SB

92

Alaska Permanent Fund Corporation
P.O. Box 25500 Juneau, AK 99802-5500
Telephone (907) 465-2047
Facsimile (907) 586-2057

MEMORANDUM

DATE: April 28, 2001

TO: Senator Gene Therriault, Chair
Legislative Budget & Audit Committee

FROM: Robert D. Storer, Executive Director RDS

SUBJECT: Sponsor Statement on Senate Bill 92

SB 92 is an important improvement to current Permanent Fund law. The enhanced continuity of Board membership that this legislation provides is identical to that currently enjoyed by the Alaska State Pension Investment Board and 18 other boards.

The Board is unanimous in its support for this proposal because the members know, first hand, that it takes a great deal of time to gain sufficient knowledge of the Fund's operations and investment policies to be able to make informed decisions. As an investment professional working with public funds in Alaska for nearly two decades, I can attest that the Permanent Fund is a mature fund and that overseeing its complex investment structure is necessarily a demanding task. The institutional memory and experience of longer-serving members is definitely helpful to new members in fulfilling their fiduciary responsibilities.

With removal only for cause, the next Governor will appoint two cabinet members to the Board of Trustees shortly after he or she takes office. A third (public) member will then be appointed in July of the first year of the Governor's term. In July of the following year, roughly one and one-half years after taking office, the Governor will appoint a second public member, with his or her appointments at that time constituting a majority of the members of the Board. This more deliberate schedule for filling Board seats, which clearly reflects the intent of one-year staggered terms, would provide important continuity for the APFC by eliminating the risk that a new Governor may summarily replace all Trustees at one time. In short, we believe this bill serves the best long-term interests of the Fund and the people of Alaska.

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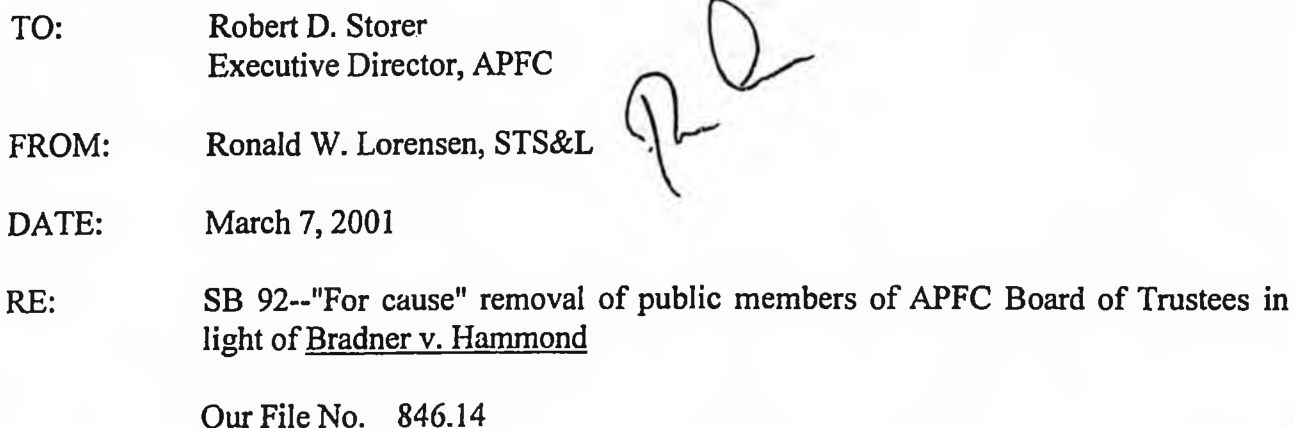
MEMORANDUM



TO: Robert D. Storer
Executive Director, APFC

FROM: Ronald W. Lorensen, STS&L

DATE: March 7, 2001

RE: SB 92--"For cause" removal of public members of APFC Board of Trustees in light of Bradner v. Hammond

Our File No. 846.14

In my recent testimony to the Senate State Affairs Committee on SB 92 ("for cause" removal of public members of the Alaska Permanent Fund Corporation Board of Trustees), I explained why I thought that the Alaska Supreme Court's decision in Bradner v. Hammond[1] did not mean that the bill would be unconstitutional if enacted. I thought it might be helpful to put those thoughts in writing, along with some further discussion of the Bradner decision.

In Bradner, the Court was presented with a legislative enactment[2] that, in addition to confirmation of the head of each principal department (i.e., commissioners), required legislative confirmation of all departmental deputy commissioners and of the directors of a number of named divisions within state government. The Alaska constitution (Article III, Section 25) expressly provided for legislative confirmation of the heads of each principal department, but it was silent regarding the confirmation of subordinate departmental officers. Governor Hammond challenged the enactment on grounds that it violated the doctrine of separation of powers by impermissibly interfering with the executive's power of appointment.

After discussing the purpose and importance of the separation of powers doctrine (and the "complementary doctrine" of checks and balances), the Court agreed with the governor's position. In that discussion, the Court made some observations about those doctrines that are important to keep in mind, generally, when analyzing the effect of a legislative enactment that is

[1] 553 P. 2d 1 (Alaska 1976)
[2] Section 1, Chapter 82, SLA 1975

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L. MERRILL LOWDEN · RONALD W. LORENSEN (OF COUNSEL)

challenged for encroaching on the powers of either (or both) the executive or judicial branch. In particular, the Court pointed out that:

> Both doctrines address and are designed to resolve the problem of efficient government and have as their goal the protection of the electorate from tyranny.

Bradner, at 6 - 7. It then went on to quote with favor a statement by former U.S. Supreme Court Justice Brandeis in which he said the purpose of the doctrine of separation of powers was "not to promote efficiency but to preclude the exercise of arbitrary power."[3]

The legislature's attempt in Bradner to throw a wider confirmation net around the governor's appointees than allowed by the constitution directly and clearly implicated the concerns identified by the Court. Confirmation necessarily requires that the legislature become involved in each and every one of the governor's appointments that is subject to confirmation. History (both in Alaska and elsewhere) has shown that the confirmation process can all too easily become politicized, frequently turning into debates (and compromises) over issues that are unrelated to the merits of the appointment, itself. Those situations exemplify the "tyranny" and the "exercise of arbitrary power" that the separation of powers doctrine was designed to protect against.

On the other hand, the effect on the workings of government of a general law that defines the conditions under which certain public officials, once appointed, may be removed from office is different by several orders of magnitude. Unlike the confirmation process where absolutely no objective standards for legislative approval exist, the "for cause" removal standard proposed by SB 92 sets out a very specific standard[4] that is uniform in its application and for which relief can be obtained by an aggrieved official through the judicial branch if it is not properly applied. Further--and perhaps even more importantly--under a "for cause" removal standard, the legislature plays no role in individual removal decisions: there is no opportunity for inter-branch "tyranny" or "exercise of arbitrary power" to arise.

When I described these important differences at the committee's hearing, Senator Therriault asked if they weren't just a matter of degree, rather than raising different legal principles. I think he was correct in making that point, since our courts would almost certainly say that removal of a public official is an integral aspect of the executive's power of appointment. However, in my experience the resolution of many constitutional questions has ultimately boiled down to one of degree.

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[3] *Id.* at 6, n. 11, quoting dissenting opinion of Brandeis, J., in Myers v. United States, 272 U.S. 52, at 293 - 95.

[4] See my January 11, 2001 memo to the APFC Trustees discussing the "for cause" standard.

Take, for example, AS 37.13.050(b) which sets out certain specific qualifications for the public members of APFC Board.[5] Because that provision imposes those qualifications for appointment to the Board, it has the direct effect of limiting the governor's appointment power: he cannot simply appoint any person he choses. Yet I doubt that even the most ardent supporter of the primacy of the executive's appointment power would seriously argue that such legislatively imposed qualifications violate our constitution.

A "for cause" removal requirement for a public member of the APFC Board falls somewhere between the appointment qualifications of AS 37.13.050(b) (clearly constitutional) and a requirement that those members be subject to legislative confirmation (clearly unconstitutional). I don't know precisely where the line between what's permissible and what's not might ultimately be drawn, but I do think that SB 92's proposed "for cause" requirement would fall on the permissible side of that line.

cc: Jim Baldwin, Assistant Attorney General
Jim Kelly, APFC

[5] That provision states: "The four public members of the board must have recognized competence and wide experience in finance, investments, or other business management-related fields."

Alaska Permanent Fund Corporation
P.O. Box 25500 Juneau, Alaska 99802-5500
(907) 465-2047

MEMORANDUM

DATE: February 20, 2001

TO: Senator Gene Therriault, Chair
Other Members of the Senate State Affairs Committee

FROM: Robert D. Storer, Executive Director

SUBJECT: Senate Bill 92 -- Removal of members of the Board of Trustees only for cause

On behalf of the Board of Trustees of the Alaska Permanent Fund Corporation, I am writing to thank you for LB&A's introduction of Senate Bill 92, and your prompt scheduling of the bill on February 22. I will be present at the hearing and look forward to answering any questions you may have.

SB 92 is an important improvement to current Permanent Fund law. The enhanced continuity of Board membership that this legislation provides is identical to that currently enjoyed by the Alaska State Pension Investment Board (ASPIB). Note: I have attached a memorandum prepared by our legal counsel which provides some helpful background on this issue.

The Board is unanimous in its support for this proposal because the members know, first hand, that it takes a great deal of time to gain sufficient knowledge of the Fund's operations and investment policies to be able to make informed decisions. As an investment professional working with public funds in Alaska for the past 18 years, I can attest that the Permanent Fund is a mature fund and that overseeing its complex investment structure is necessarily a demanding task. The institutional memory and experience of longer-serving members is definitely helpful to new members in fulfilling their fiduciary responsibilities.

In short, we believe this bill serves the best interests of the Fund and the people of Alaska.

Here is one example of why continuity is important. The Trustees recently decided not to invest in private equities even though over time we believe this asset class would provide superior returns to those provided by public equities. Because returns from private equities typically underperform in the short term and only generate their expected higher returns over time, investing in this asset class requires patience and an institutional commitment on the part of the Board.

Part of why the Board decided against investing in private equities was because of its collective concern that the next Governor might replace the entire Board at one time, thereby wiping out the Board's history with – and understanding of – this asset class, including memory of the careful deliberative process this Board followed in considering alternative investments. Worse, new, inexperienced Trustees might simply choose to liquidate those investments at a time when returns are low, rather than staying the course for the longer term.

With removal only for cause, the next Governor will appoint two cabinet members to the Board of Trustees shortly after he or she takes office. A third (public) member will then be appointed in July of the first year of the Governor's term. In July of the following year, roughly one and one-half years after taking office, the Governor will appoint a second public member, with his or her appointments at that time constituting a majority of the members of the Board. This more deliberate schedule for filling Board seats would provide important continuity for the APFC that would likely not occur under the present appointment scheme by which a new Governor could summarily replace all Trustees at one time.

I look forward to discussing this issue with you further, and thank you for your consideration.

Attachment

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MEMORANDUM

To: Trustees, Alaska Permanent Fund Corporation

From: Ron Lorensen, STS&L

Date: January 11, 2001

Re: "For cause" standard for removal of public officers
Our File No.: 846.14

In response to the Board's request at its December 8, 2000 meeting, I have researched court decisions that articulate standards for the "for cause" removal of both public and private officers and employees. In addition, to determine whether and how the term is defined in the Alaska statutes, I have also attempted to identify all instances in which removal of a public officer or employee is statutorily provided for on a "for cause" basis. The majority of "for cause" removal statutes in Alaska do not provide any standards beyond the "for cause" requirement.

I. Judicial Approach to "Cause/For Cause".

The Alaska statutes dealing with the removal of public officers and employees use three different terms to state the standard for removal--"for cause," "good cause," and "just cause." There is no apparent significance to the choice of the term used, and courts have recognized that the terms are interchangeable.[1]/ The focus of each term is whether "cause" for removal exists.

The following excerpts from two court cases and one law review article reflect that there is no single, widely accepted definition of "cause" in the cases. Nonetheless, they do reflect a common theme:

> "Good cause" cannot be just any reason the Board deems sufficient for the discharge of the teacher. ... Not only must there be "good cause" and substantial evidence in support of the charge, but in order for the facts to sustain such a charge they must bear reasonable relationship to the teacher's fitness or capacity to perform his duties in that position. . . . We find the test of good cause with respect to public officers generally to be facts which are related to the office and affect the administration thereof. Lucero v. Mathews, 901 P.2d 1115, 1122 (Wyoming 1995) (citations omitted).

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[1]/ *See, for example,* Lockhart v. Cedar Rapids Community Sch. Dist., 577 N.W. 2d 845 (Iowa 1998), at 846-47 (equating "proper cause" with "just cause" and "for cause").

E. BUDD SIMPSON · JON K. TILLINGHAST · STEPHEN F. SORENSEN · LESLIE LONGENBAUGH
L. MERRILL LOWDEN · RONALD W. LORENSEN (OF COUNSEL)

> There is no all-encompassing definition of "just cause." This term does encompass, however, reasons that relate to an employee's performance in his or her job and the impact of that performance on an employer's ability to attain its reasonable goals. "Just cause" also includes reasons based on an employer's legitimate budgetary or personnel requirements, unrelated to employee fault. "Just cause" does not include "reasons which are arbitrary, unfair, or generated out of some petty vendetta." Lockhart v. Cedar Rapids Community Sch. Dist., 577 N.W. 2d 845, 847 (Iowa 1998) (citations omitted)

> In years of exposure and study and thought, both to and of the bad as well as the good, some conclusions have inevitably emerged, and one of them is a definition of what "just cause" probably is, for here and now. It seems to be that cause which, to a presumably-reasonable determiner ... appears to be (not necessarily is), fair and reasonable, when all of the applicable facts and circumstances are considered, and are viewed in the light of the ethic of the time and place. That's a mouthful, in words, but it really is only, bottom-line, another expression of the now-common expression, "fair shake." Hill & Westhoff, "No Song Unsung, No Wine Untasted," 47 Drake Law Review 399, 411 (1999).

Here's my own shot at a definition of "cause": Fair minded people will know it when they see it, taking into account the needs of the office and the performance and conduct of the incumbent.

II. "Cause" for Removal in the Alaska Statutes.

Of the terms "for cause," "good cause," and "just cause," "for cause" is used most frequently in the Alaska statutes to express a "cause" standard for removal of a public officer or employee. That term appears in a total of 15 different provisions. The "good cause" standard comes in second with a total of three provisions. "Just cause" appears only once. Twelve of these 19 "cause" provisions state only the simple standard, without either definition or example. Six provisions include multiple examples of "cause," such as AS 31.05.007(d) which provides that the governor may remove a member of the Alaska Oil and Gas Conservation Commission "for cause including but not limited to incompetence, neglect of duty or misconduct in office" or AS 47.30.663(c) which provides for removal of a member of the Alaska Mental Health Board "only for cause, including, but not limited to, poor attendance or lack of contribution to the board's work."[2]/ One provision, AS 08.04.030, provides only a single example of "cause."

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[2]/ The most comprehensive listing appears at AS 43.05.414(c), which provides examples of "good cause" for removal of the state's administrative law judges. That provision states:

> (c) In this section, "good cause" includes
> (1) violation of the Alaska code of judicial conduct adopted by the Alaska Supreme Court;
> (2) conviction of a crime of moral turpitude;

Under that section a member of the Board of Public Accountancy may be removed by the governor "for neglect of duty or other just cause." No statute attempts to set out a comprehensive definition of "cause."

It should be noted that, within the 19 provisions that require "cause" for removal of a public officer or employee, seven condition the standard with the word "only" (i.e., "may be removed only for cause"). The other 12, including AS 37.10.210(d) which establishes a "for cause" standard for removal of members of the Alaska State Pension Investment Board (ASPIB),[3/] do not use "only" or any similar word of limitation. Because the role and responsibilities of the APFC Board are so similar to those of ASPIB, I did not use the word "only" in the accompanying draft bill amending AS 37.13.070(a) to provide a "for cause" standard for removal of the public members of the APFC Board. Although the use of "only" in some "for cause" provisions appears to make a somewhat stronger statement about the applicable standard for removal, from a legal point of view I believe that omitting that word from the bill does not have any substantive effect. The appropriate standard for removal of a public officer is either "at will" or "for cause"--it can't be both.

I hope the preceding information is helpful.

cc: Robert D. Storer, Executive Director, APFC
Jim Baldwin, Assistant Attorney General, Department of Law

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(3) unjustified failure to handle the caseload assigned or similar nonfeasance of office;

(4) failure to meet the requirements of AS 43.05.425 relating to qualification for office; and

(5) unreasonable failure to comply with the statutes or regulations regarding the confidentiality of taxpayer information.

[3/] As suggested at the December 8 Board meeting, I went back through the legislative history materials on the bill that created ASPIB to see whether there was any discussion of the intended meaning of "for cause" removal of ASPIB members. From the written record, it does not appear that there was.

SENATE STATE AFFAIRS COMMITTEE

DATE March 13, 2001

SUBJECT OF MEETING:

SB 92-REMOVAL OF MEMBERS OF THE PF BOARD

THE SEAL OF THE STATE OF ALASKA

PLEASE SIGN IN

PLEASE PRINT:

NAME	ADDRESS (MAILING & ZIP)	REPRESENTING	DO YOU WANT TO TESTIFY?
MARI			
Jim Baldwin		ACO	

Who can be removed "for cause"

04.06.070	director of Alcohol Beverage Control Board
08.01.020	Boards & Commissions ~ 3 or more unexcused absences
08.04.030	Accountants mention specifically @
08.20.025	Chiropractors
08.63.040	Marital and Family Therapy
08.80.105	Pharmacists & Pharmacies
10.25.140	Cooperatives – BoDs
16.43.030	CFEC
18.85.040	Public Defender
31.05.007	AOGCC
37.10.210	ASPIB @
39.52.410	Boards & Commissions ~ under Executive Ethics
41.37.050	Citizens' Advisory Commission on Federal Areas in AK
43.05.415	Chief Administrative Law Judge ~ Office of Tax Appeals DOR
47.30.021	AK Mental Health Trust Authority

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 92
() Publish Date:

Revision Date/Time (Note if correction): 2/20/01 3:00 PM
Title: Removal of Members of the Permanent Fund Board
Sponsor: Senate Ru[illegible] (request of Leg Budget & Audit)
Requester: Senate S[illegible] Affairs

Dept. Affected: Revenue
BRU: APFC
Component: APFC
Component Number: , 9

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal: [ ]

POSITIONS

POSITIONS	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

The provisions of SB 92 would not have any financial cost to the APFC operating budget.

Prepared by: Robert D. Storer
Phone (907)465-2047
Division: Alaska Permanent Fund Corporation
Date/Time 2/20/01 3:00 PM
Approved by: Larry Persily, Deputy Commissioner
Date Feb. 21, 2001
Agency: Department of Revenue

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

June 10, 1996

Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: HCS CSSB 89(FIN) -- Relating to the board and staff of the Permanent Fund Corporation
Our file 883-96-0072

Dear Governor Knowles:

At your legislative office's request on your behalf, we have reviewed HCS CSSB 89(FIN), a bill relating to the board and staff of the Permanent Fund Corporation.

Section 1 of the bill would increase the number of members on the board from six to seven, by adding another public member appointed by the governor. Section 2 of the bill would require that at least one public member have "recognized competence and experience in investment portfolio management." Section 3 of the bill makes a technical change to conform to the increase in the number of public members. Section 4 of the bill would allow the governor to remove a public member only for cause, and defines cause as either incompetency or misfeasance or malfeasance in office. Section 5 of the bill would require the governor to base the decision to appoint a board member solely on the best financial interest of the fund, would prohibit the governor from attempting to influence the board to make an investment decision that violates prudent investment principles, and would make a violation of this section a violation of the executive branch ethics act (AS 39.52). Section 6 would provide that the fund executive director, and other fund employees with investment responsibilities, serve at the pleasure of the board, but would allow the board to enter into employment contracts with these employees that do not exceed two years in duration. Finally, sec. 7 of the bill would specify that each board member has a fiduciary duty to the fund, and must perform official actions solely in accordance with that duty.

As we indicated in testimony before the legislature, we believe that section 4 of this bill may violate your appointment power under art. III, sec. 26 of the Alaska Constitution, by making the

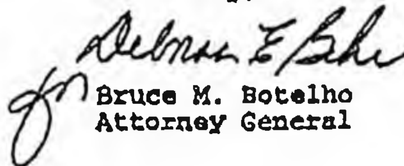
public members removable only for cause.[1] We have previously discussed this appointment power question in our review of the 1991 bill which would have established the Alaska State Pension Investment Board, and which also contained a removal-for-cause provision.[2] See 1991 Inf. Op. Att'y Gen. 311 (883-91-0071; June 11). What we said there is equally applicable here:

> The removal-for-cause provision may constitute a usurpation of the executive power of appointment. The ability to remove an appointee is an incident of the power of the appointment. The governor's ability to assure that appointees remain faithful to his or her philosophies and programs is preserved when appointees may be removed at the governor's pleasure. Article III of the Alaska Constitution specifically authorizes the legislature to provide for the removal of members of regulatory and quasi-judicial boards and commissions. Alaska Const., art. III, sec. 26. There is no other specific grant of power to the legislature to prescribe grounds for removal for other agencies governed by a board. Because the corporation is not a regulatory or quasi-judicial agency, the legislature lacks the power to restrict the governor's removal power in the manner set out in this bill.

Id. at 312.

We find no other constitutional or legal problems with the bill.

Sincerely,



Bruce M. Botelho
Attorney General

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[1] Comments by certain legislators indicated to us that this provision was included in lieu of a legislative confirmation requirement, which art. III, sec. 26 of the Alaska Constitution would not allow. Under that section, confirmation power is limited to those boards and commissions at the head of an principal department (such as the Board of Education) and those with regulatory or quasi-judicial powers. The board of the Permanent Fund Corporation is neither type of board. And the Alaska Supreme Court ruled in Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), that the legislature could not confer confirmation power upon itself beyond that specified in the constitution.

[2] That bill was vetoed by Governor Hickel, at our recommendation, because of numerous legal problems. A better bill establishing the investment board became law the next year.

Journal Text

SB 89
Message of June 14 was received, stating:

Dear President Pearce:

Under the authority of art. II, sec. 15 of the Alaska Constitution, I have vetoed the following bill:

HOUSE CS FOR CS FOR SENATE BILL NO. 89(FIN)
An Act relating to the members of the board and staff of the Alaska Permanent Fund Corporation.

I have taken this action out of a strongly held belief that the trustees of the Alaska Permanent Fund Corporation must be answerable to Alaskans for the decisions they make in managing over $18 billion of public money. This bill, among other things, would change existing law by making trustees removable only for very specific causes. Under existing law, the board serves at the pleasure of the governor and must answer to the governor for management decisions. The governor, in turn, must answer to the voters for the governors stewardship of the Alaska Permanent Fund. It is in this very basic way that the Alaska Permanent Fund Corporation will remain responsive to the will of the people.

Sincerely,
/s/
Tony Knowles
Governor

Bill Root: [ ] Display History/Action | Clear Bill Root

Return to BASIS Main Menu(19th Legislature)
Return to the Legislature Home Page
BASIS Last Updated 12/31/96

Mike BRADNER, Speaker of the House, Alaska State Legislature, et al., Appellants, v. Jay S. HAMMOND, Governor of the State of Alaska, Appellee

No. 2802

Supreme Court of Alaska

553 P.2d 1; 1976 Alas. LEXIS 396

August 2, 1976

COUNSEL:
[**1]

Terrance Sandalow, Ann Arbor, Michigan, Billy G. Berrier, Juneau, for Appellants.

Robert M. Johnson, Rodger W. Pegues, Asst. Attys. Gen., and Avrum M. Gross, Atty. Gen., Juneau, for Appellee.

JUDGES:
Boochever, C.J., Rabinowitz and Erwin, JJ., Dimond, Justice Pro Tem., and Taylor, Superior Court Judge sitting as Justice Pro Tem. Connor and Burke, JJ., not participating.

OPINIONBY:
RABINOWITZ

OPINION:

[*2] This appeal arises from a declaratory judgment suit which appellants instituted in superior court seeking a declaration that Section 1 of Chapter 82, SLA 1975 is constitutional. This legislative measure effected significant changes in the procedures for appointment and removal of subcabinet officials, including deputy commissioners and division heads of the executive branch of Alaska's government. n1 Specifically, it removed certain division directors from the classified service and placed them in the partially exempt service, provided that the appointment of deputy heads of each principal executive department and 19 specified directors of divisions were subject to confirmation by the legislature in joint session, and it prescribed procedures pertaining to the confirmation process. [**2]

n1 Chapter 82, SLA 1975 provides:

Section 1. AS 39.05.020 is amended to read:

Sec. 39.05.020. Appointment of department heads and other executive officers. The governor shall appoint the head of each principal executive department in the state government. Each appointment is subject to confirmation by a majority of the members of the legislature in joint session. The following executive appointments are also subject to confirmation by a majority of the members of the legislature in joint session:

(1) The deputy head of each principal executive department of the state;

(2) director, division of banking;

(3) director, division of insurance;

(4) director, division of family and childrens services;

(5) director, division of corrections;

(6) director, division of oil and gas;

(7) director, division of elections;

(8) director, division of policy planning and research;

(9) director, division of personnel;

(10) director, division of budget and management;

(11) director, division of medical assistance;

(12) director, division of mental health;

(13) director, division of public health;

(14) director, office of telecommunications;

(15) director, division of marine transportation;

(16) director, division of waters and harbors;

(17) director, division of lands;

(18) state geologist, division of geological and geophysical surveys;

(19) director, division of agriculture;

(20) director, division of aviation.

Section 2. AS 39.05.080(2) is amended to read:

(2) When appointments are presented to the legislature for confirmation,

(A) the presiding officer of each house shall assign the name of each appointee to a standing committee of that house for a hearing, report and recommendation; standing committees of the two houses assigned the same person's name for consideration may meet jointly to consider the qualifications of the person appointed and may issue either a separate or a joint report and recommendation concerning that person; then

(B) the legislature shall, before the end of the session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented.

Sec. 3. AS 39.25.040 is amended to read:

Sec. 39.25.040. Director of personnel. The head of the division of personnel is the director of personnel appointed by the commissioner of administration and responsible to the commissioner of administration for the execution of the duties and responsibilities imposed by this chapter and the rules adopted under this chapter. The director of personnel must have at least three years of practical working experience in the field of personnel administration.

Sec. 4. AS 39.25.120(2) is amended to read:

(2) the directors, division of personnel, division of mental health, division of public health, division of medical assistance, and those other directors of the major divisions of the principal departments of the executive branch as are specifically designated by the governor; ....

[**3]

The legislative history of Chapter 82 discloses that on April 28, 1975, Alaska's Ninth State Legislature enacted Free Conference Committee Substitute to Senate [*3] Bill 98. After initial passage, Governor Hammond vetoed the bill on the ground that Section 1 thereof impinged upon the executive power of appointment. On May 21, 1975, the legislature, in joint session, overrode the veto. The act then became law the following day as Chapter 82 of the 1975 Session Laws of Alaska (hereinafter Chapter 82).

Subsequent to enactment of Chapter 82, Governor Hammond appointed persons to posts affected by the Act's provisions. Under AS 39.05.080(1), part of the codification of Chapter 82, the governor was obliged to present to the legislature for confirmation the names of these persons. The governor refused to do so. Appellants then commenced this action for a declaratory judgment n2 of the constitutionality of Chapter 82. The superior court granted Governor Hammond's motion for summary judgment, declaring Section 1 unconstitutional. This appeal followed.

n2 AS 22.10.020(b) provides:

In case of an actual controversy within the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

[**4]

The controlling constitutional provisions we are called on to interpret here are contained in Article III of Alaska's constitution and concern the appointive powers of the governor. n3 Article III, Section 1 provides:

The executive power of the State is vested in the governor.

n3 There is no dispute that our constitution was designed with a strong executive in mind. Executive Committee Chairman Victor Rivers

reported to the floor that "we are all strongly agreed on the principle of the strong executive." Alaska Constitutional Convention Proceedings at 1984 (hereinafter ACCP). *Accord,* ACCP at 1102, 1741, 1986-88, 2038, 3103.

Article III, Section 25 further provides that:

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 [**5] with respect to the secretary of State. The heads of all principal departments shall be citizens of the United States.

This provision explicitly empowers the governor to appoint and dismiss the head of each principal department. It subjects these executive appointments to confirmation by a majority of the members of the legislature in joint session. Article III, Section 26 treats related offices and 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 of commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

As with Section 25, Section 26 vests the power of appointment in the governor and the power to confirm in the legislature in joint session. Removal of Section 26 board or commission members is as provided by law and, therefore, not necessarily at the governor's pleasure. [**6]

As analyzed by appellants, the sole question in this appeal is whether Sections 25 and 26 of Article III describe the outer [*4] limits of the legislature's confirmation authority, or whether the legislature may by statute require confirmation of other high-level, policy-making officials within the executive branch. In arguing that Sections 25 and 26 only establish a constitutional minimum requiring that certain appointments within the executive branch must be legislatively confirmed, appellants emphasize that neither Section 25 nor 26 prohibits the legislature from requiring confirmation of other executive appointments. Admitting that the power to enact legislative confirmation requirements in addition to those provided for in Sections 25 and 26 is not explicitly conferred on the legislature by Alaska's constitution, appellants advance the contention that the validity of Chapter 82 turns on whether such enactments are within the ambit of the constitution's general grant of legislative power to the legislative branch of Alaska's government. n4

n4 Article II, Section 1 of the Alaska Constitution provides in part that "the legislative power of the State is vested in a legislature ...."

In support of their thesis that the confirmation power is within the legislative power grant of Article II, Section 1, appellants contend that the record of the constitutional convention demonstrates that the delegates "clearly understood that the legislature would have authority to enact statutory confirmation requirements." Additionally, appellants point to the circumstance that since the inception of statehood both the executive and legislative branches "have consistently acted upon the understanding that the legislature has such authority" and this long-standing interpretation should be accorded significant weight by the judiciary in matters of constitutional interpretation. *Okanogan Indians v. United States (The Pocket Veto Case) 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed 894 (1929); Hampton v. United States, 276 U.S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928); Downes v. Bidwell, 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901); see generally* 16 Am.Jur.2d Constitutional Law § 83 (1964); 16 C.J.S. Constitutional Law § § 32-34 (1956).

In addition appellants emphasize that this interpretation dates back to the first years of statehood. Contemporaneous interpretation of fundamental law by those participating in its drafting has traditionally been viewed as especially weighty evidence of the framers' intent. *Myers v. United States, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926); Cooper Mfg. Co. v. Ferguson, 113 U.S. 727, 5 S. Ct. 739, 28 L. Ed. 1137 (1885); Norfolk & W. Ry. Co. v. Board of Public Works, 124 W.Va. 562, 21 S.E.2d 143 (1942); Jones v. Williams, 121 Tex. 94, 45 S.W.2d 130 (1931).*

[**7]

In opposition, appellee Hammond primarily argues that the power to confirm executive officers is an executive power which may be lawfully exercised by the legislature only to the extent granted by the Alaska Constitution. Viewed in this manner, appellee analyzes the power to confirm executive officers as part of the appointment process, incapable of existence independent of the power of appointment, and characterizes this confirmation authority as a power "super-added" to the legislature's general legislative powers. Thus, appellee would find that Sections 25 and 26 set the maximum rather than the minimum parameters of the legislature's power to confirm appointments of executive officers. This follows, according to appellee, from the fact that legislative confirmation is a delegated function taken from an executive function, and thus the breadth of this delegated authority must be strictly construed. n5 Applying this strict interpretative criterion, appellee concludes that Chapter 82 is violative of the separation of [*5] powers doctrine implied in Alaska's constitution.

n5 Countering appellants' contention, appellee's reading of Alaska's constitutional history demonstrates "an intent by the constitutional framers to restrict legislative confirmation of those officers set forth in Art. III, § § 25 and 26."

The attorney general candidly admitted at oral argument that examination of practice between the legislative and executive branches since statehood indicates that the executive has at least acquiesced to legislative confirmation of certain subcabinet officials. However, he argued that the political reality of a legislature dominated by the same party as that of the governor, as well as the minor interference such intervention created, indicates that the executive stance in the past should not be read as a "constitutional interpretation by a coordinate branch of government," but rather as a product of a realistic ordering of executive goals at the time.

[**8]

After study of the excellent briefs and oral arguments of respective counsel, on March 25, 1976, this Court issued an order affirming the superior court's declaration that Section 1, Chapter 82, SLA 1975 is unconstitutional. In this order we further indicated that a full opinion would be issued in due course. n6

n6 At oral argument respective counsel advised that if a decision was not forthcoming in the immediate future, Governor Hammond, without prejudice to his position in this appeal, intended to submit the names of various subcabinet appointments to the legislature in order to facilitate confirmation hearings. Our March order was in response to these disclosed time constraints.

In *Alaska State-Operated School System v. Mueller, 536 P.2d 99, 103 (Alaska 1975)*, we observed that "those who wrote our constitution followed the traditional framework of American government. The governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the [**9] judicial." Analyzing this tripartite form of government provided for Alaska, this court concluded, in *Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975)*, that ".... it can be fairly implied that this state does recognize the separation of powers doctrine." n7 Our recent opinion in *Continental Insurance Cos. v. Bayless & Roberts, Inc., 548 P.2d 398, 410-11 (Alaska 1976)*, acknowledges that the underlying rationale of the doctrine of separation of powers is the avoidance of tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers. n8 It is clear that the doctrine is not a common law concept; it is, however, a brooding omnipresence by virtue of its conceptually central role in the structure of American constitutional government.

n7 In *Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975)*, we also said that "although the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed. *Wade v. Nolan, 414 P.2d 689, 698 (Alaska 1966)*."

In reaching this conclusion that the doctrine of separation of powers is implicit in the Alaska Constitution, we cited *Lira v. Billings, 196 Kan. 726, 414 P.2d 13, 16 (1966)*, where the Kansas Supreme Court acknowledged that the doctrine is implied from the existence of three separate constitutional provisions calling for three branches of government. [**10]

n8 *Continental* dealt in part with the inherent contempt powers of the courts of Alaska. There

we observed that the inherent power to punish for contempt exists independently of statute and that although the legislature may regulate the procedure and enlarge the power, it cannot ".... 'without trenching upon the constitutional powers of the court, and destroying the autonomy of that system of checks and balances which is one of the chief features of our triple-department form of government, fetter the power itself.'" *Continental Ins. Cos. v. Bayless & Roberts, Inc., 548 P.2d 398, 410 (Alaska 1976)*, quoting *In re Shortridge, 99 Cal. 526, 528, 34 P. 227, 229 (1893).*

The doctrine prohibits one branch from encroaching upon and exercising the powers of another branch. *Myers v. United States, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926); Giss v. Jordan, 82 Ariz. 152, 309 P.2d 779 (1957).*

A problem inherent in applying the doctrine of "separation of powers" stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine [**11] of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers. n9 Both doctrines address and are designed to resolve the problem of efficient government versus tyrannical government n10 and have as their goal [*6] the protection of the electorate from tyranny. n11 In the instant appeal, the parties, in recognition of the controlling nature of the issue, dispute the meaning of the doctrine of separation of powers, and its implications for the determination as to whether Chapter 82 is violative of Alaska's constitution. In our view, the doctrine is of importance to the resolution of the merits of this appeal, for if the doctrine clearly precludes legislative intervention (by confirmation) in the appointment of executive officials, or requires "strict departmentalization," then Chapter 82, which purports to authorize legislative "meddling" in the exercise of an executive power, is unconstitutional because it would be violative of separation of powers requirements.

n9 ".... a dynamic relationship of cooperation and conflict ...." R. Tresolini & M. Shapiro, American Constitutional Law 9 (3d ed. 1970) [hereinafter Tresolini]. [**12]

n10 Tresolini, *supra* note 9, at 11. *Compare O'Donoghue v. United States, 289 U.S. 516, 530, 53 S. Ct. 740, 77 L. Ed. 1356, 1360 (1933) and United Public Workers of America v. Mitchell, 330 U.S. 75, 91, 67 S. Ct. 556, 565, 91 L. Ed. 754, 768 (1947).*

n11 Justice Brandeis wrote, dissenting in *Myers v. United States, 272 U.S. 52, 293-95, 47 S. Ct. 21, 85, 71 L. Ed. 160, 242-43 (1926):*

The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy .... In America, as in England, the conviction prevailed then that the people must look to representation assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.

Compare C. Antieau, 2 Modern Constitutional Law § 11:13, at 200 (1st ed. 1969):

The doctrine of separation of powers was deemed necessary by the framers of the Constitution for two principal purposes: first, to protect the liberty of the citizen; and second, to safeguard the independence of each branch of the government and protect it from domination and interference by the others.

Cf. Warren v. Boucher, 543 P.2d 731, 734, 737 (Alaska 1975).

[**13]

In determining if Chapter 82 violates the doctrine of separation of powers, which is implicit in Alaska's constitution, it is necessary to answer the threshold question whether the appointment of executive officers is a legislative or executive function. Under the structure envisaged by Alaska's fundamental charter, the legislative power of the state is vested in the legislature, n12 the executive power in the governor, n13 and the judicial power in a supreme court, a superior court and such additional courts as established by the legislature. n14

n12 Art. II, § 1, Alaska Const.

n13 Art. III, § 1, Alaska Const.

n14 Art. IV, § 1, Alaska Const.

Appellee contends that the appointment of executive officers is an executive function. n15 We find appellee's contention most persuasive. In addition to vesting the executive power of the state in the governor, Section 16 of Article III provides that "the governor shall be responsible for the faithful execution of the laws." In view of the responsibilities [**14] imposed by Section 16, and the authority granted by Section 1, the governor is necessarily clothed with the power to appoint subordinate executive officers to aid him in carrying out the laws of Alaska. n16 Thus, we conclude that the appointment of executive officers is an executive function; n17 for without such a power, the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too [*7] great a concentration of power in one branch, would be defeated.

n15 There is no dispute here that the appointees subjected to legislative confirmation by Chapter 82 are executive officers.

n16 *Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969).*

n17 In *Springer v. Philippine Islands, 277 U.S. 189, 202, 48 S. Ct. 480, 482, 72 L. Ed. 845, 849 (1927),* the Supreme Court said:

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

See also Myers v. United States, 272 U.S. 52, 115-16, 47 S. Ct. 21, 24-25, 71 L. Ed. 160, 165-66 (1926).

[**15]

Given our conclusion that under Alaska's constitution the appointment of subordinate executive officers by the governor is an executive function, it is then necessary to determine the nature of the legislature's confirmation powers. Here we are in agreement with appellee's analysis that under Alaska's constitution confirmation is a specific attribute of the appointive power of the executive. n18 Other courts which have been called upon to resolve this issue have been unanimous in their holdings that confirmation is 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. n19

n18 In *Myers v. United States, 272 U.S. 52, 169, 47 S. Ct. 21, 43, 71 L. Ed. 160, 187 (1926),* the Supreme Court termed confirmation a power "super added" to those possessed by the legislature.

n19 *Myers v. United States, 272 U.S. 52, 138-39, 47 S. Ct. 21, 32-33, 71 L. Ed. 160, 174-75 (1926); Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62, 67 (1966); Spears v. Davis, 398 S.W.2d 921 (Tex. 1966); Walker v. Baker, 145 Tex. 121, 196 S.W.2d 324 (1946); State v. Dowling, 167 La. 907, 120 So. 593 (1928); People v. Shawver, 30 Wyo. 366, 222 P. 11 (1924).*

[**16]

In light of the nature of the legislature's power of confirmation, the question whether Sections 25 and 26 of Article III describe the outer limits of the legislature's confirmation authority, or whether the legislature may by statute require confirmation of other high-level, policy making officials within the executive branch, admits of but one resolution. As to this issue, we think the provisions of Sections 25 and 26 of Article III are clear and unambiguous. n20 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. n21

n20 *Compare Warwick v. State ex rel. Chance, 548 P.2d 384, 391-96 (Alaska 1976).*

n21 In *O'Donoghue v. United States, 289 U.S. 516, 530, 53 S. Ct. 740, 743, 77 L. Ed. 1356 (1933),* the Supreme court said:

The Constitution, in distributing the powers of government, creates three distinct and separate departments - the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands, 277 U.S. 189, 201, 48 S. Ct. 480, 72 L. Ed. 845;* namely, to preclude a commingling of these essentially different powers of government in the same hands. *And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the*

general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.

[**17]

The lack of ambiguity in Sections 25 and 26 of Article III of the Alaska Constitution mandate that this court interpret these express provisions as embodying not only the maximum parameters of the delegation of the executive appointive authority through the legislative confirmation function but, further, that they delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers. In our view, the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision. n22 [*8] To hold otherwise would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the executive by the legislative branch, because there would be no logical termination point to the legislature's confirmation of executive appointments. n23

n22 *Compare Leege v. Martin, 379 P.2d 447, 450 (Alaska 1963). See also State v. Campbell, 536 P.2d 105, 110-11 (Alaska 1975),* where we said:

This court is admittedly under a duty to reconcile, whenever possible, challenged legislation with the constitution by rendering a construction that would harmonize the statutory language with specific constitutional provisions. However, in fulfilling that duty, the extent to which the express language of the provision can be altered and departed from and the extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers which prohibits this court from enacting legislation or redrafting defective statutes.

[**18]

n23 Our holding makes it unnecessary to discuss any of the other arguments advanced in this appeal.

The superior court's judgment is Affirmed.

CONNOR and BURKE, JJ., not participating.