

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10672 SENATE STATE AFFAIRS

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U. S., at 126.

California's blanket primary violates the principles set forth in these cases. Proposition 198 forces political parties to associate with— to have their nominees, and hence their positions, determined by— those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to

with adverse political principles” upon the selection of the party's nominee (in that case its presidential nominee). 450 U. S., at 122 (quoting *Ray v. Blair*, 343 U. S. 154, 221–222 (1952) (*per curiam*)). See also 450 U. S., at 125 (comparing asserted state interests with burden created by the “imposition of voting requirements upon” delegates). Of course *La Follette* involved the burden a state regulation imposed on a national party, but that factor affected only the weight of the State's interest, and had no bearing upon the existence *vel non* of a party's First Amendment right to exclude. 450 U. S., at 121–122, 125–126. Although JUSTICE STEVENS now considers this interpretation of *La Follette* “specious”, see *post*, at 4, n. 3, he once subscribed to it himself. His dissent from the order dismissing the appeals in *Bellotti v. Connolly* described *La Follette* thusly: “There this Court rejected Wisconsin's requirement that delegates to the party's Presidential nominating convention, selected in a primary open to nonparty voters, must cast their convention votes in accordance with the primary election results. In our view, the interests advanced by the State . . . did not justify its substantial intrusion into the associational freedom of members of the National Party. . . . Wisconsin required convention delegates to cast their votes for candidates who might have drawn their support from nonparty members. The results of the party's decisionmaking process might thereby have been distorted.” 460 U. S. 1057, 1062–1063 (1983) (emphasis in original).

Not only does the dissent's principle of no right to exclude conflict with our precedents, but it also leads to nonsensical results. In *Tashjian v. Republican Party of Conn.*, 479 U. S. 208 (1986), we held that the First Amendment protects a party's right to invite independents to participate in the primary. Combining *Tashjian* with the dissent's rule affirms a party's constitutional right to allow outsiders to select its candidates, but denies a party's constitutional right to reserve candidate selection to its own members. The First Amendment would thus guarantee a party's right to lose its identity, but not to preserve it.

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change his party affiliation the day of the primary, and thus, in some sense, to "cross over," at least he must formally *become a member of the party*; and once he does so, he is limited to voting for candidates of that party.⁸

The evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote—indeed, it is a clear and present danger. For example, in one 1997 survey of California voters 37 percent of Republicans said that they planned to vote in the 1998 Democratic gubernatorial primary, and 20 percent of Democrats said they planned to vote in the 1998 Republican United States Senate primary. Tr. 668–669. Those figures are comparable to the results of studies in other States with blanket primaries. One expert testified, for example, that in Washington the number of voters crossing over from one party to another can rise to as high as 25 percent, *id.*, at 511, and another that only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot, App. 136. The impact of voting by nonparty members is much greater upon minor parties, such as the Libertarian Party and the Peace and Freedom Party. In the first primaries these parties conducted following California's implementation of Proposition 198, the total votes

⁸In this sense, the blanket primary also may be constitutionally distinct from the open primary, see n. 6, *supra*, in which the voter is limited to one party's ballot. See *La Follette, supra*, at 130, n. 2 (Powell, J., dissenting) ("[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. . . . The situation might be different in those States with blanket primaries—i.e., those where voters are allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to vote in with respect to each individual elective office"). This case does not require us to determine the constitutionality of open primaries.

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cast for party candidates in some races was more than *double* the total number of *registered party members*. California Secretary of State, Statement of Vote, Primary Election, June 2, 1998, http://primary98.ss.ca.gov/Final/Official_Results.htm; California Secretary of State, Report of Registration, May 1998, http://www.ss.ca.gov/elections/elections_u.htm.

The record also supports the obvious proposition that these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. The 1997 survey of California voters revealed significantly different policy preferences between party members and primary voters who "crossed over" from another party. Pl. Exh. 8 (Addendum to Mervin Field Report). One expert went so far as to describe it as "inevitable [under Proposition 198] that parties will be forced in some circumstances to give their official designation to a candidate who's not preferred by a majority or even plurality of party members." Tr. 421 (expert testimony of Bruce Cain).

In concluding that the burden Proposition 198 imposes on petitioners' rights of association is not severe, the Ninth Circuit cited testimony that the prospect of malicious crossover voting, or raiding, is slight, and that even though the numbers of "benevolent" crossover voters were significant, they would be determinative in only a small number of races.⁹ 169 F. 3d, at 656-657. But a single election in which the party nominee is selected by non-party members could be enough to destroy the party. In the 1860 presidential election, if opponents of the fledgling

⁹The Ninth Circuit defined a crossover voter as one "who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party." 169 F. 3d 646, 656 (1999).

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Republican Party had been able to cause its nomination of a pro-slavery candidate in place of Abraham Lincoln, the coalition of intraparty factions forming behind him likely would have disintegrated, endangering the party's survival and thwarting its effort to fill the vacuum left by the dissolution of the Whigs. See generally, 1 *Political Parties & Elections in the United States: An Encyclopedia* 398-408, 587 (L. Maisel ed. 1991). Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. "[R]egulating the identity of the parties' leaders," we have said, "may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu*, 489 U. S., at 231, n. 21.

In any event, the deleterious effects of Proposition 198 are not limited to altering the identity of the nominee. Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions— and, should he be elected, will continue to take somewhat different positions in order to be renominated. As respondents' own expert concluded, "[t]he policy positions of Members of Congress elected from blanket primary states are . . . more moderate, both in an absolute sense and relative to the other party, and so are more reflective of the preferences of the mass of voters at the center of the ideological spectrum." App. 109 (expert report of Elisabeth R. Gerber). It is unnecessary to cumulate evidence of this phenomenon, since, after all, the whole *purpose* of Proposition 198 was to favor nominees with "moderate" positions. *Id.*, at 89. It encourages candidates— and officeholders who hope to be renominated— to curry favor with persons whose views are more "centrist" than those of the party base. In effect, Proposition 198 has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the "basic function" of choosing their own leaders. *Kusper*, 414 U. S., at 58.

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Nor can we accept the Court of Appeals' contention that the burden imposed by Proposition 198 is minor because petitioners are free to endorse and financially support the candidate of their choice in the primary. 169 F. 3d, at 659. The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee. In *Eu*, we recognized that party-leadership endorsements are not always effective—for instance, in New York's 1982 gubernatorial primary, Edward Koch, the Democratic Party leadership's choice, lost out to Mario Cuomo. 489 U. S., at 228, n. 18. One study has concluded, moreover, that even when the leadership-endorsed candidate has won, the effect of the endorsement has been negligible. *Ibid.* (citing App. in *Eu v. San Francisco County Democratic Central Comm.*, O. T. 1988, No. 87-1269, pp. 97-98). New York's was a closed primary; one would expect leadership endorsement to be even less effective in a blanket primary, where many of the voters are unconnected not only to the party leadership but even to the party itself. In any event, the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders.

We are similarly unconvinced by respondents' claim that the burden is not severe because Proposition 198 does not limit the parties from engaging fully in *other* traditional party behavior, such as ensuring orderly internal party governance, maintaining party discipline in the legislature, and conducting campaigns. The accuracy of this assertion is highly questionable, at least as to the first two activities. That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems

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to us improbable. Respondents themselves suggest as much when they assert that the blanket primary system "will lead to the election of more representative problem solvers' *who are less beholden to party officials.*" Brief for Respondents 41 (emphasis added) (quoting 169 F. 3d, at 661). In the end, however, the effect of Proposition 198 on these other activities is beside the point. We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired. See, e.g., *Spence v. Washington*, 418 U. S. 405, 411, n. 4 (1974) (*per curiam*); *Kusper*, 414 U. S., at 58. There is simply no substitute for a party's selecting its own candidates.

In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process— the "basic function of a political party," *ibid.*— by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome— indeed, in this case the *intended* outcome— of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons*, 520 U. S., at 358 ("Regulations imposing severe burdens on [parties] rights must be narrowly tailored and advance a compelling state interest"). It is to that question which we now turn.

III

Respondents proffer seven state interests they claim are compelling. Two of them— producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns— are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices. Indeed, respondents admit as much. For instance, in substantiating their interest in "represen-

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tativeness," respondents point to the fact that "officials elected under blanket primaries stand closer to the median policy positions of their districts" than do those selected only by party members. Brief for Respondents 40. And in explaining their desire to increase debate, respondents claim that a blanket primary forces parties to reconsider long standing positions since it "compels [their] candidates to appeal to a larger segment of the electorate." *Id.*, at 46. Both of these supposed interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.

We have recognized the inadmissibility of this sort of "interest" before. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995), the South Boston Allied War Veterans Council refused to allow an organization of openly gay, lesbian, and bisexual persons (GLIB) to participate in the council's annual St. Patrick's Day parade. GLIB sued the council under Massachusetts' public accommodation law, claiming that the council impermissibly denied them access on account of their sexual orientation. After noting that parades are expressive endeavors, we rejected GLIB's contention that Massachusetts' public accommodation law overrode the council's right to choose the content of its own message. Applying the law in such circumstances, we held, made apparent that its "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. . . . [I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.*, at 578.

Respondents' third asserted compelling interest is that

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the blanket primary is the only way to ensure that disenfranchised persons enjoy the right to an effective vote. By "disenfranchised," respondents do not mean those who cannot vote; they mean simply independents and members of the minority party in "safe" districts. These persons are disenfranchised, according to respondents, because under a closed primary they are unable to participate in what amounts to the determinative election—the majority party's primary; the only way to ensure they have an "effective" vote is to force the party to open its primary to them. This also appears to be nothing more than reformulation of an asserted state interest we have already rejected—recharacterizing nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. We have said, however, that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Tashjian*, 479 U. S., at 215–216, n. 6 (citing *Rosario v. Rockefeller*, 410 U. S. 752 (1973), and *Nader v. Schaffer*, 417 F. Supp. 837 (Conn.), summarily aff'd, 429 U. S. 989 (1976)). The voter's desire to participate does not become more weighty simply because the State supports it. Moreover, even if it were accurate to describe the plight of the non-party-member in a safe district as "disenfranchisement," Proposition 198 is not needed to solve the problem. The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee is a state-imposed restriction upon theirs.

Respondents' remaining four asserted state interests—promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—are not, like the others, automatically out of the running; but

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neither are they, *in the circumstances of this case*, compelling. That determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant. And for all four of these asserted interests, we find it not to be.

The aspect of fairness addressed by Proposition 198 is presumably the supposed inequity of not permitting nonparty members in "safe" districts to determine the party nominee. If that is unfair at all (rather than merely a consequence of the eminently democratic principle that—except where constitutional imperatives intervene—the majority rules), it seems to us less unfair than permitting nonparty members to hijack the party. As for affording voters greater choice, it is obvious that the net effect of this scheme—indeed, its avowed purpose—is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." This may well be described as broadening the range of choices *avored by the majority*—but that is hardly a compelling state interest, if indeed it is even a legitimate one. The interest in increasing voter participation is just a variation on the same theme (more choices favored by the majority will produce more voters), and suffers from the same defect. As for the protection of privacy: The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one. If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appoint-

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ment to certain offices. See, e.g., 47 U. S. C. §154(b)(5) ("[M]aximum number of commissioners [of the Federal Communications Commission] who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission"); 47 U. S. C. §396(c)(1) (1994 ed., Supp. III) (no more than five members of Board of Directors of Corporation for Public Broadcasting may be of same party); 42 U. S. C. §2000e-4(a) (no more than three members of Equal Employment Opportunity Commission may be of same party).

Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot— which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"— all without severely burdening a political party's First Amendment right of association.

* * *

Respondents' legitimate state interests and petitioners' First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate

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with those who do not share their beliefs. And it has done this at the "crucial juncture" at which party members traditionally find their collective voice and select their spokesman. *Tashjian*, 479 U. S., at 216. The burden Proposition 198 places on petitioners' rights of political association is both severe and unnecessary. The judgment for the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

SB

146

ALASKA STATE HOUSE OF REPRESENTATIVES

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Session Contact:
(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 102

REPRESENTATIVE JOHN COGHILL

Date: March 16, 2001
To: Representative Coghill
From: Rynnieva Moss, Legislative Aide *Rynnieva Moss*
Re: AccuVote

I talked with John McLaurin from Global in Florida about the possibility of one ballot. He said he is 95 per cent sure they could do it because the software people have been talking about it, but the software solution would be very expensive. Right now Accuvote has two General Election ballots that use a party declaration.

The first one is the "straight party voting" where you mark the block of your party affiliation and the ballot automatically counts the candidates from that party. This wouldn't work because in a primary a party could have more than one candidate running for the same seat.

The second is the "straight party crossover" where you can vote for any party affiliation on the ballot as long as you only vote for one candidate per seat. This again is only used in the general election.

When I told him we were dealing with a primary election, he said this would be extremely difficult because you are throwing in so many variables. He said it is even more unlikely one ballot programming would be feasible because the party's can determine the method their candidates are selected, those methods could be change by the party requiring the software programming to change the ballots. He said this is problematic from the poll standpoint, from the voter' standpoint and from the programming standpoint. Election workers and voters would have to be educated every time a change was made.

John said one ballot would mean a major software rewrite of Alaska's system. He said without the host computer, proprietary software and accouterments for programming a rewrite could not happen. The system cost \$1.98 million to get running. He said he talked to Randy two weeks ago about this. He has also been talking to Lt. Gov. Ulmer the last couple of weeks.

John's mobile phone is 904-235-6645 and office phone is 904-672-0460.

Representative John_Coghill@LEGIS.state.ak.us

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FRAN ULMER
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NEWS RELEASE

www.state.ak.us

FOR IMMEDIATE RELEASE: March 15, 2001

0112

**New Primary Election rules recommended
Legislation introduced today**

A bill changing the way Alaska runs its primary elections was sponsored by Governor Tony Knowles and introduced in the Alaska Senate today. Lt. Governor Fran Ulmer requested the bill (Senate Bill 146) be drafted after reviewing the recommendations of the Primary Election Task Force.

"The recommendations were developed after the Task Force reviewed the legal issues on the primary election process and gathered information from the public," Ulmer said. "The next primary election will be held in August of 2002 and it's critical the legislature address this issue as soon as possible so that the Division of Elections can run the next primary consistent with the court decision."

Last year's U.S. Supreme Court ruling that declared California's blanket primary unconstitutional impacted Alaska's blanket primary election system. As a result, Lt. Governor Ulmer held the 2000 Primary Election under temporary regulations that allowed the Republican Party to have a closed ballot while all other parties were on an open ballot. The regulations were temporary and Ulmer, who oversees the Division of Elections, formed the Primary Elections Task Force in February to develop recommendations for legislation to address the issue in time for the 2002 primary. Task Force members included four former lieutenant governors, two former attorneys general, a member of the League of Women Voters and Ulmer.

"The Task Force recommended a system that looks a lot like the old primary," Ulmer said. "People who don't choose a political party and register with the Division of Elections, non-partisan or undeclared voters, will get a blanket primary ballot that has all of the parties on it as long as the parties say someone who isn't registered with another party can vote on their candidate. Any political party that chooses to close its primary will have a separate ballot for voters registered for that party."

-more-

Primary Election bill introduced**Page 2****March 15, 2001**

The provisions of SB 146 are as follows:

1. A political party may choose to close its primary election to exclude voters not registered with that party. A separate primary election ballot listing appropriate candidates will be prepared for that party. The party must submit its rules governing primary elections to the director of elections by September 1 in the year prior to the year in which a primary election is held. These party rules must have been pre-cleared by the United States Department of Justice by this date.
2. If a political party fails to submit its primary preference to the director of elections by September 1, the parties' candidates will appear on a blanket primary ballot. The blanket primary ballot will list all candidates regardless of party affiliation.
3. Voters will be given the ballot prepared for their party affiliation. If a voter desires to be registered as a member of a political party, that registration must be done 30 days prior to the primary election.

Senate Bill 146 was read across this morning and received three Senate committee referrals, to the State Affairs, Judiciary and Finance committees.

Broadcast Advisory: Radio actualities of Lt. Governor Fran Ulmer are available on the Governor's Information line (465-5213 or 1-800-478-5669). A video clip is also available on the Governor's ARCS window at 3:30 p.m. today.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 146
(S) Publish Date: 3/19/01

Revision Date/Time (Note if correction): _____ Dept. Affect: OOG
Title: "An Act relating to the primary election;..." BRU: Elective Operations
Component: Elections
Sponsor: Rules Committee
Requester: Governor Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|------------------------|------------|--------------|------------|--------------|------------|--------------|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | 5.2 | 210.0 | 5.2 | 210.0 | 5.2 | 210.0 |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 5.2 | 210.0 | 5.2 | 210.0 | 5.2 | 210.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| FUND SOURCE | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|--------------------------|------------|--------------|------------|--------------|------------|--------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 5.2 | 210.0 | 5.2 | 210.0 | 5.2 | 210.0 |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 5.2 | 210.0 | 5.2 | 210.0 | 5.2 | 210.0 |

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)
This fiscal note is based on the scenario that all recognized political parties choose to limit who may participate in the selection of their party candidates in a primary election and they all allow unaffiliated voters to participate. This would require the printing of seven different ballots. The cost above is what would be required in addition to the division's annual budgets. These include: additional ballot printing costs (\$90.0); revision and printing of forms (\$5.2); voter education (\$120.0).
It should be noted for the record that the ballot tabulation system may require programming changes. At this time, the vendor has been unable to determine the cost of such changes. The impact of the cost may be determined by the individual party by-laws.
If only the two major recognized political parties choose to limit who may participate in the selection of their party candidates in a primary election, the fiscal note would be reduced by \$20.0. This reduction would be in ballot printing costs.

Prepared by: Gail Fenumiai/ MAN Phone 465-3935
Division: Division of Election Date/Time 3/16/01 1:54 PM
Approved by: Sally Rue Date 03/16/2001
Agency: Office of the Lieutenant Governor

For distribution information, call the Governor's Legislative Office

WORK ORDER REQUEST FORM

W.O. [22] LS-0807

KEYWORDS: ELECTIONS ASSIGNED: Kurtz

VOTING

REQUEST FOR: Research/OP TAKEN BY: Kurtz

SUBJECT: Primary Elections

REQUESTED FOR: SEN THERRIALT BY: Joe Balash PHONE: 465-4797

DELIVER TO: Sen Therriault, Attn: Joe, Cap 121

INSTRUCTIONS: Legal opinion as the the effect of maintaining statutory status quo relating to primary elections.

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>OBTAIN</p> | <p>SPECIAL DRAFTING INSTRUCTIONS ATTACHED []</p> <p>AUTHORIZED TO CONFER WITH _____</p> <p>_____</p> <p>RETURN _____</p> <p>_____ TO REQUESTOR</p> <p>APPROVED: <input checked="" type="checkbox"/> DIRECTOR, LEGAL SERVICES</p> |
| <p>REVIEWED _____</p> <p>IN <u>03/21/01</u> DUE _____</p> <p>TYPED: Draft _____ Date _____</p> <p>Final _____ Date _____</p> <p>PROOFED _____ DELIVERED _____</p> | <p>SPECIAL INSTRUCTIONS to TYPING/PROOFING</p> <p>_____</p> <p>_____</p> <p>Request for DRAFT</p> |

March 14, 2001

The Honorable Fran Ulmer
Lieutenant Governor
PO Box 110015
Juneau AK 99811-0015

Dear Lieutenant Governor Ulmer:

On January 25, 2001, the Primary Election Task Force was created in which you invited members to discuss and recommend how Alaska should run its primary election. Last June, in California Democratic Party v. Jones, the U.S. Supreme Court ruled that California's blanket primary was unconstitutional. The ruling affected other state's blanket primary election system, including Alaska.

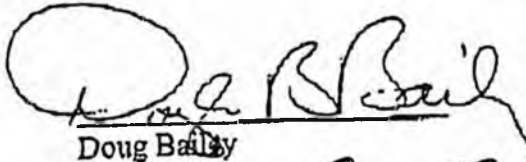
The task force held three meetings. The first was an organizational meeting held on February 9 at which time the purpose of the task force was discussed. Presentations were made by the Division of Elections and the Department of Law which included information concerning the Jones decision, Alaska's primary election and those of other states. On February 27, a hearing to receive statewide public comment was held. Public comments were received from members of both the major and minor political parties, the public, and the League of Women Voters. On March 9, the task force met to formulate a recommendation concerning the conduct of Alaska's primary election system.

We, the members of the Primary Election Task Force, do hereby approve the attached recommendation.

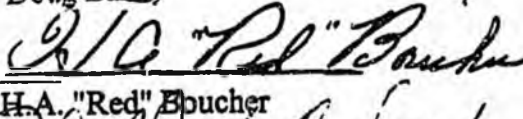
Sincerely,



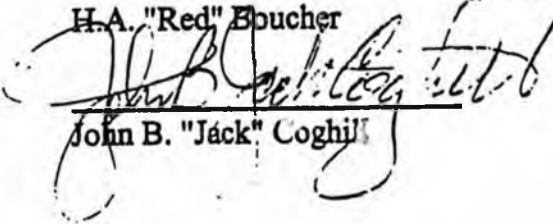
Av Gross, Chairman



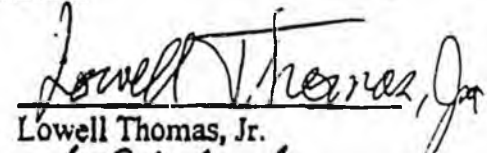
Doug Bailey



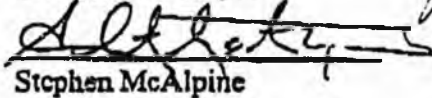
H.A. "Red" Boucher



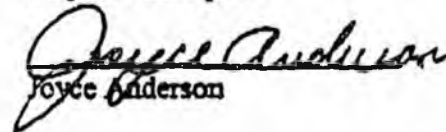
John B. "Jack" Coghill



Lowell Thomas, Jr.



Stephen McAlpine



Joyce Anderson

**PRIMARY ELECTION TASK FORCE
RECOMMENDATION TO
LIEUTENANT GOVERNOR FRAN ULMER**

The Primary Election Task Force has reviewed the U.S. Supreme Court decision in California Democratic Party v. Jones and the state's primary election procedures. We believe it is in the best interests of the voters of Alaska to have legislation introduced and adopted this legislative session to resolve the conflict between Alaska's primary election system and the Jones decision. We recommend that the legislation be formulated around these four points.

1. If a political party chooses not to participate in a blanket primary, the party must submit its party rules governing primary elections to the lieutenant governor not later than September 1 in the year prior to a primary election. These party rules must have received preclearance by the U.S. Department of Justice by this date. If a party fails to submit their party primary preference to the lieutenant governor by this date, the party's candidates will appear on the blanket primary.

For the first election following enactment of this legislation, the parties must notify the Lieutenant Governor of their party primary plans by September 1. In subsequent years, if the party rules governing primary elections have not changed, there is no need to notify the Lieutenant Governor. The party's primary will be conducted in the manner which the Lieutenant Governor was last notified.

2. Voters cannot change their party registration within 30 days of a primary election. Voters should not be allowed to change their political party affiliation at the polling place on election day.
3. The design of the ballot should be centered around a blanket primary ballot. The blanket primary ballot will list all candidates regardless of party affiliation. If a political party chooses to exclude voters not registered with their parties from participating in their primary election, then a ballot listing appropriate candidates shall be prepared for members of that party.
4. The lieutenant governor or director of elections shall have the authority to adopt regulations necessary to implement this legislation.

Note: While this is not a recommendation of the task force, it is noted for the record that there was discussion by members whether political parties should or should not be able to opt out of the primary system and nominate candidates by convention. The task force determined this was beyond the scope of the task force's purpose. It is suggested that the legislature discuss this issue.

Legislative Research Services


Alaska State Legislature
Legislative Affairs Agency
Division of Legal and Research Services

State Capitol
Juneau, AK 99801
Phone: 907-465-3991
Fax: 907-465-3908

March 28, 2001

Memorandum

TO: Senator Randy Phillips

FROM: Cherie Nienhuis 
Legislative Analyst

RE: Election Workers' Pay
Legislative Research Request 01.192

You wished to know when election workers last received a pay increase.

We contacted Janet Kowalski, Director of the Division of Elections, Office of the Lieutenant Governor.¹ Ms. Kowalski told us it had been 20 years since election workers' pay was set by regulation, and the workers have not received a pay raise since that time. Ms. Kowalski believes the current pay is inadequate, and she is very supportive of a wage increase for election workers.

Attached is 6 AAC 25.035 "Payment of Election Workers," that sets the pay for election workers, effective July 11, 1982. This regulation was amended in 1988, 1996, and twice in 1998. However, because of Ms. Kowalski's certainty that the election workers' pay remained constant over 20 years, we have not researched the exact changes made in these amendments.

I hope you find this information useful. If you have questions or need additional information, please do not hesitate to contact us.

¹ Janet Kowalski may be reached at 465-4611.

6 AAC 25.035

PAYMENT OF ELECTION WORKERS.

(a) Election judges, election clerks, election workers, and members of the control and receiving boards will be paid \$7.50 an hour for time spent at their election duties.

(b) Election board chairpersons will be paid \$8 an hour for time spent at their election duties.

(c) Members of the district absentee ballot and questioned ballot counting boards will be paid \$10 an hour for time spent at their election duties.

(d) Members of the state ballot counting review board and the Accu-Vote coordinators will be paid \$12.50 an hour for time spent at their election duties.

(e) Members of the regional Accu-Vote review boards will be paid a fee of \$500 per election for time spent at their election duties.

(f) Repealed 8/13/2000.

(g) Repealed 7/17/88.

(h) Absentee voting officials at absentee sites will be paid \$50 for time spent at their election duties.

(i) Absentee voting officials at absentee stations will be paid \$10 per hour for time spent at their election duties.

(j) An owner of a building used as a polling place will be paid \$30 per election for use of the building.

(k) Municipal employees who provide absentee voting services during the course of their work will not receive compensation from the division.

History -

Eff. 7/11/82, Register 83; am 7/17/88, Register 107; am 8/24/96, Register 139; am 6/22/98, Register 147; am 10/31/98, Register 148; am 8/13/2000, Register 155

Authority -

AS 15.07.100

AS 15.10.110

AS 15.15.010

AS 15.15.030

AS 15.15.380

AS 15.20.190

AS 15.20.220

AS 15.20.590

AS 15.20.900

FISCAL NOTE

revised plus increase for workers

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: SB 146
() Publish Date: _____

Revision Date/Time (Note if correction): 3/29/01 9:35 AM Dept. Affect: OOG
Title: An Act relating to the primary election BRU: Elective Operations
Component: Elections
Sponsor: Rules Committee
Requester: Governor Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|------------------------|-------------|--------------|-------------|--------------|-------------|--------------|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | 81.8 | 733.5 | 81.8 | 733.5 | 81.8 | 733.5 |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 81.8 | 733.5 | 81.8 | 733.5 | 81.8 | 733.5 |

| | | | | | | |
|----------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|----------------------|--|--|--|--|--|--|

| | | | | | | |
|------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| FUND SOURCE | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|--------------------------|-------------|--------------|-------------|--------------|-------------|--------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 81.8 | 733.5 | 81.8 | 733.5 | 81.8 | 733.5 |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 81.8 | 733.5 | 81.8 | 733.5 | 81.8 | 733.5 |

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

This fiscal note is based on the scenario that all recognized political parties choose to limit who may participate in the selection of their party candidates in a primary election and they all allow unaffiliated voters to participate. This would require the printing of up to seven different ballots. The cost above is what would be required in addition to the division's annual budgets. These include: additional ballot printing costs (\$90.0); revision and printing of forms (\$5.2); voter education (\$150.0); additional election workers (\$29.5).

It should be noted for the record that the ballot tabulation system may require programming changes. At this time, the vendor has been unable to determine the cost of such changes. The impact of the cost may be determined by the individual party by-laws.

If only the two major recognized political parties choose to limit who may participate in the selection of their party candidates in a primary election, the fiscal note would be reduced by \$20.0. This reduction would be in ballot printing costs.

This fiscal note also reflects a pay increase for election workers. Election workers have not had a pay increase since 1982. The increase costs in FY02, FY04 and FY06 for election workers employed for the conduct of the REAA and CRSA elections is \$76.6. The increase costs in FY03, FY05 and FY07 for election workers employed for the conduct of the election is \$24.0.

Prepared by: Gail Fenumiai Phone 465-3935
Division: Division of Election Date/Time 3/29/01 9:35AM
Approved by: _____ Date _____
Agency: Office of the Lieutenant Governor

464.0

*2500 election workers
10-14 hrs/day*

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB 146
 () Publish Date: _____

Revision Date/Time (Note if correction): 3/28/01 10:59 AM Dept. Affect: OOG
 Title: An Act relating to the primary election BRU: Elective Operations
 Component: Elections
 Sponsor: Rules Committee
 Requester: Governor Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|------------------------|------------|--------------|------------|--------------|------------|--------------|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | 5.2 | 269.5 | 5.2 | 269.5 | 5.2 | 269.5 |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 5.2 | 269.5 | 5.2 | 269.5 | 5.2 | 269.5 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| FUND SOURCE | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|--------------------------|------------|--------------|------------|--------------|------------|--------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 5.2 | 269.5 | 5.2 | 269.5 | 5.2 | 269.5 |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 5.2 | 269.5 | 5.2 | 269.5 | 5.2 | 269.5 |

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: *(Attach a separate page if necessary)*
 This fiscal note is based on the scenario that all recognized political parties choose to limit who may participate in the selection of their party candidates in a primary election and they all allow unaffiliated voters to participate. This would require the printing of up to seven different ballots. The cost above is what would be required in addition to the division's annual budgets. These include: additional ballot printing costs (\$90.0); revision and printing of forms (\$5.2); voter education (\$150.0); additional election workers (\$29.5).
 It should be noted for the record that the ballot tabulation system may require programming changes. At this time, the vendor has been unable to determine the cost of such changes. The impact of the cost may be determined by the individual party by-laws.
 If only the two major recognized political parties choose to limit who may participate in the selection of their party candidates in a primary election, the fiscal note would be reduced by \$20.0. This reduction would be in ballot printing costs.

Prepared by: Gail Fenumiai/ man Phone 465-3935
 Division: Division of Election Date/Time 3/28/01 10:59AM
 Approved by: Sally Rue Date 03/28/2001
 Agency: Office of the Lieutenant Governor

For distribution information, call the Governor's Legislative Office

22-GS1089A.1
Kurtz
3/29/01

AMENDMENT

OFFERED IN THE SENATE

BY SENATOR PHILLIPS

TO: SB 146

1 Page 1, line 1, following "election;":

2 Insert "relating to the payment of election workers;"

3

4 Page 1, line 5, following "of":

5 Insert "secs. 3 - 5 of"

6

7 Page 1, following line 14:

8 Insert a new bill section to read:

9 "* Sec. 2. AS 15.10 is amended by adding a new section to article 1 to read:

10 Sec. 15.10.190. Payment of election workers. (a) For time spent at election
11 duties, the director shall pay

12 (1) election judges, election clerks, election workers, and members of
13 the control and receiving boards _____ an hour;

14 (2) election board chairpersons _____ an hour;

15 (3) members of the district absentee ballot and questioned ballot
16 counting boards _____ an hour;

17 (4) members of the state ballot counting review board and the
18 coordinators appointed as part of the counting process for optically scanned ballots
19 under AS 15.20.900 _____ an hour;

20 (5) members of the regional review boards established as part of the
21 counting process for optically scanned ballots under AS 15.20.900 _____ an election;

22 (6) absentee voting officials at absentee sites _____;

23 (7) absentee voting officials at absentee stations _____ an hour.

24 (b) The director shall pay an owner of a building used as a polling place

22-GS1089\A.1

1 _____ an election for use of the building.

2 (c) The director may not compensate a municipal employee who provides
3 absentee voting services during the course of the employee's work."

4

5 Renumber the following bill sections accordingly.

#1

AMENDMENT

OFFERED IN THE SENATE

BY SENATOR THERRIAULT

TO: CSSB 146(), Draft Version "C"

- 1 Page 3, line 25, following "primary election.":
- 2 Insert "Each primary election ballot must include any ballot proposition or
- 3 question required to appear on the primary election ballot and the names of all
- 4 candidates nominated by petition under AS 15.25.140 - 15.25.205."

adopted
w/o

CS FOR SENATE BILL NO. 146()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the primary election; and providing for an effective date."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. The uncodified law of the State of Alaska is amended by adding a new section
4 to read:

5 PURPOSE. The purpose of this Act is to

6 (1) comply with the decision of the United States Supreme Court in California
7 Democratic Party v. Jones, 530 U.S. 567 (2000), which required state law to recognize a
8 political party's right to determine with whom it will associate under the First Amendment to
9 the Constitution of the United States to nominate candidates of the party to be placed on the
10 general election ballot; and

11 (2) have a new system in place in time to conduct the next primary election in
12 an orderly and efficient manner consistent with this court decision.

13 * Sec. 2. AS 15.25.010 is repealed and reenacted to read:

14 Sec. 15.25.010. Provisions for primary election; ballots; voter
15 participation. (a) Candidates for the elective state executive and state and national

1 legislative offices shall be nominated in a primary election in the manner prescribed
2 by this chapter.

3 (b) The director shall prepare and provide primary election ballots in
4 accordance with AS 15.25.012 and the other provisions of this chapter.

5 (c) If modified primary election ballots are provided under AS 15.25.012(b)
6 ~~_____~~

7 ~~_____~~ a voter may use only one of the ballots. For the
8 purpose of determining which modified ballot a voter may use, a voter's party
9 affiliation is considered to be the affiliation registered with the director as of the 30th
10 day before the primary election. If a voter changes party affiliation within the 30 days
11 before the primary election, the voter's previous party affiliation shall be used for the
12 determination under this subsection.

13 * Sec. 3. AS 15.25 is amended by adding new sections to read:

14 Sec. 15.25.012. Primary election ballots. (a) Except as provided in (b) of
15 this section, the director shall prepare and provide a primary election ballot that
16 contains all candidates for elective state executive and state and national legislative
17 offices. All voters may use the primary election ballot prepared under this subsection.

18 (b) In place of the primary election ballot under (a) of this section, if a
19 political party notifies the director under AS 15.25.014(a) that the party's bylaws limit
20 who may participate in the primary election for selection of the party's candidates, and
21 otherwise meets the requirements of this chapter and other applicable law, the director
22 shall prepare and provide modified primary election ballots in a manner that carries
23 out those limitations.

24 Sec. 15.25.014. Participation in primary election selection of a political
25 party's candidates. (a) Not later than 5:00 p.m., Alaska time, on September 1 of the
26 calendar year before the calendar year in which a primary election is to be held, a
27 political party must submit a notice in writing to the director stating whether the party
28 bylaws limit who may participate in the primary election for selection of the party's
29 candidates for elective state executive and state and national legislative offices. A
30 copy of the party's bylaws limiting who may participate in the primary election for
31 selection of the party's candidates, documentation required under (d) of this section,

1 and other information required by the director, must be submitted along with the
2 notice. The notice, bylaws, documentation, and other information required by the
3 director must be provided by the party's chairperson or another party official
4 designated by the party's bylaws.

5 (b) If a political party fails to timely provide the notice and information
6 required by (a) of this section or to otherwise meet the requirements of this section and
7 other applicable provisions of law, the director shall place candidates of that party
8 affiliation on a primary election ballot under AS 15.25.012.

9 (c) Once a political party timely submits a notice and bylaws under (a) of this
10 section and the director finds that the party has met the requirements of this chapter
11 and other applicable laws, the primary election ballot for selection of the party's
12 candidates must continue to be consistent with that notice. However, for a subsequent
13 primary election, the party shall timely submit another notice, bylaws, documentation,
14 and other information under (a) of this section if the party's bylaws regarding a
15 limitation on who may participate in the primary election for selection of the party's
16 candidates change.

17 (d) Party bylaws required to be submitted under (a) of this section must be
18 precleared by the United States Department of Justice under 42 U.S.C. 1973c (sec. 5,
19 Voting Rights Act of 1965) before submission. Documentation of the preclearance
20 must accompany the bylaws submitted under (a) of this section.

21 * Sec. 4. AS 15.25.060 is amended to read:

22 Sec. 15.25.060. Preparation and distribution of ballots. Each [THE]
23 primary election ballot shall be prepared and distributed by the director in the manner
24 prescribed for general election ballots except as specifically provided otherwise for the
25 primary election. For the primary election ballot under AS 15.25.012(a), the
26 [THE] director shall print the ballot on white paper and place the names of all
27 candidates who have properly filed in groups according to offices filed for, without
28 regard to party affiliation. For a modified primary election ballot under
29 AS 15.25.012(b), the director shall print the ballot on white paper and place the
30 names of candidates who have properly filed and who may appear on that ballot
31 under AS 15.25.012 and 15.25.014 in groups according to the offices filed for.

1 The order of the placement of the names for each office shall be as provided for the
2 general election ballot. Blank spaces may not be provided on a [THE] ballot for the
3 writing or pasting in of names.

4 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

22-GS1089C
Kurtz
3/28/01

CS FOR SENATE BILL NO. 146()

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - FIRST SESSION**

BY

**Offered:
Referred:**

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the primary election; and providing for an effective date."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 *** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
4 to read:

5 **PURPOSE.** The purpose of this Act is to

6 (1) comply with the decision of the United States Supreme Court in California
7 Democratic Party v. Jones, 530 U.S. 567 (2000), which required state law to recognize a
8 political party's right to determine with whom it will associate under the First Amendment to
9 the Constitution of the United States to nominate candidates of the party to be placed on the
10 general election ballot; and

11 (2) have a new system in place in time to conduct the next primary election in
12 an orderly and efficient manner consistent with this court decision.

13 *** Sec. 2.** AS 15.25.010 is repealed and reenacted to read:

14 **Sec. 15.25.010. Provisions for primary election; ballots; voter**
15 **participation.** (a) Candidates for the elective state executive and state and national

1 legislative offices shall be nominated in a primary election in the manner prescribed
2 by this chapter.

3 (b) The director shall prepare and provide primary election ballots in
4 accordance with AS 15.25.012 and the other provisions of this chapter.

5 (c) If modified primary election ballots are provided under AS 15.25.012(b) to
6 carry out limitations on who may participate in the selection of a political party's
7 candidates under the party's bylaws, a voter may use only one of the ballots. For the
8 purpose of determining which modified ballot a voter may use, a voter's party
9 affiliation is considered to be the affiliation registered with the director as of the 30th
10 day before the primary election. If a voter changes party affiliation within the 30 days
11 before the primary election, the voter's previous party affiliation shall be used for the
12 determination under this subsection.

13 * **Sec. 3.** AS 15.25 is amended by adding new sections to read:

14 **Sec. 15.25.012. Primary election ballots.** (a) Except as provided in (b) of
15 this section, the director shall prepare and provide a primary election ballot that
16 contains all candidates for elective state executive and state and national legislative
17 offices. All voters may use the primary election ballot prepared under this subsection.

18 (b) In place of the primary election ballot under (a) of this section, if a
19 political party notifies the director under AS 15.25.014(a) that the party's bylaws limit
20 who may participate in the primary election for selection of the party's candidates, and
21 otherwise meets the requirements of this chapter and other applicable law, the director
22 shall prepare and provide modified primary election ballots in a manner that carries
23 out those limitations.

24 **Sec. 15.25.014. Participation in primary election selection of a political**
25 **party's candidates.** (a) Not later than 5:00 p.m., Alaska time, on September 1 of the
26 calendar year before the calendar year in which a primary election is to be held, a
27 political party must submit a notice in writing to the director stating whether the party
28 bylaws limit who may participate in the primary election for selection of the party's
29 candidates for elective state executive and state and national legislative offices. A
30 copy of the party's bylaws limiting who may participate in the primary election for
31 selection of the party's candidates, documentation required under (d) of this section,

1 and other information required by the director, must be submitted along with the
2 notice. The notice, bylaws, documentation, and other information required by the
3 director must be provided by the party's chairperson or another party official
4 designated by the party's bylaws.

5 (b) If a political party fails to timely provide the notice and information
6 required by (a) of this section or to otherwise meet the requirements of this section and
7 other applicable provisions of law, the director shall place candidates of that party
8 affiliation on a primary election ballot under AS 15.25.012.

9 (c) Once a political party timely submits a notice and bylaws under (a) of this
10 section and the director finds that the party has met the requirements of this chapter
11 and other applicable laws, the primary election ballot for selection of the party's
12 candidates must continue to be consistent with that notice. However, for a subsequent
13 primary election, the party shall timely submit another notice, bylaws, documentation,
14 and other information under (a) of this section if the party's bylaws regarding a
15 limitation on who may participate in the primary election for selection of the party's
16 candidates change.

17 (d) Party bylaws required to be submitted under (a) of this section must be
18 precleared by the United States Department of Justice under 42 U.S.C. 1973c (sec. 5,
19 Voting Rights Act of 1965) before submission. Documentation of the preclearance
20 must accompany the bylaws submitted under (a) of this section.

21 * Sec. 4. AS 15.25.060 is amended to read:

22 **Sec. 15.25.060. Preparation and distribution of ballots. Each [THE]**
23 **primary election ballot shall be prepared and distributed by the director in the manner**
24 **prescribed for general election ballots except as specifically provided otherwise for the**
25 **primary election. For the primary election ballot under AS 15.25.012(a), the**
26 **[THE] director shall print the ballot on white paper and place the names of all**
27 **candidates who have properly filed in groups according to offices filed for, without**
28 **regard to party affiliation. For a modified primary election ballot under**
29 **AS 15.25.012(b), the director shall print the ballot on white paper and place the**
30 **names of candidates who have properly filed and who may appear on that ballot**
31 **under A's 15.25.012 and 15.25.014 in groups according to the offices filed for.**

1 The order of the placement of the names for each office shall be as provided for the
2 general election ballot. Blank spaces may not be provided on a [THE] ballot for the
3 writing or pasting in of names.

4 * **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

For each of these scenarios, it is important to keep in mind the following rule: *the political parties have a right to choose who has access to their ballot, but cannot prohibit their party members from voting for candidates of another political party, as long as that party allows for this to happen.*

Scenario One

All recognized political parties allow only voters registered with their party to vote for their candidates. All parties would allow Undeclared/Nonpartisan voters to vote for their candidates.

The ballots for each party would appear as follows:

| | | | | | | |
|-------------------|-------------------|----------------|--------------|----------------------|--------------------|-------------------------------|
| <u>Republican</u> | <u>Democratic</u> | <u>AIP</u> | <u>Green</u> | <u>Rep. Moderate</u> | <u>Libertarian</u> | <u>Undeclared/Nonpartisan</u> |
| R candidates | D candidates | AIP candidates | G candidates | RM candidates | L candidates | R candidates |
| | | | | | | D candidates |
| | | | | | | AIP candidates |
| | | | | | | G candidates |
| | | | | | | RM candidates |
| | | | | | | L candidates |

Scenario Two

The Republican party allows only voters registered with their party to vote for Republican candidates. Undeclared/Nonpartisan voters may vote for Republican candidates.

The Democratic party allows only registered voters from parties that do not restrict Democrats from voting for their candidates to vote for Democratic candidates. Undeclared/Nonpartisan voters may vote for Democratic candidates.

The AIP, Green, Republican Moderate and Libertarian political parties allow any registered voter to vote for their candidates.

The ballots for each party would appear as follows:

| <u>Republican</u> | <u>Democratic</u> | <u>AIP</u> | <u>Green</u> | <u>Rep. Moderate</u> | <u>Libertarian</u> | <u>Undeclared/Nonpartisan</u> |
|-------------------|-------------------|----------------|----------------|----------------------|--------------------|-------------------------------|
| R candidates | D candidates | AIP candidates | G candidates | RM candidates | L candidates | R candidates |
| AIP candidates | AIP candidates | G candidates | AIP candidates | AIP candidates | AIP candidates | D candidates |
| G candidates | G candidates | RM candidates | RM candidates | G candidates | G candidates | AIP candidates |
| RM candidates | RM candidates | L candidates | L candidates | L candidates | RM candidates | G candidates |
| L candidates | L candidates | D candidates | D candidates | D candidates | D candidates | RM candidates |
| | | | | | | L candidates |

Scenario Three

The Republican party allows only voters registered with their party to vote for Republican candidates. Undeclared/Nonpartisan voters may vote for Republican candidates.

The Democratic party allows only registered voters from parties that do not restrict Democrats from voting for their candidates to vote for Democratic candidates. Undeclared/Nonpartisan voters may vote for Democratic candidates.

The Green party allows only voters registered with their party to vote for Green candidates. Undeclared/Nonpartisan voters may vote for Green candidates.

The AIP, Republican Moderate and Libertarian political parties allow any registered voter to vote for their candidates.

The ballots for each party would appear as follows:

| <u>Republican</u> | <u>Democratic</u> | <u>AIP</u> | <u>Green</u> | <u>Rep. Moderate</u> | <u>Libertarian</u> | <u>Undeclared/Nonpartisan</u> |
|-------------------|-------------------|----------------|----------------|----------------------|--------------------|-------------------------------|
| R candidates | D candidates | AIP candidates | G candidates | RM candidates | L candidates | R candidates |
| AIP candidates | AIP candidates | RM candidates | AIP candidates | AIP candidates | AIP candidates | D candidates |
| RM candidates | RM candidates | L candidates | RM candidates | L candidates | RM candidates | AIP candidates |
| L candidates | L candidates | D candidates | L candidates | D candidates | D candidates | G candidates |
| | | | | | | RM candidates |
| | | | | | | L candidates |

Scenario Four

The Republican party allows only voters registered with their party to vote for Republican candidates. Undeclared/Nonpartisan voters may vote for Republican candidates.

The Democratic party allows only registered voters from parties that do not restrict Democrats from voting for their candidates to vote for Democratic candidates. Undeclared/Nonpartisan voters may vote for Democratic candidates.

The Green party allows only voters registered with their party to vote for Green candidates. Undeclared/Nonpartisan voters may vote for Green candidates.

The AIP allows only voters registered with their party to vote for AIP candidates. Undeclared/Nonpartisan voters may vote for AIP candidates.

The Republican Moderate and Libertarian parties allow any registered voter to vote for their candidates.

The ballots for each party would appear as follows:

| <u>Republican</u> | <u>Democratic</u> | <u>AIP</u> | <u>Green</u> | <u>Rep. Moderate</u> | <u>Libertarian</u> | <u>Undeclared/Nonpartisan</u> |
|-------------------|-------------------|----------------|---------------|----------------------|--------------------|-------------------------------|
| R candidates | D candidates | AIP candidates | G candidates | RM candidates | L candidates | R candidates |
| RM candidates | RM candidates | RM candidates | RM candidates | L candidates | RM candidates | D candidates |
| L candidates | L candidates | L candidates | L candidates | D candidates | D candidates | AIP candidates |
| | | | | | | G candidates |
| | | | | | | RM candidates |
| | | | | | | L candidates |

Scenario Five

The Republican party allows only voters registered with their party to vote for Republican candidates. Undeclared/Nonpartisan voters may vote for Republican candidates.

The Democratic party allows only registered voters from parties that do not restrict Democrats from voting for their candidates to vote for Democratic candidates. Undeclared/Nonpartisan voters may vote for Democratic candidates.

The Green party allows only voters registered with their party to vote for Green candidates. Undeclared/Nonpartisan voters may vote for Green candidates.

The AIP allows only voters registered with their party to vote for AIP candidates. Undeclared/Nonpartisan voters may vote for AIP candidates.

The Libertarian party allows only voters registered with their party to vote for Libertarian candidates. Undeclared/Nonpartisan voters may vote for Libertarian candidates.

The Republican Moderate party allows any registered voter to vote for their candidates.

The ballots for each party would appear as follows:

| <u>Republican</u> | <u>Democratic</u> | <u>AIP</u> | <u>Green</u> | <u>Rep. Moderate</u> | <u>Libertarian</u> | <u>Undeclared/Nonpartisan</u> |
|-------------------|-------------------|----------------|---------------|----------------------|--------------------|-------------------------------|
| R candidates | D candidates | AIP candidates | G candidates | RM candidates | L candidates | R candidates |
| RM candidates | RM candidates | RM candidates | RM candidates | D candidates | RM candidates | D candidates |
| | | | | | | AIP candidates |
| | | | | | | G candidates |
| | | | | | | RM candidates |
| | | | | | | L candidates |

Scenario Six

The Republican party allows only voters registered with their party to vote for Republican candidates. Undeclared/Nonpartisan voters may vote for Republican candidates.

The Democratic party allows only registered voters from parties that do not restrict Democrats from voting for their candidates to vote for Democratic candidates. Undeclared/Nonpartisan voters may vote for Democratic candidates.

The Republican Moderate party allows only voters registered with their party to vote for Republican Moderate candidates.

The AIP, Green and Libertarian parties allow any registered voter to vote for their candidates.

The ballots for each party would appear as follows:

| <u>Republican</u> | <u>Democratic</u> | <u>AIP</u> | <u>Green</u> | <u>Rep. Moderate</u> | <u>Libertarian</u> | <u>Undeclared/Nonpartisan</u> |
|-------------------|-------------------|----------------|----------------|----------------------|--------------------|-------------------------------|
| R candidates | D candidates | AIP candidates | G candidates | RM candidates | L candidates | R candidates |
| G candidates | G candidates | G candidates | AIP candidates | AIP candidates | AIP candidates | D candidates |
| AIP candidates | AIP candidates | L candidates | L candidates | G candidates | G candidates | AIP candidates |
| L candidates | L candidates | D candidates | D candidates | L candidates | D candidates | G candidates |
| | | | | | | L candidates |

Scenario Seven

The Republican party allows only voters registered with their party to vote for Republican candidates. Undeclared/Nonpartisan voters may vote for Republican candidates.

The Democratic party allows any registered voter to vote for their candidates. Undeclared/Nonpartisan voters may vote for Democratic candidates.

The Green party allows voters registered with the Democratic party to vote for their candidates. Undeclared/Nonpartisan voters may vote for Green candidates.

The Libertarian party allows only their party members to vote for their candidates. Undeclared/Nonpartisan voters may vote for Libertarian candidates.

The Republican Moderate party allows only voters registered with the Republican party to vote for their candidates. Undeclared/Nonpartisan voters may vote for Libertarian candidates.

The AIP allow any registered voter to vote for their candidates.

The ballots for each party would appear as follows:

| <u>Republican</u> | <u>Democratic</u> | <u>AIP</u> | <u>Green</u> | <u>Rep. Moderate</u> | <u>Libertarian</u> | <u>Undeclared/Nonpartisan</u> |
|-------------------|-------------------|----------------|----------------|----------------------|--------------------|-------------------------------|
| R candidates | D candidates | AIP candidates | G candidates | RM candidates | L candidates | R candidates |
| D candidates | G candidates | D candidates | AIP candidates | AIP candidates | AIP candidates | D candidates |
| AIP candidates | AIP candidates | | D candidates | D candidates | D candidates | AIP candidates |
| RM candidates | | | | | | G candidates |
| | | | | | | L candidates |

Scenario Eight

The Republican party allows only voters registered with their party to vote for Republican candidates. Undeclared/Nonpartisan voters may vote for Republican candidates.

The Democratic party allows voters registered with the Republican Moderate and Libertarian parties to vote for their candidates. Undeclared/Nonpartisan voters may vote for Democratic candidates.

The Green party allows voters registered with the Democratic party to vote for their candidates. Undeclared/Nonpartisan voters may vote for Green candidates.

The Libertarian party allows only their party members to vote for their candidates. Undeclared/Nonpartisan voters may vote for Libertarian candidates.

The Republican Moderate party allows only voters registered with the Republican party to vote for their candidates. Undeclared/Nonpartisan voters may vote for Libertarian candidates.

The AIP allows voters registered with the Democratic party to vote for their candidates. Undeclared/Nonpartisan voters may vote for Libertarian candidates.

The ballots for each party would appear as follows:

| <u>Republican</u> | <u>Democratic</u> | <u>AIP</u> | <u>Green</u> | <u>Rep. Moderate</u> | <u>Libertarian</u> | <u>Undeclared/Nonpartisan</u> |
|-------------------|-------------------|----------------|--------------|----------------------|--------------------|-------------------------------|
| R candidates | D candidates | AIP candidates | G candidates | RM candidates | L candidates | R candidates |
| RM candidates | G candidates | | | D candidates | D candidates | D candidates |
| | AIP candidates | | | | | AIP candidates |
| | | | | | | G candidates |
| | | | | | | RM candidates |
| | | | | | | L candidates |

Scenario Nine

All parties allow all persons to vote on their candidates.

Blanket Primary Ballot

R candidates
D candidates
AIP candidates
G candidates
RM candidates
L candidates

Scenario Ten

All parties allow only their members to vote on their candidates.

Republican
R candidates

Democratic
D candidates

AIP
AIP candidates

Green
G candidates

Rep. Moderate
RM candidates

Libertarian
L candidates

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DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 28, 2001

SUBJECT: Primary Elections: Legal Effect of Maintaining the Status Quo
(Work Order No. 22-LS0807)

TO: Senator Gene Therriault
Attn: Joe Balash

FROM: Kathryn L. Kurtz ^{KK}
Legislative Counsel

You asked about the legal status of Alaska's existing primary elections statutes, and what will happen if the statutes are not changed.

Alaska's blanket primary election system was invalidated by the decisions in California Democratic Party v. Jones, 120 S.Ct 2402 (2000) (holding California's blanket primary unconstitutional because it forces political parties to associate with people who do not share their beliefs) and O'Callaghan v. State, 6 P.3d 728 (Alaska 2000) ("we find no constitutionally significant difference between Alaska's primary election law and the California law declared unconstitutional in Jones. Nor do we find any principled basis for concluding that Alaska's blanket primary election statute remains constitutional in light of Jones.")

If the Division of Elections were to attempt to hold the 2002 primary election under the system currently in the statutes, a political party aggrieved by the denial of its associational rights under the system would have a very strong case based on the Jones and O'Callaghan decisions. It is difficult to predict what type of remedy the court might fashion; that would depend to a certain extent on the relief sought by the party bringing the action.

On the other hand, if the Division of Elections were to attempt to address the constitutional problems in the existing statutes by adopting regulations to implement a different primary election system, its authority to do so would likely be questioned. The court in O'Callaghan acknowledged the division's "power to abrogate a clearly unconstitutional statute" and "regulate on a temporary basis in an emergent situation like the situation we face here." *Id.* at 730. However, when that case was decided, upholding the emergency regulations, the Jones decision had just been issued, less than two months remained before the scheduled primary, and the legislature was out of session. The situation is no longer "emergent"; it has arrived. It will be harder for the administration to argue that an emergency regulation was "necessary for the immediate preservation of

Senator Gene Therriault
March 28, 2001
Page 2

the public peace, health, safety, or general welfare" under AS 44.62.250 if the legislature has been aware of the situation for two years and not acted. On the other hand, one could argue that the legislature's inaction has created a new state of emergency.

The O'Callaghan decision specifically held that "AS 15.25.060, regarding the preparation and distribution of primary election ballots, is clearly unconstitutional." *Id.* at 730. So, the Division of Elections has been relieved by the court of the burden of determining whether that statute should be "abrogated." At a minimum, that statute should be repealed. If it is not, the O'Callaghan decision provides the Division of Elections with grounds to ignore it, but it will remain on the books to confuse those attempting to read the statutes. Either way, if that statute is not replaced with something else, there will be no clear statutory direction to the Division of Elections as to how the primary ballot should be prepared and distributed.

Arguably, the director has authority to adopt regulations to fill the gap under AS 15.15.010 ("[t]he director ... may adopt regulations ... necessary for the administration of state elections"). The statutes also provide that all provisions governing the conduct of the general election shall govern the conduct of the primary election, unless specifically provided otherwise. AS 15.25.090. AS 15.15.030(a)(1) gives the director authority to determine the size of the ballot, type of print, and other "similar matters of form not provided by law." Still, this point might be subject to a court challenge.

I hope this is helpful. If you have questions, please call.

KLK:glc
01-283.glc

SB

147

SB 147

Sponsor Statement

“An Act relating to nongovernmental activities of state agencies; and providing for an effective date.”

SB 147 is a mirror of the, “Federal Activity Inventory Reform Act.” It passed congress in 1998 and then was signed into law by President Clinton.

SB 147 requires state agencies to annually list, which of their activities are “not inherently governmental.” An inherently governmental function is defined as, “a function that is so closely related to the public interest that it requires performance by state governmental employees”. Section 1 (c) of the bill contains several paragraphs of elaboration for this definition.

SB 147, first of all, requires each state agency to identify government activities that are not inherently governmental in nature. Secondly, it requires consideration of all realistic and fair costs of government agency performance, of these non-governmental activities.

Interested persons may challenge the inclusion or omission of an activity on a list. There are always challenges to the list, by employees, private industry, and unions. On the Federal level it has been evident that challenges and appeals work through the process and often the decision is reversed upon the gathering of new information.

SB 147 provides a long-term mechanism to start the process of reorganization of state government. In order to accomplish this, we need legislation that requires the executive branch to identify activities that are inherently non-governmental, and to associate a cost with them. This is the type of information that is a prerequisite to making intelligent decisions, about whether the government should be doing the work at all. Surely, it will generate debate about what is or is not inherently governmental, and how much cost is attached to these functions. These debates are a vital step in the reorganization process. SB 147 puts us on the right track toward government activities that we want and are willing to pay for.

SB 147 provides the basis for long term, consistent efforts toward cost effective government. Policymakers and citizens alike become more informed about the missions, budgets, and responsibilities of the services being provided by our government workers. This merely is the first step in making intelligent, informed decisions about government services.

FISCAL NOTE

**STATE OF ALASKA
2001 LEGISLATIVE SESSION**

Fiscal Note Number: _____
 Bill Version: SB 147
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: All
 Title: An act relating to nongovernmental activities of BRU: _____
state departments. Component: _____
 Sponsor: Sen. Cowdery
 Requester: Senate State Affairs Component Number: _____

Expenditures/Revenues (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|------------------------|------------|------------|------------|------------|------------|------------|
| 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 (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

SB 147 requires all state agencies to annually prepare a list of activities performed that are "not inherently governmental activities." The bill narrowly defines inherently governmental activities, and also defines activities that are not inherently governmental, including building security, mail operations, facilities operations, facilities maintenance, and several other functions.

This bill appears to be an attempt to encourage privatization or contracting out of certain predetermined functions. While the Knowles Administration supports the evaluation of contracting state services where appropriate, the approach taken by this bill is not a sound basis for determining which services should be contracted, and the Administration opposes this legislation.

Prepared by: Jack Kreinheder, Senior Policy Analyst Phone 465-4676
 Division: Office of Management and Budget Date/Time 3/25/01 4:30 PM
 Approved by: Annalee McConnell, Director Date 03/25/2001
 Agency: Office of Management and Budget

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ALASKA
★ STATE ★
CHAMBER
OF COMMERCE

March 28, 2001

Senator John Cowdery
Alaska State Senate
Juneau, Alaska 99801

SB 147 - Nongovernmental Activities of State Agencies

Dear Senator Cowdery:

The Alaska State Chamber of Commerce is in support of Senate Bill 147, requiring state agencies to list the activities performed by the departments that are not inherently governmental activities.

Over time, for various reasons, agencies become involved in activities that would not ordinarily fall into the purview of their responsibilities. Sometimes it is done out of expediency when there is no other entity available to perform the activity. This bill would generate the need to take inventory and provide opportunity to relieve agencies of unneeded activities, or activities for which someone else could be responsible.

Much progress has been made in the state's effort to achieve a more cost-effective government. Senate Bill 147 will help keep us on the path toward efficiency. The federal government recognized the value of this inventory process and, in 1998, the *Federal Activity Inventory Reform Act* was passed by the U.S. Congress. We believe adoption of Senate Bill 147 would, likewise, be beneficial to Alaska.

Sincerely,

Pamela La Bolle
President

Letter of Support

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Daily Briefing

March 3, 1999

OMB orders agencies to send outsourcing lists

By Brian Friel

letters@govexec.com

Federal agencies must prepare lists of employees' jobs that could be outsourced under rules proposed by the Office of Management and Budget on Monday.

OMB's proposed rules, which require agencies to submit the target lists to OMB by June 30 each year, are mandated by the Federal Activities Inventory Reform (FAIR) Act of 1998. The act directs agencies to submit a list to OMB each year of all their activities, such as technical support and cafeteria maintenance, that are performed by federal employees and are not inherently governmental. Agencies must also report to OMB the number of federal employees who currently perform functions that could be outsourced. The lists will be published in the *Federal Register*.

The act then calls on agencies to review the commercial activities lists "within a reasonable time" to decide whether to outsource the jobs.

OMB's proposed rules include procedures for people to protest the inclusion or exclusion of activities on the lists. For example, federal employees' unions could challenge an agency's assertion that an activity is not inherently governmental, while private firms could challenge an agency's decision that an activity could not be outsourced.

If an agency decides to outsource an activity on its list, then it must follow OMB Circular A-76 procedures, which require a public-private competition for the work. The federal employees who currently perform the work compete against private-sector bidders in the A-76 process.

The Defense Department is conducting A-76 competitions

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for 229,000 employees' jobs from 1997 through 2005. But most other agencies have not jumped on the A-76 bandwagon. The FAIR Act is an attempt to get other agencies to use A-76 procedures more frequently.

OMB published its proposed rules in the Mar. 1 *Federal Register*.

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Daily Briefing

January 11, 2000

Agencies say most federal jobs not 'inherently governmental'

By Brian Friel

letters@govexec.com

About 900,000 federal employees—more than half of the civilian workforce—do work that could be performed in the private sector, according to lists released by 115 agencies and compiled by *GovExec.com*.

The first-ever governmentwide tally of jobs that could be outsourced, released under the Federal Activities Inventory Reform (FAIR) Act, indicates that fewer federal jobs are inherently governmental than are candidates to be contracted out. The 115 agencies that released inventories employ a total of 1.7 million workers, so only about 850,000 federal jobs are inherently governmental, according to the FAIR Act lists.

Under the FAIR Act, if a private sector company could perform the work, an employee's job must be included on the outsourcing list. The lists also indicate whether agencies plan to actually outsource the jobs or if they plan to keep the work in-house.

The Defense Department, which employs 662,900 civilian workers, listed 504,000 civilian jobs on its FAIR Act inventory that could be performed in the private sector. But the Pentagon is considering outsourcing only 304,000 of those jobs, and has designated only about 229,000 jobs as candidates to be contracted out.

Once DoD jobs are designated for outsourcing, workers undergo a public-private competition, which gives the in-house employees a chance to defend their jobs against private companies. About 50 percent of public-private competitions result in jobs being outsourced.

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RELATE
For all the lists, see [GovExec. Act Report](#)

Fed Agency Comments

3/27/2001 12:51 PM

Private contractors are combing through the FAIR Act inventories to see if they think even more federal jobs should be included on the lists, while employees and unions are reviewing the lists to determine if jobs on the inventories should be re-classified as inherently governmental.

The FAIR Act inventories were released in three waves in 1999—one in September, one in October and one in December. Updated inventories will be released annually.

The FAIR Act lists are compiled in *GovExec.com's* FAIR Act Report.

Sample List From:

FEDERAL HIGHWAY ADMINISTRATION FAIR Act Inventory 2000

| Organization Unit | State | Location | FTE | Activity / Function Code | Reason Code | Year the Activity First Appeared on the Commercial Activities Inventory | Responsible Official | Year of Cost Comparison or Conversion | FTE Savings | Estimated Annualized Cost Comparison Dollar Savings | Date of Completed Post-MEO Performance Review | |
|----------------------------------|-------|----------------|-----|--------------------------------|----------------|----------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|---------------------------------------------|----------------|--------------------------------------------------------------|-----------------------------------------------------------|-----|
| FHWA DIVISION OFFICE | AK | JUNEAU | 1 | W829 | D | 1999 | GARY L. DICKSON SEVENTH STREET, NW WASHINGTON DC 20590-0003 5707 E-MAIL: GARY.DICKSON@FHWA DOT GOV | 400 TEL: (202) 366-5707 | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | AZ | PHOENIX | 1 | W829 | D | 2000 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | AR | LITTLE ROCK | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| WESTERN RESOURCE CENTER | CA | SAN FRANCISCO | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | CO | LAKEWOOD | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| SOUTHERN RESOURCE CENTER | GA | ATLANTA | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | GA | ATLANTA | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | IA | AMES | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| MIDWESTERN RESOURCE CENTER | IL | OLYMPIA FIELDS | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | IL | SPRINGFIELD | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | IN | INDIANAPOLIS | 1 | WR29 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | KS | TOPEKA | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | MD | ANNAPOLIS | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| EASTERN RESOURCE CENTER | MD | BALTIMORE | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | ME | AUGUSTA | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | MI | LANSING | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | MN | ST PAUL | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | MO | JEFFERSON CITY | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |
| FHWA DIVISION OFFICE | MT | HELENA | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A | |

Sample List FHA

FEDERAL HIGHWAY ADMINISTRATION
FAIR Act Inventory 2000

| Organization Unit | State | Location | FTE | Activity / Function Code | Reason Code | Year the Activity First Appeared on the Commercial Activities Inventory | Responsible Official | Year of Cost Comparison or Conversion | FTE Savings | Estimated Annualized Cost Comparison Dollar Savings | Date of Completed Post-MEO Performance Review |
|-------------------------------|-------|----------------|-----|--------------------------------|----------------|----------------------------------------------------------------------------------|----------------------|---------------------------------------------|----------------|--------------------------------------------------------------|-----------------------------------------------------------|
| FHWA DIVISION OFFICE | NE | LINCOLN | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | NH | CONCORD | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | NV | CARSON CITY | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| EASTERN RESOURCE CENTER | NY | ALBANY | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | NY | ALBANY | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | OH | COLUMBUS | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | OK | OKLAHOMA CITY | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | OR | SALEM | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | PA | HARRISBURG | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | SD | PIERRE | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | TN | NASHVILLE | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | TX | AUSTIN | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | UT | SALT LAKE CITY | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | VT | MONTPELIER | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | WI | MADISON | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | WV | CHARLESTON | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
| FHWA DIVISION OFFICE | WY | CHEYENNE | 1 | W829 | D | 1999 | - DITTO - | N/A | 0 | \$0 | N/A |
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A-76 and Outsourcing

March 14, 2001



The FAIR Act Report

This special ongoing section provides lists of jobs that could potentially be outsourced under the 1998 Federal Activities Inventory Reform Act. New lists will be added as agencies release them.

These lists include all activities performed by federal employees that could be outsourced to private firms, as reported by the agencies. Activities that are considered "inherently governmental" are not included on the lists, unless noted. Jobs are listed by category, and in some cases, by location.

For more information, see:

- [Reason Codes](#).
- [Activity/Function Codes](#)
- [FAIR Act reporting](#)
- [Year 2000 data requirements](#)

| | | |
|-------------------------------------------|----------------------|----------------------|
| Advisory Council on Historic Preservation | 1999 | 2000 |
| Agency for International Development | 1999 | 2000 |
| Agriculture Department | 1999 | 2000 |
| Arlington National Cemetery | 1999 | 2000 |
| Broadcasting Board of Governors | 1999 | 2000 |
| Chemical Safety Board | 1999 | 2000 |
| Commerce Department | 1999 | 2000 |
| Commission on Fine Arts | 1999 | N/A |
| Consumer Product Safety Commission | 1999 | 2000 |

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| | | |
|------------------------------------------------------------|----------------------|----------------------------|
| Defense Department | 1999 | 2000 |
| Defense Nuclear Facilities Safety Board | 1999 | 2000(pdf) |
| Education Department | 1999 | 2000 |
| Energy Department | 1999 | 2000 |
| Environmental Protection Agency | 1999 | 2000 |
| Environmental Protection Agency (OIG) | 1999 | 2000(pdf) |
| Equal Employment Opportunity Commission | 1999 | 2000 |
| Federal Emergency Management Agency | 1999 | 2000 |
| Federal Energy Regulatory Commission | 1999 | N/A |
| Federal Labor Relations Authority | 1999 | 2000 |
| Federal Maritime Commission | 1999 | 2000 |
| Federal Mediation and Conciliation Service | N/A | 2000 |
| Federal Mine Safety and Health Review Commission | 1999 | 2000(pdf) |
| Federal Retirement Thrift Investment Board | 1999 | 2000 (pdf) |
| Federal Trade Commission | 1999 | N/A |
| General Services Administration | 1999 | 2000 |
| Health and Human Services Department | 1999 | 2000 |
| Holocaust Memorial Council and Museum | 1999 | 2000 (pdf) |
| Housing and Urban Development Department | 1999 | 2000 |
| Housing and Urban Development Department Inspector General | 1999 | 2000 |
| Interior Department | 1999 | 2000 |
| International Trade Commission | 1999 | 2000(pdf) |
| Inter-American Foundation | 1999 | N/A |
| John F. Kennedy Center for the Performing Arts | 1999 | 2000 |
| Justice Department | 1999 | 2000 |
| Labor Department | 1999 | 2000 |
| Merit Systems Protection Board | 1999 | 2000 |

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|-------------------------------------------------------------|--------------|-------------------|
| NASA | <u>1999</u> | <u>2000</u> |
| National Archives and Records Administration | <u>1999</u> | <u>2000</u> |
| National Capital Planning Commission | <u>1999</u> | N/A |
| National Credit Union Administration | <u>1999</u> | N/A |
| National Endowment for the Arts | <u>1999</u> | <u>2000</u> |
| National Gallery of Art | <u>1999</u> | <u>2000</u> |
| National Labor Relations Board | <u>1999</u> | <u>2000</u> |
| National Science Foundation | <u>1999</u> | <u>2000</u> |
| National Transportation Safety Board | <u>1999</u> | <u>2000</u> |
| Nuclear Regulatory Commission | <u>1999</u> | <u>2000</u> |
| Nuclear Regulatory Commission(OIG) | N/A | <u>2000</u> |
| Nuclear Waste Technical Review Board | <u>1999</u> | <u>2000</u> |
| Office of Government Ethics | <u>1999</u> | <u>2000(pdf)</u> |
| Office of Inspector General, Defense Department | <u>1999</u> | N/A |
| Office of Inspector General, National Labor Relations Board | <u>1999</u> | <u>2000</u> |
| Office of Management and Budget | <u>1999</u> | <u>2000</u> |
| Office of National Drug Control Policy | No 1999 list | <u>2000</u> |
| Office of Personnel Management | <u>1999</u> | <u>2000</u> |
| Office of Special Counsel | <u>1999</u> | <u>2000</u> |
| Peace Corps | <u>1999</u> | <u>2000</u> |
| Railroad Retirement Board, Office of Inspector General | No 1999 list | <u>2000</u> |
| Securities and Exchange Commission | <u>1999</u> | N/A |
| Selective Service System | <u>1999</u> | N/A |
| Small Business Administration | <u>1999</u> | N/A |
| Smithsonian Institution | <u>1999</u> | <u>2000</u> |
| Social Security Administration | <u>1999</u> | <u>2000</u> |
| State Department | <u>1999</u> | <u>2000 (pdf)</u> |
| State Department Inspector General | <u>1999</u> | N/A |
| Transportation Department | <u>1999</u> | <u>2000</u> |
| Treasury Department | <u>1999</u> | <u>2000</u> |
| Treasury Department Inspector General | <u>1999</u> | <u>2000</u> |

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|------------------------------------|-------------|-------------|
| United States Trade Representative | <u>1999</u> | <u>2000</u> |
| Veterans Affairs Department | <u>1999</u> | <u>2000</u> |
| Woodrow Wilson Center | <u>1999</u> | <u>2000</u> |

The following agencies reported that all of their jobs are inherently governmental during the years indicated:

| | | |
|-----------------------------------------------------------------------|------|-------------------|
| African Development Foundation | 1999 | <u>2000</u> |
| American Battle Monuments Commission | 1999 | N/A |
| Appalachian Regional Commission | 1999 | <u>2000</u> |
| Architectural and Transportation Barriers Compliance Board | 1999 | <u>2000</u> |
| Barry Goldwater Scholarship and Excellence in Education Foundation | 1999 | <u>2000</u> (pdf) |
| Christopher Columbus Fellowship Foundation | 1999 | 2000 |
| Committee for Purchase from People who are Blind or Severely Disabled | 1999 | <u>2000</u> (pdf) |
| Council on Environmental Quality | 1999 | 2000 |
| Federal Election Commission | 1999 | <u>2000</u> |
| Federal Housing Finance Board | 1999 | N/A |
| Federal Financial Institutions Council Appraisal Subcommittee | 1999 | N/A |
| Harry S. Truman Scholarship Foundation | 1999 | <u>2000</u> |
| Institute of Museum and Library Services | 1999 | <u>2000</u> |
| James Madison Memorial Fellowship Foundation | 1999 | <u>2000</u> |
| Japan-United States Friendship Commission | 1999 | <u>2000</u> |
| Marine Mammal Commission | 1999 | 2000 |
| Morris Udall Foundation | 1999 | 2000 |
| National Commission on Libraries and Information Science | 1999 | N/A |
| National Council on Disability | 1999 | <u>2000</u> |
| National Education Goals Panel | 1999 | N/A |
| National Endowment for the Humanities | 1999 | <u>2000</u> (pdf) |
| National Mediation Board | 1999 | <u>2000</u> (pdf) |
| Occupational Safety & Health Review Commission | 1999 | <u>2000</u> |

| | | |
|------------------------------------------------|--------------|-------------------|
| Office of Federal Housing Enterprise Oversight | 1999 | <u>2000</u> |
| Office of Navajo and Hopi Indian Relocation | <u>1999</u> | 2000 |
| Office of Science and Technology Policy | No 1999 list | <u>2000</u> |
| Occupational Safety & Health Review Commission | 1999 | <u>2000</u> |
| Trade and Development Agency | No 1999 list | <u>2000 (pdf)</u> |

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THE WHITE HOUSE

Federal Activities Inventory Reform Act of 1998

Help Text Only

DOCID: f:publ270.105]

[[Page 2381]]

FEDERAL ACTIVITIES INVENTORY REFORM ACT OF 1998

[[Page 112 STAT. 2382]]

Public Law 105-270

105th Congress

An Act

To provide a process for identifying the functions of the Federal Government that are not inherently governmental functions, and for other purposes. <<NOTE: Oct. 19, 1998 - [S. 314]>>

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, <<NOTE: Federal Activities Inventory Reform Act of 1998. 31 USC 501 note.>>

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Activities Inventory Reform Act of 1998".

SEC. 2. <<NOTE: Records.>> ANNUAL LISTS OF GOVERNMENT ACTIVITIES

NOT INHERENTLY GOVERNMENTAL IN NATURE.

(a) <<NOTE: Deadline.>> Lists Required.--Not later than the end of the third quarter of each fiscal year, the head of each executive agency shall submit to the Director of the Office of Management and Budget a list of activities performed by Federal Government sources for the executive agency that, in the judgment of the head of the executive agency, are not inherently governmental functions. The entry for an activity on the list shall include the following:

- (1) The fiscal year for which the activity first appeared on a list prepared under this section.
- (2) The number of full-time employees (or its equivalent) that are necessary for the performance of the activity by a Federal Government source.
- (3) The name of a Federal Government employee responsible for the activity from whom additional information about the activity may be obtained.

(b) OMB Review and Consultation.--The Director of the Office of Management and Budget shall review the executive agency's list for a fiscal year and consult with the head of the executive agency regarding the content of the final list for that fiscal year.

(c) Public Availability of Lists.--

(1) Publication.--Upon the completion of the review and consultation regarding a list of an executive agency--

(A) the head of the executive agency shall promptly transmit a copy of the list to Congress and make the list available to the public; and

(B) <<NOTE: Federal Register, Publication.>> the Director of the Office of Management and Budget shall promptly publish in the Federal Register a notice that the list is available to the public.

(2) Changes.--If the list changes after the publication of the notice as a result of the resolution of a challenge under section 3, the head of the executive agency shall promptly--

(A) make each such change available to the public and transmit a copy of the change to Congress; and

[[Page 112 STAT. 2383]]

(B) <<NOTE: Federal Register, Publication.>> publish in the Federal Register a notice that the change is available to the public.

(d) Competition Required.--Within a reasonable time after the date on which a notice of the public availability of a list is published under subsection (c), the head of the executive agency concerned shall review the activities on the list. Each time that the head of the executive agency considers contracting with a private sector source for the performance of such an activity, the head of the executive agency shall use a competitive process to select the source (except as may otherwise be provided in a law other than this Act, an Executive order, regulations, or any executive branch circular setting forth requirements or guidance that is issued by competent executive authority). The Director of the Office of Management and Budget shall issue guidance for the administration of this subsection.

(e) Realistic and Fair Cost Comparisons.--For the purpose of determining whether to contract with a source in the private sector for the performance of an executive agency activity on the list on the basis of a comparison of the costs of procuring services from such a source with the costs of performing that activity by the executive agency, the head of the executive agency shall ensure that all costs (including the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs) are considered and that the costs considered are realistic and fair.

SEC. 3. CHALLENGES TO THE LIST.

(a) Challenge Authorized.--An interested party may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list for which a notice of public availability has been published under section 2.

(b) Interested Party Defined.--For the purposes of this section, the term "interested party", with respect to an activity referred to in subsection (a), means the following:

(1) A private sector source that--

(A) is an actual or prospective offeror for any contract, or other form of agreement, to perform the activity; and

(B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.

(2) A representative of any business or professional association that includes within its membership private sector sources referred to in paragraph (1).

(3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

(4) The head of any labor organization referred to in section 7103(a)(4) of title 5, United States Code, that includes within its membership officers or employees of an organization referred to in paragraph (3).

(c) Time for Submission.--A challenge to a list shall be submitted to the executive agency concerned within 30 days after the publication of the notice of the public availability of the list under section 2.

[[Page 112 STAT. 2384]]

(d) <<NOTE: Deadline.>> Initial Decision.--Within 28 days after an executive agency receives a challenge, an official designated by the head of the executive agency shall--

(1) decide the challenge; and

(2) transmit to the party submitting the challenge a written notification of the decision together with a discussion of the rationale for the decision and an explanation of the party's right to appeal under subsection (e).

(e) Appeal.--

(1) <<NOTE: Deadline.>> Authorization of appeal.--An interested party may appeal an adverse decision of the official to the head of the executive agency within 10 days after receiving a notification of the decision under subsection (d).

(2) Decision on appeal.--Within 10 days after the head of an executive agency receives

an appeal of a decision under paragraph (1), the head of the executive agency shall decide the appeal and transmit to the party submitting the appeal a written notification of the decision together with a discussion of the rationale for the decision.

SEC. 4. APPLICABILITY.

(a) Executive Agencies Covered.--Except as provided in subsection

(b), this Act applies to the following executive agencies:

(1) Executive department.--An executive department named in section 101 of title 5, United States Code.

(2) Military department.--A military department named in section 102 of title 5, United States Code.

(3) Independent establishment.--An independent establishment, as defined in section 104 of title 5, United States Code.

(b) Exceptions.--This Act does not apply to or with respect to the following:

(1) General accounting office.--The General Accounting Office.

(2) Government corporation.--A Government corporation or a Government controlled corporation, as those terms are defined in section 103 of title 5, United States Code.

(3) Nonappropriated funds instrumentality.--A part of a department or agency if all of the employees of that part of the department or agency are employees referred to in section 2105(c) of title 5, United States Code.

(4) Certain depot-level maintenance and repair.--Depot-level maintenance and repair of the Department of Defense (as defined in section 2460 of title 10, United States Code).

SEC. 5. DEFINITIONS.

In this Act:

(1) Federal government source.--The term "Federal Government source", with respect to performance of an activity, means any organization within an executive agency that uses Federal Government employees to perform the activity.

(2) Inherently governmental function.--

(A) Definition.--The term "inherently governmental function" means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

[[Page 112 STAT. 2385]]

(B) Functions included.--The term includes activities that require either the exercise of

discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as--

- (i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (iii) to significantly affect the life, liberty, or property of private persons;
- (iv) to commission, appoint, direct, or control officers or employees of the United States; or
- (v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

(C) Functions excluded.--The term does not normally include--

- (i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or
- (ii) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

SEC. 6. EFFECTIVE DATE.

This Act shall take effect on October 1, 1998.

Approved October 19, 1998.

LEGISLATIVE HISTORY--S. 314:

SENATE REPORTS: No. 105-269 (Comm. on Governmental Affairs).
CONGRESSIONAL RECORD, Vol. 144 (1998):

July 30, considered and passed Senate.

Oct. 5, considered and passed House. [Return to FAIR main page](#)

SB

159



SENATOR DAVE DONLEY
ALASKA STATE LEGISLATURE

Memorandum

To: Senator Gene Therriault, Chair Senate State Affairs
From: Senator Dave Donley **DD**
Date: March 13, 2002 **SB 159**
Re: SB 151 - "An Act relating to retention elections for judges of the court of appeals."

I have attached a list prepared by my office regarding the average terms for Alaskan judicial officers compared with those of other states.

The Alaska Judicial Council (AJC) opposes shortening judges' retention terms to four years as proposed in Senate Bill 159. One of their arguments is that Alaska's current retention terms are in line with retention terms in other merit selection states. In fact, Alaska's terms are currently longer than the average in those states using the merit system solely. In addition, several merit system states whose judges serve terms longer than ours require legislative confirmation of their appointees ensuring public input before an individual becomes a judge.

In Alaska, our only opportunity to assess a judge's performance is during retention elections. By shortening the length of time between elections, we will ensure public accountability of our justice system.

DD/kk

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Vice-Chair: Senate Judiciary Committee
Member: Legislative Budget and Audit Committee • Legislative Council

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ALASKA COURT SYSTEM
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March 28, 2002

The Honorable Gene Therriault
Chairman, Senate State Affairs Committee
State Capitol, Room 121
Juneau, Alaska 99811

Re: SB 159, "An Act relating to retention elections for judges of the court of appeals."

Dear Senator Therriault:

Last session, the Senate State Affairs Committee held a hearing on SB 159. This legislation proposes reducing the time between retention elections for judges of the court of appeals from 8 years to 4 years. At the hearing, the bill's sponsor stated that the retention term of judges of the Alaska Court of Appeals is longer than the average retention term in other states, thus justifying the reduction. In support of this claim, the sponsor provided the committee with a list of states and their retention terms. A member of the sponsor's staff apparently compiled this list. Unfortunately, as was pointed out during the hearing, the list contained a number of errors that affected the result. For example, while there are 39 states that have intermediate appellate courts, the sponsor's aide only listed 32. When the errors are corrected, the 8-year retention term for judges of the Alaska Court of Appeals is essentially identical to the average term of office for intermediate appellate courts in other states. The average for all other states is 7.8 years.

The information on judicial retention and terms of office contained in this letter is based on information collected by the National Center for State Courts (NCSC) and the American Judicature Society (AJS). When the sponsor's data conflicted with information provided by the NCSC and the AJS, I reviewed the applicable statutes to confirm the accuracy of the information. In each case, the NCSC and AJS information proved to be correct. The AJS source data is attached.

For purposes of appointment of judges of intermediate appellate courts, there are two categories of states: those that use some variation of the merit system (18 states), and those that use a non-merit based selection method, either discretionary gubernatorial appointment, discretionary legislative appointment, or contested elections (21 states). The 39 states, and their correct retention terms, are as follows:

Merit Selection States:

| | |
|------------------------|------------|
| Alaska | 8 |
| Arizona | 6 |
| Colorado | 8 |
| Connecticut | 8 |
| Florida | 6 |
| Hawaii | 10 |
| Indiana | 10 |
| Iowa | 6 |
| Kansas | 4 |
| Maryland | 10 |
| Massachusetts | 15* |
| Missouri | 12 |
| Nebraska | 6 |
| New Mexico | 8 |
| New York | 5 |
| Oklahoma | 6 |
| Tennessee | 8 |
| Utah | 6 |
| Average Term: | <u>7.9</u> |
| (not including Alaska) | |

Non-Merit Selection States:

| | |
|----------------|------------|
| Alabama | 6 |
| Arkansas | 8 |
| California | 12 |
| Georgia | 6 |
| Idaho | 6 |
| Illinois | 10 |
| Kentucky | 8 |
| Louisiana | 10 |
| Michigan | 6 |
| Minnesota | 6 |
| Mississippi | 8 |
| New Jersey | 15* |
| North Carolina | 8 |
| Ohio | 6 |
| Oregon | 6 |
| Pennsylvania | 10 |
| South Carolina | 6 |
| Texas | 6 |
| Washington | 6 |
| Wisconsin | 6 |
| Virginia | 8 |
| Average Term: | <u>7.8</u> |

Average Term of All States: 7.8
 (not including Alaska)

* Actual term is "until age 70;" this is assumed to be 15 years for calculating the average.

The specific inaccuracies contained in the sponsor's documentation are as follows:

1. The documentation listed Alabama as a state in which the term of office for appellate court judges is 8 years. It is actually 6 years.

2. The documentation did not list California. The judges of the California Courts of Appeal are appointed by a non-merit gubernatorial selection. Their term of office is 12 years.
3. The documentation did not list Connecticut. The judges of the Connecticut Appellate Court are appointed by merit selection through a nominating commission. Their term of office is 8 years.
4. The documentation listed Massachusetts, but left the term of office blank and did not figure it into the average. The judges of the Massachusetts Appeals Court are appointed by merit selection through a nominating commission. Their term of office is "until age 70," the longest term in the nation. If applied to the Alaska Court of Appeals, the three incumbent judges would each have terms of over 20 years. Because of this, because the full vesting period of the Judicial Retirement System is 15 years, and because most judges serve at least that long, this letter assumes that Massachusetts has a term of 15 years for purposes of calculating the average.
5. The documentation did not list New Jersey. The judges of the Appellate Division of the Superior Court are appointed by a non-merit gubernatorial selection. Their retention term is "until age 70". Along with Massachusetts, this is the longest retention term in the nation. This letter assumes that New Jersey has a retention term of 15 years for purposes of calculating the average.
6. The documentation did not list New York. The judges of the Appellate Division of the Supreme Court are appointed from the trial court of general jurisdiction by merit selection through a nominating commission. Their term of office as appellate judges is five years. However, their underlying term of office as trial court judges is 14 years. For purposes of calculating the average, this letter assumes that their term of office is 5 years.
7. The documentation did not list South Carolina. The judges of the South Carolina Court of Appeals are appointed by merit selection through a nominating commission. Their term of office is 6 years.
8. The documentation listed Tennessee as a state in which the appellate court judges are elected. In fact, these judges are appointed by merit selection through a nominating commission.
9. The documentation listed Utah as a state in which the retention term of office for judges of the Utah Court of Appeals is 10 years. It is actually 6 years.

The Honorable Gene Therriault
March 28, 2002
Page 4

10. The documentation did not list Virginia. The judges of the Virginia Court of Appeals are appointed by a non-merit legislative selection. Their term of office is 8 years.

CONCLUSION

The sponsor stressed the importance of reducing the term of office of the judges of the Alaska Court of Appeals because their current retention term was believed to be longer than the national average. In fact, their current retention term (8 years) is essentially identical to the national average for all other states (7.8 years). Broken down, it is also essentially identical to the average for both merit-selection states (7.9 years) and non-merit selection states (7.8 years).

Like the sponsor, the framers of the Alaska Constitution thought it was important that the retention terms of Alaska's appellate judges reflect the national average. The minutes of the Constitutional Convention show that the retention term for the supreme court (10 years) was selected because it was the average retention term for supreme court justices in other states. A motion to reduce the term from 10 to 6 years failed on an 11 - 42 vote. I Proceedings of the Alaska Constitutional Convention 611 (December 5, 1955).

I urge you to keep the retention term for the court of appeals at its current length. Please advise if you have any additional questions.

Very truly yours,



C. S. Christensen III
Deputy Administrative Director

Attachment



SENATOR DAVE DONLEY
 ALASKA STATE LEGISLATURE

Alaska's Judges Have Longer Terms and Less Public Accountability Than 47 Other States

Alaska's judicial officers, on average, serve longer terms and have less public accountability than judges in forty-seven other states. The vast majority of the states exercise more public control in two ways; judges are elected by the public and the average terms are shorter than in Alaska. In the seven states with a combination of merit system appointment and elections, the average terms of all levels of judicial officers are less than Alaska. In the five states with a combination of merit system appointment and confirmation by a legislative body, the average terms are longer but this is mitigated by the requirement for legislative confirmation. In the only seven other pure merit system states, judicial terms are shorter on average for appellate and supreme courts. With only two exceptions (Colorado and Utah), Alaska's judicial officers serve longer terms with less public accountability than in any other place in the nation.

Average Terms for Judges Using Various Systems of Selection and Retention

| STATE | SUPERIOR | APPELLATE | SUPREME |
|--------|----------|-----------|---------|
| Alaska | 6 | 8 | 10 |

The following terms are for the seven states that, similar to Alaska, use the Merit System solely:

| | | | |
|----------------------|-----|-----|-----|
| Colorado | 6 | 8 | 10 |
| Florida | 6 | 6 | 6 |
| Iowa | 6 | 6 | 8 |
| Massachusetts | --- | --- | --- |
| Nebraska | 6 | 6 | 6 |
| Utah | 6 | 10 | 10 |
| Wyoming | 6 | --- | 8 |
| Average No. of Years | 6 | 7.2 | 8 |

Co-Chair: Senate Finance Committee
 Vice-Chair: Senate Judiciary Committee
 Member: Legislative Budget and Audit Committee • Legislative Council

Average Terms for Judges Using Various Systems of Selection and Retention

There are seven states that use a mixture of systems, including the Merit System and either partisan or nonpartisan elections. Their data is as follows:

| STATE | SUPERIOR | APPELLATE | SUPREME |
|----------------------|----------|-----------|---------|
| Arizona | 4 | 6 | 6 |
| Indiana | 6 | 10 | 10 |
| Kansas | 4 | 4 | 6 |
| Missouri | 6 | 12 | 12 |
| New Mexico | 6 | 8 | 8 |
| Oklahoma | 4 | 6 | 6 |
| South Dakota | 8 | --- | 8 |
| Average No. of Years | 5.4 | 7.7 | 8 |

There are five states that use the Merit System, but the Senate confirms appointments. Their data is as follows:

| | | | |
|----------------------|-----|-----|------|
| Delaware | 12 | --- | 12 |
| Hawaii | --- | 10 | 10 |
| Maryland | --- | 10 | 10 |
| Vermont | 6 | --- | 6 |
| District of Columbia | 15 | --- | 15 |
| Average No. of Years | 11 | 10 | 10.6 |

The following are the terms for those states that elect their judicial officers either through partisan or nonpartisan ballots:

| | | | |
|----------------|---|-----|----|
| Alabama | 6 | 8 | 6 |
| Arkansas | 4 | 8 | 8 |
| Georgia | 4 | 6 | 6 |
| Idaho | 4 | 6 | 8 |
| Illinois | 6 | 10 | 10 |
| Kentucky | 8 | 8 | 8 |
| Louisiana | 6 | 10 | 10 |
| Michigan | 6 | 6 | 8 |
| Minnesota | 6 | 6 | 6 |
| Mississippi | 4 | 8 | 8 |
| Montana | 6 | --- | 8 |
| Nevada | 6 | --- | 6 |
| North Carolina | 8 | 8 | 8 |
| North Dakota | 6 | --- | 10 |
| Ohio | 6 | 6 | 6 |


Average Terms for Judges Using Various Systems of Selection and Retention

| | | | |
|----------------------|----|-----|----|
| Oregon | 6 | 6 | 6 |
| Pennsylvania | 10 | 10 | 10 |
| Tennessee | 8 | 8 | 8 |
| Texas | 4 | 6 | 6 |
| Washington | 4 | 6 | 6 |
| West Virginia | 8 | --- | 12 |
| Wisconsin | 6 | 6 | 10 |
| Average No. of Years | 6 | 6 | 8 |

--- / Court does not exist in jurisdiction or not applicable

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| | | | | | | | | | | |
|----|----|----|----|----|----|----|----|----|----|----|
| AL | AK | AZ | AR | CA | CO | CT | DE | DC | FL | GA |
| HI | ID | IL | IN | IA | KS | KY | LA | ME | MD | MA |
| MI | MN | MS | MO | MT | NE | NV | NH | NJ | NM | NY |
| NC | ND | OH | OK | OR | PA | RI | SC | SD | TN | TX |
| UT | VT | VA | WA | WV | WI | WY | | | | |

ALABAMA

Supreme Court

Elective System: Partisan Election
Initial Term of Office: 6 Years
Method of Retention: Re-election (6 year term)

Court of Civil Appeals

Elective System: Partisan Election
Initial Term of Office: 6 Years
Method of Retention: Re-election (6 year term)

Court of Criminal Appeals

Elective System: Partisan Election
Initial Term of Office: 6 Years
Method of Retention: Re-election (6 year term)

Circuit Court*

Elective System: Partisan Election
Initial Term of Office: 6 Years
Method of Retention: Re-election (6 year term)

*[Compiler's Note: Four counties in Alabama use a judicial nominating commission only to fill midterm vacancies on the Circuit Court.]

ALASKA

Supreme Court

Appointive System: Merit Selection through Nominating Commission
Initial Term of Office: 3 Years
Method of Retention: Retention Election (10 year term)

Court of Appeals

Appointive System: Merit Selection through Nominating Commission
Initial Term of Office: 3 Years
Method of Retention: Retention Election (8 year term)

Superior Court

Appointive System: Merit Selection through Nominating Commission
Initial Term of Office: 3 Years
Method of Retention: Retention Election (6 year term)

ARIZONA

Supreme Court

Appointive System: Merit Selection through Nominating Commission
Initial Term of Office: 2 Years
Method of Retention: Retention Election (6 year term)

Court of Appeals

Appointive System: Merit Selection through Nominating Commission
Initial Term of Office: 2 Years
Method of Retention: Retention Election (6 year term)

Superior Court (county pop. greater than 250,000—Pima & Maricopa counties only)

Appointive System: Merit Selection through Nominating Commission
Initial Term of Office: 2 Years
Method of Retention: Retention Election (4 year term)

Superior Court (county pop. less than 250,000)

Elective System: Non-Partisan Election
Initial Term of Office: 4 Years
Method of Retention: Re-election (4 year term)

ARKANSAS

Supreme Court

Elective System: Non-Partisan Election
Initial Term of Office: 8 Years
Method of Retention: Re-election for additional 8 year terms

Court of Appeals

Elective System: Non-Partisan Election
Initial Term of Office: 8 Years
Method of Retention: Re-election for additional 8 year terms

Circuit Court

Elective System: Non-Partisan Election
Initial Term of Office: 4 Years
Method of Retention: Re-election for additional 4 year terms

Chancery Court and Probate Court*

Elective System: Non-Partisan Election
Initial Term of Office: 6 Years
Method of Retention: Re-election for additional 6 year terms

*[Compiler's Note: Combination judges for circuit/chancery serve for 4 year terms.]