

**HB**

**6**

<TARGET><BILL>HB 6</BILL><SUBJECT>HB  
6</SUBJECT><COMM>SJUD27</COMM></TARGET>

# Alaska State Legislature

## House of Representatives



**Representative Max F. Gruenberg, Jr.**

**House District 20**

**Anchorage (Mountain View, Russian Jack, East Anchorage)**

**House Minority Floor Leader**

*Member*

*Standing Committees:*

Judiciary

Rules

State Affairs

Transportation

*Interim:*

716 W 4<sup>th</sup> Avenue, Rm 350  
Anchorage, Alaska 99501-2133

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Rep.Max.Gruenberg@legis.state.ak.us

### **CS HB 6 (JUD) amended in the House:**

#### **Removing a Regent**

#### **Sponsor Statement**

This bill creates a statutory due process procedure under which the governor may suspend or remove a University of Alaska regent for good cause.

This bill is in response to a 2007 incident in which a regent was federally indicted on multiple counts of fraud. He refused to resign his position until impeachment proceedings began. The board of regents' by-laws do not set forth a procedure to remove a regent. Legislative legal counsel has concluded that regents serve at the pleasure of the governor and thus can be removed. An informal attorney general's opinion states that the governor does not have the authority to remove a regent without cause (implying that he can do so with just cause). That AG opinion concluded that the governor does have the authority to remove a regent so long as cause is established and due process granted.

It should be noted that, during the Twenty-Fifth Legislature, letters were sent by the House Judiciary Committee to the Board of Regents asking that it, under the authority of AS 14.40.170(b)(1), adopt procedures for the suspension and removal of a regent. But the board has not done so.

It is important to acknowledge that the constitution does bear upon this bill due to the governor's powers being enumerated in Article III of the Alaska Constitution while the board of regents is established in Article VII, section 6. The Alaska Supreme Court has ruled that the UA is subject to a degree of legislative control. For example, the legislature can, without approval of the regents, dispose of UA land. Additionally, the legislature has, through law, provided the UA with a broad degree of autonomy, however this implies that the UA is still subject to laws enacted by the legislature. The legislature has been given broad authority under the constitution, indeed the only constitutional constraints on the power of the legislature to make laws regarding other agencies of the State of Alaska deal with the rules of court and the repeal of initiatives. In effect this legislation provides a check upon the powers of the university.

This bill will allow the suspension or removal of a regent for cause under a due process procedure. It will protect both the regent's interests and the university's interests.

Member

*Standing Committees:*

Judiciary  
Rules  
State Affairs  
Transportation

# Alaska State Legislature

## House of Representatives



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Rep.Max.Gruenberg@legis.state.ak.us

### House Bill 6:

### Removing a Regent

### Sectional Analysis for CS HB 6 (JUD) (27-LS0027\O)

**Section 1**<sup>1</sup> sets forth the legislative findings and purposes of the bill. The legislature finds that the framers of the Alaskan Constitution intended to insulate the University of Alaska from politics, that the legislature delegated the power of self-governance to the UA under AS 14.40.170(b), and that the legislature has the power to create laws that pertain to the university. The purposes of the bill are to clarify that the governor may only suspend or remove a regent with good cause and that the governor must afford a regent procedural due process. Finally, the legislative findings in this section affirm the insulation of the university and the board of regents from the executive and legislative branches and from politics in the suspension or removal of regents.

**Section 2**<sup>2</sup> adds a new section, AS 14.40.155, to AS 14.40, the chapter which governs the University of Alaska Board of Regents. AS 14.40.155 is patterned after statutory removal procedures for certain other boards, such as the Workers Compensation Appeals Commission. See AS 23.30.007(j).

AS 14.40.155(a) sets forth the procedure for the governor to suspend a regent. The governor must provide the regent with notice and an opportunity for a hearing.

AS 14.40.155(b) allows the governor to remove a regent for good cause by providing the regent with a charging document (an "accusation") and the opportunity for a hearing and for judicial review. Good cause is defined in subsection (g) to include a violation of the Executive Branch Ethics Act that results in a recommendation of removal, a conviction of a felony, conviction of a misdemeanor involving a crime of dishonesty or the University of Alaska, malfeasance or nonfeasance in office, or failure to continue to meet the qualification requirements of a regent.

AS 14.40.155(c) allows a regent to request, at any time, a hearing to either defend against a possible suspension, or lift a suspension once it has been imposed.

AS 14.40.155(d) permits the governor to delegate the conduct of the hearing to the Office of Administrative Hearings. The standard of proof to be used in the hearing for removal for "good

<sup>1</sup> Page 1, lines 5-14 through page 2, lines 1-11

<sup>2</sup> Page 2, lines 12-31 through page 4, lines 1-3

cause” is “clear and convincing” evidence, one of the highest standards of proof that is required in civil suits.

AS 14.40.155(e) states that the Administrative Procedures Act (AS 44.62.330-44.62.630) applies to all of the proceedings of this section.

AS 14.40.155(f) requires the governor to file a copy of the accusation, the findings on each allegation in the accusation, and a complete record of the removal and/or suspension proceedings with the lieutenant governor.

**Section 3<sup>3</sup>** is an applicability clause that allows AS 14.40.155 to apply to conduct occurring before, on or after the effective date of the Act.

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<sup>3</sup> Page 4, lines 4-7

**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

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM**

April 17, 2007

**SUBJECT:** Removal of a University Regent (HB 237)  
(Work Order No. 25-LS0839A)

**TO:** Representative Bob Lynn  
Attn: Nancy Manly

**FROM:** Jean M. Mischel  
Legislative Counsel

You asked whether the governor may remove a University regent. In my opinion, the answer is yes. In fact, the constitutional authority of the legislature to restrict or otherwise control the removal or suspension of a regent by the governor is the subject of considerable debate. Unlike boards and commissions controlled by art. III, sec. 26 of the constitution, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over removal of the regents and therefore the governor's removal authority appears to be unrestricted.

Article VII, sec. 3 provides:

The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session . . . .

A limitation on removal of some executive officers may be interposed by law, but arguably only as to persons who hold appointment under art. III, sec. 26 of the state constitution. Article III, sec. 26 states:

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* . . . .

Even with the additional legislative authority over sec. 26 boards, the Alaska Supreme Court interpreted that authority very narrowly. When the Court was faced with the question of the extent of legislative authority over sec. 26 boards and commissions, the Court found that the confirmation power of the legislature provided in art. III, secs. 25 (principal department heads) and 26, is merely a limited delegation of the executive appointment power to the legislature and stated:

As to this issue, we think the provision of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26

Representative Bob Lynn  
April 17, 2007  
Page 2

mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government. (Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976))

The University's status as a "body corporate" does not imply a legislative role in removal of a regent (apart from the impeachment process available to the legislature as to all civil officers). Though the University, alone in the constitution, expressly holds corporate status, the Alaska Supreme Court has said that members of other public corporations established by law serve at the pleasure of the governor. (Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966)) The Court stated:

The Association's three board members from the Board of Commissioners of the Alaska Housing Authority are appointed by the governor and serve at his pleasure. Therefore, the governor is empowered to remove any member of the governing board of the Association at his pleasure.

Id. at 240 (citations omitted).

I am aware of a recent informal attorney general opinion that suggests in a footnote that the legislature has some authority over removal of a regent without any judicial support for that position. The addition of legislative control over suspension of a regent is even more questionable. I do not know how a court would view the kind of intrusion proposed in HB 237 into the governor's appointment and removal authority, but perhaps the court would be persuaded by the governor's support of this concept.

If I may be of further assistance, please advise.

JMM:med  
07-247.med

# MEMORANDUM

State of Alaska  
Department of Law

<b>To:</b> Talis J. Colberg Attorney General	<b>Date:</b> February 2, 2007
<b>Thru:</b> Craig J. Tillery Deputy Attorney General	<b>File No:</b> 663-06-0103
	<b>Tel. No.:</b> (907) 465-3600
	<b>Fax:</b> (907) 465-2520
<b>From:</b> Michael A. Barnhill Assistant Attorney General Labor and State Affairs Section	<b>Subject:</b> Governor's Power to Remove a University of Alaska Regent

We have been asked whether the Governor has the power to remove a University of Alaska regent without cause. In our view, the answer is no.

We acknowledge that this question has been posed to different counsel and different conclusions reached. Legislative counsel has concluded in a written opinion that regents serve at the pleasure of the governor and may be removed at any time. University of Alaska counsel has concluded in a verbal opinion that a regent may be removed only through impeachment by the legislature.

For the reasons set forth below, we do not fully agree with the conclusions of either legislative counsel or university counsel. That being said, we do agree with both legislative counsel and university counsel that impeachment is an option that may be pursued in order to remove a regent. But we disagree with university counsel that it is the only option.

The basis for our views is grounded primarily in the constitution and discussions of the framers regarding the University of Alaska during the constitutional convention. We start there.

## I. Historical Background

The University of Alaska was created by the territorial legislature in 1935. ch. 49, SLA 1935. The Board of Regents was created at that time as well, with the governor empowered to appoint regents subject to confirmation by a joint session of the legislature. *Id.* at sec. 3. The term of a regent was eight years and a regent was to serve "until their successors are appointed and have qualified." *Id.* The original statute made no mention

of how a regent should be removed. This law has essentially remained unchanged through today, though the number of regents was increased to eleven in 1975. *See AS 14.40.120; 14.40.140; AS 14.40.150.*

From the University's inception through statehood we are aware of no instance of a governor removing a regent prior to the end of a regent's term. We recognize that it is possible such could have happened, but it would take further historical research to determine this.

The constitutional convention considered the University of Alaska several times during the course of the convention. Before considering these passages, however, it is important to understand that the territory of Alaska had suffered from a fragmented executive branch with several elected officials and multiple governing boards designed to erode the power of the federally appointed governor. A fundamental goal of the convention was to establish a strong governor who was completely in control of the executive branch of government.<sup>1</sup>

During the consideration of the executive branch article, however, concerns were raised regarding the appropriate place for the University of Alaska within the constitutional design for the new government. These concerns were often expressed in terms of the need to insulate education from politics. Alaska Constitutional Convention Proceedings at 2043, 2246. During the discussions of the provisions that ultimately

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<sup>1</sup> Delegate Fischer later wrote, "[Territorial] government was neither responsible nor responsive to the people. As a result, convention delegates were ready to make basic structural changes so the people could hold the governor wholly responsible for the conduct of state administration." V. Fischer, Alaska's Constitutional Convention at 106 (1975).

became sections 25 and 26 of Article III,<sup>2</sup> questions were raised concerning the extent to which these sections governed appointments to the Board of Regents. The chair of the Executive Branch Committee, Victor Rivers, and a member of that Committee, Katherine Nordale, both responded that section 26 of Article III only applied to "principal departments" and that the University of Alaska was not a principal department. Alaska Constitutional Convention Proceedings at 2034, 2037, 2246. Therefore, in their mind, the University of Alaska did not fall under section 26 of Article III.

Other delegates, however, remained concerned that in order to insulate the University from politics it needed to be made explicit that the University was not subject to section 26 of Article III. In particular, certain delegates were concerned that if section 26 did apply to the University, that the Board of Regents' appointment of a president would be subject to approval by the governor. Accordingly, these delegates sought to amend section 26 to state that the provision did not apply to the University of Alaska. Alaska Constitutional Convention Proceedings at 2245-2258. Ultimately, these attempts failed because the members of the Executive Branch committee persuaded the convention that section 26 simply did not apply to the University of Alaska. Alaska Constitutional Convention Proceedings at 2246, 2257. Moreover, several delegates noted that a separate article was being drafted to govern the University of Alaska. *Id.* at 2247-48, 2250, 2255.

During the debate, some delegates expressed observations as to the status of the University. The chair of the Executive Committee, Victor Rivers, stated that the Executive Branch article would have no impact on the University:

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<sup>2</sup> 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.

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.

Walsh: May I ask a question, Mr. Rivers? I think to clarify in the minds of several people here it might be well for me, that [as] one of those serving on the Board of Regents of the University of Alaska, composed of eight members, and the Board of Regents select the President of the University. The governor, as I understand it, does not have the power of the removal of the president of the University. It is a matter for the Board. Would this situation change that, Mr. Rivers?

Rivers: No, in regard to the University, this would not affect their present setup. They are a private corporation, or rather a nonprofit corporation, and under the specific law providing for their make-up, and you would still have a board of regents appointed by the governor and confirmed by the legislature, and the powers as you now have them would be identical to what they now are as I visualize them.

*Id.* at 2033-34. Delegate Taylor stated that the "University is not a part of the Territorial government whatsoever; it is an independent agency." *Id.* at 2253. Notably, Delegate Nordale expressed the view that by explicitly putting the University in a separate article it would "make it very clear that it can never be dissolved and that it is not part of the executive branch of government." *Id.* at 2256.

Later in the convention, the Executive Branch committee proposed language regarding the University. Chair Rivers introduced the language as follows:

Mr. President, you have heard the reading of this article and it was considered important that in the constitution there be included an article of this type. It gives the University, as a corporate body, the authority to receive and hold property which will be granted to them under the enabling act. It also gives them the authority for administering and disposing of that according to law. It sets up the board of regents and the governing body of the University, and I think the main point of this article has is that constitutionally the University of Alaska shall be the only state university in Alaska.

*Id.* at 2792. Perhaps notably, the Executive Branch committee saw fit to clear the language of the proposed article with the President of the University prior to bringing it to the floor of the convention.<sup>3</sup> *Id.*

## II. Analysis

With this summary of the constitutional history of the University in mind, we think it is fair to draw the following conclusions. First, the convention intended to create a very strong governor with full appointive power. Second, despite the strong governor model, the convention nevertheless intended to insulate the University from politics, including the governor. Third, the convention intended that the University would not be subject to section 26 of Article III of the Alaska Constitution. Fourth, the convention intended to constitutionalize the existence of the University. Finally, some members of the convention believed that the University resided outside the executive branch of government in 1955 and that the constitution preserved that status.<sup>4</sup>

Nowhere in the convention minutes is there any discussion regarding removal of a regent.<sup>5</sup> But the above conclusions are sufficient to give us pause that the governor's power to remove certain executive branch appointees without cause extends to the University Board of Regents. This view is consistent with the views previously expressed by this office. In 1979, we opined:

Under the state constitution, the University of Alaska is 'governed' by the Board of Regents. Alaska Const., art. VII, § 3. The regents are appointed by the governor, subject to confirmation by the legislature. Id. They serve for terms of eight years. Thus, while the regents are appointed by and are responsible to the governor, they do not serve at his pleasure but rather for fixed terms, and they may, therefore, be

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<sup>3</sup> In other words, it is doubtful that President Patty, the University president at the time, would have approved this language if he thought it allowed the governor to remove a regent without cause.

<sup>4</sup> By observing this latter point, we do not conclude that in fact the convention succeeded in fully removing the University from the executive branch.

<sup>5</sup> Though at one point, Chair Rivers states that "[t]he law could provide no doubt for means of removal . . ." *Id.* at 2255-56. He appears to be referring to the chief executive of the University, not the regents, however.

removed from office solely for cause. 67 C.J.S. Officers § 120 (1978); 63 Am. Jur.2d Public Officers and Employees § 189 (1972). As a result, the governor's supervision over the university is made distinctly indirect. Unless the members of the Board of Regents commit acts of malfeasance, misfeasance, or nonfeasance sufficient to constitute cause for their removal, the governor possesses no check upon them and no power to direct their activities.

1979 Inf. Op. Att'y Gen. 1 (Jan. 23; J-66-103-79). We have reiterated this view over the years<sup>6</sup> and see no reason to stray from it today.

For the reasons expressed above, the University is accorded unique constitutional status. We must be mindful of these reasons when considering the applicability of Alaska Supreme Court precedents. A number of these cases have been cited by other counsel, but we doubt that a court would find them controlling on the issue of whether the governor may remove a regent without cause. For instance, *Walker v. Alaska State Mortgage Assoc.*, 416 P.2d 245 (Alaska 1966) does not involve the University of Alaska, but rather pertains to a board of a public corporation that does not have a unique constitutional status. The cases involving the University do not have issues that directly implicate the political independence of the University, one of the reasons for the University's unique constitutional status. See, e.g., *University of Alaska v. Nat'l Aircraft Leasing*, 536 P.2d 121 (Alaska 1975) (University is instrumentality of state for purposes of sovereign immunity); *McGrath v. University of Alaska*, 813 P.2d 1370 (Alaska 1991) (legislature may subject University to Administrative Procedures Act). Instead, we think a court if faced with the issue of whether the governor may remove a regent without cause would be more likely to focus on the constitutional history of the University set forth above.

Finally, legislative counsel contends that under AS 39.05.060(d) regents serve at the pleasure of the governor and may be removed at any time. This interpretation is at odds with the express intention of the constitutional convention that the University be insulated from politics. Moreover, review of the fairly lengthy legislative history of this statute demonstrates that the legislature never intended AS 39.05.060(d) to reach the

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<sup>6</sup> In 1998, an assistant attorney general stated that, "Regents are considered to be sort of in a class by themselves. We've always advised the governor that it's inadvisable to remove the regents at a change of an administration. Legal complications may ensue." 1998 Anchorage Daily News (quoting AAG James Baldwin).

Board of Regents. This statute was originally enacted as part of the State Organization Act of 1959, under which the executive branch of the new State of Alaska was formed. *See* ch. 64, SLA 1959. The University of Alaska is not within the scope of this Act—it was not mentioned in the Act and was left out of the organization of the executive branch accomplished by this Act. *Id.* When initially enacted, AS 39.05.060 only referred to boards that were explicitly mentioned in the State Organization Act of 1959. While the scope of AS 39.05.060 has both expanded and contracted over the years, it has never been broadened to include the Board of Regents.<sup>7</sup>

In summary, we conclude that the Governor may only remove a regent if cause is established, preferably at a hearing prior to removal. We would be happy to address in another memo the evidence necessary to establish cause, and the criteria for an appropriate hearing process.

MAB:ajh

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<sup>7</sup> We note, however, that it may be possible for the legislature to provide for removal of a regent through enactment of a statute consistent with the constitution. Such a statute would have to preserve the University's politically independent constitutional status and probably could only provide for removal if it were for some cause that was established at a hearing prior to removal.

# FISCAL NOTE

**STATE OF ALASKA**  
**2012 LEGISLATIVE SESSION**

Bill Version HB006  
 Fiscal Note Number \_\_\_\_\_  
 () Publish Date \_\_\_\_\_

Identifier (file name) HB006-UA-SYSBRA-12-21-11 Dept. Affected University of Alaska  
 Title Removing a Regent Appropriation Budget Reductions/Additions-Systemwide  
 Allocation Budget Reductions/Additions-Systemwide  
 Sponsor Representative Gruenberg  
 Requester (S) JUD OMB Component Number 1296

**Expenditures/Revenues** (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Prgm (DGF)							
1037 GF/MH (UGF)							
1178 temp code (UGF)							
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS**

Full-time							
Part-time							
Temporary							

**CHANGE IN REVENUES**

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Estimated **SUPPLEMENTAL (FY12) operating costs** \_\_\_\_\_ (separate supplemental appropriation required;  
 (discuss reasons and fund source(s) in analysis section)

Estimated **CAPITAL (FY13) costs** \_\_\_\_\_ (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Updated fiscal note to reflect current fiscal year.

Prepared by Michelle Rizk  
 Division University of Alaska  
 Approved by Michelle Rizk

Phone 907-450-8187  
 Date/Time 12/21/11 1:30pm  
 Date 12/21/2011

FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

BILL NO. HB006

**Analysis**

HB006 will have a zero fiscal impact on the University of Alaska

# FISCAL NOTE

STATE OF ALASKA cost # codes  
 2012 LEGISLATIVE SESSION

Bill Version CSHB006  
 Fiscal Note Number \_\_\_\_\_  
 Publish Date \_\_\_\_\_

Identifier (file name) HB006CS(JUD)-DOA-OAH-12-02-11 Dept. Affected Administration  
 Title Removing a Regent Appropriation Centralized Administrative Services  
 Allocation Office of Administrative Hearings  
 Sponsor Representatives Gruenberg, P. Wilson, Lynn, Gardner  
 Requester Senate Judiciary OMB Component Number 2771

**Expenditures/Revenues** (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

FUND SOURCE		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

POSITIONS							
Full-time							
Part-time							
Temporary							

<b>CHANGE IN REVENUES</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
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Estimated SUPPLEMENTAL (FY12) operating costs 0.0 (separate supplemental appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Updated to new fiscal note form.

Prepared by Terry L. Thurbon, Chief Administrative Law Judge  
 Division Office of Administrative Hearings  
 Approved by John Cramer, Deputy Commissioner  
Department of Administration

Phone 465-1886  
 Date/Time 12/01/2011 3:32 p.m.  
 Date 12/2/2011

FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

BILL NO. CSHB006

**Analysis**

This bill authorizes the Governor to remove a member of the University of Alaska Board of Regents for good cause and establishes procedures for removal. The procedures include an opportunity for a hearing. Under section 2, the hearing function could be delegated by the Governor to the Office of Administrative Hearings (OAH). Removals likely would be infrequent. OAH, therefore, does not anticipate that this bill would result in an appreciable increase in caseload and expects to be able to provide any hearing related services required with existing authorized personnel. The cost to OAH of performing the services would be recovered from the Office of the Governor through interagency receipts, based on the time commitment required for hearings.

**SENATE CS FOR CS FOR HOUSE BILL NO. 6(JUD)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-SEVENTH LEGISLATURE - SECOND SESSION**

**BY THE SENATE JUDICIARY COMMITTEE**

**Offered:**

**Referred:**

**Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson, Lynn, Gardner**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act authorizing the governor to remove or suspend a member of the Board of**  
2 **Regents of the University of Alaska for good cause; and establishing a procedure for the**  
3 **removal or suspension of a regent."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 \* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section  
6 to read:

7 **LEGISLATIVE FINDINGS AND PURPOSES.** (a) The legislature finds that

8 (1) the framers of the Constitution of the State of Alaska intended to insulate  
9 the University of Alaska and the Board of Regents from politics, but did not intend to  
10 immunize the University of Alaska and the Board of Regents from appropriate nonpolitical  
11 legislative and executive branch oversight;

12 (2) the legislature has the power to pass laws that pertain to the University of  
13 Alaska; and

14 (3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

1 Regents the power to "adopt reasonable rules, orders, and plans with reasonable penalties for  
 2 the good government of the university and for the regulation of the Board of Regents";  
 3 however, it is not clear that the Board of Regents has the constitutional authority to suspend or  
 4 remove an officer who has been appointed by the governor and confirmed by the legislature.

5 (b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

6 (1) clarify that the governor may remove a regent only for good cause;

7 (2) prescribe a due process procedure under which the governor may remove a  
 8 regent for good cause;

9 (3) prescribe a due process procedure under which, in certain circumstances,  
 10 the governor may suspend a regent; and

11 (4) accomplish each of the above purposes in a manner that ensures the  
 12 University of Alaska and the Board of Regents remain insulated from politics.

13 \* **Sec. 2.** AS 14.40 is amended by adding a new section to read:

14 **Sec. 14.40.155. Suspension and removal of regents.** (a) The governor may,  
 15 after providing notice and an opportunity for a hearing, suspend a member of the  
 16 Board of Regents while a final disposition is pending on

17 (1) a criminal complaint, presentment, information, or indictment  
 18 involving a felony in any jurisdiction;

19 (2) an information or formal criminal charges of a misdemeanor  
 20 described under (g)(3) of this section;

21 (3) a probable cause determination of a knowing ethics violation under  
 22 AS 39.52 that results in an accusation under consideration before the personnel board;

23 (4) a written complaint under consideration before the governor,  
 24 signed under oath by the person making the complaint, that alleges malfeasance or  
 25 nonfeasance in office as described in (g)(4) of this section, if the governor determines,  
 26 after an investigation, that there is probable cause to believe that malfeasance or  
 27 nonfeasance in office has occurred; a determination of probable cause under this  
 28 paragraph

29 (A) must specify with particularity the factual basis for the  
 30 determination;

31 (B) must include objective evidence of substantial and material

1 malfeasance or nonfeasance; and

2 (C) may not be based on political differences or the  
3 discretionary performance of a lawful act or a prescribed duty; or

4 (5) a formal allegation or charge by a professional or occupational  
5 licensing body alleging or finding a violation of licensing statutes or regulations that is  
6 related to the regent's ability or fitness to serve as a regent.

7 (b) The governor may remove a member of the Board of Regents for good  
8 cause by providing to the member an accusation and an opportunity for a hearing and  
9 judicial review.

10 (c) Notwithstanding the procedure under AS 44.62.390, a regent who has been  
11 suspended under (a) of this section may, at any time, request a hearing to

12 (1) defend against the grounds for the suspension stated in the  
13 accusation; or

14 (2) lift the suspension.

15 (d) If a hearing is to be held under this section, the governor shall delegate the  
16 conduct of the hearing to the office of administrative hearings under AS 44.64.030(b).  
17 If a hearing is requested, the hearing officer shall prepare a proposed decision under  
18 AS 44.62.500(b)

19 (1) to remove a regent based on clear and convincing evidence of good  
20 cause for removal;

21 (2) not to remove a regent; or

22 (3) to continue a suspension or lift a suspension of a regent.

23 (e) AS 44.62.330 - 44.62.630 apply to all proceedings under this section.

24 (f) After a final decision by the governor that suspends a regent under (a) of  
25 this section or removes a regent for good cause under (b) of this section, the governor  
26 shall file with the lieutenant governor a copy of the allegations made against the  
27 former regent, the governor's findings on each of the allegations, and a complete  
28 record of the suspension or removal proceedings.

29 (g) In this section, "good cause" means

30 (1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act) that  
31 results in a recommendation of removal under AS 39.52.410(b)(3);

1 (2) a conviction of a felony in any jurisdiction;  
 2 (3) a conviction of a misdemeanor in any jurisdiction if the  
 3 misdemeanor involves

- 4 (A) dishonesty;  
 5 (B) breach of trust; or  
 6 (C) the University of Alaska;

7 (4) substantial and material malfeasance or nonfeasance in office that  
 8 is not based on political differences or the discretionary performance of a lawful act or  
 9 prescribed duty; in this paragraph "malfeasance or nonfeasance in office" includes

- 10 (A) misconduct in office;  
 11 (B) an inability to serve for an extended period of time;  
 12 (C) neglect of duty;  
 13 (D) incompetence;  
 14 (E) unjustified failure to perform the duties of the Board of

15 Regents;

16 (5) a violation of a professional or occupational licensing statute or  
 17 regulation that is related to the regent's fitness to serve as a regent, resulting in the  
 18 revocation or suspension of a professional or occupational license issued under state  
 19 law; or

20 (6) a failure to possess the qualifications of a regent under  
 21 AS 14.40.130.

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23 (a) The office shall conduct all adjudicative administrative hearings required  
 24 under the following statutes or under regulations adopted to implement the statutes:

- 25 (1) AS 04.11.510(b)(1) and (c) (alcoholic beverages license);  
 26 (2) AS 05.15 (charitable gaming);  
 27 (3) AS 05.20 (recreational devices);  
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 30 provided otherwise by AS 06.60.590;  
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10 benefit plan);

11 **(15) AS 14.40.155 (suspension and removal of regents);**

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14 than AS 17.20.060 and 17.20.360;

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16 AS 21.27.420(d), AS 21.34, AS 21.36, AS 21.69, AS 21.86.200, AS 21.87, and  
17 AS 21.96 (insurance);

18 **(19)** [(18)] AS 25.27 (child support services);

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20 **(21)** [(20)] AS 34.45 (unclaimed property);

21 **(22)** [(21)] AS 34.55.024 and 34.55.026 (Uniform Land Sales Practices  
22 Act);

23 **(23)** [(22)] AS 36.30 (State Procurement Code), other than  
24 AS 36.30.627(a)(2);

25 **(24)** [(23)] AS 38.05.065 (contracts for sale of state land);

26 **(25)** [(24)] AS 39.30.165 (supplemental benefits system);

27 **(26)** [(25)] AS 39.30.335 (teachers' and public employees' health  
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30 **(28)** [(27)] AS 39.35.522 (waiver of adjustments under public  
31 employees' defined benefit plan);

- 1                    (29) [(28)] AS 39.45.055 (public employees' deferred compensation  
2                    program);
- 3                    (30) [(29)] AS 39.52 (Alaska Executive Branch Ethics Act);
- 4                    (31) [(30)] AS 43.23 (permanent fund dividends);
- 5                    (32) [(31)] AS 43.70 (Alaska Business License Act);
- 6                    (33) [(32)] AS 44.50 (notaries public);
- 7                    (34) [(33)] AS 44.77 (claims against the state);
- 8                    (35) [(34)] AS 45.48.080(c) (breach of security involving personal  
9                    information);
- 10                   (36) [(35)] AS 45.30.040 (mobile homes);
- 11                   (37) [(36)] AS 45.55 (Alaska Securities Act);
- 12                   (38) [(37)] AS 45.57 (Takeover Bid Disclosure Act);
- 13                   (39) [(38)] AS 46 (water, air, energy, and environmental conservation),  
14                   other than AS 46.03.820, 46.03.850, AS 46.39, and AS 46.40;
- 15                   (40) [(39)] AS 47.32 (licensing by the Department of Health and  
16                   Social Services);
- 17                   (41) [(40)] AS 47.45 (longevity bonuses).

# 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

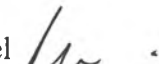
State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

March 29, 2012

**SUBJECT:** Retroactivity questions (SCS CSHB 6( )  
(Work Order No. 27-LS0027\G))

**TO:** Representative Max Gruenberg  
Attn: Ted Madsen

**FROM:** Jean M. Mischel  
Legislative Counsel 

As I understand your question, you have asked about the effect of removing the applicability provision in sec. 4 of the above-referenced draft in its entirety. That section provides for the applicability of AS 14.40.155, added by sec. 2 of the bill, to conduct or acts occurring before, on, or after the effective date of the Act. AS 01.10.090 provides that "no statute is retrospective unless expressly declared therein." Removal of sec. 4, then, would result in the prospective application only of sec. 2 of the Act. Even without removing sec. 4, however, I do not know whether a court would uphold a retroactive application of the good cause definition, particularly as it relates to past criminal convictions of a sitting regent. At this time during session, I am unable to fully analyze that question, although the Department of Law may have an opinion as the language originated there.

If I may be of further assistance, please advise.

JMM:ljw  
12-239.ljw

# LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY  
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Mail Stop 3101


State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

March 29, 2012

**SUBJECT:** Retroactive applicability (Amendment to SCS CSHB 6( )  
(Work Order No. 27-LS0027\G.1))

**TO:** Senator John Coghill  
Attn: Karen Lidster

**FROM:** Jean M. Mischel  
Legislative Counsel 

You have asked about the legal implications of removing the retroactive applicability language in the above-referenced bill and replacing it with "on-going effect" language. Section 4 of the bill currently provides that the suspension and removal of a regent provisions added by sec. 2 of the bill apply to "all conduct and acts occurring *before*, on, or after the effective date of" the Act. In my opinion, removal of the retroactive effect and inclusion of specific language that clarifies the applicability of the Act to conduct that has a continuing effect on or after the effective date of the Act, eliminates a risk of violating due process and *ex post facto* protections in the constitution, particularly with respect to the effect of prior convictions.

The issue is, however, complicated by (1) the nature of the Act as it applies to removal of a regent that may not, under certain circumstances, affect constitutional rights of a regent, and (2) unresolved questions about the current ability of the governor to remove a regent so that the Act may be interpreted as having no significant effect on the existing rights of a regent.<sup>1</sup> In fact, one could argue that HB 6 provides more, not less, legal protection over a regent's appointment. At this point in the session, I am unable to provide a thorough legal review of these and related questions. If a court does find that due process and *ex post facto* considerations apply to an appointment of a regent and that HB 6 represents a change in the law that in some way limits the rights of a regent, then the

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<sup>1</sup> In section 1 of the bill at page 1, lines 9 - 11, the legislature finds that the framers of the constitution "did not intend to immunize the University of Alaska and the Board of Regents from appropriate nonpolitical legislative and executive branch oversight", and at page 2, lines 2 -3 concedes that "it is not clear that the Board of Regents has the constitutional authority to suspend or remove an officer who has been appointed by the governor and confirmed by the legislature." The purpose of the bill as provided at page 2, line 6 is to "clarify that the governor may remove a regent only for good cause", not to change the law with respect to a regent's appointment or removal.

general rule of retroactivity applies (as discussed below) and clarifying the applicability provision may be warranted.

Article 1, section 15, Constitution of the State of Alaska provides that "no law impairing the obligation of contracts shall be passed." Courts have compared this to the prohibition of *ex post facto* criminal laws. Under AS 01.10.090 no statute is retrospective unless expressly declared in the statute. Even when the legislature attempts to provide for express retroactive application of a new statute, as in HB 6, courts have sometimes invalidated the provision on constitutional grounds. Courts have also implied retroactivity when no express provision exists.

The Alaska Supreme Court has previously held that a civil statute will be considered retroactive if it "gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute." *Eastwind, et. al. v. State of Alaska*, 951 P.3d 844, 848 (Alaska 1997). The rationale for the prohibition on *ex post facto* criminal laws is obvious: the avoidance of additional penalties that were unanticipated at the time of a criminal conviction. The Alaska Supreme Court has explained the rationale for limitations on retroactivity for civil laws as follows:

the reason for the statutory presumption against retrospective legislation is that people in conducting their business should be able to rely on existing laws with reasonable certainty.

*Id.* at 847 (Alaska 1997) (citations omitted).

In *Catholic Bishop of Northern Alaska v. John Does*, 141 P.3d 719 (Alaska 2006), the Alaska Supreme Court had the opportunity to compare legislative intent to apply both criminal and civil statutory amendments retroactively. In that case, the legislature had been advised by legal counsel that retroactive application of the criminal law to revive time barred claims would violate constitutional prohibitions on passing *ex post facto* laws. The court viewed the legislative history and, on the basis of a lack of similar discussion and express intent to allow a revival of previously time barred civil claims, the court refused to apply the new law retroactively in the criminal or civil context.

A simple analysis of amendment G.1 under the general rule leads to the conclusion that removal of the express retroactivity provision and inclusion of the continuing effect requirement for actions makes the statute apply prospectively only. On the other hand, due process and fairness considerations may have defeated the retroactive application of the arguably new standards set out in HB 6 for removal even without amendment G.1. If, however, a court found that the standards did not in fact change the legal rights of a regent, the express retroactive application in HB 6 may have been upheld by a court, at least in the civil context. The amendment changes the effect of HB 6 so that it may not be applied to prior conduct unless the conduct has a continuing effect after the effective date of the Act. The problem, however, is in defining precise circumstances in which conduct has a continuing effect, particularly with respect to prior convictions or license

Senator John Coghill  
March 29, 2012  
Page 3

revocations. I have attempted to avoid any due process and *ex post facto* issues by describing a continuing effect for those purposes. I trust that I have captured your intent in that regard.

If I may be of further assistance, please advise.

JMM:ljw:plm  
12-238.ljw

Enclosure

Member

*Standing Committees:*

Judiciary  
Rules  
State Affairs  
Transportation

# Alaska State Legislature

## House of Representatives



**Representative Max F. Gruenberg, Jr.**

**House District 20**

**Anchorage (Mountain View, Russian Jack, East Anchorage)**

**House Minority Floor Leader**

*Interim:*  
716 W 4<sup>th</sup> Avenue, Rm 350  
Anchorage, Alaska 99501-2133  
*Phone:* (907) 269-0123  
*Fax:* (907) 269-0124

*Session:*  
Alaska State Capitol, Rm 110  
Juneau, Alaska 99801-1182  
*Phone:* (907) 465-4940  
*Toll Free:* (866) 465-4940  
*Fax:* (907) 465-3766

*Email:*  
Rep.Max.Gruenberg@legis.state.ak.us

### House Bill 6:

### Removing a Regent

### Explanation of changes between

### CS for HB 6 (27-LS0027\O.A) to SCS for CS for HB 6 ( ) (27-LS0027\G)

At the suggestion of the Board of Regents, several changes have been incorporated into the "G" version.

**Section 1:** (a)(3) has been changed to state that it is not clear whether the Board of Regents has the constitutional authority to suspend or remove a regent. There was also one grammatical change to (b)(1) changing "with" to "for."

**Section 2:** (a) contains a minor grammatical change.

**Section 2:** (a)(3) contains a minor grammatical change.

**Section 2:** (a)(4) has been changed to make the suspension procedure, in the case of a complaint of malfeasance or nonfeasance in office, more rigorous. The "G" version now requires: (1) a sworn complaint, (2) the governor must investigate the allegations, and then (3) find "probable cause" to proceed further. "Probable cause" is defined to require a statement of the specific factual bases for the allegations plus objective evidence of substantial and material malfeasance or nonfeasance. The new language will also prohibit proceedings based on political differences or the discretionary performance of a lawful act or a prescribed duty. This paragraph also contains a few minor grammatical changes.

**Section 2:** (a)(5) was changed to require a formal allegation or charge by a licensing board to proceed under this provision, AS 14.40.155(a)(5).

**Section 2:** (d) was changed to require that, if a hearing is to be held, the Office of Administrative Hearings conduct it. The hearing officer will be required to issue a decision.

**Section 2:** (g)(4) was changed to make the removal procedure, in the case of malfeasance and nonfeasance in office, more rigorous. The new language will also prohibit removals based on political differences or the discretionary performance of a lawful act or a prescribed duty.

**Section 2:** (g)(5) was changed to clarify that a violation of a professional or occupational licensing statute or regulation that results in the revocation or suspension of a professional or occupational licensing statute be found to suspend or remove a regent under this provision, AS 14.40.155(g)(5).

**Section 2:** (g) also contains a few minor grammatical changes.

**Section 3** was added to include these hearings to the list of hearings conducted by the Office of Administrative Hearings.

27-LS0027/G  
Mischel  
3/21/12

**SENATE CS FOR CS FOR HOUSE BILL NO. 6( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-SEVENTH LEGISLATURE - SECOND SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson, Lynn, Gardner**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act authorizing the governor to remove or suspend a member of the Board of**  
2 **Regents of the University of Alaska for good cause; and establishing a procedure for the**  
3 **removal or suspension of a regent."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 **\* Section 1.** The uncodified law of the State of Alaska is amended by adding a new section  
6 to read:

7 **LEGISLATIVE FINDINGS AND PURPOSES.** (a) The legislature finds that

8 (1) the framers of the Constitution of the State of Alaska intended to insulate  
9 the University of Alaska and the Board of Regents from politics, but did not intend to  
10 immunize the University of Alaska and the Board of Regents from appropriate nonpolitical  
11 legislative and executive branch oversight;

12 (2) the legislature has the power to pass laws that pertain to the University of  
13 Alaska; and

14 (3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

1 Regents the power to "adopt reasonable rules, orders, and plans with reasonable penalties for  
2 the good government of the university and for the regulation of the Board of Regents";  
3 however, it is not clear that the Board of Regents has the constitutional authority to suspend or  
4 remove an officer who has been appointed by the governor and confirmed by the legislature.

5 (b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

6 (1) clarify that the governor may remove a regent only for good cause;

7 (2) prescribe a due process procedure under which the governor may remove a  
8 regent for good cause;

9 (3) prescribe a due process procedure under which, in certain circumstances,  
10 the governor may suspend a regent; and

11 (4) accomplish each of the above purposes in a manner that ensures the  
12 University of Alaska and the Board of Regents remain insulated from politics.

13 \* **Sec. 2.** AS 14.40 is amended by adding a new section to read:

14 **Sec. 14.40.155. Suspension and removal of regents.** (a) The governor may,  
15 after providing notice and an opportunity for a hearing, suspend a member of the  
16 Board of Regents while a final disposition is pending on

17 (1) a criminal complaint, presentment, information, or indictment  
18 involving a felony in any jurisdiction;

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20 described under (g)(3) of this section;

21 (3) a probable cause determination of a knowing ethics violation under  
22 AS 39.52 that results in an accusation under consideration before the personnel board;

23 (4) a written complaint under consideration before the governor,  
24 signed under oath by the person making the complaint, that alleges malfeasance or  
25 nonfeasance in office as described in (g)(4) of this section, if the governor determines,  
26 after an investigation, that there is probable cause to believe that malfeasance or  
27 nonfeasance in office has occurred; a determination of probable cause under this  
28 paragraph

29 (A) must specify with particularity the factual basis for the  
30 determination;

31 (B) must include objective evidence of substantial and material

1 malfeasance or nonfeasance; and

2 (C) may not be based on political differences or the  
3 discretionary performance of a lawful act or a prescribed duty; or

4 (5) a formal allegation or charge by a professional or occupational  
5 licensing body alleging or finding a violation of licensing statutes or regulations that is  
6 related to the regent's ability or fitness to serve as a regent.

7 (b) The governor may remove a member of the Board of Regents for good  
8 cause by providing to the member an accusation and an opportunity for a hearing and  
9 judicial review.

10 (c) Notwithstanding the procedure under AS 44.62.390, a regent who has been  
11 suspended under (a) of this section may, at any time, request a hearing to

12 (1) defend against the grounds for the suspension stated in the  
13 accusation; or

14 (2) lift the suspension.

15 (d) If a hearing is to be held under this section, the governor shall delegate the  
16 conduct of the hearing to the office of administrative hearings under AS 44.64.030(b).  
17 If a hearing is requested, the hearing officer shall prepare a proposed decision under  
18 AS 44.62.500(b)

19 (1) to remove a regent based on clear and convincing evidence of good  
20 cause for removal;

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22 (3) to continue a suspension or lift a suspension of a regent.

23 (e) AS 44.62.330 - 44.62.630 apply to all proceedings under this section.

24 (f) After a final decision by the governor that suspends a regent under (a) of  
25 this section or removes a regent for good cause under (b) of this section, the governor  
26 shall file with the lieutenant governor a copy of the allegations made against the  
27 former regent, the governor's findings on each of the allegations, and a complete  
28 record of the suspension or removal proceedings.

29 (g) In this section, "good cause" means

30 (1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act) that  
31 results in a recommendation of removal under AS 39.52.410(b)(3);

- 1 (2) a conviction of a felony in any jurisdiction;
- 2 (3) a conviction of a misdemeanor in any jurisdiction if the
- 3 misdemeanor involves
- 4 (A) dishonesty;
- 5 (B) breach of trust; or
- 6 (C) the University of Alaska;
- 7 (4) substantial and material malfeasance or nonfeasance in office that
- 8 is not based on political differences or the discretionary performance of a lawful act or
- 9 prescribed duty; in this paragraph "malfeasance or nonfeasance in office" includes
- 10 (A) misconduct in office;
- 11 (B) an inability to serve for an extended period of time;
- 12 (C) neglect of duty;
- 13 (D) incompetence;
- 14 (E) unjustified failure to perform the duties of the Board of
- 15 Regents;
- 16 (5) a violation of a professional or occupational licensing statute or
- 17 regulation that is related to the regent's fitness to serve as a regent, resulting in the
- 18 revocation or suspension of a professional or occupational license issued under state
- 19 law; or
- 20 (6) a failure to possess the qualifications of a regent under
- 21 AS 14.40.130.

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- 23 (a) The office shall conduct all adjudicative administrative hearings required
- 24 under the following statutes or under regulations adopted to implement the statutes:
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- 27 (3) AS 05.20 (recreational devices);
- 28 (4) AS 05.90.001 (special racing events);
- 29 (5) AS 06 (banks, financial institutions, and fund claims), except as
- 30 provided otherwise by AS 06.60.590;
- 31 (6) AS 08 (occupational licensing), other than AS 08.08,

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3 (8) AS 10.13 (Alaska BIDCO Act);

4 (9) AS 10.25.375 (Electric and Telephone Cooperative Act);

5 (10) AS 10.50.408 (limited liability companies);

6 (11) AS 14.11.016 (education-related facility grants);

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8 (13) AS 14.25.006 (teachers' retirement system);

9 (14) AS 14.25.175 (waiver of adjustments under teachers' defined

10 benefit plan);

11 **(15) AS 14.40.155 (suspension and removal of regents);**

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23 **(23) [(22)] AS 36.30 (State Procurement Code), other than**

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29 **(27) [(26)] AS 39.35.006 (public employees' retirement system);**

30 **(28) [(27)] AS 39.35.522 (waiver of adjustments under public**

31 **employees' defined benefit plan);**

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13                   (39) [(38)] AS 46 (water, air, energy, and environmental conservation),  
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16                   Social Services);

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18                   \* **Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to  
19                   read:

20                                      APPLICABILITY. AS 14.40.155, added by sec. 2 of this Act, applies to all conduct  
21                   and acts occurring before, on, or after the effective date of this Act.

27-LS0027AY  
Mischel  
3/20/12

**SENATE CS FOR CS FOR HOUSE BILL NO. 6( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-SEVENTH LEGISLATURE - SECOND SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson, Lynn, Gardner**

**A BILL**  
**FOR AN ACT ENTITLED**

1 **"An Act authorizing the governor to remove or suspend a member of the Board of**  
2 **Regents of the University of Alaska for good cause; and establishing a procedure for the**  
3 **removal or suspension of a regent."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 **\* Section 1.** The uncodified law of the State of Alaska is amended by adding a new section  
6 to read:

- 7 **LEGISLATIVE FINDINGS AND PURPOSES.** (a) The legislature finds that
- 8 (1) the framers of the Constitution of the State of Alaska intended to insulate
  - 9 the University of Alaska and the Board of Regents from politics, but did not intend to
  - 10 immunize the University of Alaska and the Board of Regents from appropriate nonpolitical
  - 11 legislative and executive branch oversight;
  - 12 (2) the legislature has the power to pass laws that pertain to the University of
  - 13 Alaska; and
  - 14 (3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

1 Regents the power to "adopt reasonable rules, orders, and plans with reasonable penalties for  
2 the good government of the university and for the regulation of the Board of Regents";  
3 however, it is not clear that the Board of Regents has the constitutional authority to suspend or  
4 remove an officer who has been appointed by the governor and confirmed by the legislature.

5 (b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

6 (1) clarify that the governor may remove a regent only for good cause;

7 (2) prescribe a due process procedure under which the governor may remove a  
8 regent for good cause;

9 (3) prescribe a due process procedure under which, in certain circumstances,  
10 the governor may suspend a regent; and

11 (4) accomplish each of the above purposes in a manner that ensures the  
12 University of Alaska and the Board of Regents remain insulated from politics.

13 \* **Sec. 2.** AS 14.40 is amended by adding a new section to read:

14 **Sec. 14.40.155. Suspension and removal of regents.** (a) The governor may,  
15 after providing notice and an opportunity for a hearing, suspend a member of the  
16 Board of Regents while a final disposition is pending on

17 (1) a criminal complaint, presentment, information, or indictment  
18 involving a felony in any jurisdiction;

19 (2) an information or formal criminal charges of a misdemeanor  
20 described under (g)(3) of this section;

21 (3) a probable cause determination of a knowing ethics violation under  
22 AS 39.52 that results in an accusation under consideration before the personnel board;

23 (4) a written complaint under consideration before the governor,  
24 signed under oath by the person making the complaint, that alleges malfeasance or  
25 nonfeasance in office as described in (g)(4) of this section, if the governor determines,  
26 after an investigation, that there is probable cause to believe that malfeasance or  
27 nonfeasance in office has occurred; a determination of probable cause under this  
28 paragraph

29 (A) must specify with particularity the factual basis for the  
30 determination;

31 (B) must include objective evidence of substantial and material

1 malfeasance or nonfeasance; and

2 (C) may not be based on political differences or the  
3 discretionary performance of a lawful act or a prescribed duty; or

4 (5) a formal allegation or charge by a professional or occupational  
5 licensing body alleging or finding a violation of licensing statutes or regulations that is  
6 related to the regent's ability or fitness to serve as a regent.

7 (b) The governor may remove a member of the Board of Regents for good  
8 cause by providing to the member an accusation and an opportunity for a hearing and  
9 judicial review.

10 (c) Notwithstanding the procedure under AS 44.62.390, a regent who has been  
11 suspended under (a) of this section may, at any time, request a hearing to

12 (1) defend against the grounds for the suspension stated in the  
13 accusation; or

14 (2) lift the suspension.

15 (d) If a hearing is to be held under this section, the governor shall delegate the  
16 conduct of the hearing to the office of administrative hearings under AS 44.64.030(b).  
17 If a hearing is requested, the hearing officer shall prepare a proposed decision under  
18 AS 44.62.500(b)

19 (1) to remove a regent based on clear and convincing evidence of good  
20 cause for removal;

21 (2) not to remove a regent; or

22 (3) to continue a suspension or lift a suspension of a regent.

23 (e) AS 44.62.330 - 44.62.630 apply to all proceedings under this section.

24 (f) After a final decision by the governor that suspends a regent under (a) of  
25 this section or removes a regent for good cause under (b) of this section, the governor  
26 shall file with the lieutenant governor a copy of the allegations made against the  
27 former regent, the governor's findings on each of the allegations, and a complete  
28 record of the suspension or removal proceedings.

29 (g) In this section, "good cause" means

30 (1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act) that  
31 results in a recommendation of removal under AS 39.52.410(b)(3);

- 1 (2) a conviction of a felony in any jurisdiction;
- 2 (3) a conviction of a misdemeanor in any jurisdiction if the
- 3 misdemeanor involves
- 4 (A) dishonesty;
- 5 (B) breach of trust; or
- 6 (C) the University of Alaska;
- 7 (4) malfeasance or nonfeasance in office, including
- 8 (A) misconduct in office;
- 9 (B) an inability to serve for an extended period of time;
- 10 (C) neglect of duty;
- 11 (D) incompetence;
- 12 (E) unjustified failure to perform the duties of the Board of
- 13 Regents;
- 14 (5) a violation of a professional or occupational licensing statute or
- 15 regulation that is related to the regent's fitness to serve as a regent, resulting in the
- 16 revocation or suspension of a professional or occupational license issued under state
- 17 law; or
- 18 (6) a failure to possess the qualifications of a regent under
- 19 AS 14.40.130.
- 20 \* **Sec. 3.** AS 44.64.030(a) is amended to read:
- 21 (a) The office shall conduct all adjudicative administrative hearings required
- 22 under the following statutes or under regulations adopted to implement the statutes:
- 23 (1) AS 04.11.510(b)(1) and (c) (alcoholic beverages license);
- 24 (2) AS 05.15 (charitable gaming);
- 25 (3) AS 05.20 (recreational devices);
- 26 (4) AS 05.90.001 (special racing events);
- 27 (5) AS 06 (banks, financial institutions, and fund claims), except as
- 28 provided otherwise by AS 06.60.590;
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- 30 AS 08.18.125, and AS 08.62.046;
- 31 (7) AS 10.06 (Alaska Corporations Code);

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7 (14) AS 14.25.175 (waiver of adjustments under teachers' defined  
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14 AS 21.27.420(d), AS 21.34, AS 21.36, AS 21.69, AS 21.86.200, AS 21.87, and  
15 AS 21.96 (insurance);  
16 **(19)** [(18)] AS 25.27 (child support services);  
17 **(20)** [(19)] AS 32.06 (Uniform Partnership Act);  
18 **(21)** [(20)] AS 34.45 (unclaimed property);  
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26 reimbursement arrangement plan);  
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29 employees' defined benefit plan);  
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31 program);

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# Alaska State Legislature

## House of Representatives



### Representative Max F. Gruenberg, Jr.

#### House District 20

Anchorage (Mountain View, Russian Jack, East Anchorage)

House Minority Floor Leader

Member

#### Standing Committees:

Judiciary  
Rules  
State Affairs  
Transportation

#### Interim:

716 W 4<sup>th</sup> Avenue, Rm 350  
Anchorage, Alaska 99501-2133  
Phone: (907) 269-0123  
Fax: (907) 269-0124

#### Session:

Alaska State Capitol, Rm 110  
Juneau, Alaska 99801-1182  
Phone: (907) 465-4940  
Toll Free: (866) 465-4940  
Fax: (907) 465-3766

#### Email:

Rep.Max.Gruenberg@legis.state.ak.us

### House Bill 6:

#### Removing a Regent

#### Explanation of changes between

#### CS for HB 6 (27-LS0027\O.A) to SCS for CS for HB 6 ( ) (27-LS0027\L)

At the suggestion of the Board of Regents several changes have been incorporated into the "L" version.

**Section 1 (a)(3)** has been changed to state that it is not clear whether the Board of Regents has the constitutional authority to suspend or remove a regent.

**Section 2 (a)(4)** has been changed to make the suspension procedure, in the case of a complaint of malfeasance or nonfeasance in office, more rigorous. The "L" version new requires: (1) a sworn complaint, (2) the governor must investigate the allegations, and then (3) find "probable cause" to proceed further. "Probable cause" is defined to require a statement of the specific factual bases for the allegations plus objective evidence of substantial and material malfeasance or nonfeasance. The new language will also prohibit proceedings based on political differences or the discretionary performance of a lawful act or a prescribed duty.

**Section 2 (a)(5)** was changed to require a formal allegation or charge by a licensing board to proceed under this provision, AS 14.40.155(a)(5).

**Section 2 (d)** was changed to require that, if a hearing is to be held, the Office of Administrative Hearings conduct it.

**Section (g)(5)** was changed to clarify that a violation of a professional or occupational licensing statute or regulation that results in the revocation or suspension of a professional or occupational licensing statute be found to suspend or remove a regent under this provision, AS 14.40.155(g)(5).

**Section 2 (g)** also contains a few minor grammatical changes.

**Section 3** was added to include these hearings to the list of hearings conducted by the Office of Administrative Hearings.

27-LS0027L  
Mischel  
3/14/12

**SENATE CS FOR CS FOR HOUSE BILL NO. 6( )**  
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**TWENTY-SEVENTH LEGISLATURE - SECOND SESSION**

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  - 13 Regents;
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Board of Regents' Office  
Phone: (907) 450-8010  
Fax: (907) 450-8012  
EMAIL: [sybor@alaska.edu](mailto:sybor@alaska.edu)  
[www.alaska.edu/bor/](http://www.alaska.edu/bor/)



202 Butrovich Building  
910 Yukon Drive  
P.O. Box 755300  
Fairbanks, AK 99775-5300

March 9, 2012

The Honorable Representative Max Gruenberg  
The Honorable Senator Hollis French

Re: House Bill 6 – Suspension or Removal of a Regent for Good Cause

Dear Representative Gruenberg & Senator French:

I am writing to express the Board of Regents' appreciation for the careful consideration you have given to HB 6. Circumstances warranting the removal of a regent have arisen rarely in the long history of the University. However, the present members of the Board of Regents and administration of the University of Alaska share your concern that the University and State of Alaska not have to face another such situation without a clear path to resolution.

At the same time, the Board has two major concerns regarding HB 6:

1. An administrative suspension or removal is likely to result in prolonged and expensive legal challenges by the affected regent.<sup>1</sup> Such challenges may disrupt and call into question the validity of board action; and
2. An administrative removal provision that may be initiated by one person, required only to sign a complaint, is much more likely to be used and thus may be subject to abuse through frivolous or politically motivated complaints. That problem is exacerbated if the grounds for removal include subjective grounds, e.g., "neglect of duty," "incompetence," "unjustified failure to perform . . . duties . . ."<sup>2</sup>

These concerns are not theoretical. The University recently took advantage of historically low interest rates to refinance existing bonds, saving the University and the state millions of dollars over the life of the bonds. Each time bonds are issued the University is required to certify that *there is no litigation potentially affecting the validity of the board's action*. An accused regent who refuses to step aside, despite an objective reason to do so, is entirely likely to take action to tie the board and University in knots while he seeks injunctions & files appeals to keep his seat. This litigation would involve at least the board and the governor, and potentially the new regent, and would result in significant costs and disruption.

At the same time, regents who are wrongly accused under proposed AS 14.40.155(a)(4) or (g)(4) may be forced to resign or seek defense & indemnity from the University rather than

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<sup>1</sup> Article VII, Section 3 of the Constitution providing for appointment of regents does not provide for removal of regents "in accordance with law." By contrast, that authority was explicitly granted the governor for Executive Branch boards and commissions by Article III, Section 26. That difference, as well as constitutional proceedings indicating an intent to insulate the board from political interference, will provide a suspended or removed regent with a basis for a challenge to administrative removal that courts cannot readily dismiss.

<sup>2</sup> See proposed AS 14.40.155(a)(4) and (g)(4).

Representative Gruenberg  
Senator French  
Re: HB 6  
March 9, 2012  
Page 2 of 3

incur the expense of defending against subjective or frivolous charges. Regents occasionally take actions that are unpopular with students and parents, such as raising tuition or fees, discontinuing a little used program, or with single individuals, such as terminating a problematic professor, etc. A regent appointed by one governor may become a political nuisance to a successor. It is important to note that regents serve as volunteers, and are in no position to incur the expense of defending frivolous charges. While a court may eventually establish that there were no grounds for suspension, in the interim an effective and appropriate regent may have been forced to resign and/or the validity of board action needlessly called into question.

An impeachment hearing is an unfortunate and unlikely scenario. However, it has the advantage of being completely legally defensible if it comes to pass. On March 9, 2012, the Board of Regents adopted Bylaw 20, attached. That bylaw creates a process that confronts a regent who has engaged in alleged misconduct with investigation and, in the worst case scenario, a public referral for possible impeachment. The Board believes this is an appropriate intermediate step that avoids the legal questions and potential disruptions that may result if the Legislature cedes its authority over regent removal to the governor.

At the same time, the Board recognizes that it is within the province of the Legislature to pass laws it deems appropriate. If you determine to advance HB 6, the Board of Regents respectfully requests that you consider the following amendments for the stated reasons:

- The Board does have statutory authority to regulate its internal operations as a "Board." However, the board does not believe it has or should have the legal authority to remove or suspend regents, in contravention of appointments made by the governor and approved by the legislature. The Board of Regents asks that you substitute the following for the language at Page 1, Section 1, Line 14
  - Alternative language: (3) *"under AS 14.40.170(b)(1), the legislature has delegated to the Board of Regents the power to 'adopt reasonable rules, orders and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents, however, it is not clear that the Board has the constitutional authority to suspend or remove an officer who has been appointed by the governor and confirmed by the legislature."*
- The allegations that would form the basis for suspension or removal under AS 14.40.155(a)(4) or (g)(4) are subjective. Some are also duplicative of other processes or ambiguous. The Board of Regents asks that you change the following language to provide for a probable cause standard for suspension, to require objective evidence and prohibit findings based on political differences.
  - Alternative language at Page 2, Section 2, Line 22: (4) *a written complaint under consideration by the governor, signed under oath by the person making the complaint, that alleges malfeasance or nonfeasance in office described under (g)(4) of this section, if the governor determines, after investigation, that there is probable cause to believe that such malfeasance or nonfeasance*

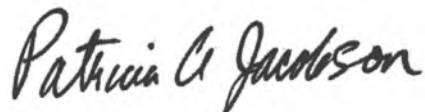
Representative Gruenberg  
Senator French  
Re: HB 6  
March 9, 2012  
Page 3 of 3

*in office has occurred. A finding of probable cause shall specify with particularity the factual basis for the finding, shall include objective evidence of substantial and material malfeasance or nonfeasance, and shall not be based on political differences or discretionary performance of a lawful act or prescribed duty; or*

- *Alternative language at Page 3, Section 2, Line 26: (4) malfeasance or nonfeasance in office, including the following, but provided that a finding of good cause under this section shall require substantial and material malfeasance or nonfeasance, and shall not be based on political differences or discretionary performance of a lawful act or prescribed duty*
- The Board of Regents asks that you tighten the language at Page 2, Section 2, Line 24, and page 4, line 2. As written these bases for suspension or removal require only “proceedings,” do not require that the alleged misconduct involve a matter that is properly before the licensing body, and do not require a formal allegation or charge.
  - *Alternative language: (5) A formal allegation or charge by a professional or occupational licensing body, alleging or finding a violation of the relevant licensing statutes or regulations that is related to the regent's ability or fitness to serve as a regent;*

Thank you again for your thoughtful consideration of this matter. Please do not hesitate to let me know if you have questions or concerns.

Sincerely,



Pat Jacobson, Chair

Attachment (Resolution & Bylaw 20)

cc: Senator Bill Wielechowski  
Senator Joe Paskvan  
Senator Lesil McGuire  
Senator John Coghill  
Representative Peggy Wilson  
Representative Bob Lynn  
Representative Berta Gardner



**RESOLUTION REGARDING REFERRAL FOR  
POSSIBLE IMPEACHMENT**

*WHEREAS* Article VII, Section 3 of the Alaska Constitution creates the Board of Regents and provides for appointment of regents by the governor, subject to confirmation by a majority of the members of the legislature; and

*WHEREAS* Article II, Section 20 authorizes impeachment and removal from office of all civil officers, including members of the Board of Regents; and

*WHEREAS* the proceedings of the constitutional convention make clear that the framers intended to insulate the University of Alaska and the Board of Regents from politics, including action by the governor; and

*WHEREAS* those same proceedings and the Alaska Supreme Court have made clear that the university is not a principal department of the executive branch, and thus is not subject to Article III, Section 26 which authorizes removal of members of certain executive branch boards or commissions "as provided by law;" and

*WHEREAS* Article VII, Section 3 of the Alaska Constitution does not provide for removal of regents by the governor or in accordance with law, as is the case with a board or commission at the head of a principle department in the executive branch;

*WHEREAS* the Board of Regents lacks the constitutional authority to remove regents who have been duly appointed by the governor and approved by the legislature; and

*WHEREAS* suspension or removal of a regent by means other than those specified in the constitution is likely to lead to legal challenges by the affected and any newly appointed member, disruption of the board and legal uncertainty for the university;

*NOW THEREFORE* the Board of Regents adopts Bylaw 20 to provide for referral of regents for possible impeachment

*BE IT FURTHER RESOLVED* that this resolution be conveyed to The Alaska State Legislature, with a copy to be incorporated into the official minutes of the March 9, 2012 meeting of the Board of Regents.

**University of Alaska Statewide System  
Bylaws of the Board of Regents**

**BL20. Referral of a Regent for Possible Impeachment**

- A. Upon a simple majority vote of the whole board finding that it is in the best interests of the university to do so, the board may refer a regent to the senate with a recommendation that the senate consider impeachment of the regent.
- B. Grounds for referral may include:
1. A criminal complaint, presentment, information, indictment or conviction involving a felony in any jurisdiction;
  2. An information, formal criminal charges or conviction of a misdemeanor involving dishonesty, breach of trust, or the University of Alaska;
  3. A probable cause determination of a knowing ethics violation under AS 39.52 that results in an accusation under consideration by the personnel board, or a recommendation of removal from office under AS 39.52.410(b)(3);
  4. Circumstances indicating: conduct that necessarily brings the university into disrepute; material, repeated and documented neglect of duty; or a regent's inability to serve for an extended period;
  5. Judicial proceedings involving or an adjudication of incompetence;
  6. A formal allegation or charge, or a final decision, by a professional or occupational licensing body, alleging or finding a violation of the relevant licensing statutes or regulations that is related to the regent's ability or fitness to serve as a regent; or
  7. Failure to possess the qualifications of a regent under AS 14.40.130.
- C. The following process shall be followed in considering a motion to refer for possible impeachment. Consistent with AS 44.62.310(d)(5), the Open Meetings Act does not apply and all meetings regarding a possible referral shall be conducted in executive session. The process shall maintain confidentiality consistent with the circumstances and the requirements of the review:
1. Any member may request an executive session to discuss appointment of a review committee;
  2. The board may consider a motion to appoint a review committee. If a simple majority of the whole board approves the motion:

- a. The chair shall appoint a review committee of not less than three members and provide written notice to the affected member of the makeup of the committee and the stated grounds for possible referral;
  - b. The review committee shall gather information relevant to the stated grounds for referral, offer the affected member an opportunity to comment on the information gathered, and make a written report of its review, findings and recommendation to the secretary of the board. The report shall be confidential unless a referral for impeachment is made, at which point any further release shall be made in accordance with this bylaw and applicable law. The secretary shall immediately distribute the report to all members of the board, including the affected member.
3. The chair shall schedule a meeting to consider the report, to occur at least 14 calendar days after distribution. The board shall consider information the affected member provides in response to the report that is relevant to the issue of referral and consistent with the question before the board.
  4. The board shall consider whether it is in the best interests of the university to refer the affected member for possible impeachment.
    - a. In accordance with AS 39.52.120(a)(4), *Roberts Rules of Order* and this bylaw, the affected member may not participate in the vote, but is considered an active member for purposes of the required majority.
  5. If the motion passes by the required majority the secretary immediately shall transmit the motion, the report and any written response or materials provided by the affected member to the president of the senate.
    - a. The board shall reconvene in public session and the motion shall be entered in the official minutes of the board.

(03-09-12)

Member

# Alaska State Legislature

## House of Representatives

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Rules  
State Affairs  
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**Representative Max F. Gruenberg, Jr.**  
**House District 20**  
**Anchorage (Mountain View, Russian Jack, East Anchorage)**  
**House Minority Floor Leader**

*Email:*  
Rep.Max.Gruenberg@legis.state.ak.us

TO: Senator Hollis French, Chair  
Senate Judiciary Committee

FROM: Representative Max F. Gruenberg, Jr. 

DATE: April 12, 2011

RE: HB 6: Removing a Regent

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Please consider this memorandum as a request for the Senate Judiciary Committee to schedule a hearing on House Bill 6. Accompanying this memo are the following documents:

- Sponsor Statement
- Sectional Analysis
- CS for House Bill 6 (JUD) amended in the House (27-LS0027\O.A)
- Legislative Legal Counsel Memo from Jean Mischel April 17, 2007
- Informal Legal Opinion from Michael Barnhill, Assistant Attorney General February 2, 2007

Thank you for considering my request for a hearing on House Bill 6. Please contact my legislative aide, Ted Madsen, at 465-2840 with any questions.