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the Division of Legislative Audit. The Subcommittee does not endorse a particular outcome for this pilot project, but believes that it may be useful to explore whether the State should consider this matter further.

Recommendation 7. The Subcommittee recommends that the Legislature direct the Division of Legislative Audit to determine the full and fair value per billable hour of legal services rendered by the Department of Law and ensure that the rates are consistently applied in the budgeting process pertaining to the Department. Following completion of this task, the Subcommittee recommends to the Legislature that it examine whether legal services rendered by the Department should be billed at different rates for different services. The Subcommittee is generally of the view that the Department's costs of service should distinguish between routine and complicated legal services.

During the course of Subcommittee deliberations, a discrepancy was noted in the hourly rate charged by the Department of Law to client agencies and the rate that the Department utilizes when making presentations to the courts on the costs of litigation.
Any discussion on potential privatization of services will at some point consider and compare the cost of contracting representation out to private attorneys and the costs of retaining the matter in-house. The Subcommittee generally believes that fully comparable data regarding such costs is needed and further that the Division of Legislative Audit is best equipped to gather, analyze and compare this information.

There are widely differing views in the legal community, among Subcommittee members and the Department on the rates which are and should be paid for legal services. The Department sincerely believes that many types of cases are more economically handled in-house. Some Subcommittee members believe that the Departmental costs are understated and that quality private counsel is available for less than the rate utilized by the Department in assessing the feasibility of the use of outside counsel.

In addition to the above, the Subcommittee questions whether it is appropriate for the Department to charge client agencies the same uniform rate for all types of legal services. Clearly there is a wide disparity in the complexity of legal tasks. As a general proposition, the Subcommittee is of the view that the development of multiple rates for particular types of legal services could produce a savings for the State.

One Subcommittee member expressed before the Subcommittee that an audit could also determine the percentage of time and money the Department expends on assisting persons and agencies which are not part of the State. The same commenter noted that a difference may be arising between and the "public interest", "State interest", and "bureaucratic interest." An audit could also determine how much public resources are expended defending the latter at the expense of the first. Finally the member noted that Department may be developing an in-house bureaucratic culture and that the use of private attorneys and other litigation support services can save Alaska money as well as diversify the departmental culture.

Recommendation 8. The Subcommittee recommends that the Legislature develop and enact measures to prohibit the linkage between contributions to political campaigns and selection to perform legal services on behalf of the State. The American Bar Association has engaged in several studies on this matter, which it refers to as the "pay to play" issue, and has drafted specific policies to address the matter. The Subcommittee believes that the centralized nature of the delivery of legal services for the State of Alaska justifies additional controls in this area.

There was broad support on the Subcommittee for action by the Legislature on the "pay-to-play" issue. The American Bar Association has appointed a task force to consider this issue and the task force has forward proposed amendments to the rules of professional responsibility to the ABA House of Delegates. These materials are included with this Report. The Department told the Subcommittee that it was aware of this issue but did not

elaborate as to what steps, if any, it may have taken to address the issue. In general, the Department has expressed confidence in the existing procurement rules and process.

The Subcommittee believes that the process for selection of outside counsel by the Department would be enhanced by the adoption of proposals comparable to the ABA task force proposal. In part, this view is based on the fact that in Alaska all outside legal service providers to the State, with the exception of conflict counsel by the Office of Public Advocacy, are selected by the Department of Law. In addition, the Subcommittee is mindful that virtually all professional employees of the Department of Law are either exempt or partially-exempt employees, and serve at the pleasure of the Governor. The centralization of procurement authority in the Department of Law and the subjective nature of outside counsel selection gives rise to the danger of favoritism in the selection process. Adoption of the "pay to play" rules could install additional safeguards into the process. At a minimum, the Legislature should hold hearings on this issue, which has attracted national attention.

Some members of the Subcommittee believe that the "pay to play" issue should involve broader considerations than simply the making of campaign contributions by attorneys and should encompass long-standing personal or professional relationships of attorneys to candidates.

Other Subcommittee members have commented that the Department of Law should be pro-active regarding this issue and develop protective measures for recommendation to the legislature using a "disclosure" approach rather than waiting for mandatory requirements to be imposed with the Department of Law in a reactive posture.

Recommendation 9. **The Subcommittee recommends that the Legislature develop additional tools to review and provide advice to the Department for litigation where the potential for significant financial liability exists. As presently arranged the roles of client and attorney are blurred, with the Department being charged with conducting litigation and being viewed by agencies as having superior knowledge as to the goals of litigation. Additional oversight is needed to protect and enhance the wishes of the ultimate client.**

While qualified and competent, the legal staff of the Department is by no means infallible and may, at times lack all the expertise which may be desirable for particular types of cases which pose the risk of significant financial liability to the State. At the same time those in supervisory roles are also advising or actually making decisions on litigation strategy including the decision to retain specialized counsel verses keeping the litigation "in house". The Subcommittee believes that it may be prudent to install mechanisms which permit and perhaps even require the Department to review cases with major liability exposure to assure the highest quality representation is considered in timely manner.

The Subcommittee lacked the time to further develop suggestions on how to accomplish this result. One idea was to establish a consultation process through the Division of Legislative Audit.
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 and would provide a measure which legislature audit or any other audit or oversight body might utilize to evaluate the effectiveness of both the department of law and contract counsel. Such a plan and objective may not be necessary or appropriate for routine cases.

Recommendation 10. **The Subcommittee recommends that the Legislature review and consider changes to statutes setting forth the powers and duties of head of the Department, the Attorney General. The Attorney General is not specifically provided for in the Alaska Constitution, but rather is but one of the heads of executive departments. Present statutes provide, and the Supreme Court has thus held that the Attorney General may exercise the powers of an attorney general at common law. The Subcommittee believes that such an arrangement may be incompatible with the concept of limited, constitutional government and may be in need of amendment.**

The Subcommittee posed a series of questions to the Department regarding the settlement process, and the Department responded in correspondence which is part of the Report. The Subcommittee urges that this response be examined closely by the Commission. Continued efficient delivery of government services by the Department of Law requires an ongoing appreciation of the limited resources available to the State of Alaska. The Subcommittee believes that the power to settle cases poses unique dangers since the Department of Law stands in a position to acquiesce to an incredible variety of claims and assertions that the Department would never make on behalf of the State. A restrictive view of the authority to settle cases is consistent with the notion of limited state resources. As a practical matter, attorneys with an expansive view of their authority to act on behalf of their client may be more inclined to agree to settlement terms which would not be available if the client alone was jealously guarding the checkbook.. Such considerations are all the more important in the case of non-financial terms of settlement. If legal services are to be delivered effectively and efficiently by the Department, as an institution it should very carefully husband the exercise of those powers. It is in this spirit that the Subcommittee examined settlement practices and authority.

In the response to the Subcommittee, the Department, after a description of the internal process utilized in evaluating proposed settlements, stated that the local case assessment committee will

> ...forward a recommendation to the Attorney General, or his designee, as appropriate, for consideration and action. All settlement decisions include the input of the state agency implicated by the settlement decision.
>
> *Final settlement authority rests with the Attorney General*, who may delegate final approval based on departmental policy. (Emphasis added)

Thus, unlike the typical situation in which the client decides whether to accept or reject a proposed settlement, it is the attorney who makes this judgment on behalf of the State of Alaska. The Subcommittee believes that this arrangement poses considerable danger for the State when it is combined with the Department's broad view of the powers of the Attorney General.

Status of the Attorney General

It is important to note that the Attorney General is not specifically provided for in the Alaska Constitution. Rather, the Attorney General by statute is but one of the heads of the departments of state government appointed by the Governor. At the Constitutional Convention, the following was said about the status of the Attorney General:

> Now it is my thought on the basis of the bill that we have here that probably what we want to decide is whether we want a constitutional attorney general or not. It seems to me on the executive department, as we have outlined in here so far, that we probably don't want a constitutional attorney general at all; that the matter should be left to the legislature as to whether we do or don't and to what his powers are when the legislature decides to set up an attorney general, and accordingly it seems to me pointless to discuss as to how the attorney general is be selected.
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> *Alaska Constitutional Convention Proceedings*, Page 2221, comments of Delegate Davis. (Emphasis added)

In this respect, the Attorney General holds no greater status than that of the head of any other executive department. From a constitutional perspective, the Attorney General derives power from the Governor under Article III, Section 16, who is charged with the responsibility for the faithful execution of the laws. The Legislature has granted certain powers to the Attorney General by statute, AS 44.23.020.

The 1991 Opinion

The Department of Law has added to the above framework. In responding to the Subcommittee's inquiry regarding settlement authority, the Department provided what it apparently believes is the best statement of the powers of the Attorney General as stated in a 1991 memorandum opinion to the Legislative committees examining the Exxon Valdez settlement authored by then Attorney General Charles Cole. This Opinion is included with this report.

The Subcommittee recommends that the 1991 Opinion be examined by the Commission but with reference to the statement of Delegate Davis regarding the status of the Attorney General. In the hands of the Department, the office

of Attorney General is expanded from a statutorily created office into a broadly based[1] office with additional common law powers[2] which may not be limited.[3] Fortunately, the 1991 Opinion cannot supercede the Alaska Constitution or rewrite the Alaska Statutes. The Alaska Supreme Court in *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975) notes that the basis for the Attorney Generals common law powers is statutory, AS 44.23.020 and that such common law powers exist ". . . except where they are limited by statute or conferred upon some other state official." Id.

As embodied in the 1991 Opinion, the views of the Department may be at odds with the Alaska Constitution and the intent of the founders. The Subcommittee recommends that Legislature hold hearings on potential amendments to AS 44.23.020. The purpose of these hearings and potential amendments would be to discover ways to restore the balanced view of the authority of the Department envisioned by the framers of the Alaska Constitution.

The Subcommittee subscribes to the proposition that the duties and powers of the Attorney General should derive solely from the Alaska Constitution and legislative enactments. In the view of the Subcommittee, the effective, efficient and responsive delivery of governmental legal services will be obtained by reemphasizing the legislative basis for the Department's acts and the limited nature of the State's resources.

The Subcommittee has drafted legislation to achieve this purpose, or, at a minimum, serve as the starting point for review. It is included with this report.

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[1] See Opinion at page 13: "The Attorney General is the State officer charged with implementing the executive branch's policies with respect to execution of the law." The authority cited for this proposition is not particularly helpful in understanding the basis for the statement. The Subcommittee is unaware of any constitutional or statutory provision which vests more authority for implementing the law in the hands of the Attorney General than any other executive department.

[2] See Opinion at page 13-14: "In that respect, the Attorney General has broad common law powers and responsibilities;." and page 15: "Alaska takes a similarly expansive view of the Attorney General's common law powers." These statements appear to be flawed. To the extent that the Alaska Attorney General has common law powers, they are granted by the Legislature in AS 44.23.020 (b)(7).

[3] See Opinion at page 24-25: "Given the absence of any such express prohibition it is unnecessary to speculate concerning the issue whether and to what extent the Legislature might prohibit the Attorney General from so settling the litigation. However, it is clear that the separation of powers doctrine would restrict any legislative attempt to intrude on the executive branch's discretionary authority to conduct litigation in the State's interest." Contrast this view with the limited view of the Attorney General expressed by Delegate Davis during the Constitutional Convention. The Opinion's statement might be correct if it is referring to the Governor's constitutional power, but the issue is the Attorney General's power, not the Governor's. The Subcommittee does not believe it is as "clear" as the Department suggests. See also page 26, footnote 27: "Some courts have held that the legislature may not restrict the attorney general's common law powers." The Opinion cites *Gust K. Newberg, Inc. v. Ill. St. Toll Hwy.*, 456 N.E 2d 50 (Ill. 1983) and *Murphy v. Yates*, 348 A. 2d 837 (Md. 1975) for this last proposition. The Subcommittee read the cases and found the results revealing.

In the *Newberg* case, the Illinois courts found that the constitutionally created attorney general held common law powers. Unlike the Alaska Constitution, the Illinois Constitution has established the elected office of Attorney General and declared that he is "...the legal officer of the State...". Once again, compare the comments of Delegate Davis, set out above.

In the *Murphy* case, the appeals court in Maryland determined that the constitutionally established State's attorney could not have his powers restricted by the legislature. Interestingly enough, when the 1991 Opinion was written it failed to mention that the voters of Maryland in 1976 overturned the effect of the *Murphy* case by amending the Maryland Constitution. *Goldberg v. State*, 519 A.2d 779 (Md. App. 1987): "The likely effect of the 1976 amendment to Art. V, Sec. 9 was to make valid, once again, the proposition that the duties and powers of the State's Attorney derive solely from the constitution and legislative enactments. *Id.*, footnote 4, at 783. Under these circumstances, it is fair to say that the precedential value of the *Murphy* case is extremely limited.

STATE OF ALASKA

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November 15, 1999

Commission on Privatization and Delivery
of Government Services
Alaska State Legislature
716 W. 4th Ave., Ste. 320
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Dear Commission Members:

The Department of Law appreciates the opportunity to respond to the recommendations of the citizen volunteer subcommittee that reviewed our operations. Our responses address the subject matter in each recommendation.

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 department strongly opposes contracting the functions of the Office of Special Prosecutions and Appeals (OSPA) to the private sector.

The department has previously expressed its view that the prosecution function is an inherently governmental activity that is not appropriate for privatization for both ethical and public policy reasons. In appellate work, it is extremely important for the state to be uniform in the interpretation of the criminal laws and in presenting the state's legal position in the appellate courts. Indeed, this is the precise reason that the

appellate function was centralized: before OSPA, district attorney offices often took varying and sometimes contradictory legal positions in writing appeals.[1]

Maintaining a consistent legal position is just one reason why it is best to have one criminal division office handle the vast majority of the state's criminal appellate work. In addition, similar issues can be assigned to the same attorney, thereby avoiding duplication of research. Moreover, because OSPA appellate attorneys devote full time to criminal appeals, they develop a high level of expertise. OSPA enjoys a good reputation and a high level of credibility with the appellate judges and justices. This is precisely why the United States Department of Justice utilizes a centralized office of the solicitor general, which handles all federal cases in the United States Supreme Court.

The OSPA appellate attorneys are also called upon daily to provide advice to prosecutors and police agencies. They must be available to immediately respond to telephonic and e-mail inquiries that often need answers in a matter of hours or even minutes. For example, trial attorneys frequently contact OSPA appellate attorneys during a 10-15 minute recess in trial to seek advice on a legal issue that has just arisen. In addition, OSPA attorneys often work jointly with prosecutors to prepare briefs in serious or complicated trials. This on-call function is not well suited for privatization. OSPA appellate attorneys rarely issue formal, written legal opinions. They do not issue "letter opinions."

<u>Recommendation 2.</u> 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.

The department strongly opposes contracting the misdemeanor prosecution function to the private sector.

Although the Public Defender Agency and Office of Public Advocacy do have private contracts for criminal *defense* work, that does not present a model the department can follow. The ethical obligation of a criminal defense attorney is to advocate what is best for *that particular client*, regardless of how others might be affected. A public prosecutor, on the other hand, has broader obligations to the public as a whole, to victims, to law enforcement agencies, and to other similarly situated criminal defendants.

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[1] The department would note that the report includes little, if any, examination of performance as measured through such means as client and court interviews and input. We believe that such an examination is one necessary component in determining whether privatization of legal services, criminal or civil, would be in the best interests of the state.

As noted above, the department has previously expressed its view that the prosecution function is an inherently governmental function that is not appropriate for privatization for both ethical and public policy reasons. In addition, the department believes that the administration of criminal justice can best be served by observing statewide policies designed to promote uniformity in the application of the criminal law and in the state's legal position taken in case screening and case resolution. For these reasons, the department strongly believes that its District Attorney offices should handle misdemeanor prosecutions.

In response to the department's points, the subcommittee has suggested that the Department of Law continue to review and screen the 20,000 misdemeanor cases that it now handles each year, and only then refer the cases to private counsel. The subcommittee also suggests that the Department of Law retain supervisory review over all those cases, and approve any dismissals of charges. For the same reasons, we presume the subcommittee would also recommend the department supervise and review all reductions in charges and plea bargains.

The subcommittee's suggested procedure thus requires department attorneys to spend essentially the same amount of time handling misdemeanor cases as they presently do, because the majority of the effort in those cases (aside from complying with victim's rights laws) goes into initial screening and analyzing possible negotiated resolutions. This duplication of effort would not only remove any cost savings, but would make misdemeanor prosecution much more costly, much more time consuming, and much less efficient than it is today.

Recommendation 3. The Subcommittee recommends that the Legislature conduct specific hearings on the issue of the allocation of costs and responsibilities for criminal prosecution between the State and local governments. Such hearings would 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.

Ever since the decline of oil revenues in the mid- to late-1980s, there has been considerable discussion about the role of municipalities in the criminal justice system, particularly in providing police protection, jails, and prosecution of misdemeanor offenses. The Alaska statutes provide that the attorney general shall prosecute cases involving violation of state law. AS 44.23.020(b)(3). In addition, Title 29 allows, but does not require, certain municipal governments to adopt and prosecute misdemeanor criminal ordinances. Indeed, earlier this year the criminal division provided testimony on

this subject before the House Finance Subcommittee. The Department of Law will continue to participate in any legislative review of whether this statutory scheme should be changed to require municipalities to prosecute some cases, and how that could be done equitably.

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.

The department certainly supports reducing government expenditures when possible. However, the department does not believe the subcommittee should recommend that the legislature automatically cut its budget if further efficiencies are achieved. Instead, each year's budget must be based on the department's current workload, any new duties that might be imposed by law, and an analysis of the work that the department is not now able to do with its current staffing levels. Moreover, whether budget cuts take the form of "reductions in staff" or reductions in other non-staff costs should depend on a more complete analysis of the department's activities.

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 a pre-qualified list of potential providers would be a useful tool.

The department agrees that fairness and objectivity in the selection of outside counsel is necessary; however, we do not agree with the subcommittee's premise that the current system is flawed.

Formal avenues are in place for complaints about procurement violations. Legislative Audit, the Ombudsman, and the State Procurement Code itself provide the means for such complaints to be investigated and, if necessary, resolved. Individual legislators are often the first to hear from constituents who feel they have been wronged by a state agency. Yet, our office has rarely received a complaint or protest concerning the award of a legal services contract.

When the legislature adopted its own version of the Model Procurement Code in 1986 it established procedures that mirrored those in use by many other states, counties, and local governments. In adopting the code, the legislature set into place a wide range of procurement procedures that acknowledged the need for flexibility and the fact that the objective measures used in purchasing commodities and equipment are different from the subjective criteria that must be considered in hiring professional

service providers. Subsequent revisions to the code have sought to streamline these procedures even further, in part to stem the growth of a "procurement bureaucracy" within state government and to better meet the needs of both state agencies and private vendors.

Regardless of whether an agency is attempting to secure the services of a medical doctor, engineer, architect, accountant, economist, or attorney, the factors that are considered *most* heavily in the selection process are those that have to do with the knowledge, experience, and skills of each professional. Assessing which prospective provider's unique combination of knowledge, experience, and skill is best suited to the circumstances of a particular case, project, or body of work must be at the heart of any selection process.

In adopting the Procurement Code, the legislature acknowledged the inherent difference involved in securing professional services, and it established procedures by which those services are to be procured. In our view the need for any additional legislation seems unwarranted; however, if the legislature chooses to pursue changes to the code it would be advisable to continue to address the procurement of "professional services" as a whole and not to single out any one profession.

The approach the subcommittee recommended the legislature take is the use of a "pre-qualified list of potential providers" for classes of matters which may be more "routine" in nature. Contracts would then be awarded on a rotating basis through the list. Specific examples provided by the subcommittee include criminal appeals, collections, and workers' compensation cases. Past experience has shown that such a rotating system does not work.

The idea of rotating through a list of pre-qualified law firms for workers' compensation and certain tort cases was tried by the Division of Risk Management. They had initially identified seventeen different categories of work and requested that firms submit separate proposals outlining their qualifications and proposed hourly rate for each category for which they wished to be considered. The entire procurement process turned out to be *very* time consuming for both the agency and the prospective contractors. Because the categories of work were based on previous caseloads and given the uncertainty of future work, there was no guarantee that any work would ever be assigned to a particular category or that each firm in that category would be reached during the contract period. As a consequence there was little incentive for firms to significantly lower their rates and the costs of contracting out significant amounts of the tort caseload proved to be exorbitantly high. In addition, the process of rotating through the list, while it may have seemed to be the fairest method of doling out work, proved to be less than

satisfactory when factors such as trial skills or related experience should have entered into the selection decision.

Because of this experience, when these contracts expired, the Division of Risk Management decided that it would prefer to bolster the in-house staff within the Department of Law to handle the bulk of the state's tort litigation, at a greatly reduced rate, and turn over to the department responsibility for procuring the services of outside legal counsel on an as needed basis.

If the state hopes to gain the services of qualified and capable outside counsel at rates that are equal to or less than the cost of in-house counsel, the "rotating-list" concept is clearly self-defeating. Without the assurance of a consistent level and high volume of work, which is simply not possible with a rotating list, it is extremely doubtful (and has never been achieved in the past by this department) that the state could ever expect to obtain the services of outside counsel at comparable rates.[2]

Recommendation 6. The Subcommittee recommends that the Legislature require the Department to develop in consultation with 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.

The department has no objection to the concept of a legal auditing firm providing additional review of outside counsel bills, provided funding is appropriated to pay any additional cost. Such a firm can help deflect potential criticism as a quasi-independent reviewer of outside counsel bills. We believe, however, that we are doing an excellent job of managing contracts and that no legal auditing firm could find sufficient items to cut out of our outside counsel bills to pay its own fees, let alone provide a savings.

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[2] The FY 2000 hourly rate for a department civil division attorney, including all overhead costs, is $92.49. We question whether the state can contract with private counsel for less than this amount, given that our actual experience shows that the hourly rate for contract counsel, with discounts provided to the state, is typically between $125 to $200 per hour, and higher for non-Alaska attorneys retained for specialized expertise. We discussed the issue of in-house and outside counsel rates in our letter to the subcommittee dated August 31, 1999. We discussed the issue of performance/effectiveness of in-house as compared to outside counsel in tort litigation, using examples from actual case experience, in our memorandum on tort litigation attached to our September 30, 1999, letter. These materials are all included in the subcommittee's attachments provided to the commission. See also our response to recommendation 8.

In 1997, the Division of Legislative Audit performed an audit of the department's contract management. The audit found in most cases the contracts were properly managed, and where the auditors found problems, they attributed them to a lack of training and clear directives for project managers. The exceptions resulted in an audit recommendation for contract management guidelines. The department developed a manual on contract management, which has been provided to the Commission on Privatization and the Delivery of Government Services by the subcommittee as an appendix to the subcommittee's report.

Based on other states' experience, we conservatively estimate the cost of contracting with a legal auditing firm for all legal services contracts would have been at least $150,000 in FY 1999. A pilot project for torts cases would have cost about $20,000. The department is not funded for this additional cost.

Recommendation 7. The Subcommittee recommends that the Legislature direct the Division of Legislative Audit to determine the full and fair value per billable hour of legal services rendered by the Department of Law and ensure that the rates are consistently applied in the budgeting process pertaining to the Department. Following completion of this task, the Subcommittee recommends to the Legislature that it examine whether legal services rendered by the Department should be billed at different rates for different services. The Subcommittee is generally of the view that the Department's costs of service should determine between routine and complicated services.

The Department of Law implemented full timekeeping and billing for the Civil Division in the final quarter of FY 1996. The decision to implement full timekeeping grew out of concerns expressed in a legislative audit that resulted in a monetary assessment imposed on the department by the federal government. The findings from that audit did not arise because the department had unfairly or inconsistently allocated costs to federal programs, but because, at the time, the department could not show that it had not.

Since the implementation of full timekeeping for the Civil Division, annual reviews of the division's rates are performed by a number of entities:

- The Division of Legislative Audit's annual statewide single audit examines the rate-setting methodology for financial soundness and consistency. Legislative Audit's annual audit report for the fiscal year ending June 30, 1998, did not include any findings regarding the Department of Law's timekeeping and billing rate, or any other aspect of the department's business, for that matter.

- The state also contracts with a consulting firm to assist the department in the development of its federally approved cost allocation plan, which includes approval of the department's timekeeping and billing methodology. This review assures that the methodology is consistent from year to year and is in compliance with OMB Circular A-87 governing what costs government entities may allocate to federal programs. Again, no findings, exceptions, or disallowed costs have resulted from this review.

- In addition, the Office of the Governor's Office of Management and Budget conducts a review of the rates. The Department of Law's ability to implement proposed rates in any fiscal year is subject to this approval process.

- The department is also required to submit the annual timekeeping and billing rates for similar scrutiny by the heads of the administrative divisions of each department. Questions arising from this review could result in a revision to the rates.

All of these governing bodies have accepted the rates and methodology proposed by the Department of Law. As a consequence of these reviews and audits, the department's rates receive fully adequate review to ensure consistency, accuracy, and fairness.

The department has no incentive to understate costs in the development of its rates. Such an understatement would lead to a shortfall situation tantamount to insolvency. In such a situation, the department would be forced to seek supplemental funding from the legislature in order to make up the shortfall. While an error in the rate calculation or some set of unforeseen circumstances may result in a need for supplemental funding, the department does not approach setting its rates by intentionally excluding some of its costs. Such practices would be at the very least unethical, and perhaps even illegal.

The Department of Law's "clean bill of health" with respect to its time-keeping and billing rates is in part due to its simple and straightforward methodology and the consistency with which it is applied from year to year. In the world of rate setting, once an acceptable rate-setting methodology has been established, it is inadvisable to seek a new methodology without the most compelling circumstances, *i.e.*, some fundamental shift in the underlying business process makes the previous methodology unacceptable or unworkable. Such a shift has not occurred in the Department of Law.

It may seem that different timekeeping rates should be applied depending on the complexity of the work, however adopting such a change would be unwise for the following reasons:

- The current rate methodology is highly objective. In its simplest terms, costs are divided by billable hours to produce a rate. What the subcommittee seems to imply is that an objective process be replaced with a subjective one. That suggestion appears to conflict with other subcommittee recommendations that seek to diminish subjectivity in the contract award and other discretionary arenas.

- A more subjectively applied rate is likely to expose the department to the risk that a monetary assessment or loss of federal funds may result - bearing in mind that it is not necessary for an audit to find that an agency inappropriately applied costs, only that it could not prove otherwise.

- No savings can occur from a multiple rate structure. Whatever rate structure is used, it must recover all costs or the department will be in budget shortfall at the end of the fiscal year.

- Implementation of a more complex rate application system will result in an administrative burden that will in turn result in higher administrative costs. This outcome by itself is a compelling reason to continue with the simple approach developed by the department.

Finally, the subcommittee expressed concern over a discrepancy between the rates charged the department's client agencies and the rates claimed in motions for the recovery of legal fees and costs before the courts. The department requests reimbursement of attorneys' fees based on the prevailing market rate, not based on its interagency billing rate. The attached Memorandum of Law, which is in the form most commonly used by the department's attorneys when requesting attorneys' fees and costs, describes the legal basis for this claim. The superior court in that case awarded the requested market rate, as have the trial courts in numerous other cases.

<u>Recommendation 8.</u> **The Subcommittee recommends that the Legislature develop and enact measures to prohibit the linkage between contributions to political campaigns and selection to perform legal services on behalf of the state. The American Bar Association has engaged in several studies on this matter, which it refers to as the "pay to play" issue, and has drafted specific policies to address the matter. The Subcommittee believes that the centralized nature of the delivery of legal services for the State of Alaska justifies additional controls in this area.**

At the outset the department states again, as we did in our testimony to the subcommittee, that no "pay-to-play" system exists in the Department of Law for the retention of outside counsel. There simply is no pay-to-play problem that needs to be

addressed. Moreover, Alaska's State Procurement Code, the Executive Branch Ethics Act, and the campaign finance laws, together provide very adequate controls and standards to prevent against any such system.

We have reviewed the American Bar Association's pay-to-play materials. These materials relate to the issue of lawyers making political contributions or soliciting political contributions for the purpose of obtaining or being considered for a government legal engagement. We note that the ABA House of Delegates voted, at its meeting in August 1999, to *not* adopt the model rule of professional conduct on pay-to-play that was proposed by the ABA committee.

As discussed in the background report by the ABA committee that considered the pay-to-play issue, while lawyers and their political contributions are an important component in pay-to-play, lawyers are nc the most important players. Rather, the issue is primarily one of campaign finance practices and laws, and uniform procurement procedures. (See pages 2-3 of ABA committee background report included in the attachments to the Law Subcommittee's report.)

The ABA committee background report states that consistent and diligent enforcement of statutory provisions governing fair campaign finance practices and the conduct of public officials is the "most fundamental method" of addressing the issue of pay-to-play. In this regard, it should be noted that the Alaska Legislature enacted a comprehensive campaign finance reform law in 1996. The Alaska Public Offices Commission enforces this law. The department would of course participate in any legislative process to consider further campaign finance reform measures. At this time, however, we do not see a justification or need to specifically single out lawyers for special treatment in the campaign finance laws. Also, the conduct of public officials in the executive branch is regulated in detail in the Executive Branch Ethics Act, AS 39.52.

The ABA committee background report notes that the second method of protecting against a pay to-play system is the use of uniform procurement procedures for placement of legal engagements by government entities. We previously addressed for the subcommittee the procurement procedures used by the department when outside counsel is retained by the department. The entire procurement and contracting process is directed and supervised by the department's contracting officer within the Administrative Services Division. The department adheres to the requirements spelled out in the State Procurement Code (AS 36.30) and the corresponding administrative regulations (2 AAC 12) whenever we secure the services of outside counsel. We set out the procurement procedures and step-by-step process used by the department in our letter to Mr. Mark Johnson dated August 31, 1999, a copy of which is included in the subcommittee's

attachments, and we provided testimony to the subcommittee on our procurement procedures as well.

As mentioned above, the ABA House of Delegates recently voted down the pay-to-play rule proposal. Opponents of the measure contended that a professional conduct rule of this nature would be unconstitutional under the First Amendment and an inappropriate infringement on the right of lawyers to participate in the electoral process. According to press reports on the debate at the annual meeting, a past chair of the ABA ethics committee pointed out there is need for campaign finance reform, "but not reform disguised as an ethics rule, only for lawyers."
See, www.abanet.org/journal/oct99/10ahouse.html

Recommendation 9. The Subcommittee recommends that the Legislature develop additional tools to review and provide advice to the Department for litigation where the potential for significant financial liability exists. As presently arranged, the roles of client and attorney are blurred, with the Department being charged with conducting litigation and being viewed by agencies as having superior knowledge as to the goals of litigation. Additional oversight is needed to protect and enhance the wishes of the ultimate client.

The attorney general serves as the chief legal officer for the state executive branch. AS 44.23.020. As such, the attorney general plays a major role in articulating the powers and duties of the agencies of state government through appropriate legal interpretation. The attorney general is by law responsible for the conduct of litigation in which the state is a party. The attorney general is responsible for ensuring consistency and uniformity in the state's legal policy.

The attorney general does in fact have more knowledge with respect to the goals of litigation and matters of legal interpretation than the agencies he or she represents. Indeed, the provision of legal expertise, advice, and representation to state agencies and officers is the very function of an attorney general. It is through this advice and representation that the attorney general, in daily consultation with state agencies and officers, is able to establish consistency and uniformity in the state's legal policy. These concepts of the role of the attorney general are certainly not unique to Alaska. *See*, State Attorneys General, Powers and Responsibilities, National Association of Attorneys General, Second Printing 1998.

There are clearly differences between government attorneys and their private counterparts, and this is true whether the government be federal, state, or local. Attorneys general, while representing the state agencies, also are (and should be)

concerned with the public interest in any given situation. This is different from the private attorney, who generally represents only the interests of a particular individual client. This difference does not mean that with the attorney general the roles of client and attorney are "blurred" or that the wishes of the client are somehow not being "protected." What it means is that in advising and consulting with the client agency or officer as to legal interpretations, or a possible step in litigation, or a proposal to resolve an issue in dispute, or other matters, the attorney general in providing advice will carefully consider the law, the interests and position of the agency, and the public interest. It is a delicate and important blend, and a part of the responsibility of a government lawyer. By the same token, the agencies are also concerned with the public interest in carrying out their various functions, so the blend here is natural and generally not problematic.

As the department explained to the subcommittee in our written responses to questions and in testimony, cases that we are handling in which there is a potential for significant financial liability undergo close scrutiny through reviews by settlement committees and case status meetings at appropriate supervisory levels. For instance, often a settlement committee will be convened at the request of the assistant attorney general handling the matter even when a particular settlement proposal is not on the table - the purpose instead being to lay out and discuss case status and strategy in anticipation of further developments, be they motion practice, court rulings, discovery proceedings, or settlement negotiations. Reports on those sessions are prepared for the attorney general to seek direction or to advise him on the status of the case and the strategy being pursued, as appropriate. And, we are fortunate to be able to draw upon legal expertise in a variety of substantive areas in the department in assembling committees with the necessary experience to effectively and critically consider any particular matter.

We understand from the subcommittee's written discussion on recommendation 9 that the subcommittee did not have time to fully develop suggestions on this recommendation. However, one idea mentioned in the report is to establish a "consultation process through the Division of Legislative Audit" presumably for some sort of oversight of the attorney general's conduct of litigation. We do not think such oversight is necessary or appropriate for the following reasons:

- First, as discussed above, supervisory work within the department of the representation provided to state agencies is professional, competent, ongoing, and provided at several levels up to and including the attorney general.

- Second, we believe such oversight would, depending on the specifics of the consultation idea, violate the separation of powers. The governor is constitutionally charged with the responsibility of executing and enforcing the laws. Alaska Const.,

Art. III, Sec. 16. The attorney general, appointed by the governor, is the state officer charged with implementing the executive branch's policies with respect to execution of the law. AS 44.23.020. It is the attorney general, in consultation with the state agencies, who decides how to proceed in litigation, not the legislative branch.

- Third, the legislative branch of government already has an important tool that may be used to review action of the attorney general in cases in which financial liability to the state is determined - the power of appropriation. Let's say the attorney general settles an employment case and the state is obligated under the settlement to pay the plaintiff $100,000 in damages. The settlement would be entered subject to appropriation by the legislature, and the matter would be presented to the legislature for its consideration during the next session. If the funds are not appropriated, the case would go back into litigation mode for some other resolution, whether by court decision or new settlement amount (which would again be presented to the legislature). Our letter to Mr. Mark Johnson dated September 30, 1999, included in the attachments to the subcommittee's report, sets out this process in detail. *See also,* AS 09.50.270.

Recommendation 10. The Subcommittee recommends that the Legislature review and consider changes to statutes setting forth the powers and duties of head of the Department, the Attorney General. The Attorney General is not specifically provided for in the Alaska Constitution, but rather is one of the heads of executive departments. Present statutes provide, and the Supreme Court has thus held that the Attorney General may exercise the powers of an attorney general at common law. The Subcommittee believes that such an arrangement may be incompatible with the concept of limited, constitutional government and may be in need of amendment.

The department strongly questions the wisdom of eliminating or limiting the common law powers of the attorney general in Alaska. The common law powers of the office of attorney general have evolved over literally hundreds of years of Anglo-American law and are entirely appropriate to the fulfillment of an attorney general's responsibilities.

> The common law is the fountainhead of the Attorney General's authority to represent, defend, and enforce the legal interests of state government and the public. Notwithstanding relatively recent constitutional and statutory enumerations of Attorney General powers, traditionally recognized prerogatives of the state's chief legal officer continue to shape and expand the role of the modern

> Attorney General. Contemporary experience convincingly demonstrates that the common law is a vital source of power for Attorneys General who seek to protect public interests in recently developing areas of the law.

State Attorneys General, Powers and Responsibilities, National Association of Attorneys General, Second Edition 1998, page 27.

An examination of the common law powers of the attorney general, as articulated by the Alaska Supreme Court as well as courts all over the United States, demonstrates that these powers are complementary and incidental to the functions of the office of attorney general, and are not inconsistent in the least with the duties and powers of the attorney general as set out in the Alaska statutes, AS 44.23.020. *See also,* AS 09.50.300.

The National Association of Attorneys General, in its comprehensive review of the case law on the common law powers of attorneys general, describes the common law roles of the attorney general as follows:

- The attorney general has the duty to appear for and to defend the state and its agencies.
- The attorney general has the right to control litigation and appeals.
- The attorney general has the right to intervene in legal proceedings on behalf of the public interest.
- The attorney general has the power to determine the state's legal policy.
- The attorney general has the authority to prosecute criminal activity, in the absence of express legislative restriction.

State Attorneys General, Powers and Responsibilities, at pages 37-38.

The common law functions of the attorney general were recognized by the Alaska Supreme Court in *Public Defender Agency v. Superior Ct., Third Judicial Dist.*, 534 P.2d 947 (Alaska 1975). In *Public Defender*, our court held that it would violate the separation of powers for the judicial branch to order the attorney general to prosecute an action for civil contempt for nonsupport; while the attorney general had the power to prosecute such an action, the court did not have the power to control the exercise of the attorney general's discretion as to whether he will take action in particular cases. "Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. The discretionary control over

the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases." 534 P. 2d at 950 (citations omitted).

The attorney general's common law powers, as well as statutory powers, are not incompatible with the Alaska Constitution. The subcommittee is correct that the Alaska attorney general is not a constitutional officer. The attorney general is appointed by the governor and serves as the chief legal officer for the governor and the executive branch of state government. Alaska Constitutional Convention Proceedings 2193-2201; 2215-23.[3]

However, this does not mean that the Alaska attorney general does not properly have common law powers - as discussed above, our Supreme Court has held that under current Alaska law the attorney general does have such powers, consistent with the Alaska Constitution. In other words, whether the duties and responsibilities of the attorney general are spelled out in constitution or in statute or both, the long-recognized common law powers of the attorney general still apply unless specifically limited by law. "In most states, the modern-day office retains common law authority, as well as the powers and duties that specifically are assigned by constitutions and statutes." State Attorneys General, Powers and Responsibilities, at page 38.

Both the common law powers and the statutory authority of the Alaska attorney general are important in ensuring that the public interest can be protected as new laws are enacted, new law enforcement issues arise, and technology advances. The removal of the attorney general's common law powers could have unintended consequences. We could easily find ourselves spending our limited legal resources litigating whether or not the attorney general had the authority to bring some particular action. For example, consider the participation by the Alaska attorney general in the 50-state action against the tobacco industry brought on a variety of new consumer fraud, antitrust, and Medicaid reimbursement theories. Do we want the attorney general spending state resources litigating his authority to bring such a case because the common law powers of the office were removed? As you know, this case brought in hundreds of millions of dollars for the State of Alaska.

Recommendation 10 again discusses the authority of the attorney general to settle litigation on behalf of the state. For purposes of this response, we note that we

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[3] We would note that an expansion of the role of the attorney general from legal advisor of the governor and other state officers to legal advisor of the "state, including the" governor and other state officers, as suggested by the subcommittee in its proposal concerning AS 44.23.020, would be inconsistent with the intent of the framers of the Alaska Constitution.

disagree with many of the subcommittee's characterizations of the opinion of former Attorney General Charlie Cole on the issue of the governor's and the attorney general's settlement authority under Alaska law. 1991 Inf. Op. Att'y Gen. (April 2). Be that as it may, we believe it would be disastrous for the state to allow its approach to litigation and settlements to be fragmented from agency to agency as suggested by the subcommittee.

The subcommittee would apparently have one believe the attorney general goes out on his own, without the benefit of consultation and involvement of the client agency, to settle cases, without taking into account the state's limited resources or the needs and desires of the agency. Nothing could be further from the truth. The relationship between the attorney general and our clients is one of constant communication, sharing of information and viewpoints, discussion and consultation, and ultimately decision on what course of action is in the best interests of the State of Alaska. And the best interests of the state and the zealous guarding of its limited resources are always of paramount concern.

In conclusion, thank you for this opportunity to provide the Department of Law's response to the subcommittee's report and we appreciate your consideration of our comments. Please let us know if you have questions or would like further information.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Barbara J. Ritchie
Deputy Attorney General - Civil

By: Cynthia M. Cooper FOR
Deputy Attorney General - Criminal

Attachments

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

DAVID E. JOHNSON, and STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF FAMILY & YOUTH SERVICES,

Defendants.

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
KETCHIKAN

DEC 21 1998

Clerk of the Trial Courts
By S M/C Deputy

Case no. 1KE-97-117 CI

ORDER GRANTING ATTORNEY'S FEES

THE COURT having considered the State of Alaska's Motion for Attorney's Fees, supporting documents, and any response thereto, and being fully advised in the premises,

HEREBY ORDERS that the motion is GRANTED. The court finds that the defendant State of Alaska, Department of Health & Social Services, Division of Family & Youth Services (the state) is a prevailing party in this case, and the state's attorney's and paralegal fees of $12,443.40 are reasonable and were necessarily incurred. Under Civil Rule 82(b), the state shall be awarded $ 2488.68 in fees from plaintiff Gregory A. Shapley.

DATED: 12/21/98

Judge Thomas M. Jahnke

SEAL OF THE TRIAL COURTS STATE OF ALASKA FIRST JUDICIAL DISTRICT

CERTIFICATION
Copies Distributed
Date 12-21-98
To G. Shapley
M. Lessmeier
Susan Cox, AG
By S M/C

This is to certify that on September 30, 1998, a copy of the foregoing was mailed to the attorney or party of record:
Gregory A. Shapley, Pro Se
PO Box 85
Craig, AK 99921

Michael Lessmeier, Esq.
Lessmeire & Winters
124 W. 5th Street
Juneau, AK 99801
(Attorney for Dr. Johnson)

Pamla Credo-Hayes DATED: September 30, 1998

OCT 5 1998

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

vs.

DAVID E. JOHNSON, M.D. and STATE OF ALASKA, DEPT. OF HEALTH AND SOCIAL SERVICES, DIVISION OF FAMILY AND YOUTH SERVICES,

Defendants.

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
KETCHIKAN

SEP 14 1998

Clerk of the Trial Courts
By _____ Deputy

CASE NO. 1KE-97-117 CI

FINAL JUDGMENT

This case, having been dismissed with prejudice by granting summary judgment motion in favor of David E. Johnson, on August 10, 1998 and the court having examined the documents on file herein and otherwise being fully advised;

IT IS HEREBY ORDERED that final judgment is entered on the summary judgment motion in favor of David E. Johnson against Gregory A. Shapley. David E. Johnson shall receive after proper application an award of costs in the amount of $154.04 (RWS 9/21/98) and attorney fees in the amount of $457.00, plus interest accruing on said amounts at 10.5% per annum from August 10, 1998 until paid. 12/21/98

DATED this 11th day of ~~August~~ Sept, 1998 at Ketchikan, Alaska.

SUPERIOR COURT JUDGE

Approved/Disapproved as to form:

Gregory A. Shapley, Pro Se

CERTIFICATION
Copies Distributed
Date 12-21-98
To G. Shapley
M. Lessmeier
Susan Cox, AG
By CNH

LESSMEIER & WINTERS
LAWYERS - LLC
124 WEST 5TH STREET
JUNEAU, ALASKA 99801
TELEPHONE (907) 586-5912
FACSIMILE (907) 463-3020

AUG 17 1998

Approved as to form:

Michael L. Lessmeier, Attorney for Defendant
ABA #7910082

The undersigned hereby certifies that on the 24 of August, 1998, a copy of the foregoing document was mailed to:

Susan D. Cox, Chief Asst. A.G.
Attorney General's Office
P.O. Box 110300
Juneau, AK 99811-0300

Gregory A. Shapley, Pro Se
P.O. Box 85
Craig, AK 99921

0023-050.fjudform

CERTIFICATION
Copies Distributed
Date 9.21-98
To Gregory Shapley
Michael Lessmeier
Susan Cox
By

LESSMEIER & WINTERS
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124 WEST 5TH STREET
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

DAVID E. JOHNSON, and STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF FAMILY & YOUTH SERVICES,

Defendants.

Case no. 1KE-97-117 CI

STATE OF ALASKA'S MOTION FOR AWARD OF ATTORNEY'S FEES

Pursuant to Rule 82 of the Alaska Rules of Civil Procedure, the defendant State of Alaska, Department of Health & Social Services, Division of Family & Youth Services (the state), as prevailing party in the above captioned action, hereby moves for an award of attorney's and paralegal fees. The state requests an award of 20 percent of its fees, for a total award of $2,488.68. Civ. R. 82(b)(2).

This motion is supported by the accompanying memorandum of law, affidavit of counsel, and the attached exhibit.

DATED: 9/30/98

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General

This is to certify that on September 30, 1998, a copy of the foregoing was mailed to the attorney or party of record: Gregory A. Shapley, Pro Se, PO Box 85, Craig, AK 99921; Michael Lessmeier, Esq., Lessmeire & Winters, 124 W. 5th Street, Juneau, AK 99801, (Attorney for Dr. Johnson)

Pamla Credo-Hayes

Pamla Credo-Hayes DATED: September 30, 1998

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

DAVID E. JOHNSON, and STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF FAMILY & YOUTH SERVICES,

Defendants.

Case no. 1KE-97-117 CI

MEMORANDUM OF LAW IN SUPPORT OF STATE OF ALASKA'S MOTION FOR AWARD OF ATTORNEY'S FEES

On August 10, 1998, this court granted defendant State of Alaska's Motion for Summary Judgment, dismissing the above captioned case against the State of Alaska, Department of Health and Social Services, Division of Family and Youth Services (the state) with prejudice. The state is therefore the prevailing party in this action and, as such, moves for an award of attorney's fees pursuant to Civil Rule 82.[1]

I. THE STATE OF ALASKA IS ENTITLED TO AN AWARD OF 20 PERCENT OF NECESSARILY INCURRED ATTORNEY FEES

Alaska Civil Rule 82(b)(2) provides that defendants who are prevailing parties are automatically entitled to an award of 20 percent of their actual reasonable fees for judgment without trial, 30 percent with a trial.

> In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case . . . resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

The purpose of Civil Rule 82 in providing for the allowance of attorney's fees is to partially compensate a prevailing party for the expense of litigation. City of Valdez v. Valdez Development Co., 523 P.2d 177, 184 (Alaska 1974).

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[1] Final Judgment in favor of the state was distributed by the clerk on September 21, 1998.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Although the Attorney General, as counsel for the state, bills client agencies at a rate far below the market rate of attorneys in private practice, it is well settled that when the state is the prevailing party, it may request reimbursement of attorney's fees at a reasonable market rate. The Attorney General is not limited to recovering fees based on the Department of Law's inter-agency billing rate.[2] There is clear authority for awarding attorney's fees under Civil Rule 82 based on market rates instead of the department's overhead rate. Atlantic Richfield Co. v. State, 723 P.2d 1249, 1251-52 (Alaska 1996) (Alaska Supreme Court ruled it appropriate to use average of hourly billing rates charged by private attorneys to calculate fee award for legal work performed by assistant attorneys general); Amfac Hotels v. State, Dept. of Transportation, 659 P.2d 1189, 1194 (Alaska 1983) (approved fee award based on "the average private billing rate" -- $75 per hour, 14 years ago); Morrison-Knudsen Co., Inc. v. State, 519 P.2d 834, 844 (Alaska 1974) (Alaska Supreme Court specifically rejected argument that state could not recover attorney's fees at a rate higher than hourly salary of highest paid assistant attorney general who worked on the case).

The Attorney General has worked to identify a uniform reasonable market rate upon which to base attorney fee requests that will more fairly reimburse the State of Alaska for its fees as a prevailing party. See Affidavit of Counsel. This was necessary because the department's historic rate formulae and the newer universal blended rate formula all produce figures far below the market rate and value of the services rendered, and because Civil Rule 82 provides for only 20 percent reimbursement of actual fees where there is no trial or money judgment and 30 percent where the case goes to trial. Based on the recommendations of a working group tasked with assessing the Department of Law's policy on attorney fee requests, the Attorney General established in 1997 a policy to request $150 per hour as the market rate for journey level attorneys (Attorneys III and above). Id. This decision was based on the working group's review of attorney billing rates statewide, a similar policy in the U.S. Attorney's Office, and the fact that the average rate (typically reflecting a discount for the state) that the Department pays experienced private

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[2] The Department of Law has formulated a blended attorney "overhead rate" for any assistant attorney general (regardless of years of practice), which was $94.72 per hour for Fiscal Year 1998. This is a uniform rate used to bill client agencies for legal services, regardless of the experience level or salary range of the individual assistant attorney general who actually handled the legal matter.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

practitioners to provide legal services to the state under contract exceeds $150 per hour. Id. The rate of $125 per hour was approved for less experienced attorneys. Id.

In the case at bar, the court granted all defendants summary judgment, dismissing the case with prejudice. In pursuing its defense, the state's attorney's fees, calculated using the market rates described above, amount to $8,325.00. Affid. Of Counsel. A copy of the billing print-out detailing the work done and time spent relative to this case is attached as Exhibit A. The state's counsel of record in this case, Susan Cox, holds an Attorney VI position, and has been practicing law over 15 years. She consulted as needed with Assistant Attorney General Shannon O'Fallon, who handled the guardianship proceeding that was at issue in this case; her hours are also reflected in Exhibit A. The attorney hours expended in defending this action total 56.1 hours: 52.5 for AAG Cox and 3.6 for AAG O'Fallon. The billing print-out reflects an attorney hourly billing rate of $150 per hour for AAG Cox, and $125 for AAG O'Fallon. The totals are 52.5 hours at $150/hour or $7,875.00, and 3.6 hours at $125/hour, or $450.00, for the combined total of $8,325.00.

Also included in Exhibit A are the hours billed by paralegal assistants who worked on this case. The paralegals performed tasks delegated to them by AAG Cox, which would customarily be done by an attorney. The paralegals spent 57.2 hours performing legal work necessary to this case, amounting to a cost of $4,118.40, at the overhead billing (non-market) rate of $72 per hour.

Under Civil Rule 82(b)(2), prevailing defendants who do not recover a money judgment are entitled to 20 percent of their reasonable attorney's fees, including fees for legal work delegated to a paralegal. The State of Alaska prevailed in this case without trial. Therefore, under Civil Rule 82 the state is entitled to recover 20 percent of its fees. As indicated in Exhibit A, the state's legal (attorney and paralegal) fees incurred in this action, at appropriate hourly rates, total $12,443.40. The state is entitled to an award of 20 percent of that amount, or $2,488.68, in fees.

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ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

II. CONCLUSION

For the reasons set out above, the State of Alaska respectfully requests that this court award it attorney's fees in the amount of $2,488.68.

DATED: 9/30/98

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General
Alaska Bar No. 8611136

This is to certify that on September 30, 1998, a copy of the foregoing was mailed to the attorney or party of record: Gregory A. Shapley, Pro Se, PO Box 85, Craig, AK 99921; Michael Lessmeier, Esq., Lessmeire & Winters, 124 W. 5th Street, Juneau, AK 99801 (Attorney for Dr. Johnson)

Pamla Credo-Hayes DATED: September 30, 1998

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

DAVID E. JOHNSON, and STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF FAMILY & YOUTH SERVICES,

Defendants.

Case no. 1KE-97-117 CI

AFFIDAVIT OF COUNSEL

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

I, Susan D. Cox, having been duly sworn, hereby state as follows:

1. I am an assistant attorney general employed by the Department of Law, and attorney of record in the above captioned action on behalf of the State of Alaska, Department of Health and Social Services, Division of Family and Youth Services (the state). I submit this affidavit in support of the state's motion, as prevailing party, for attorney's fees.

2. Legal fees (representing attorney and paralegal assistant time) in the amount of $12,443.40 were incurred on behalf of the state through August 1998 in defense of this case. This amount represents a total of 56.1 hours of attorney time, and 57.20 hours of paralegal time, broken down as follows:

Susan D. Cox	52.5 hours @	$150/hr = $ 7875.00
Shannon O'Fallon	3.6 hours @	125/hr = $ 450.00
Paralegals	57.2 hours @	72/hr = $ 4118.40
TOTAL	113.3 hours	$12,443.40

Exhibit A contains an itemized listing of the dates, descriptions of work accomplished and by whom, and the time expended. I have reviewed this report for accuracy and applicability.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

3. I have determined both that the information presented in Exhibit A is correct, and that the time listed was necessarily spent in defending this matter. I do not believe that any of the work performed in this case was unnecessary or duplicative. I do believe the total amount of time and money expended on behalf of the state is reasonable.

4. The attorney time set forth above was billed, for the purposes of this motion, at market rates approved by the Attorney General. Although the state bills client agencies at a rate far below the market rate of attorneys in private practice (the uniform overhead billing rate was $94.72 per hour in fiscal year 1998), the Attorney General established in 1997 a policy which would more fairly reimburse the state for its fees as a prevailing party. To that end the Attorney General approved the hourly rate of $150 as the market rate for journey level attorneys (Attorneys III and above). This rate was based on the recommendations of a working group tasked with assessing the Department of Law's policy on attorney fee requests. After reviewing attorney billing rates statewide, the policy in place at the U.S. Attorney's Office, and the fees paid by the state to experienced private practitioners who provide legal services to the state, the working group determined that $150 per hour was a reasonable rate which would more fairly reimburse the state for its legal services. The rate of $125 per hour was approved for less experienced attorneys.

5. While the purpose of the department's uniform overhead billing rate is to track and recover the costs of legal services provided to the state's client agencies, there is legal authority for awarding attorney's fees under Civil Rule 82 based on market rates rather than the department's overhead billing rate. Atlantic Richfield Co. v. State, 723 P.2d 1249, 1251-52 (Alaska 1996); Amfac Hotels v. State, Dept. of Transportation, 659 P.2d 1189, 1194 (Alaska 1983); Morrison-Knudsen Co., Inc. v. State, 519 P.2d 834, 844 (Alaska 1974).

6. I was responsible for all facets of the defense of this case. I prepared all of the written discovery on behalf of the state. I also consulted as needed with Assistant Attorney General(AAG) Shannon O'Fallon, who had personally handled the underlying guardianship matter that was at issue in this case.

7. I have been practicing law in Juneau for over 15 years and with the Attorney General's office for more than 14 years; I am an Attorney VI. I have been aware of rates charged by private practitioners over the years through state procurements for legal services, attorney fee requests in cases, and personal conversations with private attorneys. In my professional judgment, a request for reimbursement for my time spent on this case at a rate of $150 per hour is reasonable.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

8. The paralegal time is billed at the actual, non-market rate of $72 per hour. The paralegals worked on discovery, coordinating witness lists, and performing other legal tasks that I delegated to them and that would customarily be done by an attorney.

Further your affiant sayeth naught.

DATED: 9/30/98

Susan D. Cox

SUBSCRIBED AND SWORN to before me this 30th day of September 1998.

Notary for the State of Alaska
My Commission expires: 2000

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

SENATOR JERRY WARD

ALASKA STATE LEGISLATURE

SPONSOR STATEMENT SJR 14

SJR 14 is a Constitutional Amendment to allow a vote of the people to elect the Attorney General.

Many states elect the attorney general as opposed to having that important office as a political appointment. Many times in the history of the state of Alaska, the "appointed" attorney general has followed political whims of the Governor instead of working for the Alaskan people. Under the present governor appointee system, the governor has his own personal lawyer, who very clearly enforces laws as the governor directs, instead of the way it should be, with the Attorney General owing his allegiance and loyalty to the Constitution and the people of the State of Alaska instead of to one man's personal political agenda.

The advantages are many for Alaskans with an elected attorney general:

- A Department of Law that serves only the people of Alaska.
- That stands up for Alaskans.
- Answers only to the Alaskan people.
- Interprets the Constitution, instead of the Governor.
- Works directly for Alaskans.

Past experience shows us that appointed attorney generals do not have Alaskan's Rights at heart. We have had attorney generals drop very important actions at the insistence of the Governor:

- Statehood Compact
- Subsistence Lawsuit
- State's Rights issues
- 90/10 Royalty NPRA

SJR 14 allows a Constitutional Amendment vote of the people to begin the process of electing the State's Attorney General, taking that process out of the hands of the Governor as a political appointee.

January-May: STATE CAPITOL • JUNEAU AK • 99801-1182 • (907) 465-4940 • FAX (907) 465-3766
ANCHORAGE: 716 W. 4th AVE. • S1 01 • (907) 269-0106 • FAX (907) 269-0109
KENAI: 145 MAIN STREET 07) 283-7996 • FAX (907) 283-3075
Chairman, Senate Transp Senate State Affairs Committee
Senator_Jerry_Ward@legis.state.ak.us

SENATOR JERRY WARD

ALASKA STATE LEGISLATURE

'Constitutional amendment relating to the duties and election of the Attorney General'

Many states elect the attorney general as opposed to having that important office as a political appointment. Many times in the history of the state of Alaska, the "appointed" attorney general has followed political whims of the Governor instead of working for the Alaskan people. Under the present governor appointee system, the governor has his own personal lawyer, who very clearly enforces laws as the governor directs, instead of the way it should be, with the Attorney General owing his allegiance and loyalty to the Constitution and the people of the State of Alaska instead of to one man's personal political agenda.

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A Department of Law that:

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Past experience shows us that appointed attorney generals do not have Alaskan's Rights at heart. We have had attorney generals drop very important actions at the insistence of the Governor:

- Statehood Compact
- Subsistence Lawsuit
- State's Rights issues
- 90/10 Royalty NPRA
- State Sovereignty- dropped appeal of Tribal Listing
- Failed to enforce civil fraud laws – Ponzi Scheme
- Failed to enforce civil invasion of privacy – APSIN violations

SJR 14 allows a vote of the people to elect the State's Attorney General, taking that process out of the hands of the Governor as a political appointee.

It's the people's state, it's the people's constitution, it should be the people's Attorney General, this constitutional amendment will return this issue back to the people of Alaska to decide. Political decisions made by the attorney general must stop. The people of the State of Alaska need to have an elected AG loyal to the Constitution and the people of Alaska, not a personal lawyer for the Governor.

January-May: STATE CAPITOL • JUNEAU, AK • 99801-1182 • (907) 465-4940 • FAX (907) 465-3766
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Chairman, Senate Transportation Committee • Chairman, Senate State Affairs Committee
Senator_Jerry_Ward@legis.state.ak.us

SJR

15

During Session, January - May
State Capitol, Room 115
Juneau, Alaska 99801
(907) 465-2095
465-3810 fax

During Interim, June - December
716 W 4th Ave, Suite 520
Anchorage, Alaska 99501
(907) 269-0240
269-0242 fax

Senator Loren Leman

Sponsor Statement – SJR 15

SJR 15 proposes amendments to the Constitution of the State of Alaska that are designed to bring a measure of public involvement to the judicial selection process, and to increase the judicial branch's accountability to Alaskans. It does so in three ways.

First, SJR 15 allows the governor to fill court vacancies by appointing any attorney who meets the qualifications set out in the constitution and state statutes. This differs from the current system, in which the governor's choices are limited to only those nominees selected by the Alaska Judicial Council (AJC), a body which has little political accountability. Three of the six voting members on the AJC are selected by the Alaska Bar Association and are not required to undergo any type of confirmation process. The other three are non-attorney members appointed by the governor and subject to legislative confirmation. Since AJC members serve lengthy six-year terms, and only half are chosen by elected officials accountable to the voters, opportunities to change the composition of the council are exceedingly rare.

Under Article IV, Section 5 of the Alaska Constitution, the AJC is allowed to submit as few as two names to the governor to fill each judicial vacancy. Out of the thousands of attorneys in Alaska, the governor can choose only among those hand-picked few approved by AJC. This makes the governor's appointment power largely ceremonial. A committee of six persons exercises near total control over who is permitted to serve in one of the three branches of state government. There is no other example in our constitutional order of such enormous power being concentrated in the hands of a few non-elected functionaries. It is also noteworthy that three of the six AJC members are attorneys who are permitted to represent clients in the courtrooms of judges who may some day apply and be considered by the AJC to fill future vacancies on higher courts.

The second change proposed by SJR 15 is to require legislative confirmation of the governor's appointments to fill vacancies on the superior court and supreme court. This is similar to the federal system, in which the president's appointees to fill vacancies on the federal bench are confirmed by the U.S. Senate. Many other states also require some form of legislative confirmation, which allows the public to participate in the process through their elected representatives. Confirmation hearings provide a valuable opportunity for judicial nominees to be questioned about their philosophy on interpreting and applying statutory and constitutional law.

Finally, SJR 15 would increase the frequency of judicial retention elections. Currently, each superior court judge and supreme court justice is subject to approval or rejection by the voters at the first general election held more than three years after he or she is appointed. After the initial retention election, supreme court justices are up for approval or rejection every tenth year and superior court judges every sixth year. SJR 15 changes these intervals to six years for supreme court justices and four years for superior court judges. This change will provide Alaska voters more frequent opportunities to assess the performance of those who serve us in the judicial branch of government.

Prepared by Mike Pauley, Staff Aide to Senator Loren Leman (907-465-3841)
Last updated: March 22, 2000

2000 Retention Election Candidates

Judge	Appointed	City/Judicial District
1. Supreme Court Justice Alexander O. Bryner*	01/24/97	Anchorage/NA
2. Supreme Court Justice Dana Fabe*	01/26/96	Anchorage/NA
3. Supreme Court Justice Warren W. Matthews	05/26/77	Anchorage/NA
4. Court of Appeals Judge Robert G. Coats	07/30/80	Anchorage/NA
5. Court of Appeals Judge David Stewart*	06/25/97	Anchorage/NA
6. Superior Court Judge Thomas M. Jahnke	05/11/85	Ketchikan/First
7. Superior Court Judge Larry Weeks	09/03/90	Juneau/First
8. Superior Court Judge Larry C. Zervos	9/14/90	Sitka/First
9. Superior Court Judge Richard H. Erlich	03/08/91	Kotzebue/Second
10. Superior Court Judge Ben Esch*	02/16/96	Nome/Second
11. Superior Court Judge Elaine M. Andrews	03/08/91	Anchorage/Third
12. Superior Court Judge Harold M. Brown*	04/08/96	Kenai/Third
13. Superior Court Judge Rene J. Gonzalez	11/08/84	Anchorage/Third
14. Superior Court Judge Dan A. Hensley*	12/04/96	Anchorage/Third
15. Superior Court Judge Donald D. Hopwood	11/30/90	Kodiak/Third
16. Superior Court Judge Karen L. Hunt	01/10/84	Anchorage/Third
17. Superior Court Judge Jonathan H. Link	07/20/90	Kenai/Third
18. Superior Court Judge Peter A. Michalski	01/31/85	Anchorage/Third
19. Superior Court Judge Eric Sanders*	08/08/96	Anchorage/Third
20. Superior Court Judge Eric Smith*	04/18/96	Palmer/Third
21. Superior Court Judge Milton M. Souter	01/23/78	Anchorage/Third
22. Superior Court Judge Sen K. Tan*	12/04/96	Anchorage/Third
23. Superior Court Judge Fred Torrisi*	11/27/96	Dillingham/Third
24. Superior Court Judge Michael L. Wolverton*	12/04/96	Anchorage/Third
25. Superior Court Judge Dale O. Curda	12/15/89	Bethel/Fourth
26. Superior Court Judge Mary E. Greene	01/04/85	Fairbanks/Fourth
27. Superior Court Judge Charles R. Pengilly*	11/07/97	Fairbanks/Fourth
28. District Court Judge Peter G. Ashman	07/31/87	Anchorage/Third
29. District Court Judge Joel H. Bolger*	07/03/97	Valdez/Third
30. District Court Judge Natalie K. Finn	03/3/83	Anchorage/Third
31. District Court Judge William H. Fuld	03/31/83	Anchorage/Third
32. District Court Judge Stephanie Joannides	10/28/94	Anchorage/Third
33. District Court Judge Suzanne Lombardi*	07/03/97	Palmer/Third
34. District Court Judge James N. Wanamaker	08/13/93	Anchorage/Third
35. District Court Judge Mark I. Wood	01/21/93	Fairbanks/Fourth
36. District Court Judge (Vacant)*		Fairbanks/Fourth

* Indicates first time judges for retention in current position.

legislature. The duration of such appointments shall be prescribed by law.

ARTICLE IV.
THE JUDICIARY.

SECTION 1. JUDICIAL POWER AND JURISDICTION. The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

SECTION 2. SUPREME COURT.

(a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.

(b) The chief justice shall be selected from among the justices of the supreme court by a majority vote of the justices. His term of office as chief justice is three years. A justice may serve more than one term as chief justice but he may not serve consecutive terms in that office.

SECTION 3. SUPERIOR COURT. The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

SECTION 4. QUALIFICATIONS OF JUSTICES AND JUDGES. Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.

SECTION 5. NOMINATION AND APPOINTMENT. The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.

SECTION 6. APPROVAL OR REJECTION. Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

SECTION 7. VACANCY. The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.

SECTION 8. JUDICIAL COUNCIL. The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

SECTION 9. ADDITIONAL DUTIES. The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law.

SECTION 10. COMMISSION ON JUDICIAL CONDUCT. The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the justices and judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.

SECTION 11. RETIREMENT. Justices and judges shall be retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law. Retired judges shall render no further service on the bench except for special assignments as provided by court rule.

SECTION 12. IMPEACHMENT. Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.

SECTION 13. COMPENSATION. Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.

SECTION 14. RESTRICTIONS. Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

SECTION 15. RULE-MAKING POWER. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

SECTION 16. COURT ADMINISTRATION. The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.

ARTICLE V.
SUFFRAGE AND ELECTIONS.

SECTION 1. QUALIFIED VOTERS. Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote, except that for

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/5/99

FURTHER: Finance

Date of 5-Day Notice:_____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: _____

Judiciary Committee considered

SENATE JOINT RESOLUTION NO. 15

Proposing amendments to the Constitution of the State of Alaska relating to the appointment and confirmation of supreme court justices and superior court judges and to approval or rejection of justices and judges during certain general elections.

and recommends:

[X] be **replaced** with _____ CS SJR 15 (JUD)

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

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[X] new title

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

SIGNING DO PASS	*DP*	*OTHER-RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Rick Halford	✓				
CHAIR: Robin L. Taylor	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

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

1-LS0596\H
Luckhaupt
3/31/00

as adopted and amended 3/29/00

CS FOR SENATE JOINT RESOLUTION NO. 15(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Donley

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska relating to when supreme court justices and superior court judges are to be subject to approval or rejection following initial approval.

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

* **Section 1.** Article IV, sec. 6, Constitution of the State of Alaska, is amended to read:

Section 6. Approval or Rejection. Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after [HIS] appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every **sixth** [TENTH] year, and each superior court judge, every **fourth** [SIXTH] year.

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

L

Alaska Action Trust
P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 "L" Street, Suite 206 • Anchorage, AK 99501
(907) 258-4040 • FAX (907) 276-7185

March 12, 1999

Senator Robin Taylor
State Capitol
Juneau, Alaska 99801-1182

Dear Senator Taylor:

The Alaska Action Trust is very interested in SJR 15, *proposing amendments to the Constitution of the State of Alaska relating to the appointment and confirmation of supreme court justices and superior court judges and to approval or rejection of justices and judges during certain general elections.*

We would be most appreciative of some advanced scheduling notice of this resolution in the Senate Judiciary Committee so that we may alert and prepare our members and others who share our concerns about this proposed legislation.

Thank you for your consideration of this request.

Sincerely,

Jan Bouch

Jan Bouch
Executive Director

Cc: Russell Winner, Chair

ALASKA COURT SYSTEM
State of Alaska Court System
Office of the Administrative Director

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Anchorage, Alaska 99501
(907) 264-0547
(907) 264-0881
scole@courts.state.ak.us

Stephanie J. Cole
Administrative Director

THE ALASKA COURT SYSTEM OPPOSES SJR 15

The Alaska Legislature is currently considering SJR 15, which would make three significant changes to the current system of selecting and retaining judges:

- SJR 15 would require legislative confirmation of supreme court justices and superior court judges. **The proposed system could add months to the selection process, creating a real danger that extended judicial vacancies would result in delays in the resolution of court cases. The changes would also pull judicial candidates into the realm of partisan politics and threaten judicial independence.**

- SJR 15 would eliminate the Judicial Council's role in the judicial selection process. **The removal of the Judicial Council from the selection process eliminates the stringent, merit-based screening currently in place.**

- SJR 15 would shorten the periods between retention elections for supreme court justices and superior court judges. **The proposed shortened retention periods would increase costs to the state, lower voters' scrutiny of individual judges, and are not in line with retention terms in other merit selection states.**

The changes proposed in SJR 15 would erode the balance of power among the three branches of government and weaken Alaska's nationally-recognized system of merit-based selection of judges.

- **Alaska's current merit-based selection process is rigorous and non-political**

Unlike the federal court system, Alaska's current structure for selection of judges is a rigorous, merit-based process. The drafters of the Alaska Constitution resoundingly rejected the idea of electing judges by a vote of 51-2, in favor of a method with a minimum of political consideration or partisanship. Alaska was only the third state to use merit selection, but today 35 states have some method of merit selection. The national movement is toward judicial selection processes that are less political, not more.

Under our current selection system, the Alaska Judicial Council recruits applicants for judicial vacancies, investigates and screens those applicants on the basis of their demonstrated abilities to perform judicial duties, and forwards names of qualified applicants to the Governor, who must make a final selection from only those names sent by the Council. The Judicial Council is a nonpartisan commission of lawyers and non-lawyers, who examine each applicant's education, employment history, activities, credit and criminal history, bar discipline history, client grievances and conflicts of interest. Only those candidates who are deemed most qualified after this extensive investigation are forwarded to the Governor. This process does not involve any consideration, or even identification, of the partisan political affiliations of the judicial candidates.

In the final step of the process, the Governor may only choose from the applicants found most qualified by the Council. Prior governors who have been unhappy with choosing only from among the applicants sent forward by the Judicial Council have requested additional names, but the Council has consistently declined to add applicants at the Governor's request. In the past, there has been no consistent tradition of the Governor

appointing on a partisan basis; judges have been appointed who have had different political affiliations than the Governor.

- **A legislative confirmation requirement would increase judicial vacancy periods and aggravate court delay**

The provisions of SJR 15 undermine the current process, and would have a negative impact on both court operations and service to the public. Currently, approximately six months pass between the time applications for the judgeship are solicited and the Governor's selection of the successful candidate. Under the changes set forth in SJR 15, the Governor's appointee will not be able to take office until after legislative confirmation. Depending upon the time of year of appointment (which might be when the legislature is not in session) and upon the willingness of the legislature to act swiftly in holding confirmation hearings, many months could be added to the period of judicial vacancy.

An extended judicial vacancy has a high impact on any court's ability to do its work. In the federal system, legislative reluctance to hold hearings and to confirm judicial appointments has created a crisis for the federal judiciary, as cases are backlogged because of the lack of judicial resources to decide them. Historically, appointment delays have been aggravated in the fourth year of a presidential term, when confirmation is often withheld by a Senate controlled by an opposition party. At the state level, should the legislature decide to disapprove an appointment, a lengthy period of delay would result, as an entirely new selection process might be required.

- **A confirmation requirement may affect the pool of judicial applicants**

Lengthening the time between application and assumption of judicial office will also have a disproportionate impact on attorneys in the private sector. Applying for a judgeship is already a disruptive process for private sector attorneys, who must make hard decisions about pursuing cases and accepting new clients during such an extended period of uncertainty. Public sector attorneys, who do not have to worry about maintaining a client base, and sitting judges who are seeking appointment to a higher judicial seat, will have a great advantage. An often-expressed goal is that our judges would have histories which reflect both private and public sector experience, and this goal would not be promoted by the changes proposed in this legislation.

- **SJR 15 erodes Judicial Independence**

The greatest danger in this proposed legislation is its erosion of judicial independence. As has been seen in much-publicized federal confirmation hearings in recent years, judicial candidates who enter the legislative realm are often subject to the currents of partisan politics. The Canons of Judicial Ethics do not allow judicial candidates to "...make pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office," nor may a judicial candidate, "make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court." It is a fundamental principle of the law that a judge has the responsibility to weigh the facts of each case impartially, and to apply the law to those facts, to reach a decision. To the extent that demands are made in a

confirmation process, as they often are, that a judicial candidate commit to a particular point of view of controversial issues, a judge who emerges from the process can easily be perceived as biased towards a particular point of view. If a judicial candidate is championed by one political faction, and opposed by another, the judicial candidate's ability to handle controversies involving those parties later in the courtroom is severely compromised.

Edward W. Madiera, Jr., the chair of the ABA's Commission on Separation of Powers and Judicial Independence, has noted that "Judicial independence is not for the protection of judges, but for the protection of the public." Each person who brings a case in Alaska's courts should feel that his or her case will be measured on its individual merits, by a judge who is free from bias and political obligation. Our current merit-based system, which keeps judicial candidates out of partisan politics and yet empowers the voters to remove judges in retention elections, is one of the best in our country. It encourages the appointment of well-qualified, independent, and courageous judges. The changes proposed in SJR 15 would be a step backward for justice in Alaska.

- **Shortening the periods between retention elections increases costs and lowers voters' scrutiny of individual judges. The proposed periods are not in line with other merit selection states.**

The people of Alaska have the opportunity to approve or reject judges at periodic retention elections. Alaska has the nation's most extensive system for seeking public input on retention. The Judicial Council surveys lawyers, law enforcement officers, jurors, court employees and children's caseworkers. It looks at a judge's disciplinary record, disqualifications from assigned cases, appellate record, and the evaluation by the

CourtWatch program. The Judicial Council holds public hearings to allow people to testify about their experiences with judges who are standing for retention. Most of this information is made available to the voters. A judge will be voted out of office if enough voters are unhappy with the judge's performance.

The following periods between retention elections are established in the Alaska Constitution:

- Supreme Court Justice: At first general election held more than three years after appointment, and then every 10th year
- Superior Court Judge: At the first general election held more than three years after appointment, and then every 6th year

Alaska's Constitution strikes the right balance between public accountability and judicial independence. Alaska's Constitutional delegates worked hard to create a judicial merit and selection system that delicately balances the public's right to an accountable judiciary with the important goal of a strong and independent judiciary. The current proposal to change retention terms would upset that balance and damage the integrity of Article IV. The convention minutes show that the drafters specifically considered and rejected a proposal to decrease the retention term for supreme court justices to six years.

Shortening retention terms would decrease voters' scrutiny of individual judges. Shortening retention terms would cause more judges to be on the ballot at each general election. Voters are bombarded with information about candidates and ballot propositions. Voters have limited time to study information on judges standing for retention, and increasing the number of judges on the ballot would only exacerbate that problem.

Shorter retention terms increase costs. The judicial evaluation process is integral

to retention elections. The Judicial Council provides voters with important information on the performance of each judge or justice, so that voters can make informed retention decisions. Increasing the frequency of retention elections would increase the number, and thus the cost, of these evaluations.

Alaska's current retention terms are in line with retention terms in other merit selection states. Twenty other states have merit selection and retention laws similar to Alaska's. Retention terms in many of those states are similar to or longer than Alaska's current terms. Only three of those states have terms even approaching the four years proposed in SJR 15. No other merit selection states have terms as short as those proposed by SJR 15.

Retention terms in Colorado, South Carolina and Utah are identical to Alaska's. Six states have retention terms longer than Alaska's: California (12 years supreme, 6 years trial court), Hawaii (10 year terms), Indiana (10 years supreme court, 6 years superior courts), Maryland (10 years), Massachusetts (to age 70) and Missouri (12 years supreme court, 6 years circuit court).

Retention terms in eight other states are significantly longer than the terms proposed in SJR 15: Florida (6 years supreme, 6 years circuit), Iowa (8 years, 6 years), Nebraska (6 years), New Mexico (8 years for appellate, 6 years for district), South Dakota (8 years for supreme court), Tennessee (8 years supreme court), Vermont (6 years), Wyoming (8 years for supreme, 6 years for district court).

Only three states have retention terms even approaching the terms proposed in SJR 15: Arizona (6 years supreme, 4 years superior), Kansas (6 years supreme court, 4 years

district court), Oklahoma (6 years supreme court, 4 years district court).

Shorter terms will tend to discourage the most highly qualified people from seeking judicial office. Short-term positions are inherently less attractive because of the lack of job security. Highly skilled attorneys with well established practices will be less inclined to leave their private-sector positions knowing that they must stand for retention at four year intervals.

Voters already have an early opportunity to vote on supreme court justices and superior court judges. Alaska's retention system requires newly appointed superior court judges and justices to first stand for retention after a short, probationary term (three years after appointment). This evaluation period gives judges early feedback on their performance and gives voters an early chance to unseat them if necessary.

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Position paper on SJR 15, Legislative Confirmation Of Judges; Shortening of Retention Election Intervals

Prepared For The Alaska Action Trust By Les Gara, 258-0704

SJR 15 changes the constitutional protection against politicized judges. It threatens to politicize the judiciary. A version of this bill has failed the past two legislative sessions, and has been opposed by both Republican and Democratic Attorneys' General. It should be opposed again.

In 1955 the fifty-five delegates to Alaska's Constitutional Convention decided judges should be appointed based on their competence and independence, and not their allegiance to the majority party in the Legislature. Today judicial candidates are reviewed by our citizen-run Judicial Council. The Governor can only choose from candidates recommended by the Judicial Council. SJR 15 would prevent judges from being appointed unless they first receive majority support from the Legislature, presumably after they prove at hearings that they will promote the sitting Legislature's agenda.

The Delegates to our Constitutional Convention considered the arguments that have resurfaced today. They agreed with a study commissioned by our Statehood Committee in 1955. The study concluded that an "independent judiciary is one of the truly important features of American democratic government" and that judges "should be independent of political and personal pressures." The Delegates voted in favor of the Judicial Council process over a process that required candidates to receive the political blessing of the Legislature. The Statehood Committee Study correctly recommended the plan adopted at the Constitutional Convention, known as the "Missouri Plan", as a way to curb government's "powers to fill the judiciary with political hacks."

It is predictable that half of all parties will disagree with what a judge does. Not surprisingly, some in the Legislature have been irritated by recent decisions. That is inevitable, but is not a reason to let the Legislature take control of the judiciary. What irritates one side of the isle today will be followed by something that irritates the other side of the aisle next year. The majority party one-year will be the minority party next year. The uniqueness of tour State Constitution is that it creates a judiciary that does not to shift with political winds. If we want impartial judges, we should not require legislative hearings and approval of judicial candidates.

The current proposal is shortsighted. Today you might agree with the political party that controls the Legislature, and that would control judges under the proposed constitutional amendments. But over time, different parties will control the Legislature. Then judges will issue political opinions you don't like. It is better to have a judge decide

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a case impartially than to have a judge who decides a case based on a pre-existing political agenda. The value of the Constitution is that it protects us over the long run, and from shortsighted proposals aimed at political gain for the party in power on any particular day.

Likewise, the Delegates to the Convention believed that judges, to be independent, should not have to face the prospect of too-frequent voter approval. Thus, the delegates provided that Superior Court judges should run every 6 years, and that Supreme Court judges should run every 10. They should not run on a consistent cycle, every 4 years, with political candidates. That, too, threatens to pressure judges to disregard the nuances of the facts and law they are presented with in favor of rulings that make good, popular headlines and sound bites. The retention vote cycles should not be reduced to 6 and 4 years, respectively, as SJR 15 proposes.

The proposals that are being made today are not new. They were rejected forty years ago. Delegates to the Constitutional Convention spoke against any requirement that candidates receive a Legislative stamp of approval. They agreed with the sentiment that: "all of us here want an independent judiciary, a judiciary that will not be swayed by the public will at any particular moment, a judiciary that will not be subject to any political pressure . . . . [W]e have taken the best means devised yet to appoint and select qualified judges and to keep judges free from outside political pressures and to get rid of judges who are not able to properly do their job."

Justice occurs when a judge considers a case fairly and impartially. Injustice occurs when judges ignore the facts and law in favor of a political agenda they have promised to promote. Our system is better today than it will be if SJR 15 finds its way into the constitution.

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Luckhaupt
3/17/00
adopted 3/29/00 amended

CS FOR SENATE JOINT RESOLUTION NO. 15( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Donley

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska requiring supreme court justices and superior court judges to be subject to approval or rejection every four years following initial approval.

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

* **Section 1.** Article IV, sec. 6, Constitution of the State of Alaska, is amended to read:

Section 6. Approval or Rejection. Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after [HIS] appointment. Thereafter, each supreme court justice 6yrs. and each superior court judge 4yrs shall be subject to approval or rejection in a like manner every fourth [TENTH] year [, AND EACH SUPERIOR COURT JUDGE, EVERY SIXTH YEAR].

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

Kansas

The Alaska Judicial Council opposes shortening retention terms to four years as proposed by SJR 15

Alaska's Constitution strikes the right balance between public accountability and judicial independence. Even a cursory review of the minutes of the Constitutional convention shows that Alaska's Constitutional delegates worked hard to create a judicial merit selection system that delicately balances the public's right to an accountable judiciary with the important goal of an independent judiciary able to protect the Constitutional rights of citizens. The current proposal to change retention terms would upset that balance and damage the integrity of Article IV. Indeed, the drafters of our constitution specifically considered and rejected lowering the retention term for supreme court justices to even six years. The American Judicature Society recommends retention terms of at least eight years.

Shorter terms discourage qualified attorneys from applying. Shorter retention terms, with the lesser job security they entail, will discourage highly qualified judicial applicants. This will be especially true for experienced and successful private practitioners. The result of SJR 15 may be a lesser qualified judiciary with less experience representing private citizens.

Increased numbers of judges on the ballot decrease voters' scrutiny of individual judges. At each general election voters are bombarded with information about candidates and ballot propositions leading to what are referred to as "bed-sheet ballots." Voters already have limited time to study information on judges standing for retention. (There are 33 judges now scheduled to be on the ballot this year.) Increasing the numbers of judges on the ballot would only exacerbate that problem.

Shorter retention terms increase costs. An integral part of retention elections is the retention evaluation process. The Judicial Council gathers extensive information on each judge or justice and provides that information to the voters so that they can make informed retention decisions. Increasing the frequency of retention elections would increase the costs of the evaluation or, in the alternative, lead to a less intensive evaluation. Election costs also would increase.

Alaska's current retention terms are in line with retention terms in other merit selection states. Twenty other states have merit selection and retention laws similar to Alaska's. Retention terms in many of those states are similar to or longer than Alaska's current terms, while only three of those states have terms even approaching the four years proposed in SJR 15. No other merit selection states have terms as short as proposed by SJR 15.

Retention terms in Colorado, Indiana, South Carolina and Utah are identical to Alaska's. Five states have longer retention terms longer than Alaska's: California (12 years supreme, 6 years trial court), Hawaii (10 year terms), Maryland (10 years), Massachusetts (to age 70) and Missouri (12 years supreme court, 6 years circuit court).

Retention terms in eight other states are significantly longer than the terms proposed in SJR 15: Florida (6 years supreme, 6 years circuit), Iowa (8 years, 6 years), Nebraska (6 years), New Mexico (8 years for appellate, 6 years for district), South Dakota (8 years for supreme court), Tennessee (8 years supreme court), Vermont (6 years), Wyoming (8 years for supreme, 6 years for district court).

Only three states have retention terms even approaching the terms proposed in SJR 15: Arizona (6 years supreme, 4 years superior), Kansas (6 years supreme court, 4 years district court), Oklahoma (6 years supreme court, 4 years district court).

The Judicial Council's thorough evaluation process is more effective in ensuring public accountability than shorter retention terms. Alaska has a system of judicial performance evaluation that is used as a model throughout the United States and in many other countries. The Judicial Council has created a system in which more than 7,500 people in 1998 had an opportunity to critique judicial performance. Citizens commenting included jurors, citizens at public hearings, police, probation officers, social workers, court employees, attorneys and independent court watchers. Their input was summarized and considered by the Judicial Council along with detailed information about appellate affirmances and reversals, peremptory challenges, promptness, conflicts of interest and other aspects of performance. The information was available throughout the state in news articles, on the Internet, in the Alaska Voters' Pamphlet and through other media.

The Judicial Council already conducts mid-term evaluations of judges. The Council conducts attorney and peace officer surveys every two years of judges who are on the ballot that year, or who will be on the ballot 2 ½ years in the future. The mid-term evaluation gives judges a chance to improve performance and the Council advance notice of any problems.

Voters already have an early opportunity to vote on supreme court justices and superior court judges. Alaska's retention system requires newly appointed superior court judges and justices to first stand for retention after a short, probationary term (three years after appointment). This evaluation period gives judges early feedback on their performance and gives voters an early chance to assess the judges.

Conclusion. Alaska already has a system that emphasizes both judicial accountability and judicial independence. A thorough evaluation gives Alaska voters more information on judicial performance than is available anywhere else in the world. The judicial independence so prized by our constitutional drafters allows courts to protect the constitutional rights of Alaskans. Shortening retention terms as proposed in SJR15, shorter than in any merit selection state, will upset this delicate balance. The change is unnecessary, expensive, and would discourage quality judicial applicants. Ultimately, the goal of the Judicial Council is to maximize judicial excellence. This proposal is counterproductive to that goal.

State Courts are Increasingly Flexing Their Judicial Muscles by Overruling State Legislatures and Making Policy

by Michael Hotra

The unprecedented level of judicial activism in our state courts begs the question: with state judges making public policy, do state legislators matter anymore?

In many states, and across a broad spectrum of issues, state courts and state court judges have undermined legislatures' ability — and constitutional charge — to represent the voters and craft public policy. In the next decade, the largest battles in state capitals will likely be power struggles between legislatures and courts.

Each branch of state government, the legislature, the executive, and the judiciary, is a creation of the state constitution, which is, in most cases, a lengthy, detailed and highly prescriptive document.

Precisely because state constitutions are so prescriptive, it is incumbent upon the judiciary to exercise restraint in its interpretations of certain clauses and phrasing.

When the state courts attempt to use clauses in state constitutions as the predicate for an activist agenda, the result is an infringement on the role of the legislature, and bad public policy.

As final arbiters of state constitutions, state courts trump legislatures with their decisions. Legislatures then have little recourse, short of amending the state constitution — a lengthy and complicated process that can occupy significant portions of time in more than one legislative session. Even then, at least one state appellate court — Pennsylvania's — has thrown out constitutional amendments using highly controversial interpretations of the state constitution. The notion of judicial restraint has seemingly disappeared.

Gone are the days when state court judges, in particular state supreme court judges, saw their role as limited, principled arbiters of the cases and controversies before them. Today, state courts prescribe school district funding levels (and in one state, curriculum), levy taxes, trash criminal sentencing guidelines, and discard reasonable liability reforms. If the courts make state policy, what is left for the legislature to do?

Equally disturbing is the chilling effect of judicial activism on the spirited and worthy public policy debate that occurs between organizations such as ALEC and those organizations and individuals holding dissimilar views. If state courts create our public policy, then lively policy and issue debates become a purely rhetorical exercise.

When state supreme courts make policy, they do so in the course of deciding the case or controversy before them. They hear from lawyers pleading their respective cases; they review briefs and deliberate behind closed doors. The court's policy making is a by-product of the case or controversy before it.

State legislatures, by contrast, make policy in full public view. Any interested citizen can watch the legislature in action, testify at hearings, and choose their representatives to make the laws, a characteristic critical to the proper administration of a representative government.

State Constitutions Are Subject to Almost Any Interpretation

State constitutions afford judges and courts tremendous leverage. Constitutions are literally chock full of vague clauses, catchall phrasing and obscure rules that have been recently used by the courts as a predicate for making policy. Unlike the U.S. Constitution, which is about 10 letter-sized pages long, state constitutions can run on for 200 to 300 pages.

The California Constitution, for example, contains the obscure "right to fish" in state waters. But, as the *Madison Review* wryly notes, "There is no comparable right to camp,

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to hunt, or to walk in the woods; hence, California's state statutes and local ordinances in managing fish have constitutionally restricted status compared to similar laws and regulations that manage other recreational activities."

The Illinois State Constitution contains the peculiar requirement that three of the seven state Supreme Court Justices be drawn from Cook County — Chicago. Florida's Constitution contains the following catchall: Article II, Section 7, which reads: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." Using this clause, a state court judge could ban billboards, smokestacks, pink flamingos on front lawns, and sport fishing — the very same right protected by California's Constitution.

As one attorney familiar with state constitutions has jokingly observed, "If you look carefully, you can find a ham sandwich in state constitutions."

There are other vague constitutional clauses, such as "separation of powers," "special legislation" and "open courts" that many courts use to run roughshod over the legislature. These amorphous, ill-defined clauses are subject to varying and highly inconsistent interpretations, even within the same state.

A Constitutional Crisis in Pennsylvania

The most egregious case of imperialistic judicial policy making has occurred in Pennsylvania. There, the Commonwealth Court has decided to ignore the voters, legislature and common sense while playing fast and loose with the state Constitution.

In the mid-1980s, the Pennsylvania legislature and the Governor, in an attempt to spare children the horror of reconfronting their attackers face to face, enacted legislation to permit children victimized by sexual abuse to testify in court by videotape. The law was struck down by the Pennsylvania Supreme Court on the basis of a clause in the state Constitution that one has the right to "face" one's accuser. Videotaped testimony in sex crimes, the Court felt, didn't meet that standard. "Face to face," meant "in person," or so the Court ruled.

In 1993, Senator Stewart Greenleaf, an ALEC member, spearheaded efforts to amend the Pennsylvania Constitution and permit videotaped testimony in sex offense cases involving victims who are minors.

The hurdles that one must clear to amend Pennsylvania's Constitution are set high. Any proposed amendment must pass two votes held in two consecutive sessions of the legislature. Then, the amendment must be approved by Pennsylvania's voters in a ballot initiative.

Greenleaf's amendment passed in both the 1993-1994 session of the legislature and the 1995-1996 session. In November 1996, the Pennsylvania voters spoke. They approved Greenleaf's amendment by a 3-1 margin. This should have been the end of the story. Unfortunately, it is not.

In May 1997, the Pennsylvania Commonwealth Court invalidated the ballot initiative. It accepted a petition from three lawyers who had no standing (no actual case) before the Court. While the amendment directly changed the "face-to-face" provision in sex offense cases, which was its intent, the Court decreed that the amendment also *implicitly* changed the court's rulemaking authority, which is — you guessed it — constitutionally protected.

Greenleaf- Even though his amendment to protect children testifying against pedophiles jumped all the constitutional hurdles, the Pa. Supreme Court still voided it

The Pennsylvania Constitution prohibits any ballot initiative that changes more than one section of the Constitution. According to the creative reasoning of the Commonwealth Court, this amendment affected two portions of the Constitution — one explicitly, one implicitly — and was therefore invalid.

"This is absurd," said Greenleaf, Chairman of the Pennsylvania Senate Judiciary Committee. "If the Court will not properly defer to the legislature on policy matters, even constitutional amendments, then I have to question the Court's commitment to a three-branch government."

In Pennsylvania, as in other states, all three branches of government are creations of the state constitution, and therefore derive their powers from it. By invalidating a legitimate ballot initiative to amend the constitution, the Commonwealth Court has, in effect, declared itself superior to, and exempt from, Pennsylvania law.

The lower Court ruling is being appealed to the Pennsylvania Supreme Court, which has an activist agenda on par with the Commonwealth Court's. The Pennsylvania Supreme Court has the constitutional authority to suspend any statute passed by the legislature that it believes impinges upon its rulemaking authority. It has applied this doctrine inconsistently, but with increasing regularity, much to the frustration of the Pennsylvania General Assembly. In Pennsylvania and in 19 other states, there is no check on the Supreme Court's ability to enact such suspensions.

Recently, the Pennsylvania Supreme Court has suspended a state law expediting death penalty appeals that would have required parties appealing death sentences to file all appeals within one year of initial sentencing. The Court found this to be a judicial rulemaking function. Under existing Pennsylvania law, the legislature has no recourse. The Court also suspended Pennsylvania's *Post-Conviction Release Act* on similar grounds.

Greenleaf and others have tried to work constructively with the courts to fashion reasonable standards and rulemaking procedures beneficial to both branches of government: so far, they have had little success. Right now, the legislature is under court order to implement by July 1 a statewide funding plan for trial courts.

Education: A New Frontier of Judicial Activism

Since 1989, 18 state supreme courts have declared state education funding formulas unconstitutional (See March 9,

FYI). Most state constitutions contain provisions that entitle students to "adequate and equitable education," or some similarly amorphous standard.

Courts have used these vague standards as mandates for school funding reform, despite the dubious correlation between school funding and educational quality.

According to ALEC's 1994 *Report Card on American Education*, which analyzed data from all 50 states and the District of Columbia, "It is also true that none of the states that rank in the top 10 in performance rank in the top 10 states in per-pupil expenditures. Utah ... ranks in the top 10 in all measures of academic achievement. Yet in expenditures per pupil, Utah ranks 51st."

The Vermont State Supreme Court admits as much in its decision declaring Vermont's educational funding system unconstitutional: "We recognize that equal dollar resources do not necessarily translate equally in effect. ... Money is clearly not the only variable affecting educational opportunity, but it is the one that government can effectively equalize."

The Vermont Supreme Court has ruled that a school district funding formula that is 60 percent reliant on local taxes is unconstitutional because it deprives children of an "equal educational opportunity" and violates the Vermont Constitution.

Unfortunately the Court only considered funding when it examined the question of "equal educational opportunity." Lacking in the 16-page decision is any indication that the Court considered other potential factors in ensuring equal educational opportunity such as class size, dropout rates, test scores, teacher certification or pupil performance.

These important factors were absent from the Court's deliberations because they weren't at issue in the narrow case before the court — only public education and property taxes were at issue.

New Jersey Judges Dictate School Programs

The New Jersey State Supreme Court has gone even further. There, the Court has used its decision to overturn state education funding schemes as a predicate to dictate actual school programs.

After striking down the state's school funding formula, which had already appropriated $2.3 billion in state funds (about half of what the state spends on public education, according to the *New York Times*) for poor schools, the legislature appropriated an additional $248 million.

The Court then instructed New Jersey education officials to identify additional educational programs and curricula to be implemented in poor districts, as well as assess the conditions of buildings and facilities in these districts.

Judge King-Recommended the New Jersey legislature come up with $3.1 billion in new funding for poorer schools

New Jersey Appellate Judge Michael Patrick King has also been asked by the New Jersey Supreme Court to recommend new programs and services that poor school districts should implement. The cost of his recommendations, which include all-day preschool and a long-term building improvement fund: $3.1 billion.

Not surprisingly, New Jersey Attorney General Peter Verniero and the legislature are growing incredulous. Referring to the involvement of judges in school management, Verniero said in the *New York Times*: "It's the question of which branch of government shall determine, control, and ultimately implement the educational policies of New Jersey." In a letter to the Supreme Court, New Jersey Assembly Speaker Jack Collins and Senate President Donald DiFrancesco reminded the Court that the legislature "doesn't have a blank check when it comes to funding education."

Said one legislator of his state's education funding morass, "We are in special session right now responding to a court order related to education funding. When you're trying to please the court rather than improve education, you're going to have people displeased with the result."

According to Dr. Lewis Solomon of the Goldwater Institute, courts enter a policymaking minefield when they begin to prescribe programs to ensure "adequacy" in education

"Implicit in this view of adequacy is the belief that there is some consensus about what is adequate in terms of buildings, facilities and equipment for public schools," says Solomon. "Of course, every interest group will find an expert to testify that more of what they want is necessary and appropriate to achieve adequacy."

Illinois Courts: Soft on Crime, Tough on Tort Reform

Illinois' partisan judiciary has also become quite adept at making policy by fiat. In two recent decisions, Illinois courts have struck down important laws using inconsistently applied and vague clauses in the Illinois Constitution.

On March 4, the Illinois 4th District Appellate Court overturned the state's truth-in-sentencing law (which specifies the minimum percentage of an inmate's sentence he or she must serve before becoming eligible for parole) because the Illinois Constitution prohibits a state statute from containing more than a single issue — the Constitution's so-called "single-subject rule."

The Court struck down Illinois' truth-in-sentencing legislation, sponsored by Senator Kirk Dillard, now Chair of ALEC's Civil Justice Task Force, because it found that the law, as enacted in 1995, contained matters relating to both civil and criminal law — truth-in-sentencing and reimbursement of hospital costs from plaintiff personal injury awards.

"If this reasoning holds up, the Court might as well toss Illinois' statutes from the last 50 years," said Michael Flynn, Director of ALEC's Tax and Fiscal Policy Task Force, and a former policy analyst for the Illinois legislature. "Every day was Christmas in the statehouse. Attaching riders and amendments to popular legislation was not only common, it was considered something of an art form," Flynn added.

Illinois estimates that some 1,500 criminal sentences will have to be recalculated because of the Court's ruling,

including the case of a murderer who repeatedly stabbed his victim, slit her throat, and left her to die. Under Illinois' truth-in-sentencing law, the killer would be required to serve a minimum 30 years of a 36-year sentence. Now, after serving only three years, he's eligible for day-for-day good-time credits and could be released in another 15 years.

According to Dillard, as quoted in the *Chicago Tribune*, "This is just another example of the Illinois Court wanting to substitute its judgment for that of the legislature."

On December 18, 1997, the Illinois State Supreme Court struck down the *Civil Justice Reform Amendments* of 1995 — Illinois' comprehensive tort reform package. That package, also sponsored by Dillard, reformed damage awards in tort cases, abolished joint and several liability, and raised standards of proof in certain types of tort cases.

In its decision, the Court struck down portions of the Illinois *Civil Justice Reform Amendments* — abolishing joint and several liability — not even at issue in the case before it. No other state supreme court has struck down as unconstitutional tort reform that abolishes joint and several liability. The Illinois Supreme Court reasoned that since the legislation was enacted as a package, it had to be struck down as a package, despite the insertion of a severability clause into the bill.

According to the Court, "Determining whether portions of an Act are severable is a matter of statutory construction, and the existence of a severability clause within the statute is not conclusive of the issue."

In his eloquent dissent from the Court's opinion, Justice Miller writes, "Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the majority's mode of analysis simply constitutes an attempt to overrule by judicial fiat the considered judgment of the legislature."

Tort Reform: an Unprecedented Level of Judicial Activism

In striking down tort reform, the Illinois Supreme Court joins 72 other courts that have used obscure, vague and little-understood clauses in state constitutions to strike down tort reform. In all of these cases, state courts have based their decisions solely on clauses appearing in state constitutions, and not in the U.S. Constitution. Not coincidentally, state court justices effectively lock their decisions at the state level. There can be no appeal to the U.S. Supreme Court.

A recent monograph published by the Washington Legal Foundation entitled *Who Should Make America's Tort Law: Courts or Legislatures?* discusses the rise of state constitutionalism and its impact on tort reform:

"Never before have state constitutional provisions been used on so grand a scale to overturn state legislative policy decisions. The pace is unparalleled in American history, without precedent, and simply wrong. In addition, some judges have, on a retroactive basis, created brand new tort claims that have no basis in precedent or state public policy. The courts have, in some instances, acted as legislators."

Possible Solutions

Arizona faced problems similar to those found in other states: its judges were creating entirely new causes of action, and overturning tort reform. At the request of both chamber's leadership, Senator John Kaites has convened a study commission consisting of judges, legislators and members of the legal community to examine some of the issues raised by ALEC's *Separation of Powers Act*, and the proper role of the legislature and the courts.

Arizona's John Kaites - at the request of leadership, he created a study commission of judges, legislators and members of the legal community to examine contentious issues between courts and legislatures

"It has been a real interesting debate, at times a fight, to keep the work of the committee going," said Kaites. "This committee of experts, legislators and judges was set up and started a dialogue on the proper role of the courts versus the Governor and the legislature. The trial bar sees this as a tort reform issue rather than an issue of judicial activism. Some of these issues happen to be tort, but the focus of the committee is clearly separation of powers," Kaites emphasized.

In other states, such as Alabama, legislators have filed amicus briefs in cases that challenge their policymaking prerogative.

Unfortunately, in many instances, legislators simply throw up their hands in despair. They feel powerless in their struggles with the judiciary. But the solution is two-fold. Legislators need to shed light on the decisions of the judiciary, and in states with popularly elected judges, those judges need to be held accountable for their decisions.

ALEC's *Separation of Powers Act* can help. This innovative model bill was developed by former Arizona Senate President John Greene and his counsel to clarify little-understood clauses in state constitutions and discern the proper relationship between courts and legislatures. It recognizes that in many cases, state supreme court judges defer to the legislature, and in those cases, the court should be acknowledged for its principled restraint. But in other cases, the courts need to be constrained from creating new causes of action.

In response to unprecedented judicial activism, state legislators may even need to consider "trimming the fat" from their constitutions. Statutes can clarify legislative intent, and in extreme cases, constitutional amendments might be needed to rein in runaway judges.

Perhaps Thomas Jefferson, referring ironically to the constitution within each of us, said it best:

"Men by their constitutions are naturally divided into two parties: (1) Those who fear and distrust the people and wish to draw all power from them into the hands of the higher classes. (2) Those who identify themselves with the people, have confidence in them, cherish and consider them the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist; and in every one where they are free to think, speak, and to write, they will declare themselves." ■

BY JOHN LEO

Steamrolled and bulldozed

Justice Ruth Bader Ginsburg made a revealing comment recently at the University of Virginia law school. She said she would still like to see the Equal Rights Amendment in the Constitution as "a symbol" for her granddaughter, but it doesn't really matter because "there is no practical difference between what has evolved and the ERA."

In other words, the voters said no, but the courts overrode them and installed the ERA anyway. "How We Got the ERA" is the lead article in the spring issue of the *Women's Quarterly*, a publication of the Independent Women's Forum and an opponent of the feminist establishment. The article's subtitle tells the story: "The people rejected it, but the Supreme Court steamrolled it into the Constitution anyway." The word "steamrolled" echoes Justice Antonin Scalia's complaint that one of the court's rulings was a "bulldozer of social engineering."

How did this happen? In part, it is the natural result of the interplay between litigating lobbyists and judges who mostly share the same attitudes, social goals, and elite-law-school training. Justice Ginsburg has sat at both ends of the table in this cozy dialogue—first as a Columbia law professor who moonlighted as head of the ACLU's Women's Rights Project, later as the Supreme Court justice who wrote the VMI decision that ratcheted up the existing legal standard for any sex-based state action to a strict ERA level.

More broadly, the modern judiciary is the product of many trends—the rise of cynical, postmodern philosophies in the law schools; disgust with an increasingly venal and deadlocked political system; and the endless fallout from the landmark desegregation ruling in *Brown v. Board of Education*.

"An elite legal culture has emerged, contemptuous of ordinary democracy."

Troubling legacy. The lesson of *Brown*, alas, is not that an out-of-the-blue precedent-shattering decision is occasionally required, but that all precedents and traditions are suspect and can be overturned at any time by any court. And since nearly everybody agrees that *Brown* was correctly decided, it is almost impossible to make the case against the troubling legacy of *Brown* without criticizing *Brown* itself.

Conservatives and a few moderates tend to agree that the judiciary has vastly inflated its proper role and that a constitutional crisis may be at hand. If so, it is fair to say that conservatives have made a mess of coping with it. The heavily publicized articles in last November's issue of the conservative religious magazine *First Things* argued seriously and well that the courts have gone too far. But they were marred by several suggestions of civil disobedience and one of "morally justified revolution." These ideas dominated news coverage and managed to change the subject. Instead of talking about judges, people began to talk about the mental state of some conservatives.

The campaign by Tom DeLay in the House of Representatives to impeach activist judges was worse. In three instances, DeLay wanted to impeach a judge on the basis of a single ruling made on the bench. Like the sign-it-or-else pledge against the confirmation of activist judges that is being circulated in the Senate, the DeLay effort has the whiff of the campaign against Communists in government in the 1940s and '50s.

Besides, nobody can clearly define what a "judicial activist" is and who may be guilty of the charge. As a result, vaguely liberal judges are lumped with judges (some of them conservative) who are willing and eager to vote their biases from the bench. And most of the egregious activists have the wit not to reveal themselves in advance. As retired Judge Robert Bork says, "We usually discover what we've bought after the candidate is on the bench."

Some in Congress talk as though the main task is to stop the flow of hyperactivists to the bench. But the truth is that the imperial judiciary keeps expanding with ordinary Democratic and Republican nominees doing the work. A new report by the libertarian Institute for Justice concludes that Clinton nominees Ginsburg and Stephen Breyer are not flamethrowing activists—they are more restrained and less likely to strike down federal and state laws than their Republican colleagues on the court.

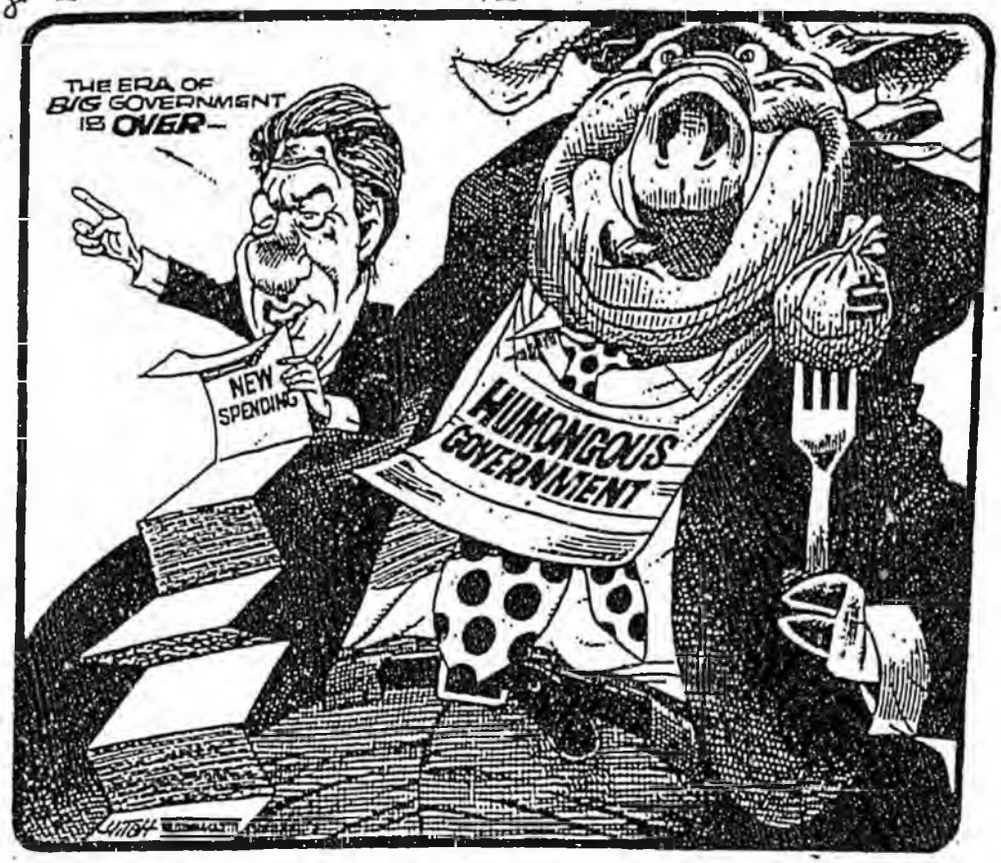
The problem is usually not the nominees but the legal culture they come from. That culture, vastly transformed in the last generation, is eager to solve social problems, addicted to rights-based claims, dismissive of religion, and dubious about the fairness of existing law. As Mary Ann Glendon of Harvard Law School wrote in *A Nation Under Lawyers*, the freewheeling impulses unleashed by the Warren court proved difficult to contain: "Many lawyers and laypeople began to imagine that wise judges in black robes could cure social ills. . . . The flight from politics turned into a stampede, as courts became alternatives to legislatures and judges began acting like executives and administrators."

This is the case that has to be made with the voters. It's not that some abstract "judicial activism" is a threat but that an elite legal culture has emerged, contemptuous of ordinary democracy and willing to handle things without all that old-fashioned messy involvement of the people. It may take time, but this is a message that can get through. ■

GC TO JUDICIARY FILE

Court's abuse of power invites public backlash

By SEN. LOREN LEMAN AT 3-4-98



On Feb. 25, the Alaska Legislature gathered in joint session to listen to the annual "State of the Judiciary" address, delivered by Warren Matthews, chief justice of Alaska. Aside from his request for additional funding and a concern about high caseloads in certain districts, Justice Matthews informed us that all is well with Alaska's court system.

Unfortunately, all is *not* well with Alaska's courts — and the problems will not be cured with additional money. Alaska's Constitution created three independent branches of government: the legislative, executive and judicial. In theory, the three branches are equal. In reality, the judiciary's power has crept far beyond its original mandate, to the extent that the court is clearly encroaching on the legitimate authority of the legislative and executive branches. This trend should concern Alaskans, because the judiciary is the least accountable to the public.

The Supreme Court's 1997 decision in *Mat-Su Coalition for Choice v. Valley Hospital Association* is only the most recent example of the court's abuse of power. Here are the facts: In 1992, the operating board of Valley Hospital in Palmer voted to no longer permit elective abortions. Exceptions were allowed for pregnancies endangering the life of the mother, pregnancies caused by an act of rape or incest, and also in cases of severe fetal deformity.

Valley Hospital is a private, non-profit corporation managed by an operating board that is elected by members of the Valley Hospital Association (VHA). The operating board no doubt felt it was exercising a valid right because an Alaska statute enacted in 1970 specifically states "Nothing in this section requires a hospital or person to participate in an abortion. . ." [AS 18.16.010(b)].

Incredibly, Justice Matthews and three of his colleagues on the Alaska Supreme Court declared that Valley Hospital's policy is unconstitutional. Under court order, Valley Hospital is now being forced to provide abortions, in violation of the consciences of its directors, members and employees.

As for the Legislature's 1970 law protecting the right of hospitals not to provide abortions, the court has declared the law to be "unconstitutional" at least as it applies to Valley Hospital and other "quasi-public" institutions. Although Valley Hospital is clearly a private health care institution, the court declared it to be a quasi-public institution because, like virtually all hospitals, it receives some government funds.

Thus, the "right to have an abortion" has now undergone a terrifying evolution, courtesy of the Supreme Court. It has now become a weapon to coerce people and institutions to participate in what many consider to be an act of violence against an unborn child.

The arrogance displayed in the Valley Hospital decision is unfortunately not an isolated incident. Many judges are no longer content to interpret the law. Instead, they are busy writing the law — legislating from the bench, in violation of their constitutional mandate.

This trend recently came under sharp criticism from no less an authority than U.S. Supreme Court Justice Antonin Scalia. "What secret knowledge, one must wonder, is breathed into lawyers when they become justices of this court?" asked Justice Scalia. "Day by day, case by case, (the court) is busy designing a constitution for a country I do not recognize."

Justice Scalia's comments ring true for me. I am a lifelong Alaskan, yet I do not recognize the Alaska which the court is attempting to create when it renders decisions such as *Valley Hospital*. It is a place alien to the values of my family and most Alaskans.

Left unchecked, the courts acquire frightening power. This was clearly recognized by the 12th chief justice of the U.S. Supreme Court, Harlan Fiske Stone (1872-1946). Justice Stone wrote: "While unconstitutional exercise of power by the executive or legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of restraint."

In their lack of restraint, the Alaska courts have ignored Justice Stone's advice. Not surprisingly, the Legislature is considering HJR47, which would require legislative confirmation for appointees to the Supreme Court, the Court of Appeals and to the Alaska Judicial Council.

If the court cannot resist the urge to trample on the rights of the people, its power must be checked by the voters and their elected representatives.

Loren Leman, Republican, represents District G, which includes parts of west and north Anchorage and Elmendorf Air Force Base.

SJR

18

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/24/99 FURTHER: Resources

Date of 5-Day Notice: 4-1-99
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: _____

Judiciary Committee considered SENATE JOINT RESOLUTION NO. 18

Requesting Exxon Corporation to pay claimants for court-ordered damages resulting from the Exxon Valdez oil spill.

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 DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
	X				
	✓				
	X				
CHAIR: Robin L. Taylor		*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

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

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. SJR 18

Revision Date (Note if correction) 04/07/99
Dept. Affected

Title Exxon Valdez Damage Claims
BRU

Component

Sponsor Senator Lincoln

Requester Senate Judiciary Committee
Component Serial No.

Expenditures/Revenues (Thousands of Dollars)

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

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY98) cost: 0.0

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 Sue Mossgrove
Phone 465-3717
Division Senate Judiciary Committee
Date 4/7/99
Approved by Senator Taylor
Date 4/7/99
Agency Chair, Senate Judiciary

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ALASKA STATE LEGISLATURE

Senator Georgianna Lincoln

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3732
Fax (907) 465-2652

Standing Committees:
Resources
Transportation

Budget Subcommittees:
Natural Resources
Corrections
Public Safety
Commerce & Economic Development

DISTRICT R

Alatna
Alcan
Allakaket
Anak
Anvik
Arctic Village
Beaver
Bettles
Big Delta
Birch Creek
Boundary
Canyon Village
Central
Chalkyitsik
Chenega Bay
Chicken
Chistochina
Chitina
Chuathbaluk
Circle
Cold Foot
Copper Center
Copperville
Cordova
Crooked Creek
Delta Junction
Dot Lake
Dry Creek
Eagle
Eagle Village
Evansville
Fort Greely
Fort Yukon
Gakona
Galena
Georgetown
Glennallen
Grayling
Gulkana
Healy Lake
Holy Cross
Hughes
Huslia
Kaltag
Kenny Lake
Koyukuk
Lake Minchumina
Lime Village
Livengood
Lower Kalskag
Manley Hot Springs
Marshall
McCarthy
McGrath
Meiklta
Mendeltna
Mentasta
Minto
Nabesna
Nenana
Nikolai
Northway
Nulato
Paxson
Pilot Station
Rampart
Red Devil
Ruby
Russian Mission
Shageluk
Slana
Sleetmute
Stevens Village
Stony River
Takotna
Tanacross
Tanana
Tanlek
Tazlina
Tehlta
Tetlin
Tok
Tolsona
Toyuna
Tuluksak
Tyonek
Upper Kalskag
Valdez
Venetie
Whittier
Wiseman

Sponsor Statement
SJR 18

SJR 18 requests Exxon Corporation pay punitive damages claims resulting from the Exxon Valdez oil spill. It has been 10 years since the spill, and 5 years since an Alaskan jury in federal district court returned a $5 billion punitive damages judgement against Exxon. Over 40,000 claimants have waited while Exxon has filed numerous motions and appeals to overturn the verdict, request new trials, or otherwise delay payment.

The legislature has been very supportive of the oil industry and has offered many incentives for development. An important element of the partnership between government and industry is good corporate citizenship. In order to help bring closure to the Exxon Valdez oil spill, SJR 18 urges Exxon to cease its efforts to avoid or delay payment of the court ordered judgement and pay all claimants due punitive damages.

EVOS LITIGATION ABBREVIATED TIMELINE

March 24, 1989:	Exxon Valdez grounds on Bligh Reef and spills 11 million gallons of crude oil.
May 2, 1994:	Trial begins in federal court - +5 years after spill.
September 16,1994:	Jury in federal court returns $5 billion punitive damages verdict in Phase III of case.
September 30, 1994:	Exxon files 12 motions to overturn the jury verdicts.
October 3, 1994:	Exxon files 3 motions to overturn the jury verdicts.
January 27, 1995:	Judge Holland denies Exxon's motions to overturn the jury verdicts (Order 267).
February 7, 1995:	Exxon files motion asking to depose the jurors and a motion to adjust the Phase IIA verdict.
February 7, 1995:	Exxon files motion to reconsider the order re: chum price and to reconsider order re: UCI setnetter harvest.
May 5, 1995:	Judge Holland denies Exxon's motion to reconsider the jury verdict regarding chum salmon price.
June 13 and 14, 1995:	Judge Holland conducts jury interviews.
July 12,1995:	Exxon files motion to depose Juror Rita Wilson and Reporter Natalie Phillips.
July 12,1995:	Exxon seeks access to Jurors Murray and Dean original juror questionnaires filed under seal.
August 11, 1995:	Judge Holland denied Exxon's motion for the juror questionnaires.
August 16, 1995:	Judge Holland denied Exxon's motion to depose Wilson and Phillips.
September 6, 1995:	Exxon files motion for a new trial claiming juror misconduct and coercion.
October 24, 1995:	Exxon files motion to amend the Phase 11(a) findings and adjust verdict re: UCI setnetters.
October 24, 1995:	Exxon files motion attacking punitive damages verdict.
November 13,1995:	Exxon opposes Plaintiffs' motion to finalize the

	Phase IIA verdict.
February 14,1996:	Plaintiffs are served with a complaint for declaratory relief from the Seattle Seven seeking a percentage of plaintiffs' damages on behalf of Exxon
February 20,1996:	Judge Holland denies Exxon's motion for new trial based on possible juror misconduct and coercion (Order 308).
March 6, 1996:	Seattle Seven intervene in litigation on behalf of Exxon.
March 18, 1996:	Exxon files motion attacking punitive damage verdict and Seattle Seven object to Plan of Allocation acting on Exxon's behalf.
April 5, 1996:	Judge Holland denied Exxon's fourth attack on the UCI setnetter verdict (Order 316).
June 11, 1996:	Judge Holland approves Plan of Allocation and denounces Seattle Seven/Exxon scheme (Order 317).
June 18,1996:	Exxon files motion to reconsider Court's order re: Seattle Seven.
August 6,1996:	Judge Holland rejects Exxon's attempt to attack the punitive damages verdict based on credits claimed from the Seattle Seven releases (Order 326).
September 6,1996:	Judge Holland denies Exxon's motion to reconsider order re: Seattle Seven finding that Exxon perpetuated a deception upon the court and the jury (Order 327).
September 24,1996:	Judgment finally entered on federal court jury verdicts, including $5 Billion punitive damages award - +7 years after spill -- +2 years after verdict.
September 30,1996:	Exxon and Seattle Seven file joint notice of appeal on Seattle Seven kickback.
October 8, 1996:	Exxon files motion to alter or amend the judgment and files its bill of costs against certain plaintiffs.
November 20, 1996:	Judge Holland dismisses the Seattle Seven complaint with prejudice.
December 19,1996:	Seattle Seven and Exxon file appeal challenging dismissal of complaint.
January 17, 1997:	Judge Holland issues order on Exxon's Motion to

	Amend Judgment (Order 332).
February 12, 1997:	Exxon files notice of appeal to Ninth Circuit.
March 18,1997:	Plaintiffs filed motion for approval of Plans of Distribution.
September 23,1997:	Exxon moved for a new trial on the ground of "newly discovered" evidence.
January 5, 1998:	The Ninth Circuit issued a limited remand to permit the district court to consider Exxon's motion for new trial.
March 16,1998:	Exxon deposed Juror Rita Wilson.
July 31,1998:	Judge Holland denied Exxon's second motion for a new trial (Order 339).
August 7,1998:	Exxon filed an appeal on the denial of the second motion for a new trial.
Where we are now:	The final brief on Exxon's second motion for a new trial was filed on November 27,1998. Oral argument will be scheduled in front of a panel of three judges from the Ninth Circuit sometime in 1999. Once the Ninth Circuit makes its decision (on a date unknown), Exxon can be expected to file a petition for further review of an adverse decision to the United States Supreme Court possibly adding another year to the litigation.

Back to Litigation Page | Introdution to Litigation

Cordova District Fishermen United

Celebrating 65 Years of Service to Commercial Fishermen in Cordova, Alaska
P.O. Box 939 Cordova, Alaska 99574 / Telephone (907) 424-3447 / Fax (907) 424-3430

April 5, 1999

Senate Judiciary Committee
Senator Robin Taylor, Chairman
MS 3100
State Capitol
Juneau, AK 99811-0001

SENT VIA FACSIMILE TO (907) 465-3922

Dear Members,

Cordova District Fishermen United (CDFU), the oldest commercial fishing organization of the state representing the salmon and herring fishermen of Prince William, urges your support for SJR 18.

The Exxon Valdez Oil Spill had a profound impact upon not only the ecosystem of Prince William Sound, but also the lives of those men and women whose livelihoods and lifestyles depended upon the harvests of the marine ecosystem. Exxon promised the people of Prince William Sound--lawsuits and court cases notwithstanding--that it would "make Alaska whole again." It is important that Exxon pay its claimants the damages duly assessed in a court of law to compensate those affected by the spill.

Payment of the punitive damages as a awarded by the lawsuit should certainly go a long ways toward bringing closure to this very painful and sensitive chapter in the lives of those impacted by the Spill.

Respectfully submitted,

Sue Aspelund

Sue Aspelund
Executive Director

March 31, 1999

Senate Judiciary Committee
Robin Taylor, Chair

Dear Committee Members:

I fully support SJR 18 in the effort to finalize the claims of so many Alaskans. As a lifetime commercial fisherman from Cordova, I have suffered through bankruptcy, depressed prices for our fish, and depressed lives for the citizens who depend on the environment to provide our sustainable way of life. In the post spill years I was forced to move to the Mat-Su valley from Cordova, just to be able to afford groceries and other basic necessities for my family. Well, I found that the grass was not greener here. With tax attorney fees from my bankruptcy, high payments for my boat and house and low prices for our fish, I'm barely hanging on. The input of 5 billion dollars into the state's economy, would no doubt help the state's financial crisis. It would definitely help the situation of people like myself, before we go under. I applaud the efforts of this resolutions sponsors! Thank you.

Sincerely,

Bob Martinson

Bob Martinson
900 Iroquois Drive
Wasilla, AK 99654
Phone: 373-2627
e-mail: danse(@)mtaonline.net

SJR

19

FISCAL NOTE

STATE OF ALASKA **BILL NO.** SJR19
1999 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) _____ Dept. Affected Office of the Governor
Title Constitutional Amendment relating to an office of administrative hearings BRU Elective Operations
Component General and Primary
Sponsor Senator Taylor
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 Fenumiai Phone 465-3935
Division Division of Elections Date/Time 3/26/99 9:25 AM
Approved by C Lt. Governor Fran Ulmer Date 3/26/99
Agency Office of the Lieutenant Governor

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SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/24/99

FURTHER: Finance

Date of 5-Day Notice: 3/25/99
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered

SENATE JOINT RESOLUTION NO. 19

Proposing amendments to the Constitution of the State of Alaska relating to an office of administrative hearings.

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 DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
John Torgerson	✓	Thomas		X	
Dave Donley	✓				
CHAIR: Robin L. Taylor	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
Gov.	3/26	✓	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

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

NFIB Alaska

NFIB
The Voice of Small Business

Statement of Support of SJR 19

A resolution calling for a constitutional amendment to create an office of administrative hearings separate from state agencies.

March 29, 1999

The Alaska Chapter of the National Federation of Independent Business has 3,700 members, making it the largest small-business advocacy group in the state. The legislative agenda of NFIB is determined by ballot. The following question was contained in the 1998 ballot:

Should in-house state agency hearing officers be moved to an independent office in the Department of Administration in order to foster an impartial hearing process when citizens challenge government decisions? **Seventy-nine percent of the members voted yes**, 7% voted no and 14% were undecided.

NFIB/Alaska supports the formation off an Office of Administrative Hearings and additionally supports SJR 19, which would place the question before the citizens of the state of Alaska.

Background: State legislatures and administrations in many states are reforming their administrative hearing process to separate the appeal process from the agency making the decision in dispute. Currently a citizen who wishes to appeal a state agency decision must petition a hearing officer from the same agency with which they have the disagreement. NFIB believes the current process does not provide for a fair and impartial hearing process when a person must appeal to the same agency they are disputing with. Creating a central hearing adjudication system with highly skilled hearing officers who are not connected to the agencies will provide a more objective process. Other states that have implemented an independent central hearing system have experienced efficiencies in all segments of the hearing process with an overall reduction in costs. Additionally, they have seen a reduction in hearing delays and less litigation.

NFIB/Alaska urges support for SJR 19.

Submitted by Thyes Shaub on behalf of NFIB/Alaska.

National Federation of Independent Business
217 Second Street, Suite 206 • Juneau, AK 99801 • 907-463-5118 • Fax 907-463-5128

Alaska State Legislature

Chairman,
Judiciary Committee
Administrative Regulations
Revenue Committee

Vice Chairman,
Resources Committee

Senator Robin L. Taylor

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3873
Fax: (907) 465-3922

50 Front Street
Suite 203
Ketchikan, Alaska 99901
(907) 225-8088
Fax: (907) 225-0713

SPONSOR STATEMENT

SJR 19

Constitutional Amendment to the State of Alaska relating to an office of administrative hearings.

This constitutional amendment, if approved by voters, will establish an office of administrative hearings apart from and separate from state agencies.

All research shows significant cost savings, efficiency of the process, and a re-establishment of fairness when hearing officer functions are consolidated, held to due process standards, and politically insulated from agencies.

Benefits to the public, in addition to saving money, are extremely positive. They include less litigation, stable investment climate, comfort for small businesses, and an increase in public confidence in administrative hearings.

Perhaps most importantly, full time independent hearing officers provide a level playing field for those challenging regulations. They also hold those who develop, promulgate, and enforce regulations to a higher standard. All data shows regulations become less onerous when unbiased hearing officers, governed not by a commissioner, but by due process, scrutinize them.

SJR 19, like due process reform in 25 other states, will correct inefficiency, increase professional standards, save money, restore public confidence, stimulate development and restore the proper balance.

Table 1
Expenditures for Administrative Adjudications
Fiscal Years 1994 - 1996
(dollars in thousands)

Department	Fiscal Year 1994	Fiscal Year 1995	Fiscal Year 1996
Administration (a)	727.8	886.6	812.8
Commerce and Economic Development (b)	837.4	928.1	1,056.6
Community and Regional Affairs (c)	0.0	0.0	0.0
Corrections (d)	64.5	0.0	0.0
Education (e)	63.7	172.0	190.3
Environmental Conservation (f)	5.0	7.4	75.0
Fish and Game (g)	629.2	614.5	612.6
Health and Social Services (h)	341.7	296.0	353.4
Labor (i)	1,684.7	1,781.6	2,041.0
Law (j)	0.0	0.0	0.0
Military and Veterans' Affairs (k)	0.0	0.0	0.0
Natural Resources (l)	7.0	7.8	0.8
Public Safety (m)	15.0	18.0	32.1
Revenue (n)	370.7	374.1	352.6
Transportation and Public Facilities (o)	114.7	46.0	137.3
University of Alaska (p)	276.2	192.2	205.6
Alaska Court System (q)	2.9	5.3	12.3
Office of the Governor, Lt. Governor, and Division of Elections (r)	16.8	9.6	46.3
Total	5,157.3	5,339.2	5,928.7

NOTES:
Departments responded to a survey asking for administrative appeals expenditures for fiscal years 1994 through 1996. Data include amounts spent for personal services (hearing officers, persons serving in that capacity, and support personnel); contractual arrangements; and associated costs including travel, equipment, and supplies. Costs associated with judicial review of administrative procedures were not included.

(a) Administration–Most expenditures were for labor-related appeals. The department is responsible for mediation and arbitration in labor relations disputes for all departments.
(b) Commerce and Economic Development–Most expenditures were for occupational licensing appeals, and at least 60 percent of these expenditures were for investigations regarding licensing and disciplinary actions. The department total does not include complete data for the Alaska Public Utilities Commission because of changes in their accounting system.
(c) Community and Regional Affairs–No expenditures for administrative appeals during fiscal years 1994-1996.
(d) Corrections-Most 1994 expenditures were for an RSA with the Department of Law for prisoner rights litigation.
(e) Education–Most expenditures were for special education and vocational rehabilitation related appeals. The department continues to compile data for 1994; consequently, the 1994 data is incomplete.
(f) Environmental Conservation–Most expenditures were for air quality, water quality, or solid waste permit appeals.
(g) Fish and Game–Most expenditures were for permit appeals before the Commercial Fisheries Entry Commission.
(h) Health and Social Services–Most expenditures were for appeals concerning Medicaid and cash benefits for public assistance programs.
(i) Labor–Most expenditures were for workers' compensation and unemployment benefit appeals.
(j) Law –No expenditures for administrative appeals during fiscal years 1994-1996.
(k) Military and Veterans' Affairs–No expenditures for administrative appeals during fiscal years 1994-1996.
(l) Natural Resources–Most expenditures were for appeals concerning procurement disputes or land use permits.
(m) Public Safety-Most expenditures were for hearings before the Violent Crimes Compensation Board.
(n) Revenue–Most expenditures concerned permanent fund dividend eligibility and child support enforcement.
(o) Transportation and Public Facilities–Most expenditures were for construction and lease appeals.
(p) University of Alaska–Most expenditures were for labor relations, procurement-related appeals, and student grievances.
(q) Alaska Court System–Expenditures were for procurement-related appeals.
(r) Office of the Governor–Expenditures were for hearings before the Human Rights Commission.

SOURCES: Directors of Administrative Services for each department.

Prepared by Alaska Legislative Research Services, April 1997 (97.049 Revised).

TABLE 2
Expenditures for Administrative Adjudications (a)
Fiscal Years 1994-1996
(dollars in thousands)

Department	Fiscal Year 1994				Fiscal Year 1995				Fiscal Year 1996			
	Federal Receipts	General Fund	Other Receipts (b)	Total	Federal Receipts	General Fund	Other Receipts (b)	Total	Federal Receipts	General Fund	Other Receipts (b)	Total
Administration	0.0	727.8	0.0	727.8	0.0	888.6	0.0	888.6	0.0	812.8	0.0	812.8
Commerce and Economic Development	0.0	820.4	17.0	837.4	0.0	911.1	17.0	928.1	0.0	1,056.6	17.0	1,056.6
Community and Regional Affairs	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Corrections	0.0	64.5	0.0	64.5	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Education	46.5	0.0	17.2	63.7	138.9	10.0	23.1	172.0	123.1	20.0	47.2	190.3
Environmental Conservation	0.0	5.0	0.0	5.0	0.0	7.4	0.0	7.4	0.0	75.0	0.0	75.0
Fish and Game	0.0	629.2	0.0	629.2	0.0	614.5	0.0	614.5	0.0	612.6	0.0	612.6
Health and Social Services	170.3	171.4	0.0	341.7	147.3	148.7	0.0	296.0	142.0	162.2	49.2	353.4
Labor	682.7	1,002.0	0.0	1,684.7	735.1	1,046.5	0.0	1,781.6	852.1	1,188.9	0.0	2,041.0
Law	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Military and Veterans' Affairs	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Natural Resources	0.0	7.0	0.0	7.0	0.0	7.8	0.0	7.8	0.0	0.8	0.0	0.8
Public Safety	0.0	0.0	15.0	15.0	0.0	0.0	18.0	18.0	2.0	1.6	28.5	32.1
Revenue	0.0	90.3	280.4	370.7	101.4	39.2	233.5	374.1	123.5	39.5	189.8	352.8
Transportation and Public Facilities	114.7	0.0	0.0	114.7	14.4	9.6	22.0	46.0	112.2	0.7	24.4	137.3
University of Alaska	0.0	276.2	0.0	276.2	0.0	192.2	0.0	192.2	0.0	205.6	0.0	205.6
Alaska Court System	0.0	2.9	0.0	2.9	0.0	5.3	0.0	5.3	0.0	12.3	0.0	12.3
Office of the Governor, Lt. Governor, and Division of Elections	0.0	16.8	0.0	16.8	0.0	9.6	0.0	9.6	0.0	46.3	0.0	46.3
Total	1,014.2	3,813.5	329.6	5,157.3	1,137.1	3,888.5	313.6	5,339.2	1,354.9	4,234.9	356.1	5,928.7

NOTES:

(a) Departments responded to a survey asking for data on expenditures for administrative appeals for fiscal years 1994 through 1996, including amounts spent for all personal services, contractual arrangements, and all associated costs such as travel, equipment, and supplies. Departments excluded costs associated with judicial review of administrative procedures. See Table 1 for additional notes.

(b) "Other" receipts include Reimbursable Service Agreements (RSA) from other agencies (for DCED and DHSS), administrative funds from the Permanent Fund (for Revenue), and an RSA of lease receipts from Anchorage International Airport (for DOT/PF)

SOURCES: Directors of Administrative Services in each department.

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) 465-2075

March 26, 1999

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

Re: SJR 19, Constitutional amendment for administrative hearings

Dear Senator Taylor:

I am writing with respect to SJR 19, which is pending for hearing before your committee.

I have prepared the attached analysis of the language contained in SJR 19. Currently, the legislature has the discretion to legislate administrative adjudicative authority. A constitutional amendment would presumably limit that discretion. If the intent is to change administrative adjudicative authority without curtailing the legislature's current powers, the appropriate route would be through statutory change rather than amendment to the state's constitution.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Barbara Hilton for
Teresa Williams
Assistant Attorney General

TW:jem

Attachment

cc: Members, Senate Judiciary Committee
Pat Pourchot, Legislative Director, Office of the Governor
Chrystal Smith, Legislative Liaison, Department of Law
Deborah Behr, Legislation Attorney, Department of Law

ANALYSIS OF LANGUAGE IN SJR 19

I. THE OFFICE OF ADMINISTRATIVE HEARINGS IS VESTED WITH THE **"POWER TO CONDUCT ADMINISTRATIVE LAW HEARINGS."**

Alaska law defines the term "administrative law hearings" broadly to cover any agency dispute-resolution process. An administrative adjudicative proceeding commences when one party serves on the other party a document that sets in motion **regulatory or statutory procedures for the resolution of a dispute.** Hickel v. Halford, 872 P.2d 171 (Alaska 1994) The term "administrative law hearings" would apply whether or not a hearing officer currently conducts the proceeding and would also apply to reviews currently conducted at a lower agency level. It would apply to hearings that are conducted in writing, rather than by personal appearances.

The boards and commissions that exist for the primary function of conducting administrative hearings would no longer have that function. Those agencies include: Alaska Workers' Compensation Board, State Board of Parole, Occupational Safety and Health Review Board, Fisherman's Fund Advisory and Appeals Council, State Assessment Review Board, Violent Crimes Compensation Board, Alaska Labor Relations Agency, Alaska Commission for Human Rights, Alaska Public Utilities Commission, and Alaska Public Offices Commission.

II. THE OFFICE OF ADMINISTRATIVE HEARINGS IS VESTED WITH THE **"POWER TO RENDER FINAL AGENCY DECISIONS."**

The term "agency decisions" is a misnomer, because the decision would not in fact be a decision by the agency.

The constitutional mandate would encompass all aspects of state programs. An attorney in the Office of Administrative Hearings would decide any formal dispute involving state licensing, loan programs, tax matters, public assistance programs, employee relations, resource use, safety regulation, state land allocation, procurement, and the myriad other state functions.

The constitutional mandate would include agencies of the legislature and the judicial branch, as well as the executive branch.

III. **"THE JURISDICTION OF THE OFFICE SHALL BE PRESCRIBED BY LAW"**

The proposed clause does not give the legislature the express authority to exempt agencies or certain levels of proceedings from the constitutional mandate. The Alaska courts hold that the identical language for the judiciary does not allow the legislature, by statute, to take away judicial power vested by the constitution in the courts.

IV. THE HEAD OF THE OFFICE IS NAMED "CHIEF **ADMINISTRATIVE LAW JUDGE."**

Alaska has purposively not adopted the "Administrative Law Judge" style of hearing officer. An Administrative Law Judge is more likely to use hearing chambers, wear robes, and to be referred to as "judge" or "your honor." Alaska administrative proceedings are intended to be more informal and less threatening to the participants.

SJR

25

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 4/22/99 FURTHER:

Date of 5-Day Notice:_____
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered SENATE JOINT RESOLUTION NO. 25

Relating to voluntary school prayer.

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 DO PASS	*DP*
Vicki Halford	✓
CHAIR: Toni L. Troxler	✓

OTHER RECOMMENDATIONS	*NR*	*DNP*	*AM*
Dan Dawley	✓		
Jeff Ellis	✓		
CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
	5/3	✓	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] APPROPRIATION -- no fiscal note

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

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. SJR 25

Revision Date (Note if correction) 05/03/99
Dept. Affected
Title Relating to voluntary School prayer
BRU
Component
Sponsor Senator Ward
Requester Senate Judiciary Cmte
Component Serial No.

Expenditures/Revenues (Thousands of Dollars)

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

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY98) cost: 0.0

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 Sue Mossgrove
Phone 465-3717
Division Senate Judiciary Cmte
Date 5/3/99
Approved by Senator Taylor
Date 5/3/99
Agency Chair, Senate Judiciary

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Proposing an amendment to the Constitution of the United States relating to voluntary school prayer. (Introduced in the House)

HJ 7 IH

106th CONGRESS

1st Session

H. J. RES. 7

Proposing an amendment to the Constitution of the United States relating to voluntary school prayer.

IN THE HOUSE OF REPRESENTATIVES

January 6, 1999

Mrs. EMERSON introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to voluntary school prayer.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of at least three-fourths of the several States within seven years from the date of its proposal to the States by the Congress:

`Article--

`Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall prescribe the content of any such prayer.'