

Michael Hostina
General Counsel
Matthew Cooper
Associate General Counsel
Ardith Lynch
Associate General Counsel
Michael O'Brien
Associate General Counsel
Larry Zervos
Associate General Counsel

203 Butrovich Building
P.O. Box 755160
Fairbanks, Alaska 99775-5160
Telephone: (907) 450-8080
Facsimile: (907) 450-8081
Legal@alaska.edu



UNIVERSITY
of ALASKA
Many Traditions One Alaska

March 5, 2014

TO: The Honorable John Coghill, Senate Majority Leader

THROUGH: Pat Gamble, President, University of Alaska

FROM: Michael Hostina, General Counsel, University of Alaska & *Michael B. Hostina*
Matt Cooper, Associate General Counsel

RE: Legal Issues Posed by SB 176/HB 335¹

Thank you for the opportunity to provide input regarding the legal impacts of SB 176, a bill relating to the regulation of firearms and knives² by the University of Alaska.

A. Current Status of Regents' Policy and University Regulation Regarding Weapons

Regents' Policy and University Regulation presently permit: supervised activities involving firearms on University premises; possession of firearms by campus residents, though students are required to use secure storage; transportation to approved activities or storage; possession on undeveloped and uninhabited University land; and possession and storage in private vehicles. Except as provided above, firearms are not permitted on developed University property, or in dorm, office, classroom or meeting space controlled and posted by the University. Violations of rules result in administrative, not criminal, penalties, and generally only after efforts to secure compliance.

B. Regents' Policy and University Regulation Comply With Existing Law

In our opinion, and given the current state of the law, Regent's Policy and University Regulation are reasonable, withstand scrutiny under constitutional analysis, are consistent with express legislative enactments concerning firearms and have not been preempted.

(1) UA Restrictions are Reasonable and Have Analogs in Alaska Criminal Law

The state and federal constitutions protect the right to keep and bear arms. However, like every other constitutional right, that right has limits and is subject to reasonable

¹ For ease of reference this memo will refer to SB 176 but is applicable to HB 335 as well.
² Regents' Policy and University Regulation do not regulate knives.

The Honorable John Coghill, Senate Majority Leader
RE: Legal Issues Posed by SB 176/HB 335
March 5, 2014
Page 2 of 13

regulation. For example, the Alaska Legislature has regulated this right by criminalizing possession of a firearm by certain people or in certain locations or circumstances. Criminalizing conduct is far more burdensome than the administrative regulation imposed by UA.

Firearms conduct criminalized³ under state law includes:

- Concealed carry for people under 21;
- Concealed carry in residences, without the express permission of an adult resident;
- Loaded firearms in places where intoxicating liquor is served;
- Possession in child care facilities;
- Possession in court system facilities;
- Possession in domestic violence/sexual assault shelters;
- Possession in schools from pre-school through secondary school.

University campuses are complex and contain many sensitive places. They have many of the features of the places where the Alaska legislature has chosen to criminalize firearm possession. Universities include residences occupied by young adults where living space is limited and shared. Youthful residents in this setting may disregard security or may lack the maturity and judgment to insist that firearms not be present or that they be handled safely. Many University students are under 21.⁴ Liquor may be served in pubs and is present in dormitories, legally and illegally. Both UAA and UAF have child care facilities. K-12 students are often on campus in large numbers, sometimes in extended residential, enrichment and college prep programs. Universities are schools and workplaces where responsible and irresponsible, healthy and troubled students and employees live and work side by side. Disciplinary and academic issues are adjudicated on a daily basis. Classrooms and workplaces range from completely benign to laboratories containing explosive and hazardous materials.

The significant similarities between the people, locations and circumstances prevailing on University campuses and those people, locations and circumstances in which the Legislature has criminalized firearm possession indicates that the University has regulated reasonably and creates an inference of constitutionality.

(2) Presence on UA Premises Creates UA Responsibility & Potential Liability

Some argue that UA should be treated no differently than municipalities because these conditions, including the presence of K-12 students, are present throughout our

³ A much broader array of conduct with weapons is regulated by law. See AS 11.61.190 - .220.

⁴ In Fall 2013, 29% of students enrolled in for-credit courses were under 21 years of age; 7% were less than 18 years of age. This does not reflect numerous minors who participate in UA non-credit outreach programs.

The Honorable John Coghill, Senate Majority Leader
RE: Legal Issues Posed by SB 176/HB 335
March 5, 2014
Page 3 of 13

communities. However, when incidents occur on UA premises, the Board of Regents and University will be held responsible if the University fails to maintain a safe work and learning environment. By contrast, municipalities are not held responsible for failing to regulate what happens on public streets or in private homes. Nor are public streets and homes gathering places for thousands of people on a daily basis.

(3) The University has Properly Regulated Firearms Under the Alaska and United States Constitutions.

In 2010 and 2012 the US Supreme Court overturned firearm regulations in the District of Columbia⁵ and City of Chicago.⁶ The court clarified the scope of the second amendment, i.e., that it protects an individual's right and that the right applies to limit state as well as federal regulation of firearms.

While the cases properly are seen as confirming broad individual rights to bear arms, the US Supreme Court did not overturn all regulation of firearms. The *Heller* decision emphasized that the "right secured by the Second Amendment is not unlimited."⁷ As the Court explained:

From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁸
(emphases added) (citations omitted).

The Court added that it had listed "these presumptively lawful regulatory measures only as examples;" the list was illustrative, "not exhaustive."⁹ The *McDonald* decision repeated this statement:

We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of

⁵ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁶ *McDonald v. Chicago*, 130 S.Ct. 3020 (2010)

⁷ *Heller* at 626.

⁸ *Id.* at 626–27.

⁹ *Id.* at 627, n.26.

The Honorable John Coghill, Senate Majority Leader
RE: Legal Issues Posed by SB 176/HB 335
March 5, 2014
Page 4 of 13

firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. We repeat those assurances here.”¹⁰ (citation and internal quotation marks omitted).

The United State Supreme Court has not defined the level of scrutiny courts should apply to laws regulating firearms in sensitive places.¹¹ The Ninth Circuit adopted a two-step inquiry that “(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.”¹² The Ninth Circuit recently rejected the “rational basis” test and held that the level of scrutiny should depend on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.¹³

The Court in *Heller* stated that the core of the Second Amendment is “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹⁴ Regents’ Policy and University Regulation do not appear to strike at the “core” of the Second Amendment, given the limited time, place and manner nature of the restrictions, and that they apply only on premises for which the University is responsible. Moreover, the burden Regents’ Policy and University Regulation place on Second Amendment rights appears minimal to moderate. The appropriate standard is likely intermediate scrutiny, which requires that 1) the university have a significant, substantial, or important objective in regulating firearms and 2) a reasonable fit between Regents’ Policy and University Regulation and the objective.¹⁵ Regents’ Policy and University Regulation likely meet this test.

The Alaska Constitution contains a provision that is similar but not identical to the Second Amendment:

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.

Art. I, Sec. 19, Constitution of the State of Alaska.

The voters of Alaska added the second sentence of Article I, Section 19 in 1994. The right described is broad. However, as with any constitutional right, the government may

¹⁰ *McDonald* at 3047

¹¹ *United States v. Chovan*, 735 F.3d 1127, 1134 (9th Cir. 2013)(citing *United States v. Chester*, 628 F.3d 679, 682 (4th Cir. 2010)).

¹² *Id.* at 1136.

¹³ *Id.* at 1138.

¹⁴ *Id.* at 1138 (quoting *Heller*, 554 U.S. at 635).

¹⁵ *Id.* at 1139.

The Honorable John Coghill, Senate Majority Leader
RE: Legal Issues Posed by SB 176/HB 335
March 5, 2014
Page 5 of 13

impose limits on the exercise of the right to bear arms. The Alaska Legislature is of course subject to constitutional constraints but the Legislature has regulated firearms in a number of areas as discussed earlier in this memo.

In *Wilson v. State*, the Alaska Court of Appeals looked at whether the 1994 amendment to Article I, Section 19 invalidated Alaska law prohibiting felons from possessing firearms.¹⁶ Without applying one of the traditional tests for constitutional analysis, the Court of Appeals concluded that the voters had not intended to invalidate Alaska's laws regulating firearms that pre-dated the amendment.¹⁷ However, in his dissent, Judge Mannheimer independently reviewed the history of the constitutional amendment and concluded that the state needs more than a reasonable basis to enact laws regulating firearms; it needs a compelling state interest and a narrowly tailored law.¹⁸

Existing Alaska law requires that the legislature (or the university in this case) have a reasonable basis for regulating constitutional rights, i.e., "has a reasonable relationship to a legitimate government purpose."¹⁹ Current university policy and regulation meet that standard. However, if Judge Mannheimer is correct and a future court determines that state regulation of firearms must pass the "strict scrutiny" test, then the university must establish that its policy and regulation advance a compelling state interest and use the least restrictive means available.²⁰ This would pose a much closer question. However, the fact that these restrictions govern UA premises rather than firearms more broadly, and that they regulate premises that share significant congruity with state criminal law and other sensitive places, weighs in UA's favor.

The difficulty with applying Alaska constitutional analysis is that the Alaska Supreme Court applies a sliding scale that begins "by measuring the weight and depth of the individual right at stake."²¹ If a right is fundamental, then the strict scrutiny test applies.²² The court recognizes that even fundamental rights are not absolute and essentially balances the interests involved.²³ Unfortunately, no Alaska court has analyzed the nature of the right to bear arms under the state constitution so the end result of a constitutional challenge is unclear; however, current Regents' Policy and University Regulation do not conflict with the state constitution on their face or as a matter of law.

¹⁶ 207 P.3d 565 (Alaska App. 2009).

¹⁷ *Id.* at 568.

¹⁸ *Id.* at 571.

¹⁹ *Ravin v. State*, 537 P.2d 494, 497-98 (Alaska 1975).

²⁰ *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007).

²¹ *Id.* at 581.

²² *Id.*

²³ *Id.*

(4) Regent's Policy and University Regulation are Not Contrary to Current State Law

In our opinion the limited administrative restrictions imposed by Regents' Policy and University Regulation do not violate current state statute. The most common argument that Regents' Policy regarding concealed carry is contrary to state law involves the 2003 amendments to AS 11.61.220. Those amendments among other things decriminalized concealed carry without a permit. However, the fact that concealed carry is not prohibited or criminalized by state law does not require the conclusion that the Board may not govern University property and premises by restricting firearms and imposing administrative penalties. For example, the repeal of prohibition did not mean that alcohol could not be regulated.

UA has responded when the legislature has restricted UA's ability to regulate firearms. In February of 2010 the university amended Regulation 02.09.020 to comply with AS 18.65.800.²⁴ There do not appear to be any new state law enactments relating to firearms or weapons that directly affect the university's weapons policy.²⁵

(5) Existing State Law Regulating Firearms does not Preempt the University's Authority to Regulate Firearms.

In our opinion, current Regent's Policy and University Regulation are not preempted by state law. Review of relevant case law and statutory provisions establishes that with the exception of municipalities, the Alaska Legislature has not expressly stated its desire to preempt the entire field of firearm regulation. Nor are there grounds to conclude that preemption exists by implication.

Cases involving home rule municipalities make up the bulk of Alaska preemption case law and are instructive here given the similarities between the powers granted to home rule municipalities and the Board of Regents through the state constitution.²⁶ Home rule municipalities have all legislative powers not prohibited by law or charter.²⁷ Conflicts arise between municipal enactments and state law. However, a "municipal ordinance is not necessarily invalid ... because it is inconsistent or in conflict with state statute. The question turns on whether exercise of authority has been prohibited to municipalities. *The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive*

²⁴ AS 18.65.800 prohibits the state from adopting or enforcing a law, regulation, policy or rule prohibiting an individual from possessing a firearm in a motor vehicle. This statute is now reflected in University Regulation R02.09.020(A).

²⁵ Most notably, the legislature enacted Stand Your Ground legislation and the Knife Rights Act (allowing possession of certain switchblade and gravity knives). Since these laws do not affect firearm possession, they do not affect current university policy or regulation.

²⁶ See Article X, Section 11 and Article VII, Section 2 and 3; Constitution of the State of Alaska.

²⁷ Article X, Section 11; Constitution of the State of Alaska.

The Honorable John Coghill, Senate Majority Leader
RE: Legal Issues Posed by SB 176/HB 335
March 5, 2014
Page 7 of 13

*effect if the other is to be accorded the weight of law.*²⁸ For state law to preempt local authority, “it is not enough for state law to occupy the field. Rather, ‘[i]f the legislature wishes to ‘preempt’ an entire field, [it] must so state.’”²⁹

Current state law is not in conflict with Regent’s policy or University Regulation such that both cannot be accorded the weight of law. Nor has the legislature expressed an intent to preempt the field of firearm regulation with respect to entities other than municipalities. The argument that AS 18.65.755 and AS 29.35.145(a), read together, preempt the university’s authority to regulate concealed handguns is not persuasive.

AS 18.65.755 is part of a chapter dealing with concealed carry permits. Before significant repeals, it specified places where a person even with a permit could not possess a concealed weapon. That list is now limited to places where it is illegal to carry concealed firearms under state or federal law. One might argue that this creates a negative implication that an individual may possess a concealed weapon anywhere not on the list. However this statute never created rights, it limited them and provided criminal penalties for violation.³⁰ As discussed in the previous section, the fact that something is not criminal, or even that it has been decriminalized, does not mean that it must be permitted or that it cannot be administratively regulated.

Significantly, the same chapter and section explicitly preempts **municipal** restrictions on concealed carry. AS 18.65.778 provides:

A municipality may not restrict the carrying of a concealed handgun by permit under AS 18.65.700--18.65.790.

This express preemption of municipalities is at best inconsistent with the idea that the Legislature intended to preempt University regulation by inference. Given that full weight can be given both AS 18.65.755 and Regent’s Policy at the same time, preemption by inference is not supported.

AS 29.35.145(a) also prohibits a “municipality” from enacting or enforcing an ordinance regulating the possession, ownership, sale, transfer, use, carrying, transportation, licensing, taxation, or registration of firearm.³¹ While the preamble states that regulation of firearms is reserved to the state,³² the statute is located in the chapter governing municipalities, and expressly preempts municipal regulation of firearms. While this statute makes clear that the Legislature intended to preempt municipalities from the field of firearm regulation, that is not the case with respect to the University.

²⁸ *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974) (emphasis added).

²⁹ *Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001).

³⁰ AS 18.65.755(c) provides: “ In addition to any other penalty provided by law, a person who violates this section is guilty of a class B misdemeanor.

³¹ As noted earlier, this statute is the analog of SB 176.

³² The University is of course an entity of the state.

C. The Approach in SB 176/HB 335 is Problematic in the University Context

Two points are worth emphasizing at the outset of discussion of the bill: (1) SB 176 is not limited to concealed carry but also applies to open carry of long guns; (2) University "policies" are fundamentally different from municipal ordinances.

SB 176 is based on AS 29.35.145 which restricts municipal "ordinances" regarding firearms and knives. SB 176 contains language similar to AS 29.35.145, but instead restricts University "policies." Municipal ordinances could broadly affect the general public's right to possess and bear arms throughout a municipality, in private as well as on public property.

By contrast, University policies only apply on premises owned or controlled by the University. Policies also are the vehicle used by the Board of Regents and administration to regulate conduct of students, employees and visitors to UA premises. As a result, UA's restrictions may more aptly be regarded as regulation of UA premises than general regulation of firearms. Policies are the only means for managing student, employee and visitor conduct involving weapons on University premises.

(1) SB 176 Provisions for Regulation are Unworkable as Written

SB 176 in Sec. 14.40.173(a) would prohibit the Board of Regents from regulating firearms and knives "except as specifically provided by statute."

Sub-section (b) contains provisions allowing regulation that also are taken from the municipal statute. However, these provisions do not provide the Board of Regents with any meaningful ability to regulate firearms apart from enforcing criminal law. Part (b) would provide in pertinent part:

- Sec. 14.40.173. (b)** The board of regents may adopt and enforce policies
- (1) that are **identical to state law and that have the same penalty** as provided for by state law;
 - (2) **restricting the discharge** of firearms on any portion of university land where there is a reasonable likelihood that people, domestic animals, or property will be jeopardized; policies adopted or enforced under this paragraph may not abridge the right of the individual guaranteed by art. I, sec. 19, Constitution of the State of Alaska, to bear arms in defense of self or others; and
 - (3) **prohibiting the possession of firearms or knives in the restricted access area of university buildings; the university shall post notice of the**

The Honorable John Coghill, Senate Majority Leader
RE: Legal Issues Posed by SB 176/HB 335
March 5, 2014
Page 9 of 13

prohibition against possession of firearms or knives at each entrance to the restricted access area.³³
(c) . . . (Emphasis added.)

First, the language of SB 176 appears to permit UA to impose restrictions and penalties. However, restrictions and penalties must be identical to those in state law. State law restrictions and penalties are criminal in nature. UA lacks authority to impose criminal penalties.

Lesser administrative sanctions arguably could not be imposed because they are not “identical” to those in state law. Ironically, while a student, employee or visitor might face jail for criminal weapons misconduct, the University arguably would not be able to restrict that same individual from campus, suspend or expel if a student, or terminate employment.³⁴ UA’s only clear path would be to seek arrest and prosecution of the student, employee or campus visitor. Relying solely on criminal law to regulate conduct involving weapons is to use a blunt instrument at best. Pending decisions about prosecution (or after incarceration, if any, ends), the individual who engaged in weapons misconduct could be accessing UA dorms, classes, offices, day cares, labs containing hazardous materials, critical infrastructure or UA’s numerous programs involving K-12 students.

In addition, a criminal act that is not prosecuted, or conduct by students and employees that involves weapons and implicates safety but falls short of a criminal act, also arguably could not be addressed. For example, the University arguably could not take action in response to possession of weapons by students who are depressed or subject to administrative discipline, troubled employees, or individuals who openly carry weapons in an effort to intimidate faculty or colleagues with whom they have disputes.³⁵

So, as President Gamble noted in his testimony to the committee on March 3, 2014, if a 16 year old shows up at a RAHI meeting (or for that matter, a graduation, performance, hockey game or disciplinary proceeding) with a shotgun, UA would not be permitted to take any action and must permit the individual to attend.

The bill also provides that the Board of Regents may establish “restricted access areas.” For reasons discussed in more detail below, the University’s operations are far more complex than those of municipalities. University operations involve literally thousands of K-12 children and young adults in an environment in which common public areas cannot be segregated neatly from sensitive areas.

³³ “Restricted access area” would be defined in (c)(2) to mean “the area beyond a secure point where visitors are screened and does not include common areas of ingress and egress open to the general public.”

³⁴ The University would of course seek some way to remove an individual posing a safety threat from campus. However, if the issue involved a weapon, we could anticipate a strong legal challenge.

³⁵ The same caveat discussed in footnote 34 applies here.

These bills would significantly affect the regents' ability to regulate student and employee conduct and to provide for the safety of University premises. This is what the regents are charged to do by the constitution and other state law.³⁶ Thus regents and UA may be held responsible and liable for failing to take action when warning signs are evident even if UA is precluded from doing so.

D. Enactment of SB 176 would, on its Face, Preempt the Board of Regents' Authority to Regulate Firearms.

The preceding discussion analyzes the current state of Alaska law. Assuming that the law as enacted is constitutional, SB 176 would render preemption analysis moot as it would expressly and unequivocally express the Legislature's intent to preempt the university's authority to regulate firearms. That would leave only two issues, whether the regents' constitutional authority to govern the University or the constitutional prohibition on special legislation precludes this particular legislative action.

E. The Outcome of a Legal Challenge to SB 176 is Uncertain.

SB 176 poses two constitutional issues. Does the bill violate the constitutional restriction on "special" legislation, and does the bill violate the Board of Regents' constitutional authority to govern the University?

(1) Is SB 176 "Special" Legislation Prohibited by the Alaska Constitution?

One potential constitutional challenge to SB 176 is that it violates the state's constitutional prohibition on local and special legislation because it is not generally applicable and affects only the university.³⁷ A two-stage test is used to determine whether legislation violates this constitutional prohibition. The first stage is a threshold

³⁶ AK Const. Art. 7, § 3 Board of Regents 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 board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board." AS 14.40.170 provides: (a) The Board of Regents shall

...

- (4) have the care, control, and management of
 - (A) all the real and personal property of the university; and

...

- (b) The Board of Regents may
 - (1) adopt reasonable rules, orders, and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents;

...

³⁷ Article II, Section 19; Constitution of the State of Alaska. 19. Local or Special Acts. "The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected."

inquiry “as to whether the proposed legislation is of general, statewide applicability.”³⁸ If the legislation is not applicable statewide, the court looks at the “relationship between the narrow focus of the proposed legislation and the purpose of the proposed legislation.”³⁹ The inquiry at the second stage assesses “whether the legislation bears a ‘fair and substantial relationship’ to legitimate purposes.”⁴⁰ If this standard is satisfied, the legislation generally is not invalid. Moreover, legislation need not operate evenly in all parts of the state to avoid being classified as local or special.⁴¹ However, it is not clear whether this relatively low standard would be applied in dealing with subjects of legislation that have independent constitutional protection, such as the Board of Regents’ constitutional authority to govern the University.

(2) Does SB 176 Violate the Board of Regents’ Constitutional Authority to Govern the University?

Another potential challenge to SB 176 is that it arguably violates the Board of Regents’ constitutional grant of authority to govern and the university’s unique status as a constitutional corporation separate from other branches of state government.⁴² For better or worse, there is no case law addressing an effort by the Legislature to overturn specific governance decisions by the Board of Regents.

Two constitutional provisions address UA’s governance and status:

AK Const. Art. 7, § 2 State University

The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. **Its property shall be administered and disposed of according to law.** (Emphasis added.)

AK Const. Art. 7, § 3 Board of Regents

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 board shall, in accordance with law, formulate policy and appoint the president of the university.** He shall be the executive officer of the board. (Emphasis added.)

³⁸ *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1078 (Alaska 2009).
³⁹ *Id.* at 1078-79.

⁴⁰ *Id.*, citing *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977).
⁴¹ *Id.*

⁴² *University of Alaska v National Aircraft Leasing*, 536 P.2d 121 (1975). This case addressed whether the University should be considered “the state” for purposes of determining whether a statute restricting all suits against the state to bench trials applied to the University.

The Honorable John Coghill, Senate Majority Leader
RE: Legal Issues Posed by SB 176/HB 335
March 5, 2014
Page 12 of 13

Both provisions require that the board administer property & govern UA "in accordance with law." On its face that language may be read to subject the Board and University to all enacted laws, including those that deal solely with UA. And there is no question that despite significant independence, the university is "subject to some executive and legislative control" and that the "formulation of university policy as well as administration and disposition of university property are made subject to legislative enactment."⁴³ However, an argument remains that while the board must comply with generally applicable law (e.g., Board of Regents can't engage in criminal acts and must comply with laws that are broadly applicable to government entities), the legislature may not pass laws that deprive the board of its essential authority to govern UA. Arguably the drafters would have been mindful of the "special legislation" limitation they had crafted and may have intended the phrase "in accordance with law" to be interpreted to mean broadly applicable law.

This argument is supported by the proceedings of the Alaska Constitutional Convention which reflect the intention of the drafters to insulate the university from political interference.⁴⁴ The language of the twin constitutional provisions and intent of the drafters would mean little if the legislature could "govern" UA through narrowly tailored legislation. However, even assuming that there are constitutional limits on the legislature's ability to constrain the board's ability to "govern," the distinction between legitimate policy-making for state government and interference in UA governance likely would be determined on a case-by-case basis, perhaps favoring the board in special legislation or academic matters and the legislature in broadly applicable laws on matters of more general concern to the public.

It is worth noting that in 2012 the University of Colorado Board lost a similar but by no means identical argument over concealed carry on campus. The Colorado constitution contains significantly different language that expressly makes the Colorado university system "subject to the control of the state," and expressly limits the board's grant of authority to supervise institutions with the phrase, "unless otherwise provided by law." In pertinent part the provision reads: The university shall be established and managed "*subject to the control of the state, under the provisions of the constitution and such laws and regulations as the general assembly may provide;*" and "*The governing boards . . . shall have the general supervision of their respective institutions and the exclusive control and direction of all funds of and appropriations to their respective institutions, unless otherwise provided by law.*" Unlike Alaska's constitution, this language specifically permits removal of the Colorado board's authority to govern.

Conclusion

SB 176 will have far reaching and, we believe, unintended legal consequences if adopted.

⁴³ *Id.*, at 124.

⁴⁴ 2007 Alaska Op. Atty. Gen. 1 at 3.

The Honorable John Coghill, Senate Majority Leader
RE: Legal Issues Posed by SB 176/HB 335
March 5, 2014
Page 13 of 13

Today the university manages its premises and responds appropriately and immediately to known, potentially unsafe situations involving weapons. UA will not be able to do so if these bills pass. Today if someone openly carrying a weapon approaches a UA graduation ceremony or sporting event, enters UA housing, displays a weapon in a classroom or takes up a position with a weapon in a corridor, UA can contact them, ask them to put the weapon in secure storage or a locked car, or ask them to leave campus with the weapon if they decline. These are administrative procedures.

The day after SB 176 becomes law, UA will not be permitted to restrict even openly carried long guns into these settings and must wait for that person to commit a crime to take action--even if UA knows the student, staff or visitor is depressed, suicidal, angry about a grade, evaluation or disciplinary action, or in a serious dispute with another student, colleague or significant other in that location. This creates a significant potential for preventable tragedy and liability where one office of the University knows about the circumstances but the institution cannot take action.

The bill would: prohibit administrative penalties for criminal misconduct, thus allowing offenders to remain on or return to campus; prohibit administrative intervention in cases such as troubled individuals possessing weapons or when weapons are openly carried into labs, classrooms, grievance meetings or large gatherings; and prohibit restrictions on weapons around sensitive areas or populations.

SB 176 would deny the Board of Regents any meaningful authority to regulate individuals on University premises with respect to weapons, even while the Board of Regents and UA are likely to be held legally responsible for issues involving weapons on UA premises. As a result, the bill significantly impacts the university's ability to manage risk proactively and to respond to a range of inappropriate and even criminal misconduct.