ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8072

2452 HJ HB 446 - HB 456

2452

CCC 507

ORS 488.011 to 488.180 and 488.990. [illegible]

488.020 Regulations establishing minimum specifications for rented boats; inspection; cancellation of certificate of boats not meeting specifications. (1) The board shall provide by regulations minimum specifications of design, construction, material and condition of boats rented or chartered to the public. The regulations shall be made in accordance with ORS 183.310 to 183.550.

(2) Designated representatives of the board may annually, each spring inspect all rental boats as to material condition and seaworthiness. Any approval sticker or decal shall be placed in clear view of the operator on all boats which equal or exceed the minimum specifications provided by the board.

(3) After a hearing upon 10 days' notice to the owner of the boat, the board may cancel or revoke the certificate of number for any boat rented or chartered to the public if it does not equal or exceed the minimum specifications provided by the board. [illegible]

488.027 Peace officers to enforce chapter. (1) The sheriff of each county and all other peace officers shall be responsible for the enforcement of this chapter and [illegible] regulations made by the board pursuant [illegible]. In the exercise of this responsibility, a peace officer may stop any boat and direct it to a suitable pier or anchorage for boarding.

(2) No person, while operating a boat on any waters of this state, shall knowingly flee or attempt to elude any law enforcement officer after having received a signal from a law enforcement officer to bring the boat to a stop. [illegible]

488.028 Contrary local laws prohibited. No political subdivision of this state may enact or enforce any law contrary to the provisions of this chapter. [illegible]

488.030 [Repealed by 1957 c.467 §20]

488.031 Personal flotation devices. (1) All boats shall carry at least one United States Coast Guard approved personal flotation device in good and serviceable condition for each person on board. Each device shall be of an appropriate size for the person for whom it is intended and shall be readily accessible whenever the boat is in use. As used in this subsection, a personal flotation device is not "readily accessible" if it is stowed in a locked compartment or locker or is otherwise not immediately, physically available to persons on board the boat in case of an emergency.

(2) The board by regulation will classify types of devices and specify which types are approved for various classes of vessels. The regulations will be consistent with, but shall not exceed those regulations promulgated by the United States Coast Guard. [illegible]

488.040 [Repealed by 1957 c.467 §20]

488.041 Lights. (1) Except as provided by the regulations adopted by subsection (3) of this section, every boat shall carry and show the following lights when underway between sunset and sunrise:

(a) Manually propelled boats, a lantern capable of showing a white light which shall be temporarily displayed in sufficient time to prevent collision.

(b) (A) Motorboats less than 26 feet in length, a white light aft showing all around, visible for at least two miles, and a combination 20 point light in the forepart of the boat, lower than the white light aft, showing green to starboard and red to port, visible for at least one mile.

(B) Motorboats 26 feet or longer, a white light aft showing all around, visible for at least two miles, two separate 10 point side lights visible for at least one mile and a 20 point white light in the forepart of the boat, lower than the white light aft, visible for at least two miles.

(c) Boats propelled by sail, a white 12 point light aft, visible for at least two miles and two separate 10 point sidelights visible for at least one mile.

(2) As used in this section, "visible" means visible on a dark night with clear atmosphere.

(3) On all waters of the state, every boat shall carry and exhibit the lights required by inland rules for preventing collisions, promulgated by the United States Coast Guard, May 1, 1959 (Part 80, Title 33, Code of Federal Regulations of the United States of America, as amended). [illegible]

488.050 [Repealed by 1957 c.467 §20]

488.051 [1957 c.467 §5; repealed by 1959 c.[illegible]]

488.020 [Repealed by 1957 c.467 §50]

488.021 Application of ORS 488.011 to 488.180 and 488.990. (1) Except as provided in subsection (2) of this section, ORS 488.011 to 488.180 and 488.990 apply to all boats operated on the waters of this state, except when inconsistent with any applicable laws or regulations of an agency of the United States or when such laws or regulations otherwise prevail.

(2) ORS 488.011 to 488.180 and 488.990 do not apply to the following boats, except as herein or provided in this section:

(a) A boat that has a valid document issued by the Bureau of Customs of the United States or by a federal agency that succeeds to the duties of issuing marine documents.

(b) Foreign boats operated temporarily in the waters of this state.

(c) A boat owned and operated by the United States or by an entity of the United States.

(d) A ship's lifeboat used solely for lifesaving purposes.

(e) A boat belonging to a class of boats which is exempted from the provisions of ORS 488.715 to 488.740 and 488.745 to 488.760 by the board as provided in ORS 488.715 (4).

(3) Subsection (2) of this section does not exempt the following boats:

(a) Vessels of passenger vessels of less than [illegible] gross tons.

(b) Commercial vessels that are not required to be inspected under federal law or

(c) [illegible] owned recreational vessels [illegible] 1981 c.421 §84; 1983 c.102 §2]

488.022 Operating boat in violation of chapter prohibited. No person shall operate a boat in violation of any provision of this chapter. [1959 c.656 §2]

488.024 Operating improperly equipped boat prohibited. No person shall operate or give permission for another person to operate a boat which is not equipped as required by ORS 488.011 to 488.180 and 488.990 [illegible]

488.025 Operator of boat livery to provide properly equipped boats. No operator of a boat livery shall permit any boat be hired to depart from the boat livery premises unless the boat is equipped as provided under ORS 488.011 to 488.180 and 488.990. [1959 c.656 §10; c.185 §1]

488.026 Regulations establishing minimum specifications for rented boats; inspection; cancellation of certificate of boats not meeting specifications. (1) The board shall provide by regulations minimum specifications of design, construction, material and condition of boats rented or chartered to the public. The regulations shall be made in accordance with ORS 183.310 to 183.550.

(2) Designated representatives of the board may annually, each spring inspect all rental boats as to material condition and seaworthiness. Any approval sticker or decal shall be placed in clear view of the operator on all boats which equal or exceed the minimum specifications provided by the board.

(3) After a hearing upon 10 days' notice to the owner of the boat, the board may cancel or revoke the certificate of number for any boat rented or chartered to the public if it does not equal or exceed the minimum specifications provided by the board. [1959 c.656 §37; 1973 c.564 §9; 1979 c.87 §21]

488.027 Peace officers to enforce chapter. (1) The sheriff of each county and all other peace officers shall be responsible for the enforcement of this chapter and any regulations made by the board pursuant thereto. In the exercise of this responsibility, a peace officer may stop any boat and direct it to a suitable pier or anchorage for boarding.

(2) No person, while operating a boat on any waters of this state, shall knowingly flee or attempt to elude any law enforcement officer after having received a signal from a law enforcement officer to bring the boat to a stop. [1959 c.656 §39; 1965 c.501 §2; 1967 c.156 §2; 1967 c.501 §17; 1973 c.564 §10]

488.028 Contrary local laws prohibited. No political subdivision of this state may enact or enforce any law contrary to the provisions of this chapter. [1959 c.656 §41]

488.030 [Repealed by 1957 c.467 §50]

488.031 Personal flotation devices. (1) All boats shall carry at least one United States Coast Guard approved personal flotation device in good and serviceable condition for each person on board. Each device shall be of an appropriate size for the person for whom it is intended and shall be readily accessible whenever the boat is in use. As used in this subsection, a personal flotation device is not

TITLE 46

MOTOR VEHICLES

CHAPTER 46.61—RULES OF THE ROAD

Abandoned junk motor vehicles: RCWA 46.52.145-46.52.160.
18 Am Jur Trials p 443 (unwitnessed automobile accident cases).
Ops Atty Gen 1972 No. 3 (application of provisions of this chapter to United States Forest Service roads).
4 ALR Fed 6 (Federal Tort Claims Act: Automobile negligence cases).

OBEDIENCE TO AND EFFECT OF TRAFFIC LAWS

46.61.005 Provisions of chapter refer to vehicles upon the highways —Exceptions

Actions of an individual in driving an unlicensed pickup rapidly in circles in a field owned by his parents while under the influence did not fall within purview of RCWA 46.61.506 prohibiting driving while intoxicated in light of fact that it would have been an unreasonable exercise of police power to extend prohibition to defendant's conduct, defendant was posing no threat to public, vehicle was unlicensed and defendant was not on or even near a public road, land on which he was driving was privately owned, and public had no right to be there nor was public expected to be on the property. State v Day (1981) 96 Wn 2d 646, 638 P2d 546.

46.61.010 Required obedience to traffic laws—Penalties

Amended by Laws 2nd Ex Sess 1975-76 ch 95 § 1, effective March 13, 1976, and repealed by Laws 1st Ex Sess 1979 ch 136 § 109, effective January 1, 1981.
Reviser's note: RCWA 46.61.010 was repealed by 1979 ex.s. c 136 § 109, effective July 1, 1980; the effective date of 1979 ex.s. c 136 was delayed until January 1, 1981, by 1980 c 128 § 9. For later enactment, see RCWA 46.63.020.

Ops Atty Gen 1976 No. 19 (traffic offenses as crimes; commitment for contempt for failure to comply with order to pay costs).
Ops Atty Gen 1979 No. 1 (although the privilege from arrest in Article II, § 16 of the Washington constitution extends beyond the term of a legislative session, it relates to the possibility of civil arrest only and is not a privilege from arrest for the commission of a crime; therefore, Article II, § 16 does not preclude the arrest of a member of the Washington state legislature for the commission of a traffic offense within the purview of RCWA 46.61.010).

Sheriff who observed defendant's automobile following another vehicle too closely, defendant's suspicious movements in the automobile after he became aware of sheriff's presence, defendant's intoxicated condition, and out-of-date temporary license possessed by defendant, was justified in arresting defendant for misdemeanor offenses relating to defendant's conduct. United State v McCambridge (1977) 551 F2d 865.

After having stopped defendant's automobile and arrested defendant for various misdemeanor offenses relating to defendant's operation of the automobile, sheriff was entitled to enter and secure the automobile, which, left by itself on the highway, would have been subject to vandalism and might have threatened public safety and convenience. United States v McCambridge (1977) 551 F2d 865.

46.61.015 Obedience to police officers, flagmen, or fire fighters

No person shall willfully fail or refuse to comply with any lawful order or direction of any duly authorized flagman or any police officer or fire fighter

invested by law with authority to direct, control, or regulate traffic. [Amended by Laws 1975 ch 62 § 17.]

Severability—1975 c 62: See note following RCW 36.75.010.

Washington Court Rules: Bail in traffic offense cases—Mandatory appearance—JCrR 2.09.

In ordinary circumstances, responsibility of police in directing traffic is to maintain due regard for safety of all who would be affected by discharge of such responsibility. Anthony v C. D. Amende Co. (1982) 31 Wn App 21, 639 P 2d 231.

In action for personal injuries arising from car accident which allegedly was caused by negligence of employees of department of transportation in directing traffic on wrong side of street around another accident, trial court erred in imposing upon state burden to exercise higher degree of care than ordinary care. Anthony v C. D. Amende Co., (1982) 31 Wn App 21, 639 P2d 231.

46.61.020 Refusal to give information to or cooperate with officer

Washington Court Rules: Bail in traffic offense cases—Mandatory appearance—JCrR 2.09.

46.61.021 Duty to obey law enforcement officer—Authority of officer

(1) Any person requested or signaled to stop by a law enforcement officer for a traffic infraction has a duty to stop.

(2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check the status of the person's license and the vehicle's registration, and complete and issue a notice of traffic infraction.

(3) Any person requested to identify himself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself, give his current address, and sign an acknowledgement of receipt of the notice of infraction.

[Added by Laws 1st Ex Sess 1979 ch 136 § 4, effective January 1, 1981.]

Effective date—Severability—1979 1st ex.s. c 136: See notes following RCWA 46.63.010.

CJS Arrest §§ 38, 40.

Key Number Digests: Arrest ⇨63.5(6).

46.61.022 Failure to obey officer--Penalty

Any person who wilfully fails to stop when requested or signaled to do so by a person reasonably identifiable as a law enforcement officer or to comply with RCW 46.61.021(3), is guilty of a misdemeanor.

[Added by Laws 1st Ex Sess 1979 ch 136 § 5, effective January 1, 1981.]

Effective date—Severability—1979 1st ex.s. c 136: See notes following RCWA 46.63.010.

Washington Court Rules: Bail in traffic offense cases—Mandatory appearance—JCrR 2.09.

CJS Motor Vehicles §§ 606 et seq.

Key Number Digests: Automobiles ⇨335.

46.61.024 Attempting to elude pursuing police vehicle

Any driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.

[Added by Laws Ex Sess 1979 ch 75 § 1; Amended by Laws 1st Ex Sess 1982 ch 47 § 25.]

Severability—1982 1st ex.s. c 47: See note following RCWA 9.41.025.

CJS Motor Vehicles §§ 606 et seq.

Key Number Digests: Automobiles ⊂⊃335.

Offense of felony flight was decriminalized from January 1, 1981 until April 16, 1981. State v Taylor (1982) 97 Wn 2d 724, 649 P2d 633.

No crime is committed under RCWA 46.61.024 if one being pursued by a police vehicle merely fails to immediately stop his vehicle, since to violate the statute one must also engage in conduct that indicates wanton and wilful disregard for life and property of others. State v Mather (1981) 28 Wn App 700, 626 P2d 44.

Police power may lawfully extend to prohibiting flight from unlawful detention where such flight indicates wanton and wilful disregard for life and property of others. State v Mather (1981) 28 Wn App 700, 626 P2d 44.

Constitutional right to be free from unreasonable searches and seizures does not create a constitutional right to react unreasonably to illegal detention. State v Mather (1981) 28 Wn App 700, 626 P2d 44.

Although RCWA 46.61.024, proscribing attempt to elude pursuing police vehicle, is directed at unreasonable resistance to both legal and illegal detentions, it is not for such reason overbroad. State v Mather (1981) 28 Wn App 700, 626 P2d 44.

RCWA 46.61.024, proscribing attempt to elude pursuing police vehicle, provides fair notice of conduct that is prohibited and is drafted so as to avoid punishment of constitutionally protected behavior. State v Mather (1981) 28 Wn App 700, 626 P2d 44.

While defendant, charged with attempting to elude pursuing police vehicle, argued that the statute in question is vague and overbroad because it does not require knowledge that the pursuing vehicle is a police vehicle, the statute does require that defendant wilfully fail and refuse to stop his vehicle while attempting to elude a pursuing police vehicle, and wilfulness in this context is identical with knowledge. State v Mather (1981) 28 Wn App 700, 626 P2d 44.

RCWA 46.61.024, proscribing attempt to elude pursuing police vehicle, was not unconstitutionally vague or overbroad by reason of the fact that it does not require pursuing officer to have probable cause to stop vehicle. State v Mather (1981) 28 Wn App 700, 626 P2d 44.

Respondents were not denied due process on ground that they did not have proper notice of proscribed conduct because a person reading one chapter would reasonably conclude that "eluding" had been decriminalized and would not be referred to another chapter where "eluding" was listed as a felony exception to RCWA 46.63.020 decriminalizing traffic offenses. State v Dalnard (1982) 31 Wn App 828, 644 P2d 1222.

RCWA 46.61.024, governing eluding of a pursuing police vehicle, continues to be an excluded felony exception to RCWA 46.63.020, decriminalizing traffic offenses. State v Dalnard (1982) 31 Wn App 828, 644 P2d 1222.

Constitutional prohibition against being twice put in jeopardy precluded multiple punishment of defendant who was convicted of both reckless driving and reckless endangerment following high speed police chase, because the state necessarily had to prove reckless driving to prove reckless endangerment. State v Potter (1982) 31 Wn App 883, 645 P2d 60.

Trial court, in prosecution for reckless driving and reckless endangerment involving incident in which police gave chase to defendant's car, properly permitted police officer to testify that 22 months earlier defendant had been in-

§ 2543. Convictions

8 Cal Jur 3d Automobiles § 145.

§ 2544. Disciplinary Actions

8 Cal Jur 3d Automobiles § 144.

§ 2545. Surrender of License

8 Cal Jur 3d Automobiles § 147.

§ 2547. Period for Filing Accusations

8 Cal Jur 3d Automobiles § 155.

§ 2548. Revocation or Suspension of Additional License

8 Cal Jur 3d Automobiles § 148.

§ 2549. Reinstatement of License

8 Cal Jur 3d Automobiles § 149.

ARTICLE 6

Hazardous Waste Inspections

[Added by Stats 1979 ch 1097 § 6.]

§ 2560. Annual inspection fee

The commissioner may determine the fee for the annual inspection of trucks, trailers, semitrailers, vacuum tanks, cargo tanks, and containers used to transport hazardous waste. The fee, established by regulation, shall be sufficient to cover the cost to the department of conducting hazardous waste inspections but shall not exceed fifty dollars ($50).

Added Stats 1979 ch 1097 § 6; Amended Stats 1980 ch 1112 § 10.

Amendments:

1980 Amendment: Added "semitrailers," in the first sentence.

Review of Selected 1979 California Legislation, 11 Pacific LJ 527.

§ 2561. [Added by Stats 1979 ch 1097 § 6 and repealed by Stats 1981 ch 912 § 4.5, effective September 28, 1981.]

See H & S C § 25168.5.

§ 2600. Members of Reciprocity Commission

The Reciprocity Commission is composed of the Lieutenant Governor, the Director of Motor Vehicles, the Director of Transportation, the State Controller, and the Commissioner of the California Highway Patrol.

Amended Stats 1974 ch 345 § 155.

Amendments:

1974 Amendment: Substituted "Transportation" for "Public Works".

§ 2800 *and following sections—general references:*

Cal Jur 3d Schools § 330.

§ 2800. Obedience to Traffic Officers

It is unlawful to willfully fail or refuse to comply with any lawful order, signal, or direction of any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, when that peace officer is in uniform and is performing duties under any of the provisions of this code, or to refuse to submit to any lawful inspection under this code.

Amended Stats 1981 ch 644 § 1.

Amendments:

1981 Amendment: Substituted "peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, when that peace officer is in uniform and is performing duties under any of the provisions of this code," for "traffic officer".

Optional appearance before a magistrate by anyone arrested for specified offenses: § 40303.

Cal Jur 3d Automobiles § 195, Criminal Law §§ 3197, 3206.

A passenger in a vehicle stopped by officers who suspected the driver to be under the influence of alcohol was guilty of violation of Veh. Code, § 2800, where he failed to remain in the vehicle as requested by the police, prevented one of the officers from "administering the walk-the-line test" to the driver, and refused to move back to the vehicle so that the investigation of the driver could continue. Within the meaning of the language in Veh. Code, § 2800 that it is unlawful to wilfully fail or refuse to comply with any lawful order, signal, or direction of any traffic officer, an order the disobedience of which is illegal under the statute includes a lawful order, wilfully disregarded or disobeyed, that is relevant to and reasonably necessary in the performance by a traffic officer of the duties imposed on him under Veh. Code, § 625, respecting the enforcement of the rules of the road. People v Ritter (1981) 115 CA3d Supp 1, 170 Cal Rptr 901.

In a prosecution of defendant, on the basis of the same misconduct, for violation of Pen. Code, § 148, specifying the offense of wilfully resisting, delaying, or obstructing a public officer in the discharge of any duty of his office, and for violation of Veh. Code, § 2800, for disobedience of a lawful order of an officer issued in aid of his performance of duties involving enforcement of the rules of the road (Veh. Code, § 625), acquittal of the charge of violation of Pen. Code, § 148, did not require a finding of not guilty on the charge of violation of Veh. Code, § 2800, where defendant had refused an officer's request to stay in a car in which he was a passenger, stopped because the police suspected the driver was intoxicated. The request had been made to enable investigation of the driver without defendant's interference. Although violation of Veh. Code, § 2800, is a lesser offense than violation of Pen. Code, § 148, a Veh. Code, § 2800, offense is not a necessarily lesser included offense within the offense defined in Pen. Code, § 148, since it is possible to violate Pen. Code, § 148, without violating Veh. Code, § 2800. As to offenses for disobedience of an officer's order, many types of offenses can occur when an officer is discharging a duty having nothing to do with a traffic offense. People v Ritter (1981) 115 CA3d Supp 1, 170 Cal Rptr 901.

§ 2800.1. Flight from peace officer

Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist:

(a) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.

(b) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary.

(c) The peace officer's motor vehicle is distinctively marked.

(d) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform.

Added Stats 1982 ch 947 § 2.

Former Section: Former § 2800.1, similar to the present section, was added by Stats 1977 ch 1104 § 1, amended by Stats 1978 ch 504 § 1, Stats 1981 ch 600 § 2, and repealed by Stats 1982 ch 947 § 1.

Flight causing bodily injury or death: § 2800.2.

Review of Selected 1977 California Legislation, 9 Pacific LJ 434.

Review of Selected 1978 California Legislation, 10 Pacific LJ 439.

In an action by a policeman against a motorist for injuries incurred while plaintiff was in pursuit of defendant for speeding, defendant's alleged violation of various statutory provisions did not preclude enforcement of the fireman's rule prohibiting recovery by a policeman for injuries sustained in the course of his duty. While Veh. Code, § 2800.1, makes it a misdemeanor willfully to disregard an officer's siren and red light and to attempt to flee or attempt to elude pursuit, and Pen. Code, § 148, proscribes willful resistance, delay or obstruction of a police officer, and Pen. Code, § 834a, forbids using force or a weapon to resist arrest, none of the statutory provisions were specifically designed to protect persons in plaintiff's class. Hubbard v Boelt (1980) 28 C3d 480, 169 Cal Rptr 706, 620 P2d 156.

In a prosecution of defendant for attempt to evade a pursuing peace officer (Veh. Code, § 2800.1), the trial court correctly instructed the jury that defendant's state of intoxication was relevant in determining whether he had the specific intent necessary to convict him of an attempt to evade a pursuing peace officer. People v Finney (1980) 110 CA3d 705, 168 Cal Rptr 80.

§ 2800.2. Flight from peace officer causing death or bodily injury

Whenever willful flight or attempt to elude a pursuing peace officer in violation of Section 2800.1 proximately causes death or bodily injury to any person, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, by imprisonment in the county jail for not less than 30 days nor more than six months, or by a fine of not less than one hundred seventy dollars ($170) nor more than five hundred dollars ($500), or by both that fine and imprisonment.

Added Stats 1982 ch 947 § 3.

§ 2801. Obedience to Firemen

Cal Jur 3d Automobiles § 14, Criminal Law §§ 3197, 3206.

§ 2802. Load Inspection

(a) Any traffic officer having reason to believe that a vehicle is not safely loaded or that the height, width, length, or weight of a vehicle and load is unlawful may require the driver to stop and submit to an inspection, measurement, or weighing of the vehicle. The weighing may be done either by means of portable or stationary scales and the officer may require that the vehicle be driven to the nearest scale facility, in the event the scales are within five miles.

(b) Selected inspection facilities and platform scales operated by the Department of the California Highway Patrol may, at the discretion of the commissioner, be open for extended hours, up to and

HB

447

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 447

Title: "An Act repealing peremptory disqualification of a judge."

Sponsor: Repr. Fritz

Requestor: House Judiciary

Date of Request: 2/3/84

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: Admin. of Justice

BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	Unk.	Unk.	Unk.	Unk.	Unk.	Unk.
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	Unk.	Unk.	Unk.	Unk.	Unk.	Unk.
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	Unk.	Unk.	Unk.	Unk.	Unk.	Unk.
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Division Date: 2-3-84

Approved by Commissioner: Norman C. Gorsuch Date: 2-3-84

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

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

12/1/83

Fiscal Note
Analysis
HB 447

February 3, 1984

Although not quantifiable at this time, this bill has the potential for causing a significant fiscal impact on the Department of Law, the Public Defender and the Court System. A problem will arise as the criminal defense bar, which now disqualifies some judges 30% to 40% of the time, and some even more, begins to seek disqualification for cause. This latter form of disqualification will be the only course left to the bar, to have an action heard before a judge they believe will be more favorable for their case, if the statutory right of peremptory disqualification, granted by AS 22.20.022 is repealed. As a result, a substantial motion practice will develop that could require a significant amount of prosecutor time. Additionally, enactment of this bill will also result in numerous appeals to the State Supreme Court questioning whether or not the repeal of AS 22.20.022 requires a two-thirds majority vote of the legislature because of the bill's effect of repealing Criminal Rule 25.

Without any prior experience to guide us, the department is hesitant to speculate on the actual cost that this bill might cause. The department does believe that this bill will have the effect of hampering its overall ability to prosecute criminal offenses, by diverting already diminished resources from more critical matters currently handled such as violent crimes, sexual assault, child abuse and DWI. Any cost estimate at this time would be speculative. However, if just 5% of our available district attorney time were lost to unnecessary motion practice, at a weighted cost of $120,000 per attorney, including support costs, the cost would be about $360,000. This is a very conservative figure and the actual cost may be substantially greater.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

February 3, 1984

MEMORANDUM

TO: Representative Ramona Barnes

FROM: Heidi Borson Paine HBP
Legislative Analyst

RE: Peremption of Judges
Research Request 84-026

Jim Wood of your staff requested information on the peremption of judges in Judicial District 3. He specifically asked for a breakdown of total peremptions by judge according to criminal and civil cases. The requested information follows:

District 3 Peremptions by Judge
Calendar Year 1983

District Court Judges

Judge	Location	Criminal Case	Civil Case
Hornaday	Homer	234	1
Bosshard	Valdez	1	0
Anderson	Anchorage	9	2
Andrews	Anchorage	11	0
Finn	Anchorage	8	1
Fuld	Anchorage	12	1
Mason	Anchorage	4	1
Tucker	Anchorage	121	5
Subtotal--District Court		400	11

Superior Court Judges

Judge	Location	Criminal Case	Civil Case
Cranston	Kenai	0	20
Madsen	Kodiak	19	9
Cutler	Palmer	0	18
Buckalew	Anchorage	3	14
Carlson	Anchorage	22	133
Johnstone	Anchorage	0	79
Moody	Anchorage	46	13
Moore	Anchorage	0	3
Hanson	Anchorage	3	44
Ripley	Anchorage	34	3
Rowland	Anchorage	0	12
Serdahley	Anchorage	0	7
Shortell	Anchorage	0	32
Soutor	Anchorage	1	27
Subtotals--Superior Court		128	289
TOTAL--District & Superior Courts*		528	300

*These figures indicate the total peremptions reported to the Administrative Director's Office of the Alaska Court System. The totals also include 16 recusals, cases in which a judge disqualifies himself or herself because of interest or prejudice.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

January 24, 1984

MEMORANDUM

TO: Representative Milo Fritz

FROM: Heidi Borson-Paine HBP
Legislative Analyst

RE: Peremption of Judges
Research Request 84-003

To respond to your request for information concerning the incidence and cost of the peremption of judges in Alaska for 1983, we contacted the administration of the Alaska Court System. However, because we found that no central records are kept on peremption rates or costs, we contacted the presiding judges and court administrators in each of Alaska's four judicial districts. Most area court administrators in the individual judicial districts were able to provide us with accurate estimates of the total peremptions for 1983; however, District 2 did not have any records of peremptions and therefore was only able to supply an educated guess.

Review of Peremption Provisions in Alaska

Currently, there are two means by which a party may perempt a judge without proving cause in district and superior courts. First, under Alaska Statute 22.20.022, if a party or a party's attorney files an affidavit alleging under oath that a fair and impartial trial cannot be obtained under the assigned judge, the presiding district court judge, without requiring proof, must assign the case to another judge in that district. If another judge in the appropriate court is not available, then the chief justice of the supreme court will assign a judge to the case. No more than one affidavit each may be filed by the prosecution or defense.

Second, under Alaska Rules of Court, Criminal Rule 25 and Civil Rule 42, both the prosecution and defense are entitled as a matter of right to one change of judge in actions pending in the district and superior courts. This provision applies in both civil and criminal cases. A person wishing to exercise his or her right is required to file a Notice of Change of Judge; however, the party is not required to specify the grounds for changing. A Notice of Change of Judge must be filed before the commencement of the trial and within five days after

notice that the case has been assigned to a specific judge (see attachment A for copies of the statute and specific Rules of Court). The intent of House Bill 447, as you described it, is to reduce the number of peremptions without cause by repealing AS 22.20.022. The impact this legislation would have on the incidence of peremptions is difficult to predict. However, according to attorney Don Bauermeister of the Alaska Court System, people could still perempt an assigned judge without proving cause by filing a Notice of Change of Judge under Rules 25 and 42 of the Alaska Rules of Court. Consequently, to eliminate all provisions for peremption without cause, it would be necessary to repeal AS 22.20.022, as well as rescind Rules 25 and 42 of the Alaska Rules of Court. Because Alaska Rules of Court are promulgated by the Alaska Supreme Court, rescinding the court rules would require a two-thirds vote of the members in both the Senate and the House, under the State Constitution, Article IV, Section 15 (see attachment B).

Number of Peremptions

As indicated earlier in this memorandum, Alaska is divided into four judicial districts. District 1 includes judges in Ketchikan, Juneau, Sitka, Wrangell and Petersburg. District 2 includes judges in Nome, Bethel, Barrow and Kotzebue. The superior and district court judges in District 3 are located in Anchorage, Kodiak, Palmer, Kenai, Homer and Valdez. In District 4, the superior and district courts are all located in Fairbanks; however, the Fairbanks judges also cover peremptions in Bethel.

In 1983, there were a total of 1,770 peremptions in Alaska district and superior courts. This total does not include recusals which accounted for an additional 188 changes in case assignments. Recusals refer to instances in which a judge disqualifies himself or herself from hearing a lawsuit because of interest or prejudice. In District 1, 398 peremptions occurred, 331 in District Court and 67 in Superior Court. In District 2, area court administrator Mike Hall estimated that judges were perempted approximately 44 times; however, he was not able to provide a breakdown of the total for superior and district courts. Superior and district judges in District 3 accounted for a total of 937 peremptions, 407 in district court and 530 in superior court. Finally, in District 4, judges were perempted 391 times, 250 in district court and 141 in superior court. This information is also presented in Table 1.

For purposes of comparing the number of cases perempted to the number of total cases, we collected the number of nontraffic case filings from each district. We did not include the traffic filings because they are comprised mainly of traffic tickets, which rarely involve

peremptions. The total filings for fiscal year 1983 in all four judicial districts is 59,854 cases. Therefore, peremptions were involved in approximately three percent of all cases in Alaska in 1983.*

TABLE 1
PEREMPTIONS, RECUSALS & NON-TRAFFIC FILINGS--1983

	District One	District Two	District Three	District Four	Totals
PEREMPTIONS (CY 83)					
District Court	331	N/A	407	250	988*
Superior Court	67	N/A	530	141	738*
Total	398	44	937	391	1,770
RECUSALS (CY 83)					
District Court	17	N/A	4	12	33*
Superior Court	47	N/A	12	71	130*
Total	64	25	16	83	188
NON-TRAFFIC FILINGS (FY 83)					
District Court	6,658	1,638	26,419	6,775	41,490
Superior Court	2,274	776	11,732	3,582	18,364
Total	8,932	2,414	38,151	10,357	59,854

*Subtotals do not include District 2 information.
N/A = not available.

Prepared by House Research Agency, January 1984.

Peremptions are not distributed evenly among districts or among judges within each district. For example, District 1 has five superior court judges and two district court judges; however, in 1983, Judge Williams, a district court judge in Juneau, accounted for 320 of the total 398 peremptions in District 1. Furthermore, six judges accounted for 61 percent of all the peremptions statewide, or a total of 1,086 of the 1,770 peremptions in 1983. Those judges, their locations and number of peremptions are as follows:

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*Total case filings were recorded on a fiscal year basis, whereas the number and costs of peremptions and recusals were reported on a calendar-year basis. However, we believe the information from the calendar-year roughly parallels that of the fiscal year.

District 1:	Judge Williams, Juneau	320
District 3:	Judge Hornaday, Homer	235
	Judge Carlson, Anchorage	155
	Judge Tucker, Anchorage	126
		516
District 4:	Judge Cline, Fairbanks	150
	Judge Connelly, Fairbanks	100

According to several of the judges we contacted, peremption rates may vary greatly from year to year. For example, Judge Cook of the superior court in Bethel contended that the response of an individual judge to particular kinds of cases has a lot to do with the incidence of peremptions. Consequently, it is not possible to say that the number of peremptions in 1983 will be matched again in 1984. In addition, because of the lack of available data on peremption rates, we are not able to determine if the rate for 1983 was representative of the rates in previous years.

Cost of Peremptions

Information on the cost of peremptions in 1983 was extremely difficult to find. First, little information is collected on the cost of travel and per diem for peremptions. Second, many of the costs of peremption, such as lost efficiency, calendaring and other administrative problems are difficult to quantify. In an attempt to provide you with an estimate of the costs of peremptions in 1983, we contacted the area court administrators in each district, and Mr. Robert Fisher, Fiscal Officer for the Alaska Court System.

Chris Carlisle, area court administrator for District 1, had fairly in-depth records on costs of travel and per diem for Judge Gucker in 1983. Judge Gucker is the District Court Judge in Ketchikan; however, he routinely sits in the Juneau District Court one week every month because of the high number of peremptions incurred by Judge Williams of Juneau. As indicated earlier, Judge Williams was perempted 320 times in 1983. In 1983, the costs of per diem for the days Judge Gucker presided in the Juneau District Court amounted to $6,379. This amount also included the cost of transportation while in Juneau. In addition, the court spent $2,417 on his travel to and from Juneau. In 1983, the total costs of travel and per diem for Judge Gucker to cover Judge Williams' peremptions amounted to $8,796.

Al Szal, area court administrator for District 3, estimated the costs of Judge Hornaday's peremptions in the Homer District Court as approximately $10,000 per year. This figure includes travel and per diem for both the judge who travels from Anchorage to replace Judge Hornaday, and in some instances for Judge Hornaday to travel to Anchorage

to cover his replacement's cases. Judge Horneday's peremptions usually result in a judge traveling from Anchorage one week out of each month of the year. Mr. Szal estimated that hearing a case in Homer usually involves a three to four-day stay for the substitute judge. Mr. Szal cautioned that the actual costs of peremptions for Judge Hornaday could be more or less than $10,000 depending on the distances traveled by the replacement judges as well as on their length of stay.

Peremptions are usually more costly in rural locations such as Bethel. Mac Gibson, area court administrator for District 4 which covers peremptions in Bethel, did not have a record of money spent on perempted cases in Bethel. However, he was able to estimate the costs of covering the 20 cases perempted in Bethel in 1983. According to Mr. Gibson, a round trip ticket from Fairbanks to Bethel costs $436. However, because of the flight schedule, a judge traveling to Bethel must usually overnight in Anchorage, and receives a per diem of $85 to cover that expense. While in Bethel, the judge pays $100 per night for a hotel and receives $40 a day for meals. The average length of stay in Bethel to hear a case is three days. The judge is then able to fly directly back to Fairbanks on the evening of the third day.

Given those figures, Mr. Gibson calculated that it costs approximately $841 per trip for a Fairbanks judge to preside over cases perempted in Bethel. In some instances this figure is doubled because the Fairbanks judge is required to bring an in-court clerk along. However, to calculate the total costs of covering perempted cases in Bethel for 1983, Mr. Gibson mulitiplied the cost per trip for an individual judge times the 20 cases perempted in 1983 and arrived at $16,820.

The estimated costs of travel and per diem for covering the peremptions in Homer, Bethel, and in Juneau's district court for three judges amounted to approximately $35,616. It should be noted that Judge Williams and Judge Hornaday have the two highest number of peremptions for 1983, and that the costs of peremptions in Bethel are usually the highest in the state because of the distance and cost of living there.

After obtaining the above information from individual districts, we contacted Robert Fisher, Fiscal Officer for the Alaska Court System. Mr. Fischer estimated that $25,000 was spent per year for peremptions statewide. He explained that the accounting office of the Alaska Court System arrived at that estimate after conducting a study of all travel and per diem claims filed by superior and district court judges between July 1, 1982 and December 31, 1982. The claims which involved peremptions were totalled, and then that amount was doubled to come up with a yearly cost of $25,000 for FY 83.

Mr. Fisher believes that the estimate is accurate even if it appears low. He notes that the court system avoids greater costs by calendaring

several perempted cases together in one area, so that a judge traveling to that area may hear several cases per trip. In addition, he maintained that many of the total peremptions occur in Anchorage and Fairbanks, which allows for perempted judges to swap cases at no cost to the State because of the many judges in these locations.

However, according to Judge Tunley, Presiding Judge for District 2, swapping cases is not always feasible because of the 120-day limit within which some cases must be heard. In addition, he points out that individual cases progress at different rates, and that some perempted cases involve several trips for pre-trial, sentencing and other hearings.

Mr. Fisher agreed that the $25,000 estimate does not reflect all of the costs involved in peremptions. He pointed out that down time for judges, such as the time spent on airplanes and in transit to and from airports, also costs the State money. For example, Mr. Fisher estimated that the State pays a superior court judge approximately $86.00 per hour. If that judge spends two hours on a round trip flight from Anchorage to Homer and back, plus an additional two hours of the work day preparing to leave, traveling to the airport, and waiting for a plane, the State pays the judge for four hours of foregone court work; this amounts to a total of $344.00 per trip. Judge Hornaday was perempted 235 times in 1983; however, it is not evident how many trips resulted from those peremptions. But if, for example, those 235 peremptions resulted in 20 trips, down time could have cost the State approximately $6,880 for one judge's peremptions.

The peremption of judges also results in other costs which are not easily quantified. For example, Judge Schultz, Presiding Judge for District 1, notes that the estimated total cost of peremptions in District 1 for 1983 does not reflect the administrative costs of (1) rescheduling Judge Gucker's cases in his own court when he is hearing cases perempted in Juneau, (2) the costs incurred when the magistrate in Ketchikan leaves his job to cover some of Judge Gucker's caseload while he's gone, or (3) the cost of lost efficiency. Judge Schultz contends that the normal disposition rate for a case in District 1, or the time it takes to reach a final settlement is 90 days. However, he asserted that the disposition rate in Juneau has increased to 140 days because of the high number of peremptions in the district court there, and the time each peremption involves.

We regret that we are unable to supply you with a single estimate of the costs of peremptions for 1983. The data is not available, and we are not in a position to estimate those costs with the information we have to date. If you would like us to attempt to gather additional information about the costs of peremptions, we will do so.

We hope the information we collected is useful to you. Please contact us if you have any further questions regarding this topic or any other topic of interest to you.

HBP

Attachments

Attachment A

Rule 25. Judge—Disqualification or Disability.

(a) **Before Trial.** Where a judge of the superior court is disqualified or for any other reason is unable to sit in the trial or hearing of any pending matter, the presiding judge or the chief justice of the supreme court shall designate another judge of the judicial district in which the matter is pending, or a judge temporarily assigned thereto, to hear the matter.

(b) **During Trial.** If a judge holding superior court be prevented during a trial from continuing to preside therein, the presiding judge or the chief justice of the supreme court shall designate another judge of the superior court to sit in such court to complete such trial, as if such other judge had been present and presiding from the commencement of such trial, provided, however, that from the beginning of the taking of testimony at such trial a stenographic or electronic record of such trial shall have been made so that the judge so continuing may familiarize himself with the previous proceedings at such trial.

(c) **After Verdict.** If by reason of absence from the district, death, sickness or other disability, the judge before whom the action has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(d) Change of Judge as a Matter of Right. In all courts of the state, a judge may be peremptorily challanged as follows:

(1) *Entitlement.* In any criminal case in superior or district court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge. When multiple defendants are unable to agree upon the judge to hear the case, the trial judge may, in the interest of justice, give them more than one change as a matter of right; the prosecutor shall be entitled to the same number of changes as all the defendants combined.

(2) *Procedure.* At the time required for filing the omnibus hearing form, or within five days after a judge is assigned the case for the first time, a party may exercise his right to change of judge by noting the request on the omnibus hearing form or by filing a "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. A judge may honor a timely informal request for change of judge, entering upon the record the date of the request and the name of the party requesting it.

(3) *Re-Assignment.* When a request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury before the action can be transferred to another judge. However, if the named judge is the presiding judge, he shall continue to perform the functions of the presiding judge.

(4) *Timeliness.* Failure to file a timely request precludes a change of judge under this rule as a matter of right.

(5) *Waiver.* A party loses his rights under this rule to change a judge when he agrees to the assignment of the case to a particular judge or participates before him in an omnibus hearing, any subsequent pretrial hearing, a hearing under Rule 11, or the commencement of trial. No provision of this rule shall bar a stipulation as to the judge before whom a plea of guilty or of nolo contendere shall be taken under Rule 11. (Amended by Supreme Court Order 185 effective July 1, 1974; and by Supreme Court Order 292 effective February 21, 1978)

(b) CROSS REFERENCE: Crim. Form 34

1. Simplification of the issues.

2. Possibility of obtaining admissions of fact and documents which will avoid unnecessary proof.

3. The number of expert witnesses or character witnesses or other witnesses who are to give testimony of a cumulative nature.

4. Such other matters as may aid in the disposition of the proceeding.

DATED: _____

_____
Superior Court Judge

34. Order Transferring Case to Another Judge [Cr. R. 25(b)]

The Honorable _____, Judge of the Superior Court for the _____ Judicial District, having been prevented from presiding further in the trial of this action, it is hereby

ORDERED that pursuant to Criminal Rule 25(b), the Honorable _____, Judge of the Superior Court for the _____ Judicial District be designated to complete the trial in the same manner as if he had been present and presiding from the commencement of such trial, and it is further

ORDERED that a stenographic or electronic record of such trial from the beginning of the taking of testimony at such trial shall be made available by the clerk of the court to the Honorable _____ so that he may familiarize himself with the previous proceedings at such trial.

DATED: _____

_____
[Chief Justice of the Supreme Court
or
Presiding Judge]

Rule 42. Consolidation—Separate Trials—Change of Judge.

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Alaska Constitution and Statutes of Alaska.

(c) **Change of Judge as a Matter of Right.** In all courts of the state, a judge or master may be peremptorily challenged as follows:

(1) *Nature of Proceedings.* In an action pending in the Superior or District Courts, each side is entitled as a matter of right to a change of one judge and of one master. Two or more parties aligned on the same side of an action, whether or not consolidated, shall be treated as one side for purposes of the right to a change of judge, but the presiding judge may allow an additional change of judge to a party whose interests in the action are hostile or adverse to the interests of another party on the same side. A party wishing to exercise his right to change of judge shall file a pleading entitled "Notice of Change of Judge." The notice may be signed by an attorney, it shall state the name of the judge to be changed, and it shall neither specify grounds nor be accompanied by an affidavit. A judge may honor an informal request for change of judge. When he does so, he shall enter upon the record the date of the request and the name of the party or parties requesting change of judge. Such action shall constitute an exercise of the requesting party's right to change of judge.

(2) *Filing and Service.* The notice of change of judge shall

be filed and copies served on the parties, the presiding judge, and the area court administrator, if any, in accordance with Rule 5, Alaska Rules of Civil Procedure.

(3) *Timeliness.* Failure to file a timely notice precludes change of judge as a matter of right. Notice of change of judge is timely if filed before commencement of trial and within five days after notice that the case has been assigned to a specific judge. In a court location having a single resident judge of the level of court in which the case is filed, the case shall be assigned to that judge when it is at issue upon a question of fact and the clerk shall immediately notify the parties in writing of such assignment. Where a party enters an action after the case has been assigned to a specific judge, a notice of change of judge shall also be timely if filed by the party before the commencement of trial and within five days after he appears or files a pleading in the action.

(4) *Waiver.* A party waives his right to change a particular judge as a matter of right when he knowingly participates before that judge in:

(i) Any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or of affidavits; or

(ii) A pretrial conference; or

(iii) The commencement of trial; or

(iv) If the parties agree upon a judge to whom the case is to be assigned. Such waiver is to apply only to the agreed-upon judge.

(5) *Assignment of Action.* After a notice of change of judge is timely filed, the presiding judge shall immediately assign the matter to a new judge within that judicial district. Should that judge be challenged, the presiding judge shall continue to assign the case to new judges within the judicial district until all parties have exercised or waived their right to change of judge or until all superior court judges, or all district court judges, within the judicial district have been challenged peremptorily or for cause. Should all such judges in the district be disqualified, the presiding judge shall immediately notify the administrative director in writing and request that he obtain from the Chief Justice an order assigning the case to

another judge.

If a judge to whom an action has been assigned later becomes unavailable because of death, illness, or other physical or legal incapacity, the parties shall be restored to their several positions and rights under this rule as they existed immediately before the assignment of the action to such judge. (Amended by Supreme Court Order 186 effective July 1, 1974; by Supreme Court Order 258 effective November 15, 1976; by Supreme Court Order 262 effective December 31, 1976; and by Supreme Court Order 465 effective June 1, 1981)

(a) CROSS REFERENCE: Civ. Form 78

torial role. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

C. Paragraph (a)(6).

Maintenance of appearance of impartiality. — Paragraph (a)(6) of this section does not provide for disqualification where the sole concern is maintenance of the appearance of impartiality. However, in light of the importance of promoting public confidence in the integrity and impartiality of the judiciary, it would be well to permit disqualification under such circumstances. Amidon v. State, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

Review of decisions under paragraph (a)(6). — The supreme court rejected the argument that the disqualification standards under paragraph (a)(6) are wholly subjective and therefore not amenable to appellate review. Clearly, review is contemplated on a challenge for cause grounded in bias. The supreme court's duty to assure that judicial proceedings comply with due process mandates appellate scrutiny of allegations of bias. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3602), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Since the initial determination under paragraph (a)(6) of this section has been placed in the discretion of the trial judge, that judge's decision should be given substantial weight. When the judge does not recuse himself or herself, the decision should be reviewable on appeal only if it amounted to an abuse of discretion. Amidon v. State, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

Collateral references. — Disqualification of judge by relative's ownership of stock in corporation which is a party to action. 8 ALR 295; 110 ALR 472.

Right of party in course of litigation to challenge title or authority of judge. 114 ALR 1207.

Disqualification of judge in pending case as subject to revocation or removal. 162 ALR 641.

Relationship of judge to one who is party in an official or representative capacity as disqualification. 10 ALR2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification. 45 ALR2d 937.

Relationship to attorney as disqualifying judge. 50 ALR2d 143.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member. 64 ALR2d 600.

Prior representation or activity as attorney or counsel as disqualifying judge. 72 ALR2d 443.

Time for asserting disqualification. 73 ALR2d 1238.

Intervenor's right to disqualify judge. 92 ALR2d 1110.

Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

Disqualification of original trial judge to sit on retrial after reversal or mistrial. 60 ALR3d 176.

Disqualification of judge by state, in criminal case, for bias or prejudice. 68 ALR3d 509.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 ALR3d 1021.

Sec. 22.20.022. Peremptory disqualification of a superior court judge. (a) If a party or a party's attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay.

(b) No judge or court may punish a person for contempt for making, filing or presenting the affidavit provided for in this section, or a motion founded on the affidavit.

(c) The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, whichever event occurs later, unless good cause is shown for the failure to file it within that time.

(d) A party or a party's attorney may not file more than one affidavit under this section in an action and no more than two affidavits in an action. (§ 2 ch 48 SLA 1967; am § 6 ch 143 SLA 1968; am § 1 ch 116 SLA 1971)

Cross references. — For the court rules on change of judge as a matter of right, see Civ. R. 42 (c) and Cr. R. 25 (d). Civil R. 42 (c) provides that a notice of change of judge . . . "shall neither specify grounds nor be accompanied by an affidavit."

Editor's notes. — This section was redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

Legislative history reports. — For report on ch. 48, SLA 1967 (SB 66), see 1967 House Journal, p. 311.

NOTES TO DECISIONS

I. General Consideration.
II. Application of Right of Peremptory Challenge.
III. Procedure.

I. GENERAL CONSIDERATION.

Constitutionality. — A litigant is entitled to a fair hearing before a tribunal which is disinterested, impartial and unbiased, and a statute which affords that right by providing some means for showing bias or lack of impartiality does not offend the principle of separation of powers of government. Channel Flying, Inc. v. Bernhardt, Sup. Ct. Op. No. 530 (File No. 1082), 451 P.2d 570 (1969).

Where no affidavit is necessary, a judge may be disqualified for good cause, bad cause, or no cause at all. But where an affidavit is required, the assertion of bias or prejudice under oath is at least some showing or an imputation of the fact that the judge is disqualified, and this is sufficient to save the statute from successful attack on constitutional grounds. Channel Flying, Inc. v. Bernhardt, Sup. Ct. Op. No. 530 (File No. 1082), 451 P.2d 570 (1969).

This section is not constitutionally invalid as an attempt to usurp the rule-making powers of this court insofar as it provides for a peremptory disqualification of a judge. Channel Flying, Inc. v. Bernhardt, Sup. Ct. Op. No. 530 (File No. 1082), 451 P.2d 570 (1969); Gieffels v. State, Sup. Ct. Op. No. 1295 (File No. 2787), 552 P.2d 661 (1976); Wamser v. State, Sup. Ct. Op. No. 1768 (File No. 4166), 587 P.2d 232 (1978).

This section does not merely regulate procedure. With or without it the particular action in court takes the same course. The statute rather creates and defines a right — the right to have a fair trial before an unbiased and impartial judge. This is something more than merely prescribing a method of enforcing a right. The main subject matter of the statute is substantive in nature and was within the province of the legislature to deal with. Channel Flying, Inc. v. Bernhardt, Sup. Ct. Op. No. 530 (File No. 1082), 451 P.2d 570 (1969).

Legislative history. — See Peterson v. State, Sup. Ct. Op. No. 1411 (File No. 2642), 562 P.2d 1350 (1977).

This section reflects a fundamental tenet of the Alaska system of justice that every litigant shall have his rights adjudicated by a judge who is disinterested, impartial, and unbiased. In re G.K., Sup. Ct. Op. No. 796 (File Nos. 1627, 1654, 1674), 497 P.2d 914 (1972).

This section codifies a fundamental tenet of the Alaska system of justice, the right to a hearing by a fair and impartial judge. Kvasnikoff v. State, Sup. Ct. Op. No. 1153 (File No. 2363), 535 P.2d 464 (1975).

This section is designed to further the substantive right of a litigant to a fair trial before an unbiased judge. Riley v. State, Sup. Ct. Op. No. 2038 (File No. 4672), 608 P.2d 27 (1980).

Constitution of the State of Alaska

Attachment B

officers of the State.

(The amendment to this section was approved by the voters of the state August 27, 1968 and became effective October 11, 1968. The words "and the commission on judicial qualifications" were incorporated in this section.)

Restrictions

SECTION 14. Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, and the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

Rule-making Power

SECTION 15. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Court Administration

SECTION 16. The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.

(The amendment to this section was approved by the voters of the state August 25, 1970 and became effective October 10, 1970. The amendment substituted "the pleasure of the supreme court" for "his pleasure" in the last sentence.)

ARTICLE V

SUFFRAGE AND ELECTIONS

Qualified Voters

SECTION 1. Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be

Christian Ministers Association of Kachemak Bay
P.O. Box 2018
Homer, Alaska 99603

December 9, 1982

Judge Mark C. Rowland
303 K Street, Courtroom D
Anchorage, AK 99501

Dear Judge Rowland,

Your office and the judicial system are held in high regard by us and our children. We value justice as one of the key ingredients in our democratic way of life. We regularly instruct our children to respect the law and to deal in a just way with their companions and fellow citizens.

In this context we cannot understand why you should order Homer District Court Judge James Hornaday transfered to Anchorage against his will and against the overwhelming wishes of our community. As we understand, there is no precedence for this.

Therefore, we ask — for justice sake — that Judge Hornaday be retained as our District Court Judge. Secondly, you should know that we wholeheartedly endorse the policies of Judge Hornaday in sentencing DWI offenders. Finally, we request that the whole peremption policy be reviewed in light of these circumstances.

A judge serves his community in an exceptional manner. His policies are supported by the people he serves. He is an outstanding example for our children. Yet, he is transfered against his will. That seems a strange reward — even stranger justice.

Speaking for the Christian Ministers Association, I am

Sincerely yours,

J Schmidt

The Rev. John D. Schmidt, President
235-7600

cc: Chief Justice Edmond Burke

December 6, 1982

Homer Chamber of Commerce

Judge Mark C. Rowland
303 K Street
Courtroom D
Anchorage, AK 99501

Dear Judge Rowland:

The community and surrounding areas of Homer is greatly dismayed to learn of your decision to transfer Judge James C. Hornaday from Homer to Anchorage. We strongly urge your reconsideration in this matter.

Judge Hornaday has been an excellent judicial representative for Homer for many years. His home and family are here. We do not want to lose Judge Hornaday to this area.

This community has steadfastly supported Judge Hornaday's courageous stand against the crime of drunken driving and we wholeheartedly support his sentencing procedures.

Please find attached petitions of support in favor of Hornaday being retained as District Judge in this area.

Sincerely,

HOMER CHAMBER OF COMMERCE

Jim Daily,
President

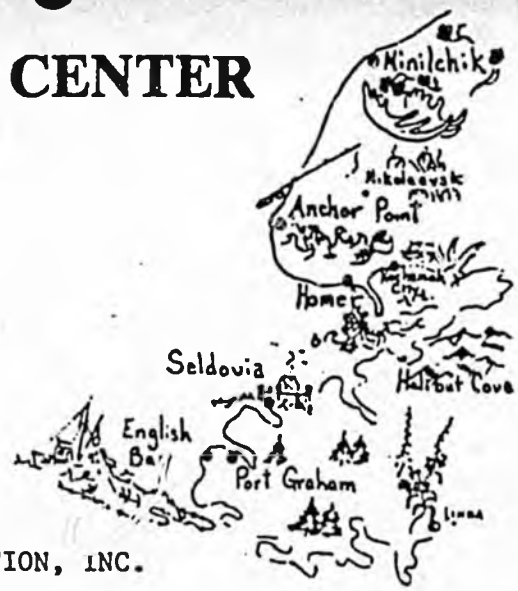
JD:lag
Enclosures

cc: Governor Bill Sheffield
Judge Edmond Burke
Homer City Council
Kenai Peninsula Borough Assembly
Rep. Milo Fritz
Hugh Malone
Sen. Paul Fischer
Don Gilman

Post Office Box 541 • Homer, Alaska 99603

COMMUNITY MENTAL HEALTH CENTER

Box 2274
Homer, Alaska 99603-2274
(907) 235- 7701



RESOLUTION

SOUTH PENINSULA MENTAL HEALTH ASSOCIATION, INC.

December 11, 1982

Whereas, Judge James Hornaday has proven to be an effective and competent District Court Judge serving the Homer Court, and

Whereas, Judge Hornaday was overwhelming endorsed by the residents of his jurisdiction during the recent election, and

Whereas, the right of the State Judicial system to move a Judge without public hearing or other procedural considerations is currently being questioned,

Be it hereby resolved that the South Peninsula Mental Health Association requests the retention of Judge Hornaday in the Homer District Court, and

Be it further resolved that the judicial pre-emption statutes in Alaska should be thoroughly reviewed and that the procedures for moving a Judge from one jurisdiction to another should be standardized through promulgation of appropriate regulations.

Resolution passed at the Board of Directors meeting on December 11, 1982.

Joe L Aprill

Reverend Joe Aprill, Chairperson

C. R. BALDWIN
ATTORNEY
P. O. BOX 4210
KENAI, ALASKA 99611
TELEPHONE (907) 283-7167

December 23, 1982

Milo H. Fritz
Box 158
Anchor Point, Alaska 99556

Dear Milo:

This letter is prompted by the article concerning your position on certain legal reforms you have proposed which appears in the December 20 issue of The Clarion.

You were quoted as indicating that you expected the legal profession to oppose your bill removing the right of peremptory challenges. I know of very few attorneys who have ever exercised their right to file a peremptory challenge against a judge. I, myself, have never filed one and I agree that no such right should exist. I have not made a study of other jurisdictions but would be very surprised if the right exists in very many states. Presumably, the law was originally passed by well meaning individuals who enjoy tinkering with the system. I wish you well in pushing the legislation and offer you my support.

I was surprised that you were quoted as indicating your interest in enacting legislation which would impose a limit on attorney's fees in probate matters. Although I do not do any probate work myself at the present time, it has been my experience in the past that after the passage of the Uniform Probate Act and the institution of simplified probate procedures, many attorneys are now charging fees which are lower than they were in the past. In the case of a large estate I would suggest that a fee based upon the percentage of that estate would be unconscionable. From the attorney standpoint, it generally does not cost any more to probate a large estate than to probate a small one. Prior to the passage of the Uniform Probate Act, that was not the case.

Philosophically, I am opposed, as I am sure you are,

to the State interfering in contract relationships between professionals and their clients. I would suggest that a legislature which would concern itself with fees charged by an attorney to his client would also not hesitate in interfering with the fees charged by a physician to his patient. As a practical matter, a client who is overcharged by an attorney presently has recourse to the fee arbitration panel which operates under the auspices of the Alaska Bar Association. In light of the foregoing, I would request that you rethink your position on supporting a limit on attorneys fees.

Thank you for your attention to my comments. I wish you well in Juneau this year.

Very truly yours,

Rick

C. R. BALDWIN

CRB/hs

CITY OF HOMER
P. O. BOX 335
HOMER, ALASKA 99603-0335

Box 335
Homer, Alaska 99603

CITY OF HOMER

REPLY TO:

- ☐ City Hall
  Ph. (907) 235-8121
- ☐ Port of Homer
  Ph. (907) 235-8597
- ☐ Harbor Master
  Ph. (907) 235-8959
- ☐ Public Works Dept.
  Ph. (907) 235-8120
- ☐ City Engineer
  Ph. (907) 235-6368

December 6, 1982

The Honorable Mark Rowland
Presiding Judge of the Superior Court
303 "K" Street
Anchorage, AK 99501

Dear Judge Rowland:

We, as a community, strongly oppose the transfer of Judge James Hornaday. Judge Hornaday's stance on drunk driving is looked upon as a favorable public service in the community. Perhaps the laws of pre-emption should be closely scrutinized and amended out of necessity in administering a trial court system.

Jim Hornaday is an active participant in community affairs, an impeccable family man, and contributes strong support to this rural community. The type of program he advocates serves the individual rights of our citizens to travel the streets of Homer with less probability of being harmed by drunk drivers.

As Mayor of Homer, I petition you to cancel the transfer order removing Judge Hornaday from this community as District Court Judge.

Sincerely,

Erle Cooper
Mayor

EC:lcr
CC: Governor Bill Sheffield
Judge Edmond Burke
District 5, Legislative Delegation

CITY OF HOMER
HOMER, ALASKA

RESOLUTION 82-20(S)

A RESOLUTION SUPPORTING A STIFF SENTENCING POLICY FOR DRIVING WHILE INTOXICATED (DWI).

WHEREAS, the absence of sidewalks in Homer requires pedestrians to walk along the traveled ways, subjecting themselves to potential vehicle associated accidents; and,

WHEREAS, studies which have been conducted show that the higher the blood alcohol level, the greater the likelihood of an accident; and,

WHEREAS, there has been an increase in D.W.I. cases of some seventy-seven percent (77%) between 1980 and 1981 in the Homer District Court; and,

WHEREAS, the City Council of the City of Homer wishes to have life, liberty and property protected from potential injury by person(s) who drive while under the influence of alcohol;

NOW THEREFORE, BE IT RESOLVED that the Common Council of the City of Homer, Alaska, supports a stiff sentencing policy for Driving While Intoxicated (DWI).

BE IT FURTHER RESOLVED that copies of this resolution be directed to the State legislators of Alaska.

DATED in Homer, Alaska this 14th day of June, 1982.

CITY OF HOMER

Sam Matthews

Sam Matthews, Mayor Pro tem

ATTEST:

Kathleen F. Herold

Kathleen F. Herold, City Clerk

TESTIMONY OF JUDGE JAMES D. HORNADAY, HOMER
February 2, 1983

Mr. Chairman and ladies and gentlemen of the Committee, thank you for holding this hearing and inviting me to address the Committee. I hope I am not the monster judge that everyone has been talking about. My name is James D. Hornaday and from a perspective of nearly 20 years in Alaska I am speaking to you today as a judge. The judicial cannons permit and even require that judges speak out for the improvement of the administration of justice. And with all of the comments by many of my lawyer friends I feel a little like David when he went up against Goliath. The men and women of good will can and do differ in their opinions, and it does remind a little of the old Alaska adage that if the lawyers are against something it must be worthwhile. I wish it were someone else who was on the line rather than me, frankly I would rather be playing basketball or working on a legal history project. But the question of the peremptory challenge is involved with the independence of the judiciary and the decreasing respect for the judiciary. First of all, the peremptory challenge is not a fundamental constitutional right; it does not even exist anywhere in the Federal system, and there are Federal judges in every state and territory. Apparently it does not even exist in the vast majority, about two-thirds of the states. Alaska is in the extreme minority. It did not exist in Alaska until a few years ago when some lawyers pushed it through the Legislature. The Federal system and the majority of states get along just fine without it. Now as one example, drunk driving cases are the most serious problem facing the Alaska Court System. Over half of all the jury trials in the entire Court System are drunk driving cases. Drinking was involved in over 80% of the traffic fatalities; over 200 thousand are killed or injured annually on our nation's highways. Let's make clear what the Legislature has already done; the Legislature has passed legislation providing for up to one year in jail and $5,000 fine, revocation of licenses and community work. Now the statutes specifically states that for the first offense a defendant is to receive not less than 72 consecutive hours. It is too serious a problem to leave in the hands of the attorneys and that is the none effect of the peremptory challenge without cause. Judges are concerned about the peremptory challenge; it is affecting sentences. The Chief Justice has stated publicly that the peremptory challenge moderates sentences and that a judge has to walk a fine line and if they get too far over they will be removed by the peremption. I was told by the presiding judge that I had to take peremptions into consideration when I sentence. It is the most frequent topic of conversation at the Annual Judicial Conference. The leading authority on court delay called the Alaska peremptory challenge an absolute abomination, those were his words. Representatives of the National Center of State Courts were amazed at the existence of the removal without cause. I have heard judges tell the Chief Justice they are concerned about the peremption. It is a problem state-wide, not just in Homer. You have heard the lawyer in Bethel and the problems there. You've heard the judges in Fairbanks. It exists in Kodiak, Ketchikan, Juneau and all over the state, even in multi-judge areas. Now we announced a pattern of sentencing in drunk driving cases in Homer about a year ago which was effective, but sentences were clearly within the sentences permitted by the Legislature. Fifteen days is less than 5% of the maximum penalty. Although the announced pattern is no longer in effect and was rescinded when the higher court ruled that it could not be applied. There are sentencing patterns in Alaska, attorneys keep records of the sentences of judges. So there are patterns but known only to the judges and the lawyers. The public, including the potential defenders, do not know the patterns. It is time to open up the System and bring it out from behind the closed doors of the

legal profession. Now I was a lawyer for 10 years and you are never going to satisfy the lawyers on sentencing. About 6 years ago we initiated the first work program, alternate work program, for drunk drivers in Alaska. Some lawyers supported, but other complained that work was a cruel and unusual punishment. Now the program has been reinstituted pursuant to the community work which the Legislature has made a sentencing tool. Now the lawyers are complaining that we are giving too much community work. Also the argument that the System would be flooded with time consuming challenges for cause is questionable, as several attorneys have indicated that they would not use challenges for cause. Further the presiding judge denied a challenge because against me on hearing a DWI case after the announced policy was rescinded. The hearing took all of 10 minutes. The Court System and the people of Alaska should not be held held hostage by attorneys threating to plug the System with challenges for cause. Further judges will disqualify themselves if for some reason they should not hear a case. There is already a procedure for this approach that is in effect. However, again note that a judge has to give a reason why they are disqualifying themselves. Related to the peremptory challenge is another deep concern which I have as a 20 year Alaskan and as a lawyer and a judge and a citizen, and that is the growing lack of respect for the Alaska Judiciary among the members of the public. Reportedly, concern over the Justice System trailed only the capitol move and subsistence in intensity in the recent election. Almost half of the voters in the Third District voted not to retain the trial judges last November. This negative vote is up nearly 10% in only 4 years. How many years will it be before all judges are defeated? Some of the longer serving judges remember when they received 85% approval ratings. For the first time in nearly 20 years in the legal profession, so many people told me they were voting against all of the judges that I lost count. And note that, at least to-date, that most of the people, most of the lay people, testifying to you are against the peremption, only the lawyers are testifying before you in favor of it. That should tell you something. We pride ourselves in Alaska on the merit selection appointment procedure for judges. The Judicial Council recommends, the Governor appoints and the people vote, and yet the present situation with the peremptory challenge is worse than the most partisan political election of judges, and that a very few attorneys can remove a judge a hold the System hostage. The cost to the public and the wasted expense and time is high. The selection process of which we are so proud and the public vote means absolutely nothing. Just as an example, I was required to move to Homer to take the judgeship in Homer. The Judicial Council recommended me for Homer and the Governor specifically appointed me to Homer. The family moved here and has put down deep roots; we have children in school of all ages. I received good ratings from the lawyers and the highest rating from the Alaska Peace Officers and was retained overwhelmingly by the voters in the November election in my home area by a 2 to 1 margin. And although I appreciate Mrs. Barnes' invitation to Anchorage, I would prefer frankly to remain in Homer. I did live in Anchorage for a couple years and I have, we have, a lot of friends up there, however we are pretty deeply rooted in Homer at the present time. Two weeks after the election I was asked to transfer to Anchorage because of the peremptions. I have been assured that there is no other reasons for my transfer, only the peremptions. None of my sentences have ever been reversed as excessive. Now there are checks and balances that are far more appropriate than peremptions without cause, and they are numerous. If a judge is doing something improper turn them over to the Judicial Qualifications Commission, or challenge the judge for cause, or test the judge in the retention elections, or appeal the judge's decision, or ask the judge to voluntarily disqualify himself. The message is going out loud and clear to the judges in Alaska, to the attorneys and to the public that inspite of the vote of thousands that vote means nothing, and a handful of attorneys can accomplish the transfer

of a judge, and threaten other judges through peremptions for which they do not even have to give a reason. All the attorneys have talked about before you, are the rights of their clients, and these are important rights, no one would say that they are not. But what about the rights of the victims? What about the rights of society? The Constitution clearly requires a judge to sentence to protect society and reformation. No where in the Constitution, in the statutes or in the case law is there any indication that a judge is to sentence in order to avoid peremptions. And yet the Chief Justice of the Alaska Supreme Court has stated publicly that this is happening, and any judge who will level with you will tell you the same. The tail is wagging the dog at the present time as the attorneys are in effect controlling sentencing, and are now even controlling the transfer of judges. Thank you.

TESTIMONY OF ATTORNEY HENRY CAMAROT, ANCHORAGE
February 3, 1983

Gentlemen and (unable to hear the period of 4 log numbers due to static in the teleconference) except for a short period when I left Alaska I practiced in the State of Oregon. I presently represent District Judge James Hornaday in respect to an order that was issued by the Honorable Mark Rowland, presiding Superior Court Judge for the Third Judicial District. In that order, Judge Hornaday had been directed to move from Homer, Alaska, his place of residence for some seven years, to Anchorage, Alaska to permanently fill the office of District Judge in the Anchorage area. I come in favor of repealing the perempt statute. Alternatively I wish to make several other comments and I think they can be interpreted as clear recommendations. The consideration of the perempt statute repeal perhaps can be invaluated against the framework of the true factual situation that currently exists; infact, I got the impression as I was listening to some of the witnesses testify, that this law seems to be directed all towards Judge Hornaday, when I believe the issue is far greater than Judge Hornaday.

Some eight years ago more or less Judge Hornaday gave up a successful 10 year law practice to accept an appointment as the acting district judge in Homer. The condition of his employment at thr time that he moved to Homer. He moved to Homer. The Legislature established a Homer District Judge position. He applied to the judicial council for that office in Homer. His name was forwarded to the Governor for that office and that office began in Homer. He was appointed by the Governor for that specific office. The Judicial council twice recommended him for retention and he has twice been overwhelming retained by the vote in the election of the Third District. More recently, in the election of 1982, more people turned out to testify on his behalf before the judicial council meetings held in Homer than for any other judge in the state. He also passed with the lawyers in the bar poll and received the highest rating of any judge with the Alaska Peace Officers Association.

Judge Hornaday has established deep roots in Homer. His wife, Karen, teaches violin to many children and serves as chairperson on the Homer Parks and Recreation Commission. She serves on many church and civic activities and just recently helped passed the bond issue of the building of the new high school in Homer. His daughter, Mary, is a sophomore
in college and his son, Dan, is a high school sophomore who worked his way up to the staring quarterback on the football team. He also plays on the basketball team. Dan is usually on the honor roll. Their son, Joshua, is in the third grade and is into music, Little League and Cub Scouts. Five year old Matthew has just started kindergarten. The Judge is active in Little League matters, Chamber of Commerce matters and plenty of other activities. When he left the private practice and accepted the appointment as the district judge in Homer, he made substantial financial sacrifices. He was required to sell his home and a commercial building that had been partially set aside as a retirement income. When he moved to Homer, he bought a home there. That was to be his home and that was to be his community for years to come.

We have all heard about how in early 1982, the first part of 1982, Judge Hornaday decided to do something about the drunk driving. He was deeply concerned about this continuing highway travesty, which he was aware resulted in the killing and maiming of over 200,000 Americans a year. It was frustrating to him. Apparently, drunk driving cases constitute over 50% of all the jury trials in the Alaska court system. For many reasons, and because he also serves at times as a coroner and probate judge, because of times when he has come in direct contact with auto crash results, leaving maimed bodies and grieved families or person who have suffered injuries, thereby, felt he had to do

something. He wanted to do it, not by legislative action, but what he wanted to do was in a true effort to be fair, give notice beforehand that persons convicted of a drunk driving in his court would receive a 60 day sentence with 45 suspended and 15 days actually having to be served. Now at the outstead let me point out this is not the maximum sentence, as some people have suggested. The maximum sentence under AS28.35.030 is $1000 or by imprisonment for not more than one year or by both. Now it is not the minimum sentence, which is 72 consecutive hours in the first instance. But what he was really doing, was, he was really giving fair warning beforehand to attorneys and drivers, particularly those consuming alcohol and driving under the influence, that this is what he would do. Now that resulted in an increase in Judge Hornaday being perempted. This is not to say that Judge Hornaday had not been perempted on prior occasions, but this announced policy seemed to have resulted in a definite increase in the peremptions that he experienced prior to the spring of 1982. Let me stop here and note that he was not legislating at that time. He was not attempting to. But what he was doing again just simply identifing the symptom patterns. Now when it was called to his attention that the public statement could not be followed, that he had to consider matters on a case to case basis, he acknowledged that. He publicly recinded the policy and he did sentence on a case-by-case basis. And he did not give 15 days in every insistence. He did go back to the 72 hours, frequently. But the peremptions continued. Continued to the point that Presiding Judge Mark Rowland determined, as he put it, it became administratively a nightmare and was costly to the system. And the system is one of the things I want to talk about.

Now the statistics put together by the court administrator regarding Judge Hornaday and our statistics will be at odds. Truthfully speaking, we don't think that there is comparable statistics that show that one District Judge or Superior Court Judge, particularly in areas where there is only one judge, that experience any more or less peremptions than Judge Hornaday had been experiencing. We don't know to what degree the peremptions compare. But we do know that there are problems and there are serious problems and the problems are going to continue in our opinion with the peremption statute in other areas as they have happened in the past in Wrangell, Petersburg, Ketchikan, Juneau and Kodiak. In any event, Judge Rowland believes that Judge Hornaday's peremptions in Homer were occurring to such a degree that he determined that he had to move Judge Hornaday out of Homer. I don't suggest that Judge Rowland is not acting in good faith. He was very candid when he said that it is the exercising of the peremption by counsel out of the current statute and the resulting costs of bringing in another judge from Anchorage, which is causing him to issue his order. Judge Rowland is attempting to follow obligations imposed on him as the presiding judge to properly administer the court system. And also to be concerned about the costs endowed in his responsibility.

In that regard, as I understand it from Judge Hornaday, Judge Hornaday was advised that he should consider peremtory challenges in sentencing persons before him as a particular consideration. I am sure this is done to avoid having the expense of the cost of having to send another District Judge to Homer when Judge Hornaday was perempted. Chief Justice Burke in a public hearing in Homer indicated perempts had to be considered in sentencing. So, I think we ought to recognize the issue that peremptions affect sentencing, that with the statute as it exists, the system should acccept that the consequences and cost and, threaten, the independence of the judiciary. So it's understood, are we challenging Judge Rowland's order on Judge Hornaday's behalf because I believe that there are serious constitutional and legal arguments on whether he has the authority to take the action he did. But aside from that, and if it be found that Judge Rowland does have the power and authority to remove a District Judge

from his place of residence and the office to which he is assigned, then the problem will still remain. Let's turn for a moment to the defense attorneys or primarily to the ones that are utilizing the perempt statutes.

I have talked with defense attorneys, quite a few of them, and I recognize what they are saying. They can not claim that Judge Hornaday has been more stern in his sentencing practices than other judges. They contend they are under ethical duties to advise the client that he or she has a right to perempt Judge Hornaday. I hear what those defense counselors are saying. But I also know that this constitutes and is just as clear an act as judge-shopping as any other act would be if not for the perempt statute. Even if the attorney contended that he had a ethical responsibility, it's judge shopping. In other instances in my opinion, they are using the perempt for purposes of delay in coming to trial. The delay is always an act that has to do with the defendant because anything can happen between the time of the charge and the actual time of the trial. But what is truly more troubling is, and what must be troubling to an elected official, be he legislator or otherwise, be he judge or otherwise, regarding what the justification might be claimed in respect to the perempt statute, the bottom line is not withstanding thousands of voters particularly those voters in the Homer area voting in favor of the man, Judge Hornaday. There will still be a few members of the bar who are mainly able to sufficiently prevail upon the presiding judge so as to require Judge Hornaday to be removed from one area to another. I don't say they are making personal contact, I say they are doing that through the perempt statute. In my mind as it has already been indicated, the perempt statute and peremption rule interferes with the judicial process under the Constitution and the court responsibility to perform the duties endowed upon them. It also destroys the independence of the judge and to a degree I believe it interferes with the oath of office that each judge takes that he will support the state and federal constitution and will faithfully discharge the duties of his office as a judge of the court to which he is appointed, to the best of his ability. It destroys the independence of the judge. I sincerely believe that it is very wrong to remove a judge who is regarded as judicially competent and I would like to make a note that the major incidents that I have heard in respect to Judge Hornaday has nothing to do with his ability in a civil case, nothing to do with his ability during the course of a trial, presumably it has to do with his sentencing in DUIL cases and some pretrial motions, other than that attorney after attorney have told me he is a very competent, capable judge. But the clutch of the issue comes down to this, if the peremption statutes are to stay in existance and Judge Rowland's order is to remain in effect, then every judge appointed to a district judge area is subject to be reassigned depending on how his rulings and sentencing practices are viewed by the attorneys. I suggest that the precedent being established here is extreme for the reasons already stated. It should be a matter of a state-wide concern. What happens to the next District Judge that goes to Homer. He accepts that office in the wake of Judge Hornaday's reassignment, if that occurs. He knows that the presiding judge doesn't want to have make another reassignment. He does know that he has to avoid peremptions and to avoid peremptions he obviously must not follow the practices followed by Judge Hornaday. Peremption has an effect on sentencing without a question. The matter of degree perhaps in Homer is a matter of degree anywhere. I know that there are many judges today in Alaska who are very concerned about this order. I think it is a matter for new judicial candidates to consider as part of the input as to whether or not they want to become judges. They are invited to place themselves, as now, in front of the judicial council for particular judicial office. They have to realize they maybe reassigned. Against this background I wish to make the following recommendations. I thought a lot about

the perempt statute and I believe that it has one part of it that makes me feel that it should be repealed and its the view of it being unfair.

I submit to you that whether its the filing of an affidavit or a simple notice of a change of judge of Criminal Rule 25 and Civil Rule 43, the accusation is that litigants can not receive a fair and impartial trial. If the judge has no opportunity to defend himself against that charge, although it clearly imputes his integrity. In my opinion the judge, whether it's Judge Hornaday or any other judge is denied due process, he cannot defend his integrity which is so important to a judge. I would suggest in the first inistance, therefore, that the particular AS22.20.022 be repealed.

Then I have an alternative suggestion. I have a lot of respect for my brethren. I see the attorneys here in mass. I've heard them. Accordingly, realistically speaking, that perempt statute cannot be repealed. I would like to give you perhaps a compromise. I would suggest that there would be a statute passed or present statute amended, rejecting the reassignment of any Superior Court or District Judge from the area of his residence to any other location. It is not say that a judge cannot be temporarily assigned, as the Constitution recognizes, and it takes place periodically, so long as there is a time limit on each assignment each year. I think the wholesome affect of this type of law is that if the perempt statute is to be continue as part of the Alaska Judicial processes that it be recognized as part of the overall system, including the cost of reassigning a judge to the area where the peremption right is imposed. It will also reassure other members of the judiciary or future potential members, that have to give that fact their consideration. They are weighing the pros and cons of continuing or becoming a judge.

Another alternative, the second alternative, I would suggest would be given serious consideration, would be to limit the perempt statute to those areas that have more than one judge serving a community, such as Anchorage and Fairbanks, and deny the invoking of the peremptory challenge for no cause where there are single judges, whether they be Superior or District Court Judges in other areas.

I realize that this would not be as popular and be subject to constitutional attack. However, I believe that it could withstand that constitutional attack.

I wish to thank the committee for allowing me to make this presentation. I sincerely hope that reservation in supporting this and that the recommendations maybe of some assistance to the committee. Needless to say, in the final analysis, in the case of Judge Hornaday, that any action taken by the legislature, I sincerely hope, will allow him to stay in Homer. Thank you.

HB 79---PEREMPTORY CHALLENGE OF JUDGES REPEAL--

REMARKS BY REPRESENTATIVE JOHN LISKA

THANK YOU MR. SPEAKER:

I RISE TO SPEAK IN FAVOR OF HB 79. I PARTICIPATED, AS A MEMBER OF THE JUDICIARY COMMITTEE, IN HEARING THE MANY WITNESSES TESTIFY BOTH IN FAVOR AND AGAINST THE BILL ON THE TWO DAYS THE HEARINGS WERE HELD.

I ESPECIALLY NOTED THAT JUDGES WERE ALMOST UNIVERSALLY FAVOR OF THE BILL. ONE JUDGE STATED THAT AS AN ATTORNEY SHE WOULD BE OPPOSED, BUT THAT AS A JUDGE IT CERTAINLY MADE HER ROLE MORE DIFFICULT.

NOT ALL THE ATTORNEYS WERE OPPOSED TO THE BILL EITHER. IN PARTICULAR, ONE ATTORNEY FROM BETHEL, ONE OF THE VERY FIRST WITNESSES, SPOKE QUITE STRONGLY IN FAVOR OF PASSAGE OF HB 79. IT APPEARED SIGNIFICANT TO ME THAT SO MANY ATTORNEYS WERE OPPOSED TO THE BILL, AND SO MANY JUDGES AND LAYMEN WERE IN FAVOR OF IT, THAT IT APPEARS TO ME THAT THE ATTORNEYS MUST HAVE SOME DECIDED ADVANTAGE WHICH THEY ARE JEALOUSLY GUARDING AND DON"T WANT TO BE TAKEN AWAY FROM THEM.

WE WERE ESPECIALLY APPRECIATIVE OF THE REMARKS BY MS. KAREN HUNT OF ANCHORAGE, FORMERLY PRESIDENT OF THE BAR ASSOCIATION. NEAR THE CONCLUSION OF HER TESTIMONY I ASKED HER IF THE SITUATION AT HOMER, ALASKA WAS SUCH THAT SO MANY PEOPLE ARE IN FAVOR OF THE BILL AND SHOWED SUCH SUPPORT FOR IT, COULD THE PEOPLE BE WRONG OR COULD THE LAW BE WRONG? SHE PROMPTLY REPLIED THAT THE LAW IS WRONG!!

TESTIMONY FROM WITNESSES, MR. SPEAKER, WAS ALMOST EVENLY DIVIDED, FOR AND AGAINST THE BILL. I FAVOR PASSAGE OF THIS BILL BECAUSE I FEEL A JUDGE SHOULD BE ALLOWED TO FOLLOW THE DICTATES OF HIS CONSCIENCE IN UPHOLDING THE LAW AND DISCHARGING THE DUTIES OF THE OFFICE, WITHOUT FEAR OF BEING TOSSED OFF THE BENCH BECAUSE A H+NUMBER OF ATTORNEYS WISH TO HAVE A CHANGE OF JUDGE WITHOUT HAVING TO BE RESPONSIBLE FOR GIVING THE REASONS FOR THAT CHANGE. WE HEARD TESTIMONY, MR. SPEAKER, THAT THE FACT THAT CHALLENGES TO A JUDGE ARE POSSIBLE HAS A DECIDED IMPACT ON DECISIONS THE

THE JUDGE IS, BY LAW, REQUIRED TO MAKE. IT IS ATROCIOUS TO ME, MR. SPEAKER, TO HAVE A SITUATION IN OUR STATE WHERE OUR JUDGES ARE HAMPERED BY HAVING TO CONSIDER WHETHER OR NOT THEIR SENTENCING PRACTICES WILL LEAD TO CHALLENGES OR EVEN TO REMOVAL FROM ONE LOCATION TO ANOTHER. IT IS CLEAR THAT THE CHIEF JUSTICE HAS INDICATED THAT JUDGES HAVE TO BEAR THIS IN MIND. WITH THE PASSAGE OF THIS BILL, SUCH WOULD NO LONGER BE THE CASE AND JUSTICE WOULD BE BETTER SERVED. THANK YOU, MR. SPEAKER.

TESTIMONY IN FAVOR OF PASSAGE OF HB 79

THANK YOU, MR. CHAIRMAN.

I AM REP. MILO FRITZ FROM ANCHOR POINT, NEAR HOMER ALASKA.

THE FIRST COURT OF JUSTICE IN ALASKA WAS ESTABLISHED BY THE U.S. IN 1900 UNDER JUDGE JAMES WICKERSHAM IN EAGLE ON THE YUKON RIVER. SINCE THEN, THE COURT SYSTEM HAS GROWN IN SIZE AND COMPLEXITY TO MEET THE CHANGING NEEDS OF THE TIMES AND THE INCREASE IN POPULATION.

GENERALLY SPEAKING, THE LEGAL NEEDS OF THE PEOPLE OF ALASKA, EXCEPTING THE DISSIDENTS AND ECCENTRICS PRESENT IN ANY AGE, WERE ADEQUATELY MET. UNTIL 1967, PEREMPTORY DISQUALIFICATION OF A JUDGE COULD ONLY BE INVOKED FOR CAUSE, THAT IS, FOR A GOOD, TRENCHANT REASON. AND I BELIEVE, MR. CHAIRMAN, THAT NO REASONABLE PERSON CAN OBJECT TO THAT.

IN 1967, ACCORDING TO THE SESSION LAWS OF ALASKA FOR THAT YEAR AND APPEARING IN ALASKA STATUTES, THAT IS THE LAWS OF ALASKA KNOWN AS AS 22.20.022, AN ADDITION WAS MADE, MAKING IT POSSIBLE FOR THE PETITIONER, THAT IS THE LAWYER OR THE CLIENT TO DISQUALIFY A JUDGE WITHOUT PROVIDING ANY REASON WHATSOEVER. AND IT IS THE PURPOSE OF HB 79 TO STRIKE THIS 1967 AMENDMENT TO ALASKA LAW FROM THE BOOKS MAKING PEREMPTORY CHALLENGE OF A JUDGE POSSIBLE ONLY FOR CAUSE, THAT IS, FOR A VALID REASON.

IN THE ELECTION OF NOVEMBER 2, 1982, THE VOTERS IN THE THIRD JUDICIAL DISTRICT VOTED 57,000 TO 38,000 TO RETAIN JUDGE JAMES C. HORNADAY ON THE BENCH. ON THE KENAI PENINSULA, WHERE

JUDGE HORNADAY RESIDES AND HOLDS COURT IN THE SMALL CITY OF HOMER, THE VOTE WAS 6000 TO 3000 IN FAVOR--AN IMPRESSIVE VOTE.

NOW IT HAPPENS THAT JUDGE HORNADAY HANDS OUT TOUGH SENTENCES TO THOSE CONVICTED OF DRUNK DRIVING. SO QUITE NATURALLY, THE TRANSGRESSOR AND HIS LAWYER, QUITE LOGICALLY AND WITHOUT HAVING TO GIVE A REASON, PEREMPTORILY CHALLENGED JUDGE HORNADAY ASKING THAT THE CASE BE HEARD BEFORE ANOTHER JUDGE SINCE, OF COURSE, THE SENTENCE ~~CAN'T LEGALLY BE~~ IS NOT GENERALLY MADE ANY MORE SEVERE AND MIGHT QUITE POSSIBLY BE LIGHTER. ANY GOOD LAWYER WHO DOES THIS IS QUITE WITHIN HIS RIGHTS, SINCE IT HIS DUTY TO OBTAIN FOR HIS CLIENT THE LIGHTEST POSSIBLE SENTENCE. IN OTHER WORDS, THE LAWYER IS NOT AT FAULT, THE LAW IS, AND THAT IS WHY I ASK YOU AND YOUR COMMITTEE TO REMEDY THIS DEFECT BY FAVORABLY PASSING OUT HB 79.

NOW, IN A STATEMENT AT A HEARING REGARDING JUDGE HORNADAY HELD IN HOMER ON JANUARY 5, 1983, SUP. COURT JUDGE MARK ROWLAND TESTIFIED THAT JUDGE HORNADAY WAS PEREMPTORILY CHALLENGED IN ABOUT 80% OF THE CASES COMING BEFORE HIM, ONLY A SMALL PERCENTAGE OF WHICH HAD TO DO WITH DRUNKEN DRIVING. IN OTHER WORDS, BY ACCIDENT OR DESIGN, MOST OF THE LAWYERS ON THE KENAI PENINSULA INDULGED IN A VENDETTA AGAINST JUDGE HORNADAY PEREMPTORILY DISQUALIFYING HIM. IN EFFECT, THESE LAWYERS SAID, "OKAY, SO YOU ARE GOING TO HAND OUT MAXIMUM SENTENCES AGAINST OUT DRUNK DRIVING CLIENTS. THEREFORE, WE WILL PEREMPTORILY DISQUALIFY YOU FOR ALL OUR CASES." OF COURSE, THIS LEFT JUDGE HORNADAY WITH LITTLE TO DO AND MADE IT NECESSARY FOR SUP. COURT JUDGE

MARK ROWLAND TO DISPATCH A JUDGE FROM ANCHORAGE AT NEEDLESS EXPENSE TO HOMER TO HEAR JUDGE HORNADAY'S CASES. AND SINCE HORNADAY HAS BEEN RENDERED INEFFECTIVE, ROWLAND HAS TRANSFERRED HIM TO ANCHORAGE AS OF JUNE 1, THUS QUITE LEGALLY TRANSGRESSING THE WILL OF THE PEOPLE OF THE KENAI PENINSULA. JUDGE ROWLAND IS NOT WRONG; THE LAWYERS ARE NOT WRONG; THE LAW IS WRONG AND HB 79 RECTIFIES THE SITUATION.

IN ANCHORAGE, PEREMPTORY DISQUALIFICATION OF JUDGE HORNADAY WOULD COST NOTHING SINCE THERE ARE SEVERAL JUDGES OF JUDGE HORNADAY'S RANK AVAILABLE.

THEREFORE, IT SEEMS THAT PEREMPTORY CHALLENGE OF A JUDGE WITHOUT CAUSE SHOULD BE STRICKEN FROM THE BOOKS SINCE IT SERVES LAWYERS AND TRANSGRESSORS AND NOT THE ADMINISTRATION OF JUSTICE. REM ACU TETIGISTI.

IF, MR. CHAIRMAN, THIS 13TH STATE LEGISLATURE PROMPTLY PASSES OUT HB 79 WHICH WOULD ELIMINATE PEREMPTORY DISQUALIFICATION WITHOUT CAUSE, THE PEOPLE OF THE KENAI PENINSULA WILL KEEP THE JUDGE WHOSE ACTIONS THEY APPLAUDED BY VOTING FOR HIS RETENTION 2 TO 1.

PASSAGE OF THIS MEASURE WILL ALSO PREVENT THIS FROM OCCURRING IN OTHER one-JUDGE JURISDICTIONS WHERE, FOR FRIVOLOUS REASONS OR NO REASON AT ALL, A JUDGE MAY BE PEREMPTORILY DISQUALIFIED. THE JUDGES ARE NOT WRONG, THE LAWYERS ARE NOT WRONG, THE PEOPLE ARE NOT WRONG--THE LAW IS WRONG. LET US REPEAL IT BY PASSING HB 79.

I THANK YOU, MR. CHAIRMAN.

Pre-emption of judges 'disruptive'

by J[illegible] Berliner
Times [illegible]er

Times 2-6-83

A handful of state judges are "disrupting" the state court system because they are removed from cases so frequently, says state court administrator Art Snowden.

Court records show that one Anchorage judge and five other judges from around the state are excused from cases far more than their colleagues.

Although the current debate over pre-emptions has focused on Homer District Court Judge James Hornaday, he is not the only judge regularly excused from cases by lawyers. There are 42 trial judges in the state, (the eight appellate judges may not be pre-empted), and lawyers routinely excuse six of them."

According to court records, in addition to Hornaday, the judges being regularly bumped from

See Judges, page A-l

Judges

(Continued from page A-1)

cases are Juneau District Court Judge Gerald Williams, Fairbanks District Court Judge Stephen Cline, Anchorage Superior Court Judge Karl Johnstone, Juneau Superior Court Judge Roger Pegues, and Wrangell Superior Court Judge Henry Keene.

By law, attorneys have a right of pre-emption, called peremptory challenge, which means that each side in a case may excuse the judge assigned to that case one time. The parties involved do not have to state the reason. Lawyers have five days from the initiation of a case to file a notice for a change of judge. The legislature is now considering a bill to repeal lawyers' right to pre-empt a judge.

Court officials have called the pre-emption an "administrative nightmare" because of the problems in reassigning judges.

"It is more efficient without it," Snowden said, adding that the court system has not taken a policy on the peremptory challenge and is probably split on the issue.

Snowden called it "a disruption" that costs the state court system an average of $30,000 yearly in extra costs of reassigning cases to other judges.

The biggest expense, Snowden said, is paying travel and expense money to have judges journey to one-judge areas to fill in where the only judge in town has been legally removed from a case.

That has happened so much in Homer that Hornaday has been ordered to pack up, leave town, and don his judicial robes in Anchorage. Even if lawyers pre-empt him there, the reasoning is, there are other judges to fill in. Presiding Judge Mark Rowland ordered Hornaday to move to Anchorage by June 1 to fill a judicial vacancy here.

Hornaday has been pre-empted from about 84 percent of the criminal cases assigned to him. His lawyer, Henry Camarot, claims that Hornaday is pre-empted 8 percent of the time when all his cases are considered.

Cline, Williams and Johnstone are taken off cases up to half the time. All four of the most pre-empted judges have been retained in office by voters in recent elections.

Johnstone, the only Anchorage judge regularly excused, is also the only judge who hears civil cases almost exclusively. The others regularly hear criminal cases, too. Johnstone is pre-empted three times more than all the other Anchorage Superior Court civil judges put together, and his pre-emptions climbed to a high of 20 in December. Judges are assigned between 30 and 40 new cases monthly. Johnstone was pre-empted 153 times in 1982, up from 71 in 1981. And although Johnstone said last summer that his pre-emptions were going down, court records show they are on the rise.

But in Anchorage, the state's biggest judicial district, Johnstone's cases are simply reassigned to another Anchorage judge. That can't be done in Homer, where Hornaday is the only judge. His removal means that court administrators have to send in another judge to hear Hornaday's cases.

Last week the House Judiciary Committee held two days of hearings on the bill to abolish the pre-emption. Lawyers argued against the bill, claiming the pre-emption is used to excuse a judge who may not give their client a "fair shake."

Both defense attorneys and Anchorage municipal prosecutor Allen Bailey argued for keeping pre-emptions around so they have a tool to excuse a judge they think is either too lenient or too harsh when it comes to sentencing.

Anchorage Daily
News
Anchorage, AK

(62)
11
74
16

Hunting charge dropped

FAIRBANKS — A felony charge alleging a man defrauded Belgian hunters by setting up illegal hunts in Alaska has been dismissed. Assistant Attorney General Tom Wickwire said the charge against Melville Morris, 58, was dropped because it would have been too expensive to fly the hunters to Alaska on three occasions to testify against him. Charges of guiding without a license and 13 other misdemeanor hunting and fishing violations still are pending against Morris. District Court Judge Jane Kauvar reduced his bail from $25,000 to $12,000 following dismissal of the felony charge.

Anchorage Daily
News
Anchorage, AK
FEB 7 1982

57

Judge gives 15 days minimum for DWI

(6

By JAN O'MEARA
Special to The Daily News

HOMER — A Homer District Court judge last week announced a new sentencing policy that will increase to 15 the minimum number of days first offenders convicted of drunken driving must serve in jail.

"The situation has become so serious in Homer that something must be done immediately," said Judge James Hornaday in revealing the new policy.

Hornaday said that in addition to the minimum jail term, persons convicted of drunken driving will be fined, be required to work 10 days in a community service program, lose their driving privileges except for limited uses, and be required to enroll in an alcoholism screening and rehabilitation program.

The previous minimum jail term required for first offenders was three days.

The judge said if a convicted drunken driver refuses to participate in the community service program or the alcohol screening program, "they'll sit in jail 60 days."

Hornaday said drunken driving cases in Homer increased 70 percent in January over the same month in 1981. "Drunk drivers kill people," he said. "This (new sentencing policy) is not a war on alcohol. It's an attempt to solve a very serious problem in Homer."

Increased jail time has been linked to an 80 percent reduction in moose poaching on the Kenai Peninsula, Hornaday said.

Hornaday said he decided to increase the minimum jail term for drunken drivers after consulting with other judges, law enforcement officers, attorneys and alcoholism counselors.

"I certainly do not like to put people in jail, but hopefully the word will get out that driving under the influence will no longer be tolerated in Homer," he said.

Judge blames lawyers for high disq

Empire 2-3-83

Lawyers counter that challenges are needed to guarantee fairness

By CHRIS JARVIS
Empire Staff Reporter

Lawyers, not judges, are to blame for the high frequency with which some judges are disqualified from cases, Juneau District Court Judge Gerald O. Williams said today.

Williams is frequently disqualified from hearing cases because, in his opinion, "Alaska is the most lawyer-whipped state in a lawyer-whipped country."

Williams and Juneau Superior Court Judge Rodger Pegues have been named as two of six Alaska trial judges most frequently disqualified from cases. Pegues is on vacation and was unavailable for comment.

Alaska Court Administrator Art Snowden said the peremptory challenges, which allow lawyers to ask for a different judge without stating a reason, are an "administrative nightmare," noting it costs the state an estimated $20,000 a year to fly judges into a jurisdiction to hear a case.

Williams, a former Alaska State Trooper and members of the bench should not b[e] blamed.

Williams said it is his responsibility t[o] make sure a person accused of a crime is brought to trial within 120 days of h[is] arrest, he said. He thinks peremptor[y] challenges are often used to prolong th[e] time before trial.

Lawyers generally disagree.

"I don't know of any attorney" who us[es] peremptory challenges o[r] to prolo[ng]

qualification rate

cases, said lawyer Richard Burnham.

According to current rules, an attorney on either side of a case can request a judge be disqualified without giving a reason.

Requiring attorneys to say why a judge should be disqualified would present problems if a judge is not disqualified and the attorney must then argue a case before him, Burnham said.

Although acknowledging it costs money to fly a judge to hear the cases of a disqualifed judge, Burnham said there are other solutions to the problem. For example, he said, a superior court judge could hear district court cases or, if that is not possible, another district judge could be hired.

"It doesn't seem to me the goal of the judicial system is to run cheaply. It's to give people their day in court," Burnham said.

Williams, however, said if a case is prolonged long enough, eventually a case

Continued on Page 2

Judge...

Continued from Page 1

could be dismissed because the time limit for trial has been passed.

Admitting he is sometimes curt when on the bench, Williams said he finds it difficult to "put someone in jail in a nice way."

He defended his record, saying he treats everyone who is convicted in his court in the same way.

"I've still got friends who are mad at me (for sentencing them to jail), but it goes with the turf," he said.

"I admit I'm old fashioned," Williams said. He seldom likes to grant delays in court proceedings because cases often end up dismissed when delayed too long, he said.

Peremptory challenges are often used by attorneys in a "tactical and strategic" manner, Williams said.

Of defense attorneys, Williams said, "it is in their interest to prolong to avoid a trial."

However, it is not always in the best interest of the defendent, Williams said. Peremptory challenges and continuances might result in an attorney's client staying in jail, if not able to make bail, he said.

It is the court's responsibility to assure efficiency in the system especially with criminal case loads in Juneau almost doubling in four years, he said.

Sometimes 30 to 60 days will have elapsed days since a person's arrest before making the first court appearance. That leaves as few as 60 days before the case may go to trial, Williams said, noting motions for continuances, if granted, could extend beyond the 120 day limit.

Although some people who see Williams on the bench for the first time might see him as "a combination of Attila the Hun and Genghis Kahn," he said it is because his experience has taught him he must be absolute when passing judgement.

"I may appear curt in court but I've learned through experience that you've got to do it," he said.

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Homer News
Homer AK

Tough new drunk driving sen
raise flap; Homer judge stands firm

by Jan O'Meara
Staff Writer

Homer District Court Judge James Hornaday was disqualified from presiding over a drunk driving trial this week because of his newly adopted 15-day mandatory sentence policy.

Anchorage Judge Mark Rowland, presiding judge for the Superior Court, Third Judicial District, disqualified Judge Hornaday on Monday, based upon the motion and contention of Alan Beiswenger, attorney for defendant Stephen Seelye, that the 15-day sentence indicated a bias on the part of Judge Hornaday.

Mr Beiswenger had originally filed a motion asking Judge Hornaday to disqualify himself for bias, but the judge denied the motion.

Under Alaska law, Judge Hornaday was then required to submit the motion to the presiding superior court judge

Court procedure gives every defendant the right to challenge a judge, once only, so long as the challenge is made within five days of the judge's assignment to the case Mr Beiswenger made such a motion, but the five days had lapsed. Mr Beiswenger said, and Judge Hornaday denied that motion also

Mr Beiswenger said that his challenge was based on the theory that in establishing his own mandatory sentencing policy, Judge Hornaday was focusing solely on deterrence rather than reform or any other consideration as required by state statute

Judge Rowland declined comment Tuesday.

His law clerk, Richard Foley, speaking of the decision, said, "The legislature sets policy and has set a presumptory sentence of three days minimum. It's not up to a judge to change that policy." A judge must weigh each case on its own

Judge Hornaday said Tuesday that he intends to file a motion for reconsideration of Judge Rowland's decision within the week. If the disqualification holds, another judge will be sent to Homer to hear Mr. Seelye's case.

Even if he is disqualified on this case, Judge Hornaday said he intends to continue the policy he adopted last week. "I will stand on the procedure that's been initiated."

Alaska law contains no provision for forcing a judge to change a sentencing policy so long as it is within the range established by statute. Alaska statutes provide for a mandatory minimum sentence of three days and a maximum of one year.

If a judge is challenged, the court system must provide another, which in the case of Homer would mean bringing a judge in from Kenai or Anchorage. That has led some court system observers to speculate that Judge Rowland, as chief administrator for the judicial district, may rebel at the time, travel, scheduling and expense involved in continually supplying alternate judges to Homer for DWI cases.

Fairbanks
News Miner
Fairbanks, AK

Bill would give $750 in cash to Alaskans

JUNEAU (AP)--Every Alaskan would get about $750 in cash under a bill introduced by House Majority Leader Rick Halford and Rep. Vern Hurlbert to take effect if the U.S. Supreme Court outlaws Alaska's permanent fund dividend program.

Under the bill proposed by Halford, R-Chugiak, and Hurlbert, D-Sleetmute, every resident would be eligible for the one-time payment. A person would be considered a resident if he or she has lived in Alaska for at least 30 days as of the date the court issues a ruling.

The bill (HB743) calls for the $300 million already set aside for dividend payments to be paid out

Fairbanks
News Miner
Fairbanks A

Cold Storage d
permit upheld

ANCHORAGE—A S
judge has upheld the
dock permit issued to A
Storage to use the Port o
unload barges carryi
beverages.

Judge Brian Shortel
dismissed a lawsuit
Independent Longshore
the Anchorage Port C
Port Director Bill McKi

The union maintained
was illegal because i
secretly last october by
the municipality's chief
instead of the by the port

The city agreed that
was unusual, but said it
The city said it was han
because the barge was o
out of port and there wa
through normal channels.

When the barge finally
dock, it provoked a
longshoremen and teams
on strike against An
Storage.

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 79
Title "An Act repealing peremtory disqualification of a judge...."
Requested by House Judiciary Committee Date 1/26/83

II. FISCAL DETAIL
Agency Affected Department of Law
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected Prosecution
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL		X	X	X		

Costs that will occur cannot be determined at this time. See analysis below.

FUNDING (Thousands of Dollars)
General Funds costs that will occur cannot be determined at this time. Please see analysis below.

GENERAL FUND		X	X	X		
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Although not quantifiable at this time, this bill has the potential for causing a significant fiscal impact on the Department of Law, the Public Defender and the Court System. The department rarely uses peremptory disqualification and the department's Criminal Division probably does so only 10 or 12 times each year. The problem will arise from the private criminal defense bar which disqualifies some judges 30% or 40% of the time. If the private bar continues to seek this same level disqualification, based on cause, our prosecutors will then have to devote substantial portions of their time participating in a two-tier disqualification hearing process. Without any prior experience to guide us, the department is hesitant to speculate on the actual cost that this bill might cause. The department does believe that this bill will have the effect of hampering its

IV. DATE January 28, 1983 PREPARED BY Richard L. Pegues, Dir. Adm.Svcs.
AGENCY Department of Law
PHONE 465-3672

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

OMB review by Guy Bell

overall ability to prosecute criminal offenses, by diverting already diminished resources from other matters currently being addressed.

HB

456

Extracted from: Powers, Duties and Operations of State Attorneys General (1977) (Study by National Assoc. of A.G.s)

6. SELECTION, TERM AND REMOVAL

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

Method of Selection

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

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

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

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

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

TABLE 6: SELECTION AND TERM OF ATTORNEYS GENERAL

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

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

A study published in the Law Library Journal[88] showed how methods of selecting Attorneys General developed in nineteen states; of these, eight provided for legislative selection prior to 1843, but none finally retained this method. Prior to 1845, twelve states provided by constitution or legislation for the appointment of an Attorney General by the Governor, the legislature, or other authority. The trend then turned toward election. For example, North Carolina's 1776 Constitution provided for appointment by the legislature; its 1868 Constitution provided for election. Louisiana's 1812 Constitution provided for appointment by the Governor; its 1852 Constitution provided for election. Michigan's 1835 Constitution provided for appointment by the Governor; the 1850 Constitution provided for election. Virginia's 1776 Constitution provided for selection by the legislature; its 1902 Constitution provided for election. Kentucky's 1792 Constitution provided that the Governor would appoint the Attorney General, with the consent of the Senate; the 1850 Constitution made the office elective.

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

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

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

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

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

should be equipped with the constitutional status necessary to exercise constructive leadership as the chief lawmaker and political head of his state.[89]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

such as advising county attorneys and handling routine criminal appeals. The Governor is only one of many state officials whom the Attorney General advises.[94]

Confirmation of Appointment

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

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

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

Length of Term and Succession

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

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

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

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

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

Succession to Office

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

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

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

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

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

Removal from Office

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

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

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

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

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

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

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

term in 1894. Further, it mentioned that vacancies would be filled by Gubernatorial appointment until the next general election, when an Attorney General would be chosen to fill out the term or commence a new term. The Governor appointed an Attorney General in 1891. The question of the case was whether there was to be an election to fill out the first "quasi-term" in the general election of 1892. The court ruled that there was to be such an election.

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

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

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

Filling Vacancies

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

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

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

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

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

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

POSITION PAPER

of

LOUIS J. LEFKOWITZ

ATTORNEY GENERAL

to

CONSTITUTIONAL CONVENTION,

COMMITTEE ON THE

EXECUTIVE BRANCH

in support of

PROPOSITION THAT THE PRESENT

CONSTITUTIONAL PROVISION FOR

THE ELECTION OF THE ATTORNEY

GENERAL SHOULD BE RETAINED

POSITION PAPER

Submitted to the Constitutional Convention,
Committee on the Executive Branch,
at hearing held on June 1, 1967
at the State Capitol, Albany, New York

PROPOSITION

THE PRESENT CONSTITUTIONAL PROVISION FOR THE ELECTION OF THE ATTORNEY GENERAL SHOULD BE RETAINED.

HISTORICAL BACKGROUND AND COMPARATIVE ANALYSIS

In the early years of the Colony of New York (17t' century), the Attorney General was an appointee of the Royal Governor who was, himself, an appointee of the English Crown. About 1700 the intermediary was dropped and appointment of the Attorney General was vested directly in the Crown.

In 1777 the first Constitutional Convention established the State of New York, appointed all the State officers deemed necessary in the establishment of the new state, and provided for a Council of Appointment to make future appointments. Under this system, appointment of State officers was the rule rather than the exception. The Attorney General could be removed at any time and frequently was removed. There was neither difficulty nor hesitancy in removing him when a majority of the Council was of the opposite political faith. The fact of the matter is that under this system the average tenure was less than 2-1/2 years.

At the Constitutional Convention of 1821 a proposal was made that the Attorney General be appointed by the Governor with the consent of the Senate. This was rejected by the Convention and, instead, provision was made that the Attorney General, together with other important State officials, be elected by the Legislature.

By 1846 there was an overwhelming demand for the popular election of the Attorney General. This was recognized by the Constitutional Convention of 1846 and made a part of our Constitution.

Historically, traditionally, and as a matter of basic constitutional mandate, we have continued to elect our Attorneys General in New York State for the past 121 years. This is not to say that the question has not been raised or the problem re-assessed from time to time in the light of vastly changed conditions. As a matter of fact, at every Constitutional Convention since 1846 the question was reconsidered and in each instance the Convention adhered to the elective system.

Comparatively considered, and without going into the historical background of each case, it may be noted that in forty-two of the fifty States the Attorneys General are elected by the people. Interestingly, included among the States which follow the elective system are many of the most populous states in the Union (for examples: New York, California, Illinois, Ohio, Michigan and Massachusetts).

POINTS IN SUPPORT OF AN ELECTED ATTORNEY GENERAL

1. Independence.

While the history of the office of the Attorney General of New York includes efforts to make the Attorney General an appointed officer, it is significant that for upwards of one hundred years without interruption that office has survived as one to be filled by the elective process. Thus, retaining the Attorney General as an independent constitutional officer to be elected by the People of the State not only reserves to the People their traditional right to select a candidate of their choice as the State's highest ranking legal official, but has the added advantage characteristic of a democratic government of greater assurance that the laws of the State will be construed and applied objectively and without favor.

Exactly 100 years ago, at the Constitutional Convention of 1867, when that issue was considered, the report of the discussion states in part:

"The Attorney General holds a dignified position; he has important functions and acts on his own judgment and responsibility" and further, "It was not the Governor alone, but the people who wanted an Attorney General. He was to look after the interest of the people in the State and take care of their money so far as action in the courts was concerned * * *," and again, "If he (the Attorney General) does his duty it matters little to the people whether he is

in accord with the Governor or not." "Indeed," observed a delegate, "it may be to the interest of the people that the Attorney General should not always be in accord with the Governor," and more, "that he should be a man who could not be ordered by anybody. His opinions should be above any fear of the loss of his office. His duties are of the highest order * * * as high as those of any judicial officer; and he should be as independent as any judge. The Governor should have no more power to remove the Attorney General than he has to remove the Chief Judge of the Court of Appeals. His opinions are upon great questions, affecting the great questions of the State. He ought not be a mere creature of the Governor to supervise his vetoes and obey his dictation."

This independence of action and expression is particularly significant with respect to opinions of the Attorney General concerning the construction of statutes and the validity and propriety of acts thereunder by other departments and agencies of the State.

All of the various departments and agencies of government turn to the Attorney General for legal advice and for the rendering of Official Opinions. Such opinions are acted upon daily and a great deal of the operation of the State government depends upon the nature of the advice that is so rendered. These Opinions are rendered to all departments of the State government, those under the direction

and supervision of the Governor and those under the direction of other elected officials. It is important to note that the Opinions have a direct and significant impact upon the People in their daily life. Here is a compelling reason why the Attorney General should continue to be independently elected. If the Attorney General is appointed by the Governor, then of necessity his opinions must reflect the philosophy of that Governor or the relationship would not be a compatible one.

An Attorney General does not give partisan advice; he gives legal advice. There is no such thing as "Democratic" law, "Republican" law, "Conservative" law or "Liberal" law. There is simply "law" — and the Attorney General, with the same degree of impartiality and objectivity as a Judge, calls it as he sees it.

The independent status of the Attorney General — the fact that he is the People's choice and is accountable to no one else — is implicit in the wide range of his official activities and duties which are based on the concept of his independence. Thus, he is, ex officio, a member of several boards and commissions, the other members of which are usually representatives of the administration. Thus, it is his duty to defend in Court the constitutionality of an act of the Legislature regardless of whether the current administration, as a matter of policy, supports it or not. And thus, with regard to proposed legislation, it is his duty impartially

to consider its constitutional validity and statutory interpretation and advise the Governor accordingly, regardless of the latter's policy consideration of such bills. If the Attorney General were an appointee of the Governor such functions may be rendered anomalous because the objectivity and impartiality inherent in his independence would necessarily fall with the destruction of his independence.

Furthermore, the responsibility for the effective protection of the consumer and the investor entrusted to the Attorney General (the prototype for similar authority in the Attorney General in many states in the Union) is predicated upon the existence of an independently elected Attorney General who will not be deterred (as during my tenure) in taking the initiative for affirmative action by the opposition of other governmental departments or agencies, the heads of which are appointed by the Executive. My own experience in the past ten years as Attorney General is illustrative of this fact. Thus, the creation in 1957 of the Consumer Frauds and Protection Bureau in the Department of Law was resisted on the ground that there would be duplication of some of the functions of the Banking Department. Similarly, the establishment of the Real Estate Syndication Bureau in the Department of Law was effected despite executive resistance on the ground that the Attorney General would thereby be performing a function in an area presumably

policed by the State Division of Housing. The creation of the Civil Rights Bureau in 1957 was opposed on the ground that it overlapped and duplicated existing functions of the State Commission Against Discrimination. These three bureaus were created by an elected Attorney General who acted on his own initiative in behalf of the people. The important fact is that they were created without clearance from the Executive.

The basic statutes (Executive Law § 63[12] and Business Corporations Law §§ 109 and 1101) confer authority upon the Attorney General to investigate and secure judicial disposition restraining any illegal and fraudulent acts. This power is not circumscribed or qualified by the existence of concurrent jurisdiction in a limited area by other government officials. Such authority of the Attorney General obviously bespeaks an independent Attorney General.

Similar independence is called for in the invocation and enforcement of the State's anti-trust law. The vigorous enforcement in the last ten years of this statute, aided by the expanded powers authorized by the Legislature, has been so singularly impressive as to receive national attention and commendation. The intensity of such activity should not, as is the case elsewhere, be made subject to the decision of a Governor who may be influenced by many factors alien to proper anti-trust considerations. Such enforcement must be left to an independent Attorney General responsible only to

the People for the implementation of the State's anti-trust policy.

My views are based on ten years of close affiliation with all branches of State Government — with the Governor and his Counsel, with the Legislature and its Committees, leaders and members, with the executive departments and agencies and their counsel, with the Judiciary, and with Authorities and local subdivisions and their officers and counsel. The activities of the State are so vast in magnitude, so varied and complex in character — the actions of its constituent elements being occasionally at cross-purposes — that, in the best interests of the People of the State there must necessarily be premised as greater assurance of independence, impartiality and objectivity, an Attorney General who is elected.

In West Virginia, where the Attorney General is elected, the incumbent Attorney General said:

> "I've been an elected Attorney General for two terms, and in the exercise of my duties I could not have fairly represented the agencies of government or the citizens of this State had I been subject to the whims of the executive or subject to political pressures other than the voters.
>
> "* * * In every occasion wherein one would have the authority of appointment, he also would have the 'hammer' on tough questions of policy. No Attorney General should be forced to operate under such an

> arrangement. The mere fact that it would be possible should be precluded."*

The overwhelming weight of opinion in favor of the elective process, predicated on the concept of the independence of the office, is exemplified by expressions of official views throughout the United States. Thus, at the Constitutional Convention of the State of Michigan, held as recently as 1963, in adhering to the elective process, it was said:

> "We favor election of the attorney general, the chief law enforcement officer of the state. In a representative government, appointment of the chief law enforcement officer would place him in a position of obligation which would make his duties more difficult. If the attorney general were appointed, he could be subjected to the influences of the appointing authority. Presently, he is able to make an independent legal judgment which might differ from the political decisions of other members of the executive branch. * * * [T]he governor has to make many decisions. Many of them are political decisions. I don't think that the best interests of the state can be served if the attorney general is appointed so that he must confirm the political decision of the governor. I think that the people of the state of Michigan have a right to the service of an attorney general who can say no, when the law and the interpretation of the law demands that he say no."

The Attorney General of Maine, who is appointed by the Legislature, said:

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* At my invitation the Attorneys General of virtually all of the States have stated their positions on the proposal here under discussion. Copies of their replies have been submitted to your Committee.

> "[I]f the Attorney General is appointed by the Governor, there is always the question of whether or not he becomes in the nature of a legal rubber stamp and convenient oracle of the law for the Governor's purposes."

Oregon's Attorney General states that "the elected Attorney General is the people's best guarantee of vigorous and impartial interpretation and administration of state law."

Perhaps the most forthright statement of all has come from the Attorney General of Nevada:

> "When you place the chief legal office of the state under the appointing power of the Governor you rob him of the complete independence that is his when elected by the people.
>
> "It is this very independence which results in the fearless and efficient administration of justice."

Although no elective Attorney General has favored an appointive process, it is interesting to note that two appointive Attorneys General are in favor of the elective system. Maine's Attorney General, appointed by the Legislature, has said:

> "I think I am of those who would like to see the Attorney General in Maine elected at large by the people * * *."

And the Attorney General of Alaska, who is appointed by the Governor, has said:

> "Again, from my own experience, if I were given the choice I would be inclined to favor the elective position over the appointive for the simple reason that I believe that a lawyer can function more

> effectively if he has freedom of action in his own specialized field."

It has been argued that the elective process may result in a Governor of one political party and an Attorney General of another, with possible resultant disharmony and friction in the running of the State government. Of course, as a matter of abstract theory, implicit in the concept of independence is the concept of potential disagreement. And it is always possible that incumbents who are influenced solely by political motivations are capable of disruptive tactics. But experience has shown that men who have the knowledge, experience, character and maturity to have attained the high office of Attorney General can be relied on to have a sufficient sense of responsibility and responsiveness to the public need to make such accommodations as the law will permit.

It should be noted that in those jurisdictions in which the Attorney General is appointed, because it is believed that the Governor and the Attorney General should be of the same political faith, the Attorney General is merely a part of the Executive branch of the state. An elected Attorney General, as in New York, is more than merely a part of the Executive branch.

While harmonious relations between the Governor and the Attorney General are unquestionably desirable, it seems that harmony merely for its own sake is too high a price to pay for the loss of the independence which gives greater assurance of effective government in the public interest.

It has been said that the Governor should at all times have an Attorney General with whom confidential matters can be transacted; that the Governor should not be compelled to retain his own counsel. But this is based on the erroneous concept that the Attorney General is the Governor's counsel. He is not the Governor's counsel in the normal sense of the term; he is the People's counsel. This is recognized even in States, like New Jersey, where there is Counsel to the Governor despite the fact that the Attorney General is appointed by the Governor.

The diverse functions of the Attorney General and the Governor's counsel may be succinctly summarized as follows:

(a) Attorney General

1. Litigation in all courts.

(a) Court of Claims - Representing the State and its agencies and officials in all claims based on contracts, torts and appropriations.

(b) All other Courts - Representing the State, the Governor, State Departments, Agencies and Authorities, the Judiciary, and the Legislature.

(c) Defending the validity of statutes which are attacked as unconstitutional.

(d) Habeas corpus matters - criminal and civil.

(e) Affirmative actions in all courts on behalf of the People in such matters as consumer frauds, anti-trust, civil rights, security frauds, realty investment frauds, and theatrical financing and charity frauds.

2. Renders opinions and advises the State, the Governor, the Legislature, and all State departments, agencies and officials.

3. Submits memoranda to the Governor on bills passed by the Legislature.

4. Renders advice on an informal basis to political subdivisions of the State.

5. Exercises criminal jurisdiction under the Executive Law and other statutes.

6. Supersedes District Attorneys when directed by the Governor.

7. (a) Administers registration of brokers, dealers and salesmen who deal in securities, and exercises enforcement powers.

   (b) Supervises public offerings of real estate (syndication, investment trusts condominiums, and cooperatives) and theatrical financing, and exercises enforcement powers.

   (c) Administers registration of theatre box office ticket-selling personnel, and exercises enforcement powers.

   (d) Administers registration of charitable foundations and trusts, and exercises enforcement powers.

   (e) In dealing, in court or otherwise, with estates and trusts in which the People are possible beneficiaries, he appears on behalf of the People.

(b) Counsel to the Governor

1. Advisor to the Governor.
2. Prepares annual message and special messages of the Governor.
3. Prepares Governor's legislative program.
4. Assists in the preparation of the departmental legislative programs.
5. Handles complaints against officials.
6. Extradition.
7. Clemency.

A further distinction in function between the Attorney General and Governor's counsel resides in the affirmative work of the Attorney General on behalf of the People which is constitutionally and statutorily imposed upon him. Thus, to name but a few of his functions, some of which have been mentioned, he acts affirmatively in matters of consumer protection, civil rights, anti-trust matters and charity frauds. Constitutionally, he acts under Article I § 6 of the Constitution against public officers and employees who refuse to waive immunity or testify in grand jury investigations. There are other statutory provisions, too numerous to mention, under which the Attorney General is required to take affirmative action. The most recent of those provisions, as an example, is the new Public Employees' Fair Employment Act (Laws of 1967, Chap. 392) under

which the Attorney General is now placed in the highly important field of public labor relations.

Obviously, because of the overriding primary allegiance of the Attorney General to the People, rather than to the Governor, the basis of the independence which is the hallmark of the office of the Attorney General, it is perfectly proper that the Governor have his own counsel. There is no antipathy between the two offices. Despite some unavoidable duality of operation, they complement each other.

That the existence of both positions does not create a problem of unavoidable friction is attested to by actual experience in our own State when we had a Democratic Governor with Counsel of his political persuasion and a Republican Attorney General. Dean Daniel Gutman, former Counsel to Governor Harriman, wrote to me as follows:

> "During the four years in which I served as Counsel to the Governor, I enjoyed a compatible and co-operative relationship with the Attorneys General, - first, the present Senator Javits and then yourself.
>
> "On occasions we found ourselves in disagreement. This occurred very rarely, and it served to reinforce my opinions on the more numerous occasions when we were in complete accord.
>
> * * *
>
> "In my opinion the broad scope of the Attorney General's activity, his

> great and varied responsibilities and the volume of business, particularly in a State such as ours, requires that this official be elected rather than appointed. I see nothing worthwhile that can come from a change in the present system that has been in existence here as in most other States, for so many years."

Judge Samuel I. Rosenman, who was counsel to Governor Roosevelt, observed that perhaps ten per cent of his time was devoted to legal matters. He added:

> "Neither the Counsel to the Governor nor Counsel to the President can render any official opinion. Official opinions can come only from the Attorney General; so it is not quite accurate to say that the Counsel takes the place of the Attorney General in serving the Chief Executive."

Although Judge Rosenman leaned toward the appointive method, he conceded:

> "Having said all the above, presenting the pros and cons, I don't think I am completely convinced on either side. It is as Oscar Hammerstein said in THE KING AND I a 'puzzlement.'"

Governor Poletti, who was counsel to Governor Lehman, observed:

> "I do not favor the discontinuance of the Attorney General as an elected official and his appointment by the Governor."

Pointing out that, since the Governor and the Lieutenant Governor are elected as one, the only two remaining statewide officials who are elected are the Attorney General

and the Comptroller. With perspicacity born of a lifetime of experience Governor Poletti added:

> "The people are smart enough to vote for each of these officials, and there is serious danger in reducing the scope of participation by the people in their government.
>
> * * *
>
> "* * * In all events, I believe the State greatly benefits from the independence of the Attorney General and Comptroller."

2. Separation of Powers - Checks and Balances.

As a corollary to the concept of the independence of the office is the fundamental concept of a democracy respecting the separation of powers--the system of checks and balances. "Appointment" of the Attorney General is incompatible with the doctrine of the separation of powers. There is nothing intrinsically wrong with the concept of a Governor of one political party and an Attorney General from another. They can and do often act as a "check" upon one another and if, as a result, there is occasional friction, this is a healthy phenomenon which a viable and dynamic political society can survive and, indeed, probably be the better for it. In certain situations, given a weak or ineffectual Legislature and a strong and forceful Governor, the only effective balancing and checking power may come

from an Attorney General who publicly espouses a responsible opposing point of view.

The Attorney General of Kansas expressed the point well:

> "[T]he elected attorney general is a further extension of the system of checks and balances which was incorporated into the form of government initiated by our founding fathers and which has flourished in the United States since its beginning."

To the same effect is the statement of the Attorney General of Minnesota:

> "[T]he office of Attorney General has developed in state government in a unique way. State legislatures do not have the broad investigative power that the Federal Congress has. In most states — one of the most important statewide investigative officials is the Attorney General. If an Attorney General was to be appointed by the administration he then becomes solely dependent upon it and tends to overlook problems which develop within that administration.
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> "* * * [U]ntil there is some alternative form of check and balance on state government, a broadly based elected Attorney General is preferable to one appointed by the Governor."

The Attorney General of the State of Washington, an elected official, has said:

> "The reason I would like to see the Auditor and Attorney General elected by the people is because I believe in

> government there are two necessary ingredients--money and law. These are so important that I think an official personally responsible to the electorate should be chosen by the people to provide the necessary check and balance.
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> "The law is the whole touchstone of our Democratic form of government. The man or woman who says the law is or is not being followed should be, in my belief, directly responsible to the people."

Vermont's Attorney General has stated:

> "Having an independent Attorney General, elected by the people of the state as a whole, is but another check and balance in state government that in the all important realm of legal and constitutional interpretations is essential to the sound functioning of state government, * * *."

The Ohio Attorney General believes that the elective status of the office "constitutes one of the more effective balances of the Executive Department of the State." He adds:

> "The Attorney General's office should be run as a law office, with a completely objective approach to the legal problems of an administration, and should not be relegated to a position of house counsel finding ways and means to support executive policy. By being elected the Attorney General is responsible only to the people of the state and this, to my way of thinking, is as it should be."