

**ALABAMA LEGISLATURE COMMITTEE FILES**

**1991-1992**

**8672**

**7024**

**HOUSE**

**JUDICIARY**

## Vigilance In Behalf Of Liberty: The Second Amendment in Its 200th Year.

By James Jay Baker

In the last several decades, a vocal minority, popular with the major news media, has put forth a distorted interpretation of the Second Amendment to the United States Constitution.

This has been done for the avowed political purpose of removing the Second Amendment as an obstacle to their goal of depriving private citizens of some or all of their firearms. And, as with virtually all attempts to minimize precious freedoms guaranteed by the Bill of Rights, this vocal minority has twisted the original and very plain meaning of the right to keep and bear arms.

The right to keep and bear arms, like many of the other rights guaranteed by the Bill of Rights, did not have its origin in the Second Amendment. Rather, this fundamental, individual right, largely developed in English jurisprudence prior to the Revolutionary War, pre-dates the U.S. Constitution and was part of the common-law heritage of the original colonies.

The tenets of this common law were echoed by individual rights champions including Patrick Henry who, fearful of the power of Congress over both a standing army and the militia, told delegates to the Virginia Constitutional Convention, "the great object is, that every man be armed ... Everyone who is able may have a gun." Furthermore, Henry said, "Are we at last brought to such a humiliating and debasing degradation, that we cannot be trusted with arms for our own defense? ... If our defense be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to use, as in our own hands?"

Noted contemporary jurists like Supreme Court Justice Black have upheld the principles set down in the Second Amendment, commenting, "Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many."

Social strife dating back to the Reconstruction Period has issued continuous challenges to the Second Amendment. Firearm prohibition laws have been passed to satisfy political opportunity or appease vested interests. Yet upon 15 occasions various courts have struck down laws that violated the peoples' right to keep and bear arms.



In *United States v. Cruikshank*, the first case in

which the Supreme Court had the opportunity to interpret the Second Amendment, the Court plainly recognized that the right of the people to keep and bear arms was a fundamental right which existed prior to the Constitution when it stated that such a right "is not a right granted by the Constitution ... neither is it in any manner dependent upon that instrument for its existence"

In *Presser v. Illinois*, although the Supreme Court affirmed the holding in *Cruikshank* that the Second Amendment, standing alone, applied only to action by the federal government, it nonetheless found the states without power to infringe upon the right to keep and bear arms:

"It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government."

More recently, the Supreme Court has continued to uphold the classic interpretation of the peoples' right to keep and bear arms. In *Perpich v. Department of Defense*, the Court, in 1990, affirmed that "militia" referred to a body of armed citizens trained to perform military duty. And in *U.S. v. Verdugo-Urquidez*, the Court held that the term "the people," protected by the Second Amendment, as well as the First, Fourth and Ninth Amendments, are a class of persons who are part of a national community, or who have otherwise developed sufficient connection with this country to be considered a part of that community, i.e., all citizens, as well as legal aliens in the United States.

The Second Amendment will continue to be tested by the tribulations of the moment, just as it will continue to prevail due to the unyielding power and clarity of its intent. This is the Bill of Right's legacy to a free people, and the truth on which it endures.

James Jay Baker is an attorney and executive director of the NRA's Institute for Legislative Action.

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## ADVERTISEMENT

*By John Martin*

# Firearms By And For The People.

**T**he Second Amendment to the Constitution of the United States guarantees the citizens of this nation the right to keep and bear arms. Fully and clearly the framers of our federal Bill of Rights intended to protect a fundamental individual right and not, as some detractors claim, merely to protect an organized militia. And, just as clearly, history shows that the 14th Amendment to the federal Constitution applies the protections of the Second Amendment to the states and localities.

We have this assurance in the Founding Fathers' own words, confirmed by the well-documented research of the nation's foremost constitutional scholars. But, what we do not have is an opinion issued by the United States Supreme Court — a ruling that states, without reservation, that the freedoms protected by the Second Amendment not only protect against the federal government but against state laws or local ordinances as well.

**W**ithout such a clear High Court opinion, many state and local governments believe they have the power to restrict or even ban altogether the exercise of the rights protected by the Second Amendment. This is why 43 states have now placed into their constitutions provisions expressly guaranteeing their citizens the right to keep and bear arms, thereby protecting the exercise of the right to keep and bear arms against state laws and local ordinances.

Today I can point out with pride that Maine is among these 43 states. Indeed, people here have only recently indicated, through the

power of a free electorate, that they overwhelmingly support the tenets of the

Second Amendment, and that they believe that the citizens of Maine should insure those protections without having to wait for the U.S. Supreme Court to hear, consider, and decide a case involving a state or local gun law. Carefully selected strong language in our newly revised right to keep and bear arms provision will prevent any future attempts to sidestep or weaken this vital constitutional principle. We are now squarely and proudly in line with the thinking of men like Madison and Jefferson. The citizens of Maine have spoken, and this basic right so dear to our democracy will never be decimated by fad, trend or petty political maneuvering.

It should be obvious by now to all of us serving in government that the right to keep and bear arms is vital to the freedom of the American people. Millions of liberty-loving individuals have made this perfectly clear in 43 states, just as the constitutional framers made themselves perfectly clear when they penned these historic words: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

**I**t now remains for lawmakers in the remaining seven states to consider this issue and to review the need in their states for the protections we now enjoy in Maine. The meaning of the Second Amendment is clear. In keeping with the spirit of our nation's sacred Bill of Rights, let us show the courage and the statesmanship to let the peoples' will be done.



*John Martin is Speaker of the Maine House of Representatives.*

# Limiting campaign costs

by Jeffrey B. Garfield and Robert M. Stern

**M**any states are wrestling with skyrocketing campaign costs and the ethics of candidates keeping campaign funds for personal use.

To help them through the minefield of campaign financing, the Council on Governmental Ethics Laws has released an 88-page model law.

While the model law contains the traditional limits on contributions from persons and political action committees, it also includes innovative provisions on campaign financing.

More funds than ever are being given to incumbents not facing reelection. These contributions often are given when important legislation is pending. The model law contains two options: a ban on contributions while the legislature is in session or a ban on all non-election year contributions.

## Limiting big donors

Contributions from donors other than individuals are beginning to dominate state races. The days of the mom and pop contributor and the \$20 spaghetti dinner are over. Yet, most people believe that individual contributions are the most important part of political fundraising. The model law limits the overall amount of non-individual contributions to one-third of the total received.

A candidate's own funds comprise an increasingly large percentage of overall giving, as candidates lend their campaigns money in hopes of victory and then repayment. This, however, can create a major percep-

tion problem: money donated to the campaign after the election to repay a debt to the candidate is really going into the candidate's personal pocket.

The U.S. Supreme Court has ruled a state may not limit how much a candidate can give his own campaign, but the court has not extended the ruling to loans. Kentucky, where many candidates have lent their campaigns huge sums, has enacted a law that limits loans but not contributions from candidates. The model law uses Kentucky's approach.

Contractors with pending bids often make campaign contributions to public officials considering those bids. A common example is when cable companies bid on lucrative franchises. Even when there is no evidence of a *quid pro quo*, most people concede it doesn't look right. The model law uses a widely praised Gardena, Calif., law provision to restrict such contributions.

## A public approach

Many state and local governments have limited how much a candidate can spend in an election. Because of the 1976 U.S. Supreme Court opinion *Buckley vs. Valeo*, expenditure limits only can be imposed on candidates who accept public campaign financing. While many people assume the public is unwilling to use taxes to finance campaigns, in the last 10 years, voters have approved public financing of campaigns in Sacramento County, Calif., New York City, King County, Wash., Tucson and Los Angeles. These public campaign financing proposals were linked to expenditure ceilings and other reforms.

The COGEL model law provides that funds for public financing be derived from an income tax check-off similar to the check-off on federal tax returns. Unlike most public financing systems, however, it does

not provide for matching funds, but gives a maximum amount to all candidates who raise a qualifying amount.

The model law's campaign disclosure and reporting provisions reflect the long-standing policy that the public is entitled to know a campaign's financial influences. To increase public access to reports, the model law calls for convenient filing locations.

The model law proposes legislation to deal with disclosure of independent expenditures by PACs, special reports listing contributions by government contractors, and timely reporting of large contributions and expenditures made late in a political campaign.

To monitor and enforce campaign finance laws, the law calls for an independent bipartisan board or commission. The law balances the need for secrecy in the investigatory stage with the need for sunlight in the hearing stage of an agency proceeding. The agency needs enforcement options, including the authority to impose civil fines, to address the wide range of violations and circumstances. A citizen check on the agency's investigative process also is included. If the agency has not issued a finding on a complaint within a prescribed period, any person may commence a civil action in court to enforce the law.

At a time when public confidence in the electoral process and in elected officials is at its lowest ebb since the Watergate era, the COGEL model law provides a comprehensive approach towards restoring this confidence. COGEL represents 72 state, federal, local and Canadian agencies that enforce and administer campaign finance, ethics and lobbying laws.

For more information or a copy of the COGEL model law at \$10.00 per copy, contact The Council of State Governments in Lexington, Ky. at 1-800-800-1910. □

*Jeffrey B. Garfield is executive director and general counsel for the Connecticut State Elections Enforcement Commission. Robert M. Stern is co-director and general counsel for the California Commission on Campaign Financing, a Los Angeles private research organization.*

*Police Lieutenant Harry Thomas*

## Why Gun Laws Waste My Time.

**G**un laws are a waste of time—your time, my time and the taxpayer's money. Why? Because gun laws directed at law-abiding citizens do nothing to combat crime. That's why rank-and-file law enforcement stands firm with the NRA in support of the people's right to keep and bear arms.

The majority of peace officers I've talked to agree that gun laws only result in armed criminals preying on defenseless citizens. Instead of useless anti-gun owner legislation, what we need and need right now are tough anti-crime measures. Anti-gun bills only cloud the real issue. And those of us who actually battle crime pay the price.

**I**n Cincinnati, where I work, members of my Fraternal Order of Police lodge voted to oppose a local ban on semiautomatic firearms: real cops don't trample on citizens' rights in order to effect an imaginary increase in their own margin of safety. Ohio is the home of U.S. Senator Howard Metzenbaum, who has sponsored numerous anti-gun bills, including the proposed ban on semiautomatics. I oppose this legislation and, along with more than 225 law enforcement officers from throughout the nation, traveled to Washington to speak out against it. Once again, we all considered the bill an affront to law-abiding citizens and a waste of our time.

I can only appeal to you as a policeman, and not as an official spokesman for the Cincinnati Police Division. Yet I think most peace officers feel that the semiauto firearms issue has been blown totally out of proportion by the news media. I don't know of any officer who considers himself "outgunned." Frankly, most of the people ranting about semiautos don't even know what they're talking about. Maybe they should do their homework—or talk to a peace officer—before they push for these bans.

Right now, America has over 20,000 gun laws already in

place across the nation, yet crime continues to flourish. Criminals do not

obtain firearms through legal channels, and law-makers need to realize it. Only law-abiding citizens obey gun laws, and law-abiding citizens aren't a threat to law and order. We need tougher laws that punish criminals, not laws that punish the millions of Americans who own guns and support our efforts.

As a second-generation police officer with 17 years of service, I can also assure you that privately owned firearms truly do provide a strong deterrent to crime. Yet most of the anti-gun legislation I've seen will only serve to disarm good, hard-working, law-abiding American people—and leave criminals free to plunder.

Sometimes I think the news media has conspired to cover up how law enforcement really feels about the gun issue. For far too long, anti-gun big city police chiefs with political axes to grind and political favors to repay have received extensive press coverage, while pro-Second Amendment working cops have been ignored. That's why so many peace officers want America to hear the truth—hear it from those of us who are out in the streets fighting crime every day.

**L**awmakers all across the nation should listen to what real peace officers – not desk-bound police bureaucrats—say about crime and guns. We want you to hear from those of us who actually fight crime,

instead of the reporters and political opportunists who claim to speak for us. We say restrictive gun laws will not reduce crime. They only waste our time, your time, and skirt the real issue—the failure of our criminal justice system to effectively deal with violent criminals. And that's the truth from a real police officer.



*Cincinnati Police Division Lieutenant Harry Thomas is a veteran police officer who has joined thousands of rank-and-file law enforcement officers from across the nation in opposing anti-gun legislation.*

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# THE STATE OF GUN CONTROL

## SELECTED FIREARMS LAWS

(As of May 10, 1991)

	State Prereq. or Prereq.	Waiting Period	Instant Check	Permit to Purchase
Alabama	●	48 hours <sup>A</sup>		
Alaska				
Arizona	●			
Arkansas				
California	●	15 days <sup>E</sup>		
Colorado				
Connecticut	● <sup>1</sup>	14 days <sup>E</sup>		
Delaware	●		● <sup>B</sup>	
Florida	●	3 days <sup>A</sup>	● <sup>A</sup>	
Georgia	● <sup>1</sup>			
Hawaii				● <sup>E5</sup>
Idaho	●			
Illinois		72 hours <sup>A</sup> 24 hours <sup>D</sup>		30 days <sup>E</sup>
Indiana	● <sup>1</sup>	7 days <sup>A</sup>		
Iowa	●			3 days <sup>A</sup>
Kansas				
Kentucky	●			
Louisiana	●			
Maine	●			
Maryland	●	7 days <sup>C</sup>		
Massachusetts	● <sup>2</sup>			90 days <sup>E</sup>
Michigan	●			● <sup>A5</sup>
Minnesota	●			7 days <sup>A</sup>
Mississippi	●			
Missouri	●			7 days <sup>A</sup>
Montana	●			
Nebraska	●			
Nevada	●			
New Hampshire				
New Jersey	● <sup>1</sup>	7 days <sup>A</sup>		30 days <sup>E</sup>
New Mexico	●			
New York	● <sup>1</sup>			6 months <sup>A</sup>
North Carolina	● <sup>2</sup>			30 days <sup>A</sup>
North Dakota	●			
Ohio				
Oklahoma	●			
Oregon	●	15 days <sup>A</sup>		
Pennsylvania	●	48 hours <sup>A</sup>		
Rhode Island	●	7 days <sup>E</sup>		
South Carolina	●			F
South Dakota	●	48 hours <sup>A</sup>		
Tennessee	●	15 days <sup>A</sup>		
Texas	●			
Utah	●			
Vermont	●			
Virginia	●		● <sup>B</sup>	
Washington	●	5 days <sup>A*</sup>		
West Virginia	●			
Wisconsin		48 hours <sup>A</sup>	● <sup>A</sup>	
Wyoming				

<sup>1</sup> Prereq. by judicial ruling

<sup>2</sup> Legislature must approve all local firearms ordinances

<sup>A</sup> Handguns

<sup>B</sup> Handguns and rifles

<sup>C</sup> Handguns and "military-style" firearms

<sup>D</sup> Rifles and shotguns

<sup>E</sup> All firearms

<sup>F</sup> Limit of one handgun purchase per 30-day period

\* May be extended to as much as 90 days under certain circumstances

† No time limit set by law

Source: National Rifle Association

records. And while some states require their background checks to include a check for mental incompetency, there is no similar public access to records of persons involuntarily committed to mental institutions. Gun control advocates make those points frequently, arguing for laws that include waiting periods to provide time for "cooling off."

The NRA says that requiring computerization of all criminal records is a benefit to law enforcement. "That's one of its major positive side effects," says Gardiner. "It will force a lot of states to upgrade criminal records." Gardiner firmly believes that instant check itself does nothing to stop criminal activity. But he adds, "It doesn't do any harm." Instant check is now a cornerstone of the NRA's strategy; Gardiner says it blunts the urge for other gun control legislation. "They tried to pass a three-day waiting period this year in Virginia, and the legislature said, 'What's the point? We've got instant check. We've got a thorough background check.'"

But while instant check in Virginia has short-circuited some gun control efforts, state Senator Moody Stallings, author of the defeated bill calling for a three-day waiting period, says flatly of the issue of gun control in Virginia: "It's a new game now." Stallings, a former Marine and avid gun owner who calls himself "one of the good ol' boys," says the NRA is "very much on the defensive." In 1988, he recalls, there was one gun bill in the General Assembly—a bill to make it harder for judges to deny concealed weapons permits. This year, there were 35 gun bills. And while Stallings' waiting period bill was killed, the NRA supported the expansion of instant check to long guns.

Stallings has no doubt about what the difference has been. He agrees with the NRA that media attention has changed the debate. There have been two sensational incidents involving assault weapons in Virginia in recent years, Stallings points out, and the public is increasingly worried about gun violence. "The climate is more conducive now," he says, "and the press got behind it and turned up the volume."

When the NRA's Gardiner says that his organization has the bodies and gun control advocates have the media, he'll get no argument from Handgun Control. Until a few years ago, a legislator who voted for gun control had to fear serious retribution by the NRA—letter-writing campaigns to local papers and campaign contributions to and endorsements of opponents. NRA members aren't like most other voters, says Gardiner. When NRA members don't like a politician's stand, they don't just vote against that candidate—they work against that candidate in the next election. Now, says David Weaver of Handgun Control, gun control opponents have something to fear too: "There is fear of retribution from editorials and in news coverage. And there is the fear of a visit by Jim and Sarah Brady—campaigning for your opponent."

**T**hat fear is a relatively new factor. Before 1989, says Horn of Handgun Control, the NRA "killed us. They clobbered us in the states. They won all the battles." But in 1988, Maryland passed a state law aimed at banning the sale and manufacture of the cheap handguns known as Saturday Night Specials; the law was upheld the following year by voter referendum. That same year, after the schoolyard shootings in Stockton, California, the state banned the sale of assault weapons. With that, says Horn, "people began to think that the NRA can be beaten."

systems for checking a prospective gun purchaser's criminal and mental background or with seven-day waiting periods, gun control advocates added a powerful argument to their repertoire: A state gun control bill is better than Brady.

While gun control advocates acknowledge a preference for a uniform federal gun control law, Horn says they view Brady as a national minimum standard. By urging states to consider gun control—even if it is to opt out of Brady—they hope to eventually get stronger laws in some states.

**C**onsider them side by side, and Handgun Control is no match for the NRA. It has 500,000 dues-paying members compared with the NRA's 2.6 million, and its annual budget of \$5 million is a fraction of the \$87 million the NRA spends yearly. But Handgun Control's success at getting the Brady bill seriously debated in Congress and the national prominence of Handgun Control that resulted from the involvement of Sarah and Jim Brady have changed the debate. "The advent of Handgun Control has certainly made a difference," acknowledges Richard Gardiner of the NRA. "There's a focal point, there's an organization that is putting out information that the media can pick up and do something with." He characterizes the fight this way: "We have the bodies and they have the media; that's what it's coming down to."

That the NRA has the bodies is undeniable.

Walter Radcliffe, a Lincoln lobbyist hired by Handgun Control to work for Ashford's bill, says the impact of the NRA's grass-roots organization is obvious: It effectively eliminates any stigma of the NRA being an outside organization. "What they have been able to do is energize their whole local constituency," says Radcliffe, "which is a whole different deal than somebody coming in from the outside." Handgun Control, by contrast, is viewed in places like Nebraska as a group of liberal Washington outsiders. That's why its strategists followed the advice of Chizek and Ashford: They hired local lobbyists and stayed out of the way. The NRA, by contrast, was a full-fledged player, highly visible and calling the shots at every turn.

Radcliffe, who also lobbies for the tobacco industry, says that while the tobacco industry has a more sophisticated approach to government relations, "I think the NRA is more willing to commit resources more quickly, more abundantly." In the first three months of this year, for example, the NRA reported spending \$109,000 in Nebraska, including \$88,000 for radio and newspaper advertising. Handgun Control spent \$14,000 in the same period.

Handgun Control is more limited in other ways. With just 2,000 members in the state compared with the NRA's 80,000, Handgun Control can't turn on the mail spigots the way the NRA can. "The most important thing we provide is the statewide mailing—the 'call to action,'" says Lenzi, the NRA lobbyist. "We send a letter to our folks on the ground in Scottsbluff, and they go down to the VFW and tell everybody what's happening in Lincoln." He says that the same kind of effort that "buried the U.S. Capitol in mailbags" went on in Nebraska.

To Radcliffe, that kind of constituent pressure is "the second-best kind of lobbyist." In Nebraska, he says, "the first-best lobbyist is a senator on the inside." In a one-house legislature, explains Radcliffe, "if there is a senator who is a

The instant check system was 'invented' by the NRA for just such circumstances as Nebraska's—as an alternative to waiting periods.

passionate supporter of something, there is a real tendency here to help out a colleague." Senator Stan Schellpeper, a strong opponent of a waiting period for handgun purchases, says it was clear that Ashford was passionate, "and eventually something will happen because he's so pushy on it and he wants to get something done." So, says Schellpeper, "I thought we needed to do something." Enter the NRA.

Schellpeper had talked to Lenzi last summer at the National Conference of State Legislatures meeting in Nashville, and Lenzi had an idea: a Nebraska version of an "instant check" system as an alternative to Ashford's bill. This approach—like the alternative to the Brady bill debated in Congress—requires a computer check with law enforcement officials to determine whether a potential gun purchaser has a state or federal criminal record. The check takes place at the point of sale and requires no registration. Schellpeper agreed to sponsor such a bill, limited to handguns. Says Schellpeper: "I think the NRA found that out here in Nebraska you can't just sit back and say no."

Instant check was "invented" by the NRA for just such circumstances. Gardiner, the director of the NRA's state and local affairs division, says it was devised in response to what happened in Virginia in 1989. "There was going to be a ban on certain semiautomatics," recalls Gardiner, "and we were trying to think up some way to deal with that situation...and there was also a push for a waiting period on handguns." Gardiner says the group hashed out some ideas, came up with the notion of using Touch-Tone phones to tap into police records, and sold the idea to Virginia legislators. The instant check system has compelled Virginia law enforcement officials to computerize all their criminal records, and even though the process isn't complete, the state's arrest records are fully indexed. When a gun buyer's name turns up in the index, either a manual or computerized search can ascertain that person's legal status.

A few months later, says Gardiner, the scenario was repeated in Florida. There was an attempt to legislate a waiting period; the NRA proposed instant check, and it passed. The third state to adopt instant check that same year was Delaware, again with NRA leadership. Wisconsin adopted instant check this year.

There is a heated debate about whether instant check works. It requires computerization of all state criminal records—something most states have yet to do. In Nebraska, for instance, only 55 percent of the state's criminal records are now accessible by computer. The U.S. Justice Department reports that 10 states have fully computerized criminal records. There are other complications. Only half the states belong to the FBI's national computerized records network, which lets states tap into each other's available computerized

SJR

2

# HOUSE COMMITTEE REPORT

(7) Date Referred: April 15, 1992 FURTHER REFERRALS: Finance

Date of Committee Action: 5/9/92

The JUDICIARY Committee considered: CSSJR 2(JUD)

CS FOR SENATE JOINT RESOLUTION NO. 2 (JUD) REPEAL OF REGULATIONS BY LEGISLATURE

Proposing an amendment to the Constitution of the State of Alaska relating to repeal of regulations by the legislature.

RECOMMENDATIONS:  
 be replaced with HCS CS SJR 2 (JUD)  the same title  
 a new title

- have attached amendments(s)
- do pass
- do not pass
- no recommendations
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

ADOPTS: Admin Reg. Review Comm. letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) APPROVES PREVIOUS: (Dept/Date)  
 fiscal impact \_\_\_\_\_  fiscal note(s) Law 2-21-92  
 zero fiscal note \_\_\_\_\_  zero fiscal note(s) Elect 2-21-92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<u>Derek Douley</u>	✓				
<u>John Ellis</u>	✓				
<u>Kevin Pat Farrell</u>	✓				
<del>_____</del>					
<u>_____</u>	✓				
<u>Mark Stanley</u>	✓				

Derek Douley  
 CHAIRMAN'S SIGNATURE

FISCAL NOTE

No. 4

Version: SJR 2

(S) Publish Date: 2-21-92

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Revision Date: 01/13/92  
Title: Amendment to the Constitution RE: Repeal of Regulations by BRU: Division of Elections  
Legislature  
Sponsor: Senator Fischer  
Requestor: Senate Finance Committee

Department Affected: Office of the Governor-Elections  
Component: II-Primary and General Elections

COMPONENT SERIAL NO. 

0	0	2	2
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	2.2*	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
<b>TOTAL OPERATING</b>	<b>2.2*</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	2.2*	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
<b>TOTAL</b>	<b>2.2*</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.) \* This figure covers cost of inclusion of information about this issue in the Official Elections Pamphlet as required by AS 15.58, and programming for DataVote counting of votes cast on this measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be: 53.4.

Changes in CS SJR 2 (Jud.) reflect NO FISCAL CHANGE from the original fiscal note. This fiscal note is appropriate.

2-20-92 date JLH Comte Aide (Initial)

Prepared by: Elizabeth Zieglar, Deputy Director  
Division: Elections

Phone: 465-4611  
Date: 01/13/92

Approved by Commissioner: Charles E. Heisterkamp  
Agency: Office of the Governor

Date: 01-13-92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

FISCAL NOTE

No. 3

Bill Version: CSSJA 2 (TLD)

(S) Publish Date: 2-21-92

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Revision Date: December 19, 1991 Department Affected: Department of Law

Title: "...relating to repeal of regulations by the legislature." BRU: Legal Services

Sponsor: Senator Fischer Component: Operations

Requestor: Governor's Office COMPONENT SERIAL NO. 

		9	3
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
-------------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
<b>FUND SOURCE:</b>						
<b>TOTAL</b>						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

*Richard I. Pegues*

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

Division: Administrative Services / DIR Date: December 19, 1991

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law Date: December 19, 1991

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSJR 2 (Jud.)

The Judiciary Committee substitute for Senate Joint Resolution No. 2 proposes an amendment to the Constitution of the State of Alaska that would give the legislature the power to repeal a regulation adopted by a state department or agency by joint resolution of the legislature, if the legislature finds that a regulation is inconsistent with the authorizing statute. If the amendment is adopted in the 1992 general election, it will probably not have a direct immediate fiscal impact on the department's operations. The department is statutorily responsible for reviewing all regulations for legality and form to insure consistency with the appropriate enabling legislation. The department also drafts regulations on behalf of some departments and assists other departments in drafting regulations that deal with highly complex matters requiring the attention of an attorney. Obviously, some of the time spent in these efforts will have been lost whenever a regulation has been annulled. Larger departments, which have the responsibility for carrying out major state programs, and who routinely draft numerous program operating regulations inhouse, will probably experience an even greater loss of staff time. More importantly the absence of statutorily mandated regulations, which would occur after annulment, could result in litigation from an adversely impacted industry, public interest group, or a member of the public claiming damages due to the absence of required regulations. The impact of such litigation cannot, in this case, be estimated in advance and therefore no cost impact can be shown.

# Alaska State Legislature

Senator Paul Fischer  
Senate District D  
Box 784  
Soldotna, Alaska 99669  
(907) 262-9420 W  
262-9269



## State Senate

While in Juneau  
P.O. Box V  
Juneau, Alaska 99811  
(907) 465-3791

### MEMORANDUM

TO: Representative Dave Donley, Chairman  
House Judiciary Committee

FROM: Senator Paul Fischer *PF*

SUBJECT: CS Senate Joint Resolution 2 (Judiciary)  
(repeal of regulations by the legislature)

DATE: April 15, 1992

---

In preparation of your bill calendar for next week, I would appreciate your considering the above referenced resolution for a hearing before the House Judiciary Committee at your earliest possible convenience.

This resolution passed the Senate unanimously on Wednesday, March 18, and received unanimous "do pass" recommendations from the House State Affairs committee this date.

I have attached, under separate cover, background material on the previous ballot measures for your committee files as well as a letter of support from House and Senate members on the Administrative Regulation Review Committee.

Your consideration of my request would be greatly appreciated.

PAF/sgn

Attachment

# Alaska State Legislature

Senator Paul Fischer  
Senate District D  
Box 784  
Soldotna, Alaska 99669  
(907) 262-9420 W  
262-9269



## State Senate

While in Juneau  
P.O. Box V  
Juneau, Alaska 99811  
(907) 465-3791

### MEMORANDUM

TO: Representative Dave Donley, Chairman  
House Judiciary Committee  
House Judiciary Committee Members

FROM: Senator Paul Fischer *P.F.*

SUBJECT: CS Senate Joint Resolution 2 (Judiciary)  
(repeal of regulations by the legislature)

DATE: April 15, 1992

---

### Background

This proposal for an amendment to the Constitution of the State of Alaska to repeal regulations by the Legislature has been placed on the ballot on three previous occasions. Each time it failed to be approved by the voters. The following chart and past proposition materials are attached for your files.

<u>1980</u>	<u>1984</u>	<u>1986</u>	
58,808	91,174	65,176	Yea's
82,010	98,856	94,299	Nay's
140,818	190,030	159,475	Total Proposition Votes
16%	4%	18%	Failure Percentage
162,653	213,173	182,526	Total Votes Cast
258,742	305,262	292,274	Total Registered Voters
63%	70%	62%	Voter Turnout

PAF/sgn  
Attachments

(7)

Date Referred: March 20, 1992

HOUSE COMMITTEE REPORT  
FURTHER REFERRALS:

Judiciary  
Finance

Date of Committee Action: 4/15/92

The STATE AFFAIRS Committee considered:

CSSJR 2(JUD)

CS FOR SENATE JOINT RESOLUTION NO. 2(JUD) REPEAL OF REGULATIONS BY LEGISLATURE

Proposing an amendment to the Constitution of the State of Alaska relating to repeal of regulations by the legislature.

RECOMMENDATIONS:  the same title  
be replaced with \_\_\_\_\_  a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) Div of Elections 2-21-92

zero fiscal note \_\_\_\_\_

zero fiscal note(s) Dept. of Law 2-21-92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Eugene H. Kubinski</i>	<input checked="" type="checkbox"/>				
<i>T. Morgan</i>	<input checked="" type="checkbox"/>				
<i>[Signature]</i>	<input checked="" type="checkbox"/>				
<i>Jerry W. Baker</i>	<input checked="" type="checkbox"/>				

*Eugene H. Kubinski*  
CHAIRMAN'S SIGNATURE

# Alaska State Legislature

Chairman  
State Affairs  
Committee

Legislative Council

Transportation  
Committee

During Session:  
State Capitol  
P.O. Box V  
Juneau, Alaska 99811  
(907) 465-4859

During Interim:  
P.O. Box 2463  
Valdez, Alaska 99686  
(907) 835-2111

Representative Eugene Kubina

April 15, 1992

## MEMORANDUM

TO: Rep. Dave Donley, Chairman  
House Judiciary Committee

FROM: Rep. Gene Kubina, Chairman  
House State Affairs Committee *E. Kubina*

RE: CSSJR 2 - Relating to Repeal of Regulations by  
Legislature

The House State Affairs Committee passed CSSJR 2 out of committee on April 15, 1992 and sent it on to the House Judiciary Committee. A question arose during our hearing which we would like the House Judiciary Committee to address during your hearing.

In your opinion, would quasi-governmental agencies and departments such as the Alaska Railroad be covered by the references to "state agencies and departments" in SJR 2?

We look forward to your answer to this question. Thank you very much.

— DISTRICT SIX —

• Chenega Bay • Chitina • Cooper Landing • Cordova • Hope • Moose Pass • Seward • Tatitlek • Valdez • Whittier •



# Alaska State Legislature

Senator Paul Fischer  
Senate District D  
Box 784  
Soldotna, Alaska 99669  
(907) 262-9420 W  
262-9269



## State Senate

While in Juneau  
P.O. Box V  
Juneau, Alaska 99811  
(907) 465-3791

### MEMORANDUM

TO: Representative Gene Kubina, Chairman  
House State Affairs Committee  
House State Affairs Committee Members

FROM: Senator Paul Fischer *PF*

SUBJECT: CS Senate Joint Resolution 2 (Judiciary)  
(repeal of regulations by the legislature)

DATE: March 23, 1992

### Background

This proposal for an amendment to the Constitution of the State of Alaska to repeal regulations by the Legislature has been placed on the ballot on three previous occasions. Each time it failed to be approved by the voters. The following chart and past proposition materials are attached for your files.

<u>1980</u>	<u>1984</u>	<u>1986</u>	
58,808	91,174	65,176	Yea's
82,010	98,856	94,299	Nay's
140,818	190,030	159,475	Total Proposition Votes
16%	4%	18%	Failure Percentage
162,653	213,173	182,526	Total Votes Cast
258,742	305,262	292,274	Total Registered Voters
63%	70%	62%	Voter Turnout

PAF/sgn  
Attachments

# ALASKA STATE LEGISLATURE

Sen. Shirley Craft, Chair  
Sen. Virginia Collins  
Sen. Arliss Sturgulewski



Rep. Dave Donley, Vice-Chair  
Rep. Kay Brown  
Rep. Mark Hanley

## Administrative Regulation Review Committee

March 16, 1992

Senator Paul Fischer  
Room 423, State Capitol  
Juneau, AK 99801

Dear Senator Fischer:

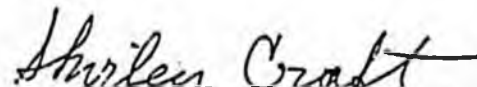
The Administrative Regulation Review Committee supports SJR 2, "Proposing an amendment to the Constitution of the State of Alaska relating to the repeal of regulations by the legislature".

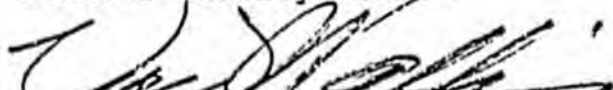
Often agencies go far beyond the intent of the law passed by the legislature, by either expanding or omitting regulations relating to sections of the statute that they feel are inappropriate.

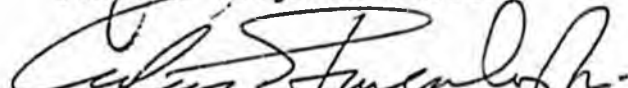
This resolution proposes an amendment to the state constitution that would give the legislature the authority to repeal a regulation adopted by a state agency.

Providing the legislature with the ability to annul regulations that do not meet statutory intent, may encourage state agencies to adhere to the authority given them.

Sincerely,

  
\_\_\_\_\_  
Senator Shirley Craft

  
\_\_\_\_\_  
Senator Virginia Collins

  
\_\_\_\_\_  
Senator Arliss Sturgulewski

  
\_\_\_\_\_  
Representative Dave Donley

  
\_\_\_\_\_  
Representative Kay Brown

  
\_\_\_\_\_  
Representative Mark Hanley

# BALLOT PROPOSITION NO. 1

## LEGISLATIVE ANNULMENT OF REGULATIONS Constitutional Amendment

(Committee Substitute for House Joint Resolution No. 82 Amended)

### SUMMARY

(As it will appear on the November 4, 1980 General Election Ballot)

This proposal would permit the legislature to annul, by adopting a resolution, regulations adopted by state agencies. Annulment of regulations by resolution was authorized by the First State Legislature in 1959; however, in 1980 the Alaska Supreme Court held that the constitution permits the legislature to annul a regulation only by passing a bill, which requires three readings of the bill and a roll call vote which is recorded. The procedures for adopting resolutions are governed by legislative rules and require only the approval of the resolution by voice vote of a majority of both houses. A bill passed by the legislature annulling a regulation could be vetoed by the governor or repealed by referendum. A resolution annulling a regulation could not.

### BALLOT FORM:

A vote "FOR" adopts the amendment.

A vote "AGAINST" rejects the amendment.

FOR   
AGAINST

### VOTE CAST BY MEMBERS OF 11TH STATE LEGISLATURE ON FINAL PASSAGE

Senate	(20 members):	Yeas <u>18</u>	Nays <u>0</u>	Absent or Not Voting <u>2</u>
House	(40 members):	Yeas <u>36</u>	Nays <u>0</u>	Absent or Not Voting <u>4</u>

### LEGISLATIVE AFFAIRS AGENCY SUMMARY

(As required by law)

This proposal would add a new section, section 22, to Article II of the state constitution. If adopted, the proposal would authorize the legislature to annul or set aside a regulation which has been adopted by a state department or agency. In order to annul a regulation, the legislature could adopt a concurrent resolution by approval of the resolution by majority vote of the membership of each house of the legislature. The resolution specifies the date on which the annulment of a regulation would take effect.

### FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

**SECTION 22. ANNULMENT OF REGULATIONS.** The legislature by a concurrent resolution approved by a majority vote of the membership of each house may annul a regulation adopted by a state department or agency. The annulment of the regulation is effective on the date the concurrent resolution is approved by both houses unless the concurrent resolution specifies a different date.

## STATEMENT IN FAVOR OF BALLOT PROPOSITION NO. 1

The legislature, when it writes a law, cannot foresee all of the possible details involved in carrying it out. The appropriate administrative agency is therefore allowed to write regulations which spell out who does what, when, where, and how. If the agency does no more than this no problem is created.

Unfortunately agency regulations are not always consistent with the intent the legislature had in passing the law. Sometimes an agency will get carried away and put out regulations that cause an unnecessary burden for the citizens. The First State Legislature realized this and provided a simple solution. The legislature could, by a concurrent resolution passed by a majority of each house, annul an administrative regulation. Such a resolution is not subject to the governor's veto.

The Alaska Supreme Court recently held, in a 3-2 decision, that the legislature must use a bill rather than a resolution to annul administrative regulations. But a bill is subject to

the governor's veto. The governor can hardly be expected to approve a bill overruling his subordinates, who put out the regulation in the first place. The present governor has already vetoed one such bill.

The court ruling gives agency regulations equal standing with laws, *even though no single person elected by the voters has approved them.*

Our government is wisely based on dividing power among the three branches: legislative, executive and judicial. The current situation gives entirely too much power to the executive branch. Your approval of this constitutional amendment will restore the better balance under which the state operated from 1961 to 1980.

— Charles H. Parr  
Chairman, House Judiciary Committee  
Alaska State Legislature

## STATEMENT AGAINST BALLOT PROPOSITION NO. 1

This is still another proposal by the legislature to free itself from the checks and balances of our constitution. Under the constitution, the legislature has all the power it needs to make laws and annul administrative regulations. This proposal does not aid the public in any way. What it does is allow the legislature to exercise its power to annul regulations in disregard of the constitutional requirements that each bill have a single subject, that each bill have three readings in each house, and that there be a recorded vote of the ayes and nays on final passage. It would also free the legislature from the executive veto and it would allow it to ignore the prohibition against special and local legislation.

The Alaska Supreme Court has recently ruled that the legislature must abide by the constitution's checks and balances on its power whenever it exercises that power, including when it acts to annul regulations. This amendment is intended to overrule the court's decision and erode the constitution's safeguards. It aids legislators, not the public, and it should be rejected.

— Katherine D. Nordale  
Delegate to the Alaska  
Constitutional Convention,  
1955-1956

# MEASURE NO. 1

## Constitutional Amendment

### LEGISLATIVE ANNULMENT OF ADMINISTRATIVE REGULATIONS

(1983 Legislative Resolve No. 15 (SCS HJR 5(Jud)))

#### SUMMARY

*(As it will appear on the November 6, 1984 General Election Ballot)*

This amendment of the Alaska Constitution would permit the legislature to annul executive-branch regulations by passing a resolution. The annulment would become effective 30 days after passage by the legislature, unless the resolution sets a different date. The resolution must have three readings in each house on separate days, except that it may be advanced from second to third reading on the same day by a three-fourths vote of the house considering it. The resolution must receive approval of a majority of the membership of each house. The yeas and nays on final passage must be entered in the legislative journals. The resolution is not subject to veto by the governor, and it is not subject to repeal by referendum.

#### BALLOT FORM:

A vote "FOR" adopts the amendment.  
A vote "AGAINST" rejects the amendment.

FOR   
AGAINST

#### VOTES CAST BY MEMBERS OF THE 13TH STATE LEGISLATURE ON FINAL PASSAGE

Senate	(20 members):	Yeas 19	Nays 0	Absent or Not Voting 1
House	(40 members):	Yeas 34	Nays 2	Absent or Not Voting 4

#### LEGISLATIVE AFFAIRS AGENCY SUMMARY

*(As required by law)*

This proposal for a constitutional amendment would allow the legislature to annul a regulation adopted by a state department or agency by concurrent resolution. The annulment is effective thirty days after the date the concurrent resolution is approved by both houses unless the resolution specifies a different date. Adoption requires three readings in each house on three separate days except it may be advanced from second to third reading on the same day by concurrence of three fourths of the membership of the house considering it. Adoption requires approval by a majority vote of the membership of each house. The vote on final passage must be entered into the journal.

#### FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

*(This amendment would add the following section to article II of the Alaska Constitution.)*

**SECTION 22. ANNULMENT OF REGULATIONS.** The legislature by concurrent resolution may annul a regulation adopted by a state department or agency. The annulment of the regulation is effective thirty days after the date the concurrent resolution is approved by both houses unless the concurrent resolution specifies a different date. The concurrent resolution requires three readings in each house on three separate days, except that it may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it, and approval by a majority vote of the membership of each house. The yeas and nays on final passage shall be entered into the journal.

## STATEMENT IN FAVOR OF BALLOT MEASURE NO. 1

Voters who have ever experienced irritation or anger as a result of a problem they have had with state regulations should vote in favor of Ballot Measure No. 1. While many regulations do conform to and support state laws, there are occasionally regulations which are imposed that go beyond the intent of the law and cause undue hardship on our citizens. These regulations often make no sense at all, state agency people are often at a loss to explain the meaning or sense of the regulations, and yet the state agencies involved continue to enforce them, and voters are powerless to change them.

The Alaska Constitution, patterned essentially upon the Constitution of the United States and the experience of the other states, provides a system of checks and balances among the three branches of government, and further entitles the people to their own checks and balances through the voting booth, the initiative process, and final authority over amendments to the constitution. The one major area of government that is currently not directly accessible to the people's checks and balances is the very considerable volume of administrative regulations which are written by the state agencies in the executive branch of government.

These regulations deal with every aspect of government and our lives: fish and game, education, health and social services, traffic, land development, utilities, taxes; the list is endless. And once the regulations go into effect, they have all the force of law. The problem is, that unlike the situation that occurs with laws, the agency people who make and enforce regulations are not subject to voter approval at election time; they are either appointed by the governor or by his commissioners.

While the legislature is often made aware of foolish bureaucratic requirements by unhappy constituents, it is almost powerless to do anything about them. Currently, to annul a regulation, the legislature must pass a new bill which is then subject to veto by the governor. This puts the governor in the powerful position of being able to stop a bill that would overturn a regulation made by his own subordinates.

It was never intended by the framers of our State Constitution that any governmental body except the legislature have the power to make laws. Yet, bad regulations have been written, on occasion by state agencies, which go beyond the letter and intent of the law as passed by the legislature and in effect create law on their own.

This measure would provide a reasonable avenue for annulment of bad regulations. It would allow your elected representatives in the legislature, through a majority vote of both houses, to annul regulations in the same way they pass any legislative bill, except it would not be subject to veto by the governor, who clearly has a biased position in the matter.

The House Joint Resolution which created the ballot measure had bi-partisan sponsorship during the last legislative session, and was passed with near-unanimous support by both houses of the legislature.

—Mike Szymanski,  
State Representative

## STATEMENT OPPOSING BALLOT MEASURE NO. 1

This proposed amendment to the Alaska Constitution is very similar to the one proposed in 1980 and rejected by the voters 82,010 to 58,808. Although the present version includes some improvements over the 1980 version, it is another attempt by the legislature to concentrate governmental power in its own hands.

Under the current constitution and statutes, the legislature has all the power it needs to make laws and to limit or guide the adoption of administrative regulations. The regulations are adopted to implement statutes. This proposal would enable legislators to use a law-making procedure that is not subject to veto by the governor or repeal by referendum, and that could be used to ignore the prohibition against special and local legislation.

The constitution now provides for a balance of power among the legislative, executive, and judicial branches of the government. This balance requires a blending or sharing, as well as a dividing, of governmental responsibilities. If this constitutional amendment were to be approved by the voters, it would enable the legislature not only to write the laws, as has traditionally been the legislature's function, but it would also enable the legislature to act in place of the courts in deciding whether the executive has lawfully executed the laws when adopting a regulation; and it would empower the legislature to act in place of the executive by nullifying a specific executive-branch decision.

The annulment is like a repeal. In using this expedited procedure to annul a regulation, the legislature would act only in a negative way. It would not be providing the sort of policy guidance and direction that is appropriate to its law-making function. And it would not be providing the thoughtful analysis necessary to solve a problem. The legislature would be saying to the agency "your decision to adopt that regulation is wrong". But it would not be telling the agency what would be right. This is especially troublesome when dealing with a complex subject. Without any guidance beyond the statute that the executive branch agency was trying to implement in the first place, the agency is left with only the option to guess again. That is neither an efficient nor an appropriate way to run the government.

The Alaska Supreme Court has ruled that the legislature must abide by the Constitution's checks and balances on its power when it exercises that power, including when it acts to annul regulations. The present proposal is intended to overrule the court's decision. As argued four years ago, when the voters rejected the 1980 proposal, this amendment would aid legislators, not the public, and it should be rejected.

—Katherine D. Nordale,  
Delegate to the Alaska Constitutional Convention, 1955-1956

# BALLOT MEASURE NO. 2

## Constitutional Amendment Legislative Annulment of Administrative Regulations (1986 Legislative Resolve No. 60 HCS SJR 40 [Jud] am H)

### BALLOT LANGUAGE

(As it will appear on the November 4, 1986, General Election Ballot)

This amendment of the Alaska Constitution would permit the legislature to annul executive branch regulations by passing a resolution that is not subject to veto by the governor or repeal by referendum. The annulment would become effective 30 days after passage by the legislature, unless the resolution sets a different date. The resolution must have three readings in each house on separate days, except that it may be advanced from second to third reading on the same day by a three-fourths vote of the house considering it. The resolution must receive approval of a majority of the membership of each house. The yeas and nays on final passage must be entered in the legislative journals.

A vote "FOR" adopts the amendment. FOR

A vote "AGAINST" rejects the amendment. AGAINST

### VOTES CAST BY MEMBERS OF THE 14TH ALASKA LEGISLATURE ON FINAL PASSAGE

House:	Yeas	31
	Nays	4
	Absent or Not Voting	5
Senate:	Yeas	17
	Nays	0
	Absent or Not Voting	3

### LEGISLATIVE AFFAIRS AGENCY SUMMARY

(HCS SJR 40 [Jud] am H)

This proposal for a constitutional amendment would allow the legislature to annul a regulation adopted by a state department or agency by its adoption of a concurrent resolution. Under the present provisions of the constitution, the legislature may annul a regulation only by the enactment of a bill that is subject to the veto of the governor; if the governor vetoes the bill, the constitution now requires a two-thirds affirmative vote of the legislature assembled in joint session to override the veto.

If the legislature adopts a concurrent resolution to annul a regulation under the authority proposed here, the annulment would be effective thirty days after the date the concurrent resolution is approved by both houses unless the resolution specified a different date. The concurrent resolution would not be subject to the veto of the governor. Adoption would require three readings in each house on three separate days except that it may be advanced from second to third reading on the same day by the concurrence of three-fourths of the membership of the house considering it. Adoption would require approval by a majority vote of each membership of each house. The vote on final passage must be entered into the journal.

### FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

(This amendment would add the following section to article II of the Alaska Constitution.)

**SECTION 22. ANNULMENT OF REGULATIONS.** The legislature by concurrent resolution may annul a regulation adopted by a state department or agency. The annulment of the regulation is effective thirty days after the date the concurrent resolution is approved by both houses unless the concurrent resolution specifies a different date. The concurrent resolution requires three readings in each house on three separate days, except that it may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it, and approval by a majority vote of the membership of each house. The yeas and nays on final passage shall be entered into the journal.

# BALLOT MEASURE NO. 2

## STATEMENT IN SUPPORT OF BALLOT MEASURE NO. 2

The issue is basically simple: should bureaucrats or the Legislature be the ultimate lawmaking authority?

All 60 members of the Legislature (40 House and 20 Senate) are elected by the people. They are all voted in to, and out of, office by individual voters. The Alaska Constitution says, "The legislative (i.e., lawmaking) power of the State is vested in a Legislature consisting of a Senate... and a House of Representatives..." The Legislature proposes, considers, and enacts laws, known collectively as the Alaska Statutes (if general and permanent) or as the Session Laws of Alaska (if specific and temporary).

All bureaucrats who promulgate (i.e., enact and enforce) regulations (theoretically, to put laws into effect) are in the Executive Branch, headed by the Governor. Bureaucrats are not voted into office and thus cannot be removed by the people. Instead, bureaucrats are hired by the Governor or by his/her appointees, and thus can only be removed from office by the Governor or by somebody answerable to him/her. However, the regulations promulgated by the bureaucrats, known collectively as the Alaska Administrative Code, have the force of law and affect all of us, sometimes adversely.

What can be done about a law that's bad? It can be repealed by the Legislature or, in some cases, by the people directly via an initiative petition.

What about a regulation that's bad? It can only be repealed by the bureaucrats who promulgated it, up to and including the Governor. If the Legislature tries to repeal a regulation by passing a bill, the Governor will almost certainly (and always has, in the past) veto the bill so that the bad regulation stays in full force and effect.

Now, if the Legislature had the power to repeal regulations by passing a concurrent resolution (instead of a bill), then the resolution could not be vetoed by the Governor. Thus, the Legislature would be able to get rid of bad regulations, which in effect it cannot do now.

Would this give the Legislature too much power? Not hardly. Since the Legislature already has full power to enact laws, why shouldn't it have full power to repeal all laws, including regulations?

Why do Governors and bureaucrats oppose giving the Legislature such regulatory repeal power? Because Governors and their handpicked bureaucrats, which are answerable only to the Governor (and cannot be removed by the people, which can remove Legislators), don't want to lose the power they now have to promulgate and enforce any regulation they want. It's that simple.

If you feel that the Legislature should have the power to repeal regulations via concurrent resolution (not vetoable by the Governor), vote FOR the ballot measure. If you feel that bureaucrats should be the ultimate lawmaking authority, vote otherwise.

I recommend that you vote FOR. Only in this way will we realistically be able to get rid of bad regulations.

Andre Marrou  
State Representative

## STATEMENT OPPOSING BALLOT MEASURE NO. 2

For the third time in six years, the legislature insists on confronting the voters with a proposed constitutional amendment giving the legislature a short-cut to law-making—another attempt by the legislature to concentrate governmental power in its own hands. The voters rejected a similar proposal in 1980 and the identical proposal in 1984. It should be rejected again.

Under the current constitution and statutes, the legislature has all the power it needs to make laws and to limit or guide the adoption of administrative regulations. Regulations are adopted to implement statutes. They have the force of law. Annulling them changes the law. This proposal would enable legislators to use a law-making procedure that is not subject to veto by the governor or repeal by referendum, and that would be used to ignore the prohibition against special and local legislation.

The constitution now provides for a balance of power between the legislative, executive, and judicial branches of the government. This balance requires a blending or sharing, as well as a dividing, of governmental responsibilities. If this constitutional amendment were to be approved by the voters, it would enable the legislature not only to write the laws, as has traditionally been the legislature's function, but it would also enable the legislature to act in place of the courts in deciding whether the executive has lawfully executed the laws when adopting a regulation, and it would empower the legislature to act in place of the executive by reversing a specific executive-branch decision.

In its intent statement accompanying this proposal, the legislature admitted that the "difficulty in achieving [the two-thirds] majority [to override a veto] in opposition to the governor and the governor's administration has led the legislature to propose this amendment." In other words, the fear that the governor might veto a bill and that not enough legislators would agree to override that veto prompted this short-cut approach to law-making. That fear overlooks the governor's accountability to the voters throughout the state.

The annulment is like a repeal. The legislature would act only in a negative way. It would not be providing the sort of policy guidance and direction that is appropriate to its law-making function. The legislature would be saying to the agency "your decision to adopt that regulation is wrong." But it would not be telling the agency what would be right. This is especially troublesome when dealing with a complex subject. Without any guidance beyond the statute that the executive-branch agency was trying to implement in the first place, the agency is left with only the option to guess again. That is neither an efficient nor appropriate way to run the government.

The Alaska Supreme Court has ruled that the legislature must abide by the constitution's checks and balances on its power, including when it acts to annul regulations. The present proposal is intended to overrule the court's decision. As mentioned when the voters rejected the 1980 and 1984 proposals, this amendment would aid legislators, not the public, and it should be rejected.

Katherine D. Nordale  
Delegate to the Alaska  
Constitutional Convention, 1955-1956

SJR

4

# HOUSE COMMITTEE REPORT

(7)  
 Date Referred: May 2, 1992 FURTHER REFERRALS: Finance

Date of Committee Action: 5/7/92

The JUDICIARY Committee considered: CSSJR 4(JUD)

CS FOR SENATE JOINT RESOLUTION NO. 4 (JUD) LEGISLATURE TO CONFIRM RR & PF BOARDS  
 Proposing an amendment to the Constitution of the State of Alaska relating to appointment, confirmation, and removal of members of the governing entities of public corporations.

- RECOMMENDATIONS:  the same title  
 be replaced with \_\_\_\_\_  a new title
- have attached amendments(s)  
 do pass  
 do not pass  
 no recommendations  
 individual recommendations  
 additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

- ATTACHES NEW FISCAL NOTE(S): (Dept) APPROVES PREVIOUS: (Dept/Date)
- fiscal impact \_\_\_\_\_  fiscal note(s) Electons 4-1-92
- zero fiscal note \_\_\_\_\_  zero fiscal note(s) \_\_\_\_\_

SIGNING <del>DO</del> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>David D. Doolley</i>	✓	<i>Terry Masten</i>		✓	
<i>Ed F. Gurenkov</i>	✓				
<i>John S. Ellis</i>	✓				

*David D. Doolley*  
 \_\_\_\_\_  
 CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

BILL NO. SJR 4

Revision Date: 01/13/92 Department Affected: Office of the Governor-Elections  
 Title: Amendment to the Constitution RE: Legislature to Confirm BRU: Division of Elections  
~~Oilroad and Permanent Fund Boards~~ Component: II-Primary and General Elections  
 Sponsor: Senator Kerttula  
 Requestor: Senate Judiciary

JAN 29 1992

COMPONENT SERIAL NO.:

0	0	2	2
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	2.2*	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	2.2*	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	2.2*	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	2.2*	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.) \* This figure covers cost of inclusion of information about this issue in the Official Elections Pamphlet as required by AS 15.58, and programming for DataVote counting of votes cast on this measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be: 53.4.

Prepared by: Elizabeth Ziegler, Deputy Director Phone: 465-4611  
 Division: Elections Date: 01/13/92

Approved by Commissioner: Charles L. Wickham  
 Agency: Office of the Governor Date: 01-13-92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

# Alaska State Legislature



Sen. Jay Kerttula, Co-Chairman  
Sen. Pat Pourchot, Co-Chairman

Sen. Al Adams  
Sen. Jim Duncan  
Sen. Lyman F. Hoffman  
Sen. Dick Shultz  
Sen. Rick Uehling

## Senate Finance Committee

### SPONSOR STATEMENT Senator Jay Kerttula

#### CSSJR 4 (Judiciary)

#### Legislative Confirmation of Public Corporation Boards

CS SJR 4(Judiciary) proposes a constitutional amendment which would require legislative confirmation for the boards of public corporations.

The Alaska Constitution currently provides for legislative confirmation of any board or commission which is the head of a principal department (Dept. of Education) or is a regulatory(Dept. of Fish and Game) or quasi-judicial agency. Public corporations, such as the Alaska Railroad and the Permanent Fund Corporation are not included in this provision.

Legislative counsel has provided an opinion that only those officers whom the constitution explicitly describes are subject to legislative confirmation; the legislature is not free to add to the list of boards and commissions which is it required to confirm. Our

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counsel cited Bradner v. Hammond as authority for this conclusion. The legal opinion is attached.

The Permanent Fund corporation invests extremely large sums of state funds and their activities have a tremendous impact on all Alaskans and on our state economy. As of January 1, 1992, the Permanent Fund was managing \$11.9 billion in state funds.

The Railroad Corporation is an agency which is virtually independent of any state control, while being vital to our statewide transportation system and which has received state capital funds (\$9 million for the purchase of locomotives for Wishbone Hill project - 1990). As of November 30, 1991, the total assets of the Railroad Corporation were \$98.6 million; while not as large as the Permanent Fund Corporation, this is still a substantial holding.

I am not generally in favor of revisions to our state constitution. I believe that the drafters of the constitution put a great deal of thought into the document and the citizens of Alaska had a large voice in its drafting. However, it appears clear that the drafters of the constitution intended that the boards of principal functions of the state be subject to legislative

confirmation. Public Corporations, such as the Permanent Fund and the Alaska Railroad Corporation are too important to the state to be exempted from legislative confirmation.

As originally introduced, SJR 4 proposed a constitutional amendment which specified legislative confirmation for the Alaska Permanent Fund and the Alaska Railroad Corporation.

The legislation was amended in Senate Judiciary to include all corporations and the title was amended accordingly.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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

240 Main Street, Suite 500  
Juneau, Alaska 99801-2101

FEB 03 1992

### MEMORANDUM

February 3, 1992

**SUBJECT:** Alaska Public Corporations (Work Order No. 17-LS1927)

**TO:** Senator Jay Kerttula  
Attn: Paula

**FROM:** Jerry Luckhaupt *JEL*  
Legislative Counsel

You have requested a compilation of the public corporations and corporate authorities of the state of Alaska. In my review of the statutes I have found the following corporations and authorities:

- (1) Alaska Aerospace Development Corporation (AS 14.40.821)
- (2) Alaska Amateur Sports Authority (AS 05.40.010);
- (3) Alaska Energy Authority (AS 44.83.020);
- (4) Alaska Gas Pipeline Finance Authority (AS 44.82.010);
- (5) Alaska Housing Finance Corporation (AS 18.56.020);
- (6) Alaska Industrial Development and Export Authority (AS 44.88.020);
- (7) Alaska Medical Facility Authority (AS 18.26.010);
- (8) Alaska Municipal Bond Bank Authority (AS 44.85.020);
- (9) Alaska Permanent Fund Corporation (AS 37.13.040);
- (10) Alaska Railroad Corporation (AS 42.40.010);
- (11) Alaska Resources Corporation (AS 37.12.010);
- (12) Alaska Science and Technology Foundation (AS 37.17.010)
- (13) Alaska Seafood Marketing Institute (AS 16.51.010)
- (14) Alaska State Housing Authority (AS 18.55.020);
- (15) Alaska Tourism Marketing Council (AS 44.33.700);

In addition, the Commercial Fishing and Agriculture Bank (AS 44.81.010), appears to have some of the attributes of a public corporation in that the exercise of its powers "is considered to be for a public purpose." AS 44.81.010(a). Further, a cursory review of legislation that has been introduced during the 17th Legislature shows these additional public corporations have been proposed:

Senator Jay Kerttula  
February 3, 1992  
Page 2

- (a) HB 10 - Alaska Marine Highway Authority;
- (b) HB 59 - Alaska Mental Health Trust Corporation;
- (c) HB 71 - Alaska State Health Resources Authority;
- (d) HB 358 - Alaska State Salmon Marketing Association;
- (e) SB 18 - Alaska State Pension Corporation;
- (f) SB 73 - Health Insurance Authority.

Gubernatorial appointees to the boards of public corporations are apparently not subject to confirmation by the legislature as the public corporations are not "at the head of a principal department or a regulatory or quasi-judicial agency" as provided in art. III, § 26 of the Alaska Constitution. See also, Bradner v. Hammond, 553 P.2d 1 (Alaska 1976)(only section 26 boards subject to confirmation); Walker v. Alaska State Mortgage Authority, 416 P.2d 245 (Alaska 1966)(ASMA not a section 26 board).

GPL:pl  
92-064.plm

MEMORANDUM

June 22, 1990

SUBJECT: Confirmation of the members of boards  
and commissions (Work Order No. 7-0029)

TO: Senator Jay Kerttula

FROM: Richard A. Bradley  
Legislative Counsel

Kathy Hathaway has asked that we comment on an opinion of the attorney general regarding the power of the legislature to confirm members of boards and commissions. The only opinion that we could find on that subject goes back to 1975; it addresses the "Constitutionality of CSSB 98 (Legislative Confirmation Bill)".

I have checked with Ron Lorensen and Jim Baldwin in the attorney general's office on the question whether anything more recent has been issued; neither could recall any more recent opinions. The index of opinions published by the Department of Law contains no such opinion.

Jim Baldwin suggested that the Bradner case represents the authoritative statement on the question; we agree that Bradner v. Hammond, 553 P.2d 1 (Alaska 1976) represents a more informed statement of the law than the attorney general's opinion, particularly as the Bradner decision is a year later than the opinion.

We have enclosed a copy of the 1975 attorney general's opinion as well as the Bradner decision.

I. Discussion of the Attorney General's opinion.

The opinion concludes that it would be beyond the power of the legislature to require the confirmation of the members of boards and commissions except for that confirmation

contemplated by art. III, sec. 26 of the Alaska Constitution. The provision states, in pertinent part:

SECTION 26. BOARDS AND COMMISSIONS. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. . . .

While the opinion also addresses the authority of the legislature to require the confirmation of sub-cabinet officers-- and finds the power to require their confirmation also lacking-- the essential point of the opinion regarding confirmation is that the "power to confirm [executive] appointments is an executive function." The logic of concluding that the power to confirm constitutes an executive function leads to the corollary of that conclusion: that legislative incursions into executive functions are construed against the legislature. The result is that only those officers whom the Constitution has required the legislature to confirm are subject to confirmation; the legislature is not free to add to (or subtract from) the list of executive officers serving as members of boards or commissions whom it is required to confirm-- or not.

While I have not sought to review our opinions from this era, my assumption is that we may have disagreed with the attorney general's opinion at that time. I note that Billy Berrier, director of the division of legal services at that time was counsel for the legislative officers and members in the Bradner litigation. But because of the Bradner decision, discussed below, we now agree that the conclusion reached by the attorney general represents the law of the state.

## II. Discussion of Bradner.

The court starts out by noting that the members of the constitutional convention that drafted the Alaskan Constitution intended that the state have a "strong executive." The court quoted the chairman of the executive committee at the convention, Victor Rivers: "We are all strongly agreed on the principle of the strong executive." Bradner, supra, at 3.

The court then stated that the sole question before the court is whether secs. 25 and 26 of art. III describe the outer limits of the legislature's confirmation authority or whether the legislature may, by statute, require the confirmation of other high-level, policy-making officials within the executive branch. The legislative officers had argued that no provision of the constitution prohibited the legislature from requiring confirmation of other executive officers.

The governor had argued, on the other hand, that the power of confirmation is an executive function that may be exercised by the legislature only to the extent that the Constitution grants the power to the legislature.

Viewed in this manner, appellee [Hammond] analyzes the power to confirm executive officers as part of the appointment process, incapable of existence independent of the power of appointment, and characterizes this confirmation authority as a power "super-added" to the legislature's general legislative powers. Thus, appellee would find that Sections 25 and 26 set the maximum rather than the minimum parameters of the legislature's power to confirm appointments of executive officers. This follows, according to appellee, from the fact that legislative confirmation is a delegated function taken from executive function, and thus the breadth of this delegated authority must be strictly construed.  
Bradner, at 4.

The court affirmed the superior court's judgment that the law requiring legislative confirmation of certain sub-cabinet officers was in excess of legislative power.

In its decision, the court agreed with decisions of the U.S. Supreme Court concluding that confirmation is a power "super added" to those possessed by the legislature. Myers v. United States, 272 U.S. 56 (1926). Confirmation is not a distinct legislative power but is a part of the executive power of appointment, some part of which in specific instances was delegated to the legislative branch.

Moreover, the court stated, "[t]he lack of ambiguity in Sections 25 and 26 of Article III of the Alaska Constitution mandate that this court interpret these express provisions as embodying not only the maximum parameters of the delegation of the executive appointment authority through the

legislative confirmation function but, further, that they delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers. In our view, the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision."

### III. Comments.

The Bradner decision did not explicitly discuss the application of sec. 26 to members of boards and commissions the Bradner decision construed AS 39.05.020, as enacted in 1975, required the confirmation only of deputy commissioners and certain division directors. The logic of the decision makes clear, however, that the court believes that only those members of the boards and commissions described in sec. 26 would be subject to legislative confirmation. Sec. 26 states that legislative confirmation is required for members of a board or commission when the board or commission is "at the head of a principal department or a regulatory or quasi-judicial agency". I believe that the phrase describes most state boards or commissions-- but not all. For example, advisory commissions are not among those described in sec. 26. The board recently established in the Forest Practices Act, ch. 34, SLA 1990, appears only to have advisory functions and its members are not subject to legislative confirmation under that Act; in my view, they are similarly not subject to confirmation under Sec. 26. See AS 41.17.041 as enacted in Sec. 3 of ch. 34.

Other boards or commissions that seem not to fall under sec. 26 include the Alaska Women's Commission [AS 44.19.165], the Alaska Public Broadcasting Commission [AS 44.21.256], and the Older Alaskans Commission [AS 44.21.200]. Others probably exist.

If I may be of further assistance, please advise.

RAB:gc  
G15/002

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL  
JUNEAU 99811

February 3, 1977

Honorable Jay S. Hammond  
Governor  
State of Alaska  
Pouch A  
Juneau, Alaska 99811

Re: Confirmation of Members  
of Boards and Commissions

Dear Governor Hammond:

You have asked us for an opinion as to the propriety under the State Constitution of the Legislature's confirming your appointments to State Boards and Commissions.

Under the Constitution, Article 3, Sections 25 and 26, the Legislature's power to confirm your appointments to executive positions is limited to those positions specified by the Constitution, that is, heads of the principal departments and the members of boards and commissions which are at the head of principal departments or quasi-judicial or regulatory agencies. Bradner vs. Hammond, 553 P.2d 1 (Alaska 1976).

We have accordingly prepared an alphabetical listing of all the State boards and commissions in Alaska and have indicated for each the statute under which its members are appointed, whether that statute requires legislative confirmation, and whether the Constitution requires or permits legislative confirmation. The list follows:

Administration of Justice, Governor's Commission on the.  
AS 44.19.746. Confirmation is not required by statute or the Constitution.

Aging, Governor's Advisory Committee on.  
There is no statute on this one and no confirmation would be required by statute or Constitution.

~~Alcoholic Beverage Control Board.~~  
AS 4.05.010 and 39.05.060. This is a regulatory board and requires confirmation under the statutes and the Constitution.

Alcoholism, Advisory Board on.  
AS 47.37.070. Confirmation is not required under either statute or the Constitution.

Arts, Alaska State Council on the.  
AS 44.19.900. This board is made expressly not subject to legislative confirmation under the statute, and of course, is not subject to confirmation under the Constitution.

Assessment Review Board, State.

AS 43.56.040. This is a quasi-judicial agency and must be confirmed under both the statute and the Constitution.

Athletic Commission.

AS 05.05.010. This is a regulatory board and is subject to confirmation under both the statute and the Constitution.

Barber Examiners, Board of.

AS 08.12.010. This is a regulatory board and must be confirmed under the Constitution, even though not required by statute.

Bristol Bay Regional Development Council.

Chapter 4, SSSLA 1974, and Chapter 209, SLA 1976. No confirmation is required under either the statute or the Constitution.

Capital Site Selection Committee.

AS 44.06.110. Confirmation is not required under either the statute or the Constitution.

Chiropractic Examiners, Board of.

AS 08.20.010. This is a regulatory board and confirmation is required under the Constitution, even though not required under the statute.

Code Revision Commission.

AS 24.20.075. Confirmation is not required by either the statute or the Constitution.

Collection Agency Board.

AS 8.24.011. This is a regulatory board and confirmation is required under the Constitution, even though not required by the statute.

Commercial Fisheries Entry Commission.

AS 16.43.020. This is a regulatory commission and confirmation is required under both the statute and the Constitution.

Comprehensive Health Advisory Council.

AS 18.07.020. Confirmation is required by the statute; however, this is not a quasi-judicial or regulatory agency, and confirmation is not permissible under the Constitution.

Commission for Northern Operations of Rail Transportation and Highways.

AS 44.19.704 and 39.05.060. Confirmation is required under the latter statute but cannot be required under the Constitution.

Dental Examiners, Board of.

AS 8.36.010. This is a regulatory board, and confirmation is required under both the statute and the Constitution.

Developmental Disability Planning and Advisory Council.

This is created under federal law and confirmation is not required.

Development Corporation, Alaska State.

AS 44.59.010. Confirmation is required by the statute; however it cannot be required under the Constitution.

Dispensing Opticians, Board of.

AS 08.71.010. This is a regulatory board, and while not required by statute, confirmation is required under Constitution.

Drug Abuse, Advisory Board on.

AS 44.29.030. Confirmation is not required under either the statute or the Constitution.

Education, Board of.

AS 14.07.075. This is head of a principal department, and confirmation is required under both the statute and the Constitution.

Educational Broadcasting Commission, Alaska.

AS 14.40.700. Confirmation is not required under either the statute or the Constitution.

Electrical Examiners, Board of.

AS 08.40.010. This is a regulatory board, and confirmation is required under the statute and the Constitution.

Employment of the Physically Handicapped, Governor's Committee on.

AS 23.15.220. Confirmation is not required under either the statute or the Constitution.

Environmental Advisory Board.

AS 44.46.030. Confirmation is not required under either the statute or the Constitution.

Equal Employment Opportunity Committee.

This board is created by administrative order, and confirmation is not required.

Fisheries, Board of.

AS 16.05.221(a). This is a regulatory board and confirmation is required by both the statute and the Constitution.

Fisheries Council.

This board was created by administrative order, and confirmation is not required.

Fishermen's Fund Advisory and Appeals Council.

AS 23.35.010. Confirmation is not required by the statute or the Constitution.

Game, Board of.

AS 16.05.221(b). This is a regulatory board, and confirmation is required by the statute and the Constitution.

Geographic Board, State.

AS 44.19.360. Confirmation is not required by the statute or the Constitution.

Growth Policy Council, Alaska.

This board was created by administrative order and confirmation is not required by statute or the Constitution.

Guide Licensing and Control Board.

AS 08.54.010. This is a regulatory board, and confirmation is required by both the statute and the Constitution.

Hair Dressing and Beauty Cultural Examiners, Board of.

AS 08.28.010. This is a regulatory board, and while confirmation is not required by the statute, it is required by the Constitution.

Historical Commission, Alaska.

AS 41.19.461. Confirmation is not required by the statute or by the Constitution.

Historic Site Advisory Committee.

AS 41.35.110. Confirmation is required by the statute; however, confirmation is not permissible under the Constitution.

Housing Authority, Alaska State.

AS 18.55.020; 39.05.060. Confirmation is not required by the former statute but it is by the latter. Confirmation is not permissible under the Constitution.

Housing Finance Corporation, Alaska.

AS 18.56.010. Confirmation is not required by the statute or by the Constitution.

Human Rights, State Commission for.

AS 18.80.010. This is a quasi-judicial agency, and confirmation is required by the statute and by the Constitution.

International Development Commission, Alaska.

AS 44.19.400. Confirmation is not required by the statute or by the Constitution.

Investment Advisory Committee.

AS 37.10.010(f). Confirmation is not required by the statute or the Constitution. (The presence of legislators on this committee is probably not permissible under the constitutional prohibition against dual office holding. Alaska Constitution, Art. 2, Sec. 5).

Judicial Council.

Alaska Constitution, Art. 4, Sec. 8. The non-attorney members, and solely the non-attorney members, are subject to legislative confirmation.

Judicial Qualifications, Commission on.

Alaska Constitution Art 4. Sec. 10. The two members who are non-lawyers and non-judges are subject to legislative confirmation.

Juvenile Justice and Delinquency Commission.

This board is created under federal law and no confirmation is required.

King Crab Marketing and Quality Control Board, Alaska.

AS 18.90.040. This board has regulatory powers and confirmation is required by the statute and the Constitution.

Land Use Planning Commission, Joint Federal-State.

AS 41.40.020. Confirmation is not required by statute or by the Constitution.

Law of the Sea, Commission on the Conference of the.

AS 44.19.789. Confirmation is not required by the statute or by the Constitution.

Libraries, Advisory Council on.

This board is the creature of federal law, and no confirmation is required.

Local Boundary Commission.

AS 44.19.250; 39.05.060. The former law does not require confirmation, but the latter does; however, that is not permissible under the Constitution.

Manpower Planning Council, State.

This is also a creature of federal law, and no confirmation is required.

Manpower Services Council, State.

This group is also a creature of federal law and no confirmation is required.

Marine Pilots, Board of.

AS 08.62.010. This is a regulatory board and confirmation is required by the statute and the Constitution.

## Medical Board, State.

AS 08.64.100. This is a regulatory board and confirmation is required by the statute and the Constitution.

## Medical Indemnity Corporation of Alaska (MICA).

AS 21.88.030. Confirmation is required by statute but is not permissible under the Constitution.

## Mental Health Advisory Council.

AS 47.30.605. Confirmation is not required by statute or the Constitution.

## Municipal Bond Bank Board.

AS 44.58.010. Confirmation is required by statute; however, confirmation is not permissible under the Constitution.

## Nursing, Board of.

AS 08.68.010. This is a regulatory board, and while not required by statute, confirmation is required by the Constitution.

## Nursing Home Administrators, Board of.

AS 08.70.010. This is a regulatory board, and while not required by statute, confirmation is required by the Constitution.

## Occupational Safety and Health Review Board.

AS 18.60.057. This is a quasi-judicial board, and confirmation is required by the statute and the Constitution.

## Optometry, Board of Examiners in.

AS 08.72.010. This is a regulatory board, and while not required by statute, confirmation is required by the Constitution.

## Pacific Marine Fisheries Commission.

AS 16.45.020. Confirmation is required by the statute; however, confirmation is not permissible under the Constitution.

## Parole, State Board of.

AS 33.15.010. Confirmation is required by the statute; however, confirmation is not permissible under the Constitution.

## Personnel Board (also acts as Public Employees Retirement Board and Labor Relations Board).

AS 39.25.060. This is a regulatory board and also a quasi-judicial agency, and confirmation is required by the statute and the Constitution.

## Pharmacy, Board of.

AS 08.88.010. This is a regulatory board, and confirmation is required by the statute and the Constitution.

Physical Therapy Board, State.

AS 08.84.010. This is a regulatory board, and while not required by statute, confirmation is required by the Constitution.

Pioneers Home Advisory Board, Alaska.

AS 44.21.100. Confirmation is not required by the statute or the Constitution.

Pipeline Commission, Alaska.

AS 46.06.020. This is a regulatory board and confirmation is required by the statute and the Constitution.

Police Standards Council, Alaska.

AS 18.65.140. Confirmation is not required by the statute or by the Constitution.

Post-Secondary Education, Alaska Commission on.

AS 14.40.903. Confirmation is required by the statute; however, confirmation is not permissible under the Constitution. (The presence of legislators on this Commission is highly questionable under the separation of powers doctrine and the prohibition against dual office holding).

Professional Teaching Practices Commission.

AS 14.20.380. This commission has quasi-judicial powers, and confirmation is required by the statute and by the Constitution.

Psychologist and Psychological Associate Examiners, Board of.

AS 08.86.010. This is a regulatory board, and confirmation is required by the statute and by the Constitution.

Public Accountancy, Alaska State Board of.

AS 08.04.010. This is a regulatory board, and while not required by the statute, confirmation is required by the Constitution.

Public Offices Commission, Alaska.

AS 15.13.020(b). This is a quasi-judicial commission, and while not required by statute, confirmation is required by the Constitution. (The method of appointment to this commission is highly suspect under the Constitution Art 2. Secs. 25 and 26).

Public Offices Salary Commission.

AS 39.23.010. Confirmation is not required by statute or by the Constitution.

Public Utilities Commission, Alaska.

AS 42.05.010. This is a regulatory board, and confirmation is required by the statute and by the Constitution.

Real Estate Commission.

AS 08.88.011. This is a regulatory board, and confirmation is required by the statute and the Constitution.

Regents Board, University of Alaska.  
Alaska Constitution. Art. 7 Sec. 3; AS 14.40.120.  
Confirmation is required by the Constitution.

Royalty Oil and Gas Development Advisory Board.  
AS 38.06.010. Confirmation is required by the statute; however,  
confirmation is not constitutionally permissible.

Rural Affairs Commission.  
AS 44.19.720. Confirmation is not required by the statute or  
by the Constitution.

Small Business Corporation of Alaska.  
AS 44.60.020. Confirmation is not required by the statute or  
by the Constitution.

Soil Conservation Board, Alaska.  
AS 41.10.040. Confirmation is required by the statute; however,  
confirmation is not permissible under the Constitution.

Teacher's Retirement Board, Alaska.  
AS 14.25.035. Confirmation is not required by the statute or  
by the Constitution.

Tourism Advisory Board.  
AS 44.33.190; 39.05.060. Confirmation is not required by the  
former, but it is required by the latter. However, confirmation  
is not permissible under the Constitution.

Transportation Commission, Alaska.  
AS 42.07.011. This is a regulatory board, and confirmation is  
required by the statute and the Constitution.

Transportation Planning Committee.  
Administrative Order No. 33. No confirmation is required by  
statute or the Constitution.

Veterinary Examiners, Board of.  
AS 8.98.010. This is a regulatory board, and confirmation  
is required by the statute and by the Constitution.

Violent Crimes Compensation Board.  
AS 18.67.020. This is a quasi-judicial agency, and while not  
required by the statute, confirmation is required by the  
Constitution.

Vocational Education Advisory Council, Alaska State.  
This is a creature of federal law, and confirmation is not  
required by statute or by the Constitution.

Water Resources Board.  
AS 46.15.190. Confirmation is required by the statute; however,  
confirmation is not permissible under the Constitution.

Welding Examiners, Board of.

AS 8.99.101. This is a regulatory board, and while not required by the statute, confirmation is required by the Constitution.

Western Interstate Commission for Higher Education.

AS 14.40.690. Confirmation is required by the statute; however, confirmation is not permissible under the Constitution.

Workman's Compensation Board, Alaska.

AS 23.30.005. This is a quasi-judicial agency, and confirmation is required by the statute and by the Constitution.

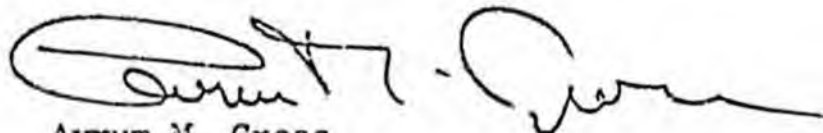
Yukon-Taiya Commission.

AS 44.20.010. Confirmation is not required by the statute or by the Constitution.

Summarizing the above, there are 41 boards which do not require confirmation under the applicable statutes and the Constitution. There are 27 boards that require confirmation under both the applicable statutes and the Constitution. There are 13 regulatory or quasi-judicial boards which must be confirmed by the legislature under the Constitution but which are not required to be by the applicable statutes. There are 14 boards which require confirmation under the applicable statutes, but which are not subject to confirmation under the Constitution.

It is our opinion that you should submit the names of your appointees to the boards and commissions which are subject to confirmation under the Constitution. You need not submit appointees for confirmation that under the Constitution are not subject to that requirement. You are, of course, free to do so as an advisory matter relying upon the legislative vote as an indication of the legislature's views on the appointment, but under the Constitution, if the appointee is not required to be confirmed, a legislative decision not to confirm the appointee would be of no legal effect. The appointment would be valid in any event.

Yours very truly,



Avrum M. Gross  
Attorney General

FEB 11 1992

BRADNER v. HAMMOND

Alaska

1

Cite as, Alaska, 553 P.2d 1

Mike BRADNER, Speaker of the House, Alaska State Legislature, et al., Appellants,

v.

Jay S. HAMMOND, Governor of the State of Alaska, Appellee.

No. 2802.

Supreme Court of Alaska.

Aug. 2, 1976.

Speaker of the House, President of the Senate and State Legislature brought action against Governor for declaratory judgment of constitutionality of statute which provided that appointment of deputy heads of each principal executive department and 19 specified directors of divisions were subject to confirmation by legislature and which prescribed procedures pertaining to confirmation process. The Superior Court, First Judicial District, Juneau, Thomas E. Schulz, J., granted Governor's motion for summary judgment and declared statute unconstitutional, and plaintiffs appealed. The Supreme Court, Rabinowitz, J., held that state constitutional provisions delineate full extent of legislature's authority to confirm Governor's appointment of subordinate executive officers and that such statute was violative of separation of powers requirements of State Constitution.

Judgment affirmed.

1. Constitutional Law ⇐50

"Separation of powers doctrine" prohibits one branch of state government from encroaching upon and exercising powers of another branch.

See publication Words and Phrases for other judicial constructions and definitions.

2. States ⇐48

Appointment of executive officers of state government is an "executive func-

553 P.2d-1

tion" rather than a legislative one. Const. art. 3, §§ 1, 16.

See publication Words and Phrases for other judicial constructions and definitions.

3. States ⇐48

Confirmation of appointment of executive officers of state government is an attribute of appointive power of Governor rather than a distinct legislative power. Const. art. 2, § 1; art. 3, §§ 1 et seq., 16.

4. States ⇐46, 52

State constitutional provisions, which empower Governor to appoint and dismiss head of each principal executive department and subjects such appointments to confirmation by legislature and which, with regard to related offices, vests power of appointment in Governor and power to confirm in legislature and provides for removal of such officers as provided by law, delineate full extent of legislature's authority to confirm Governor's appointment of subordinate executive officers. Const. art. 3, §§ 25, 26.

5. Constitutional Law ⇐58

States ⇐48

Statute, which provided that appointment of deputy heads of each principal executive department and 19 specified directors of divisions were subject to confirmation by legislature and which prescribed procedures pertaining to confirmation process, was violative of separation of powers requirements of State Constitution. AS 39.05.020; Const. art. 2, § 1; art. 3, §§ 1, 16, 25, 26; art. 4, § 1.

6. Constitutional Law ⇐50

"Separation of powers doctrine" requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision.

Terrance Sandalow, Ann Arbor, Mich., Billy G. Berrier, Juneau, for appellants.

Robert M. Johnson, Rodger W. Pegues, Asst. Attys. Gen., and Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before BOOCHEVER, C. J., RABINOWITZ and ERWIN, JJ., DIMOND, Justice Pro Tem., and TAYLOR, Superior Court Judge sitting as Justice Pro Tem.

### OPINION

RABINOWITZ, Justice.

This appeal arises from a declaratory judgment suit which appellants instituted in superior court seeking a declaration that Section 1 of Chapter 82, SLA 1975 is constitutional. This legislative measure effected significant changes in the procedures for appointment and removal of sub-cabinet officials, including deputy commis-

sioners and division heads of the executive branch of Alaska's government.<sup>1</sup> Specifically, it removed certain division directors from the classified service and placed them in the partially exempt service, provided that the appointment of deputy heads of each principal executive department and 19 specified directors of divisions were subject to confirmation by the legislature in joint session, and it prescribed procedures pertaining to the confirmation process.

The legislative history of Chapter 82 discloses that on April 28, 1975, Alaska's Ninth State Legislature enacted Free Conference Committee Substitute to Senate

#### 1. Chapter 82, SLA 1975 provides:

Section 1. AS 39.05.020 is amended to read:

Sec. 39.05.020. Appointment of department heads and other executive officers. The governor shall appoint the head of each principal executive department in the state government. Each appointment is subject to confirmation by a majority of the members of the legislature in joint session. The following executive appointments are also subject to confirmation by a majority of the members of the legislature in joint session:

- (1) The deputy head of each principal executive department of the state;
- (2) director, division of banking;
- (3) director, division of insurance;
- (4) director, division of family and children services;
- (5) director, division of corrections;
- (6) director, division of oil and gas;
- (7) director, division of elections;
- (8) director, division of policy planning and research;
- (9) director, division of personnel;
- (10) director, division of budget and management;
- (11) director, division of medical assistance;
- (12) director, division of mental health;
- (13) director, division of public health;
- (14) director, office of telecommunications;
- (15) director, division of marine transportation;
- (16) director, division of waters and harbors;
- (17) director, division of lands;
- (18) state geologist, division of geological and geophysical surveys;
- (19) director, division of agriculture;
- (20) director, division of aviation.

Section 2. AS 39.05.080(2) is amended to read:

(2) When appointments are presented to the legislature for confirmation,

(A) the presiding officer of each house shall assign the name of each appointee to a standing committee of that house for a hearing, report and recommendation; standing committees of the two houses assigned the same person's name for consideration may meet jointly to consider the qualifications of the person appointed and may issue either a separate or a joint report and recommendation concerning that person; then

(B) the legislature shall, before the end of the session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented.

Sec. 3. AS 39.25.040 is amended to read:

Sec. 39.25.040. Director of personnel. The head of the division of personnel is the director of personnel appointed by the commissioner of administration and responsible to the commissioner of administration for the execution of the duties and responsibilities imposed by this chapter and the rules adopted under this chapter. The director of personnel must have at least three years of practical working experience in the field of personnel administration.

Sec. 4. AS 39.25.120(2) is amended to read:

(2) the directors, division of personnel, division of mental health, division of public health, division of medical assistance, and those other directors of the major divisions of the principal departments of the executive branch as are specifically designated by the governor; . . .

Bill 98. After initial passage, Governor Hammond vetoed the bill on the ground that Section 1 thereof impinged upon the executive power of appointment. On May 21, 1975, the legislature, in joint session, overrode the veto. The act then became law the following day as Chapter 82 of the 1975 Session Laws of Alaska (hereinafter Chapter 82).

Subsequent to enactment of Chapter 82, Governor Hammond appointed persons to posts affected by the Act's provisions. Under AS 39.05.080(1), part of the codification of Chapter 82, the governor was obliged to present to the legislature for confirmation the names of these persons. The governor refused to do so. Appellants then commenced this action for a declaratory judgment<sup>2</sup> of the constitutionality of Chapter 82. The superior court granted Governor Hammond's motion for summary judgment, declaring Section 1 unconstitutional. This appeal followed.

The controlling constitutional provisions we are called on to interpret here are contained in Article III of Alaska's constitution and concern the appointive powers of the governor.<sup>3</sup> Article III, Section 1 provides:

The executive power of the State is vested in the governor.

Article III, Section 25 further provides that:

The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members

of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of State. The heads of all principal departments shall be citizens of the United States.

This provision explicitly empowers the governor to appoint and dismiss the head of each principal department. It subjects these executive appointments to confirmation by a majority of the members of the legislature in joint session. Article III, Section 26 treats related offices and provides:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

As with Section 25, Section 26 vests the power of appointment in the governor and the power to confirm in the legislature in joint session. Removal of Section 26 board or commission members is as provided by law and, therefore, not necessarily at the governor's pleasure.

As analyzed by appellants, the sole question in this appeal is whether Sections 25 and 26 of Article III describe the outer

rights have been determined by the judgment.

2. AS 22.10.020(b) provides:

In case of an actual controversy within the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose

3. There is no dispute that our constitution was designed with a strong executive in mind. Executive Committee Chairman Victor Rivers reported to the floor that "[w]e are all strongly agreed on the principle of the strong executive." Alaska Constitutional Convention Proceedings at 1984 (hereinafter ACCP). Accord, ACCP at 1102, 1741, 1986-88, 2038, 3103.

limits of the legislature's confirmation authority, or whether the legislature may by statute require confirmation of other high-level, policy-making officials within the executive branch. In arguing that Sections 25 and 26 only establish a constitutional minimum requiring that certain appointments within the executive branch must be legislatively confirmed, appellants emphasize that neither Section 25 nor 26 prohibits the legislature from requiring confirmation of other executive appointments. Admitting that the power to enact legislative confirmation requirements in addition to those provided for in Sections 25 and 26 is not explicitly conferred on the legislature by Alaska's constitution, appellants advance the contention that the validity of Chapter 82 turns on whether such enactments are within the ambit of the constitution's general grant of legislative power to the legislative branch of Alaska's government.<sup>4</sup>

In opposition, appellee Hammond primarily argues that the power to confirm

executive officers is an executive power which may be lawfully exercised by the legislature only to the extent granted by the Alaska Constitution. Viewed in this manner, appellee analyzes the power to confirm executive officers as part of the appointment process, incapable of existence independent of the power of appointment, and characterizes this confirmation authority as a power "super-added" to the legislature's general legislative powers. Thus, appellee would find that Sections 25 and 26 set the maximum rather than the minimum parameters of the legislature's power to confirm appointments of executive officers. This follows, according to appellee, from the fact that legislative confirmation is a delegated function taken from an executive function, and thus the breadth of this delegated authority must be strictly construed.<sup>5</sup> Applying this strict interpretative criterion, appellee concludes that Chapter 82 is violative of the separation of

4. Article II, Section 1 of the Alaska Constitution provides in part that "[t]he legislative power of the State is vested in a legislature . . . ."

In support of their thesis that the confirmation power is within the legislative power grant of Article II, Section 1, appellants contend that the record of the constitutional convention demonstrates that the delegates "clearly understood that the legislature would have authority to enact statutory confirmation requirements." Additionally, appellants point to the circumstance that since the inception of statehood both the executive and legislative branches "have consistently acted upon the understanding that the legislature has such authority" and this longstanding interpretation should be accorded significant weight by the judiciary in matters of constitutional interpretation. *Okanogan Indians v. United States* (The Pocket Veto Case) 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929); *Hampton v. United States*, 278 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928); *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901); see generally 16 Am.Jur.2d Constitutional Law § 83 (1964); 16 C.J.S. Constitutional Law §§ 32-34 (1956).

In addition appellants emphasize that this interpretation dates back to the first years of statehood. Contemporaneous interpretation of fundamental law by those partici-

pating in its drafting has traditionally been viewed as especially weighty evidence of the framers' intent. *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926); *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727, 5 S.Ct. 739, 28 L.Ed. 1137 (1885); *Norfolk & W. Ry. Co. v. Board of Public Works*, 124 W.Va. 562, 21 S.E.2d 143 (1942); *Jones v. Williams*, 121 Tex. 94, 45 S.W.2d 130 (1931).

5. Countering appellants' contention, appellee's reading of Alaska's constitutional history demonstrates "an intent by the constitutional framers to restrict legislative confirmation of those officers set forth in Art. III, §§ 25 and 26."

The attorney general candidly admitted at oral argument that examination of practice between the legislative and executive branches since statehood indicates that the executive has at least acquiesced to legislative confirmation of certain subcabinet officials. However, he argued that the political reality of a legislature dominated by the same party as that of the governor, as well as the minor interference such intervention created, indicates that the executive stance in the past should not be read as a "constitutional interpretation" by a coordinate branch of government, but rather as a product of a realistic ordering of executive goals at the time.

powers doctrine implied in Alaska's constitution.

After study of the excellent briefs and oral arguments of respective counsel, on March 25, 1976, this court issued an order affirming the superior court's declaration that Section 1, Chapter 82, SLA 1975 is unconstitutional. In this order we further indicated that a full opinion would be issued in due course.<sup>6</sup>

[1] In *Alaska State-Operated School System v. Mueller*, 536 P.2d 99, 103 (Alaska 1975), we observed that "[t]hose who wrote our constitution followed the traditional framework of American government. The governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the judicial." Analyzing this tripartite form of government provided for Alaska, this court concluded, in *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947, 950 (Alaska 1975), that ". . . it can be fairly implied that this state does recognize the sep-

aration of powers doctrine."<sup>7</sup> Our recent opinion in *Continental Insurance Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 410-11 (Alaska 1976), acknowledges that the underlying rationale of the doctrine of separation of powers is the avoidance of tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers.<sup>8</sup> It is clear that the doctrine is not a common law concept; it is, however, a brooding omnipresence by virtue of its conceptually central role in the structure of American constitutional government.

A problem inherent in applying the doctrine of "separation of powers" stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers.<sup>9</sup> Both doctrines address and are designed to resolve the problem of efficient government versus tyrannical government<sup>10</sup> and have as their goal

6. At oral argument respective counsel advised that if a decision was not forthcoming in the immediate future, Governor Hammond, without prejudice to his position in this appeal, intended to submit the names of various subcabinet appointments to the legislature in order to facilitate confirmation hearings. Our March order was in response to these disclosed time constraints.

7. In *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947, 950 (Alaska 1975), we also said that "[a]lthough the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed. *Wade v. Nolan*, 414 P.2d 689, 698 (Alaska 1966)."

In reaching this conclusion that the doctrine of separation of powers is implicit in the Alaska Constitution, we cited *Lira v. Billings*, 198 Kan. 726, 414 P.2d 13, 16 (1966), where the Kansas Supreme Court acknowledged that the doctrine is implied from the existence of three separate constitutional provisions calling for three branches of government.

8. *Continental* dealt in part with the inherent contempt powers of the courts of Alaska. There we observed that the inherent power

to punish for contempt exists independently of statute and that although the legislature may regulate the procedure and enlarge the power, it cannot ". . . 'without trenching upon the constitutional powers of the court, and destroying the autonomy of that system of checks and balances which is one of the chief features of our triple-department form of government, fetter the power itself.'" *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 410 (Alaska 1975), quoting *In re Shortridge*, 99 Cal. 526, 528, 34 P. 227, 229 (1893).

The doctrine prohibits one branch from encroaching upon and exercising the powers of another branch. *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926); *Giss v. Jordan*, 82 Ariz. 152, 309 P.2d 779 (1957).

9. ". . . a dynamic relationship of cooperation and conflict. . . ." R. Tresolini & M. Shapiro, *American Constitutional Law* 9 (3d ed. 1970) [hereinafter Tresolini].

10. Tresolini, *supra* note 9, at 11. Compare *O'Donoghue v. United States*, 280 U.S. 516, 530, 53 S.Ct. 740, 77 L.Ed. 1356, 1360 (1933) and *United Public Workers of America v. Mitchell*, 330 U.S. 75, 91, 67 S.Ct. 550, 565, 91 L.Ed. 754, 768 (1947).

the protection of the electorate from tyranny.<sup>11</sup> In the instant appeal, the parties, in recognition of the controlling nature of the issue, dispute the meaning of the doctrine of separation of powers, and its implications for the determination as to whether Chapter 82 is violative of Alaska's constitution. In our view, the doctrine is of importance to the resolution of the merits of this appeal, for if the doctrine clearly precludes legislative intervention (by confirmation) in the appointment of executive officials, or requires "strict departmentalization," then Chapter 82, which purports to authorize legislative "meddling" in the exercise of an executive power, is unconstitutional because it would be violative of separation of powers requirements.

[2] In determining if Chapter 82 violates the doctrine of separation of powers, which is implicit in Alaska's constitution, it is necessary to answer the threshold question whether the appointment of executive officers is a legislative or executive function. Under the structure envisaged by

Alaska's fundamental charter, the legislative power of the state is vested in the legislature,<sup>12</sup> the executive power in the governor,<sup>13</sup> and the judicial power in a supreme court, a superior court and such additional courts as established by the legislature.<sup>14</sup>

Appellee contends that the appointment of executive officers is an executive function.<sup>15</sup> We find appellee's contention most persuasive. In addition to vesting the executive power of the state in the governor, Section 16 of Article III provides that "[t]he governor shall be responsible for the faithful execution of the laws." In view of the responsibilities imposed by Section 16, and the authority granted by Section 1, the governor is necessarily clothed with the power to appoint subordinate executive officers to aid him in carrying out the laws of Alaska.<sup>16</sup> Thus, we conclude that the appointment of executive officers is an executive function;<sup>17</sup> for without such a power, the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too

11. Justice Brandeis wrote, dissenting in *Myers v. United States*, 272 U.S. 52, 293-95, 47 S.Ct. 21, 85, 71 L.Ed. 160, 242-43 (1926):

The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. . . . In America, as in England, the conviction prevailed then that the people must look to representation assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.

Compare C. Antieau, 2 *Modern Constitutional Law* § 11:13, at 200 (1st ed. 1969):

The doctrine of separation of powers was deemed necessary by the framers of the Constitution for two principal purposes: first, to protect the liberty of the citizen; and second, to safeguard the independence

of each branch of the government and protect it from domination and interference by the others.

*Cf. Warren v. Boucher*, 543 P.2d 731, 734, 737 (Alaska 1975).

12. Art. II, § 1, Alaska Const.

13. Art. III, § 1, Alaska Const.

14. Art. IV, § 1, Alaska Const.

15. There is no dispute here that the appointees subjected to legislative confirmation by Chapter 82 are executive officers.

16. *Ahearn v. Bailey*, 104 Ariz. 250, 451 P.2d 30 (1960).

17. In *Springer v. Philippine Islands*, 277 U.S. 189, 202, 48 S.Ct. 480, 482, 72 L.Ed. 845, 849 (1927), the Supreme Court said:

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

See also *Myers v. United States*, 272 U.S. 56, 115-16, 47 S.Ct. 21, 24-25, 71 L.Ed. 160, 163-66 (1926).

great a concentration of power in one branch, would be defeated.

[3] Given our conclusion that under Alaska's constitution the appointment of subordinate executive officers by the governor is an executive function, it is then necessary to determine the nature of the legislature's confirmation powers. Here we are in agreement with appellee's analysis that under Alaska's constitution confirmation is a specific attribute of the appointive power of the executive.<sup>18</sup> Other courts which have been called upon to resolve this issue have been unanimous in their holdings that confirmation is not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government.<sup>19</sup>

In light of the nature of the legislature's power of confirmation, the question whether Sections 25 and 26 of Article III describe the outer limits of the legislature's confirmation authority, or whether the leg-

islature may by statute require confirmation of other high-level, policy making officials within the executive branch, admits of but one resolution. As to this issue, we think the provisions of Sections 25 and 26 of Article III are clear and unambiguous.<sup>20</sup> Thus, we conclude that Sections 25 and 26 mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government.<sup>21</sup>

[4-6] The lack of ambiguity in Sections 25 and 26 of Article III of the Alaska Constitution mandate that this court interpret these express provisions as embodying not only the maximum parameters of the delegation of the executive appointive authority through the legislative confirmation function but, further, that they delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers. In our view, the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision.<sup>22</sup>

18. In *Myers v. United States*, 272 U.S. 56, 189, 47 S.Ct. 21, 43, 71 L.Ed. 160, 187 (1926), the Supreme Court termed confirmation a power "super added" to those possessed by the legislature.

19. *Myers v. United States*, 272 U.S. 56, 138-39, 47 S.Ct. 21, 32-33, 71 L.Ed. 160, 174-75 (1926); *Wittler v. Baumgartner*, 180 Neb. 448, 144 N.W.2d 62, 67 (1966); *Spears v. Davis*, 398 S.W.2d 921 (Tex.1966); *Walker v. Baker*, 145 Tex. 121, 196 S.W.2d 324 (1946); *State v. Dowling*, 167 La. 907, 120 So. 593 (1928); *People v. Shawver*, 30 Wyo. 360, 222 P. 11 (1924).

20. Compare *Warwick v. State ex rel. Chance*, 548 P.2d 384, 391-96 (Alaska 1976).

21. In *O'Donoghue v. United States*, 289 U.S. 516, 530, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933) (emphasis added), the Supreme court said:

The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands*, 277 U.S. 189, 201, 48 S.Ct. 480, 72 I.Ed. 845; namely, to preclude a com-

mingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.

22. Compare *Leege v. Martin*, 379 P.2d 447, 450 (Alaska 1963). See also *State v. Campbell*, 536 P.2d 105, 110-11 (Alaska 1975), where we said (footnotes omitted):

This court is admittedly under a duty to reconcile, whenever possible, challenged legislation with the constitution by rendering a construction that would harmonize the statutory language with specific constitutional provisions. However, in fulfilling that duty, the extent to which the express language of the provision can be altered and departed from and the extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers which prohibits this court from enacting legislation or redrafting defective statutes.

To hold otherwise would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the executive by the legislative branch, because there would be no logical termination point to the legislature's confirmation of executive appointments.<sup>23</sup>

The superior court's judgment is Affirmed.

CONNOR and BURKE, JJ., not participating.



Kenneth D. MOORE et al., Appellants,

v.

STATE of Alaska et al., Appellees.

STANDARD OIL COMPANY OF CALIFORNIA, Cross-Appellant,

v.

Kenneth D. MOORE et al., Cross-Appellees.  
Nos. 2551, 2587.

Supreme Court of Alaska.

July 9, 1976.

Fishermen and owner of lodge on Kachemak Bay brought action challenging legality of sale of certain offshore oil and gas leases in the Bay. The Superior Court, Third Judicial District, Anchorage, Thomas E. Schulz, J., granted defendants' motion for summary judgment and fishermen and lodge owner appealed. The Supreme Court, in separate opinions by Connor and Rabinowitz, JJ., held that the action was not barred by laches; that legal requirements concerning publication of notice of sale were met; that determination that the sale was in the best interests of the State was required to be made prior to

the sale; that contention that no such decision had been made was subject to judicial review; that the director of the division of lands had not made such a determination; that remand was required for determination of whether commissioner of natural resources had relieved the director of the division of lands of the responsibility for making that decision; that director of division of lands was required to consult with planning agencies in two cities and one borough in the vicinity of Kachemak Bay prior to entering into the sale; but that rule requiring the director to enter into such consultation would be applied prospectively only.

Remanded.

Dimond, J. pro tem., dissented in part and filed an opinion in which Rabinowitz, J., concurred.

Connor, J., filed a statement dissenting in part.

1. Appeal and Error ⇨949  
Equity ⇨84

Decision to sustain a defense based on laches is properly addressed to the discretion of the trial court and will not be overturned unless the Supreme Court feels a definite and firm conviction that a mistake has been committed.

2. Appeal and Error ⇨1169(8)

Although clear error in a trial court ruling cannot be demonstrated by merely showing a conflict in evidence and Supreme Court will not reweigh conflicting evidence, existence of conflicts in evidence which give rise to genuine issues of material fact provides an adequate ground for reversal of a grant of summary judgment.

3. Equity ⇨72(1)

Before the equitable doctrine of laches can be applied, defendant must show that the plaintiff was guilty of inexcusable delay and that the delay resulted in undue prejudice to the defendant.

23. Our holding makes it unnecessary to discuss any of the other arguments advanced in this appeal.

SJR

6

HOUSE COMMITTEE REPORT

5/21/91  
Rules

Date Referred: May 14, 1991

FURTHER REFERRALS:

Date of Committee Action: 5-20-91

The JUDICIARY Committee considered:

CSSJR 6(FIN)

CS FOR SENATE JOINT RESOLUTION NO. 6 (FINANCE)

DESECRATION OF U.S. FLAG

Relating to an amendment to the Constitution of the United States prohibiting desecration of the Flag of the United States.

RECOMMENDATIONS: CS CSSJR 6 (JUD) the same title  
be replaced with CS CSSJR 6 (JUD) a new title

[ ] have attached amendments(s)

do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact \_\_\_\_\_

[ ] fiscal note(s) \_\_\_\_\_

[ ] zero fiscal note \_\_\_\_\_

2M (Senate zero fiscal note(s) Dept. LAW 5/14-91 sen. JUL 2-13-91)

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Larry Martin</i> martin	<input checked="" type="checkbox"/>				
<i>John ...</i>	<input checked="" type="checkbox"/>				
<i>David ...</i>	<input checked="" type="checkbox"/>				
		<i>J. Ellis</i> ELLIS		<input checked="" type="checkbox"/>	

*David ...*  
CHAIRMAN'S SIGNATURE

FISCAL NOTE

No. 1

Bill Version: STAR 6

(S) Publish Date: 2/13/91

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_

Department Affected: None -

Title: Prohibit Desecration of  
US Flag

BRU: \_\_\_\_\_

Sponsor: Sen Zharoff

Component: \_\_\_\_\_

Requestor: \_\_\_\_\_

COMPONENT SERIAL NO. 

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: None -

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: [Signature] Phone: 965-3717

Division: Senate Judiciary Committee Date: \_\_\_\_\_

Approved by Commissioner: \_\_\_\_\_

Agency: \_\_\_\_\_ Changes in CSJR 6 (Fin) Date: Feb 12, 1991

Distribution (by preparer): Legis: \_\_\_\_\_ or, OMB, & Impacted Agency(ies).

Rev 10/90 3/28/91 [Signature] Page 1 of 1

date Comptroller (initial)

FISCAL NOTE

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

BILL NO. HCSCSSJR 6

Revision Date: December 19, 1991 Department Affected: Department of Law  
 Title: "...Constitution of the United States BRU: Prosecution  
prohibiting desecration of the flag..." Component: Criminal Justice Litigation  
 Sponsor: Senator Zharoff  
 Requestor: Governor's Office COMPONENT SERIAL NO. 

		8	9
--	--	---	---

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
-------------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
<b>TOTAL</b>						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

**ANALYSIS:** (Attach a separate page if necessary.)  
 Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672  
 Division: Administrative Services Date: December 19, 1991  
 Approved by Commissioner: Richard I. Pegues / For / Charles E. Cole, Attorney General  
 Agency: Department of Law Date: December 19, 1991

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HCSCSSJR 6

The House Judiciary Committee substitute for CSSJR 6 calls upon the Congress of the United States to prepare and present to the legislatures of the several states an amendment to the United States Constitution that would empower the Congress and the legislatures of the several states to prohibit the physical desecration of the Flag of the United States. SJR 6, which is a communication from the Alaska State Legislature to the Congress of the United States, will not have a fiscal impact on the Department of Law.

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Department Affected: Department of Law  
Title: "...Constitution of the United States BRU: Prosecution  
prohibiting desecration of the flag..." Component: Criminal Justice Litigation  
Sponsor: Senator Zharoff  
Requestor: Senate Judiciary COMPONENT SERIAL NO. 

			8	9
--	--	--	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672  
Division: Administrative Services Date: February 4, 1991  
Approved by Commissioner: Richard I. Pegues / for  
Charles E. Cole, Attorney General  
Agency: Department of Law Date: February 4, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

# CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SJR 6

Senate Joint Resolution No. 6 calls upon the Congress of the United States to propose an amendment to the United States Constitution that would empower the Congress and the legislatures of the several states to prohibit the physical desecration of the Flag of the United States. SJR 6, which is a communication from the Alaska State Legislature to the Congress of the United States, will not have a fiscal impact on the Department of Law.

5/14/91

HOUSE COMMITTEE REPORT

(7)  
Date Referred: April 19, 1991

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 5-13-91

The STATE AFFAIRS Committee considered:

CSSJR 6(FIN)

CS FOR SENATE JOINT RESOLUTION NO. 6 (FINANCE)

DESECRATION OF U.S. FLAG

Relating to an amendment to the Constitution of the United States prohibiting desecration of the Flag of the United States.

- RECOMMENDATIONS:
- be replaced with \_\_\_\_\_  the same title
  - a new title
  - have attached amendments(s)
  - do pass
  - do not pass
  - no recommendations
  - individual recommendations
  - additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note Law

zero fiscal note(s) Senate Judiciary 2-13-91

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Mike Miller mwmiller	<input checked="" type="checkbox"/>	Gene Kubina Kubina		<input checked="" type="checkbox"/>	
Larry Baker Baker	<input checked="" type="checkbox"/>	Harv Greenberg Greenberg		<input checked="" type="checkbox"/>	
David Choquette choquette	<input checked="" type="checkbox"/>	(needs testimony)			
		Ed Bruckman (Bruckman)	<input checked="" type="checkbox"/>		

Gene Kubina  
CHAIRMAN'S SIGNATURE



Official Business

# Alaska State Legislature

HOUSE OF REPRESENTATIVES

House State Affairs Committee

P.O. Box V  
State Capitol  
Juneau, Alaska 99811

May 13, 1991

## MEMORANDUM

**TO:** Representative Dave Donley, Chair  
House Judiciary Committee

**FROM:** Representative Gene Kubina, Chair  
House State Affairs Committee *Gene*

**SUBJECT:** SJR 6: Desecration of the U.S. Flag

The House State Affairs Committee has heard SJR 6, supporting an amendment to the U.S. Constitution to prohibit desecration of the U.S. flag. Due to time constraints and the Committee's desire not to delay action on the resolution, no testimony was heard on SJR 6 before it was passed out with no recommendations.

Since there were no people signed up to testify at the hearing of SJR 6, the House State Affairs Committee respectfully requests the House Judiciary Committee to allow the public an opportunity to testify on the resolution.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811  
(907) 465-3867 or 465-2450  
FAX (907) 465-2029

Deliveries to: 240 Main Street  
Court Plaza, Room 500  
Mail Stop 3101

### MEMORANDUM

May 19, 1991

**SUBJECT:** Flag Desecration (HCS CSSJR 6 (Judiciary) (Work Order No. 7-LS0337\G)

**TO:** Representative Dave Donley

**FROM:** Jerry Luckhaupt *ja*  
Legislative Counsel

**Question Presented:** Can HCS CSSJR 6 (Judiciary) be construed to be an application by the legislature for a constitutional convention under Art. V of the United States Constitution?

**Answer:** No. See discussion.

### DISCUSSION

Article V of the United States Constitution provides:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendment to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

This provision provides that the Congress may: (1) propose constitutional amendments for ratification by the states; or (2) call a constitutional convention to propose amendments to the constitution. HCS CSSJR 6 (Judiciary) merely asks Congress to propose a constitutional amendment for ratification by the states. By its

Representative Dave Donley  
May 19, 1991  
Page 2

own language it does not ask Congress to call a constitutional convention to propose amendments to the constitution.<sup>1/</sup>

If you are concerned that somehow HCS CSSJR 6 (Judiciary) could be read as a call for a constitutional convention, language could be inserted on p. 2, line 26 of the resolution, following "United States" to say: "; this request does not constitute a call for a constitutional convention".

If I can be of further assistance, please contact me at your convenience.

GPL:lmb:gc  
91-196.lmb

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<sup>1/</sup> SJR 6 as originally introduced asked in the alternative that Congress: (1) propose a constitutional amendment for ratification by the legislatures of the several states; or (2) call a constitutional convention to consider an amendment that would prohibit the desecration of the flag. The call for the constitutional convention was eliminated in the Senate Finance Committee. See CSSJR 6 (Finance).



# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Committee  
committee name

committee on SJR 6 - Flag Desecration dated May 15, 1991 - 1:30pm  
bill/subject

- (1) Some have gone to far in damaging the flag and the freedom it stands for.
- (2) We in the American Legion in the State of Alaska demand that something be done to protect our flag from desecration. Not to protect our flag from burning is not acceptable.
- (3) We are outraged because we fought to keep it free. No one should be allowed to destroy our flag.

Signed:

William Bishop

Testifier

American Legion Post 17 /N.E.C. State of Alaska

Representing (Optional)

PO Box 687

Address

(907) 486-3258

Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Committee  
committee name

committee on SJR 6 - "Flag Desecration", dated May 15, 1991 - 1:30 pm  
bill/subject

The American Legion with its 8700 members strongly recommends that SJR 6 be passed. I has been proven through the supreme court that laws that have been passed by congress do not do the job.

Signed: William Hogan *William Hogan*  
Testifier  
Service Officer American Legion Post 17  
Representing (Optional)  
PO Box 687 Kodiak, Alaska 99615  
Address  
486-3258  
Phone No.

SJR

18

HOUSE COMMITTEE REPORT

(7)

Date Referred: April 2, 1991

FURTHER REFERRALS:

Date of Committee Action: 4-16-91

The JUDICIARY Committee considered:

CSSJR 18(JUD)am

CS FOR SENATE JOINT RESOLUTION NO. 18 (JUDICIARY) am

SUPPORT FED ACT ON VIOLENCE AGAINST WOMEN

Relating to federal legislation against violence to women.

RECOMMENDATIONS:

be replaced with HCS CSSJR 18 (Jud)  the same title

a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note \_\_\_\_\_

zero fiscal note(s) No Dept. 3-1-91

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<u>Mike Miller</u>	<input checked="" type="checkbox"/>				
<u>J. Ellis</u>	<input checked="" type="checkbox"/>				
<u>Dave Donley</u>	<input checked="" type="checkbox"/>				
<u>Mark Stanley</u>	<input checked="" type="checkbox"/>				

Dave Donley  
CHAIRMAN'S SIGNATURE

FISCAL NOTE

No. 1

Bill Version: SJR 18

(S) Publish Date: 2/1/91

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Department Affected: NA  
 Title: Relating to S15, a federal bill BRU: \_\_\_\_\_  
against violence to women Component: \_\_\_\_\_  
 Sponsor: Sturgulewski  
 Requestor: Sen. State Affairs COMPONENT SERIAL NO. 

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS. CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0					

CAPITAL	0					
---------	---	--	--	--	--	--

REVENUE	0					
---------	---	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0					

POSITIONS:

FULL-TIME				
PART-TIME				
TEMPORARY				

Changes in CS SJR 18 (Jud.)  
 have no fiscal impact. This  
 fiscal note is appropriate.

3-19-91 DBB  
 date Comte Aide (initial)

Estimate of current year impact: none

ANALYSIS: (Attach a separate page if necessary.) While there is no fiscal impact with passage of SJR-18, Congressional passage of S15 could result in additional federal funding to assist prosecutors, police, public safety departments, etc. in combating violence against women.

Prepared By: Senate State Affairs Committee Phone: 465-4522  
 Division: Alaska Legislature Date: 2-27-91  
 Approved by Pat Rodey  
 Agency: Chair, Sen. State Affairs Date: 2-27-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

FISCAL NOTE

No. 1

SK10

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

Bill Version: HJR 27

(H) Publish Date: 3/21/91

Revision Date: \_\_\_\_\_ Department Affected: Legislative Affairs Agency

Title: Relating to S.15, a federal bill against violence to women BRU: \_\_\_\_\_

Sponsor: Rep. B. Davis Component: \_\_\_\_\_

Requestor: House State Affairs Committee COMPONENT SERIAL NO. 

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS: N/A

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: House State Affairs Committee Phone: 465-4859

Division: \_\_\_\_\_ Date: 3-19-91

Approved by Commissioner: Representative Gene Kubina, Chair

Agency: House State Affairs Committee Date: 3-19-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

# Alaska State Legislature



SENATOR  
ARLISS STURGULEWSKI

311 C STREET, SUITE 550  
ANCHORAGE, ALASKA 99503  
(907) 561-7615


While in Juneau  
P.O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-3818

Senate

MEMORANDUM

04 April 1991

TO: Representative Dave Donley  
Chairman, House Judiciary Committee

FROM: Senator Arliss Sturgulewski 

RE: SJR 18

I would appreciate your scheduling SJR 18 for a hearing before your committee at your earliest convenience.

This resolution is to express support on the part of the State of Alaska for S.15 as well as sections 201 and 241-272 of S. 472, federal legislation to provide national leadership and funding for programs to end violence against women. S.15 is expected to increase funds for prosecutors, police, public safety departments, shelters, and rape crisis centers to increase prevention, intervention, and response to this growing national problem. S. 472 addresses the problem as well with provisions to improve the reporting of sexual assaults at school campuses, fund education grants to reduce domestic violence and to create a national task force on violence against women.

Please contact me or Melissa Fouse of my staff if you have any questions.

# STATE OF ALASKA

## DEPARTMENT OF PUBLIC SAFETY

### COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

WALTER J. HICKEL, GOVERNOR

P.O. BOX N  
JUNEAU, ALASKA 99811-1200  
PHONE: (907) 465-4356

OFFICE ADDRESS: 450 WHITTIER STREET

*A FVI*

March 12, 1991

*File in  
SJR 18*

The Honorable Arliss Sturgulewski  
Alaska State Senate  
P.O. Box V  
Juneau, AK 99811

Dear Senator Sturgulewski:

On behalf of the Council on Domestic Violence and Sexual Assault, I would like to thank you for sponsoring Senate Joint Resolution No. 18 supporting S.15, which is federal legislation titled the Violence Against Women Act of 1991. S.15 draws attention to the growing problem of violence toward women and strengthens the efforts of victims' services, law enforcement and other agencies to deal with these issues.

Domestic violence and sexual assault are primarily directed towards women. National studies show that ninety-five percent of victims of domestic violence are women. It is estimated that more than 13,000 women living in Alaska have required medical treatment for injuries caused by domestic violence during their lives. Alaska continues to have one of the highest rates of rape of women of any state. In 1988, the reported rate of rape in Alaska was 53 per 100,000 compared to a national reported rate of rape of 38 per 100,000.

The national attention and resources derived from this legislation will benefit our state. It is important that the Alaska Legislature support S.15, and your recognition of the significance of the Violence Against Women Act of 1991 is appreciated.

Sincerely,

*Andy Klamser*  
*Bgmfor*  
Andy Klamser  
Chair