Confirmations

Alaska State Legislature

House of Representatives
House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

May 13, 1991

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

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of board and commission members that were "intentionally omitted from the February 19, 1991 request, and are hereby withdrawn from request for legislative confirmation...".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 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 rrom 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.)

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,

Dave Donley

Representative Dave Donley

DD/hk

cc: Senator Richard Eliason, President of the Senate

April 26, 1991

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

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

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
SERVE AT PLEASURE UNDER AS 08.01.020

Big Game Commercial Services Board
Doody, Michael J. - Eagle River
Original term began 8/29/89 reappointed 6/15/90
expires 6/30/94
SERVE AT PLEASURE AS 08.01.020

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
expire 7/15/94

Board of Clinical Social Work Examiners
Patrick-Riley, Colleen C. - Anchorage
Term began 6/15/90 expires 7/1/94
Stortz, Libby F. - Sitka
Original term began 1/13/89 reappointed 6/15/90
expires 7/1/94

SERVE AT PLEASURE AS 08.01.020

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

SERVE AT PLEASURE AS 08.01.020

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

SERVE AT PLEASURE AS 08.01.020

Board of Marine Pilots
Taylor, M. Paul - Skagway
Original term began 10/31/86 reappointment 6/15/90
expires 6/1/94

SERVE AT PLEASURE AS 08.01.020

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

SERVE AT PLEASURE AS 08.01.020

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

SERVE AT PLEASURE AS 08.01.020

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

REMOVAL "ONLY FOR CAUSE" AS 39.25.060(c)

State Physical Therapy and Occupational Therapy Board
Hayden, Avis C. - Juneau
Term began 9/28/90 expires 9/1/94

SERVE AT PLEASURE AS 08.01.020

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

"Any member may be remo by the governor for misco nonfeasance or nonfeasance in office, or incapacity." AS 14.20.~~[illegible]~~430.

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

SERVE AT PLEASU AS 08.01.020

Alaska Public Offices Commission
Carey, William B. - Anchorage
Term began 6/21/90 expires 2/1/92

Board of Certified Real Estate Appraisers
Boyd, Jon "Randy" - Anchorage
Term began 11/2/90 expires 6/30/93
Evans, Robert A. - Anchorage
Term began 11/2/90 expires 6/30/92
Guinn, Chris - Fairbanks
Term began 11/2/90 expires 6/30/94

SERVE AT PLEASURE AS 08.01.020

Alaska Public Utilities Commission
Sokolov, Peter - Anchorage
Original term began 6/16/87 reappointed 10/23/90
expires 10/31/96

REMOVAL ONLY WITH CONSENT OF LEGISL AS 42.05.035

Alaska Workers' Compensation Board
Rednall, Joanne R. - Anchorage
Term began 7/5/90 expires 7/1/93
Scott, Donald R. - Anchorage
Original term began 7/1/85 reappointed 6/15/90
expires 7/1/93
Thomas, II, Joe J. - Fairbanks
Original term began 8/19/83 reappointed 6/15/90
expires 7/1/93

AS 23.30.005 creating the board is silent as to removal.

Sincerely,
S/S Walter J. Hickel

Walter J. Hickel
Governor

Rod Mowrant from Sen Pearce's office came by to ask about holding a joint hearing - re confirmation of Don Schroeder. with Labor & Commerce Committee, & Judiciary Committee

Alaska State Legislature

Senate

Office of the Secretary

OFFICIAL BUSINESS

P.O. BOX V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

March 6, 1991

M E M O R A N D U M

TO: Senator Halford, Chair
Judiciary Committee

FROM: Nancy Quinto NQ
Secretary of the Senate

SUBJECT: Withdraw Governor's Appointee

Governor Hickel withdrew the following name for legislative confirmation to the position noted on March 4, 1991:

Commission on Judicial Conduct
Brown, Dianne - Anchorage
Term began 11/29/90

Please remove the above name from the appointees referred to your committee.

NQ/hc

Alaska State Legislature

Senate

Office of the Secretary

OFFICIAL BUSINESS

PO BOX V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

February 22, 1991

M E M O R A N D U M

TO: Senator Halford, Chair
Judiciary Committee

FROM: Nancy Quinto NQ
Secretary of the Senate

RE: Confirmation of Governor's Appointees

Pursuant to AS 39.05.080, President Eliason has referred the positions noted to your committee for a hearing, recommendation and report:

~~DEPARTMENT OF LAW~~
Charles Cole
~~Attorney General~~

Done —
Withdrawn March 6, 1991

Commission on Judicial Conduct
Brown, Dianne - Anchorage
Term began ~~11~~/29/90 expires 12/31/91

Alaska Public Utilities Commission
Schroer, Don - Anchorage
Term began 1/23/91 expires 10/31/96

w/attached resumes

Alaska State Legislature

House of Representatives

House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

February 20, 1991

Representative Ben Grussendorf
Speaker of the House
P.O. Box V - State Capitol
Juneau, AK 99811

Dear Mr. Speaker:

The House Judiciary Committee recommends that the House of Representatives return the governor's nomination of Don Schroer and proceed with the confirmation process for the appointment of Peter Sokolov to the Alaska Public Utilities Commission. The committee also finds that Mr. Sokolov continues to be a member of the commission and his dismissal was contrary to law.

On February 4th and 20th, 1991, the House Judiciary Committee held hearings to review the governor's power to appoint and remove members of various boards and commissions, including the Alaska Public Utilities Commission. Based on the information and arguments presented during the hearings and on materials provided by the Attorney General and Legislative Counsel we made the following findings applicable to the APUC:

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. 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 has attempted to appoint Don Schroer to the APUC 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 has not requested 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.

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.

The House Judiciary Committee finds that the governor should submit a request for legislative consent to the removal of an APUC Commissioner.

In addition, the governor has attempted to move the consumer member of the commission, Mark Foster, to the engineering seat which has been held by Mr. Sokolov and to appoint Mr. Schroer to the consumer seat which had been occupied by Mr. Foster. AS 42.05.040 sets out the required qualifications of commission members.

The committee has been advised by legislative counsel that the switching of seats by the governor requires the legislative confirmation of that person to the new seat. To allow the switching of seats without confirmation by the legislature when appointees are required to have different qualifications for different 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 functions. Although the committee is taking no position on this issue at this time, arguably the governor should submit to the legislature the appointment of Mark Foster to the engineering seat.

The House Judiciary Committee recommends that, if the governor does send you a request for legislative consent for removal of Peter Sokolov, the vote be taken in joint session with the Senate. AS 42.05.035 states that an APUC commissioner may only be removed "by and with the consent of a majority of the legislature." While a joint session is not specifically required by law, we feel that a joint session is what was contemplated by the statute.

Any appointment to the commission that is in addition to that of Peter Sokolov should be returned to the governor. If the legislature votes not to confirm, or adjourns without confirming, Mr. Sokolov, then another appointment by the governor to that seat could be entertained. The governor could also submit the name of another person contingent upon

receiving the consent of the legislature to his formal removal of Mr. Sokolov.

The committee also recommends that in the above circumstance separate votes be taken. The first vote should be on whether the legislature consents to the removal of Mr. Sokolov. If the vote is not to consent to removal, then a vote can be taken on Mr. Sokolov's confirmation.

In the event that Mr. Sokolov does not wish to contest the governor's actions, we recommend that both Mr. Sokolov's and Mr. Schroer's appointments be read across. Then the legislature can proceed with Mr. Schroer's confirmation process, under the theory that Mr. Sokolov has constructively resigned, and convey a formal opinion to the governor that the above procedures are required by law and will be required by the House of Representatives.

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

Sincerely,

Dave Donley

Representative Dave Donley
Chair

DD/hk

Alaska State Legislature

House of Representatives
House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

EXECUTIVE SUMMARY
HOUSE JUDICIARY COMMITTEE FINDINGS ON THE APPOINTMENT AND REMOVAL POWERS OF THE GOVERNOR

Peter Sokolov was legally reappointed to the engineering seat on the Alaska Public Utilities Commission by former Governor Cowper. He remained in office until the end of January when he was informed that the governor was removing him and replacing him with Don Schroer.

AS 42.05.035 provides that an A.P.U.C. commissioner may only be removed from office "by and with the consent of a majority of the legislature." The governor has not requested the legislature to consent to the removal of Mr. Sokolov.

In addition, the governor also attempted to move Mark Foster from the consumer seat on the A.P.U.C. to the engineering seat and to appoint Don Schroer to the consumer seat vacated by Mr. Foster. The committee concluded 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 requiring confirmation to that other position.

The committee concluded that the A.P.U.C. 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. **Accordingly, Peter Sokolov is presently a member of the commission and his confirmation is legally before the legislature.**

In a related matter, the committee found that despite the fact that the governor is attempting to remove five members of the Professional Teaching Practices Commission and two members of the Personnel Board by withdrawing their names from legislative consideration for the confirmation, they are legally before the legislature for confirmation.

The legislature may take "legislative notice" of the lawful appointment of appointees of a governor, even absent a communication from the governor regarding those appointees and may properly consider their confirmation or rejection.

GOVERNOR'S APPOINTMENTS TO BOARDS & COMMISSIONS

COMMISSIONERS

DEPARTMENT OF ADMINISTRATION
Commissioner Millett Keller

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
Commissioner Glenn Olds

DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS
Commissioner Edgar Blatchford

DEPARTMENT OF CORRECTIONS
Commissioner Lloyd Hames

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Commissioner John Sandor

DEPARTMENT OF FISH AND GAME
Commissioner Carl Rosier

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
Commissioner Theodore Mala

DEPARTMENT OF LABOR
Commissioner Nancy Bear Usera

DEPARTMENT OF MILITARY AND VETERANS AFFAIRS
Major General Hugh Cox

DEPARTMENT OF NATURAL RESOURCES
Commissioner Harold Heinze

DEPARTMENT OF PUBLIC SAFETY
Commissioner Richard Burton

DEPARTMENT OF REVENUE
Commissioner Lee Fisher

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
Commissioner Frank Turpin

DEPARTMENT OF LAW
Attorney General
Charles Cole

ALASKA AIR NATIONAL GUARD
Brigadier General Dan Dennis

ALASKA ARMY NATIONAL GUARD
Brigadier General Thomas Carroll

BOARDS AND COMMISSIONS

State Board of Registration for Architects, Engineers, and Land Surveyors
Davidson, George W. - Juneau
Term began 6/15/90 expires 7/1/94

Big Game Commercial Services Board
Alsworth, Glen - Anchorage
Original term began 8/29/89 reappointed 6/15/90 expires 6/30/94

Board of Education
Cuddy, Kathryn - Anchorage
Term began 1/7/91 expires 1/31/95
Montgomery, Joe - Anchorage
Term began 1/7/91 expires 1/31/93
Nelson, June - Kotzebue
Term began 1/7/91 expires 1/31/94
Norheim, Patricia - Petersburg
Term began 1/7/91 expires 1/31/92
Phelps, Jack - Talkeetna
Term began 1/7/91 expires 1/31/94
Walp, Robert - Anchorage
Term began 1/7/91 expires 1/31/95
Warwick, Andy - Fairbanks
Term Began 1/7/91 expires 1/31/93

Board of Fisheries
Carlisle, Irving - Soldotna
Term began 2/20/91 expires 1/31/94
Croxton, Loren - Petersburg
Term began 4/4/91 expires 1/31/93
Wardwell, Ken - Anchorage
Term began 2/19/91 expires 1/31/94

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

State Commission on Human Rights
Hamilton, James S. - Skagway
Term began 4/23/91 expires 1/31/96

Judicial Council
Dapcevich, David - Sitka
Term begins 5/19/91 expires 5/18/97
Dittrick, Paul, M.D. - Anchorage
Term began 4/6/91 expires 5/18/95

Alaska Labor Relations Agency
Williams, H.O. "Red" - Fairbanks
Term began 7/16/90 expires 6/30/91
Johnson, B. Gil - Anchorage
Term began 2/6/91 expires 6/30/93
Smith, Darrell - Anchorage
Term began 2/6/91 expires 6/30/92

Alaska Oil and Gas Conservation Commission
Douglass, Russell - Anchorage
Term began 11/26/90 expires 12/31/94
Smith, Lonnie C. - Anchorage
Original term began 1/1/79 reappointed 1/23/91
expires 12/31/96

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

Alaska Public Offices Commission
Anderson, John M. 'Jack' - Anchorage
Term begins 5/15/91/expires 2/1/96

Alaska Public Utilities Commission
Schroer, Don - Anchorage
Term began 1/23/91 expires 10/31/96

Board of Certified Real Estate Appraisers
Ferrara, Alfred J. - Anchorage
Term began 11/2/90 expires 6/30/94
Sutton, Sue G. - Juneau
Term began 11/26/90 expires 6/30/91

University of Alaska Board of Regents
Gagnon, Sharon - Anchorage
  Term began 2/1/91 expires 2/1/99
Henri, Joseph R. - Anchorage
  Term began 2/1/91 expires 2/1/99
Kelley, Mike P. - Fairbanks
  Term began 2/1/91 expires 2/1/99
Reeve, Mary - Anchorage (Student member)
  Term began 10/23/90 expires 5/31/91
Williams, Jr., Lew M. - Ketchikan
  Term began 2/1/91 expires 2/1/99

APPROVED BY THE GOVERNOR'S OFFICE

Date:

/s/
Don Tanner
Boards and Commissions
Office of the Governor

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM April 29, 1991

SUBJECT: Appointments by Governor Cowper not submitted for confirmation by Governor Hickel
(Work Order No. 7-LS1299)

TO: Senator Dick Eliason
Attn: Sheila Peterson

FROM: Jerry Luckhaupt JEB
Legislative Counsel

QUESTIONS PRESENTED:

Governor Cowper made appointments to positions on various boards and commissions during his last year in office, Governor Hickel by recent letter stated that he intentionally omitted those appointees from request for legislative confirmation.

I. What can the legislature do if they wish to confirm some or all of Governor Cowper's appointments?

ANSWER: The legislature may by majority vote in joint session confirm some or all of Governor Cowper's appointments (that have not already legally been removed from office) without communication from Governor Hickel requesting their confirmation. See discussion I.

II. What happens if the legislature does nothing regarding these appointments?

ANSWER: To the extent the appointees have not already legally been removed from office they will be removed from office by operation of law (AS 39.05.-080(3)), for a failure to be confirmed. See discussion II.

FACTUAL BACKGROUND

In 1990, during his last year in office, Governor Cowper made appointments to various boards and commissions of the state. The names of these appointees have not been transmitted to the legislature by Governor Hickel for confirmation.

Governor Hickel recently provided a letter to you in which he identifies these appointees and states their names "were intentionally omitted" from Governor Hickel's February 19, 1991, confirmation transmittal and that their names "are hereby withdrawn from request for legislative confirmation of appointment".

Of the appointees whose names are not being transmitted for confirmation, I am only aware of one who has been purportedly removed from office by Governor Hickel. Peter Sokolov was reappointed to an engineering seat on the Public Utilities Commission by Governor Cowper in November of 1990. The other appointees may still occupy their positions or memberships.

DISCUSSION

I

In answer to your first question, I direct your attention to my memorandum to you of January 25, 1991 (copy attached). In that memorandum, I discuss the authority of the legislature to hold confirmation proceedings for an appointment to a position that requires legislative confirmation. If the governor refuses to transmit a request for confirmation, the legislature may act to confirm or reject the appointee on their own. This conclusion is based upon the notion of legislative notice (akin to judicial notice) and that imposing a requirement of a communication or request for confirmation would make the legislature's constitutional duty to confirm gubernatorial appointment subject to the whim, caprice, or indiscretion of the executive. This conclusion is supported in the decisions of other states that have confronted this issue and is consistent with the decisions of our supreme court in similar situations.

There is one group of appointments that this conclusion would not apply to and that could not be confirmed by the legislature. That group would consist of appointees who have legally been removed from office by the governor. For example, if one of the individuals appointed by Governor Cowper was appointed to a board or commission whose members serve at the pleasure of the governor and may be removed at any time for any reason, and the Governor removed that appointee, "as provided by law,"[1/] then the appointee would not be holding office and his appointment would not properly be before the legislature. A purported removal, not "as provided by law,"[2/] is ineffective and I believe the legislature still would have the authority to consider the confirmation of the appointee who has been removed from office contrary to statute.

[1/] Article III, section 26 of the Alaska Constitution provides that members of boards or comm. ons that are "at the head of a principal department or a regulatory or quasi-judicial agency" may o. 'be removed as provided by law."

[2/] "Provided by law" means as provided by the legislature. Article XII, section 11, Alaska Constitution.

II

Article III, section 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.

Only members of boards or commissions that are at "the head of a principal department or a regulatory or quasi-judicial agency" are subject to confirmation. Bradner v. Hammond, 553 P.2d 1 (1976).

AS 39.05.080 implements this constitutional requirement and requires the governor to submit to the legislature the names of those

> (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. . . .

AS 39.05.080(3) provides that the

> [F]ailure of the legislature to act to confirm an appointment during the session in which the appointment was presented is tantamount to a declination of confirmation on the day the session adjourns.

This provision clearly provides that if an appointee is not confirmed or rejected by the legislature that the inaction is a rejection and the appointee loses his office on the day the legislature adjourns that session of the legislature. See e.g. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

But what if the appointee's name is not forwarded by the governor and presented to the legislature? Article III, section 26 of the Alaska Constitution requires that appointments made by the governor be confirmed by the legislature. The constitution does not limit the confirmation requirement to situations where the governor has transmitted the appointee's name to the legislature for confirmation.

> [I]n acting upon an appointment, [the legislature] is not exercising a prerogative granted it in its own interest or that of its members; there.

> can be no waiver of that duty so that inaction would be the equivalent of a tacit approval of an appointment.

State ex rel McCarthy v. Watson, 132 Conn. 518, 45 A.2d 716, 724 (1946).

Although, AS 39.05.080(3) does anticipate an orderly procedure for confirmation or rejection of all appointments by providing that all appointments will be presented to the legislature (and if not confirmed they are rejected by operation of law), it does not anticipate the situation where an appointment has been made and a request for confirmation is not communicated to the legislature. But, just as the legislature may take notice of an appointment for the purpose of confirming an appointee, as discussed in the January 25, 1991 memorandum to you (attached) so too, is the legislature charged with notice when it fails to confirm a gubernatorial appointee even without communication from the governor. Shawver, supra; Bell v. Sampson, supra. Therefore, if the legislature does not act to confirm any of the individuals appointed by Governor Cowper whose names have been withheld by Governor Hickel, their appointments will have been rejected by the legislature on the day the legislature adjourns this session. At that time, there will be vacancies on each of the boards and commissions listed in Governor Hickel's letter and Governor Hickel will be free to appoint someone else to the seat.[3/]

GPL:lmb:pl
91-148.lmb

Enclosure

[3/] These new appointments will, of course, be subject to confirmation at the next regular session of the legislature.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
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FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM February 11, 1991

SUBJECT: Regulatory Boards under art. III, § 26 of the Constitution (Work Order No. 17LS-0663)

TO: Representative Max F. Gruenberg, Jr.

FROM: Jerry Luckhaupt JER
Legislative Counsel

You have asked for an opinion on the meaning of "regulatory agency" to determine what boards may be covered by the appointment, confirmation, and removal requirements of art. III, § 26 of the Alaska Constitution. That section 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.

To determine the meaning of the term "regulatory agency" we must first look to the views of the framers of our constitution to determine what they thought the term meant or what they intended the term to signify. Art. III, § 26, was proposed by the Committee on the Executive Branch as Committee Proposal 10 (later amended and resubmitted as Committee Proposal 10a), at the Constitutional Convention. Alaska Constitutional Convention Proceedings(ACCP), Part 6. In the commentary submitted by the executive branch committee with the proposal the committee explained their recommendations concerning government organization. These recommendations are embodied in secs. 22 - 27 of art. III, of the constitution. The committee said:

> A clear distinction is made between the administrative departments, such as public works, health, education, and welfare, and the regulatory, including quasi-judicial, bodies such as a rate-setting public utility commission.

Delegate V. Rivers, chairman of the executive branch committee, summarized the committee proposal and the meaning of a "regulatory board" in this manner:

The purpose of that is that in a regulatory board, regulating the power rates, telephone rates, etc., the power of removal might be the power to make the office ineffective so that removal would be prescribed by the legislature.

ACCP, at p. 1102 - 03.

Discussion of what a "regulatory board" is and does includes these statements by delegates: "To me a utilities board would be regulatory" (ACCP, at p. 2204, Delegate V. Fischer); and Delegate McLaughlin, in response to a question of what is the difference between a "regulatory board" and a "quasi-judicial board" said:

> Perhaps I can explain it in the terms best known to Alaskans. Very roughly, the Fish and Wildlife Service and the CAB, the Fish and Wildlife Service can set down regulations. Normally if there is an infraction of those regulations, they pick up the offender and deliver him to a judicial body, that is to the United States Commissioner, or to the United States District Court. They have no power of absolute confiscation on their own, no power to deprive of money or rights. In the case of the CAB, the Fish and Wildlife, in substance then, sets down regulations, but in the case of the CAB, they go further than that. In substance, they determine as between carrier and carrier, who is privileged and who can be deprived of it.

ACCP, at pp. 2204 - 05.

The delegates also acknowledged that a "regulatory board" could also be a "quasi-judicial board." ACCP, at p. 2206.

From this discussion it appears that the framers believed that a "regulatory board" was a board that issued rules or regulations to govern the public (Fish and Wildlife Service), segments of the public (public utilities commission), or the use or management of resources (Fish and Wildlife Service). A "regulatory board" would seem to control or govern at large or in an area or field as the examples cited by the convention reveal. A board or commission that merely issues rules or regulations that govern or control its own internal conduct would not seem to be a "regulatory board" as that term is used in our constitution as the regulations or rules issued by such a such a board or commission do not govern or control at large or in an area or field.

Such a construction comports with the definitions of the term "regulate." Webster's New World Dictionary defines regulate as "to control, direct, or govern according to

a rule. . . ." And Black's Law Dictionary defines regulate as " to fix, establish, or control." While these definitions are broad enough to encompass internal operating rules, rules that govern a board's own conduct, when applied to the examples and statements of the delegates to the constitutional convention, regulate apparently means the act of controlling, directing, or governing the public, segments of the public, or the resources of the state.

The constitutional convention proceedings are also helpful in determining whether a public corporation could be considered a "regulatory board." The convention specifically addressed the relationship between § 26 and the University of Alaska, a public corporation, and public corporations generally. Discussion of § 26 includes this statement by Delegate Sundborg:

> This whole section applies only to three classes of agencies. It applies to principal departments of the state, to regulatory bodies and quasi-judicial bodies. It is inconceivable to me that no matter what the legislature did it could ever put the University of Alaska under one of those three headings, and I am very much afraid here that if we read in here an exception saying that it shall not apply to the University of Alaska, that it would apply or that it could be construed to apply to any other state corporation because we had not excepted that from the language.

ACCP, at p. 2257.

Delegate Walsh stated that after checking with a couple of attorneys he believed that the University of Alaska was not subject to the requirements of § 26 because it was a public corporation. ACCP, at p. 2246. Delegate Riley stated the he believed that the University of Alaska was clearly beyond the reach of § 26. ACCP, at p. 2248. A similar comment was made by Delegate V. Rivers while entertaining questions about the Committee on the Executive Branch's report. ACCP, at p. 2033-34.

From these examples it seems clear that a public corporation, established by the state, is not a § 26 board. It is also difficult to conceive how the state could delegate the responsibility of running a principal department or the exercise of the state's police powers through a regulatory or quasi-judicial agency to a public corporation, whose board owes a duty to the corporation and not necessarily to the state. Finally, the Alaska Supreme Court in Walker v. Alaska State Mortgage Authority, 416 P.2d 245 (Alaska 1966) held that ASMA, a public corporate authority of the state, was not at the head of a principal department of the state for purposes of triggering the confirmation requirement of § 26. The court did not discuss, but apparently assumed for purposes of that section that ASMA was not a "regulatory or quasi-judicial agency."

Therefore, I conclude that a "regulatory agency" for purposes of art. III, § 26 of the constitution, is an agency governed by a board or commission that adopts rules that govern, direct, or control the public, segments of the public (including professions or enterprises), or the use of the resources of the state. The term does not include public corporations created by the state. Whether a particular board qualifies as a "regulatory agency" would probably be determined by the court on a case by case basis. In view of the narrow reading the court gave to the legislature's power of confirmation in Bradner v. Hammond, 553 P.2d 1 (Alaska 1976) I would expect the court to find that the legislature has no right to confirm in doubtful cases.

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MEMORANDUM February 11, 1991

SUBJECT: Discussion of Munson v. Territory of Alaska (W.O. 17LS-0662)

TO: Representative Dave Donley

FROM: Jerry Luckhaupt JER
Legislative Counsel

You have requested a discussion of the case of Munson v. Territory of Alaska, 16 Alaska 580 (1956) and of its significance, if any, to the dismissal by Governor Hickel of the chairman of the Alaska Public Utilities Commission. As the facts have been presented to me, Peter Sokolov's term as a commissioner on the APUC expired on October 31, 1990. On November 8, 1990, Governor Cowper reappointed Mr. Sokolov to a new term ending October 31, 1996. Governor Hickel removed Mr. Sokolov from office in mid to late January, 1991, and appointed another to his seat.

The factual background of the Munson case was stated by the territorial district court as follows:

> One Ira A. Rothwell was appointed to the Alaska Fisheries Board March 29, 1950, for a period of five years. On March 24, 1955, and while the Twenty-second Territorial Legislature was in regular session, the Honorable B. Frank Heintzleman, Governor of the Territory of Alaska, submitted a letter for his reappointment to the legislature, as follows:
>
> "In accordance with the provisions of chapter 68, Session Laws of Alaska 1949, I submit herewith for confirmation by a majority of all the members of the Senate and House of Representatives in joint session assembled, the name of Mr. Ira Rothwell of Cordova, Alaska, for appointment to the Alaska Fisheries Board for the term ending March 31, 1960."
>
> The legislature adjourned on March 25, 1955, sine die, without acting upon this request and no further action was taken in its extraordinary session, which followed the regular session. The governor took no

> further action in regard to his appointment. Nevertheless, Mr. Rothwell continued to serve as a member of the board beyond the five years of the original appointment without taking another oath of office or receiving a new certificate.
>
> By letter dated August 1, 1955, the Governor of Alaska appointed the plaintiff, Albert Munson, on an interim status, to take the place of Mr. Rothwell. On August 5, 1955, the plaintiff executed the oath of office and received a certificate of his appointment.
>
> The Alaska Fisheries Board, in preparation for a meeting which was called for November 7, 1955, through its then director, Clarence L. Anderson, sent notices of said meeting to all members of the Alaska Fisheries Board, including Ira A. Rothwell, but failed to send a notice to the plaintiff, Albert Munson.
>
> Mr. Munson, nevertheless, flew to Juneau and attended all meetings of the board but was refused his seat by the other members of the board.

Munson, supra, at 582 - 83.

Munson then filed a declaratory judgment action asking that he be awarded his seat on the board and that Rothwell be removed from the seat that he claimed. The territorial court stated the issue in this manner:

> There is but one issue to be determined in this case and that is, what effect did silence and inaction on the part of the legislature have on the attempted reappointment of Mr. Rothwell, that is, was such inaction tantamount to confirmation, rejection, or was it without legal effect whatsoever.

Munson, supra, at 584.

In answering this question the territorial court determined that the attempted reappointment of Rothwell, having occurred while the legislature was in session, was merely a "nomination" akin to the federal system whereby the president "nominates" persons to the senate for confirmation. In the federal system the "nominee" does not take office pending appointment. 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, supra, at 585, discussing Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803).

The territorial court also observed that state courts have frequently held that:

> [i]f the legislature is in session at the time of the appointment, though a vacancy in the office may exist, the authorities frequently hold the appointee has no right to the office until confirmation.

Munson, supra, at 587.

The territorial court then found that a failure of a legislature to confirm is tantamount to and thereby constitutes a rejection "and places an affirmative duty on the governor to make a new appointment." Id. The territorial court also found that § 4, ch. 64, SLA 1955 (now embodied with only minor changes as AS 39.05.080(d)), which provided that appointees pending confirmation are vested with the duties, powers, and obligations of their offices, only applied to interim appointments by the governor, that is, to appointments made by the governor when the legislature was not in session. The court found that section had no application to the situation where the governor makes an appointment while the legislature is in session. In that situation, as stated earlier, the appointment is merely a "nomination" which vests no title to, or any of the duties, powers, or obligations of the office.

Therefore, the territorial court found that Rothwell's attempted reappointment while the legislature was in session was merely a "nomination" which vested no title to membership on the Alaska Fisheries Board. When the legislature failed to confirm Rothwell's nomination and adjourned on March 25, 1955, by operation of law Rothwell's nomination was rejected. Rothwell continued to hold office under his original appointment until that term expired on March 31, 1955, and then became a holdover appointment, serving until his successor was appointed. Munson, supra, at 584. In this case August 1, 1955, when Munson was appointed by the governor.

The application of Munson to our present situation does not in any way support the action of Governor Hickel in removing Mr. Sokolov from his seat on the Public Utilities Commission. First, Mr. Sokolov was an interim appointee of Governor Cowper. Mr. Sokolov's term ended on October 31, 1990. He was reappointed by Governor Cowper on November 8, 1990, to a term ending October 31, 1996. The legislature was not in session, therefore under Munson's reasoning, Mr. Sokolov's appointment was an interim appointment vesting him with the title to, and the duties, powers, and obligations of his office. At that time Mr. Sokolov became not a "nominee", without title and the duties, powers, and obligations of his office, but an appointee, vested with the title and the duties, powers and obligations of his office by virtue of AS 39.05.080(d), subject only to the legislature's authority to confirm or

fail to confirm him or to the governor's authority to remove him as provided by law. Art. III, § 26, Alaska Constitution; AS 42.05.035.

The territorial court in Munson reaches this same conclusion after discussing a case that interpreted a statute "strikingly similar" to that at issue in Munson. After quoting from Bell v. Sampson, 232 Ky. 376, 23 S.W.2d 575 (1930), the territorial court said:

> It is apparently the position of the Kentucky court that inaction is tantamount to rejection and places an affirmative duty upon the governor to make a new appointment. **This does not mean that the interim appointee can be arbitrarily removed from his position at the caprice of the governor.**

Munson, supra, at 587 (emphasis added).

By this statement the Munson court clearly accepted the reasoning that in the case of an interim appointee, that once title to an office has vested and the appointee has entered upon the duties of it, his appointment may not be withdrawn or removed merely at the governor's discretion, as in the case of a nominee, who has not received title to nor entered upon the duties of his office. The interim appointee may only be removed as provided by law or by failure of the legislature to confirm, not "at the caprice of the governor."

Bell v. Sampson, quoted from extensively by the territorial court in Munson, is also instructive on this point. In Bell, the Kentucky Supreme Court was confronted with a situation involving interim appointments to state boards requiring confirmation by the state senate. These interim appointees were vested with the title and duties of their office pending confirmation. A new governor took office and apparently failed to transmit the names of these appointments to the senate. The senate at its next regular session failed to confirm these appointees. The new governor then appointed others to these positions. The court held that the failure of the senate to confirm, even without executive communication, was tantamount to rejection of the appointments. The court found that the senate:

> did not have to wait for the Governor to submit these appointments of Governor Fields, but could on its own initiative, without any executive communication from the Governor, institute and conduct investigation of recess appointments made by him and confirm or reject them.

Bell, supra, at 581.

Also cited in Munson is another Kentucky case decided the same day as Bell and involving a factual situation that is similar to that presented by Mr. Sokolov's appointment by Governor Cowper and removal by Governor Hickel, McChesney v.

Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930). In McChesney, Governor Flem Sampson appointed McChesney to the state text-book commission during the interim between sessions of the legislature. McChesney entered upon the duties of the office. Prior to the state senate coming into session the governor removed McChesney and appointed another to the office. The governor contended that:

> an appointment to the office in question is not complete without the consent of the Senate, and until the title to the office is thus vested, the Governor is free to designate, revoke, and reappoint at will. . . . We are thus brought to the final contention forcibly pressed that the appointments by the chief executive are mere nominations to be confirmed by the Senate, vesting no title to the office until both the Governor and the Senate concur, and that the governor may substitute new nominations at will until the Senate has finally acted.

McChesney, supra, at 585 - 86.

The court rejected these arguments saying:

> [I]n 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 powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall. It is the general rule that an appointment to office is intrinsically executive. . . . In all jurisdictions where appointment to office is regarded as an executive function, as here, an appointment to office once made is incapable of revocation or cancellation by the appointing executive in the absence of a statutory or constitutional power. . . . What then constitutes an appointment in so far 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. . . . It is completed when the appointing authority has

> performed the acts incumbent upon him to accomplish the purpose. . . . 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.

McChesney, supra, at 587.

Under the reasoning of the territorial court in Munson and the cases cited by that court, Mr. Sokolov's appointment by Governor Cowper was not a mere "nomination" but an appointment vesting Mr. Sokolov with the title and the duties, powers, and obligations of his office on the Alaska Public Utilities Commission.

This conclusion is further buttressed by the fact that art. III, § 26 of the Constitution does not mention that the governor shall nominate board and commission members and later appoint them, but rather states that the members of boards and commissions "shall be appointed by the governor, subject to confirmation by a majority of the legislature." Nomination is no where mentioned. In fact, the original and revised drafts of art. III, § 26 of the Alaska Constitution, as prepared by the executive branch committee at the Alaska Constitutional Convention, recommended the following language be adopted:

> 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. . . .

This "nomination" language and reasoning was specifically rejected by the framers of our Constitution in § 26 as it was finally enacted.

Any discussion of Munson deserves at least one final comment. The territorial court in Munson held that the forerunner of AS 39.05.080(d), which vests an appointee with the duties, powers, and obligations of the office appointed to, pending confirmation, only applies in the case of interim appointments - appointments when the legislature is not in session - and that all appointments made while the legislature is in session are mere nominations which vest no title to the office nor any of its duties, powers, and obligations. The language of AS 39.05.080 does not limit itself to such an interpretation, nor is such an interpretation necessary under § 26 of our Constitution as explained earlier. Nor has the practice of the executive branch supported this interpretation. Executive branch appointees, subject to confirmation by the legislature, have routinely been appointed by previous governors and the present governor while the legislature has been in session. These appointees have

taken office, begun exercising the duties, powers, and obligations of their respective offices and have received their salaries. These appointees have not acted nor been treated as mere "nominees", who are not entitled to their offices until confirmation, but are appointees serving in their respective offices, presumably pursuant to AS 39.05.080(d). I, therefore, conclude that the Munson court's interpretation of this provision and its application only to interim appointments was erroneous.

If you have further questions, please contact me at your convenience.

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MEMORANDUM February 6, 1991

SUBJECT: Governor's Appointment to APUC (Work Order No. 17-LS0366)

TO: Senator Pat Pourchot

FROM: Tamara Brandt Cook TBC
Director

Gerald P. Luckhaupt JEB
Legislative Counsel

You have asked the following questions: (1) May the governor switch the members of the Alaska Public Utilities Commission among the various seats, for example from a public seat to engineering seat; (2) If seats may be switched, does the term go with the member or stay with the seat; (3) Who or what determines when the term of an appointee begins and when the appointee goes on the payroll, and may the governor, prior to confirmation, instruct an appointee to take office? We hereby respond as follows.

The facts as we understand them are that Mr. Sokolov was reappointed 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 recent dismissal by Governor Hickel. Mr. Foster was appointed, and confirmed by the legislature, to a consumer seat for a six year term approximately four years ago. Governor Hickel has now moved Mr. Foster from his consumer seat to the engineering seat which was opened up by Mr. Sokolov's dismissal. Mr. Foster continues to serve the term he was originally appointed to (for the consumer seat) while Mr. Schoer, who was appointed to the consumer seat by Governor Hickel, is serving the six year term vacated by Mr. Sokolov.

Technically, the switching of a board member from one seat to another on a board would appear to constitute the removal and reappointment of the member, especially if the seats are earmarked for individuals with particular qualifications, such as the case where a member is moved from a public seat to an engineering seat. Accordingly, if the legislature has the authority to designate seats for individuals with

certain qualifications (the Attorney General has apparently accepted that such qualifications may be legal, see e.g., April 23, 1981, opinion from R. Pegues to Helen Beirne; August 13, 1979, opinion from R. Pegues to Governor Hammond; May 24, 1988, opinion from G. B. Schaible to Governor Cowper), the appointment of an individual to that seat, including the switching of seats, requires the removal of a member from one seat in accordance with law and the confirmation of that member in a new seat by the legislature. In the current situation, the legislature confirmed Mr. Foster's appointment to a consumer seat four years ago. His qualifications to hold the engineering seat have never been reviewed or passed upon by the legislature. To allow the switching of seats without confirmation by the legislature when appointees are required to have different qualifications for different seats would, arguably, 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 state government functions. Therefore, assuming the legislature has the authority to prescribe qualifications for appointments to particular seats of the APUC, we conclude that the switching of seats by the governor requires confirmation by the legislature.

However, if the legislature is found to lack the authority to interfere with the governor's appointment power by prescribing qualifications for particular seats on the APUC, a court could conclude that the governor has the power to switch seats. If the legislature lacks the authority to prescribe qualifications and if the member who is moved continues to serve for the duration of the term he was originally appointed to, and confirmed for, and does not commence a new or different term, no removal or reappointment has occurred. In that situation a court might conclude that the member's service to the state has not been interrupted - no break in service has occurred - so as to require a new appointment by the governor and confirmation by the legislature.

Regardless of whether a seat requires particular qualifications, if the board member commences a new term, that is, if he assumes the term that belongs to the new seat he is taking or the governor appoints him to some wholly new term (regardless of whether his old term has expired), the effect is that of a new appointment or a reappointment, requiring confirmation by the legislature. If the member whose seat is switched retains his original term, that is, if the duration of the period he serves in office is not altered, we do not believe that confirmation would necessarily be required. Note, however, that if the period is shortened by the switch, the member may have a cause of action against the state based upon his or her property interest in the original term. Likewise, if the period is increased a confirmation requirement may be triggered. We have been unable to discover any authority that clearly addresses the question of whether the term is appurtenant to the seat or to the person occupying the seat. Though, it seems reasonable to assume that a term should be found to be appurtenant to the particular seat and not the individual who happens to be occupying it at any particular point in time.

Regarding your questions as to when a term begins and when an appointee goes on the payroll and begins work, AS 39.05.080(4) provides:

> (4) 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.

This language seems to provide that an appointment is effective when the person is appointed by the governor (subject of course to the legislature's authority to reject or fail to confirm the appointee). The Attorney General has so held in an opinion issued February 17, 1982 by Kenneth Vassar, attached. The Supreme Court has, also, held in a similar situation that an appointment is effective when made by the governor. Division of Elections v. Johnstone, 669 P.2d 537 (Alaska 1983). When the person goes on the payroll conceivably could be a different time than when the person is appointed. There are no statutes that set a date that an appointee is to begin receiving a paycheck, though, there are statutes that set out when the governor and lieutenant governor are to begin receiving their salaries. AS 39.20.020 and 39.20.040. These statutes provide that the governor and lieutenant governor begin receiving their salaries when they take the oath of office. At that time they have officially commenced upon the duties of their office. Using these provisions for guidance, we conclude that executive branch appointees should begin receiving their salaries when they take the oath of office and commence upon the duties of their office.

If you have further questions, please contact us at your convenience.

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MEMORANDUM February 5, 1991

SUBJECT: Confirmation Power of Legislature When the Governor Has Failed or Refused to Transmit the Appointment to the Legislature (Work Order No. 17LS-0664)

TO: Representative Dave Donley

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have asked what the authority of the legislature is to hold confirmation proceedings for an appointee of the governor when the governor fails or refuses to transmit the name of the appointee, or notice of the appointment, to the legislature for confirmation. We hereby respond as follows.

Initially, in considering your question we must look to the constitution to determine the appointment power of the governor and the authority of the legislature to confirm or reject those appointments. Article III, sec. 25, of the Alaska Constitution provides:

> The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

And 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.

These provisions provide that the governor has the authority to appoint the "head of each principal department" of the state and 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 all subject to the legislature's constitutional authority to confirm or reject them.[1/]

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

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[1/]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.

> 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 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 give 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 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.

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); McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (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 one court decision that has reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941). That 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.

Therefore, we conclude that the legislature may properly consider the confirmation or rejection of art. III, sec. 25 and 26 appointees of the governor, absent a communication from the governor of a particular appointment or appointments made during the interim and the session. While it is hoped that the governor will comply with the reasonable procedure for communication of appointments the legislature has provided in AS 39.05.080, if the governor fails or refuses the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in sections 25 and 26. 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. 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.

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MEMORANDUM February 1, 1991

SUBJECT: Governor's Power to Remove Members of Boards and Commissions (Work Order No. 17-LS0618)

TO: Representative Dave Donley, Chair
House Judiciary Committee

FROM: Gerald P. Luckhaupt
Legislative Counsel

Tamara Brandt Cook
Director

You have asked about the power of the legislature to confirm members of various boards and about the authority of the governor to remove members.

Article III, § 26, of the Alaska Constitution 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. . . .

This section clearly provides that the members of art. III, § 26 boards and commissions are subject to confirmation and may only be removed as the legislature has provided by law. The Alaska Supreme Court in Bradner v. Hammond, 553 P.2d 1, 3 (1976) recognized this and said:

> Removal of Section 26 board or commission members is as provided by law and, therefore, not necessarily at the governor's pleasure.

To determine how the legislature has provided for the removal of the members of a board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency" one must look to the specific authorizing legislation for the board or commission to determine if the legislature has provided a specific procedure

for removal. One must also look to the statutes pertaining to boards and commissions generally in AS 39 and AS 08. AS 39.05.060 provides that the members of the various boards or commissions listed therein serve at the pleasure of the governor. AS 08.01.020 provides that the members of those boards and commissions listed at AS 08.01.010 serve at the pleasure of the governor.

The removal of the members of boards or commissions that do not meet the attributes of art. III, § 26 boards or commissions is not as simple a question. In considering this situation one must look to the appointment and removal authority of the governor and the type of government established by our constitution.

The government of the state of Alaska is divided into three branches, the executive, the legislative, and the judicial. The authority granted to one branch may not be exercised by another. In Alaska, "[t]he executive power of the State is vested in the Governor." Alaska Constitution, art. III, § 1. In Bradner v. Hammond, supra, the court found the executive authority of the governor necessarily clothes him "with the power to appoint subordinate executive officers to aid him in carrying out the laws of Alaska" and that "the appointment of executive officers is an executive function." In support of this proposition the court cited Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969). In that case the Arizona Supreme Court found:

> The Governor is charged with the duty of taking care that the laws are faithfully executed. He must, therefore, have the power to select subordinates and to remove them if they are unfaithful. Accordingly, we conclude that the power to remove is an executive function. . . .

And in Myers v. United States, 272 U.S. 52, 117-118, 47 S.Ct. 21, 71 L.Ed.2d 160 (1926) the United States Supreme Court said regarding the powers of the President:

> As he is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. [Citation omitted.] It was urged that the natural meaning of the term 'executive power' granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.

And generally it has been held in other states that:

> [T]he power to remove is incident to the power to appoint and that the authority to appoint an officer carries with it the authority to remove such officer in the absence of any constitutional or statutory restriction. (Gowey v. Siggelkow, 382 P.2d 764, 773 (Idaho 1963); 63 Am.Jur.2d, Public Officers and Employees § 221.)

Clearly from this discussion the power to remove a member of a board or commission is as much a part of the executive power of the governor as is the power to appoint as determined by the Alaska Supreme Court in Bradner v. Hammond.

In determining that the confirmation power of the legislature provided in art. III, §§ 25 (principal department heads) and 26, is merely a limited delegation of the executive appointment power to the legislature, the court said:

> As to this issue, we think the provisions of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26 mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government. (Bradner v. Hammond, supra, at 7.)

Similarly, the legislature's authority to determine how an art. III, § 26 board or commission member may be removed appears to be a limited delegation of the executive appointment power and is limited to those boards or commissions that are "at the head of a principal department or a regulatory or quasi-judicial agency." Under this reasoning, other board or commission members serve at the pleasure of the governor and may be removed at any time despite limitations the legislature may attempt to impose by statute.

There is contrary authority that rejects the notion that an appointee serves at the pleasure of the governor when the legislature has set a specified term of office or has otherwise limited the authority of the executive to remove the appointee by statute.

> But the power of removal is not incident to the power of appointment where the extent of the term is fixed by the statute. In the absence of any provision for summary removal, appointments to continue for life or during good behavior, which in contemplation of law is for a fixed term - or for a fixed term of years cannot be terminated except for cause. It is the fixity of the term that destroys the power of removal at pleasure. (Gowey v. Siggelkow, supra, at 774.)

While the Alaska Supreme Court could adopt this general rule in Alaska, the likelihood of this appears to be remote based upon the Supreme Court decision in

Bradner. The reasoning of the Bradner court appears to require a determination that non-section 26 boards and commissions are not subject to removal provisions enacted by the legislature and that the members of those boards and commissions serve at the pleasure of the governor. This conclusion seems to be supported by the reasoning in Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966) in which the court treated removal as an executive power and noted that where members of a board serve at the pleasure of the governor they may be removed at any time.

In response to your specific inquiries concerning the Boards of Education, Fisheries, and Game, it appears that all are art. III, § 26 boards and so their members are subject to confirmation and may only be removed as provided by law. AS 14.07.115 provides that members of the Board of Education serve at the pleasure of the governor.

The inquiries concerning the Board of Fisheries and the Board of Game are not as easily answered. AS 16.05.280 provides that "[t]he governor may remove a board member for inefficiency, neglect of duty, or misconduct in office" and provides for notice and a hearing. This section applies to both the Board of Fisheries and the Board of Game and appears to limit the governor to removals for cause only. However, AS 39.05.060 provides that each member of the Boards of Fisheries and Game "holds office at the pleasure of the governor notwithstanding the member's term." AS 39.05.060(d).

Two interpretations are available from the existence of these two seemingly conflicting statutes. One is that they are not in conflict but are merely alternative methods for the removal of board members. The second is that they are in conflict and the later (in time) enactment controls. We will briefly discuss the two interpretations.

That the provisions are not in conflict comports with the general rules governing statutory construction. Generally, repeals of statutes by implication or reach of another statute are disfavored and the statutes will be read in pari materia to avoid any such conflict. Peter v. State, 531 P.2d 1263 (Alaska 1975). Here, the statutes do not necessarily pertain to the same subject matter. AS 16.05.280 pertains to removals of board members for cause and AS 39.05.060 deals with removals of board members without cause. AS 16.05.280 also provides that board members "may" be removed for cause. It does not provide that board members may "only" be removed for cause, thereby not providing an exclusive removal procedure. The statutes may be read together to avoid any conflict, though the net result is to allow for the removal of board members at any time and for any reason. Such a result is not absurd, since a removal for cause may occasion public ridicule and injury to reputation necessitating the notice and hearing provisions of AS 16.05.280, while no such effects would normally attend a without cause removal.

The second alternative, that the two provisions are in conflict and that the provision enacted later in time controls, leads to the result that AS 39.05.060 impliedly repealed AS 16.05.280. Terry, supra. AS 16.05.280 was enacted in 1959 and has not been amended since that time. AS 39.05.060 was also enacted in 1959 and included the Board of Fisheries and Game (when only one combined board existed). In 1975 the Board of Fisheries and Game was split into two separate boards, the Board of Fisheries and the Board of Game, by chapter 206, SLA 1975. That act also amended AS 39.05.060 to include both the Board of Fisheries and the Board of Game. Since the legislature is intended to have knowledge of all its previous enactments, its enactment of AS 39.05.060 to include the Boards of Fisheries and Game acted as an implied repeal of AS 16.05.280 under this interpretation and, therefore, the members of the Boards of Fisheries and Game serve at the pleasure of the governor.

Of these two interpretations the former appears to be the most reasonable. Therefore, we conclude that the members of the Boards of Fisheries and Game serve at the pleasure of the governor in addition to being subject to removal for cause after notice and hearing as provided by AS 16.05.280.

In response to your question regarding removal of members of the Board of Trustees of the Alaska Permanent Fund Corporation AS 37.13.070(a) provides:

> (a) The governor may remove a member of the board from office. A removal by the governor must be in writing and must state the reason for the removal. A member who is removed by the governor may not participate in board business and may not be counted for purposes of establishing a quorum after the member receives written notice of removal from the governor.

The Board of Trustees is not a regulatory or quasi-judicial body, nor is it at the head of a principal department. (See Walker v. Alaska State Mortgage Association, supra, wherein the court specifically considered and rejected the argument that a board of a public corporation with a legal existence independent of the state is a board of a principal department for purposes of triggering the confirmation requirement.) Since the Board of Trustees is not a section 26 board, members are not subject to confirmation and the legislature may not by law substantially curtail the power of the governor to remove members. It is possible that even the requirement of a statement of reasons for removal would not be enforced by a court.

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MEMORANDUM January 25, 1991

SUBJECT: Confirmation Power of Legislature When the Governor Has Failed or Refused to Transmit the Appointment to the Legislature (W.O. 17LS-0450)

TO: Senator Dick Eliason

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have asked what the authority of the legislature is to hold confirmation proceedings for an appointee of the governor when the governor fails or refuses to transmit the name of the appointee, or notice of the appointment, to the legislature for confirmation. We hereby respond as follows.

Initially, in considering your question we must look to the constitution to determine the appointment power of the governor and the authority of the legislature to confirm or reject those appointments. Article III, sec. 25, of the Alaska Constitution provides:

> The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

And 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

> 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 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 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 give 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.

> 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.

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); McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (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 one court decision that has reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941). That 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.

Therefore, we conclude that the legislature may properly consider the confirmation or rejection of art. III, sec. 25 and 26 appointees of the governor, absent a communication from the governor of a particular appointment or appointments made during the interim and the session. While it is hoped that the governor will comply with the reasonable procedure for communication of appointments the legislature has provided in AS 39.05.080, if the governor fails or refuses the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in sections 25 and 26. 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. 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.

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MEMORANDUM December 26, 1990

SUBJECT: Status of governor's appointment to APUC
(W.O. No. 7-LS0360)

TO: Representative Kay Brown

FROM: Jerry Luckhaupt
Legislative Counsel

You have asked for an opinion on the status of the appointment by Governor Cowper in November of a commissioner to the Alaska Public Utilities Commission: Is the appointment binding on the new administration? May the appointment be withdrawn by the new governor prior to confirmation by the legislature?

To answer your questions we must first look to art. III, sec. 26 of the Alaska Constitution which states:

> When a board or commission is at the head of a principal department or 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.

AS 39.05.080(4) provides:

> 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 plain language of these provisions, if the public utilities commission is a "regulatory or quasi-judicial agency" for purposes of art. III, sec. 26 (as it appears to be), and if the commissioner: (1) has received a commission from Governor

Cowper, as provided in AS 39.05.035; (2) has executed his constitutionally required oath of office and filed it with the lieutenant governor as required by art. XII, sec. 5 of the Alaska Constitution and AS 39.05.040; and (3) has embarked upon and is exercising the duties of his office; it appears his appointment is binding upon the subsequent administration and he may only be removed as provided by law, subject, of course, to the legislature's authority to confirm or fail to confirm him. A member of the Alaska Public Utilities Commission may only be removed from office by the governor "by and with the consent of a majority of the legislature." AS 42.05.035. Absent removal by Governor Hickel, and consent to remove by a majority of the legislature, the commissioner is entitled to retain his office subject to the legislature's decision to confirm.

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'". Begich v. Jefferson, 441 P.2d 27, 32 (Alaska 1968). In Alaska, "appointed" clearly does not mean "nominated".

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 court cited McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930) in support of this proposition. 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. [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 the 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).

Clearly, if the APUC commissioner has been appointed by Governor Cowper, has received his commission and executed and filed his oath, and has embarked upon the duties of his office his appointment may not be revoked or recalled and he may be removed only as provided in AS 42.05.035, subject, of course, to the legislature's decision to confirm him or not to confirm him.

Be advised that the Attorney General has issued two memoranda of advice (attached hereto) that appear to conflict with this opinion. The first, issued in 1979, dealt with a reappointment of a board member by an outgoing governor to a term to commence after the outgoing governor has left office. The other memorandum issued in 1983, does not acknowledge the limited nature of this earlier memorandum and alerts the reader that the memoranda are without authority. These memoranda were issued prior to the Johnstone decision cited in this opinion. The vitality of these memoranda are questionable considering their lack of authority, this opinion, and the settlement by the state of a lawsuit filed by Michael Whitehead appointed by Governor Hammond to a position on the Commercial Fisheries Entry Commission prior to Governor Hammond leaving office. Mr. Whitehead was replaced by Governor Sheffield and he sued. It is my understanding that the state settled the case.

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90-019.mai

Enclosure

Vicki A. Clayman
Office of the Governor

DATE: December 10, 1979

FILE NO. J-66-334-80

TELEPHONE NO.:

AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Reappointments to boards or commissions

By:
Rodger W. Peppes
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,

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

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

SUBJECT: Withdrawal of appointment

FROM: Norman C. Gorsuch
Attorney General

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 the 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.

TELECOPIER (907) 747-5588
TELEPHONE (907) 747-2211

ALASKA PULP CORPORATION
4600 SAWMILL CREEK ROAD • SITKA, ALASKA 99835-9801

May 7, 1991

Senate Judiciary Committee
State of Alaska

Gentlemen:

This letter is in support of the confirmation of Dave Dapcevich for the State Judiciary Council. I have known Mr. Dapcevich for more than 8 years in a variety of relationships in Sitka. He has always been fair, honest, and a person of the highest integrity. He is obviously a thoughtful, intelligent person that understands the realities of life in Alaska.

I would urge your confirmation of Mr. Dapcevich as a person who will ably represent the interests of all the people of the State on the Judicial Commission.

Very truly yours,

ALASKA PULP CORPORATION

Franklin C. Roppel
Executive Vice President

FCR:lc

cc: Dave Dapcevich

called May! -
130 May 12 OK

March 15, 1991

BOARDS & COMMISSIONS
MAR 25 199[illegible]

Donald Tanner,
Director of Boards and Commissions
State of Alaska

Juneau, AK 99810

Dear Mr. Tanner,

I am writing to request that I be considered for an appointment to a public member position on the Alaska Judicial Council when a vacancy occurs.

I am a lifelong Alaskan, have been actively involved in public service for the past sixteen years and am committed to the concept of citizen involvement in the affairs of our state and municipalities.

My involvement has always gone beyond mere membership on the boards and committees on which I've served as I do my homework and make every effort to become as knowledgable as I can before making any decisions. I believe that hard work, plus a common-sense approach to problem solving, has enabled me to serve successfully for many years in many diverse positions. I believe this is the type of approach you are looking for in your citizen-at-large appointments to state boards and commissions.

My resume follows:

Age:	42
Birthplace:	Juneau
Marital Status:	Married, two children
Current Employment:	1975-91 - Self-employed accountant
Previous Work Experience:	1975-78 - Assistant Director & Accountant for the Alaskan Youth Village in Juneau 1970-75 - Employed as accountant at Dapcevich Accounting Service in Sitka and Juneau
Education:	1963-67 - Sitka High School Graduate 1967-69 - Attended Western Washington State College in Bellingham 1968 - Attended Sheldon Jackson College in Sitka 1970-73 - Attended ITT Peterson School of Business in Seattle - Graduated 1973 from Executive Accounting Pgm.

Community Service	1975-78 - Worked for 1/3 previous salary for Alaskan Youth Village.
	1978-86 - Member of Board of Directors Sitka Receiving Home
	1984-86 - Chaired Receiving Home Board
	1979-85 - Member of Sitka Parks and Recreation Committee
	1985-91 - Assembly Member, City and Borough of Sitka
	1988-89 - Deputy Mayor
	1990-91 - Deputy Mayor
	1986-87 - Member, Legislative Committee, Taxation & Finance, Alaska Municipal League
	1987-91 - Member, Board of Directors Alaska Municipal League
	1990-91 - Local Government Committee, Southeast Conference
	1975-91 - Various short-term boards & committees when requested

I feel a bit uncomfortable going to all this detail, but am listing it to show that my committment to public service is for real. I might also add that I'm not proud of my educational stints at W. Wash. State and Sheldon Jackson Colleges, but finally got serious in the early 1970's and have been "going to school" ever since.

If I can provide any additional information which would assist you in making your decision, please do not hesitate to call or write.

Thank you for your thoughtful consideration.

Respectfully yours,

David A. Dapcevich
221 Lincoln Street
Sitka, AK 99835
Phone (W)747-1040 (H)747-6018

November 8, 1990

Mr. Peter Sokolov
11100 Magnolia Street
Anchorage, AK 99516

Dear Peter,

I want to express my sincare appreciation for the many hours which you have given to the State of Alaska as a member of Alaska Public Utilities Commission. I am pleased to re-appoint you to another term ending October 31, 1996. Again, you will possess the authority to exercise the powers and perform the duties of your office pending confirmation by the Legislature. With this reappointment, you will continue in the position of Chair of APUC until your Chair term expires on December 1, 1993.

Enclosed is an updated identification card to facilitate your travel as a board member. Please use these card privileges only during official state business. If you should resign your appointment before your term expires, please return the card to my Boards and Commissions Office.

We Alaskans appreciate your continuing and important contribution to our citizens and state. Thanks for doing your part.

Sincerely,

S/S Steve Cowper

Steve Cowper
Governor

Enclosure

bcc: Lt. Governor's Office
Regional Offices
Contact: Ted Moninski
Juneau Information Office
Chief Clerk of the House
Anchorage Information Office
APOC
Barbara Whiting
Senate Secretary
Rep. Ron Larson
EEO

SC:PFB:tln

0108/05

January 31, 1991

SENT VIA TELECOPIER

Don Tanner, Director
Boards and Commissions
Office of the Governor
State of Alaska
P.O. Box A
Juneau, Alaska 99811-0101

Dear Mr. Tanner:

This is in response to your January 29, 1991 letter, in which you informed me that Governor Hickel is attempting to withdraw my reappointment to the Alaska Public Utilities Commission, and to replace me on the Commission effective January 23, 1991.

I was lawfully appointed to the Commission, and may not be summarily removed. Furthermore, the Alaska State Legislature has the right and the responsibility to decide whether or not to confirm my appointment. I believe that my appointment has already been submitted to the Legislature for confirmation, and I request that no action be taken to prevent the Legislature from carrying out its responsibilities. If my name has not been submitted, then I request that it be submitted, as the law requires.

While I believe that the action taken by the Governor's Office is illegal, I also do not believe that it is in the public interest to become involved in a personal confrontation with the Governor's Office. I will therefore physically vacate the premises where my office is located, as you request. I also will comply with any reasonable request for my continued assistance in seeing that the duties and responsibilities of the Commission are carried out. At the same time, I reserve all of my rights under law, including the right to be reinstated to my position on the Commission. I will immediately resume the performance of my duties on the Commission upon notification of my reinstatement.

Sincerely yours,

Peter Sokolov

Military Authority.

ommander-in-chief of the armed forces of the State. He
e forces to execute the laws, suppress or prevent insur-
violence, or repel invasion. The governor, as provided
oint all general and flag officers of the armed forces of
to confirmation by a majority of the members of the
t session. He shall appoint and commission all other

artial Law.

proclaim martial law when the public safety requires
on or actual or imminent invasion. Martial law shall
onger than twenty days without the approval of a
nbers of the legislature in joint session.

cutive Clemency.

e prescribed by law, the governor may grant pardons,
reprieves, and may suspend and remit fines and
er shall not extend to impeachment. A parole system
law.

utive Branch.

ministrative offices, departments, and agencies of
and their respective functions, powers, and duties
law among and within not more than twenty prin-
as to group them as far as practicable according to
latory, quasi-judicial, and temporary agencies may
and need not be allocated within a principal

anization.

ke changes in the organization of the executive
nment of functions among its units which he
efficient administration. Where these changes
they shall be set forth in executive orders. The
ty days of a regular session, or a full session if of
approve these executive orders. Unless disap-
ncurred in by a majority of the members in joint
come effective at a date thereafter to be desig-

Section 24 - Supervision.

Each principal department shall be under the supervision of the governor.

Section 25 - Department Heads.

The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

Revisor's note - Senate Joint Resolution No. 2, "changing the name of the secretary of state to lieutenant governor" in 16 sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.

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.

Section 27 - Recess Appointments.

The governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law.

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary Committee
committee name

committee on CONFIRMATION OF DAVID DARCEVICH FOR JUDICIAL COUNCIL, dated 7 MAY 1991.
bill/subject

I HAVE KNOWN AND OBSERVED DAVE DARCEVICH OVER THE PAST FIVE YEARS AS A SITKA ASSEMBLYMAN AND AS A CITIZEN OF THE COMMUNITY. HE HAS DEMONSTRATED THOSE QUALITIES OF DETACHED FAIRNESS AND REASONED ACTION THAT WILL SERVE THE JUDICIAL COUNCIL WELL. DAVE DARCEVICH IS INVOLVED IN HIS COMMUNITY AND KNOWS THE STATE, HE WILL MAKE NECESSARY ANALYSES TO PROPERLY CHOOSE AMONG POSSIBLE JUDICIAL CANDIDATES.

DAVE DARCEVICH HAS DEMONSTRATED THE BREADTH OF KNOWLEDGE AND MATURITY TO WARRENT APPOINTMENT.

THANK YOU FOR YOUR CONSIDERATION

Signed: Edward Mackler
Testifier

Representing (Optional)

Box 133, SITKA
Address

907-747-2211
Phone No.

Testimony Faxed
Via the Sitka LIO
5-7-91 1 of 1

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary Committee
committee name

committee on CONFIRMATION OF DAVID DAPCEVICH FOR JUDICIAL COUNCIL, dated 7 MAY 1991.
bill/subject

I HAVE KNOWN AND OBSERVED DAVE DAPCEVICH OVER THE PAST FIVE YEARS AS A SITKA ASSEMBLYMAN AND AS A CITIZEN OF THE COMMUNITY. HE HAS DEMONSTRATED THOSE QUALITIES OF DETACHED FAIRNESS AND REASONED ACTION THAT WILL SERVE THE JUDICIAL COUNCIL WELL. DAVE DAPCEVICH IS INVOLVED IN HIS COMMUNITY AND KNOWS THE STATE, HE WILL MAKE NECESSARY ANALYSES TO PROPERLY CHOOSE AMONG POSSIBLE JUDICIAL CANDIDATES.

DAVE DAPCEVICH HAS DEMONSTRATED THE BREADTH OF KNOWLEDGE AND MATURITY TO WARRENT APPOINTMENT. THANK YOU FOR YOUR CONSIDERATION

Signed: Edward Malewski
Testifier

Representing (Optional)

Box 133, SITKA
Address

907-747-2211
Phone No.

The New England Journal of Medicine

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THANK YOU

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SPECIAL ARTICLES

INCIDENCE OF ADVERSE EVENTS AND NEGLIGENCE IN HOSPITALIZED PATIENTS

Results of the Harvard Medical Practice Study I

TROYEN A. BRENNAN, M.P.H., M.D., J.D., LUCIAN L. LEAPE, M.D., NAN M. LAIRD, PH.D., LIESI HEBERT, SC.D., A. RUSSELL LOCALIO, J.D., M.S., M.P.H., ANN G. LAWTHERS, SC.D., JOSEPH P. NEWHOUSE, PH.D., PAUL C. WEILER, LL.M., AND HOWARD H. HIATT, M.D.

Abstract *Background.* As part of an interdisciplinary study of medical injury and malpractice litigation, we estimated the incidence of adverse events, defined as injuries caused by medical management, and of the subgroup of such injuries that resulted from negligent or substandard care.

Methods. We reviewed 30,121 randomly selected records from 51 randomly selected acute care, nonpsychiatric hospitals in New York State in 1984. We then developed population estimates of injuries and computed rates according to the age and sex of the patients as well as the specialties of the physicians.

Results. Adverse events occurred in 3.7 percent of the hospitalizations (95 percent confidence interval, 3.2 to 4.2), and 27.6 percent of the adverse events were due to negligence (95 percent confidence interval, 22.5 to 32.8). Although 70.5 percent of the adverse events gave rise to disability lasting less than six months, 2.6 percent caused permanently disabling injuries and 13.6 percent led to death. The percentage of adverse events attributable to negligence increased in the categories of more severe injuries (Wald test $\chi^2 = 21.04$, $P<0.0001$). Using weighted totals, we estimated that among the 2,671,063 patients discharged from New York hospitals in 1984 there were 98,609 adverse events and 27,179 adverse events involving negligence. Rates of adverse events rose with age ($P<0.0001$). The percentage of adverse events due to negligence was markedly higher among the elderly ($P<0.01$). There were significant differences in rates of adverse events among categories of clinical specialties ($P<0.0001$), but no differences in the percentage due to negligence.

Conclusions. There is a substantial amount of injury to patients from medical management, and many injuries are the result of substandard care. (N Engl J Med 1991; 324:370-6.)

OVER the past decade there has been a steady increase in the number of malpractice claims brought against health care providers[1,2] and in the monetary damages awarded to plaintiffs.[3-5] This increase has precipitated numerous state programs designed to moderate the number of claims and encourage providers to develop quality-of-care initiatives.[6,7] Advocates of tort reform argue that the existing system of malpractice litigation is inefficient in compensating patients injured by medical practice and in deterring the performance of poor-quality care that is sometimes responsible for the injuries.[8] Others defend the role of tort litigation.[9] These debates will probably continue even as claims rates begin to decrease.[10]

Controversy over the virtues of common-law malpractice litigation occurs without much empirical information regarding the epidemiology of poor-quality care and iatrogenic injury. The most widely quoted estimates of the incidence of iatrogenic injury and substandard care were developed over 10 years ago.[11] Other reviews by physicians to identify poor-quality care or adverse events have been restricted to nonrandom samples of much smaller numbers of records.[12,13]

To address the need for empirical information, we undertook the Harvard Medical Practice Study. A primary goal was to develop more current and more reliable estimates of the incidence of adverse events and negligence in hospitalized patients. We defined an adverse event as an injury that was caused by medical management (rather than the underlying disease) and that prolonged the hospitalization, produced a disability at the time of discharge, or both. We defined negligence as care that fell below the standard expected of physicians in their community. To estimate the incidence of these critical events, we reviewed a random sample of more than 31,000 hospital records using techniques we have previously described.[14-16]

From the Division of General Medicine, Brigham and Women's Hospital and Harvard Medical School (T.A.B., H.H.H.), the Department of Health Policy and Management, Harvard School of Public Health (L.L.L., L.H., A.R.L., A.G.L., J.P.N., H.H.H.), the Department of Biostatistics, Harvard School of Public Health (N.M.L.), and the Department of Health Care Policy, Harvard Medical School (J.P.N.), all in Boston; and the Kennedy School of Government, Harvard University (J.P.N.), and Harvard Law School (P.C.W.), both in Cambridge, Mass. Address reprint requests to Dr. Brennan at the Division of General Medicine, Brigham and Women's Hospital, 75 Francis St., Boston, MA 02115.

Presented in part at the Annual Meeting of the Association of American Physicians, Washington, D.C., May 6, 1990.

Dr. Brennan is a Research and Teaching Scholar of the American College of Physicians.

METHODS

Sample Selection and Record Review

We have presented our methods of record review and our sampling strategy in detail elsewhere.[16] We used a two-stage sampling process to create a weighted sample of 31,429 records of hospitalized patients from a population of 2,671,863 nonpsychiatric patients discharged from nonfederal acute care hospitals in New York in 1984. Initially, the records were screened by trained nurses and medical-records analysts; if a record was screened as positive, two physicians independently reviewed it. The physicians, almost all of whom were board-certified internists or surgeons, were trained by us to assess the medical records for evidence of adverse events and negligence (Appendix 1) and to grade

their confidence that an adverse event had occurred on a scale of 0 to 6 (the causation score).

Because we were interested in estimating the statewide incidence of adverse events, the physician-reviewers recorded not only adverse events that occurred and were discovered during the index hospitalization, but also those caused by medical management before the index hospitalization and first discovered during it. In calculating incidence rates, we counted only events discovered during the sampled 1984 hospitalizations. By including adverse events that occurred earlier but were first discovered during the index hospitalization, we compensated for adverse events caused during the index hospitalization but discovered only after discharge. In order to avoid overstating incidence, we excluded events that were caused during the 1984 index hospitalization but were discovered during a subsequent hospitalization in 1984.

If the reviewers' confidence in the occurrence of an adverse event was greater than 1 on a six-point scale, they assessed the disability it caused. Next, they judged whether there was evidence of negligence and indicated their level of confidence in that judgment. Throughout the process, they could consult New York specialists recruited for the purpose. Discrepancies between the two physician-reviewers in the identification of adverse events were noted by a medical-records-analysis supervisor overseeing the screening process and were resolved in an independent review by a supervising physician (one of six physicians from Boston who directed the record review in one region in New York).

Testing Reliability and Validity

To test the validity of the process of screening by medical-records analysts, 1 percent of all records were reviewed again by a medical-records-analysis supervisor using a blank screening form. The validity of the initial review was tested by considering the supervisor's review a gold standard.

The reliability of judgments of adverse events (causation) and substandard care (negligence) was tested by a team consisting of a medical-records-analysis supervisor, several physician-reviewers, and a physician-supervisor, which completed a second review of all records initially screened as positive at two hospitals. The results of this review were compared with those of the original review, with use of the kappa statistic.

Follow-up of Missing Records and Adjustments

Several months after the initial review of records, we asked all the hospitals to attempt to identify the current status of any records that they had not located earlier. We reviewed all the records found in this follow-up search, using our regular review process. This enabled us to estimate the rates of adverse events and negligence in missing records. We also adjusted for possible differential selection of missing records according to hospital and case type, and we used imputation to fill in the missing items of data, conditional on a reviewer's response to other items.[17]

Definition of Variables

To establish that an adverse event or negligence had occurred, we used as a criterion an average confidence score of 4 or higher (on a six-point scale). For patient-disability scores we used the ratings given by both reviewers and assigned half the weight for each case to each of the two reviewers. Data concerning age, sex, and primary discharge diagnosis were obtained from the data base of the New York Statewide Planning and Research Cooperative System (SPARCS).[18] Specialties were determined on the basis of diagnosis-related groups (DRGs) (Appendix II).

Statistical Analysis

We report our results as the percentage of discharges with adverse events, the percentage of adverse events due to negligence, and population estimates of the numbers of adverse events and adverse events due to negligence according to disability category. We calculated all percentages and population projections using the selection weights, adjusted as described above. We used the SESUDAAN software package to calculate standard errors.[19] The significance of differences in rates was tested with the Wald statistic.

For five age groups we computed the crude rate of adverse events and a rate directly standardized to control for the inherent risk that a particular diagnosis would give rise to an adverse event. We standardized the rate using four risk categories obtained as follows. Three physician-supervisors individually rated all 470 DRGs on a scale of 1 to 6, reflecting their belief that the DRG was most (6) or least (1) likely, on clinical grounds, to be associated with an adverse event. We averaged the three ratings to define four risk categories of DRG (Appendix II). We did not standardize the percentage of negligence according to DRG risk. Since the denominator of the percentage of negligence was the number of adverse events, this acted as an implicit control for the complexity of care.

To compare rates of adverse events and negligence according to sex, we used directly standardized rates controlling for five categories of patient age and four categories of risk that a particular diagnosis would give rise to an adverse event. Only two age categories (<65 and ≥65 years) were used to standardize the percentage of negligence.

Results

We completed the initial review of 30,195 of the 31,429 records (96.1 percent) in the original random sample. Among these, the medical-records analysts found 7817 positive according to the screening criteria. Physicians reviewed 7743 of them at the second-level review. The results reported here are thus based on 30,121 records, including 22,378 with negative screens and 7743 reviewed by physicians. Using the incidence categories described above, the physicians identified 1278 adverse events and 306 adverse events due to negligence (Fig. 1). The incidence rates presented here are based on the 1133 adverse events and 280 negligent ones discovered during 1984 admissions (categories 1, 4, and 5; Table 1).

We estimated the statewide incidence rate of adverse events to have been 3.7 percent (95 percent confidence interval, 3.2 to 4.2) and the rate of adverse events due to negligence to have been 1.0 percent (95 percent confidence interval, 0.8 to 1.2). The percentage of adverse events due to negligence was 27.6 percent (95 percent confidence interval, 22.5 to 32.6). Using the weighting procedure, we calculated that of the 2,671,863 patients discharged from acute care hospitals in New York State in 1984, there were 98,609 adverse events and 27,179 adverse events due to negligence.

Most adverse events (mean [±SE], 56.8±1.6 percent) resulted in minor impairment with complete recovery in one month. Another 13.7±1.1 percent led to disabilities that lasted more than one but less than six months. However, 2.6±0.4 percent of the adverse events gave rise to permanent total disability, and 13.6±1.7 percent caused death. Extrapolating to the state of New York in 1984, we estimated that 2550 patients suffered permanent total disability and that 13,451 died at least in part as a result of adverse events (Table 2).

Negligence was more frequent in patients who had more severe adverse events. Of the adverse events that

led to temporary disability lasting less than one month, 22.2±2.8 percent were caused by negligence. On the other hand, of those that caused permanent total disability, 34.4±8.1 percent were caused by negligence. In addition, 51.3±6.9 percent of the deaths from adverse events were caused by negligence. These differences in the percentage of negligence according to category were significant (Wald test $\chi^2 = 21.04$, $P<0.0001$).

We also analyzed the distribution of adverse events among different patient populations. Rates of adverse events increased strongly with increasing age ($P<0.0001$). Persons 65 or older had more than double the risk of persons 16 to 44 years of age (Table 3).

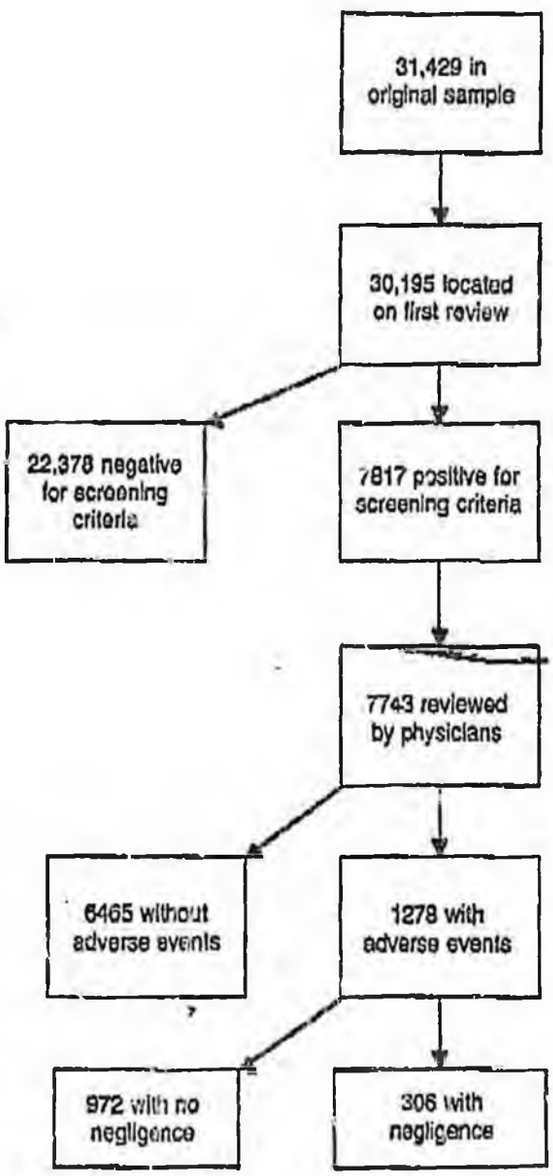

Figure 1. The Record-Review Process. Numbers of medical records are shown.

Unlike the rates of adverse events, the percentage of adverse events due to negligence did not increase monotonically with age, but the rate of negligence among those older than 64 was higher than that of any other age group, a difference that remained after standardizing for DRG risk category.

After standardizing for age and DRG risk category, we found no significant differences between sexes in rates of adverse events (male, 3.8±0.4 percent; female, 3.7±0.4 percent) or in the percentage of adverse events due to negligence (male, 27.4±2.8 percent; female, 25.0±2.8 percent).

Table 4 shows the rates of adverse events and negligence for groups of clinical specialties based on DRG groupings, as well as population estimates for each specialty. Rates of adverse events varied significantly, ranging from a low of 0.6±0.1 percent for neonatal DRGs to a high of 16.1±3.0 percent for vascular-surgery DRGs, a more than 25-fold difference. Rates of negligence did not vary significantly.

We checked the accuracy of our results in several ways. First, we found 154 of the 326 missing records (47.2 percent) in follow-up visits to the six hospitals. The rates of adverse events (2.5 percent) and negligence (0.7 percent) among the missing records were lower than among the records originally reviewed. Second, a test by the medical-records-analysis supervisors of the validity of the screening criteria revealed a sensitivity of 89 percent. Third, the reliability of the judgments by the physicians was comparable to that in our pilot studies.[14] The agreement on the presence of an adverse event was 89 percent (kappa = 0.61). With regard to negligence, the agreement was 93 percent, but the kappa statistic was much lower (0.24) (Table 5).

Discussion

As part of a comprehensive empirical assessment of medical injury and medical malpractice,[15] we estimated the rates of adverse events and the subgroup of those adverse events caused by negligent care in hospitalized patients in New York State in 1984. Our results should be understood in the context of both medical-malpractice litigation and quality assessment. The concepts of adverse event and negligence are derived explicitly from the theory of tort law, of which medical malpractice is a part. Malpractice litigation is intended in part to promote better-quality care by fixing economic sanctions on those who provide substandard care that leads to injuries. Thus, malpractice litigation should in theory be linked to quality assurance. We left aside the aspects of compensation and corrective justice in tort litigation in this analysis.[19]

Adverse events do not, of course, necessarily signal poor-quality care; nor does their absence necessarily indicate good-quality care. For example, a drug reaction that occurs in a patient who has been appropriately prescribed the drug for the first time is an adverse event, but one that is unavoidable given today's

Table 1. Categories of Incidence of Adverse Events and Negligence.

Category	Timing of Adverse Event	Adverse Events*	Adverse Events Due to Negligence*
		number (percent)	
1	Occurred and discovered during index hospitalization	647 (50.6) 55,046 (49.4)	136 (51.0) 15,237 (51.2)
2	Occurred during index hospitalization, discovered during subsequent outpatient care	78 (6.1) 6,327 (5.7)	7 (2.5) 776 (2.6)
3	Occurred during index hospitalization, discovered during subsequent hospitalization	67 (5.2) 6,576 (5.9)	19 (6.2) 1,837 (6.2)
4	Occurred during outpatient care before index hospitalization but discovered during index hospitalization	167 (13.1) 16,142 (14.5)	59 (19.3) 6,019 (20.2)
5	Occurred during earlier hospitalization but discovered during index hospitalization	319 (25.0) 27,420 (24.6)	65 (21.2) 5,903 (19.8)

*For each category the first row of values indicates the sample count, and the second row the weighted population total.

technology. If, on the other hand, the drug reaction occurs in a patient who is given the drug despite a known sensitivity to it, the adverse event is properly judged to be due to negligence. Such care, which may reasonably lead to successful tort litigation, should be a target of quality-assurance programs.

Using our methods, we estimated that 3.7 percent of the patients hospitalized in 1984 suffered adverse events, whereas the rate of adverse events due to negligence was 1.0 percent. These results may be compared with those of the only other large-scale effort to estimate the incidence of iatrogenic injury and substandard care, the California Medical Association's Medical Insurance Feasibility Study.[11] Investigators there found 870 potentially compensable events (a category comparable to our adverse events) in a convenience sample of 20,864 records, for an overall rate of 4.6 percent. This rate was 26 percent higher than our estimate of 3.7 percent. The California study revealed a negligence rate of 0.8 percent, 20 percent lower than the result of our review.

Because our sample of hospital records was random, we could provide for the first time population estimates of adverse events and adverse events due to negligence. Among the 2,671,863 discharges from New York hospitals in 1984, we estimate that there were 98,609 adverse events. Although 56,042 of them (56.8 percent) led to minimal disability with complete recovery in one month and another 13,521 (13.7 percent) to moderate disability with complete recovery in six months, 2550 (2.6 percent) produced permanent total disability, and 13,451 (13.6 percent) led to death. The burden of iatrogenic injury was thus large.

Even more disturbing was the number of adverse events caused by negligence. We estimated that 27,179 injuries, including 6895 deaths and 877 cases of permanent and total disability, resulted from negligent care in New York in 1984. Under the tort system, all of these could have led to successful litigation. We could not measure all negligent acts, and made no attempt to, but measured only those that led to injury. Medical records are probably a poor source of information on negligence that does not cause injury. Thus, our figures reflect not the amount of negligence, but only its consequences.

The analyses of rates of adverse events and the percentage of adverse events due to negligence according to characteristics of the patient are of special interest. Identifying risk factors for adverse events, whether negligent or not, constitutes a crucial first step toward their prevention, an important goal of quality assurance. In this study, we focused on patient age and sex and on clinical-specialty groups.

To increase the precision of our analyses of risk factors, we standardized the data according to our estimates of the risk of a particular DRG's giving rise to an adverse event. This risk categorization was found to correlate well with the observed rates of adverse events, but not with rates of negligence (Appendix II). The absence of an effect of DRG risk category on negligence was expected, for our physicians' judgments regarding the standard of care reflected the inherent riskiness of a procedure or disease state.

We found that both crude and standardized rates of adverse events increased with age. This suggests that elderly people are at higher risk of an adverse event, and it may reflect in part the fact that older people are likely to have more complicated illnesses and often require more complicated intervention. It may also be ascribable in part to their greater fragility. Such differences highlight the importance of controlling for age when comparing population groups. People over the age of 64 were at higher risk of an adverse event associated with negligence, a finding not readily explained by differences in the severity of illness. Presumably, this means that care for the elderly less frequently meets the standard expected of reasonable medical

Table 2. Population Distribution of Adverse Events According to Category of Disability.*

Category of Disability	Adverse Events	Adverse Events Due to Negligence	Percentage Due to Negligence
	number (percent)		
Minimal impairment, recovery 1 mo	56,042 (56.8±1.6)	12,428 (45.7±3.7)	22.2±2.8
Moderate impairment, recovery >1 to 6 mo	13,521 (13.7±1.1)	3,302 (12.1±2.2)	24.4±4.8
Moderate impairment, recovery >6 mo	2,702 (2.8±0.5)	817 (3.0±1.0)	29.6±8.6
Permanent impairment, <30% disability	3,807 (3.9±0.6)	869 (3.2±1.1)	22.8±6.8
Permanent impairment, >30% disability	2,550 (2.6±0.4)	877 (3.2±0.8)	34.4±5.1
Death	13,451 (13.6±1.7)	6,895 (25.4±4.2)	51.3±6.9
Could not reasonably judge disability	6,477 (6.6±0.7)	1,989 (7.3±1.3)	30.7±5.9
Total†	98,610	27,177	27.6±2.4

*Plus-minus values are means ±SE.

†Values differ from the sums of those reported above because of rounding.

practitioners. Sex did not appear to represent a risk factor for adverse events or negligence.

There is great variation among specialties with regard to the riskiness of the procedures employed and the severity of illness in the patients for whom care is provided. The finding that patients in certain specialty groups, as defined by DRGs, were at higher risk of adverse events was therefore not surprising. The percentage of adverse events due to negligence did not, however, vary according to specialty. The momentary lapse on the part of an internist who forgets to ask about sensitivity to an antibiotic until the end of an interview (but before writing a prescription) may have far different consequences than the neurosurgeon's momentary lapse during an operation on the brain or spinal cord. One goal of our study was to examine such issues, for the nature of medical injury and of medical injury due to negligence will help guide investigators who seek to reduce the occurrence of such injuries.

The observations concerning rates of adverse events and negligence among specialties have implications relevant to today's system of malpractice insurance. Practitioners of certain specialties are sued more frequently and thus pay much higher premiums than others.[3] We found that these specialties (neurosurgery, cardiac and thoracic surgery, and vascular surgery) had higher rates of adverse events, but not higher rates of negligence. Our data suggest that variations among specialties in rates of litigation do not reflect differing levels of competence, but rather differences in the kinds of patients and diseases for which the specialist cares.

There were a number of potential sources of error in our estimates. One was missing records, but we were reassured by the fact that the rates of adverse events and negligence in the follow-up study were lower overall than in the initial survey. Another possible source of error was our use of hospital records for information on adverse events and negligence. We had, however, previously demonstrated the integrity of hospital records in this capacity.[15]

Table 3. Rates of Adverse Events and Negligence According to Age.

Age of Patient	Cases Reviewed	Rate of Adverse Events		Rate of Negligence
		Crude	Standardized*	
	no.	rates (±SE) percent		
Newborn	3,595	0.6±0.1	1.4±0.3	20.8±7.1
≤15 yr	3,066	2.1±0.4	3.7±0.6	21.9±6.0
16–44 yr	11,101	2.6±0.2	2.6±0.2	26.7±2.6
45–64 yr	7,379	4.7±0.4	4.4±0.4	20.6±2.4
≥65 yr	4,980	5.9±0.5	5.7±0.6	33.1±4.2
P value†			<0.0001	<0.01

*According to DRG class.
†For the distribution of rates of events.

Table 4. Rates of Adverse Events and Negligence among Clinical-Specialty Groups.*

Specialty	Rate of Adverse Events		Rate of Negligence	
	Percent	Population Estimate	Percent	Population Estimate
Orthopedics	4.1±0.6	6,740	22.4±4.7	1,514
Urology	4.9±0.8	4,819	19.4±6.3	933
Neurosurgery	9.9±2.1	2,987	35.6±8.6	1,063
Thoracic and cardiac surgery	10.8±2.4	3,588	23.0±9.3	826
Vascular surgery	16.1±3.0	3,187	18.0±8.1	575
Obstetrics	1.5±0.2	5,013	38.3±7.0	1,920
Neonatology	0.6±0.1	1,713	25.8±6.9	442
General surgery	7.0±0.3	22,324	28.0±3.4	6,247
General medicine	3.6±0.3	37,135	30.9±4.4	11,475
Other	3.0±0.4	11,097	19.7±4.9	2,182
P value†	<0.0001		0.64	

*Plus–minus values are means ±SE. Values differ from the sums of those reported above because of rounding.
†For the distribution of rates of events.

Of course, our findings cast little light on practice in physicians' offices.

Error may also have been introduced by our review methods. We realize that judgments regarding the causes of adverse events and negligent care are difficult and sometimes inaccurate. In previous studies we addressed the reliability and validity of our process.[14,15] We repeated some of these tests in our record review in New York. We found that the screening process had a higher level of validity than our previous estimates had suggested, with a sensitivity of 89 percent as compared with 85 percent in our pilot study. The reliability of physicians' judgments about the presence of adverse events was good (kappa = 0.61).

However, the more difficult judgments regarding negligence had a lower degree of reliability (kappa = 0.24), although the overall agreement on judgments of negligence was excellent (93 percent). The low kappa statistic indicates that in the records with evidence of negligence, physicians disagreed frequently about the extent of substandard care. If we use the presence of any evidence of negligence (rather than a combined confidence of more than 50–50) as a threshold to test reliability, the statistic increases considerably (kappa = 0.49). Moreover, using the confidence-in-negligence score as an ordinal measure produces an intraclass correlation coefficient of 0.41 for negligence. It is also important to note that because of budgetary and time constraints, this test of reliability involved only two teams of physicians. Our pilot test, which showed a higher degree of reliability on judgments of negligence, involved numerous sets of physicians and perhaps better reflected the variation from physician to physician.[14]

Nonetheless, all of this underlines the fact that physicians find it difficult to judge whether a standard of care has been met — hardly a surprising fact in view

Table 5. Results of Duplicate Review Process.

Review Process A	Review Process B					
	Adverse events			Negligence		
	absent	present	total	absent	present	total
Absent	249	21	270	293	12	305
Present	13	35	48	9	4	13
Total	262	56	318	302	16	318
Kappa statistic		0.61			0.24	

of the complexity of clinical decision making. The relatively low level of reliability tends to bias estimates toward the null. The differences that emerged in the group comparisons are therefore that much more likely to be true. In addition, as Table 5 demonstrates, the rates from both review processes were quite similar, suggesting that our overall estimates are accurate, even given some unreliability of judgments.

Physicians' estimates of disability were another potential source of error. The physicians based their decisions on evidence in the medical records, which sometimes described hospitalizations subsequent to the index admission. Without complete follow-up information on the patient, however, absolutely accurate estimates of disability were not, of course, possible.

The judgments of physicians that an adverse event led to death also require a note of caution. Many patients who died after an adverse event had very serious underlying disease, and several surely had shortened life expectancies independent of their iatrogenic injury. Physicians could not, and were not asked to, estimate the number of days of life lost as a result of the adverse event. This is a critical issue, particularly in the case of a terminally ill person. For instance, a pneumothorax injury sustained during the insertion of a central venous catheter may have been the immediate cause of death in a comatose patient with metastatic lung cancer who was undergoing mechanical ventilation because of respiratory failure. Although this patient might have lived only a few more hours or days had the adverse event not occurred, the death was judged to have resulted from the medical injury. In addition, some patients may have requested and received limited care, even though the fact was not documented in the medical record. Although we trained physician-reviewers to be alert to this issue, it may still have led to some error in our estimates. None of this is to say that deaths of sick, elderly patients due to adverse events are excusable, only that the number of deaths we report here is not directly comparable in economic terms to the number of deaths from automobile accidents, for example, in which the victims are generally younger and healthier.

In summary, we reviewed a random sample of 30,121 medical records from New York State in 1984, analyzing them for the presence of adverse events and substandard care. We believe that our findings indicate that there are certain risk factors, many definable, for the occurrence of adverse events and negligence.

Appendix I: Examples of Adverse Events and Negligence

Case 1: During angiography to evaluate coronary artery disease, a patient had an embolic cerebrovascular accident. The angiography was indicated and was performed in standard fashion, and the patient was not at high risk for a stroke. Although there was no substandard care, the stroke was probably the result of medical management. The event was considered adverse but not due to negligence.

Case 2: A patient with peripheral vascular disease required angiography. After the procedure, which was performed in standard fashion, the patient's renal function deteriorated as a result of exposure to angiographic dye. The hospital course was stormy because of kidney failure, but the patient's renal function slowly returned to normal. The adverse event caused the prolonged hospital stay, but there was no negligence. The event was considered adverse but not due to negligence.

Case 3: During a therapeutic abortion after 13 weeks of pregnancy, the physicians unknowingly perforated the patient's uterine wall with a suction device and lacerated the colon. The patient reported severe pain, but was discharged without evaluation. She returned one hour later to a hospital emergency room with even greater pain and evidence of internal bleeding. She required a two-stage surgical repair over the ensuing four months. The event was considered adverse and due to negligence.

Case 4: A middle-aged man had rectal bleeding. The patient's physician completed only a limited sigmoidoscopy, which was negative. The patient had continued rectal bleeding but was reassured by the physician. Twenty-two months later, after a 14-kg (30 lb) weight loss, he was admitted to a hospital for evaluation. He was found to have colon cancer with metastases to the liver. The physicians who reviewed his medical record judged that proper diagnostic management might have discovered the cancer when it was still curable. They attributed the advanced disease to substandard medical care. The event was considered adverse and due to negligence.

Appendix II: Classifying Patients According to Specialty Group and Risk of Adverse Events

In order to classify hospitalizations according to clinical specialty, we used the principal discharge diagnosis. Beginning with the Fetter classification of 24 specialties based on diagnosis-related groups (Fetter RB: Preliminary research document: assignment of diagnosis related groups using ICD-9-CM codes to clinical subspecialties, School of Organization and Management, Yale University, 1980), we made four alterations to reduce the number of specialty groups to 10. First, the following specialties were combined with

Table 6. Population Estimates of Rates of Adverse Events and Negligence According to DRG Category.

DRG Category	Adverse Events	Adverse Events Due to Negligence
	each (±SE) percent	
1	1.82±0.32	24.4±6.6
2	3.34±0.21	30.0±3.4
3	4.26±0.36	27.0±2.9
4	7.13±0.91	23.0±4.6
P value*	<0.0001	0.67

*By the Wald method.

general medicine: cardiology, nephrology, dermatology, neurology, endocrinology, pulmonology, gastroenterology, rheumatology, and hematology. Second, the following specialties were combined in a residual group: dentistry, gynecology, ophthalmology, and otolaryngology. Third, medical back problems (DRG 243) was moved from the orthopedics specialty to the general-medicine specialty. Fourth, psychiatric discharges were not included in this study.

The principal discharge diagnosis was used to measure the risk of adverse events associated with severity of disease. To obtain DRG risk groups, three senior physicians were asked to rate on a scale of 1 (low) to 6 (high) the likelihood that a patient in each of the 470 DRGs would have an adverse event. All DRGs received at least one rating of the likelihood of adverse events. By selecting natural breakpoints in the distribution, we grouped the scores into four risk categories.

The risk groups formed by the physicians' judgments were validated first by comparing the rates of adverse events among these groups with use of the data from the Harvard Medical Practice Study pilot project. They were validated again with the 30,121 observations of this study. Both sets of data exhibited monotonic increases in the rates of adverse events with DRG level. The rate of adverse events according to DRG level in this study is shown in Table 6.

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THE NATURE OF ADVERSE EVENTS IN HOSPITALIZED PATIENTS

Results of the Harvard Medical Practice Study II

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Abstract *Background.* In a sample of 30,195 randomly selected hospital records, we identified 1133 patients (3.7 percent) with disabling injuries caused by medical treatment. We report here an analysis of these adverse events and their relation to error, negligence, and disability.

Methods. Two physician-reviewers independently identified the adverse events and evaluated them with respect to negligence, errors in management, and extent of disability. One of the authors classified each event according to type of injury. We tested the significance of differences in rates of negligence and disability among categories with at least 30 adverse events.

Results. Drug complications were the most common type of adverse event (19 percent), followed by wound infections (14 percent) and technical complications (13 percent). Nearly half the adverse events (48 percent) were associated with an operation. Adverse events during surgery were less likely to be caused by negligence (17 percent) than nonsurgical ones (37 percent). The proportion of adverse events due to negligence was highest for diagnostic mishaps (75 percent), noninvasive therapeutic mishaps ("errors of omission") (77 percent), and events occurring in the emergency room (70 percent). Errors in management were identified for 58 percent of the adverse events, among which nearly half were attributed to negligence.

Conclusions. Although the prevention of many adverse events must await improvements in medical knowledge, the high proportion that are due to management errors suggests that many others are potentially preventable now. Reducing the incidence of these events will require identifying their causes and developing methods to prevent error or reduce its effects. (N Engl J Med 1991; 324:377-84.)

IN recent years, concern about the increasing cost of malpractice-insurance premiums has led to numerous tort reforms. At the same time, and largely independently of tort reform, interest in initiatives affecting the quality of care has grown. Curiously, however, the problem of medical injury has received comparatively little attention from either perspective. But an important objective for those concerned with both medical malpractice and quality of care is the prevention of iatrogenic injury. A first step in prevention is to develop a better understanding of the types of such injuries and their causes.

In our investigation of accidental injury in patients hospitalized in 1984 in the state of New York, we found that 3.7 percent of patients had injuries and that negligent care was responsible for 28 percent of them.[1] In this report we analyze these injuries, including the types of adverse events, the types most likely to result in serious disability, the types most likely to be caused by negligence, the effects of various risk factors, and the management errors that were responsible. Finally, we develop a conceptual framework encompassing notions of negligence, error, and preventability in an effort to understand iatrogenic injury better.

METHODS

The study design, sampling plan, and record-review process have been described elsewhere.[2] In brief, we evaluated 30,195 randomly selected records in 51 hospitals in the state of New York, using a two-stage process. All records were screened by trained nurses or medical-records administrators using 18 screening criteria. Records that met any of our criteria were then reviewed independently by two physicians who identified adverse events and instances of negligence. We defined an adverse event as an unintended injury that was caused by medical management and that resulted in measurable disability. Negligence was defined as failure to meet the standard of care reasonably expected of an average physician qualified to take care of the patient in question.

We asked the reviewers to describe each adverse event and its relation to medical care and to estimate the degree of disability that resulted. Disability was rated on a six-point scale[1] on which "serious" disability was defined as that persisting for more than six months (a score above 2 on the 6-point scale). When the two physicians disagreed, we randomly selected one of their two reviews in order to assign a single disability score to each patient. (The reviewers disagreed in 4 percent of the cases about whether the disability score was greater than 2.) The reviewers also identified the site inside or outside the hospital where the treatment that had caused the adverse event had taken place. In addition, the reviewers were asked to indicate whether each adverse event could have been caused by a reasonably avoidable error, defined as a mistake in performance or thought. If so, they classified the error, and if more than one class of error was found, they ranked the errors in order of seriousness. They then indicated the specific type of error within the class. Finally, the reviewers determined whether there had been negligence after they considered and recorded whether there had been deviation from accepted norms of treatment, the potential (not actual) consequences of the negligence, the frequency of risk, the degree of emergency, the complexity of the case, the presence of any coexisting conditions, and the extent to which there was a consensus about the correct therapy or diagnosis for a given situation. If they found negligence, they rated its severity on a three-point scale on which 1 indicated a slight degree of negligence, 2 a moderate degree, and 3 a grave degree.

Each adverse event was subsequently classified with regard to type of injury by one of the authors after reading the descriptions of each case prepared by both physician-reviewers. An adverse event was considered an operative complication if it occurred within the first two weeks after surgery or if it was thought to have been caused by the operation, regardless of when it occurred. Operative complications were subclassified as technical (e.g., injury occurring during an operation, bleeding, or difficulty with wound healing), nontechnical (e.g., pulmonary embolism, myocardial infarction, and pneumonia), related to wound infections, caused

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by surgical failure (to cure, relieve, or prevent symptoms, such as pregnancy after tubal ligation), or late (bad results and delayed complications).

Nonoperative categories of injuries included those that were related to a procedure (which were further classified in the same manner as the operative complications), diagnostic mishaps (injuries that resulted from [illegible] or delayed diagnosis), therapeutic mishaps (injuries resulting from complications of noninvasive therapy), and those related to drugs. The last were treated separately because of the number and importance of drug reactions. We also established separate categories for fractures, injuries related to anesthesia, postpartum injuries, and neonatal injuries, because of the unique nature of the adverse events in these groups. Because we were concerned about all types of adverse events in hospitalized patients, not only those caused by physicians, we also established separate categories to include falls and system errors, two categories of adverse events that may be more likely to be caused by nursing or support personnel.

We oversampled patients in several high-risk, low-volume specialties, such as neurosurgery and vascular surgery, to ensure that there were adequate numbers in each category of injury. To project the numbers in the sample to those of the entire population, we used weights for all our analyses. Thus, the percentages given do not correspond directly to the numbers in the sample. The final determination of the occurrence of an adverse event or case of negligence was based on a calculation of the average of the two reviewers' scores.

The significance of the differences in the rates of negligence and disability between categories of adverse events and locations was tested for the categories in which there were at least 30 adverse events. Standard errors were computed for the difference between the rate of negligence or disability in the category studied and that in all other categories combined, with use of the SESUDAAN package of the Research Triangle Institute[3] to adjust for the complex sample design and the Bonferroni procedure for simultaneous inferences.[4]

Table 1. Types of Adverse Events and Proportion of Events Involving Negligence.

Type of Event	No. of Events in Sample	Weighted Proportion of Events*		
		In Population	Due to Negligence	With Serious Disability
			percent	
Operative				
Wound infection	160	13.6	12.5†	17.9
Technical complication	157	12.9	17.0	12.0†
Late complication	137	10.6	13.6‡	35.7
Nontechnical complication	87	7.0	20.1	43.8
Surgical failure	58	3.6	36.4	17.5
All	599	47.7	17.0	24.0
Nonoperative				
Drug-related	178	19.4	17.7‡	14.1‡
Diagnostic mishap	79	8.1	75.2†	47.0‡
Therapeutic mishap	62	7.5	76.8†	35.4
Procedure-related	88	7.0	15.1	28.8
Fall	20	2.7	—	—
Fracture§	18	1.2	—	—
Postpartum¶	18	1.1	—	—
Anesthesia-related	13	1.1	—	—
Neonatal	29	0.9	—	—
System and other	29	3.3	35.9	36.0
All	534	52.3	37.2	25.3
Total	1133	100.0	27.6	24.7

*Dashes denote categories for which there were too few observations to determine a percentage.

†$P<0.001$ for the difference between this rate and all others in the same column.

‡$P<0.01$ for the difference between this rate and all others in the same column.

§Includes nonoperative fractures only.

¶Includes nonobstetric deliveries only.

Results

Adverse Events

As reported elsewhere, we identified 1133 adverse events in our sample of records for 30,195 patients hospitalized in New York in 1984.[1] Table 1 lists the distribution of the kinds of adverse events and negligence-related adverse events we discovered. Nearly half the adverse events (48 percent) resulted from operations. Wound infections were the most common surgical adverse event, accounting for 29 percent of surgical complications and nearly one seventh of all adverse events identified in the study.

Drug complications were the most common single type of adverse event (19 percent). Table 2 lists the classes of drugs responsible for adverse events in the order of their frequency, and Table 3 shows the various types of adverse events caused by drugs. These events covered a broad spectrum, from those that were unpredictable and unpreventable, such as allergic reactions to drugs to which the patient had had no known previous exposure, to those that might have been unavoidable, such as marrow depression from antitumor drugs, to those that resulted from errors in administration or monitoring, such as bleeding associated with the use of anticoagulant agents.

Negligence

Overall, 28 percent of the adverse events were judged to have resulted from negligent care, but there was wide variation among categories (Table 1). Seventeen percent of the adverse events related to operations were due to negligence, ranging from 13 percent of the wound infections to 36 percent of the surgical failures (e.g., persistent back pain that responded to a second operation to remove a disk that had been treated inadequately in a previous laminectomy). Of the adverse events due to drug treatment, 18 percent resulted from negligence. By contrast, negligent care was identified as causing 75 percent of the adverse events due to problems in diagnosis (such as failure to diagnose an ectopic pregnancy) and 77 percent of those due to a therapeutic mishap (resulting from non–drug-related, noninvasive treatment).

Disability

The large majority of the adverse events did not result in serious disability. More than half the patients had minimal impairment, recovering completely in a month or less. Seventy percent recovered completely in less than six months.[1] Rates of serious disability were significantly lower than average for technical complications of surgery (12 percent) and drug-related adverse events (14 percent), and significantly higher than average for diagnostic mishaps (47 percent) (Table 1).

Effects of Age

We noted previously that patients over the age of 64 had adverse events and negligence-related adverse events at rates more than double the rate of patients under 45, and although only 27 percent of the hospi-

Table 2. Drug-Related Adverse Events, According to Class of Drug Involved.

Drug Class	No. of Events	Weighted Percentage
Antibiotic	29	16.2
Antitumor	31	15.5
Anticoagulant	20	11.2
Cardiovascular	13	8.9
Antiseizure	15	8.1
Diabetes	8	5.5
Antihypertensive	10	5.0
Analgesic	6	3.5
Antiasthmatic	5	2.8
Sedative or hypnotic	4	2.3
Antidepressant	1	0.9
Antipsychotic	2	0.7
Peptic ulcer	1	0.5
Other	33	19.3
Total	178	100.0

talized population in New York in 1984 was over 64, those patients accounted for 43 percent of all the adverse events.[1]

Table 4 shows the frequency of each type of adverse event per 1000 discharges from the hospital in each of four age categories, based on the weighted number of patients in each age group in the sample. Drug-related complications were the most common type of adverse event for patients in all age groups, except those 16 to 44 years old, among whom drug complications ranked second to wound infections. Elderly patients were next most likely to have adverse events from noninvasive therapeutic mishaps and late surgical complications. Wound infections were the most frequent type of adverse event in young adults. Children had the lowest rates in every category.

Surgical failures constituted a much higher fraction of the total number of adverse events in young adults than in the other age groups. The operations most commonly associated with such failures were tubal ligation, procedures for back problems, tendon repair, meniscus repair, excision of pilonidal cysts, nasal reconstruction, cervical cerclage, and repair of tibial fractures — operations that are seldom performed in elderly patients or children.

Most other types of adverse events were more common among elderly patients. In the elderly, four classes of events occurred two or more times as often as was observed in younger patients: nontechnical postoperative complications, noninvasive treatment mishaps, fractures, and falls. The increased rates may reflect more frequent use of interventions, as well as increased risk of an adverse event with a given condition or treatment. For example, the elderly may have more noninvasive treatments per hospitalization than younger people.

Site of Adverse Events

The largest number of adverse events (41 percent) resulted from treatment provided in the operating room (Table 5). The next most frequent (27 percent) were those that occurred in the patient's hospital room. The emergency room, intensive care units, and labor and delivery rooms were each the site of approximately 3 percent of the adverse events. The number of events occurring in all other locations in the hospital added up to 5 percent of the total. Most adverse events occurring outside the hospital were attributed to interventions in the physician's office. (The only out-of-hospital adverse events measured in our study were those that resulted in hospitalization.)

Table 5 also shows the percentage of adverse events at each site that were caused by negligent care — an overall proportion of 28 percent. In the operating room the proportion was 14 percent, in the patient's hospital room it was 41 percent, and in the emergency room it was 70 percent. The differences at other sites were not significant. Rates of disability also varied according to site. The percentage of patients with serious disabilities was significantly lower than average in the case of adverse events occurring at home (8 percent) or in the labor and delivery room (10 percent). Other differences were not significant.

Physicians' Errors

The classification of errors is shown in Table 6, which includes the first choices of each reviewer. Because two physicians reviewed almost every case, the total number of observations shown is nearly double the number of cases for which there was a question of error. The physician-reviewers used their own criteria to identify errors in management, and they were asked to list the errors whether or not negligence was involved. They identified one or more management errors corresponding to 58 percent of all the adverse events, but only 28 percent of the events ultimately met our requirements for a judgment of negligence. For each class of error, the percentage of cases that were ultimately attributed to negligence is shown in Table 6.

The most common class of error, accounting for 35 percent of all the errors in this series, involved the performance of a procedure or operation. Errors in prevention (i.e., failure to take preventive measures)

Table 3. Types of Drug-Related Complications.

Type of Complication	No.	Weighted Percentage
Marrow suppression	29	16.3
Bleeding	26	14.6
Central nervous system	26	14.6
Allergic/cutaneous	25	14.0
Metabolic	18	10.1
Cardiac	17	9.6
Gastrointestinal	14	7.9
Renal	12	6.7
Respiratory	5	2.8
Miscellaneous	6	3.4
Total	178	100.0

were the next most common (22 percent), followed by diagnostic errors (14 percent). Errors in diagnosis and prevention were the most likely to be considered negligent (75 percent and 60 percent involved negligence, respectively). Thus, errors in performance were the most common but the least likely to be attributed to negligence. In contrast, diagnostic errors, though much less common, were very likely to be attributed to negligence.

Types of Error

Because the reviewers were asked to list all the types of error they found, the numbers shown in Table 7 for each class are higher than those in Table 6. In addition, since the reviewers were not limited to assigning a single category to each error, the percentages exceed 100.

Although technical errors were the most common class of error observed, the sum of the various types of "errors of omission" composed a higher percentage of the total in several classes. These included failure to take precautions to prevent accidental injury, avoidable delays in treatment, failure to use indicated tests or to act on the results of such tests, and the entire gamut of diagnostic errors.

Disability as a Function of the Gravity of Negligence

Adverse events resulting from negligence were more likely than other adverse events to lead to serious disability, defined as a disability with a score greater than 2 (Table 8). Only 20 percent of the patients who had adverse events not attributed to negligence had serious disabilities, whereas 38 percent of those who had adverse events due to negligence had such disabilities.

The percentage of adverse events resulting in serious disability increased progressively with the gravity (severity) of the negligence. Nearly three fourths of the patients who had adverse events attributed to grave negligence (grade 3) had serious disabilities. Two thirds of these patients died, as compared with 10 percent of the patients with adverse events not resulting from negligence.

Table 4. Rates of Adverse Events According to Age.

Type of Event	Age (yr)*			
	0–15	16–44	45–64	≥65
	events per 1000 discharges			
Operative				
Wound infection	1.77	4.93	6.59	6.15
Technical complication	1.70	3.77	8.25	3.36
Late complication	1.01	2.40	5.17	6.77
Nontechnical complication	0.20	1.38	2.97	5.46
Surgical failure	0.39	2.22	0.84	1.22
All	5.07	14.63	23.82	24.93
Nonoperative				
Drug-related	2.36	3.87	11.18	11.46
Diagnostic mishap	1.71	1.78	3.56	5.08
Therapeutic mishap	0.38	0.81	2.54	7.04
Procedure-related	0.76	1.58	4.16	3.85
Fall	—	0.19	0.30	3.19
Fracture	0.22	0.31	0.24	0.84
Postpartum	0.05	1.18	—	—
Anesthesia-related	0.07	0.89	0.30	0.09
Neonatal	1.88	—	—	—
System and other	0.41	0.54	1.57	2.34
All	7.84	11.15	23.85	33.89
Both operative and nonoperative	12.91	25.84	47.43	58.85

*Dashes denote categories for which there were too few observations to determine a rate.

Table 6. Sites of Care That Resulted in Adverse Events.

Site	No. of Events*	Weighted Proportion of Events		
		In Sample	Due to Negligence	With Serious Disability
		percent		
In hospital				
Operating room	1019	41.0	13.7‡	22.0
Patient's room	495	26.5	41.1‡	30.4
Emergency room	71	2.9	70.4‡	24.8
Labor and delivery room	123	2.8	27.7	9.8§
Intensive care unit	53	2.7	30.2	50.4
Radiology	32	2.0	36.9	35.8
Cardiac catheterization laboratory	28	0.9	—	—
Ambulatory care unit	19	0.8	—	—
Other	47	1.7	—	—
All	1887	81.2	26.4	25.9
Outside hospital				
Physician's office	153	7.7	31.2	21.0
Home	68	3.7	11.6	8.2§
Ambulatory care unit	32	1.4	53.6	13.7
Nursing home	11	0.9	—	—
Other	26	1.1	—	—
All	270	13.8	30.2	17.0
Unknown	61	5.1	38.6	25.6
Total	2218	100.0	27.6	24.7

*Numbers shown are based on the total number of reviews, not the number of cases.

†Dashes denote categories for which there were too few observations to determine a percentage.

‡P<0.001 for the difference between this rate and all others in the same column.

§P<0.01 for the difference between this rate and all others in the same column.

Discussion

Preventability, Error, and Negligence

Many of the adverse events we identified were neither preventable nor predictable, given the current state of medical knowledge — for example, idiosyncratic drug reactions in patients who had not taken the drugs previously, postoperative myocardial infarctions in young patients without previous evidence of heart disease, and adhesive intestinal obstructions. Other unpreventable adverse events occurred with predictable frequency, but patients accepted the risk of treatment because of the potential benefits. Examples of these include radiation injury and bone marrow suppression from chemotherapy. Preventing these "unpreventable" adverse events will require advances in biomedical knowledge.

Most adverse events are preventable, however, particularly those due to error or negligence. Our findings confirm the observations of others[3] — that errors in medical practice are common. Studies in other areas of human endeavor, such as the generation of nuclear power, shipping, and the airline industry, confirm that some degree of error is inherent in all human activity.[6] In highly technical, complicated systems, even minor

Table 6. Types of Errors Leading to Adverse Events, as Classified by the Reviewers in a Weighted Sample.

Type of Error	No. of Reviews	Errors Observed	
		In Entire Sample	Ultimately Judged Negligent
		percent	
Performance	537	35.2	28.2
Prevention	232	21.9	59.6
Diagnosis	168	13.8	74.7
Drug treatment	87	8.9	52.8
System and other	32	2.4	66.0
Unclassified	220	17.9	43.4
All	1276	100.0	47.3

errors may have disastrous consequences. Medicine is no exception; errors in the performance of highly technical procedures, such as brain or open-heart surgery, can also have catastrophic results.

Our physician-reviewers identified management errors in more than half the adverse events we studied. Technical errors were by far the most common class of error, but relatively few of these were judged to result from negligence. In contrast, errors of omission — failure or delay in making a diagnosis or instituting treatment, and failure to use indicated tests or take precautions to prevent injury — were often classed as negligent. When the errors of omission were combined, they were more common than the errors of commission.

Error is not the same as negligence.[7] In tort law, medical negligence is defined as failure to meet the standard of practice of an average qualified physician practicing in the specialty in question.[8] Negligence occurs not merely when there is error, but when the degree of error exceeds an accepted norm. The presence of error is a necessary but not sufficient condition for the determination of negligence.

Sometimes the evidence of negligence appears clear-cut, as when a physician fails to evaluate a patient with rectal bleeding. Other cases are less obvious. For example, depending on the circumstances, each of the following could be considered either negligent or not: a mistaken diagnosis of acute appendicitis, misinterpretation of a chest film of pneumonia as instead showing congestive heart failure, puncture of the pleura during the insertion of a central venous catheter, and perforation of the bowel during an operation to remove adhesive intestinal obstruction.

In the case of the mistaken diagnosis of acute appendicitis, the patient may have had a classic history, typical findings on physical examination, and laboratory-test results supportive of the diagnosis. If the physician then failed to make the diagnosis, it would be both an error in diagnosis and a case of negligence. If, however, the diagnosis was made but no appendicitis was found, there would also have been an error in diagnosis, but not one involving negligence, because the surgeon would have followed the generally accepted standard of practice. With the present state of medical knowledge, such errors are unavoidable and therefore not negligent.

Furthermore, the standards of practice that form the basis for such judgments are often not well defined, and thus they may be susceptible to considerable variation in interpretation. Perfection can never be the standard of practice, since the vagaries of biology and human behavior make perfection unattainable, in either execution or outcome, for any form of treatment. Accordingly, standards of practice must always include an acceptance of some degree of error.

Programs of quality assurance should strive to re-

Table 7. Incidence of Specific Types of Errors in a Weighted Sample.*

Type of Error	No.	Percent†
Performance (697)		
Inadequate preparation of patient before procedure	59	9
Technical error	539	76
Inadequate monitoring of patient after procedure	61	10
Use of inappropriate or outmoded form of therapy	24	3
Avoidable delay in treatment	41	7
Physician or other professional practicing outside area of expertise	13	2
Other	75	14
Prevention (397)		
Failure to take precautions to prevent accidental injury	178	45
Failure to use indicated tests	79	23
Failure to act on results of tests or findings	80	21
Use of inappropriate or outmoded diagnostic tests	6	1
Avoidable delay in treatment	120	31
Physician or other professional practicing outside area of expertise	16	4
Other	77	19
Diagnostic (265)		
Failure to use indicated tests	134	50
Failure to act on results of tests or findings	83	32
Use of inappropriate or outmoded diagnostic tests	3	1
Avoidable delay in diagnosis	149	55
Physician or other professional practicing outside area of expertise	17	6
Other	24	10
Reason not apparent	16	5
Drug treatment (353)		
Error in dose or method of use	67	42
Failure to recognize possible antagonistic or complementary drug–drug interactions	10	8
Inadequate follow-up of therapy	65	45
Use of inappropriate drug	38	22
Avoidable delay in treatment	21	14
Physician or other professional practicing outside area of expertise	8	5
Other	18	9
System (68)		
Defective equipment or supplies	5	8
Equipment or supplies not available	8	5
Inadequate monitoring system	8	10
Inadequate reporting or communications	11	26
Inadequate training or supervision of physician or other personnel	13	31
Delay in provision or scheduling of service	10	14
Inadequate staffing	5	6
Inadequate functioning of hospital service	7	8
Other	12	20

*Numbers in parentheses after each category of error are the number of errors found by the reviewers for that category. Because the reviewers were asked to list as many errors as they found, the numbers in each class are larger than those in Table 6. In addition, since the reviewers were not limited to identifying a single reason for each error, the percentages exceed 100.

†Percentages are of the total number of errors in each category.

Table 8. Disability and Gravity of Negligence*

Type of Adverse Event (Grade)	No. of Events	% of Total	Severity of Disability					
			Class 1	Class 2	Class 3	Class 4	Class 5	Class 6
			percent					
With negligence								
Slight (1–1.5)	76	7.2	77.4	16.2	4.1	0.3	1.9	1.8
Moderate (2–2.5)	141	13.3	47.0	17.2	4.3	7.8	0.5	21.7
Grave (3)	67	7.1	19.0	5.9	0.9	7.8	1.1	65.6
Without negligence	858	72.4	64.5	16.0	2.7	5.3	1.8	9.7
All	1133	100	59.9	15.4	2.9	5.5	1.6	14.7

*Negligence was graded by case, as the average of the scores from the two reviews or the score from the single review when there was only one. Percentages do not correspond directly to numbers of events because of weighting.

duce rates of error to an optimal level. Because the cost of preventing adverse events entirely would be prohibitive, defining an optimal level requires a realistic assessment of the effectiveness of efforts to reduce their occurrence. In industry, an error rate that exceeds defined norms is deemed unacceptable. We believe that similar considerations should apply in medicine. For example, in the absence of evidence of negligence, a rate of wound infection of 1 percent in the primary repair of hernias may be acceptable, since it is well recognized that infections occasionally develop even with carefully executed operations, and trying to reduce their occurrence further would not be cost effective. However, even without evidence of negligence, if the infection rate for such operations exceeds 5 or 10 percent, it is reasonable to conclude that the aseptic precautions followed during the operation need review and improvement. Norms for acceptable levels of various adverse events need to be established. Hospitals can then target their quality-assurance activities to the areas most likely to respond to such efforts.

Risk Factors

An important step in reducing the incidence of adverse events is to identify the patients at highest risk. The number and variety of adverse events described in this study testify clearly to the diversity of hazards in modern medical care. In a typical hospitalization, a patient may have hundreds of encounters with doctors, nurses, hospital staff, and equipment. Unexpected results or errors can occur with each encounter, perhaps causing an adverse event.

Many factors increase the risk that a patient will have an adverse event during hospitalization. Our findings suggest that one major determinant is the complexity of the disease or treatment. If, as seems likely, every intervention carries some level of risk, patients with complicated disease are more likely to have adverse events, if only because their care requires more interventions. Thus, it is not surprising that nearly half the adverse events we identified resulted from operations. In even a simple operation there are dozens, even hundreds, of maneuvers, from skin preparation to wound closure, as well as many interventions in the postoperative care. Each presents an opportunity for an adverse event. Our findings are very similar to those of a California study in which half the potentially compensable events (comparable to what we have called adverse events) were found to result from treatment in the operating room.[9]

The high number of drug-related adverse events in our study may also be related in part to the quantity and variety of medications administered to hospitalized patients.

Characteristics of patients also increase the risk of an adverse event. Elderly patients, for example, are far more likely not only to have more complicated disease, but also to have underlying degenerative conditions that increase the risk of such nontechnical postoperative complications as myocardial infarction, pulmonary embolism, and pneumonia. Insults or errors that are tolerated well by children or young healthy adults can be lethal in patients who are weakened by disease or who have impaired vital organs. In addition, elderly patients are at increased risk of falling and therefore of hip fractures.[10]

Another factor that may account for the increased rate of adverse events in the elderly is the presence of coexisting conditions. Greenfield has shown that such conditions are a strong predictor of serious hospital complications (such as pulmonary embolism, septicemia, or stroke after hip surgery). Patients with severe coexisting conditions on admission are more than seven times as likely to have a complication as those without such conditions (Greenfield S, Apolone G, McNeil BJ, Cleary PD: personal communication).

Yet another risk factor is the location where care is provided. The high rate of negligence in adverse events resulting from treatment in the emergency room could be caused by several factors. Because no operations and only a few procedures are performed in the emergency room, the adverse events we identified that occurred there were more likely to involve diagnostic errors or mishaps of noninvasive treatment, which the reviewers frequently judged as negligent. Emergency rooms are sometimes staffed with part-time physicians who are not well trained in emergency care. Because they are frequently very busy, these physicians have less time to spend with each patient. Finally, some of the sickest patients enter the hospital through the emergency room.

Our experience is not unique. Dearden and Rutherford found that for 58 percent of patients with severe trauma treated in the emergency room there had been serious errors in treatment.[11] Although many of these errors involved mistakes or delays in diagnosis, most were errors in treatment. The risk of error was increased with certain characteristics of the patient, such as alcoholism and the presence of multiple injuries, but the investigators concluded that the treating physician's inexperience was the chief cause of the high rate of error.

Finally, we believe that the risk of injury, particu-

fairly serious injury, is closely related to the medical nature of the intervention. A momentary lapse that delays the diagnosis of a skin rash is usually of little consequence, for example, whereas a similar lapse during a brain operation can have disastrous effects. It is unlikely that neurosurgeons are more prone to error than dermatologists, but the conditions under which they work are far less forgiving. As we have seen, certain specialties, such as thoracic surgery, obstetrics, and neurosurgery, had more adverse events than other specialties, but the events were not more likely to have been caused by negligence.[1]

Limitations of the Study

Our observations and conclusions must be interpreted within the limitations of a retrospective review of records. Several features of the study could have biased the results. First, we relied exclusively on data from hospital records. Although we have shown that adverse events can be identified accurately from information in hospital records,[12] such records may not provide evidence or insight into the specific causes of an adverse event. For example, in some of our study patients, the adverse event was caused by failure to diagnose an ectopic pregnancy. From the information in most hospital records, it would not be possible to tell whether such failures occurred because the physician (1) did not think of the diagnosis, (2) considered the diagnosis unlikely and therefore did no further follow-up examinations or testing, or (3) considered the diagnosis possible and recommended further testing, but the patient did not come for the test (in which case the outcome would not have been considered an adverse event). Nor can we tell whether (4) both the physician and the patient sought the test, but the equipment was broken (or overbooked, unavailable on weekends, or the like), (5) the examination was performed but the results were not reported, or (6) any one of many other possible problems arose that can be imagined.

Second, we relied on implicit, not explicit, review. Because we studied the entire range of medical services, it was not possible to set up explicit criteria for every conceivable type of adverse event. Accordingly, we relied on the judgments of physicians. To minimize variability therein, we structured the record-review process by means of an Adverse Event Analysis Form, which required the reviewers to conduct their analysis in a standardized way and to address specific questions about causation.

Third, we used general internists and surgeons as physician-reviewers, not specialists. For a study of this scope and magnitude, it would have been both difficult and expensive to do otherwise, since the reviewers were required to identify adverse events of all types. In our pilot study, we found that internists and surgeons could identify adverse events with a high degree of accuracy.[13] As they had been instructed to do, the reviewers consulted with a panel of specialists when they needed to determine whether the care that had resulted in a possible adverse event met accepted standards.

Finally, our information on the follow-up of the patients was limited to data about care in the hospital (including the outpatient department). Although the reviewers had available the record of care provided at the same hospital after the index hospitalization, they had no access to the information in physicians' private offices. However, except for those that are rapidly fatal, adverse events not requiring hospital care are unlikely to result in serious disability.

Prevention of Adverse Events

As knowledge increases, in theory more adverse events will become preventable. Indeed, the safety and effectiveness of many current medical treatments result from the earlier reduction or elimination of complications similar or identical to those we have identified as adverse events here: high rates of heart block, bleeding, and mortality in the early years of heart surgery, problems associated with the initial attempts at organ transplantation, side effects of many drugs, and so forth. These were the adverse events of an earlier day, and they were greatly reduced in frequency after research led to an understanding of their causes.

Future reductions in the occurrence of adverse events also depend in part on research into causes. In the case of adverse events that are currently unpreventable, progress will come from scientific advances, such as the development of less hazardous chemotherapeutic agents. In the case of events due to error, control will require scientific advances in some instances, but we believe that progress will also depend heavily on systems analysis, education, and the development and dissemination of guidelines and standards for practice. Automatic "fail-safe" systems — such as a computerized system that makes it impossible to order or dispense a drug to a patient with a known sensitivity — are likely to have an increasing role.

The reduction of adverse events involving negligence will also require an increased emphasis on education. To the extent that failure to meet the standard of practice is due to ignorance, improved dissemination and enforcement of practice guidelines might be effective. The development of better mechanisms of identifying negligent behavior and instituting appropriate corrective or disciplinary action is equally important.

Preventing medical injury will require attention to the systemic causes and consequences of errors, an effort that goes well beyond identifying culpable persons.[7] Such approaches have paid off handsomely in other highly technical and complicated enterprises, such as aviation.[5,14] A similar strategy may work in medicine as well.[5,15-17]

In this context, our description of adverse events represents an agenda for research on quality of care. Adverse events result from the interaction of the patient, the patient's disease, and a complicated, highly technical system of medical care provided not only by a diverse group of doctors, other care givers, and support personnel, but also by a medical-industrial sys-

tem that supplies drugs and equipment. Reducing the risk of adverse events requires an examination of all these factors as well as of their relation with each other.

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REVIEW ARTICLE

DRUG THERAPY

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FLUOROQUINOLONE ANTIMICROBIAL AGENTS

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THE introduction of fluoroquinolone antimicrobial agents (Fig. 1) into clinical use is an important recent advance.[1-3] These drugs, also called quinolones, include norfloxacin, ciprofloxacin, ofloxacin, enoxacin, and pefloxacin. Of these, norfloxacin, ciprofloxacin, and ofloxacin have been approved for use in the United States. Quinolones are orally absorbed, are potent in vitro against a broad spectrum of bacterial species, and have favorable pharmacokinetic properties. We shall evaluate here the current status of the quinolones, considering mechanisms of action and resistance, activity in vitro, pharmacokinetics, clinical efficacy, adverse effects, and clinical uses. A discussion of the structure–activity relations of the quinolones is beyond the scope of this article, and this topic has recently been reviewed elsewhere.[4,5]

Mechanisms of Action and Resistance

Uniquely among antimicrobial agents in clinical use, the primary bacterial target of quinolones is DNA gyrase (bacterial topoisomerase II),[6-9] an enzyme that introduces negative supertwists into DNA and separates interlocked DNA molecules. Quinolones antagonize these enzymatic activities, interfering with DNA replication, segregation of bacterial chromosomes, transcription, and other cellular processes and damaging DNA. Recently, binding to gyrase–DNA complexes has been reported.[10]

Spontaneous single-step mutation to quinolone resistance tends to be infrequent ($1:<10^9$), and when it occurs the resistance is of a low level for many bacterial species. High-level resistance can be selected by serial exposure of bacteria to increasing drug concentrations. Mechanisms of bacterial resistance to quinolones include chromosomal mutations that either alter DNA gyrase (resistance to quinolones alone) or reduce drug accumulation in association with changes in bacterial outer-membrane proteins (pleiotropic resistance). Destruction or modification of the drug by bacteria has not yet been described, and plasmid-mediated resistance to fluoroquinolones has not yet been found in clinical isolates.

Activity in Vitro

In general, quinolones have excellent potency in vitro[3,11] against most Enterobacteriaceae, fastidious gram-negative bacilli including species of haemophilus, and gram-negative cocci, such as *Neisseria gonorrhoeae*, *N. meningitidis*, and *Moraxella (Branhamella) catarrhalis* (Table 1). Among the drugs listed in Table 1, ciprofloxacin is the most potent. Quinolones are active against *Pseudomonas aeruginosa* but are less active against other species of pseudomonas. They also have good activity against *Staphylococcus aureus* and other staphylococci but are less active against species of streptococcus and enterococcus. They have minimal activity against anaerobes and none against *Candida albicans*. Quinolones are active against gram-negative

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