

SB

69

Alaska State Legislature

Senate

JERRY WARD

State Capitol
Juneau, AK 99801-1182
Phone (907) 465-4940
Fax (907) 465-3766

716 W. 4th Ave., Ste. 450
Anchorage, AK 99501-2133
Phone (907) 258-8183
Fax (907) 258-0820

145 Main Street Loop
Kenai, AK 99611
Phone (907) 283-7996
Fax (907) 283-3075



SB 69

Advisory vote of the people to elect the Attorney General.

SB 69 allows an advisory vote of the people to begin the process of electing the State's Attorney General. Most states elect their Attorney General, there are currently five states where the governor appoints the AG; Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming. One state, Maine, where the legislature elects the AG; and Tennessee, where the judges of the state supreme court appoint the AG.

Many times in the history of the state of Alaska, the "appointed" attorney general has followed political whims of the Governor instead of working for the Alaskan people. Under the present governor appointee system, the governor has his own personal lawyer, who very clearly enforces laws as the governor directs, instead of the way it should be, with the Attorney General owing his allegiance and loyalty to the Constitution and the people of the State of Alaska.

The advantages are many for Alaskans with an elected attorney general:

- A Department of Law that serves only the people of Alaska.
- That stands up for Alaskans.
- Answers only to the Alaskan people.
- Interprets the Constitution, instead of the Governor.
- Works directly for Alaskans.

Past experience shows us that appointed attorney generals do not have Alaskan's Rights at heart. We have had attorney generals drop very important actions at the insistence of the Governor:

- Statehood Compact
- Subsistence Lawsuit
- State's Rights issues
- 90/10 Royalty NPRA

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

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

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

MEMORANDUM

February 15, 1999

SUBJECT: Attorney General

TO: Senator Jerry Ward
Attn: Mark Hodgins

FROM: Tamara Brandt Cook
Director *TBC*

You have asked a number of questions regarding the office of the attorney general.

(1) Who is the attorney general legally required to represent and provide advice to?

Although there are many other specific provisions that apply to the attorney general and the Department of Law, AS 44.23.020 sets out the general duties and powers of the attorney general. Subsection (a) makes the attorney general "the legal advisor of the governor and other state officers." Note that the attorney general is specifically authorized to give legal advice and furnish written legal opinions to members of the legislature, as well as to other state officers. (AS 44.23.020(b)(4))

With respect to representation, the attorney general is charged with bringing and defending actions for the collection of revenue (AS 44.23.020(b)(1)); representing "the state in all civil actions in which the state is a party" (AS 44.23.020(b)(2)); and prosecuting "all cases involving violation of state law" (AS 44.23.020(b)(3)). Additionally, the attorney general has the powers ascribed at common law, including the power to bring any action he or she thinks necessary to protect the public interest. The attorney general has discretionary control of the legal business of the state, both civil and criminal, and the exercise of that discretion is not subject to control or review of the courts on separation of powers grounds. (Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975))

(2) Does the attorney general have the power to enforce constitutional mandates (or overlook constitutional violations) even when directed otherwise by the governor?

Under the reasoning of the Public Defender Agency case the attorney general does have discretion to initiate, prosecute, or dispose of cases (or to fail to initiate cases). However, as the head of a principal department, the attorney general serves at the pleasure of the governor. (Art. III, sec. 25, Constitution of the State of Alaska) The governor has the power to control the discretion of the attorney general by removal from office.

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(3) If the attorney general has a clear mandate, such as a statute put in place by the people or the legislature, may he or she ignore it if directed to do so by the governor?

Art. III, sec. 16 of the state constitution makes the governor "responsible for the faithful execution of the laws." There are many cases involving the executive's misapplying a statute, but few cases deal with situations where the executive simply fails to implement a statutory scheme that has been funded. However, in National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C.Cir. 1974), the court stated that it could issue an order requiring the president to perform a ministerial duty that was clearly required by law (in that case the granting of a pay raise), although the court, in fact, simply declared that the president should do so.

As previously pointed out, the attorney general has the discretion in a particular situation to take action or not to enforce a law, regardless of the role the governor may have played in the decision. Nonetheless, there are certainly situations when an action may be brought to challenge a decision of the executive branch that a law is unconstitutional and unenforceable on that ground. (O'Callaghan v. State of Alaska, 914 P.2d 1250 (Alaska 1996) cert. denied 177 S.Ct 1690, 137 L.Ed.2d 818 (1997)), holding the state's blanket primary statute constitutional) Also, following the reasoning in the National Treasury Employees Union case, the court does have authority in some situations to order an agency to comply with a statute or perform a statutory duty. (Ellis v. city of Valdez, 686 P.2d 700 (Alaska 1984; AS 22.10.020(c); AS 22.10.050) However, whether the court would actually order the performance of a duty in any particular case is unknown. The court in the Ellis case specifically reserved its decision regarding the legal effect of a failure of an agency to carry out a mandate. *Supra*, footnote 8, page 706) Mandamus is not available to require the performance of a discretionary act.

(4) What is the difference between an elected attorney general and an appointed one?

Presumably, an elected attorney general would not necessarily be chosen by the governor and could not be removed from office at the will of the governor. This would, I think, change the relationship between the attorney general and the governor.

(5) May the legislature remove the attorney general from office?

The attorney general, along with all other civil officers, is subject to impeachment under Art. II, sec. 20 of the state constitution.

(6) How would I describe the duties of the attorney general to an audience who wonders what the duties are and what role the attorney general plays in protecting the rights of citizens?

I would point out the provisions of AS 44.23.010 and discuss the fact that the governor has the power to remove an attorney general from office.

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