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UNIVERSITY OF ALASKA  
Fairbanks, Alaska

Office of the President

Juneau, Alaska  
April 2, 1975

Memorandum to: Honorable Terry Gardiner, Chairman  
House Judiciary Committee

From: Don M. Daboe, Executive Vice-President

Subject: Comments on HB 213 and HJR 15

We were informed at 1:00 p.m. today that hearings scheduled on the above bill and Resolution had to be deferred. Your Aide suggested that we might submit a written statement.

Under date of March 14, Vice-President Rae, responding to a request from Representative Naughton, noted general concurrence with the provisions of the bill. However, Dr. Rae had not conferred with our Legal Counsel relative to the implications of the amendments proposed to AS 14.40.290.

Note attached is a copy of an opinion from our University Counsel, Dr. Tom Gruening. He concurs, as do we in the Office of the President, with the amendments to 14.40.190 and 14.40.250 which specifically provide for reporting to the legislature on the administration and disposition of restricted as well as appropriated funds. We believe that this provision is entirely reasonable. We do not see, however, why a constitutional amendment as provided for in HJR 15 would be necessary.

We concur with the opinion of our Counsel that the amendments proposed to Sec. AS 14.40.290 would raise serious constitutional questions in view of the constitutional mandate to the Regents to "govern" the University. We believe that application of all requirements of AS 37.07 to the University, particularly AS 37.07.030(4) and 37.07.080(a)(c)(d) and (e), would infringe upon and perhaps usurp the constitutional responsibility and the policy prerogatives of the Board of Regents.

We would emphasize the desire of the University to respond meaningfully, and hopefully in a timely manner, to legislative needs for information in general and particularly to needs related to the budget process. We believe our controls are adequate but do acknowledge some difficulty with timely response.

In this regard, we believe that the Legislative Budget and Audit Committee might well want to convene some Interim Sessions involving legislative finance Chairmen and analysts, Department of Administration representatives, Office of the Governor representatives, and University administrators with a view toward clarifying and simplifying reporting and budget policy and processes.

MEMORANDUM

TO: Dr. Don M. Dafoe, Executive Vice President

FROM: Tom ~~Greenig~~, University Counsel

SUBJECT: House Bill #213

DATE: March 27, 1975

This is in response to your request for an analysis of the implications of House Bill #213. The bill would amend four sections of the Alaska Statutes.

It would amend 14.40.190 to include language expressly encompassing appropriated and restricted funds as being included in the written report to the Legislature. In my opinion this amendment simply clarifies existing law and has no implications.

A.S. 14.40.250 is amended to conform with the proposed amendment to Section 190 clarifying the scope of the written report to the Legislature. This section also simply clarifies existing law and has no implications.

A.S. 14.40.290 is amended by adding a new subsection subjecting the University to the Executive Budget Act, and A.S. 37.07.120 (1) is correspondingly amended to include the University of Alaska within the definition of agency contained in the Executive Budget Act.

Inclusion of the University within the terms of the Executive Budget Act raises serious constitutional questions. The relationship between the constitutional autonomy of the Board of Regents in relation to similar attempts by other branches of state government has been considered at length in a Memorandum of Opinion from Grace Schaible, the University's retained counsel, to William R. Wood, then President of the University of Alaska, dated January 9, 1973. I have excerpted the pertinent portions of that opinion rather than repeat them here. The excerpt is set out in Exhibit A which is attached hereto. The basic thrust of the constitutional argument is that under Alaska Constitution Art. VII, Sec. 3, the Board of Regents shall govern the University and any attempt by the Legislature to intervene in University management decisions respecting planning or expenditure of funds would effectively emasculate the constitutional duty of the Board of Regents to govern.

A second constitutional ground is that under Alaska Constitution, Article VII, Section 2, real and personal property is subjected to the requirement that it shall be administered and disposed of according to law. Since money is not mentioned it is not subject to regulation by the Legislature as to its administration and disposition. (Thus A.S. 14.40.280 is unconstitutional on its face as it purports to regulate the expenditure or management of money of the University of Alaska. This probably explains why no attempt has ever been made to enforce it.)

The two sections of the Alaska Constitution mentioned above would, in my opinion, render unconstitutional the portions of the Executive Budget Act listed below insofar as they purport to authorize the management or control of the University's expenditures, policies, planning or operations or otherwise interfere with or restrict the governance of the University by the Board of Regents:

A.S. 37.07.010 (2), (3)

A.S. 37.07.030 (4)

A.S. 37.07.040 (5)

A.S. 37.07.050 (a) (2) except insofar as needed to determine the University's budget.

A.S. 37.07.050 (d) except insofar as the division purports to describe rather than set policy, priorities, etc.

A.S. 37.07.070

A.S. 37.07.080 (a), (c), (d), and (e).

It should be noted that there is no constitutional or statutory objection to the requiring that information be provided for purposes of budget planning, priority setting, etc., by the Legislature so long as such requirements do not interfere with the Board of Regents' governance of the University.

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Exhibit A

Memorandum of Opinion from Grace Schaible to Willima R. Wood,  
dated January 9, 1973.

It may be well at this point to review the broader aspects of the problem in view of the Constitutional provisions relating to the University of Alaska and Board of Regents. There are two provisions involved as follows:

"Section 2, Article VII. State University. The University of Alaska is hereby established as the State University and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. This property shall be administered and disposed of according to law."

and Section 3 of Article VII as follows:

"Section 3, Board of Regents of University. The University of Alaska shall be governed by a Board of Regents. The Regents shall be appointed by the Governor, subject to confirmation by a majority of the members of the legislature in joint session. The Board shall, in accordance with law, formulate policy and appoint the President of the University. He shall be the executive officer of the Board."

These two sections of the Constitution are unique in that it is the only place that a division of State government is singled out and provided a special corporate status. As we are all aware, both secondary educational groups and the Fish and Wildlife people tried to obtain like status at the constitutional convention, but were unsuccessful. Alaska is not unique in having a constitutionally established University and Board of Regents; however, only a few institutions of public higher education in the entire United States enjoy this very privileged legal status. As one treatise writer has indicated:

"These fortunate few possess a sphere of authority within which neither the legislative nor the executive division of State government may interfere. They are, in substance,

coordinate with the legislative, executive, and judicial branches and thus represent a fourth arm of State government". (Blackwell, College Law, page 242).

As has been pointed in Alexander and Solomon's College and University Law 1972 edition, there are nine states which guarantee Constitutional autonomy for universities. Although Alaska is not expressly included among these nine which are Michigan, Minnesota, California, Colorado, Georgia, Idaho, Oklahoma, Nevada and Arizona, it is recommended the University contact the authors and advise of the omission. In three of these states there has developed a considerable body of law regarding the autonomous status of the university, namely Michigan, Minnesota and California. We believe that when the Alaska Constitutional provisions relating to the University and Board of Regents are judicially interpreted it is very probable that Alaska's constitutional provisions will be considered as establishing an "autonomous" university. The Michigan Constitution provides:

"The Board of Regents shall have the general supervision of the University, and the direction and control of all expenditures of funds."

Although Alaska's constitutional provision is drafted less explicitly, Article VII, Sec. 2 and 3, supra, establishes the University as a "body corporate" and directs that "the University of Alaska shall be governed" by the Board. This specific power to govern the University strongly implies and indeed mandates the "control of all expenditures of funds" must be in the governing board, with the legislative control being the overall sum and not the specific direction of where and how said funds are to be spent.

The broad grant of powers above quoted has given the Board of Regents of Michigan complete control of all university income regardless of source. The Michigan Supreme Court in 1895 resolved the issue of a legislative enactment requiring the Board of Regents to discontinue a homeopathic school in Ann Arbor and establish a new school in Detroit and spelled out the legislature-university relationship in an unmistakable fashion:

"The Board of Regents and the legislature derive their power from the same Supreme authority, namely the Constitution...they are separate and distinct Constitutional bodies, with the power of the regents defined. By no rule of construction can it be held that either can encroach upon or exercise the powers conferred upon the other."

This interpretation was based on the broad constitutional powers given to the Board of Regents under the Michigan Constitution. We believe the Alaska Supreme Court, in light of these precedents combined with the intent of the delegates to our 1956 constitutional convention expressed in the minutes of those proceedings will likewise find similar powers in the Board of Regents of the University of Alaska.

The citizens of Michigan in the Constitution of 1908 granted privileges similar to that granted to Michigan State College (now Michigan State University) and provided that State Board of Agriculture was given "general supervision of the college, and the direction and control of all agricultural college funds".

The Constitutional status of the University of Minnesota is likewise closely aligned to that of Alaska. The Board of Regents of the University of Minnesota was incorporated by the Territorial Assembly in 1851 with a mandate "to govern" the university and the 1858 Constitution of the State of Minnesota expressly "perpetuated unto said university" "all the rights, immunities, franchises and endowments heretofore granted or conferred". It was not until 1925, however, that the first legislative test was made of the autonomous powers of the University of Minnesota. In that year the legislature enacted the laws regarding the organization of the State government which centralized the State Administrative functions under the Governor. The Commission on Administration and Finance operating under the Governor's office pursuant to this act claimed the authority to supervise and control the expenditure of moneys for the University of Minnesota. Suit brought on behalf of the University against the Commission resulted in a decision of the Supreme Court which stated in part:

"...the right to control university finances is the power to dictate university policy and direct every legislative activity....The legislature cannot transfer any of these constitutionally confirmed powers from the regents to any other board, commission or officer whatever....The purpose of the constitution remains clear. It was to put the management of the greatest state educational institution beyond the danger of vacillating policy, ill-informed or careless meddling and partisan ambition that would be possible in the case of management by either legislature or executive, chosen at frequent intervals and for functions and because of qualities and activities vastly different from those which qualify for the management of an institution of higher learning." See State v. Chase, 175 Minn. 259 220 N.W. 951 (1928).

In subsequent suits involving an enactment of the legislature who changed the method of selection of regents, the Supreme Court of

Minnesota in describing the university's relationship to the executive, legislative and judicial branches of government commented:

"The people by their Constitution chose to perpetuate the university which had been created by their Territorial Legislature in a Board of Regents, and the powers they gave are not subject to legislative or executive control; nor can the courts at the suit of a taxpayer interfere with the board while governing the university in the exercise of its granted powers. This does not mean that the people created a corporation or institution which is above the law. The board must keep within the limits of its grant."

The California Constitution of 1879 provided for the independence of the Board of Regents as follows:

"The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the Organic Act creating the same..., subject only to such legislative control as may be necessary to insure compliance with the terms of this endowment and the proper investment and security of its funds."

This constitutional language has been uniformly interpreted by the Supreme Court in California to provide immunity from any legislative act changing the form of government of the college. In 1913, the Supreme Court of California made a clear statement of the University's independence in a case involving a conflict between vaccination requirements of the legislature and those of the University of California. (Williams v. Wheeler, 23 Cal. App. 619, 138 P. 937) The Board of Regents of the University of California had required all enrolling students to be vaccinated whereas the legislature provided for exceptions for those conscientiously opposed or for those for whom vaccination would be harmful to their health. A student not having been vaccinated and conscientiously opposed to vaccination was denied entrance to the university and sued for admission. The question of legislative versus university predominance in making of admission and health policies was placed squarely before the court. The court held that the exceptions provided for in the vaccination law were not founded upon consideration of the general health and did not constitute an exercise of the general police protection of the legislature. More specifically with regard to the Constitutional powers of the university, the Court said:

"...it was the intention of the framers of the Constitution to invest the Board of Regents with a larger degree of independence and discretion in respect to these matters than is usually held to exist in such inferior boards and commissions as are solely subjects of legislative creation and control. This would seem to be a necessary conclusion from the fact of the evaluation of the university to the place and dignity of a constitutional department of the body politic...."

In Idaho the Constitution adopted in 1889 provided with reference to the administration of the University of Idaho:

"The Regents shall have the general supervision of the university and control and direction of all funds of and appropriations to, the university, under such regulations as may be prescribed by law."

In its 1921 decision in State v. State Board of Education, 33 Idaho 415 196 P. 201, Supreme Court of Idaho officially placed the University of Idaho in the magic circle of autonomous universities. The Supreme Court held that the Constitutional provision meant that while functioning within the scope of its authority, the Board of Regents is not subject to the control or supervision of any other branch, board, or department of the State government. The portion of the Constitution limiting the Board of Regents' authority ("under such regulations as may be prescribed by law") refers to methods and rules for the conduct of business and accounting functions and does not interfere with the Constitutional discretion of the Board. When an appropriation of public funds is made to the university and the university Board of Regents accepts the funds, the legislature may impose such conditions and limitations on the use of the funds as it deems necessary. However, the court stated, where the Board sells university property there is no obligation on the part of the Regents to pay the proceeds from the sale of the property into the State treasury.

The Colorado Constitution vested in the Board of Regents "the general supervision of the State university" and "the exclusive control and direction of all funds of, and appropriations, to the university". This broad grant of power is quite similar to that given to the governing boards of other constitutionally independent universities. However, the courts of Colorado have not, as yet, conceded that it was the intention of the people to grant full autonomy to their State university. Furthermore, in another section of the State Constitution, the management of the university is declared to be "subject to the control of the State, under the provisions of the Constitution, and such laws and regulations as the general assembly may provide."

Two States, Missouri and Utah, have failed to achieve autonomy even though the Constitutional grants of powers to the governing boards were rather broad. In Utah, for example, the State Supreme Court held in 1956:

"It is inconceivable that the framers of the Constitution ...intended to place the university above any controls available to the people of this State as to the property, management and government of the university.... The university is a public corporation, not above the powers of the legislature to control, and is subject to the laws of the State from time to time enacted relating to its purposes in government."

Although all the constitutional provisions establishing university autonomy in the foregoing States are not uniform where autonomy has been found to exist by the courts, it has been of constitutional origin such as is contained in the Alaska Constitution. It has also been observed in establishing constitutional autonomy,

"a great deal depends on the attitude of the court and how it, within the context of either implied or explicit constitutional provisions, is willing to view the relationship between the State and the university. The lack of autonomy of some State universities may be attributed to the attitudes of the courts or even to inaction on the part of university officials." (Alexander and Solomon College and University Law, 1972).

#### Summary and Conclusion

In light of the detailed research outlined above and with knowledge of the debate and circumstances at the constitutional convention in singling out the University as the only division of State government afforded special status, besides the traditional three branches, we are of the opinion that serious constitutional questions have been raised by the method of legislative appropriation proposed by the Governor for fiscal year 1974 and actually used by the legislature for 1973, which constitutes effective internal control of the University. If the constitutional language that the University as a body corporate "shall be governed" by a Board of Regents is to be given the meaning intended by the constitutional convention, the University should not be subordinated to the Executive, Legislative and Judicial branches of government or relegated to the status of the legislatively-created department or agency.

We cannot see how the Board of Regents can legally consent to administration of University affairs, either directly or indirectly, by any branch of the State government without an express constitutional change. The precedents established in other jurisdictions such as Michigan, Minnesota, California and Idaho are clearly in point and we believe the Supreme Court of Alaska in a proper case would be strongly inclined to follow such precedents and hold that the Alaska Constitution created an autonomous University to be governed in all respects by a Board of Regents without the spectre of any type of partisan, geographical or political influence.