7200170

FILE COPY

Alaska Legislative Council

LEGISLATIVE AFFAIRS AGENCY

CONSIDERATION OF CERTAIN LEGISLATIVE PROCEDURES

CURRENTLY USED BY THE ALASKA LEGISLATURE

Legislative Reference Library
Legislative Affairs Agency
Pouch Y State Capital
Juneau, Alaska 99811

DECEMBER 1972

THE ALASKA LEGISLATIVE COUNCIL

and the

LEGISLATIVE AFFAIRS AGENCY

serving the Legislature and the state by providing administrative and technical services essential to the proper and effective exercise of the duties and the responsibilities of the Legislature as a separate, coordinate and equal branch of the state government.

Membership
1971 - 1972

Senator Robert H. Ziegler, Sr., Chairman . Ketchikan

Representative Gene Guess, Vice-chairman . Anchorage

Senator Edward A. Merdes, Secretary .... Fairbanks

Representative Mildred H. Banfield .... Juneau

Representative Genie Chance .... Anchorage

Representative Frank R. Ferguson .... Kotzebue

Senator Jay S. Hammond .... Naknek

Senator C. R. Lewis .... Anchorage

Representative Richard L. McVeigh .... Anchorage

Senator Donald E. Young .... Fort Yukon

John M. Elliott
Executive Director

INTRODUCTION

House Concurrent Resolution No. 69, passed by the Seventh Legislature, directed the Legislative Council to "conduct a study of legislative procedure used in adopting conference committee reports and concurring in amendments offered by the house other than the house of a measure's origin . . ."

The impetus for the introduction and passage of this resolution was a ruling by the speaker during the last session that the adoption of a Free Conference Committee report required only a majority vote of the members of the house present, as opposed to an affirmative vote by a majority of the membership of the house.

A memorandum from the executive director of the Legislative Affairs Agency concluded that, indeed, the required vote was a majority of the members of the body who are present. Although the ruling of the chair was not appealed, a member of the house distributed a letter to the members detailing his disagreement with the correctness of the chair's ruling and with the executive director's memorandum. The eventual outcome of this controversy was the passage of House Concurrent Resolution No. 69 directing the Legislative Council to further examine these differences of opinion and to make a report with recommendations to the First Session of the Eighth Legislature.

The legislature specifically requested the council to consider the following questions:

1. What constitutes "final passage" of a bill?

2. What vote is required to adopt a conference committee report or to concur in amendments?

3. Must the vote on a conference committee report or concurrence in amendments be by a roll call vote with the "yeas" and "nays" recorded in the journal, or may the vote be by voice?

Finally, the Council was requested to incorporate the opposing memorandum and letter into its written report. The reader will find those documents in appendices A and B respectively.

The Council's report and recommendations as a result of its analysis of the issue are contained in the following pages and are respectfully submitted to the Legislature for its consideration.

CONSIDERATION OF CERTAIN LEGISLATIVE PROCEDURES CURRENTLY USED BY THE ALASKA LEGISLATURE

OPINION AND ANALYSIS OF THE ISSUES

Article II, Section 14, of the Constitution of the State of Alaska reads as follows:

> "The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal." (emphasis added)

In line with the above constitutional provision the Alaska Legislature has established the procedure for enactment of bills into law in AS 24.30.010 -- AS 24.30.130, subject to implementing rules adopted by the legislature. (See AS 24.-30.010 and Art. II, Sec. 12, of the Alaska Constitution.

At the outset, it should be noted that neither the Constitutional Convention minutes nor any of the pertinent committee reports reveal what the delegates to the Constitutional Convention had in mind when the language of Art. II, Sec. 14, of the Alaska Constitution was adopted. There appears to be no discussion of what was intended by "final passage" nor does there appear to be any discussion of the language "No bill may become law without an affirmative vote of a majority of the membership of each house." In other words, there is no clue as to what stage of the legislative process the vote requirement is to be applied nor is there any clue as to what constitutes "final passage." Nor has any Alaskan court been called upon to construe these two sentences.

The Alaska Legislature has, however, interpreted Art. II, Sec. 14 consistently in the same manner since statehood. Rule 40(d) of the Uniform Rules of the Alaska Legislature reads as follows:

> "(d) Third reading. On its third reading the bill is read by heading and title only. The question on third reading of a bill is upon its final passage and no

amendments may be considered. No bill may become law without an affirmative majority of the membership of each house. The yeas and nays on final passage, noting the name and vote of each member, shall be entered in the journal. The bill is then engrossed or enrolled, as appropriate, at the direction of the clerk or secretary." (emphasis added)

Thus, it would seem to be self-evident that the Alaska Legislature has itself construed the requirements of Art. II, Sec. 14, as all going to the time of final passage and final passage occurs when the particular piece of legislation is before the body in third reading.

As the Montana court states in Johnson v. City of Great Falls, (1909) 38 Mont. 369, 99 Pac. 1059, ". . . while not conclusive, the construction given by the Legislature to those provisions of the Constitution dealing with legislative procedure is entitled to great weight."

The Montana Court further stated, in construing a constitutional provision which dictated that "No bill shall become a law except by a vote of a majority of all the members present in each house, nor unless on its final passage the vote be taken by ayes and noes and the names of those voting be entered on the journal" that "The final passage of a bill, within the meaning of such a provision, is the vote on which each house adopts the bill after it has passed its first and second readings and after it has been read again for the purpose of being put upon its passage, and where a bill has been passed in one house and amended and passed in the other, it is not necessary that the vote on the adoption of such amendment by the house in which it was first passed shall be taken by yeas and nays and entered on the journal."

The letter to the speaker last session implies that the Johnson case is not applicable to the discussion of this issue because of the word "present" in the Montana Constitution. This argument would be valid if one were citing the Johnson language as supportive of the vote requirement, but here it is cited only to illustrate the point that when a bill is before a legislative body in third reading, that that has been held to constitute "final passage" as opposed to when further consideration of the bill occurs after it has been amended in the other house, and it is submitted that the case is in point. It is noted that the only essential difference between the Montana Constitutional provision and the pertinent portions of Art. II, Sec. 14, of the Alaska Constitution is that the voting requirement and the recording of votes on final passage are stated in disjunctive form while the Alaska Constitution sets out the same two mandates in separate sentences.

This discussion of what constitutes "final passage" of a bill and to what the vote requirement of a majority of the membership of each house applies is pertinent to the larger issue of what vote requirement there may be for the adoption of a conference committee report or in concurring in amendments as the argument against the interpretation placed on Art. II, Sec. 14, of the Alaska Constitution depends on an interpretation that has the ". . . no bill may become law without an affirmative vote of the majority of the membership of each House," requirement going to some phase of legislative action other than "final passage", if, in fact, final passage occurs in third reading.

Mr. Rose, in his letter to the speaker, states that "the difference between 'final passage' and how a bill becomes law was apparently recognized by the framers of the Alaska Constitution when they clearly separated the two requirements . . ." (into two sentences) With no such intent indicated by the Constitutional proceedings, that conclusion simply cannot stand as being self-evident, it being just as logical to read the two sentences together as requiring the vote on "final passage" to be a majority of the membership of the body. And it is almost universal among the states, regardless of varying constitutions and rules that "final passage" is when a bill is in third reading.

A more logical conclusion to the author of this report is that the framers of the Constitution simply did not consider adoption of amendments nor conference reports during their deliberations, at least insofar as the issues raised by HCR 69 are concerned. If, indeed, the framers intended for the vote requirement to be applied to something other than "final passage" it could easily have been so stated - perhaps to the effect that final approval or action on all legislation in each house must be by a majority vote of the membership. Such a requirement would clearly have left no question concerning the voting requirements on procedures surrounding the adoption of amendments or conference reports after third reading. The legislature, by adoption of the Uniform Rules, dealt with the practices to be followed in these areas and Alaska's first seven legislatures have been remarkably consistent in their application.

To return for a moment to Mr. Rose's letter, he quotes from <u>State v. Boyer (1917) 84 Ore. 513, 165 Pac. 587</u> as supporting his position:

> "On principle it would seem plain that the intent of the framers of the constitution was that no bill became a law without the assent of a majority of all the members elected to the Legislature. Laying aside the technical and extremely refined definitions of some of the courts of the words 'final passage', used in

Section 19 of Article 4, supra, wherein it has been held that such words mean something less than the last legislative vote upon the bill in its completed form, Section 25 of Article 4 is complete in itself. It provides, first, that 'a majority of all the members elected to each house shall be necessary to pass every Bill or Joint Resolution'; and, second, that 'all Bills and Joint Resolutions so passed shall be signed by the presiding officers of the respective Houses.' Analyzing this section, we inquire, 'what bills are the officers of each House required to sign?' The answer must be, 'Bills passed by a majority of the members of each House: The plain intent of the Section quoted is that every bill presented to the officers for their signatures shall in its entirety as presented have received the vote of a majority of the members of each House; and to say that it means anything less or different from this would be a perversion of language and logic.'"

Also in his letter to the Speaker Mr. Rose quotes the Kentucky Court in Norman v. Kentucky Board of Managers, 20 SW 901, where it was considering a constitutional requirement for an affirmative vote of the majority of the membership of each house as follows:

"If a bill after passing one House in the proper manner and then, after amendment, passing the other House in a like manner, could come back to the House in which it originated and be adopted by a majority of those voting, or a quorum, it would defeat this object and render the section ineffectual. Let us look at it practically. An appropriation bill of $100 originates in the Senate and is properly passed. It goes to the House, where it is amended by making the sum $10,000 and is then properly passed by it. It returns to the Senate for concurrence, and is adopted as amended by a majority of those present without a yea or nay vote. Can it be well contended that this would be a compliance with the constitution? If so, then, there being 38 Senators, it would require 20, or a majority of them, to pass a bill for a trifle; but after being amended in the House, so as to perhaps bankrupt the treasury, it could be concurred in by the Senate by the votes of 11 members, or a majority of a quorum; and in the case of the House, with its 100 members, it would require 51 to pass the bill, if it originated there, but only 26, or majority of a quorum, to concur in it after it had been changed in like manner by the Senate."

Although at first blush, the reasoning of the Oregon and Kentucky courts may seem logical, such a position taken by the Alaska Legislature could lead to ludicrous results. The Montana court in the Johnson case, supra, also considered the Kentucky decision and had this to say:

> ". . . but, if we apply the doctrine announced by the Idaho and Kentucky courts, the result would be to very materially embarrass legislation, for, carried to its logical effect, it would require that the same procedure be taken with an amended bill as with an original one, and the Supreme Court of Idaho recognizes this, for it says: "A bill which passes the house, and is materially changed by amendment by the other house, and then sent back to the house where it first originated, must go through the same procedure as to reading and final vote as if it was an original bill." Our constitution does not require this, and an examination of the legislative journals discloses that it has never been the practice in our legislative procedure, . . ."

It would appear that if Mr. Rose's interpretation of Art. II, Sec. 14, of the Alaska Constitution were to prevail a result similar to that enunciated by the Idaho court would be the end result. It could very well be argued - every bill that had been amended in the other house or by a conference committee would have to begin the legislative route all over. This would follow because of the requirement that "No bill may become law unless it has passed three readings in each house on three separate days . . ." If the latter two sentences must be read separately and as referring to two different steps in the legislative process, so must this third sentence. A free conference bill oftentimes is totally different than either of the versions before the committees. Did the framers of our constitution intend that in such an instance that that legislation must start the legislative process all over so that it may have three readings, the votes recorded on final passage, etc. There is no indication that our Constitutional Convention delegates intended such a cumbersome mechanism to be employed by the Alaska Legislature.

It is apparent from the foregoing discussion that if the Constitutional requirements contained in Art. II, Sec. 14, of the Alaska Constitution refer to the vote required when a bill is before the body in third reading, i.e., up for final passage, the Constitution is silent as to the vote requirement on concurrence in amendments made by the other house or the vote required for the adoption of conference reports. The Uniform Rules of the Alaska Legislature likewise are silent as to any

vote requirement pertaining to concurrence in amendments or the adoption of conference reports. (See Uniform Rules, numbers 36, 42, and 43.) In all cases not specifically covered by the Uniform Rules, Rule 56 provides that the rules of parliamentary practice comprised in Mason's Manual of Legislative Procedure implement and govern Alaska's rules. Mason's provides us with the following general rules regarding amendments and voting:

> Sec. 530 (3) Except as constitutional provisions may control, votes may be taken viva voce, by show of hands or by a rising vote, upon roll call, or by ballot, and when no provision is made in the constitution, charter, or controlling provision of law, the rules of each house will govern.
>
> Sec. 532 (1) The usual manner of voting, except when the constitution or rules may require a roll call, as upon the passage of a bill, is for the presiding officer to call for the "ayes" and "noes" on a question and judge the vote by the sound. This is usually known as a viva voce vote. It is much the quickest and simplest manner of voting, but has the defect that if the vote is close it is difficult to determine the prevailing side. It usually serves, however, because on most questions there is a decided majority.
>
> Sec. 771 (1) The final passage of a bill upon which the vote is required to be taken by "ayes" and "noes" is the vote by which each house adopts it after final reading, and not the vote by which the house in which it originated may subsequently concur in amendments made by the other house. The constitutional provision requiring an "aye" and "no" vote on final passage of bills does not apply to concurrence in amendments of the other house.
>
> Sec. 510 (1) A majority of the legal votes cast, a quorum being present, is sufficient to carry a proposition unless a larger vote is required by a constitution, charter, or controlling provision of law, and members present but not voting are disregarded in determining whether an action carried.

In line with the above quoted rules of legislative procedure, the Alaska Legislature has consistently concurred in amendments and adopted conference reports either by voice vote or vote of those members present. It is clear from the above Rule 771(1) that a constitutional provision requiring an "aye" and "no" vote on final passage does not apply to concurrence

in amendments. Mr. Rose argues that the other requirement that a bill may become law without a majority of the membership of the house voting in the affirmative must be read apart from the final passage requirements and that it applies to approval of the bill in its final form. Again, that simply is not so stated by the Alaska Constitution. In his letter to the Speaker, Mr. Rose states that "Surely, the constitutional requirement for majority of the membership of each House can only be meaningful if that requirement is for a vote upon the bill in its final form, as stated in Sec. 770." There simply is no such statement appearing in Sec. 770 of Mason's Manual. He further states that "Only that interpretation is consistent with the language of Sub. Sec. 2 of Sec. 771." Sec. 771(2) reads as follows:

> "When more than a majority vote is required for the passage of certain types of bills, an amendment by the other house, not involving any question requiring more than a majority vote, requires only a majority vote for concurrence."

Again, the applicability of this section to the issue discussed in this report is not evident. Sec. 771(2) simply means, for instance, that if one house passed a bill changing a court rule, the bill must have received a two-thirds majority under the Uniform Rules. The other house can, however, amend the bill by inserting, for example, a new section not involved in the changing of a court rule, and concurrence in that amendment would not take a two-thirds vote.

CONCLUSION

After having examined the applicable Constitutional provisions, laws, cases, the Uniform Rules, and Mason's Manual of Legislative Procedure, prior legislative practices, and the arguments presented in the memorandum and letter under discussion in this report, it is the Legislative Council's opinion that the Alaska Legislature has complied with all mandatory directives of the Constitution and State of Alaska in the enactment of legislation. In answer to the specific questions presented by HCR 69 it is the determination of the Council that in Alaska, "final passage" of a bill occurs when the bill is before the body in third reading; that a conference report or concurrence in amendments may be accomplished by a majority of those present and voting, unless a greater vote is required, and the vote on a conference report may be viva voce or by roll call.

Although the above conclusions have been agreed upon by the Council, the Council agrees with Mr. Rose that a definitive answer as to what the third sentence of Art. II, Sec. 14, of the Alaska Constitution refers - will not be available until the issue is litigated in an Alaskan court of law. The Council also recognizes the fact that the term "final passage" has been defined differently by different courts and by the different jurisdictions.

The Council also agrees with the proposition that if the legislature in the enactment of legislation, does not comply with mandatory constitutional provisions that the courts will, and should, strike such legislation.

Because, after delving into this matter, it is felt that Art. II, Sec. 14 could be subject to differing interpretations that it is recommended that Rules 36, 42 and 43 be amended to reflect that a majority of the membership of each house must approve amendments before final passage, when concurring in amendments made in the other house, and in the adoption of committee reports. The reason for this recommendation is twofold: One is that the Council believes, in line with Mason's Manual, that "the best practice would require that the vote on concurrence be taken with the same formalities as the vote on final passage," at least insofar as the vote requirement is concerned. It is not recommended that the additional requirement, however, of recording the ayes and noes as on final passage be adopted. The practice is well established and serves the legislature well, for as a practical matter it is normally clear to the presiding officer what the result was. In cases of doubt, other safeguards and procedures will continue to govern a voice vote situation. It should be noted also that under AS 01.05.026 and AS 24.35.010(b), the published acts are prima facie the law and the courts do not look beyond them to see that all procedures set forth in law and rule were followed. To make these simple amendments would clarify the rules once and for all as to the votes required by our Uniform Rules in the cases we have been discussing and secondly: with these amendments to the above mentioned rules it does not matter what interpretation is placed on the mandatory language in the third sentence of Art. II, Sec. 14, for whether a court would say it refers to passage in third reading, or to the final form of a bill, all legislation would be safe from attack so far as the mandates of that section go. Further, the Council is unable to think of a practical or political reason why such a vote requirement should not clearly be made mandatory.

In closing, the Council would like to remind the members of the legislature that the situation which gave rise to HCR 69, i.e.,

adoption of a free conference report by less than a majority of the membership, was an occurrence of great rarity in Alaska's history. In view of the rarity of this action, the suggested amendments would do no more than make mandatory what has been the general rule.

Any member who might desire to see how our procedure stands in relation to the other states may do so in the offices of the Legislative Affairs Agency. All of the other states' procedures regarding the issues in this report were gathered and examined during the course of the interim, but their bulk made it impossible to attach to the report as appendices.

Appendix A

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

June 8, 1972

MEMORANDUM

TO: Representative Bradner

FROM: John Elliott, Executive Director

SUBJECT: Adoption of Free Conference Committee Reports

In response to your request this date for my opinion regarding the vote necessary to adopt a free conference committee report, it would be my judgment that the required vote is a majority of the members of the body who are present.

It should be noted first of all that art. II, sec. 14 of the Alaska Constitution provides in part that " ... no bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal." This constitutional requirement is not applicable to the question presented for the following reasons:

The vote adopting or rejecting a conference or free conference report is not the vote on final passage of a bill. Rather the final passage vote on any bill occurs when the vote is taken on third reading. (Rule 40(d) Uniform Rules of the Alaska Legislature) Also Sec. 771 of Mason's Legislative Manual provides that "The final passage of a bill upon which the vote is required to be taken by 'ayes' and 'noes' is the vote by which each house adopts it after final reading, and not the vote by which the house in which it originated may subsequently concur in amendments made by the other house. The constitutional provision requiring an 'aye' and 'no' vote on final passage does not apply to concurrence in amendments of the other house." And in point of fact voice votes have been utilized consistently in Alaska to adopt FCC reports.

When a free conference report is before the body and it is adopted, the effect of adoption of the report is to concur in the adoption of amendments as proposed by the conference report. (Sec. 731 Mason's Legislative Manual) Amendments to bills in the Alaska Legislature, at any time, are subject only to the requirement of approval by a majority of those present.

The argument that conference reports merely propose amendments seems to be enhanced by the simple fact that the chapter of Mason's which covers conference committees is entitled "Conferences Concerning Amendments".

Finally, Mason's concludes that "The best practice would require that the vote on concurrence be taken with the same formality as the vote on final passage", but regardless of the merits of that suggestion, I do not find authority under our existing rules or law that would require such a procedure.

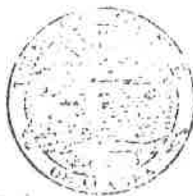
For your information, it has been held in Arkansas and Montana that the vote on concurrence is not required to meet the technicalities of vote on final passage and the vote may be viva voce and the names of those voting need not be entered in the journal. Although I have not had an opportunity to study these opinions and, in turn, opinions cited internally, nor more recent decisions, the Montana case appears to be most pertinent to the present issue. Copies of both are enclosed for your perusal.

JME/sm
Enclosures

Alaska State Legislature

REPRESENTATIVE
MIKE ROSE
P.O. BOX 4-252
ANCHORAGE, ALASKA 99503

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99801



House of Representatives

June 10, 1972

Mr. Gene Guess
Speaker of the House
Juneau, Alaska

Dear Mr. Speaker:

On June 8, 1972, in the course of our consideration, the Free Conference Committee report on CSHB 323, the House vote was 20 yeas and 18 nays. At that time you ruled that the adoption of a Free Conference Committee report required only a majority of those present that the report has thus been adopted. It is my understanding that your ruling was based on considerable precedent in the Alaska Legislature, but I indicated to you never-the-less that I thought the ruling to be erroneous. It was agreed that the matter would not be brought up until that afternoon, so that there might be an opportunity to obtain a legal opinion from Mr. John Elliot the Executive Director of the Legislative Affairs Agency. Up until this time I have not challenged any of your rulings for the reason that I hold great respect for your ability and experience and for the position you hold. However, this time I do find it necessary to disagree.

Inasmuch as no challenge was made from the ruling of the Chair, the matter should normally be considered closed as to the treatment by the House of this particular Bill. In this instance, I fear that that may not be the case, therefore this letter to advise you and the members of the Legislature of my concern.

I respectfully submit that the question is not whether the measure would be constitutional if passed, but whether the measure has in fact passed the Legislature. State v Boyer, 165 Pac 587,588. The courts which have passed on questions such as this seem to be all in agreement to the effect that if a Bill is not enacted in accordance with the mandatory provisions of the constitution, it is void. That appears to be the case even after the Bill has been duly signed by the Speaker of the House, the President of the Senate, and by the Governor. Consequently, it appears that legislative interpretation of the constitutional requirements is not determinative of the validity of the legislative action taken under such interpretation. In other words, assuming that I am right, we could, in good faith, go through the entire lengthy and laborious expensive process of enacting legislation, only to find that because of an erroneous interpretation of the constitutional requirements, the actions were in fact void and have no effect whatsoever.

As best as I can determine, there has never been a test of the question presented in the State of Alaska.

For your convenience, I am appending to this letter copies of the pertinent provisions of the Constitution of Alaska, the Uniform Rules of the Legislature, and of Mason's Manual of Legislative Procedure incorporated by Rule 56 of the Uniform Rules of the Alaska State Legislature.

A review of Mr. Elliot's memorandum shows that his opinion to the effect that adoption of a free conference committee report requires only a majority of the members of the body who are present is based on the following points:

1. The vote adopting or rejecting the conference committee report is not the vote on final passage of the Bill.

2. Adoption of the free conference committee report is, in effect, adoption of amendments proposed by the report.

3. Amendments to Bills require only approval of a majority of those present.

The last paragraph of Mr. Elliot's memorandum makes reference to two cases, one a decision of the Supreme Court of Montana of 1909, Johnson vs City of Great Falls 99 Pac 1059, and the other, of the Supreme Court of Arkansas of 1913, namely Mechanics Building and Loan Assoc. v Coffman 162 Southwestern 1090. Mr. Elliot states that the Montana case appears to be the most pertinent to the present issue. He would be right, except for the fact that the constitution of Montana provided that "no bill shall become law except by a vote of the majority of all the members present in each House..."That is quite different from the requirement in article II, Section 14 of the Alaska constitution which requires "...no bill may become law without an affirmative vote of the majority of the membership of each House."

Both constitutions that of Alaska and of Montana require that on final passage the vote be taken by ayes and nays. The gravamen of Johnson v City of Great Falls is that

> "The final passage of a Bill, within the meaning of such a provision, is the vote on which each House adopts the bill after it has passed its first and second readings and after it has been read again for the purpose of being put upon it's passage, and where a Bill has been passed in one House and amended and passed in the other, it is not necessary that the vote on the adoption of such amendments by the House in which it was first passed shall be taken by yeas and nays and entered in the Journal."

The weight of authority supports this view which is fully consistent with Section 771 (1) of Mason's.

It is important to note that there is a very real difference between final passage on a Bill and with approving a bill in its final form so that it may become law. That difference is emphasized by 771 (2) of Mason which states

> "When more than a majority vote is required for the passage of certain types of bills, and amendments by the other House, not involving any question requiring more than a majority vote, requires only the majority vote for concurrence."

The footnote to sec 771 cites a number of cases interpreting that section, particularly as to paragraph 2, Wagstaff v Central Highway Commission (1917), 174 NC 377, 93 S.E. 908; State v Boyer (1917) 84 Ore ______ 513, 165 Pac 587. As to Boyer, the footnote points out that "the same vote is required to concur in amendments as to pass the bill." That view is consistent with Sub Sec 5 of Sec 770 which states "when both Houses have adopted the report they have approved the bill in its final form and it is ordered to enrollment."

There appears to have been a considerable amount of controversy over and judicial interpretation of the meaning of "final passage". The difference between "final passage" and how a bill becomes law was apparently recognized by the framers of the Alaska Constitution when they clearly separated the two requirements in Art. II, Sec. 14 which provides in one sentence that "...no bills may become law without affirmative vote of the majority of the membership of each House." And in the next sentence that "The yeas and nays on final passage shall be entered in the Journal." Mr. Elliot's opinion lumps these two requirements into one when he states "this constitutional requirement is not applicable to the question presented..."

The applicable principle was discussed very ably and at length in Boyer. Briefly, the facts of that case are as follows:

Suit was brought to enjoin the defendant county clerk from placing upon the ballot for a special election a measure to assess certain lands. The Bill had passed the House. The measure had been sent to the Senate where it was amended, then passed by the Senate then returned to the House where the question was put "Shall the House concur?" Yeas and Nays were demanded. Upon roll call, there were 28 yeas, 26 nays, 6 absent, and one excused. The roll call was entered in the Journal. The bill was signed by the Speaker of the House, the President of the Senate and approved by the Governor. The Plaintiff complained that the bill never became law because it did not receive a majority of the vote of the members elected to the House of Representatives. The language of the Supreme Court of Oregon appears particularly applicable to the question facing us at this time. The court stated (165 Pac 588:

"On principle it would seem plain that the intent of the framers of the constitution was that no bill should become a law without the assent of a majority of all the members elected to the Legislature. Laying aside the technical and extremely refined definitions of some of the courts of the words 'final passage,' used in Section 19 of Article 4, Supra, wherein it has been held that such words mean something less than the last legislative vote upon the bill in its completed form, Section 25 of Article 4 is complete in itself. It provides, first, that 'a majority of all the members elected to each House shall be necessary to pass every Bill or Joint Resolution,' and, second, that 'all Bills and Joint Resolutions so passed shall be signed by the presiding officers of the respective Houses.' Analyzing this section, we inquire, 'What bills are the officers of each House required to sign?" The answer must be, 'Bills passed by a majority of the members of each House.' The plain intent of the Section quoted is that every bill presented to the officers for their signatures shall in its entirety as presented have received the vote of a majority of the members of each House; and to say that it means anything less or different from this would be a perversion of language and logic."

Counsel for the defendant was arguing to the court the exact position taken by Mr. Elliot's memorandum and, in support of his position, defendant cited Johnson v City of Great Falls also cited by Mr. Elliot. The Oregon Court commenting on Johnson correctly points out that "The question as to whether a failure of the constitutional majority of the members to concur in an amendment would render it invalid was not involved or considered." That is the very question with which we are concerned in this instance, so that the Johnson case is clearly inapplicable.

The Oregon Court quotes at some length from Norman v Kentucky Board of Managers 93 KY 537, 20 SW 901, 18 L.R.A. 557 where a very similar case was considered. Speaking of the constitutional requirement for an affirmative vote of the majority of the membership of each House, the Kentucky Court states:

> "If a bill after passing one House in the proper manner and then, after amendment, passing the other House in a like manner, could come back to the House in which it originated and be adopted by a majority of those voting, or a quorum, it would defeat this object and render the section ineffectual. Let us look at it practically. An appropriation bill of $100 originates in the Senate and is properly passed. It goes to the House, where it is amended by making the sum $10,000 and is then properly passed by it. It returns to the Senate for concurrence, and is adopted as amended by a majority of those present without a yea or nay vote. Can it be well contended that this would be a compliance with the constitution? If so, then, there being 38 Senators, it would require 20, or a majority of them, to pass a bill for a trifle: but after being amended in the House, so as to perhaps bankrupt the treasury, it could be concurred in by the Senate by the votes of 11 members, or a majority of a quorum; and in case of the House, with its 100 members, it would require 51 to pass the bill, if it originated there, but only 26, or majority of a quorum, to concur in it after it had been changed in like manner by the Senate."

The Kentucky Court then concludes "The bill, as approved by the speakers of the two Houses and by the Governor, never passed the Senate by the majority of all it's members, nor, by a yea or nay vote."

Other cases cited by the Oregon Court to the same effect are Cohn v Kingsley, 5 Idaho 416, 49 Pac 985, 38 L.R.A. 74; Stevens v Labette Co., 79 Kansas 153, 98 Pac 790; and note to 16 Ann. Cas. 974.

The Oregon Court then concedes for the purpose of that particular case that the taking of yea and nay vote upon the amendment is unnecessary and that the final passage of the bill in the meaning of the constitution is the vote by which it passed before being amended by the other branch of the legislature. As pointed out by the Court, when the record is silent on whether the concurrence was by less than a constitutional majority of the House, the court will presume that the constitutional requirement was observed. But "Here the record is not silent. It shows up on its face that only 28 members of the 60 elected voted in favor of the measure. Until some system of logic can be invented which will demonstrate that to pass the bill it is necessary only to pass a part of one, and that 28 and 31 are synonymous, we cannot hold that this measure ever passed the Legislature."

We must differenciate between amendments to a bill before final passage and amendments after final passage, such as concurrence in amendments by the other House or adoption of a free conference committee report. Mr. Elliot makes reference to Sec. 731 of Mason which is not all together applicable to the Alaska Legislature in as much as it provides in sub sec 11 that a bill is open to amendment on second reading and upon third reading. That provision conflicts with [illegible] 40

which provides specifically that amendments may only be made in second reading.

Sec. 731 states, in sub para 4:

"A bill, after passing the House, may be materially amended in the other and passed as amended, this practice being in accordance with common Legislative procedure; and the amendments may take the form of the substitution of an entirely new bill for the bill introduced, so long as the subject of the bill is not changed."

Amendments adopted by a majority of those present in second reading may well cause the defeat of the bill on third reading if the totality of amendments is obnoxious to a majority of the total membership. Thus, it is clear that the passage upon third reading meets the constitutional requirement that no bill may become law without an affirmative vote of the majority of the membership of each House. The exact opposite could well be true if concurrence in amendments of the other House or in adoption of free conference committee reports is by simple majority of those present. In the case of HB 323, it is clear that 20 is not synonymous with 21 and that, in order to become law, the bill must receive an affirmative vote of the majority of the membership of each House.

If the ruling based on Mr. Elliot's opinion is allowed to stand, it would possible, in case of attendance by a mere quorum, to have a bill pass the House with the concurrence of 11 Representatives, or pass the Senate with a concurrence of only 6 Senators.

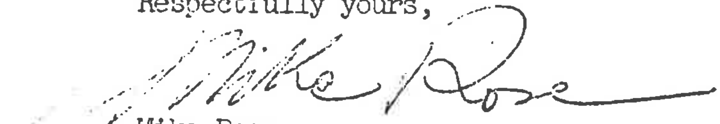
Surely, the constitutional requirement for majority of the membership of each House can only be meaningful if that requirement is for a vote upon the bill in its final form, as stated in Sec. 770. Only that interpretation is consistent with the language of Sub. Sec. 2 of Sec. 771. Any other interpretation would render the constitutional requirement meaningless and useless.

The above does not in any way disagree with Mr. Elliot's conclusions concerning the second constitutional requirement, namely that "the yeas and nays on final passage shall be entered in the Journal." Nor is it necessary to disagree with Mr. Elliot's conclusion that voice votes may be utilized to adopt free conference committee reports. In the great majority of instances, the adoption of such a report is by such overwhelming majority that it is clear to the Speaker and to the membership that more than the constitutional majority has voted in favor of the report. When there is doubt, or upon request by one fifth of the membership as provided by Rule 35, Sub. A, a roll call vote may be had.

Mechanics Building and Loan Assoc. v Coffman, the second case cited by Mr. Elliot is one which does not consider the question of the vote necessary to adopt a free conference committee report, or even to adopt or concur in an amendment proposed by the other House. In that case, the question in contention was whether there had been a proper entry in the Journal to show that the bill as amended by the House, passed the Senate. The case does confirm that it is the general practice of legislative bodies of the State of Arkansas, when concurring in amendments, to do so by viva voce vote, except when a division is called for, and then the members voting for or against the amendments are counted and the results declared by the presiding officer of the body. Interestingly two of the Justices of the Supreme Court of Arkansas dissented from that part of the opinion which holds that the bill was passed in accordance with the mandates of the constitution of that state.

In conclusion, while the question may never be resolved until we have a court test of the question in Alaska, I submit that the better view should be that the majority <u>of the membership</u> should be required to pass on amendments by the other House or on free conference committee reports in order to (1) meet the letter of constitutional language, (2) assure that we meet the spirit of the constitutional language, and (3) in order not to run the risk that acts of the Legislature may be found subsequently to be void as in State v Boyer.

Respectfully yours,



Mike Rose
State Representative

cc: All Members of the Legislature (w/o encl.)
John Elliot (w/o encl.)