ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672 3/8
4746 HJUD HJR 26 - HJR 44

tant question of law necessary to be determined by the body making the inquiry. Opinion of the Justices (1892) 67 NH 600, 43 A 1074.

12. —Private rights

This article does not authorize the legislature or the governor and council to require advice from the justices on a question affecting private rights alone on which interested persons are entitled to be heard, and justices will refuse to give advice when such questions are propounded. Opinion of the Justices (1949) 95 NH 557, 66 A2d 76; Opinion of the Justices (1883) 62 NH 704.

The justices will decline, as far as possible in the performance of their advisory duties imposed by this article, to express their views upon questions involving private rights, or to make any answer unless the official power or official duty of the body making the inquiry is clearly involved by the question submitted. Opinion of the Justices (1911) 76 NH 597, 79 A 490.

13. —Questions of law or fact

Opinions of the justices are to be given on questions of law only and not upon questions of fact in any form, and the court in such opinions will not weigh the evidence with any view of settling disputed questions the decision of which depends upon evidence alone. Opinion of the Justices (1864) 45 NH 607.

Generally, this section does not permit the supreme court to advise the legislature as to the meaning and scope of existing statutes. Opinion of the Justices (1959) 102 NH 187, 152 A2d 872.

This provision does not apply to constitutional questions involving existing laws. Opinion of the Justices (1955) 99 NH 524, 113 A2d 542.

14. —Unnecessary answers

The court will not undertake to answer the second of two questions submitted as to the constitutionality of proposed legislation, where the answer to the first will serve the present legislative purpose, and adjournment of the legislature is impending. Opinion of the Justices (1959) 102 NH 240, 154 A2d 184.

15. Effect of opinions

In giving an opinion on a question propounded to them by the legislature the justices do not act as a court, but as the constitutional advisors of either branch of the legislature requiring their opinion, and it is not essential that the question proposed should be such as might come before them in their judicial capacity. Opinion of the Court (1881) 60 NH 585; Opinion of the Justices (1906) 73 NH 625, 63 A 505, 6 Ann. Cas. 689; Opinion of the Justices (1911) 76 NH 597, 79 A 490.

An opinion of the justices on proposed legislation is not binding upon the court in case the proposed legislation should become law and a case should arise requiring its construction. Opinion of the Justices (1852) 25 NH 537.

An opinion of the justices does not amount to a judicial decision. Re School Law Manual (1885) 63 NH 574, 4 A 858; Opinion of the Justices (1911) 76 NH 597, 79 A 490.

16. Dissent

Where the opinion of one or more justices is opposed to the opinion expressed by the majority of the justices on a question submitted to them it is the duty of the minority to express their opinion in the same manner as that of the majority. Opinion of the Justices (1915) 77 NH 611, 93 A 311.

17. Cited

Cited in Wyman v. De Gregory (1957) 101 NH 171, 137 A2d 512; Opinion of the Justices (1958) 101 NH 549, 137 A2d 726.

[Art.] 75. [Justices of Peace Commissioned for Five Years.] In order that the people may not suffer from the long continuance in place of any justice of the peace who shall fail in discharging the important duties of his office with ability and fidelity, all commissions of justice of the peace shall become void at the expiration of five years from their respective dates, and upon the expiration of any commission, the same may if necessary be renewed or another person appointed as shall most conduce to the well being of the state.

DELAWARE CODE ANNOTATED

REVISED 1974

With Provision for Subsequent Pocket Parts

Prepared under the Supervision of
The Delaware Code Revisors
JOSEPH WHITMORE MAYBEE AND DANIEL F. WOLCOTT, JR.
by
The Editorial Staff of the Publishers
Under the Direction of
D. P. HARRIMAN, A. D. KOWALSKY
AND A. E. ESTES

VOLUME 16

1981 Replacement Volume

Including Legislation Enacted Through December 31, 1981 by the 131st General Assembly and annotations taken from Atlantic Reporter 2d through Volume 432 (p. 327)

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1981

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1984 Cumulative Supplement

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Annotated through ... 226. For complete scope of annotations, see ... in supplement to Volume 1.

THE MICHIE COMPANY
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1984

RULE 44.

ADVISORY OPINIONS UPON REQUEST FROM THE GOVERNOR OR FROM THE GENERAL ASSEMBLY

(a) Request for an Opinion. A request from the Governor or from the General Assembly shall be regarded as confidential for a period of 5 days after receipt thereof, or until the request becomes public information, whichever first occurs.

(b) Briefing and Oral Argument. The request shall be docketed with the Clerk of the Court and, after designation of counsel, shall be processed through briefing and argument in the same manner as an appeal or as an original proceeding in the Supreme Court. Correspondence between the Governor, or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, and the Justices about the request shall be included in the docket which is public information.

(c) Delivery and Publication. After the opinions are prepared, they shall be hand-delivered to the Governor or to the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, and shall be regarded as confidential for a period of 5 days thereafter, or until the Governor or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, has released them, whichever first occurs.
(Amended, effective Dec. 15, 1983.)

Commentary. The rule amendment implements recent legislation amending § 141 of title 10 to permit the General Assembly as well as the Governor to request advisory opinions of the Supreme Court.

Effect of amendment. — The 1983 amendment, effective Dec. 15, 1983, added "or from the General Assembly" in the title of the rule, inserted "or from the General Assembly" in paragraph (a), substituted "5" for "10" in that paragraph, inserted "or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be" in the second sentence of paragraph (b), and in paragraph (c), deleted "the office of" following "hand-delivered to," inserted "or to the Speaker of the House and the President Pro Tempore of the senate, as the case may be" and substituted "5" for "10" and "or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, has released" for "releases."

PART V. ATTORNEYS

Subpart A — Board of Bar Examiners

RULE 52.

ADMISSION TO THE BAR — GENERAL

(a) Requirements for Admission. Except as to persons admitted under Rule 53, no person shall be admitted to the Bar unless he shall have qualified by producing evidence satisfactory to the Board:

(5) That he has been regularly graduated with a baccalaureate degree or its equivalent from a law school which at the time of conferring such

degree was listed on the A
schools.

(6) That he has been exa
of law, equity, legal ethics a
Responsibility and has bee
as an attorney. The Board'
its discretion and shall b
scoring standard to be pro

(7) That he is a domicilia
if he passes the examina
admission, either his domi

(8) That he has served
service for at least 5 mon

(i) In the office of or
Preceptor, or under t
member of the Bar o
and has been in prac

(ii) As a law clerk
State or of a United

(iii) In the office o
the United States At
Legal Aid Society, In
tion approved by the
of a member of the
certified by the Boa

(9) That he has sati
instruction called by the
Court or the Board shal
instruction for those see
$75 to the Clerk of the

(c) Clerkship. No perso
served a satisfactory clerksh
of this rule. The 5-month pe
a clerkship shall qualify un
shall have matriculated at a
graph (a) of this rule. The
desiring to qualify for admi
practical experience to be a
Prior to the admission of
applicant and his Preceptor
completed the required list

(d) Certification. Upon
admission to the Bar, the E
of his qualification for adm

An applicant for admissi
for admission, including e
domicile or his principal of

MICHIGAN RULES OF COURT: 1986 STATE

With Amendments
Received Through April 15, 1986

ST. PAUL, MINN.
WEST PUBLISHING CO.
1986

(5) 50¢ per page for a copy of an opinion; however, one copy must be given without charge to each party in a case.

A person who is unable to pay a filing fee may ask the court to waive the fee by filing a motion and an affidavit disclosing the reason for the inability.

(H) Rule Applicable. Except as provided in this rule, MCR 2.625 applies generally to taxation of costs in the Court of Appeals.

(I) Violation of Rules. The Court of Appeals may impose costs on a party or an attorney when in its discretion they should be assessed for violation of these rules.

[Amended January 31, 1985.]

Note

MCR 7.219 is based on GCR 1963, 822.

Subrules (F) and (G) carry forward the provisions of GCR 1963, 822.2 and 822.3 regarding the fees and expenses that may be collected and taxed. The fee for a copy of a Court of Appeals opinion is changed to 50¢ per page, to conform with MCL 600.321(4); MSA 27A.321(4).

New subrules (A)–(E) provide the procedure for taxation of costs, formerly covered by reference to the rule governing taxation of costs in trial courts. See GCR 1963, 822.1.

Subrule (I) adds explicit authorization for the Court of Appeals to impose costs on a party or attorney for violation of the rules.

SUBCHAPTER 7.300 SUPREME COURT

RULE 7.301 JURISDICTION

The Supreme Court may:

(1) review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.223–9.226);

(2) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.302);

(3) review by appeal a final order of the Attorney Discipline Board (see MCR 9.122);

(4) give an advisory opinion (see Const 1963, art 3, § 8);

(5) respond to a certified question (see MCR 7.305);

(6) exercise superintending control over a lower court or tribunal (see, *e.g.*, MCR 7.304);

(7) exercise other jurisdiction as provided by the constitution or by law.

Colorado
Art 6 - §3
Mass - Chap 3 part 2 Art 2
New Hamp - Part 2 Art 74

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 1-18-88 1:30p.m.

Introduced: 4/8/87
Referred: State Affairs,
Judiciary and Finance

5-0420A

BY DONLEY, MILLER, MARTIN AND BOUCHER

IN THE HOUSE

Separation of Powers

HOUSE JOINT RESOLUTION NO. 26

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to advisory opinions of the Supreme Court on the request of the governor or legislature.

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

* Section 1. Article IV, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 17. SUPREME COURT OPINIONS ON THE REQUEST OF THE GOVERNOR OR LEGISLATURE. The Supreme Court has jurisdiction to render an advisory opinion on an important question of law submitted to the court by the legislature, by either house of the legislature, or by the governor. The Supreme Court shall accept briefs addressing the question on behalf of the legislature, a house of the legislature, the governor, or another interested person.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Proposed amendment:

more ⇒ 1890 in constitution since 1890

by man by state since 1923

constitutional convention ⇒ ???

mandatory ≠ discretionary

speculative resolution of hypothetical situations.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN - SPENARD

P.O. BOX V, JUNEAU 99811
(907) 465-3892

CHAIRMAN
LABOR AND COMMERCE
COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE
INTERNATIONAL TRADE
SUB-COMMITTEE

DATE: JANUARY 18, 1987

TO: All Members
Alaska House of Representatives, Judiciary Committee

FROM: Representative Dave Donley, Sponsor DD

SUBJECT: HJR 26 backup

HJR 26 is a resolution authorizing the Alaska Supreme Court to issue an advisory opinion on questions of law submitted to the court by the legislature or by the Governor.

HJR 26 would ask Alaskan voters to decide whether the Legislature and Governor could seek advice from Alaska's Supreme Court when considering critical issues to the state such as bidders preference, local hire, and preference for local products.

Under current practice, the Legislature is forced to play a guessing game with the courts and the Constitution. The system costs the state money, time and credibility when we adopt laws that cannot meet a constitutional challenge.

Under HJR 26, we could request some guidance from the courts before we pass legislation that could potentially be struck down, so that we can adopt legislation that is both fair and constitutionally sound. Currently nine other states have similar laws which have proven to be successful and effective.

HJR 26 would not require the legislature to request opinion but rather would give the legislative body another tool to assist in the development of constitutionally sound legislation.

INTERIM IN ANCHORAGE
1024 WEST SIXTH AVENUE • ANCHORAGE, ALASKA 99501 • (907) 561-8234

Litigation has become a part of legislative life. In the past, legislatures have relied exclusively on the state attorney general to represent them—as the law often says they must. Now, some of them are hiring their own legislative counsels. That trend is likely to grow.

From The Last Frontier

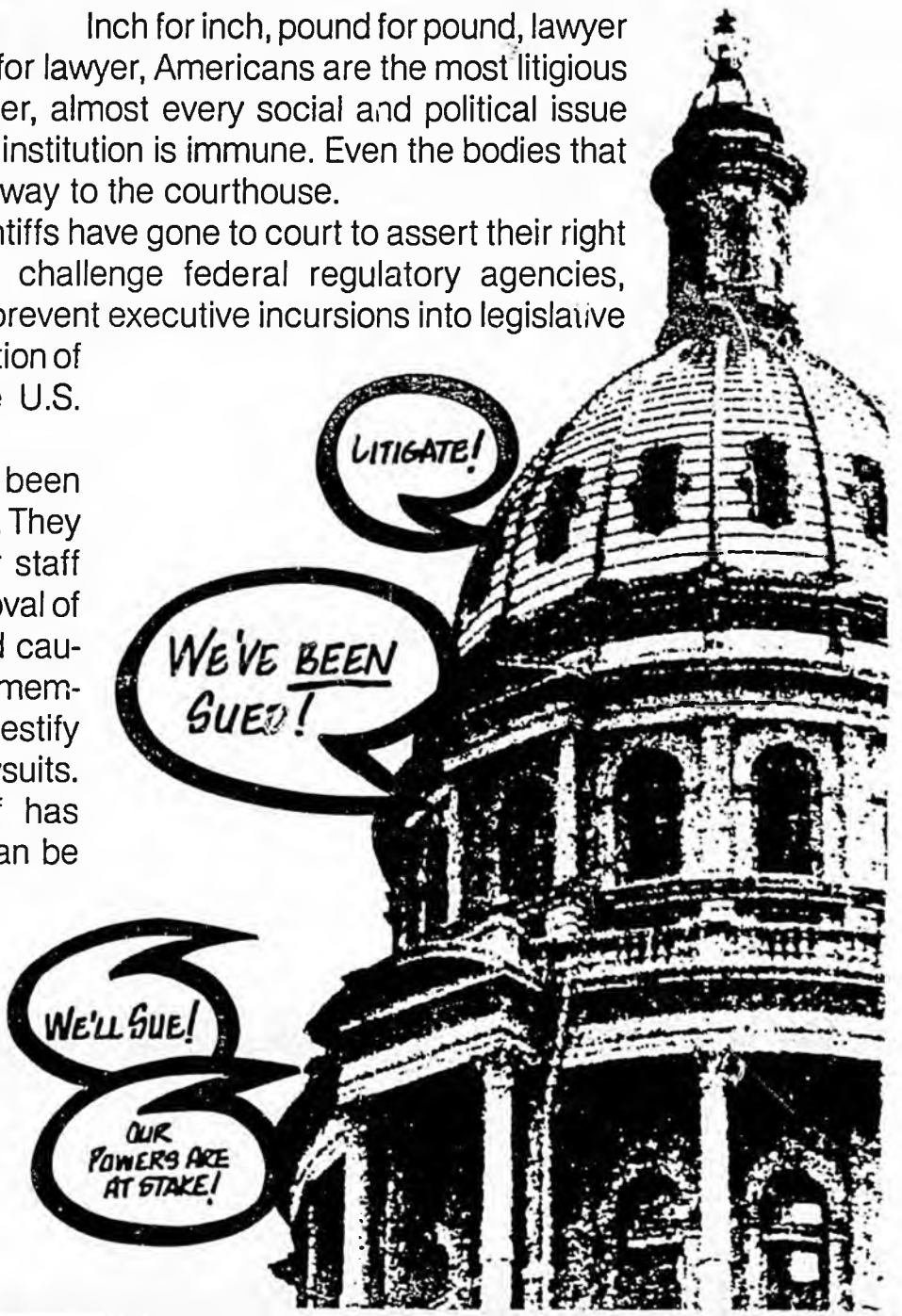
Rep. Terry Martin
State Capitol, Pouch V
Juneau, AK 99811

The State Legislature in Court

Inch for inch, pound for pound, lawyer for lawyer, Americans are the most litigious people on earth. Sooner or later, almost every social and political issue ends up in court. No person or institution is immune. Even the bodies that write the laws are finding their way to the courthouse.

State legislatures as plaintiffs have gone to court to assert their right to appropriate federal funds, challenge federal regulatory agencies, regulate the initiative process, prevent executive incursions into legislative prerogatives, and seek clarification of the process for amending the U.S. Constitution.

Legislatures have also been hauled into court as defendants. They have been told to explain their staff hiring practices and justify removal of legislators from committee and caucus positions. Legislative staff members have been subpoenaed to testify before grand juries and in lawsuits. The legislative process itself has been assaulted. No tradition can be taken for granted.



Lanny Proffer

U.S. Court of Appeals for the District of Columbia that an allegedly improper Presidential veto sufficiently infringed the power of the Senate, and his rights as a senator, to establish his standing to sue.

Aside from its opinion in *Coleman* v. *Miller*, the Supreme Court has not ruled on the question of legislator standing. And although the *Coleman* ruling has been cited repeatedly, it has limited value as precedent, since the standing of the legislature was not directly at issue when the Supreme Court decided the case. Their comments on the legislators' right to sue were superfluous to the decision.

Traditionally, legislatures have relied on the state attorney general for legal assistance. There are only a handful of states where the attorney general is not specifically directed to give legal opinions to the legislature when asked to do so. In some states, such as Oklahoma and South Carolina, the attorney general is available as a bill drafter for the legislature. In New Hampshire, the attorney general can be asked for legal advice in addition to drafting assistance.

In some cases, however, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest. In the Colorado case cited above, where members of the legislature challenged the Environmental Protection Agency, and in Pennsylvania, where the legislature challenged the power of the governor to spend federal funds without a legislative appropriation (*Shapp* v. *Sloan* 391 A.2d 602), the attorney general opposed the legislature. In both cases, the legislature retained outside counsel and was ably represented. Nevertheless, these examples show that legislatures cannot rely on the state attorney general to represent their interests in all cases.

Congress has encountered similar problems in disputes with the executive branch. A case now on appeal to the Supreme Court (*Chada* v. *Immigration and Naturalization Service* [No.-1932]) tests the validity of the legislative veto. The U.S. Department of Justice, on behalf of President Reagan, argues that the legislative veto is an unlawful intrusion by Congress into an executive function. The recently established Office of Legal Counsel in the Senate is arguing the Senate position.

From time to time, every legislature faces an issue that requires it to assert its position in court. If these occasional lawsuits were the only basis for legislative counsel, it might be economic to retain outside counsel on a case-by-case basis. But many legislatures have found that legal questions now arise almost daily.

Legislatures have become big enterprises with large budgets, broad powers and extensive responsibilities. They operate in a highly charged, contentious atmosphere. One would have to search to find any official legislative action that did not raise one or more legal questions. In similar circumstances, a private concern would have a battalion of lawyers. To be effective, the legislature must not only defend its prerogatives from all sides, but also exercise them to the fullest extent. A power not asserted is abdicated.

The legislative power to investigate, which lies at the heart of the lawmaking function, has been the subject of entire texts and innumerable court cases. The legislatures of Kentucky, Montana, Nebraska, and other states without statutory authority to litigate, *do* have express authority to go to court to enforce their subpoena power.

Not all threats to the legal authority of a legislature necessarily arise in the state or federal courts of the home state. Federal precedent applies in all cases under the federal system. A decision in a distant federal court may have profound effects beyond the parties to the litigation.

As mentioned earlier, the power of the Congress to veto certain administrative rules of federal agencies is before the U.S. Supreme Court. The same concerns that prompted Congress to provide for review of agency rules and regulations have been apparent in state legislatures, some of which have established procedures to review the administrative rules of state agencies. If the Supreme Court curtails congressional power in this area, attacks on similar state statutes are inevitable. Thus it can be important for the legislature to be heard even when it is not a party to the litigation.

The law recognizes the importance of such third parties and provides for their participation as *amicus curiae* or

In some cases, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest.

The State Legislature

Legislators have always believed that what was said or done in the legislature could not be questioned elsewhere, and their view was supported by a tradition of immunity that can be traced back to the 17th century. Yet in 1980 the U.S. Supreme Court held that immunity did not apply when the federal government was investigating a state legislator (*U.S.* v. *Gillock* 445 U.S. 360 [1980]). Legislators also believed that their power to raise and appropriate money was absolute. Today, federal judges instruct legislatures under threat of contempt to appropriate whatever sums are necessary to implement judicial decrees.

It is clear from a reading of the state statutes governing the operation of the legislatures and the attorneys general of the states that legislatures were not considered potential litigants. This seems incongruous, since American political theory relies so heavily on the notion of carefully calculated checks and balances. From a contemporary perspective, it seems inevitable that arguments between branches of government occasionally ripen into lawsuits.

Many states have absolute prohibitions against any state agency, institution or individual representing the state or its officials. Arizona statutes designate the attorney general as the only legal counsel for the state. Outside counsel can be retained only with the attorney general's consent. The Connecticut attorney general is specifically directed to defend members of the legislature if any of their official acts are challenged.

In 1966, the Utah Legislature passed a bill that authorized the legislature to retain its own counsel. The attorney general challenged the statute, and it was declared unconstitutional by the state supreme court. Not until 1972, when the legislative article of the state constitution was amended, could the Utah Legislature hire its own attorney.

Six state legislatures have statutory authority to litigate issues of concern to them: California, Georgia, Kansas, Nevada, Oregon and Utah.

Exclusion of the legislatures as litigants may have been based on the assumption that disputes between branches of government should be resolved by the political process rather than the courts. It may also have seemed that any sort of enforcement role, even if only to enforce a legislative prerogative, was inconsistent with the legislative function. Whatever the reason, the courts still have difficulty with legislatures as litigants.

Robert Coldsnow, legislative counsel for the Kansas Legislature, argues that without its consent the legislature has no existence for purposes of litigation. Individual members may sue or be sued; the legislature may not. Certain entities within the legislature have a legal existence; the legislature does not.

This lack of a clear party in interest causes confusion in the courts. When the Colorado General Assembly entered a suit against the Environmental Protection Agency, the U.S. Court of Appeals for the Tenth Circuit ruled that the named members of the legislature could not speak for the state and they lacked the requisite interest or "standing" in the case to be heard as individuals (*Mountain States Legal Foundation* v. *Costle* 630 f. 2d 754 [1980]). To quote the court: "Even if state law permitted the petitioner legislators to press the state's constitutional claims . . . this court should not allow the legislators standing to raise claims that the state itself declines to raise and in fact opposes."

In that case, the legislature and the governor took contradictory positions. Governor Richard D. Lamm instructed Attorney General John D. MacFarlane to enter the case as his advocate. The court ruled that "the attorney general has the exclusive right to represent the state in actions to enforce its interest." It held that the legislators could not represent the interests of the state because to do so would be to pre-empt the power of the attorney general and the governor.

The court either did not understand or chose to ignore the claim that uniquely *legislative* powers were being threatened. Legislatures may not have standing to compel enforcement of the statutes they pass, but they definitely have the requisite interest in preserving legislative authority. Issues that fall into this category include confirmation of certain state officials, ratification of constitutional amendments, and the legislature's investigatory and information-gathering functions.

In *Coleman* v. *Miller* (307 U.S. 433 [1939]), the U.S. Supreme Court made it clear that state legislators challenging the procedure for ratification of constitutional amendments had sufficient interest in the outcome of the case to have their claim resolved. Similarly, U.S. Senator Edward Kennedy (D-Mass.) successfully argued before the

U.S. Court of Appeals for the District of Columbia that an allegedly improper Presidential veto sufficiently infringed the power of the Senate, and his rights as a senator, to establish his standing to sue.

Aside from its opinion in *Coleman* v. *Miller*, the Supreme Court has not ruled on the question of legislator standing. And although the *Coleman* ruling has been cited repeatedly, it has limited value as precedent, since the standing of the legislature was not directly at issue when the Supreme Court decided the case. Their comments on the legislators' right to sue were superfluous to the decision.

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From time to time, every legislature faces an issue that requires it to assert its position in court. If these occasional lawsuits were the only basis for legislative counsel, it might be economic to retain outside counsel on a case-by-case basis. But many legislatures have found that legal questions now arise almost daily.

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The legislative power to investigate, which lies at the heart of the lawmaking function, has been the subject of entire texts and innumerable court cases. The legislatures of Kentucky, Montana, Nebraska, and other states without statutory authority to litigate, *do* have express authority to go to court to enforce their subpoena power.

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The law recognizes the importance of such third parties and provides for their participation as *amicus curiae* or

In some cases, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest.

"friend of the court." An institution, group or person with an interest in the outcome of a case may file a brief with the court, explaining its point of view and bringing to the court's attention the potential effects of the decision.

State attorneys general regularly join their colleagues in other states as *amici* in lawsuits when the outcomes might affect them. A recent Supreme Court case raised the question whether a local government might be subjected to punitive damages under a U.S. civil rights law (*City of Newport* v. *Fact Concerts, Inc.* 49 USLW4860 [1981]). Many states intervened in the case as *amicus curiae* and the Court ruled that punitive damages could not be imposed upon the city. Because few legislatures have offices set up to handle such tasks, their participation in such cases is limited.

In states where the legislature has no legal counsel of its own, the main difficulty is that an outside counsel, who has been retained for a limited time and purpose, may not understand the nuances of the legislative process. Legislatures with legal counsels are able to accumulate legislative

States with In-House Legislative Counsels

State	Statutory Authority	Agency Approving Litigation	Scope of Litigating Authority	Other Duties	Authority to Retain Outside Counsel
California	Annotated California Code 10200 et seq.	Joint Rules Committee or legislature by resolution.	No specific limitation other than authorization by Joint Rules Committee.	Bill drafting; and advice and counsel to legislature, drafting and advice for governor and state judges, code revision, preparation of initiative measures; statutory indexing and codification.	Yes
Georgia	Georgia Code Annotated 46-1203	Legislative Services Committee.	"Represent the interests of the Legislative branch in matters involving litigation."	Bill drafting; assist committees, advisory opinions; statutory and code revision; research.	Yes
Kansas	Kansas Statutes Annotated 46-1224	Legislative Co-ordinating Council when legislature is out of session. Either house by resolution when legislature is in session.	May represent legislature in "any cause or matter." Legislative Council has same mandamus and quo warranto powers and standing as attorney general.	Advisory opinions, counsel to special committees of legislature; provide investigative assistance upon request of committee chairpersons.	Legislative Coordinating Council may provide legal, investigative and clerical assistance to legal counsel as needed.
Nevada	Nevada Revised Statutes 218.690 et. seq.	Legislative Commission.	"To protect the official interests of the legislature or one or more legislative committees."	Bill drafting; advisory opinions; code revision; digest and annotate Supreme Court opinions; service on Commission on Uniform State Laws.	May contract for necessary services.
Oregon	Oregon Revised Statutes 173.111 et. seq.	Legislative Counsel Committee.	"To protect the official interests of the legislative Assembly, one or more committees, or one or more members."	Bill drafting; research; assist in preparation of initiative measures; code revision.	Yes
Utah	Utah Revised Statutes 36-12-14	Legislative Management Committee.	"Represent the legislature, any of its committees or subcommittees, or the professional legislative staff in cases or controversies before courts, administrative agencies and tribunals.	Bill drafting; advice and counsel to legislature; code revision; bill status.	No statutory authority.

experience and knowledge to complement legal experience. This experience and knowledge can be brought to bear in litigation even if outside counsel is retained for the actual trial.

Six state legislatures have statutory authority to litigate issues of concern to them: California, Georgia, Kansas, Nevada, Oregon and Utah. In each case, the selection of the legal counsel is nonpartisan and professional. The Kansas statute describes the qualifications and the selection process in detail. The Nevada statute requires membership in the state bar and expertise in "political science, parliamentary practice, legislative procedure, and the methods of research, statute revision and bill drafting."

Before the counsel in any state can initiate an action or enter his appearance in a lawsuit, the legislature must consent. In most states, the legislative counsel is a part of the legislative service agency and the supervising committee of legislators must give its consent before any action can be brought.

The legislatures have given their counsels broad power to litigate. The Oregon statute is typical: Legal action may be brought "when deemed necessary or advisable to protect the official interests of the legislative assembly, one or more legislative committees, or one or more members of the legislative assembly." The authorizing legislation for the Georgia counsel is broad and succinct: "to represent the interests of the legislative branch in matters involving litigation." Georgia and Oregon specifically provide for outside counsel as necessary; presumably the other states would permit such counsel as well if the particular litigation called for it.

Legislatures with offices of legal counsel have managed to get a lot of mileage out of them. Their duties, as spelled out in each state's enabling legislation, include far more than litigation. All are asked to provide legal counseling to legislators and legislative committees. Most are involved with bill drafting and service to investigative committees. The Nevada legislative counsel works with the National Commission on Uniform State Laws. In Oregon and California, the counsels are involved in the initiative processes. California, Utah and Nevada specifically assign code revision duties, including the development of recommendations for improvement and reform. Other states, such as Georgia and Nevada, assign "such other authority and duties as the committee may provide."

The office of legal counsel in the legislature is essentially analogous to that of the general counsel in a large corporation. Although there may be lawyers in many divisions, the ultimate responsibility in legal matters resides in the office of the general counsel. All litigation is channeled through that office.

Some states have stopped short of creating an official legislative counsel but have assured that they have other knowledgeable counsel on legislative issues. New Jersey is an example. The New Jersey Senate and General Assembly retain majority and minority counsel who spend a substantial portion of their time representing the respective legislative bodies. During the remainder of their time they carry on the private practice of law. Their legislative responsibilities keep them current on legislative issues and the private practice gives them regular and continuous courtroom experience. These counsels do not, however, handle bill drafting and other legislative chores assigned to in-house counsels.

This kind of legal representation provides more flexibility for the leadership, according to Robert Smartt, deputy director of the New Jersey General Assembly. "Issues sometimes arise where only the majority has a substantial interest at stake," he said. "In those instances, counsel to the majority can respond quickly and effectively." Lawrence Marinari, majority counsel to the General Assembly, sees litigation as a growth industry in the state. "The more modernized and co-equal the legislature becomes," Marinari said, "the more often it is likely to be drawn into lawsuits. Representing the legislature could become a full-time job."

Perhaps the most important function of the legal counsel in a legislature is also the most subtle. Creation of the office signals to the other branches of state government and to the public at large that the legislature is prepared to defend its prerogatives and assert its powers to the fullest extent possible.

The legislature must be prepared to defend itself as an institution when it is challenged in a court of law. As a co-equal branch of government, the legislature must be prepared to use the courts as a sword as well as a shield. When necessary, legislatures must bring actions as well as defend them. They must also extend their vision beyond their own states to federal courts throughout the nation, and, as issues warrant, to let those courts know how their rulings might affect the states.

If there was ever a time when the legislature was a cloistered institution, that time has passed. In tomorrow's state legislatures, there may be fewer cries of "there oughta be a law"—and more of "I'll see you in court."

Lanny Proffer is counsel to NCSL.

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: Bill Version: HJR 26
Publish Date:

Revision Date: 1-6-88
Title: Advisory opinions of the supreme court
Sponsor:
Requestor:

Agency Affected: Alaska Court System
BRU: Appellate Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services	. . . .	41.3	41.3	41.3	41.3	41.3
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	1.9	1.9	1.9	1.9	1.9
Equipment	. . . .	2.8	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	46.0	43.2	43.2	43.2	43.2
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	46.0	43.2	43.2	43.2	43.2
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	46.0	43.2	43.2	43.2	43.2

POSITIONS:

Full-time	. . . .	1.0	1.0	1.0	1.0	1.0
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

See attached fiscal analysis.

Prepared by: Jan Strandberg, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 1-6-88

Approved by: Arthur H. Snowden, II, Administrative Director — Date: 1-6-88
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

Fiscal Analysis - HJR 26

It is difficult to predict with complete accuracy the number of advisory opinion requests which could be anticipated if this measure becomes law. Given the substantial number of constitutional issues which have concerned the legislature and the governor's office in recent years, this note is calculated based upon an assumptions of 25 requests annually.

The primary impact on the supreme court would be in time spent researching, analyzing and drafting the opinions. The research and analysis function is performed by law clerks. Without a lower court ruling or appellate record for a law clerk to review, the appellate clerk indicates that at least two weeks will be expended preparing materials for the justices. As is the case in other appellate matters, law clerks will also proofread and check technical aspects of the opinion.

The appellate clerk estimates a total of 260 days of law clerk time spent on these requests. An additional law clerk III position would be required.

Although additional judicial and clerical support staff time will also be expended in these matters, it appears that existing resources are adequate to absorb the additional workload.

ALASKA COURT SYSTEM
HJR 26 - Fiscal Analysis

Personal Services:

	Salary	Benefits	Total
Law Clerk II, Range 15A, Anchorage, PFT - 12 months	$30,372	$10,941	$41,313
Supplies			1,875
Equipment: (one-time cost)			
Desk, chair, typewriter, filing cabinet, statutes, and rules of court			2,823
Total First-Year Cost			$46,011

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: Bill Version: HJR 26
Publish Date:

Revision Date:
Title: Advisory opinions of the supreme court
Sponsor:
Requestor:

Agency Affected: Alaska Court System
BRU: Appellate Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
Personal Services		40.3	40.3	40.3	40.3	40.3
Travel						
Contractual						
Supplies		1.9	1.9	1.9	1.9	1.9
Equipment		2.8				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	45.0	42.2	42.2	42.2	42.2
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	45.0	42.2	42.2	42.2	42.2
Federal Funds						
Other						
TOTAL	0.0	45.0	42.2	42.2	42.2	42.2

POSITIONS:

Full-time		1.0	1.0	1.0	1.0	1.0
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached fiscal analysis.

Prepared by: Karla Forsythe, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 4-30-87

Approved by: Stephanie J. Cole, Deputy Director — Date: 4-30-87
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

ALASKA COURT SYSTEM
HJR 26 - Fiscal Analysis

Personal Services:

	Salary	Benefits	Total
Law Clerk II, Range 15A, Anchorage, PFT - 12 months	$30,372	$9,966	$40,338
Supplies			1,875
Equipment: (one-time cost)			
Desk, chair, typewriter, filing cabinet, statutes, and rules of court			2,823
Total First-Year Cost			$45,036

Fiscal Analysis - HJR 26

It is difficult to predict with complete accuracy the number of advisory opinion requests which could be anticipated if this measure becomes law. Given the substantial number of constitutional issues which have concerned the legislature and the governor's office in recent years, this note is calculated based upon an assumptions of 25 requests annually.

The primary impact on the supreme court would be in time spent researching, analyzing and drafting the opinions. The research and analysis function is performed by law clerks. Without a lower court ruling or appellate record for a law clerk to review, the appellate clerk indicates that at least two weeks will be expended preparing materials for the justices. As is the case in other appellate matters, law clerks will also proofread and check technical aspects of the opinion.

The appellate clerk estimates a total of 260 days of law clerk time spent on these requests. An additional law clerk III position would be required.

Although additional judicial and clerical support staff time will also be expended in these matters, it appears that existing resources are adequate to absorb the additional workload.

(7)

HOUSE COMMITTEE REPORT

Date referred: 4/8/87

FURTHER REFERRALS: Judiciary
Finance

DATE: 4-29-87

The State Affairs Committee has considered HJR 26
Proposing an amendment to the Constitution of the State of Alaska relating to advisory opinions of the Supreme Court on the request of the governor or legislature.

RECOMMENDS:

[ ] replace with ______________ [ ] the same title
[ ] attached amendment(s) [ ] a new title

[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ______________ Committee

ADOPTS: [ ] __________letter of intent

ATTACHES NEW FISCAL NOTE(s):

[X] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis

[ ] same as previous fiscal note published ______________
[ ] same as previous zero fiscal note published ______________

SIGNING DO PASS:

[signature]
[signature]
Terry Martin

SIGNING OTHER RECOMMENDATIONS:

[signature] No Rec
[signature] No Rec

[signature]
Chairman's signature


HJR

(7)

HOUSE COMMITTEE REPORT

Date referred: 2/10/88

FURTHER REFERRALS:

DATE: March 24, 1988

The Judiciary Committee has considered HJR 44

Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

RECOMMENDS:

[ ] replace with CS HJR 44 (JUD) [ ] the same title [ ] a new title

[ ] attached amendment(s)

- [ ] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [ ] fiscal impact
- [ ] zero fiscal note
- [ ] zero with analysis
- [ ] same as previous fiscal note published _____
- [ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

~~Will not unanimous consent~~

Allan L. Taylor DO NOT PASS W/O AM cmte

Vice Chairman's signature

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 3-24-88 1:30p.m.

H. JUD. 2-24-88 1:30p.m.

Original sponsors: Brown, Ellis,
Frank, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 44 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

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

* Section 1. Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 23. MEETINGS OPEN. The deliberations of each house of the legislature and its committees shall be open to the public unless the legislative body is meeting in executive session to consider matters authorized by law. If a matter is appropriate to a particular legislative body, private and substantive deliberation on the matter by a quorum of that legislative body is a violation of this section. A member of the legislature who wilfully violates this section is subject to a civil penalty for each wilful violation in an action brought in the superior court. Caucuses of the legislature may meet in private to consider matters of procedure, organization, or strategy. The provisions of this section that permit executive sessions and caucuses shall be narrowly construed to achieve maximum public access and to avoid unnecessary executive sessions and caucuses.

* Sec. 2. (a) The purpose of the amendment to art. I, Constitution of the State of Alaska, proposed in sec. 1 of this resolution is to make openness in government the rule and secrecy the exception. The amendment ensures that the public is not excluded during the substantive deliberative and decision-making stages of the budgetary and lawmaking process.

(b) The existing open meetings law, AS 44.62.310 and 44.62.312,

complies with this constitutional amendment and the amendment provides a basis for judicial enforcement of that law, notwithstanding art. II, secs. 6 and 12, Constitution of the State of Alaska.

(c) The existing open meetings law requires that votes be conducted in a manner that allows the public to know how members voted. For executive sessions, it requires that meetings first be convened as public meetings and the question of holding an executive session be determined by a majority vote of the body. Reasonable public notice is required for open meetings.

(d) Under existing law, a legislative body may use an executive session only to discuss

(1) matters, the immediate knowledge of which would clearly have an adverse effect on the finances of the government;

(2) subjects which tend to prejudice the reputation and character of any person, provided the person may request a public discussion; and

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(e) This amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events. Meetings of less than a quorum of the legislative body that have the purpose or effect of circumventing the open meetings law would also be a violation of this section.

(f) In the preparation of its neutral summary under AS 15.58.020(6)-(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) - (e) of this section.

* Sec. 3. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

5-1378B
Bradley
3/22/88

Adopted

Original sponsors: Brown, Ellis,
Frank, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 44 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

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

* Section 1. Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 23. MEETINGS OPEN. The deliberations of each house of the legislature and its committees shall be open to the public unless the legislative body is meeting in executive session to consider matters authorized by law. If a matter is appropriate to a particular legislative body, private and substantive deliberation on the matter by a quorum of that legislative body is a violation of this section. A member of the legislature who wilfully violates this section may be fined for each wilful violation in an action brought in the superior court. Caucuses of the legislature may meet in private to consider matters of procedure, organization, or strategy.

* Sec. 2. (a) The purpose of the amendment to art. I, Constitution of the State of Alaska, proposed in sec. 1 of this resolution is to make openness in government the rule and secrecy the exception. The amendment ensures that the public is not excluded during the substantive deliberative and decision-making stages of the budgetary and lawmaking process.

(b) The existing open meetings law, AS 44.62.310 and 44.62.312, complies with this constitutional amendment and the amendment provides a basis for judicial enforcement of that law, notwithstanding art. II, secs. 6 and 12, Constitution of the State of Alaska.

(c) The existing open meetings law requires that votes be conducted in a manner that allows the public to know how members voted. For executive sessions, it requires that meetings first be convened as public meetings and the question of holding an executive session be determined by a majority vote of the body. Reasonable public notice is required for open meetings.

(d) Under existing law, a legislative body may use an executive session only to discuss

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(2) subjects which tend to prejudice the reputation and character of any person, provided the person may request a public discussion; and

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(e) This amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events. Meetings of less than a quorum of the legislative body that have the purpose or effect of circumventing the open meetings law would also be a violation of this section.

(f) In the preparation of its neutral summary under AS 15.58.020(6)-(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) - (e) of this section.

* Sec. 3. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Introduced: 1/15/88
Referred: State Affairs
and Judiciary

5-1378A

BY BROWN, ELLIS, FRANK, DAVIS, COTTEN, NAVARRE, POURCHOT AND BOYER

IN THE HOUSE

HOUSE JOINT RESOLUTION NO. 44

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

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

* Section 1. Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 23. MEETINGS OPEN. The deliberations of each house of the legislature and the deliberations of the committees and subcommittees and of each committee of the whole shall be open to the public unless the legislative body is meeting in executive session to consider matters authorized by law. If a matter is appropriate to a particular legislative body, private and substantive deliberation on the matter by a quorum of that legislative body is a violation of this section. Caucuses of the legislature may meet in private to consider matters of procedure, organization, or strategy.

* Sec. 2. (a) The purpose of the amendment to art. I, Constitution of the State of Alaska, proposed in sec. 1 of this resolution is to make openness in government the rule and secrecy the exception. The amendment ensures that the public is not excluded during the substantive deliberative and decision-making stages of the budgetary and lawmaking process.

(b) The existing open meetings law, AS 44.62.310 and 44.62.312, complies with this constitutional amendment and the amendment provides a basis for judicial enforcement of that law, notwithstanding art. II, secs. 6 and 12, Constitution of the State of Alaska.

(c) The existing open meeting law requires that votes be conducted in

a manner that allows the public to know how members voted. For executive sessions, it requires that meetings first be convened as public meetings and the question of holding an executive session be determined by a majority vote of the body. Reasonable public notice is required for open meetings.

(d) Under existing law, a legislative body may use an executive session only to discuss

(1) matters, the immediate knowledge of which would clearly have an adverse effect on the finances of the government;

(2) subjects which tend to prejudice the reputation and character of any person, provided the person may request a public discussion; and

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(e) This amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events. Meetings of less than a quorum of the legislative body that have the purpose or effect of circumventing the open meetings law would also be a violation of this section.

(f) In the preparation of its neutral summary under AS 15.58.-020(6)(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) - (e) of this section.

* Sec. 3. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

5-1378B6
Bradley

Adopted

AMENDMENT #1

Offered in the HOUSE

By Brown

TO: CSHJR 44 (Judiciary)

Page 1, lines 17 - 18:

Delete "may be fined"

Insert "is subject to a civil penalty"

--

3/23/88

5-1378Bá
Bradley

Failed

AMENDMENT #3

Offered in the HOUSE By Brown

TO: CSHJR 44 (Judiciary)

Page 1, line 19, after "court":

Insert "and the court may enjoin violations of this section" and grant declaratory relief

3/23/88

Adopted

5-1378Bb
Bradley

AMENDMENT #2

Offered in the HOUSE

By Brown

TO: CSHJR 44 (Judiciary)

Page 1, line 20, after "strategy.":

Insert "The provisions of this section that permit executive sessions and caucuses shall be narrowly construed to achieve maximum public access and to avoid unnecessary executive sessions and caucuses."

A M E N D M E N T

Offered in the HOUSE By Taylor

TO: HJR 44

Page 1, line 7, after "meetings"

Insert "of the legislature"

Page 1, lines 11 - 19:

Delete all material and insert:

"SECTION 23. LEGISLATIVE MEETINGS PUBLIC. (a) Each meeting of a house of the legislature, of a committee of the whole of a house of the legislature, or of a committee of the legislature is open to the public except as provided by this section. This section does not apply to a vote taken to organize the legislature or to subcommittees of a legislative committee.

(b) If subjects described under (c) of this section are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss subjects described in (c) of this section shall be determined by a majority vote of the house of the legislature or of a committee of the legislature. A subject may not be considered at the executive session except one mentioned in the motion calling for the executive session unless the subject is auxiliary to the main question. A vote may not be taken at the executive session.

(c) The following subjects may be discussed in an executive

session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the state;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters that by law are required to be confidential.

(d) Reasonable public notice shall be given for each meeting required to be open under this section. The notice shall include the date, time, and place of the meeting.

(e) A vote taken contrary to this section is void."

5-1378A
Bradley
12/16/87

IN THE HOUSE BY BROWN

HOUSE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

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

* Section 1. Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 23. MEETINGS OPEN. The deliberations of each house of the legislature and the deliberations of the committees and subcommittees and of each committee of the whole shall be open to the public unless the legislative body is meeting in executive session to consider matters authorized by law. If a matter is appropriate to a particular legislative body, private and substantive deliberation on the matter by a quorum of that legislative body is a violation of this section. Caucuses of the legislature may meet in private to consider matters of procedure, organization, or strategy.

* Sec. 2. (a) The purpose of the amendment to art. I, Constitution of the State of Alaska, proposed in sec. 1 of this resolution is to make openness in government the rule and secrecy the exception. The amendment ensures that the public is not excluded during the substantive deliberative and decision-making stages of the budgetary and lawmaking process.

(b) The existing open meetings law, AS 44.62.310 and 44.62.312, complies with this constitutional amendment and the amendment provides a basis for judicial enforcement of that law, notwithstanding art. II, secs. 6 and 12, Constitution of the State of Alaska.

a manner that allows the public to know how members voted. For executive sessions, it requires that meetings first be convened as public meetings and the question of holding an executive session be determined by a majority vote of the body. Reasonable public notice is required for open meetings.

(d) Under existing law, a legislative body may use an executive session only to discuss

(1) matters, the immediate knowledge of which would clearly have an adverse effect on the finances of the government;

(2) subjects which tend to prejudice the reputation and character of any person, provided the person may request a public discussion; and

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(e) This amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events. Meetings of less than a quorum of the legislative body that have the purpose or effect of circumventing the open meetings law would also be a violation of this section.

(f) In the preparation of its neutral summary under AS 15.58.-020(6)(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) - (e) of this section.

* Sec. 3. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Kay Brown

Alaska State Legislature
House of Representatives

MEMORANDUM

TO: All House Members

FROM: Rep. Kay Brown

DATE: April 22, 1988

RE: HJR 44 - Proposed Rules CS

Attached for your review is a work draft for a proposed Rules Committee Substitute for CS HJR 44(Judiciary) that I requested in response to concerns voiced by some House members.

The changes are:

1) lines 19-20, add "A court may not prescribe rules or procedures for the conduct of legislative business."

2) line 18, delete "penalty" and insert "fine".

These changes are intended to make clear the legislature's intent that the court not prescribe operating procedures such as defining the circumstances under which teleconferences should be held, room size, adequate public notice, and other operational matters.

A civil "fine" rather than a "penalty," would provide a deterrent for wilful violations and define the extent of court enforcement. This change further indicates the legislature's intent that the court not enjoin violations.

In response to these concerns, the House Rules Committee will be meeting at 8:00 a.m. Tuesday, April 26, in the Speaker's Chambers to consider adoption of the proposed Committee Substitute. I welcome your questions and comments.

Attachment

P. O. Box 20-2661
Anchorage, AK 99520-2661
(907) 272-0207

During Session:
P. O. Box V
Juneau, AK 99811
(907) 465-4998

5-1378L

Bradley
4/21/88

Original sponsors: Brown, Ellis,
Frank, et al.

IN THE HOUSE BY THE RULES COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 44 (Rules)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

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

* Section 1. Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

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* Sec. 2. (a) The purpose of the amendment to art. I, Constitution of the State of Alaska, proposed in sec. 1 of this resolution is to make openness in government the rule and secrecy the exception. The amendment ensures that the public is not excluded during the substantive deliberative

and decision-making stages of the budgetary and lawmaking process.

(b) The existing open meetings law, AS 44.62.310 and 44.62.312, complies with this constitutional amendment and the amendment provides a basis for judicial enforcement of that law, notwithstanding art. II, secs. 6 and 12, Constitution of the State of Alaska.

(c) The existing open meetings law requires that votes be conducted in a manner that allows the public to know how members voted. For executive sessions, it requires that meetings first be convened as public meetings and the question of holding an executive session be determined by a majority vote of the body. Reasonable public notice is required for open meetings.

(d) Under existing law, a legislative body may use an executive session only to discuss

(1) matters, the immediate knowledge of which would clearly have an adverse effect on the finances of the government;

(2) subjects which tend to prejudice the reputation and character of any person, provided the person may request a public discussion; and

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(e) This amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events. Meetings of less than a quorum of the legislative body that have the purpose or effect of circumventing the open meetings law would also be a violation of this section.

(f) In the preparation of its neutral summary under AS 15.58.020(6)-(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) - (e) of this section.

* Sec. 3. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity

with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Kay Brown

Alaska State Legislature
House of Representatives

MAR 30 1988

MEMORANDUM

TO: All Members of the House

FROM: Rep. Kay Brown

DATE: March 28, 1988

RE: Open Meetings Constitutional Amendment

Attached for your review is CS HJR 44 (Judiciary), "Proposing an amendment to the Constitution of the State of Alaska relating to open meetings," and a news article.

I introduced the constitutional amendment to ensure the right of public access to the deliberations of legislative bodies. The legislative process must be accountable, accessible, and responsive to the press and the people of Alaska.

A summary of the legal proceedings leading up to the introduction of HJR 44 is relevant. As you will recall, the League of Women Voters v. Adams et al lawsuit was brought over the closed budget discussions in caucus meetings during the 1986 session. The Superior Court found an implied right of access to the proceedings of the legislature under the Alaska Constitution. The Superior Court appeared to hold that discussion and binding decisions on substantive legislation cannot be made in a private caucus. However, the open meetings law specifically does not apply to "...any votes required to be taken to organize a public body..."(AS 44.62.310(a)). It had been noted earlier by the Supreme Court that the statute has no application to private caucuses, so there is no reason to exempt from the statute organizational votes which take place in those caucuses. (Tamara Cook memo, Dec. 11, 1986).

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The case was appealed to the Alaska Supreme Court. The higher court had earlier demonstrated an unwillingness to interfere in matters of procedure involving the legislature (Malone v. Meekins, 650 Psd 351 (Alaska 1982)). The legislature is constitutionally required to determine rules for its own proceedings and it may not do so by statute because this would bind itself in the future (the legislature would be subject to the Governor's veto of the repeal of the statute, or would need a supermajority vote to override a veto.) The task before the Supreme Court in League of Women Voters was to determine whether the public has an unenumerated right of access to legislative meetings at which substantive budget decisions are made.

The Supreme Court reversed the lower court's ruling and held that there is no implied right of public access to legislative committees or caucuses under the Alaska Constitution. The Court's decision was based on the separation of powers doctrine; that is, the Court had no constitutional authority to enforce the law governing the operating procedures of the legislature. The Court concluded that it is not the function of the judicial branch to require the legislature to follow its own rules.

HJR 44 would amend the constitution to mandate legislative adherence to the Open Meetings Act and to provide for judicial enforcement in the instance of a violation. It provides the legal framework to protect the public's right to openness in the legislative process.

The resolution requires that deliberations be open unless the body is meeting in executive session to consider matters authorized by law. It prohibits a quorum of each house and its committees from engaging in private and substantive deliberation on a matter appropriate to that body. It allows private caucuses for matters relating to procedure, organization and strategy.

HJR 44 was amended in House Judiciary to provide for a civil penalty in Superior Court for a wilful violation of the open meetings requirement. It also was amended to provide that the language permitting executive sessions and caucuses shall be narrowly construed to avoid unnecessary closed meetings.

The intent language included in the constitutional amendment makes clear that it is not intended to prevent the free flow of ideas among legislators, or their participation in public forums, community meetings, or social events.

HJR 44 requires a two-thirds vote of both the House and the Senate, and the signature of the Governor to place it before the voters in November. I would appreciate your careful review and consideration of this measure. Please call me at -4998 if you have any questions or concerns. Thank you.

Attachments

January, 1988

Opinion

Open meetings: A critical issue

By Rep. Kay Brown and Sen. Arliss Sturgulewski

When the Alaska Supreme Court issued its opinion on the open meetings lawsuit brought against the Alaska legislature by the League of Women Voters and two Alaska newspapers, the ruling brought to light a crucial flaw in our state constitution. The court ruled that it had no jurisdiction in the open meetings dispute and accordingly could not force the legislature to comply with the state Open Meetings Act.

The crucial issue in the open meetings lawsuit concerned the right of the press and the public to know about and understand the deliberations of their elected representatives. The need for access to legislative deliberations has never been more critical than at present. Decisions made in Juneau are of vital interest to all Alaskans as the state comes to terms with declining oil revenues.

In response to the Supreme Court's decision, one legislative leader characterized the ruling as giving legislators "a blank check." In essence, the Alaska Supreme Court found that the legislature's conduct is above the law that requires other state and local officials to conduct the public's business in the open.

Before the Supreme Court ruling, it had been our belief that the public was entitled to open legislative meetings; we now know that a constitutional amendment is needed. With that goal in mind, we have introduced an identical Joint Resolution in both the House and the Senate that would amend the Alaska Constitution and specifically provided for open meetings by the legislature

The proposed amendment language is the work product of a number of individuals who began meeting shortly after the Supreme Court issued its ruling, including representatives of the League of Women Voters and several news organizations. In trying to draft suitable language with the help of this ad hoc group, we knew that it was essential to develop both realistic and workable standards. Such standards must fundamentally ensure openness by the legislature but also not prevent the free exchange of ideas among legislators, which is essential to a legislator's ability to represent his or her constituents. At the same time, we felt that the legislature, as the state's only bicameral legislative body, elected along partisan lines, must have the flexibility to exercise that partisanship.

With these standards in mind, our proposed amendment requires that legislative deliberations be open unless, as presently provided by the Open Meetings Act, the body is meeting in a properly convened executive session to consider matters expressly authorized by law. The amendment also states that if a matter is appropriate to a particular body (which includes committees and subcommittees), then "private and substantive deliberation on the matter by a quorum of that legislative body" is prohibited. The proposed amendment also recognizes the unique role of legislative caucuses and specifically allows caucuses to meet in private, but only to consider "matters of procedure, organization, or strategy."

We recognize, of course, that our amendment draws a fine line of distinction between a discussion that would be prohibited as "private and substantive" and a discussion that would be permissible as a matter of caucus "strategy." In the final analysis, however, it is our feeling that it will be incumbent upon all legislators to police themselves as a group and for individual members to insist when appropriate, as we have, that the public's right-to-know must be protected and that the public's substantive business be conducted openly.

Finally, we believe that the proposed amendment provides both a realistic and workable set of standards by which the legislature can conduct legislative business in an open manner while still providing legislators an opportunity to participate in confidential partisan activities. Without a constitutional amendment to provide for the public's right of access, the legislature will continue to be free to meet at will behind closed doors in clear violation of the Open Meetings Act, but beyond the reach of the courts.

Rep. Kay Brown and Sen. Arliss Sturgulewski both represent Anchorage in the Alaska State Legislature.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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M E M O R A N D U M March 18, 1988

SUBJECT: Open meetings
(CSHJR 44(Judiciary))

TO: Representative Kay Brown

FROM: Richard A. Bradley
Legislative Counsel

I have reviewed the citations from the House Research Agency report that Roxanne provided to me on the avoiding of action for a violation of open meeting laws. I have reviewed about half of the laws of the other states and will, if you wish, review the remainder. But it seems that some kind of pattern appears in the laws of the states that I did review. Let me make some observations about the laws and then offer the individual analyses of the states from Alabama through Missouri.

First, and I think this is significant, I found no case where an Act of a legislature was avoided. It appears that no action was avoided (or challenged until Abood) where the violation was based only on the actions of a committee or subcommittee of the legislative body.

There is some logic to this point. While committee recommendations are useful, a member may vote for or against final passage based on or in spite of recommendations of a committee. What one committee does may be disregarded by a subsequent committee or used for entirely different reasons. It should not follow that the action by a committee vitiates the final legislative action.

In probably every state, state constitutions will require votes on final enactment to be public. Whether a disregard of committee action that violates open meeting concepts (if final action is open) is a serious loophole or a reasonable expectation may be debatable but it appears to explain why the application of open meeting concepts to legislative

action does not result in the avoidance of the final legislative action. The legislature should have the power to cure the defects in legislation caused by a committee of the legislature.

While the senate and the house each seem to have their own different ideas about the amount of debate required for adoption, it is quite different for a court to order the legislature to engage in "substantial, de novo, independent and public reconsideration of those substantive matters previously discussed in private." That remedy was requested in Abood v. League of Women Voters of Alaska, 743 P.2d 333, 334 (Alaska 1987).

The amount of debate required to cure a violation is the kind of question that the courts would be required to address if a violation by a committee is permitted to taint the final legislative action fatally. If I am correct that only violations by the enacting body will cause action to be void, the cure for violations is not a problem since no violation by the legislature itself will (or can) occur.

During our discussion, I noted frustration with effective remedies. John Hartle suggested an analogy to the exclusionary rule (on evidence in criminal trial obtained in violation of civil rights, etc); the only remedy is the exclusion of the evidence; the only solution here is the avoidance of the law.

I disagree. A number of the states permit citizen complaints for mandatory or other injunctions against the violations. A number permit the citizen plaintiff to obtain fines for violations. One would permit the court to terminate the term of a member who violated open meetings requirements and was sanctioned twice during a term; that would not work as to a legislator since expulsion of members is also constitutionally regulated but it could work on other levels of government. The Maryland provision says that the action of a public body may not be voided because of the violation by another public body; perhaps that addresses the legislature vs. its committees question.

At that point, the proper sanction is not an avoidance of the legislation but the proper sanctions against individuals involved at the committee level. And as I suggest, the cases that do appear address violations by school boards, municipalities, and other public bodies. I found no case

where the defect in committee action voided the action by the final adopting body that itself complied with open meeting requirements.

Finally, an analysis of state laws. While it has been suggested (by the House Research Agency report) that each state has an open meeting law, it is far from true that the citations offered prove that the legislatures have uniformly subjected themselves to such laws.

Alabama. I could find no laws at the citation suggested in the HR report. Title 13 has been repealed. No entries in the index for the topic.

Arizona. Sec. 38.431. Applies to the legislature. No case in annotation appears to have challenged legislative violations. Only applies when a quorum is present according to AG opinion. Court may impose a fine of not to exceed $500. Sec.431.07. Public body may not expend public money to defend action under certain circumstances. Sec. 431.07. Either house of legislature may exempt itself by adoption of rule or procedure. Sec. 431.08(B). Does not apply to conference committees of legislature or any caucus. Sec. 431.08(A); conference committees shall nonetheless be open.

Arkansas. Citation incorrect: see A.C.A. 25.19.101 et seq. Open meetings section does not apply to the legislature. Sec. 25.19.106. Misdemeanor penalty for violations of $200 or 30 days (sec. 25.29.104). Action taken not void unless adopted at a public meeting. Sec. 25.19.106.

California. Citation given (sec. 11120 et seq., Cal. Gov't Code) applies only to executive branch agencies. See earlier memorandum for comments on sections applicable to the legislature.

Colorado. C.R.S. sec. 24.6.401 et seq. Applies to the legislature. Sec. 24.6.402. Does not apply to "chance meeting or social gathering at which discussion of public business is not the central purpose." Sec. 24.6.402(2.1). Provisions on invalidity may not apply to the legislature: "(4) No resolution, rule, regulation, ordinance, or formal action of a board, committee, commission, or other policy-making or rule-making body shall be valid unless taken or made at a meeting that meets the requirements . . ." Note

that while it applies to a committee in the legislature, a committee is not a policy making body.

Connecticut. G.S.C. sec. 1.21. Appears to apply to the legislature. Sec. 1.21(a). Establishes notice; has no provision explicitly establishing application to the legislature or providing for the implications of violations (even as to executive branch agencies).

Delaware. 29 D.C.A. sec. 10001 et seq. Includes legislature. Sec. 10002. "Any action taken at a meeting in violation of this chapter may be voided by the Court of Chancery" within 60 days of notice of the action but not more than 6 months from the action. Sec. 10005(a). No annotations regarding violations by the legislature.

Florida. Ch. 286, F.S. at 011. Does not apply to the legislature. Sec. 286.011(1). Did not determine whether other law applies to the legislature.

Georgia. O.C.G. sec 50-14-1 et seq. Not applicable to the legislature.

Hawaii. H.R.S. sec. 92.3. Does not apply to the legislature. Sec. 92.10; rather, will be subject to rules adopted by the legislature (I have not found such rules). Executive action voidable on "proof of willful violation." Sec. 92.-11.

Idaho. I.C. sec. 67-2340 et seq. General sections do not apply to the legislature. Sec. 2341. Open legislative meetings required. Sec. 2346. Curiously, there is no statutory authorization for any executive session by legislative committees: "All meeting . . . shall be open at all times"; I suggest the section cannot be taken seriously. Action taken at a meeting that violates the sections is null and void. No cases construing statute in context of suit against legislature for its violation.

Illinois. 102 Ill. A.S. sec. 41 et seq. Includes "legislative . . . bodies of the state . . . except the General Assembly and committees or commissions thereof." Sec. 41.02. Did not find any specific sections applying to the legislature.

Indiana. B.I.S.A. sec. 5-15-1.5-1. Appears to apply to the legislature. Sec. 5-14-1.5-2(a). Notice requirement do not

apply to the legislature. Sec. 5-14-1.5-5(g). Citizen may enjoin action taken at an executive session or to declare void action in violation of notice requirements (not applicable to legislature). Sec. 5-14-1.5-7(a). Court may award costs and attorney fees if action was knowing and intentional. Sec. 5-14 - 1.5-7(f).

Iowa. The correct citation is chapter 21 in the 1987 code. The chapter does not apply to the legislature. Remedies include assessment of fines of $100 to $500 for participants; no fines for a person who voted against the violating meeting or acted in good faith or in reliance of legal advice. Sec. 21.6(3). Costs and attorney fees for prevailing party who establishes the violation. Sec. 21.6(3). Voids the action taken in violation if the case is brought within six months of the action on a determination that the public interest in the enforcement of the open meeting policy outweighs the public interest in sustaining the validity of the action taken; doesn't apply to an action regarding the issuance of bonds or other indebtedness of a governmental body if a public hearing, election, or public sale has been held. The court may remove an individual who has engaged in two prior violations in which damages were assessed during the member's term. May issue a mandatory injunction punishable by civil contempt. Ignorance is no defense.

Kansas. 75 K.S.A. sec. 4317 et seq. Appears to apply to the legislature. Sec. 4318. Violators subject to a $500 civil penalty. Any binding action taken in violation is voidable in an action brought by the attorney general or county attorney. Sec. 4320. Court may award costs and attorney fees. Exceptions for impeachment are made. Sec. 4318. One annotation says that there was no "authority for private individual to bring action to void acts performed in violation of open meetings law. Stoldt v. City of Toronto, 678 P.2d 153 (Kansas 1984). Unannounced gathering prior to official meeting violates the law. Coggins v. Public Employee Relations Board, 581 P.2d 817.

Kentucky. KRS 61.805. Appears to apply to the legislature. Sec. 61.805(2), but with some "exceptions" "committees of the general assembly other than standing committees". Sec. 61.810(9). Courts may enforce by injunction. Sec. 61.845. Curiously, though there are pages of annotations of opinions of the attorney general as well as court decisions, no case involves the legislature.

Louisiana. RS 42.5 is the law; a 1981 amendment deleted the language that exempted the legislature in those words but the words now used do not include the legislature. Sec. 42.4.2(2). A specific section authorizes closed or executive sessions of legislative houses and committees. Sec. 42.6.2. The law also exempts "chance meetings, social gatherings, or other gatherings at which only presentations are made to members of the legislature or members of either house thereof or of any committee or subcommittee if no vote or other action, including formal or informal polling of members, is taken." Sec. 42.6.2(C). The legislature is exempted from requirement applicable to executive agency that meetings for the year be announced at the beginning of the year. Sec. 42.7. Suits to void action must be filed within 60 days of the action.

Maine. 1 MRSA sec. 401 et seq. Applies to the legislature. Sec. 402.2. For violations of the policy: "If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action shall be illegal and the officials responsible shall be subject to the penalties hereinafter provided". I note that "Acts" are not included. The penalty is a class E crime, probably a misdemeanor. No case examines a challenge to a legislative enactment.

Maryland. 76A A.C.M., sec. 7 et seq., reorganized as 10 A.C.M., 501 et seq. in the 1984 edition. Regarding enforcement, the law says: . . . the court may declare void any final action taken at a meeting held in wilful violation of [the law] if the court finds no other remedy would be adequate under the circumstances. However, the action of a public body may not be voided because of the violation . . . by any other public body." Sec. 10- 510(a)(2); sec. 10-510(e) authorizes injunctions or other appropriate relief. The section specifically excludes actions appropriating public funds, levying taxes, or providing for the issuance of bonds, notes, or evidences of public obligation from the authority of the court to void actions. Sec. 10-510(a). No case examines a challenge to a legislative enactment.

Massachusetts. 30A M.G.L.A. sec. 11A. Does not apply to the general court (legislature) or the committees or recess committees of the general court. Sec. 11A.

Michigan. Michigan has a constitutional provision requiring open meeting unless the public welfare requires otherwise. Art. 4, sec. 20. The current citation to the general law is 15 M.C.L.A. sec 261 et seq. "Public body" is defined as "any state . . . legislative . . . body, including a . . . committee, subcommittee . . . empowered by the state constitution . . . to exercise governmental . . . authority . . . ." Sec. 15.262(a); under 15.262(d), "decision" includes a "vote . . . upon a . . . bill . . ." Attorney General opinions are consistent that committee action is covered. A reenactment complying with the act cures a prior enactment that was deficient; the effective date is on the reenactment. Sec. 15.270. No case addresses a challenge to a legislative enactment.

Minnesota. M.S. 471.705. Does not apply to the legislature.

Mississippi. Not reviewed.

Missouri. M.R.S., sec. 610.010 et seq. Applies to the legislature. Sec. 610.010(2). Violations include injunctive relief. Sec. 610.027(1). Civil fines of not more than $100 are authorized. Sec. 610.027(3). Actions may void the action on evidence that the governmental body violated the section "if the court finds under the facts of the particular case that the public interest in the enforcement of the policy . . . outweighs the public interest in sustaining the validity of the action taken at the closed meeting, record, or vote." Sec. 610.027(4). Injunctive relief is authorized. Sec. 610.030. No annotation applies a challenge to a legislative enactment.

If I may be of further assistance, please advise.

RAB:bb
b4/020

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THE LEGISLATURE

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LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 15, 1988

SUBJECT: Open meetings; "action violating the section is void" (CSHJR 44(Judiciary))

TO: Representative Kay Brown

FROM: Richard A. Bradley
Legislative Counsel

I have reviewed the citations that Roxanne Turner provided to me regarding the constitutions and laws of California and Oregon regarding open meetings.

A brief summary of the provisions would be that neither state has any provision voiding laws for violations of the open meetings laws of those states.

Nor do the constitutions of those states lead to that result.

The California Constitution provides that the "proceedings of each house and the committees thereof shall be public except as provided by statute or concurrent resolution, when such resolution is adopted by two-thirds vote of the members of each house, . . ." Art. IV, sec. 7(c), California Constitution.

Contrary to the information Roxanne gave me, the enabling legislation at Secs. 11120 - 11131 of the California (Government) Code does not apply to the legislature but rather only to state executive branch agencies. And I believe that no provision of that law provides that action taken in violation of it is void. The only remedies offered in those sections of the California law is the authorization of litigation seeking mandamus or injunctive relief (Sec. 11130), costs and attorney fees (Sec. 11130.5), and a provision making the conduct a misdemeanor (Sec. 11130.7). A copy of these sections is enclosed.

California does, however, have an open meetings law specifically concerned with the legislature. See Secs. 9027 - 9031, California (Government) Code, copies enclosed.

The legislative formulation of art. IV, sec. 7(c), quoted above, provides that all "meetings of the Assembly and Senate and the committees and subcommittees thereof, and any conference committee, shall be open and public and all the proceedings shall be conducted openly so that the public may remain informed, except as otherwise provided in this article. All meetings of any conference committee shall be open to press representatives accredited by the Joint Rules Committee." Sec. 9027.

Two sanctions are stated: (1) a knowing violation is a misdemeanor. Sec. 9030; and (2) a mandamus or injunctive action for declaratory relief may be filed. Sec. 9031.

The Oregon laws are consistent.

The Oregon Constitution provides that the "deliberations of each house, of committees of each house or joint committees and of committees of the whole, shall be open." Art. IV, sec. 14, Oregon Constitution. The section also directs each house to adopt rules to implement the section and both houses are directed to adopt joint rules relating to joint legislative activity.

I have included copies of ORS Secs. 192.610 - 192.690. They are ambiguous as to whether they apply to legislative Acts or legislative proceedings. I can find no provision within these sections that uses terms to be expected in laws applying to the legislature. But I can find no specific provisions that do apply to the legislature; since we do not have access to the legislative rules, that may well be the the location of those provisions.

Sec. 192.680 establishes the policy that the court may order equitable relief as it considers appropriate. The law also provides that

> A decision shall not be voided if other equitable relief is available. The court may order payment to a successful plaintiff in a suit brought under this section of reasonable attorney fees at trial and on appeal, by the governing body, or public body of which it

is a part or to which it reports. ORS, sec. 192.-680(1).

This remedy may be offered because it would be very unlikely that a plaintiff could prove "actual damages" for a violation of the law.

The law also provides that if the violation was a "result of wilful misconduct by any member or members of the governing body, that member or members shall be jointly and severally liable to the governing body . . . for the amount paid under subsection (1)."

Finally, the Oregon law provides that "the provisions of this section shall be the exclusive remedy for an alleged violation of ORS 192.610 - 192.690."

I believe it is accurate to note that neither California nor Oregon will void a legislative Act for a violation of their open meetings laws. The laws also suggest that sanctions against members whose conduct is wilful is a proper recourse.

During the meeting yesterday, I heard the suggestion several times that voiding the law was required because no other remedy was available. It seems that there may be some others.

You may wish to consider the alternatives that seems to flow from the California and Oregon experience.

(1) Amend the open meeting law to permit injunctive and mandatory actions for violations of the law, with the sanction available from the funding of the agency sued but with the court given the option, as in Oregon, of assessing the fine against the acting members if the violation was wilful.

(2) Make violations of the open meeting law by legislators a violation of legislative ethics, AS 24.60.

If I may be of further assistance, please advise.

Enclosures

RAB:bb
b4/013

HJR 44

Kay Brown

Alaska State Legislature
House of Representatives

DEC 30 1988

TO: All House Members

FROM: Representative Kay Brown

DATE: December 28, 1987

SUBJ: Constitutional Amendment for Open Meetings

Please find attached a draft Joint Resolution that I plan to introduce along with Representatives Ellis, Frank, Davis, Cotten and Navarre providing for an amendment to the state constitution relating to open meetings. The proposed amendment provides a reasonable and workable solution to a difficult problem, and I would welcome additional co-sponsors of this legislation.

The amendment would constitutionally mandate legislative adherence to the Open Meetings Act and provide for enforcement in the instance of a violation. The amendment also allows legislative caucuses to meet in private for certain specific purposes.

The proposed language is the work product of a number of individuals who began meeting together shortly after the Supreme Court issued its ruling on the open meetings lawsuit last September. It is my feeling that the amendment provides a realistic and workable set of standards under which we can conduct the public's business while also providing a constitutional basis for court enforcement of the Open Meetings Act.

As you know, the Supreme Court ruled that the Open Meetings Act is not enforceable against the legislature. In League of Women Voters v. the Alaska Legislature, not even the defense attorneys disputed that the law had been violated. However, the Supreme Court found that it had no constitutional basis to force the legislature to adhere to the open meetings statute.

Respect for the legislature is diminished when we mandate a law for other public bodies, such as municipal assemblies, but do not hold ourselves to the same standard. The proposed amendment requires that legislative deliberations be open unless the legislative body is meeting in executive session to consider matters authorized by law. It states that if a matter is appropriate to a particular legislative body, a quorum of

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that body (ie, committee, subcommittee, etc.) cannot engage in private and substantive deliberation on that matter.

The amendment specifically allows legislative caucuses to meet in private to consider matters of procedure, organization or strategy. The legislative intent included in this measure makes it clear that this amendment is not intended to prevent the free flow of ideas among legislators or participation by legislators in public forums, community meetings, or social events.

As I mentioned, the language included in this draft is the product of several meetings with a variety of individuals and organizations. This same group is presently discussing the possibility of an initiative drive to place an advisory resolution on the ballot.

If you have any questions, or would care to discuss this proposal, please feel free to contact my Juneau office at 465-4998 after January 7th. If you wish to have your name listed as a cosponsor when the resolution is introduced, please let me know by January 13th.

SECTIONAL ANALYSIS OF HJR 44

Proposing an amendment to the Constitution
of the State of Alaska relating to open meetings.

SECTION 1 amends Article 1. Declaration of Rights, of the Constitution of the State of Alaska, by adding a new Section 23:

The deliberations of each house of the Legislature, and its committees and subcommittees, shall be open to the public, unless the legislative body is meeting in executive session to consider matters authorized by law.

If a matter is appropriate to a particular legislative body, private and substantive deliberation on the matter by a quorum of that body is prohibited.

Caucuses of the legislature may meet in private to consider matters of procedure, organization or strategy.

SECTION 2 Expresses legislative intent and summarizes provisions in the existing open meetings law.

Subsection (f) provides that the Legislative Affairs Agency will consider the statement of legislative intent expressed in (a) through (e) when preparing its neutral summary for the election pamphlet.

SECTION 3 Provides that the amendment will be placed before the voters at the next general election.

Prepared by:
Rep. Kay Brown
January 29, 1988

By Brown, Ellis, Frank, Davis, Cotten,
Navarre, Pourchot, Boyer, Koponen,
Boucher, Davidson, and Menard

HJR 44: Proposing an amendment to the Constitution of the State of Alaska relating to open meetings

HJR 44 proposes to amend the State Constitution by:

- mandating legislative adherence to the Open Meetings Act
- providing for court enforcement in the instance of a violation
- requiring that legislative deliberations be open unless the body is meeting in executive session to consider matters authorized by law
- prohibiting a quorum of a legislative body (committee, subcommittee, etc.) from engaging in private and substantive deliberation on a matter appropriate to that body
- allowing legislative caucuses to meet in private to consider matters of procedure, organization or strategy

HJR 44 includes intent language making it clear that this amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community meetings, or social events.

The proposed language is the work of a number of individuals who began meeting together shortly after the Supreme Court issued its ruling last September.

Prepared by:
Rep. Kay Brown
January 29, 1988

By Brown, Ellis, Frank, Davis, Cotten,
Navarre, Pourchot, Boyer, and Koponen

HJR 44: Proposing an amendment to the Constitution of the State of Alaska relating to open meetings

HJR 44 proposes to amend the State Constitution by:

- mandating legislative adherence to the Open Meetings Act
- providing for court enforcement in the instance of a violation
- requiring that legislative deliberations be open unless the body is meeting in executive session to consider matters authorized by law
- prohibiting a quorum of a legislative body (committee, subcommittee, etc.) from engaging in private and substantive deliberation on a matter appropriate to that body
- allowing legislative caucuses to meet in private to consider matters of procedure, organization or strategy

HJR 44 includes intent language making it clear that this amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community meetings, or social events.

The proposed language is the work of a number of individuals who began meeting together shortly after the Supreme Court issued its ruling last September.

Prepared by:
Rep. Kay Brown
January 19, 1988

SECTIONAL ANALYSIS OF HJR 44

Proposing an amendment to the Constitution
of the State of Alaska relating to open meetings.

SECTION 1 amends Article 1, Declaration of Rights, of the Constitution of the State of Alaska, by adding a new Section 23:

The deliberations of each house of the Legislature, and its committees and subcommittees, shall be open to the public, unless the legislative body is meeting in executive session to consider matters authorized by law.

If a matter is appropriate to a particular legislative body, private and substantive deliberation on the matter by a quorum of that body is prohibited.

Caucuses of the legislature may meet in private to consider matters of procedure, organization or strategy.

SECTION 2 Expresses legislative intent and summarizes provisions in the existing open meetings law.

Subsection (f) provides that the Legislative Affairs Agency will consider the statement of legislative intent expressed in (a) through (e) when preparing its neutral summary for the election pamphlet.

SECTION 3 Provides that the amendment will be placed before the voters at the next general election.

Prepared by:
Rep. Kay Brown
January 29, 1988

January 29, 1988
House State Affairs Committee
The Alaska Legislature

Testimony of the League of Women Voters of Alaska

HJR 44: Proposing an Amendment to the Constitution of the State of Alaska relating to open meetings.

Madame Chair, Members of the Committee:

My name is Eve Reckley. I represent the League of Women Voters of Alaska. You have before you House Joint Resolution number 44 proposing to amend the Constitution of the State of Alaska to mandate that the business of the Legislature and thus, the business of the people of Alaska, be conducted in open meetings. The resolution is simple and straight forward. It requires the Legislature to abide by the open meetings law it enacted. And it provides the legal framework within the constitution for the courts to enforce it.

In short, the League, advocating in the public interest, is asking legislators to stand up and be counted on this issue. The League has done so, by taking its case for open meetings of all legislative bodies to the Supreme Court of the State of Alaska. Our belief is strong that the deliberations and the decision-making of the Legislature and its constituent groups must be done in full public view. Our resolve is strong that we will advocate for a guarantee that the public has access to the legislative process.

An amendment to the Constitution of the State of Alaska expressly mandating this right of public access, is the only way to secure this guarantee. It provides the courts the legal justification for enforcement. Without it, the Open Meetings Act has little meaning.

The League and its co-appellants claimed in Superior Court that closed meetings by members of the House and Senate Finance committees at various times in formulating the 1987 budget, violated the open meetings act. While that claim was upheld by the Superior Court, the Supreme Court reversed it on the grounds that there "is no implied right of public access to legislative committee or caucus meetings under the Alaska Constitution." Under the separation of powers doctrine in the Constitution, the Supreme Court held it had no legal basis to enforce the laws and procedures under which the Legislature governs itself.

The League now asks you to give the courts the power to enforce the Open Meetings Act and guarantee the right of public access to legislative deliberations. The League does not make this request lightly. We consider a constitutional amendment so important that we will continue to work with other interested groups to launch an initiative campaign, if the Legislature fails to act.

The proposed constitutional amendment before you does not broaden the open meetings act, nor change existing law permitting an executive session for matters requiring confidentiality. Nor is the amendment intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events.

Thomas Jefferson, framer of our national constitution, noted that as democratic institutions develop and mature, changes would occasionally be necessary to guarantee for all citizens the right of full participation. I am paraphrasing a quote inscribed in marble on the Jefferson Memorial in Washington, D.C.: As a man, I would not expect to wear the clothes that fitted as a boy, and so democratic institutions must grow and change as circumstances dictate.

We are a young state, under 30 years of age, and we are maturing in our democratic processes. The League believes that the Alaska legislative system should be "responsive, representative, accessible, efficient, and accountable."

Constitutionally mandating open meetings is vital to making the legislative process accessible and accountable to the people of Alaska.

As you know, this amendment requires a two thirds vote of both the House and the Senate and the signature of the Governor to place it on the ballot for a vote of the people in November.

This process will provide an opportunity for public date and then for voters to say whether they believe public access to legislative meetings should be guaranteed in the Constitution of the State of Alaska.

The League asks you to give the people of Alaska the opportunity to make that decision. Thank you.

February 24, 1988
House Judiciary Committee
The Alaska Legislature
Testimony On HJR 44

Mister Chairman, Members of the Committee:

I am Eve Reckley. I represent the League of Women Voters of Alaska. The League supports enactment of House Joint Resolution No. 44 to amend the Constitution of the State of Alaska to require that deliberations of legislative committees and subcommittees be open to the public. We appreciate the opportunity to present testimony on this legislation which is one of the League's highest priorities for action in this legislative session.

The League believes strongly in the right of public access to deliberations of legislative bodies, so much so, that it pressed its challenge of violations of the Open Meetings Act by legislative committee members to the Supreme Court of the State of Alaska. While the issue was undisputed, that closed meetings were held at various times during the formulation of the 1987 Alaska state budget, the high court held "there is no implied right of public access to legislative committee or caucus meetings under the Alaska Constitution." The League asks you now to approve this resolution to constitutionally guarantee the right of public access to deliberations of legislative bodies.

The League submitted affidavits to the Superior Court attesting to "a pattern of meetings by legislative committee and caucus majority members which were closed to the public, the press, and sometimes minority members of the legislature." The legislators did not deny the meetings occurred, or that they conducted the business and made the decisions that the League alleged. However, the Supreme Court's decision reversing the decision of the lower court was based on the separation of powers doctrine, that the court had no constitutional authority to enforce the law governing the operating procedures of the Legislature.

It is questionable whether such a "win" is really a win for either the Legislature or the public. We believe that when the Legislature refuses to follow the laws it establishes, public confidence is undermined. You have an opportunity now to help restore that public confidence.

The resolution before you, HJR 44, is simple and straight forward. It would amend the constitition to provide the legal framework for the courts to enforce the Open Meetings Act. An amendment to the Constitution of the State of Alaska to expressly mandate the right of public access, is the only way to secure this guarantee. Without it, the Open Meetings Act, in sofar as it relates to the Legislature, is meaningless. This proposal, developed with the League's participation and support, is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events.

Time and again the question has been raised, what is substantive delibertions? We think you know. And if there is ever a question, trust the public to make that determination. Hold the discussions in open meetings. The League believes that the better informed the public is, the better our government will be because it will be reflective of the will of the people.

The League believes that constitutionally mandating open meetings is vital to making the legislative process accessible and accountable, as well as more responsive to, and representative of the people of Alaska. As you know, the resolution requires a two-thirds vote of both the House and Senate and the signature of the governor to place it before voters in November. This process will give voters a say in whether they believe public access to legislative meetings should be guaranteed in the Constitution of the State of Alaska.

The League of Women Voters of Alaska asks you to give the people of Alaska the opportunity to make that decision. We urge your approval of HJR 44.

Thank you.

Appearances: Avrum M. Gross and Susan A. Burke, Gross & Burke, Juneau, for Senate Appellants/Cross-Appellees, Mitchell E. Abood, Jr., Don Bennett, John B. Coghill, Edna DeVries, Richard I. Eliason, Bettye Farhenkamp, Jan Faiks, Frank R. Ferguson, Paul Fischer, Richard Halford, Tim Kelly, Jalmar M. Kerttula, Patrick Rodey, John C. Sackett, Arliss Sturgulewski, Fred F. Zharoff, Jack Gibbons, and Peggy Mulligan. Richard M. Burnham, Findley & Burnham, Juneau, for House of Representatives Appellants/Cross-Appellees, Albert P. Adams, Johne Binkley, H.A. Boucher, Bette M. Cato, Jim Duncan, Steve Frank, John G. Fuller, Peter Goll, Max F. Gruenberg, Jr., Ben F. Grussendorf, Adelheid Herrman, Niilo E. Koponen, Ronald L. Larson, M. Mike Miller, Mike W. Miller, Mike Navarre, John Ringstad, Richard Shultz, John Sund, Robin L. Taylor, David W. Thompson, and Kay Willis. D. John McKay and Laura N. Cromwell, Middleton, Timme & McKay, Anchorage, for Appellees/Cross-Appellants League of Women Voters of Alaska and Anchorage Daily News.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

MATTHEWS, Justice.
COMPTON, Justice, dissenting.

These appeals arise from the superior court's decision that a claim that certain groups of state legislators held closed committee meetings and caucuses in violation of the Open Meetings Act was not justiciable, but that a claim that the closed meetings violated an implied constitutional right of public access to meetings of legislative units was both justiciable and correct. We agree that the claim of violation of the Open Meetings Act by state legislators is nonjusticiable, but contrary to the superior court's decision, we hold that there is no

THE SUPREME COURT OF THE STATE OF ALASKA

MITCHELL E. ABOOD, JR., DON BENNETT, JOHN B. COGHILL, EDNA DeVRIES, RICHARD I. ELIASON, BETTYE FARHENKAMP, JAN FAIKS, FRANK R. FERGUSON, PAUL FISCHER, RICK HALFORD, TIM KELLY, JALMAR M. KERTTULA, PATRICK RODEY, JOHN C. SACKETT, ARLISS STURGULEWSKI, FRED F. ZHAROFF, JACK GIBBONS, PEGGY MULLIGAN, ALBERT P. ADAMS, JOHNE BINKLEY, H.A. BOUCHER, BETTE M. CATO, JIM DUNCAN, STEVEN FRANK, JOHN G. FULLER, PETER GOLL, MAX F. GRUENBERG, JR., BEN F. GRUSSENDORF, ADELHEID HERRMAN, NIILO E. KOPONEN, RONALD L. LARSON, M. MIKE MILLER, MIKE W. MILLER, MIKE NAVARRE, JOHN RINGSTAD, RICHARD SHULTZ, JOHN SUND, ROBIN L. TAYLOR, DAVID W. THOMPSON, and KAY WILLIS,	File No. S-1831 File No. S-1841 File No. S-1957
Appellants and Cross-Appellees,	
v.	O P I N I O N
LEAGUE OF WOMEN VOTERS OF ALASKA, and ANCHORAGE DAILY NEWS,	
Appellees and Cross-Appellants.	[No. 3230 - September 29, 1987]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Walter L. Carpeneti, Judge.

The League attached affidavits from several senators and representatives which described these meetings in some detail.

The League charged that these meetings violated the Open Meetings Act (AS 44.62.310), the Uniform Rules of the Legislature (Rule 22), various federal and state constitutional provisions, and common law rights of access to government. The superior court was asked to declare that the closed meetings violated state and federal law, and that any appropriation bill adopted as a result of such meetings would be void unless each house of the legislature conducted "substantial, de novo, independent and public reconsideration of those substantive matters previously discussed in private." The injunctive relief sought by the League was aimed at preventing the legislature from continuing to engage in the type of meetings complained of, and from enacting the state budget for FY 1987 unless and until certain remedial action was taken.

On April 30, the superior court held a hearing on an application by the League for a temporary restraining order, and on May 1 the court issued its first decision in this case. The court concluded that litigation premised upon the alleged closed meetings held in violation of the Open Meetings Act presented a justiciable controversy. The court refused to issue the requested TRO, however, because it found that it could not fashion an order that would effectively control these legislative activities. The court then decided that it was empowered to

implied right of public access to legislative committee or caucus meetings under the Alaska Constitution. We therefore reverse.

I. FACTS AND PROCEEDINGS

In April 1986, the League of Women Voters of Alaska, the Anchorage Daily News, and the Fairbanks Daily News Miner (collectively referred to hereafter as the League) filed an action seeking a declaratory judgment and injunctive relief against certain members of the Alaska Legislature (the Legislators) and four legislative employees. The League alleged that members of the Senate and House Finance Committees had held meetings "closed to the press and members of the public," and during those meetings had "engaged in collective fact-finding, deliberation, debate and decision-making with respect to the budget for FY 1987." The complaint further alleged that members of the House Finance Committee and the Senate Finance Committee had met jointly in meetings closed to the press and public "to discuss and attempt to obtain agreement upon the amount of funds available for the FY 1987 budget." The complaint also alleged that members of the House Finance Committee and the Senate Finance Committee had met from time to time in "closed caucus meetings" with other members of the ruling majority, and during these meetings had engaged in "substantial collective discussion, deliberation, and decision-making" concerning the FY 1987 budget.

issue a final declaratory judgment solely on the basis of the League's complaint and affidavits filed in support of the motion for the TRO. The court found that a pattern of conduct which was violative of the Open Meetings Act had been established, that action taken contrary to the Act was void, and therefore that any budget decision which was reached at a closed meeting was void.

The Legislators immediately appealed from the superior court's decision and requested emergency relief, claiming that due process had been denied to them because the decision had been rendered before the Legislators had been afforded a fair opportunity to respond on the merits. After an expedited argument, we reversed the judgment issued by the superior court and remanded the case for the purpose of conducting a full hearing on the merits.

Shortly thereafter, the Legislators filed their answers to the complaint, and moved to dismiss the case or alternatively for summary judgment, arguing that the issues in the case were nonjusticiable and that the claims against the Legislators were barred by legislative immunity. The League filed a cross-motion for summary judgment on the justiciability issue.

In October 1986, the superior court entered its second decision in this case, the partial final judgment which is the subject of this appeal. The court reversed its earlier ruling and concluded that the League's claim that the closed meetings violated the Open Meetings Act was not justiciable. The League

appeals from this ruling. The court proceeded to hold, however, that the public and press enjoy an implied right of access to the proceedings of the legislature under article I, section 5 of the Alaska Constitution, which guarantees freedom of speech and of the press. The court further held that a claim that the Legislators violated this constitutional right was justiciable. The court finally held that legislative immunity was not a bar to the suit. The Legislators appeal from these rulings. The State of Alaska, intervenor on behalf of the Legislators below, and the Fairbanks Daily News Miner, are not participants in this appeal.

II. STANDARD OF REVIEW

All of the issues in this appeal raise questions of Alaska constitutional and statutory law, subject to de novo review. The facts of this case are not in dispute; the only facts in the record are the seven affidavits submitted by the League which attest to a pattern of meetings by legislative committee and caucus majority members which were closed to the public, the press, and sometimes minority members of the legislature. The Legislators do not deny that these meetings occurred, or that they conducted the business and made the decisions that the League alleges.

III. VIOLATIONS OF THE OPEN MEETINGS ACT ARE NOT JUSTICIABLE

The League argues that the Legislators violated Alaska's Open Meetings Act[1] and the legislature's Uniform Rule

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1. The Alaska Open Meetings Act provides:

> Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. . . . Except when voice votes are authorized, the vote shall be conducted in such manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the bodies specified in this subsection.
>
> (b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No

(Footnote Continued)

(Footnote Continued)

action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges, or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section. . . .

(f) Action taken contrary to this section is void.

AS 44.62.310.

22[2] through the closed meetings attested to in the League's affidavits. The superior court held that these claims were

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2. Uniform Rule of the Legislature 22 provides:

> OPEN AND EXECUTIVE SESSIONS. (a) All meetings of a legislative body are open to all legislators, whether or not they are members of the particular legislative body that is meeting, and to the general public except as provided by (b) of this rule.
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> (b) A legislative body may call an executive session at which members of the general public may be excluded for the following reasons:
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> (1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;
>
> (2) discussion of subjects that tend to prejudice the reputation and character of a person;
>
> (3) discussion of a matter that may, by law, be required to be confidential.
>
> (c) When a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present.
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> (d) The provisions of this rule may not be interpreted as permitting the exclusion of a legislator from an executive session, whether or not the legislator is a member of the body that is meeting. A legislator not a member of the body holding an executive session shall, however, be subject to the same rules of confidentiality and decorum as pertain to regular members of the body.

nonjusticiable because "[j]usticiability in this case depends on a determination that there is a constitutional right alleged to have been infringed." (Emphasis by the court.) As a general proposition, we agree.

> In Malone v. Meekins, we recognized that
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> > the established principle that courts should not attempt to adjudicate "political questions" . . . stems primarily from the separation of powers doctrine. . . . "[I]t is the relationship between the judiciary and the coordinate branches of the . . . Government . . . which gives rise to the 'political question.'"
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> 650 P.2d 351, 356 (Alaska 1982) (quoting Baker v. Carr, 369 U.S. 186, 210, 7 L. Ed. 2d 663, 682 (1962)). See also Abood v. Gorsuch, 703 P.2d 1158, 1160 (Alaska 1985) ("There are certain questions involving coordinate branches of the government, sometimes unhelpfully called political questions, that the judiciary will decline to adjudicate.").

Our statement in Abood suggests the difficulty inherent in precisely defining the contours of the doctrine of justiciability. It is not possible to draw the exact boundary separating justiciable and nonjusticiable questions.

> Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision . . . and the actual hardship to the litigants of denying them the relief sought.

Poe v. Ullman, 367 U.S. 497, 508-09, 6 L. Ed. 2d 989, 999 (1961) (Frankfurter, J., plurality opinion). Nor will merely characterizing a case as nonjusticiable or political in nature render it immune from judicial scrutiny. Malone, 650 P.2d at 356. Rather, to identify those political questions which will be held to be nonjusticiable, we have utilized the approach adopted by the United States Supreme Court in Baker v. Carr. Id. at 357; see also Abood, 703 P.2d at 1160. In Malone, we explained that the Supreme Court of the United States had identified "various elements, one or more of which is '[p]rominent on the surface of any case held to involve a political question. . . .' These elements included (1) a textually demonstrable commitment of the issue to a coordinate political department . . . ." 650 P.2d at 357 (citing Baker v. Carr, 369 U.S. at 217, 7 L. Ed. 2d at 686).

The Legislators argue that article II, section 12 of the Alaska Constitution contains an express textual commitment of authority, which specifically and exclusively authorizes the legislature to adopt its own rules of procedure. Article II, section 12 provides in part: "Rules. The houses of each legislature shall adopt uniform rules of procedure." Pursuant to this authority, the legislature has adopted Uniform Rule 22, in language substantially identical to the Open Meetings Act, providing that all meetings of a legislative body are open to the general public.. Compare notes 1 and 2, supra. The Legislators argue that since the constitution commits to the legislature the

authority to set its own procedures, only the legislature may determine whether the Open Meetings Act should apply to the legislature, and how it should apply consistent with Uniform Rule 22. The Legislators rely on this court's decisions in Malone and Abood, and on the Florida Supreme Court's opinion in Moffitt v. Willis, 459 So.2d 1018 (Fla. 1984).

In Malone, we declined to address the question of whether the legislature had violated AS 24.10.020, which prohibited a person other than the Speaker of the House from convening a session of the House. We held that the matter of the election or removal of the Speaker was committed by the constitution to the House, and the judicial branch owed respect to that body. We explained that

> [s]uch a declaration would, in our view, be an unwarranted intrusion into the business of the House. To be sure, the judicial branch of government has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including the compliance by the legislature. But a statute such as AS 24.10.020 relates solely to the internal organization of the legislature, a subject which has been committed by our constitution [Article II, section 12] to each house.

650 P.2d at 356 (footnote omitted). We also considered the question whether the "reasonable public notice" requirement of the Open Meetings Act, AS 44.62.310(e), was violated by the legislature and said, "we regard this question as it

relates to the internal organization of one of the Houses of the legislature to be nonjusticiable." Id. at 359.

In Abood, we held nonjusticiable the question of whether a joint session of the legislature could legally be presided over by the President of the Senate in the absence of the Speaker of the House. At issue was the interpretation of the legislature's Uniform Rule 51 which required the presence of both officers. We agreed with the trial court that the issue arose out of "the rulemaking powers of the legislature." 703 P.2d at 1164. We also agreed that "out of respect owed to a coordinate branch of state government, [we must] defer[] to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature." Id.

Our holdings in Malone and Abood are controlling in this case. The Alaska Constitution expressly commits to the legislature authority to adopt its own rules of procedure. The question whether legislative business should be conducted in open or closed sessions is a procedural question which has traditionally been the subject of legislative rules. See Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569, 577 (D. Utah 1985) (a right of access to administrative hearings is more a procedural right than a substantive right); see also P. Mason, Manual of Legislative Procedure sec. 630 (1979) (committee meetings open to public except when considering specified restricted subjects). Pursuant to this constitutional

grant of authority, the legislature has enacted Uniform Rule 22 and the Open Meetings Act in substantially identical language.

The League asserts that the Legislators have violated both the Uniform Rule and the Open Meetings Act. If they have, to hold that these claims are justiciable places the judiciary in direct conflict with the legislature's constitutionally authorized rulemaking prerogative. We agree with the Florida Supreme Court that it is the legislature's prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative. Moffitt v. Willis, 459 So.2d 1018, 1021 (Fla. 1984).[3] As we stated in Malone, "except in extraordinary

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3. The facts in Moffitt are virtually identical to the facts in this case. Newspaper publishing companies brought a declaratory judgment action against the state house speaker and senate president alleging that secret meetings of the legislature violated the legislature's rule requiring open meetings, a statute requiring the legislature to follow its own rules, and various state and federal constitutional provisions. The Florida Supreme Court held that the courts lacked jurisdiction to hear the case, explaining:

> In our view, a judicial determination of this matter hinges on the meaning of legislative committee meetings and what activity constitutes such a meeting. At this point, the judiciary comes into head-to-head conflict with the legislative rulemaking prerogative.
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> Article III, section 4(a) of the Florida Constitution gives each house the power to determine its own rules of procedure. . . .

(Footnote Continued)

circumstances, as where the rights of persons who are not members of the legislature are involved, it is not the function of the judiciary to require that the legislature follow its own rules." 650 P.2d at 359. In support of this proposition, we cited United States v. Smith, 286 U.S. 6, 33, 76 L. Ed. 954, 958-59 (1932), where the Court discussed the rule that the only justiciable limitations on a legislative body's power to adopt rules of its proceedings are that the body

> may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rules and the result which is sought

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(Footnote Continued)

> [T]his provision gives each house the power and prerogative not only to adopt, but also to interpret, enforce, waive or suspend whatever procedures it deems necessary or desirable so long as constitutional requirements for the enacting of laws are not violated. . . . It is the final product of the legislature that is subject to review by the courts, not the internal procedures.
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> . . . .
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> Just as the legislature may not invade our province of procedural rulemaking for the court system, we may not invade the legislature's province of internal rulemaking. . . . A member of the legislature can raise a point of order regarding a violation of any of the rules of the house or senate. That is the proper forum for determining the propriety of the activities complained of in the suit below.

Id. at 1021-22 (emphasis by the court, citations omitted).

> to be obtained. But within these limitations all matters of method are open to the determination of the house. . . .

Id. at 33, 76 L. Ed. at 959, quoting United States v. Ballin, 144 U.S. 1, 5, 36 L. Ed. 321, 324 (1891). See also Exxon Corp. v. F.T.C., 589 F.2d 582, 590 (D.C. Cir. 1978) ("Although the courts will intervene to protect constitutional rights from infringement by Congress, . . . where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress . . ."), cert. denied, 441 U.S. 943, 60 L. Ed. 2d 1044 (1979); Consumers Union of United States v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 24 (D.D.C. 1973) ("A congressional rule which infringes upon the constitutional rights of persons other than Congressmen presents a proper question for the judiciary"), rev'd on other grounds, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051, 46 L. Ed. 2d 640 (1976); State ex rel. City Loan & Sav. Co. v. Moore, 127 N.E. 910 (Ohio 1931) (the legislature's disregard of its own rules as to its lawmaking procedures is not subject to judicial inquiry, where the rule is not embraced in the constitution); Schweitzer v. Territory, 47 Pac. 1094 (Okla. 1897) (since the court cannot declare an act of the legislature void on account of noncompliance with rules of procedure made by itself to govern its deliberation, the failure of the legislature to observe a statute enacted by itself, and concerning the legislature's procedure for lawmaking, was no ground for refusing

to enforce a statute passed in noncompliance with the rule, where there was no constitutional provision mandating a particular procedure); State v. Cumberland Club, 188 S.W. 583, 585 (Tenn. 1916) (where a state legislature has the right under its constitution to make its own rules of procedure, it must be the judge of those rules, and all the court can do is to ascertain whether the constitution has been complied with). Likewise, in Abood, we noted that the "nonjusticiability [of rules violations] doctrine would not apply to cases involving our constitutionally mandated duty to insure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." 703 P.2d at 1161.[4]

We observe that in Smith, the Court held that where the "construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one." 286 U.S. at 33, 76 L. Ed. at 959. In this case, the construction of the Open Meetings Act and Uniform Rule 22 does not affect persons other than members of the legislature in the same sense as was the case in Smith. There, the controversy was between the United States Senate and an appointee of the

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4. We adjudicated the question presented as to the quorum needed for acts of the legislature in joint session because it "is a question of Alaska constitutional law. . . . to which the nonjusticiability doctrine does not apply." Id. at 1161.

President, the resolution of which depended upon the right of the Senate to reconsider, under its rules, its prior confirmation of the President's nominee after the President had appointed the nominee pursuant to the earlier confirmation. Here, there is no specific individual with any particular right at stake in the controversy. Rather, the right granted under the Open Meetings Act as it applies to the legislature, and under Uniform Rule 22, is a right of the public generally to observe the legislature's proceedings.

It is true that the legislature has identified in the Open Meetings Act the public's interest in open meetings, AS 44.62.312(a), and we have recognized that the Act exists primarily to advance the people's interest, and that it is applicable to the legislature.[5] Alaska Community Colleges' Federation of Teachers v. University of Alaska, 677 P.2d 886, 891 (Alaska 1984). We do not retreat from these principles. The question before us, however, is not whether the Open Meetings Act applies to the legislature, but rather whether the legislature's alleged violation of the Act or Uniform Rule is justiciable.[6] As

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5. Even so, it is beyond doubt that the legislature has the power to exempt itself at any time from the coverage of the Open Meetings Act.

6. Compare Cole v. State, 673 P.2d 345, 349 (Colo. 1983) (held: requirement of open meetings law that legislative caucus meetings be open to public does not conflict with state

(Footnote Continued)

we have concluded, the Open Meetings Act, as it applies to the legislature, like the legislature's Uniform Rule 22, merely establishes a rule of procedure concerning how the legislature has decided to conduct its business. Of course, having made the rule, it should be followed, but a failure to follow it is not the subject matter of judicial inquiry. See State ex rel. City Loan & Sav. Co. v. Moore, 177 N.E. 910, 911 (Ohio 1931).

If there were allegations that the legislature, acting pursuant to or in violation of one of its rules of procedure, had infringed on the rights of a third person not a member of the legislature as in Smith, or had ignored constitutional restraints or violated fundamental rights, then the "exceptional circumstances" exception to the rule of nonjusticiability would come into play. None of these factors are involved in this case, however, and there is no basis for employing the "exceptional circumstances" exception.

Thus, because the constitution commits to the legislature the authority to provide for its own rules of procedure, and because the question of whether a legislative committee meeting or caucus meeting shall be open or closed falls within this grant of authority, we regard the question whether the Legislators have violated the Open Meetings Act or Uniform

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(Footnote Continued)

constitutional provision authorizing legislature to establish its own rules, however, court did not discuss justiciability).

Rule 22 to be nonjusticiable. As we have recognized, the legislature's violation of its rules of procedure may be justiciable in "exceptional circumstances" of constitutional dimension. If the League's claim is to survive this justiciability challenge, it must involve a right protected by either the Alaska Constitution or the United States Constitution.

IV. NO IMPLIED CONSTITUTIONAL RIGHT OF ACCESS TO LEGISLATIVE MEETINGS

The United States Constitution does not expressly require the Congress to hold any of its meetings in public. There is also no common law right to attend meetings of government bodies. Society of Professional Journalists, 616 F. Supp. at 572; see Watkins, Open Meetings under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 268 (1984) (Watkins); Note, Open Meeting Statutes: The Press Fights for the "Right to Know", 75 Harv. L. Rev. 1199, 1203 (1962) (Note). Indeed, the tradition of the English Parliament, which was subsequently carried on in the legislative bodies of Colonial America, was to hold legislative debate in secret and to prohibit publication of legislative proceedings. Society of Professional Journalists, 616 F. Supp. at 572 (observing that both the Continental Congress and the Constitutional Convention conducted their proceedings in secret, and thus "[i]t is not surprising . . . that the Framers of the Constitution did not include an express provision in the