular vote. Let us also assume that Party B were to contain two charismatic figures and that one of them, Mr. X, were certain that the other, Mr. Y, had the Party B nomination sewed up. What if Mr. X were then to calculate that it made sense for him to run as well since he was certain that he could:

Take 25% of the total popular vote which formerly was committed to Mr. Y,

Take 7% of the voters committed to the candidate from Party A, and thereby

Deny both candidates the requisite 40% and ensure a runoff in which he would be the second candidate and the probable winner.

However, should Mr. X prove wrong in one calculation—that he can take 7% of the vote away from Party A's candidate—this nation might well find itself faced with the unfortunate prospect of living with one man's blunder. In short, it might awake to find that it had elected an unpopular and ideologically unacceptable President from Party A—a President who has been given his "mandate" under the direct election system with some 40.1% of the popular vote.

RECOUNTS

3. In close elections, like those of 1960 and 1968, the recount problem could be staggering, as would the temptation to commit fraud. Under a simple direct election system, it would not be possible or relevant—as it is today to isolate the states in which vote-count problems had arisen.

There are over 150,000 polling places in the United States. It should be remembered that under a direct election system, two miscounted votes in each polling place in the United States would have shifted the 1968 election from Richard Nixon to Hubert Humphrey. The miscount of only one vote in half of this country's polling places in 1960 could have changed the result in that Presidential election.

One need have little imagination to conjure up visions of elections in which the country anxiously awaits word of who its new President is to be while recounters puzzle over discarded or poorly marked ballots in rural and urban counties throughout the entire United States.

Finally, it must be added that recount problems will be further complicated in the proposed direct election system by questions which may arise if the issue is whether a particular candidate has received 40.001% of the popular vote or 39.999% of the popular vote.

COST

4. The cost of Presidential elections would soar once a number of parties had become involved and runoff elections had become part of the system. Each of our major parties is already sagging under the burden of financing Presidential campaigns. What new problems relating to campaign fund suppliers and their influence on substantive decisions will be raised if parties are forced to obtain double or triple the present sums to finance two-tiered Presidential races?

FEDERAL SYSTEM WEAKENED

5. A direct election system would drastically weaken the federal system. Candidates would ignore small and medium-sized two-party states and focus either on the most populous areas (comprised of a few fairly homogenous states) or on one-party states, where substantial popular margins could be obtained.

Under a direct election system, the objective of each candidate will be to concentrate on those States and regions where he can maximize his popular vote and minimize

the popular vote of his opponents. Under the present electoral college system, it is crucial for a candidate to win in medium-sized and small two-party States. For today, a hard-fought victory in such States as Indiana, Iowa, Maryland, South Dakota, and Washington together is of greater value than a victory in California. Under a direct election system, this will no longer be the case. If a candidate can carry California or New York by a wide enough margin, he can offset losses in the four named, as well perhaps five or ten other, States.

Moreover, the medium-sized and smaller two-party States will also get shunted aside in a Presidential campaign in favor of one-party States. For why should a candidate strive to win a close election in a State with two million voters when he can realize a greater advantage by obtaining a huge margin in a one-party State with only one million voters? And—if one wishes to carry this logic further—why should a candidate even make a great effort in an extremely close race in one of the large States, when he knows that he can easily make up any differential in a small one-party State?

MINORITIES

6. A direct election system would curtail the power—which exists within a two-party electoral college context—of urban-oriented racial, ethnic and other minority groups, since these groups would have reduced ability to affect the outcome of a Presidential election. This reduction in power for various urban voting blocs would occur for the same reason as the reduction in the power of small, medium, or even large two-party states.

The best interests of this country do not lie in removing the power which these urban groups have in Presidential races. To ask them to rely on the Congress for that representation is unfair. Even with the gains which have resulted from reapportionment decisions, the Congress remains most responsive to rural and suburban constituencies.

The passage of a direct system might well ensure that all of these voting blocs—in an effort to be heard and to obtain influence in the selection of the President—would take the only logical step left open to them, namely, the creation of Presidential parties, which can barter votes for power in subsequent runoff election.

ADOPTION UNLIKELY

7. A direct election system stands little chance of being adopted by three-fourths of the states since small two-party states which come to understand the power they are relinquishing under a simple direct election system will reject it. Such a rejection will have the unfortunate effect of legitimating the present electoral college system, and will set back the cause of an electoral reform for many years.

The District Plan and the Proportional Plan, which have been suggested at various times in our history, do not offer any clear advantages over the present electoral college system. In fact, both of these plans provide even less assurance than does the present electoral college that the popular vote winner throughout the country will become President. Retention of the present electoral college system—but with an automatic electoral vote to avoid faithless electors and a revised contingency election system in which the President is selected by a vote of the individual members of Congress—has the built-in disadvantage that it provides no procedures to deal with the possibility of a divergence between the popular vote winner and the electoral college winner.

Is there a way to avoid the pitfalls involved in all of these electoral college reform proposals, while at the same time fashioning an electoral system which maintains basic adherence to the popular sovereignty principle of one man, one vote?

THE FEDERAL SYSTEM PLAN

The Federal System Plan, outlined below, may offer a viable alternative. This system—which builds upon the simple direct election formula as enacted by the House of Representatives and proposed in the Senate by Senator Bayh—would provide that any candidate who was the popular vote victor under circumstances which demonstrated that this victory was based upon support throughout the nation would be elected President. Moreover, it would provide a method for effectively eliminating the paralyzing effect which third parties may have under both the present electoral college and under the direct election system.

The Federal System Plan would work as follows:

1. A President would be elected if he (1) won a plurality of the national vote *and* (2) won *either* pluralities in more than 50% of the states and D.C., *or* pluralities in states with 50% of the voters in the election. The latter would be called the "50% rule."

2. If no candidate qualified, the election would go to an Electoral College where the states would be represented as they are today, and each candidate would automatically receive the electoral votes of the states he won. A candidate who won a majority of the electoral votes would be elected President.

3. In the unlikely event that no candidate received a majority of the electoral votes, the electoral votes of states which went for third-party candidates would be divided between the two leading national candidates in proportion to their share of the votes in those states.

THE "50 PERCENT RULE"

The "50% rule" is designed to reconcile the principle of federalism with the principle of popular sovereignty. It would award the Presidency to the national popular vote winner of he had been able to demonstrate that he had a broad base of support across the country. The "50% rule" would provide a better indication of whether a popular vote winner had the national support needed to govern this country effectively than would the 40% minimum popular vote formula contained in the present direct election proposal.

ELECTORAL VOTES

If no candidate qualified under the 50 percent rule and an election went to the Electoral College, the Presidential candidate with the most popular votes in a particular state would be automatically assigned that state's Congressional vote quota (hereinafter referred to as "electoral votes")—namely, the number of Senators and Representatives it is entitled to under the Constitution. The District of Columbia would have three electoral votes. If one candidate obtained a majority of the electoral votes assigned to all of the states, he shall be declared President.

The real key to eliminating third party fragmentation in a Presidential election system is to persuade the voter that he would be wasting his power to choose the next President if he voted for the candidate of a narrowly based party. The Federal System Plan achieves this result by providing that if the popular vote winner has not satisfied the "50% rule," then the President will be selected on the basis of the vote outcome broken down on a state-by-state basis.

REDISTRIBUTION OF ELECTORAL VOTES

If no candidate has an initial majority of the electoral votes—which might occur because of the presence of third party candidates—the Federal System Plan would then eliminate all but two leading candidates from consideration and redistribute the electoral votes won by any other candidates in particular states. Redistribution of the electoral votes won by "third party" candidates would be done proportionally, based on the relative number of popular votes obtained by the two leading national candidates in the particular state being redistributed.

In a redistribution situation, proportionalisation of electoral votes is fairer than the winner-take-all method which will be used when counting electoral votes initially.

It is expected that this redistribution technique will rarely be used since virtually all "third parties" which do not have a broad national base—such as the Bull Moose Party had in 1912—will be discouraged from entering candidates. People will not vote for such candidates when they realize that by doing so, they are throwing away their votes and leaving the choice of the President to other residents in their state who vote for the candidates of the two major parties.

BENEFITS OF PRESERVING THE FEDERAL ELEMENT

By melding the direct election plan—as enacted by the House of Representatives—with a concept that takes this nation's federal design into account, it is possible to reduce the difficulties which are inherent in a simple one man, one vote proposal.

Under this hybrid Presidential election system, the objective of each of the major parties will not only be to win in the national popular vote, but also to win in each state.

Candidates can be persuaded to pay attention to the needs of all states—including small ones.

The power of swing states and the minority groups who live in them can be retained and the prospect of flourishing splinter parties negated.

The problem of voter fraud can be localized, the complexities relating to vote recounts can be more easily avoided.

Finally, by building into the electoral process a factor which is dependent upon the total number of people voting in each state in that election, we would create (1) an incentive to encourage voting and (2) a mechanism which takes account of population shifts not reflected in the current electoral college system which is based upon a census that may be ten years old on the date of an election.

HYPOTHETICAL EXAMPLES OF PRESIDENTIAL ELECTIONS UNDER THE FEDERAL SYSTEM PLAN

1. Candidates A and B are the only two significant candidates running for the Presidency. Candidates A receives 50 million popular votes; candidate B receives 40.5 million popular votes. Candidate A has been the popular vote victor in 29 states (including the District of Columbia). Under the Federal System Plan, he would have satisfied the 50% rule and would be declared President.

2. Candidates A and B are the only two significant candidates running for the Presidency. Candidate A receives 50 million popular votes; candidates B receives 40.5 million popular votes. Candidate A has been the popular vote victor in only 22 states. However these states contained approximately 55% of the people voting in that election. Under the Federal System Plan candidate A would have satisfied the 50% rule and would be declared President.

3. Candidates A and B are the only two significant candidates running for the Presidency. Candidate A receives 50 million popular votes; candidates B receives 49.5 million popular votes. Candidates A is the victor in 28 states containing approximately 48% of the people voting in that election. Under the Federal System Plan candidate A would not have satisfied the 50% rule which would automatically make him President on the basis of his popular vote victory. The contingency plan would then come into effect and the popular votes won by candidates A and B would be translated into popular vote victories in each of the 50 States plus the District of Columbia. Under the hypothetical given it is quite probable that the 28 states won by candidate A would provide him with

enough electoral votes to become President. On the other hand if candidate A had obtained a popular vote victory while being the popular vote choice in only 5 or 6 states, the electoral vote contingency plan would make candidate B the President since he would have demonstrated a much broader base of national support.

4. Candidates A, B, C, and D run for the Presidency. Candidate A obtains 40 million votes; candidate B obtains 39.5 million votes; candidate C obtains 10.8 million votes; and candidate D obtains 10 million popular votes. Candidate A has been the popular vote victor in 22 states containing 42% of the people voting in that election and possessing 240 electoral votes. Candidate B has been the victor in 18 states containing 40% of the people voting in the election and possessing 200 electoral votes. Candidates C and D have each been the victor in 8 states (for a total of 10) containing about 18% of the people voting in that election and possessing a total of 98 electoral votes.

Under the Federal System Plan, candidate A would not have satisfied the 50% rule which, with his popular vote victory, would have automatically entitled him to the Presidency. Under the contingency electoral vote system, neither candidate A nor candidate B would have a majority in the initial count. The Federal System Plan would therefore redistribute the electoral votes won by candidates C and D.

The redistribution would be done in proportion to the popular votes won by candidates A and B in the particular state whose electoral votes were being redistributed. If candidates A and B both had a national appeal, the redistribution would probably favor the candidate who was ahead under the initial electoral vote count. Thus in the above example, it would be quite probable that under the redistribution formula, candidate A would wind up with something like 288.5 electoral votes and candidate B would wind up with something like 249.5 electoral votes. Candidate A would then be declared President. (Note should be taken, however, that this last hypothetical is extremely implausible under the Federal System Plan. The presence of a redistribution formula in the Presidential election system will work to discourage regional or ideological parties from putting up candidates like the above candidates C and D since voters will probably not waste their ballots voting for them.)

HISTORICAL EXAMPLES

The Federal System Plan would not have changed the outcome of any past American election. It would however have averted some awkward contingencies which could easily have occurred. The following cases help illustrate the stabilising effect the Federal System Plan would have had in these situations, as well as some of the weaknesses of the direct election plan.

1888—HARRISON VERSUS CLEVELAND

Cleveland had a popular vote margin of 98,000, but Harrison was elected by an electoral vote of 233 to 168. Cleveland's popular majority came almost entirely from the "solid South."

Under a direct election system, Cleveland's overwhelming victory among Alabama's 176,000 voters would have offset the popular preference of 2.9 million voters in New York, Ohio and Illinois.

Under the Federal System Plan, despite his popular victory, would have failed to qualify under the 50% rule: he won only 18 out of 88 States, and won state with only about 30% of the voters. The election would have gone to the Electoral College where Harrison's broader geographical base of support would have made him President.

1916—WILSON-HUGHES

Wilson won by a popular majority of 580,000. He won in 31 states—mostly small ones—with 277 electoral votes, while Hughes' electoral vote total was 254. A change only of 1,904 votes would have given California's 13 electoral votes—and the election—to Hughes. Wilson would have lost, although his popular margin would still have been over half a million and he would still have been the preferred candidate in well over half the states.

Under the Federal System Plan, Wilson would easily have qualified with his popular plurality and with victories in over 50% of the states (although he did not win states with 50% of the voters). Wilson could have lost as many as six states, still had a popular plurality, and have been the victor under the Federal System Plan.

1948—TRUMAN-DEWEY-THURMOND

Truman won by over 2 million popular votes. The electoral count was Truman 303, Dewey 189, Thurmond 39.

A shift of 24,294 votes from Truman to Dewey in California, Illinois, and Ohio could have shifted 78 electoral votes, giving Dewey an electoral vote majority by one vote. Under the Federal System Plan, Truman would still have won with a popular plurality and victory in 28 states—over 50%.

If Dewey had won California and Illinois, but not Ohio, neither he nor Truman would have had an electoral majority, and under the present system the election would have been thrown into the House. Under the Federal System Plan, the election would not even have gone as far as the Electoral College, because Truman would still have won a popular plurality and over 50% of the states.

1960—KENNEDY-NIXON-BYRD

Under the present system, this election would have been thrown into the House if Kennedy, the popular vote winner, had lost three very close states: Illinois (margin: 8,000 votes, electoral votes: 27), South Carolina (margin: 9,600, electoral votes: 8), and Hawaii (margin: 115 votes, electoral votes: 3).

Under the Federal System Plan, Kennedy would have been elected without the risk of horsetrading and without delay because he would still (a) have been the popular vote winner, and he would still (b) have won states with a majority of the voters.

Mr. EAGLETON. Mr. President, I yield to the Senator from Kansas for his presentation on the same subject.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

THE FEDERAL SYSTEM PLAN

Mr. DOLE. Mr. President, the 1968 election did more to stimulate concern for our system of choosing the President than any other election in recent history. A very real possibility existed that Congress would determine the two highest officeholders in the land.

There is agreement among most Americans of all political and ideological persuasions that the present electoral system should be changed. Considerable study, effort and thought have gone into a number of proposals which have been presented to Congress. I withheld support of any of the several electoral reform proposals because, in my opinion, each appeared to contain a number of significant deficiencies. To change from one set of deficiencies to another would seem an exercise in futility, as well as perilous tinkering with our constitutional processes. I am especially pleased, therefore, to cosponsor the federal system plan—which I believe has considerable merit.

In essence, the federal system plan introduces the direct-election concept to presidential politics, while assuring continued, decisive importance of broad and widespread national support for candidates.

THE FEDERAL SYSTEM PLAN COMPARED

The junior Senator from Missouri has described the federal system plan and its advantages over the direct-election plan and the present electoral college.

Briefly, I will compare the federal system plan with three other major electoral reform proposals.

THE DISTRICT PLAN

Under the district plan, popular vote results would tend to be reflected more accurately in electoral vote results than they are under the present system. The all-or-nothing system of assigning a State's electoral vote would be eliminated.

The major weakness of the district plan is its inherent tendency to encourage jerrymandering. The problems and temptations for political manipulation would surely not be diminished over present difficulties with congressional districts, and the situation could become even more involved.

Under the federal system plan, voting would take place on a statewide basis, free from the administrative complications of districting the results.

Also, the district plan could have a significant adverse effect on the establishment and maintenance of viable two-party State political systems. The stimulus for a minority party to turn out the vote would be severely diminished when it saw no chance to carry any district within a State. Under the federal system plan, however, a minority party would know its votes would not be frozen within the State but would have significance on a national scale.

THE PROPORTIONAL PLAN

The proportional plan would eliminate the unit rule for distribution of a State's electoral votes and would prevent an electoral victory for a minority popular vote-getter by tying the electoral vote directly to the popular vote.

The proportional plan would not strngthen the two-party system. Instead of discouraging the minority party, it would encourage formation of many minority parties tending to represent narrow and perhaps extreme viewpoints because minority parties would be assured electoral vote reflection of their strength. At the same time, it would discourage the major parties from attempting to broaden their appeal and assimilate diverse groups and factions. The federal system plan, on the other hand, by diminishing the potential impact of any third or multiparty development, would encourage a vigorous and broadened two-party system.

By entirely abolishing presidential electors and by permitting States to have separate ballots, the proportional plan would make a practical, as well as a theoretical, possibility of electing a President and Vice President from different parties. The federal system plan requires presidential and vice-presidential candidates to be paired, thus avoiding a split election, and it retains an electoral system as a backup procedure with a favorable influence on the two-party system.

THE AUTOMATIC ELECTORAL PLAN

The automatic electoral plan has the appeal of simplicity and close adherence to established practices, but it locks in the all-or-nothing rule which has evolved over the years, whereby each State's entire electoral vote is allocated to the winner of the popular vote. No real improvements are offered in the electoral influence of minority voters, possibilities for the election of narrow-basis Presidents or enhancement of State significance in the electoral process. The federal system plan, as the junior Senator from Missouri has pointed out, affords substantial advances in each of these important areas.

QUESTIONS ABOUT THE FEDERAL SYSTEM PLAN

I think it might be well to anticipate some of the questions which may be raised concerning the federal system plan. I have discussed this proposal with some of my colleagues and others familiar with the different electoral reform proposals. A number of questions have been raised, and I am certain others would be in the event hearings were held.

Let me state briefly a few of them:

First. If the electoral machinery is used—as it would be under certain circumstances in the federal system plan—would the unit or bloc system of casting votes be continued, and would this within a State nullify votes cast for an unsuccessful candidate?

Second. The question has been raised that this plan would make possible the election of a President who may have fewer popular votes than the unsuccessful candidate.

Third. One area of concern is that the federal system plan would bring into effect two relatively untried and untested features embodied in the backup system, and an untried and untested feature in the division of electoral votes of minority candidates, whereas the runoff election has been tested and has worked successfully in various States.

Fourth. There is a general feeling that the plan is too complicated and subject to uncertainty and might be productive of unexpected results.

I believe that these questions can be answered satisfactorily and the changes could be made in the proposal being introduced today by the junior Senator from Missouri and myself. It is important, however, to look carefully at the advantages of this proposal:

First. It adheres in principle to the direct election plan, but eliminates the runoff feature of the direct election plan.

Second. It removes the possibility—like the direct election plan—of contingent elections by either House of Congress.

Third. It does minimize the election of the President and Vice President by the electoral vote process.

Fourth. This plan preserves as a backup procedure the electoral vote system, which some persons feel should be continued as a matter of tradition and because it is conducive to a two-party system.

Fifth. This plan does look to ultimate assertion of influence of the vote for minor candidates within the framework of the two-party system, rather than as support for independent or splinter parties.

OPERATION OF THE FEDERAL SYSTEM PLAN

The junior Senator from Missouri has ably described our proposal, but again, let me emphasize its relative simplicity—and its operation:

First. The popular vote winner would be declared elected if—

He has carried States which contain more than one-half of persons who voted in the election; or

He has carried more than one-half of the States.

Second. If neither of the above is satisfied, the winner would be decided by electoral vote.

Third. If there is no electoral winner, the electoral votes of minor candidates would be distributed among two front-runners by giving the electoral votes carried by minor candidates to the two front-runners in each particular State in proportion to their popular vote totals.

CONCLUSION

Mr. President, interest in electoral reform is high and support for change is broad based. The federal system plan does strengthen the one-man, one-vote principle, and at the same time avoids the serious pitfalls in the direct election proposal. A summary of these pitfalls will be made a part of the record, but it should be emphasized that under the direct election plan, a presidential candidate could be elected even though he failed to receive a plurality of the popular votes in most—or conceivably in any—of the States. Those of us from small and middle-size States are naturally concerned about any system which would permit States with large populations to have a distinct advantage. We recognize that numbers are important and that the one-man, one-vote principle should be adhered to, but we also strongly feel that anyone elected to the Presidency of the United States should have broad-based support throughout the country. This important consideration is embodied within the federal system plan.

Let me add that all the electoral reform proposals submitted have certain advantages and certain disadvantages. The district and proportional plans do not assure that the popular vote winner would necessarily become President.

The issue of electoral reform is so vital that I would hope the Judiciary Subcommittee on Constitutional Amendments will consent to immediate hearings on the federal system plan proposal. In addition to introducing the federal system plan resolution today, the junior Senator from Missouri and I are contacting a number of experts in this field across the country, asking for their comments on this proposal.

Let me conclude by saying that any proposal approved by the House and the Senate must be ratified by 38 States. In my opinion, the federal system plan would be acceptable to large States because of the direct election features and to small States because it requires broad-based support by virtue of the "50-percent rule."

Again, I commend the junior Senator from Missouri for his leadership in this most important area and also acknowledge the efforts of Mr. Myron Curzan, a Washington attorney who has spent countless hours in the formulation of this proposal.

Mr. EAGLETON. I thank the Senator for his cogent summation of the issues involved and his able presentation of the Federal system plan.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. EAGLETON. I yield.

Mr. BAYH. I would like to compliment my colleagues from Missouri and Kansas for adding to the debate which has been going on for some time over the importance of revising the present electoral college system. I appreciate the comments of the Senator from Missouri in his initial remarks as to my interest in this particular area.

As chairman of the Subcommittee on Constitutional Amendments, as the Senator has pointed out, it has been the responsibility of the Senator from Indiana to delve into that particular matter. I think a great deal of heart can be taken from the interest expressed by the Senator from Missouri and the Senator from Kansas.

First, it demonstrates that two of our distinguished colleagues are concerned about the need to do something about the present system.

Second, their proposal embodies as a fundamental principle the direct popular vote. I know that time has been allotted here this morning to others of our colleagues to speak on other subjects. So it is not my intention to continue this discussion at any great length.

I personally will do all I can to study this matter. As the Senator from Missouri knows and the Senator from Kansas knows, this matter has been debated at length. We have held three different sets of hearings. The matter is now before the full Judiciary Committee, and an agreement has already been arrived at to vote no later than April 24.

Whether it will be possible to hold hearings or not, I do not know, but I personally pledge that we will study in great detail any informaton that either of our distinguished colleagues brings to our attention.

The only matter of significant concern to me about the direct popular vote plan embodied in Senate Joint Resolution 1, of which I am the principal author, and which has some 46 cosponsors, is what happens in the case of a runoff. History has shown us that only once in almost 200 years has a President of the United States been elected when he had less than 40 percent of the votes, the figure which would require a runoff in our system. This was in 1860, when Abraham Lincoln was elected. At that time he had 39.76 percent of the votes, so he was just below the 40 percent figure, and he was not on the ballot in 10 States. Nevertheless, I think we have to examine this possibility.

Whether the shortcomings, as described by my two distinguished colleagues, of a runoff in the direct popular election in which no candidate gets 40 percent of the votes are greater than the shortcomings of any of the other

plans. I am not yet willing to concede. But I am certainly willingly to study it, because I recognize it as one of the principal difficulties.

I have said from the beginning that I have not held out the direct popular vote plan as a panacea, without any problems at all, because as long as man devises a plan a few unscrupulous souls are going to try to take advantage of it, no matter what it is. What appeals to me about the Senate Joint Resolution 1 approach, which won a 339 to 70 vote in the House, is that it guarantees that the winner is going to have the most votes, and it will protect us at all stages of the process.

I want to thank both of my colleagues for their interest and for presenting these new ideas. We are willing to study them. I know they are both legislative craftsmen and recognize the need to search for the art of the possible. So in working together here in this body and trying to consult our colleagues in the other body, and the experts to which the Senator from Kansas alluded, I hope we can get the best possible plan, and that we will be able to make real progress. But we all know, from having gone through the constitutional amendment process before, that when we are looking for and need 67 colleagues to vote with us and ratification by three-fourths of the State legislatures, it is going to be impossible to get a plan that absolutely pleases everyone.

I know, from the record of our two distinguished colleagues, that they are going to do their very best to help us try to perfect the system and try to reconcile the system as best we can.

I salute them for adding to the debate on this matter.

Mr. EAGLETON. Mr. President, I thank the Senator from Indiana for his kind remarks, and wish to say at this time that were it not for the efforts of the Senator from Indiana, we would not have the opportunity of considering this problem at all. It has been through his diligence and unswerving efforts over the past 5 years or more that at long last it appears that we will have a chance to have this issue before us. He is to be commended most highly for his efforts in this regard. I take his comments most seriously because he is truly an expert on this subject matter.

One brief comment on the Senator's remarks. He points out that in only one election, the first Lincoln election, did the winner receive less than 40 percent of the votes. Historically, that is true. But the winner has come precariously close to that 40-percent mark in other elections. It was true in the first Wilson election of 1912. The 1968 election of President Nixon was rather close to the 40-percent margin.

What concerns me very much about the direct election plan is that it will further encourage the proliferation of third, fourth, fifth, sixth, and seventh parties. Past history on elections which came close to 40 percent may, therefore, not be a perfect guide insofar as the future conduct of national elections is concerned. If my worries are realized, and if we do see an endless number of political parties involved in elections under the direct system plan in 1976 or 1980, or 1984, it may well be that it would be uncommon in the future for any of the national candidates to achieve as much as 40 percent of the vote.

This may be a needless worry. In any event, it is what has caused me, among other things, serious concern about the direct election plan, of which I am one of the cosponsors, as I pointed out in my earlier remarks.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. EAGLETON. I yield.

Mr. DOLE. Let me endorse the statement just made by the junior Senator from Missouri as to the great effort made by the Senator from Indiana. We all recognize the temper of the people and the need for some change; and hopefully the proposal offered this morning will shed some light—perhaps not—after it is carefully explored. I share the hope of the Senator from Indiana that it can be reviewed carefully, perhaps, with the Senator from Indiana, other committee and staff members.

We recognize that the time frame is narrow. We recognize the importance of moving as rapidly as possible with electoral reform. Hopefully, we can discuss the matter with the Senator from Indiana to determine if there may be a possibility of having brief hearings. But it is my hope and the hope of the junior Senator from Missouri to at least come forth with some principle embodying the efforts of the Senator from Indiana, that will alleviate some of the fears those in small and middle-sized States have, because the federal system plan, as we see it, without, of course, exploring all the possible pitfalls, does provide in principle for direct elections, and does also insure that the candidate elected would have broad-based support.

As far as I am concerned, this is its main strength. If it falls in some other area, we should know that, and will know it if we have hearings.

Mr. BAYH. Mr. President, will the Senator from Missouri yield?

Mr. EAGLETON. I yield.

Mr. BAYH. I appreciate the comments of my friend from Kansas. The reason I think it is imperative that we look into this plan is that it is very easy to examine ideas that look good on the surface, and find out that they really do not work quite as well in practice. I say this without being at all critical of the plan submitted here today by our two distinguished colleagues, because I have not had a chance to study its implications fully. All I know is that in my 4- or 5-year study of this problem, I started out convinced that the direct popular vote would not work, and my main concern was the destruction by proliferation of parties of the two-party system.

By incorporating the 40-percent runoff provision, I felt we had sufficiently dealt with some of the nuisance splinter parties who get in just to achieve a bargaining position, and yet left the door open for a bona fide, valid third party. We have to recognize, for example, that the party of which our distinguished colleague from Kansas is a member started out as a minority party. Now they have the Presidency.

I do not think we want to say that from today on, for the next thousand years, we are going to preclude any splinter party from being able openly to capture the imagination of the American people.

But even when I became convinced that direct election was the best solution, as I just pointed out to my friend from Missouri——

The PRESIDING OFFICER. The time of the Senator from Missouri has expired.

Mr. EAGLETON. Mr. President, I ask unanimous consent that I be allowed an additional 5 minutes, to continue and complete this exchange.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAYH. I shall hurry on. I just wanted to point out, as a sign of good faith, in talking to our distinguished friend from North Carolina, I thought perhaps he might be prevailed upon to join in the popular vote effort if we had the runoff provision with a joint session of the House and the Senate. I felt that perhaps we could thus maintain the system that our distinguished colleague from North Carolina is sincerely concerned about. But finally I came to the conclusion that the three criteria I mentioned before; namely, that the winner have the most votes, that everybody's vote count the same, and that everyobdy vote directly, were of overwhelming importance. That is why I came out in favor of Senate Joint Resolution 1.

Mr. ALLEN. Mr. President, will the Senator yield?

Mr. EAGLETON. I yield.

Mr. ALLEN. I congratulate the Senator from Missouri (Mr. EAGLETON) and the Senator from Kansas (Mr. DOLE) for the work and the thinking that has gone into this plan that they are suggesting. I must say, however, that I am not yet persuaded that any plan for modifying or abolishing the electoral college is in the public interest; and I have yet to be convinced of that.

The comment of the Senator from Missouri that his plan might well stop the proliferation of parties was interesting. But I wonder if that is correct. I see in the plan of the Senator from Missouri and the Senator from Kansas the possibility of more proliferation of parties, possibly, than under any other plan; and it would seem to me that if one candidate should literally sweep from 15 to 20 States of the Union, he would comply with the provisions of this proposal; namely, that he receive a plurality of the votes in the entire country and a plurality in States having 50 percent of the vote in the election, without getting votes in other States.

So it would seem to me that there is serious danger of a real minority President being chosen—not one who failed to receive a plurality of the vote, but one who failed to get a majority of the overall vote—and having a plurality far below the 40 percent provided in the direct plan.

I would suggest, however, that the Senators who proposed this plan stick

by the plan, and if it is not agreed upon by the Senate and the House of Representatives, that they cast their votes against any modification of the electoral college. I believe that would be in the public interest.

I thank the Senator for yielding.

Mr. EAGLETON. I thank my distinguished friend and colleague from Alabama. I think his remarks underscore all the more the necessity that this plan, as well as the other plans that have previously been submitted by other Senators, be given thorough and detailed examination by the Committee on the Judiciary.

As was pointed out by the Senator from Kansas (Mr. DOLE) and in my remarks, we do not know at this time whether this is utopian, whether this is the answer, whether this is the panacea. We think it has much to commend it, and we want the experts who compromise the Committee on the Judiciary—and I note in the Chamber, among the members of that committee, the Senator from North Carolina (Mr. ERVIN)—to consider this plan among others.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from South Carolina is recognized for a period not to exceed 1 hour.

File
Re Direct election

GUEST PRIVILEGE

THEODORE H. WHITE

Direct elections: an invitation to national chaos

Last September, in a triumph of noble purpose over common sense, the House passed and has sent to the Senate a proposal to abolish the Federal System.

It is not called that, of course. Put forth as an amendment to the Constitution, the new scheme offers a supposedly better way of electing Presidents. Advanced with the delusive rhetoric of *vox populi, vox Dei*, it not only wipes out the obsolete Electoral College but abolishes the sovereign states as voting units. In the name of The People, it proposes that a giant plebiscite pour all 70,000,000 American votes into a single pool whose winner—whether by 5,000 or 5,000,000—is hailed as National Chief.

American elections are a naked transaction in power—a cruel, brawling yearlong adventure swept by profound passion and prejudice. Quite naturally, therefore, Constitution and tradition have tried to limit the sweep of passions, packaging the raw votes within each state, weighting each state's electoral vote proportionately to population, letting each make its own rules and police its own polls.

The new theory holds that an instantaneous direct cascade of votes offers citizens a more responsible choice of leadership—and it is only when one tests high-minded theory against reality that it becomes nightmare.

Since the essence of the proposal is a change in the way votes are counted, the first test must be a hard look at vote-counting as it actually operates. Over most of the United States votes are cast and counted honestly. No one anymore can steal an election that is not close to begin with, and in the past generation vote fraud has diminished dramatically.

Still, anyone who trusts the precise count in Gary, Ind.; Cook County, Ill.; Duval County, Texas; Suffolk County, Mass.; or in half a dozen border and Southern states is out of touch with political reality. Under the present electoral system, however, crooks in such areas are limited to toying with the electoral vote of one state only; and then only when margins are exceptionally tight. Even then, when the dial riggers, ballot stuffers, late counters and recounters are stimulated to play election-night poker with the results, their art is balanced by crooks of the other party playing the same game.

John F. Kennedy won in 1960 by the tissue-thin margin of 118,550—less than 1/5 of one percent of the national total—in an election stained with outright fraud in at least three states. No one challenged his victory, however, because the big national decision had been made by electoral votes of honest-count states, sealed off from contamination by fraud elsewhere—and because scandal could as well be charged to Republicans as to Democrats. But if, henceforth, all the raw votes from Hawaii to Maine are funneled into one vast pool, and popular results are as close as 1960 and 1968, the pressure to cheat or call recounts must penetrate everywhere—for any vote stolen anywhere in the Union pressures politicians thousands of miles away to balance or protest it. Twice in the past decade, the new proposal would have brought America to chaos.

▸ To enforce honest vote-counting in all the nation's 170,000 precincts, national policing becomes necessary. So, too, do uniform federal laws on voter qualifications. New laws, for example, will have to forbid any state from increasing its share of the total by enfranchising youngsters of 18 (as Kentucky and Georgia do now) while most others limit voting to those over 21. Residence requirements, too, must be made uniform in all states. The centralization required breaches all American tradition.

▸ Reality forces candidates today to plan campaigns on many levels, choosing groups and regions to which they must appeal, importantly educating themselves on local issues in states they seek to carry.

But if states are abolished as voting units, TV becomes absolutely dominant. Campaign strategy changes from delicately assembling a winning coalition of states and becomes a media effort to capture the largest share of the national "vote market." Instead of courting regional party leaders by compromise, candidates will rely on media masters. Issues will be shaped in national TV studios, and the heaviest swat will go to the candidate who raises the most money to buy the best time and most "creative" TV talent.

▸ The most ominous domestic reality today is race confrontation. Black votes count today because blacks vote chiefly in big-city states where they make the margin of difference. No candidate seeking New York's 43 electoral votes, Pennsylvania's 29, Illinois' 26 can avoid courting the black vote that may swing those states. If states are abolished as voting units, the chief political leverage of Negroes is also abolished. Whenever a race issue has been settled by plebiscite—from California's Proposition 14 (on Open Housing) in 1964 to New York's Police Review Board in 1966—the plebiscite vote has put the blacks down. Yet a paradox of the new rhetoric is that Southern conservatives, who have most to gain by the new proposal, oppose it, while Northern liberals, who have most to lose, support it because it is hallowed in the name of The People.

What is wrong in the old system is not state-by-state voting. What is wrong is the anachronistic Electoral College and the mischief anonymous "electors" can perpetrate in the wake of a close election. Even more dangerous is the provision that lets the House, if no candidate has an electoral majority, choose the President by the undemocratic unit rule—one state, one vote. These dangers can be eliminated simply by an amendment which abolishes the Electoral College but retains the electoral vote by each state and which, next, provides that in an election where there is no electoral majority, senators and congressmen, individually voting in joint session and hearing the voices of the people in their districts, will elect a President.

What is right about the old system is the sense of identity it gives Americans. As they march to the polls, Bay Staters should feel Massachusetts is speaking, Hoosiers should feel Indiana is speaking; blacks and other minorities should feel their votes count; so, too, should Southerners from Tidewater to the Gulf. The Federal System has worked superbly for almost two centuries. It can and should be speedily improved. But to reduce Americans to faceless digits on an enormous tote board, in a plebiscite swept by demagoguery, manipulated by TV, at the mercy of crooked counters—this is an absurdity for which goodwill and noble theory are no justification.

Mr. White has closely followed the campaigns of the last four Presidents. His most recent book is *The Making of the President, 1968.*

HB 9

REPORT TO JUDICIARY COMMITTE ON HOUSE BILL #9

The only change in present statute is that persons convicted of first degree murder are not eligible for bail.

A real problem has developed in Anchorage where recently convicted murderers have been released on bail. The press has made much to do about it. In at least one instance a convicted murderer out on bail was reconfined at the complaint of his wife for threats on her life.

Representative Miller states that the present Alaska Statute is identical to the federal statute. It can be claimed that the present bill may be unconstitutional or declared so in the future. That is, if an appeal is taken or if sentence has not been pronounced, the decision is not final.

Therefore confinement without bail of someone who still may be adjudged innocent or of someone who has yet not been sentenced to confinement may be unconstitutional even though he has been convicted of a crime.

Representative Miller has informed me that because of a federal statute requiring the death penalty for first degree murder convictions, this bill if enacted into law would not be unconstitutional.

Because of this looming constitutional question it is my recommendation that the committe have Art research the constitutional aspects.

Certainly we have a duty to protect the public from the presence of a convicted murderer and absent a constitutional prohibition, I recommend a "do pass."

HB12

JUDICIARY COMMITTEE REPORT

HOUSE BILL NO. 12

This bill is designed to permit Alaskans to purchase firearms to the full extent permitted by P.L. 90-618. Specifically, the bill enables Alaskans to take advantage of the exception contained in Sec. 922(b) (3) (A) and purchase a rifle or shotgun in a "contiguous" state.

Are there any states "contiguous" to Alaska? An opinion of the Legislative Affairs Agency, dated January 9, 1969, indicates that "contiguous" may mean "near, though not in contact". Construed this way, the bill has meaning and may be useful to some Alaskans.

Barry Jackson, Chairman

HB 12

HB 12

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

January 9, 1969

Representative Jess Harris
1016 - 11th Avenue
Anchorage, Alaska 99501

Dear Representative Harris:

In preparing your bill for pre-file permitting Alaskans to buy guns in other states within the framework of the new Gun Control Bill of 1968 (draft copy attached), I have checked Public Law 90-618 closely and find that the exceptions for nonresidents under sec. 922(b)(B) and (C) do not prohibit an Alaskan from securing a firearm for the purposes set out. In sec. 922(B) a resident Alaskan in another state may "borrow or rent a firearm for temporary use for lawful sporting purposes," and sec. 922(C) does not preclude a resident Alaskan in another state from

> "purchasing a rifle or shotgun when he is participating in any organized rifle or shotgun match or contest, or is engaged in hunting in a state other than his state of residence and whose rifle or shotgun has been lost or stolen or has become inoperative in such other state ... if such person presents to such dealer a sworn statement (i) that his rifle or shotgun was lost or stolen or became inoperative while participating in such a match or contest or while engaged in hunting, in such other state, and (ii) identifying the chief law enforcement officer of the locality in which such person resides, to whom such licensed dealer shall forward such statement by registered mail."

However, in (A) of sec. 922(b)(3) it states the exception that a resident of a "contiguous state" may purchase a rifle or shotgun in another state only where the purchaser's state of residence permits such sale or delivery by law.

The enclosed draft would take care of (A), leaving only the problem that there are no other states strictly "contiguous" to Alaska. Excluding the people of Alaska from coverage under sec. 922(b)(3)(A) would be subject to challenge on constitutional grounds as discriminatory. The courts, as a matter of construction, will always attempt to construe provisions as not

conflicting if possible and in this case "contiguous" would probably be construed as including those states nearest to Alaska, i.e., Oregon, Washington, and possibly California. The generally accepted legal definition is as follows:

> CONTIGUOUS. In close proximity; near, though not in contact; neighboring; adjoining; near in succession; in actual close contact; touching; bounded or traversed by. Black, Law Dictionary (4th ed. 1951)

If contiguous were not construed in this manner, then the exception provided by sec. 922(b)(3)(A) would not apply, regardless of any law of this state authorizing it. In any case, the fact that a resident Alaskan is not prohibited from purchasing a rifle or shotgun under (B) and (C) may take care of the specific situation posed in your request.

If I have in any way misunderstood your request or the enclosed draft does not reflect your wishes, please let me know and advise whether or not this one is to be formally prefiled. I have enclosed a copy of the pertinent sections of Public Law 90-618 for your inspection.

Sincerely,

John M. Elliott
Executive Director

Joel F. Bennett

Joel F. Bennett
Legislative Counsel

JFB/mh

Encl.

which the transferor resides (or other than that in which its place of business is located if the transferor is a corporation or other business entity); except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes; and

"(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

§ 922

"(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

"(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age.

"(2) any firearm or ammunition to any person in any State where the purchase or possession by such person of such firearm or ammunition would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

"(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of a rifle or shotgun to a resident of a State contiguous to the State in which the licensee's place of business is located if the purchaser's State of residence permits such sale or delivery by law, the sale fully complies with the legal conditions of sale in both such contiguous States, and the purchaser and the licensee have, prior to the sale, or delivery for sale, of the rifle or shotgun, complied with all of the requirements of section 922(c) applicable to intrastate transactions other than at the licensee's business premises, (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes, and (C) shall not preclude any person who is participating in any organized rifle or shotgun match or contest, or is engaged in hunting, in a State other than his State of residence and whose rifle or shotgun has been lost or stolen or has become inoperative in such other State, from purchasing a rifle or shotgun in such other State from a licensed dealer if such person presents to such dealer a sworn statement (i) that his rifle or shotgun was lost or stolen or became inoperative while participating in such a match or contest, or while engaged in hunting, in such other State, and (ii) identifying the chief law enforcement officer of the locality in which such person resides, to whom such licensed dealer shall forward such statement by registered mail;

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"(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity; and

Post, p. 1231.

Recordkeeping.

"(5) any firearm or ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Secretary.

"(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

"(1) the transferee submits to the transferor a sworn statement in the following form:

"'Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are _____

_____

Signature _____ Date _____'

Ante, p. 1214.

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

"(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

"(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

Recordkeeping.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

HB 14

JUDICIARY COMMITTEE

REPORT ON HOUSE BILL NO. 14

This bill seeks to protect the public from being sent and billed for merchandise which was not ordered. It is intended to discourage certain promotional schemes by which an individual would receive some merchandise, usually through the mail, and find that although he never asked for it he is faced with the inconvenience and expense of returning the merchandise or being billed for it. The bill covers only those situations in which the unsolicited sending constitutes an offer of sale and does not cover either contractual arrangements for the periodic sending of merchandise or cases of mistaken delivery where there was no actual "offer".

The committee substitute differs from the original bill in that it removes some redundant language and relocates the section so that it is covered by the definition of "merchandise" in AS 45.45.110. That definition is broadened to cover this new section, and the circularity of the definitions in sec. 110 is removed.

Barry Jackson, Chairman

HB 18

JUDICIARY COMMITTEE REPORT ON

HOUSE BILL NO. 18

This bill is one product of the legislatively directed project to revise the Alaska Administrative Code and the Administrative Procedure Act. It clarifies the functions of the Department of Law with respect to administrative regulations, and established the concept of "regulations attorney." This person would work with the various administrative agencies, bringing to them a greater understanding of the nature of administrative regulations, preventing the Code from deteriorating after the revision project is completed, assisting in preparing regulations and relevant legislation, advising of the need for new regulations and amendment of old ones, and assuring constitutionality, legality and compliance with the Administrative Procedure Act and the drafting manual for administrative regulations. It is intended that this person be taken from these duties only when his work load permits or when the interests of the state definitely require it.

Some of the very serious problems relating to the present treatment of regulations are discussed at pp. 5 - 6 of the January 1968 study entitled, "Revision of the Alaska Administrative Code", prepared by the Legislative Affairs Agency. The primary cause of the problems is the fact that under the present system laymen, who may be excellent administrators or specialists in another field, are being required to analyze, interpret and apply complex legal matter without the requisite legal training. This is an illogical and inefficient system, leading to general frustration for administrators and users of the Code and to wasted money for the state.

To preserve uniformity of style, numbering, form, citation of authority, etc., the bill also requires adherence to the drafting manual for administrative regulations which Sec. 2(a), Ch. 70 SLA 1966 required the Legislative Affairs Agency to prepare.

Henry Logan, Chairman

SB-45
HB 31

STANLEY H. REITMAN
ATTORNEY AT LAW
708 FOURTH AVENUE
ANCHORAGE, ALASKA 99501
PHONE 272-2409

February 13, 1969

The Honorable Barry Jackson
Chairman, House Judiciary Committee
House Chambers
Juneau, Alaska

Dear Barry:

The Legislative Council, as a result of my letter of January 6, 1969 (copy of which was forwarded to you on the 3rd of this month) pertaining to existing deficiencies in the Alaska Professional Corporation Act, drafted Senate Bill No. 45. This new bill faithfully follows the suggestions set forth in my January 6 letter, and in my opinion should be adopted as drafted.

One minor troublesome item is the introduction of House Bill No. 31 at the request of the Legislative Council. This bill addresses itself to A.S. 10.45.080. However, Senate Bill No. 45, in a more comprehensive amendment of the Alaska Professional Corporation Act, contains an amendment to the very same section. In my opinion, House Bill No. 31 should not be adopted, as Senate Bill No. 45 adequately and properly handles the situation.

Again, thank you for any courtesies extended to me and to all Alaskan professionals who are vitally interested in the effectiveness of the Alaska Professional Corporation Act.

Very truly yours,

Stanley H. Reitman

SHR/mm

Decision
send it to Senate

Chairman Jackson file Jud HB51

NORTHERN LIFE INSURANCE COMPANY

NORTHERN LIFE TOWER • SEATTLE

February 20, 1969

Executive Offices

Mr. William K. Boardman, Speaker
Alaska State Legislature
State Capitol Building
Pouch V
Juneau, Alaska 99801

Dear Bill:

It has come to our attention that you have a House Bill #51 by Tom Fink which is substantially similar to the Bill he introduced during the Fifth Legislature (H.B. #361).

Joe Peel of the Health Insurance Association of America asked me if I would advise you that the HIAA is opposed to this Bill. Also, I am enclosing a copy of some information that Robert Scott sent to the sponsor, Tom Fink, which states some of the objections to the Bill.

We will certainly appreciate any help you can give the industry.

Best regards,

A. L. Whetstone
Vice President

ALW:rrm
Encl.

ALASKA HOUSE BILL NO. 51

Sponsor: Tom Fink

Referred: House Commerce, Labor and Management, and Judiciary Committees

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Purpose of Bill

This bill would require payment by the insurer of interest at the rate of 8% per annum on sums "determinable at the time of filing" and owed under life and health insurance policies starting from the day of filing of a "claimant's statement and death certificate" in the case of a life insurance death claim, and from the day of filing of a "claimant's statement and physician's statement" in the case of a disability claim; and on additional sums, on the day they become determinable. It further provides that a bona fide settlement offer equal to final settlement or judgment would stop the running of the interest penalty.

Objections

This bill is similar to House Bill No. 361 introduced by Mr. Fink during the Fifth Legislature. The bill is punitive in nature in that while it is apparently designed to penalize an insurer which vexatiously delays payment of its claims, it would penalize even reputable insurance companies if, through no fault of their own, a claim were not paid pursuant to the terms of the proposal.

Delays in claim settlements when they occur in the case of life and

health insurance are due to a variety of bona fide reasons caused chiefly by the need to await information from sources over which the life insurance company has no control.

This bill would impose an excessive interest penalty which would commence upon receipt of specific items, i.e., a "claimant's statement" and a death certificate or physician's statement. There is no indication in this bill of what the expression "claimant's statement" means. It could be construed to be anything from a telephone call, letter, telegram, or postcard notifying the insurer of a claim, to filing the proof of loss forms and other documents necessary for perfecting the claim, all as required under the contract. Interest should not begin to run until the completed claim proofs and other required documents are received at the insurer's home office.

Even assuming that due proof of loss forms and a death certificate were filed under a death claim, the insurer might need a certificate of appointment delayed because of a controversy among the heirs or next of kin, or a tax waiver the issuance of which would not be within the insurer's control. There may be a discrepancy with regard to the insured's age, requiring additional proof from the claimant. Frequently, the contract also calls for the surrender of the policy, receipt of which may be delayed by the beneficiary. However, under the bill, if these additional documents are not received upon the filing of "claimant's statement" and "death certificate", the insurer would be unjustly penalized.

In the case of a life insurance policy with accidental death benefits, there may be suspicious circumstances involved, or a question as to whether the death was accidental. In such situations, the insurer should be permitted a reasonable amount of time to conduct a proper investigation without the threat of an interest penalty.

"Disability" insurance is defined in the insurance code (AS 21.12.050) as including all forms of health insurance. It would appear that where hospitalization coverage is provided, the insurer will need more than just a "claimant's statement and a physician's statement" to settle such a claim. The same is true with respect to medical coverage involving reimbursement for cost of drugs, etc.

Disability claims are generally of small amounts, and computing interest on a daily basis from the day of filing such statements would only amount to pennies. On the other hand, the computation of interest on such small amounts would create an administrative nightmare.

It should be noted that the bill would not apply to claims payable by fraternal benefit societies, nor to hospital and medical service corporations when reimbursement is required to be made to a subscriber. This is so because the bill does not specifically amend the chapters of the insurance code dealing with these organizations.

The life insurance business believes that the proper remedy in the case of any insurer which delays payment of claims without good cause is that its certificate of authority to do business in Alaska should be revoked. A provision requiring the Director of Insurance to take such action is already contained in the Insurance Code. See AS 21.09.150.

We urge that House Bill No. 51 not receive favorable consideration.

Respectfully submitted,

Robert M. Scott, Juneau
Legislative Agent
Life Insurance Association of America

HB 75

JUDICIARY COMMITTEE REPORT

ON

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 75

The Judiciary Committee is unable to obtain an opinion from the Attorney General's office as to the constitutionality of House Bill No. 75.

In order to permit action on this bill in this session the Committee puts the bill out with the recommendation on the merits of the bill, but without complete review of the legal aspects of the bill.

The Committee Substitute deletes the local government sharing provisions, which the sponsor intends to submit by a separate bill, and inserts a percentage alternative in order to offset any effects of inflation.

_____

Barry Jackson, Chairman

March 5, 1969

To: G. Kent Edwards
Attorney General

From: Barry Jackson
Chairman
House Judiciary Committee

Subject: House Bill No. 75

We hereby request an opinion from your office regarding any constitutional problems on the above bill.

We specifically direct your attention to the various rate structures and to the method of allocating the one half of the proceeds to local government.

File

STATEMENT BEFORE THE HOUSE
JUDICIARY COMMITTEE

March 14, 1969

Mr. Chairman, Gentlemen:

I am H. M. Cole, Counsel for Atlantic Richfield Company.

On 3-3-69 T. F. Carlisle, Manager of the Tax Division of Atlantic Richfield's North American Producing Department stated, in testimony before the House Resources Committee that certain portions of HB 75 may raise the question of constitutionality. I have been asked to elaborate on that thesis and, therefore, shall confine my remarks to that issue.

There are a number of arguments which might be mentioned to indicate the possible unconstitutionality of the bill. These include:

(1) undue burden on interstate commerce;

(2) unreasonable classification and thus violating the due process principles in that the tax is based on an occurrence after the tax is imposed;

(3) the unconstitutional levying of a state export tax, and

(4) discriminatory taxation.

It is axiomatic that a tax must be equal and uniform, but the tax here is neither. The incidence of the tax is on severance, but the rate is on the location of use.

Article I, Section 8, Clause 3 of the United States Constitution provides, among other things, that

> The Congress shall have power -- to regulate commerce with foreign nations and among the several states. . .

In 1940 the U.S. Supreme Court, in Best & Company, Inc. v. Maxwell[1] stated that "The Commerce Clause forbids discrimination whether forthright or ingenious" in holding a State statute unconstitutional which required out-of-state merchants to pay larger privilege taxes than local merchants.

Both Texas and Louisiana have passed gas gathering taxes, which are taxes on the occupation of gathering gas from a producer. In the Michigan-Wisconsin Pipe Line Co. v. Calvert[2] Case, a tax was imposed on the Pipeline for the exit of gas from Texas. The U.S. Supreme Court held that the gathering of natural gas, as defined in the Statute, was an inseparable part of interstate commerce and characterized the tax as a tax "on the exit of the gas from the state." The Court said that "the receiving of a commodity for transportation cannot be carved out of the transportation process itself." "It is now well settled," the Court continued, "that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." "The economic process is inherently unsusceptible of division into distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other." the Court continued. "If Texas may impose this. . .tax. . .then Michigan and other recipient states have at least equal rights to tax the. . .unloading. . .when it arrives for distribution. . .The net effect would be substantially to resurrect the Custom barriers which the Commerce Clause was designed to eliminate."

It seems to me that HB 75, if enacted, would undertake the same thing which the Supreme Court has said is unconstitutional.

Calvert v. Transcontinental Pipe Line Corporation[3], a 1960 Texas Supreme Court Case, citing the Michigan-Wisconsin Pipe Line Co. Case, stated that the tax was on the downstream purchaser of gas (an out-of-state entity) and, therefore, was not valid because it was a burden on interstate commerce.

The Texas Legislature tried again with their gas gathering tax and Calvert v. Panhandle Eastern Pipe Line Co.[4] was the involved case. The Texas Supreme Court voided the act and said that, "Irrespective of what the Act labels the tax and of what other declarations are found in the Act that seeks to attach the tax to the production and processing of natural gas, it is apparent, as the U.S. Supreme Court found in the Michigan-Wisconsin example, that the tax attaches to the gas after it has been produced and processed and has begun its journey in interstate commerce."

It seems to me that this language is singularly appropriate to the provisions of HB 75. "Where a tax is a burden on interstate commerce, it is not made valid by isolating and denominating some incident or element as 'local activity' and designating such incident as the focal point of the tax."

The Louisiana case to which reference has been made is Louisiana-Nevada Transit Co. v. Fontenat[5]. Twenty percent (20%) of the gas involved was for local use and eighty percent (80%) for interstate use. The Louisiana Court, citing the Michigan-Wisconsin Pipe Line Co. case, held that a tax imposed on a local activity is valid only if the local activity can realistically be separated from the interstate process, the flow of commerce.

A producer who chose to ship his oil in interstate commerce (either on his own motion or because the market in Alaska could not support more processing) prior to processing would incur

a greater tax than the producer who does process his crude in Alaska. The incidence of the added tax would tend to encourage processing in Alaska to the exclusion of other states. Such would impede interstate commerce and it is this type of impediment upon the commerce of the nation that was struck down in Best v. Maxwell. An independent producer, without refining capabilities would under HB 75 pay a tax which would be determined by what the purchaser of his production chose to do with it. It is doubtful that a classification such as here proposed would meet the due process requirements of the 14th Amendment of the Constitution.

One other case which might be of interest to the Committee on this matter is Pennsylvania v. West Virginia[6]. This case is cited in the Michigan-Wisconsin case and involved an attempt by one state to prevent the export of gas into another state. By way of dictum the U.S. Supreme Court stated, "Even the States power to lay and collect taxes, extensive though it may be, cannot extend in such a way as to impede interstate commerce."

Mr. Walker's brief contains several other cases which are additional examples of legislatures favoring local business by discriminating v. interstate business, so I shall not longer belabor the point. It seems clear to me that the extra tax proposed upon oil and gas exported from Alaska is an added burden on interstate commerce; that it is in fact discriminatory against oil and gas not processed within Alaska and therefore is subject to constitutional attack.

I have pointed out a number of reasons why I am of the opinion that HB 75 as written is unconstitutional. I would like to make it clear, however, that Atlantic Richfield is interested in the

amount of the tax and not the technical aspects of the statute, but I would assume that the legislature would not want to enact legislation which appears on its face to be subject to attack.

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[1] Best & Company v. Maxwell, 311 U.S. 4 54 (1940)

[2] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)

[3] Calvert v. Transcontinental Gas Pipe Line Corp., 341 SW_2 679 (1960)

[4] Calvert v. Panhandle Eastern Pipe Line Co., 371 SW_2 601 (1963)

[5] Louisiana-Nevada Transit Co. v. Fontenat, 97 SO_2 409 (1957)

[6] Pennsylvania v. West Virginia, 262 U.S. 553

File

STATEMENT PRESENTED TO HOUSE JUDICIARY COMMITTEE
ALASKA SIXTH LEGISLATURE
BY HUMBLE OIL & REFINING COMPANY

CONSTITUTIONALITY OF HOUSE BILL NO. 75
AN ACT RELATING TO REVENUES FROM OIL AND GAS PROPERTIES

Facts

House Bill No. 75, an Act relating to revenues from oil and gas properties is now before you for your consideration. Last Wednesday you invited the oil industries' comments on the constitutionality of House Bill No. 75. Among other provisions House Bill No. 75 proposes that there would be one rate for those engaged in primary manufacturing and processing in the State of Alaska, and another rate for those shipping raw materials outside the State. Alaska presently imposes an oil and gas conservation tax at the rate of five mills per barrel of oil produced and for each 50,000 cubic feet of gas produced. Alaska also imposes an oil and gas production tax at the rate of three percent (3%) of value and the disaster severance tax of one percent (1%) of value.

Issue

The question in issue is whether the enactment of a split severance tax as proposed by House Bill No. 75 would be valid under both the Alaska Constitution and the United States Constitution.

Answer

It is concluded that the enactment of an occupation tax as proposed by House Bill No. 75 would patently violate the Commerce Clause,

Article I, Section 8, Clause 3, of the United States Constitution. This being the case no effort was made to justify such an enactment under the Alaska Constitution.

Discussion

Article I, Section 8, Clause 3 of the United States Constitution provides:

> The Congress shall have power. . .To regulate commerce with foreign nations, and among the several states. . .

The primary considerations for determining the limits of a state's power to tax activities connected with interstate commerce have been aptly stated by the Supreme Court of Washington in Washington-Oregon Shippers Cooperative Association, Inc. v. Schumacher, et al., 367 P.2d 112 (1961). They are:

> . . .(1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage; the discrimination test. (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; the multiple burden test.

Because the occupation taxed in a typical state production or severance tax is strictly a local activity and occurs but once, we need not concern ourselves with the second or multiple burden test. It appears obvious that the type of split severance tax proposed for Alaska fails to satisfy the first test, that of nondiscrimination against interstate commerce.

The United States Supreme Court has upon many occasions struck down state license and occupation taxes where they favored

instate business by discriminating against interstate business. Welton v. Missouri, 91 U.S. 275 (1876), relating to discriminatory licensing of out-of-state producers or manufacturers of goods; Walling v. Michigan, 116 U.S. 446 (1886), involving discriminatory taxation of out-of-state liquor sales; Darnell v. Memphis, 208 U.S. 113 (1908), discrimination against out-of-state agricultural products; Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939), involving discrimination against cement transported into the state from out of state; Mullaney v. Anderson, 342 U.S. 415 (1952), striking down an Alaska licensing tax on the grounds of discrimination against interstate commerce since the tax was levied at a higher rate upon nonresident fishermen than upon resident fishermen; Memphis Steam Laundry Cleaners Inc. v. Stone, 342 U.S. 389 (1952), involving a discriminatory license tax imposed at a higher rate on out-of-state peddlers than on instate peddlers.

In Best v. Maxwell, 311 U.S. 454 (1940) the Supreme Court held a state statute unconstitutional in violation of the Commerce Clause since the statute required out-of-state merchants to pay larger privilege taxes than instate merchants. In so holding, the court said:

> The Commerce Clause forbids discrimination whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack will in its practical operation work discrimination against interstate commerce. The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.

Seeing that the key to constitutionality is nondiscrimination, the proposed split severance tax should be examined to determine if it

would discriminate against interstate commerce. The extra burden of tax proposed upon oil and gas exported and not processed in Alaska clearly is an added burden on interstate commerce. A producer who chooses to ship his oil or gas in interstate commerce prior to refining or processing would incur a greater tax than would the producer who chose to refine or process his oil or gas in Alaska. Clearly the State of Alaska would benefit from such a tax as integrated producers would be encouraged to locate refineries and processing plants in Alaska at the exclusion of other states. This would clearly impede interstate commerce. This type of impediment upon the commerce of the nation was struck down in Best & Company, Inc. v. Maxwell, 311 U.S. 454 (1940), where the Supreme Court said:

> . . .Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this $250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. A $250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market. Extra-state merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.

As to a nonintegrated producer who must sell all of his oil and gas prior to refining or processing, such a tax would appear to violate the Due Process Clause of the 14th Amendment to the United States Constitution. The amount of his tax would be determined by what the purchaser of his production chose to do with it. It is doubtful that a classification such as proposed in the split severance tax would meet the tests of the Due Process Clause of the 14th Amendment.