July 19, 2016

The Honorable Bill Walker
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: *Legislators Serving on Executive Branch Boards and Commissions*
AGO No. AN2016101165

Dear Governor Walker:

You have asked for an opinion on the constitutionality of legislators serving on executive branch boards and commissions, either as voting or non-voting members. Your question has been posed, in part, because of the passage of HCS CSSB 125(RES), which would make three sitting legislators directors of the Alaska Gasline Development Corporation ("AGDC"). As detailed below, we conclude that legislative presence on several of the specific boards and commissions asked about would violate the Alaska constitution, regardless of the voting status of the legislative members.

Having legislators serve on executive branch boards and commissions raises two constitutional issues. The first is the prohibition against legislators holding dual offices as set out in article II, section 5 of the Alaska constitution. The second is the separation of powers doctrine that is inherent in the framework of the Alaska constitution.

The specific functions of any board or commission on which a legislator is serving need to be considered to determine whether the dual office holding prohibition or the separation of powers doctrine is violated. In general, the constitution is violated if a legislator serves on a board or commission that is charged with executing the law in some way, such as carrying out duties prescribed by statute. It would not matter whether the legislator serves in a voting or non-voting capacity on such a board or commission. In contrast, the constitution likely will not be violated if a legislator serves on a board or commission that only collects information or provides recommendations on matters of

public concern to other governmental bodies or agencies for their consideration. In some circumstances, the chances of being constitutional are improved if the body the legislator serves on is one of temporary duration. In all instances, the constitutionality of a legislator serving on a board or commission will depend on the exact circumstances presented.

Our opinion is that having legislators serve as non-voting directors of AGDC violates the prohibition against dual office holding and the separation of powers doctrine.

We are also of the opinion that having legislators serve as non-voting directors of the Alaska Aerospace Corporation ("AAC") and the Knik Arm Bridge and Toll Authority ("KABATA") is unconstitutional. Legislators serving on the board of the Alaska Seafood Marketing Institute ("ASMI") is likely unconstitutional, but we do not think it is necessary to reach the constitutional question for that entity. The governing statutes do not authorize legislators to act as directors of ASMI. In addition, we are of the opinion that the constitution prohibits legislators from serving as members of the Alaska Commission on Postsecondary Education ("ACPE").

For the specific advisory boards and commissions you have inquired about, we conclude that having legislators serve on these, as either voting or non-voting members, is likely constitutional so long as the legislators do not receive separate compensation for their service.

DISCUSSION

I. Dual office holding is prohibited under the Alaska constitution.

Article II, section 5 of the Constitution of the State of Alaska prohibits dual office holding by legislators. In its entirety, article II, section 5 states:

> *No legislator may hold any other office or position of profit under the United States or the State.* During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of

> governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.[1]

The Alaska Supreme Court first dealt with the dual office holding prohibition in *Begich v. Jefferson*,[2] in which it held that legislators could not act as superintendent or teachers in a State-operated school district while in office.[3] In the decision, the court pointed out that article II, section 5, as originally drafted, did not include the first sentence.[4] The first sentence was added by the framers to make it clear that "there should be no dual office holding from the standpoint of a legislator."[5] The court in *Begich* went on to discuss the policy reasons why dual office holding is prohibited under the constitution:

> Alaska's constitutional prohibition against members of our three separate branches of state government holding any other positions of profit under the State of Alaska *reflects the intent to guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers in regard to the exercise by these governmental officials* of the executive, judicial, and legislative functions of our state government. *The rationale underlying such prohibitions can be attributed to the desire to encourage and preserve independence and integrity of action and decision on the part of individual members of our state government.*[6]

The Alaska Supreme Court also considered the prohibition against dual office holding in *Warwick v. State ex rel. Chance*.[7] The issue in *Warwick* was whether a

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1 Alaska Const. art. II, § 5 (emphasis added).

2 441 P.2d 27 (Alaska 1968).

3 *Id*. at 34.

4 *Id*. at 30.

5 *Id*. (quoting 4 *Proceedings of the Alaska Constitutional Convention* at 3095 (Jan. 25, 1956)).

6 *Id*. at 35 (emphasis added).

7 548 P.2d 384 (Alaska 1976).

legislator could resign his elected office to take the position of Commissioner of Education even though the legislature had approved a salary increase for the Commissioner less than one year earlier. In holding that the legislator could not become Commissioner of Education in that circumstance, the court ruled that article II, section 5 of the constitution meant what it says. "The terms of art. II, sec. 5 of the Alaska Constitution are clear and unambiguous."[8]

The prohibition against dual office holding was reinforced in the case of *State v. A.L.I.V.E. Voluntary*.[9] In that decision, the Alaska Supreme Court noted that the legislature could not create an executive branch agency to review and void proposed regulations and then appoint its own members to act as such an agency. The court said that doing so "would amount to dual officeholding, prohibited by article II, section 5, and would infringe on the executive appointment power set out in article III, section 26."[10]

Based on these decisions, the Department of Law has observed that the "prohibition against dual-office holding is enforced in Alaska in accordance with its literal terms."[11] The Department of Law has issued a series of opinions about legislators serving on boards and commissions of the executive branch, finding in most instances that the prohibition of dual office holding is violated or likely violated.[12]

As our prior opinions point out, the term "office" in article II, section 5 of the Alaska constitution must be distinguished from the separate term of "position of profit."

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8 *Id*. at 391.

9 606 P.2d 769 (Alaska 1980).

10 *Id*. at 777-78.

11 1980 Inf. Op. Att'y Gen. (Sept. 24; J-66-212-81), 1980 WL 27547 at *1.

12 *E.g.,* 1996 Inf. Op. Att'y Gen. (May 24; 883-96-0063), 1998 WL 915884 at *3 (legislators on board of Alaska Student Loan Corporation unconstitutional); 1989 Inf. Op. Att'y Gen. (July 1; 883-89-0111), 1989 WL 266890 at *1-2 (dual office holding violated by legislators serving on the Alaska Amateur Sports Authority); 1988 Inf. Op. Att'y Gen. (April 12; 883-88-0022), 1988 WL 249454 at *1 (legislators on the Alaska Children's Trust Fund and board contravene dual office holding prohibition); 1977 Inf. Op. Att'y Gen. (Nov. 16; J-66-265-78), 1977 WL 21968 at *1 (unconstitutional for legislators to serve on State Bond Committee).

The word "profit" modifies only "position" and not "office."[13] Accordingly, the constitutional prohibition applies even though the second "office" a legislator is to hold carries no salary or other compensation. The prohibition against dual office holding is applicable "notwithstanding the presence or absence of compensation or 'profit.' . . . The term 'office' stands without further limitation. We believe it includes offices which effect or directly influence the execution or adjudication of the law."[14]

Our prior opinions have also observed that the term "office" is to be broadly construed. An "office 'is a public charge or employment, the duties of which are prescribed by law, and he who performs the duties is an officer.'"[15] This interpretation is consistent with the generally accepted legal meaning of the term. An "office" is defined as a "position of duty, trust, or authority, esp. one conferred by a governmental authority for a public purpose."[16] The Alaska Supreme Court has used a similar definition for "public office," which it defined as "[a]n office or position in the services of a nation, state, city, etc."[17] The Alaska Supreme Court has also said that an "office" is one created by constitution or statute, the duties of which are provided for by constitution or statute, and that involves a delegation of some of the sovereign functions of government, to be exercised for the benefit of the public.[18]

Furthermore, the Department of Law previously addressed the question of whether a legislator can be a non-voting member of an executive branch board or commission and avoid the constitutional prohibition against dual office holding. In 1996, we advised Governor Knowles on a bill that would have restructured the ACPE and the Alaska

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[13] 1988 Inf. Op. Att'y Gen. (July 1; 663-88-0430), 1988 WL 249567 at *1 (discussing unconstitutionality of appointment of legislators to unpaid positions on advisory committee of the Alaska Land Use Council).

[14] 1988 Inf. Op. Att'y Gen. (Feb. 29; 663-88-0371), 1988 WL 249424 at *1 (legislator may not serve on North Pacific Fishery Management Council).

[15] 1981 Inf. Op. Att'y Gen. (April 10; J-66-557-81), 1981 WL 38619 at *1 (quoting *State v. Dunn*, 496 S.W.2d 480, 490 (Tenn. 1973)).

[16] *Black's Law Dictionary* 1115 (8th ed. 2004).

[17] *Carter v. Alaska Pub. Emps. Ass'n*, 663 P.2d 916, 921 (Alaska 1983).

[18] *Larson v. State*, 564 P.2d 365, 369 (Alaska 1977).

Student Loan Corporation. The bill would have made two legislators non-voting directors of Alaska Student Loan Corporation. We advised that legislative membership on the board violated the constitutional prohibition against dual office holding. "Membership by legislators is precluded even if the position is considered as not 'for profit' and as advisory only."[19]

In like manner, we advised in 1988 that it was unconstitutional for a legislator to be appointed to serve on an advisory committee to the Alaska Land Use Council.[20] "The fact that the council or its lesser-included advisory committee is advisory does not determine whether a legislator is forbidden to serve."[21] The issue was whether holding the office on the advisory committee would lead to conflicts of interest, self-aggrandizement, concentration of power, and dilution of the separation of powers that article II, section 5 of the constitution was meant to guard against. Because the advisory committee wielded actual influence and could affect the execution of statutes, the prohibition against dual office holding was found to apply.[22]

Nonetheless, the constitution does not prohibit legislators from serving on all committees or advisory bodies that may be located in the executive branch or that may involve the legislative branch and another branch of government.[23] We have previously stated that it may be permissible for legislators to serve on advisory boards or task forces that do not have an actual role in executing or administering the law, especially if the board or task force is one of temporary duration. For example, in 1977, we advised that it was likely permissible for legislators to serve on the Bodily Injury Reparation Commission because that commission was a temporary one that could "exercise no sovereign power but rather may only inquire and advise."[24] The opinion, however, cautioned that there was legal uncertainty as to the constitutionality of such an

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19 1996 Inf. Op. Att'y Gen. (May 24; 883-96-0063), 1998 WL 915884 at *3.

20 1988 Inf. Op. Att'y Gen. (July 1; 663-88-0430), 1988 WL 249567 at *1.

21 *Id*.

22 *Id*.

23 *See* 1976 Op. Att'y Gen. No. 44 at 4-6 (Dec. 27) (discussing legislators or judges serving on advisory or clearinghouse commissions that do not exercise executive branch powers).

24 1977 Inf. Op. Att'y Gen. (Aug. 24), 1977 WL 21981 at *1.

appointment and that the prudential response might be to have legislators attend the commission's public meetings and work with the commission rather than sit on it.[25]

We have also previously stated:

> It is not our opinion that either the separation of powers or the prohibition against dual-office holding absolutely forbids the formation of inter-branch committees. Those inter-branch committees which are established as clearinghouses for an exchange of ideas and advice on a given subject and which do not exercise sovereign power, i.e. which do not make, execute, or declare the law, do not offend either prohibition.[26]

Thus, in each specific instance, the exact functions of the particular board or commission must be considered to determine whether the constitution is violated.

II. The doctrine of separation of powers requires segregation of the executive branch and the legislative branch.

The Alaska Supreme Court has recognized that the Alaska constitution was premised on there being a clear separation of the three branches of government. "Those who wrote our constitution followed the traditional framework of American government. The governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the judicial."[27] The "underlying rationale of the doctrine of separation of powers is the avoidance of tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers."[28]

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25 *Id*.

26 1977 Inf. Op. Att'y Gen. (Nov. 16; J-66-265-78), 1977 WL 21968 at *1 (advising that legislators may not serve on State Bond Committee).

27 *Alaska State-Operated School Sys. v. Mueller*, 536 P.2d 99, 103 (Alaska 1975).

28 *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976).

At its core, the "doctrine prohibits one branch from encroaching upon and exercising the powers of another branch."[29] The doctrine serves to block "legislative 'meddling' in the exercise of an executive power."[30]

The prohibition against dual office holding is one particular aspect of the separation of powers established in the constitution. At least two other aspects of separation of powers are implicated by legislators serving on boards and commissions of the executive branch. The first of these is the executive's power to appoint subordinate executive branch officials. The second is the executive privilege that protects confidential internal communications involving the executive's decision-making process.

In *Bradner v. Hammond*, the Alaska Supreme Court considered the separation of powers doctrine and the executive's power of appointment. The case concerned a legislative enactment that required all deputy heads of the principal executive departments and nineteen specified directors of divisions to be subject to legislative confirmation. The court held that this act was unconstitutional "meddling" by the legislative branch in the executive branch.[31] "[T]he governor is necessarily clothed with the power to appoint subordinate executive officers to aid him in carrying out the laws of Alaska."[32] In view of the separation of powers, the court said that the Alaska constitution's provision requiring legislative confirmation only for the heads of each principal department of the executive branch described "the outer limits of the legislature's confirmation authority."[33]

The Department of Law has relied on the doctrine of separation of powers in several opinions disapproving of the legislature designating appointments to boards and commissions of the executive branch. "By requiring the president of the Senate and the

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29 *Id.* at 5 n.8.

30 *Id*. at 6.

31 *Id*.

32 *Id*.

33 *Id*. at 7; *see also A.L.I.V.E. Voluntary*, 606 P.2d at 777–78 (the legislature could not appoint its own members to act as an executive branch agency to review administrative regulations because doing so "would infringe on the executive appointment power set out in article III, section 26").

Speaker of the House to appoint legislators to the [Alaska Amateur Sport Authority], this bill usurps an executive function and thus violates the separation of powers doctrine."[34] "[T]he appointing authority for offices in the executive branch is the governor. . . . But if the law were to designate legislative committee chairman, i.e. persons appointed by the legislature or its officers, to hold an office in the executive branch, then there would be a serious constitutional problem."[35]

The other aspect of the doctrine of separation of powers implicated here is the executive privilege. The Alaska Supreme Court has recognized that the executive privilege is based "in the constitutional separation of powers principle."[36] The executive privilege affords a chief executive a qualified power "to keep confidential certain internal governmental communications so as to protect the deliberative and mental processes of decision-makers."[37] The privilege "is applicable to internal advice, opinions and recommendations."[38]

The executive privilege has been specifically applied to a legislator's attempt to access internal reports prepared for a governor on significant issues involving the departments, boards, commissions and other authorities of state government.[39] The

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[34] 1989 Inf. Op. Att'y Gen. (July 1; 883-89-0111), 1989 WL 266890 at *1.

[35] 1977 Inf. Op. Att'y Gen. (Nov. 16; J-66-265-78), 1977 WL 21968 at *1 (unconstitutional for chairs of house and senate finance committees to serve on state bond committee); *see also* 1988 Inf. Op. Att'y Gen. (April 12; 883-88-0022), 1988 WL 249454 at *1 (having presiding officers of house and senate appoint members of Alaska Children's Trust Fund Board "infringes on the governor's appointment authority under art. III, secs. 1 and 26, of the Alaska Constitution").

[36] *Doe v. Alaska Superior Court, Third Judicial Dist.*, 721 P.2d 617, 622 (Alaska 1986).

[37] *Id*. at 622–23.

[38] *Id*. at 623.

[39] *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 475-76 & 483-85 (Ohio 2006).

privilege also has been applied to protect from disclosure recommendations a commission gave to a governor related to the discharge of executive functions.[40]

In Alaska, the executive privilege is supplemented by a corollary protection of confidentiality—the deliberative process privilege. The deliberative process privilege protects pre-decisional communications that reflect the "give-and-take" of decision-making and that contain opinions, recommendations, or advice about policies.[41]

The appointment of legislators to an executive branch board or commission undermines these privileges that the separation of powers doctrine otherwise protects. In performing their duties as members of a board or commission with any substantive executive authority, the legislators would be entitled to receive or be informed of confidential information being exchanged between the board or commission and the governor or other members of the executive branch. Such an intrusion of the legislative branch into the internal decision-making processes of the executive branch contravenes the separation of powers doctrine.[42]

III. Non-voting status does not sidestep the violation of the constitution.

As noted above, the Department of Law has previously opined that the constitutional problems created by having legislators serve on executive branch boards and commissions are not cured by making the legislators non-voting members. We continue to adhere to this view. If the board or commission on which a legislator serves is charged with executing or administering the law, the fact that the legislator does not have a vote on the board or commission does not eliminate dual office holding or overcome the separation of powers problem. The legislator is still entitled to participate in all board or commission discussions and debates in order to influence how the entity executes or administers its statutory authority. The legislator is still entitled to participate in executive session discussions, including consideration of confidential matters that would otherwise be protected by the executive or deliberative process privileges. The legislator is still

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40 *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 782-85 (Del. Super), *appeal dismissed*, 670 A.2d 1338 (Del. 1995).

41 *Gwich'in Steering Comm. v. State*, 10 P.3d 572, 579 (Alaska 2000).

42 *See* 1988 Inf. Op. Att'y Gen. (Aug. 15; 663-88-0016), 1988 WL 249537 at *3-4 (it is a violation of separation of powers for a legislative act to override an executive branch decision to keep information confidential to protect the decision-making process).

entitled to serve on any committees of the board or commission that can, without any vote necessarily being taken, give direct instructions to managers on carrying out the entity's statutory duties.

Our conclusion on the question of non-voting members fits with the governing Alaska Supreme Court decisions. A legislator serving on a board or commission carrying out executive functions remains subject to the evils that the Alaska Supreme Court has said the prohibition against dual office holding was meant to prevent. The legislator's presence on the board or commission, even as a non-voting member, raises "conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers."[43] The legislator's trespass on executive branch functions also undercuts the constitutional goal of "independence and integrity of action and decision on the part of individual members of our state government."[44]

Similarly, a legislator's presence on a board or commission, even as a non-voting member, constitutes "one branch . . . encroaching upon and exercising the powers of another branch."[45] The non-voting legislator's presence to influence the board or commission's execution of the laws and to become privy to confidential communications remains "legislative 'meddling' in the exercise of an executive power."[46] The separation of powers problem is compounded by having the presiding officers of the house or senate appoint the non-voting legislator to the board or commission. Such appointments "infringe on the executive appointment power set out in article III, section 26."[47]

Our view that non-voting status does not avoid the constitutional problems is confirmed by the Arkansas Supreme Court's decision in *State Board of Workforce Education and Career Opportunities v. King*.[48] In that case, the court held that having a state senator serve on two state boards violated both the prohibition against dual office

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43 *Begich*, 441 P.2d at 35.

44 *Id*.

45 *Bradner*, 553 P.2d at 5 n.8.

46 *Id*. at 6.

47 *A.L.I.V.E. Voluntary*, 606 P.2d at 777–78.

48 985 S.W.2d 731 (Ark. 1999).

holding and the separation of powers doctrine. The court reached this conclusion even though the senator acted in an ex officio, non-voting capacity.

> [T]he principle that a member of one branch of government shall not serve in another is fixed in no uncertain terms by the Arkansas Constitution . . . . The legislator, in this case Senator Wilson, has been authorized by the General Assembly to occupy a position on the appealing board and commission. Hence, he serves with the imprimatur of the General Assembly which enacted the enabling legislation. With the full weight of this legislative authority behind him, he participates in debate, voices his opinions, and assesses the pros and cons of any given issue with the other members of the board and commission. His views are made known, and carry, no doubt, inordinate influence because of who and what he is. *Under these circumstances, it makes little difference whether he actually votes on the issue at hand. He is unmistakably exercising the power of the executive branch of government by his participation on the board and commission, and that is forbidden to him as a member of the General Assembly.*[49]

The rationale the Arkansas court offered is persuasive and, in our opinion, it would be followed by the courts in Alaska.

We are aware that the courts of South Carolina would reach a different conclusion. The South Carolina Supreme Court has recognized an exception to the prohibition against dual office holding under that state's constitution that it refers to as the "ex officio exception." In *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*,[50] the court held that the appointment of two legislators to the South Carolina Infrastructure Bank—a state corporation formed to finance economic development projects—was constitutional. "This Court . . . has recognized an 'ex officio' or 'incidental duties' exception where 'there is a constitutional nexus in terms of power and responsibilities between the first office and the 'ex officio'

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49 *Id.* at 735 (emphasis added).

50 744 S.E.2d 521 (S.C. 2013).

office'." [51] The court found that, since the infrastructure bank could borrow money and issue bonds for economic development, and since it was also within the province of the legislature to incur debt on behalf of the state, there was "a constitutional nexus" between the powers and responsibilities of the board of the infrastructure bank and the state legislature.[52] Moreover, the court concluded that "service by legislators on the Board is 'reasonably incidental to the full and effective exercise of their legislative powers.'"[53]

The South Carolina court went on to hold that there was no separation of powers problem with legislators serving on the board of the infrastructure bank. The court relied on South Carolina's unique history on legislative influence in the other branches of government.

> In South Carolina, this allowance of overlap between the branches is somewhat singular in the extensive involvement of the legislature in the powers of the executive and judiciary. Historically, this State has been considered a "legislative state" with a practice of "[j]oining legislators with executive branch decision makers" for a "commission approach to government."[54]

The court concluded that separation of powers was not a problem in South Carolina because "our rich and unique constitutional history has resulted in a system of

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51 *Id*. at 524 (citation omitted). The term "ex officio" means "[b]y virtue or because of an office." *Id*. The term "ex officio" is not the equivalent of non-voting. In fact, South Carolina applies its "ex officio exception" to legislators serving as voting members of boards and commissions.

52 *Id*. at 525.

53 *Id*.

54 *Id*. at 526 (quoting Cole Blease Graham, Jr., *The South Carolina Constitution: A Reference Guide* 46 (2007)).

government which does not lend itself to a neat, compartmentalized, or 'cookie-cutter' approach."[55]

We conclude the unique South Carolina "ex officio exception" is out of step with the Alaska law and the Alaska constitution. The "constitutional nexus" test that the South Carolina court adopted for the application of the "ex officio exception" places no meaningful restriction on legislative interference in the executive branch. The Alaska State Legislature passes all the substantive laws that the executive branch administers, and the Alaska State Legislature controls the budget for the executive branch. If the South Carolina "ex officio exception" was adopted in Alaska, a "nexus" between the legislature and the executive branch would always exist to justify "incidental" legislative involvement in every executive branch matter. Under the South Carolina approach, the Alaska constitution's prohibition against dual office holding would be annulled and a large hole would be carved into the separation of powers doctrine.

Moreover, Alaska has not had the "singular" experience that South Carolina has had with overlap between the branches of government. Unlike South Carolina, Alaska has not tolerated extensive legislative involvement in executive and judicial branch functions. To the contrary, when called upon to consider the enforcement of the prohibition against dual office holding and the separation of powers doctrine, the Alaska Supreme Court has rejected legislative overlap with the executive branch.[56]

IV. Applying these principles to fourteen boards and commissions yields different results based on the functions they perform.

Applying these legal principles to the boards and commissions you asked us to consider, we reach the following conclusions.

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[55] *Id*. at 527; *see also Segars-Andrews v. Judicial Merit Selection Commission*, 691 S.E.2d 453, 461–63 (S.C. 2010) ("ex officio" exception allowed legislators to serve on judicial commission); *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 363 S.E.2d 683, 685-86 (S.C. 1987) (legislators serving on educational television commission was constitutional).

[56] *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976); *Warwick v. State ex rel. Chance*, 548 P.2d 384, 391-92 (Alaska 1976); *Begich v. Jefferson*, 441 P.2d 27, 35 (Alaska 1968).

A. The constitution is violated by legislators serving on the AGDC board.

AGDC is a public corporation of the State. AGDC is described in statute as a "government instrumentality acting in the best interests of the state" that is located "for administrative purposes in the Department of Commerce, Community and Economic Development."[57] The purposes of AGDC are, among other things, to develop an in-state natural gas pipeline (the ASAP Project), an Alaska liquefied natural gas (LNG) project, and the delivery of natural gas, including propane, to public utility and industrial customers of the state.[58] In performing these functions, AGDC is also to "assist the Department of Natural Resources and the Department of Revenue to maximize the value of the state's royalty natural gas, natural gas delivered to the state as payment of tax, and other natural gas received by the state."[59]

Although AGDC is set up as a statutory corporation, it is an executive branch entity of the State and functions as such.[60] AGDC is managed by a board of directors and the five public members of the board are appointed by the governor.[61] Two commissioners of the principal departments of the State chosen by the governor also serve as AGDC directors.[62] The public members and, by necessity the two commissioners, all serve on AGDC's board at the pleasure of the governor.[63]

AGDC very recently adopted revised bylaws that explicitly acknowledge its position in the executive branch and its role in following the governor's policy directives.

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57 AS 31.25.010.

58 AS 31.25.005(3), (4) & (6).

59 AS 31.25.005(2).

60 *See DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 724 (Alaska 1962) (although Alaska State Development Corporation had a legal existence independent of the State, it remained a State instrumentality the control of which was retained in the executive branch).

61 AS 31.25.020(a)(1) & (b).

62 AS 31.25.020(a)(1).

63 AS 31.25.020(b).

The bylaws state: "As the chief executive officer of the State of Alaska, the Governor speaks on behalf of AGDC's owner in giving direction to AGDC, and AGDC will endeavor to implement the Governor's directions."[64] The bylaws further provide: "The Governor establishes policies for the executive branch of the State of Alaska provided that those policies are consistent with applicable law. AGDC is an instrumentality of the State of Alaska and will endeavor to perform its duties and exercise its powers in furtherance of the Governor's policies."[65]

AGDC's finances are handled as a part of the executive branch. Although AGDC may issue bonds and notes payable for its own revenues or assets to develop the projects it is pursuing,[66] AGDC does not control its own finances as an independent corporation would. AGDC is subject to the Executive Budget Act[67] and each year it must submit its operating budget to the governor, who may modify it before presenting it the legislature for its consideration. AGDC can make no expenditures for operating expenses without a legislative appropriation approving it. AGDC has control over two funds that the legislature created: the in-state natural gas pipeline fund and the Alaska liquefied natural gas project fund.[68] But AGDC may expend the money from these funds only for the purposes the legislature has specifically authorized. Any revenues AGDC generates that are not pledged to pay outstanding bonds are program receipts that AGDC cannot apply as it decides. Instead, these revenues must be transferred to the State's general fund for legislative appropriation.

AGDC performs executive branch functions in that it executes the statutory programs that the legislature has prescribed for it by law. AGDC does not merely collect information and make recommendations to other governmental officials or agencies to consider. Instead, AGDC is charged with executing and administering the laws that the legislature has enacted regarding the development of the ASAP Project and the LNG project. AGDC further performs executive and administrative duties in assisting the

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64 AGDC Amended and Restated Bylaws § (1)(a)(ii) (adopted April 8, 2016).

65 *Id*. § (2)(a).

66 AS 31.25.160.

67 AS 37.07.

68 AS 31.25.100 & 31.25.110.

Department of Natural Resources and the Department of Revenue with their own executive branch functions.

Given these circumstances, it is unconstitutional for legislators to serve as AGDC directors, even as non-voting ones. AGDC is not an advisory entity. Rather, AGDC executes the law by performing the functions its governing statutes set out. A director of AGDC, even a non-voting one, holds an "office" of the State within the meaning of article II, section 5 of the Alaska constitution. All the directors hold a position created by statute and they all serve to assist the corporation in executing and administering its statutory missions.

The dangers that the dual office prohibition was meant to guard against are all present by having legislators on AGDC's board. The difficulty with conflicts of interest is particularly acute since the legislators would owe a fiduciary duty to AGDC as directors but they would also owe an obligation as legislators to act independently for the benefit of the entire state. This conflict would be most obvious on budgetary matters. The legislators, as AGDC directors, would need to act in the corporation's best interest in considering its annual budgetary needs, but in passing the state operating budget each year the legislators would have to take a different, broader view.[69]

Having legislators serve as AGDC directors also violates the doctrine of separation of powers. The legislators, whether or not they vote on the board, would be influencing AGDC's execution of its statutory functions and thereby "encroaching upon and exercising the powers of another branch."[70] The appointment of the legislators to AGDC's board by the presiding officers of the house and senate in and of itself would

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[69] The constitutional prohibition against dual office holding was derived from the older common law rule against incompatible offices. The common law rule provides that, as a matter of public policy, the same person may not hold two public offices incompatible with one another. *See Acevedo v. City of North Pole*, 672 P.2d 130, 133-34 (Alaska 1983). "Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second." *Township of Belleville v. Fornarotto*, 549 A.2d 1267, 1271 (N.J. Super. Ct. Law Div. 1988). "No clearer case of incompatibility can arise than . . . where one position involves an element of budgetary control over the other." *Held v. Hall*, 741 N.Y.S.2d 648, 652 (N.Y. Sup. Ct. 2002).

[70] *Bradner v. Hammond*, 553 P.2d 1, 5 n.8 (Alaska 1976).

contravene the governor's exclusive authority to appoint subordinate executive officials. And, the legislators' participation in executive sessions of the AGDC board during which confidential executive decision-making matters are considered would violate the executive privilege that separation of powers protects. In fact, the legislative history of HCS CSSB 125(RES) shows that the bill was specifically aimed at getting legislators access to the executive sessions of AGDC's board so that confidential information would be available to them.[71]

In short, having legislators serve as non-voting directors of AGDC is unconstitutional. We recommend you veto HCS CSSB 125(RES).

B. A legislator acting as a director of KABATA is unconstitutional.

KABATA is a public corporation of the State. It is designated by statute as "an instrumentality of the state within the Department of Transportation and Public Facilities, but the authority has a separate and independent legal existence from the state."[72] The exercise of its statutory powers is specified as being "considered an essential governmental function of the state."[73]

KABATA is governed by a board of directors that consists of three public members, two commissioners, and two non-voting legislators.[74] One of the non-voting legislators is to be a state representative appointed by the speaker of the house and the other non-voting legislator is to be a senator appointed by the president of the senate.[75]

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71 *Hearing on SB 125 before Senate Resources Committee*, 29th Leg., 2d Sess. (March 2, 2016), *available at* http://www.akleg.gov/basis/Meeting/Detail/?Meeting=SRES%202016-03-02%2015:30:00.

72 AS 19.75.021(a).

73 *Id.*

74 AS 19.75.031(a).

75 *Id*.

The public members serve for a five-year term and may only be removed for cause.[76] The governor designates the member who is to serve as chair of the board.[77]

KABATA is subject to the Executive Budget Act[78] and its finances are handled as a part of the executive branch.[79] KABATA's operating budget each year must be presented by the governor to the legislature for approval. KABATA formerly managed appropriated capital funds for the Knik Arm bridge project, but KABATA's appropriated capital funds were transferred to the Department of Transportation and Public Facilities ("DOTPF") in recent years and have been managed by DOTPF ever since.[80]

As originally created, KABATA had the statutory authority to develop and finance the Knik Arm bridge project, which it planned to do through a public-private partnership. In 2014, the legislature removed KABATA's authority to develop and finance the project.[81] Instead, the legislature provided that the project would be developed by DOTPF as a publicly funded project paid for through federal loans and revenue bonds. As of July 1, 2014, KABATA transferred all of its capital assets and all of its full-time employees to DOTPF.[82]

As modified, KABATA's statutory authority is now to operate the Knik Arm bridge and its appurtenant facilities, once the project has been constructed and turned over to KABATA by DOTPF.[83]

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76 AS 19.75.031(b).

77 AS 19.75.041(c).

78 AS 37.07.

79 AS 19.75.076.

80 AS 19.75.113.

81 Sec. 5, ch.51, SLA 2014.

82 *2015–A Year of Transition, Knik Arm Bridge and Toll Authority, Comprehensive Annual Financial Report*, at 23 & 27 (Sept. 12, 2015).

83 AS 19.75.111.

We conclude that having a legislator serve as a director of KABATA contravenes the constitution. A position on the KABATA board is an "office" of the State within the meaning of article II, section 5 of the Alaska constitution. KABATA is not an advisory body. Although KABATA's authority has been curtailed since 2014, it still is charged with executing and administering the law as the operator of the State-owned Knik Arm bridge project. Moreover, the 2014 changes to KABATA's statutes and the shift of its employees to DOTPF means that, as a practical matter, the KABATA board must work more closely with DOTPF with respect to the project. Therefore, a director of the KABATA board, even a non-voting one, is in a position to influence not only KABATA but also DOTPF in executing and administering their respective statutory powers and duties.

Similarly, a legislator serving as a KABATA director is encroaching on the executive branch in violation of the separation of powers doctrine and is in a position to intercept confidential, deliberative process communications. Also, having legislators appointed to the KABATA board by the presiding officers of the house and senate violates the governor's power of appointment under article III, sections 1 and 26 of the Alaska constitution.

C. Legislators serving on the board of AAC contravene the constitution.

AAC is a public corporation of the State.[84] AAC is designated as "a body corporate and politic located for administrative purposes within the Department of Military and Veterans' Affairs and affiliated with the University of Alaska but with a separate and independent existence."[85]

AAC is managed by a board of directors.[86] Eight of the directors are appointed by the governor or designated as directors by virtue of their positions with the University of Alaska.[87] The adjutant general of the Department of Military and Veterans' Affairs is a ninth director.[88] In addition, two legislators serve "as ex officio nonvoting members of

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84 AS 26.27.010(a).

85 *Id*.

86 AS 26.27.020(a).

87 *Id*.

88 *Id.*

the board of directors" and are appointed to AAC's board by the presiding officers of each chamber of the legislature.[89]

Like the other public corporations of the State, AAC is subject to the Executive Budget Act[90] and must have the governor approve and submit its operating budget to the legislature each year for consideration.[91] AAC is prohibited from conducting a construction project of $1 million or more without getting prior legislative approval.[92] AAC is also required to obtain prior legislative approval to issue any bonds in excess of $1 million or if the annual debt service on all its outstanding bonds is to exceed $1 million.[93]

AAC is charged with promoting and developing "space-related economic growth" in the state and "space-related educational and research development" in conjunction with the University of Alaska.[94] AAC is authorized to develop, own and operate launch sites and other space-related facilities and to contract for their use with private industry and government agencies.[95] Consistent with this authority, AAC has developed and operates the Pacific Spaceport Complex – Alaska on State-owned land located on Kodiak Island.

In our opinion it is unconstitutional for a legislator to serve as a director of AAC, even as a non-voting director. A position on AAC's board is an "office" of the State within the meaning of article II, section 5 of the Alaska constitution. ACC is not an advisory body. Instead, AAC executes and administers the statutory powers that the legislature by law has granted it. And, just like AGDC and KABATA, having legislators

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89 AS 26.27.020(d).

90 AS 37.07.

91 AS 26.27.100(b)(2).

92 AS 26.27.140.

93 AS 26.27.150(b).

94 AS 26.27.090.

95 AS 26.27.100(a)(9), (10) & (15).

serving on AAC's board, even as non-voting members, contravenes the separation of powers doctrine.

D. The governing statutes do not provide for legislators to be directors of ASMI.

ASMI is another public corporation of the State. ASMI is designated as "an instrumentality of the state in the Department of Commerce, Community, and Economic Development" but with "a legal existence independent of and separate from the state."[96] ASMI's statutory functions are, among other things, to promote seafood harvested in the state, develop quality specifications for Alaska seafood, and prepare market research and seafood product development plans.[97]

ASMI is governed by a board of directors that consists of seven members appointed by the governor.[98] ASMI's statutes do not provide for any legislator to serve in any capacity on the ASMI board, either as a voting or non-voting member. Nevertheless, ASMI's website discloses that it has four "ex officio" members on its board, two officials from the executive branch and two sitting legislators.[99] It is not clear who appoints these "ex officio" members to ASMI's board.

We have not been able to determine how ASMI came to have "ex officio" directors. Although ASMI could not modify its governing statutes through a regulation or a corporate bylaw, ASMI has no regulation or bylaw creating "ex officio" directors. We assume, but we do not know for certain, that at some point the ASMI board itself passed a resolution or adopted a corporate policy to provide for these "ex officio" directors.

The ASMI "ex officio" director positions deviate from the governing statutes. The legislature created ASMI and designated the make-up of its board of directors by statute.[100] ASMI lacks the power to change the statutes that govern its existence.

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96 AS 16.51.010.

97 AS 16.51.110.

98 AS 16.51.020.

99 http://pressroom.alaskaseafood.org/board-of-directors/.

100 AS 16.51.020.

Although ASMI can invite legislators and others to attend its meetings and provide advice on any topics, ASMI cannot create new directors for its board, either as voting or non-voting members.

For the reasons stated above with respect to AGDC, KABATA and AAC, we think the constitution is likely violated by having legislators serve as directors of ASMI, even as non-voting members. But we need not reach the constitutional questions with respect to ASMI since the governing statutes do not provide for legislators to be members of ASMI's board of directors.

E. It is unconstitutional for legislators to be members of the ACPE.

The ACPE is not a public corporation. The ACPE is part of the Department of Education and Early Development, one of the principal departments of the executive branch.[101] The ACPE consists of fourteen members, two of whom are legislators appointed by the presiding officers of each legislative chamber.[102] The legislators are full members of the commission and do not serve in a non-voting capacity.

The ACPE performs some advisory functions, but it is also charged with executing and administering the law.[103] The ACPE administers several financial aid programs for higher education, including the Education Loan Program,[104] the AlaskaAdvantage Loan Program,[105] the Alaska Supplemental Education Loan Program,[106] and others. The commission also regulates the licensing of postsecondary educational institutions in the state.[107]

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101 AS 14.42.015(a).

102 AS 14.42.015(a)(7).

103 AS 14.42.030.

104 AS 14.43.091–14.43.160.

105 AS 14.43.161–14.43.168.

106 AS 14.43.170–14.43.175.

107 AS 14.42.030(b)(2) & 14.48.040.

We have pointed out the constitutional problems with legislators serving on the ACPE on three prior occasions.[108] Consistent with our prior advice, we are of the opinion that having legislators as members of the ACPE is unconstitutional. Because the commission is part of the executive branch, and because the commission is unquestionably executing and administering the law, it is a violation of the prohibition against dual office holding and the doctrine of separation of powers for legislators to serve on the ACPE.

F. The constitution is likely not violated by legislators serving on the other boards and commissions on your list.

You have asked us to look into constitutional problems with having legislators serve on nine other specific boards and commissions. These nine bodies are:

(1) the Alaska Criminal Justice Commission;[109]

(2) the Alaska Health Care Commission;[110]

(3) the Alaska Native Language Preservation and Advisory Council;[111]

(4) the Alaska Tourism Marketing Board;[112]

(5) the bond reimbursement and grant review committee of the Department of Education and Early Development;[113]

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[108] 1996 Inf. Op. Att'y Gen. (May 24; 883-96-0063), 1998 WL 915884; 1977 Inf. Op. Att'y Gen. (Feb. 3), 1977 WL 21832 at *4; 1976 Op. Att'y Gen. No. 44 at 3 (Dec. 27).

[109] AS 44.19.641–44.19.649.

[110] AS 18.09.010–18.09.080.

[111] AS 44.33.520.

[112] AS 44.33.136.

[113] AS 14.11.014.

(6) the Citizens' Advisory Commission on Federal Management Areas in Alaska;[114]

(7) the advisory committee on bail for state park offenses;[115]

(8) the advisory committee of the Alaska Energy Authority on rural energy grants;[116] and

(9) the Statewide Suicide Prevention Council.[117]

Based on our review of the statutes governing these bodies and the information we have on how they actually function, we conclude it is unlikely that having legislators serve on these boards, commissions, committees and councils contravenes the Alaska constitution. Insofar as we are able to determine, all of these bodies perform an advisory role only. Their duties are to gather information, make recommendations to others to consider and possibly act upon, and in some cases, write periodic reports.

Two of the bodies—the Alaska Energy Authority's advisory committee on rural energy grants, and the Department of Education and Early Development's bond reimbursement and grant review committee—screen, or establish criteria for screening, grant fund requests. These grant fund requests ultimately must be accepted or rejected by the legislature itself in appropriating the money for the grants. Legislators serving on these advisory committees can be seen as fulfilling a legislative branch function, not performing an executive branch one.

As we have said before, the constitution is not offended by having legislators serve on boards and commissions that can only "inquire and advise."[118] "Inter-branch committees which are established as clearinghouses for an exchange of ideas and advice on a given subject and which do not exercise sovereign power, i.e. which do not make,

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114 AS 41.37.160–41.37.260.

115 AS 41.21.960(b).

116 AS 42.45.045(i).

117 AS 44.29.300–44.29.390.

118 1977 Inf. Op. Att'y Gen. (Aug. 24), 1977 WL 21981 at *1.

execute, or declare the law, do not offend [the constitution]."[119] Because these nine bodies are advisory only and do not actually execute or administer the law, we think that legislators may serve on them without violating the Alaska constitution.

Our advice regarding these bodies would be different if the legislators who served on them were entitled to receive compensation for their service on the bodies, in addition to the compensation paid to them as legislators. In such an instance, the legislators' membership on these bodies would be a "position of profit" that the dual office holding prohibition of the constitution forbids. The payment of a legislator's travel expenses for attending meetings should be permissible. The payment of per diem to defray a legislator's out-of-pocket expenses while traveling also would be permissible as long as the legislator was not also receiving the legislative per diem for the same time period.

CONCLUSION

The constitutionality of a legislator serving on a board or commission of the executive branch depends on the functions the board or commission performs. If the board or commission executes or administers the law, the constitution prohibits a legislator from holding a position on the board or commission, even if the position is non-voting. If the board or commission serves an advisory function only, then the constitution likely does not prohibit a legislator from serving on the board or commission.

Legislators may not serve as non-voting directors of AGDC without violating the dual office holding prohibition of the Alaska constitution and the separation of powers doctrine. We recommend that you veto HCS CSSB 125(RES) as unconstitutional.

In our opinion it is unconstitutional for legislators to be non-voting directors of KABATA and AAC. It is also unconstitutional for legislators to serve as members of the ACPE. The constitution is likely violated by legislators serving as non-voting directors of ASMI, but the question need not be definitively answered because the governing statutes do not provide for legislators to serve on that board.

As to the other boards and commissions you have inquired about, we think that legislators may serve on those advisory bodies without offending the constitution so long as no compensation is paid them beyond what they otherwise receive as legislators.

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[119] 1977 Inf. Op. Att'y Gen. (Nov. 16; J-66-265-78), 1977 WL 21968 at *1.

If you should need further advice on these matters, please let us know.

Sincerely,

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JEC:JHJ:aec