

**HOUSE & SENATE JOINT  
JOURNAL SUPPLEMENT**

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**February 15, 1995**

**Wednesday**

**No. 7**

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**CONFIRMATION OF GOVERNOR'S APPOINTMENTS  
BEFORE A JOINT SESSION  
OF THE FIRST SESSION OF THE  
NINETEENTH ALASKA STATE LEGISLATURE**

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**REFERENCE DOCUMENTS**

**\*\*\*\*\***

**February 15, 1995  
Juneau, Alaska**



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MEMORANDUM

February 3, 1995

**SUBJECT:** Status of Appointees Whose Names Have Not Been Presented to the Legislature (Work Order No. 9-LS0638)

**TO:** Senator Tim Kelly  
Attn: Josh

**FROM:** Terri Lauterbach   
Legislative Counsel

You have asked what the status is of board members' who have been appointed to their positions by Governor Hickel during the interim between legislative sessions if Governor Knowles does not present their names for confirmation by the legislature. You have asked, specifically about a person appointed to the Alaska Public Utilities Commission (APUC).

As to the status of the board members, it is the opinion of this office that board members appointed by Governor Hickel during the interim hold their positions until (1) rejected by the legislature by a vote not to confirm; (2) rejected by the legislature by its failure to take a vote on confirmation by the end of the legislative session; or (3) removed from office according to the law governing removal for each particular board. (Please see Part One of this memo in regard to this conclusion.) In the case of the APUC, AS 42.05.035 provides for removal with the consent of the legislature.

As to the effect of Governor Knowles' failure to present the appointees' names to the legislature, we do not believe that a subsequent governor's failure to present the appointees' names to the legislature prohibits the legislature from acting on a previous governor's appointments. (Please see Part Two of this memo in regard to this conclusion.)

DISCUSSION

PART ONE.

It is our opinion that Governor Hickel's appointments of board members during the 1994 interim are binding on Governor Knowles, and they cannot be removed from office by

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<sup>1</sup>This memorandum will use the term "board member" to refer to persons appointed to boards, commissions, councils, etc., whose appointments must be confirmed by the legislature.

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Governor Knowles without following the laws applicable to removal for each particular board. So, their status, pending removal according to law or failure to be confirmed, is that they hold the offices to which they were appointed by Governor Hickel.

Article III, § 26 of the Alaska Constitution provides:

Section 26. Boards and Commissions. 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**. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor. [Emphasis supplied].

This provision clearly delineates the respective powers of the governor and the legislature regarding the appointment of members of boards and commissions. The governor has the exclusive power to appoint and the legislature has the exclusive power to confirm and to provide how a member of a board or commission may be removed from office.<sup>27</sup>

As to removal of APUC members, AS 42.05.035 provides

Sec. 42.05.035. REMOVAL OF COMMISSIONERS. The governor may remove a[n APUC] commissioner from office by and with the consent of a majority of the legislature.

The governor may appoint members of boards and commission, such as the APUC, to fill vacancies that occur while the legislature is not in session pursuant to art. III, § 27 of the Alaska Constitution.

Further, AS 39.05.080(4) provides that

Pending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, and have the powers and be charged with the duties prescribed by law for the appointive positions or membership.

Based upon the facts as presented there was a vacancy (or an expiring term) on a number of boards during the 1994 interim, including the APUC, and Governor Hickel, pursuant to statutory and constitutional authority appointed various persons to those vacant positions. Those persons entered upon and were vested with all the duties of their offices at that time.

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<sup>27</sup> Article III, § 26 of the Alaska Constitution only applies to boards and commissions that are "at the head of a principal department or a regulatory or quasi-judicial agency." The APUC is clearly a regulatory board subject to art. III, § 26.

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But are these interim appointments binding on Governor Knowles or may Governor Knowles, by failing to forward their names, withdraw the appointments or otherwise remove those persons from office? It is our opinion that these appointments are binding on Governor Knowles and that these persons may not be removed from office absent the legislature's failure to confirm them or Governor Knowles' compliance with the various removal procedures provided in the statutes applicable to each board, such as removal for cause, removal for specified reasons, or removal with the consent of the legislature (APUC).

Support for this conclusion is found in the plain language of the Constitution and in the court decisions. The Constitution recites in art. III, sec. 26 that the members of those boards or commissions shall be "appointed" by the governor. To determine the meaning of "appointed" we can look to other provisions of the Constitution for assistance. Article II, sec. 5 of the Constitution refers to the terms "nominated," "elected," or "appointed" as exclusive alternatives which are "clearly intended to catalogue the routes by which one may attain an office or position of profit." Bejich v. Jefferson, 441 P.2d 27, 32 (Alaska 1968). In Alaska, "appointed" clearly does not mean "nominated."

That "nominated" and "appointed" are not synonymous terms in this state is further supported by the proceedings of the framers of our constitution. Art. III, § 26 of our constitution, as originally proposed in Committee Proposal No. 10a, by the Executive Branch Committee of the Alaska Constitutional Convention stated:

Whenever a board or commission is at the head of a principal department or of a regulatory or quasi-judicial body, the members thereof shall be **nominated and appointed** by the governor, with the advice and consent of the senate. . . . [Emphasis supplied].

This "nomination" language and reasoning was specifically rejected by the framers of our constitution as it was finally enacted.

The distinction between "nominated" and "appointed" is significant. In the federal system, the president "nominates" persons to the senate for confirmation. A federal "nominee" does not take office pending confirmation. In that situation:

There is no appointment within the meaning of vesting final title to the office until acted upon affirmatively by the legislative branch of government. Justice Marshall states that until the legislature acts, the president is free to choose whom he will.

Munson v. Territory of Alaska, 16 Alaska 580 (1956). But, an "appointee" takes office and is vested with all the duties, powers, and responsibilities of the office subject only to the legislature's authority to fail to confirm the appointment. When a person is "appointed" and takes office and exercises the powers of the office, the governor has performed the "last act" necessary to vest the person with the powers of the office. The governor may not later

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withdraw or revoke the appointment except that he may remove the appointee as provided by law.

In Division of Elections v. Johnstone, 669 P.2d 537, 539-540 (Alaska 1983) the supreme court held that the term appointment as used in the Constitution means "to designate for office." The court also found that the appointment of a superior court judge was effective on the completion of the "last act" of the appointing authority, in that case, the letter of appointment issued to the judge by the governor.

The Alaska Supreme Court, in Johnstone, cited McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930) in support of this proposition. McChesney is strikingly similar to the present case. In McChesney, the Kentucky Supreme Court was confronted with a situation where the governor, having the authority to appoint members of a board subject to confirmation by the Senate, appointed in the interim (between sessions of the legislature), McChesney who entered upon and performed the functions of the office. Several months later, before the legislature had again convened, the governor removed McChesney without cause and appointed another person. McChesney sued to retain his office. The court held that the governor's purported removal of McChesney was illegal. The court stated that the governor by naming and appointing McChesney had exhausted his power to appoint and performed the "last act" necessary to vest McChesney with his office, subject only to the state senate's authority to confirm or fail to confirm and to the governor's authority to remove McChesney for cause as provided by law. The court further contrasted the situation where an officer is "appointed" subject to confirmation by the legislature (as exists in Alaska by art. III, sec. 26 of the Constitution) with the situation where an officer is "nominated" subject to confirmation (as exists for federal appointments) and said:

Furthermore, in cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested. But under our system the appointee of the Governor takes the office, enters upon the performance of its duties, and is charged with responsibility. He holds then subject alone to the action of the Senate. His status is not that of a nominee awaiting confirmation, but that of an officer invested with the powers, privileges, and responsibilities of the position until the Senate acts. A recall of his designation would operate as a removal from office. It is argued that appointment to the office consists of two separate acts, one by the Governor and one by the Senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the two powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall . . . What, then, constitutes an appointment insofar as the chief executive has to do with it? Appointment to an office by one possessing the appointing power is the designation of another person to discharge the duties of the office.

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[Citation.] It is completed when the appointing authority has performed the acts incumbent upon him to accomplish the purpose. [Citations.] The fact that the title to the office, and the tenure of the officer, are yet subject to the action of the Senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power. [Emphasis supplied].

McChesney, *supra*, at 587.

The court concluded by stating: "Such power as flows from the act of the Governor in making the appointment is invested by the statute in the appointee, and may not thereafter be recalled or bestowed upon another unless the consent of the Senate is withheld." See also Barrett v. Duff, 114 Kan. 244, 217 P. 918 (1923).

The rule discussed in McChesney v. Sampson has been variously stated by courts and commentators to be the "majority rule," the "general rule," and to be "universally held." See e.g., Barrett v. Duff, *supra*; State v. Essling, 128 N.W. 2d 307, 311 (Minn. 1964) ("well settled"); State v. Brewster, *supra*, 89 ALR 135 ("general rule").

McChesney and the rule discussed in it are based upon Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 159-60, 2 L.Ed 60, 68-69 (1803) in which Justice Marshall stated:

[W]hen the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him.

While the principle of a strong executive is embraced by our Constitution and recognized by our courts, Bradner v. Hammond, 553 P.2d 1, 3, n.3 (Alaska 1976), that principle does not mandate a different conclusion than that reached by the United States Supreme Court, the McChesney court and their progeny. To state that a subsequent governor has the authority to recall the appointments of a previous governor, absent constitutional or statutory authority, would render appointments to office personal to the particular governor and his term. This is contrary to our Constitution which establishes an office of governor and provides for succession to that office. Under our Constitution there is a governor and a governor there will always be, though the individuals occupying that office may come and go. See e.g., People v. Shawver, 30 Wyo. 366, 222 P. 11 (1924); Barrett v. Duff, *supra*; State v. Brewster, 84 S.E.2d 231, 246 (W. Va. 1954); Tappy v. State, 82 So.2d 161, 169 (1955).

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This memo will assume that when Governor Hickel appointed persons to boards during the interim, that is, named them to their offices in their letters of appointment, there were vacancies on those boards. Under the rationale of the Alaska Supreme Court in Johnstone, supra, those persons were appointed at that time. If there is a present vacancy in office and when the governor performs that "last act," in this case the letter of appointment, then the appointment is effective and binding upon the executive branch, subject only to the legislature's power to confirm or not to confirm and the statutory authority of the governor to remove the appointee "as provided by law." If Governor Hickel had attempted to appoint persons to positions where a vacancy did not then exist, but for which a vacancy was anticipated in the future (for example, a seat on a board that was currently occupied but the occupant's term was due to expire, say on January 1, 1995), then we would conclude that a purported appointment by Governor Hickel to take effect in the future, after Governor Hickel had left office, would not be binding on the subsequent administration.<sup>3</sup>

This distinction was recognized in an Alaska Attorney General's opinion from Rodger Pegues to Vicki Clayman on December 10, 1979. In that opinion the attorney general opined that appointments by an outgoing governor to take effect beyond the governor's term are not binding upon and may be withdrawn by the new administration. That opinion, though, recognizes that if "the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense." Presumably, if they make some sense, then they are also effective and binding upon the new administration. If there is a present vacancy in an office when the governor performs that "last act," in this case the letters of appointment during the 1994 interim, then the appointments are effective and binding on the new administration, subject only to the legislature's power to confirm or not to confirm and the statutory authority of the new governor to remove the appointees "as provided by law."

Support for this conclusion is found in the settlement of a lawsuit brought by a former member of the Alaska Commercial Fisheries Entry Commission, Michael Whitehead, against the state. Mr. Whitehead was appointed to a position on the commission on October 16, 1982, by then Governor Hammond. Governor Sheffield took office in December, 1982, and on February 28, 1983, Governor Sheffield appointed another person to fill the position occupied by Mr. Whitehead. AS 16.43.030(a) provided that the members of the commission could only be removed for cause. Governor Sheffield contended that he had the authority to withdraw Mr. Whitehead's appointment as Mr. Whitehead had not as yet been confirmed by the legislature.\* Mr. Whitehead then sued to retain his position on the commission. The state

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<sup>3</sup>A purported "appointment" to take effect at some date in the future is in actuality a "nomination" because the purported "appointee" is not then, at the time of "appointment," vested with all the duties, powers, and responsibilities of the office.

\* It was apparently the state's position that Mr. Whitehead was a "nominee" and that the "last act" necessary to make his appointment effective was confirmation by the legislature.

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settled the lawsuit by paying Mr. Whitehead his salary and benefits as a member of the commission up to June 16, 1983, and an additional \$75,000.

Be advised that the Alaska Attorney General in an opinion from James L. Baldwin to Kevin Bruce, dated February 3, 1983 advised the Sheffield administration that the governor had the authority to withdraw an appointment made by a previous governor. The opinion does not cite any authority for this position other than another Department of Law opinion from Rodger Pegues to Vicki Clayman issued on December 10, 1979, discussed earlier. That opinion also does not cite any authority other than Marbury v. Madison, discussed herein.

#### PART TWO.

With regard to the aspect of your question that relates to Governor Knowles' failure to forward the appointees' names for confirmation, we believe the legislature can consider those appointments for confirmation anyway.

Art. III, sec. 26 provides:

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. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.\*

This provision provides that the governor has the authority to appoint the members of each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency." These appointees are subject to the legislature's constitutional authority to confirm or reject them.\*

In Bradner v. Hammond, 553 P.2d 1, 7 (1976), the Alaska Supreme Court described the authority of the legislature to confirm the appointees described in sections 25 and 26 as:

not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government.

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\* Art. III, § 25 provides that the governor may appoint the "head of each principal department" of the state.

\* Other appointments subject to legislative confirmation include certain military officers, art. III, §19; the non-attorney members of the judicial council, art. IV, §9; members of the Commission on Judicial Qualifications, art. IV, §10, and members of the University of Alaska Board of Regents, art. VII, §3.

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Therefore, the power of confirmation of the governor's appointees to the "head of each principal department" and to membership on each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency," though normally an executive branch function, has been exclusively delegated to the legislature by the Alaska Constitution.

To implement this confirmation power granted by the constitution the legislature has enacted AS 39.05.080. This section provides that the governor:

shall, within 30 days of the convening of the legislature in regular session, present to the legislature the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature or either house of it; (B) persons appointed subject to confirmation to fill an existing position or membership vacancy; (C) persons to be appointed subject to confirmation to fill a position or membership the term of which shall expire before July 2, following the session of the legislature. If an appointment is made after the deadline but while the legislature is in session, the appointing authority shall, within five calendar days after the appointment is made, present to the legislature for confirmation the name of the person appointed. The deadline may be extended by the legislature by the approval of a concurrent resolution. . . .

But what if the governor fails or refuses to transmit the names of his appointments, or a particular appointment, to the legislature? Is the legislature without authority to confirm or reject the appointment if the governor does not commence the confirmation process by transmitting the name? The Alaska Supreme Court has never considered this issue but the courts of several other states have. The leading case on the subject of the legislature's authority to confirm or reject a gubernatorial appointment in the absence of a communication by the governor appears to be People v. Shawver, 30 Wyo. 366, 222 P.2d 11 (1924). Shawver was cited by the Alaska Supreme Court in Bradner for the proposition that confirmation is actually a portion of the executive's appointment power that has been delegated to the legislature by the constitution. Bradner, *supra*, at 7, n. 19. In Shawver, the Wyoming Supreme Court after reaching this conclusion addressed the next part of the issue presented by that case: Whether the Wyoming Senate (granted the power to confirm the appointees of the governor by the Wyoming Constitution) could act to confirm or reject an appointee when the governor did not transmit the appointee's name to the Senate and did not ask that the appointee be confirmed? The case involved the appointment of an individual to a state office by a governor who was then succeeded by another governor. The new governor failed to submit the appointment to the Senate for confirmation. The court said:

But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent

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of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. [Citations omitted] While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously provide him the power to ignore the coordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure.

Shawver, supra, at 23 - 24. The court then held that the Wyoming Senate properly confirmed an appointee, though the governor had not requested the confirmation.

The Kansas Supreme Court reached a similar conclusion in Barrett v. Duff, 114 Kan. 220, 217 P. 918 (1923). That case involved the appointments to state offices by a governor during a recess of the legislature. The appointees entered upon the duties of their offices. A new governor took office and attempted to appoint others to the offices and removed the previous governor's appointees. By constitution, the Kansas Senate had the authority to confirm the appointees of the governor and the governor could not remove the state officers involved here except as provided by law, for cause. The court said:

The plaintiffs deny any force or validity to the action of the Senate in considering and confirming the appointments of defendants because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. Judicial notice or knowledge is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them. Judicial notice means that the court will bring to its aid and consider, without proof of the facts, its own knowledge of those matters of public concern which are known to all well-informed persons. Legislative notice is far broader than judicial notice. 23 C.J. 58. The legislative department is equipped to deal with any condition, general or special, however manifested or brought to the knowledge of the law-making power. The mass of individual legislation found among the statutes of all the states demonstrates this legislative attribute. [Citation omitted].

The offices in controversy are all located in the capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the

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departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether their respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and frequently does, investigate the character, fitness, and ability of the appointee submitted for its consideration. The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. . . . We conclude that the Senate did not go beyond its powers in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it is the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberative and final judgment in confirming or rejecting appointees of the Governor.

Barrett, supra, 925-926. The Kentucky Supreme Court in McChesney, supra, discussed in Part One also reaches the same conclusion.

In fact, virtually all other courts that have considered this issue have reached the same conclusion. See, e.g., Bell v. Sampson, 232 Ky. 376, 23 S.W.2d 575 (1930); State v. Halladay, 219 N.W. 125 (S.D. 1928); State v. Brewster, 84 S.E.2d 231, 248 (W.Va. 1954); Commonwealth v. Stewart, 286 Pa. 511, 134 A. 392 (1926). Our research has disclosed only two court decisions that have reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941) and Burke v. Schmidt, 191 N.W. 2d 281 (S.D. 1971)). In Warner, the court though, held that under the Michigan Constitution and that State's court decisions that the confirmation power of the legislature is a legislative power, not a delegation of the executive's appointment power. As such, its reasoning is contrary to the Alaska Supreme Court's decision in Bradner and is distinguishable on that ground. In Burke, it appears the court held that the board members involved were not entitled to succeed to their offices and perform the duties thereof until they were confirmed. Burke, Supra, at 285. This is contrary to the procedure that is provided here in Alaska by constitutional provision and statute and is clearly distinguishable on that ground. See Art. I, § 27 of the Alaska Constitution and AS 39.05.080(4).

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Therefore, we conclude that the legislature may properly consider the confirmation or rejection of interim Hickel appointees as art. III, § 26 appointees of the governor. While one can always hope that subsequent governors will comply with the reasonable procedure for communication of a previous governor's appointments that the legislature has provided in AS 39.05.080, if the governor fails or refuses to request the confirmation of an appointee, the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in section 26. To hold otherwise would allow the governor to prevent the legislature from exercising its constitutional confirmation power at the governor's whim, caprice, or neglect and would render the confirmation function a nullity. Shawver, supra. Such an absurd result was not intended by the framers of our constitution and would not, we believe, be embraced by our courts.

Further support for this position is found in Governor Hickel's purported removal of Peter Sokolov as a member of the Alaska Public Utilities Commission in 1991. Mr. Sokolov had been appointed by Governor Cowper in November 1990 to begin a new term after the expiration of Mr. Sokolov's previous term. In January 1991, Governor Hickel notified Mr. Sokolov that his appointment was being "withdrawn." The legislature that year took up Mr. Sokolov's appointment, even though the governor failed to send Mr. Sokolov's name to the legislature for confirmation. The legislature then failed to confirm Mr. Sokolov's appointment.

Just last session the Alaska Legislature revisited this issue when Governor Hickel appointed Jack Didrickson to the Board of Game after the governor's previous appointment to the position was rejected by the legislature. Mr. Didrickson took office and performed the duties of that office until he was notified by the governor's office that his "nomination" was being withdrawn, he was being removed from office, and the governor was forwarding the name of a different person to the legislature for confirmation to the seat that had been held by Mr. Didrickson. Absent any communication from the governor the legislature took up the confirmation of Mr. Didrickson and rejected his appointment to the Board of Game.

In conclusion, both case law and legislative custom support the legislature's power to consider appointees even in the absence of a communication from the governor presenting their names for confirmation.

TML:glc:kfb  
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MEMORANDUM

February 3, 1995

**SUBJECT:** When the Governor Sends to the Chief Clerk and the Senate Secretary a Copy of a Letter of Appointment, Does this Constitute Gubernatorial Presentment of the Appointee's Name for Purposes of Legislative Confirmation? (Work Order No. 9-LS0643)

**TO:** Senator Tim Kelly  
Attn: Josh

**FROM:** Terri Lauterbach   
Legislative Counsel

You have asked whether an appointee's name has been presented for purposes of legislative confirmation if the governor merely sends a copy of the appointee's letter of appointment to the chief clerk of the house and to the senate secretary during the interim before a new legislature convenes.

In our opinion, the forwarding of a copy of a letter of appointment in this manner can be viewed by the legislature as actual notice of the appointee's name for purposes of confirmation even though the governor has not complied with the presentment procedure in AS 39.05.080. However, we also wish to point out that the legislature could act on the appointment even if a copy of the letter of appointment was not forwarded. We believe that case law and legislative custom support the power of the legislature to confirm (or not confirm) an appointee about which it has knowledge, even absent any communication of the appointment from the governor to the legislature, so the ambiguity that may be involved in receiving copies of letters of appointment and the failure to follow AS 39.05.080 are immaterial to whether the legislature has the power to consider the appointment.

Discussion

You have sent us a copy of a letter of appointment for a member of a board for which the legislature has confirmation power. The letter was written during the 1994 interim and sent to the appointee. The bottom of the letter indicates that copies of the letter were also sent to the chief clerk of the house and to the senate secretary. Your question is whether this constitutes presentment of the appointee's name to the legislature for purposes of confirmation.

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We believe that it would be reasonable for the legislature to construe this action as presentment of the name for purposes of the legislature's exercise of its power of confirmation. The communication, although a copy of a letter to someone else, has been sent intentionally to the legislature by the governor and provides actual notice to the legislature that the appointment has been made.

We realize that an argument could be made that this notice does not comply with the "presentment" requirement in AS 39.05.080, the copy having been sent during the 1994 interim before a new legislature began in 1995 rather than within the first 30 days of the legislative session as required in AS 39.05.080. However, for two reasons, we find this distinction to be unimportant for purposes of the legislature's power to use its confirmation power with respect to the appointee: (1) the constitution contains no "presentment" requirement, so a failure to "present" in the way required by statute cannot be used to prevent exercise of the legislature's constitutionally ordained power to confirm; and (2) a subsequent governor cannot "withdraw" an appointment made by a predecessor merely by failing to present the name to the legislature. The legislature, even if it had not received the copies of the letter of appointment during the interim, could use its power of confirmation with respect to any board member about whom the legislature has knowledge, whether that knowledge came from the governor or otherwise. In our opinion, a communication by the governor is not necessary.

This opinion is based on the Alaska Supreme Court's interpretation of art. III, sec. 26 of the Alaska State Constitution and on court cases from other jurisdictions regarding the legislative power of confirmation.

Art. III, sec. 26 provides:

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. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor."

This provision provides that the governor has the authority to appoint the members of each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency." These appointees are subject to the legislature's constitutional authority to

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" Art. III, § 25 provides that the governor may appoint the "head of each principal department" of state.

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confirm or reject them.

In Bradner v. Hammond, 553 P 2d 1, 7 (1976), the Alaska Supreme Court described the authority of the legislature to confirm the appointees described in sections 25 and 26 as:

not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government.

Therefore, the power of confirmation of the governor's appointees to the "head of each principal department" and to membership on each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency," though normally an executive branch function, has been exclusively delegated to the legislature by the Alaska Constitution.

To implement this confirmation power granted by the constitution the legislature has enacted AS 39.05.080. This section provides that the governor

shall, within 30 days of the convening of the legislature in regular session, present to the legislature the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature or either house of it; (B) persons appointed subject to confirmation to fill an existing position or membership vacancy; (C) persons to be appointed subject to confirmation to fill a position or membership the term of which shall expire before July 2, following the session of the legislature. If an appointment is made after the deadline but while the legislature is in session, the appointing authority shall, within five calendar days after the appointment is made, present to the legislature for confirmation the name of the person appointed. The deadline may be extended by the legislature by the approval of a concurrent resolution. . . . (Emphasis added)

But what if the governor fails or refuses to transmit the names of his appointments, or a particular appointment, to the legislature or transmits the names at a time that precedes the convening of the legislature? Is the legislature without authority to confirm or reject the appointment if the governor does not commence the confirmation process by transmitting the name in a manner required by statute? The Alaska Supreme Court has never considered this issue but the courts of several other states have.

The leading case on the subject of the legislature's authority to confirm or reject a gubernatorial appointment relates to a situation where there was an absence of

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<sup>2</sup> Other appointments subject to legislative confirmation include certain military officers, art. III, §19; the non-attorney members of the judicial council, art. IV, §8; members of the Commission on Judicial Qualifications, art. IV, §10, and members of the University of Alaska Board of Regents, art. VII, §3.

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communication by the governor. That case is People v. Shawver, 30 Wyo. 366, 222 P.2d 11 (1924). Shawver was cited by the Alaska Supreme Court in Bradner for the proposition that confirmation is actually a portion of the executive's appointment power that has been delegated to the legislature by the constitution. Bradner, supra, at 7, n. 19. In Shawver, the Wyoming Supreme Court after reaching this conclusion addressed the next part of the issue presented by that case: Whether the Wyoming Senate (granted the power to confirm the appointees of the governor by the Wyoming Constitution) could act to confirm or reject an appointee when the governor did not transmit the appointee's name to the Senate and did not ask that the appointee be confirmed? The case involved the appointment of an individual to a state office by a governor who was then succeeded by another governor. The new governor failed to submit the appointment to the Senate for confirmation. The court said:

But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. [Citations omitted] While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously provide him the power to ignore the coordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure.

Shawver, supra, at 23 - 24. The court then held that the Wyoming Senate properly confirmed an appointee, though the governor had not requested the confirmation.

The Kansas Supreme Court reached a similar conclusion in Barrett v. Duff, 114 Kan. 220, 217 P. 918 (1923). That case involved the appointments to state offices by a governor during a recess of the legislature. The appointees entered upon the duties of their offices. A new governor took office and attempted to appoint others to the offices and removed the previous governor's appointees. By constitution, the Kansas Senate had the authority to confirm the appointees of the governor and the governor could not remove the state officers involved here except as provided by law, for cause. The court said:

The plaintiffs deny any force or validity to the action of the Senate in considering and confirming the appointments of defendants because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess

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appointments without such direct word from the executive. Judicial notice or knowledge is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them. Judicial notice means that the court will bring to its aid and consider, without proof of the facts, its own knowledge of those matters of public concern which are known to all well-informed persons. Legislative notice is far broader than judicial notice. 23 C.J. 58. The legislative department is equipped to deal with any condition, general or special, however manifested or brought to the knowledge of the law-making power. The mass of individual legislation found among the statutes of all the states demonstrates this legislative attribute. [Citation omitted].

The offices in controversy are all located in the capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether their respective offices are filled, whether they are functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and frequently does, investigate the character, fitness, and ability of the appointee submitted for its consideration. The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. . . . We conclude that the Senate did not go beyond its powers in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it is the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberative and final judgment in confirming or rejecting appointees of the Governor.

Barrett, supra, 925-926. The Kentucky Supreme Court in McChesney v. Sampson, 232 Ky. 395, 23 S.W. 2d 584 (1930), reaches the same conclusion.

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In fact, virtually all other courts that have considered this issue have reached the same conclusion. See, e.g., Bell v. Sampson, 232 Ky. 376, 23 S.W.2d 575 (1930); State v. Halladay, 219 N.W. 125 (S.D. 1928); State v. Brewster, 84 S.E.2d 231, 248 (W.Va. 1954); Commonwealth v. Stewart, 286 Pa. 511, 134 A. 392 (1926). Our research has disclosed only two court decisions that have reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941) and Burke v. Schmidt, 191 N.W. 2d 281 (S.D. 1971)). In Warner, the court though, held that under the Michigan Constitution and that State's court decisions that the confirmation power of the legislature is a legislative power, not a delegation of the executive's appointment power. As such, its reasoning is contrary to the Alaska Supreme Court's decision in Bradner and is distinguishable on that ground. In Burke, it appears the court held that the board members involved were not entitled to succeed to their offices and perform the duties thereof until they were confirmed. Burke, Supra, at 285. This is contrary to the procedure that is provided here in Alaska by constitutional provision and statute and is clearly distinguishable on that ground. See Art. I, § 27 of the Alaska Constitution and AS 39.05.080(4).

Since the governor cannot, according to most court decisions, prevent the legislature from exercising its confirmation power by failing to submit appointees' names, we find it axiomatic that a governor cannot prevent the legislature from exercising its confirmation power by submitting the names in a manner not specified by statute.

Therefore, we conclude that the legislature may properly consider the confirmation or rejection of interim Hickel appointees as art. III, § 26 appointees of the governor regardless of how or whether those appointments are communicated to the legislature. While one can always hope that subsequent governors will comply with the reasonable procedure for communication of a previous governor's appointments that the legislature has provided in AS 39.05.080, if the governor fails or refuses to request the confirmation of an appointee at the time and in the manner that may be specified by statute, the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in section 26. To hold otherwise would allow the governor to prevent the legislature from exercising its constitutional confirmation power at the governor's whim, caprice, or neglect and would render the confirmation function a nullity. Shawver, supra. Such an absurd result was not intended by the framers of our constitution and would not, we believe, be embraced by our courts.

Further support for this position is found in Governor Hickel's purported removal of Peter Sokolov as a member of the Alaska Public Utilities Commission in 1991. Mr. Sokolov had been appointed by Governor Cowper in November 1990 to begin a new term after the expiration of Mr. Sokolov's previous term. In January 1991, Governor Hickel notified Mr. Sokolov that his appointment was being "withdrawn." The legislature that year took up Mr. Sokolov's appointment, even though the governor failed to send Mr. Sokolov's name to the legislature for confirmation. The legislature then failed to confirm Mr. Sokolov's appointment.

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Just last session the Alaska Legislature revisited this issue when Governor Hickel appointed Jack Didrickson to the Board of Game after the governor's previous appointment to the position was rejected by the legislature. Mr. Didrickson took office and performed the duties of that office until he was notified by the governor's office that his "nomination" was being withdrawn, he was being removed from office, and the governor was forwarding the name of a different person to the legislature for confirmation to the seat that had been held by Mr. Didrickson. Absent any communication from the governor the legislature took up the confirmation of Mr. Didrickson and rejected his appointment to the Board of Game.

In conclusion, both case law and legislative custom support the legislature's power to consider appointees even in the absence of a communication from the governor formally presenting their names for confirmation. Therefore, we advise the legislature not to worry about whether the interim copies of appointment letters amount to "presentment" within the meaning of AS 39.05.080. The legislature can rely on either its own knowledge of the appointment or on the actual notice provided by the copies of the appointment letters in order to begin its confirmation process.

TML:glc  
95-117.glc

**DIVISION OF LEGAL SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

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130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

**MEMORANDUM**

February 14, 1995

**SUBJECT:** Appointments and Legislative Confirmation  
(Work Order No. 9-LS0686)

**TO:** Senator Drue Pearce

**FROM:** Terri Lauterbach   
Legislative Counsel

You have asked additional questions on this subject:

- (1) Does a member of the State Board of Education serve at the pleasure of the governor or may the member be removed only for cause?
- (2) Were the confirmations of Eleanor Andrews and Peter Sokolov properly before the legislature when they were considered for confirmation four years ago?
- (3) Were there board members appointed by Governor Cowper during the 1990 interim, not presented or properly removed by Governor Hickel, about whom the legislature held a confirmation vote in 1991?

In answer to your first question, AS 14.07.115 provides that the members of the State Board of Education serve at the pleasure of the governor. We believe this statute is controlling, even though AS 14.07.085(d) says that a member of the board "may act and receive compensation from the date of appointment **until confirmation or rejection by the legislature.**"

In answer to your second question, there is no question as to whether the names of Eleanor Andrews and Peter Sokolov were properly before the legislature four years ago when the legislature voted on their confirmation because, by the time of the confirmation vote, Governor Hickel had presented their names for confirmation (after refusing to do so for several months).

As to your third question, the answer is "No." It appears from the journal records that Governor Hickel, having purportedly "withdrawn" many Cowper appointees from consideration by the legislature, later issued a letter reinstating most of the "withdrawn" names. The reinstated names included Eleanor Andrews and Seaborn Buckalew (Personnel

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Board), Peter Sokolov (APUC), and five appointees to the Professional Teaching Practices Commission. So, by the time the legislature had its confirmation vote on these people, their names had been presented by the sitting governor.

However, it is evident from the journal that the executive branch and legislative branch reached this point only after a long dispute and that the reinstatement of names was not a recognition by the governor that the legislature was correct in its position that the prior governor's appointments were valid. The reinstatement was done only "as a matter of comity" and "respect." Governor Hickel specifically reserved the right to "contest the title of office of any of the [reinstated] persons who are subsequently confirmed." However, he did not contest any seats, to my knowledge, even though seven of the eight were confirmed (all but Sokolov).

Attached are 1991 journal pages showing the following history with respect to these eight people:

Feb. 20 - Hickel letter appointing Buckalew to Personnel Board  
Hickel appointee list leaving out Cowper appointees

March 11 - Cowper letter appointing Sokolov to APUC  
Hickel letter appointing Schroer to APUC

April 26 - Hickel letter of Feb. 25, "withdrawing" Buckalew

May 14 - Hickel letter confirming that names left out of list on Feb. 20th were meant to be "withdrawn." Includes Andrews, Sokolov, and the five members appointed to the Professional Teaching Practices Board.

May 14 - Letter from House Judiciary Committee finding that the Sokolov appointment was properly before the legislature and the Schroer appointment was not.

May 14 - Letter from then-Representative Donley finding that the names of Eleanor Andrews, Seaborn Buckalew, and the five interim appointees to the Teaching Practices Commission were properly before the legislature, even after "withdrawal" by Governor Hickel.

May 16 - Schroer (APUC) rejected in joint session

May 18 - Letter from Governor Hickel presenting names of previously "withdrawn" appointees: Buckalew, Andrews, Sokolov, and the five Teaching Practices persons, reserving the right to challenge them if they were confirmed.

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May 18 - Confirmation of the five Teaching Practice persons  
Confirmation of Buckalew and Andrews (Personnel Board)  
Rejection of Sokolov (APUC)  
Reconsideration and confirmation of Schroer (APUC)

Attached also is a copy of a settlement reached with Michael Whitehead in 1983. The facts are described in the settlement. Basically, Whitehead (who was appointed in the interim by Gov. Hammond) disputed the power of the new governor (Gov. Sheffield) to remove him without "cause" by withdrawing his name. The size of the settlement (\$75,000 + pay through June 8th) may say something about whether the executive branch thought they would win in court.

So, in summary, the way things worked out four years ago, all the interim appointees about which there was a dispute were eventually presented for legislative confirmation by the sitting governor. The issue about whether the legislature could consider for confirmation an appointee who had not been presented became moot. Right now, we don't have that situation in 1995. As far as I know, Governor Knowles has still not presented all of the Hickel appointees' names for confirmation. Whether the issue will once again become moot by the time confirmation votes are held this session, only time will tell.

I hope you find this memo and the attached information helpful. Please let us know if we can be of further assistance.

TML:klb  
95-072.klb

Enclosure

For as leaders, we must provide the example of loyalty to You, and our country, and when necessary put our own interest last. Help them to be sensitive to Your leading and guidance, for we pray this in the name of our Lord Jesus Christ. Amen."

The Pledge of Allegiance was led by Representative Jacko.

#### CERTIFICATION OF THE JOURNAL

Representative Gruenberg moved and asked unanimous consent that the journal for the 30th legislative day with the following correction be approved as certified by the Chief Clerk. There being no objection, it was so ordered.

#### HB 148

Page 259, the title for HOUSE BILL NO. 148 should read:

"An Act amending certain appropriations made in 1990 to the Department of Health and Social Services; making miscellaneous supplemental appropriations for fiscal year 1991 and prior fiscal years; and providing for an effective date."

#### INTRODUCTION OF GUESTS

Former Alaska Senator Vic Fischer introduced Alexander Granberg, Professor of the USSR Academy of Sciences, Director of the Institute of Economics in Novosibirsk, member of the Russian Federation Parliament, and visiting professor at the University of Alaska, Anchorage, and Professor Granberg addressed the House.

#### GOVERNOR'S APPOINTMENTS

A letter dated February 19, 1991, was read stating that, in accordance with AS 39.05.080 and Article III, Sections 25 and 26 of the Alaska Constitution, the Governor submits the following names for legislative confirmation of appointment to the positions noted, and the Speaker made the following committee referrals:

Department of Administration

Commissioner Millett Keller

was referred to the State Affairs Committee.

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Department of Commerce and Economic Development

Commissioner Glenn Olds

was referred to the Labor & Commerce Committee.

Department of Community and Regional Affairs

Commissioner Edgar Blatchford

was referred to the Community & Regional Affairs Committee.

Department of Corrections

Commissioner Lloyd Hames

was referred to the Health, Education & Social Services and  
Judiciary Committees.

Department of Environmental Conservation

Commissioner John Sandor

was referred to the Resources Committee.

Department of Fish and Game

Commissioner Carl Rosier

was referred to the Resources Committee.

Department of Health and Social Services

Commissioner Ted Mala

was referred to the Health, Education & Social Services  
Committee.

Department of Labor

Commissioner Nancy Usura

was referred to the Labor & Commerce Committee.

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Department of Law

Attorney General Charles Cole

was referred to the Judiciary Committee.

Department of Military and Veterans Affairs

Major General Hugh Cox

was referred to the House Special Committee on Military & Veterans' Affairs and State Affairs Committees.

Department of Natural Resources

Commissioner Harold Heinze

was referred to the Resources Committee.

Department of Public Safety

Commissioner Richard Burton

was referred to the State Affairs Committee.

Department of Revenue

Commissioner Lee Fisher

was referred to the Finance Committee.

Department of Transportation and Public Facilities

Commissioner Frank Turpin

was referred to the Transportation Committee.

Alaska Air National Guard

Brigadier General Dan Dennis

was referred to the House Special Committee on Military & Veterans' Affairs and State Affairs Committees.

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Boards and Commissions

State Board of Registration for Architects,  
Engineers, and Land Surveyors

George W. Davidson - Juneau  
Term began 6/15/90, expires 7/1/94

Alaska Labor Relations Agency

H.O. "Red" Williams - Fairbanks  
Term began 7/16/90, expires 6/30/91

B. Gil Johnson - Anchorage  
Term began 2/6/91, expires 6/30/93

Darrell Smith - Anchorage  
Term began 2/6/91, expires 6/30/92

Board of Certified Real Estate Appraisers

Alfred J. Ferrara - Anchorage  
Term began 11/2/90, expires 6/30/94

Sue G. Sutton - Juneau  
Term began 11/26/90, expires 6/30/91

were referred to the Labor & Commerce Committee.

Big Game Commercial Services Board

Glen Alsworth - Anchorage  
Original term began 8/29/89,  
reappointed 6/15/90, expires 6/30/94

Board of Fisheries

Ken Wardwell - Anchorage  
Term began 2/19/91, expires 1/31/94

Board of Game

Richard Burley - Fairbanks  
Term began 1/19/91, expires 1/31/94

were referred to the Resources Committee.

Board of Education

Kathryn Cuddy - Anchorage  
Term began 1/7/91, expires 1/31/95

Joe Montgomery - Anchorage  
Term began 1/7/91, expires 1/31/93

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June Nelson - Kotzebue  
Term began 1/7/91, expires 1/31/94

Patricia Norheim - Petersburg  
Term began 1/7/91, expires 1/31/92

Jack Phelps - Talkeetna  
Term began 1/7/91, expires 1/31/94

Robert Walp - Anchorage  
Term began 1/7/91, expires 1/31/95

Andy Warwick - Fairbanks  
Term began 1/7/91, expires 1/31/93

were referred to the Health, Education & Social Services Committee.

#### State Commission for Human Rights

John "Jack" Alleman - Juneau  
Term began 2/19/91, expires 1/31/96

#### Personnel Board

Judge Seaborn Buckalew - Anchorage  
Term began 7/11/90, expires 6/20/96

was referred to the State Affairs Committee.

#### Commission on Judicial Conduct

Dianne Brown - Anchorage  
Term began 11/29/90, expires 12/31/91

was referred to the Judiciary Committee.

#### Alaska Oil and Gas Conservation Commission

Lonnie C. Smith - Anchorage  
Original term began 1/1/79, reappointed  
1/23/91, expires 12/31/96

was referred to the House Special Committee on Oil & Gas and Resources Committees.

Resumes of the appointees are on file in the Chief Clerk's office.

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HOUSE JOURNAL

March 11, 1991

CERTIFICATION OF THE JOURNAL

Representative Gruenberg moved and asked unanimous consent that the journal for the 47th, 48th and 49th legislative days and House Journal Supplement No. 3 be approved as certified by the Chief Clerk. There being no objection, it was so ordered.

MESSAGES FROM THE GOVERNOR

A copy of a letter from Governor Cowper to Mr. Peter Sokolov, dated November 8, 1990, stated that the Governor made the following reappointment:

Alaska Public Utilities Commission

Peter Sokolov - Anchorage  
Term ending 10/31/96

A letter dated February 19, 1991, stated that Governor Hickel submits the following name and resume for legislative confirmation of appointment to the position noted:

Alaska Public Utilities Commission

Don Schroer - Anchorage  
Term began 1/23/91, expires 10/31/96

The appointments were referred to the Labor & Commerce and Judiciary Committees.

MESSAGES FROM THE SENATE

A message dated March 8, 1991, was read stating the Senate has accepted the invitation to meet in joint session in the House at 10:15 a.m., April 3, 1991, to hear the Honorable Ted Stevens, U.S. Senator for Alaska.

A message dated March 6, 1991, was read stating the Senate has approved the following citation and it is transmitted for consideration:

Honoring - Western Regional JIII Skiers  
By Senators Duncan, Sturgulewski, Fischer, Collins,  
Rodey, Menard, Halford, Cotten  
Representatives Ulmer, Hudson

The citation was referred to the Rules Committee for placement on the calendar.

The message also stated the Senate has approved the following citations, and they are being enrolled:

Honoring - International Women's Day

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April 26, 1991

CERTIFICATION OF THE JOURNAL

Representative Gruenberg moved and asked unanimous consent that the journal for the 94th and 95th legislative days be approved as certified by the Chief Clerk. There being no objection, it was so ordered.

MESSAGES FROM THE GOVERNOR

A letter dated April 25, 1991, was read stating that, in accordance with AS 39.05.080 and Article III Sections 25 and 26 of the Alaska Constitution, the Governor submits the following names for legislative confirmation of appointment to the positions noted, and the Speaker made the following committee referrals:

## State Commission on Human Rights

James S. Hamilton - Skagway  
Term began 4/23/91, expires 1/31/96

was referred to the State Affairs Committee.

## Alaska Oil and Gas Conservation Commission

Russell Douglass - Anchorage  
Term began 11/26/90, expires 12/31/94

was referred to the Resources Committee.

## Board of Pharmacy

Chris E. Coursey - Anchorage  
Term began 4/23/91, expires 4/1/95

was referred to the Labor & Commerce Committee.

Resumes for the appointments were attached.

A letter dated February 25, 1991, was read stating that the following name was withdrawn from the February 19, 1991, request for legislative confirmation:

## Personnel Board

Judge Seaborn Buckalew - Anchorage  
(Term 7/11/90 - 6/20/96)  
Withdrawn effective 4/25/91

A copy of the letter was sent to the State Affairs Committee.

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CSSB 213(FIN)

"An Act relating to State v. Amerada Hess with respect to transfers to the dividend fund; and providing for an effective date."

was read the first time and referred to the Judiciary and Finance Committees.

CSSB 263(JUD)

CS FOR SENATE BILL NO. 263 (JUDICIARY) by the Judiciary Committee, entitled:

"An Act relating to oil discharge prevention and contingency plans and financial responsibility requirements for oil operations; and providing for an effective date."

was read the first time and referred to the Resources Committee.

SB 284

SENATE BILL NO. 284 by Senator Eliason, entitled:

"An Act amending ch. 195, SLA 1990, to revise the basis for computing the additional refund due certain municipalities based on fisheries business activities within them; and providing for an effective date."

was read the first time and referred to the Community & Regional Affairs Committee.

COMMUNICATIONS

Letters dated April 24, 1991, and May 13, 1991, were received from the Judiciary Committee in reference to a letter from the Governor dated April 26, 1991, regarding certain appointments to Boards and Commissions. The letters appear below.

The following letter, dated April 24, 1991, was received:

"Dear Mr. Speaker:

On February 4th and 20th, 1991, the House Judiciary Committee held hearings to review the governor's power to appoint and remove members of the Alaska Public Utilities

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Commission. Based on the information and arguments presented during the hearings and on materials provided by The Attorney General and Legislative Counsel the committee made a number of findings applicable to the subject.

The House Judiciary Committee recommends against the confirmation of the appointment of Don Schroer to the consumer seat on the Alaska Public Utilities Commission and for the confirmation of Peter Sokolov to the engineering seat. The committee wishes to make no judgment on Mr. Schroer's qualifications for office. The reasons for our recommendation against his appointment are set forth below.

Governor Cowper reappointed Peter Sokolov to the commission upon the October 31, 1990, expiration of his previous term. The reappointment was made on November 8, 1990, for a six year term on the commission under Article III, Section 26, of the Alaska Constitution and AS 42.05.020. (Footnote #1) A copy of Mr. Sokolov's letter of appointment was sent to the Chief Clerk of the House of Representatives and to the Senate Secretary.

Although Governor Hickel later attempted to appoint Don Schroer to the APUC (Footnote #2) and to remove Mr. Sokolov from the commission, AS 42.05.035 clearly states that an APUC commissioner may only be removed from office "by and with the consent of a majority of the legislature."

Because the governor did not request that the legislature consent to the removal of Mr. Sokolov and because he was reappointed by former Governor Cowper in the manner provided by the constitution and by statute, our conclusion is that Mr. Sokolov is presently a member of the commission and his confirmation is legally before the Alaska Legislature. (Footnote #3)

The House Judiciary Committee finds that the governor should have submitted a request for legislative consent to the removal of Peter Sokolov as an APUC Commissioner. (Footnote #4)

The Alaska Public Utilities Commission does not now have a vacancy as defined by AS 42.05.030. A replacement appointee cannot be considered until the original appointee is removed as provided by law. (Footnote #5)

In addition to the above, another issue was discussed by the committee on April 17, 1991, and the committee found the following:

Peter Sokolov was reappointed, under AS 42.05.040, to the engineering seat on the APUC for a six year term upon the expiration of his first term by Governor Cowper. Mr. Sokolov took office and exercised the duties of his office until his purported dismissal by Governor Hickel.

Mark Foster was appointed and confirmed by the legislature to a consumer seat for a six year term approximately four years ago. On January 23, 1991, Governor Hickel attempted

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to remove Mr. Foster from his consumer seat and appoint him to the engineering seat which was opened up by Mr. Sokolov's dismissal. (Footnote #6) The governor then appointed Don Schroer to Mr. Foster's consumer seat.

Since the legislature has the constitutional authority to designate by law the qualifications for appointees to certain boards and commissions (Footnote #7), and since doing so has the effect of designating seats for individuals with those qualifications (Footnote #8), the switching of a board member from one seat to another constitutes the removal and reappointment of the member. (Footnote #9) To allow the switching of seats would prevent the legislature from exercising its constitutional duty to review the appointments of the governor to ensure that qualified people are being placed in control of important government function. (Footnote #10)

We now conclude that the switching of an appointee, who was confirmed because he possessed certain qualifications for office, to another position requiring different qualifications constitutes a removal from the first position and a new appointment to the other position, which necessitates confirmation by the legislature to that other position. (Footnote #11)

Mr. Schroer's name is not properly before the legislature because there is no vacancy on the commission. (Footnote #12) Therefore, we find that only Mr. Sokolov's name is before the legislature for confirmation. (Footnote #13) Even if Mr. Sokolov had been properly removed from the engineering seat, Mr. Schroer could not be nominated to fill Mr. Sokolov's position because he does not possess the requisite engineering qualifications.

Attached you will find copies of the relevant constitutional and statutory provisions, as well as copies of opinions from our legal counsel and the Department of Law which bear on the issues raised by Mr. Sokolov's case.

Sincerely,

/s/

Representative Dave Donley,  
Chair  
House Judiciary Committee

**Footnotes:**

1. See copy of November 8, 1990, letter from Governor Cowper to Peter Sokolov; copy of Art. III, Sec. 26, Alaska Constitution; AS 42.05.020.
2. See copy of January 23, 1991, letter from Peter Sokolov to Don Tanner.
3. Luckhaupt, "Status of governor's appointment to APUC", December 26, 1990, pp. 2 - 4.

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4. Id. at p. 2.
5. Id. at p. 4.
6. See copy of April 9, 1991, letter from Mark Foster to Representative Donley.
7. Luckhaupt, "Legislative Designation of Qualifications for Members of Boards and Commission", February 19, 1991, pp. 3 - 4; April 23, 1981, informal opinion of the Attorney General from R. Pegues to Helen Beirne; August 13, 1979, informal opinion of the Attorney General from R. Pegues to Governor Hammond; May 24, 1988, bill review letter regarding HCS CSSB 192(RES) from G.B. Schaible to Governor Cowper.
8. Luckhaupt, "Governor's Power to Switch APUC Seats", March 1, 1991, pp. 1 - 2.
9. Id. at pp. 1 - 2.
10. Id. at p. 2.
11. Id. at pp. 1 - 2.
12. "Status of governor's appointment to APUC", at pp. 1-2.
13. Id. at p. 4."

The following letter dated May 13, 1991, was received:

"Dear Representative Grussendorf:

In a letter dated April 26, 1991, the governor sent the legislature a list of names of board and commission members that were 'intentionally omitted from the February 19, 1991 request, and are hereby withdrawn from request for legislative confirmation...'

Most of the names were those of members of professional regulatory boards who 'serve at the pleasure of the governor' under AS 08.01.020, and thus are removable at will.

However, the governor is also attempting to withdraw the appointments of five of the nine members of the Professional Teaching Practices Commission who were appointed by Governor Cowper in July of last year. This commission is charged with developing criteria for professional teaching practices in ethical and professional performance and contractual obligations and enforcing those criteria.

AS 14.20.430 provides that a member of the P.T.P.C. 'may be removed by the governor for misconduct, malfeasance or nonfeasance in office, or incapacity.' None of the members that the governor is attempting to remove have been accused of misconduct, malfeasance, nonfeasance or incapacity. This

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is a nonpolitical board, charged with policing the teaching profession. The governor's request not to confirm them treats them as if they are serving at the pleasure of the governor, in clear contravention of statute.

In another such situation, AS 39.25.060 creates the State Personnel Board and subsection (c) states that a 'board member may be removed by the governor only for cause.' The governor is attempting to withdraw the appointments of Eleanor Andrews and Seaborn Buckalew, both of whom were appointed in July of last year, both of whom have been and are still serving on the board, and neither of whom are being removed for cause.

Staff has contacted Ms. Andrews and Judge Buckalew as to their desires to remain on the board. Both of them stated that they did not intend to resign and both wished to remain on the board.

The Personnel Board is another board which should be non-political. The board deals with amendments to the personnel rules, considers extensions of the partially exempt and classified service, hears employee appeals, and appoints and reviews the findings of hearing officers under the Executive Branch Ethics Act, and issues findings and decisions regarding violations of the Code of Ethics.

Even more critical when considering the potential politicization of this board is the fact that the Personnel Board is charged with reviewing and investigating ethics complaints against the governor and lieutenant governor.

There are two basic ways to remove an unconfirmed appointee of a previous governor. If the appointee serves at the pleasure of the governor, the person may simply be removed. If the appointee may be removed for cause, the governor must state the cause for removal. If the appointee may be removed only with the consent of the legislature, the governor must request the legislature's consent to the removal. The other way, which is what is being attempted here, is to withdraw the names of unconfirmed appointees and have the legislature adjourn without considering their confirmation. Not considering the confirmation of an appointee is tantamount to a 'no' vote on the appointee's confirmation by the body.

The fact that the governor is purposely not submitting certain names for confirmation does not mean that the legislature may not consider those names. The legislature may take 'legislative notice' of the lawful appointment of art. III, sec. 25 and 26 appointees of a governor, even absent a communication from the governor regarding those appointees, and may properly consider their confirmation or rejection. 'To hold otherwise would allow the governor to prevent the legislature from exercising its constitutional confirmation power at his whim, caprice, or neglect and would render the confirmation function a nullity.' (See attached February 5, 1991, Legislative Affairs Legal Services memorandum from Gerald Luckhaupt to Representative Donley.)

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The House Judiciary Committee recommends that the five members of the Professional Teaching Practices Commission, the two members of the Personnel Board, and the member of the Alaska Public Utilities Commission whose names were withdrawn from legislative consideration by the governor, be voted on by the joint body.

The committee further advises that any other individual nominee who has not been removed by the governor is available for confirmation by motion of any member of either body.

Sincerely,

/s/

Representative Dave Donley"

The Judiciary Committee recommends legislative consideration of the following names for appointment to positions noted:

**Professional Teaching Practices Commission**

Bonnie L. Barber

Gerald A. Clancy

Claudia S. Dybdahl

Betty "Jean" Krause

Mary Lou Purvis

were referred to the Health, Education & Social Services Committee.

**Personnel Board**

Eleanor Andrews

was referred to the State Affairs Committee.

The following letter dated April 26, 1991 was received from the Governor:

"Dear Representative Grussendorf:

This letter confirms that the following names were intentionally omitted from the February 19, 1991 request and are hereby withdrawn from request for legislative confirmation of appointment to the positions noted below:

**Alaska State Board of Public Accountancy**

Hunt, Sandra S. - Homer  
Term began 6/15/90 expires 4/25/92

Post, Barbara - Eagle River  
Term began 9/28/90 expires 4/25/92

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**State Board of Registration for Architects, Engineers,  
and Land Surveyors**

Luke, Jacquelyn R. - Anchorage  
Original term began 10/30/86 reappointed 6/15/90  
expires 7/1/94

**Board of Governors of the Alaska Bar**

Filler, Stan - Sitka  
Term began 6/15/90 expires 6/30/93

**Big Game Commercial Services Board**

Doddy, Michael J. - Eagle River  
Original term began 8/29/89 reappointed 6/15/90  
expires 6/30/94

**Board of Chiropractic Examiners**

Chivers, Betsy - Barrow  
Original term began 6/7/89 reappointed 6/15/90  
expires 7/15/94

Davis, D.C., Carol J. - Fairbanks  
Original term began 8/6/86 reappointed 6/15/90  
expires 7/15/94

**Board of Clinical Social Work Examiners**

Patrick Riley, Colleen C. - Anchorage  
Term began 6/15/90 expires 7/1/94

Storts, Libby F. - Sitka  
Original term began 1/13/89 reappointed 6/15/90  
expires 7/1/94

**Board of Dispensing Opticians**

Camero, Mabelita - Anchorage  
Original term began 7/14/89 reappointed 5/14/90  
expires 6/14/94

May, Barbara J. - Douglas  
Original term began 10/30/86 reappointed 6/15/90  
expires 6/14/94

**Board of Electrical Examiners**

Boyd, Steven - Anchorage  
Original term began 1/17/89 reappointed 6/15/90  
expires 7/1/94

**Board of Marine Pilots**

Taylor, M. Paul - Skagway  
Original term began 10/11/86 reappointed 6/15/90  
expires 6/1/94

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**Board of Mechanical Examiners**

Rutland, Eugene - Fairbanks  
Original term began 1/13/89 reappointed 5/14/90  
expires 6/9/94

**Board of Nursing Home Administrators**

Nordale, Sheila - Fairbanks  
Term began 10/8/90 expires 10/1/92

Vowell Jr., John - Wrangell  
Original term began 8/19/88 reappointed 9/28/90  
expires 10/1/94

**Board of Examiners in Optometry**

Hammond, O.D., Robert P. - Fairbanks  
Term began 7/5/90 expires 6/15/94

Statter, Anita - Juneau  
Term began 8/30/90 expires 6/15/94

**Personnel Board**

Andrews, Eleanor - Anchorage  
Term began 7/26/90 expires 6/20/92

**State Physical Therapy and Occupational Therapy B**

Hayden, Avis C. - Juneau  
Term began 9/28/90 expires 9/1/94

**Professional Teaching Practices Commission**

Barber, Bonnie L. - Fairbanks  
Original term began 9/8/87 reappointed 7/5/90  
expires 7/1/93

Clancy, Gerald A. - Naknek  
Term began 7/5/90 expires 7/1/93

Dybdahl, Ph.D., Claudia S. - Anchorage  
Original term began 9/8/87 reappointed 7/5/90  
expires 7/1/93

Krause, Betty "Jean" - Palmer  
Term began 10/8/90 expires 7/1/91

Purvis, Mary Lou - Juneau  
Term began 7/30/90 expires 7/1/91

**Board of Psychologist and Psychological Associate Examiners**

Green, Ph.D., Kenneth D. - Fairbanks  
Original term began 1/19/89 reappointed 6/15/90  
expires 7/1/94

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Nays: 33

Excused: 0

Absent: 1

And so, the appointment was not confirmed.

Senator Halford moved and asked unanimous consent that the appointment of Don Schroer to the Alaska Public Utilities Commission be confirmed.

Representative Donley objected.

The question being: "Shall the appointment of Don Schroer to the Alaska Public Utilities Commission be confirmed?" The roll was taken with the following result:

Nays:	10	Sturgulewski, Zharoff, Adams, Cotten, Duncan, Hoffman, Kerttula, Menard, Pearce, Pourchot
Absent:	2	Fahrenkamp, Jones

SCHROER

HOUSE

Yeas:	15	Baker, Barnes, Choquette, Gonzales, Hanley, Leman, Mackie, Martin, M.A.Miller, M.W.Miller, G.Phillips, R.Phillips, Sharp, Taylor, Zawacki
Nays:	25	Boyer, Brown, Bruckman, Carney, Davidson, B.Davis, C.Davis, Donley, Ellis, Finkelstein, Foster, Gruenberg, Grussendorf, Hudson, Ivan, Jacko, Koponen, Kubina, Larson, Lincoln, MacLean, Moyer, Navarre, Parnell, Ulmer
Excused:	0	
Absent:	0	

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TOTAL

Yeas: 23

Nays: 35

Excused: 0

Absent: 2

And so, the appointment was not confirmed.

Senator Halford moved and asked unanimous consent that the joint session adjourn. There being no objection, the joint session adjourned at 5:42 p.m.

**EXECUTIVE ORDERS**

## EO 78

Referrals	10	1/21
Engrossment	549	3/21

## EO 79

Referrals	11	1/21
ITT recommendation	107	1/30
Engrossment	549	3/21

## Proposed EO

Letter from governor	52	1/23
Response from House and Senate	52	1/23

**GOVERNOR'S APPOINTMENTS FOR LEGISLATIVE  
CONFIRMATION**

## Lieutenant Governor Designee

Department of Administration, Commissioner	1436	5/15
Confirmed	1484	5/16

## COMMISSIONERS:

## Department of Administration

Referral to State Affairs	266	2/20
State Affairs Committee recommendations	1410	5/15
Confirmed	1483	5/16

## Department of Commerce &amp; Economic Development

Referral to Labor & Commerce	267	2/20
L&C Committee recommendations	720	4/8
Confirmed	1484	5/16

## Department of Community &amp; Regional Affairs

Referral to Community & Regional Affairs	267	2/20
CRA recommendations	960	4/26
Confirmed	1485	5/16

Department of Corrections		
Referral to Health, Education and Social Services and Judiciary	267	2/20
Judiciary Committee recommendations	862	4/19
Confirmed	1485	5/16
Department of Environmental Conservation		
Referral to Resources	267	2/20
Resources Committee recommendations	1135	5/6
Confirmed	1485	5/16
Department of Fish & Game		
Referral to Resources	267	2/20
Resources Committee recommendations	631	3/29
Confirmed	1486	5/16
Department of Health & Social Services		
Referral to Health, Education and Social Services	267	2/20
HES Committee recommendations	719	4/8
Confirmed	1487	5/16
Department of Law		
Referral to Judiciary	268	2/20
Judiciary Committee recommendations	1034	5/1
Confirmed	1492	5/16
Department of Labor		
Referral to Labor & Commerce	267	2/20
L&C Committee recommendations	1411	5/15
Confirmed	1487	5/16
Department of Military & Veterans Affairs		
Referral to House Special Committee on Military & Veterans' Affairs and State Affairs	268	2/20
MLV Committee recommendations	460	3/13
State Affairs Committee recommendations	479	3/15
Confirmed	1488	5/16

## Alaska Air National Guard

Referral to House Special Committee on Military & Veterans' Affairs and State Affairs	268	2/20
MLV Committee recommendations	460	3/13
State Affairs Committee recommendations	479	3/15
Confirmed	1493	5/16

## Alaska Army National Guard

Referral to House Special Committee on Military & Veterans' Affairs and State Affairs	382	3/6
MLV Committee recommendations	460	3/13
State Affairs Committee recommendations	479	3/15
Confirmed	1493	5/16

## Department of Natural Resources

Referral to Resources	268	2/20
Resources Committee recommendations	1264	5/10
Confirmed	1489	5/16

## Department of Public Safety

Referral to State Affairs	268	2/20
State Affairs Committee recommendations	999	4/29
Confirmed	1490	5/16

## Department of Revenue

Referral to Finance	268	2/20
Finance Committee recommendations	1135	5/6
Confirmed	1491	5/16

## Department of Transportation and Public Facilities

Referral to Transportation	268	2/20
Transportation Committee recommendations	412	3/8
Confirmed	1491	5/16

## BOARDS AND COMMISSIONS:

## Letters regarding appointments

Judiciary Committee	1348	5/14
Judiciary Committee	1351	5/14
Governor	1353	5/14
Speaker	1567	5/18
Governor	1580	5/18

## Alaska Public Offices Commission

Referral to State Affairs	772	4/12
State Affairs Committee recommendations	1410	5/14
Objections to confirmation	1500	5/16
Anderson, not confirmed	1501	5/16

## Alaska Public Utilities Commission

Referral to the Labor & Commerce and Judiciary	436	3/11
L&C Committee recommendations	719	4/8
Objections to confirmation	1500	5/16
Schroer, not confirmed	1502	5/16
Governor's communication	1580	5/18
Sokolov, not confirmed	1581	5/18
Schroer, rescind previous action	1583	5/18
Seat transfer - Foster	1584	5/18
Schroer, confirmed	1585	5/18

## Architects, Engineers, and Land Surveyors,

## State Board of Registration for

Referral to Labor & Commerce	269	2/20
Confirmed	1493	5/16

## Big Game Commercial Services Board

Referral to Resources	269	2/20
Resources Committee recommendations	507	3/18
Confirmed	1493	5/16

## Education, Board of

Referral to Health, Education and Social Services	269	2/20
HES Committee recommendations	999	4/29
Confirmed, except Phelps	1493	5/16
Phelps, not confirmed	1495	5/16

Fisheries, Board of		
Referral to Resources	269	2/20
Referral to Resources	322	2/27
Resources Committee recommendations	686	4/5
Referral to Resources	742	4/10
Resources Committee recommendations	1114	5/3
Confirmed, except Croxton, Wardwell	1494	5/16
Croxton, not confirmed	1496	5/16
Wardwell, not confirmed	1497	5/16
Game, Board of		
Referral to Resources	269	2/20
Resources Committee recommendations	507	3/18
Objections to confirmation	1494	5/16
Confirmed	1498	5/16
Human Rights, State Commission of		
Referral to State Affairs	270	2/20
Withdrawal of appointment	742	4/10
Referral to State Affairs	958	4/26
State Affairs Committee recommendations	1225	5/9
Confirmed	1500	5/16
Judicial Conduct, Commission on		
Referral to Judiciary	270	2/20
Withdrawal of appointment	382	3/6
Judicial Council		
Referral to Judiciary	772	4/12
Judiciary Committee recommendations	1411	5/15
Confirmed	1500	5/16
Labor Relations Agency, Alaska		
Referral to Labor & Commerce	269	2/20
Confirmed	1500	5/16
Oil and Gas Conservation Commission, Alaska		
Referral to House Special Committee on Oil & Gas and Resources	270	2/20
Referral to Resources	958	4/26
Resources Committee recommendations	1264	5/10
O&G recommendations	1272	5/10
Confirmed	1500	5/16

Personnel Board		
Referral to State Affairs	270	2/20
Withdrawal of appointment	958	4/26
Appointment recommendation by Judiciary Committee	1353	5/14
Referral to State Affairs	1353	5/14
State Affairs Committee recommendations	1410	5/15
Governor's communication	1580	5/18
Buckalew, confirmed	1586	5/18
Andrews, confirmed	1586	5/18
Pharmacy, Board of		
Referral to Labor & Commerce	958	4/26
Confirmed	1494	5/16
Professional Teaching Practices Commission		
Appointment recommendations by Judiciary Committee	1353	5/14
Referral to Health, Education and Social Services	1353	5/14
HES Committee recommendations	1457	5/16
Governor's communication	1580	5/18
Confirmed	1581	5/18
Real Estate Appraisers, Board of Certified		
Referral to Labor & Commerce	269	2/20
Confirmed	1494	5/16
Regents, University of Alaska Board of		
Referral to Health, Education and Social Services	78	1/25
HES Committee recommendations	894	4/19
Objections to confirmation	1499	5/16
Confirmed	1501	5/16

**REPORTS AND COMMUNICATIONS****DEPARTMENT OF ADMINISTRATION:**

Alaska Public Broadcasting Commission Long Range Plan, 1991 edition (as required by AS 44.21.266(12))	960	4/26
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AFTER RECESS

JOINT SESSION IN THE HOUSE

Speaker Grussendorf called the House to order and, in accordance with the Uniform Rules, turned the gavel over to President Eliason who called the joint session to order at 11:40 a.m.

The purpose of the joint session was to consider confirmations.

The following letter dated May 18, 1991, was received from Governor Hickel to Speaker Grussendorf, and appears below:

"Dear Mr. Speaker:

During a joint session of the legislature held on May 16, 1991, members of the House of Representatives asserted that the names of persons who were appointed to office by former Governor Cowper were properly before the legislature for confirmation. As a matter of comity, I am referring the following persons for consideration by the joint session of the first regular session of the Seventeenth Alaska State Legislature called for May 18, 1991:

Personnel Board

Judge Seaborn Buckalew - Anchorage

Professional Teaching Practices Commission

Bonnie L. Barber - Fairbanks

Gerald A. Clancy - Naknek

Claudia S. Dybdahl, Ph.D. - Anchorage

Betty "Jean" Krause - Palmer

Mary Lou Purvis - Juneau

Personnel Board

Eleanor Andrews - Anchorage

Alaska Public Utilities Commission

Peter Sokolov - Anchorage

This act of referral, is not a concession that I lack the power to withdraw names of persons appointed by my predecessor in office. I am merely showing respect for those in the legislature who desire to express their

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preference for the appointment of a person listed above. I reserve the right to contest the title of office of any of these persons who are subsequently confirmed by the joint session.

Sincerely,

/s/

Walter J. Hickel  
Governor"

Senator Halford moved and asked unanimous consent that the following appointments be confirmed:

**Professional Teaching Practices Commission**

Bonnie L. Barber - Fairbanks

Gerald A. Clancy - Naknek

Claudia S. Dybdahl, Ph.D. - Anchorage

Betty "Jean" Krause - Palmer

Mary Lou Purvis - Juneau

There being no objection, the appointments were confirmed.

Senator Halford moved and asked unanimous consent that the following appointment be confirmed:

**Alaska Public Utilities Commission**

Peter Sokolov - Anchorage

Objections were heard.

The question being: "Shall the appointment of Peter Sokolov to the Alaska Public Utilities Commission be confirmed?"  
The roll was taken with the following result:

SOKOLOV

HOUSE

Yeas:	15	Boyer, Brown, Bruckman, Carney, Davidson, B.Davis, C.Davis, Donley, Ellis, Finkelstein, Gruenberg, Koponen, Moyer, Navarre, Ulmer
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Nays: 25 Baker, Barnes, Choquette,  
Foster, Gonzales, Grussendorf,  
Hanley, Hudson, Ivan, Jacko, Kubina,  
Larson, Leman, Lincoln, Mackie,  
MacLean, Martin, M.A. Miller,  
M.W. Miller, Parnell, G. Phillips,  
R. Phillips, Sharp, Taylor, Zawacki

Excused: 0

Absent: 0

SOKOLOV

SENATE

Yeas: 3 Sturgulewski, Menard, Pourchot

Nays: 15 Shultz, Uehling, Zharoff, Adams,  
Collins, Cotten, Duncan, Fischer,  
Halford, Hoffman, Jones, Kerttula,  
Pearce, Rodey, Eliason

Absent: 2 Fahrenkamp, Frank

TOTAL

Yeas: 18

Nays: 40

Excused: 0

Absent: 2

And so, the appointment was not confirmed.

Senator Halford moved and asked unanimous consent that the joint session rescind action in failing to confirm Don Schroer to the Alaska Public Utilities Commission.

Objections were heard.

Representative Ellis rose to point of order stating that the motion was not properly before the joint session.

Senator Halford requested a ruling on the availability of the rescinding motion.

President Eliason ruled that the motion was properly before the joint session.

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President Eliason cautioned the joint session to proceed in order.

The question being: "Shall the joint session rescind action in failing to confirm the appointment of Don Schroer to the Alaska Public Utilities Commission?" The roll was taken with the following result:

## RESCIND

## SENATE

Yeas:	18	Sturgulewski, Uehling, Zharoff, Adams, Collins, Cotten, Duncan, Fischer, Frank, Halford, Jones, Kerttula, Menard, Pearce, Pourchot, Rodey, Shultz, Eliason
Nays:	1	Hoffman
Absent:	1	Fahrenkamp

## RESCIND

## HOUSE

Yeas:	21	Baker, Barnes, Choquette, Foster, Gonzales, Hanley, Hudson, Ivan, Jacko, Leman, Lincoln, Mackie, MacLean, Martin, M.A. Miller, M.W. Miller, G. Phillips, R. Phillips, Sharp, Taylor, Zawacki
Nays:	19	Boyer, Brown, Bruckman, Carney, Davidson, B. Davis, C. Davis, Donley, Ellis, Finkelstein, Gruenberg, Grussendorf, Koponen, Kubina, Larson, Moyer, Navarre, Parnell, Ulmer
Excused:	0	
Absent:	0	

## TOTAL

Yeas:	39
Nays:	20
Excused:	0
Absent:	1

And so, the motion passed.

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Senator Halford moved and asked unanimous consent that the following appointment be confirmed:

Alaska Public Utilities Commission

Don Schroer

Representative Finkelstein objected.

Representative Barnes rose to a point of order regarding impugning integrity.

President Eliason advised the member to proceed in order.

Representative Navarre moved and asked unanimous consent to postpone the previous motion and withdrew the motion.

Senator Halford moved and asked unanimous consent that the motion to confirm Don Schroer be withdrawn. There being no objection, it was so ordered.

Representative Donley moved and asked unanimous consent that the joint session not object to the transfer of Mark Foster from a consumer seat to an engineering seat on the Alaska Public Utilities Commission.

There being no objection, it was so ordered.

Senator Halford moved and asked unanimous consent that the following appointment be confirmed:

Alaska Public Utilities Commission

Don Schroer

Representative Ellis objected.

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The question being: "Shall the appointment of Don Schroer to the Alaska Public Utilities Commission be confirmed?"  
The roll was taken with the following result:

## SCHROER

## HOUSE

Yeas: 38 Baker, Barnes, Boyer, Brown,  
Carney, Choquette, Davidson,  
B.Davis, C.Davis, Donley,  
Finkelstein, Foster, Gonzales,  
Gruenberg, Grussendorf, Hanley,  
Hudson, Ivan, Jacko, Koponen,  
Kubina, Larson, Leman, Lincoln,  
Mackie, MacLean, Martin, M.A.Miller,  
M.W.Miller, Moyer, Navarre, Parnell,  
G.Phillips, R.Phillips, Sharp,  
Taylor, Ulmer, Zawacki

Nays: 2 Bruckman, Ellis

Excused: 0

Absent: 0

Ulmer changed from "Nay" to "Yea".  
Koponen changed from "Nay" to "Yea".

## SCHROER

## SENATE

Yeas: 19 Uehling, Zharoff, Adams, Collins,  
Cotten, Duncan, Fischer, Frank,  
Halford, Hoffman, Jones, Kerttula,  
Menard, Pearce, Pourchot, Rodey,  
Shultz, Sturgulewski, Eliason

Nays: 0

Absent: 1 Fahrenkamp

## TOTAL

Yeas: 57

Nays: 2

Excused: 0

Absent: 1

And so, the appointment was confirmed.

RELEASE AND SETTLEMENT AGREEMENT

Michael M. Whitehead was appointed to a position on the Alaska Commercial Fisheries Entry Commission by Governor Hammond on October 16, 1982, for a term expiring July 1, 1985. In a letter to Mr. Whitehead dated February 28, 1983, Governor Sheffield advised Mr. Whitehead that he had decided to appoint another person to fill the term to which Mr. Whitehead had previously been appointed by Governor Hammond. In that letter Governor Sheffield thanked Mr. Whitehead for his service to the public interest, and stated that he had been enormously helpful to the state during his tenure as Commissioner. On or about March 1, 1983 the Governor's office caused to be circulated to all members of his office, the Lieutenant Governor and all members of his cabinet a memorandum stating that the Governor had chosen to appoint another person to Mr. Whitehead's position on the Commission.

Mr. Whitehead disputed the Governor's power to remove him from office. Specifically, Mr. Whitehead contended that the Governor was required by AS 39.05.080 to submit his name to the Legislature within 30 days of its convening. He further contended that, by virtue of AS 16.43.030(a), he could be removed from office only for "cause." The Governor has acknowledged that no "cause" exists for Mr. Whitehead's removal; indeed, as already stated, Mr. Whitehead's performance of his duties as Commissioner has been outstanding. The fundamental basis for Mr. Whitehead's claim is that, had the Governor removed him from office as planned, he would have suffered serious emotional and mental injury and despite the Governor's commendation of his performance in office, he would nevertheless have suffered reputational harm.

The Governor, on the other hand, maintains that, despite Mr. Whitehead's outstanding job performance, he has the power under law to withdraw Mr. Whitehead's interim recess appointment to the Commission by failing to transmit Mr. Whitehead's name to the Legislature for confirmation. In fact, on or about March 23, 1983 the Governor appointed Mr. Richard Listowski to Mr. Whitehead's position and sent Mr. Listowski's name to the Legislature for confirmation, and on June 8, 1983 the Legislature in joint session confirmed Mr. Listowski's appointment.

But for this settlement agreement, the Governor would have taken steps to remove Mr. Whitehead from the Commission, forcing a judicial determination of the dispute. In order to avoid the expense and uncertainty of litigation and in consideration of the promises contained herein, the Governor and Mr. Whitehead agree to settle this dispute on the following terms:

ATTACHMENT 2

1. The State of Alaska will pay to Mr. Whitehead the sum of Seventy Five Thousand and 00/100 Dollars (\$75,000.00), receipt of which is hereby acknowledged.

2. Mr. Whitehead's employment on the Alaska Commercial Fisheries Entry Commission ends as of the close of business on Thursday, June 16, 1983, and he will receive all salary and benefits that will normally accrue as a result of his employment.

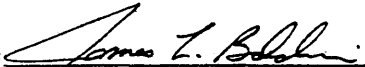
3. Mr. Whitehead hereby waives any claim he has to a position on the Alaska Commercial Fisheries Entry Commission.

4. Mr. Whitehead and the State of Alaska hereby release and forever discharge each other of and from any and all claims, including claims arising from the allegedly tortious conduct described in this agreement, whether known or unknown, foreseen or unforeseen, which they have now or which may hereafter accrue on account of the events set forth in this agreement.

DATED at Juneau, Alaska this 16<sup>th</sup> day of June, 1983.

  
\_\_\_\_\_  
Michael M. Whitehead

ATTORNEY GENERAL  
STATE OF ALASKA

By:   
\_\_\_\_\_  
James L. Baldwin  
Assistant Attorney General

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 26, 1993

The Honorable William K. Williams  
House Resource Committee  
State Capitol, Room 128  
Juneau, Ak 99801-1182

Re: Governor's Appointment  
Authority

Dear Representative Williams:

You have requested comment on the following issues: (1) the authority of the governor to submit or not submit to the legislature for confirmation, the name of an interim appointee to a board (in this case, an appointee to the Board of Game); and (2) whether the legislature has the power to confirm an appointee whose name has not been presented to it by the governor.

We have reviewed our previous opinions on these issues and the opinions prepared by legislative counsel. While it is apparent there is varying authority on these issues, we reaffirm our previous advice.

The Department of Law has consistently advised that a newly elected governor may withdraw interim appointments made by a preceding governor. The rationale for this position also applies to the withdrawal of an interim appointment made by the governor who made that interim appointment.

The Department of Law has also consistently advised that absent the governor's transmittal to the legislature of the name of the governor's appointee, the legislature is powerless to confirm the appointee interim. Similarly, the legislature only has power to confirm the name of an appointee that has been transmitted by the governor.

Copies of our previous opinions and memoranda on these issues are attached, specifically: 1979 Inf. Op. Att'y Gen. (Dec. 19; A.G. file no. 366-335-80); 1983 Inf. Op. Att'y Gen. (Feb. 3; A.G. file no. 366-391-83); Memorandum from James L. Baldwin, Assistant Attorney General, to Don Tanner, Director, Boards and Commissions, dated April 30, 1991; Letter from James L. Baldwin, Assistant Attorney General, to Dave Donley, Chairman, House Judiciary Committee, dated February 15, 1991 (without attachments).

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

- 1031 WEST 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-5100  
FAX: (907) 276-3697
- KEY BANK BUILDING  
100 CUSHMAN ST., SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
PHONE: (907) 451-2811  
FAX: (907) 451-2846
- P.O. BOX 110300 - STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
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Hon. William K. Williams, AK St Rep.  
AK House of Representatives

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As discussed in our prior opinions, we construe the appointment process for recess appointments to consist of the following steps:

1. appointment by the governor (i.e., interim appointment),
2. submission of the name of the interim appointee to the legislature, and confirmation (or not),
3. consideration of the submitted appointee by the legislature.

Thus, pending submittal and confirmation, the governor's appointment is interim in nature only. Until confirmation by the legislature, the appointment process is incomplete and the appointee has no vested right to the office.

With respect to the automatic presentment issue, we would refer to the advice rendered by this office in 1991:

The answer to this question is arrived at by applying the plain meaning of AS 39.05.080. That section directly implements article III, section 27 of the Alaska Constitution (recess appointments). For recess appointments, section 080 requires a transmittal "within 30 days after convening in regular session." Section 080 requires the governor to "present" appointments. It is not reasonable to interpret this provision so that an appointment can be "deemed" to be presented.

February 15, 1991, letter from Assistant Attorney General Baldwin to Chairman Donley, at page 2.

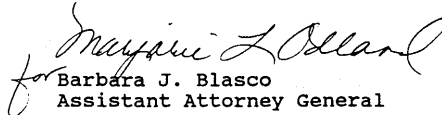
Hon. William K. Williams, AK St Rep.  
AK House of Representatives

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As Mr. Jack Didrickson's name was not presented to the legislature, his name is not before the legislature for confirmation. Rather, Governor Hickel has presented the name of Mr. Ernest Polley for confirmation. Accordingly, Mr. Polley is the person before the legislature for confirmation. If Mr. Polley is not confirmed, the office will become vacant the day after the legislature adjourns.

Sincerely,

CHARLES E. COLE  
ATTORNEY GENERAL

  
for Barbara J. Blasco  
Assistant Attorney General

BJB:kh

cc: Tuckerman Babcock, Director of Boards and Commissions  
Kris Lethin, Legislative Liaison

Attachments

WALTER J. HICKEL, GOVERNOR

REPLY TO:

**DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

February 15, 1991

— 1031 W 4th AVENUE SUITE 20  
ANCHORAGE, ALASKA 99501  
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FAX: (907) 463-5295

The Honorable Dave Donley, Chairman  
House Judiciary Committee  
Alaska House of Representatives  
P O Box V  
Juneau, Alaska 99811

Re: Second follow-up on  
committee testimony  
regarding governor's  
power of appointment

Dear Mr. Chairman:

This letter serves as my second response to follow up on information asked of this office during my testimony before the House Judiciary Committee on February 5, 1991.

Set out below is our response to questions not previously answered in my memo of February 7, 1991:

1) You asked what our legal authority is for the assertion that the governor has the discretion to withdraw and substitute the name of another person to the legislature to confirm the appointment to fill a vacant office.

It is generally held that uncompleted appointments are subject to withdrawal. Petition of Com'n on Governorship of Cal. v. Curb, 603 P.2d 1357, 1365 (Cal. 1979); In re Advisory Opinion to the Governor, 247 So.2d 428 (Fla. 1971) (tab #1). The appointment is not complete until the legislature confirms and the governor issues a certificate of permanent appointment. Burke v. Schmidt, 191 N.W.2d 281, 284 (S.D. 1971) (tab #2). You will note from our 1979 opinion that we construe the appointment process for recess appointments to consist of a nomination by the governor, transmittal to the legislature, consideration by the legislature in joint session which may or may not result in confirmation of the nominee and, finally, the issuance of a commission by the governor. Attached for your information are copies of the Minutes of the Constitutional Convention which contain the discussion of the interim appointment process I referred to in my testimony (tab #3).

Representative Dave Donley, Chm,  
House Judiciary Committee  
Re: Second follow-up on committee  
testimony regarding governor's  
power of appointment

February 15, 1991  
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2) You asked for legal authority for our assertion that the legislature is powerless to confirm an appointee until that appointee's name is transmitted to it.

The answer to this question is arrived at by applying the plain meaning of AS 39.05.080. That section directly implements article III, section 27 of the Alaska Constitution (recess appointments). For recess appointments, section 080 requires a transmittal "within 30 days after convening in regular session." Section 080 requires the governor to "present" appointments. It is not reasonable to interpret this provision so that an appointment can be "deemed" to be presented. Consider the fact that former Governor Cowper's term expired before the 17th legislature convened. It was impossible for him to present an appointment for confirmation to the appropriate legislature during a regular session.

3) You asked for a historical summary of appointments of persons possessing the professional skills set out in AS 42.05.040.

We have discussed this request with the governor's special assistant responsible for appointments to boards and commissions. The bulk of records that must be analyzed to answer this question are located in the state archives. Neither the governor nor this office have the personnel available to conduct the extensive record search necessary to adequately answer this request. However, personnel in the governor's office are willing to advise your research staff as to methods for gathering the necessary records.

4) You asked for results of our research on the question of what constitutes a "regulatory" board.

Attached you will find copies of pages from the Minutes of the Constitutional Convention that explain the meaning of the term "regulatory board" intended by the framers of the state constitution (tab #4).

5) You asked for copies of cases that reached an opposite holding to that of McChesney v. Sampson, 23 S.W.2d 584 (Ky 1930).

A good collection of the cases both supporting McChesney and reaching an opposite holding are set out in the annotation appearing at 89 ALR at 132. Rather than copying all the cases, I have attached a copy of the annotation (tab #5). Additionally, attached is Burke v. Schmidt, 191 N.W.2d 281 (S.D. 1971) (tab #2).

Representative Dave Donley, Chm,  
House Judiciary Committee  
Re: Second follow-up on committee  
testimony regarding governor's  
power of appointment

February 15, 1991  
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We believe that the foregoing together with the corresponding attachments constitutes a full response to the committee's questions. Do not hesitate to call if we can assist you further.

Sincerely yours,

CHARLES E. COLE  
ATTORNEY GENERAL

By: 

James L. Baldwin  
Assistant Attorney General

JLB:jr

Attachments

## MEMORANDUM

State of Alaska  
Department of Law

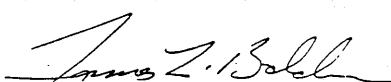
TO: Don Tanner, Director  
Boards and Commissions  
Office of the Governor - Juneau

DATE: April 30, 1991

FILE NO:

TEL NO: 465-3600

SUBJECT: APUC appointment of  
Donald Schorer

FROM:   
James L. Baldwin  
Assistant Attorney General  
Governmental Affairs - Juneau

You asked me to briefly set out our legal arguments concerning the status of the withdrawal of the appointment of Peter Sokolov and the nomination of Donald Schorer as chairman of the Alaska Public Utilities Commission (A.P.U.C.).

Governor Hickel presented the name of Donald Schorer to the legislature as required by AS 39.05.080. This presentment is an essential part of the governor's nomination of Mr. Schorer to serve as the chairman of the A.P.U.C. The House Judiciary Committee contends that the name of Peter Sokolov, an appointee of former Governor Cowper, is before the legislature for confirmation rather than the name of Mr. Schorer. The committee reasons that the name is automatically before them by virtue of his appointment by Governor Cowper. Alternatively, they contend that Sokolov's name was presented by the sending of a letter by Governor Cowper's staff to the clerk of each house of the legislature in October of 1990 when Sokolov was appointed.

As for the automatic presentment argument, a statute expressly requires formal presentment of all nominees by Governor Hickel "within 30 days of the convening of the legislature in regular session." AS 39.05.080(1). This office has consistently advised that a newly elected governor may withdraw interim appointments made by a preceding governor. See, 1979 Inf. Op Att'y Gen. (Dec. 19; A.G. file no. 366-335-80). Pending confirmation, the officeholder is only a nominee who has no vested right to the office. Even if a court were to find that Governor Hickel's failure to present Sokolov's name to the legislature did not operate to cancel his nomination, it is more likely than not that he would be considered only an "ad interim" appointee whose appointment expires when the legislature adjourns. See, In Re Advisory Opinion to Governor, 247 So. 2d 428 (Fla. 1971). Under that view, the presentment of Schorer's name for the same office is valid, but, if confirmed, his term begins on the day after this legislative session adjourns when Sokolov's ad interim term expires.

The contention that Governor Cowper's letter constituted a presentment is also easily disposed of. If that argument is

Don Tanner, Director, Bds & Comm./Gov. Ofc  
Re: APUC appt of Donald Schorer

April 30, 1991  
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accepted, then Sokolov's name is not before the legislature at all. His name would have been presented to the second session of the Sixteenth Legislature which did not expire until January of 1991. The controlling statute provides:

[f]ailure of the legislature to act to confirm an appointment . . . is tantamount to a declination of confirmation on the day the session adjourns.

AS 39.05.080(3). Literal application of the foregoing provision means that Sokolov failed to be confirmed when the Sixteenth legislature expired in January 1991.

I hope the foregoing analysis adequately explains our legal arguments concerning this matter.

JLB:jr

## MEMORANDUM

## State of Alaska

TO: Kevin Bruce, Special Assistant  
Office of the Governor

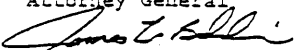
DATE: February 3, 1983

FILE NO: 366-391-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch  
Attorney General

SUBJECT: Withdrawal of  
appointment

By:   
James L. Baldwin  
Assistant Attorney General  
Governmental Affairs-Juneau

You have asked if Governor Sheffield may refuse to forward to the legislature the name of a person appointed by the former governor to an office in the executive branch of state government.

We have attached a copy of our earlier memorandum of advice of December 10, 1979. In that memorandum we advised that governor that he may remove a person before confirmation by withdrawing the nomination, or if the name has not been forwarded to the legislature, by informing the person that he or she is no longer under consideration. We reaffirm that advice. However, you should consider the fact that no authority is cited for our earlier advice and that no Alaska case exists to guide us concerning the resolution of this issue.

If our reasoning expressed in the earlier memorandum is rejected by a court, and the appointment is not considered to be a nomination, then an appointee whose name is summarily withdrawn may have a cause of action for denial of a property right without due process of law. See Breeden v. City of Nome, 628 P.2d 924 (Alaska 1981).

JLB/pjg

Enc.

JL-0015 (Rev. 10/79)

STATE  
of ALASKA

**MEMORANDUM**

TO: [ Vicki A. Clayman  
Office of the Governor

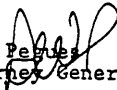
DATE: December 10, 1979

FILE NO: J-66-334-80

TELEPHONE NO:

FROM: AVRUM M. GROSS  
ATTORNEY GENERAL

SUBJECT: Reappointments to  
boards or commissions

By:   
Rodger W. Peltus  
Assistant Attorney General

You have asked whether, prior to the expiration of his own term, the Governor can make reappointments of members of boards or commissions whose terms expire thereafter. You also ask whether, if that is the case, the new Governor can revoke the reappointment and appoint someone else.

We believe that the answer to both questions is yes.

When a term for an office is set by law, the term continues until its conclusion, regardless of the actual tenure of any person who may hold the office from time to time. Thus, when an incumbent leaves office prior to the expiration of his term, his successor is appointed for the remainder of that term, and the successor must be reappointed if he is to hold the position beyond the end of that term. Accordingly, no matter what an incumbent may do, his term continues until its prescribed end.

Nothing, however, precludes the Governor, as appointing authority, from anticipating the end of terms of office and making present appointments to fill the offices as those terms expire in the near future. Indeed, he is required to do this during each session of the legislature with respect to offices which have terms which will expire before July 2, and to submit the names of his appointees to the legislature for confirmation. AS 39.05.080(1). Hence, the Governor, even though he may be leaving office in early December, may make appointments for terms which begin the following January.

If the appointments are subject to confirmation, they are not complete until the legislature confirms them. Prior to confirmation, the new Governor may withdraw the nomination. And indeed, he need not even submit it and can merely revoke the nomination outright. If the appointments are not subject to nomination, they take effect when the appointee qualifies and takes office. That cannot happen until the new term for the office begins. Until that time,

Ms. Vicki A. Clayman  
December 10, 1979  
Page #2

the appointment can, as a general rule, be revoked.

It is probably because each new Governor has the power to countermand any appointive actions taken by each outgoing Governor which remain pending that the latter have not established a history of making midnight appointments to terms of office which begin after they leave office. Where, as in the famous case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense. But where they remain pending, they will have been futile unless the incoming chief executive approves of them as well.

RWP/pjg