You can find examples of bad regulations in every venue of Alaska State Government. The proposed regulations 17 ACC 40 & 45 happen to be the aviation community's most obvious and current example. My file alone has filled a dozen storage boxes since 1994 and the most recent outcry during the "public comment period" staged during the 1996 Christmas holidays runs to volumes.

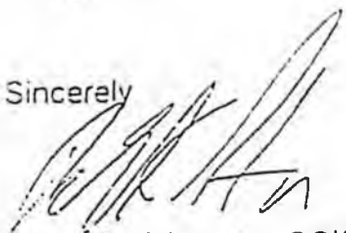
I will only cite one example of issue from17 ACC 45. Our members file letters are available upon request:

17 ACC 45.210 (a) " a person may not construct, reconstruct ... a private air facility within two miles of a proposed ... highway... without the written approval of the commissioner".

What law has given the Department of Transportation the right to control private property not on or related to a State Airport?

Without the control provided by HJR- 2 which provides for the intercession of The Legislature to balance the over reaching of a willful bureaucracy, the people of the State of Alaska are at the mercy of these tenured appointees. The further irony of this situation is that we (the people) are forced to pay the salaries of our antagonists.

Sincerely



Philip K. Livingston, CCIM

Legislative Chair
Alaska Airmen's Association

ALASKA AIRMEN'S ASSOCIATION., INC.

RESOLUTION

The Alaska Airmen's Association Inc. hereby resolves it's support for HJR-2, a bill proposed for passage by the 1997 Alaska State Legislature by Representative Norman Rokeberg and Representative Jeannette James to wit:

1. The State bureaucracy is empowered to write regulations to implement bills passed by the State Legislature and signed into law by the Governor.

2. The State bureaucracy frequently writes regulations, with or without the active participation of the Governor, that clearly circumvent the intent of the Legislature.

3. In order to maintain the checks and balances required by the Constitution of the State of Alaska, the Legislature must have the right to reject regulations that violate their original intent.

4. Passage of a series of bills to clarify or change the written regulations is costly, time consuming, and requires the support of the Governor who may be a party to circumvention of the legislative intent.

5. A joint resolution of the Legislature to repeal regulations that circumvent their intent is the most efficient and equitable manner in which to rectify the problem and assure the people of Alaska that their best interests are served.

SO RESOLVED THIS 11th DAY OF FEBRUARY 1997

John Spalding

John Spalding, President
Alaska Airmen's Association

MAR 0 3 1997

Headquarters:
217 2nd Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515

ALASKA
STATE
CHAMBER
OF COMMERCE

February 27, 1997

Representative Norman Rokeberg
Alaska State Capitol
Juneau, Alaska 99801-1182

Dear Representative Rokeberg:

Thank you for your letter regarding HJR 2, proposing an amendment to the State Constitution relating to repeal of regulations by the legislature. We are pleased to know that you and Representative James have undertaken this important legislative issue.

Reform of the present regulatory system is one of the highest priorities of the Alaska State Chamber of Commerce. Our resolution on this matter asks the legislature and the administration to create a regulatory and economic environment supportive of business development that encourages businesses to locate and grow in Alaska. ASCC's resolution also asks the legislature and the administration to provide for an effective oversight mechanism to assure that regulations are producing effective results that follow legislative intent.

A common complaint of the business community is that too often regulations ignore or miss the point of the legislation to which the regulations are intended to apply. Presently, the only recourse the legislature has in correcting regulation that is contrary to their intent is to pass further corrective legislation. However, if the administration is supportive of the regulatory intent, rather than the legislative intent, the governor is able to veto the corrective legislation. In this manner, under the present system, the power of the legislative branch can be usurped by the executive branch of government.

Throughout the legislative process the public has opportunity to provide input on the laws under consideration and, therefore, has the opportunity to influence the laws by which they must abide. The regulatory process is not nearly so open or receptive to the thoughts of the public, and regulations are sometimes adopted in spite of public sentiment.

HJR 2 provides the public with the opportunity to express their wishes on this matter by placing it before them on the ballot in the next general election. The Alaska State Chamber fully supports your effort.

Sincerely,

Pamela La Bolle

Pamela La Bolle
President

MAR 0 4 1997

Juneau Chamber of Commerce

February 27, 1997

The Honorable Norman Rokeberg
State Representative
State Capitol
Juneau, AK 99801-1182

Dear Rep. Rokeberg:

Thank you for your inquiry relating to House Joint Resolution No. 2, proposing an amendment to the Constitution of the State of Alaska relating to repeal of regulations by the legislature.

As the Juneau Chamber of Commerce has previously supported similar legislation, the Chamber Board at its meeting on February 18, 1997, reaffirmed its continuing support of legislation proposing an amendment to the Constitution of the State of Alaska for the repeal of regulations by the legislature.

Thank you for the opportunity to comment on proposed legislation.

Sincerely,

Patty Ann Polley
Executive Director

124 West 5th Street • Juneau, Alaska 99801 • (907) 586-6420 • FAX (907) 463-5670

ALASKA MINERS ASSOCIATION, INC.

501 W. Northern Lights Blvd., Suite 203, Anchorage, Alaska 99503 FAX: (907) 279-7997 Telephone: (907) 276-0347

March 5, 1997

Honorable Norm Rokeberg
Alaska State House of Representatives
Capitol Building
Juneau, AK 99801

RE: HJR-2, Repeal of Regulations by the Legislature

Dear Representative Rokeberg,

The Alaska Miners Association wishes to go on record in support of House Joint Resolution 2 relating to the repeal of regulations by the legislature with some changes as described below.

It is our understanding that the purpose of this legislation is to insure that if regulations do not accurately implement the Legislature's intent in passing a statute, the regulations can be repealed, with the result that the agency will have to rewrite them. This approach has several advantages. First, the Legislature, the Administration, and the public would not have to again go through the entire law-making process to address an issue that everyone believed had been settled in a previous Session of the Legislature. A second advantage is that this approach does not infringe on the administrative public process under which the regulations are developed. This approach in effect says, no, these regulations were not our intent, Department of XYZ, go back to the drawing board and develop new regulations on this topic that will satisfy our intent. A third advantage is that the agencies will be more concerned to insure that the regulations accurately implement the statutes.

A potential problem with this approach is that a simple majority in a future legislature could repeal regulations which would cause tremendous uncertainty until new regulations were promulgated. Also, when there is a major high-visibility issue, for example an "Exxon Valdez" incident, there could be a tendency to over-react without allowing sufficient time and perspective to deal properly with an issue.

It appears that some minor changes to HJR-2 could be made that would preserve the advantages of this approach while at the same time minimize the potential problems. One way to accomplish this would be to change Section 1 of the bill to read as follows

with the new material underlined:

"Section 22. Repeal of Regulations. The legislature may, by joint resolution, repeal a regulation adopted by a State department or agency within one year after promulgation of regulations to implement a statute that has become law. The repeal of the regulation..."

There are other ways to accomplish the same thing but this is one approach.

Sincerely,

Steven C. Borell P.E.
Executive Director

cc: Representative Jeannette James

MEMBER STATEWIDE MULTIPLE LISTING SERVICE
MEMBER NATIONAL ASSOCIATION OF REALTORS
MEMBER ALASKA ASSOCIATION OF REALTORS
MEMBER FAIRBANKS BOARD OF REALTORS

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P O. BOX 70258 PHONE (907) 452-1247 FAX (907) 451-8577 FAIRBANKS, ALASKA 99707-0258

1/29/98

TO: ALL MEMBERS OF THE HOUSE

FROM: VINCE GUZZARDI

RE: HOUSE JOINT RESOLUTION 2

OUR COMPANY AND STAFF URGE YOU TO SUPPORT THE PASSAGE OF HOUSE JOINT RESOLUTION 2. THE LEGISLATURE SHOULD HAVE THE POWER TO REPEAL ANY REGULATION THAT THEY FEEL IS IMPROPER OR INCONSISTENT WITH THE LAW.

WE ALSO FEEL THAT ANY REGULATION SHOULD HAVE THE APPROVAL OF THE LEGISLATURE **BEFORE** THEY ARE IMPLEMENTED.

GOLDEN NORTH REALTY

Vincent P. Guzzardi

VINCENT P. GUZZARDI, BROKER

JAN'S D[illegible]RIBUTING, INC.
Box 140856
Anchorage, Alaska 99514
243-JANS
Fax 243-5744
1-800-478-9898

To: Rep. Rokeberg

From: Jan's Distributing

Date: January 28, 1998

This letter is to inform you that we at Jan's Distributing support House Joint Resolution #2. We urge you to move this out of the committees as quickly as possible. Thank you for taking the time out of your busy schedule to read this letter.

Sincerely,

Bobby Scott
Sales Supervisor

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

☐ *1031 WEST 4TH AVENUE, SUITE 200*
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

☒ *P.O. BOX 110300-DIMOND COURTHOUSE*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

January 16, 1998

Hon. Mark Hanley
Hon. Gene Therriault
Chairs
House Finance Committee
House of Representatives
State Capitol
Juneau, Alaska 99801

Re: CSHJR 2(JUD)

Dear Representatives Hanley and Therriault:

CSHJR 2(JUD) has been referred to the House Finance Committee. This letter is to restate the Department of Law's opposition to CSHJR 2 expressed when the measure was before the House Judiciary Committee.

CSHJR 2(JUD) is a resolution to place before the voters, for the fourth time, an amendment to the Constitution of the State of Alaska to allow repeal of regulations by resolution of the legislature. If passed by the voters, the amendment would create a new section 22 in Article II of the state constitution to allow the legislature, by joint resolution to repeal a regulation adopted by a state department or agency. The resolution would not be subject to the review, and possible veto, of the governor.

The Department of Law opposes the resolution for the following reasons:

1. The voters of Alaska have already voted down this type of constitutional amendment three times, in the 1980, 1984, and 1986 general elections. Two of those defeats were by margins of four to three and three to two. We assume that the public means what its votes have indicated and that the public prefers the status quo on checks and balances in the development and enforcement of regulations.

2. Under existing law, the legislature has substantial power to guide or limit the adoption of regulations. Initially, the legislature can pass statutes that clearly define the executive branch's rule-making authority. The Administrative Procedure Act requires that a regulation must be consistent with the statute. See AS 44.62.030. The Department of Law makes a legal review for

consistency before a regulation is filed by the Office of the Lieutenant Governor. After an executive-branch regulation is adopted, if the legislature believes that the regulations not consistent with the enabling statute, the legislature can amend the statute to clarify its intent. The current system provides the legislature with the power to guide regulations formation.

3. Allowing the legislature to repeal a regulation by resolution would mean a major change in the way law is developed in this state. Regulations have the force of law. Repealing a regulation changes law. The state constitution presently grants the power to the legislature to change law by passing a bill, which is then subject to the governor's review and possible veto. Because the governor cannot veto a resolution, allowing repeal of regulations by resolution would allow the legislature to change law without the action being subject to the governor's review. This is an important change in our constitution's system of checks and balances between the legislative and executive branches.

4. Significantly, by repealing a regulation by resolution, the legislature would not be providing policy guidance or direction that is appropriate to the legislature's lawmaking function. In other words, the resolution would tell the executive branch that the regulation was unacceptable, but now what is acceptable. The state agency would have to guess again and spend state money to develop a new regulation, which might not be on the "right track." By using a bill, the legislature could change statutes to give clearer policy direction to the executive branch.

5. The Administrative Procedure Act allows legislators, as well as the general public, to comment on any new regulation proposed. Agencies of the executive branch consider comments in the development of the final content of regulations. In this way, the legislature and public have input into the rulemaking process.

If you have additional questions, please let me know.

Sincerely yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: John B. Chenoweth
Assistant Attorney General

JBC:clh:prm

cc: Hon. Norman Rokeberg
Alaska House of Representatives

Pat Pourchot, Legislative Director
Office of the Governor

Bruce M. Botelho, Attorney General
Barbara Ritchie, Deputy Attorney General
Chrystal Smith, Legal Administrator
Dept. of Law - Juneau

JON BALLOT CARD:

:D B

SIDE 2

I HAVE VOTED

HAVE YOU?

STATE OF ALASKA
General Election November 4, 1980

BALLOT PROPOSITION NO. 1

Constitutional Amendment
Legislative Annulment of Regulations

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.

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

BALLOT PROPOSITION NO. 2

Constitutional Amendment
Disqualification of Legislators

This is a proposal to eliminate the prohibition which exists during his term of office and for one year thereafter against a legislator's taking a state office or position of profit, during his term of office and for one year thereafter, the salary or emoluments of which were increased while he was a member. It retains the [illegible] office which was created while

SIDE 1

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OFFICIAL GENERAL ELECTION BALLOT

GENERAL ELECTION NOVEMBER 4, 1980
STATE OF ALASKA

THIS STUB TO BE REMOVED BY ELECTION BOARD

STATE OF ALASKA
General Election November 4, 1980

BALLOT PROPOSITION NO. 4

Constitutional Amendment
Appointment and Confirmation
of Members of Boards and Commissions

This proposal would expand the legislature's power over the appointment and confirmation of members of state boards and commissions by giving it the power to provide for the appointments to be made other than by the governor and the power to require confirmation of members of all boards or commissions in addition to those which are at the head of principal departments or regulatory or quasi-judicial agencies.

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

BALLOT PROPOSITION NO. 5

Initiative No. 79-02
Alaska General Stock
Ownership Corporation (AGSOC.)

This measure establishes a general stock ownership corporation (AGSOC) in Alaska. It will be a private corporation owned by Alaskans. Shares will be distributed without charge to Alaska residents who wish to become stockholders. The corporation will not be subject to income tax and this is expected to enhance its financial success. Shareholders will be subject to

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B _LOT PROPOSITION). 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 to 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 18	Nays 0	Absent or Not Voting 2
House	(40 members):	Yeas 36	Nays 0	Absent or Not Voting 4

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.

No: 2

Bill Version: HJR 2

FISCAL NOTE

(H, ublish Date: 1/20/98

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____ Dept. Affected Office of the Governor

Title Const. Amend: Repeal of Regulations BRU Elective Operations

by Legislature Component Elections

Sponsor Representatives Rokeberg, James, Kohring

Requester House Finance Committee Component Serial No. #21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by Dana LaTour Phone 465-5347

Division Division of Elections Date 1/16/98

Approved by C Lt. Governor Fran Ulmer Date 1/16/98

Agency Office of the Lieutenant Governor

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COMMITTEE COPY

HJR

30

FISCAL NOTE

No. 1
Bill Version: HJR 30
(H) Publish Date: 4/10/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date: 4/8/97
Title: Creating a Twelfth Circuit Court of Appeals
Sponsor: House Judiciary Committee
Requester: House Judiciary Committee

Dept. Affected: None
BRU:
Component:
COMPONENT SERIAL NO.

Expenditures/Revenues _ (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: $

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Lisa Kirsch
Division: House Judiciary Committee
Phone: 465-4990
Date: 4/8/97

Approved by: Chair
Agency: House Judiciary Committee
Date: 4-8-97

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CBR

Page of

FISCAL NOTE(S)

SENATE COMMITTEE REPORT

DATE: 4/25/97

FURTHER:

DATE TURNED IN TO OFFICE: 4/28/97

Judiciary Committee considered HOUSE JOINT RESOLUTION NO. 30

Relating to the creation of a new United States Court of Appeals for the Twelfth Circuit.

and recommends:

[V] be **replaced** with S CS HJR 30 (JUD)

[ ] adopt **previous** _____ CS _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[✓] same title
[ ] technical change
[ ] new: SCR#_____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Judith Zaffirini	✓	Florence Shapiro	X		
Ike Harris	✓				
Adam Haywell	✓				
CHAIR: Judith Zaffirini	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
LAA-House JUD	4/8/97	-0-	

[ ] APPROPRIATION -- no fiscal note

***include fiscal notes accompanying Governor's bill**

Alaska State Legislature

House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

Sponsor Statement

HJR 30 - Endorsing S.431 and a new Twelfth US Circuit Court of Appeals

The United States Court of Appeals for the Ninth Circuit encompasses nine states and two territories: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands. The circuit contains nearly 14 million square miles and 50 million people, and is the largest US court of appeals by any measure.

HJR 30 endorses S.431, introduced by Senators Frank Murkowski, Ted Stevens and four other western senators, which proposes to split the ninth circuit and create a new twelfth circuit, to include Alaska, Idaho, Montana, Oregon, and Washington.

The legislature should support S.431 because the ninth circuit is simply too large to respond to the needs of Alaska. Alaska cases represent only 2.4% of the court's total case load, while cases originating in California account for nearly 60%. At the end of 1996 there were 181 Alaska cases pending before the court, but 4440 cases pending from California. These numbers are staggering, especially in light of the fact that while most circuits have 12 or fewer judges, the ninth circuit has 28 active court of appeals judges.

The Attorneys General from all five states involved in the proposed twelfth circuit have endorsed the split. Here in Alaska, Governor Tony Knowles, and Attorney General Bruce Botelho have endorsed the idea. HJR 30 puts the Alaska legislature on record in support S.431, and a federal judiciary that is capable of responding to Alaska's needs.

ALASKA STATE LEGISLATURE
HOUSE JOINT RESOLUTION NO. 30

HISTORY IN THE HOUSE

1997

3/17 Read first time and referred to: Jud

4/10 Jud RPT CS( ) ___New Title
7 DP 0 DNP 0 NR 0 AM
___FN 1 0FN ___Previous FN

___ RPT CS( ) ___New Title
___DP ___DNP ___NR ___AM
___FN ___0FN ___Previous FN

___ RPT CS( ) ___New Title
___DP ___DNP ___NR ___AM
___FN ___0FN ___Previous FN

4/22 Read second time
CS( ) Adopted

Amended

4/22 Advanced

4/22 Read third time

Return to second for specific amendment

4/22

PASSED	EFD Same ___ or
Yeas 35	Yeas
Nays 3	Nays
Excused 2	Excused
Absent 0	Absent

___Intent adopted

4/22 Reconsideration Nicholia

4/23 Reconsideration not taken up

PASSED ON RECON.	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

___Intent adopted

4/23 Reported correctly engrossed
Signed by Speaker, to the Senate

Suzi Lowell
Chief Clerk of the House

HISTORY IN THE SENATE

19

Read first time and referred to:

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

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___FN ___0FN To___

___ Rules Calendar(___) CS ___AM ___Other
___New Title ___Same Title ___Previous FN
___FN ___0FN

Read second time

___ CS Adopted (___) ___New Title
___Amended ___Advanced

Read third time

___ Letter of Intent adopted
___ Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

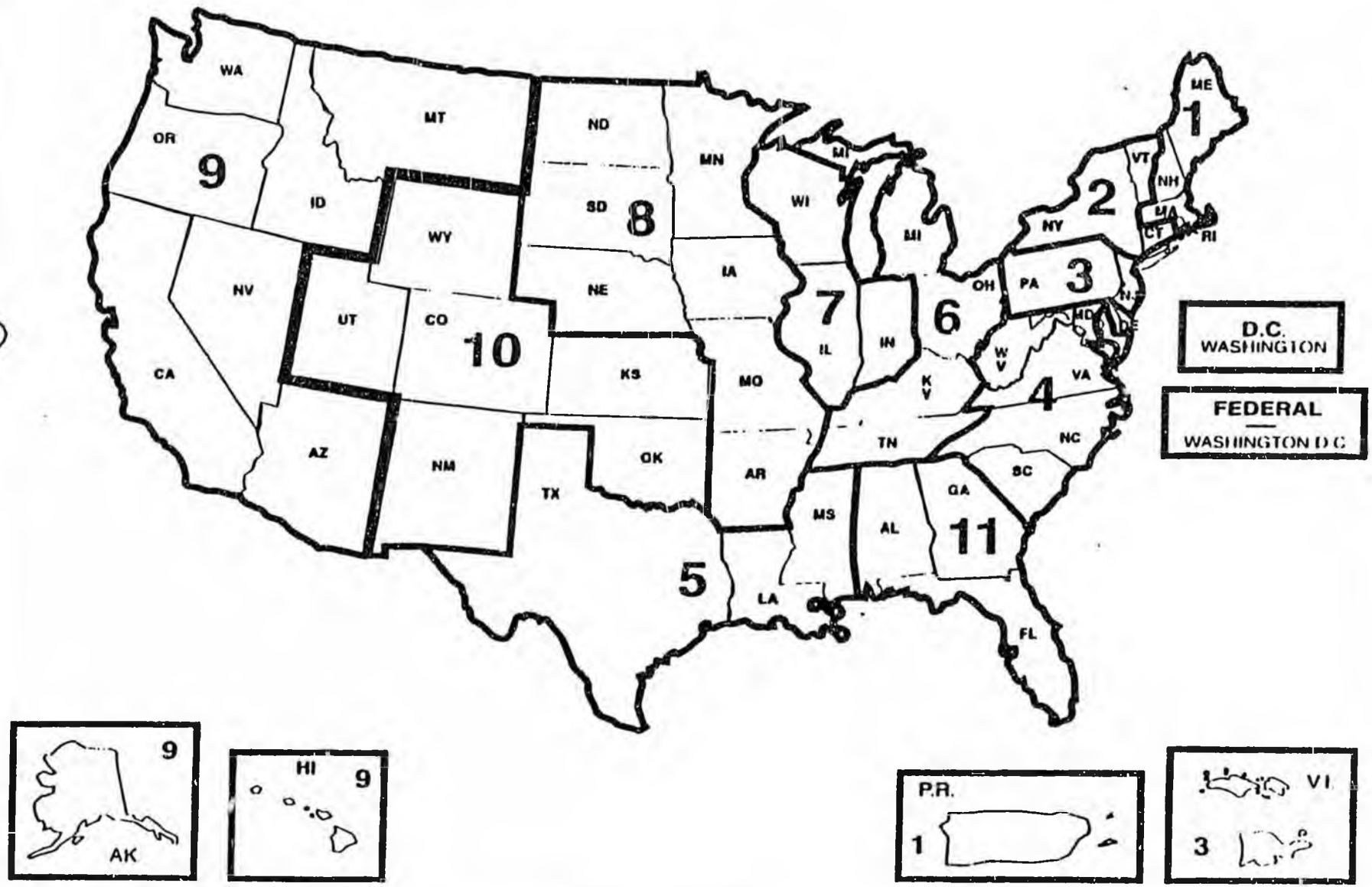
Reconsideration
Reconsideration not taken up

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

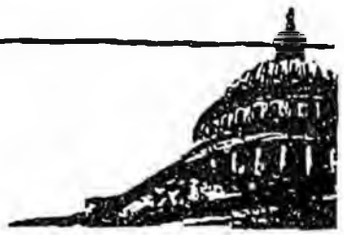
The Thirteen Federal Judicial Circuits



NEWS FROM THE OFFICE OF

FRANK MURKOWSKI

United States Senator · Alaska



For Immediate Release:
March 12, 1997

Contact: Chuck Kleeschulte or Cindi Bookout
O (202) 224-9306; H (301) 283-4149; O 224-8767
(Email: chuck_kleeschulte@murkowski.senate.gov)

MURKOWSKI-STEVENS INTRODUCE BILL TO CREATE NEW 12TH CIRCUIT FEDERAL COURT

WASHINGTON -- Saying that citizens in the Pacific Northwest should not have to suffer from slow judicial decisions, Alaska's two Sens. Frank Murkowski and Ted Stevens today introduced legislation to create a new federal judicial court circuit to relieve the blacklogged caseload of the Ninth Circuit based in California.

The two senators, joined by Sens. Slade Gorton, R-Wash., Larry Craig and Dirk Kempthorne, R-Idaho; and Sen. Gordon Smith, R-Oregon, have proposed legislation to split the existing Ninth Circuit Court. Under the proposal, California, Hawaii and the Pacific Territories would remain in the Ninth Circuit, while a new Twelfth Circuit would be created to cover the states of Alaska, Washington, Oregon, Idaho and Montana.

The senators said the move would relieve the current caseload burden on the Ninth Circuit. They added the new court would create a Northwest Circuit that is historically, economically, culturally and philosophically united.

"No one court can effectively exercise its power in an area that extends from the Arctic Circle to the tropics. We must revamp the circuits to create a court with a regional sense of community and greater knowledge that will lead to greater consistency and dependency in legal decisions," said Murkowski.

"This bill will result in a better caseload distribution among states with a Northwest focus. Of the 28 judges on the Ninth Circuit, only one is an Alaskan." Sen. Stevens said.

"Many of those currently serving on the Ninth Circuit are activists that fail to understand the uniqueness of Alaska. In rendering their decisions, they often make, rather than interpret, the law.

"We have been pursuing this split for some time. Alaskans deserve a more responsive court that understands Alaska's unique circumstances," Sen. Stevens said.

The senators said they were offering the bill for a host of reasons:

* The Ninth Circuit serves a population of more than 45 million people, well over a third more than the next largest circuit in the federal system.

* Last year the court had 7,146 new filings, the second highest in the nation. In 1995 the court had 8,092 filings, that year almost 2,000 more (25 percent) than any other circuit.

STATEMENT OF SENATOR FRANK MURKOWSKI
Ninth Circuit Reorganization Act
March 12, 1997

Mr. President, today I am pleased to be joined by my colleagues, Senators Stevens, Gorton, Burns, Craig, Kempthorne and Senator Smith of Oregon, in introducing the Ninth Circuit Court of Appeals Reorganization Act of 1997.

Our legislation will create a new Twelfth Circuit comprised of Alaska, Washington, Oregon, Idaho and Montana. This legislation will ease the current burdens of the Ninth Circuit, as well as effectively create a new Northwest Circuit that is historically, economically, culturally and philosophically united.

Mr. President, one look at the contours of the 9th Circuit reveals the need for this reorganization. Stretching from the Arctic Circle to the Mexican border, past the tropics of Hawaii and across the International Dateline to Guam and the Mariana Islands, by any means of measurement, the Ninth Circuit is the largest of all U.S. Circuit Courts of Appeal.

There is also no denying the Ninth Circuit's mammoth caseload. It serves a population of more than 45 million people, well over a third more than the next largest Circuit.

- Last year, the Ninth Circuit had an astounding 7,146 new filings.

- By 2010, the Census Bureau estimates that the Ninth Circuit's population will be more than 63 million -- a 40 percent increase in just 13 years, which inevitably will create an even more daunting caseload.

We believe that this legislation is long overdue. Because of its size, the entire appellate process in the Ninth Circuit is the second slowest in the nation. As former Chief Judge Wallace of the Ninth Circuit stated, "It takes about four months longer to complete an appeal in our court as compared to the national median time." Mr. President, what this means is that while the national median time for filing a notice of appeal to final disposition is 315 days, the Ninth Circuit median time is a year and two months.

Furthermore, the massive size of the Ninth Circuit often results in a decrease in the ability to keep abreast of legal developments within its owns jurisdiction. This unwieldy caseload creates an inconsistency in Constitutional interpretation. In fact, Ninth Circuit cases have an extraordinarily high reversal rate by the Supreme Court. (During the Supreme Court's 1994-95 session, the Supreme Court overturned 82% of the Ninth Circuit cases heard by the Court!) This lack of Constitutional consistency discourages settlements and leads to unnecessary litigation.

Mr President, the legislation I am introducing is not novel. Since the day the Circuit was founded, over a century ago, there were discussions of a split. Nearly a quarter century ago, in 1973, the Congressional Commission on the Revision of the Federal Court of Appellate System recommended that the Ninth Circuit be divided.

- Additionally, the American Bar Association has adopted a resolution expressing the benefits of divided the Ninth District.

- Since 1983, Senator Gorton and many others in this chamber have initiated legislation to split the circuit.

- There have been Senate hearings. In December 1995, Senator Hatch stated in a Committee Report that:

  "The legislative history, in conjunction with available statistics and research concerning the Ninth Circuit, provides an ample record for an informed decision at this point as to whether to divide the Ninth Circuit...Upon careful consideration the time has indeed come."

Furthermore, splitting a circuit to respond to caseload and population growth is by no means unprecedented. Congress divided the original Eighth circuit to create the Tenth Circuit in 1929, and divided the former Fifth Circuit to create the Eleventh Circuit in 1980.

The legislation that I and my colleagues introduce today is the sensible reorganization of the Ninth Circuit. The new Ninth Circuit would embrace California, Nevada, Arizona, Hawaii and the U.S. Territories. The new Twelfth Circuit would be comprised solely of states in the Northwest region. Most importantly, this split would respect the economic, historical, cultural and legal ties which exist between the states involved.

Mr. President, no one Court can effectively exercise its power in an area that extends from the Arctic Circle to the tropics. The legislation introduced today will create a regional commonality which will lead to greater consistency and dependency in legal decisions.

Mr. President, we have waited long enough. The 45 million residents of the Ninth Circuit are the persons that suffer. Many wait years before cases are heard and decided, prompting many to forego the entire appellate process. The Ninth Circuit has become a circuit where justice is not swift and not always served.

I ask unanimous consent that the text of this legislation be printed in the Record.

105TH CONGRESS
1ST SESSION

S. 431

IN THE SENATE OF THE UNITED STATES

Mr. MURKOWSKI introduced the following bill; which was read twice and referred to the Committee on JUDICIARY

A BILL

To amend title 28, United States Code, to divide the ninth judicial circuit of the United States into two circuits, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ninth Circuit Court of Appeals Reorganization Act of 1997".

SEC. 2. NUMBER AND COMPOSITION OF CIRCUITS.

Section 41 of title 28, United States Code, is amended—

(1) in the matter before the table, by striking "thirteen" and inserting "fourteen";

(2) in the table, by striking the item relating to the ninth circuit and inserting the following new item:

"Ninth	Arizona, California, Hawaii, Nevada, Guam, Northern Mariana Islands ",

and

(3) between the last 2 items of the table, by inserting the following new item:

"Twelfth	Alaska, Idaho, Montana, Oregon, Washington.".

SEC. 3. NUMBER OF CIRCUIT JUDGES.

The table in section 44(a) of title 28, United States Code, is amended—

(1) by striking the item relating to the ninth circuit and inserting the following new item:

"Ninth	19";

and

(2) by inserting between the last 2 items at the end thereof the following new item:

"Twelfth	7".

SEC. 4. PLACES OF CIRCUIT COURT.

The table in section 48 of title 28, United States Code, is amended—

(1) by striking the item relating to the ninth circuit and inserting the following new item:

"Ninth	San Francisco, Los Angeles.";

and

(2) by inserting between the last 2 items at the end thereof the following new item:

"Twelfth ..... Portland, Seattle.".

SEC. 5. ASSIGNMENT OF CIRCUIT JUDGES.

Each circuit judge in regular active service of the former ninth circuit whose official station on the day before the effective date of this Act—

(1) is in Arizona, California, Hawaii, Nevada, Guam, or the Northern Mariana Islands is assigned as a circuit judge of the new ninth circuit; and

(2) is in Alaska, Idaho, Montana, Oregon, or Washington is assigned as a circuit judge of the twelfth circuit.

SEC. 6. ELECTION OF ASSIGNMENT BY SENIOR JUDGES.

Each judge who is a senior judge of the former ninth circuit on the day before the effective date of this Act may elect to be assigned to the new ninth circuit or to the twelfth circuit and shall notify the Director of the Administrative Office of the United States Courts of such election.

SEC. 7. SENIORITY OF JUDGES.

The seniority of each judge—

(1) who is assigned under section 5 of this Act, or

(2) who elects to be assigned under section 6 of this Act;

shall run from the date of commission of such judge as a judge of the former ninth circuit.

SEC. 8. APPLICATION TO CASES.

The provisions of the following paragraphs of this section apply to any case in which, on the day before the effective date of this Act, an appeal or other proceeding has been filed with the former ninth circuit:

(1) If the matter has been submitted for decision, further proceedings in respect of the matter shall be had in the same manner and with the same effect as if this Act had not been enacted.

(2) If the matter has not been submitted for decision, the appeal or proceeding, together with the original papers, printed records, and record entries duly certified, shall, by appropriate orders, be transferred to the court to which it would have gone had this Act been in full force and effect at the time such appeal was taken or other proceeding commenced, and further proceedings in respect of the case shall be had in the same manner and with the same effect as if the appeal or other proceeding had been filed in such court.

(3) A petition for rehearing or a petition for rehearing en banc in a matter decided before the effective date of this Act, or submitted before the effec-

tive date of this Act and decided on or after the effective date as provided in paragraph (1) of this section, shall be treated in the same manner and with the same effect as though this Act had not been enacted. If a petition for rehearing en banc is granted, the matter shall be reheard by a court comprised as though this Act had not been enacted.

SEC. 9. DEFINITIONS.

For purposes of this Act, the term—

(1) "former ninth circuit" means the ninth judicial circuit of the United States as in existence on the day before the effective date of this Act;

(2) "new ninth circuit" means the ninth judicial circuit of the United States established by the amendment made by section 2(2) of this Act; and

(3) "twelfth circuit" means the twelfth judicial circuit of the United States established by the amendment made by section 2(3) of this Act.

SEC. 10. ADMINISTRATION.

The court of appeals for the ninth circuit as constituted on the day before the effective date of this Act may take such administrative action as may be required to carry out this Act. Such court shall cease to exist for administrative purposes on July 1, 1999.

SEC. 11. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on October 1, 1997.

TESTIMONY ON HJR NO. 30
APRIL 9, 1997

My name is Joanne Grace. I am an assistant attorney general here to testify on behalf of Attorney General Botelho, who supports the Ninth Circuit Court of Appeals Reorganization Act. The Ninth Circuit has by far the most judges and the largest area served of any circuit court, and these facts do not serve Alaska well. Such a large court with judges so far away cannot adequately understand and appreciate the issues unique to Alaska. In 1996, 60% of the cases the court heard came from California, while about 2% came from Alaska. Of the judges currently serving on the ninth circuit bench, 64% are from California, while only one is from Alaska.

A new circuit comprised of Montana, Alaska, Washington, Oregon, and Idaho would eliminate the dominance of California judges over these states. Proponents of splitting the circuit have complained that Californians and other southwestern judges fail to appreciate the effect of their environmental decisions on the economies of states dependant on natural resource development rather than on high-tech industries. As to Alaska, the lack of understanding extends far beyond economics; most judges on the ninth circuit have different sensibilities and perceptions of social, geographical, political, and economic matters.

For example, in interpreting the term "rural" as applied to Alaska, a ninth circuit panel consisting of three judges from

Pasadena, San Francisco, and San Diego obviously applied a non-Alaskan understanding of its meaning. The issue in *Kenaitze Indian Tribe v. State* was whether ANILCA's rural subsistence priority applies to the Kenai Peninsula. The state regulation defined "rural" as it generally is understood in Alaska, as the bush. It did so by excluding areas characterized primarily by a cash economy, and thus excluded the Kenai Peninsula. The court vehemently rejected this interpretation, calling it "unusual" and "exotic." The Court said:

> The state's definition would exclude practically all areas of the United States that we think of as rural, including virtually the entirety of such farming and ranching states as Iowa and Wyoming . . . .
>
> The term rural is not difficult to understand; it is not a term of art. It is a standard word in the English language commonly understood to refer to **areas of the country that are sparsely populated, where the economy centers on agriculture or ranching** . . . .

860 F.2d 312, 316-17.

The court completely rejected the possibility that "rural" might mean something different in Alaska, the only place that ANILCA applies, than it does in the Midwest or West.

Other examples of when an urban Californian perspective could work to Alaska's disadvantage might occur in the following situations:

* First, when the court must decide whether an action of the United States constitutes "major federal action" under the National Environmental Policy Act, thereby requiring an environmental impact statement. Development activity on 80 acres might seem far more significant in Southern California than it does in Alaska.

* Another example is when the court must decide fish and wildlife issues. Again, the perspective on hunting a wild animal or forgoing development to protect habitat probably differs greatly between California and Alaska.

* Finally, the court's perspective hurts Alaska when the court faces issues of state vs. federal jurisdiction. The court has indicated in some of its decisions a bias against Alaska's state government and in favor of the federal government, implying that Alaskans cannot be trusted to protect their natural resources or subsistence interests.

Another concern of the Attorney General is the untimeliness of decisions from the Ninth Circuit. This is due in part to the volume of cases the court hears, but also is escalated in Alaska's case because of the court's oral argument calendar. In general, the court hears argument each year twelve times in San Francisco; twelve times in Pasadena; twelve times in Seattle; six

times in Portland; two times in Honolulu; and one time in Anchorage. A panel of three judges travels to Alaska each year in July or August to hear Alaska cases. As a result, the court "saves" Alaska cases for this annual trip, so that while a case from California may be set for argument a month or two after briefing is complete, Alaska cases generally are set for July or August, even if briefing is complete in January or February. This creates an unnecessary delay for Alaskan cases.

In conclusion, Alaska and the other states included would benefit from creation of a twelfth circuit comprised of Northwestern states because the twelfth circuit court judges would not bring foreign perspectives to their decisions.

Justice Kennedy favors split of 9th Circuit

By DAVID WHITNEY
Daily News Washington Bureau

WASHINGTON — The move in Congress to divide the 9th Circuit U.S. Court of Appeals got a boost last week from Supreme Court Justice Anthony M. Kennedy, who sat on the 28-judge appeals bench before his elevation to the high court in 1988.

"I have increasing doubts and increasing reservations about the wisdom of retaining the 9th Circuit in its historic size, and with its historic jurisdiction," Kennedy told a Senate Appropriations Committee panel Thursday.

"I think institutionally, and from the collegial standpoint, that it is too large to have the discipline and control that's necessary for an effective circuit," Kennedy said.

The 9th Circuit is the largest of the 11 federal appeals courts, handling what Kennedy estimated to be about 22 percent of the nation's appellate caseload. It hears cases from California, Arizona, Nevada, Hawaii, Alaska, Oregon, Washington, Idaho and Montana.

Legislation introduced in the Senate in March would shrink the 9th Circuit's jurisdiction to California, Arizona, Nevada and Hawaii and create a new 12th Circuit court to hear appeals from Alaska and the four Pacific Northwest states.

The legislation was sponsored by Alaska Sen. Frank Murkowski. It was co-sponsored by Alaska Sen. Ted Stevens, Washington Sen. Slade Gorton, Montana Sen. Conrad Burns, Idaho Sens. Larry Craig and Dirk Kempthorne, and Oregon Sen. Gordon Smith. All are Republicans.

The Congressional Commission on the Revision of the Federal Court and Appellate System first recom-

Please see Page B-3, CIRUIT

CIRCUIT: Split considered

Continued from Page B-1

mended dividing the court in 1973. Legislation has been introduced regularly in the Senate since 1983 but has failed to gain much steam.

In introducing the bill, Murkowski cited the appeals court's huge geographic jurisdiction and "unwieldy" caseload.

"No one court can effectively exercise its power in an area that extends from the Arctic Ocean to the tropics," Murkowski said, adding that the San Francisco-based court is the second slowest of the 11 circuits in deciding cases.

Kennedy's comments came during questioning by Sen. Judd Gregg, R-N.H., at a hearing on the Supreme Court's budget.

Kennedy said that when he went onto the 9th Circuit in 1975, he was opposed to its division. He said he felt t ere was a place in the judicial ystem for "a very major circuit."

"So I was a defender of trying the experiment, and the experiment has now gone to the extent where we have 28 active judges," Kennedy said.

While he said he is "willing to think further about it," he urged Congress to swiftly "come to some resolution one way or the other as to the size of the 9th Circuit."

The Anchorage Times

Publisher: BILL J. ALLEN
"Believing in Alaskans, putting Alaska first"
Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM I. TOBIN
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Dividing the court

IT MAY NOT yet be a bandwagon, but there is some favorable forward movement toward dividing the 9th U.S. Court of Appeals and creating a new appellate court serving Alaska, Idaho, Montana, Oregon and Washington.

The latest to join the rising chorus endorsing the proposal include some powerful political figures — among them the Democratic governor of Alaska, Tony Knowles, and the state's attorney general, Bruce Botelho.

Legislation to split the 9th Circuit — the nation's largest, with 11 more judges than any other circuit — is actively under consideration in the U.S. Senate. The bill's sponsors include Republican Sens. Frank Murkowski and Ted Stevens of Alaska.

In a letter to Sen. Orrin Hatch, chairman of the Senate Judiciary Committee, which is holding hearings on the bill, Gov. Knowles said the existing court "has concerned itself predominately with issues arising out of California." That's not surprising, considering that 55 percent of all the cases before the court come from California and a majority of the court's 28 active judges are Californians.

The court's case filings also are larger than any other appeals court in the country, the governor said, "thus frequently leading to inordinate delay in decisions important to our state."

Mr. Knowles is not the first to complain about this, but adding his voice to those pointing out the drawbacks of the existing over-sized court is important.

"For instance," the governor told Sen. Hatch, "despite the court's granting of expedited consideration of an important case involving Alaska Native subsistence use in a case known as the *Katie John* case, the court required 13 months to render its decision (now being reconsidered) after oral argument.

"In other cases, panels of the court have shown a surprising lack of understanding of Alaska's geography and people. As a consequence, decisions rendered from San Francisco have often caused unnecessary hardships on Alaskans."

Similar concerns were expressed by Mr. Botelho and the top legal officials of the other four states that would be included in a new court.

In a letter to Sen. Hatch, the five state attorneys general said the creation of "a Northwest circuit court would mitigate the problems of the unwieldy size of the 9th Circuit."

If approved, Alaska, Idaho, Montana, Oregon and Washington would be placed in a new 12th Circuit Court — leaving California, Arizona, Hawaii, Nevada, Guam and the Northern Mariana Islands in the 9th Circuit. Dividing overgrown circuit courts is not an unusual move. The most recent split came as the 11th Circuit was created out of the 5th Circuit.

Creation of a new 12th Circuit is long overdue.

FRANK H. MURKOWSKI
ALASKA

COMMITTEES:

CHAIRMAN
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October 19, 1995

Mr. John Katz
Office of the Governor
State of Alaska
444 North Capitol Street, Room 518
Washington, D.C. 20001

Dear John:

Please find enclosed Charlie Cole's testimony that was submitted for the Senate Judiciary Committee hearing on the "Ninth Circuit Court of Appeals Reorganization Act of 1995" held on September 13.

Sincerely,

Frank H. Murkowski
United States Senator

STATEMENT OF CHARLES E. COLE
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY REFORMATION
OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I am an attorney at law practicing in Fairbanks, Alaska. I am a member of the State Bar of California, the Washington State Bar, and the Alaska Bar Association. I was admitted to the California and Washington bars in 1953, and the Alaska bar in 1955. The views I express here are entirely mine, and I speak for no one other than myself.

I support the enactment of S. 956. The reasons follow.

Forty years ago, while serving as a lowly law clerk to the then United States District Judge for the Territory of Alaska, at Fairbanks, in the course of my jurisprudential musing I stumbled across a remark by whom I recall as an internationally famed legal scholar. In response to an inquiry whether he would be willing to formulate a code of laws for a newly independent nation, such as, for example, the Napoleonic Code, he replied that before undertaking such a monumental task he first would want to live among the peoples for fifty years to learn their ways of life, their mores, and their economic and social values. Over the years as I have wandered my way along the path of the law I have thought again and again about that comment and have come increasingly to appreciate the wisdom that lay beneath it. Underlying it, of course, is the theory that in a republican form of government laws are to be made by the people's representatives. But the principle stops not there. Not only ought the laws be made by a representative body of the governed, the laws also ought to be interpreted and applied by representatives.

This seemingly self-evident principle has been cast adrift by the broad sweep of the appellate jurisdiction of the Court of Appeals for the Ninth Circuit. Its three-judge panels, laden with appointees from the States of California and Arizona, routinely decide case after case involving statutes applicable only to the State of Alaska, statutes such as the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act. While the judges comprising these geographically unbalanced panels are among the finest in the federal Courts of Appeal, because they have lived and practiced in what in many ways is a culture and an environment foreign to Alaska, when called upon to interpret these uniquely Alaska statutes, they lack a broad personal understanding of the competing interests involved in their enactment. These judges have the ability, to be sure, to apply the orthodox rules of statutory construction. Yet, when

called upon to interpret statutes unique to Alaska, they seem to apply an approach entirely inconsistent with those rules, a tendency to rocket to a result inapposite to that reached by jurists having a perspective gleaned from life in the North, from having lived amongst "the clash between traditional and modern ways of life" over fishing, for example, and from having lived amongst the clash between environmentalists and developmentalists, over logging, for another example.

This situation is classically illustrated by two recent appellate decisions interpreting the definition of "public lands" in the Alaska National Interest Lands Conservation Act, 16 U.S.C. §3101, et seq. (ANILCA), one by an esteemed panel of the Court of Appeals for the Ninth Circuit, the other by the Supreme Court of the State of Alaska.

In State of Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995) the issue was whether the definition of "public lands" in ANILCA includes navigable waters. ANILCA defines "public lands" as "lands situated in Alaska which...are Federal lands, 16 U.S.C. §3102(3). "Federal Land" is defined as "lands the title to which is in the United States," 16 U.S.C. § 3102(2). "Land," is defined as "lands, waters, and interests therein." 16 U.S.C. §3102(1). Thus, ANILCA defines "public lands" as "lands, waters, and interests therein the title to which is in the United States." 54 F.3d at 552.

In Babbitt a panel of Ninth Circuit judges comprised of Eugene A. Wright, Cynthia Holcomb Hall, and Charles E. Wiggins faced for decision "whether the federal agencies' conclusion that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute." 54 F.3d at 553. For three years in the litigation before the district court the federal agencies had agreed with the State that "public lands" exclude navigable waters, but at the second oral argument on the issue, those "agencies" modified their position, arguing that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine. 54 F.3d at 551, 552. "Prior to oral argument" the United States had more than merely "agreed with the State" in the early course of the litigation before the District Court. Early on the Secretary of the Interior had adopted regulations that supported the State's interpretation of the Act. As the Babbitt opinion points out, when in 1990 the United States took over implementation of the provisions of the ANILCA which gave rural residents a subsistence priority, "[t]he Secretary of the Interior, on behalf of all concerned federal agencies, published temporary subsistence management regulations that adopted a very narrow definition of public lands, explaining that 'navigable waters generally

are not included within the definition of public lands.' The final regulations do not differ significantly. See 57 Fed Reg. 22,940, at 22,942 (May 29, 1992)."

In a remarkably brief opinion, the Babbitt panel found "reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine," and held that "the federal agencies that administer the subsistence priority are responsible for identifying those waters." The Babbitt panel determined that the navigational servitude held by the United States is not "'an interest...the title to which is in the United States,' such that all navigable waters are public lands within the meaning of ANILCA." 54 F.3d at 553. It also found that "[n]either the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters." 54 F. 3d at 553. It concluded, however, that because the "United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes," it has "implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations," and therefore, "[b]y virtue of its reserved water rights, the United States has interests in some navigable waters," so "[c]onsequently public lands subject to subsistence management under ANILCA include certain navigable waters." 54 F.3d at 554.

Then, recognizing "that its holding may be inherently unsatisfactory," the panel said that it "hope[d] that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management," and that it "expect[ed] the federal agencies and the state to cooperate fully to protect and provide the opportunity for subsistence fishing in navigable waters." 54 F.3d at 554. Finally, the panel in Babbitt said that the "issue raised by the parties cries out for a legislative, not a judicial solution...only legislative action by Alaska or Congress will truly resolve the problem." 54 F.3d at 554. Noteworthy is the panel's comment that its decision has application to Alaska, and thus does not allow the United States to usurp state powers over navigable waters elsewhere. 54 F.3d at 552 n.9.

Not only is the holding in Babbitt "inherently unsatisfactory," so manifestly is the opinion. Inherently unsatisfactory is the opinion's failure to address the glaring legal issue of whether government trial counsel "at oral argument" could "modify" regulations validly adopted years earlier by the federal agency statutorily responsible for implementation of ANILCA. For the court to say that it holds

reasonable the "federal agencies" conclusion as to the scope of "public lands" without addressing this central issue, (an issue, by the way, on which there is substantial authority), is no less than remarkable. Also inherently unsatisfactory is the opinion's failure to address the issue of whether the United States holds "title" to "some navigable waters as a result of its reserved water rights." As the opinion points out, under ANILCA public lands are lands, waters, and interests therein, the title to which is in the United States. [Emphasis added]. 54 F.3d at 552. Conceding, as the Court says, that the United States "has interests in some navigable waters," the critical issue is whether it could be said to have "title" to this interest. The panel quietly passed over this issue, except to say that if it adopted the States' view and held that public lands exclude navigable waters, it "would give meaning to the term 'title' in the definition of the phrase 'public lands.'" Yet is that not precisely what ANILCA requires? Sidestepping the issue, the panel said that if it gave meaning to the term "title" it would "undermine congressional intent to protect and provide the opportunity for subsistence fishing," so legislating with fury, it decided not "to give meaning to the term 'title' in the [congressional] definition of the phrase 'public lands.'"

The panel is far too able, far too experienced, to fail to recognize these basic issues. Its failure to address them in its opinion is inexplicable. Or can it be explained as a California Court bent on making law to suit a California judicial philosophy?[1].

When the identical issue, whether ANILCA's "public lands" definition includes navigable waters came before the Alaska Supreme Court, it addressed these issues head on, and concluded that it did not. Totemoff v. State of Alaska, __ P. 2d _____, Opinion No. 4236, decided August 7, 1995. In Totemoff the Alaska Supreme Court noted that it was "not obligated to follow Babbitt, since it is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law." Slip Opinion, p. 18. It then went on to rigorously dismantle the Babbitt opinion on the public lands issue point by point. First, it said that even if the navigable servitude or reserved water rights can be considered interests to which the United States holds title, the State has an interest in fish and wildlife located in navigable waters which precludes federal regulation of such fish and wildlife, under §102(3)(a) of ANILCA and the

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[1] I recognize that the opinion's author, Eugene A. Wright, resides in Seattle, but that does not prevent him having become inbred with a California judicial philosophy from twenty-five years on the Ninth Circuit.

Submerged Lands Act of 1953, 43 U.S.C. §§1301-56 (1988).[2]

Next, the Alaska court said that "the navigational servitude and reserved water rights are not the type of property interests to which title can be held." Slip Opinion, p. 21. "Neither the navigational servitude nor reserved water rights," the Alaska court said, "are possessory rights in a body of water," and therefore, "the United States cannot hold title to the navigational servitude or reserved water rights." Slip Opinion, p. 22. The "interests" Congress had in mind when it included "interests" in "lands" or "waters," the title to which is in the United States, within the definition of public lands, the Court said, were "possessory interests less than fee interests such as leases [for which] there is considerable authority that title can be held to such interest." Slip Opinion, p. 23.

Another reason for rejecting the Babbitt holding, the Alaska court said, was because "even assuming the navigational servitude or reserved water rights are interests to which the United States holds title, the land management authority which the federal government obtains through these interests is limited by the purposes of the interests." Slip Opinion, p. 25. Accordingly, the navigational servitude only gives the United States the power to regulate navigable waters for navigation purposes without owing compensation;... it does not permit federal regulation of hunting and fishing in navigable waters. Similarly, the reserved water rights doctrine only grants to the government the right to either exclude others from appropriating water which feeds a government reservation or to use a limited volume of water in order to serve the federal land reserved.... The doctrine does not provide the federal government with plenary power over a body of water."[3] Slip Opinion, pp. 25, 26.

Another reason advanced by the Alaska court for rejecting the Babbitt holding was that the navigational servitude is derived from the Commerce Clause and the power to reserve water rights comes from the Commerce and Property Clauses. Since neither of these clauses gives Congress the power to regulate hunting and fishing on state land or water, it follows, the court said, that "neither the navigational servitude power to regulate for navigation purposes nor the power to reserve water rights can grant the federal government

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[2] The Babbitt opinion avoided mention of the Submerged Lands Act.

[3] The Babbitt court made no mention of this well-recognized limitation on the navigational servitude or reserved water rights doctrine.

jurisdiction to manage hunting and fishing in navigable waters. The two powers are over navigation and water, not fish and game." Slip Opinion, p. 26.

According to the Alaska court a final reason its ruling on the navigable waters issue was the sheer impracticality, if not the impossibility, of employing the reserved water rights doctrine to define the geographic scope of navigable waters covered by ANILCA. Congress could not have intended to create, the court said, "such a complicated and uncertain regulatory scheme" as the Babbitt holding requires. Slip Opinion, p. 27.

Rejected outright by the Alaska Court were the Babbitt panel's view "that the position taken by the federal agencies that reserved water rights...define the scope of ANILCA was a reasonable agency interpretation owed deference," and its view that the position advocated by the State would undermine Congress' intent to protect subsistence fishing. Citing a 1995 Sixth Circuit decision, the Alaska high court said no deference is owed to positions on the interpretation of statutes adopted by agencies during litigation which contradict earlier regulations. Not surprisingly, the Alaska court said that "[i]f any interpretation is owed deference, it is the interpretation in the federal regulations that ANILCA generally does not apply to navigable waters, not the position adopted in a litigation context." Slip Opinion, p. 28.

With respect to the Babbitt panel's concern about undermining congressional intent to protect and provide the opportunity for subsistence fishing, the Alaska court pointed out that "public lands" in the federal regulations issued pursuant to ANILCA includes navigable waters over submerged lands owned by the United States, and also that some subsistence fishing occurs in non-navigable waters which are "public lands." Thus "fulfilling Congress' intent to provide an opportunity for subsistence fishing does not require ruling that reserved water rights define 'public lands' under ANILCA." Slip Opinion, p. 31.

The two opinions, Babbitt and Totemoff, could hardly present a more marked contrast; one, thoroughly researched and carefully crafted, replete with supporting authority; the other sketchy, shy of authority, and rampant with the exercise of legislative power. What accounts for this remarkable divergence in the two opinions? Certainly not the lack of ability on the Babbitt panel. It was an outstanding panel, able and experienced. Surely it recognized the issue presented by the United States' amazing revelation during oral argument about the proper interpretation of public lands,; i.e. the issue of whether that position or the position

contained in regulations adopted by the Secretary of the Interior represent "the agencies' answer" to the interpretation of "public lands." Certainly the opinion's implicit conclusion that the position adopted during the oral argument represents "the agencies' answer" to the statutory ambiguity, rather than that adopted by the agencies in a published regulation, merits an explanation, for sheer common sense says that it is the duly adopted regulation of the federal agency responsible for implementation of legislation that supplies the "agencies' answer;" otherwise, the United States, whenever during litigation it views a regulation as inimical to its litigation interests, would disavow the interpretation contained in the regulation and ipso facto adopt a new one favorable to its position in the litigation. Also meriting an explanation is the court's conclusion that if it adopted the State's position it "would give meaning to the term 'title' in the definition of the phrase 'public lands.'" Surely the Babbitt panel knew that Congress intended the word "title" to have meaning when it used it in the definition of "public lands." Why then did the Babbitt panel not give the term meaning other than glibly to usurp the legislative prerogative by saying that if it gave the term meaning it would undermine congressional intent to protect subsistence fishing, and therefore conclude that the term "title" in the definition of "public lands" is devoid of meaning?

The answer lies in the panel's inability to comprehend the delicate sensitivities which underlying ANILCA's provisions dealing with subsistence. Residing thousands of miles afield from subsistence hunting and fishing in Alaska, learning of the issues presented by ANILCA's vagaries only from a sterile printed record and from tourist guides, judges in the Ninth Circuit who are life-long residents of the southern climates who lack life-long familiarity with the multi-faceted policies underling ANILCA's subsistence provisions, are less qualified to fill in its intricacies than jurists who have lived for a life time with first-hand knowledge of them. This is especially true where, so often, they are called upon to ascertain Congressional intent. The framework for "congressional intent" in the enactment of statutes of particular regional applicability is most often supplied by those with personal familiarity with the underling, wide-ranging policy issues. Such was the case with ANILCA. It was crafted basically by Alaskans having personal interests in subsistence hunting and fishing issues. Standing to reason, therefore, is that judges having historical and personal sensitivity to these policy issues are better qualified to decide the thorny issues emminating from it.

This undoubtedly is what accounts for the strikingly dissimilar opinions in Babbitt and Totemoff. The Alaska

court, comprised of judges who have lived for years among those subject to ANILCA's subsistence provisions and who themselves have fished in Alaska's navigable waters were simply better able to interpret ANILCA. If that does not account for the wide divergence in the two opinions, what, then, does? Surely not the lack of legal ability in either body.

Babbitt is not the only illustration of an "inherently unsatisfactory" opinion of a Ninth Circuit panel interpreting ANILCA. Compare the Babbitt panel's failure to address the meaning of the word "title" with Judge Kozinski's amazing opinion in Kenaitze Indian Tribe v. State of Alaska, 860 F.2d at 312 (9th Cir. 1988). There the issue was the meaning of "rural" in ANILCA's definition of "subsistence uses." An Alaska statute had defined "rural area" to mean "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." Swiftly striking down this statute as inconsistent with ANILCA, the Kenaitze panel said that the "term 'rural' is not difficult to understand," and, for guidance as to its meaning in the statute the panel referred to Webster's Third New International Dictionary 1990 (1981), and went on to say that "rural" "is a standard word in the English language, one commonly understood to refer to areas of the county that are sparsely populated, where the economy centers on agriculture or ranching," and that the "State's definition would exclude practically all areas of the United States that we think of as rural, including virtually the entirety of such farming and ranching states as Iowa and Wyoming. The panel's reference to agriculture or ranching, in especially in areas of the United States other than Alaska in support of its decision is remarkable since, apparently unbeknownst to the panel, there is virtually no agriculture or ranching in Alaska. Searching for further support of the holding, Judge Kozinski then looked to use of "rural" in other federal contexts, citing as examples, of all things, the practice of the U.S. Census Bureau, the Social Security Act, the Housing Act of 1949, and definitions adopted of rural by the Federal Communications Commission and the Federal Housing Administration.[4] These practices, statutory definitions, and regulations, of course, are applicable to the entire United States, where in many areas ranching and agriculture constitute the major economic activity, grossly unlike Alaska,

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[4] Judge Kozinski knows better than to lift definitions from the Social Security Act and the Housing Act of 1949 as support for the congressional intent in using "rural" in ANILCA. He is among the brightest of the bright.

(where essentially there is none). ANILCA uses the term "rural" to divide the State of Alaska (not the entire United States), into rural versus urban areas. Referring to rural areas in Wyoming and Iowa in contrast to the Los Angeles urban area bears no resemblance to the urban/rural contrast between Anchorage and Ophir, Alaska.

The Kenaitze panel also supported its view that the Kenai, Alaska area is not urban by dividing its population into the area in which those inhabitants reside, and then, astoundingly, employing a tourist guide, The Milepost, to support the panel's view that the Kenai area is rural. The guide describes the Kenai area as one featuring "massive peaks and broad ice fields of Kenai mounts...dropping away to the great forested plateau of the western area," with its many lakes, rivers, and streams making Kenai a prime sport fishing destination. 860 F.2d at 314. If members of the panel had spent much time in the Kenai area they would have recognized how inaccurately this describes the Kenai/Soldotna area. The "massive peaks" and "broad ice fields" are miles and miles away from the central Kenai/Soldotna communities in "the Kenai area."

After rejecting "the states's contorted definition of rural," and adopting one used by Congress in the Social Security Act and the Housing Act of 1949, as well as definitions adopted by the FCC and FHA of the term defining rural "in terms of population," the opinion solemnly cautions against "creative interpretations"[5] and points out that "Congress passes laws, not purposes,....and that "[w]hat matters is not some general purpose that may have motivated lawmakers but the means they chose to achieve that end." 860 F.2d at 317. Apparently the Babbitt panel overlooked this admonition from Judge Kozinski when it ostensibly concluded that when Congress used the word "title" in the definition of "public lands" it did not intend it to have any meaning. If this is not a classic example of "creative interpretation," one has yet to discern it.

The views I express here are not an appeal to

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[5] See footnote 7, in the Kenaitze opinion, where Judge Kozinski says: "The state does not of course claim to be rewriting the statutory language. No one ever admits to taking a blue pencil to an Act of Congress. But precisely the same end is achieved through creative interpretation. Assigning exotic definitions to statutory terms alters the statute just as surely and effectively as changing the statutory language." By the same token exotic borrowing of definitions from unrelated contexts alters the statute "as surely and effectively as changing the statutory language."

regionalism. I agree with the remarks of former Chief Judge Warren Burger that it is offensive to believe that a United States judge, having taken the oath of office, is going to be biased because of the economic conditions of his own jurisdiction. I also agree with former Senator Pete Wilson's echoing of Justice Burger's concerns when he says that the "judges of the Circuit are there to apply the law, not make it," and that "it is not intended that federal courts abide by a sense of localism." Yet that is precisely what the California-laden panels are consistently doing when they are deciding cases under statutes unique to Alaska. They are applying a "California judicial philosophy" time and time again when interpreting and applying federal statutes specifically applicable to Alaska. They are making law, and the law they are making is rooted in a "California judicial philosophy" sprinkled heavily with a large measure of localism. If that is not exactly what Babbitt and Kenaitze show, what else accounts for these bizarre decisions?

If enactment of S. 956 is what it takes to bring this pernicious practice to a halt, then that is what ought to be done.

TONY KNOWLES
GOVERNOR

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

September 8, 1995

The Honorable Orrin Hatch, Chair
Senate Committee on the Judiciary
Senate Dirksen Office Building
Washington, DC 20510-6275

Dear Senator Hatch:

I write this letter to urge passage of S. 956, a bill to divide the Ninth Circuit Court of Appeals into two circuits. In doing so, I note with pride and satisfaction that Senators Stevens and Murkowski have both joined as co-sponsors of this important legislation.

Alaskans have long observed that the Ninth Circuit, the largest in the nation both in territory and membership, has concerned itself predominantly with issues arising out of California. Indeed, the court's membership is heavily weighted to that state. The court's case filings are larger than any other circuit in the country, thus frequently leading to inordinate delay in decisions important to our state.

Alaskans have suffered from these shortcomings. For instance, despite the court's granting of expedited consideration in an important case involving Alaska Native subsistence use in a case known popularly as the Katie John case, the court required more than thirteen months to render its decision (now being reconsidered) after oral argument. In other cases, panels of the court have shown a surprising lack of understanding of Alaska's geography and people. As a consequence, decisions rendered from San Francisco have often caused unnecessary hardships on Alaskans.

The creation of a Twelfth Circuit Court of Appeals encompassing the Northwestern states and Alaska would benefit this region by providing for speedier and more consistent rulings rendered by jurists who have greater familiarity with the social, geographical, political, and economic life of the region.

Sincerely,

Tony Knowles
Governor

cc: The Honorable Ted Stevens, U.S. Senate
The Honorable Frank Murkowski, U.S. Senate

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

September 12, 1995

Honorable Orrin Hatch
Chair, Senate Committee on the Judiciary
224 Senate Dirksen Office Building
Washington, D.C. 20510-6275:

Dear Chairman Hatch:

The undersigned attorneys general support the division of the existing Ninth Circuit Court of Appeals and the creation of a new Northwest circuit court consisting of judges from the five states that we serve, Alaska, Idaho, Montana, Oregon, and Washington, provided, of course, the new circuit is adequately funded.

The creation of a Northwest circuit would mitigate the problems of the unwieldy size of the Ninth Circuit. The Ninth Circuit has by far the most judges, the largest area served, and the most cases of any circuit court. Our states are directly affected by the resulting intra-circuit inconsistencies in decisions, infrequency of *en banc* consideration, and potential for drawing panels with little familiarity with the laws and practices of our states. Judges serving a Northwest circuit would be more aware of issues pending before other panels, and more willing to hear matters important to our states *en banc*. Perhaps most importantly, the more manageable volume of cases will allow our states' citizens to have their cases heard and decided in a reasonable period of time.

The Ninth Circuit's caseload is steadily increasing with the greatest increase in cases coming from the Central District in California. In 1989, 22 percent of all Ninth Circuit cases were filed in the Central District of California; today, those cases constitute 27 percent. This trend will only aggravate our problems in the future if the Ninth Circuit is not divided.

For these reasons, we urge your support for the creation of an adequately funded and staffed Northwest Circuit Court. We appreciate your consideration of our comments and concerns.

Sincerely,

Bruce M. Botelho
Attorney General of Alaska

Alan G. Lance
Attorney General of Idaho

Joseph P. Mazurek
Attorney General of Montana

Theodore R. Kulongoski
Attorney General of Oregon

Christine O. Gregoire
Attorney General of Washington

News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

September 13, 1995 Contact: Jeanne Lopatto, 202/224-5225

STATEMENT OF SEN. ORRIN HATCH

SENATE JUDICIARY COMMITTEE

HEARING ON THE NINTH CIRCUIT SPLIT

Good Morning. I am pleased to chair this hearing on whether the United States Court of Appeals for the Ninth Circuit should be divided. I am approaching this issue with an open mind, and I look forward to the testimony on both sides of this issue today. It is my hope that this hearing will illuminate two questions: first, the extent to which any difficulties may in fact exist in the ninth circuit due to its size; and second, whether a split of the ninth circuit would remedy any problems that may be present.

As the map we have before us demonstrates, the current federal judicial system includes thirteen federal judicial circuits: the eleven numbered circuits, the D.C. Circuit and the Federal Circuit. Even a brief glance confirms that, among those circuits, the ninth unquestionably stands apart.

The ninth circuit is the largest court of appeals by any measure. It contains nine states and two territories totaling approximately fourteen million square miles, and it spreads from Alaska to the Mexican border.

Of all the regional courts of appeals, the ninth circuit serves the largest population by far: Almost 50 million people fall under the geographical jurisdiction of the ninth circuit.

The ninth circuit also has 28 active court of appeals judges. The next largest court of appeals, the fifth circuit, has 17 active judges, and most of the circuits have 12 or fewer court of appeals judges.

As most of the participants in today's hearing are aware, this is not the first time that Congress has faced the question of whether this large circuit should be split. In 1973, the Hruska Commission recommended the split of the old fifth circuit and a split of the ninth. Although the fifth circuit was split in 1981 to create the eleventh circuit, the ninth circuit was not divided.

In lieu of splitting the ninth circuit, Congress chose instead to address the ninth circuit's administrative difficulties by enacting a statutory provision that permitted the ninth circuit to form administrative units and to conduct en banc proceedings with fewer than the full court. Nonetheless, the size of the circuit continues to attract attention, and in the last ten years several bills have been introduced in the Senate that would split the circuit.

Some proponents of a split have noted that the circuit's large and rapidly changing body of case law has made it difficult for district courts, practitioners, and even the court of appeals judges themselves to keep up with the current law of the circuit. Others have raised concerns about collegiality among the judges of such a large circuit, and still others have remarked on delays in the ninth circuit.

The size of the circuit has also been argued to have caused an increased incidence of intracircuit splits -- that is, conflicting decisions within the ninth circuit itself. Whether such conflicts occur in the ninth circuit at a higher rate than in other circuits raises serious issues of judicial efficiency and legal stability. Uncertainty in circuit law not only presents difficulties for district judges and legal practitioners but also imposes costs on private parties who are trying to conform their conduct to circuit law and avoid litigation.

On the other hand, many in the ninth circuit emphasize that the circuit has made significant strides in dealing with its great size through a number of administrative innovations. I am eager to hear about the ninth circuit's experience in dealing with its heavy caseload.

And of course, splitting the circuit raises its own, equally serious issues. This committee must also consider, for example, whether creating another circuit would increase conflicts between the circuits. We must examine whether a split would needlessly dilute the federalizing function of the courts of appeals, or would lead us down a slippery slope to the unending balkanization of the circuits. Finally, we must consider whether splitting the ninth circuit without increasing judgeships would alleviate burdens created by growing caseloads.

I thank our distinguished witnesses for taking the time to testify before the committee today, and I remind witnesses that in the interests of time they should keep their opening remarks to five minutes.

#####

Anchorage · *Star of the North*
Chamber of Commerce

Juvenile Criminal Records Resolution
Anchorage Chamber of Commerce
Resolution 96/97-14

WHEREAS, juvenile crime is of utmost concern to both the Chamber and the community at large, and

WHEREAS, the curtain of security behind the juvenile justice system greatly erodes public confidence in the system, and

WHEREAS, the sealing of juvenile records impedes the ability of businesses and employers to conduct adequate background checks of prospective employees, and

WHEREAS, victims of crime, whether it be businesses or private individuals deserve to know the final resolution of the crime committed against them, and

WHEREAS, the opening of records, especially records for violent crimes will serve as a deterrent for future crimes, and

WHEREAS, the opening of records will allow law enforcement officials and school officials to communicate legally regarding problems in the community;

NOW THEREFORE BE IT RESOLVED that the Anchorage Chamber of Commerce supports the concept of the opening of juvenile criminal records.

Approved April 18, 1997

Tom Williams, Chair 1996-97

Carol Heyman, President

th Avenue, Suite 300, Anchorage, Alaska 99501-2309 (907) 272-2401 FAX (907) 272-4117
Founded 1915

HJR

44

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. CSHJR 44(RLS) AM

Revision Date (4/24/98
Title Const. Amend: Relating to redistricting of the legislature
Sponsor Representatives Porter and Mulder
Requester Senate Judiciary Committee

Dept. Affected Office of the Governor
BRU Elective Operations
Component General and Primary
Component Serial No #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by Gail Fenumiai
Division Division of Elections
Phone 465-3935
Date 4/24/98

Approved by Lt. Governor Fran Ulmer
Agency Office of the Lieutenant Governor
Date 4/24/98

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FISCAL NOTE

No: 1

Bill version: CSHJR 44(JUD)

(H) Publish Date: 2/18/98

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____ Dept. Affected Office of the Governor

Title Const. Amend: Relating to redistricting of the legislature BRU Elective Operations

Component Elections

Sponsor Representatives Porter and Mulder

Requester House Judiciary Committee Component Serial No. #21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by Gail Fenumiai Phone 465-3935

Division Division of Elections Date 2/12/98

Approved by C Lt. Governor Fran Ulmer Date 2/12/98

Agency Office of the Lieutenant Governor

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No: 2

FISCAL NOTE

Bill Version: CSHJR 44(JUD)
(H) Publish Date: 2/18/98

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Revision Date (Note if correction)
Dept. Affected Law
Title Proposing amendments to the Constitution of the State of Alaska relating to redistricting and reapportionment ...
BRU Civil Division
Component Governmental Affairs
Sponsor Representative Porter
Requester House Judiciary Committee
Component Serial No 2207

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	20.1	9.4				
Travel	0.1	0.0				
Contractual	43.2	1.5				
Supplies	0.3	0.2				
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	63.7	11.1	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	63.7	11.1				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	63.7	11.1	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

CS HJR 44 (JUD), Workdraft M, would amend the Alaska Constitution to change the method of redistricting legislative election districts, and create a Reapportionment Board appointed by the legislature to do the redistricting.

Passage of the resolution itself would have no cost to the Department of Law. However, if the constitutional amendment were adopted by the people of the State of Alaska, the new law would require preclearance by the United States Department of Justice (DOJ) before implementation because it changes a voting law. The preclearance process would require the Department of Law to document and present the state's position to the DOJ. We anticipate that 3 months of in-house attorney time would be required for preclearance, 20 hours of paraprofessional time, and $40,000 for expert opinions, assuming that the process remains an administrative one. Should the new law be challenged, and referred to a

Prepared by Joan M. Kasson
Division Attorney General's Office
Phone 465-5370
Date 2/13/98

Approved by Commissioner Bruce M. Botelho, Attorney General
Agency Department of Law
Date 2/13/98

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COMMITTEE COPY

ANALYSIS CONTINUATION

three-judge panel in the District of Columbia Circuit, costs would increase dramatically. The department has not included those speculative costs in this fiscal note, and would request a supplemental appropriation should that eventuality occur.

In-house costs are based on the department's FY98/99 standard attorney cost schedule ($92.72/hour per for attorney time and $71.94/hour for paraprofessionals). The schedule includes clerical support, lease costs, communications, and other standard overhead costs. Expert fees and costs are added separately. If the resolution passes this session, preclearance would begin 30 days after certification of the 1998 election, the next general election. The department is assuming that most of the work can be completed in FY99, and has included two months of in-house costs, and all expert costs, during that year, with the remaining one month of in-house costs to be incurred in FY00.

COST SUMMARY

Attorney				
	FY99	$92.72	240.0 hrs	$22,253
	FY00	$92.72	120.0 hrs	$11,126
Paraprofessional				
	FY99	$71.94	20.0 hrs	$1,439
Expert Costs				
FY99				$40,000
Total				
	FY99			$63,692
	FY00			$11,126

Sectional Analysis for CS FOR HJR 44(RLS) 0-LS0528\S.a
4/6/98

Section Number of HJR 44.	Changes Made to Existing Section of Constitution Article VI	Reasons for Changes and Intent
Section 1 and Section 2.	Language is added to Section 1 and Section 2 of Article VI that boundaries of house districts and senate districts are to be established after every decennial census, as provided in the framework spelled out in the changes to Article VI.	The proposed language changes clarify that boundaries of house and senate districts are redrawn after every decennial census of the United States. This amendment requires that senate districts, as well as house districts, be subject to redistricting to achieve equal representation. This change brings the constitution into line with the U.S. Supreme Court's decision 34 years ago in Reynolds v. Sims (1964), 377 US 533, and companion Alaska Supreme Court decisions in Wade v. Nolan (1966), 414 P.2d 689, and Egan v. Hammond (1972), 502 P.2d 856.
	Old language is deleted which referred to Article XIV. Article XIV is no longer necessary, and is repealed in Section 11 of HJR 44.	Article XIV is a lengthy description of existing house and senate districts, which changes every 10 years. The intent in eliminating Article XIV is to eliminate the need for unnecessary amendment of the constitution every ten years.
Section 3.	The power to reapportion house and senate districts in Section 3 of Article VI is changed from the Governor to a Redistricting Board.	Alaska and Maryland are the only two states where the governor has reapportionment authority. However, in Maryland, the senate has ratification power over the governor's appointments to the board. In Alaska there is no such check and balance over the executive branch, with the result the governor has nearly unfettered discretion in appointing board members and to alter the board's plan. This change is intended to remove reapportionment and redistricting as far as possible from the partisan political arena by creating a redistricting board appointed by the chief justice.
	Language is added to make clear that both house districts and senate districts are reapportioned, and not just the house districts.	At the time the Alaska Constitution was drafted, The U.S. Supreme Court had not yet ruled that the one-person, one-vote equal protection requirement in the XIVth Amendment applied to senate districts as well as to house districts in state legislatures. As discussed above in Section 1 and 2, this change is intended

		to conform the constitution to controlling federal and state case law.
	The word "civilian" is deleted to make clear that reapportionment is based on the entire state's population base, including military population, and not just the civilian population.	Citing Davis v. Mann (1964), the controlling U.S. Supreme Court precedent, twenty six years ago the Alaska Supreme Court held that eliminating military personnel as a class from the reapportionment population base is unconstitutional. Egan v. Hammond, 502 P. 2d 856 (1972), at 871. The issue then arose as to whether it is constitutionally required to exclude non-resident military personnel from the population base. In Hickel v. Southeast Conference (1992), 846 P.2d 38, at 55, the Alaska Supreme Court held that exclusion is not constitutionally required if it is not possible to accurately identify non-resident military personnel, after finding that it was "methodologically impossible" to accurately identify them. There has been much discussion about the difference between "reapportionment" and "redistricting" in many places in Article VI. The Alaska Supreme Court has stated by way of dicta that there is little difference between the two words, and that reapportionment is inseparable from redistricting. Egan v. Hammond (1972), 502 P. 2d 856, at 873. However, given the modern trend toward greater use of the term "redistricting" as the line drawing component of reapportionment, "redistricting" has been substituted for "reapportionment" in several appropriate places in Article VI.
	Language is added which makes clear that the census upon which reapportionment and redistricting is based is the official decennial census of the United States.	Throughout HJR 44, language is added to clarify that what is intended by the word "census" is the official decennial census of the United States. This clarification is specifically intended to prevent the utilization of any census other than the official decennial census of the United States.
Section 4.	Language is added to Section 4 of Article VI to create forty	The intent is to require single-member house districts. Single-member house

	single-member house districts, which contain one-fortieth of the state's population base.	and senate districts are cited as preferable to multi-member districts. See Chapman v. Meier, 420 U.S. 1 (1975) and Groh v. Egan, 526 P.2d 863, at 880 (1974).
	Language is added to create twenty single-member senate districts, which consist of two house districts.	The intent is to require single-member senate districts, each consisting of two house districts.
	Language is deleted about civilian population and creating forty equal election districts.	The deleted language refers to "civilian" population, which, as discussed above, has been struck down by the U.S. Supreme Court and the Alaska Supreme Court on constitutional grounds. The requirement of nearly equal population in house and senate districts is now in Article VI, section 6.
Section 5.	Language is added to Section 6 of Article VI to clarify that the Redistricting Board, and not the Governor, will perform the redistricting function.	Self-explanatory. See discussion in Section 3.
	Each house district will contain "as nearly as practicable" one-fortieth of the state's population.	Since U.S. Supreme Court and Alaska Supreme Court cases make clear that minor deviations from an ideal one-fortieth of the state's population are permissible for house and senate districts, the "as nearly as practicable" language is added.
	Each senate district will be composed "as nearly as practicable of two contiguous house districts".	This language recognizes the Alaska Supreme Court's emphasis on flexibility in where redistricting lines are drawn, and that actual contiguity may not always be possible.
Section 6.	(a) Language is added to Section 8 of Article VI to clarify that one member of the Redistricting Board shall be appointed by the chief justice of the supreme court, and the legislature shall appoint the remaining members, two each by the minority and the majority, subject to the provisions of this section	This section was amended on the floor of the House, and changed the Rules version which previously imposed the duty to appoint all five board members on the chief justice.

	The board shall consist of five members, "all of whom shall be residents of the state for at least one year and none of whom may be public employees or officials at the time of and during the tenure of appointment".	The state has a compelling interest in maintaining the integrity of the reapportionment and redistricting process, and in avoiding even the appearance of impropriety in board composition. The "for at least one year " language was added on the floor of the House.
	Previous draft language which clarified that compensation is to be paid to board members "as provided by law" was deleted for unknown reasons.	It is intended that the board members be compensated for per diem and travel expenses. If the constitutional amendment is approved by the voters, a bill should be drafted to provide for compensation.
	Language is deleted which previously required board members to be from certain geographic areas of the state, and which required that appointments be made without regard to political affiliation.	The geographic representation concept has been moved to section 8(b) of Article VI. The "without regard to political affiliation" language dropped out when previous drafts contemplated two majority and two minority party board members.
	(b) New language is added which requires board members to be appointed by September 1 of the year in which a decennial census is taken.	Self explanatory. This allows the board to be appointed and organized to start work once the official census is released.
	New language is added that "at least one board member shall be a resident from each judicial district that existed on January 1, 1999".	This restores the geographical representation which was deleted above.
	New language is added that requires board members to serve until a final redistricting plan and proclamation has been adopted and all legal challenges to it under the enforcement section have been resolved through final remand or affirmation.	It is the intent of this language to require board members to serve until a plan and proclamation have been adopted, and to continue to serve through any remands following superior court or supreme court challenges.
	(c) New language is added which prevents a person who was a member of the board from becoming a candidate for the legislature in the general election following the adoption of the final redistricting plan	This provision is intended to avoid the appearance of impropriety on the part of a board member who might otherwise be accused of redistricting a district for self serving reasons. The over-all goal of the changes to Article VI is to have as far as possible, a redistricting plan that is fair,

	and proclamation.	rational, objective, and free from undue political influence.
Section 7.	Language is added by which "actions of the board" require the concurrence of three members. Ambiguous language is deleted about "a ruling or determination" and "or otherwise act for the board". New language is added which requires the board to "employ or contract for services of independent legal counsel".	The language in the existing constitution creates ambiguities about the legal effect of a majority of only three board members meeting somewhere and making unspecified "rulings or determinations". Two members in this scenario should not be able to bind a five member board. The board will need independent legal counsel, and should not be required to utilize legal services from any state, local or federal government entity.
Section 8.	New language is added to Section 10 of Article VI which requires the board to agree on one or more proposed plans within 30 days of release of the decennial census population data. The board then has 60 more days to hold hearings and agree on a final reapportionment plan and to issue a proclamation of reapportionment. If the census data is officially released before the board is duly appointed, language has been added to clarify that the 30 and 90 day clock starts to run after two events have occurred: the board is duly appointed and the census data has been officially released. Language is deleted about the board reporting to the governor, and the governor submitting the final plan and proclamation. New language is added by which the final plan is to set out boundaries of house districts and senate districts.	Once the board has been appointed and the decennial census has been officially released, the 90 day clock starts to run. . The board has 30 days to agree on one proposed plan, if it can. If it cannot, it will have hearings on multiple proposed plans over the next 60 days. By the end of the 90 day period, the board must adopt a final single plan and proclamation. In the remote event the census data is officially released before the board is duly appointed, it is the intent of this language that the board has 30 days after it is appointed to come up with one or more proposed plans, and a total of 90 days after it is appointed to come up with the final plan. This deletion is for consistency reasons. It is the Redistricting Board which develops and adopts the proposed and final plans of reapportionment. This provision is intended to clarify that the final plan sets out the boundaries of senate districts as well as of house election districts, as discussed above.

	(b) New language is added to clarify that adoption of a final redistricting plan requires at least three votes of the board.	Self-explanatory.
Section 9.	The enforcement provisions of Article VI, Section 11, now provide that any qualified voter can compel the board to perform its duties in formulating a final plan and proclamation, or to correct any error in redistricting or reapportionment.	This is a consistency change which substitutes the board for the Governor.
	A lawsuit to compel performance of the duty to formulate a final redistricting plan and proclamation at the end of 90 days must be filed not later than 30 days after the 90 day period. A lawsuit to correct any error in redistricting or reapportionment must be filed within 30 days after adoption of the final plan and proclamation by the board.	This provision allows for a reasonable time to prepare a lawsuit, but sets an absolute limit so as to meet the timing requirements for the next election. This is an existing constitutional provision.
	New language is added to require the courts to dispose of cases arising under Article VI on an expedited basis.	Same reasoning as above, and is consistent with recent supreme court handling of such cases.
	If any reapportionment remands are ordered by the courts, the matter shall be remanded directly to the board for correction and development of a new plan, and not to the superior court or to special masters. On the floor of the House, upon the motion of Rep. Grussendorf, a sentence was added that "if that new plan is declared invalid the matter may be referred again to the board".	This language is intended to avoid the situation which arose in Hickel v. Southeast Conference, in which the court system in effect rewrote the reapportionment plan. The approach was criticized by two of the justices in a dissenting opinion in that case. The intent of the Grussendorf amendment is to reaffirm the supreme court's continuing jurisdiction over the board's task of redoing the plan in accordance with the court's order. If the board fails to redo the plan in accordance with the court's order, the court will continue to remand until the board gets it right.

Section 10.	Consistency change to another part of the constitution in order to eliminate "election districts" in favor of " house districts".	Provides a precise term that is distinguishable from senate district.
Section 11.	A new Article XV, section 29 is added by which the 1998 amendments to Article VI apply only to plans and proclamations of redistricting adopted on or after January 1, 2001.	This language is intended to ensure that the plan and proclamation in effect since 1994 will not be subject to legal challenge on the basis that it is not in conformity with the 1998 amendments, which become effective approximately 90 days after voter approval.
Section 12.	Article VI, sections 5 and 7, and Article XIV of the constitution are repealed.	These sections of Article VI and Article XIV are repealed because they are no longer necessary in light of the changes made in HJR 44.

Alaska State Legislature

Official Business

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JOINT SPONSOR STATEMENT
FOR
HJR 44: A RESOLUTION PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF ALASKA RELATING TO REAPPORTIONMENT AND REDISTRICTING OF THE LEGISLATURE; REPEALING OBSOLETE LANGUAGE; AND PROVIDING FOR AN EFFECTIVE DATE.

The reapportionment and redistricting provisions of the Alaska Constitution have been outdated for more than 25 years. U.S. Supreme Court decisions have struck down state law provisions excluding military personnel from reapportionment population bases, and have extended the one-person, one-vote requirement of the equal protection clause of the XIVth Amendment to senate districts as well as to house districts. The Alaska Supreme Court has been inviting the legislature to amend the constitution since at least 1972 in these areas.

Alaska is only one of two states in the Union which places the reapportionment and redistricting power in the office of the Governor. In the other state, Maryland, the senate has the right to ratify the governor's appointees. No such check exists in Alaska. This situation has produced redistricting plans which have been subject to criticism of being borne in the crucible of politics, rather than creating redistricting plans based on bipartisan fairness and objectivity. The existing system of constitutional provisions has spawned litigation after every decennial census since statehood, the most recent of which was exceptionally contentious.

This proposal creates a five-member redistricting board which is appointed by the Chief Justice of the Alaska Supreme Court. The redistricting process proposed in this legislation is intended to produce balanced, professionally drawn districting plans.

Probably due in part to the inherent political bias of the existing mechanism, and the delays inherent in legal challenges, the Alaska Supreme Court has had to take an increasingly activist approach in deciding redistricting disputes in time for primary elections. The most recent legal challenge caused two of the Justices to dissent regarding what they perceived to be an "abuse of power" by the majority of the court. The court majority sent the final redistricting task to the superior court and special masters to rewrite the plan, rather than remand the case to the reapportionment board. The proposed changes to the constitution will require the court to remand the redistricting function back to the redistricting board to make changes in accordance with the court's order.

There are other changes proposed, such as clarifying that representatives and senators shall be elected from single-member districts. A more detailed analysis of other sections of HJR 44 appears in the sectional analysis, which is incorporated by reference.