

LEGAL SERVICES

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

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

MEMORANDUM

March 21, 2015

SUBJECT: Transition to nine-member Board of Regents
(CSHB 107(); Work Order No. 29-LS0465\P)

TO: Representative Lynn Gattis
Attn: Andrew Ford

FROM: Kate S. Glover 
Legislative Counsel

Enclosed is the draft committee substitute you requested reducing the number of regents on the Board of Regents for the University of Alaska to nine members. The "Transition" section of the draft takes a different approach than Mr. Ford and I discussed on the phone. Instead of allowing the governor to determine which regents to remove without cause under AS 14.40.155, the draft provides that the terms of office of all of the regents will expire in February 2016, and the governor must appoint replacements who will serve staggered terms. The draft uses this approach to provide an enforceable process for reducing the size of the board, and to minimize the extent to which the draft would encroach on the governor's, or the Board of Regents' authority.

As this office has explained in previous memos to your office, the legislature has a limited role in the appointment of members to the Board of Regents of the University of Alaska under the Constitution of the State of Alaska. Because all of the regents' terms would expire, the draft does avoid potential problems with the legislature selecting individual regents to remove from the board. It may nonetheless exceed the legislature's authority.

The extent of the governor's authority is also uncertain, however, and is a matter of some debate. An opinion from the state attorney general concludes that the governor does not have the power to remove a regent without cause.¹ In addition, AS 14.40.155 purports to limit the grounds on which the governor may suspend or remove a regent, and requires hearings prior to suspension or dismissal. The approach you requested, which would require the governor to select regents and provide for the immediate expiration of their terms, may require the governor to exceed his authority.

¹ Alaska Op. Atty Gen., File No. 663-06-0103 (Feb. 2, 2007). The attorney general's opinion cites to conflicting opinions that have been issued by this office and by the general counsel for the University.

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A third approach might be to allow the Board of Regents to select the regents whose terms will expire early. This would give the board, instead of the governor or the legislature, the discretion to choose members, and thereby avoid some of the separation of powers problem with removing regents from the board, but it would be unenforceable. If no board members volunteered to give up their terms, it would be difficult to obtain a court order requiring the board to eliminate two regents.

The approach least likely to violate separation of powers principles would be an approach similar to that reflected in the previous version of the bill (29-LS0465\N). The next two regents whose terms expire would simply not be replaced, and the governor would appoint regents who meet the residency requirements of the bill as vacancies arise. According to the website for the Board of Regents, two regents' terms will expire in 2017, and two more in 2019.

Please review the draft carefully and let me know if I can be of further assistance.

KSG:ld

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Enclosure

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MEMORANDUM

September 10, 2014

SUBJECT: Legislative authority to limit appointment to the University Board of Regents (Work Order No. 28-LS1798)

TO: Representative Lynn Gattis
Attn: Drew Ford

FROM: Jean M. Mischel
Legislative Counsel 

You have asked whether the legislature may limit the governor's appointment of members to the University Board of Regents by requiring statewide representation on the Board of Regents.

The constitutional authority of the legislature to restrict or otherwise control the qualifications of a regent is the subject of considerable debate and raises a possibility of a separation of powers challenge. The legislature has, however, established some qualifications in the past for the student regent and the citizenship requirements contained in AS 14.40.130 and 14.40.150.

Unlike boards and commissions controlled by art. III, sec. 26 of the Constitution of the State of Alaska, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over the qualifications of a regent outside of the confirmation process.

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. . . .

The Alaska Supreme Court has in the past interpreted the legislature's confirmation authority very narrowly. When the Supreme Court was faced with the question of the extent of legislative authority over boards and commissions appointed under art. III, sec. 26 of the Constitution of the State of Alaska, the Court found that the confirmation power of the legislature provided in art. III, secs. 25 (principal department heads) and 26,

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is merely a limited delegation of the executive appointment power to the legislature and stated:

As to this issue, we think the provisions 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 additional legislative powers over the qualifications of University Regents apart from the role of the legislature with respect 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 250 (citations omitted).

I am aware of an informal attorney general opinion issued in 2007 that suggests in a footnote that the legislature has some authority over removal of a regent, without any judicial support for that position.¹ I do not know how a court would view the kind of intrusion into the governor's appointment powers that you propose, but the court may be persuaded by the governor's past support of legislative control over removal of a regent and the previously unchallenged legislative actions governing the appointment process in AS 14.40.150, the citizenship and residency requirements of regents and student regents in AS 14.40.140, and the passage in 2012 of a suspension and removal procedure of regents in AS 14.40.155.

If I may be of further assistance, please advise.

JMM:lem
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¹ 2007 Inf. Op. Att'y. Gen (Feb. 2; 663-06-0103) n. 7.