

LEGAL SERVICES

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MEMORANDUM

March 17, 2011

SUBJECT: Separation of powers issue (HB 6; Work Order No. 27-LS0027\A)

TO: Representative Steve Thompson
Attn: Jane Pierson

FROM: Jean M. Mischel
Legislative Counsel 

You have asked about the constitutionality of HB 6. The constitutional authority of the legislature to restrict or otherwise control the removal or suspension of a regent by the governor is the subject of considerable debate and raises a significant possibility of a separation of powers challenge. Unlike boards and commissions controlled by art. III, sec. 26 of the constitution, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over removal of the regents and therefore the governor's removal authority appears to be unrestricted.

Article VII, sec. 3 provides:

The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. . . .

A limitation on removal of some executive officers may be interposed by law, but arguably only as to persons who hold appointment under art. III, sec. 26 of the state constitution. Article III, sec. 26 states:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, *and may be removed as provided by law.* . . .

Even with the additional legislative authority over sec. 26 boards, the Alaska Supreme Court interpreted that authority very narrowly. When the Court was faced with the question of the extent of legislative authority over sec. 26 boards and commissions, the Court found that the confirmation power of the legislature provided in art. III, secs. 25 (principal department heads) and 26, is merely a limited delegation of the executive appointment power to the legislature and stated:

As to this issue, we think the provision of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26

mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government.

Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976).

The University's status as a "body corporate" does not imply a legislative role in removal of a regent (apart from the impeachment process available to the legislature as to all civil officers). Though the University, alone in the constitution, expressly holds corporate status, the Alaska Supreme Court has said that members of other public corporations established by law serve at the pleasure of the governor. Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966). The Court stated:

The Association's three board members from the Board of Commissioners of the Alaska Housing Authority are appointed by the governor and serve at his pleasure. Therefore, the governor is empowered to remove any member of the governing board of the Association at his pleasure.

Id. at 240 (citations omitted).

I am aware of an informal attorney general opinion that suggests in a footnote that the legislature currently has some authority over removal of a regent without any judicial support for that position. I do not know how a court would view the kind of intrusion proposed in this draft into the governor's appointment and removal authority, but perhaps the court would be persuaded by the governor's support of this concept.

If I may be of further assistance, please advise.

JMM:ljw
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