

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7492 SENATE LABOR & COMMERCE

February 26, 1991


Drue -

APUC

I spoke with Nancy Quinto. The Senate never received a letter from Cowper submitting Sokolov's name for confirmation. They did however receive a roster indicating that Sokolov was serving as chair and his term dates.

I mentioned to Halford's office that we would like to hold a joint hearing on Schroer. They seemed amenable and we will schedule a mutual date when Doug Bailey returns to Juneau.

I am working with Pouchot's office to determine what they have found out about the process. (They have spent a lot of effort on the topic.)

TO: Drue
FROM: Rod 
Date: January 25, 1991
RE: APUC Appointment

Attached is article and opinions from Legislative Counsel and the Attorney General's Office.

What it boils down to is the Governor appointed Schroer and withdrew Sokolov. The controversy centers around whether Cowper's actions before leaving office amounted to an appointment or a nomination.

Luckhaupt argues, rather convincingly, that the action was an appointment that only negative action by the Legislature can reverse.

A.G. Jim Baldwin, arguing Sheffield's removal of Mike Whitehead from the Limited Entry Commission, that Hammond's actions were only a nomination. He cites little precedent and, since the case was settled out of court, sets little precedent.

Rodger Pegues, then assistant AG, responding to an informal request by Vicki Clayman, Hammond's Boards and Commissions person, says that any actions by a governor are merely nominations subject to legislative action. Even though Vicki was working for me at the time, I can't recall why we asked the question. As with the Baldwin opinion, little supporting case precedent is cited.

Could be interesting.



TELECOPY COVER SHEET

SENATOR DRUE PEARCE'S OFFICE

Office Phone (907) 465-4993 FAX (907) 463-5352

TO: RON DUNNAN - GCI Fax: 265-5676
Phone: 265-5620

ATTN: _____

TRANSMITTED BY: ROD MOURANT - SEN. PEARCE

DATE: 1/25/91

RE: APUC

COMMENTS: PLEASE DELIVER TO RON
ASAP THANK YOU.

NUMBER OF PAGES: 11 (INCLUDING cover sheet)

Alaska State Legislature



House of Representatives
House Judiciary Committee
Chairman Dave Donley

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

April 24, 1991

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

Dear Mr. Speaker:

On February 4th and 20th, 1991, the House Judiciary Committee held hearings to review the governor's power to appoint and remove members of the Alaska Public Utilities Commission. Based on the information and arguments presented during the hearings and on materials provided by the Attorney General and Legislative Counsel the committee made a number of findings applicable to the subject.

The House Judiciary Committee recommends against the confirmation of the appointment of Don Schroer to the consumer seat on the Alaska Public Utilities Commission and for the confirmation of Peter Sokolov to the engineering seat. The committee wishes to make no judgment on Mr. Schroer's qualifications for office. The reasons for our recommendation against his appointment are set forth below.

Governor Cowper reappointed Peter Sokolov to the commission upon the October 31, 1990, expiration of his previous term. The reappointment was made on November 8, 1990, for a six year term on the commission under Article III, Section 26, of the Alaska Constitution and AS 42.05.020. (Footnote #1) A copy of Mr. Sokolov's letter of appointment was sent to the Chief Clerk of the House of Representatives and to the Senate Secretary.

Although Governor Hickel later attempted to appoint Don Schroer to the APUC (Footnote #2) and to remove Mr. Sokolov from the commission, AS 42.05.035 clearly states that an APUC commissioner may only be removed from office "by and with the consent of a majority of the legislature."

Because the governor did not request that the legislature consent to the removal of Mr. Sokolov and because he was reappointed by former Governor Cowper in the manner provided by the constitution and by statute, our conclusion is that Mr. Sokolov is presently a member of the commission and his confirmation is legally before the Alaska Legislature. (Footnote #3)

The House Judiciary Committee finds that the governor should have submitted a request for legislative consent to the removal of Peter Sokolov as an APUC Commissioner. (Footnote #4)

The Alaska Public Utilities Commission does not now have a vacancy as defined by AS 42.05.030. A replacement appointee cannot be considered until the original appointee is removed as provided by law. (Footnote #5)

In addition to the above, another issue was discussed by the committee on April 17, 1991, and the committee found the following:

Peter Sokolov was reappointed, under AS 42.05.040, 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 purported dismissal by Governor Hickel.

Mark Foster was appointed and confirmed by the legislature to a consumer seat for a six year term approximately four years ago. On January 23, 1991, Governor Hickel attempted to remove Mr. Foster from his consumer seat and appoint him to the engineering seat which was opened up by Mr. Sokolov's dismissal. (Footnote #6) The governor then appointed Don Schroer to Mr. Foster's consumer seat.

Since the legislature has the constitutional authority to designate by law the qualifications for appointees to certain boards and commissions (Footnote #7), and since doing so has the effect of designating seats for individuals with those qualifications (Footnote #8), the switching of a board member from one seat to another constitutes the removal and reappointment of the member. (Footnote #9) To allow the switching of seats would prevent the legislature from exercising its constitutional duty to review the appointments of the governor to ensure that qualified people

Representative Grussendorf
April 24, 1991
Page 3

are being placed in control of important government functions. (Footnote #10)

We now conclude that the switching of an appointee, who was confirmed because he possessed certain qualifications for office, to another position requiring different qualifications constitutes a removal from the first position and a new appointment to the other position, which necessitates confirmation by the legislature to that other position. (Footnote #11)

Mr. Schroer's name is not properly before the legislature because there is no vacancy on the commission. (Footnote #12) Therefore, we find that only Mr. Sokolov's name is before the legislature for confirmation. (Footnote #13) Even if Mr. Sokolov had been properly removed from the engineering seat, Mr. Schroer could not be nominated to fill Mr. Sokolov's position because he does not possess the requisite engineering qualifications.

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

Sincerely,

A handwritten signature in cursive script that reads "Dave Donley". The signature is written in dark ink and is positioned below the word "Sincerely,".

Representative Dave Donley, Chair
House Judiciary Committee

DD/hk

FOOTNOTES

- 1 See copy of November 8, 1990, letter from Governor Cowper to Peter Sokolov; copy of Art. III, Sec. 26, Alaska Constitution; AS 42.05.020.
- 2 See copy of January 23, 1991, letter from Peter Sokolov to Don Tanner.
- 3 Luckhaupt, "Status of governor's appointment to APUC", December 26, 1990, pp. 2-4.
- 4 Id. at p. 2.
- 5 Id. at p. 4.
- 6 See copy of April 9, 1991, letter from Mark Foster to Representative Donley.
- 7 Luckhaupt, "Legislative Designation of Qualifications for Members of Boards and Commissions", February 19, 1991, pp. 3 - 4; April 23, 1981, informal opinion of the Attorney General from R. Pegues to Helen Beirne; August 13, 1979, informal opinion of the Attorney General from R. Pegues to Governor Hammond; May 24, 1988, bill review letter regarding HCS CSSB 192(Res) from G. B. Schaible to Governor Cowper.
- 8 Luckhaupt, "Governor's Power to Switch APUC Seats", March 1, 1991, pp. 1 - 2.
- 9 Id. at pp. 1 - 2.
- 10 Id. at p. 2.
- 11 Id. at pp. 1 - 2.
- 12 "Status of governor's appointment to APUC", at pp. 1 - 2.
- 13 Id. at p. 4.

Military Authority.

Commander-in-chief of the armed forces of the State. He shall have the power to execute the laws, suppress or prevent insurrection, violence, or repel invasion. The governor, as provided by law, shall appoint all general and flag officers of the armed forces of the State, subject to confirmation by a majority of the members of the legislature in joint session. He shall appoint and commission all other officers of the armed forces of the State.

Martial Law.

The governor may proclaim martial law when the public safety requires it in the event of an actual or imminent invasion. Martial law shall not remain in effect longer than twenty days without the approval of a majority of the members of the legislature in joint session.

Executive Clemency.

As prescribed by law, the governor may grant pardons, reprieves, and may suspend and remit fines and penalties, but shall not extend to impeachment. A parole system may be established by law.

Executive Branch.

The governor shall determine the organization of the executive branch, including administrative offices, departments, and agencies of the State, and their respective functions, powers, and duties. He shall have the power to group them as far as practicable according to law among and within not more than twenty principal departments, regulatory, quasi-judicial, and temporary agencies may be established, and need not be allocated within a principal department.

Reorganization.

The governor may make changes in the organization of the executive branch, including the assignment of functions among its units which he deems necessary for efficient administration. Where these changes are made, they shall be set forth in executive orders. The governor may issue such orders during the twenty days of a regular session, or a full session if of emergency nature. Unless disapproved by a majority of the members in joint session, such orders shall become effective at a date thereafter to be designated by the governor.

Section 24 - Supervision.

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

Section 25 - Department Heads.

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

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

Section 26 - Boards and Commissions.

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

Section 27 - Recess Appointments.

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

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

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

ALASKA PUBLIC UTILITIES COMMISSION
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

1016 WEST 6TH AVENUE
SUITE 400
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-6222

April 9, 1991

Representative Dave Donley
P. O. Box V
Juneau, Alaska 99811
VIA FAX: 465-2299

Dear Representative Donley:

Per a request from your office inquiring as to the process used to change the "seat" I was designated to fill on the Alaska Public Utilities Commission from consumer to engineer, I offer the following:

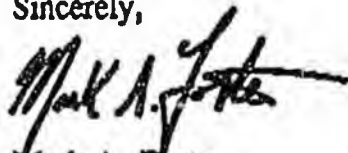
January 22, 1991, 8:35pm - Don Tanner, Director of Boards and Commissions, left a message to call.

January 23, 1991, 8:45am - I called Don Tanner. He wanted to "make me aware" that they were changing my "definition from the at-large seat to the engineers seat" effective today. He indicated my term would remain unchanged and confirmed that it would still expire October 31, 1993. He offered no further elaboration.

I have received no additional verbal or written communications from Mr. Tanner or other members of the administration on the topic.

If you have any questions, please call me at 276-6222.

Sincerely,



Mark A. Foster,
Commissioner

cc: Don Tanner, Director, Boards and Commissions

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COMMISSIONERSHIPS - ALASKA PUBLIC UTILITIES ACT OF 1970
(AS 42.05)

| TERM(6YR) | NAME | APPOINTED | EXPIRED | RESIGNED |
|--------------------------------|--------------------------|-----------|----------|----------|
| <u>LEGAL CHAIR</u> | | | | |
| (1) | John M. Stern | 1971 | 1976 | 1973 |
| | B. Richard Edwards | 1974 | 1976 | |
| (2) | Stuart C. Hall | 1976 | 1983 | |
| (3) | Louis E. Agi | 1983 | 1989 | |
| (4) | Daniel Patrick O'Tierney | 1989 | 1994 | |
| <u>BUSINESS CHAIR</u> | | | | |
| (1) | Gordon J. Zerbetz | 1968* | 1974 | |
| (2) | Gordon J. Zerbetz | 1974 | 1980 | |
| (3) | Diana E. Snowden | 1981 | 1986 | 1985 |
| | Kathleen L. Whiteaker | 1985 | 1986 | |
| (4) | Kathleen L. Whiteaker | 1986 | 1992 | 1990 |
| | Donald F. May | 1990 | 1992 | |
| <u>ENGINEERING CHAIR</u> | | | | |
| (1) | James R. Hendershot | 1971 | | 1975 |
| | Marvin R. Weatherly | 1975 | | 1975 |
| (2) | Marvin R. Weatherly | 1978 | 1984 | |
| (3) | Marvin R. Weatherly | 1984 | 1990 | 1987 |
| | Peter Sokolov | 1987 | 1990 | |
| (4) | Peter Sokolov | 1990 | 1996 | 1991** |
| | Mark A. Foster | 1990 | 1993*** | |
| <u>CONSUMER CHAIR (2)*****</u> | | | | |
| (1) | Susan M. Knowles | 1975 | 1981 | |
| (2) | Susan M. Knowles | 1981 | 1987 | |
| (3) | Susan M. Knowles | 1987 | 1993 | |
| (1) | Carolyn S. Guess | 1975 | 1981 | |
| (2) | Carolyn S. Guess | 1981 | 1987 | |
| (3) | Carolyn S. Guess | 1987 | 1993 | 1990 |
| | Mark A. Foster | 1990 | 1993**** | |
| (4) | Don Schröer | 1991 | 1996 | |

- * Originally appointed to Alaska Public Service Commission.
- ** Appointed by Gov. Cowper - not appointed by Gov. Hickel.
- *** Moved to Engineering chair by Gov. Hickel.
- **** Appointed by Governor Hickel to fill vacancy in Engineering.
- ***** Amended legislation of AS 42.05 in 1975 increased the number to five members and provided for 2 (Consumer Commissioners).

DIVISION OF LEGAL SERVICES

DEC 31 1990

**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*

M E M O R A N D U M

December 26, 1990

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

TO: Representative Kay Brown

FROM: Jerry Luckhaupt
Legislative Counsel

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

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

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

AS 39.05.080(4) provides:

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

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

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

Support for this conclusion is found in the plain language of the Constitution and in the court decisions. The Constitution recites in art. III, sec. 26 that the members of those boards or commissions shall be "appointed" by the governor. To determine the meaning of "appointed" we can look to other provisions of the Constitution for assistance. Article II, sec. 5 of the Constitution refers to the terms "nominated", "elected", or "appointed" as exclusive alternatives which are "clearly intended to catalogue the routes by which one may attain an 'office or position of profit'". Begich v. Jefferson, 441 P.2d 27, 32 (Alaska 1968). In Alaska, "appointed" clearly does not mean "nominated".

In Division of Elections v. Johnstone, 669 P.2d 537, 539-540 (Alaska 1983) the supreme court held that the term appointment as used in the Constitution means "to designate for office." The court also found that the appointment of a superior court judge was effective on the completion of the "last act" of the appointing authority, in that case, the letter of appointment issued to the judge by the governor.

The court cited McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930) in support of this proposition. In McChesney, the Kentucky Supreme Court was confronted with a situation where the governor, having the authority to appoint members of a board subject to confirmation by the Senate, appointed in the interim (between sessions of the legislature), McChesney who entered upon and performed the functions of the office. Several months later, before the legislature had again convened, the governor removed McChesney without cause and appointed another person. McChesney sued to retain his office. The court held that the governor's purported removal of McChesney was illegal. The court stated that the governor by naming and appointing McChesney had exhausted his power to appoint and performed the "last act" necessary to vest McChesney with his office, subject only to the state senate's authority to confirm or fail to confirm and to the governor's authority to remove McChesney for cause as provided by law. The court further contrasted the situation where an officer is "appointed" subject to confirmation by the legislature (as exists in Alaska by art. III, sec. 26 of the Constitution) with the situation where an officer is "nominated" subject to confirmation (as exists for federal appointments) and said:

Furthermore, in cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested. But under our system the appointee of the Governor takes the office, enters upon the performance of its duties, and is charged with responsibility. He holds then subject alone to the action of the Senate. His status is not that of a nominee awaiting confirmation, but that of an officer invested with the powers, privileges, and responsibilities of the position until the Senate acts. A recall of his designation would operate as a removal from office. It is argued that appointment to the office consists of two separate acts, one by the Governor and one by the Senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the two powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall . . . What, then, constitutes an appointment insofar as the chief executive has to do with it? Appointment to an office by one possessing the appointing power is the designation of another person to discharge the duties of the office. [Citation.] It is completed when the appointing authority has performed the acts incumbent upon him to accomplish the purpose. [Citations.] The fact that the title to the office, and the tenure of the officer, are yet subject to the action of the Senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power. [Emphasis supplied].

McChesney, *supra*, at 587.

The court concluded by stating: "Such power as flows from the act of the Governor in making the appointment is invested by the statute in the appointee, and may not thereafter be recalled or bestowed upon another unless the consent of the Senate is withheld." See also Barrett v. Duff, 114 Kan. 244, 217 P. 918 (1923).

The rule discussed in McChesney v. Sampson has been variously stated by courts and commentators to be the "majority rule", the "general rule", and to be "universally held." See e.g., Barrett v. Duff, *supra*; State v. Essling, 128 N.W. 2d 307, 311 (Minn. 1964) ("well settled"); State v. Brewster, *supra*; 89 ALR 135 ("general rule").

McChesney and the rule discussed in it are based upon Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 159-60, 2 L.Ed 60, 68-69 (1803) in which Justice Marshall stated:

[W]hen the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him.

While the principle of a strong executive is embraced by our Constitution and recognized by our courts, Bradner v. Hammond, 553 P.2d 1, 3, n.3 (Alaska 1976), that principle does not mandate a different conclusion than that reached by the United States Supreme Court, the McChesney court and their progeny. To state that a subsequent governor has the authority to recall the appointments of a previous governor, absent constitutional or statutory authority, would render appointments to office personal to the particular governor and his term. This is contrary to our Constitution which establishes an office of governor and provides for succession to that office. Under our constitution there is a governor and a governor there will always be, though the individuals occupying the office may come and go. See e.g., People v. Shawver, 30 Wyo. 366, 222 P. 11 (1924); Barrett v. Duff, *supra*; State v. Brewster, 84 S.E.2d 231, 246 (W. Va. 1954); Tappv v. State, 82 So.2d 161, 169 (1955).

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

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

GPL:mi:gc:mi
90-019.mai

Enclosure

Vicki A. Clayman
Office of the Governor

DATE: December 10, 1979

FILE NO: J-66-334-80

TELEPHONE NO:

AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Reappointments to
boards or commissions

By:

Rodger W. Pegues
Assistant Attorney General

You have asked whether, prior to the expiration of his own term, the Governor can make reappointments of members of boards or commissions whose terms expire thereafter. You also ask whether, if that is the case, the new Governor can revoke the reappointment and appoint someone else.

We believe that the answer to both questions is yes.

When a term for an office is set by law, the term continues until its conclusion, regardless of the actual tenure of any person who may hold the office from time to time. Thus, when an incumbent leaves office prior to the expiration of his term, his successor is appointed for the remainder of that term, and the successor must be reappointed if he is to hold the position beyond the end of that term. Accordingly, no matter what an incumbent may do, his term continues until its prescribed end.

Nothing, however, precludes the Governor, as appointing authority, from anticipating the end of terms of office and making present appointments to fill the offices as those terms expire in the near future. Indeed, he is required to do this during each session of the legislature with respect to offices which have terms which will expire before July 2, and to submit the names of his appointees to the legislature for confirmation. AS 39.05.030(1). Hence, the Governor, even though he may be leaving office in early December, may make appointments for terms which begin the following January.

If the appointments are subject to confirmation, they are not complete until the legislature confirms them. Prior to confirmation, the new Governor may withdraw the nomination. And indeed, he need not even submit it and can merely revoke the nomination outright. If the appointments are not subject to nomination, they take effect when the appointee qualifies and takes office. That cannot happen until the new term for the office begins. Until that time,

Ms. Vicki A. Clayman
December 10, 1979
Page #2

the appointment can, as a general rule, be revoked.

It is probably because each new Governor has the power to countermand any appointive actions taken by each outgoing Governor which remain pending that the latter have not established a history of making midnight appointments to terms of office which begin after they leave office. Where, as in the famous case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense. But where they remain pending, they will have been futile unless the incoming chief executive approves of them as well.

RWP/pjg

MEMORANDUM

State of Alaska

TO: Kevin Bruce, Special Assistant
Office of the Governor

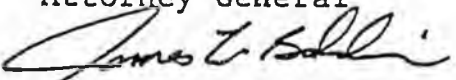
DATE: February 3, 1983

FILE NO: 366-391-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Withdrawal of
appointment


By: James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

You have asked if Governor Sheffield may refuse to forward to the legislature the name of a person appointed by the former governor to an office in the executive branch of state government.

We have attached a copy of our earlier memorandum of advice of December 10, 1979. In that memorandum we advised the governor that he may remove a person before confirmation by withdrawing the nomination, or if the name has not been forwarded to the legislature, by informing the person that he or she is no longer under consideration. We reaffirm that advice. However, you should consider the fact that no authority is cited for our earlier advice and that no Alaska case exists to guide us concerning the resolution of this issue.

If our reasoning expressed in the earlier memorandum is rejected by a court, and the appointment is not considered to be a nomination, then an appointee whose name is summarily withdrawn may have a cause of action for denial of a property right without due process of law. See Breeden v. City of Nome, 628 P.2d 924 (Alaska 1981).

JLB/pjg

Enc.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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(907) 465-3867 or 465-2450
FAX (907) 465-2029

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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

Representative Dave Donley

February 19, 1991

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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

Representative Dave Donley

February 19, 1991

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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. Matassarini, 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

Representative Dave Donley

February 19, 1991

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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

MEMORANDUM

State of Alaska

Hon. Helen D. Beirne
Commissioner
Department of Health & Social
Services

DATE: April 23, 1981

FILE NO: J-66-698-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Proposed Council on
Domestic Violence
and Sexual Assault

By:

Rodger W. Peguffs
Assistant Attorney General

You have asked whether establishment of a proposed Council on Domestic Violence and Sexual Assault poses any legal problems.

In the form proposed by the draft bill for an Act relating to domestic violence and sexual assault, the proposal violates the state constitution in two ways. */

The first constitutional infirmity in the proposed bill is that it unduly impairs the appointment authority of the chief executive, transferring it, as it were, to a special interest group under proposed AS 18.66.030(3). The proposed council's job is to carry out the law, and that function is vested by the constitution in the governor. To perform that function, he appoints subordinates to assist him. While reasonable qualifications may unquestionably be prescribed by law for those appointments, the power of selection cannot be shared except as the constitution itself provides. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Accordingly, in order to conform with the dictates of the state constitution, the requirement in proposed AS 18.66.030(3) that appointments be from a list should be changed to a requirement for consultation with the Network of Domestic Violence and Sexual Assault. (We are concerned that the network may lack a formal, corporate status, thereby making even consultation haphazard.)

The second constitutional infirmity is that the bill gives the council tenure and also the authority to super-

*/ There are other existing and proposed councils on ad hoc subjects which share one or both of these constitutional defects, for example, CSHB 198 (Fin), establishing a seafood market council.

April 23, 1981

wise and direct a unit of state government in carrying out a significant part of the law which, under the constitution, is expressly a function and responsibility of the governor. We are not dealing here with a regulatory or quasi-judicial council, the members of which under the constitution, need not serve at the chief executive's pleasure. Humphrey's Executor v. United States 295 U.S. 602 (1935); Buckley v. Valeo, 424 U.S. 1, 140-141 (1976) (dicta). We are dealing rather with persons who are being placed in charge of carrying on the duties of an executive department of the government, and such officers must be responsible to the chief executive. Myers v. United States, 272 U.S. 52 (1926); cf., Alaska State Operated School System v. Mueller, 536 P.2d 99 (Alaska 1975), Walker v. Alaska State Mtg. Ass'n, 416 P.2d 245 (Alaska 1966).

Accordingly, in order further to conform the bill with the dictates of the state constitution, the last sentence of proposed AS 18.66.040 should be amended to delete after the word "members," the words "shall be limited to no" and insert "serve at the pleasure of the governor and may not serve" instead.

There are other, technical changes which should be made. For example, the Attorney General, rather than the Chief Prosecutor, should be named to retain the parallelism. The Attorney General would have the option of naming a designee. It makes no sense to appoint a subcabinet, non-statutory officer to a statutory council.

Finally, experience teaches that the establishment of a line division on domestic violence and sexual assault in whichever department should handle the subject (with an advisory council of concerned and involved citizens) will have much more effect than the establishment of a separate council which will not be part and parcel of either department's operations. That is a practical matter rather than a legal one, and we do not insist on a change, but we strongly recommend one.

RWP/pjg

cc: Hon. W.R. Nix, Commissioner
Department of Public Safety

Hon. Donald Clocksin
House of Representatives

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR


POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

August 13, 1979

M E M O R A N D U M

To: Honorable Jay S. Hammond
Governor

From: Avrum M. Gross
Attorney General

By: Rodger W. Pegues 
Assistant Attorney General

Re: Qualifications for appointment to boards or
commissions

You have asked whether a person appointed to the Commercial Fisheries Entry Commission must have been a registered voter in Alaska before the last general election.

The short answer is yes.

AS 39.05.100(a) reads as follows:

(a) A person appointed to a board or commission of the state government, shall be and have been before the last general election, (1) a registered voter in the state, if the appointment is made at large or (2) a registered voter from the judicial district, if the appointment is made from a specific judicial district.

So far as is known, this requirement has never been challenged, and each governor since statehood has followed its dictates.

It can be argued that the requirement violates the provisions of article III, section 26, of the Alaska Constitution in that it adds to the qualifications prescribed there. The record of the Alaska Constitutional Convention indicates that the only requirement respecting a person's citizenship or residence for an appointment to a board or commission is United States Citizenship. The governor's

The Honorable Jay S. Hammond
Governor
August 13, 1979
Page #2

power to select the person he wanted was not to be limited to Alaska residents. 3 Proceedings, Alaska Constitutional Convention 2232-2233, 2236-2244 (1956). It is probable that technical, professional, occupational, or other like qualifications can be imposed without violating the constitution. And even a requirement that the appointee be a registered voter could be upheld if it did not bar persons from out of the state from being appointed, i.e., by requiring their prompt registration. But requiring an appointee to be a registered voter in this state so as to eliminate nonresidents and new residents was expressly rejected by the convention. Accordingly, the constitutionality of AS 39.05.-100(a) as it applies to new residents or to nonresidents is questionable.

AMG:pjg:RWP

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

May 24, 1988

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

Honorable Steve Cowper
Governor
State of Alaska
P.O. Box A
Juneau, Alaska 99811

Re: HCS CSSB 192(Res) -- relating
to the membership of the
Agricultural Revolving Loan
Fund Board
Our file: 883-88-0079

Dear Governor Cowper:

At Judy C. Fleming's request on your behalf, we have reviewed HCS CSSB 192(Res), a bill relating to the membership of the Agricultural Revolving Loan Fund Board.

Section 1 amends AS 03.10.050(b) to increase the membership of the board from five to seven members. The two new members of the board that would be added under this bill must be "producing" Alaska farmers. At present, there is no requirement that any members of the board be persons actively engaged in farming.

An additional amendment of AS 03.10.050(b) would make clear that members of the board serve at the pleasure of the governor.

Section 2 of the bill would add a new subsec. (b) to AS 03.10.052. The proposed subsection would establish, as a new qualification for membership on the board, that a person may not serve on the board if he or she is delinquent on an agricultural loan obtained under AS 03.10. (Current AS 03.10.052 provides that a board member may not obtain a loan under AS 03.10, except for a short-term loan under AS 03.10.030(c), during the member's term of office or within one year after leaving office. Nothing, however, prohibits the appointment of a person who already holds a loan under AS 03.10 at the time of appointment.)

Proposed subsec. (b) also would require the governor to discharge, within 30 days after the delinquency occurs, a board member who becomes delinquent on an agricultural loan. This provision presents two legal questions, neither of which presents a legal problem.

MEMORANDUM

Hon. Steve Cowper, Governor
Our file: 883-88-0079

May 24, 1988
Page 2

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Govern

The first question is whether mandating that the governor discharge a board member who becomes delinquent is inconsistent with the second proposed amendment to AS 03.10.050(b), mentioned above, which would make clear that a board member serves at the pleasure of the governor. The two provisions can easily be harmonized, as they should be. Matter of Estate of Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978). The second proposed amendment to AS 03.10.050(b) would simply make clear that the governor could discharge a board member without cause. Proposed AS 03.10.052(b), on the other hand, would simply establish that, as a matter of public policy, a borrower under AS 03.10 appointed to the board could not continue to serve if the borrower becomes delinquent on the loan.

The second question is whether it would violate the separation-of-powers doctrine for the legislature to require the governor to discharge a board member if the member becomes delinquent on a loan. In our view, it would not. Article III, sec. 26, of the Alaska Constitution, provides that members of boards or commissions "may be removed as provided by law." The Alaska Supreme Court has stated: "Removal of Section 26 board or commission members is as provided by law and, therefore, not necessarily at the governor's pleasure." Bradner v. Hammond, 551 P.2d 1, 3 (Alaska 1976). The directive to the governor to discharge a board member upon becoming delinquent on a loan would simply provide, by law, for the manner of removal.

Although the Department of Natural Resources apparently did not support the bill initially, we understand from the department's May 4, 1988 letter about the bill to Representative Sam Cotten, that the department does now support it.

CCS SB 484, dealing with loans made from the Agricultural Revolving Loan Fund, is still being reviewed by us (our file 883-88-0144).

Except as discussed above, there are no legal or constitutional problems presented by this bill.

Sincerely,

Arthur F. Peterson
for Grace Berg Schaible
Attorney General

GBS:GTK:cb:dlm

cc: Hon. Judith M. Brady, Commissioner
Department of Natural Resources

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MEMORANDUM

March 1, 1991

SUBJECT: Governor's Power to Switch APUC Seats
(Work Order No. 17LS0896)

TO: Representative Max Gruenberg

FROM: Gerald P. Luckhaupt
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; and (2) If seats may be switched, does the term go with the member or stay with the seat.

The facts as we understand them are that Mr. Peter 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 the purported dismissal of Mr. Sokolov. 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

Representative Max Gruenberg

March 1, 1991

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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.

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

GPL:pl
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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 *GLP*
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 capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether their respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and

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

Barrett, supra, 925-926.

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

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

Alaska State Legislature



House of Representatives
House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
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February 20, 1991

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

Dear Mr. Speaker:

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

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

Governor Cowper reappointed Peter Sokolov to the commission upon the October 31, 1990, expiration of his previous term. The reappointment was made on November 8, 1990, for a six year term on the commission under Article III, Section 26, of the Alaska Constitution and AS 42.05.020. A copy of Mr. Sokolov's letter of appointment was sent to the Chief Clerk of the House of Representatives and to the Senate Secretary.

Although Governor Hickel has attempted to appoint Don Schroer to the APUC and to remove Mr. Sokolov from the commission, AS 42.05.035 clearly states that an APUC Commissioner may only be removed from office "by and with the consent of a majority of the legislature."

Because the governor has not requested that the legislature consent to the removal of Mr. Sokolov and because he was reappointed by former Governor Cowper in the manner provided by the constitution and by statute, our conclusion is that Mr. Sokolov is presently a member of the commission and his confirmation is legally before the Alaska Legislature.

The Alaska Public Utilities Commission does not now have a vacancy as defined by AS 42.05.030. A replacement appointee cannot be considered until the original appointee is removed as provided by law.

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

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

The committee has been advised by legislative counsel that the switching of seats by the governor requires the legislative confirmation of that person to the new seat. To allow the switching of seats without confirmation by the legislature when appointees are required to have different qualifications for different seats would prevent the legislature from exercising its constitutional duty to review the appointments of the governor to ensure that qualified people are being placed in control of important government functions. Although the committee is taking no position on this issue at this time, arguably the governor should submit to the legislature the appointment of Mark Foster to the engineering seat.

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

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

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

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

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

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

Sincerely,

A handwritten signature in cursive script that reads "Dave Donley". The signature is written in dark ink and is positioned above the typed name and title.

Representative Dave Donley
Chair

DD/hk

REPRESENTATIVE DAVE DONLEY

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BRIEFING ON APPOINTMENT AND REMOVAL AUTHORITY

I. Constitutional provisions

A. Art. III, Sec. 25 - head of each principal department is single executive unless the legislature provides otherwise.

1. Appointed by and serves at pleasure of governor.

2. Subject to confirmation by legislature.

B. Art. III, Sec. 26 - when legislature provides that a board or commission is at head of department or regulatory or quasi-judicial agency, its members are:

1. appointed by governor;

2. subject to confirmation by legislature;

3. removable as provided by law.

C. Art. III, Sec. 27 - duration of recess appointments to fill vacancies shall be prescribed by law; (names must be submitted within 30 days of convening of session).

D. Bradner v. Hammond, "...Sections 25 and 26 mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government."

II. "Appointment v. Nomination"

A. Art. III, Sec. 26 says that members of those boards and commissions shall be "appointed" by the governor.

B. Art. II, Sec. 5 refers to the terms "nominated", "elected", or "appointed" as exclusive alternatives which are "clearly intended to catalogue the routes by which one may attain an 'office or position of profit'". Begich v. Jefferson.

C. Division of Elections v. Johnstone held:

1. that the term appointment in the constitution means "to designate for office";

2. that the appointment of a judge was effective on the completion of the "last act" of the appointing authority, i.e., the letter of appointment issued to the judge by the governor.

D. McChesney v Sampson (KY), the majority rule in U.S., contrasted:

1. situation where an officer is appointed subject to confirmation by the legislature (like AK) the appointee takes office, enters upon performance of duties, and is charged with responsibility pending confirmation; unlike the



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2. situation where officer is nominated subject to confirmation (federal situation) and nominee may be removed at will of executive until title to the office is vested.

3. Court stated further that "such power as flows from the act of the Governor in making the appointment is invested by the statute in the appointee, and may not thereafter be recalled or bestowed upon another unless the consent of the Senate is withheld."

E. Whitehead v State. State settled lawsuit filed by Mr. Whitehead where he was appointed by Governor Hammond, shortly before leaving office, to the Limited Entry Commission and removed and replaced by Governor Sheffield. Received \$75,000 + eight months' salary from the date of his appointment by Hammond.

III. Removal generally.

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

1. AS 39.05 and 08.01 provide that members of listed boards or commissions serve at the pleasure of the governor.

2. Members of boards and commissions at head of departments or regulatory or quasi-judicial agencies may be removed as provided by law.

3. Members of non-section 26 boards and commissions are not subject to removal provisions of legislature and serve at pleasure of governor.

IV. Specific boards and commissions.

A. Board of Education (Sec. 26 board).

1. AS 14.07.115 - members serve at pleasure of the governor.

B. Boards of Fisheries and Game (Sec. 26 board). Conflict in the statutes.

1. AS 16.05.280 - removal for inefficiency, neglect of duty, or misconduct in office with notice and hearing afforded.

2. AS 39.05.060(d) - hold office at the pleasure of the governor notwithstanding the member's term.

C. Permanent Fund Corp. Board. (Non-section 26 board and therefore not subject to confirmation or removal according to law.)

1. AS 37.13.070(a) - removal must be in writing and must state the reason for removal.

2. Legislature may not substantially curtail the power of the governor to remove members; arguably the above section would not be enforceable.

D. Public Utilities Commission (Sec. 26 board).

1. AS 42.05.020 - appointed by governor.

2. AS 42.05.035 - may only be removed from office by and with the consent of the majority of the legislature.

V. Additional questions.

A. Is an interim appointment binding on the subsequent administration.

1. AS 39.05.080(4) - "[p]ending 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."

2. If the commissioner:

a. has received a commission from a sitting governor (AS 39.05.035);

b. has executed his constitutionally required oath of office and filed it with the lieutenant governor (Art. XII, Sec. 5 and AS 39.05.040);

c. has embarked upon and is exercising the duties of his office;

d. his appointment is binding upon the subsequent administration and he may only be removed as provided by law, subject to the legislature's authority to confirm or fail to confirm him.

B. May the governor switch the members of the APUC among the various seats? If seats may be switched, does the term go with the member or stay with the seat? Who or what determines when the term of an appointee begins and when the appointee goes on the payroll. May the governor, prior to confirmation, instruct an appointee to take office? (For discussion see LAA legal memo of Feb. 6, 1991, WO # 17-LS0366.)

C. What is the authority of the legislature 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. (For discussion see LAA legal memo of Feb. 5, WO # 17LS-0664.)

D. What is the legislature's authority to designate qualifications for membership on boards and commissions created by the legislature. (For discussion see LAA legal memo of Feb. 19, 1991, WO # 17LS-0661.)

VI. Options available to legislature.

A. Standardize removal procedures with a general statute for all Section 26 boards and commissions.

B. Rewrite the removal provisions for each Sec. 26 board and commission.

C. Constitutional amendment setting out with more specificity the desires of the legislature re appointment, qualifications, and removal. Provide more power to the legislature, if desired.

D. Ignore the whole issue and let the executive branch further cement its power in re the legislative branch.

VII. Removal options.

A. Serve at the pleasure of the governor.

B. Removal for certain causes.

C. Removal with the consent of the legislature (APUC).

D. Removal only by the legislature (probably unconstitutional).

DIVISION OF LEGAL SERVICES

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MEMORANDUM

February 11, 1991

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

TO: Representative Max F. Gruenberg, Jr.

FROM: Jerry Luckhaupt *JLR*
Legislative Counsel

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

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

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

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

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

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

ACCP, at p. 1102 - 03.

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

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

ACCP, at pp. 2204 - 05.

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

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

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

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

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

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

ACCP, at p. 2257.

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

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

Representative Max F. Gruenberg, Jr.

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

GPL:mi

91-029.mai

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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 *JEL*
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.

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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

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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 nowhere 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~~

Representative Dave Donley
February 11, 1991
Page 7

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

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

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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 *TBC*
Director

Gerald P. Luckhaupt *GL*
Legislative Counsel

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

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

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

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

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

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

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

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

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

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

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91-022.lmb

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MEMORANDUM

February 4, 1991

SUBJECT: Alaska Public Corporations (Work Order No. 17 LS-0640)

TO: Representative Dave Donley

FROM: Jerry Luckhaupt *JER*
Legislative Counsel

You have requested a compilation of the public corporations and corporate authorities of the state of Alaska. In my review of the statutes I have found the following corporations and authorities:

- (1) Alaska Amateur Sports Authority (AS 05.40.010);
- (2) Alaska Energy Authority (AS 44.83.020);
- (3) Alaska Gas Pipeline Finance Authority (AS 44.82.010);
- (4) Alaska Housing Finance Corporation (AS 18.56.020);
- (5) Alaska Industrial Development and Export Authority (AS 44.88.020);
- (6) Alaska Medical Facility Authority (AS 18.26.010);
- (7) Alaska Municipal Bond Bank Authority (AS 44.85.020);
- (8) Alaska Permanent Fund Corporation (AS 37.13.040);
- (9) Alaska Railroad Corporation (AS 42.40.010);
- (10) Alaska Resources Corporation (AS 37.12.010);
- (11) Alaska Science and Technology Foundation (AS 37.17.010);
- (12) Alaska Seafood Marketing Institute (AS 16.51.010);
- (13) Alaska State Housing Authority (AS 18.55.020);
- (14) Alaska Tourism Marketing Council (AS 44.33.700);
- (15) Medical Indemnity Corporation of Alaska (AS 21.88.020).

In addition, the Commercial Fishing and Agriculture Bank (AS 44.81.010), appears to have some of the attributes of a public corporation in that the exercise of its powers "is considered to be for a public purpose." AS 44.81.010(a). Further, bills that have been filed so far this year would create the following additional public corporations:

Representative Dave Donley

February 4, 1991

Page 2

- (a) HB 10 - Alaska Marine Highway Authority;
- (b) HB 46 - Alaska Spaceport Authority;
- (c) HB 59 - Alaska Mental Health Trust Corporation;
- (d) HB 71 - Alaska State Health Resources Authority;
- (e) SB 18 - Alaska State Pension Corporation;
- (f) SB 73 - Health Insurance Authority.

Gubernatorial appointees to the boards of public corporations are apparently not subject to confirmation by the legislature as the public corporations are not "at the head of a principal department or a regulatory or quasi-judicial agency" as provided in art. III, § 26 of the Alaska Constitution. See also, Bradner v. Hammond, 553 P.2d 1 (Alaska 1976)(only section 26 boards subject to confirmation); Walker v. Alaska State Mortgage Authority, 416 P.2d 245 (Alaska 1966)(ASMA not a section 26 board).

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MEMORANDUM

February 4, 1991

SUBJECT: Removal of Members of Boards of Fisheries and Game (Work Order No. 17LS-0644)

TO: Representative Dave Donley

FROM: Jerry Luckhaupt *JL*
Legislative Counsel

Enclosed is a draft of a bill to provide that members of the Board of Fisheries and the Board of Game may only be removed for cause as provided in AS 16.05.280. To that end, the bill in Section 2, amends AS 16.05.280 by inserting the word "only" after "The governor may" in the first line, thereby making the opening clause of the section read "The governor may only remove a board member for. . ." and, in Section 4, repeals AS 39.05.060(a)(5) and (10), which make certain provisions, including that the members of these boards serve at the pleasure of the governor, applicable to the boards.

The bill also supplies, in Section 1, a term for the members to serve. As explained in the Analysis for the 1991 Revisor's Bill, sec. 8, the previous term provision was repealed in 1975, apparently by oversight. This section of the bill provides the term which has been lacking and is implemented by Section 3 of the Bill, which provides that current members of the boards will complete their terms and new members will be appointed for terms as provided in the bill. As alluded to previously, the replacement of a term in AS 16.05 is also the subject of sec. 8, of the 1991 Revisor's Bill.

Section 5 of the Bill provides for an immediate effective date.

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Enclosure

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the appointment, removal, and terms of the members of the Board
2 of Fisheries and the Board of Game; and providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 16.05.221 is amended by adding a new subsection to read: —

5 (c) The members of the Board of Fisheries and the Board of Game shall serve staggered
6 three-year terms. They may be reappointed.

7 * Sec. 2. AS 16.05.280 is amended to read:

8 Sec. 16.05.280. REMOVAL OF BOARD MEMBERS. The governor may only remove
9 a board member for inefficiency, neglect of duty, or misconduct in office by delivering to the
10 member a written copy of the charges and giving the member an opportunity to be heard in
11 person or through counsel at a public hearing before the governor or a designee upon at least 10
12 days' notice by registered mail. The member may confront and cross-examine adverse witnesses.
13 Upon removal, the governor or a designee shall file in the proper state office the findings and
14 a complete statement of all charges made against the member.

1 * Sec. 3. APPLICABILITY. A person who is a member of the Board of Fisheries or the Board of
2 Game on the effective date of this Act shall serve the term to which the person was appointed, subject
3 to AS 16.05.280, as amended by sec. 2 of this Act. A person who is appointed to the Board of Fisheries
4 or the Board of Game after the effective date of this Act shall be appointed for the term provided by
5 AS 16.05.221(c).

6 * Sec. 4. AS 39.05.060(a)(5) and 39.05.060(a)(10) are repealed.

7 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

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MEMORANDUM

February 1, 1991

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

TO: Representative Dave Donley, Chair
House Judiciary Committee

FROM: Gerald P. Luckhaupt *GL*
Legislative Counsel

Tamara Brandt Cook *TBC*
Director

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

Article III, § 26, of the Alaska Constitution provides:

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

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

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

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

Representative Dave Donley

February 1, 1991

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

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

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

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

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

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

And generally it has been held in other states that:

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

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

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

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

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

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

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

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

Representative Dave Donley

February 1, 1991

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

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

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

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

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

Representative Dave Donley

February 1, 1991

Page 5

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

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

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

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

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

GPL:TBC:pl
91-059.plm

WALTER J. HICKEL, GOVERNOR

REPLY TO

DEPARTMENT OF LAW

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February 15, 1991

The Honorable Dave Donley, Chairman
House Judiciary Committee
Alaska House of Representatives
P O Box V
Juneau, Alaska 99811

Re: Second follow-up on
committee testimony
regarding governor's
power of appointment

Dear Mr. Chairman:

This letter serves as my second response to follow up on information asked of this office during my testimony before the House Judiciary Committee on February 5, 1991.

Set out below is our response to questions not previously answered in my memo of February 7, 1991:

1) You asked what our legal authority is for the assertion that the governor has the discretion to withdraw and substitute the name of another person to the legislature to confirm the appointment to fill a vacant office.

It is generally held that uncompleted appointments are subject to withdrawal. Petition of Com'n on Governorship of Cal. v. Curb, 603 P.2d 1357, 1365 (Cal. 1979); In re Advisory Opinion to the Governor, 247 So.2d 428 (Fla. 1971) (tab #1). The appointment is not complete until the legislature confirms and the governor issues a certificate of permanent appointment. Burke v. Schmidt, 191 N.W.2d 281, 284 (S.D. 1971) (tab #2). You will note from our 1979 opinion that we construe the appointment process for recess appointments to consist of a nomination by the governor, transmittal to the legislature, consideration by the legislature in joint session which may or may not result in confirmation of the nominee and, finally, the issuance of a commission by the governor. Attached for your information are copies of the Minutes of the Constitutional Convention which contain the discussion of the interim appointment process I referred to in my testimony (tab #3).

Representative Dave Donley, Chm,
House Judiciary Committee
Re: Second follow-up on committee
testimony regarding governor's
power of appointment

February 15, 1991
Page 2

2) You asked for legal authority for our assertion that the legislature is powerless to confirm an appointee until that appointee's name is transmitted to it.

The answer to this question is arrived at by applying the plain meaning of AS 39.05.080. That section directly implements article III, section 27 of the Alaska Constitution (recess appointments). For recess appointments, section 080 requires a transmittal "within 30 days after convening in regular session." Section 080 requires the governor to "present" appointments. It is not reasonable to interpret this provision so that an appointment can be "deemed" to be presented. Consider the fact that former Governor Cowper's term expired before the 17th legislature convened. It was impossible for him to present an appointment for confirmation to the appropriate legislature during a regular session.

3) You asked for a historical summary of appointments of persons possessing the professional skills set out in AS 42.05.040.

We have discussed this request with the governor's special assistant responsible for appointments to boards and commissions. The bulk of records that must be analyzed to answer this question are located in the state archives. Neither the governor nor this office have the personnel available to conduct the extensive record search necessary to adequately answer this request. However, personnel in the governor's office are willing to advise your research staff as to methods for gathering the necessary records.

4) You asked for results of our research on the question of what constitutes a "regulatory" board.

Attached you will find copies of pages from the Minutes of the Constitutional Convention that explain the meaning of the term "regulatory board" intended by the framers of the state constitution (tab #4).

5) You asked for copies of cases that reached an opposite holding to that of McChesney v. Sampson, 23 S.W.2d 584 (Ky 1930).

A good collection of the cases both supporting McChesney and reaching an opposite holding are set out in the annotation appearing at 89 ALR at 132. Rather than copying all the cases, I have attached a copy of the annotation (tab #5). Additionally, attached is Burke v. Schmidt, 191 N.W.2d 281 (S.D. 1971) (tab #2).

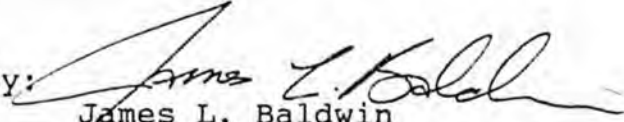
Representative Dave Donley, Chm,
House Judiciary Committee
Re: Second follow-up on committee
testimony regarding governor's
power of appointment

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Page 3

We believe that the foregoing together with the corresponding attachments constitutes a full response to the committee's questions. Do not hesitate to call if we can assist you further.

Sincerely yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
James L. Baldwin
Assistant Attorney General

JLB:jr

Attachments

MEMORANDUM

State of Alaska

Department of Law

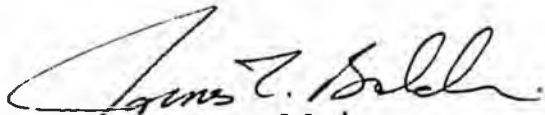
TO: Honorable Dave Donley, Chairman
House Judiciary Committee
House of Representative
Alaska State Legislature

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

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

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. No reelected 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.

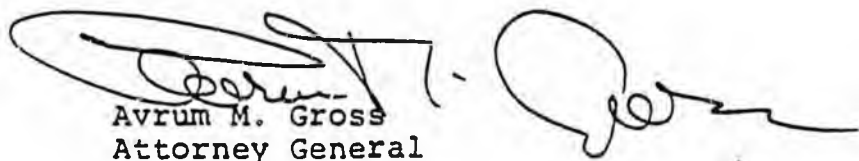
When Lieutenant Governor Miller succeeded to the office of Governor, he did not submit the names of the heads of all the principal departments for confirmation but rather only those who had been appointed to office since their predecessors had been confirmed, i.e., a new Attorney General, new Commissioners of Administration, 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

The Honorable Jay S. Hammond
January 25, 1979
Page 4

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

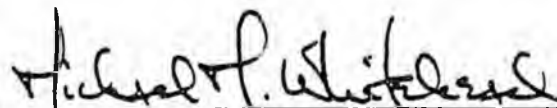
1. The State of Alaska will pay to Mr. Whitehead the sum of **Seventy Five Thousand and 00/100 Dollars (\$75,000.00)**, receipt of which is hereby acknowledged.

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.

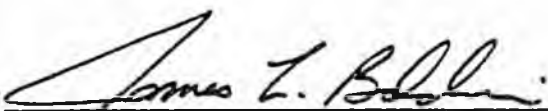
4. Mr. Whitehead and the State of Alaska hereby release and forever discharge each other of and from any and all claims, including claims arising from the allegedly tortious conduct described in this agreement, whether known or unknown, foreseen or unforeseen, which they have now or which may hereafter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

ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
PO. BOX K, JUNEAU, ALASKA 99811
PHONE 485-3600

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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.)

STEVE COWPER, Governor of the)
State of Alaska,)
Plaintiff,)
vs.)
JAN FAIKS, et al.,)
Defendants.)

No. 4FA-87-2009 CIV
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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1 court requested briefing and argument on the issue of whether
2 the senate must be in session when the appointment is confirmed
3 or rejected. The governor has styled this memorandum as being
4 in support of a motion for judgment on the pleadings.

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

15 Plaintiffs in intervention are members of the state
16 senate and members of the state Republican Party (in this memo-
17 randum, plaintiffs in intervention will be referred to as "the
18 Republican senators"). The republican senators are duly elected
19 members of the state senate. A vacancy in the seat representing
20 senate district K-A must be filled by appointment by the gover-
21 nor because Senator Bennett had less than two years and five
22 months remaining in his term of office. AS 15.40.370, 15.40.-
23 380. Under the state election code (AS 15), the appointment is
24 subject to confirmation by "a majority of the members of the
25 legislature who are members of the same political party which
26 nominated the predecessor in office and of the same house as was

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

2 On October 7, 1987, during the interim between legis-
3 lative sessions and while the state senate was adjourned, the
4 governor received a letter on official senate letterhead which
5 purported to be a "report." The report advised the governor
6 that 11 republican senators met and purportedly voted to reject
7 the governor's appointee. Exh. 2. The report also discloses
8 that one of the senators participated "via teleconference." The
9 governor immediately filed an action seeking a declaratory judg-
10 ment as to whether the purported rejection was effective. The
11 governor also questioned the validity of the delegation of con-
12 firmation power to a group of legislators. Governor's Compl..
13 dated Oct. 7, 1987, Count 2.

14 As a preliminary matter, the court should be aware of
15 the connection between the districts and the republican sena-
16 tors. The districts publicly offered only one name for appoint-
17 ment to fill the vacancy. In turn, the republican senators de-
18 clared that they would confirm only persons recommended by the
19 districts. Acquiescence in these demands would place the true
20 appointment power in the hands of the districts. The governor
21 requested the attorney general to advise him concerning the
22 proper role of the districts in the process for selecting an
23 appointee. An informal attorney general opinion was issued on
24 September 21, 1987. 1987 Inf. Op. Att'y Gen. (Sept. 21; 663-88-
25 0107), Exh. 3. The attorney general advised that the districts
26 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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1 of that controversy, Governor Egan appointed and the senate mem-
2 bers of the Republican Party successively rejected four persons
3 before a successor was confirmed. The senators demanded that
4 Governor Egan appoint from a list of candidates provided by the
5 local republican committee. Governor Egan responded to the de-
6 mand as follows:

7 Please permit me to point out that there is no
8 reference to political committees of either major
9 political party in the law which covers filling
10 of vacancies in the State Legislature. If the
11 legislature had intended that political commit-
12 tees would be responsible for such appointments,
13 the Legislature would have so provided.

14 1963 Senate J. 73. Since 1963, the legislature has been in-
15 formed of Governor Egan's interpretation and chose not to amend
16 the election code to create a role for a district committee of a
17 major political party.

18 III. THE CONFIRMATION POWER CANNOT BE DELEGATED AWAY

19 The issue identified by the court for initial consid-
20 eration concerns whether the republican senators must act for-
21 mally as a subdivision of the senate or informally as a politi-
22 cal caucus. A caucus is a private, partisan political organiza-
23 tion. It is not an official interim or standing committee of
24 the legislature. Consistent with this premise, the Alaska
25 Supreme Court has observed that a political caucus is not a leg-
26 islative 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

1 that the legislature cannot delegate confirmation powers to in-
2 dividual legislators, especially if they purport to act in the
3 form of a private political caucus.

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

13 Because the appointive office is legislative rather
14 than executive, the senate, as a separate house of the legisla-
15 ture, has an express constitutional remedy to assure the ap-
16 pointment of qualified persons to serve there. Article II, sec-
17 tion 12 of the Alaska Constitution provides: "Each [house of
18 the legislature] is the judge of the election and qualifications
19 of its members...." Respected authority on legislative proce-
20 dure states: "The exclusive power to judge of the qualifica-
21 tions and elections of its members is fixed in each house and
22 cannot by its own consent or by legislative action be vested in
23 any other tribunal or office." Mason's Manual of Legislative
24 Procedure, § 560(5) (1979 rev'd ed.) (hereafter Mason's). The
25 confirmation power added by AS 15.40 has the effect of giving
26 the exclusive power to judge qualifications to a group of legis-

1 lators determined by political affiliation rather than by mem-
2 bership in a house of the legislature as contemplated in the
3 constitutional scheme devised by the framers.

4 Under the election code, a minority of one house of
5 the legislature can frustrate the governor's will and circumvent
6 the express remedy for determining the qualifications of persons
7 selected to serve there. The Alaska Constitution provides:
8 "The legislative power of the state is vested in a legislature
9 consisting of a senate with a membership of twenty and house of
10 representatives with a membership of forty." The senate Repub-
11 licans are acting as if the senate is comprised of a membership
12 of eleven. They are also acting as if the senate can convene
13 and transact legislative business without the aid of the gover-
14 nor or the house of representatives. Additionally, the gover-
15 nor's duty to execute the election code is impaired in an inap-
16 propriate manner by requiring him to share the appointment power
17 with a partisan group of legislators. Legislators are members
18 of the law-making branch of state government. If they are al-
19 lowed to participate in the making of an appointment, they would
20 be executing the law as well.

21 The governor is not arguing that all delegations of
22 legislative power are invalid. Only a delegation which confers
23 the exclusive right to determine qualifications of a person ap-
24 pointed to legislative office. For example, the court is given
25 jurisdiction to determine election contests involving the quali-
26 fications of a legislator-elect. AS 15.20.540 -- 15.20.560.

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1 However, that power is limited to determining if a candidate is
2 qualified "as required by law." AS 15.20.540(2). This power
3 was determined to be "not atypical" and to reflect a traditional
4 role for the judiciary to assume. Boucher v. Bomhoff, 495 P.2d
5 77 (Alaska 1972); accord Mason's, § 560(7) (1979 rev.). The
6 election code expressly states that the grant of power to the
7 courts to hear election contests is "not intended to limit or
8 interfere with the power of the legislature to judge the elec-
9 tion or qualifications of its members. AS 15.20.560. If the
10 rejection by the republican senators is effective, the senate
11 will never be able to judge the qualifications of Mrs. Bennett.
12 Unlike the grant of jurisdiction to the superior court to hear
13 election contests, the confirmation power is delegated to a
14 group of legislators without standards to direct the exercise of
15 the legislative power.

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

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

Mm. for Jgmt on the Pleadings

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

5 606 P.2d at 777. The court went on to make the following gener-
6 al statement: "It is therefore worth observing that most au-
7 thorities have rejected the validity of the laws conferring ei-
8 ther affirmative or negatory legislative powers on individual
9 legislators or committees." 606 P.2d at 778 (citing and discuss-
10 ing State ex rel. Judge v. Legislative Finance Committee, 543
11 P.2d 1317 (Mont. 1975) (legislature could not delegate power to
12 approve budget amendments to an interim legislative committee)
13 and People v. Tremaine, 168 N.E. 817 (N.Y. 1929) (legislature
14 may not grant certain legislative committee chairmen the power
15 to disapprove of the allocation of lump sum appropriations to an
16 executive agency)).

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

Mm. for Jgmt on the Pleadings

- 9 -