

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

10079 SENATE JUDICIARY

(5) a statement as to whether the complainant has retained an attorney and, if an attorney has been retained, the name, address, and telephone number of the attorney.

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

(d) If the complainant has not retained an attorney, the court shall appoint an attorney to represent the complainant.

(e) If the complainant makes only the allegation set out in (b)(4)(A) of this section and if the court finds by clear and convincing evidence that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(f) If the complainant makes only the allegation set out in (b)(4)(B) of this section and the court finds that there is clear and convincing evidence of physical abuse, sexual abuse, or a pattern of emotional abuse of the complainant by one or both of the minor's parents or the minor's guardian or custodian, or by clear and convincing evidence the consent of the parents, guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(g) If the complainant makes both of the allegations set out in (b)(4) of this section, the court shall proceed as follows:

(1) the court first shall determine whether it can make the finding specified in (e) of this section and, if so, shall issue an order under that subsection; if the court issues an order under this paragraph, it may not proceed under (f) of this section; if the court does not make the finding specified in (e) of this section, it shall proceed under (2) of this subsection;

(2) if the court under (1) of this subsection does not make the finding specified in (e) of this section, it shall proceed to determine whether it can make the finding specified in (f) of this section and, if so, shall issue an order under that subsection; if the court does not make the finding specified in (f) of this section, it shall dismiss the complaint.

(h) The court may not notify the parents, guardian, or custodian of the complainant that the complainant is pregnant or wants to have an abortion.

(i) If the court dismisses the complaint, the complainant has the right to appeal the decision to the supreme court, and the superior court immediately shall notify the complainant that there is a right to appeal.

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within four days after the notice of appeal is filed. Upon receipt of the notice and record, the clerk of the supreme court shall place the appeal on the docket. The appellant shall file a brief within four days after the appeal is docketed. Unless the

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appellant waives the right to oral argument, the supreme court shall hear oral argument within five days after the appeal is docketed. The supreme court shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed. Upon motion of the appellant and for good cause shown, the supreme court may shorten or extend the maximum times set out in this subsection. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this subsection authorizing the appellant to consent to the performance or inducement of an abortion without consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

(k) Each hearing under this section, and all proceedings under (j) of this section, shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section, including papers and records that pertain to an appeal under this section, shall be kept confidential and are not public records under AS 09.25.110 — 09.25.120.

(l) The supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint or appeal under this section. The clerk of each superior court shall furnish blank copies of the forms, without charge, to any person who requests them.

(m) A filing fee may not be required of, and court costs may not be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under this section.

(n) Blank copies of the forms prescribed under (l) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required under this subsection must also include notification to the minor that

- (1) there is no filing fee required for either form;
- (2) no court costs will be assessed against the minor for procedures under this section;
- (3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;
- (4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present. (§ 4 ch 14 SLA 1997)

Cross references. — For purpose and findings concerning the enactment of this section, see § 1, ch. 14, SLA 1997 in the 1997 Temporary and Special Acts.

Effective dates. — Section 4, ch. 14, SLA 1997, which enacted this section, took effect on July 31, 1997.

Sec. 18.16.050. Partial-birth abortions. (a) Notwithstanding compliance with AS 18.16.010, a person may not knowingly perform a partial-birth abortion unless a partial-birth abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury and no other medical procedure would suffice for that purpose. Violation of this subsection is a class C felony.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section or under any other law if the prosecution is based on this section.

(c) In this section, "partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery. (§ 1 ch 15 SLA 1997)

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Sec. 18.16.

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Effective dates. — Section 1, ch. 15, SLA 1997, which enacted this section, took effect on July 31, 1997.

Sec. 18.16.090. Definitions. In this chapter,

(1) "abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "abortion" does not include the termination of a pregnancy if done with the intent to

- (A) save the life or preserve the health of the unborn child;
- (B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child; or
- (C) remove a dead unborn child;

(2) "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:

- (A) entered the armed services of the United States;
- (B) become employed and self-subsisting;
- (C) been emancipated under AS 09.55.590; or
- (D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian. (§ 4 ch 14 SLA 1997)

Cross references. — For purpose and findings concerning the enactment of this section, see § 1, ch. 14, SLA 1997 in the 1997 Temporary and Special Acts.

Effective dates. — Section 4, ch. 14, SLA 1997, which enacted this section, took effect on July 31, 1997.

Chapter 18. Hospice Care Programs.

Article

1. Licensing of Hospice Programs (§§ 18.18.005 — 18.18.100)
2. Licensing of Volunteer Hospice Programs (§ 18.18.200)
3. General Provisions (§§ 18.18.300 — 18.18.390)

Effective dates. — Section 1, ch. 104, SLA 1997, which enacted this chapter, took effect on September 30, 1997.

Article 1. Licensing of Hospice Programs.

Section

- 05. Policy declaration
- 10. License required
- 20. Issuance and renewal of license

Section

- 30. Denial, suspension, or revocation of license
- 40. Right of entry and inspection
- 100. Requirements for licensure

Sec. 18.18.005. Policy declaration. It is the policy of the state that regulation of hospice programs should ensure an appropriate standard of care for hospice clients without unduly burdening the programs with requirements that consume staff time and financial resources that are essential for the delivery of services to hospice clients. In furtherance of this policy, this chapter establishes two sets of standards for hospice programs that recognize the more limited staff time and financial resources available to voluntary hospice programs while requiring all programs to comply with basic minimum program standards. (§ 1 ch 104 SLA 1997)

Sec. 18.18.010. License required. A person, including a partnership, association, or corporation, may not represent itself as a hospice program or operate a hospice program unless the person, partnership, association, or corporation has obtained a license from the department. (§ 1 ch 104 SLA 1997)

(5) describes the circumstances under which the applicant will be practicing, including the name and license number of the supervising physician; and

(6) describes the scope of medical practice required to perform the duties for which the courtesy license is issued;

(7) repealed 8/9/95.

(e) A courtesy license is valid only for the duration of the hospital fellowship or other purpose recognized by the board, but may not exceed one year in length.

(f) A courtesy license holder is subject to all relevant provisions of AS 08.64, 12 AAC 40, and any other statutes or regulations governing the practice of medicine and the prescription of drugs in this state. (Eff. 5/1/94, Register 130; am 8/9/95, Register 135)

Authority: AS 08.02.030 AS 08.64.100

12 AAC 40.050. BIOGRAPHICAL DATA. An application for censure by credentials or examination will not be considered complete until the applicant has requested the following documents and they are on file in the division office:

(1) a physician profile from the American Medical Association or American Osteopathic Association;

(2) clearance from the United States Department of Justice, Drug Enforcement Administration;

(3) clearance from the Federation of State Medical Boards regarding previous or pending disciplinary actions against the applicant by another jurisdiction. (Eff. 8/29/73, Register 47; am 3/30/84, Register 89; am 5/18/85, Register 94; am 8/2/86, Register 99; am 5/1/94, Register 130)

Authority: AS 08.64.100 AS 08.64.190 AS 08.64.200

12 AAC 40.055. INTERVIEW. (a) An applicant for a license or permit regulated by the board shall be interviewed in accordance with AS 08.64.255 or AS 08.64.279 if additional information from the applicant is necessary for the board to determine whether the applicant meets the qualifications in AS 08.64 and this chapter for the license or permit the applicant seeks.

(b) In determining whether an interview is required, the board or a member of the board will consider the information provided by the applicant on the completed application form and

(1) the applicant's disciplinary history with any medical board, licensing agency, credentialing authority, medical or professional school, internship program, residency program, or military authority;

(2) the applicant's charges or convictions of a felony, misdemeanor, or violation of a law, statute, or regulations of this or

another jurisdiction, including the United States or another country, that relate to the grounds for the applicable license or permit denial or imposition of disciplinary sanctions under AS 08.64 or this chapter; the applicant's charges or convictions

(A) include those crimes involving alcohol or narcotics or other controlled substances; but

(B) exclude minor traffic violations;

(3) the applicant's mental, emotional, or physical fitness to practice in a profession regulated by the board under the standards established for the applicable license or permit denial or imposition of disciplinary sanctions under AS 08.64 or this chapter; the board will limit inquiry of the applicant's personal history under this paragraph to information concerning the five years immediately before the date of application;

(4) the applicant's history of negotiated settlements, judgments, or awards in claims or civil actions alleging medical or professional malpractice against the applicant;

(5) the information obtained from a disciplinary data bank regarding the applicant;

(6) the information supplied by the applicant's medical or professional school;

(7) the information received from the program in which the applicant completed post graduate training; and

(8) the information received from other licensing jurisdictions regarding the applicant's professional license status and history. (Eff. 4/10/88, Register 106; am 8/17/97, Register 143)

Authority: AS 08.64.100 AS 08.64.255 AS 08.64.279
AS 08.64.240

ARTICLE 2. ABORTIONS.

Section	Section
60. Termination of pregnancy	110. Abortion procedures
70. Informed consent	120. Standards for hospitals and facilities
80. Medical procedures	130. Records
90. Evaluation	140. Limitation
100. Consultation requirements	

12 AAC 40.060. TERMINATION OF PREGNANCY. Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian. (Eff. 12/20/70, Register 36; am 8/29/73, Register 47)

Authority: AS 11.15.060(a) AS 08.64.105

12 AAC 40.070. INFORMED CONSENT. Unless otherwise provided in 12 AAC 40.060, a written informed consent shall be obtained

Abortion Regs

from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure. (Eff. 12/20/70, Register 36; am 8/29/73, Register 47)

Authority: AS 08.64.105

12 AAC 40.080. MEDICAL PROCEDURES. The patient shall be examined by a physician licensed in Alaska, and a written record of the patient's physical and emotional health shall be prepared before performing an abortion procedure as set out in 12 AAC 40.110. (Eff. 12/20/70, Register 36; am 8/29/73, Register 47)

Authority: AS 08.64.105

12 AAC 40.090. EVALUATION. The attending physician shall make an evaluation of the patient and an estimation of the duration of gestation based upon the patient's history, examination and test results. This information shall be recorded on the patient's chart. (Eff. 12/20/70, Register 36)

Authority: AS 08.64.105

12 AAC 40.100. CONSULTATION REQUIREMENTS. Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy. (Eff. 12/20/70, Register 36; am 8/29/73, Register 47)

Authority: AS 08.64.105

12 AAC 40.110. ABORTION PROCEDURES. During the second or third trimester of a pregnancy, acceptable procedures include dilatation and curettage, suction aspiration of the uterus, injection of pharmacological agents, hysterectomy and hysterotomy. The exact procedure to be used will depend upon the patient's total health, age, associated disease and pathology, and anomalies such as skeletal defects and other medical indications. (Eff. 12/20/70, Register 36; am 8/29/73, Register 47)

Authority: AS 08.64.105

12 AAC 40.120. STANDARDS FOR HOSPITALS AND FACILITIES. (a) During the second or third trimester of a pregnancy,

abortions shall be performed under sterile conditions. A bed and a registered nurse shall be available for a minimum recovery period of one-half hour. A registered nurse shall be present during the procedure.

(b) During the second or third trimester of a pregnancy, blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed, and an operating room appropriately staffed and equipped for major surgery in accordance with regulations adopted under AS 18.2C.060 shall be immediately available. (Eff. 12/20/70, Register 36; am 8/29/73, Register 47)

Authority: AS 08.64.105

12 AAC 40.130. RECORDS. During the second or third trimester of a pregnancy, the attending physician shall record a medical history, findings of the physical examination, operative report of the abortion procedure and pathology report as part of the clinical record to be maintained by the hospital or facility. The physician and hospital or facility shall treat the patient's identity and medical record as confidential information. (Eff. 12/20/70, Register 36; am 8/29/73, Register 47)

Authority: AS 08.64.105

12 AAC 40.140. LIMITATION. A fetus which has not developed beyond 150 days after the first day of the last menstrual period may be considered non-viable for purposes of AS 11.15.060(a). In the performance of an abortion after that date, the physician shall be guided by a reasonable judgment as to whether the fetus is viable in fact. (Eff. 12/20/70, Register 36; am 8/29/73, Register 47)

Authority: AS 08.64.105 AS 11.15.060(a)

ARTICLE 3. CONTINUING MEDICAL EDUCATION.

Section
200. General requirements
210. Credit hours
220. Certification of compliance

Editor's note: For new location of the substance of former 12 AAC 40.160, see 12 AAC 40.990.

12 AAC 40.200. GENERAL REQUIREMENTS. (a) A physician seeking renewal of a license on or after January 1, 1986 shall obtain an

SB 300/

HB329 Testimony

My name is Debbie Joslin. My husband, Steven and I live in Delta Junction with our three children; Matthew, Emily and Victoria. Steven is the resource forester in our area. I am a homeschooling mom. I teach 3rd and 4th grade Sunday School and Kings Kids at my church.

On January 15, 1999 I was 22 weeks pregnant when we drove 100 miles to Fairbanks for an ultrasound on our child. After a lengthy examination of the baby, I was told we were expecting a male child with multiple anomalies. The baby we named Isaiah John had a brain cyst, a missing or unconnected stomach and a hypoplastic left heart. We were given the name of a Perinatologist in Anchorage. A perinatologist, as I understand it, is a doctor who specializes in unborn babies who have serious health complications. I spoke to this specialist over the phone and made arrangements to go to Anchorage and have another ultrasound. During that phone conversation she urged me to have the pregnancy terminated. The reasons she listed were that the baby would probably die anyway, the medical expenses would be too great and that my own life was probably in danger. Keep in mind, she had not examined me at this point. I made an appointment with this doctor, since I was told she was the only perinatologist in the state. My husband and I drove 350 miles to keep that appointment, leaving Delta at 40 below zero. When we arrived for our appointment we first saw a genetic counselor who went over some family history with us and explained that they thought Isaiah had Trisomy 18, a chromosomal abnormality (an extra number 18 chromosome). She expressed surprise that we were not considering terminating the pregnancy and asked several times whether we wanted to consider terminating the pregnancy. Another ultrasound was performed by a technician and then the perinatologist took over the exam and listed the following anomalies: Brain cyst, missing or unconnected stomach, hypoplastic left heart, eyes not properly spaced, underdeveloped chin, something wrong with spinal development, something wrong with his penis, rocker bottom feet, possibly an extra toe and fluid in the abdominal cavity and lungs. We were told the fluid indicated that Isaiah was already in congestive heart failure and that he would never make it to his due date in May. We were also told that all Trisomy infants were severely mentally retarded. The perinatologist told us that Isaiah would never respond to us if he were to live. She described a somewhat vegetative state but more probably he would be stillborn any day. She said that if he were to be born alive he would only live for a few hours or maybe a day at most. We agreed to an amniocentesis to determine whether Isaiah did actually have Trisomy 18. Our hope was that he would not, and we could begin to make plans for heart surgery. She told us doctors will not operate on Trisomy infants since they ALL die in infancy anyway.

You can imagine what heavy hearts we had as we drove back to Delta. The plans and dreams I had had for my son were shelved as we instead discussed his funeral. Within a few days I got a call from the genetic counselor with the preliminary test results which showed Isaiah had Trisomy 13. I asked how that differed from Trisomy 18 and she said it was worse. She asked again about termination and I told her again that we were not interested in that. Almost immediately I got a call from my doctor in Fairbanks who asked

me about termination. I told her (again) that I was not interested in that. She told me that since my life was in danger and I had chosen to continue with the pregnancy, she could no longer be my doctor as she was a general practitioner and not qualified to handle such a case. I began seeing the osteopath doctor in Delta and an OB/GYN in Fairbanks. I told them what I had been told about the baby and about my own health. The OB/GYN doctor told me he could not understand why I had been told my life was in danger. He treated me during the remainder of the pregnancy and I never had any complications or problems. Only the usual complaints pregnant women suffer from.

A couple of weeks after the preliminary results, the genetic counselor called with the final results from Isaiah's amniocentesis. It was final - Isaiah had Trisomy 13. She asked me again about termination and I told her no again. I then asked her out of curiosity what she would do if I did say yes. She got very excited and told me that "there is the most wonderful clinic in Kansas". I asked if she meant Tiller's and she said "yes, do you know him"? "No, I told her, but I know about him". She offered to have other women who had had abortions call me but I declined. Sensing that I was not interested in pursuing this any further she told me in a very apologetic voice that "there is a parent support group, but well....they are rather positive". She made it sound as though positive was a bad thing to be. She then went on to tell me that she had information on the group including an 800 number as well as pamphlets and books in her office that gave detailed information about Trisomy 18, 13 and related disorders including pictures. I called S.O.F.T. (Support Organization for Trisomy 18, 13 and Related Disorders) right away and found that they were indeed positive - but realistic. I told the woman over the phone about Isaiah's diagnosis and she told me that probably they were right but there was a chance he could live. She talked to me about the other "parents" and I remember asking her, "parents, you mean: they have children?" "Yes, some did," she said. "How old". I was told that they varied but there were a few children who were teenagers and even a couple of adults. The lady took my name and address and told me she would send me a family packet right away. I also requested the books they had available; Trisomy 13, a Guideline for Families and Care of the Infant and Child with Trisomy 18 or 13. These were the books the genetic counselor had described, the very ones she had in her office. While the information was heartbreaking, it also offered some hope and some help. Two things we hadn't had much of. Not only did some of these children live - they played and smiled and laughed and talked and learned things and showed affection and responded to love and affection.

We located a wonderful pediatrician in Fairbanks who agreed that Isaiah's chances were not good but she was willing to do what she could to help him. We made the decision to hire her and made plans to deliver our baby in Fairbanks. On May 10, only 11 days before his due date, Isaiah John Joslin was born at Fairbanks Memorial Hospital. He weighed 6 lbs 1 oz and was 18 1/4 inches long. Isaiah was a pretty baby with lots of bright red hair. Isaiah had difficulty breathing when first born but as the doctors and nurses checked him over they could find no sign of the problems seen earlier on three different ultrasounds. The brain cyst, stomach problem and hypoplastic heart were all missing as were all of the other problems earlier noted. However, Isaiah suffered from a ventricular septal defect (VSD) - a hole in his heart. Although very serious, it was a far cry from the problems he

had had earlier. Isaiah required oxygen and a nasal gastric tube for feeding. Because of the hole in his heart he was too weak to nurse and had to be fed with a tube. Isaiah looked so normal that even the nursing staff agreed we should retest him. Test results again showed Isaiah to have Trisomy 13. He stayed in the hospital for 12 days and then came home where we cared for him for 20 days before he left us to go to be with the LORD in heaven. Those were some of the hardest but sweetest days of my life.

I am telling you this story so you can understand why I stand before you today and ask that you pass HB329/SB 300

After talking to other doctors and doing a great deal of research and reading about Trisomy infants and because of my own personal experience, I believe my life was never in any danger. Yet, this undue burden was placed on me at a time when I already had plenty to worry about.

I was told that ALL Trisomy infants die. I now know that somewhere between 90 and 95% of all Trisomy infants die before one year of age. That doesn't leave much room for hope I realize but it is quite different than saying they ALL die.

I was not told about the parent support group (S.O.F.T.) for over two weeks. Well, you may say they were not sure your child had Trisomy until the final results were in. Perhaps, but they were sure enough that they continually brought up termination. I drove 750 miles to see the doctor and was never shown the written information about this disorder that they had right there. .

Though they were careful to tell me every negative thing they could about the baby, I was never told of any of the risks of having an abortion. There was never any mention made of the risk to my health, either physical or emotional.

I believe the doctors who repeatedly brought up termination probably meant well. The problem comes in where they apparently believed that their professional status, or their medical degrees placed them in a position to know better than me what was best for me, my family and my baby. That simply was not true.

Giving life to Isaiah was hard on our family. But it wasn't TOO hard. It was expensive. But it wasn't TOO expensive. It was hard on the other children. But it wasn't TOO hard. Giving life to Isaiah blessed our family, including the other children. Because of his heart condition Isaiah was always lethargic and sleepy and tired acting but he was never in pain. The equipment which monitored his oxygen saturation rate showed that whenever we held him or showed affection to him, Isaiah was aware of it. His saturation levels would soar when he was being loved on. There seems to be a feeling out there that a successful life is one that is free from pain or suffering or trials and that isn't true. Isaiah's life was successful. We loved him and he loved us.

Of course I would like for every mother to make the same decision I did but I realize that won't happen. But every mother deserves to have all of the information pertinent to her situation so that she can make an intelligent informed decision. I stand before you today and say that if you vote against HB329 you are saying, in effect, that women are not competent enough to be trusted with the facts regarding the health of their own bodies and that of their unborn children. A "no" vote says that you have no compassion for families and believe that doctors are better suited to make decisions for women and their unborn babies.

A "yes" vote for ^{SB200} HB329 sends an entirely different message. A vote for informed consent says that you have respect for the intelligence of women and believe that they have the right to be trusted with the information necessary to make decisions for themselves. I trust and hope that this body of legislators will prove themselves to be in favor of women's rights.

Thank you.

Debbie Joslin

Jan Whitefield, M.D., Ph.D.

4115 Lako Olin Parkway
Anchorage, AK 99508

April 4, 2000

Re: SB300

Dear Madams and Sirs:

I object to this proposed legislation on a variety of grounds. As a person who supplies abortion as part of my work, I have very specific insight on the effects of this legislation. I do NOT have anything monetary to gain from opposing this legislation. If the number of abortions decreases in Alaska, the options are delivery of a fetus, and that also is part of my work, and represents a larger income to me than abortion, so this is not financially motivated.

- The mandatory 24 hour waiting period, as written, will be discriminatory to Alaskan Natives. There is a large database of information maintained by the State epidemiologist. Women who fly in from outlying areas where abortion is not available will have to spend extra time in the location where the procedure is being performed. This means that, as a group, the procedures will cost them more money than compared to a person who lives where the procedures are locally available. Since the majority of women who live in the bush are Alaskan Natives, this has the effect of making abortions less accessible, and more expensive than for their non-Native counterparts. This makes the law discriminatory to Alaskan Natives. Data analysis on the abortion database will clearly demonstrate this discrimination toward Alaska Natives.
- The bill legislates material to be given to the patient that provides information about the possibility of an "unborn child's" survival at the various gestational ages. It should be noted that "unborn child" is a term not listed in the index on the noted book "Williams Obstetrics", an authoritative text in Obstetrics. However, even if one substitutes a medically correct term such as "fetus", this information is argued over by experts in the field, and an agreement could not be reached as to what this information should be.
- Section 18.16.060 paragraph (b), subheading (1) lists requirements for informed consent, and information that must be available and given to a patient. Subheading (2) states that the Department of Health and Social Services provides written information that describes the fetus (the bill uses: "unborn child" here) at various gestational ages, and lists the agencies that offer alternatives to abortion; that the woman has the right to review the information, and that a copy will be given to the woman at no cost. This information is already available, and is given by me to any patient who requests it, but I do not force it on her. Last week I did abortions on two women who wanted to be pregnant, and were carrying desired pregnancies. Unfortunately, prenatal diagnosis found that both of the women were carrying pregnancies that were incompatible with life. Both chose to have abortions, rather than carry these pregnancies and wait for either intrauterine deaths, or deliver fetuses, only to have them die shortly after birth. The extensive descriptions that are mandated by this bill would have been very difficult for these patients to go through. They wanted these pregnancies, and this type of counseling would have been emotional torture for them.
- C. Everette Koop, when he was a Pro-Life Surgeon General, analyzed the medical literature and could demonstrate no link between abortion and psychological risk. This bill devotes an entire

Dr. Whitefield

● Page 2

April 4, 2000

subheading to a risk that is non-existent according to our prior Surgeon General. This represents clear bias on the part of the crafters of the bill.

- Links between abortion and breast cancer have similarly been investigated by the American College of Obstetrics and Gynecology, and no link could be demonstrated, leading ACOG to issue a statement stating that no demonstrable link exists. This purported risk is alluded to in the bill, again demonstrating clear bias on the part of the crafters of the bill.
- The word "conception" was defined as the fusion of a human spermatozoon with a human ovum. Stedman's Medical dictionary, 23rd Ed. defines it as "implantation of a blastocyst". Currently, in Alaska, it is possible for couples to undergo in vitro fertilization (IVF), where fertilized eggs can be frozen when too many eggs result from a stimulated ovarian cycle. If a woman has fertilized eggs stored somewhere, how does this bill affect storage of these fertilized ova? If a woman finds that she has all the children that she wants, does this mean that destruction of those fertilized eggs is actually an abortion, and, if so, does she need to be similarly counseled on these abortion issues? Does she need to be advised that there may be women who would agree to be surrogate mothers with these fertilized ova? Would the laboratory director be required to do abortion counseling if fertilized eggs are destroyed?
- According to this bill, "fertilization" has the same meaning as conception. If that is so, why do physicians and scientists have two separate words with two separate meanings?
- The Standard medical dictionary, "Stedman's", does not have a definition for "unborn child", but does define such terms as "blastocyst", "zygote", "embryo", and other valid scientific terms. The term "unborn child" has the effect of clouding an already contentious area. This state has never assigned to a fetus the rights of a live born child, and this definition tends to only cloud these issues.
- No other surgical procedure is singled out in Alaskan Law where the legislative branch attempts to define medical informed consent. Informed consent is a fluid process. As medical techniques evolve, risks and benefits of given procedures change. The physicians who perform procedures are the ones most knowledgeable in providing current, state of the art discussions about this, or any other procedure. Inherently, it is unreasonable to expect that the legislature could write a law containing any specifics at all, since these specifics will change over time. As specific risk and benefits change, the law would have to be rewritten; a daunting task indeed. That is why informed consent needs to remain in the hands of the medical provider.

This bill is highly biased, essentially forcing information on a woman who selects to seek an abortion, no matter what the reason. There is no parallel bill requiring women who choose to carry a pregnancy to term to be supplied with alternatives, including abortion providers in their area, whom they could turn to if they chose not to carry the pregnancy. There is no parallel bill outlining the risks of carrying a pregnancy to term, nor educational material outlining the responsibilities of raising a child, or potential psychological risks of having a child when a woman isn't prepared for it. If a woman carries a pregnancy to term, there is no parallel requirement that, for instance, the WICK office be required to supply the names of facilities and providers that perform abortions, with appropriate telephone numbers to contact them.

Psychological damage has never been proven to occur as a result of abortions, but this bill, if passed and enforced, may change the situation. If women are forced to undergo biased counseling, it is possible that psychological damage may occur, thus causing a problem where none now exists. Contrary to "protecting" Alaska women, this bill may actually harm them.

Taken as a whole, this bill has a number of flaws. It is discriminatory to Alaskan Natives. It is biased in that it forces information on a person seeking an abortion who may or may not want this information, and the information is already available for the patient who wants it. It attempts to define informed

• Page 3

April 4, 2000

consent – a process wholly in the purview of the provider, not the legislature. It "defines" medical terms such as "conception," which already have medical definitions, and by doing so needlessly introduces ambiguities such as in the area of embryo storage.

Please veto this bill if it ever is brought to a vote in the senate, or at any of the subcommittees.

Sincerely,

Jan Whitefield, M.D., Ph.D.

Alaska Civil Liberties Union

An Affiliate of the American Civil Liberties Union

P. O. Box 201844, Anchorage, AK 99520-1844

Phone: (907) 258-0044 Fax: (907) 258-0288 Email: akclu@alaska.net

To: Senate Judiciary Committee

From: Jennifer Rudinger, Executive Director

Date: Tuesday April 4, 2000 (for testimony to be delivered in April 5th Committee hearing)

Re: SB 300: BIASED COUNSELING AGAINST ABORTION AND MANDATORY DELAY

The US Supreme Court's 1992 decision in Planned Parenthood of Southeastern Pennsylvania v. Casey upheld, among other restrictions, a Pennsylvania law requiring that physicians provide women with state-prepared anti-choice materials at least 24 hours prior to the abortion procedure. The law forces a doctor to provide every woman seeking an abortion with information that is intended to discourage the procedure -- even if the information is irrelevant, unnecessary, and ultimately harmful to her health.

Such "biased counseling" laws are currently enforced in more than a dozen states. In a number of other states, these laws have been enacted but are enjoined or otherwise unenforced. Often introduced under the deceptive label of "Informed Consent" or "Women's Right to Know," biased counseling laws in fact serve to hamper women's access to abortion.

Alaska, however, is one of several states that evaluate restrictions on women's reproductive choices under the stricter standard of judicial review established by the US Supreme Court in 1973 in Roe v. Wade. Therefore, the Casey analysis and conclusion do not apply when an Alaska court reviews laws such as SB 300, and it is our opinion that SB 300 is unconstitutional under the Alaska Supreme Court's decision in Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice, et al. in 1997.

Aside from our concerns that SB 300 violates the Alaska Constitution, there are many reasons why the bill is bad public policy.

1. **Biased Counseling Gives Women Inaccurate and Incomplete Medical Information.**

Mandatory anti-choice lectures do not give women accurate or meaningful medical information. Women are not told, for example, that a legal, first-trimester abortion has a lower complication rate than any other surgery, but in fact, the mortality risk of full-term pregnancy and childbirth is more than 20 times *greater* than that of a first-trimester abortion. Rather, women are read a list of possible complications from the abortion procedure, which in reality occur very rarely. SB 300 does not require that women be told about the psychological effects of giving a child up for adoption or carrying an unwanted

pregnancy to term – rather, SB 300 requires that women be told only that *abortions* pose risks of

SB 300 Position Paper

Page 2 of 4

psychological injury. In fact, according to a 1987-88 investigation by the former Surgeon General of the United States, Dr. C. Everett Koop (who is no champion of choice), as well as a study by the World Health Organization, there is no medical evidence that abortion causes psychological injury. On the contrary, relief is the most common reaction to a voluntary abortion, whereas women who are forced to continue unwanted pregnancies suffer adverse and sometimes severe psychological consequences.

SB 300 requires physicians to tell their patients that abortion increases a woman's chance of developing breast cancer. This is a scientifically unsupported statement mandated not out of concern for women's health, but in order to scare women away from choosing abortion. In fact, the most recent and most conclusive research about abortion and breast cancer, a study of more than 1.5 million women in Denmark, found that "induced abortions have no overall effect on the risk of breast cancer."

2. Requiring That Physicians Deliver the Biased Lectures Makes Access to Quality Reproductive Health Care More Difficult and Expensive.

SB 300 prohibits a trained counselor, nurse, or other health care practitioner from providing the biased counseling to the patient, requiring instead that a doctor deliver the state's anti-choice message. This stipulation has a direct effect on women's health. Many clinics experience serious difficulty in finding doctors willing and able to perform abortions, and the few who are available often find themselves barely able to meet the needs of their patients. By prohibiting doctors from delegating counseling and related tasks to other trained professionals, these laws make it far more difficult for clinics to provide women with the quality health care they deserve. Furthermore, since a doctor's time costs much more than that of a nurse, clinician, social worker, or counselor, the doctors-only stipulation drives up the costs of abortion and other health services provided by clinics.

3. Informed Consent Is Already Required For Medical Procedures.

A woman must give her informed consent before undergoing *any* surgical procedure, including abortion. Modern standards of the medical profession, as well as state laws, ensure that health care practitioners provide women with accurate and unbiased information regarding the risks and benefits of their various treatment options, and obtain their informed consent. SB 300 singles out abortion from all other medical procedures. Implicit in the requirement of a biased lecture is the assumption that women do not adequately think through their abortion decision and that the state must do their thinking for them. This assumption reflects a lack of respect for women's moral decision-making. In fact, virtually all women have carefully considered their decision to have an abortion

by the time they arrive at the clinic. Clinics in Alaska routinely refer for additional counseling the small number of women who remain ambivalent.

SB 300 Position Paper
Page 3 of 4

4. Biased Counseling Requirements Violate Standard Medical Practice and the Doctor/Patient Relationship.

SB 300 requires a doctor to supply all of the state-mandated information to every woman in every instance in order to avoid liability. This state-imposed litany may conflict with the doctor's ethical obligation to give the best medical advice to the patient, in view of her individual circumstances. For example, it is both pointless and cruel to "inform" a victim of rape or incest that the "father" of the "unborn child" is liable for financial assistance if she carries the pregnancy to term, or to remind a woman carrying a fetus with impairments so severe that it could never survive outside the womb that her "unborn child" will be 20 weeks old at the time of the abortion. Moreover, doctors are forced to provide nonmedical information -- about the availability of child support, for example -- about which they may not be qualified to speak and which is totally irrelevant to the physician's ethical obligation to provide the best medical care and advice to the patient. Indeed, the American Medical Association has resolved to oppose these types of measures, finding that "informed consent requirements [for specific medical procedures] often are not medically indicated and never are appropriate areas for codification in law." [American Medical Association, "AMA Opposition to 'Procedure Specific' Informed Consent," House of Delegates Resolution 226 (A-99).]

SB 300 is a perfect example of why legislators should not insert themselves into the business of practicing medicine. The definitions of "fertilization", "gestational age", and "pregnancy" contained in the bill are medically inaccurate, and the definition and use of the term "unborn child" is both medically inaccurate and inflammatory. Furthermore, providing women with "information" about their legal rights to collect child support from the father is both insensitive and cruel in the case of rape or incest victims and unrealistic because in reality, the percentage of fathers who actually *pay* this support is appallingly low.

5. Waiting Periods Cause Medical Risks

There are fewer than a dozen abortion providers in Alaska, and they are concentrated in Anchorage and the Kenai Peninsula. Therefore, many women in rural Alaska and in the Interior must travel great distances at great personal expense in order to terminate their pregnancy. Alaska Women's Health Services, for example, one of a handful of clinics in the state that perform abortions, serves women from all over the state whose journeys are more often measured in days than hours. With the hardships that these women face in rescheduling work, family, or school responsibilities, compounded by the providers' scheduling problems, a 24-hour waiting period could result in a delay as long as two weeks. Given these realities, a waiting period poses significant health risks to women seeking abortions.

Such a delay can push a first-trimester abortion into a second-trimester abortion, making what would have been a routine procedure into a more complicated and dangerous one. The American Medical Association, in its report on abortion, states that "[m]andatory waiting periods [and other barriers] have the potential to threaten the safety of induced abortion. Each of these factors increases the gestational age at which the induced pregnancy

SB 300 Position Paper
Page 4 of 4

termination occurs, thereby also increasing the risk associated with the procedure." After the twelfth week of pregnancy, abortions require more skill, and there is greater risk of uterine perforation, hemorrhage, and other complications. By compelling women to delay their abortions, forced waiting periods add a significant risk factor to the abortion procedure.

6. Waiting Period Laws Demean Women's Decision-Making Ability.

No other medical procedures, even much more dangerous and complicated surgeries, have legally required waiting periods. The forced delay implies that women who seek abortions do so without adequate reflection and are incapable of making reasoned, moral decisions regarding their health and future. In reality, a built-in delay already exists between the time a woman finds out that she is pregnant and the time she enters the clinic, during which period she has ample, time to think over her decision. As I have already pointed out above, clinics themselves routinely provide counseling and refer any uncertain patients for further counseling. For some, the mandatory delay is more than merely insulting – it is cruel to tell a woman who knows that her fetus is anencephalic (lacking the upper portion of the brain) or a woman who has become pregnant through rape or incest that she must wait 24 hours and reconsider her decision.

7. Conclusion: SB 300 Endangers Women's Health and Violates Women's Constitutional Right to Reproductive Choice.

SB 300 is not created to protect women's health. The purpose is clear: this bill is designed to make a woman's very personal decision even more difficult. SB 300 intimidates women and discourages them from exercising their reproductive rights. Fear of civil sanctions and the intrusive nature of the state-prescribed litany of propaganda also serve to deter doctors from performing abortions, further exacerbating the alarming present shortage of providers in Alaska.

The AkCLU respectfully urges this Committee not to place any further burdens on women's rights to choose abortion. Please feel free to call on me if you have any further questions or concerns. I can be reached at (907) 258-0044 most days, from mid-morning until mid-evening.

Thank you for your careful consideration.

SCR

3

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

No. 1
Bill Version: SR 3

Revision Date/Time (Note if correction) _____ Dept. Affect(S) Publish Date: 4-6-00
 Title Sovereignty of the State: Resources BRU _____
 Component _____
 Sponsor Senator Taylor _____
 Requester Senate Resources Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
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 ()						
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FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This resolution is anticipated to have no fiscal impact on state agencies.

Prepared by: Juli Lucky Phone 465-4907
 Division Senate Resources Committee Date/Time 3/30/00 5:20 PM
 Approved by _____ Date _____
 Agency _____

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Senator Robin L. Taylor

SPONSOR STATEMENT SCR 3

Relating to the sovereignty of the State of Alaska and the sovereign right of the State of Alaska to manage the natural resources of Alaska.

SCR 3 is based on the Constitution of the United States, the Constitution of the State of Alaska, the Alaska Statehood Act and the Alaska Statehood Compact, as well as U.S. Supreme Court case law. It asks the governor and the legislature to uphold their oaths of office and defend our sovereign rights as a state and as a people.

When Congress passes the Alaska National Interest Lands Conservation Act (ANILCA), the provisions of the Alaska Statehood Compact, the Public Trust Doctrine and the Constitutions of the State of Alaska and the Constitution of the United States of America were violated.

SCR 3 recognizes the need of the legislature to pursue a judicial solution to the conflicts between ANILCA and our State and Federal Constitutions. The resolution further requests the Governor to urge the Secretary of Interior to put the unresolved dispute before the U.S. Supreme Court for a final resolution. Finally, the resolution requests the Interior Department to allow fish and game management to remain with the state until the U.S. Supreme Court has ruled on the Constitutionality of ANILCA.

District A:

Hyder • Ketchikan • Kupreanof • Meyers Chuck • Petersburg • Saxman • Sitka • Wrangell

ACCORDING TO:

- THE U.S. CONSTITUTION; AND
- THE U.S. SUPREME COURT;

THE POWER TO CONTROL FISHING IS AN ESSENTIAL ELEMENT OF STATE SOVEREIGNTY AND THE U.S. CONGRESS DOES NOT HAVE ANY SIMILAR POWER IN ALASKA'S NAVIGABLE WATERS.

"[T]he States entered the federal system with their sovereignty intact."

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)

"Under the federal system established by the Constitution, the States retain a 'residuary and inviolable sovereignty.'"

Alden et al. v. Maine, 98-436 (Decided June 23, 1999 - Citing *The Federalist* No. 39, p. 245)

"Being an instrument of limited and enumerated powers, it follows irresistibly that what is not conferred [to the Federal Government by the Constitution] is withheld, and belongs to State authorities."

New York v. United States, 505 U.S. 144, 156 (1992)

"[I]f a power is an attribute of state sovereignty . . . it is necessarily a power the Constitution has not conferred on Congress."

New York v. United States, 505 U.S. 144, 156 (1992) Referencing *United States v. Oregon*, 366 U.S. 643, 649 (1961); *Case v. Bowles*, 327 U.S. 92, 102 (1946); and *Oklahoma ex. Rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941)

"Ownership of submerged lands - which carries with it the power to control navigation, fishing, and other public uses of water - is an essential attribute of [Alaska's] sovereignty."

United States v. Alaska, No. 84 Orig. (Decided June 19, 1997)

ACCORDING TO:

- THE UNITED STATES CONGRESS;
- THE U.S. SUPREME COURT; AND
- THE U.S. JUSTICE DEPARTMENT;

TITLE TO ALASKA'S NAVIGABLE WATERS AND SUBMERGED LANDS BELONGS TO THE STATE OF ALASKA

"[N]ew States are admitted to the Union on an "equal footing" with the original 13 colonies and succeed to the United States' title to the beds of navigable waters within their boundaries."

United States v. Alaska, No. 84, Orig. (Decided June 19, 1997)

"The State [of Alaska] received at statehood all navigable waterways . . ."

Judicial Admission by Elizabeth Ann Peterson - Attorney for U.S. Justice Department - during oral arguments re: *The Alaska Legislative Council, Alaska State Legislature, et al. v. Bruce Babbitt, Secretary of The Interior, et al.* held in the U.S. Court of Appeals for the District of Columbia on Thursday, April 8, 1999.

"In 1953 . . . Congress enacted the Submerged Lands Act . . . That Act 'confirmed' and 'established' State's title to and interest in 'lands beneath navigable waters within the boundaries of the respective States.'"

United States v. Alaska, No. 84, Orig. (Decided June 19, 1997)

"The Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska."

United States v. Alaska, No. 84, Orig. (Decided June 19, 1997)

"As a general matter, then, Alaska is entitled¹ under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act alone to submerged lands extending three miles seaward of its coastline."

United States v. Alaska, No. 84, Orig. (Decided June 19, 1997)

¹ *Black's Law Dictionary*, West Publishing Co., 1990 Edition: "Entitle. In its usual sense, to entitle is to give a right or legal title to."

"State sovereignty over submerged lands rests on the Submerged Lands Act of 1953."

United States v. Alaska, 442 U.S. 184, 188 (1975)

"Section 6(m) of the Alaska Statehood Act of July 7, 1958, provides that the Submerged Lands Act 'shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.'"

United States v. Alaska, 442 U.S. 184, 188 (Footnote 3) (1975)

"The Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska."

United States v. Alaska, No. 84, Orig. (Decided June 19, 1997)

THE SUBMERGED LANDS ACT OF 1953

"Sec. 1311 (a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use. It is determined and declared to be in the public interest that

(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the respective States . . ."

Public Law 31, 83rd Congress, Second Session: 67 Stat. 29

**THE SUBMERGED LANDS ACT AMOUNTS TO A QUIT CLAIM DEED. HENCE,
ALL LEGAL AND JUDICIAL ROADS LEAD TO THE FOLLOWING:**

- Title to Alaska's Submerged Lands belongs to the State of Alaska.
- Alaska holds title to and owns all the natural resources in all her Submerged Lands.
- Alaska holds title to and owns all the natural resources in all her Navigable Waters.
- The right and power to manage all Alaska's Submerged Lands and Navigable Waters belongs to the State of Alaska and is subject to State law (not Federal law).
- The right and power to manage all natural resources (including fish) in Alaska's Navigable Waters belongs to the State of Alaska and is subject to State law (not Federal law).

ALASKA HOLDS SOVEREIGN TITLE TO AND MANAGEMENT AUTHORITY
OVER ALASKA'S SUBMERGED LANDS, NAVIGABLE WATERS AND THE
NATURAL RESOURCES ON AND WITHIN THOSE LANDS AND WATERS

In his September 2, 1999 press release announcing his call for the September 22, 1999 special session on "subsistence," Alaska Governor Tony Knowles was quoted as stating:

"It would be irresponsible to turn over our right and responsibility to manage Alaska's fish and game to the federal government, a right that was at the heart of Statehood which we are celebrating on the 40th anniversary this year."¹

However, as shown below, it was Governor Knowles himself who has tried the hardest to surrender that right to the federal government.

During his term of office, Governor Hickel brought a lawsuit in the Federal Courts titled *State of Alaska v. Babbitt*.² He challenged federal intervention and defended Alaska's sovereign "title" and right to manage its submerged lands, navigable waters and the resources therein according to State law.

The primary discussion in *Babbitt* concerned the definition of "public lands" in Section 102 of the Alaska National Interest Lands Conservation Act ("ANILCA").³ The federal government argued that the definition of "public lands" includes navigable waters within and adjacent to federal uplands, by virtue of the implied reservation of water rights doctrine.⁴ The State of Alaska objected, pointing out that "title" to Alaska's submerged lands and navigable waters had definitively been transferred to Alaska at statehood. Therefore, according to the Equal Footing Doctrine of the U.S. Constitution and the Submerged Lands Act of 1953,⁵ ownership of and management of those lands, waters and the natural resources therein are subject to state law - not federal law. The State also pointed out that ANILCA itself clearly provides

¹ September 2, 1999 Press Release from Office of the Governor.

² 72 F.3d 698 (9th Cir. 1995)

³ 16 U.S.C. 1102.

⁴ See discussion in *State of Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995).

⁵ Section 6(m) of the Alaska Statehood Act of July 7, 1958, provides that the Submerged Lands Act "shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." 72 Stat. 343, note following 48 U.S.C. c.2 Section 2 of the Act provides: "The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." 72 Stat. 339, note following 48 U.S.C. c.2.

that federal "public land" does not include "land validly . . . granted . . . to the State under any other provision of Federal Law."⁶

Once again, *Babbitt* was an "ownership" case defending Alaska's "title" to its sovereign lands and resources and Alaska's sovereign right to manage those lands and resources according to State law. It had nothing at all to do with who could hunt or fish on Alaska's submerged lands or in Alaska's navigable waters.

Shortly after taking office, Governor Knowles announced (in Fairbanks, at a luncheon meeting of the Alaska Outdoor Council) that he was dropping *Alaska v. Babbitt* because some Alaskans felt it was "anti-subsistence." Later, at its annual convention, he told the Alaska Federation of Natives he dismissed the case to fulfill a political campaign promise. Attorney General Bothello supported that admission when he testified before the State Senate that the case was not dismissed for any "legal" reason.

By dismissing *Babbitt* "with prejudice," Governor Knowles unilaterally, without legal contest, agreed to forfeit control over huge tracts of Alaska's sovereign submerged lands, thousands of miles of Alaska's sovereign navigable waters, hundreds of thousands of Alaska's sovereign lakes and all of Alaska's sovereign natural resources within those lands and waters (including but not limited to fish) to the federal government. In other words, by dismissing "with prejudice," the Governor "consented" to the federal government's blatant attempt to narrow Alaska's sovereign domain - an act the U.S. Supreme Court has recently held to be without legal basis.⁷

Governor Knowles knew exactly what he was doing. He, not the Legislature, has caused the dilemma that is currently facing the State. He decided not to contest the federal government's position that Alaska's sovereign submerged lands and navigable waters in and adjacent to federal uplands are "Federal Lands." It was Governor Knowles who ceded management authority to the federal government: - a position that is without legal authority and is a barefaced attempt to surrender Alaska's sovereign powers to the federal government.

Now, after personally attempting to remove all avenues of appeal to the courts, the Governor is telling the Legislature that they must initiate a change in the equality provisions of Alaska's Constitution or they will take the blame for a federal takeover of Alaska's resources. His recent call for a special session (like all others the

⁶ 16 U.S.C. 3102(j)(3).

⁷ *New York v. United States*, 505 U.S. 144, 182 (1992). "Where Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the "consent" of state officials . . . The authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States."

Governor has initiated) is indeed a thinly veiled appeal for the Legislature to join him in his surrender of Alaska's sovereignty to the federal government

Interestingly, the last paragraph of the Governor's September 2nd press release provides:

"Every public opinion survey says Alaskans want us to act to preserve state sovereignty and the culture of rural residents," Knowles said. "As elected leaders, we must now have the courage and foresight to take the actions necessary to achieve these worthy goals."

Here, the Governor is right. Without a doubt, Alaskans do want a Legislature (and a Governor) with the courage and foresight to take the actions necessary to preserve (not surrender) state sovereignty. In fact, each Legislator (and the Governor) has sworn an oath to do just that. It is abundantly clear that Alaska's elected leaders cannot act to preserve Alaska's Sovereignty by surrendering to the federal government the State's ability to manage or allocate Alaska's sovereign lands, waters and wildlife resources.

What actions can the Legislature (and the Governor) take to preserve Alaska's Sovereignty?

Each member must examine the legal foundation supporting Alaska's Sovereign title and Sovereign management authority. Then, the Legislature can forge an action plan based on solid legal grounds.

Three recent U.S. Supreme Court cases: a 1975 Alaska case; a 1997 Alaska case; and a 1997 Idaho case, very clearly address the matter of state sovereignty over submerged lands.

In 1975, in *United States v. Alaska*, a case that addressed who owned the submerged lands in lower Cook Inlet, the U.S. Supreme Court ruled:

State sovereignty over submerged lands rests on the Submerged Lands Act of 1953 . . .⁹

Section 6(m) of the Alaska Statehood Act of July 7, 1958, provides that the Submerged Lands Act "shall be

⁹ *United States v. Alaska*, 422 U.S. 184, 187 (1975).

applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder."⁹

Moreover, in June of 1997, in the Alaska case of *United States of America, Plaintiff v. State of Alaska*,¹⁰ a case that addressed who owned certain submerged lands in Alaska, Justice O'Connor, delivering the opinion of the U.S. Supreme Court, wrote:

Ownership of submerged lands – which carries with it the power to control navigation, fishing, and other public uses of water – is an essential attribute of [state] sovereignty.

Justice O'Connor then very clearly explained how Alaska obtained sovereign title to and became owner of her submerged lands. In this 1997 Alaska case, the U.S. Supreme Court said:

Under the doctrine of *Lessee of Pollard v. Hagan* . . . new States are admitted into the Union on an "equal footing" with the original colonies and succeed to the United States' title to the beds of navigable waters within their boundaries.

The Alaska Statehood Act expressly provides that the [1953] Submerged Lands Act applies to Alaska.

That [Submerged Lands] Act "confirmed" and "established" States' title to and interest in "lands beneath navigable waters within the "boundaries of the respective states."

The [Submerged Lands] Act essentially confirms States' equal footing title to tidelands and submerged lands.

As a general matter, then, Alaska is entitled under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act alone to submerged lands three miles seaward of its coastline.

⁹ *United States v. Alaska*, 422 U.S. 184 (footnote 3) (1975).

¹⁰ *United States of America, Plaintiff v. State of Alaska*, No. 84 Orig. (1997).

"Entitled" is defined as: "In its usual sense, to entitle is to give a right or legal title to."¹¹

The Court said the only exception to this automatic transfer at statehood was if the United States had "explicitly retained" specific submerged lands prior to statehood.

Then, in the 1997 case of *Idaho v. Coeur d'Alene Tribe of Idaho*,¹² the U.S. Supreme Court said:

As we stressed . . . lands underlying navigable waters have historically been considered "sovereign lands." State ownership of them has been "considered an essential attribute of sovereignty."

In consequence of this rule, a State's title to these sovereign lands arises from the equal footing doctrine and is "conferred not by Congress but by the Constitution itself."

There is no doubt. The U.S. Supreme Court believes Alaska's submerged lands are State "sovereign lands" and Alaska's ownership of them is "considered an essential attribute of [State] sovereignty."

In the 1992 case of *New York v. United States*,¹³ the U.S. Supreme Court ruled:

[I]f a power is an attribute of state sovereignty . . . it is necessarily a power the Constitution has not conferred on Congress.

The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

¹¹ Black's Law Dictionary, (1990 Ed.).

¹² U.S. Supreme Court No. 94-1474 (decided June 23, 1997).

¹³ *New York v. United States*, 505 U.S. 144, 156 (1992).

Clearly, according to very recent, clear and consistent rulings of the U.S. Supreme Court: State ownership of submerged lands is an "essential attribute" of sovereignty; the power to control fishing in the water covering a state's submerged lands is an "essential attribute" of state sovereignty; and, since the power to control fishing in those waters is an "essential attribute" of state sovereignty, it is necessarily a power the Constitution has not conferred on Congress.

But, that's not all.

Notice that both Alaska cases refer to the Submerged Lands Act of 1953. Most Alaskans have never read the Act and are unaware of how directly on point it is to the current conflict. The Act was passed in 1953 by Congress to once and for all clarify which sovereign (state or federal) holds title to, ownership of and management authority over submerged lands, navigable waters and the natural resources (including fish) within those lands and waters. The Submerged Lands Act is very simple and very clear. Anyone can understand it. The portion pertinent to the matter at hand provides:

Sec. 1311(a)(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are subject to the respective States . . .

Clearly, Congress intended the Submerged Lands Act to be a simple quitclaim deed. Then Congress provided, in the Alaska Statehood Act, that the Submerged Lands Act would apply to Alaska - even though Alaska became a State long after the Act was passed. Therefore, since the moment of statehood, Alaska's submerged lands, navigable waters and the natural resources within such lands and waters have belonged to Alaska and their management has been subject to Alaska law. Hence, according to the clear and consistent rulings of the U.S. Supreme Court in Alaska cases, the federal government has no ownership of or title to Alaska's submerged lands, navigable waters or the resources in those lands and waters and has no management power or authority over any of those lands, waters and natural resources (including fish). Once again, the power to control fishing in Alaska's navigable waters is "necessarily a power the Constitution has not conferred on Congress."¹⁴

¹⁴ *New York v. United States*, 505 U.S. 144, 156 (1992).

Now, it is abundantly clear why the federal government is doing everything it can to frighten and coerce Alaskans into surrendering their sovereignty and equality and to keep the merits of this issue from being argued in the courts! They know Alaska would win!

The foregoing white paper was researched and prepared by Ralph Seekins, Chairman and Lynn Levensgood, Executive Director of:

ALASKA WILDLIFE CONSERVATION ASSOCIATION

1625 Old Steese Highway

Fairbanks, Alaska 99701

(907) 456-1992

SJR

2



SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

**Sponsor Statement
For
Senate Joint Resolution 2**

**LIMITING PRISONER RIGHTS REGARDING CRIMINAL ADMINISTRATION
OF THE ALASKA CONSTITUTION
TO THE REQUIREMENTS OF THE UNITED STATES CONSTITUTION**

Senate Joint Resolution 2 would limit the rights conveyed to convicted prisoners in Alaska under Section 12 of the Alaska Constitution to those requirements afforded under the United States Constitution. Since the Alaska Constitution is quite different from the U.S. Constitution regarding criminal administration, SJR 2 adopts a single standard - the Federal standard - for determining these rights.

Last year a different version of SJR 2 passed the legislature and was to be considered by voters on the General Election Ballot. Last year's version (Ballot Measure 1) created a new section of the Alaska Constitution which would have limited all rights conveyed to convicted prisoners in Alaska to those rights required by the U.S. Constitution.

A statewide Dittman research poll indicated 76% of Alaskans supported Ballot Measure #1.

However the Alaska Supreme Court, in Bess v. Ulmer, removed Ballot Measure #1 from the General Election Ballot. In its decision the court created new constitutional law in Alaska by deciding that Ballot Measure #1 was not an "amendment" but rather a "revision" because it would affect more than one section of the constitution and such a change should only be done at a constitutional convention.

In contrast to last year's version, Senate Joint Resolution 2 **only** applies to those rights conferred on convicted prisoners by any and all language of Article 1, Section 12 of the Alaska's Constitution. SJR 2 also returns the meaning of the phrase "principle of reformation" to the original intent of the framers of the Alaska Constitution by limiting the effect of "the principle of reformation", contained in Article 1, Section 12 of the Alaska's Constitution, to a guiding principle of criminal administration. In doing this, SJR 2 makes it clear that Article 1, Section 12 does not create an individual right of prisoners to rehabilitation.

January-May: STATE CAPITOL • JUNEAU, AK • 99801-1182 • (907) 465-3892 • FAX: (907) 465-6595
June-December: 716 W. 4TH AVE. • STE. 430 • ANCHORAGE, AK • 99501 • (907) 269-0234 • FAX: (907) 269-0238

Vice-Chair, Senate Finance Committee • Chairman, Capitol Budget Subcommittee •
MEMBER: Senate Judiciary Committee • Senate Labor & Commerce Committee • Legislative Council

Produced in House

**SPONSOR
STATEMENT**

Senate Joint Resolution 2
Sponsor Statement
Page 2

Under the United States Constitution, courts have not articulated a right of prisoners to participate in particular programs or to receive rehabilitative treatment. However, the Alaska Supreme Court has found that prisoners have an individual special right of access to rehabilitation programs under the Alaska Constitution.

Most recently the Alaska Supreme Court held that visitation is part of the right to rehabilitation guaranteed inmates under Article 1, Section 12 of the Alaska Constitution. This decision requires the Department of Corrections to give substantial deference to Alaska inmates' desire to be incarcerated near family and friends thus hindering the department's ability to control prison population through inmate transfers.

Federal courts and appellate courts in the 49 other states have universally rejected the existence of this "right" as part of an inmates' rehabilitation.

These decisions have created difficulties with prison administration in Alaska and have encouraged lawsuits by prisoners under the Alaska Constitution. Imprisoned convicted criminals should not be entitled to the same special individual rights law-abiding citizens enjoy.

The Cleary consent decree has also hampered prison administration in Alaska. The Cleary consent decree does not distinguish between Federal and State Constitutional standards. But this decree does require greater prisoners' rights in Alaska than are required by the U.S. Constitution. SJR 2 cannot directly overrule Cleary since it was a consent decree. SJR 2 can, however, assure that the U.S. Constitution, and not a more protective state constitutional standard, will be the standard for criminal administration in Alaska.

Additionally, the state may be able to modify or overturn the Cleary consent decree in which case the new single standard for criminal administration adopted by SJR 2 could be applied. Passage of SJR 2 itself may give the state sufficient basis to request a court to re-open the Cleary settlement and at the least will add to any legal justification to do so. The immediate impact of passage of SJR 2 may be small, but will prevent state courts from any future expansion of prisoners' rights regarding criminal administration based on the Alaska State Constitution.

The framers of Alaska's Constitution gave Alaskans many highly desirable individual rights and liberties not found in the United States Constitution. Unfortunately, the Alaska Supreme Court has wrongly decided these additional constitutional rights not only protect law-abiding citizens but also give special rights to imprisoned convicted criminals. Passage of SJR 2 would correct this mistake.

DD/jja



SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

SJR 2 - FEDERAL CONSTITUTIONAL RIGHTS VS. STATE CONSTITUTIONAL RIGHTS REGARDING CRIMINAL ADMINISTRATION

1) PROGRAMS AND REHABILITATION

Under the United States Constitution courts have not articulated a right of prisoners to participate in particular programs or to receive rehabilitative treatment. Each circuit that has considered the issue has held that enforced idleness does not constitute cruel and unusual punishment. Toussaint v. McCarthy (1986)

The Alaska Supreme Court has found that prisoners have a right of access to rehabilitation programs under the Alaska Constitution. Ferguson v. State, Department of Corrections (1990)

2) LOCATION OF INCARCERATION

The Alaska Supreme Court held visitation is part of the right to rehabilitation guaranteed inmates under Article 1, section 12 of the Alaska Constitution. Brandon v. Department of Corrections (1997)

This decision requires the Department of Corrections to give substantial deference to Alaska inmates' desire to be incarcerated near family and friends thereby hindering the department's ability to control prison population through inmate transfers.

Federal courts and appellate courts in the 49 other states have universally rejected the existence of this "right" as part of an inmates' rehabilitation.

3) SQUARE FOOTAGE REQUIREMENTS ON CELL SIZES

The Department of Corrections is required, under the Cleary consent decree, to provide a specific amount of square footage in inmate's cells. These square footage requirements vary on the number of inmates in a cell and the number of hours a prisoner is required to be in the cell. Additionally, there are specific requirements on the number of inmates that may occupy "dormitory" type cells. There are also different square footage requirements for any new facility built in Alaska.

The Federal constitution does not make such square footage requirements for prisoners' cells or limits on dormitory style housing.

DD/jja

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June-December: 716 W. 4TH AVE. • STE. 430 • ANCHORAGE, AK • 99501 • (907) 269-0234 • FAX: (907) 269-0238

Vice-Chair, Senate Finance Committee • Chairman, Capitol Budget Subcommittee •
MEMBER: Senate Judiciary Committee • Senate Labor & Commerce Committee • Legislative C

Produced in House

ADDITIONAL
INFORMATION FOR

SJR

9

FISCAL NOTE

STATE OF ALASKA
1999 LEGISLATIVE SESSION

BILL NO. SJR9

Revision Date/Time (Note if correction) _____ Dept. Affected Office of the Governor
 Title Constitutional Amendment relating to BRU Elective Operations
ways and means bills Component General and Primary
 Sponsor Senate Finance Committee
 Requester Senate Judiciary Committee Component Serial No. 22

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	1.5	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	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	1.5	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) 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. However, only six measures can be printed on an 8-1/2 by 14 inch ballot. If this measure requires printing an 8-1/2 by 18 inch ballot, the cost will increase by \$22.0.

Prepared by Gail Fenumial Phone 465-3935
 Division Division of Elections Date/Time 2/26/99 10:05 AM
 Approved by Lt. Governor Fran Ulmer Date 2/26/99
 Agency Office of the Lieutenant Governor

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SJR

10

FISCAL NOTE

No. 1
 Bill Version: STR10
 (S) Publish Date: 3/12/99

STATE OF ALASKA
 1999 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) _____ Dept. Affected Office of the Governor
 Title Constitutional Amendment relating to BRU Elective Operations
supermajority for tax levies Component General and Primary
 Sponsor Senator Ward
 Requester Senale State Affairs Committee Component Serial No 22

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	1.5	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	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	1.5	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) 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. However, only six measures can be printed on an 8-1/2 by 14 inch ballot. If this measure requires printing an 8-1/2 by 18 inch ballot, the cost will increase by \$22.0.

Prepared by Gail Fenumit Phone 465-3935
 Division Division of Elections Date/Time 2/26/99 10:07 AM
 Approved by Lt. Governor Fran Ulmer Date 2/26/99
 Agency Office of the Lieutenant Governor

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For fur: _____ ? Governor's Legislative Office

SENATE COMMITTEE REPORT

DATE: 3/12/99

FURTHER: Finance

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered **SENATE JOINT RESOLUTION NO. 10**

Proposing amendments to the Constitution of the State of Alaska requiring that the provisions of a bill that levy new state taxes or increase the rate of a state tax require the affirmative vote of at least two-thirds of the membership of each house of the legislature.

and recommends:

- be replaced with _____ CS _____ (_____)
- 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 title
 - new: SCR# _____

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
		<i>Wynn</i>	✓		
		<i>Baron</i>	✓		
		<i>Ellis</i>		✗	
CHAIR: <i>Ann L. Taylor</i>	✓	CHAIR:			

NEW FISCAL NOTE(S):

Department Date Zero Fiscal

PREVIOUS FISCAL NOTE(S):*

Department Date Zero Fiscal

<i>Gov.</i>	<i>3/12</i>		✗

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill



SENATOR JERRY WARD

ALASKA STATE LEGISLATURE

SPONSOR STATEMENT SJR 10

SJR 10 is a Constitutional amendment that requires a 2/3rd majority vote of both the House and the Senate to levy any new state taxes or increase the rate of any present state tax. This Constitutional amendment shall be placed before the voters at the next general election.

14 other states have enacted similar or more stringent legislation to enact or increase various state taxes:

- Delaware, Florida, Mississippi, and Oregon all require 3/5th vote of legislature to enact taxes. Florida also requires 2/3rd vote of public to enact new taxes.
- Arizona, California, Louisiana, Nevada, South Dakota, and Washington all require 2/3rd vote of legislature to enact taxes. Missouri requires 2/3rd vote of public.
- Arkansas, Colorado, and Oklahoma all require 3/4th vote of legislature to enact taxes.



SENATOR JERRY WARD

ALASKA STATE LEGISLATURE

March 18, 1999

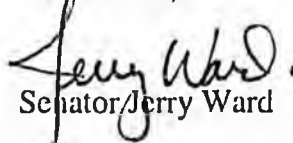
Senator Robin Taylor, Chair
Senate Judiciary Committee

Senator Robin Taylor,

SJR 10 is a constitutional amendment requiring a super majority of both Houses of the Legislature to raise state taxes or enact new state taxes.

Please schedule SJR 10 in the Senate Judiciary Committee at your earliest convenience.

Thank You,


Senator Jerry Ward

SJR

14

FISCAL NOTE

No. 2
 Bill Version: STR 14
 (S) Publish Date: 3/19/99

STATE OF ALASKA
 1999 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Office of the Governor
 Title: "Proposing amendments to the Constitution... election and the duties of the attorney general." BRU: Executive Operations
 Sponsor: Senator Ward Component: Executive Office
 Requester: Senate State Affairs COMPONENT SERIAL NO. 6

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
PERSONAL SERVICES				****	****	****
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	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 (Specify Type)						
TOTAL	0.0	0.0	0.0	****	****	****

Estimate of any current year (FY99) cost: \$ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This analysis emulates the organizational structure of the states of Washington, Oregon and Arizona. Each of these states has an elected attorney general, and each Governor has on-staff counsel to respond to general legal questions, public policy issues, internal matters, open meeting laws, ethics laws, revocation of appointments, to handle extraditions and petitions, prepare administrative orders, deeds relating to the state's natural resources, etc., and to carry-out the constitutional requirements of the Governor (i.e., executive clemency, messages to the Legislature, executive orders.)

The constitutional amendment proposed by this resolution would be on the 2000 ballot. If approved by the voters, the first election of an attorney general would be with the next gubernatorial election in 2002. Fiscal impact to the Office of the Governor would begin in FY03. A fiscal analysis for informational purposes is attached.

Prepared by: Michael A. Nizich, Administrative Director *M. Nizich* Phone: 465-3876
 Division: Administrative Services Date: 3/9/99
 Approved by Commissioner: Jim Ayers, Chief of Staff *J. Ayers* Date: 3/9/99
 Agency: Office of the Governor

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SJR 14 Analysis:

This fiscal impact below is for illustration purposes only and is based on 1999 costs and salaries. The fiscal impact associated with an elected attorney general would not be realized until FY03, and accurate costs will need to be identified then. Additionally, if the voters approve the constitutional amendment calling for an elected attorney general, the functions and duties of the attorney general will need to be defined and may result in further fiscal impact.

This note assumes an increase in Governor's staff by three positions – an attorney, rg.26, a paralegal, rg. 19, and an executive secretary, rg. 14. Fiscal note further assumes existing state-owned office space would be available and does not include lease costs.

Personal services:	three PFTs	194.7
Contractual:	comm., phones, tolls Courier svcs, subscripts, etc.	19.2
Supplies:	office/library supplies	9.8
Equipment:	office furniture, DP and communication equipment	<u>39.5</u> *
	Total first year costs:	263.2

- 39.5 first year set-up costs only and not required in subsequent years

1-LS0588\G
Kurtz ✓
4/7/99

CS FOR SENATE JOINT RESOLUTION NO. 14(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): **SENATOR WARD**

A RESOLUTION

1 **Proposing amendments to the Constitution of the State of Alaska relating to the**
2 **election and the duties of the attorney general.**

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

4 * **Section 1.** Article III, sec. 23, Constitution of the State of Alaska, is amended to read:

5 **Section 23. Reorganization. (a) Except as provided in (b) of this section,**
6 **the [THE] governor may make changes in the organization of the executive branch or**
7 **in the assignment of functions among its units which he considers necessary for**
8 **efficient administration. Where these changes require the force of law, they shall be**
9 **set forth in executive orders. The legislature shall have sixty days of a regular session,**
10 **or a full session if of shorter duration, to disapprove these executive orders. Unless**
11 **disapproved by resolution concurred in by a majority of the members in joint session,**
12 **these orders become effective at a date thereafter to be designated by the governor.**

13 * **Sec. 2.** Article III, sec. 23, Constitution of the State of Alaska, is amended by adding a
14 **new subsection to read:**

15 (b) **The governor may not make a change in the organization or function of**
16 **a unit of the executive branch that is headed by the attorney general.**

1 * Sec. 3. Article III, sec. 24, Constitution of the State of Alaska, is amended to read:

2 **Section 24. Supervision.** Except for the unit of the executive branch that
3 is headed by the attorney general, each [EACH] principal department shall be under
4 the supervision of the governor.

5 * Sec. 4. Article III, sec. 25, Constitution of the State of Alaska, is amended to read:

6 **Section 25. Department Heads.** The head of each principal department shall
7 be a single executive unless otherwise provided by law. The head of a principal
8 department [HE] shall be appointed by the governor, subject to confirmation by a
9 majority of the members of the legislature in joint session, and shall serve at the
10 pleasure of the governor, except as otherwise provided in this article with respect to
11 the lieutenant governor and the attorney general [SECRETARY OF STATE]. The
12 heads of all principal departments shall be citizens of the United States.

13 * Sec. 5. Article III, Constitution of the State of Alaska, is amended by adding new
14 sections to read:

15 **Section 28. Attorney General: Qualifications, Compensation, and Duties.**

16 (a) There shall be an attorney general. The attorney general shall be at least thirty
17 years of age and a qualified voter of the State, and a citizen of the United States and
18 a resident of the state. The attorney general shall possess additional qualifications
19 prescribed by law.

20 (b) The compensation of the attorney general shall be prescribed by law and
21 may not be diminished during the term of office unless by general law applying to all
22 salaried officers of the State.

23 (c) The attorney general shall defend the State in all civil actions in which the
24 State, a State agency, a State public corporation, or a State public enterprise is named
25 as a defendant party, shall prosecute violations of State criminal law, including
26 infractions and violations, and shall perform other duties prescribed by law.

27 **Section 29. Attorney General: Election, Term of Office, and Vacancy.** (a)
28 The attorney general shall be nominated in the manner provided by law for nominating
29 candidates for other elected offices.

30 (b) The term of office of the attorney general is four years, beginning at noon
31 on the first Monday in December after election under (a) of this section and ending

1 at noon on the first Monday in December four years later.

2 (c) A person who has been elected attorney general for two full successive
3 terms is not eligible to hold that office until one full term has intervened.

4 (d) In case of a vacancy in the office of attorney general for any reason, a
5 successor shall be elected for the remainder of the unexpired term at the first general
6 election occurring not less than six months after the office becomes vacant. The
7 governor may appoint a qualified person to fill the office between the date it becomes
8 vacant and the date it is filled by election. The appointment is subject to confirmation
9 by a majority of the members of the legislature in joint session.

10 (e) No person holding or who has at any time held the office of attorney
11 general during a term of office described in (b) of this section may hold the office of
12 governor or the office of lieutenant governor until one full term has intervened.

13 * Sec. 6. Article XV, Constitution of the State of Alaska, is amended by adding a new
14 section to read:

15 **Section 30. Initial Election of Attorney General.** The first election for an
16 attorney general required by the constitution to be elected shall occur at the first
17 general election at which a governor is to be elected occurring after the office of
18 attorney general is established under the constitution. A vacancy that occurs in the
19 office of attorney general before the first general election held at which an attorney
20 general shall be elected after the office is established under the constitution shall be
21 filled under the law as it existed before the office was established under the
22 constitution.

23 * Sec. 7. The amendments proposed by this resolution shall be placed before the voters of
24 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the
25 State of Alaska, and the election laws of the state.

SENATE COMMITTEE REPORT

DATE: 3/19/99

FURTHER:

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered

SENATE JOINT RESOLUTION NO. 14

Proposing amendments to the Constitution of the State of Alaska relating to the election and the duties of the attorney general.

and recommends:

- be replaced with S CS SJR 14 (H) (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 title
 - new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>Rick Helmer</i>					
<i>Don Dunbar</i>	<input checked="" type="checkbox"/>	<i>By 500 is</i>		<input checked="" type="checkbox"/>	
CHAIR: <i>John Taylor</i>	<input checked="" type="checkbox"/>	CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
<i>Gov. Exec. Ops</i>			
<i>Gov. Elections</i>			

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

1-LS0588V
Kurtz
2/25/00

*Sen Taylor
faced 2/25
delivered 2/2*

CS FOR SENATE JOINT RESOLUTION NO. 14(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR WARD

A RESOLUTION

1 Proposing amendments to the Constitution of the State of Alaska relating to the
2 election and the duties of the attorney general.

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

4 * Section 1. Article III, sec. 23, Constitution of the State of Alaska, is amended to read:

5 Section 23. Reorganization. (a) Except as provided in (b) of this section,
6 the [THE] governor may make changes in the organization of the executive branch or
7 in the assignment of functions among its units which he considers necessary for
8 efficient administration. Where these changes require the force of law, they shall be
9 set forth in executive orders. The legislature shall have sixty days of a regular session,
10 or a full session if of shorter duration, to disapprove these executive orders. Unless
11 disapproved by resolution concurred in by a majority of the members in joint session,
12 these orders become effective at a date thereafter to be designated by the governor.

13 * Sec. 2. Article III, sec. 23, Constitution of the State of Alaska, is amended by adding a
14 new subsection to read:

15 (b) The governor may not make a change in the organization or function of
16 a unit of the executive branch that is headed by the attorney general.

1 * Sec. 3. Article III, sec. 24, Constitution of the State of Alaska, is amended to read:

2 **Section 24. Supervision.** Except for the unit of the executive branch that
3 is headed by the attorney general, each [EACH] principal department shall be under
4 the supervision of the governor.

5 * Sec. 4. Article III, sec. 25, Constitution of the State of Alaska, is amended to read:

6 **Section 25. Department Heads.** The head of each principal department shall
7 be a single executive unless otherwise provided by law. The head of a principal
8 department [HE] shall be appointed by the governor, subject to confirmation by a
9 majority of the members of the legislature in joint session, and shall serve at the
10 pleasure of the governor, except as otherwise provided in this article with respect to
11 the lieutenant governor and the attorney general [SECRETARY OF STATE]. The
12 heads of all principal departments shall be citizens of the United States.

13 * Sec. 5. Article III, Constitution of the State of Alaska, is amended by adding new
14 sections to read:

15 **Section 28. Attorney General: Qualifications, Compensation, and Duties.**

16 (a) There shall be an attorney general. The attorney general shall be at least thirty
17 years of age and a qualified voter of the State, and a citizen of the United States and
18 a resident of the state. The attorney general shall have been a resident of the state for
19 at least seven years, and licensed to practice law in the state for at least five years,
20 immediately preceding filing for office. The attorney general shall possess additional
21 qualifications prescribed by law.

22 (b) The compensation of the attorney general shall be prescribed by law and
23 may not be diminished during the term of office unless by general law applying to all
24 salaried officers of the State.

25 (c) The attorney general is the legal officer of the State and shall have duties
26 and powers provided by law.

27 **Section 29. Attorney General: Election, Term of Office, and Vacancy.** (a)
28 The attorney general shall be nominated in the manner provided by law for nominating
29 candidates for other elected offices.

30 (b) The term of office of the attorney general is four years, beginning at noon
31 on the first Monday in December after election under (a) of this section and ending

1 at noon on the first Monday in December four years later.

2 (c) A person who has been elected attorney general for two full successive
3 terms is not eligible to hold that office until one full term has intervened.

4 (d) In case of a vacancy in the office of attorney general for any reason, a
5 successor shall be elected for the remainder of the unexpired term at the first general
6 election occurring not less than six months after the office becomes vacant. The
7 governor may appoint a qualified person to fill the office between the date it becomes
8 vacant and the date it is filled by election. The appointment is subject to confirmation
9 by a majority of the members of the legislature in joint session.

10 (e) No person holding or who has at any time held the office of attorney
11 general during a term of office described in (b) of this section may hold the office of
12 governor or the office of lieutenant governor until one full term has intervened.

13 * Sec. 6. Article XV, Constitution of the State of Alaska, is amended by adding a new
14 section to read:

15 **Section 30. Initial Election of Attorney General.** The first election for an
16 attorney general required by the constitution to be elected shall occur at the first
17 general election at which a governor is to be elected occurring after the office of
18 attorney general is established under the constitution. A vacancy that occurs in the
19 office of attorney general before the first general election held at which an attorney
20 general shall be elected after the office is established under the constitution shall be
21 filled under the law as it existed before the office was established under the
22 constitution.

23 * Sec. 7. The amendments proposed by this resolution shall be placed before the voters of
24 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the
25 State of Alaska, and the election laws of the state.

1-LS0588VH

Kurtz

4/13/99

*adopted and amended
currently (2/9) before comtee.*

*Mered
3/22/00*

CS FOR SENATE JOINT RESOLUTION NO. 14(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR WARD

A RESOLUTION

1 Proposing amendments to the Constitution of the State of Alaska relating to the
2 election and the duties of the attorney general.

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

4 * Section 1. Article III, sec. 23, Constitution of the State of Alaska, is amended to read:

5 Section 23. Reorganization. (a) Except as provided in (b) of this section,
6 the [THE] governor may make changes in the organization of the executive branch or
7 in the assignment of functions among its units which he considers necessary for
8 efficient administration. Where these changes require the force of law, they shall be
9 set forth in executive orders. The legislature shall have sixty days of a regular session,
10 or a full session if of shorter duration, to disapprove these executive orders. Unless
11 disapproved by resolution concurred in by a majority of the members in joint session,
12 these orders become effective at a date thereafter to be designated by the governor.

13 * Sec. 2. Article III, sec. 23, Constitution of the State of Alaska, is amended by adding a
14 new subsection to read:

15 (b) The governor may not make a change in the organization or function of
16 a unit of the executive branch that is headed by the attorney general.

L

1 * Sec. 3. Article III, sec. 24, Constitution of the State of Alaska, is amended to read:

2 **Section 24. Supervision.** Except for the unit of the executive branch that
3 is headed by the attorney general, each [EACH] principal department shall be under
4 the supervision of the governor.

5 * Sec. 4. Article III, sec. 25, Constitution of the State of Alaska, is amended to read:

6 **Section 25. Department Heads.** The head of each principal department shall
7 be a single executive unless otherwise provided by law. The head of a principal
8 department [HE] shall be appointed by the governor, subject to confirmation by a
9 majority of the members of the legislature in joint session, and shall serve at the
10 pleasure of the governor, except as otherwise provided in this article with respect to
11 the lieutenant governor and the attorney general [SECRETARY OF STATE]. The
12 heads of all principal departments shall be citizens of the United States.

13 * Sec. 5. Article III, Constitution of the State of Alaska, is amended by adding new
14 sections to read:

15 **Section 28. Attorney General: Qualifications, Compensation, and Duties.**

16 (a) There shall be an attorney general. The attorney general shall be at least thirty
17 years of age and a qualified voter of the State, and a citizen of the United States and
18 a resident of the state. The attorney general shall have been a resident of the state for
19 at least seven years, and licensed to practice law in the state for at least five years,
20 immediately preceding filing for office. The attorney general shall possess additional
21 qualifications prescribed by law.

22 (b) The compensation of the attorney general shall be prescribed by law and
23 may not be diminished during the term of office unless by general law applying to all
24 salaried officers of the State.

25 (c) The attorney general shall defend the State in all civil actions in which the
26 State, a State agency, a State public corporation, or a State public enterprise is named
27 as a defendant party, shall prosecute violations of State criminal law, including
28 infractions and violations, and shall perform other duties prescribed by law.

29 **Section 29. Attorney General: Election, Term of Office, and Vacancy.** (a)
30 The attorney general shall be nominated in the manner provided by law for nominating
31 candidates for other elected offices.

1 (b) The term of office of the attorney general is four years, beginning at noon
2 on the first Monday in December after election under (a) of this section and ending
3 at noon on the first Monday in December four years later.

4 (c) A person who has been elected attorney general for two full successive
5 terms is not eligible to hold that office until one full term has intervened.

6 (d) In case of a vacancy in the office of attorney general for any reason, a
7 successor shall be elected for the remainder of the unexpired term at the first general
8 election occurring not less than six months after the office becomes vacant. The
9 governor may appoint a qualified person to fill the office between the date it becomes
10 vacant and the date it is filled by election. The appointment is subject to confirmation
11 by a majority of the members of the legislature in joint session.

12 (e) No person holding or who has at any time held the office of attorney
13 general during a term of office described in (b) of this section may hold the office of
14 governor or the office of lieutenant governor until one full term has intervened.

15 * Sec. 6. Article XV, Constitution of the State of Alaska, is amended by adding a new
16 section to read:

17 **Section 30. Initial Election of Attorney General.** The first election for an
18 attorney general required by the constitution to be elected shall occur at the first
19 general election at which a governor is to be elected occurring after the office of
20 attorney general is established under the constitution. A vacancy that occurs in the
21 office of attorney general before the first general election held at which an attorney
22 general shall be elected after the office is established under the constitution shall be
23 filled under the law as it existed before the office was established under the
24 constitution.

25 * Sec. 7. The amendments proposed by this resolution shall be placed before the voters of
26 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the
27 State of Alaska, and the election laws of the state.

1-LS0588\G

Kurtz

4/7/99

Handwritten notes:
4/12/99
Kurtz
see 0011047

**CS FOR SENATE JOINT RESOLUTION NO. 14(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - FIRST SESSION**

BY THE SENATE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): **SENATOR WARD**

A RESOLUTION

1 **Proposing amendments to the Constitution of the State of Alaska relating to the**
2 **election and the duties of the attorney general.**

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

4 *** Section 1. Article III, sec. 23, Constitution of the State of Alaska, is amended to read:**

5 **Section 23. Reorganization. (a) Except as provided in (b) of this section,**
6 **the [THE] governor may make changes in the organization of the executive branch or**
7 **in the assignment of functions among its units which he considers necessary for**
8 **efficient administration. Where these changes require the force of law, they shall be**
9 **set forth in executive orders. The legislature shall have sixty days of a regular session,**
10 **or a full session if of shorter duration, to disapprove these executive orders. Unless**
11 **disapproved by resolution concurred in by a majority of the members in joint session,**
12 **these orders become effective at a date thereafter to be designated by the governor.**

13 *** Sec. 2. Article III, sec. 23, Constitution of the State of Alaska, is amended by adding a**
14 **new subsection to read:**

15 **(b) The governor may not make a change in the organization or function of**
16 **a unit of the executive branch that is headed by the attorney general.**

1 * Sec. 3. Article III, sec. 24, Constitution of the State of Alaska, is amended to read:

2 **Section 24. Supervision.** Except for the unit of the executive branch that
3 is headed by the attorney general, each [EACH] principal department shall be under
4 the supervision of the governor.

5 * Sec. 4. Article III, sec. 25, Constitution of the State of Alaska, is amended to read:

6 **Section 25. Department Heads.** The head of each principal department shall
7 be a single executive unless otherwise provided by law. The head of a principal
8 department [HE] shall be appointed by the governor, subject to confirmation by a
9 majority of the members of the legislature in joint session, and shall serve at the
10 pleasure of the governor, except as otherwise provided in this article with respect to
11 the lieutenant governor and the attorney general [SECRETARY OF STATE]. The
12 heads of all principal departments shall be citizens of the United States.

13 * Sec. 5. Article III, Constitution of the State of Alaska, is amended by adding new
14 sections to read:

15 ➔ **Section 28. Attorney General: Qualifications, Compensation, and Duties.**

16 (a) There shall be an attorney general. The attorney general shall be at least thirty
17 years of age and a qualified voter of the State, and a citizen of the United States and
18 a resident of the state. The attorney general shall possess additional qualifications
19 prescribed by law.

20 (b) The compensation of the attorney general shall be prescribed by law and
21 may not be diminished during the term of office unless by general law applying to all
22 salaried officers of the State.

23 (c) The attorney general shall defend the State in all civil actions in which the
24 State, a State agency, a State public corporation, or a State public enterprise is named
25 as a defendant party, shall prosecute violations of State criminal law, including
26 infractions and violations, and shall perform other duties prescribed by law.

27 **Section 29. Attorney General: Election, Term of Office, and Vacancy.** (a)
28 The attorney general shall be nominated in the manner provided by law for nominating
29 candidates for other elected offices.

30 (b) The term of office of the attorney general is four years, beginning at noon
31 on the first Monday in December after election under (a) of this section and ending

1 at noon on the first Monday in December four years later.

2 (c) A person who has been elected attorney general for two full successive
3 terms is not eligible to hold that office until one full term has intervened.

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5 successor shall be elected for the remainder of the unexpired term at the first general
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7 governor may appoint a qualified person to fill the office between the date it becomes
8 vacant and the date it is filled by election. The appointment is subject to confirmation
9 by a majority of the members of the legislature in joint session.

10 (e) No person holding or who has at any time held the office of attorney
11 general during a term of office described in (b) of this section may hold the office of
12 governor or the office of lieutenant governor until one full term has intervened.

13 * Sec. 6. Article XV, Constitution of the State of Alaska, is amended by adding a new
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15 **Section 30. Initial Election of Attorney General.** The first election for an
16 attorney general required by the constitution to be elected shall occur at the first
17 general election at which a governor is to be elected occurring after the office of
18 attorney general is established under the constitution. A vacancy that occurs in the
19 office of attorney general before the first general election held at which an attorney
20 general shall be elected after the office is established under the constitution shall be
21 filled under the law as it existed before the office was established under the
22 constitution.

23 * Sec. 7. The amendments proposed by this resolution shall be placed before the voters of
24 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the
25 State of Alaska, and the election laws of the state.

Draft CS

- Original Bill
1st CS draft w/ restrictions
attached.
- New CS follows as "G"

SENATE JOINT RESOLUTION NO. 14

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY SENATOR WARD

Introduced: 3/4/99

Referred: State Affairs, Judiciary

A RESOLUTION

1 Proposing amendments to the Constitution of the State of Alaska relating to the
2 election and the duties of the attorney general.

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8 efficient administration. Where these changes require the force of law, they shall be
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22 State of Alaska, and the election laws of the state.

*INSERT
Restriction
See
attached*

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services
Department of Education & Early Development
State of Alaska

draft CS

- *original bill*
- *1st CS draft w/ restrictions attached.*
- *New CS follows as "G"*

SENATE JOINT RESOLUTION NO. 14

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY SENATOR WARD

Introduced: 3/4/99

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9 majority of the members of the legislature in joint session, and shall serve at the
10 pleasure of the governor, except as otherwise provided in this article with respect to
11 the lieutenant governor and the attorney general [SECRETARY OF STATE]. The
12 heads of all principal departments shall be citizens of the United States.

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25 as a defendant party, shall prosecute violations of State criminal law, including
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29 candidates for other elected offices.

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31 on the first Monday in December after election under (a) of this section and ending

1 at noon on the first Monday in December four years later.

2 (c) A person who has been elected attorney general for two full successive
3 terms is not eligible to hold that office until one full term has intervened.

4 (d) In case of a vacancy in the office of attorney general for any reason, a
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19 constitution.

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21 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the
22 State of Alaska, and the election laws of the state.

*INSERT
Restriction
See
attached*

1 general running jointly with the governor. The candidate whose name appears on the
2 ballot jointly with that of the successful candidate for governor shall be elected
3 attorney general.

4 (b) The term of office of the attorney general is four years, beginning at noon
5 on the first Monday in December after election under (a) of this section and ending
6 at noon on the first Monday in December four years later.

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13 vacant and the date it is filled by election.

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15 general during a term of office described in (b) of this section may hold the office of
16 governor or the office of lieutenant governor until one full term has intervened.

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23 office of attorney general before the first general election held at which an attorney
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26 constitution.

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28 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the
29 State of Alaska, and the election laws of the state.

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 12, 1995

The Honorable Robin Taylor, Chair
Senate Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

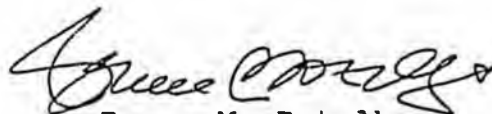
Mr. Chairman:

I am in receipt of your letter of February 10, 1995, requesting my attendance at a hearing to consider my "qualifications for confirmation by the Legislature."

I respectfully decline to appear before the Senate Judiciary Committee on February 13. My appointment as Attorney General was confirmed in the Second Session of the Eighteenth Legislature. I have served continuously since that time as Attorney General. Governor Knowles did not request my resignation when he took office, nor did I at any time submit a resignation to the Governor. Therefore, the question of my confirmation is not before the Legislature. Att'y Gen. Op. No. 3 (Jan. 25, 1979).

I would be pleased to meet with you or appear before the Judiciary Committee at any other time to explain my position or the actions of my department concerning any matter of interest to you or the committee.

Very truly yours,



Bruce M. Botelho
Attorney General

cc: The Honorable Tony Knowles
Governor

95020

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K--STATE CAPITOL
JUNEAU, ALASKA 99811

January 25, 1979

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

Re: Confirmation of heads of principal departments

Dear Governor Hammond:

You have asked whether either custom or law require you to submit the names of the heads of principal departments to the legislature for confirmation when they carry over in office following a gubernatorial election.

The short answer is that neither custom nor law impose any such requirement.

The law on the subject has been stated succinctly as follows:

When the term of office is not fixed by law, the officer holds office at the will of the appointing power, and strictly speaking has no term of office.

67 C.J.S. Officers § 66(b). Under the Alaska Constitution, the Governor is the "appointing power." Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). Article, section 25, of the Alaska Constitution provides as follows:

The head of each principal department . . . shall be appointed by the governor, subject to confirmation by . . . the legislature . . . and shall serve at the pleasure of the governor. . . .

Accordingly, under the general rule, the heads of the principal departments, once appointed and confirmed, serve indefinitely until they leave office. Unlike the Governor, whose term is fixed by the constitution, their terms are indefinite. The occurrence of a gubernatorial election has no effect, in itself, on their terms. They continue to serve even upon the election of a new governor until they are discharged by the governor or resign. There is no vacant office to which the incumbent may be "appointed" or "reappointed," and therefore no appointment or reappointment for the legislature to confirm.

The custom nationally and in Alaska is consistent with this interpretation. No reelected President of the United States has been known to have submitted for confirmation the names of persons holding over as cabinet officers. One can search the diaries of Harold Ickes, the Secretary of the Interior from 1933 through 1946, in vain for any record of his reconfirmation in 1937, 1941, or 1945. There was none. Since the first election of Franklin D. Roosevelt in 1932, there have been seven instances of presidential reelections involving cabinet officers who held over and three instances of vice-presidential succession involving cabinet officers who held over. So far as is known, the name of none was submitted for confirmation.

In Alaska, prior to 1978 there has been only one instance of a gubernatorial reelection, Governor Egan's reelection in 1962. In 1963, Governor Egan submitted the names of the heads of six principal departments to the legislature for confirmation. All but one had succeeded to office since the adjournment of the 1962 legislature. The one exception was an appointment to head a new department established by law by the 1962 legislature. The Governor did not submit the names of the heads of seven departments who had carried over in office, e.g., Floyd Guertin, who had served as Commissioner of Administration since Statehood, and Phil Holdsworth, who had served as Commissioner of Resources for the same period. 1963 Supp. to H. and S. Jour. April 9, 1963.

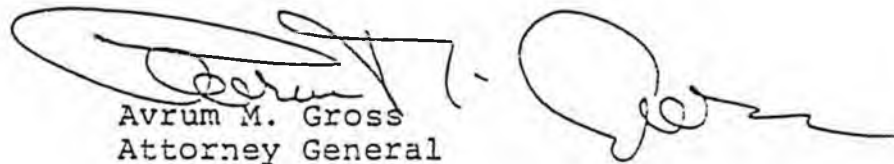
When Lieutenant Governor Miller succeeded to the office of Governor, he did not submit the names of the heads of all the principal departments for confirmation but rather only those who had been appointed to office since their predecessors had been confirmed, i.e., a new Attorney General, new Commissioners of Administration, Highways, and new Public Works. 1969 S. Jour. 491 (Mar. 27, 1969). Hence, the custom in Alaska is the same as at the national level.

Accordingly, neither by law nor by custom need you submit for legislative confirmation the names of the heads

The Honorable Jay S. Hammond
January 25, 1979
Page 4

of principal departments whose appointments have already been confirmed and who have carried over in office. There are no vacancies in those offices to which an appointment or reappointment can be made, and no appointment or reappointment which the legislature can affirm.

Sincerely,

A handwritten signature in black ink, appearing to read 'Avrum M. Gross', is written over the typed name. The signature is fluid and cursive, with a large initial 'A' and a long horizontal stroke at the end.

Avrum M. Gross
Attorney General

AMG:chw:RWP

Mark K. Johnson
13631 Windward Circle
Anchorage, Alaska 99516
907-345-3850

RECEIVED
JAN 24 2000

Ans'd.....

January 19, 2000

The Honorable Robin Taylor
Alaska State Senate
State Capitol Building
Juneau, Alaska 99811

Dear Robin:

Enclosed is a copy of the recommendations of the subcommittee which reviewed the Department of Law for the Commission on Privatization, along with the Department's response and some of the appendices.

I do not take the Department's response very seriously for one paramount reason: The Department is unable as an institution to view itself critically and objectively. The Department consists almost entirely of career employees with a uniform political philosophy and close loyalty to Bruce Botelho. Mr. Botelho has hired a good number of these employees and has the ability to discharge any attorney at any time for pretty much any (or no) reason.

At the risk of repeating myself: The subcommittee found, and the Department reluctantly agreed that the Attorney General is NOT a constitutional officer and that Legislature, by statute, may define the role and responsibilities of the head of the Department of Law.

The subcommittee drafted a proposed amendment to AS 44.23.010 which would limit to some degree the scope of the Attorney General's powers and clarify that his obligation as a legal advisor runs to the State of Alaska, not "the governor and other state officers." The draft legislation would also put into law that the Legislative power to make appropriations constrains and limits the Attorney General's authority to settle cases.^{1 2} Finally, the draft legislation would

¹ The power to settle litigation in my view poses great danger to the State and is the source of considerable mischief by this and previous Attorney Generals. As a recent example, as I understand it an attorney with the State with knowledge of the World Plus Travel scandal brought litigation against the State in connection with her discharge but that litigation was quickly settled. Through settlement, the State has the ability to quickly close and limit the potential for embarrassment from a variety of problems.

² Please note that this legislation does not address the authority of the Attorney General to enter into settlements of Alaska's anti-trust laws under Title 45.

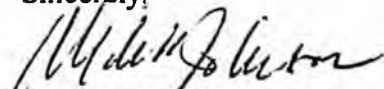
remove language which can be interpreted to vest common law powers in the Attorney General. It is my belief, and a belief shared by the subcommittee, that the Attorney General's powers should be enumerated powers – not unlimited powers.

Once it is appreciated that the Legislature can define and control the scope and powers of the Attorney General, it is interesting to consider the effect of dissolution of the office of Attorney General and the entire Department of Law. The office of State Prosecutor and Department of Prosecution could be established, which would address only criminal matters. Individual executive departments could be given authority to retain and employ counsel for needed legal services. The Governor could hire Bruce Botelho as the Governor's lawyer, which is the present situation.

Interestingly enough, under this set-up, the departmental commissioner would retain control of the legal budget of the department and the traditional relationship between client and attorney would be brought back to state government. Counsel retained in this fashion would be subject to the direction of the client – not the Attorney General. I personally believe that this arrangement would produce better results for the State of Alaska as the focus would shift to the issues presented in litigation. I would guarantee that discussions between the Governor and his department heads which touched upon legal issues would be much more substantive.

I hope this information is interesting and useful to you. Please let me know if I can answer any questions. My home phone is listed above. My work phone is 273-5290, but I am not always able to discuss non-work related matters.

Sincerely,



Mark K. Johnson

Sec. 44.23.010. Attorney general.

The principal executive officer of the Department of Law is the attorney general.

Sec. 44.23.020. Duties; and powers; waiver of immunity.

- (a) The attorney general is the legal advisor of the state, including the governor and other state officers.
- (b) The attorney general shall
- (1) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;
 - (2) represent the state in all civil actions in which the state is a party;
 - (3) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;
 - (4) administer state legal services, including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs; and give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature;
 - (5) draft legal instruments for the state;
 - (6) make available a report to the legislature, through the governor, at each regular legislative session
 - (A) of the work and expenditures of the office; and
 - (B) on needed legislation or amendments to existing law;
 - (7) perform all other duties required by law [OR WHICH USUALLY PERTAIN TO THE OFFICE OF ATTORNEY GENERAL IN A STATE]; and
 - (8) prepare, publish, and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law, division of consumer protection, before publication.
- (c) The Attorney General may, subject to the power of the legislature to make appropriations, settle actions, matters and prosecutions under subsection (b) in which the Attorney General represents the state and in which the state is a party.
- (d) Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or in any case in which the state seeks to allocate fault to the federal government or a federal employee under AS 09.17.080, waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States. The expiration on January 1, 1999, of the attorney general's authority to waive the state's Eleventh Amendment immunity does not affect existing waivers in ongoing cases.

**COMMISSION ON PRIVATIZATION
AND
DELIVERY OF GOVERNMENT SERVICES**

SUBCOMMITTEE REPORT

ON THE

DEPARTMENT OF LAW

November 18, 1999

**Subcommittee Members: Mark Johnson, Chair; Scott Brandt-Erichsen, Blake Call,
John Cowdery, Pete Kinneen, Richard McVeigh, William Oberly, Betty Rollins,
Bill Satterberg, Bruce Weyhrauch**

November 3, 1999
13631 Windward Circle
Anchorage, Alaska 99516

Senator Jerry Ward
Representative John Cowdery
Co-Chairs
Commission of Privatization
and the Delivery of Government Services
Alaska State Legislature
Anchorage, Alaska 99501

Dear Senator Ward and Representative Cowdery:

This submission constitutes the final Report of the Subcommittee for the Department of Law.

The following individuals have contributed to the work of the Subcommittee:

Mark K. Johnson, Chair
Scott Brandt-Erichsen
William B. Oberly
Richard L. McVeigh
Blake Call
Bill Satterburg
Betty Rollins
Pete Kinneen
Bruce Weyrauch

While all have contributed, no particular point which has been made in this Report should be necessarily attributed to individual members.

APPROACH OF THE SUBCOMMITTEE

The Department of Law is fairly unique among state agencies in that it exclusively performs services for the State and agencies of the State. It does not provide services to the general public or to particular classes of the public. In addition, legal services in many, if not most, cases involve the exercise of considerable discretion on the part of the attorney assigned to the case, be it at the intake, trial or appeal level.

In recognition of these facts, the Subcommittee at the outset did not commence work from the standpoint of elimination of legal professional staff or the wholesale assignment of individual programs to the private sector. In the first instance, it seems clear that appropriation for legal staff will generally produce a commitment to litigation and prosecution at that level. If more funds are appropriated, more resources will be expended on those functions. If less funds are appropriated, less resources will be expended on those functions. In this regard, the Subcommittee is probably less able to address the question of the level of appropriation for the Department than the Finance Committees, as the Subcommittee has consisted of non-budgetary professionals working on a volunteer basis.

The Subcommittee has therefore focused upon those provisions of the Full Commission's authorizing legislation which permit examination of the Department of Law from the standpoint of efficiency and effectiveness. The Subcommittee has also examined contracting policy and procedures for the Department.

To a very considerable degree, each of the subjects inquired into on the part of the Subcommittee have, in one way or another, hinged on the exercise of discretion on the part of the leadership of the Department of Law. The Department of Law is also unique among the departments of state government in that with the exception of a handful of individuals, all of the professional employees of the Department are either exempt or partially exempt State employees who serve at the pleasure of the agency head, the Attorney General, and ultimately the Governor. There is clearly more discretion exercised in carrying out the functions assigned to the Department than in any other executive Department of State government.

This circumstance has led the Subcommittee into inquiring in various ways about how the Department exercises discretion and what legal and practical limitations exist on the exercise of discretion. If any change at all is going to be made to the functions and activities of the Department by the Legislature, sooner or later the issue of the exercise of discretion on the part of the Department will enter the equation.

In light of these circumstances, the Subcommittee has ventured probably a bit further from the pathway taken by some other subcommittees of the Commission and has examined the statutory underpinnings of the Department.

SUBCOMMITTEE MEETINGS AND PROCESS

The Subcommittee has met seven times, taken extensive testimony from the Department's leadership, posed two sets of written inquiries to the Department, and discussed and debated issues as a subcommittee on multiple occasions.

The written inquiries to the Department are attached to this Report, as are the responses of the Department.

The Department has been well represented by Deputy Attorney General Barbara Ritchie, Deputy Attorney General Cynthia Cooper, and Special Assistant to the Attorney General Joan Kasson. In all instances, these representatives have responded satisfactorily to the questions of the Subcommittee. Their cooperation is appreciated.

The Subcommittee at the outset adopted a policy that it would not discuss any particular matter currently in litigation. Discussion of cases by name has been extremely rare, if it has occurred at all.

Following the fact-finding segment, the Subcommittee has met to discuss and deliberate regarding the recommendations to be included in this Report. The chair has been of the view that it is the task of the Subcommittee to generate ideas to be passed along to the full Commission and ultimately the Legislature and that therefore it is not necessary or even desirable to seek a consensus or even majority support for any particular idea to be made part of this Report. Dissent from the points contained in this Report has been encouraged, and members may submit alternative viewpoints to any point to the full Commission. The Subcommittee stands behind the points contained in this Report as ideas meriting further examination by either the full Commission or the Legislature.

Sincerely,

Mark K. Johnson, Chair

Enclosures
Appendices

RECOMMENDATIONS OF THE SUBCOMMITTEE

Recommendation 1. The Legislative Finance committees should hold hearings to develop criteria and a process to assess the feasibility of contracting functions currently performed by the Office of Special Prosecutions and Appeals. In particular, the handling of appeals and the issuance of opinion letters should be examined.

The Office of Special Prosecutions and Appeals is a component of the Department of Law, Criminal Division. Its functions were described to the Subcommittee as handling all appeals in criminal cases, prosecuting special categories of criminal offenses and providing legal opinions to the clients regarding the legality of laws both existing and prospective. Some of these functions seemed particularly suited for privatization. However, the information provided to the Subcommittee was not sufficient to make a solid recommendation on the appropriateness of such privatization.

The Criminal Division of the Department of Law described the functions of the Office of Special Prosecutions and Appeals to the Subcommittee. In so doing, the Division took the position that OSPA, like all activities of the Criminal Division, was not appropriate for consideration for privatization. However, a number of the functions of OSPA seemed to the Subcommittee open to consideration for privatization. Foremost among those were the major function of OSPA, handling appeals, and its function as provider of opinion letters when requested.

Criminal appeals handled by the State are brought to OSPA after the State or, as more frequently happens, the Defendant, appeals the case. At that point the attorney who is assigned to the case is not the trial attorney but an attorney who is new to the case. That attorney has to familiarize themselves with the case by reviewing the record on appeal. After familiarizing themselves with the issues, facts and law in the case, the attorney would prepare the appeal paperwork and arguments. The fact that the OSPA attorney must familiarize themselves with each new case means that privatization of this function would not mean a different, or extra step for the private attorney involved. Like the OSPA attorney, a private attorney contracted to handle an appeal would have to familiarize themselves with the issues, facts and law in the case before preparing the appeal. If this could be contracted at a lower per hour rate than the cost of an OSPA attorney, the State could save considerable amounts money on criminal appeals.

The same situation exists in the area of opinion letters. The requesting agency presents a new set of issues and questions to the attorney in each request. Therefore, a private attorney and an OSPA attorney would be starting from the same place, with each having to review and understand the question and do the research before writing the opinion. Again, if the contract rate for a private attorney to handle this work could be set lower than the cost to of an OSPA attorney, the State would save money.

These seem particularly fertile areas for privatization in the Criminal Division because there are no issues of prosecutorial discretion. Assuming the Department of Law itself would make all decisions on when the State wished to file an appeal in a criminal case, the contract attorneys would have no discretion on whether to proceed with a case or not, and would be hired only to do the appeal. This is so because, other than when the State appeals a case, all other appeals are brought by the Defendant and the State must respond. The same is true in the opinion letter area, as it is the State agency making the request, and the contract attorney would merely be providing the information.

A possible drawback of privatization of this function would be loss of institutional memory of each individual OSPA attorney. Although this would occur, it would seem that this could be lessened by requiring the contractors to have a certain base knowledge of Alaska criminal law. It could also be controlled by providing the contractors with access to prior work done by the State criminal appeals attorneys, whether OSPA or contract. Again the same logic applies to the opinion letters area.

Concurring views of Scott Brandt-Erichsen: Concerning the handling of criminal appeals, I favor contracting out of appeals on an hourly rate which is equivalent to or less than the in-house rate. Because the appellate counsel currently begins fresh and is confined to the record, there does not appear to be any inherent advantage to in house services. Thus, with qualified counsel, the less expensive alternative would presumably be the preferred alternative.

I do not favor contracting out issuance of opinion orders as I feel that such letters are closely related to the prosecutorial decision-making function. The advice given to law enforcement personnel can impact the ability of the trial counsel to prepare and present the best case for the state.

Recommendation 2. The Legislative Finance committees should hold hearings to develop criteria and a process to assess the feasibility of contracting the misdemeanor prosecution function after intake screening.

Misdemeanor criminal prosecution involves, for the most part, simple fact patterns and simple statutory violations. The major characteristic of misdemeanor prosecution is the large number of cases. It seems, therefore, that contract attorneys could handle the prosecution of State misdemeanor charges more economically than the District Attorney's Office if the State could contract with private attorneys at a rate less than the rate of a District Attorney.

In the fiscal year ending July, 1999, the State of Alaska handled almost 20,000 misdemeanor prosecutions and felony probation revocations statewide. Historically the issues raised in misdemeanor cases are not complicated and often entail a small portion of the misdemeanor code. This work seems particularly appropriate for privatization if the private attorneys could be contracted at a lower rate than the hourly rate for a District Attorney.

Of concern in this area, as in privatization of any criminal prosecutions, is whether contract attorneys might choose to pursue or not pursue certain criminal cases for reasons other than the public interest. This concern could be addressed by having the screening function remain with the Department of Law, and the remainder of the case work be handled by contract attorneys.

Of additional concern is the availability of private attorneys in various parts of the State to contract for these services. However, both the Public Defenders Office and the Office of Public Advocacy have had to address these concerns and have successfully contracted the services of attorneys to handle criminal cases in remote locations. The example of these agencies could serve as a model.

Another concern is the amount of discretion which should be given to any attorney who handles misdemeanor prosecutions. Issues will undoubtedly come up after a case is screened in which might impact continuation of a prosecution. This concern might be addressed by having someone at the Department of Law be authorized as a contact person for the contracting attorneys. That person would have the power to make decisions on dismissing a prosecution if the facts and/or law dictated.

The Office of Public Advocacy contracts with private attorneys at a rate far below the prevailing rate in the private sector, and far below the hourly rate quoted by the Department of Law for the cost to the State of an attorney with the Department of Law. The work of the Criminal Division could, very well, be done as effectively, but more economically, if the private sector is allowed to participate in misdemeanor prosecutions after the screening stage. More information is necessary to determine just how much could be saved.

The Subcommittee discussed that privatization could pose problems with coordinating trial schedules with those of police. This matter would need to be considered in connection with this recommendation.

Recommendation 3. The Subcommittee recommends that the Legislature conduct specific hearings on the issue of the allocation of the costs and responsibilities for criminal prosecution between the State and local governments. Such hearings could and perhaps should be expanded to address the provision of police services. The Subcommittee believes that the goal of these hearings should be to develop a consistent statewide approach to the delivery of criminal justice functions which recognizes the varying level of resources available to local governments.

To the knowledge of the Subcommittee, no framework currently exists which allocates the powers and financial responsibility for criminal justice functions among State and local governments in Alaska. In some communities, local police are maintained, in many communities law enforcement responsibility is left to the Alaska State Troopers. Even where local police exist, those officers may charge offenders under State law, with the resulting prosecution carried out by the District Attorney's offices. In some communities, violations may be violations of local ordinances and the local government undertakes the prosecution function. Another very major component of this issue is the costs of incarceration. The statewide overall public safety costs are great. Public Safety costs (police, fire and prosecution) in Anchorage are probably the largest single item in the municipal budget.

The Subcommittee believes that one viable approach to the present situation would be to link classification of a local government for the purposes of Title 29 to the assumption of public safety functions. For example, a first class municipality would be given the statutory power to hire police, but would thereby assume responsibility for prosecution. At some threshold level, a community which desired to have certain local government powers would have to assume public safety responsibility.

The Subcommittee does not necessarily see this process as one intended to shift costs to local governments - but rather focused on providing some rationality and framework for the distribution of public safety powers and financial responsibilities.

Views of Scott Brandt-Erichsen: I oppose any increase in the burden on local governments through transfer of either policing or prosecution of functions to local governments. While I endorse the concept of equitable treatment as between municipalities, I do not believe that forcing municipalities to take on more law enforcement or prosecution functions is in the state's best interests where the effect is merely a shifting of costs from the state general fund to the local taxpayers.

Recommendation 4. The Subcommittee believes that it should be the policy of the Legislature that all privatization efforts which are undertaken regarding the Department of Law should result in commensurate reductions in staff.

As noted in the introduction to this Report, the Subcommittee did not engage in a component-by-component examination of the operating budget of the Department. With the exception of a small administrative group, each division of the Department renders either civil or criminal legal services to the State. In short, increased appropriations will permit the rendering of more legal services, reduced appropriations will require a reduced level of legal services. The Subcommittee sees little value in attempting to substitute the views of the Subcommittee for those of the Legislature on aggregate appropriations for the Department.

The Subcommittee does believe, however, that each change in the delivery of services should be evaluated from a budgetary standpoint. If the State is able to obtain legal services more efficiently from the use of outside counsel, corresponding reductions to the staff of the Department are necessary.

Recommendation 5. The Subcommittee recommends that the Legislature develop and enact additional measures to ensure that the selection of legal services contractors by the State is as objective as possible. The Subcommittee believes that the use of the of a pre-qualified list of potential providers would be a useful tool.

The Subcommittee received written material and oral descriptions from Department of Law staff regarding the existing practices for making decisions on whether to contract out for legal services and how to select a legal services provider. These materials and statements also included information regarding the practices of the Department of Law in monitoring existing legal services contracts.

In the course of Subcommittee discussion, several themes were addressed. Regarding the effectiveness and accountability of outside counsel, the comparison between in-house counsel and contracted counsel with respect to cost effectiveness or efficiency in achieving client objectives is difficult to evaluate without certain data. Regarding cost effectiveness, accurate data concerning the total cost of legal services both in-house and on a contract basis on a comparable indices is needed. This concern is also addressed in item 7 below.

Additionally, evaluation of the qualitative efficiency and effectiveness of legal representation (objectives versus outcome of specific cases) requires adequate information about those objectives and outcomes to determine the overall effectiveness of in-house versus contract counsel. The contracting procedures provided by the Department of Law include identification of the litigation plan and objective as part of the contract monitoring process. This definition of the litigation objective may be an appropriate requirement in each case (whether in-house or outside counsel) and would provide a measure which legislative audit or any other audit or oversight body might utilize to evaluate the effectiveness of both the department of law and contract counsel.

The fairness in contractor selection was an area of particular concern. Subcommittee members commented that the existing contractor selection process is largely subjective. With respect to legal services which are routine and could be adequately performed by a broad range of counsel in the relevant practice area (such as criminal appeals, collections, worker's compensation or other similar routine matters), committee members felt that a more objective contractor selection system from among a pool of qualified contractors would be more likely to serve the public interest in avoiding favoritism in the award of public contracts. One method suggested was the maintenance of pools or lists of qualified contractors for various categories of work. Contractor selection within the practice area of a particular pool would look to the name at the top of the list with new service providers being added to the bottom of the list and previously selected contractors rotating to the bottom of the list. Additionally, there was some discussion of utilizing a method whereby the state sets a maximum contract compensation rate for routine matters at or below the determined in-house rate for providing legal services. Subcommittee members commented that such a system could be used for specialized litigation needs as well.

The Subcommittee recognizes that in some instances there may be justifications for deviation from a pool type objective contractor selection system, and agrees that exceptions should be permissible. However, the Subcommittee feels that where exceptions to an objective award method are utilized, the justification for the exception should be documented in writing against a standard criteria to provide a basis for oversight and evaluation of the fairness of the selection process.

Recommendation 6. The Subcommittee recommends that the Legislature require the Department to develop in consultation with the Division of Legislative Audit a pilot project to test the feasibility of the use of an outside audit firm to assess the costs incurred in litigation. Such firms are presently utilized in the private sector. The Subcommittee believes that the pilot project may be best tested in tort cases.

During the course of meetings with the Department, Subcommittee members noted that it is becoming increasingly commonplace in the private sector for clients, particularly insurers, to utilize the services of an outside auditor to ascertain the reasonableness of charges for legal services rendered by attorneys to clients. The Department acknowledged that the Division of Risk Management had been approached by these types of service providers in the past.

Some Subcommittee members believe that this type of review could be of benefit to the State in lowering the costs of representation. Other Subcommittee members expressed strong doubt that the use of this type of review contractor would either improve litigation outcomes or lower costs.

The Subcommittee obtained from the Department a copy of a solicitation from one of these types of review services. On balance, the Subcommittee believes that it may be useful to test the feasibility of the use of these types of services on a limited, experimental basis and recommends that a pilot project be developed by the Department and