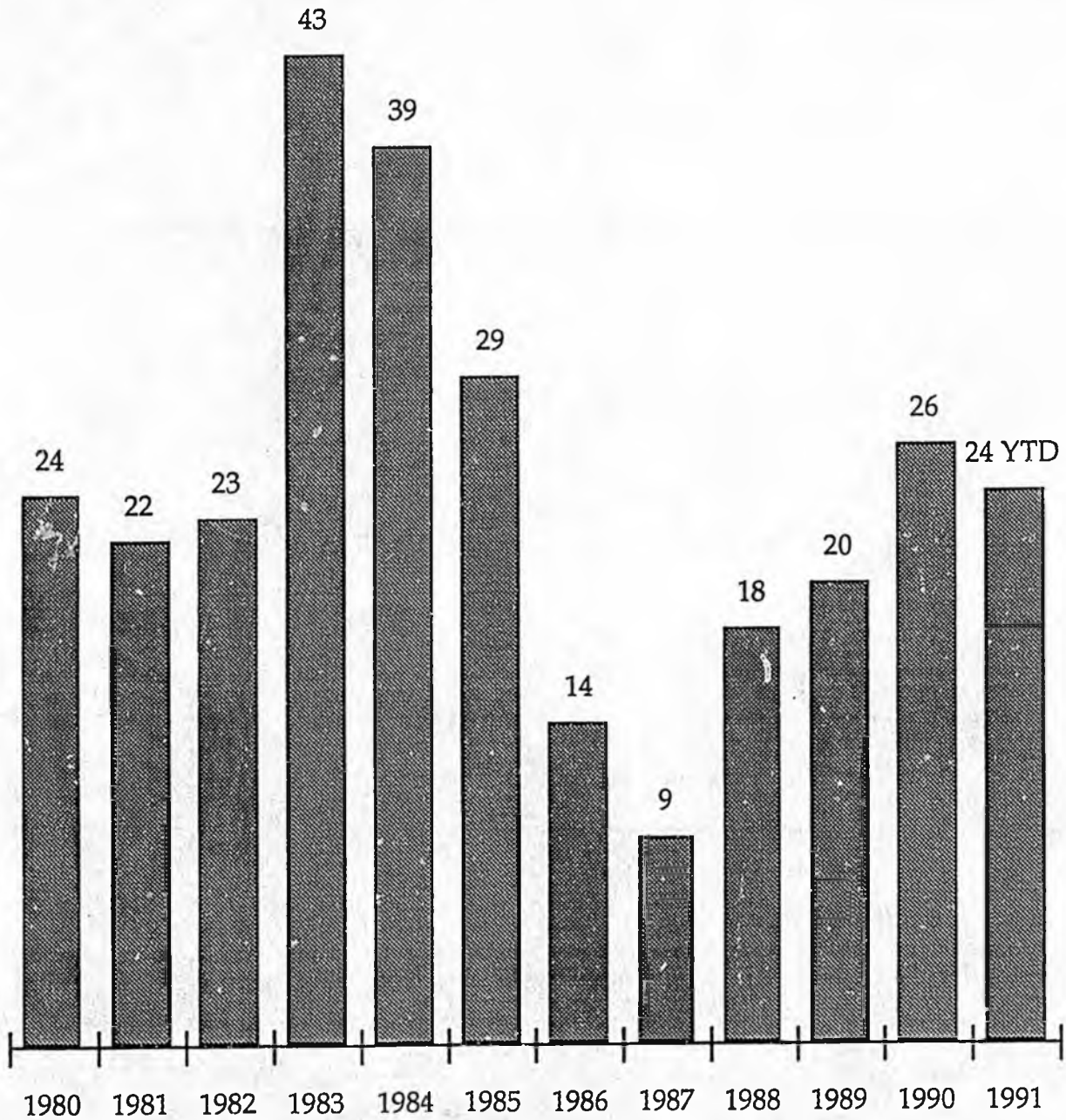
ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6898 HOUSE JUDICIARY

142

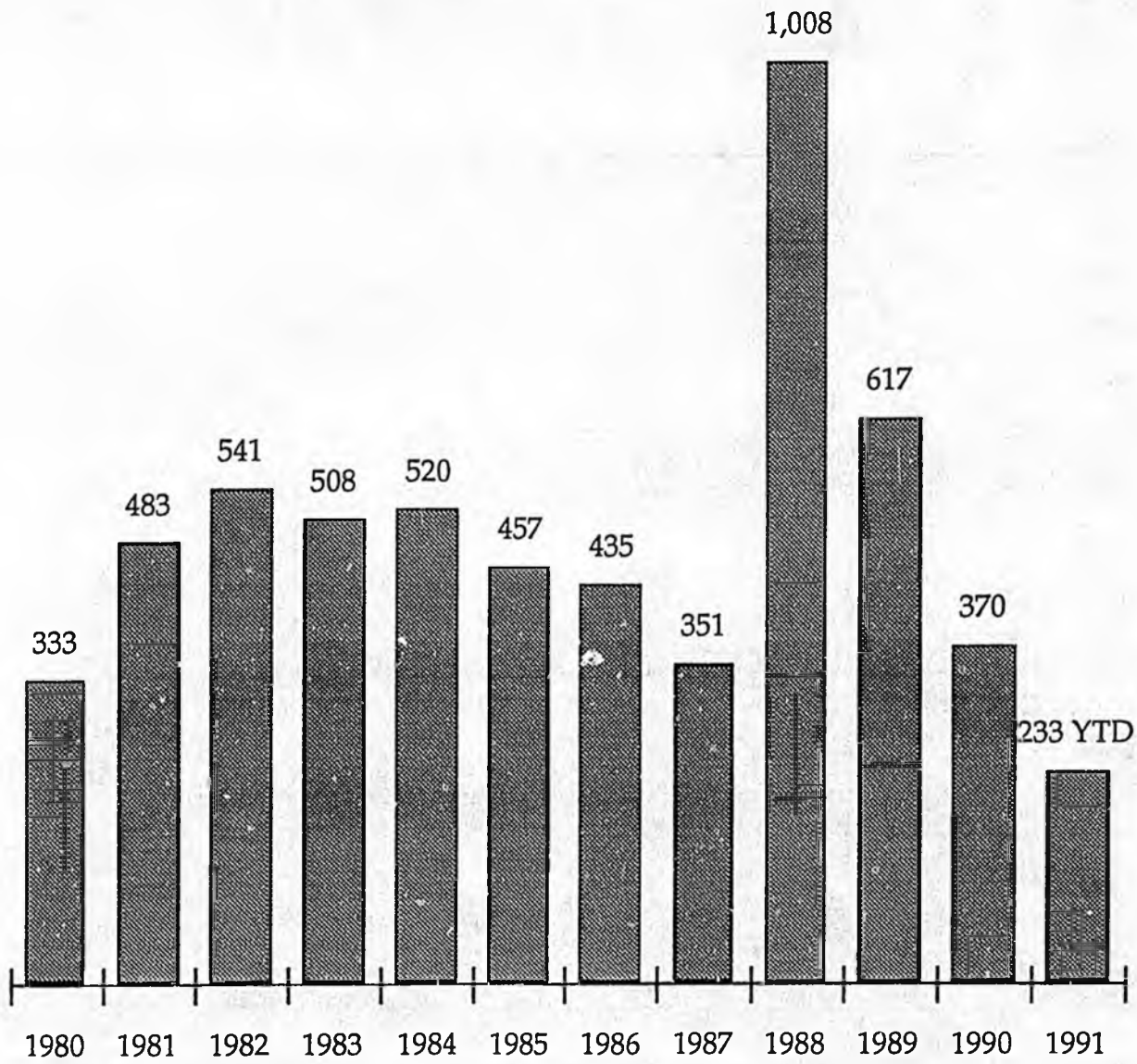
Traffic Accidents with Fatalities

Annual 1980—1990



Traffic Accidents DWI Related

Annual 1980—1990



GLOSSARY

Glossary

CASE DISPOSITIONS

Cleared (UCR definition) 1. An arrest is made. 2. A person who has been arrested on one case confesses to having committed other specific reported offenses. 3. The person known to be responsible for the commission of a reported offense dies.

Unfounded (UCR definition) Reported offenses that are false or baseless with the following exception: All "justifiable" homicides are reported as "unfounded" on the UCR report according to F.B.I. guidelines. (See Justifiable Homicide")

(APD definition) Offenses reported to APD that have been found to be false or have no basis in fact. There are no exceptions to this.

CRIME OFFENSES

"Actual" Offenses (UCR definition) Those reported offenses found to be valid, not unfounded.

Assault, Felony An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury with the use of any dangerous weapon.1

Assault, Sexual (See Sexual Assault)

Assault, Simple Assaults which do not involve the use of a firearm, knife, cutting instrument, or other dangerous weapon and in which there were no serious or aggravated injuries to the victims.1

Burglary (UCR definition) 1. The unlawful entry of a structure to commit a *felony* or *theft*. The use of force to gain entry is not required to classify an offense as burglary.1 2. (State definition) The unlawful entry of a structure, including motorhomes, with the ***intent*** to commit a felony or theft2.

Domestic Violence Those crimes against the person, harassments, criminal trespasses, & assault s which are committed against: 1) spouse, 2) former spouse, 3) grandparent, 4) parent, 5) child of the person committing the act 6) co-habitant of the dwelling of the person committing the act.3

Domestic Violence Writ A special type of restraining order issued by the court when convinced that the applicant has been, or will likely be, subject to domestic violence.2

Drunkenness Simple drunk problems involving no other serious offenses. Includes: Drunk in Roadway, Drinking in Public, Non-Criminal Detention, and Drunk Problems, such as, vagrancy & disturbances "caused more by the person's state of intoxification than by intent to commit a crime."2

Homicide (UCR & APD definition) The willful (non-negligent) killing of one human being by another. Not included in the count for this offense classification are deaths caused by negligence, suicide, or accident; justifiable homicides; and attempts to murder or assaults to murder, which are scored as aggravated assaults.1

Justifiable Homicide (UCR definition) 1. The killing of a felon by a peace officer in the line of duty, or 2. The killing (during the commission of a felony) of a felony by a private citizen.1 Justifiable homicides, according to F.B.I. guidelines for UCR reporting, are always scored as "Unfounded."1

Larceny-Theft The unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Does not include embezzlement, "con" games, forgery, and worthless checks. 1

Motor Vehicle Theft The theft or attempted theft of a motor vehicle. This does not include the taking of a motor vehicle for temporary use by those persons having lawful access.1

Offenses Against Family Includes such offenses as: Child Abuse, Child Neglect, Contribute to the Delinquency of a Minor, and Custodial Interference, Sale of Tobacco to Minor, Criminal Nonsupport, Disseminating Pornography to Minor.

Other Accidents Accident involving one vehicle and moose or other animal.1

Part I Offenses (Part I Crimes) (UCR definitions) Broken down as Homicide, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny/Theft, and Arson.1

Property Crimes Offense involving property only — no assault to persons are involved. I.e.: Burglary, Theft, Stolen Vehicle, Arson.

Rape (UCR definition) The carnal knowledge of a female forcibly and against her will. The victim must be a female and the assault must be made with the penis into the vagina. Assaults or attempts to commit rape by force or threat of force are also included; however, statutory rape (without force) and other sex offenses are excluded.1 (See "Sexual Assault")

Robbery The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or putting the victim in fear.1

Sexual Assault (State & Municipal definition) The "sexual penetration with another person without consent of that person"; or the attempt to "engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person." Also defined as "the sexual contact with another person without consent of that person". (Note that this definition uses the term "person" and does not specify that it must be a female as the UCR definition does.)

Suspicious Includes Suspicious Person, Suspicious Vehicle, and Suspicious Circumstances.1

Theft - All Other Theft not specifically classified. This category includes thefts from fenced enclosures, boats, and airplanes. Thefts of animals, lawn mowers, lawn furniture, hand tools and farm and construction equipment are also included where no breaking or entering of a structure is involved.

UCR Uniform Crime Reporting A nationwide voluntary program of reporting crimes; administered by the FBI. A standard used by all participating agencies which measures crime statistics, and trends.

Violent Crime Offense involving assault to a person, i.e. Homicide, Rape, Robbery and Assault.

1 Uniform Crime Reporting Manual, (c) 1984
2 Anchorage Police Department Regulations and Procedures Manual
3 Anchorage Police Department Report Writing Manual

Governor's Appointment Authority

DIVISION OF LEGAL SERVICES

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MEMORANDUM February 5, 1991

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

TO: Representative Dave Donley

FROM: Gerald P. Luckhaupt
Legislative Counsel

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

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

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

And art. III, sec. 26 provides:

> When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized

> by law, but the appointment shall be subject to the approval of the governor.

These provisions provide that the governor has the authority to appoint the "head of each principal department" of the state and the members of each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency." These appointees are all subject to the legislature's constitutional authority to confirm or reject them.[1/]

In Bradner v. Hammond, 553 P.2d 1, 7 (1976), the Alaska Supreme Court described the authority of the legislature to confirm the appointees described in sections 25 and 26 as:

> not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government.

Therefore, the power of confirmation of the governor's appointees to the "head of each principal department" and to membership on each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency", though normally an executive branch function, has been exclusively delegated to the legislature by the Alaska Constitution.

To implement this confirmation power granted by the constitution the legislature has enacted AS 39.05.080. This section provides that the governor:

> shall, within 30 days of the convening of the legislature in regular session, present to the legislature the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature or either house of it; (B) persons appointed subject to confirmation to fill an existing position or membership vacancy; (C) persons to be appointed subject to confirmation to fill a position or membership the term of which shall expire before July 2, following the session of the legislature. If an appointment is made after the deadline but while the legislature is in session, the appointing authority shall, within five calendar days after the appointment is made, present to the legislature for confirmation the

---

[1/]Other appointments subject to legislative confirmation include certain military officers, art. III, §19; the non-attorney members of the judicial council, art. IV, §8; members of the Commission on Judicial Qualifications, art. IV, §10, and members of the University of Alaska Board of Regents, art. VII, §3.

> name of the person appointed. The deadline may be extended by the legislature by the approval of a concurrent resolution. ...

But what if the governor fails or refuses to transmit the names of his appointments, or a particular appointment, to the legislature? Is the legislature without authority to confirm or reject the appointment if the governor does not commence the confirmation process by transmitting the name? The Alaska Supreme Court has never considered this issue but the courts of several other states have. The leading case on the subject of the legislature's authority to confirm or reject a gubernatorial appointment in the absence of a communication by the governor appears to be People v. Shawver, 30 Wyo. 366, 222 P.2d 11 (1924). Shawver was cited by the Alaska Supreme Court in Bradner for the proposition that confirmation is a portion of the executive's appointment power that has been delegated to the legislature by the constitution. Bradner, supra, at 7, n. 19. In Shawver, the Wyoming Supreme Court after reaching this conclusion addressed the next part of the issue presented by that case: Whether the Wyoming Senate (granted the power to confirm the appointees of the governor by the Wyoming Constitution) could act to confirm or reject an appointee when the governor did not transmit the appointee's name to the Senate and did not ask that the appointee be confirmed? The case involved the appointment of an individual to a state office by a governor who was then succeeded by another governor. The new governor failed to submit the appointment to the Senate for confirmation. The court said:

> But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. [Citations omitted] While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously give him the power to ignore the coordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure.

Shawver, supra, at 23 - 24. The court then held that the Wyoming Senate properly confirmed an appointee, though the governor had not requested the confirmation.

The Kansas Supreme Court reached a similar conclusion in Barrett v. Duff, 114 Kan 220, 217 P. 918 (1923). That case involved the appointments to state offices by a governor during a recess of the legislature. The appointees entered upon the duties of their offices. A new governor took office and attempted to appoint others to the offices and removed the previous governor's appointees. By constitution, the Kansas Senate had the authority to confirm the appointees of the governor and the governor could not remove the state officers involved here except as provided by law, for cause. The court said:

> The plaintiffs deny any force or validity to the action of the Senate in considering and confirming the appointments of defendants because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. Judicial notice or knowledge is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them. Judicial notice means that the court will bring to its aid and consider, without proof of the facts, its own knowledge of those matters of public concern which are known to all well-informed persons. Legislative notice is far broader than judicial notice. 23 C.J. 58. The legislative department is equipped to deal with any condition, general or special, however manifested or brought to the knowledge of the law-making power. The mass of individual legislation found among the statutes of all the states demonstrates this legislative attribute. [Citation omitted].
>
> The offices in controversy are all located in the capito. building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether their respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and

> frequently does, investigate the character, fitness, and ability of the appointee submitted for its consideration. The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. . . . We conclude that the Senate did not go beyond its powers in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it is the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberative and final judgment in confirming or rejecting appointees of the Governor.

Barrett, supra, 925-926.

Virtually all other courts that have considered this issue have reached the same conclusion. See, e.g., Bell v. Sampson, 232 Ky. 376, 23 S.W.2d 575 (1930); McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930); State v. Halladay, 219 N.W. 125 (S.D. 1928); State v. Brewster, 84 S.E.2d 231, 248 (W.Va. 1954); Commonwealth v. Stewart, 286 Pa. 511, 134 A. 392 (1926). Our research has disclosed only one court decision that has reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941). That court though, held that under the Michigan Constitution and that State's court decisions that the confirmation power of the legislature is a legislative power, not a delegation of the executive's appointment power. As such, its reasoning is contrary to the Alaska Supreme Court's decision in Bradner and is distinguishable on that ground.

Therefore, we conclude that the legislature may properly consider the confirmation or rejection of art. III, sec. 25 and 26 appointees of the governor, absent a communication from the governor of a particular appointment or appointments made during the interim and the session. While it is hoped that the governor will comply with the reasonable procedure for communication of appointments the legislature has provided in AS 39.05.080, if the governor fails or refuses the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in sections 25 and 26. To hold otherwise would allow the governor to prevent the legislature from exercising its constitutional confirmation power at his whim, caprice, or neglect and would render the confirmation function a nullity. Shawver, supra. Such an absurd result was not intended by the framers of our constitution and would not, we believe, be embraced by our courts.

GPL:gc:lmb:mi
91-014.lmb

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MEMORANDUM February 11, 1991

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

TO: Representative Dave Donley

FROM: Jerry Luckhaupt JER
Legislative Counsel

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

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

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

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

Munson, supra, at 582 - 83.

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

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

Munson, supra, at 584.

In answering this question the territorial court determined that the attempted reappointment of Rothwell, having occurred while the legislature was in session, was merely a "nomination" akin to the federal system whereby the president "nominates" persons to the senate for confirmation. In the federal system the "nominee" does not take office pending appointment. In that situation:

> there is no 'appointment' within the meaning of vesting final title to the office until acted upon affirmatively by the legislative branch of government. Justice Marshall states that until the legislature acts, the president is free to choose whom he will.

Munson, supra, at 585, discussing Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803).

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

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

Munson, supra, at 587.

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

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

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

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

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

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

Munson, supra, at 587 (emphasis added).

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

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

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

Bell, supra, at 581.

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

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

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

McChesney, supra, at 585 - 86.

The court rejected these arguments saying:

> [I]n cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested. But under our system the appointee of the Governor takes the office, enters upon the performance of its duties, and is charged with responsibility. He holds then subject alone to the action of the Senate. His status is not that of a nominee awaiting confirmation, but that of an officer invested with the powers, privileges, and responsibilities of the position until the Senate acts. A recall of his designation would operate as a removal from office. It is argued that appointment to the office consists of two separate acts, one by the Governor and one by the Senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall. It is the general rule that an appointment to office is intrinsically executive. . . . In all jurisdictions where appointment to office is regarded as an executive function, as here, an appointment to office once made is incapable of revocation or cancellation by the appointing executive in the absence of a statutory or constitutional power. . . . What then constitutes an appointment in so far as the chief executive has to do with it? Appointment to an office by one possessing the appointing power is the designation of another person to discharge the duties of the office. . . . It is completed when the appointing authority has

> performed the acts incumbent upon him to accomplish the purpose. . . . The fact that the title to the office, and the tenure of the officer, are yet subject to the action of the Senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power.

McChesney, supra, at 587.

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

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

> Whenever a board or commission is at the head of a principal department or of a regulatory or quasi-judicial body, the members thereof shall be nominated and appointed by the governor, with the advice and consent of the senate. . . .

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

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

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

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

JPL:gc
91-062.glc

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MEMORANDUM February 6, 1991

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

TO: Senator Pat Pourchot

FROM: Tamara Brandt Cook
Director TBC

Gerald P. Luckhaupt JEB
Legislative Counsel

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

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

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

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

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

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

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

> (4) Pending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, and have the powers and be charged with the duties prescribed by law for the appointive positions or membership.

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

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

GPL:lmb:mi:gc
91-022.lmb

MEMORANDUM State of Alaska

TO: Lori Svensson
Administrative Officer
AK Seafood Marketing Institute

DATE: February 17, 1982

FILE NO: J66-377-82

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

By: Kenneth E. Vassar
Assistant Attorney General

SUBJECT: Terms of office of officers of Alaska Seafood Marketing Inst.

You have asked whether the term of office of a member of the board of directors of the Alaska Seafood Marketing Institute who is also an officer of the institute may be construed to begin on the date of the first meeting of the board following the officer's appointment. It may not.

Under AS 16.51.020, the governor appoints members of the board of directors, and, under AS 16.51.030, the members of the board serve staggered three-year terms of office. Nothing in the statutes expressly states when a board member's term of office begins. In this situation, the general rule is that the term of office begins to run from the date of the appointment. 63 Am.Jur.2d, Public Officers and Employees, § 151. The power to determine when an appointee's term will begin is part of the appointing power which, under AS 16.51.020, is assigned to the governor. The suggested construction would make that power dependent upon the will of the board rather than that of the governor.

You have also asked whether the by-laws of the institute should be amended to address the situation in which the term of office of a board member who is an officer of the institute and who is not reappointed, expires leaving the institute wi' a vacancy in that office. Certainly, the by-laws could c sider this contingency, and there are undoubtedly several me ods of addressing the problem. However, the simplest method would seem to be for the staff of the institute to maintain a list of the board members who are officers and the expiration dates of their terms as board members. Then, a meeting of the board can be scheduled to follow shortly after the expiration date of a director's term so that any vacancy which arises can be filled without undue delay; or, at the last meeting before the expiration date, another director can be elected to take the office if the first director is not reappointed.

KEV/pjg

MEMORANDUM

State of Alaska
Department of Law

TO: Honorable Dave Donley, Chairman
House Judiciary Committee
House of Representative
Alaska State Legislature

DATE: February 7, 1991

FILE NO.:

TEL. NO.: 465-3600

SUBJECT: Follow up on committee testimony

FROM: James L. Baldwin
Assistant Attorney General
Governmental Affairs Section

Thank you for the opportunity to testify during a hearing of the House Judiciary Committee held on February 4, 1991, regarding the various issues concerning the governor's appointment power. During questioning by the committee, I was asked to provide additional information to assist in further deliberations. Attached you will find:

1) a copy of our January 25, 1979 opinion concerning the necessity to confirm holdover principal department heads;

2) a copy of the settlement agreement in the matter of Michael Whitehead; and

3) a copy of a brief I filed in District 16 Republicans v. Cowper, No. 4FA-87-2009 Civil. In this brief, I discussed the validity of a statute authorizing confirmation of an appointment to an office for which confirmation is not expressly authorized by the State Constitution. I believe this brief is relevant because the constitution authorizes the establishment of an appointment procedure by statute for filling a mid-term legislative vacancy. This case was settled before a decision could be rendered by the Superior Court. However, the authorities cited remain relevant to the issue we were debating.

I hope that the documents provided will help you to understand our legal arguments discussed during the hearing. We will provide the remainder of the information you requested in the time specified.

JLB:jr

Attachments

cc: Ron Lorensen, AAG, Legislation

Opinion No. 3

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

File: 663-79-0462

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

January 25, 1979

The Honorable Jay S. Hammond
Governor
Pouch A
Juneau, Alaska 99811

Re: Confirmation of heads of principal departments

Dear Governor Hammond:

You have asked whether either custom or law require you to submit the names of the heads of principal departments to the legislature for confirmation when they carry over in office following a gubernatorial election.

The short answer is that neither custom nor law impose any such requirement.

The law on the subject has been stated succinctly as follows:

> When the term of office is not fixed by law, the officer holds office at the will of the appointing power, and strictly speaking has no term of office.

67 C.J.S. Officers § 66(b). Under the Alaska Constitution, the Governor is the "appointing power." Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). Article, section 25, of the Alaska Constitution provides as follows:

> The head of each principal department . . . shall be appointed by the governor, subject to confirmation by . . . the legislature . . . and shall serve at the pleasure of the governor. . . .

ATTACHMENT 1

03-C5LH

Accordingly, under the general rule, the heads of the principal departments, once appointed and confirmed, serve indefinitely until they leave office. Unlike the Governor, whose term is fixed by the constitution, their terms are indefinite. The occurrence of a gubernatorial election has no effect, in itself, on their terms. They continue to serve even upon the election of a new governor until they are discharged by the governor or resign. There is no vacant office to which the incumbent may be "appointed" or "reappointed," and therefore no appointment or reappointment for the legislature to confirm.

The custom nationally and in Alaska is consistent with this interpretation. [illegible]ected President of the United States has been known to have submitted for confirmation the names of persons holding over as cabinet officers. One can search the diaries of Harold Ickes, the Secretary of the Interior from 1933 through 1946, in vain for any record of his reconfirmation in 1937, 1941, or 1945. There was none. Since the first election of Franklin D. Roosevelt in 1932, there have been seven instances of presidential reelections involving cabinet officers who held over and three instances of vice-presidential succession involving cabinet officers who held over. So far as is known, the name of none was submitted for confirmation.

In Alaska, prior to 1978 there has been only one instance of a gubernatorial reelection, Governor Egan's reelection in 1962. In 1963, Governor Egan submitted the names of the heads of six principal departments to the legislature for confirmation. All but one had succeeded to office since the adjournment of the 1962 legislature. The one exception was an appointment to head a new department established by law by the 1962 legislature. The Governor did not submit the names of the heads of seven departments who had carried over in office, e.g., Floyd Guertin, who had served as Commissioner of Administration since Statehood, and Phil Holdsworth, who had served as Commissioner of Resources for the same period. 1963 Supp. to H. and S. Jour. April 9, 1963.

When Lieutenant Governor Miller succeeded to the office of Governor, he did not submit the names of the heads of all the principal departments for confirmation but rather only those who had been appointed to office since their predecessors had been confirmed, i.e., a new Attorney General, new Commissioners of Adminsitration, Highways, and new Public Works. 1969 S. Jour. 491 (Mar. 27, 1969). Hence, the custom in Alaska is the same as at the national level.

Accordingly, neither by law nor by custom need you submit for legislative confirmation the names of the heads

of principal departments whose appointments have already been confirmed and who have carried over in office. There are no vacancies in those offices to which an appointment or reappointment can be made, and no appointment or reappointment which the legislature can affirm.

Sincerely,

Avrum M. Gross
Attorney General

AMG:chw:RWP

RELEASE AND SETTLEMENT AGREEMENT

Michael M. Whitehead was appointed to a position on the Alaska Commercial Fisheries Entry Commission by Governor Hammond on October 16, 1982, for a term expiring July 1, 1985. In a letter to Mr. Whitehead dated February 28, 1983, Governor Sheffield advised Mr. Whitehead that he had decided to appoint another person to fill the term to which Mr. Whitehead had previously been appointed by Governor Hammond. In that letter Governor Sheffield thanked Mr. Whitehead for his service to the public interest, and stated that he had been enormously helpful to the state during his tenure as Commissioner. On or about March 1, 1983 the Governor's office caused to be circulated to all members of his office, the Lieutenant Governor and all members of his cabinet a memorandum stating that the Governor had chosen to appoint another person to Mr. Whitehead's position on the Commission.

Mr. Whitehead disputed the Governor's power to remove him from office. Specifically, Mr. Whitehead contended that the Governor was required by AS 39.05.080 to submit his name to the Legislature within 30 days of its convening. He further contended that, by virtue of AS 16.43.030(a), he could be removed from office only for "cause." The Governor has acknowledged that no "cause" exists for Mr. Whitehead's removal; indeed, as already stated, Mr. Whitehead's performance of his duties as Commissioner has been outstanding. The fundamental basis for Mr. Whitehead's claim is that, had the Governor removed him from office as planned, he would have suffered serious emotional and mental injury and despite the Governor's commendation of his performance in office, he would nevertheless have suffered reputational harm.

The Governor, on the other hand, maintains that, despite Mr. Whitehead's outstanding job performance, he has the power under law to withdraw Mr. Whitehead's interim recess appointment to the Commission by failing to transmit Mr. Whitehead's name to the Legislature for confirmation. In fact, on or about March 23, 1983 the Governor appointed Mr. Richard Listowski to Mr. Whitehead's position and sent Mr. Listowski's name to the Legislature for confirmation, and on June 8, 1983 the Legislature in joint session confirmed Mr. Listowski's appointment.

But for this settlement agreement, the Governor would have taken steps to remove Mr. Whitehead from the Commission, forcing a judicial determination of the dispute. In order to avoid the expense and uncertainty of litigation and in consideration of the promises contained herein, the Governor and Mr. Whitehead agree to settle this dispute on the following terms:

ATTACHMENT 2

1. The State of Alaska will pay to Mr. Whitehead the sum of Seventy Five Thousand and 00/100 Dollars ($75,000.00), receipt of which is hereby acknowledged.

2. Mr. Whitehead's employment on the Alaska Commercial Fisheries Entry Commission ends as of the close of business on Thursday, June 16, 1983, and he will receive all salary and benefits that will normally accrue as a result of his employment.

3. Mr. Whitehead hereby waives any claim he has to a position on the Alaska Commercial Fisheries Entry Commission.

4. Mr. Whitehead and the State of Alaska hereby release and forever discharge each other of and from any and all claims, including claims arising from the allegedly tortious conduct described in this agreement, whether known or unknown, foreseen or unforeseen, which they have now or which may hereafter accrue on account of the events set forth in this agreement.

DATED at Juneau, Alaska this 16th day of June, 1983.

Michael M. Whitehead

ATTORNEY GENERAL
STATE OF ALASKA

By: James L. Baldwin
James L. Baldwin
Assistant Attorney General

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

FAIRBANKS REPUBLICAN PARTY DISTRICTS 19, 20, and 21, Plaintiffs, and MITCH ABOOD, et al., Plaintiffs in Intervention, vs. STEVE COWPER, Governor of the State of Alaska, Defendant.	No. 4FA-87-2009 CIV
STEVE COWPER, Governor of the State of Alaska, Plaintiff, vs. JAN FAIKS, et al., Defendants.	No. 1JU-87-1849 CIV CONSOLIDATED

MEMORANDUM IN SUPPORT OF
GOVERNOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

The governor filed an action to determine the validity of a purported rejection of an appointment he made to fill a legislative vacancy for the seat which represents senate district K-A. A similar action was brought in Fairbanks by persons seeking to have the governor make a subsequent appointment. The

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ATTACHMENT 3

court requested briefing and argument on the issue of whether the senate must be in session when the appointment is confirmed or rejected. The governor has styled this memorandum as being in support of a motion for judgment on the pleadings.

The vacancy was created by the death of Senator Don Bennett on August 30, 1987. Senator Bennett was a member of the Republican Party. His most recent term began in January 1984. Plaintiffs are local districts of the Republican Party situated in senate district K-A (in this memorandum we will refer to plaintiffs as "the districts"). The districts proposed to the governor that he appoint Dick Randolph to fill the vacancy. The governor, after a period of deliberation, appointed Beverly Bennett on September 23, 1987 to fill the vacancy created by the death of her husband. Exh. 1.

Plaintiffs in intervention are members of the state senate and members of the state Republican Party (in this memorandum, plaintiffs in intervention will be referred to as "the Republican senators"). The republican senators are duly elected members of the state senate. A vacancy in the seat representing senate district K-A must be filled by appointment by the governor because Senator Bennett had less than two years and five months remaining in his term of office. AS 15.40.370, 15.40.-380. Under the state election code (AS 15), the appointment is subject to confirmation by "a majority of the members of the legislature who are members of the same political party which nominated the predecessor in office and of the same house as was

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the predecessor in office." AS 15.40.330(a).

On October 7, 1987, during the interim between legislative sessions and while the state senate was adjourned, the governor received a letter on official senate letterhead which purported to be a "report." The report advised the governor that 11 republican senators met and purportedly voted to reject the governor's appointee. Exh. 2. The report also discloses that one of the senators participated "via teleconference." The governor immediately filed an action seeking a declaratory judgment as to whether the purported rejection was effective. The governor also questioned the validity of the delegation of confirmation power to a group of legislators. Governor's Compl., dated Oct. 7, 1987, Count 2.

As a preliminary matter, the court should be aware of the connection between the districts and the republican senators. The districts publicly offered only one name for appointment to fill the vacancy. In turn, the republican senators declared that they would confirm only persons recommended by the districts. Acquiescence in these demands would place the true appointment power in the hands of the districts. The governor requested the attorney general to advise him concerning the proper role of the districts in the process for selecting an appointee. An informal attorney general opinion was issued on September 21, 1987. 1987 Inf. Op. Att'y Gen. (Sept. 21; 663-88-0107), Exh. 3. The attorney general advised that the districts had no legal claim to a formal role in the appointment process.

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II. THE PROPER ROLE OF THE DISTRICT COMMITTEES

The Alaska Constitution directs the legislature to enact a procedure to fill mid-term vacancies in the legislature. Alaska Const. art. II, § 4. This section was implemented in 1960 by the enactment of AS 15.40.320 -- 15.40.470. The election code does not contain a requirement that the governor select the successor from a list of nominees provided by the local committee of the political party of the predecessor in office. It is not unusual for the governor to consult with local district committees before making an appointment to fill a vacancy. It make good sense to do so. However, when the governor and the nominee are not of the same political party, disagreements occasionally erupt over who should be appointed. Governors have, out of courtesy, solicited advice from local political organizations during the appointment process. But, when push comes to shove, it is the governor who is vested with the appointment power by state law and the constitution. He may seek counsel from whomever he wishes.

A review of historical precedent involving the rejection of appointments to fill legislative vacancies confirms the governor's power to act without consultation. The precedent was established soon after statehood during the first term of the Egan administration. Governor Bill Egan and senators were engaged in a struggle over an appointment to fill a vacancy left by the death of Senator Elton Engstrom, Sr. During the course

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of that controversy, Governor Egan appointed and the senate members of the Republican Party successively rejected four persons before a successor was confirmed. The senators demanded that Governor Egan appoint from a list of candidates provided by the local republican committee. Governor Egan responded to the demand as follows:

> Please permit me to point out that there is no reference to political committees of either major political party in the law which covers filling of vacancies in the State Legislature. If the legislature had intended that political committees would be responsible for such appointments, the Legislature would have so provided.

1963 Senate J. 73. Since 1963, the legislature has been informed of Governor Egan's interpretation and chose not to amend the election code to create a role for a district committee of a major political party.

III. THE CONFIRMATION POWER CANNOT BE DELEGATED AWAY

The issue identified by the court for initial consideration concerns whether the republican senators must act formally as a subdivision of the senate or informally as a political caucus. A caucus is a private, partisan political organization. It is not an official interim or standing committee of the legislature. Consistent with this premise, the Alaska Supreme Court has observed that a political caucus is not a legislative body or committee and because of that status is not subject to the Open Meetings Act (AS 44.62.310). Malone v. Meekins, 650 P.2d 351, 359 (Alaska 1982). The governor submits

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that the legislature cannot delegate confirmation powers to individual legislators, especially if they purport to act in the form of a private political caucus.

The power to appoint persons to fill a vacant legislative office is accorded by law to the governor and is an executive power. By reserving a right to confirm appointees, the legislature is attempting to authorize a part of the senate to share executive powers. Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976) ("... [C]onfirmation is a specific attribute of the appointive power of the executive."). The legislature may only share the executive power of appointment when the state constitution specifically permits it. Id.

Because the appointive office is legislative rather than executive, the senate, as a separate house of the legislature, has an express constitutional remedy to assure the appointment of qualified persons to serve there. Article II, section 12 of the Alaska Constitution provides: "Each [house of the legislature] is the judge of the election and qualifications of its members...." Respected authority on legislative procedure states: "The exclusive power to judge of the qualifications and elections of its members is fixed in each house and cannot by its own consent or by legislative action be vested in any other tribunal or office." Mason's Manual of Legislative Procedure, § 560(5) (1979 rev'd ed.) (hereafter Mason's). The confirmation power added by AS 15.40 has the effect of giving the exclusive power to judge qualifications to a group of legis-

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lators determined by political affiliation rather than by membership in a house of the legislature as contemplated in the constitutional scheme devised by the framers.

Under the election code, a minority of one house of the legislature can frustrate the governor's will and circumvent the express remedy for determining the qualifications of persons selected to serve there. The Alaska Constitution provides: "The legislative power of the state is vested in a legislature consisting of a senate with a membership of twenty and house of representatives with a membership of forty." The senate Republicans are acting as if the senate is comprised of a membership of eleven. They are also acting as if the senate can convene and transact legislative business without the aid of the governor or the house of representatives. Additionally, the governor's duty to execute the election code is impaired in an inappropriate manner by requiring him to share the appointment power with a partisan group of legislators. Legislators are members of the law-making branch of state government. If they are allowed to participate in the making of an appointment, they would be executing the law as well.

The governor is not arguing that all delegations of legislative power are invalid. Only a delegation which confers the exclusive right to determine qualifications of a person appointed to legislative office. For example, the court is given jurisdiction to determine election contests involving the qualifications of a legislator-elect. AS 15.20.540 -- 15.20.560.

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However, that power is limited to determining if a candidate is qualified "as required by law." AS 15.20.540(2). This power was determined to be "not atypical" and to reflect a traditional role for the judiciary to assume. Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972); accord Mason's, § 560(7) (1979 rev.). The election code expressly states that the grant of power to the courts to hear election contests is "not intended to limit or interfere with the power of the legislature to judge the election or qualifications of its members. AS 15.20.560. If the rejection by the republican senators is effective, the senate will never be able to judge the qualifications of Mrs. Bennett. Unlike the grant of jurisdiction to the superior court to hear election contests, the confirmation power is delegated to a group of legislators without standards to direct the exercise of the legislative power.

It is expected that plaintiffs will argue that the constitutional directive set out in article II, section 4 of the Alaska Constitution authorizes the delegation of confirmation power to a legislative political caucus. Article II, section 4 provides: "A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment." However, in State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), the Alaska Supreme Court observed:

> The legislature is bound to act in accordance with the constraints provided in article II of the constitution. The fact that it can delegate

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> legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate.

606 P.2d at 777. The court went on to make the following general statement: "It is therefore worth observing that most authorities have rejected the validity of the laws conferring either affirmative or negatory legislative powers on individual legislators or committees." 606 P.2d at 778 (citing and discussing State ex rel. Judge v. Legislative Finance Committee, 543 P.2d 1317 (Mont. 1975) (legislature could not delegate power to approve budget amendments to an interim legislative committee) and People v. Tremaine, 168 N.E. 817 (N.Y. 1929) (legislature may not grant certain legislative committee chairmen the power to disapprove of the allocation of lump sum appropriations to an executive agency)).

The superior court sitting in Juneau has ruled on the delegation question. In 1978, Judge Thomas Stewart decided that an interim committee of the legislature could not approve of transfers between appropriations during the interim between legislative sessions. Kelley v. Hammond, C.A. No. 77-4 CIV (Alaska Super., 1st Dist., Juneau, Decision on Mn. for Pt. Sum. Jgmt., Apr. 12, 1978), Exh. 4. Judge Stewart reasoned that the budget and audit committee was attempting to act as a mini-legislature by exercising legislative powers during the interim. The case was not appealed and the legislature amended AS 37.07.080(e) to provide that transfers between appropriations may only be au-

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thorized in an appropriations Act.

The foregoing analysis shows that the legislature cannot vest the legislative duty of confirmation in a discrete group of legislators. To sanction the delegation would allow the legislature to operate without the procedural safeguards established in article II of the Alaska Constitution. The governor will show in the next subdivision of this memorandum that the legislature may act only when it is assembled in session and by recorded vote.

IV. CONFIRMATION IS A LEGISLATIVE DUTY REQUIRING FORMAL ACTION

Under the governor's theory of this case, the court is asked to render a declaratory judgment concerning the formality with which the legislature must exercise legislative powers. The court is requested to determine if duties assigned by law to a house of the legislature, or a part of it, must be exercised by a formal vote during a session of the senate. Plaintiffs would have the court validate a procedure where an appointee to high government office is divested of any right to that office by unofficial action by individual senators acting in their official capacities separately from the senate. The election code requires the confirming body to be members of the legislature and the state senate. AS 15.40.330(a). These institutions of the legislative branch of state goverment exist as corporate bodies and not through individuals elected to serve in those bodies.

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It is only when the houses of the legislature are lawfully assembled that they constitute the legislature of the state. Mason's, § 780(13) (citing Ex Parte Hague, 147 A. 220 (N.J. 1929). Mason also observes: "The decision of a deliberative body can be made only by the taking of a vote at a meeting. The fact that members have individually expressed opinions on a question is not a decision of the body and is of no effect." Mason's, § 520(1). At best, the report of the caucus meeting held in Anchorage to consider the qualifications of Mrs. Bennett should be accorded no more force than a report of a standing committee of the senate. Those powers are to study and analyze the subject matter referred to the caucus and to report back to the parent body. The report by the caucus should be considered advisory only. The binding decision is made by the senate or a part of it after it reconvenes.

The election code pertaining to legislative vacancies specifies an appointment procedure that includes confirmation as the final step. AS 15.40.330(a). During the appointment struggle of 1963, Governor Egan demanded that if the senate Republicans desired to reject his appointment, a vote must be taken on the question of confirmation in open session with the vote recorded in the journal. 1963 Senate J. 74. The senators attempted to record the rejection by reading a report from the caucus into the Senate Journal. The demand for direct action during regular session was based on an interpretation of the election code advanced in an opinion of the attorney general. 1963 Inf.

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Op. Att'y Gen. (Feb. 12; Gross), Exh. 5. The senate acceded to the governor's demand by correcting the journal and taking action in open session to vote on the question of confirmation. 1963 Senate J. 85.

The attorney general opined that the term "confirmation" should be construed to mean a formal process undertaken by the appropriate house of the legislature culminating in a vote on the question. Since 1963, the legislature has been informed of a formal interpretation of AS 15.40 by the attorney general. During that period, the legislature has undertaken major revisions to the election code. See ch. 100, SLA 1980. However, the provisions under review in this action were not changed to alter the effect of the attorney general's construction of AS 15.40. The interpretation was announced within three years after the appointment provisions were enacted and has remained in effect for 24 years.

The longstanding interpretation announced by the attorney general is entitled to great weight. State, Dept. of Revenue v. Alaska Pulp America, Inc., 674 P.2d 268 (Alaska 1983). However, this is not to say that the attorney general is infallible, nor that opinions of the attorney general are always controlling. The court is the final authority on important questions of statutory construction. Trustees for Alaska v. Watt, 524 F. Supp. 1303 (D.C. Alaska 1981); aff'd 690 F.2d 1279 (9th Cir. 1982). The court should adopt the attorney general's interpretation because it is consistent with the provisions of

ATTORNEY GENERAL, STATE OF ALASKA
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the election code and legal authority concerning the manner in which the legislature must transact legislative business.

Even if the governor were to concede for the purpose of argument that a part of the senate could be authorized to confirm, the Republican senators may only exercise their delegated powers when the senate is assembled in lawful session. The election code does not contain an express authorization for the senators to meet during the interim. Rather, the code implies that confirmation will take place during the session. The governor contends that formality is necessary to ensure deliberation before action is taken, to ensure that the requisite majority of the house votes to confirm or reject, and to provide a public record of the vote of each legislator. It must be remembered that the qualifications of a prominent citizen of the state to hold office is ultimately at issue here.

Under the election code, the governor must appoint a successor if the term is less than two years and five months, or if a special election cannot be held before the legislature reconvenes. An appointment can be defeased in two ways. First, by rejection through the confirmation process, if the predecessor in office was "a member of a political party." AS 15.40.-330(a). Second, by election of a person other than the appointee to fill the vacancy. AS 15.40.380. The election code provides for the "date of office" of an appointee. AS 15.40.340. Section 340 states that the date of office of an appointment not subject to confirmation is, in this case, the date the legisla-

ATTORNEY GENERAL, STATE OF ALASKA
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ture reconvenes. However, if the appointment is subject to confirmation, the clear implication is that the "date of office" is later; i.e., a date, after the reconvening of the legislature, on which the appointment is confirmed.

The term "confirmation" has a commonly understood meaning when used to describe a legislative procedure. The term connotes a formal process that is performed by a vote taken on the record during a session of the confirming body. The state constitution provides that executive appointments are confirmed during joint session. Alaska Const. art. III, §§ 25 and 26. The legislature implemented the confirmation power by establishing a procedure for the consideration of all executive appointments made by the governor. This procedure requires a formal vote by all members. AS 39.05.080(4); see also Rule 46, Uniform Rules of the Alaska State Legislature. The provisions implementing the procedures for confirmation of appointments to executive office are in pari materia with AS 15.40 and should be used to interpret the meaning of the provision under review here. There is no basis for a more liberal interpretation of the term "confirmation."

Because the legislature does not meet during the interim, there is no institutional need to provide for an earlier confirmation. Even the election code provides that an appointee's office does not begin until confirmation. AS 15.40.340. If the legislature perceives a need to confirm an appointee during the interim, a special session could be called to take up

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the question. See Alaska Const. art. II, § 9. Apparently, the leadership of the house of representatives had no interest in calling such a session. Exh. 6. The senate Republican caucus also requested the governor to call a special session to resolve this dispute. However, the governor declined to exercise his discretionary power to do so under article III, section 17 of the Alaska Constitution. Exh. 7.

V. CONCLUSION

The governor contends that AS 15.40.330(a) is invalid because that statute purports to delegate the power to determine the qualifications of an appointed senator to a few legislators serving in the senate. This function may only be performed by the entire senate. The statute purports to require the governor to share his appointment power with individual legislators. Once a power of appointment is assigned by statute to the governor, the legislature cannot attempt to also exercise that power. The Republican senators carry the grant of the confirmation power too far when they attempt to exercise it during the interim. To be valid at all, confirmation must be decided when the senate is assembled in session. The vote of each senator permitted to vote must be recorded in the senate journal.

For the reasons set out in this memorandum, the gov-

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ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
PO. BOX K, JUNEAU, ALASKA 99811
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ernor is entitled to judgment on all counts set out in his complaint.

DATED: November 25, 1987

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By:
James L. Baldwin
Assistant Attorney General

ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
P.O. BOX K, JUNEAU, ALASKA 99811
PHONE 465-3600

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

MEMORANDUM February 19, 1991

SUBJECT: Legislative Designation of Qualifications for Members of Boards and Commissions (Work Order No. 17LS-0661)

TO: Representative Dave Donley

FROM: Jerry Luckhaupt
Legislative Counsel

You have requested an opinion concerning the legislature's authority to designate qualifications for membership on boards and commissions created by the legislature. I hereby respond as follows.

Art. III, § 26 of the Alaska Constitution provides:

> When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. 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.

This section provides that the governor shall appoint the members of boards and commissions that are "at the head of a principal department or a regulatory or quasi-judicial agency." Art. III, § 26 provides a general qualification that all appointees to these boards and commissions shall be United States citizens. Other than this general requirement the section does not provide any direction concerning the designation of qualifications for membership on particular boards or particular seats on boards.

In Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), the Alaska Supreme Court recognized that implicit in the Alaska Constitution is the doctrine of separation of powers. That doctrine, that one branch of government may not exercise the powers committed to another branch, is designed to avoid the "tyrannical aggrandizement of

power by a single branch of government. . .." Bradner, supra, at 5. The Bradner decision also recognized that our constitution envisioned a strong executive and "that the appointment of executive officers is an executive function. . .." Bradner, supra, at 6.

"The legislative power of the State [though] is vested in a legislature. . .." Art. II, § 1, Alaska Constitution. "Legislative power" is the power of the legislature "to make laws and such power is reposed exclusively in such body though it may delegate rule making and regulatory powers to departments in the executive branch." Black's Law Dictionary.

As part of its law making power the legislature may determine that the best way for a particular law to be implemented or enforced is by the establishment of a board or commission to administer the law. In fact, such appears to be expected by art. III, § 26 of our constitution. In creating the board or commission it seems only reasonable that the legislature may establish qualifications for the members of the board or commission who are going to be implementing the particular law enacted by the legislature. The legislature may want persons with experience in the field or area to be regulated, or with some other qualifications or training, to administer the law. By enacting qualifications for members of boards or commissions, the legislature is not selecting a particular person to be on the board or commission (which power is provided solely to the governor) but only specifying that certain qualifications are necessary for any person selected by the governor to serve on the particular board or commission. The governor may still select the individual he wants to be on the board or commission, provided the person has the qualifications the legislature has specified as being necessary. As such, it appears that the governor's appointment power is not invaded or restricted by the legislature's enactment of reasonable qualifications for membership on boards and commissions.

This view is consistent with the general rule of law concerning the prescription of qualifications for public office by the legislature.

> Subject to constitutional restrictions, the legislature has the right to prescribe the qualifications of officers to be elected or appointed to state offices created by it. . ..

81 A, C.J.S., States, § 83, at p. 460.

And:

> Subject to such limitations as may be imposed by the constitution, the power to fix the qualifications of public officers or employees may be exercised by the legislature. The qualifications for, or conditions of, public employment may not be arbitrary, but must be reasonable and

> based on substantial grounds which are natural and inherent in the subject matter of the legislation.

67 C.J.S., Officers, § 16, at p. 256 - 57.

Various state courts have reached this same conclusion and have upheld legislative designations of qualifications for public offices, such as, memberships on a board or commission. See, e.g., State v. Matassarin, 114 Kan. 244, 217 P. 930 (1923); State v. Eischen, 76 N.W.2d 385 (Minn. 1956); Humane Society of the United States v. New Jersey Fish and Game Council, 70 N.J. 565, 362 A.2d 20 (1976); Landes v. North Hempstead, 20 N.Y.2d 417, 284 N.Y.S.2d 441 (1967); Hurd v. Freeland, 442 P.2d 344 (Okla. 1966); State v. Wells, 112 N.W.2d 601 (S.D. 1961); State v. Millsap, 605 S.W.2d 366 (Tex. App. 1980).

This view is also consistent with the statements of the framers of our constitution at the constitutional convention. It was apparently their belief that qualifications for membership should be stated in the statutes authorizing the particular board or commission. In discussing residency requirements and qualifications of board members, Delegate V. Rivers stated:

> The board or the commission would be established by law, and we presume they might have some requirements in the law, but that leaves it open to the legislature to make the decision on it.

Alaska Constitutional Convention Proceedings (ACCP), at p. 2038. And, "I for one would prefer to see the statute provided [sic] rather than the constitution provide for board member qualifications." ACCP, at p.2039.

Further, at least three Alaska Attorney General opinions or letters of advice have concluded that the legislature may prescribe reasonable qualifications for gubernatorial appointments to boards or commissions. Opinion from R. Pegues to H. Beirne, 04/23/81; Opinion from R. Pegues to Governor Hammond, 08/13/79; Opinion from G. Schaible to Governor Cowper, 05/24/88. Copies of these opinions are attached.

An examination of these authorities reveals at least two areas of caution. First, a legislative attempt to require the governor to appoint an individual selected by some other group could be found by a court to be violative of the governor's appointment power under art. III, § 26. See, e.g., the Attorney General's opinion from R. Pegues to H. Beirne attached hereto. At least two states that have considered this issue, based of course on their own constitutional provisions, have ruled that delegating the selection of individuals to some other group and requiring the governor is to make his appointments from the names submitted by those groups is proper. Humane Society of the United States v. New Jersey Fish and Game Council, supra (New Jersey's constitution is similar to ours and was a model used by our framers); State

v. Eischen, supra. Second, since our constitution already provides a residency requirement in art. III, § 26 (that being that all members of boards and commissions must be United States citizens), it is possible that a court could find that the imposition of a state residency requirement would be improper. See the Attorney General's opinion from R. Pegues to Governor Hammond attached hereto.

It therefore appears that the legislature may prescribe reasonable qualifications for art. III, § 26, boards and commissions, that are reasonably related to the position or to the aim of the legislation and which do not interfere with the governor's appointment power or with qualifications set out in the constitution.

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

GPL:mi/pl
91-032.mai

Enclosure

DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT

February 4, 1991

Representative Ben Grussendorf
Speaker of the House of Representatives
P.O. Box V
Juneau, Alaska 99811

Dear Mr. Speaker:

On February 4, 1991, the Judiciary Committee held a hearing to review the Governor's power to remove members of various boards and commissions, including the Alaska Public Utilities Commission. After hearing from Legislative Counsel [and a representative of the Attorney General], the Judiciary Committee has concluded that the Governor does not have the legal authority to unilaterally remove Commissioner Peter Sokolov from his position on the APUC. An APUC commissioner may only be removed from office "by and with the consent of a majority of the legislature." AS 42.05.035.

Because Commissioner Sokolov's appointment to the APUC has not yet been confirmed by the Legislature, it is the recommendation of the Judiciary Committee that we proceed with the confirmation process for this appointment. In addition, because the APUC does not now have a vacancy as defined by AS 42.05.030, the Judiciary Committee recommends that the Legislature return to the Governor any additional APUC appointments that are submitted for confirmation at this time.

Very truly yours,

Dave Donley, Chair

DD:lho

Alaska State Legislature

House of Representatives
House Judiciary Committee

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

February 6, 1991

James L. Baldwin
Department of Law
P.O. Box K
Juneau, AK 99811

Dear Mr. Baldwin:

Thank you very much for your participation in the House Judiciary Committee hearing on February 4, 1991.

The following is a summary of the information that you committed on behalf of the Department of Law to provide to the committee:

The legal authority for the Attorney General's position that transmittal to the legislature of the name of an individual who has been appointed to a Section 26 board, under AS 39.05.080, is a discretionary act on the part of the governor.

The legal authority for the position that, until the name of such an appointee has been formally transmitted by the governor to the legislature, the legislature is powerless to exercise its confirmation powers with respect to that appointee.

The legal authority for the position that the removal provision for APUC Commissioners, AS 42.05.035, is invalid.

An historical summary of appointments to the law, engineering, finance, accounting or business administration, and consumer chairs on the APUC, as prescribed by AS 42.05.040.

The informal Attorney General's opinion stating that an executive appointee, once confirmed by the legislature, need not be resubmitted to the legislature after being reappointed to either the same or a different position.

The results of your research on the question of what constitutes a "regulatory" board under Article III, Section 26, of the Alaska Constitution.

Copies of the cases that reached an opposite holding to that of McChesney v. Sampson, 232 Ky 395, 23 S.W.2d 584 (1930).

A copy of the settlement agreement between the state and Michael Whitehead after he was removed from the Commercial Fisheries Entry Commission.

Because the committee would like to receive the above-requested information by February 15, 1991, your prompt attention to this request will be greatly appreciated.

Sincerely,

Dave Donley

Dave Donley, Chair
House Judiciary Committee

DD/hk

January 31, 1991

SENT VIA TELECOPIER

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

Dear Mr. Tanner:

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

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

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

Sincerely yours,

Peter Sokolov

IN THE HOUSE

HOUSE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to legislative confirmation of the board members of public corporations of the state.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article III, sec. 26, Constitution of the State of Alaska, is amended to read:

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, or a public corporation established by law, 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.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

SENATE JOINT RESOLUTION NO. 4

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY SENATORS KERTTULA, Sturgulewski

Introduced: 1/21/91
Referred: Judiciary and Finance

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska requiring legislative confirmation for members of the governing boards of the Alaska Permanent Fund Corporation and the Alaska Railroad Corporation.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** Article III, sec. 26, Constitution of the State of Alaska, is amended to read:

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, <u>or is the governing entity of the Alaska Permanent Fund Corporation or the Alaska Railroad Corporation,</u> 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.

*** Sec. 2.** The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Alaska State Legislature

House of Representatives
House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
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January 28, 1991

The Honorable Charles E. Cole
Attorney General
P.O. Box K
Juneau, Alaska 99811

Re: Constitutionality of AS 44.39.030

Dear Attorney General Cole:

In reviewing recent press accounts of the controversy involving the appointment of the Commissioner of Fish and Game, I was interested to read you have concluded that AS 44.39.030 (which requires the commissioner to be appointed from names submitted to the Governor by the Boards of Fish and Game) is an unconstitutional infringement on the power of the executive. Because I am very interested in the contours of the relationship between the executive and legislative branches of government, I would appreciate receiving a copy of any written opinion in which you or a member of your staff conclude the statute is unconstitutional. If a written opinion on this subject does not exist, please advise me of the legal basis for your conclusion that the statute is unconstitutional.

Thank you in advance for your prompt attention to this request.

Very truly yours,

Dave Donley

Dave Donley, Chair

DD:lho

Appointment of Fink pal irks lawmakers

By DAVE PATRICK
TIMES CAPITAL BUREAU

Some legislators are charging the governor with overstepping his authority when he replaced Peter Sokolov on the Alaska Public Utilities Commission with a close friend of Anchorage's mayor.

Gov. Walter J. Hickel named Don Schroer to one of two consumer seats on the 5-member commission. Schroer is Mayor Tom Fink's insurance business partner, campaign treasurer and duck hunting buddy. The appointment requires confirmation by the Legislature.

The commission regulates utilities and oversees rate-setting. It would hold approval power over Fink's bid to sell the city-owned Anchorage Telephone Utility.

Schroer's appointment was made without a formal announcement and while Sokolov was out of state on vacation. Sokolov was at the end of his 6-year term when he was re-appointed Oct. 31 by former Gov. Steve Cowper, six days before the Nov. 6 election.

Hickel won the election and took office Dec. 3. The Legislature, which convened Jan. 21, had not taken action on Sokolov's appointment. Hickel's boards and commissions director Don Tanner and the governor's deputy press secretary Ed Wicher did not return phone calls Friday on Schroer's appointment.

Rep. David Finkelstein, D-Anchorage, said he holds nothing against Schroer, but questions the nature of the appointment.

"The independence of agencies like this are in jeopardy," he said. Finkelstein chairs the House Labor and Commerce Committee, which would review APUC appointments.

"The whole idea is to have them not be on the side of the administration or the Legislature and have them be independent," Finkelstein said.

Schroer said Friday he heard Sokolov was to resign, although he could not remember who told him about a resignation.

Sokolov is expected to return from vacation Monday. APUC spokesman Ray Wipperman said Sokolov did not previously intend to resign.

Schroer, a former insurance industry lobbyist, said he did not expect trouble in the Legislature over his confirmation. He said it appears Hickel can remove Sokolov by making a new appointment.

"I understand until the Legislature acts on an appointment the governor can withdraw that," Schroer said. "Admittedly it's a different governor now."

Schroer cites six years on the state Real Estate Commission and his current seat on the Anchorage Water and Wastewater Advisory Commission as qualifications for the APUC job. Utilities commissioners are paid more than $69,000 per year.

Lawyers for the Legislature issued an opinion in December that said an APUC commissioner can be removed only for cause, or if lawmakers fail to confirm the appointment.

"It appears his appointment is binding upon the subsequent administration," wrote attorney Jerry Luckhaupt of the Legislative Affairs Agency Division of Legal Services.

Rep. Kay Brown, D-Anchorage, requested the opinion and said Hickel is overstepping his authority.

"I am concerned about the question of the separation of powers between the governor and the Legislature," Brown said. "I don't think the governor has the power to replace Commissioner Sokolov."

Hickel shifted Commissioner Mark Foster from a consumer chair to Sokolov's engineering seat to make room for Schroer. Foster is a civil engineer. Schroer does not have to be an engineer to sit on a consumer seat.

APUC Commissioner Susan Knowles said the move was unprecedented and may also require legislative review.

"Mark was confirmed as one of the consumer commissioners in early 1990," Knowles said. "How that move sits with the Legislature, I don't know," said Knowles, wife of gubernatorial candidate Tony Knowles.

Democratic Rep. Pat Parnell, a former Anchorage assemblyman, said he had no concerns about Schroer's relationship with Fink and how it may affect the ongoing debate over the proposed sale of the city's telephone utility.

"I imagine if the people were to approve that sale in a vote, the APUC would perform a perfunctory exercise in approving or disapproving it," Parnell said.

January 31, 1991

SENT VIA TELECOPIER

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

Dear Mr. Tanner:

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

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

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

Sincerely yours,

Peter Sokolov

THE FOLLOWING DOCUMENT(S)
MAY NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL

Albert MUNSON, Plaintiff, v. TERRITORY OF ALASKA; J. Gerald Williams, Attorney General for the Territory of Alaska; Hugh J. Wade, Treasurer of the Territory of Alaska; John A. McKinney, Director of Finance of the Territory of Alaska; Clarence L. Anderson, Director, Alaska Department of Fisheries; Nels Nelson, Member, Alaska Fisheries Board; Howard Wakefield, Member, Alaska Fisheries Board; Robert Kallenberg, Member, Alaska Fisheries Board; Kenneth D. Bell, Member, Alaska Fisheries Board; Ira A. Rothwell, Defendants.

Civ. No. A-11769.

District Court, Alaska. Third Division, Anchorage.

Dec. 28, 1956.

Action for a declaratory judgment determining right to office of plaintiff on the Alaska Fisheries Board. The District Court for the District of Alaska, McCarrey, J., held that plaintiff was entitled to a declaration that he was a duly appointed and qualified member of the Board.

Judgment for plaintiff.

1. Fish ⇐11

Where plaintiff, an appointee to the Alaska Fisheries Board, did not exhaust his administrative remedies for payment of his expenses while in attendance at the meetings of the Board of Fisheries, right to recover therefore would be summarily denied. 28 U.S.C.A. § 2201.

2. Statutes ⇐256

Where bill to provide procedural uniformity and appointments to certain territorial officers was passed by the Legislature on March 19, 1955 and was returned to the Legislature on March 29, 1955 without the Governor's signature, bill became a law at midnight on March 27, 1955. A.C.L.A.1949, § 4-3-3; Laws 1955, c. 64 and § 7; Laws 1949, c. 68.

3. Fish ⇐11

Where party was appointed to the Alaska Fisheries Board for a period of five years and though his term was to expire on March 31, 1955 he continued to hold office until a successor was appointed and duly qualified and under the statute the Governor had power to make an interim appointment which would be subject to confirmation by the Legislature at its next session. A.C.L.A.1949, § 4–3–3; Laws 1955, c. 64 and § 7; Laws 1949, c. 68.

4. Statutes ⇐188

A court must confine its interpretation of an act to the intent as expressed therein.

5. Fish ⇐11

Where a party was appointed to Fisheries Board March 29, 1950 for five years and on March 24, 1955 and while Legislature was in regular session, Governor reappointed party and Legislature adjourned on March 25, 1955 sine die without acting on Governor's request and no further action was taken silence and inaction of Legislature did not amount to a confirmation of appointment, and where Governor on August 1, 1955 appointed plaintiff on an interim status to take place of incumbent, plaintiff was entitled to the office. A.C.L.A.1949, §§ 4–3–3; Laws 1955, c. 64 and § 7; Laws 1949, c. 68; U.S.C.A.Const. art. 2, § 2, cl. 2; Laws 1955, c. 64, §§ 1, 4(c) (d, e).

Jack F. Scavenius, Anchorage, Alaska, for plaintiff.

J. Gerald Williams, Atty. Gen., for defendants.

Kay & Buckalew, Anchorage, Alaska, for defendant Rothwell.

McCARREY, District Judge.

This case was tried before the court under the Declaratory Judgment Act which has been extended to the Territory of Alaska. 28 U.S.C.A. § 2201.

One Ira A. Rothwell was appointed to the Alaska Fisheries Board March 29, 1950, for a period of five years. On March 24, 1955, and while the Twenty-second Territorial Legislature was in regular session, the Honorable B. Frank Heintzleman, Governor of the Territory of Alaska, submitted a letter for his reappointment to the legislature, as follows:

> "In accordance with the provisions of chapter 68, Session Laws of Alaska 1949, I submit herewith for confirmation by a majority of all the members of the Senate and House of Representatives in joint session assembled, the name of Mr. Ira Rothwell of Cordova, Alaska, for appointment to the Alaska Fisheries Board for the term ending March 31, 1960."

The legislature adjourned on March 25, 1955, sine die, without acting upon this request and no further action was taken in its extraordinary session, which followed the regular session. The governor took no further action in regard to his appointment. Nevertheless, Mr. Rothwell continued to serve as a member of the board beyond the five years of the original appointment without taking another oath of office or receiving a new certificate.

By letter dated August 1, 1955, the Governor of Alaska appointed the plaintiff, Albert Munson, on an interim status, to take the place of Mr. Rothwell. On August 5, 1955, the plaintiff executed the oath of office and received a certificate of his appointment.

The Alaska Fisheries Board, in preparation for a meeting which was called for November 7, 1955, through its then director, Clarence L. Anderson, sent notices of said meeting to all members of the Alaska Fisheries Board, including Ira A. Rothwell, but failed to send a notice to the plaintiff, Albert Munson.

Mr. Munson, nevertheless, flew to Juneau and attended all meetings of the board but was refused his seat by the

other members of the board. Thereafter he submitted vouchers to the Director of Finance, as provided by law, § 12–3–1, A.C.L.A.1949 and S.L.A.1955, c. 82, who disapproved the same. Mr. Rothwell submitted his vouchers and they were paid by the Director of Finance.

The plaintiff prayed for

> "* * * a judgment decreeing, determining and declaring that this plaintiff is a duly-appointed and qualified member of the Alaska Fisheries Board and that said plaintiff is entitled to pay any remuneration for his attendance at the meetings of said board and for his attendance at such future meetings as the board may hold.
>
> "Plaintiff further prays * * * a judgment decreeing, determining and declaring that defendant Ira A. Rothwell is not a duly-appointed and qualified member of the Alaska Fisheries Board and is not entitled to any remuneration or payment for any meetings of said board which he may attend. * * *"

[1] As heretofore announced from the bench, I am of the opinion that the plaintiff did not exhaust his administrative remedies for the payment of his expenses while in attendance at the meetings of the Board of Fisheries, thus such relief is hereby summarily denied.

Pursuant to the provisions of S.L.A.1949, c. 68, sec. 3(a), the "* * * confirmation by a majority of all of the members of the Senate and House of Representatives in joint session assembled * * *" was necessary to the plaintiff's appointment.

[2] On March 19, 1955, an act was passed entitled House Bill No. 156, characterized as follows:

> "An act to provide procedural uniformity in the appointments of certain Territorial Administrative and Executive officers, and certain members

> of Territorial boards, commissions, authorities, councils, and committees; prescribing an additional qualification for appointments; repealing prior inconsistent Acts; and declaring an emergency."

This bill was returned to the legislature on March 29, 1955, without the Governor's signature. Accordingly, this act became law at midnight on March 22, 1955. Section 4–3–3, A.C.L.A.1949 and sec. 7 of the act. This statute was in effect at the time the Governor submitted the name of Ira Rothwell to the legislature. This act, S.L.A.1955, c. 64, will hereinafter be referred to as the 1955 act.

[3] Under the provisions of the act of 1949 supra, though Mr. Rothwell's term was to expire on March 31, 1955, he continued to hold office until his successor was "* * * appointed and duly qualified". The Governor had power under this act to make an interim appointment which would be subject to the confirmation by the legislature at its next session.

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

[4] The question of case law on this subject has been briefed and argued at considerable length by the parties. It is the position of the defendant that the cases cited concerning the right to public office upon appointment and difference in wording between the statutes involved in those confirmation are not applicable in this case because of the cases and the 1955 act. A cursory comparison readily confirms this position. It is doubtful that one could find another statute with so much ambiguity and inconsistency as this one. The specific purpose of the legislators in enacting this particular act rests in the realm of conjecture, but this court must confine its opinion to their intent as expressed in the act.

Statutes requiring the action of two authorities in the completion of appointment are certainly nothing new. Article 2, sec. 2, cla...e 2 of the Constitution, provides that the consent of the Senate is necessary for appointment to certain federal offices. Justice Marshall, speaking for the Supreme Court in Marbury v. Madison, 1803, 1 Cranch 137, 2 L.Ed. 60, 5 U.S. 137, interpreted this power of appointment to consist of three acts—first, the nomination by the executive; second, the appointment by the executive by concurrence of the Senate; third, the ministerial act of certifying the appointee. He states 5 U.S. at page 156:

> "The last act to be done by the president is the signing of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed."

This would seem to establish a rule that there is no "appointment" within the meaning of vesting final title to the office until acted upon affirmatively by the legislative branch of the government. Justice Marshall states that until the legislature acts, the president is free to choose whom he will.

By the terms of the 1955 act, sec. 4(c), the legislature is required to act on the appointment within three days from the date the governor submits the name of the prospective appointee. Interpreting a similar statute in 1946, the Connecticut Supreme Court in State ex rel. McCarthy v. Watson, 132 Conn. 518, 45 A.2d 716, 724, 164 A.L.R. 1238, faced a similar situation. Quo warranto proceedings were brought by an office holder to try title to his office. His term had expired but by provisions similar to those contained in S.L.A.1949, c. 68, he continued to hold office until a successor was appointed and had qualified. The defendant had been chosen by the governor of the state to

succeed the plaintiff. The defendant's name had been submitted to the legislature prior to the expiration of the plaintiff's term in office. Contrary to the express provisions of the applicable act which provided that the legislature must act on the name submitted by the governor, the legislature voted not to consider the appointment. After the legislature adjourned the governor appointed the defendant to the position held by the plaintiff. The defendant argued as the defendant does in this case that the inaction of the legislature amounted to tacit confirmation. The Connecticut court said "* * * in acting upon an appointment, it [the legislature] is not exercising a prerogative granted it in its own interest or that of its members; *there can be no waiver of that duty so that inaction would be the equivalent of a tacit approval of an appointment*". (Emphasis supplied.) The defendant's appointment was judicially determined invalid.

In Bell v. Sampson, 1930, 232 Ky. 376, 23 S.W.2d 575, 581, the Kentucky court interpreted a statute strikingly similar to the 1949 Fisheries Act. In that case the plaintiffs had been "appointed" by the governor to the state textbook commission in the interim between sessions of the legislature. The legislature met in 1928 and failed to act on the proposed appointments. A new governor had taken office in the meantime and at the adjournment of the legislature "appointed" a new set of members to the commission. The plaintiffs sought injunctive relief to restrain these appointees and the governor from acting upon the appointments. The court found in favor of the defendants. The court ruled that laws requiring bilateral appointments are mandatory and in the interest of the public, that to allow inaction to substitute for confirmation would void the beneficial effects of this type of legislation.

> "* * * as no vote was ever taken in the Senate upon the appointments of Governor Fields [the plaintiffs], its nonaction as to such appointments cannot be * * * 'a confirmation of them."

Further,

> "It would hardly be contended that if the Senate had, by vote taken, rejected the appointments of the Governor, then the right of the Governor to make other appointments could be questioned. And as the nonaction of the Senate is just such a rejection as an actual vote of rejection would have been, it follows that the power of the Governor to make other appointments is as comprehensive as it would have been after an actual vote of rejection." 23 S.W.2d at page 583, cited p. 4, plaintiff's brief.

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

If the legislature is in session at the time of the appointment, though a vacancy in the office may exist, the authorities frequently hold the appointee has no right to the office until confirmation. McBride v. Osborn, 1942, 59 Ariz. 321, 127 P.2d 134; State ex rel. Gibbs v. Rogers, 1940, 141 Fla. 237, 193 So. 435; Sims v. Tucker, 1941, 191 Ga. 676, 13 S.E.2d 773; Hockman v. Tucker County Court, 1953, 138 W.Va. 132, 75 S.E.2d 82.

> "* * * appointment is not complete until confirmed by the members of the legislature as in the Act provided."

Lockwood v. Jordan, 1951, 72 Ariz. 77, 231 P.2d 428, 434.

The net effect of the governor's appointment when the legislature is in session is merely "nomination". McBride v. Osborn, supra; McChesney v. Sampson, 1930, 232 Ky. 395, 23 S.W.2d 584, 587; McCall v. Cull, 1938, 51 Ariz. 327, 75 P.2d 696.

Section 1 of the 1955 act declares it to be the intention of the legislature to achieve "* * * *the elimination,* insofar as possible, *of recess or interim appointments* except in the event of death, resignation, inability to act or other removal from office and the *exercise,* insofar as possible, *of such appointee powers only at such times as the Legislature is in session* duly assembled." (Emphasis supplied.) This expressed intention is certainly repugnant to tacit confirmation.

Section 4(c) contains language imposing a direct mandate upon the legislature to act upon the "nominations" of the governor.

> "Whenever appointments are presented to the Legislature for confirmation, *the Legislature shall,* in joint session assembled, *act* thereon within three days following receipt of the names so presented, *by confirming or declining to confirm by a majority vote* of all of the members thereof the appointments so made and presented;" (Emphasis supplied.)

The meaning of the phrase "by confirming or declining to confirm by a majority vote" is not easily determined. Literal interpretation would seem to demand that the legislature, acting on a motion for confirmation, should first vote on the question whether to confirm, and should the motion fail, again vote on the question of declining to confirm. Defendants argue that this is the proper construction. I am unable to attribute such an unreasonable intent to the territorial legislature. The question of confirmation is determined at the first vote; it would be ludicrous to require a second vote. By this reasoning, defendants' argument that the statute demands affirmative rejection falls.

Section 4(d) of the 1955 act provides in part:

> *"If the name of any person has been submitted and has not been confirmed, the appointing authority shall not, upon re-submission of appointments* as required by this Act, *submit again the*

> *name of the person not confirmed* for the same 'position or membership' during that session of the Legislature;"

This language would certainly tend to negate any argument of tacit confirmation. The legislature indicated that if they fail to confirm the "nominee" he is ineligible to hold the position. It is difficult to see how they could be more explicit in indicating their own interpretation of the importance of confirmation.

Section 4(e) throws more ambiguity into the picture.

> "*Pending confirmation or rejection* of appointment by the Legislature, persons so appointed shall exercise all of the functions, have all of the powers and be charged with all of the duties by law prescribed for such appointive 'positions or memberships'." (Emphasis supplied.)

Literal interpretation of this subsection again would be risible. If applied to any but interim appointments, the appointee would in effect be holding the same office as the encumbent, assuming, of course, that the new appointee is a different person. Again I am unable to attribute this intent to the legislature. The apparent purpose of sec. 4(e) is to vest authority in necessary interim appointees and therefore could not be applied in this case because the legislature was in session at the time the reappointment of Rothwell was submitted.

The reason for dual consideration of prospective office holders is the benefit of the considered opinion of the legislators to avoid the possibility of incompetency and injury to the public which may otherwise be perpetrated. The basis is not one merely of giving the public a "veto power", lost by inaction, but is rather an affirmative duty of the legislature.

Inarticulated confirmation by the failure of the legislature to act is something foreign to the whole concept of division of powers embodied in the Constitution. There

are, of course, situations when unilateral appointments are unavoidable. The territorial legislature in the 1955 act declares its intent to avoid these appointments whenever possible. It cannot be said that such an intent is compatible with the concept of tacit confirmation sought to be enforced upon us. In view of this consideration, the only alternative left to this court is to rule that the failure of the legislature to act on Mr. Rothwell's "appointment" is, in effect, rejection. To rule otherwise would place this court out of the general line of authority and against the specific declared intent of the legislature.

[5] I therefore hold that the plaintiff is entitled to a judgment decreeing and declaring him to be the duly appointed and qualified member of the Alaska Fisheries Board as was heretofore announced orally in open court.

CITY OF FAIRBANKS, Plaintiff, v. George GILBERTSON, Defendant.

No. 9210.

District Court, Alaska. Fourth Division, Fairbanks.

Jan. 4, 1957.

Action by city to recover for utility services rendered by plaintiff to defendant, wherein defendant filed counterclaim for loss of hotel and contents destroyed by fire. On plaintiff's motion to dismiss counterclaim, the District Court, Hodge, J., held that furnishing electric power for operation of pumps which supplied water to fight fire was a governmental function of city, and that hence city was not liable in damages for destruction of hotel and contents by fire on theory that after fire had been brought under control and confined to a small portion of building by fire

6. States ⇐46—Statutory requirement that Senate shall take action on Governor's appointment at first session thereafter is mandatory (Ky. St. § 3750).

Under Ky. St. § 3750, requirement that Senate shall take action on appointment to office by Governor at first session after appointment is mandatory.

7. Schools and school districts ⇐47—Failure of Senate to act on Governor's appointment to text-book commission at first session thereafter did not amount to confirmation of appointment (Ky. St. § 3750).

Under Ky. St. § 3750, providing that appointee to office by Governor shall hold office subject to advice and consent of Senate, required to take action on appointment at first session held thereafter, failure by Senate to act on appointment by Governor to state text-book commission created by Acts 1926, c. 77, § 1, did not amount to confirmation of appointment.

8. States ⇐46—Senate is charged with notice of contents of Executive Journal containing appointments by Governor, and may confirm or reject appointments without communication from Governor (Acts 1926, c. 77, § 1; Const. § 91).

Where appointments by Governor to state text-book commission created by Acts 1926, c. 77, § 1, were duly entered on Executive Journals, as required by Const. § 91, Senate was charged with notice of its contents and could on own initiative, without any executive communication from Governor, conduct investigation of recess appointments made by Governor and confirm or reject them.

9. Schools and school districts ⇐47—Appointments to text-book commission, not confirmed by Senate at first session thereafter, expired with adjournment of Senate, creating vacancy which Governor could fill (Acts 1926, c. 77, § 1; Ky. St. § 3750).

Under Ky. St. § 3750, requiring Senate to confirm appointments by Governor at first session thereafter, appointments by Governor to state text-book commission created by Acts 1926, c. 77, § 1, not confirmed by Senate at first session thereafter, expired with adjournment of Senate, and though appointees may hold over until successors are appointed and qualified, under terms of statute, vacancy was created which Governor could fill.

10. Schools and school districts ⇐47—Nonaction by Senate could not be considered confirmation of appointments to text-book commission, where Senate took no vote (Acts 1926, c. 77, § 1; Ky. St. § 3750).

Where no vote was taken by the Senate on question of confirmation of appointments to state text-book commission, under Acts 1926, c. 77, § 1, nonaction by Senate could not be considered confirmation required by Ky. St. § 3750, under rule that voters absenting themselves or abstaining from voting are considered as acquiescing in result declared by majority of those actually voting, which rule is applicable only when election is held and every one entitled to vote had opportunity to vote.

11. Schools and school districts ⇐47—Governor held not prevented from removing appointees to state text-book commission, after Senate's failure to confirm, because not having power of removal between appointment and confirmation (Acts 1926, c. 77, § 1; Ky. St. § 3750).

Where Senate failed to confirm appointments of Governor to state text-book commission created by Acts 1926, c. 77, § 1, at first session after appointment, as required by Ky. St. § 3750, fact that Governor does not have arbitrary power of removal between time of appointment and confirmation by Senate under Ky. St. § 3750, did not prevent Governor from making appointment between adjournment of Senate after appointment and expiration of term.

12. States ⇐46—Governor's power to make other appointments, after vacancy created by Senate's failure to act on appointments, is as comprehensive as though Senate actually rejected appointments (Acts 1926, c. 77, § 1; Ky. St. § 3750).

Where Senate failed to act on appointments by Governor to state text-book commission created by Acts 1926, c. 77, § 1, as required by Ky. St. § 3750, power of Governor to make other appointments for vacancies created by nonaction of Senate was as comprehensive as it would have been after actual vote of rejection by Senate.

13. Schools and school districts ⇐47—Two-year appointment to state text-book commission commenced on date specified in act, though act did not go into effect until three months thereafter (Acts 1926, c. 77, § 1).

Under Acts 1926, c. 77, § 1, providing for appointments of members of state text-book commission in April, 1926, for terms of four and two years, fact that Governor could not appoint members in April, because act did not take effect until June, did not show intention to make term expire two and four years from time of appointment, but two-year appointment first made could not extend beyond April, 1928.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Suit for injunction by W. C. Bell and others against Hon. Flem D. Sampson and others, in which defendants filed a counterclaim. A temporary injunction was granted in part against both parties. On motion by both parties to dissolve injunction in part and grant injunction in part, motion of plaintiffs was overruled and motion of defendants was sustained, and final judgment was entered in accordance therewith, and plaintiffs appeal. Affirmed.

See also 23 S.W.(2d) 584, 588.

John Marshall, Jr., and Woodward, Hamilton & Hobson, all of Louisville, for appellants.

Arthur B. Bensinger and Herman G. Handmaker, both of Louisville, B. J. Bethurum, of Somerset, and J. C. Bird, of Frankfort, for appellees.

DIETZMAN, J. By chapter 77 of the Acts of 1926, a state text-book commission was created. Section 1 of that act provides:

"There is hereby created a State Text Book Commission which shall consist of twelve members, two of whom shall be ex officio members, namely, the Governor of the Commonwealth, and the State Superintendent of Public Instruction, and ten of whom shall be appointed by the Governor at such time or times and in the manner hereinafter provided.

"All members first appointed under this act shall be appointed during the month of April, 1926. Five of the members so appointed shall serve for two years, and five for four years from and after their appointment, and until their successors are appointed and qualified, the terms of the respective members to be designated in their appointment. Upon the expiration of the term for which each of said members is appointed, his successor shall be appointed for a period of four years. Thereafter, the terms of each and all appointive members shall in like manner be for a period of four years and the appointments shall be so made that the terms of five members expire every two years, thus providing for a continuous commission having thereon at each adoption of books a majority of experienced members. All vacancies on said commission shall be filled for the unexpired term in the same manner as original membership is determined."

We are informed that, as originally prepared, this act carried an emergency clause. However, as passed, it did not contain such a clause, and hence did not become effective until in June of that year. On April 28, 1927, the Honorable W. J. Fields, then Governor of Kentucky, appointed as members of this state text-book commission Frank L. McVey, R. A. Edwards, Wm. Pearce, H. T. Peters, L. H. Powell, P. H. Hopkins, B. W. Hartley, H. C. Burnett, R. W. Kincaid, and Mrs. Pearl Hindman Harris, for a term of four years each from that date. All of these appointees, with the exception of Dr. McVey, who is not involved in this litigation, and Wm. Pearce and Mrs. Harris, who declined to join in the bringing of this suit, are parties plaintiff. On December 12, 1927, Governor Fields, having been informed that five of his appointments should have and could only have been made for a term of two years, revoked the appointment of R. A. Edwards, H. W. Peters, P. H. Hopkins, H. C. Burnett, and P. H. Harris for the four-year terms, and reappointed them for a term of two years each from April 28, 1927. These appointments of the Governor were duly entered on the Executive Journal, by the secretary of state, pursuant to section 91 of the Constitution, which, among other things, provides as to the duties of the secretary of state:

"The secretary of state shall keep a fair register of and attest all the official acts of the governor, and shall, when required, lay the same and all papers, minutes and vouchers relative thereto before either house of the general assembly."

The 1928 session of the General Assembly passed without any action on its part concerning these appointments of Governor Fields. On September 12, 1928, the Honorable Flem D. Sampson, then and now the Governor of this commonwealth, revoked these appointments of Governor Fields, and in lieu thereof appointed Dr. Frank L. McVey and the defendants, Samuel Walker, L. B. Stephen, K. R. Cummins, and Miss Delphia Evans, as members of this state text-book commission, for a term of four years each from April, 1928, and John H. Pickett, Henry O. Gray, Frank V. McChesney, Robt. J. Nickel and W. R. McCoy as such members for a term of two years each from April, 1928. Thereupon the plaintiffs brought this suit to enjoin the defendants from undertaking to act as the state text-book commission and from in any wise interfering with the plaintiffs while acting as such commission. The defendants counterclaimed, asking like relief against the plaintiffs. As Dr. McVey, an appointee of Governor Fields, had been reappointed by Governor Sampson, no relief was asked by either side as to him. On motion by both sides for a temporary injunction, the chancellor being of the opinion that the terms of office of the two-year appointees of Governor Fields had expired in April, 1928, and that therefore there was a vacancy as to them which Governor Sampson had a right to fill, refused to enjoin the four-year appointees of Governor Sampson; but, being also of the opinion that the four-year appointments of Governor Fields had not yet expired, he did enjoin the two-year appointees of Governor Sampson. Per contra, he enjoined the two-year appointees of Governor Fields and declined to enjoin his four-year appointees

Thereupon, pursuant to section 296 of the Civil Code of Practice the defendants moved one of the judges of this court to dissolve the injunction granted against the two-year appointees of Governor Sampson and to grant the injunction refused against the four-year appointees of Governor Fields. The plaintiffs made a like motion as to the two-year appointees of Governor Fields and the four-year appointees of Governor Sampson. In an order concurred in by the whole court, the motion of the plaintiffs was overruled, while that of the defendants was sustained. On the return of the case to the lower court, a final judgment was entered in accordance with the order last mentioned, and from this judgment, the defendants have appealed.

We are confronted at the outset with the question whether or not appointments to the

state text-book commission as provided for by the act creating that body, are subject to confirmation by the Senate. Although we have no general constitutional provision providing for confirmation by the Senate of executive appointments we do have a statute which, in part, reads:

"Unless otherwise provided, all persons appointed to an office by the governor, whether to fill a vacancy, or as an original appointment, shall hold office, subject to the advice and consent of the senate, which body shall take appropriate action upon such appointments at its first session held thereafter." Ky. St. § 3750.

In the case of Sewell v. Bennett, 187 Ky. 626, 220 S. W. 517, 520, we had before us the question of the application of this section of the Statutes to the appointments of members of the Workmen's Compensation Board. The Workmen's Compensation Act was passed by the 1916 session of the Legislature. So far as the appointments to the Compensation Board were concerned, it became effective by its terms in April of that year. Chapter 33, Acts of 1916, § 81. The act provided for the appointment of three members to the Compensation Board, and the question was whether such appointments had to be confirmed by the Senate pursuant to section 3750 of the Statutes or not. In holding that they did, we said:

"It was manifestly the purpose of the Legislature in adopting the sections in this chapter to make provision for omissions and deficiencies in special acts, of which there are great numbers, creating offices and officers, and that the Legislature had the power except in so far as it was restrained by the Constitution, to enact these general provisions relating to offices and officers, will not be controverted, nor will it be disputed that these general provisions, in so far as applicable and not in conflict with the provisions of the legislative acts creating offices and officers, are to be read in connection with and as a part of such acts. * * *

"With this understanding of its purpose and effect, I come now to consider whether section 3750 should be read into and considered as a part of the sections of the Workmen's Compensation Act relating to members of the board; and it will be at once seen that this is the principal question in the case, because, if section 3750 has no application to members of the board, then neither Gov. Morrow nor the Senate, acting separately or in concert, had the power to remove either Allington or Sewell during the terms for which they were appointed except for cause. On the other hand, if this section is to be read into and as a part of the related sections of the Compensation Act, Bennett and Levi are entitled to the offices.

"It will readily be seen, and indeed is not questioned, that there is no apparent conflict on the face of the Statute between section 4920 of the Compensation Act and section 3750. Section 4920 merely provides that the board shall be 'appointed by the Governor,' while section 3750 simply stipulates that, unless it is 'otherwise provided' all persons appointed to an office by the Governor shall hold it subject to the advice and consent of the Senate. This section does not in any manner interfere with the power of the Governor to appoint. It merely provides that, when he does appoint, his appointment shall be subject to the approval of the Senate. It only adds to or supplements the provisions of the Compensation Act by declaring that the appointments made by the Governor must be submitted by him to the Senate for its approval or rejection. * * *

"Section 3750, in simple and unmistakable language declares that: 'Unless otherwise provided, all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment, shall hold the office subject to the advice and consent of the Senate.'

"Now what do the words 'Unless otherwise provided' mean in connection with the point under consideration? These words are in common and general use, have no technical meaning, and should be given that construction that will carry out their purpose according to their commonly understood usage. The word 'otherwise' is, of course, the controlling word in this group of words, and, as defined by Webster, 'otherwise' means 'in a different manner; in another way; or in other ways, contrarily; another way or manner;' and it is according to these definitions that the word 'otherwise' is commonly used and understood.

"It is further plain that the words 'unless otherwise provided' have reference to something that follows the appointment by the Governor, and unless the act creating the office makes some provision whereby the appointment shall be subject to the advice and consent of some other person or body, or provides that the appointment shall not be subject to the advice and consent of any other person or body, it cannot be said that the act has 'otherwise' provided that the appointment shall not be made subject to the advice and consent of the Senate.

"Clearly the mere failure of the act to make any provision whatever concerning the approval or rejection of the appointment after it has been made is not either in spirit or in substance a provision that the appointment shall not be subject to the advice and consent of the Senate. In order to defeat the meaning and purpose of this last sentence in section 3750, the act creating the office must in terms or in substance make some provision contrary to the meaning and effect of the sentence, and this the Legislature could easily have done if it had wanted to by providing

that the appointment should not be subject to the advice and consent of the Senate, or that the appointment should be approved in some other manner or way.

"It is further insisted that the words, 'Unless otherwise provided, all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment, shall hold office, subject to the advice and consent of the Senate, which body shall take appropriate action upon such appointments at its first session held thereafter,' were intended to apply only to officers who were appointed by the Governor by and with the advice and consent of the Senate.

"In other words, the argument is that, when the act creating an office and officer provides that the officer shall be appointed by the Governor by and with the advice and consent of the Senate, but makes no provision for filling vacancies by and with the advice and consent of the Senate, the quoted words should be read into and as a part of the act, and accordingly vacancy appointments in such an act must be submitted to the Senate as the original appointments are required to be. This argument, of course, assumes that original appointments to the Compensation Board are not subject to the advice and consent of the Senate, and if this were so neither would vacancy appointments be subject to the advice and consent of the Senate. But having, as heretofore stated, reached the conclusion that original appointments under this act must be submitted to the Senate for its advice and consent, it necessarily follows, if the last sentence in section 3750 is to be given any effect, that vacancy appointments must also be submitted to the Senate.

"This last sentence is well written and its meaning expressed in simple and easily understood words. It refers as plainly as language can make it to 'all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment,' and declares that all persons so appointed 'shall hold office, subject to the advice and consent of the Senate, which body shall take appropriate action upon such appointment at its first session held thereafter.' There is no limitation or restriction in this sentence. It is as broad as it could be phrased, and covers every vacancy and every original appointment, unless 'otherwise provided' in the act, creating the office and officer."

Applying the holding and the reasoning of the Sewell Case to the instant one, we find that the act creating the state text-book commission does not in terms exempt the appointments to that commission from the necessity of confirmation by the Senate. This much is conceded. But it is insisted that the act "in substance" does effect such exemption, and that under the Sewell Case, if this be true, confirmation by the Senate is unnecessary. Although, as the Sewell Case pointed out, the mere failure of an act to make any provision whatever concerning the approval or rejection of an appointment after it has been made is neither in spirit *nor in substance* a provision that the appointment shall not be subject to the advice and consent of the Senate, it is argued that we have here more than such "mere failure," in that the section creating the text-book commission itself states that its purpose is to provide for a continuous commission having at each adoption of books a majority of experienced members, which could hardly be accomplished if appointments required to be made almost two years in advance of the meeting of the Senate should be rejected by it when it did meet, and, further, in that the first adoption of text-books, taking place in January, 1929, would be past, and one-half of the work of the 1928 appointees completed, before their appointments could be confirmed. In other words, the test urged by the appellants is the assumed intention of the Legislature, arrived at by the supposed practical working of the act. That the Sewell Case never meant such a test, when it used the language that an act creating an office must in terms or *in substance* exempt the appointment to such office from the provision of section 3750 of the Statutes in order to obviate the necessity of a confirmation by the Senate, is clear to us. The Sewell Case meant by the use of the term "in substance" just what it said earlier in the opinion:

"Unless the act creating the office makes some provision whereby the appointment shall be subject to the advice and consent of some other person or body, or provides that the appointment shall not be subject to the advice and consent of any other person or body, it cannot be said that the act has 'otherwise' provided that the appointment shall not be made subject to the advice and consent of the Senate."

And again, after using the expression "in substance" now seized upon:

"In order to defeat the meaning and purpose of this last sentence in section 3750, the act creating the office must in terms or in substance make some provision contrary to the meaning and effect of the sentence, and this the Legislature could easily have done if it had wanted to *by providing that the appointment should not be subject to the advice and consent of the Senate, or that the appointment should be approved in some other manner or way.*" (Italics ours.)

[1] To adopt the test advanced by the appellants would defeat the operation of section 3750 of the Statutes in most instances. The fact that the appointments to the state text-book commission are to be made after the adjournment of the Legislature is not at all indicative of the legislative intent concerning the requirement of confirmation by

the Senate. Almost, if not all, of the offices to be filled by the Governor's appointment have their terms beginning after the adjournment of the Senate. That was true of the Compensation Board. The appointments to that board were to be made in April following the adjournment of the Senate, just as these to the text-book commission were to be made in April also following the adjournment of the Senate. The appointments to neither the Compensation Board nor the text-book commission could be confirmed until almost two years after they had been made, unless, perchance, a special session of the Senate were called in the meantime. Further, the vast majorities of vacancies in office filled by appointment by the Governor occur when the Senate is not in session, and yet the Sewell Case holds that appointments to fill such vacancies are subject to confirmation by the Senate. To hold that the fact that the filling of an office is to take place during the recess of the Senate is indicative of a legislative intent to exempt such appointment from the necessity of confirmation by the Senate, would, in the light of what we have said about the beginning of the terms of most of our offices, amount to a practical repeal of section 3750 of the Statutes. We do not think the Legislature ever contemplated such a result.

[2] Nor does the fact that section 1 of the act stated that its purpose was to provide for a continuous body composed of a majority of experienced members lead to a different conclusion. Such, in reality, is the purpose of the Legislature with regard to most of the boards it creates, with the terms of office of the members expiring at different times. Such a provision, as in the case of the Compensation Board, indicates a purpose of having on such board a majority acquainted with the duties and responsibilities of the office. Yet this was not considered in the Sewell Case as affecting the necessity of confirmation by the Senate. The provision in the act under discussion for a continuous body of experienced members was only a reason advanced by the Legislature for the making of the terms of the members to expire at different times. The reason would have been just as clearly understood had it not been expressed. Further, the very operation of the act defeats in a measure this expressed purpose or hope, for in those years when a new Governor and new superintendent of public instruction come into office, they, together with the five members to be appointed the following April, will compose a majority of the board to select in October following the text-books, a state of case affording an opportunity for a majority of the commission to be composed of inexperienced members. We might also take into account the possibilities of death, resignation, or removal for cause.

[3, 4] We are therefore brought to the conclusion that the test urged by the appellants is not the true one to use, and that to exempt from the operation of section 3750 of the Statutes an appointment by the Governor to an office created by a statute, such statute must do so in terms or in substance by providing for approval in some other manner or way than by the Senate. As the act under discussion did not do this, it follows that the appointments therein provided are subject to confirmation by the Senate.

[5, 6] What effect did the failure of the Senate at its 1928 session to act on the appointments of Governor Fields have upon such appointments? Referring again to section 3750 of the Statutes, we find the provision that, unless otherwise provided, persons appointed to office by the Governor shall hold their offices subject to the advice and consent of the Senate, which body shall take appropriate action upon their appointments at its first session held thereafter. It was plainly the purpose of the Legislature to provide by this section that, unless otherwise provided, the title to office of one appointed to such office by the Governor finally vests in the appointee when his appointment has been confirmed by the Senate. The statute makes it the duty of the Senate to take action upon all such appointments at its first session held thereafter. As the Legislature was unwilling, unless it otherwise provided, to vest the appointments to office in the Governor except with the advice and consent of the Senate, it follows that the requirement that the Senate shall take action at its first session after the appointments is mandatory; otherwise the legislative purpose would be defeated. Wisely or not, it was unwilling to vest such appointments finally to the unfettered discretion and judgment of the Governor. His appointees were to hold office subject to the advice and consent of the Senate. And this body was to take action at its first session held after the appointments. Unless it did so act at such session, inasmuch as our Senate convenes in regular session only biennially, the terms of office of the appointees of the Governor would, in most instances, be practically over before the Senate could take appropriate action. Thus the Governor would be free from the supervisory control over his appointments which the statute designed there should be. Keeping in mind the object sought to be accomplished and the fact that the authority conferred upon the Senate was one concerning the public interest and that to ignore the provision of the statute would be to defeat its purpose, we are convinced that the provision for action at the first session held after appointments is mandatory. Cf. McCreary v. Speer, 156 Ky. 783, 162 S. W. 99; Wait v. Southern Oil & Tar Co., 209 Ky. 682, 273 S. W. 473; 25 R. C. L. 770. This being true, what effect does its

nonaction have? It certainly cannot be construed as a confirmation. In Morgan v. Champion, 150 Ky. 396, 150 S. W. 517, 518, the office of county road engineer was involved. The statute provided for his appointment by the county judge "by and with the consent of the fiscal court." The county judge made the appointment. The orders of the fiscal court showed that the county judge reported his action to that court, and that two of the members of the court voted to ratify the appointment; the other four members not voting. The record did not show that they had been given an opportunity to vote. Invoking the general rule that, where a vote is being taken, those who are present and refuse to vote are taken as voting affirmatively, the appointee of the county judge endeavored to establish his title to the office. In denying his contention, we said:

"The distinction between consent as some active propulsion or expression of the mind, and mere acquiescence as a nonactive immobile condition, is drawn in the case of Plummer v. Commonwealth, 1 Bush, 76. Consent was said to be an 'agreement of the mind to what is proposed or stated by another,' and that the mere standing by without volition, the mere acquiescence, was not a consent in the way of participation. In the case of Aull v. Columbia, etc., R. Co., 42 S. C. 431, 20 S. E. 302, it was held that consent implies some positive action as distinguished from a permission manifested by mere passivity. In Cocke v. Gooch, 5 Heisk. (Tenn.) 294, it was said that consent 'cannot be substituted for by a passive acquiescence.' In True v. Commonwealth, 90 Ky. 651, 14 S. W. 684, 12 Ky. Law Rep. 594, an instruction against an accomplice in a murder was held bad because the consent demanded by the instruction was that of offering no resistance to the crime without the slightest contribution to it by the accomplice's own will. In State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519, it was held that a submissive mind did not necessarily involve a consenting mind. In Philomath College v. Wyatt, 27 Or. 390, 31 P. 206, 37 P. 1022, 26 L. R. A. 68, it was held that in respect to suffrage consent meant the active concurrence of the voters, and not a passive acquiescence. In Crabb's Synonyms, the philologist, in differentiating to consent, to permit, and to allow, says that a consent is 'an express sanction to the conduct of others.'

"In Kentucky the rule is that, when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting. Montgomery County Fiscal Court v. Trimble, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738, 20 Ky. Law Rep. 827. But in that case, as in the Ray Case [140 Ky. 800, 131 S. W. 1039], the record disclosed that an election was held and every one entitled to vote had his opportunity to vote to say yes or to say no. Silence, passivity or acquiescence, therefore, in accord with the foregoing cases, cannot, in the case at bar, be said to be an affirmative consent, in the absence of any demonstrated opportunity to vote denying consent."

[7] In the instant case, as no vote was ever taken in the Senate upon the appointments of Governor Fields, its nonaction as to such appointments cannot be, in the light of the Morgan Case, a confirmation of them.

[8] The Senate had the right at all times, had it so desired, to take up for action these appointments of Governor Fields. They had been duly entered upon the Executive Journal as section 91 of the Constitution, to which we have referred, requires. This journal was subject at all times to inspection by the Senate. It had under the Constitution the right to call for it. It was charged with notice of its contents. The Senate did not have to wait for the Governor to submit it these appointments of Governor Fields, but could on its own initiative, without any executive communication from the Governor, institute and conduct investigation of recess appointments made by him and confirm or reject them. It was so held in the cases of Barrett v. Duff, 114 Kan. 220, 217 P. 918, 925, and People v. Shawver, 30 Wyo. 366, 222 P. 11, 23. In the latter case is a valuable discussion pointing out the difference between the power of the Wyoming Senate and the United States Senate in this regard, turning on the fact that, under the Federal Constitution, the President nominates appointees to office, whereas under the Wyoming law, the Governor appoints to office. On this point, the Wyoming court said:

"Notwithstanding the very infrequent use in our statutes of the word 'nominate' when directing an appointment by the Governor, with the consent of or to be confirmed by the Senate, a reference to the published legislative journals coming under our observation has disclosed the fact that the several Governors for at least 20 years have been in the habit of using a form of communication stating that the Governor nominates for the described office and term, and requesting the consent or confirmation of the Senate. That custom has no doubt resulted from using as a model the phraseology of presidential communications to the Senate of the United States submitting official nominations to that body. The use of the word in the case of federal appointments is proper to comply with the provision of the Constitution of the United States providing that the President shall 'nominate' and by and with the advice and consent of the Senate shall appoint. Said executive custom in this state, however, is not sufficiently potent, in our opinion, to require or justify the court, in determining the right of the Sen-