

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 86/2

2471 HJ HJR 12 - HJR 34

2471

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 21, 1983

SUBJECT: Terms of Legislators
(CSHJR 12 (Judiciary))

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel 

Enclosed are three alternative resolutions for your consideration. I believe that the draft of the Judiciary Committee Substitute provided to you earlier would have created some problems and therefore it is also replaced.

As drafted, the earlier committee substitute provided that

A legislator not eligible for reelection under this section may be . . . elected to the same house after one full term has elapsed.

The problem with the language was that it created a result that I assume was not intended: it provided that election "after one full term" was possible. But by tying the reelection possibility to the elapse of a term, the reestablishment of qualification to serve was delayed until a period having no relation to the time set for the elections. That is, a member not qualified until after "one full term has elapsed" would gain the right to run for office in the January either two or four years later, or some six months or more after the June 1st deadline for party nominations and nonparty petitions. See, AS 15.25.030, 15.25.150.

The result was that a candidate was disqualified for the "full term" plus two years.

The solution is to separate the disqualification from eligibility for election and tie it rather to eligibility to serve. A person may therefore seek office at a time when the

Representative Charlie Bussell

Page 2

February 21, 1983

person is disqualified from service; the disqualification from service will expire before for the candidate is able to take office, if elected.

The second committee substitute requested the concept of restored eligibility after two years.

The third committee substitute requested the concept of restored eligibility after four years.

I believe that the concepts have been achieved.

RAB:ljb

Enclosures

Alaska State Legislature

REPRESENTATIVE
BARBARA LACHER
P.O. BOX 478
PALMER, ALASKA 99645
(907) 376-4215



WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4894

House of Representatives

To: Representative Jack Fuller, Rules Chairman
From: Representative Barbara Lacher
Date: March 10, 1983
Subject: CS HJR 12

It has come to my attention that some clarification of intent is needed in the Judiciary Committee Substitute for House Joint Resolution 12.

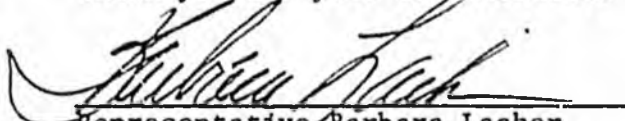
On line 20, the word, "and", should be changed to "or".

The intent of the resolution is that a legislator, when he reaches ineligibility as defined in the resolution, may either run for a seat in the other house, or must wait two years before running for the house in which he reaches ineligibility. For example, a House member who serves four full consecutive terms can immediately run for a Senate seat. He must, however, wait two years before running again for a House seat.

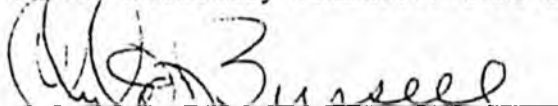
A legislator has expressed concern that the word "and" implies that one must wait two years before running for either house, once ineligibility has been reached.

I believe that the insertion of the word, "or", in place of the word, "and" should clarify the intent of the resolution to everyone's satisfaction. I have attached a copy of the resolution indicating exactly where the change should be made.

Thank you for your consideration of this request.


Representative Barbara Lacher

I concur with Rep. Lacher's request, and with her summary of the intent of the Judiciary committee substitute.


Representative Charlie Bussell
Chairman, Judiciary Committee

February 21, 1983

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee
FROM: Steve Cramer
SUBJECT: HJR 12; Background Information on suspense action required

1. Attached please find three (3) "WORK DRAFT" copies of a proposed committee substitute per request of the committee on February 16, 1983. You will note that the significant language change for discussion appears in sentence seven (7) of SECTION 3. The proposed choices for the substitute language would limit the ineligibility period for legislators to either a "full term" "four years" or "two years".
2. A survey of available resources was conducted by this researcher pursuant to the request of the House Judiciary Committee to ascertain any similar constitutional legislation or mandates in other states. The main resource used was:

"Constitutions of the United States", October 1982,
Oceana Publications, Inc., Dobbs Ferry, N.Y.

After reviewing all State constitutions it can be reported that not a single case reports the limiting of legislative terms of office to any "consecutive term" language nor do any States require legislators to participate in an "ineligibility" period because of tenure within their state government legislative structure.

3. With reference to the inquiry posed by Representative Clocksin as to the "philosophy and intent" of delegates to the Constitutional Convention relative to this issue the following is submitted, In order for me to best put before this committee the research in this area I will begin by quoting Vic Fisher, author of "Alaska's Constitutional Convention"

"Keeping a record of committee deliberations and decisions proved a major administrative problem . . . while in a number of occasions the staff consultants emphasized the critical importance of adequately recording committee deliberations, most minutes simply consisted of a record of the committee having met and of other nonsubstantive information . . . the lack of adequate committee minutes has made difficult subsequent judicial, executive, and legislative attempts to interpret constitutional intent" ¹

In reviewing the Constitutional Convention "Journal" and "Daily Proceedings" and subsequently through the tracking of the "Delegate Proposals", "Committee Proposals of the Legislative Branch", it can be reported that the Convention did not deem it appropriate to limit "government of the people" by limiting representation to our legislative branch of government for any tenure reason.

¹Fischer, Victor, "Alaska's Constitutional Convention", 1975, Institute of Social, Economic and Government Research, University of Alaska Press

I have further enclosed two (2) staff position papers submitted at the Constitutional Convention relative to this issue. Although not representative of either the full committee on legislative affairs or all convention delegates, the language and intent can be interesting to you as you prepare for this issue further within your present House Judiciary Committee.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Stephen E. Cramer". The signature is written in dark ink and is positioned above a horizontal line.

Stephen E. Cramer, Legislative Aide

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
 Bill/Resolution No. House Joint Resolution No. 12
 Title Proposing an amendment to the Constitution of the State of Alaska relating
~~Requested by~~ to the terms of legislators. Date 2/8/83
 Requested by House Judiciary Committee

II. FISCAL DETAIL
 Agency Affected Legislative Affairs Agency
 Program Category Affected General Government
 BRU, Program, Or Subprogram(s) Affected _____
 (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			-0-			
200 TRAVEL			-0-			
300 CONTRACTUAL			-0-			
400 COMMODITIES			-0-			
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL			-0-			

FUNDING (Thousands of Dollars) -0-

GENERAL FUND			-0-			
FEDERAL FUNDS			-0-			
OTHER (Specify Source)						

POSITIONS None

FULL TIME						
PART TIME						
TEMPORARY						

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

It is estimated that this bill will have no additional fiscal impact. There is no additional cost for the Division of Elections to place an issue before the voters as that is the Division's function.

RECEIVED

FEB 9 1983

LEGISLATIVE FINANCE

IV. DATE 2/9/83 PREPARED BY Wally Harrison, Director, Admin. Svcs.
 AGENCY Legislative Affairs Agency
 Original: Legislative Finance PHONE 465-3850
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)
 33-001 (P... 12/82)

Alaska State Legislature

REPRESENTATIVE
BARBARA LACHER
P.O. BOX 478
PALM BEACH, ALASKA 99645
(907) 376-4215



WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4894

House of Representatives

To: House Judiciary Committee
From: Representative Barbara Lacher
Date: February 16, 1983
Subject: HJR 12

The House recently passed a resolution which would allow Alaskans to decide whether session length should be limited. HJR 12 would let our voters decide whether to limit legislators' terms of office: representatives to four consecutive full terms, and senators to two consecutive full terms.

In light of the apparently substantial public support for this measure, I believe we owe our constituents the opportunity to vote on a resolution restricting terms of office. This is a decision which should be made by all Alaskan voters, the people who elect us and whom we represent.

In the packet you have received, several very good points are made in favor of limiting terms. First and most important, there seems to be a great deal of public support for such a measure. David Dittman did a poll in March of 1981 which showed that 62% of the people contacted support limiting terms of legislators. As you can see, regardless of how the results were broken down--whether by age, sex, income, length of residency, or education--the public supports this measure.

In addition, 49 of 76 legislative candidates responding to a survey done by Common Sense said they favor limiting the number of consecutive terms a legislator can serve.

Finally, a study done by the Anchorage FREE Committee in 1981 makes some very good points in favor of limiting terms:

- 1) Limiting terms could encourage more citizens to run for office by allowing opportunities to run for a seat without opposing an incumbent (incumbents being commonly perceived as much more difficult to defeat).
- 2) It would be more difficult for a few long-time legislators to develop excessive control. As the FREE report points out, the longer a legislator is in office, the more favors are owed by him and due to him. Limiting terms would interrupt this power process.

I firmly believe that, to eliminate power blocs and to ensure a citizen legislature, Alaskan voters must be allowed to decide whether to amend our Constitution to limit terms of office. I urge your support for HJR 12.

COMMITTEE = SSA
DATE = 031182
TIME = 1340

HEADING

SENATE STATE AFFAIRS
STANDING COMMITTEE
MARCH 11, 1982
1:40 P.M.

MEMBERS PRESENT:

SENATOR VIC FISCHER
SENATOR MIKE COLLETTA
SENATOR BRAD BRADLEY
SENATOR TERRY STIMSON
SENATOR DICK ELIASON

MEMBERS ABSENT:

COMMITTEE CALANDER

SJR 9

SJR 24

SJR 55

PROPOSING AN AMENDMENT TO THE CONSTITUTION
OF THE STATE OF ALASKA RELATING TO THE TERMS
AND ELECTIONS OF LEGISLATORS.
PROPOSING AN AMENDMENT TO THE CONSTITUTION
OF THE STATE OF ALASKA RELATING TO THE TERMS
AND ELECTIONS OF LEGISLATORS.
PROPOSING AN AMENDMENT TO THE CONSTITUTION

WITNESS REGISTER

WITNESS:

SENATOR ED DANKWORTH
POUCH V, JUNEAU, ALASKA 99811
PRIME SPONSOR OF SJR 9.
POSITION STATEMENT: SPOKE IN SUPPORT OF SJR 9.

WITNESS:

SENATOR BOB ZIEGLER
POUCH V, JUNEAU, ALASKA 99811
POSITION STATEMENT: SPOKE IN OPPOSITION TO SJR 9, SJR 24 AND SJR
55.

WITNESS:

SSA 0311821 DOCUMENT= 6 OF 9 PAGE = 3 OF 20

SENATOR FRANK FERGUSON
POUCH V, JUNEAU, ALASKA 99811
PRIME SPONSOR OF SJR 24.
POSITION STATEMENT: SPOKE IN FAVOR OF SJR 24.

ACTION NARRATIVE

TAPE #001
RECORDING
NUMBER 000

SENATOR FISCHER CALLED THE MEETING TO ORDER
AT 1:40 P.M. WITH MEMBERS SENATORS:
COLLETTA, BRADLEY, AND STIMSON PRESENT.
SENATOR FISCHER OPENED TESTIMONY ON THE
THREE PROPOSED CONSTITUTIONAL AMENDMENTS

SSA 0311821 DOCUMENT= 6 OF 9 PAGE = 5 OF 20

CONCERNING TERMS OF LEGISLATORS; SJR 9, SJR
24, AND SJR 55.

SENATOR ED DANKWORTH, PRIME SPONSOR OF SJR
9, STATED HIS OBJECTION TO RESTRAINING THE
PUBLIC'S CHOICE IN ANY MANNER. HE ASSERTED
THAT THERE WERE CERTAIN POWERS IN PLACE AT
THE TIME THE ALASKA CONSTITUTION WAS
WRITTEN, AND THAT THE BALANCE OF THESE
POWERS HAD SHIFTED. ALASKA'S ECONOMIC AND
NATURAL RESOURCE WEALTH HAS PLACED MORE
POWER WITH THE LEGISLATURE.

SENATOR DANKWORTH WENT ON TO EXPLAIN THAT
PRESENTLY, LEGISLATORS HAVE THE POTENTIAL TO
STAY IN OFFICE FOREVER. "AS LONG AS YOU KEEP
YOUR HAND OUT OF THE COOKIE JAR, YOU MIGHT
SAY". IT COULD, AND ALMOST HAS, BECOME A
YEAR-ROUND JOB. THIS IS UNFAIR TO THOSE WHO
WOULD SEEK TO REPLACE MEMBERS OF THE
LEGISLATURE.

SENATOR DANKWORTH POINTED OUT THAT ALASKA

HAS WORKED SUCCESSFULLY WITH A CITIZEN LEGISLATURE, AND NOW HAS BEEN TRANSFORMED INTO A BUREAUCRACY. ALASKA, AND TO AN EXTENT THE LEGISLATURE ITSELF, IS THE BIGGEST LAND COMPANY, AND THE MANAGER OF THE "BIGGEST NATURAL RESOURCE." IF ALASKA WANTS TO CONTINUE THE CITIZENS' LEGISLATURE, THIS SORT OF ISSUE MUST BE EXAMINED--IF YOU CAN'T MAKE A WORTHY CONTRIBUTION IN EIGHT YEARS, YOU'RE NOT GOING TO MAKE IT.

NUMBER 0098

AN ARGUMENT CAN BE MADE FOR THE VALUE OF EXPERIENCE, SENATOR DANKWORTH CONTINUED, BUT THAT DOESN'T NECESSARILY MAKE ONE MORE QUALIFIED.

SENATOR ZIEGLER (STANDING IN THE COMMITTEE ROOM) SAID "OBJECT." SENATOR DANKWORTH CONTINUED, "PERHAPS WITH THE EXCEPTION OF SENATOR ZIEGLER."

SENATOR DANKWORTH ADVOCATED LETTING OTHERS RUN FOR THE LEGISLATURE ON "AN EQUAL FOOTING

SSA 0311821 DOCUMENT=

6 OF 9 PAGE = 7 OF 20

AGAINST US", NOTING THE LARGE ADVANTAGE A LEGISLATOR HAS IN AN ELECTION FUE TO CONNECTIONS WITH MEDIA AND MONEY. IF THIS "LIMITS THE PEOPLE'S CHOICE," THAT SEEMS A FRAIL ARGUMENT THE ARGUMENT IN FAVOR OF A CITIZEN'S LEGISLATURE.

NUMBER 0145

SENATOR FISCHER STATED THAT HE WAS COMING AT THE ISSUE WITHOUT HIS MIND MADE UP. HE SAID THAT SENATOR DANKWORTH HAD ASKED THAT THE STATE AFFAIRS COMMITTEE HOLD A HEARING, BUT DOES NOT KNOW WHAT HIS RECOMMENDATION WILL BE. "WITH RESPECT TO SENATOR ZIEGLER...WE BOTH SERVED IN THE LEGISLATURE TWENTY-FIVE YEARS AGO...WE'VE COME A LONG WAY."

NUMBER 0155

SENATOR BRADLEY EXPRESSED CONCERN THAT THE MEASURE MIGHT CAUSE "LAME DUCK" REPRESENTATIVES (THOSE INELIGIBLE FOR RE-ELECTION) TO "SLOUGH OFF." HE ASKED IF, UNDER THE PROVISIONS OF SJR 9, A MEMBER WHO HAD COMPLETED HIS MAXIMUM 8 YEAR TERM COULD

SSA 0311821 DOCUMENT=

6 OF 9 PAGE = 8 OF 20

RUN FOR ELECTION TO THE OTHER BODY OF THE LEGISLATURE.

SENATOR DANKWORTH AFFIRMED THAT IT WOULD BE POSSIBLE FOR A MEMBER TO RUN FOR THE OTHER BODY, ONE JUST COULDN'T KEEP THE SAME SEAT MORE THAN TWICE.

NUMBER 0180

SENATOR BRADLEY STATED A PREFERENCE FOR A PROVISION FOR KEEPING ENTIRELY OUT OF THE LEGISLATURE FOR 2 TO 4 YEARS.

SENATOR DANKWORTH EXPLAINED THAT POWER STRUCTURES DEVELOP OVER THE YEARS WHICH AREN'T NECESSARILY HEALTHY. A LEGISLATURE WHO REPRESENTS 12,000 PEOPLE MAY BE UNABLE TO DO MUCH FOR CONSTITUENTS EXCEPT BY BELONGING TO SOME SORT OF POWER STRUCTURE. THIS MEASURE "BREAKS THE DYNASTIES...I SEE THIS MORE ON A FEDERAL LEVEL THAN THE STATE LEVEL." SENATOR DANKWORTH EXPLAINED THAT THE AMOUNTS OF MONEY INVOLVED FRIGHTENS HIM. SENATOR FISCHER ASKED SENATOR ZIEGLER IF HE

SSA 0311821 DOCUMENT=

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NUMBER 0260

WOULD JOIN COMMITTEE MEMBERS AT THE TABLE. HE DID SO.

SENATOR FISCHER COMMENTED THAT THIS SORT OF MEASURE ONCE MORE LIMITS THE ABILITY OF THE LEGISLATIVE BRANCH TO HOLD ITS OWN AGAINST THE EXECUTIVE.

SENATOR DANKWORTH RESPONDED, SAYING HE SUPPOSED YOU COULD SAY THE EXECUTIVE AND JUDICIAL BRANCHES HAVE GROWN IN POWER SOMEWHAT, BUT HE STILL SEES A NEED TO BALANCE THINGS IN A LIGHT OF A VERY POWERFUL LEGISLATURE. HE ALMOST PUT IN A BILL FOR ONE TERM FOR THE GOVERNOR (6 YEAR TERM). IN FURTHER SUPPORT OF SJR 9 SENATOR DANKWORTH STATED, "SOME OF THE DECISIONS I MAKE IN AN ELECTION YEAR I MAKE MORE WITH AN EYE TO MY OWN BEST INTEREST..."

NUMBER 0237

SENATOR FISCHER ASKED IF SENATOR ZIEGLER WOULD SPEAK ON THE OTHER SIDE OF THE ISSUE. SENATOR ZIEGLER ASKED IF SENATOR DANKWORTH

NUMBER 0245

SSA 0311821 DOCUMENT=

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KNEW WHAT OTHER STATES, IF ANY, HAVE SIMILAR RESTRICTIONS.

SENATOR ZIEGLER STATED THAT HE DIDN'T KNOW WHETHER TO CHARACTERIZE THIS BILL AS A CATASTROPHE OR AN ABOMINATION, AND FIGURED IT WAS SOMEWHERE INBETWEEN A NATURAL DISASTER AND A NATURAL CATASTROPHE. THE TITLE, HE SAID, SHOULD BE AMENDED TO READ "LEGISLATORS COMPULSORY RETIREMENT"; THE MEASURE IS A WASTE OF TIME. HE DISCUSSED PROVISIONS OF THE CURRENT LEGISLATIVE RETIREMENT PLAN, INCLUDING THE YEARS REQUIRED TO VEST, AND INDICATED HOW THIS MEASURE WOULD AFFECT LEGISLATIVE RETIREMENT. WHEN IT WAS SUGGESTED THAT THE LEGISLATOR WHO HAD SERVED TWO TERMS MIGHT RUN FOR THE OTHER BODY, SENATOR ZIEGLER ASKED, "WHO WOULD WANT TO GO TO THE OTHER BODY UNDER ANY CIRCUMSTANCES?"

SENATOR ZIEGLER WENT ON TO SAY THAT ONE

SSA 0311821 DOCUMENT=

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DOESN'T "ACCOMPLISH IT ALL IN EIGHT YEARS". HE REFERRED TO PAST LEGISLATORS, INCLUDING JOHN BUTROVICH (WHO SERVED 30 YEARS) AND FRANK PERATROVICH, WHO SERVED FOR EIGHTEEN (?) YEARS. HE IS VIOLENTLY OPPOSED TO THIS OR ANY OTHER RESOLUTION WHICH WOULD IMPOSE THIS KIND OF RESTRICTION, AND SAID HE KNEW OF NO OTHER STATE WITH THIS TYPE OF RESTRICTION. THE LEGISLATION, HE CONCLUDED, IS NOT WELL THOUGHT OUT.

NUMBER 0340

SENATOR DANKWORTH RESPONDED THAT HE DIDN'T KNOW HOW LONG THE MEASURE HAD TO BE IN THE LEGISLATURE BEFORE IT BECAME "WELL THOUGHT OUT" AS IT HAS BEEN CONSIDERED FOR A NUMBER OF YEARS. HE RESTATED HIS POINT ON THE WAY IN WHICH LEGISLATORS BECOME INVESTED IN THE SYSTEM, LOCKED, LIKE ANYONE ELSE, INTO THE BUREAUCRACY. HE SAID IT WAS NOT HIS INTENTION TO SLIGHT SENATOR ZIEGLER, OR JOHN BUTROVICH, OR ANYONE ELSE, NOR TO IMPLY THAT

NUMBER 0374

6 OF 9 PAGE = 12 OF 20
 THEIR EXPERIENCE WAS NOT VALUABLE. THE STAGGERED TERMS, HE SAID, WOULD ALLOW FOR VETERAN LEGISLATORS TO HELP OUT NEW LEGISLATORS. HE WOULD LIKE TO GET INSURANCE INTO THE ALASKA CONSTITUTION THAT THE STATE WILL STICK TO A CITIZEN LEGILATURE. SENATOR ZIEGLER DISCUSSED ELECTABILITY, AND HOW IT DETERMINES THE VALUE OF ONE'S SERVICE. PEOPLE WHO KNOW A LOT ABOUT THE PROCESS ARE VALUABLE. SENATOR BRADLEY POINTED OUT THAT IT WOULD NOT AFFECT HIM AT ALL, AND THAT SOME MEMBERS NEED TO GET OUT TO MAKE THE MONEY NECESSARY TO COME BACK TO SERVE. THERE SHOULD BE ROOM FOR EXCEPTIONS HE STATED. SENATOR ZIEGLER, FOR EXAMPLE, HAD NOT ABUSED THE POWER WHICH HAS OCCURED TO HIM OVER THE YEARS IN THE LEGISLATURE. SENATOR BRADLEY SAID THE PEOPLE HAVE A RIGHT TO ELECT WHO THEY WANT. NO ONE HAS BEEN

NUMBER 0429

6 OF 9 PAGE = 13 OF 20
 ABLE TO TALK HIS CONSTITUENTS OUT OF IT--THEY WANT A RESOLUTION SUCH AS SJR 9--THEY WANT SOME "NEW BLOOD". PERSONALLY, HE IS "50-50 SPLIT" ON THE ISSUE. BUT WILL SUPPORT IT FOR HIS CONSTITUENTS. SENATOR FERGUSON ARRIVED, AND SENATOR FISCHER BRIEFED HIM ON WHAT HAD TAKEN PLACE. SENATOR COLLETTA, PRIME SPONSOR OF SJR 55; SENATOR DANKWORTH, PRIME SPONSOR OF SJR 9; AND SENATOR FERGUSON, PRIME SPONSOR OF SJR 24, ALL WERE GATHERED AT THE TABLE. SENATOR COLLETTA EXPRESSED HIS REGRET THAT SENATOR ZIEGLER HAD TO LEAVE AS HE HAS "HEARD THOSE ARGUMENTS FOR TEN YEARS" AND DID NOT HAVE AN OPPORTUNITY FOR A REBUTTAL. THE POINT WHICH HAS TO BE KEPT IN MIND IS THE VALUE OF A CITIZENS' LEGISLATURE. SENATOR COLLETTA STATED THAT HIS MEASURE, SJR 55, DOES NOT DIFFER GREATLY FROM SENATOR DANKWORTH'S. HE PROVIDED COPIES OF THE

NUMBER 0476

6 OF 9 PAGE = 14 OF 20
 RESULTS OF A POLL HE HAD ADMINISTERED IN ALL REGIONS OF THE STATE. IN EVERY REGION IN THE STATE, IT CAME THROUGH WITH CLARITY: PEOPLE SUPPORTED LIMITING TERMS OF LEGISLATORS. IT IS THE PEOPLE'S RIGHT TO DETERMINE WHETHER OR NOT THEY WANT TO LIMIT THE LEGISLATORS. MOST SENIOR MEMBERS IN THE LEGISLATURE RUN UNOPPOSED; SO GREAT IS THEIR ADVANTAGE AS INCUMBENTS IT DISCOURAGES OTHERS FROM CHALLENGING THEM. SENATOR FERGUSON, PRIME SPONSOR OF SJR 24, TESTIFIED IN SUPPORT OF THAT MEASURE. HE FELT THERE SHOULDN'T BE A DIFFERENCE IN THE NUMBER OF YEARS SERVED IN THE HOUSE AND THE SENATE RESPECTIVELY, AND HIS MEASURE PROVIDES FOR THREE YEAR TERMS, AND A MAXIMUM OF TWO CONSECUTIVE TERMS. ANOTHER LINE OF THOUGHT ALONG THIS LINE IS TO HAVE THE GOVERNOR RUN FOR ONE SIX YEAR TERM. (THIS PROVISION NOT INCLUDED IN SJR 24.)

SENATOR FISCHER REFERRED TO THE CONSTITUTIONAL CONVENTION, WHERE IT WAS DETERMINED THAT THE SENATE, BY HAVING OVERLAPPING FOUR YEAR TERMS, WOULD PROVIDE MORE CONTINUITY, AND THE HOUSE WOULD RESPOND TO MAJOR CHANGES IN PUBLIC OPINION. SENATOR DANKWORTH STATED THAT ONE HAS TO TAKE INTO CONSIDERATION WHAT HAPPENS ON THE CAMPAIGN TRAIL AND THE COST OF IT. HE REFERRED TO THE INCUMBENT'S GREAT ADVANTAGE AND THE NEED TO HAVE MONEY. THE FACT THAT "WE ARE DOWN HERE DEALING WITH BILLIONS OF DOLLARS MAKES IT WASIER TO RAISE MONEY--WE HAVE MORE STATUS THAN THE NEW GUYS ON THE BLOCK."

NUMBER 0537

SENATOR COLLETTA STATED THAT HE HAD TO LEAVE, AND, IN CLOSING, SAID THAT THE METHOD OF IMPLEMENTATION WAS NOT IMPORTANT TO HIM. HE SUGGESTED THAT THE COMMITTEE MIGHT MOVE ONE OF THE MEASURES OUT AND SEND COPIES OF

ALL OF THEM ALONG TO THE JUDICIARY COMMITTEE. SENATOR FERGUSON SUGGESTED THAT ALL OF THE MEASURES BE PASSED ON TO JUDICIARY.

SENATOR FISCHER SAID HE HAD NEVER DONE THAT--THAT IT WOULD BE LIKE WAIVING A BILL. SENATOR STIMSON STATED THAT HE WAS IN FAVOR OF MOVING IT.

SENATOR FISCHER ASKED IF HE MEANT TO MOVE ALL THE MEASURES TO JUDICIARY, AND SENATOR STIMSON RESPONDED IN THE AFFIRMATIVE. SJR 24, SJR 55 AND SJR 9 WERE ALL PASSED OUT WITH INDIVIDUAL RECOMMENDATIONS.

SENATOR FISCHER WAS THE ONLY MEMBER OF THE COMMITTEE REMAINING UNTIL THE END.

TO: HOUSE JUDICIARY COMMITTEE
FROM: [Illegible]

TO: HOUSE JUDICIARY COMMITTEE
FROM: [Illegible]

DATE: [Illegible]

HOUSE JUDICIARY COMMITTEE
BARNES, [Illegible]

FROM: [Illegible]
[Illegible]
[Illegible]



[Illegible text]

[Illegible text]

MEMORANDUM FOR THE DIRECTOR
MAYES, LICKA, ...

FROM: DANOLA LAMIE
2720 LEXINGTON STREET
ANCHORAGE, AK 99502 (H) 248-2512 (W) 319-1534

RE: HJR 12 - LIMITING TERMS OF LEGISLATORS

AS A MEMBER OF THE FREE COMMITTEE, I SUPPORT
LEGISLATION LIMITING THE NUMBER OF TERMS A
LEGISLATOR CAN SERVE. I AM PLEASED TO SEE THAT
YOU ARE PROCEEDING WITH THIS IMPORTANT LEGISLATION.



GENERAL STATE
THIS STATE OF OREGON FOR OTHER QUALIFIED PEOPLE TO ALSO
LEGISLATURE I AGREE NO CURRENT LEGISLATION SHOULD BE EXERCISE
I ENFORCE THIS BILL AND WOULD ITS PASSAGE WITHOUT CHANGE.



FOR THE BILLING LEGISLATION, LEGIS
L. O. BOX 4-202 (DISTRICT 44)
ASTORIA, OR 97103 (H) 253-2420
LOW BERTIE KNIFE

LEGISLATION, ALL GENERAL
LEGISLATION, ALL GENERAL
LEGISLATION, ALL GENERAL

FROM BUREAU AND FID 1/15/68 11:45:00
IN CASE, JUNE 1968
18-0024 OUT-6132

HJR

13

TO: ALL MEMBERS, ALASKA LEGISLATURE

FROM: RONALD S. NISBY, 149 MICHAEL COURT, NO 2, ANCHORAGE 99504
H 337-7788 W 659-5370

THE PASSAGE OF HJR 13 WOULD STOP VIOLATIONS BY OUR GOVERNMENT
OF ARTICLE 1, SEC. 10, TO-WIT: NO STATE SHALL MAKE ANYTHING
OTHER THAN GOLD AND SILVER COIN A TENDER IN PAYMENT OF DEBTS.
CITIZENS ARE FORCED AT THE POINT OF LOSING THEIR PROPERTY TO
PAY TAXES WITH FIAT CURRENCY.

3/15/83, SHIRLEE ANC LIO, 526

TO: ALL MEMBERS, ALASKA LEGISLATURE

FROM: RONALD S. NISBY, 149 MICHAEL COURT, NO 2, ANCHORAGE 99504
H 337-7788 W 659-5378

HJR 13 WOULD HASTEN THE ABOLISHMENT OF THE FEDERAL RESERVE
SYSTEM WHICH IS UNCONSTITUTIONAL, UNDER INVESTIGATION AND
INDICTMENT BY THE GRAND JURY OF SALT LAKE CITY. IT WOULD
RETURN THE RESPECT AND SOVEREIGNTY OF AMERICA, THE NATION
FOUNDED ON PRINCIPLES OF MORAL ETHICS.

FROM: RONALD S. NISEY, 149 MICHAEL COURT, NO 2, ANCHORAGE 99504
H 337-7788 W 659-5378

IN THE CONSTITUTION OF THE STATE OF ALASKA, ARTICLE 1, SECTION 2,
TO-WIT ALL POLITICAL POWER IS INHERENT IN THE PEOPLE. ALL
GOVERNMENT ORIGINATES WITH THE PEOPLE, IS FOUNDED UPON THEIR
WILL ONLY, AND IS INSTITUTED SOLELY FOR THE GOOD OF THE
PEOPLE AS A WHOLE. PLEASE PASS HJR 13.

MSG 83-00014469 PRY 1 03/10/83 14:20:01 ORIG: LA01 IN= 0020 OUT= 0087
FROM: JUNE, AND LIO TO: POM, JNU INFO-
TARGET: LJHL SURJ: RESEND MSG 14458 FROM FREER

3/10/83, JUNE, AND LIO MSG 14469 - RESENDING MSG 14459 FROM FREER

TO: REPRESENTATIVES CLOCKSIN, WENDTE, BETTISWORTH, LISKA, PHILLIPS, **BUSSELL**,
HAYES, MALONE, AND TISCHER

FROM: ROBERT L. FREER
P. O. BOX 481
EAGLE RIVER, ALASKA 99577 (H) 694-4963 (W) SAME

I STRONGLY RECOMMEND THE PASSAGE OF HJR 13. WE NEED TO ONCE AGAIN HONOR THE
U.S. CONSTITUTION AS THE SUPREME LAW. ALL STATE AND MUNICIPAL OFFICES AND
COURTS ARE CURRENTLY IN VIOLATION OF ART. I SEC. 10 U.S. COONSTITUTION;
COINAGE ACT OF 1792, AND 31 U.S.C. 371



3/10/83. JUNE, ANC LIO, MSG 14459

7

TO: REPRESENTATIVES CLOCKSIN, WENDIE, BETTISWORTH, LISKA, PHILLIPS, ~~HUSTELL~~
HAYES, AND MALONE

FROM ROBERT L. FREER
P. O. BOX 481
EAGLE RIVER, AK 99577 (H) 694-4263 (W) SAME

I STRONGLY RECOMMEND PASSAGE OF HJR 13. WE NEED TO ONCE AGAIN HONOR THE
U. S. CONSTITUTION AS THE SUPREME LAW. ALL STATE AND MUNICIPAL OFFICES
AND COURTS ARE CURRENTLY IN VIOLATION OF ARTICLE I SEC. 10 U. S. CONSTITUT-
ION, COINAGE ACT OF 1792, AND 31 U. S. C. 371

TO: ALL MEMBERS, ALASKA LEGISLATURE

FROM: FRANK MCGUIRE, 4116 WEST 88TH, ANCHORAGE 99502
H 243-0701

OR

NOTE NO ON SSSB 172 BECAUSE THE STANDARD OF WAGES IS HARDLY
SUFFICIENT NOW WITHOUT BEING DRASTICALLY REDUCED.

NOTE YES ON HJR 13.

FROM: RONALD S. NISBY, 149 MICHAEL COURT, #2, ANCHORAGE 99504
H 337-7788 W 659-5378

I URGE IMMEDIATE PASSAGE OF HJR 13, THE LIBERTY AMENDMENT BY
TISCHER AND BETTISWORTH. THE FEDERAL AND STATE GOVERNMENTS
FOR TO LONG HAVE CONDONED, PERPETUATED AND ENCOURAGED THE
VIOLATION OF OUR MOST PRECIOUS GUARANTY OF LIFE, LIBERTY AND
HAPPINESS, THE U.S. CONSTITUTION.

HJR

29

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: HJR 29 Date on Bill: 2-11-83
 Title: Proposing an amendment...to limit...exclusionary rule
 Sponsor: Pestinger
 Requestor: _____

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86
Capital				
Operating				
Total	-0-	-0-	-0-	-0-

b. Revenues:

Revenue				
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2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

No Fiscal Impact

4. Disclaimer:

This statement has not been reviewed by the OMB in the Office of the Governor. It therefore does not represent the final estimate of fiscal impact.

Prepared By: Francis C. Allan Phone: 269-5691
 Division: Alaska State Troopers Date: 2-16-83

Approved by Commissioner: [Signature] Date: 2/25/83
 Department: Public Safety

5. Distribution:

- Original to Legislative Finance
- Copy to OMB
- Copy to Sponsor
- Copy to Requestor

2/15/83

MEMORANDUM

March 10, 1983

TO: Joe ("Judge") Brewer
FROM: Steve Cramer
SUBJECT: HJR 29 (Exclusionary Ruling); Constitutional Research of the States

1. All State's Constitutions were researched to ascertain if under the Search and Seizure rights they contained any provision for non-suppressing of evidence obtained under that particular section.
2. I delimited the search and seizure language into three (3) sub-headings:
 - [a] people to be secure in persons, houses, papers and effects from unreasonable searches and seizures
 - [b] warrants not to issue to search any place or to seize any person or thing without probable cause supported by oath or affirmation
 - [c] particularly describing the place to be searched and the person or thing to be seized

Fourty eight (48) of the states contained language similar to all three (3) sub-headings.

Alabama did not cover item [c] above.

Washington did not cover items [b] nor [c] above.

Michigan added an additional statement:

". . . the provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon seized by a peace officer outside the curtilage of any dwelling house in this state."

Definition of "Exclusionary Rule:

Evidence obtained in violation of the Fourth Amendment is inadmissible in a criminal prosecution.

"Fourth Amendment" refers to the federal constitution, as well as article 1, section 14 of the Alaska Constitution.

Evidence can also be excluded for violations of other federal and state constitutional rights:

1. 5th am. privilege vs. self incrimination; e.g.s., Mirande & forced confessions.
2. 6th am. right to counsel.
3. Due process - right to not be convicted on unreliable identification.
4. Rights created by federal statutes.
5. Rights created by state constitution and statutes which go beyond federal constitutional protections.

(c) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

EVIDENCE RULES

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights. (Added by Supreme Court Order 364 effective August 1, 1979)

ISSUE: Is 2/3 majority vote of legislature required to enact legislation limiting or amending the "exclusionary rule"?

Rule of Evidence - 412 is the actual "exclusionary rule".

Rule of Criminal Procedure - 37 (c) (copy attached) sets forth the procedure whereby the exclusionary rule can be invoked by motion to suppress.

Alaska Constitution, Article IV, Section 15, provides that court rules may only be changed by the legislature by a 2/3 vote

TEST: Is proposed limitation or amendment substantive or procedural?

HOUSE JUDICIARY SUBCOMMITTEE WEIGHS
PROPOSED CHANGES TO EXCLUSIONARY RULE

*Witnesses give Reagan Administration's
"good-faith" exception little encouragement.
p.350.03 p.100.05*

In early September Congress received President Reagan's draft of proposed changes in the field of criminal law. The proposals, embodied in S 2903 and HR 7117, are entitled the "Criminal Justice Reform Act of 1982" and, among other things, call for a change in the exclusionary rule. The Administration would like to amend chapter 223 of title 18 USC to establish a "good-faith exception" to the rule, allowing for the admission of evidence resulting from a search or seizure "undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment." 31 CrL 2540.

Additionally, just last week the Supreme Court called for reargument in *Illinois v. Gates* (No. 81-430, argued 10/13/82, 32 CrL 4069) and requested the parties to address the question of "whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, * * * should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." 32 CrL 4105.

Against this backdrop, on December 2 the House of Representatives' Judiciary Subcommittee on Criminal Justice continued its oversight hearings on the operation of the exclusionary rule. Subcommittee Chairman John Conyers, Jr. (D-Mich) characterized the issue before the subcommittee as whether or not forces were now moving against the Fourth Amendment itself. The first witness called was Silas Wasserstrom, Associate Professor of Law, Georgetown University Law Center, and former Chief of the Appellate Division of the Public Defender Service for the District of Columbia. He referred extensively to a recent article "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo L.J. 365 (1981), of which he was co-author.

FOURTH AMENDMENT STIFLED

Wasserstrom first addressed the potential outcome of the *Gates v. Illinois* reargument. He told the subcommittee that if the Supreme Court decides to adopt a good-faith exception to the exclusionary rule it would render any proposed legislation superfluous and any constitutional challenges moot. He predicted that it would not be unlikely for a limited version of this exception to be adopted in *Gates*. However, Wasserstrom continued, even this would be a "substantial inroad" on the exclusionary rule.

In an attempt to deter police misconduct, the Court may limit the exception to cases wherein police are acting pursuant to a warrant, Wasserstrom opined. But he quickly noted that then the question of judicial misconduct in issuing the warrant would arise. The result of any inquiry would be "odd" because the language of the Fourth Amendment makes clear that warrants shouldn't issue except on probable cause. Thus, if the Court decides to allow searches pursuant to illegal warrants, it would be defeating the Amendment's very purpose, Wasserstrom declared.

He cautioned that if Congress attempts to promulgate its own exception to the rule, aimed at upholding the admission of any evidence seized in reasonable good faith, it might not only go beyond the future "Gates rule" but could make any search conducted pursuant to warrants "per se good faith."

Wasserstrom strongly objected to Conyers' observation that the issue really is "real world" law enforcement versus "whether an arcane constitutional provision is minutely enforced." The Fourth Amendment protects us from a police state, Wasserstrom declared, noting that criticism directed at the exclusionary rule may really be aimed at the Fourth Amendment itself. This prompted him to suggest that the subcommittee might want to consider repealing the Fourth Amendment. The exclusionary rule does not hamstring police, the Amendment does.

To what extent are police inhibited by the Fourth Amendment? Conyers asked. Only in the sense that the Amendment tells them what they can and cannot do, Wasserstrom replied. A civil remedy directed at an individual police officer would be a far more drastic deterrent to police misconduct than the exclusionary rule, he added. However, a tort remedy would be an inadequate substitute for the rule, Wasserstrom stressed. The reason for this brought him to the gist of his argument against adopting the good-faith exception — the exclusionary rule's importance in the development of Fourth Amendment law.

If the exclusionary rule is eliminated or even if the exception is adopted, Fourth Amendment doctrine will petrify, Wasserstrom explained. Courts will never reach the question of whether an officer violates the Fourth Amendment because they will stop at the good-faith issue. Once this is determined the case is over.

At this point subcommittee member Bill McCollum (R-Fla) interrupted. You have made an underlying assumption that good faith will always be found; this concludes that justice will always fall on the side of the police, McCollum pointed out.

If the good-faith exception is adopted, Wasserstrom answered, the law freezes. The defendant will be asking for a change in existing law while the prosecution will be claiming a good-faith reliance on that law; courts won't give into change. Therefore defendants will have no incentive to pursue novel Fourth Amendment claims and courts will, in effect, be choking off the development of Fourth Amendment law. The courts will actually be amending Fourth Amendment law because they will no longer be required to look for probable cause, Wasserstrom maintained.

At this juncture Wasserstrom turned his attention to the Fifth Circuit's holding in *U.S. v. Williams*, 622 F2d 830, 27 CrL 3293 (en banc 1980), that "reason [as well as authority] plainly demand[ed] explicit recognition of a good faith exception" to the exclusionary rule. He took this decision to task, arguing that reasonableness and good faith are already built into existing Fourth Amendment law. In reality the exception changes and stifles existing law, he contended. The exclusionary rule should be supplemented, not changed or excepted to, Wasserstrom concluded: that is the only way it will grow.

BLAME POLICE ADMINISTRATORS

The next witness before the subcommittee was Sue Marie Johnson, Deputy Director of the Police Executive Research Forum, an organization of police executives from the nation's larger jurisdictions. She opened her testimony by stressing the organization's belief that the exclusionary rule, by itself, is not a sufficient deterrent on unconstitutional police actions. Like Wasserstrom Johnson rejected the good-faith exception to the rule, but she then proposed an alternative — place the responsibility for police misconduct on police administrators and not on individual officers. This not only serves the rule's purpose, it also broadly influences the improvement of policing, she explained. The change in focus of the judicial sanction, from individual officers to their departments, will provide police agencies with the incentive to develop programs for effective deterrence of police misconduct. Additionally, police officers will be more willing to perform their duties in a constitutional fashion if they know that the regulations are internal.

This is a "risk free" proposal, Johnson claimed. It is limited only by the potential of police administrators to protect individuals' constitutional rights: if they fail then the exclusionary rule can be used. However, she added, the rule would not be applied if it is apparent that the police department in question had taken its responsibility to adhere to the Fourth Amendment seriously. Departments could show proof of such good faith by meeting three requirements: "1) publishing departmental rules and regulations that guide police on proper constitutional procedures; 2) instituting effective programs to train officers according to these rules and regulations; and 3) maintaining a history of disciplinary actions taken against officers, it having been demonstrated that the officers had committed violations of departmental rules."

The judge would then rule on whether or not the officer had committed a constitutional violation, Johnson continued. If the answer is yes then the prosecutor would ask the judge to review the three foregoing requirements. The prosecution would have the burden of proving that the requirements were met in a manner sufficient to ensure one of the following: that the failure to provide a rule was reasonable and that proper regulations would be forthcoming; or if the department already had a rule covering the circumstance involved, the officer would be disciplined for violating the rule unless he was acting reasonably and in good faith; or if the rule was found unconstitutional, it was promulgated in good faith, appeared reasonable at the time, and would be reissued in

proper form. Only if the prosecution's proof failed would the evidence would be excluded, Johnson said.

Johnson admitted that this proposal would lead to eventual replacement or ossification of the exclusionary rule. However, she noted, it also does away with all the problems the rule has engendered. She closed by stating that if the proposal was implemented on the federal level then states would soon follow suit, thus developing uniform guidelines and requirements.

NO CHANGE NEEDED

The final witness was the only member of the private criminal bar to address the Subcommittee thus far in its hearings. Alan Ellis, representing the Philadelphia Bar Association, appeared to voice that body's disagreement to any substantive change in the exclusionary rule. He contended that proposed legislation — HR 4259 (replacing the rule with a tort remedy), HR 4606, HR 5971, HR 6049, HR 4422 (all creating good faith exceptions) and S 101 (weighing intentional constitutional violations) — are not only of questionable constitutionality but also "would wreak havoc on the administration of criminal justice."

Focusing in particular on the proposed good-faith exception, Ellis said that "at a time when we are trying to reduce court costs and delays, introduction of a new . . . test will trigger years of litigation, as courts are forced to throw out well developed case law." Any change would also effect police department training programs and could eventually undercut the present extensive, high quality programs in constitutional rights that did not exist prior to *Mapp v. Ohio*, 367 U.S. 634 (1961), he added. —

There is no need to change the rule, Ellis urged. Studies show that the rule actually has only an extremely minimal impact on criminal prosecutions, with eventual admission of most challenged evidence. Any change would just be an "unabated waste of criminal resources," he maintained. Already overworked judges and defense attorneys would have to delve into the subjective intent of police officers and perhaps even consider a department's entire training program. Lengthy litigation would revolve around the 'sole' issue of "good faith." Additional public defenders and judges would be needed. Also, it would impossible to develop a consistent, workable body of law because decisions would be made on a case-by-case basis.

In addition to this list of hazards, Ellis stressed the symbolic weakening or abandonment of the exclusionary rule. Police would conclude that the Fourth Amendment was not a serious matter. The present law already considers an officer's objectively reasonable factual mistakes, Ellis noted. Thus instead of adding to the law any change may just weaken it.

Ellis also argued that when the Supreme Court held in *Mapp v. Ohio* that the exclusionary rule was an essential part of the Fourth and Fourteenth Amendments, it constitutionally proscribed the Congress from revoking or rescinding the rule. Accordingly, Ellis emphasized, the subcommittee's ability to act is limited. Only the Supreme Court has the authority to reduce or remove the application of the exclusionary rule, he declared.

Testimony of
Sue Marie Johnson
Deputy Director
Police Executive Research Forum

before the
Subcommittee on Criminal Justice
Committee on the Judiciary
United States House of Representatives

Concerning
The Operation of the Exclusionary Rule

June 9, 1982

Mr. Chairman, thank you for providing to the members of the Police Executive Research Forum this opportunity to express our views on the exclusionary rule and certain proposed alternatives to it. The Forum is an organization of police chief executives from the nation's larger jurisdictions. Our goal is to improve the delivery of police services by promoting and bringing about the further professionalization of police executives and officers. We conduct research, engage in experimentation and provide a forum for debate on a wide range of criminal justice issues. It is our belief that, from these efforts, substantial improvement in the quality of law enforcement services will result.

Recently, several alternatives to the exclusionary rule have been proposed in response to dissatisfaction with the effects of the exclusionary rule. We in local law enforcement confront the effects of the exclusionary rule continually; how the rule now operates in criminal proceedings disillusion us. Still, we do not think that the alternatives suggested by critics of the exclusionary rule offer the best means of remedying the ill-effects of the rule, or of achieving the rule's primary objective: to deter unconstitutional police conduct.

What we would like to recommend is a substitute process, one that will not only serve the purposes of the rule but will also broadly influence the improvement of policing. We envision a process by which the responsibility for deterring police violations of citizens' constitutional rights is given to police administrators; they can carry

such responsibility most effectively; the judiciary can deter police violations only indirectly. The change in focus of the judicial sanction, from individual officers to their departments, will provide to police agencies the necessary incentive to institute programs for effectively deterring constitutional violations by their officers; that is because, if such programs are not implemented, the exclusionary rule will continue to be applied. If police administrators show that they can carry this responsibility, that they can execute it diligently, then the need to apply the exclusionary rule in individual cases will disappear, constitutional rights will be protected, reliable and relevant evidence will be used in trials, and the effectiveness of our criminal justice system will be enhanced.

Adopting our proposal to redirect responsibility for deterring police violations of constitutional rights from the judiciary to the police is risk free. In respect of those who believe that, to ensure true justice in criminal proceedings, the exclusionary rule must be eliminated or curtailed, our proposal provides satisfaction; it is limited only by the potential of police administrators to protect individuals' constitutional rights. Regarding those who believe that the elimination or curtailment of the exclusionary rule means more police violations of individuals' constitutional rights, our proposal guarantees that the exclusionary rule will be applied whenever the judiciary determines that police departments are not ensuring that individuals' constitutional rights will not be violated. Our proposal

guarantees that both agendas in the exclusionary rule debate will be accomplished. Each of the other proposed alternatives to the exclusionary rule forces an either-or choice: you are either for the exclusionary rule, or you are against it. Our proposal is better than the other alternatives, not only because it supports, at once, the interests expressed in both of these positions, but also because it more realistically provides for achievement of the judiciary's objectives in applying the exclusionary rule.

Objectives of the Exclusionary Rule and Problems Related to Its Application

The exclusionary rule was first enunciated in the 1914 Supreme Court decision, Weeks v. United States, 232 U.S. 383 (1914). The rule was devised as a remedy for violations of citizens' constitutional rights secured by the Fourth Amendment.

Initially, the Court held that this remedy applied only in federal prosecutions. Wolf v. Colorado, 338 U.S. 25 (1949). The Court left the states free to experiment with alternative sanctions for constitutional violations by law enforcement officers. Unfortunately, state and local officials, including those in law enforcement, did not heed the Court's warnings and failed to develop remedies that would secure compliance with the Fourth Amendment's provisions. The consequence of their inaction was the Supreme Court's 1961 decision in Mapp

v. Ohio, 367 U.S. 643 (1961), to extend the exclusionary-rule remedy to state courts.

The Rule's Objectives

The essence of the exclusionary rule is that evidence obtained in violation of Fourth Amendment requirements cannot be used against defendants in criminal proceedings. In Weeks and subsequent opinions, the Supreme Court offered a number of rationales for applying the rule, the major ones being, first, to maintain judicial integrity by removing the judiciary from the taint of partnership in unlawful behavior of law enforcement officers and, second, to deter future violations by prohibiting law enforcement officers from profiting by their lawless behavior. See, Weeks at 392 and Mapp at 648, 652, and 659-60.

Throughout the history of the exclusionary rule, the Court extended the rule's application beyond Fourth Amendment search and seizure violations to violations of the Fifth Amendment [United States v. Ade, 388 U.S. 218 (1967)], the Sixth Amendment [Miranda v. Arizona, 384 U.S. 436 (1966)] and the Fourteenth Amendment [Irvine v. California, 347 U.S. 128 (1954)]. While the sanction was being extended, however, the judicial integrity argument lost its force as an independent justification. Today, the deterrence rationale is the predominant consideration in courts' decisions regarding suppression motions; judicial integrity is a consideration that is secondary to

courts' assessments of whether or not the sanction will deter future violations. See, Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974); United States v. Janis, 428 U.S. 423, 458-59 n.35 (1976); Dunaway v. New York, 442 U.S. 200, 218 (1979).

We believe that the deterrence rationale no longer provides a reasonable justification for the rule as the rule is currently applied. Though deterrence of unconstitutional police conduct is a goal we all seek to achieve, the exclusionary rule, by itself, does not constitute an appropriate means of achieving this goal.

By our criticism we are not suggesting that the rule has failed to assist in improving our system of justice. Two major benefits of the rule's application can be identified. The first benefit is that the rule has provided to defendants an incentive to challenge the propriety of conduct of law enforcement personnel; this has led to the judiciary's focusing on the requirements of constitutional behavior as these affect police. The second benefit is constituted by the indirect, long-range effects that these judicial rulings have had on police behavior; the educational aspect of decisions that have identified certain actions as improper have led police administrators to pay more particular attention to the requirements for constitutional procedure and, as a consequence, training of police officers has improved. Whether or not these two major benefits could have been realized without the rule, or under a different sanction, will never be

known. Notwithstanding the benefits, the current level of dissatisfaction with the rule and the problems it presents require us to heed now the Court's warnings and find new ways to serve the purpose of the rule.

Ascertaining a means of measuring the deterrent effect of the rule as the rule is currently applied has proven elusive; this condition has intensified debate about the point at which a balance, if any, can be struck between the benefits of the deterrent effect and the costs to the criminal justice system and society. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 27 *University of Chicago Law Review* 665 (1970); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 *Journal of Legal Studies* 243 (1973), Canon, Is the Exclusionary Rule Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 *Kentucky Law Journal* 681 (1974); Comptroller General of the United States, Impact of the Exclusionary Rule in Federal Criminal Prosecution, Report Number GGD-79-45 (19 April 1979). Instead of further debating such issues, we want here to share our expertise as law enforcement administrators in the process of developing a suitable alternative to the rule. Abolishing the rule without substituting an effective mechanism for it amounts to a mere experiment, one in which we are not willing to engage. It is clear, however, that something must be done; the courts cannot do it themselves. We believe it is incumbent upon

the law enforcement community to work with the judiciary and the legislatures to devise a suitable alternative.

Disadvantages of the Rule

Apart from doubts about whether or not the rule has achieved its objective of deterrence, use of the rule has led to several problems, some of which are more burdensome than those that the rule was originally intended to remedy. From the many problems discussed by commentators, we have deducted seven major arguments.

In a first line of argument it is posited that the exclusionary rule interferes with justice by distorting truth. Reliable, relevant evidence that would be admitted if obtained legally is excluded from the fact-finding process when obtained in violation of constitutional commands.

A second line of argument stresses that endlessly litigating the validity of searches, seizures and other law enforcement procedures causes delays in the trial process and diverts attention from questions of guilt and innocence; focus shifts from alleged wrongdoings of defendants to allegations about police, vitiating attempts to provide swift and certain punishment for criminal activity.

A third contention is grounded in the following perception: respect that law enforcement personnel and citizens have for the law and our criminal justice system is destroyed by the rule. Instead of

operating as a deterrent, the rule encourages some police officers to twist facts and stretch the truth about searches; there is the spectacle, too, of the guilty going free because of technical errors.

A fourth line of argument is based on assertions that the rule protects only those who face criminal prosecution, and that the rule cannot deter violations of constitutionally guaranteed rights when the police have either no interest in prosecuting or are willing to forego successful prosecution in the interest of pursuing other goals.

In a fifth line of argument it is charged that the rule fails to discriminate degrees of misconduct by police officers and degrees of harm done to victims of such conduct; regarding punishments, no rational distinctions are made between minor offenses and serious crimes or between honest mistakes and deliberate, flagrant violations.

A sixth argument is that the rule discourages internal rule-making and inhibits disciplining of errant police officers because there is fear that the very fact of punishments' being administered because of rule violations can itself be used as evidence to bolster defendants' cases for suppressing evidence obtained by illegal methods.

In a seventh line of argument it is submitted that the exclusionary rule adds to the confusion about Fourth Amendment standards for

reasonable searches and seizures. Trial court judges often tortuously construe the definitions of the Fourth Amendment so they can find that searches and seizures were reasonable and avoid the harsh requirement of excluding evidence. This gives rise to minute and often bizarre gradations in legal and illegal conduct, eliminating incentives to improve police procedures: incentives that could be provided by pointing out errors and penalizing officers.

The Forum's Alternative to the Exclusionary Rule

If an alternative to the exclusionary rule is to be acceptable, it must meet two objectives. First, it must operate as a deterrent to police misbehavior by providing a clear and understandable guide to proper conduct under the Constitution and by further providing incentive to take immediate disciplinary actions in response to violations. Second, it must remove those obstacles created by the exclusionary rule, which obstacles now prevent the guilty from being convicted, so that evidence of guilt can be used in trials.

Though deterrence of unconstitutional police conduct is the main rationale for the exclusionary rule, the effectiveness of the rule, as it currently operates, in achieving the goal of deterrence is in serious question. The apparent lack of deterrence results, in plain terms, from a lack of communication: the courts, in their rulings on motions to suppress, fail to communicate to police

departments the specific requirements of the Fourth Amendment, and the police fail to educate the courts to the realities of law enforcement practices. Much of this owes to the fact that the exclusionary rule sanction is directed against individual officers.

Effective communication between the courts and the police is vital to making most productive our efforts to preserve constitutional rights. Abolition of the rule, a good faith exception to it, will not solve the problem of poor communication. A process must be devised to ensure that police awareness of constitutional restrictions and of the necessity of operating within those restrictions is increased. We believe that directing the judicial sanction of exclusion away from individual police officers to police administrators will accomplish that objective.

As law enforcement executives, we know best how to deter our officers from improper conduct. In areas of officer misconduct other than constitutional violations--one such area being the unauthorized use of deadly force--experience tells us that improper behavior can be curbed by putting to use three tools in combination: rule-making, training, and discipline. For example: in his study of shootings by officers from the New York City Police Department, Professor James Fyfe found that significant reductions in the amount of police use of deadly force were associated with the combined implementation of clear rules which guide officers in the use of force and of procedures to strictly enforce the rules. [See, Fyfe, Administrative Interventions on Police

Shooting Discretion: An Empirical Examination, 7 Journal of Criminal Justice, 309 (1979).] Currently, however, some police administrators fail to develop precise rules regarding Fourth Amendment procedures and fail to discipline officers for constitutional violations because they fear that such actions will be used against them in suppression hearings: the exclusionary rule as it is currently applied creates for police administrators a disincentive to accept responsibility for deterring constitutional violations.

What is needed is a process that eliminates disincentive and, simultaneously, provides to police administrators incentive to accept responsibility for deterring misconduct regarding Fourth Amendment procedures.

The process by which we propose to meet these needs, especially the need to provide incentive, is one in which application of the exclusionary rule would be dependent upon the performance of police departments themselves. The concept is that the exclusionary rule would not be applied if the police department in question had taken seriously its responsibility to adhere to Fourth Amendment procedures. Departments could demonstrate proof of such good faith by meeting the following three requirements:

1. Publishing departmental rules and regulations that guide police on proper constitutional procedures;
2. Instituting effective programs to train officers according to these rules and regulations; and

3. Maintaining a history of disciplinary actions taken against officers, it having been demonstrated that the officers had committed violations of departmental rules.

The procedure by which this alternative would be implemented

is as follows:

1. The judge would rule on whether or not the officer had committed a constitutional violation.
2. If the judge rules, yes, the prosecutor could then undertake to have the evidence admitted according the following procedure: the prosecutor would ask the judge to review the police department's regulations, training programs and disciplinary history.
3. The prosecutor would have the burden of proving that the police met the three requirements (mentioned above) in a manner sufficient to ensure--
 - that the failure to provide a rule was reasonable, and that regulations specifying, and training in, the proper methods for proceeding in the particular circumstances under review would be immediately forthcoming; or
 - that, if the department already had a rule covering the circumstance, the officer would be disciplined for violating the rule unless the officer was acting reasonably and in good faith; or
 - that, if the departmental rule was found to be unconstitutional, it was promulgated in good faith, appeared reasonable before it was applied to the particular facts under review, and would be reissued in proper form.

Should the prosecutor fail in an attempt to prove that the department met the above conditions, the judge would exclude the

evidence. [See, Kaplan, The Limits of the Exclusionary Rule, 26 ^{ford} Standard Law Review, 1027, 1050-52 (1974) for a similar proposal.]

We believe that rule-making, training and discipline constitute the most appropriate means for deterring Fourth Amendment violations, and that the emphasis we place on such means is well founded. To justify to you our reliance, I would like to spend a few moments discussing the effectiveness of each of these three components.

Rules and Regulations

The exclusionary rule, insofar as it was justified as a deterrent to police misconduct, was designed to ensure police conformance with constitutional requirements. In some agencies, however, the officer rarely learns of or understands the reasons for the exclusion of evidence, so the sanction fails in such instances to fulfill its objective. It can even be said that the rule has inhibited proffering of effective guidance to police officers: judicial reliance on and belief in the efficacy of the rule have led to the development of intricate, little understood rules of constitutional procedure and, regarding responsibility for officer direction, have diverted attention from police management to the judiciary, though the judiciary does not have a clear understanding of the daily operations of police agencies.

Administrative rule-making, from which would flow policies, procedures, and rules and regulations for structuring and controlling police conduct, has been advocated by numerous prestigious organizations and prominent spokespersons, some of which include the following: the American Bar Association [ABA Project on Standards for Criminal Justice, Standards Relating to the Urban Police Function §6.2 (1976)]; The National Advisory Commission on Criminal Justice Standards and Goals [Report of the Task Force on Police, §1.3, Commentary (1973)]; The National Advisory Commission on Civil Disorders [Report, 310-11, 314 (1968)]; Chief Justice Warren Burger [Who Will Watch the Watchmen, 14 American University Law Review 1 (1976)]; Kenneth Culp Davis [Discretionary Justice-A Preliminary Inquiry (1971)]; Frank Remington, Herman Goldstein [Policing In a Free Society (1977)]; and Anthony Amsterdam [Perspectives on the Fourth Amendment, 58 Minnesota Law Review 349 (1974)]. In addition, the courts have frequently suggested the need for such rules. See, e.g., Delaware v. Prouse, 440 U.S. 648 (1979); Brown v. Texas, 443 U.S. 47 (1979); Dunaway v. New York, 442 U.S. 200 (1979); and South Dakota v. Opperman, 428 U.S. 364 (1976). Some police departments have attempted to develop and implement such rules, among which departments are the following: Boston, Massachusetts; Madison, Wisconsin; and Washington, D.C. The rules provide clear, affirmative guidance to officers as to how they may proceed in a wide variety of complex situations; such rules contrast court decisions that restrict discussions to what an officer cannot do and are rendered in a manner not usually understood by police

officers. These rules address such procedures as execution of search warrants, searches incident to arrest, motor vehicle searches, stop and frisk, and eyewitness identification.

The incorporation of administrative rule-making into our alternative procedure provides several advantages over the exclusionary rule, given the rule's current application. Courts would first focus on the procedures required by the rules and, second, on the past conduct of individual officers. This would redirect judicially-imposed responsibility for constitutional violations from officers to police administrators. Police officers, as with employees of any organization, are more likely to adhere to rules established by their agencies than to rules imposed from without by the courts. Developing clear, precise directives that are free of the legal terminology contained in many court opinions and that are written in language more easily understood by police officers could make the rules easier to understand and more likely to be followed.

Administrative rule-making would exert a broader influence on police operations than the exclusionary rule; its use within constitutional restraints would help in an array of law enforcement operations because police expertise would be utilized systematically and continuously. Judges, who lack law enforcement expertise, promulgate rules through an adversary process whose sole focus is on particular facts unique to individual cases. By contrast, police administrators, who understand the realities of police behavior, are able to fully grasp

the implications of promulgated rules for all law enforcement needs. In developing rules, administrators would be able to utilize procedures best suited to the realities of law enforcement, while remaining within the confines of constitutional requirements. In addition, because many police activities are currently unregulated by the courts, i.e., activities not directed toward gathering evidence or leading toward prosecution, rule-making can lead to full definitions of rights of criminal suspects and other persons coming in contact with police. Finally, the visibility of the rule-making process would compel police administrators to make conscious assessments of law enforcement practices insofar as the practices relate to constitutional and other legal requirements and would make administrators more accountable for decisions that should be based on such assessments.

The development of administrative rules regarding police procedure would have tremendous impact in helping to control police misconduct and in preserving constitutional values. Departmental rules governing activities of officers would be applauded by street officers; the rules would free officers from the vague and clouded language of court opinions; officers could look to police guidelines that set specific bounds of conduct. The courts could find either that officers were in violation of their departments' procedures or, in some instances, that the procedures at issue were unconstitutional, thereafter requesting that departments revise such procedures so that they meet constitutional requirements.

Police Training

Development of extensive rules guiding constitutional behavior will have little value if officers are not apprised of them. Publication of the rules, though an important first step in communication, is not sufficient. Officers must be taught how, and the circumstances under which, they may invoke police procedures. Training programs should be devised in such a manner that officers acquire not only the substantive information contained in departmental rules but also insight into ways in which they may, within constitutional limits, proceed with their tasks. The need for training is not limited only to police recruits. Continual revision of regulations, reflecting refinements in constitutional requirements, will necessitate that police officials develop in-service programs to re-train their officers in accordance with changes that are made. Finally, remedial training programs should be designed to reinforce proper procedures for those officers who have violated rules in the past.

Strict Police Discipline

Deterring unconstitutional violations requires that officers be made aware that illegal behavior will not be tolerated; to make this known, an effective system of discipline must be instituted. Though precise rules and regulations are essential to defining kinds of behavior that will be subject to discipline, rules alone are insufficient. If rules are not properly enforced, their objective to conform

police behavior to the provisions of the Constitution will not be achieved. A comprehensive system of internal police discipline, administered fairly and effectively, will promote observance of the rules.

Regarding deterrence, punishing officers for improper conduct has several advantages over the current exclusionary rule sanction. First, because of the relative immediacy and personal nature of disciplinary actions, officers would generally be aware that their conduct was in violation of constitutional requirements; given how the exclusionary rule is applied today (and depending on the agency), officers might not learn of or understand a court's rationale for excluding evidence; in any event, they would not be affected personally. Second, the publication of clearly defined rules, of penalties for violating them, and of the ramification of the disciplinary process would make it clear to the entire police force, as well as to the community, that certain behavior will not be tolerated. Third, police officer aversion to disciplinary action would cause officers to conduct themselves according to proper procedures. Fourth, a system of discipline could introduce the concept of gradations of improper behavior. The exclusionary rule operates uniformly and imposes an inflexible penalty for all violations, minor or major. An effective disciplinary system could apply a variety of penalties tailored according to the seriousness of misconduct. Finally, sanctions that result from enforcement of rules

and regulations could be applied with much greater frequency than the exclusionary rule sanction; only a small percentage of investigations, searches, arrests and interrogations now reach the trial stage.

**Why the Alternative Process Proposed by the Forum
Is the Most Effective Method to Deter
Fourth Amendment Violations**

The alternative the Forum proposes is a complete package that must be viewed as a whole: the components are interweaved; each one complements the others; implementation of one component alone will provide neither an adequate substitute for the exclusionary rule nor relief from the problems currently surrounding the rule's use.

The key to the Forum's alternative is placing with police administrators responsibility for ensuring police officer compliance with constitutional requirements. Internal regulation is the most effective means by which police misconduct can be deterred. Police managers, as opposed to persons outside the agency, have greater understanding of police officer behavior and of the culture of the law enforcement community and are, therefore, more effective in causing officers to understand and comply with constitutional procedures.

If police departments realize that their efforts are to be rewarded by the admission during trials of evidence that might previously have been excluded, they will be strongly motivated to formulate rules and to institute training and discipline. Departments that

develop rules and regulations in compliance with the Constitution will not be restrained by the straitjacket of suppression motions. An objective test for determining whether or not departments have developed internal regulatory mechanisms to deter police violations will be applied by the courts. Judges will simply look to departments' good faith efforts to establish effective rules and to institute training and disciplinary systems, allowing evidence into courtrooms if departments pass the objective test. In effect, the court will be turning over to police departments the responsibility for disciplining police officer misconduct, while holding departments responsible for their policies on constitutional rights.

The procedure for determining whether or not the exclusionary rule would be applied in an individual case involves the following steps:

1. If a department has a rule governing the practice under court scrutiny, which rule is found to be constitutional, and if an officer complied with the rule, the evidence obtained as a result of the procedure would be admitted in the case.
2. If an officer fails to comply with a department's constitutional rule, and if the department has a history of disciplining its officers for violations, the evidence would likewise be admitted. Under such circumstances, the officer would be disciplined directly by the department rather than indirectly by the court.
3. If a rule is found to be unconstitutional, the court would look at whether or not the rule was promulgated in good faith and in the reasonable belief that it complied with constitutional requirements. Furthermore, if a department has a history of training and

disciplining its officers for violations, that department would merely be required to re-promulgate its rule according to proper procedures, deterring future violations while providing the benefit of use of the evidence in the immediate trial. If a department failed to meet these tests, the evidence would be excluded from the trial.

To provide an example of how this process would operate in an actual case, I will use the facts of the case United States v. Adams, 621 F.2d 41 (1st Cir, 1980). In that case, FBI agents had information regarding the possibility that an escaped murderer was living in the house of a former cellmate. This information was corroborated on a Wednesday by a social worker who had visited the residence. On Thursday at 8:30 a.m. the agents again questioned the social worker to see ~~if the escaped convict~~ was still there and found out she was. At 9:50 a.m., seven FBI agents went to the house and, after searching the premises, arrested the fugitive without having obtained either an arrest or a search warrant.

In the trial of the former cellmate for harboring a fugitive, the court excluded the evidence that the fugitive was there. The court found that there were no exigent circumstances to justify a warrantless arrest or search, stating there was ample time to obtain a warrant.

As in the case of an officer's entry into the home of a suspect to make an arrest, the court found that, absent exigent circumstances or without consent, the Fourth Amendment requires that a

police officer must obtain a search warrant before entering the home of a third party to execute an arrest warrant. Thus, under the exclusionary rule as it currently operates, the evidence was excluded from the trial because of the FBI agents' failure to abide by the Fourth Amendment requirements.

Assuming for the moment that the Forum's proposed process were in place, the evidence in this case would not necessarily be excluded. The court would first find out whether or not the FBI had promulgated a rule covering an arrest in the home of a third person, i.e., whether or not a search warrant should first have been obtained. If the court found that the FBI had no rule, the evidence would be excluded. The Bureau, having failed to carry its responsibility for deterring constitutional violations by promulgating a rule, would be responsible for the possible lost prosecution were the evidence to be excluded.

If, however, the court found that the FBI had a rule calling for a search warrant in these circumstances and that the agents violated it, the court would ask the following two questions:

1. Does the FBI conduct a program to train its agents to follow the appropriate procedures for searches and seizures as outlined in its periodically updated rules?
2. In the past, has the FBI disciplined those officers who were found to have violated its search and seizure rules?

If the answers to these questions were, yes, the court would admit the evidence into the trial, stating for the record its reasons for doing so; the FBI would be found to have carried its responsibility for deterring agent misconduct; FBI-imposed discipline would have supplanted the utility of the exclusionary rule as the rule is currently applied.

Advantages of Internal Regulation Required in the Process Proposed by the Forum

In our alternative, the focus of attention shifts from individual officers to police departments. If departments make good faith efforts to define and enforce constitutional behavior, evidence resulting from investigations should not be suppressed. Use of evidence gathered in criminal proceedings will restore the confidence of the police and the public in the criminal justice system. A balance between rights of criminal suspects to be protected from intrusive police behavior and rights of citizens to be protected from criminal acts will be restored.

Once implemented, our comprehensive approach to handling constitutional violations by police officers should prove to be the most appropriate substitute for the exclusionary rule. Placing responsibility for constitutional violations on police administrators is the most logical method for deterring police misbehavior: rules and regulations will provide effective guidance to officers, while strict internal

disciplinary procedures will ensure that discipline is more frequently applied than is now possible under the exclusionary rule. With clear departmental rules there will be less question as to when officers are in the wrong so that administrators will feel more comfortable in applying discipline. Regarding punishment, our system will allow for distinguishing gradations of violations. The development of explicit, comprehensive rules and regulations by police departments will provide a way of clearly spelling out the meaning of constitutional requirements, taking into account the realities of law enforcement practices. The introduction during trials of evidence that might previously have been excluded will increase chances that criminals will be brought to justice. The focus of the trial will shift back to alleged wrongdoings of defendants, increasing the likelihood of swift and certain punishment for criminal activity. The police and the public's respect for the law and the criminal justice system will increase; and what is most important, citizens will be protected, before the fact, from illegal police conduct in all areas of law enforcement activities--even those areas not involving evidentiary matters--because of the deterrent effect of this approach.

Gradual Replacement of the Exclusionary Rule

Incorporating the three components of rule-making, training and discipline into a single, comprehensive alternative can lead to

eventual replacement of the exclusionary rule, eliminating the problems the rule has engendered. Immediate implementation of our alternative will provide partial relief from the exclusionary rule's disadvantages and, eventually, could completely supplant dependence on the rule as a means of deterring unconstitutional police behavior; use of the exclusionary rule, however, will continue until our alternative has proved itself worthy. Determining when to apply the rule will, nevertheless, become easier; using an objective test for determining departments' good faith efforts will simplify the rule's use. Only after our alternative has been proven to be an effective substitute for the rule will the rule be discontinued. In effect, the exclusionary rule simply will atrophy.

The exclusionary rule is an integral part of the Forum's alternative. The prospect of its elimination is an incentive for police departments to develop effective controls over unconstitutional behavior of officers. Use of the exclusionary rule as an incentive to develop internal regulation of unconstitutional behavior is similar to use of the bail-out provision in the Voting Rights Act extension. Under the bail-out provision, if a jurisdiction remains free from discriminatory violations for ten years, it will no longer be subjected to pre-clearance by the Department of Justice for its changes in election procedures. Similarly, under our proposed procedure, if a police department demonstrates a pattern of good faith efforts to deter

unconstitutional behavior, it will be freed from the constraints of the exclusionary rule.

As experienced law enforcement executives, we firmly believe that internal regulation of law enforcement practices is the best possible approach to deterring unconstitutional violations. We are not, however, unrealistic: our belief must not lead to overconfidence. Though the measure of professionalism in law enforcement has increased remarkably over the years since the Mapp decision, many more improvements must be made. The process of improvement will necessarily be gradual. At first, most police departments could not fully meet changed standards without making extensive changes. Developing rules and regulations for conforming police conduct to constitutional safeguards will be a monumental task. Some departments will have to restructure their disciplinary systems extensively.

Nonetheless, police departments will gradually adopt extensive and comprehensive rules regarding constitutional procedures and will begin to take appropriate disciplinary action against officers who violate these rules. Some departments will initiate these modifications on their own; others will do so under pressure from prosecutors, the media and the public to lift the burden of the exclusionary rule.

Disadvantages of other Proposed Alternatives to the Exclusionary Rule

Though the underlying philosophy of current proposals to modify or abolish the exclusionary rule is that something must be

done about the current operation of the rule, we believe that none of these proposed alternatives will provide an effective solution to the problem. Before commenting on these proposed alternatives, however, one cautionary note should be raised: the ill effects of the rule should not be confused with the restrictions imposed by the Constitution. It is often argued that the rule handcuffs police in enforcing the law. It is not the rule but, rather, the Constitution itself that quite properly creates obstacles for overzealous police officers. The increased judicial scrutiny that followed the rule's introduction has created for some, the illusion that, if the exclusionary rule were abolished, many of the constitutional restrictions imposed on police would also be abolished. This is a gross misconception: abolishing the current rule would not do away with the constitutional provisions prohibiting illegal search and seizure. The fundamental principles of the Constitution must, of course, be preserved. An alternative's only function is to change the remedy used when violations occur, while providing a mechanism that promotes police adherence to constitutional requirements.

Provision of Civil Remedies

The primary goal of this alternative is to deter constitutional violations by providing for use of a civil damage action against

both the police officer and the government. Though well-intentioned, we believe this alternative will fail in practice. Like current civil remedies, we believe such a damage remedy will be mainly illusory. There are several reasons for this. First, few suits, especially in comparison to the number of violations, will likely be brought: bringing and maintaining a civil action is expensive, burdensome, and time consuming. Currently, overcrowding of court dockets delays the hearing of federal court cases by an average of 13 months and the hearing of state court cases by up to seven years. Victims of illegal practices, who are not themselves involved in criminal behavior, would consequently have less incentive to challenge the police than criminal defendants. Bringing suit would consume a vast amount of a plaintiff's time and could lead many to believe it would not be worth the effort. The infrequent bringing of such suits would result in less judicial review of police practices and, what is more, less guidance for police.

Second, often the only witnesses to an event are the plaintiff and the defendant officer; in such instances the issue becomes one of credibility. Because juries tend to be sympathetic toward police officers confronted with liability, awards against the police might be infrequent. Third, for those plaintiffs who do prevail, compensation will likely be pathetically meager. Because the measure of damages will be the extent of physical injury to the plaintiff or to property, the careful officer could avoid all but nominal damages. Fourth, the damage remedy provides little direct incentive for police to develop

internal rules. The deterrent effect would amount to little more than what is already provided by the rule applied today.

Though a new damage remedy might serve better to compensate victims of constitutional violations than current civil remedies, it would not satisfactorily replace the exclusionary rule. Because such civil actions would be infrequently brought, they would not serve to systematically highlight police misconduct. More importantly, the remedy comes after the fact of the violation; it does not provide adequate incentives for establishing means of deterring misconduct before it occurs.

Elimination of "Good Faith" Efforts from the Exclusionary Rule Sanction

The thrust of this alternative is to limit the application of the exclusionary rule to those instances in which it is believed that individual police officers will be deterred by its application. A similar purpose is found in the recommendation of the Attorney General's Task Force on Violent Crime to exclude "good faith" efforts from the rule. The rationale behind this proposed alternative is that, when a police officers make reasonable, good faith efforts to comply with the law but unintentionally fail to do so because of minor technical violations, it is difficult to find any deterrent effect in suppressing the evidence that was wrongfully obtained; under such circumstances, excluding the evidence from trial has little effect on

officers' future behavior; it merely allows defendants to benefit and undermines public confidence in the criminal justice process. This alternative, though sound in theory, will be cumbersome in practice; its effect will likely be to undermine the deterrent purpose behind the rule, possibly leading to an increase in constitutional violations.

This alternative suggests limiting application of the exclusionary rule to those cases in which it is shown that the officer knowingly intended to violate someone's constitutional rights or when the violation was substantial. "Good faith efforts" by the police officer and "honest mistakes" on the part of the officer would not be subject to exclusionary rule application. The essential component of this alternative is that the exclusionary rule would be applied only when the accused police officer has a specific intent to take away a right which has been established either by the express terms of the Constitution or by decisions interpreting them. Thus, when the officers have known or should have known their conduct was in violation of the Constitution, only then would the exclusionary rule be applied.

Determining how to apply the rule will require an extremely involved fact finding process, irrespective of whether the standard operates on intent, substance or good faith. Judges will be given the difficult task of examining the inner thought processes of officers to determine their true intent. Far from reducing the amount of

fact-twisting that is alleged now to take place during suppression motions, this alternative would promote officer dishonesty regarding what were their true motives for acting. Dependence on discerning the subjective intent of officers would lead to departmental toleration of officer ignorance and would inhibit development of procedures to guide officers regarding proper behavior.

In an attempt to provide an objective measure for determining the application of the rule under this alternative, its proponents have suggested an added requirement that the officer's good faith belief be reasonable. We believe that such an objective measure is necessary to ensure law enforcement agencies' attention to constitutional requirements. The difficulty lies in the standards by which this reasonableness requirement is to be measured.

Some who advocate this good faith modification have stated that, to meet the reasonable requirement, an officer's police department must have promulgated rules and regulations outlining Fourth Amendment procedures, implemented programs to train the officers in those rules and regulations, and maintain a system for disciplining officers who violate their rules. These statements give us only moderate assurance, however; we are not confident that the judiciary will hold that these same standards are part of the reasonableness requirement. What is needed, instead, is explicit reference in the legislation itself that the test to determine whether an officer's good faith belief is reasonable depends upon whether the officer's

department has a program consisting of the three elements: rules, training and discipline. If these three elements are defined in the legislation as the test of reasonableness, then the Forum's objective of placing responsibility for deterring constitutional violations upon police administrators will be met. Without such detail, we fear the nebulous standard of "reasonable" will be subject to ambiguous interpretation by judiciary. The result may lead to use of a subjective standard alone as the test of good faith. In that event, the focus of the exclusionary rule will remain upon the individual officer; the opportunity to increase law enforcement agencies' attention to proper Fourth Amendment procedures will be lost.

None of the alternatives to the exclusionary rule addresses what we believe is the most important consideration in devising a remedy for Fourth Amendment violations: law enforcement executives' assuming the responsibility for their officers' violations. This is the only way to ensure with certainty that constitutional violations are minimized. What is needed is a means of testing the good faith efforts of department administrators; such efforts are susceptible of objective measurement. Basing a test on individual officers' subjective intent in particular cases is not likely to prove productive. The Forum-developed alternative includes the necessary means of testing police administrators' good faith efforts. Our substitute process provides for an objective test by which departmental efforts to eliminate unconstitutional behavior can be gauged. Once departments have passed muster under this objective test, the exclusionary rule will not be applied.

Conclusion

As law enforcement executives who are responsible for the actions of our officers, accountable to the public, and answerable to the law, we believe that our alternative will deter constitutional violations by police officers and enhance the effectiveness of the criminal justice system. Under the process we propose, replacement of the exclusionary rule would come gradually; as the effectiveness of our process was proved, its use would gradually increase. Critics would no longer be able to complain of an artificial rule handcuffing the police in their efforts to fight crime. The key to removing the handcuffs would be placed in the hands of the police themselves. The task of establishing this alternative means of controlling police misconduct would be a time-consuming and arduous one. Judicial hearings on departmental rules, training and discipline systems would be extensive, especially in the beginning. Once the internal control systems were in place in police departments and their effectiveness in deterring unconstitutional behavior by the police was demonstrated, we believe the rewards would prove to have been well worth the effort. The alternative we have devised will best satisfy the primary purposes of the exclusionary rule and most effectively counter problems stemming from the rule's current use. These effects will promote the ends of justice and help to preserve our Constitutional liberties.



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HR 29

Judiciary Referral

April 14, 1983

Senator Vic Fischer
Senate State Affairs Committee
Pouch V
Juneau, Alaska 99811



RE: Senate Bill 49

Dear Senator Fischer,

Pursuant to your request, below is a list of cases where the Alaska Supreme Court or the Alaska Court of Appeals has invoked the Exclusionary Rule in order to suppress evidence which led to either the conviction of the defendant being reversed or evidence being considered inadmissible for purposes of trial. Time restraints prevent me from giving you a complete list of every case in Alaska where the Exclusionary Rule resulted in suppression of evidence. However, these cases are glaring enough to point up the need for revision of the "court adopted" rule of excluding evidence to prevent law enforcement "abuse."

Anderson v. State, 555 P.2d 251 (Alaska 1976)

Police officers entered defendant's apartment and conducted a search pursuant to a search warrant authorizing search for marijuana and related paraphernalia. While conducting a search, officers discovered on shelves in defendant's apartment, photographic negatives which had been mounted as slides, which depicted nude, male children. In order to discover what was on the slides, the officers had to hold them to the light. It was because of this latter act, "holding to the light," the Alaska Supreme Court reversed defendant's conviction for lewd and lascivious acts toward a child and suppressed the evidence. The Court held defendant had an expectation of privacy and the photos, since they had to be held to the light in order to view what was depicted on them, were not in plain view.

Zehrunge v. State, 569 P.2d 189 (Alaska 1977)

Defendant was stopped by a State Trooper for excessive smoke. During the course of the stop, the trooper discovered two misdemeanor warrants existed for defendant. The trooper arrested the defendant

and transported him to the city jail. The booking procedure at the time, required complete processing of an arrestee, including inventory of his property, even if the arrestee is able to post bail at the time he arrives at jail. With Zehrunge, jail personnel discovered two credit cards in his wallet during inventory search which did not belong to him. This evidence led to discovery that the credit cards were taken during a rape and robbery, which led to defendant's indictment and conviction. The Supreme Court reversed the conviction, holding there was an illegal search and seizure. The Court held that defendant should have been allowed to post bail rather than go through the regular booking procedure. Without evidence of the credit cards, the State was unable to prosecute Zehrunge for the rape charge. One final note on Mr. Zehrunge, he had been convicted of rape in 1972 and 1975. He subsequently was convicted of assault and battery and possession of narcotic drugs after he was released and prosecution dropped in the rape charge.

State v. Glass, 583 P.2d 872 (Alaska 1978)

This case involves the warrantless electronic surveillance of a narcotics transaction. The conversation of the transaction was electronically recorded by police officers stationed outside the home. The Court suppressed the conversation, which was in effect a new rule of law. It also applied a stricter construction of the Constitution of the United States Supreme Court. The Court held that a search warrant must be obtained before electronic monitoring of conversations should be allowed. Applying the Exclusionary Rule, all evidence of the tape recording was inadmissible in prosecution for possession and sale of a narcotic drug.

Anchorage v. Geber, et al., 592 P.2d 1187 (Alaska 1979)

Defendant, along with a number of other individuals, had been arrested for DWI and refused a breathalyzer. Defendant was transported to a local hospital where he submitted to a blood test, against his will. The Alaska Supreme Court, declining to follow the U. S. Supreme Court in Schmeyer v. California and reversing itself in Layland v. State, 535 P.2d 1043 (Alaska 1975); held that once an individual refuses the breathalyzer, no additional chemical tests can be conducted. In their interpretation of A.S. 28.35.032(a) the Court held that the police were precluded from obtaining evidence even after obtaining a search warrant. Evidence of defendant's blood alcohol test was suppressed.

Lauderdale v. State, 548 P.2d 376 (Alaska 1976)

Defendant, along with many others, was arrested for driving while intoxicated. As part of their standard operating procedure, police officers, after administering a breathalyzer test, destroyed the test ampule. The Court held that there was plausible evidence that could

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be derived from later testing of test ampule which could bear on the validity of the breathalyzer. The Court upheld the lower court's suppression of the breathalyzer. (Note: Testimony by experts from around the country on the Borkenstein breathalyzer, in proceedings in District Court on unrelated matters, have clearly shown that later testing of the test ampule is worthless.)

Anchorage v. Serrano, 649 P.2d 256 (Alaska Appellate 1982)

Defendant, along with many others, was arrested for driving while intoxicated. Law enforcement officers following procedures established by the Legislature and the Alaska Administrative Code, conducted breathalyzer tests in accordance with those procedures. The police officers, however, did not save a separate sample of defendant's breath for later independent testing. The Alaska Court of Appeals upheld the lower court's suppression of the breathalyzer, based on a finding that it was a violation of defendant's due process of rights of cross examination by not saving a separate sample of breath. Basically, the Court found that since it was inexpensive and reasonable to save a separate sample of breath, and it could easily verify the results of the breathalyzer, law enforcement officers should have done so.

Copelin v. State, Opinion No. 2617, February 18, 1983

The Alaska Court of Appeals in Copelin v. State, 635 P.2d 492 interpreting A.S. 12.25.150(b) and based on a prior Alaska Supreme Court decision held that an individual was not entitled to an attorney prior to taking a breathalyzer test or being placed on video to perform field sobriety tests. The date of the decision was 1981. Almost two years later, the Alaska Supreme Court reversed that decision, holding that A.S. 12.25.150(b) did require law enforcement to provide a defendant with access to an attorney, if defendant asks for one, prior to taking a breathalyzer or field sobriety tests on video. For two years, law enforcement officers, following the dictates of the Court of Appeals and the Alaska Supreme Court, denied drunk drivers the right to contact an attorney prior to taking the breathalyzer. If the decision is applied retroactively, which the Supreme Court did not reach, evidence in hundreds of drunk driving cases may be suppressed as a result of this decision. It should be noted that the application of the Exclusionary Rule resulted in a split decision in the Alaska Supreme Court itself.

Note: The last four cases led to evidence of the breathalyzer being suppressed in approximately 1,000 drunk driving cases. In many of these cases, without evidence of the breathalyzer, charges were dismissed or reduced.

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Taylor v. State, 642 P.2d 1378 (Alaska Appellate 1982)

In January, 1979, defendant was wanted in connection with an armed robbery that had taken place the day before. Police thought they could locate defendant at a particular address. The reason they thought he might be there is that a month earlier defendant and another person were arrested for armed robbery; the other person had been arrested at that address, and papers and identification of the defendant had been found at that residence. One officer went to obtain an arrest warrant for defendant while the other officers went to the address.

When officers arrived there, another man answered the door. The description of this man did not match the description of the defendant (whom one of the officers knew) or the other suspect. Officers identified themselves, and asked the man for identification. He said he would have to go get it, and one of the officers followed him to a back bedroom ("protected search"). On the way to the bedroom, the officer saw defendant trying to hide under a bed. Defendant was arrested, and two important pieces of evidence which tied him to the robbery were found in the bedroom. Officers later obtained a search warrant and found even more evidence linking defendant to the robbery.

Holdings: (1) Testimony made it unclear whether the man who answered the door actually consented to let the officers in, or whether the statement that they "had a warrant for Ernie" influenced the man to allow them in. Since the burden of proof was on the State, and the evidence was 50-50, the State did not meet its burden. Unless, the entry into the home was illegal.

(2) The "protective search" conducted into the home and into the back bedroom, for the protection of the officers, cannot be justified without "compelling circumstances." Additionally, the Court found that the facts known to the police were not sufficient to justify the police intrusion into the home. (3) In order for the police to enter a home to make an arrest, the police need: (a) probable cause to believe the person committed a crime (i.e., an arrest warrant, if possible), and (b) probable cause to believe that the suspect is at that particular residence. (4) Since the Court held the arrest was the result of the illegal entry into the home and the illegal act of following the other man to the bedroom, any evidence obtained by police as a result of the arrest should be suppressed.

Conviction reversed; searches and entry held illegal.

For your information, there is an excellent law review article on the good faith exception to the Exclusionary Rule. The article is dated in 1982 and can be found in 73 Journal of Criminal Law and Criminology 916.

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Again, these are only a few cases in which the appellate courts have invoked the Exclusionary Rule to suppress evidence. The impact those decisions have on the trial courts can be devastating. For example, in Copelin and Serrano hundreds of suppression motions have been filed.

As you may be aware, the general provisions of Senate Bill 49 are supported by the Chief Justice of the U. S. Supreme Court. The rationale for excluding improperly obtained evidence can be found in U. S. vs. Calandra, 414 U.S. 338 (1974), where six members of the U. S. Supreme Court agreed that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ."

It would seem to follow that a law enforcement officer could not be deterred from making a good faith inadvertent error in the field by this remedy.

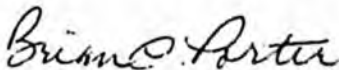
It should be noted that Senate Bill 49 does not expand police discretion and would not reduce the training and emphasis placed on the application of reasonable searches. It would provide the Courts with the ability to allow relevant evidence to be presented at trial if in its judgment any alleged error made by a police officer while obtaining the evidence was only technical in nature and made in good faith.

At least some of the above cited cases, in my opinion, would not have resulted in the dismissal were Senate Bill 49 in effect. It would appear to me that justice would have been better served.

Needless to say, we support the passage of Senate Bill 49 and urge your support.

Thank you for the opportunity of providing our thoughts.

Sincerely,



Brian S. Porter
Chief of Police

BSP:d1

cc: Anchorage Delegation

H J R

3 4

STATE OF ALASKA
FISCAL NOTE

Revision Date _____, 1983

I. REQUEST

Bill/Resolution No.: HJR 34
 Title: "...election of prosecuting attorneys."
 Sponsor: Repr. Liska
 Requestor: House Judiciary Committee

II. FISCAL DETAIL

Agency Affected: Prosecuting Attorneys (4
 Program Category Affected: Admin. of Just
 BRU, Program of Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME			*	*	*	*
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

Not specified by sponsor.

* Actual costs cannot be determined at this time. Please see the analysis.

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues Director Phone: 465-3672
 Division: Administrative Services Division Date: April 29, 1983

Approved by Commissioner: Norman C. Gorsuch, Attorney General Date: April 29, 1983
 Department: Department of Law

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

HJR 34
Fiscal Note
Analysis

This resolution would place before the voters changes to the state's constitution that would establish an elected office of prosecuting attorney in each of the state's four judicial districts. The proposal would establish each of the four offices as departments and remove the offices from both the organizational control and the supervision of the governor. In order to insure that the governor's oversight that normally controls and supervises executive branch departments does not interfere with the actions of the office of each prosecuting attorney, it will probably be necessary for these offices to duplicate many of the executive branch administrative controls and services administered by the Department of Administration and the Office of the Governor. Otherwise, the approval processes normally required of executive branch agencies, such as: position authorization and classification; recruiting; purchasing; and budgeting, would continue to shape and direct the activities of the prosecuting attorney offices.

Consequently, many of the administrative procedures required of government agencies to comply with the state's statutes that govern public finance, personnel, budgeting and contracting would have to be handled in-house at each of the four prosecuting attorney offices. Obviously, a substantial price would have to be paid to achieve the degree of freedom from the governor's supervision called for by the proposal. Under the provisions of the proposal, the first election of prosecuting attorneys would occur at the first general election held after the office was established under the constitution, or 1986 at the earliest. Because of this lengthy time frame it is nearly impossible to accurately forecast the costs that will eventually be incurred. It can be anticipated, however, that establishing four separate and virtually autonomous departments will result in at least three to four times the expense that the Department of Law currently pays for its administrative services support for the entire department. Those current costs in FY 83 dollars, after taking out special programs that would not be used by prosecuting attorneys, amount to \$345,900. Before accounting for any inflation that might occur in the next three years, the costs for providing necessary administrative services support will probably be between \$1,000,000 and \$1,400,000. These funds would be required to pay for the approximately 18 to 25 personnel, accounting, payroll, supply, purchasing and budgeting positions that would, in total, be needed to perform the administrative tasks that it would take to operate all four of the independent departments.

Providing for elected prosecuting attorneys will also cause a change in the existing balance of power and that change,

which is bound to encourage single-issue politics, will result in new and wholly independent constituencies with their own demands for a share of the state's resources. Although it is unquantifiable at this time, the long term effects of this change on the state's basic political structure will most certainly have a dramatic fiscal impact.

Lastly, the proposal may be in direct conflict with the letter and the spirit of Article III, Section 22 of the state's constitution. This section reads, in part, as follows:
"Executive Branch. All executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Establishing four prosecuting departments, in addition to the one that already exists, for the identical purpose of prosecuting violations of state law seems to lead to the very sort of bureaucratic growth, overlapping responsibilities, and governmental inefficiency that the constitutional framers intended to prevent.



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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Juneau, Alaska 99811
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*State of Alaska
Department of Natural Resources
Anchorage, Alaska
1/28/82*

January 28, 1982

MEMORANDUM

TO: Representative Barnes

FROM: Leslie Longenbaugh *W*
Research Staff

RE: Relationship of Elected and Appointed Attorneys
General in Other States to Prosecuting Attorneys
Research Request Number 82-9

Bill Cook of your staff asked that we report on the relationship between state attorneys general and state prosecuting attorneys. Specifically, Mr. Cook asked that we survey other states in regard to their election or appointment of attorneys general and prosecutors, and the degree to which prosecutors are independent of the attorneys general.

In most states, both the attorney general and the prosecuting attorneys are elected. Most attorneys general head their states' justice or law departments but have few or no statutory responsibilities concerning the prosecution of either criminal or civil cases. When they do have prosecutorial responsibilities, attorneys general in most states prosecute only appealed criminal cases. The attorney general is charged by statute (AS 44.23.020) with, among other duties, prosecuting violations of State law. The attorney general appoints regional district attorneys to fulfill these prosecutorial duties, and he may remove these appointees from office.

Ruth Blau of the National Association of Attorneys General¹ informed us that most attorneys general are elected; Alaska is among the six states that appoint, rather than elect, their attorneys general. In Maine, the legislature appoints the attorney general; in New Hampshire, the governor appoints with the aid of the Executive Council, made up of county representatives who are not in the state legislature; in Tennessee, the state Supreme Court makes the appointment; and in Wyoming and New Jersey the governor appoints the attorney general.

²Ruth Blau, Publications Director, National Association of Attorneys General, Washington, D.C.; telephone: (202) 624-5454.

According to Ms. Blau, states that elect their attorneys general usually require that the candidates be lawyers and United States citizens; some require two to ten years' residency in their states, and some two-thirds of all states require that attorneys general be of a minimum age. In thirty-seven states, candidates for attorney general must have passed the state bar examination.

The method used in New Jersey in selecting attorneys general and district attorneys is closest to that used in Alaska. As in this state, both attorneys general and district attorneys are appointed rather than elected; the major difference in New Jersey is that the district attorneys are appointed by the governor, rather than by the attorney general, and are subject to approval by the state senate.

Voters in Pennsylvania recently amended their state constitution to allow election, rather than appointment, of their attorneys general. After the constitutional change, a committee of interested attorneys, legislators and other citizens was appointed to decide how best to make the change smoothly. The elected attorney general may serve two consecutive terms of four years each; the election is held in the middle of the gubernatorial term.² The constitutional change in Pennsylvania broadened the attorney general's prosecutorial powers. Also, Ray Zimmerman, the state's first elected attorney general, was a district attorney before his election as attorney general. The new attorney general has made a commitment to cooperating with locally-elected district attorneys in investigations and prosecutions. Like his counterparts in several other states, Mr. Zimmerman has established a special office that helps local prosecutors with their investigations.

In the eastern states of Delaware and Rhode Island, attorneys general are solely responsible for prosecution of all criminal and civil cases, just as is the Alaska attorney general. The National Association of Attorneys General presumes that the two states do not have separate local district attorneys because the states are so small.

The attorney general in Ohio has no prosecutorial duties at all, even in instances of appealed criminal convictions. The attorney general in Ohio thus has little contact with the district attorneys, who are elected locally.

²Robert Gentzel, Assistant Press Secretary, Office of the Attorney General, Harrisburg, Pennsylvania; telephone: (717) 787-3391.

Representative Barnes
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Page 3

We also spoke with Tom Hinton of the National District Attorneys' Association³, who informed us that prosecuting attorneys in most states are elected from within the county, election district, or other area they serve. According to Mr. Hinton, only in Alaska, Connecticut, and New Jersey are district attorneys appointed rather than elected.

Several states make a distinction in jurisdiction between criminal and civil prosecutions. In Texas, for example, the elected "district attorneys" prosecute only criminal cases, while the also elected "county attorneys" may handle both civil and criminal prosecutions.

Some of the minimum qualifications for elected prosecuting attorneys vary widely from one state to the next, although almost all states require that candidates be trained attorneys.

Mr. Hinton stated his belief that a change to an elected attorney general could compromise the integrity of the district attorneys in Alaska, if the attorney general remained charged with their appointment. An example of such a conflict is the possibility that district attorneys' prosecutions sometimes would become entangled with the attorney general's desire to win reelection. He suggested the following methods of selection, both of which he feels would maintain the prosecutors' integrity:

- gubernatorial appointment with approval by one or both houses of the state legislature, a method which would maintain control of prosecutors at the state level; and
- popular election within the regions they serve, a method which would offer the local citizenry more direct control over its prosecuting attorneys.

Mr. Hinton stated his conviction that California has the "most efficient" criminal justice system. The popularly-elected attorney general heads the state department of justice, which performs criminal justice planning and renders legal advice to state government agencies and officials. The attorney general usually has only incidental relations with the locally-elected county district attorneys, who prosecute all civil and criminal cases during their four-year terms of office. The California attorney general and district attorneys may be impeached and removed from office by the state legislature.

³Tom Hinton, National District Attorneys' Association, Virginia; telephone: (703) 549-9222.

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January 28, 1982
Page 4

Mr. Hinton has sent us a copy of his organization's 1979 review of all states' methods of selecting district attorneys. When these materials arrive we will forward them to your office.

Please call on us if we can be of further assistance.

LL:dlp

national prosecution standards



First Edition -- 1977

Published by: NATIONAL DISTRICT ATTORNEYS ASSOCIATION
211 East Chicago Avenue
Suite 1515
Chicago, Illinois 60611

Library of Congress Catalog Card No. 76-55501

This project was supported by Grant Number 74DF-99-0021, and the printing of this document was supported by Grant Number 76DF-99-0051, awarded by the Law Enforcement Assistance Administration, U. S. Department of Justice, under the *Omnibus Crime Control and Safe Streets Act* of 1968, as amended. Even though this project was furnished financial support for the activity described in this publication, it does not necessarily reflect the views or policies of the U. S. Department of Justice or LEAA; nor does it necessarily indicate their concurrence in the statements or conclusions contained herein. These Standards and accompanying Commentaries have been passed and approved by the Board of Directors, National District Attorneys Association.

foreword

The prosecutor is the chief law enforcement official in his jurisdiction, and therefore occupies a critical position in the Criminal Justice System. His office combines legal, administrative, and judicial functions which require experience, professional personnel, and a rational and efficient organizational structure.

The NDAA standards for prosecutors cannot provide adequate salaries for prosecutors, needed manpower for understaffed offices, or new laws. However, they can provide the best tools to achieve those needs; plus the format for an efficient and effective administrative structure, standards for operations, and goals for both long and short range planning objectives.

It is felt that the Criminal Justice System should be able to swiftly determine the guilt or innocence of an accused individual, provide sentences with potential rehabilitation and deterrence from future crime, and protect the rights of society and the offender. The NDAA, through its members, developed standards and goals to achieve those ends. In doing so, the standards will reflect the overall priorities of attaining speed and efficiency in the pre-trial and trial proceedings and prompt finality in appellate proceedings; upgrading the basic and ancillary functions of prosecution, and insuring the high quality of justice reflective of the values of the citizenry of this country.

By giving the nation's prosecutors the tools to increase their efficiency, it is expected that the effectiveness of the prosecutorial process will be enhanced. Furthermore, it is felt that by attaining speed and efficiency in the pre-trial and trial proceedings, rendering prompt finality in appellate proceedings, upgrading the function of prosecution itself, and insuring a high quality of justice, the system will be able to demonstrate an increase in crime deterrence, quicker and more positive alternatives to incarceration and rehabilitation, lower recidivism rates, better screening/diversion/intake of incoming cases, and a general upgrading of the total judicial system.

The term "standards and goals" has become cliché in the Criminal Justice System. It is by no means a new concept, nor is it a revolutionary idea. Standards, as normally defined, are entities established by authority, common usage, or public consent as an example or model; as a reference point for the comparison of value, quantity or quality; as a means of arriving at a determination of what a thing

should or ought to be.

Previous "standards" have been developed. The American Bar Association Project on Standards for Criminal Justice; the National Advisory Commission on Criminal Justice Standards and Goals; and The American Law Institute's Code of Criminal Procedure and Model Penal Code are well known in the criminal justice system. NDAA's Standards complement these works in their effort to establish a high level of efficiency and expedition in the reduction of crime.

The National District Attorneys Association, being the national service organization for all prosecutors throughout the country, did not become involved in the standards and goals efforts because everyone else was working on that concept, but rather because NDAA feels that prosecutors were often ignored and not given adequate consideration for their important position within the "judicial systems" portion of the Criminal Justice System. Instead of covering all areas of the Criminal Justice System, NDAA developed Standards specifically for prosecutorial services and only addressed other areas of the Criminal Justice System if those areas interrelate directly with the prosecutorial function. Throughout the development of the Standards, the concept "standards and goals" was utilized as a vehicle for planning and initiating change where needed.

It is expected that these Standards have the potential of becoming the most far reaching project NDAA has ever undertaken. The Standards at times will ask for sweeping reform and other times for simple changes and mere transpositions. They may not be accomplished for years, or they may be achieved tomorrow. But overall they are something to strive for, goals felt necessary for the efficient and effective operation of the prosecutorial portion of the total judicial system.

The National District Attorneys Association's Standards and Commentaries are not, however, exhaustive of past or present ideology and thought on their respective topics. Nor are they a conclusive review and reflection of the literature available on any given subject. Rather, they are the reactions and collective intelligence of the nation's prosecutors as represented by the individual Task Force members and NDAA Board members, supplemented and supported by research where applicable.

When developing the Standards, the Task Force members were not constrained or coerced by existing law and rules, but had the foresight to look at "what should be, what ought to exist." The task forces did not operate in a vacuum with their prosecutorial experience as their only reference, however, but considered the rationale behind existing laws and rules, and only advocated statutory and rule alteration when current application was inadequate or impractical.

Because of this merging of existing laws and alterations, there will be a broad variation in the extent to which current laws and rules will need to be modified in order to implement these Standards. Also, some states and local jurisdiction have already equaled or surpassed these Standards, both in intent and application. Many have not, however, thus pointing up how the need to alter current laws, rules, and practices will vary from state to state and jurisdiction to jurisdiction.

In all cases, each state and local jurisdiction is encouraged to evaluate, compare, consider, and deliberate existing operations and policies, laws, court and administrative rules, and adjudication practices in relation to these Standards.

The Standards must be viewed as flexible. It is anticipated that some Standards will not be applicable in various

jurisdictions, and it is expected that many Standards will be modified to suit local needs. Individual prosecutors are encouraged to take the opportunity to implement the Standards wherever possible; each office may, however, wish to expand, modify, or alter them in order to make the Standards reflective of community needs and in practical harmony with jurisdictional realities.

It is hoped that the reader of these Standards will thoroughly review the Introduction of this document before perusing the Standards themselves, and that the reader will give the Commentaries their respective review and consideration.

The Task Force Members, who served unselfishly throughout the project have earned the highest regard and appreciation. Equally sincere gratitude is given to the Prosecutor/Evaluators and Independent Evaluator of the program. And, as in all projects, the Staff are accorded the highest praise — without them it would never have been done. Particular thanks goes to Jim Manak, Project Director, Jeff Thurmond, Deputy Project Director and Director of Research, and Will Hornsby, Prosecutor Analyst.

Patrick F. Healy,
Executive Director

chapter 1.

the prosecutor

This chapter is the heart of the prosecutorial service; the prosecutor himself. It deals with the most pressing and common concerns of the position, and seeks to equate a balance of the various alternatives for individuals occupying the position, and the creation and maintenance of the position itself.

Nowhere in the criminal justice system is the power of authority and discretion more balanced or more powerful. No matter how many arrests the police make, how prolific the courts are at gavel pounding and sentencing, or how many rehabilitated criminals corrections personnel process; if the prosecution doesn't act, the system stops. Being quasi-judicial, the prosecutor acts in an executive position executing legislative directives, affects legislative action through his inherent discretion of charging and screening, and functions in a judicial capacity by the very nature of his position.

Taking all of this into account, this set of Standards deals with such critical issues as how the prosecutor attains office, the qualifications required for the position, the responsibilities the prosecutor must be both held account-

able for and function within, what constitutes reasonable compensation for the prosecutorial service performed, and what safeguards and sanctions need to be established and how to apply them to check the balance of prosecutorial power.

Experienced and professional personnel are required to carry out the legal, judicial, and administrative functions of the prosecutor's office. The problem of crime is unlikely to be reduced or solved if prosecutors continue to be underpaid, understaffed, and inefficiently administered. There are several thousand prosecutors in the nation, the majority of whom work in offices having part time positions. Although salary levels have been rising, prosecutors still receive far less than lawyers of similar experience in private practice. This leads to high turnover in the position, inexperienced personnel in office, too few qualified individuals seeking office, too high of a political orientation to the position, chance of abuse of power due to political pressure and/or lack of understanding of the position's responsibility, and poor administration. These Standards were designed to help reduce those impediments.