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of **ALASKA**
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August 14, 2026

The Honorable Michael J. Dunleavy
Governor
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: *Constitutionality of Statutes Requiring Board and Commission
Appointments from Private-Entity Nomination Lists*

Dear Governor Dunleavy:

You requested an opinion addressing the constitutionality of statutes that require the governor to select members of public boards and commissions from a list of people nominated by a private entity.

SHORT ANSWER

Statutes requiring the governor to choose board and commission appointees from a nomination list provided by a private entity are very likely unconstitutional, unless the board or commission is purely advisory in nature. Such statutes violate the separation of powers and present nondelegation concerns because they entail the legislature delegating an executive power to private entities.

BACKGROUND

Many Alaska statutes creating public boards and commissions provide that the governor will appoint members and outline certain qualifications for appointees.¹ These requirements have generally been accepted as constitutional so long as they reasonably relate to the board or commission's purpose.² However, several statutes outline a different, far more restrictive appointment process under which the governor is required

¹ See, e.g., AS 08.64.010 (providing that the governor shall appoint a board of medical examiners, including five physicians licensed in the state).

² See 1981 Inf. Op. Att'y Gen. (April 23; J-66-698-81), 1981 WL 38632 ("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." (citing *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976))).

to appoint some members from a list of nominees provided by private entities or to appoint a private entity's designee.³ These boards and commissions include:

- The Alaska Criminal Justice Data Analysis Commission (within the Office of the Governor⁴)
 - o One member must be a member of the Alaska Native community designated by the Alaska Native Justice Center,⁵ and another member must be a victims' rights advocate designated by the Alaska Network on Domestic Violence and Sexual Assault.⁶
- The Alaska Fire Standards Council (within the Department of Public Safety⁷)
 - o The governor must appoint members of two firefighting associations and the Alaska Fire Chiefs Association from lists of nominees submitted by each association but "may reject a list submitted . . . and request that another list be submitted."⁸

³ This list does not include statutes that merely require the governor to "consider" a list of qualified candidates submitted by a private entity. *See, e.g.*, AS 14.07.085(a) (stating the governor "shall consider recommendations made by recognized educational associations in the state" when appointing members of the Board of Education and Early Development). Statutes giving other governmental or quasi-governmental entities various roles in board or commission appointments are also outside the scope of this opinion. *See, e.g.*, AS 14.42.015(a)(7) (providing that the Alaska Commission on Postsecondary Education will include two legislators appointed by the senate president and house speaker); AS 19.65.120(a)(3)(B) (providing that four public members of the Alaska Marine Highway Operations Board shall be appointed by legislators); AS 39.23.500(a) (providing that the governor will appoint two members of the State Officers Compensation Commission from nomination lists provided by the senate president and house speaker); AS 26.23.071(b) (allowing several federal agencies to appoint representatives to the Alaska State Emergency Response Commission); AS 08.08.040 (providing that nine members of the Board of Governors of the Alaska Bar are elected by active Bar members). That said, previous Attorney General opinions have likewise concluded that legislators generally may not serve on executive boards or commissions and that statutes requiring the governor to appoint members from lists provided by legislators are unconstitutional. *See* 2016 Op. Alaska Att'y Gen. (July 19), 2016 WL 4164178; 2008 Op. Alaska Att'y Gen. (Apr. 21), 2008 WL 4277524.

⁴ AS 44.19.641.

⁵ AS 44.19.642(a)(4).

⁶ AS 44.19.642(a)(11).

⁷ AS 18.70.330(a).

⁸ AS 18.70.330(b)(3), (b)(6), (c).

- The Alaska Historical Commission (within the Department of Natural Resources⁹)
 - The governor must appoint two members from a list of at least four nominees submitted annually by the Alaska Historical Society.¹⁰
- The Alaska Public Offices Commission (within the Department of Administration¹¹)
 - The governor must appoint two members from each of the two political parties with the largest number of registered voters at the time of the most recent general election at which a governor was elected.¹² The appointees must be chosen from lists of four names submitted by each party's central committee.¹³ The governor's appointees are subject to legislative confirmation.¹⁴
- The Alaska Retirement Management Board (within the Department of Revenue¹⁵)
 - The governor must appoint two members of the public employees' retirement system and two members of the teachers' retirement system as trustees.¹⁶ The appointees must be chosen from lists of four nominees submitted by the systems' respective bargaining units.¹⁷ The trustees can be removed only for cause.¹⁸
- The Alaska Workforce Investment Board (within the Department of Labor and Workforce Development¹⁹)
 - The governor must appoint four representatives of organized labor chosen from lists of nominees submitted by recognized state labor organizations, but "the governor may reject a list submitted . . . and request that another list be submitted."²⁰

⁹ See AS 41.35.300.

¹⁰ AS 41.35.310(5).

¹¹ AS 15.13.020(a).

¹² AS 15.13.020(b).

¹³ *Id.*

¹⁴ AS 15.13.020(a).

¹⁵ AS 37.10.210(a).

¹⁶ AS 37.10.210(b)(2)(C)–(D).

¹⁷ *Id.*

¹⁸ AS 37.10.210(d).

¹⁹ See AS 23.15.550(a).

²⁰ AS 23.15.550(a)(6).

- The Professional Teaching Practices Commission (within the Department of Education and Early Development²¹)
 - The governor must select several members from lists of names submitted by recognized Alaska teachers' organizations, the Alaska Principals Association, the Superintendents Advisory Commission, and Alaska institutions of higher learning.²² Members are subject to legislative confirmation and can be removed only for cause.²³
- The Statewide Suicide Prevention Council (within the Department of Health²⁴)
 - The governor must appoint "one person recommended by the Alaska Federation of Natives, Inc."²⁵
- Wood-Tikchik State Park Management Council
 - The governor must appoint five members from nomination lists submitted by a variety of public and private entities.²⁶

Several of these boards and commissions exercise significant authority, whereas others are largely advisory. For example, the Fire Standards Council adopts regulations for the training, performance, and certification of fire services personnel,²⁷ and the Professional Teaching Practices Commission has the power to suspend or revoke teaching certificates.²⁸ By contrast, the Wood-Tikchik State Park Management Council's main function is to "develop a management plan for the park with the advice and assistance of [the Department of Natural Resources]."²⁹ But the Department of Natural Resources and the Department of Fish and Game need only "consult" with the Council before adopting regulations governing the use and management of the park.³⁰

²¹ See AS 14.07.010.

²² AS 14.20.410(a).

²³ AS 14.20.390; AS 14.20.430.

²⁴ AS 44.29.300(a).

²⁵ AS 44.29.300(a)(3)(D).

²⁶ AS 41.21.163.

²⁷ AS 18.70.350.

²⁸ AS 14.20.470(a)(4).

²⁹ AS 41.21.164.

³⁰ AS 41.21.165.

ANALYSIS

I. The original understanding of Article III of the Alaska Constitution was that a strong executive would exercise broad appointment powers not controlled by outside parties.

Two constitutional provisions are relevant to this opinion. The first is article III, section 16, which provides that the governor is “responsible for the faithful execution of the laws.” Statutes impeding the governor’s ability to choose executive officers implicate this provision, as such limitations may interfere with the faithful execution of the laws or reduce the governor’s accountability to the electorate for underperforming executive agencies. The second relevant provision is article III, section 26, which outlines the appointment process for certain boards and commissions. This provision states that:

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.³¹

These provisions do not explicitly answer whether the legislature may constitutionally require the governor to choose board and commission appointees from private-party nomination lists. When constitutional provisions do not speak to the precise issue at hand, the Alaska Supreme Court “routinely look[s] to statements by the delegates at the Alaska Constitutional Convention in order to understand the intent of the framers when drafting the Alaska Constitution.”³² Those materials are most useful not because they reveal the delegates’ individual intentions, but because they illuminate the original public understanding of the constitutional language adopted by the people. Here, the debates, committee reports, and other materials from the Constitutional Convention reflect the widely shared understanding that Article III created a strong executive with broad appointment powers not subject to screening from outside entities.

A major purpose of the Constitutional Convention was to create a strong governor.³³ Delegates “were intent on establishing a strong and responsible chief executive for the future state”—a generally held sentiment that “largely resulted from the

³¹ Alaska Const., art. III, § 26.

³² *Garber v. Super. Ct., Third Jud. Dist.*, 581 P.3d 713, 720 (Alaska 2025).

³³ *See Taylor v. Alaska Legis. Affs. Agency*, 529 P.3d 1146, 1156 (Alaska 2023) (noting “the founders’ goal of a ‘strong executive’”).

lack of responsive government under the territory.”³⁴ “Executive authority was highly diffused under territorial government,” which meant that “government was neither responsible nor responsive to the people. As a result, convention delegates were ready to make basic structural changes so the people could hold the governor wholly responsible for the conduct of state administration.”³⁵

In drafting article III of the constitution, the Convention’s Executive Branch Committee drew on background materials that advocated for the governor to have much broader appointment authority than the governors of other states. The committee started its deliberations by reviewing a report prepared by the Public Administration Service (PAS), a nonprofit research organization retained to prepare a series of papers and other research materials for the delegates.³⁶ The PAS paper on the executive branch recommended that the convention create a governor with “unlimited discretion in appointments.”³⁷ The paper observed that most other states did not give their governors this level of authority.³⁸ In particular, the paper identified that governors in other states had less discretion because they must sometimes “make [their] selection[s] from panels *submitted by interest groups or professional organizations*.”³⁹ The paper concluded that “the governor’s lack of clear authority over administrative officials is a serious impediment to effective administration and unity of management” in other states.⁴⁰ This PAS paper played an important role in shaping the Executive Branch Committee’s deliberations, as the committee read the entire paper aloud during its first meetings.⁴¹

The Executive Branch Committee also relied on the Model State Constitution, which similarly outlined a vision of broad appointment powers.⁴² Like the PAS paper, the commentary to the Model State Constitution identified that giving the governor broad appointment power would combat “administrative disintegration” and ensure that, unlike in most states, the “administrative machinery” could be “guided by the chief

³⁴ Victor Fischer, *Alaska’s Constitutional Convention* 105 (1975).

³⁵ *Id.* at 105–06.

³⁶ *Id.* at 106, 19–20.

³⁷ 2 Pub. Admin. Serv., *Constitutional Studies* 2, 11 (1955).

³⁸ *Id.* at 11.

³⁹ *Id.* (emphasis added).

⁴⁰ *Id.* at 10–11.

⁴¹ Minutes Executive Branch, 1st Meeting, ¶ 5 (Nov. 16, 1955); Minutes Executive Branch, 2nd Meeting, ¶ 3 (n.d.); Minutes Executive Branch, 3rd Meeting, ¶ 5 (Nov. 18, 1955); *see also* 52 Proceedings of the Alaska Constitutional Convention (PACC) 1984 (Jan. 13, 1956).

⁴² Fischer, *supra* note 34, at 106; 52 PACC 1984 (Jan. 13, 1956).

executive.”⁴³ Thus, “[t]o keep jealous legislators from dividing the administration and particularistic reform groups from multiplying their boards[,] the [model] constitution has consistently provided that the governor shall appoint all department heads.”⁴⁴

When presenting proposals for article III to the convention, the Executive Branch Committee consistently emphasized the need to bolster the executive’s strength with broad appointment powers. The committee’s initial work culminated in Committee Proposal 10, an early version of what became article III of the Alaska Constitution.⁴⁵ The committee’s commentary to the proposal stated that “[t]he intention throughout the article is to centralize authority and responsibility for the administration of government and the enforcement of laws in a single elected official.”⁴⁶ When presenting the proposal to the convention, Committee Chair Delegate Rivers explained that “the Executive Committee has worked on the theory of the strong executive.”⁴⁷ He noted that “[t]he governor would have the strong power, power of appointing all his department heads,” and that “he would also make the appointments for the multiheaded boards in case there are such, and some there probably will be.”⁴⁸ After receiving the proposal, other delegates expressed support for a strong executive.⁴⁹

The committee eventually created an updated proposal, Committee Proposal 10a, which added a section addressing board and commission appointments.⁵⁰ The provision, which later became article III, section 26, provided that:

Wherever 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

⁴³ *Model State Constitution* 31–32 (5th ed. rev. 1948).

⁴⁴ *Id.* at 32.

⁴⁵ *See Alaska Constitutional Convention: Report of the Committee on the Executive Branch, Commentary* (Dec. 16, 1955).

⁴⁶ *Id.* at 1, § 1.

⁴⁷ 42 PACC 1102 (Dec. 19, 1955).

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, 49 PACC 1665 (Jan. 10, 1956) (Delegate McNees) (“[T]he executive article has developed a very strong executive in which I am in favor.”); 49 PACC 1731 (Jan. 10, 1956) (Delegate Barr) (stating that “the majority of this body wants . . . a strong governor who is able to appoint his own assistants in order to have a more perfect team, harmony, and cooperation”); 52 PACC 2071 (Jan. 13, 1956) (Delegate Harris) (“The whole form of government that we have built up is built around the governor, the strong executive . . .”).

⁵⁰ *Alaska Constitutional Convention: Committee Proposal No. 10/a: Report of the Committee on the Executive Branch: Article on the Executive* 8, § 17 (Jan. 16, 1956).

advice and consent of the Senate, and may be removed in the manner provided by law. Such a 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.⁵¹

When introducing Committee Proposal 10a, Chair Rivers again emphasized that the committee members were “all strongly agreed on the principle of the strong executive.”⁵² He emphasized the committee’s reliance on the PAS paper and on the Model State Constitution.⁵³ By contrast, he explained that the committee “found that the older state constitutions with their many elective officials and many restrictions upon the powers of the executive could almost in their entirety be eliminated from consideration as reference matter.”⁵⁴

As part of considering Committee Proposal 10a, the convention debated and soundly rejected a proposal that the governor should appoint the attorney general from a list of nominees submitted by the Judicial Council. A minority of the committee supported this proposal, but most committee members did not.⁵⁵ Delegate Londborg, speaking on behalf of the committee majority, explained that the committee’s objective was to create a governor “who through appointive powers would be able to select his co-workers down through the various offices so that when the state’s functions would be successful we could say that we had a good governor, and when they would not be successful we would know who to blame and could vote accordingly at the next election.”⁵⁶ In the committee majority’s view, it was the governor’s “duty to screen and select a good attorney general,” not a third party’s.⁵⁷ Other delegates expressed similar sentiments about delegating appointment power to anyone outside the executive branch. Delegate Buckalew argued that the proposal would “water down” the strong executive outlined in the proposed article III.⁵⁸ And Delegate McLaughlin echoed the concern that allowing a third party to nominate executive officers would decrease the governor’s accountability to the electorate.⁵⁹ In his view, “the governor should have the direct

⁵¹ *Id.*

⁵² 52 PACC 1984 (Jan. 13, 1956).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 55 PACC 2215 (Jan. 16, 1956) (Delegate Rivers); *id.* at 2222–23 (Delegate Londborg).

⁵⁶ *Id.* at 2222.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2217.

⁵⁹ *Id.* at 2218.

responsibility[;] he should not be able to evade it by saying, ‘It was not my selection.’”⁶⁰ Delegate McLaughlin also pointed out that if the convention accepted this limitation on the governor’s appointment power, “then in premise [it] should accept a screening of every other public official appointed by the governor in his cabinet.”⁶¹ After debate, the convention decisively rejected this proposed limitation on the governor’s authority to appoint the attorney general by a vote of 18–36.⁶²

The convention also rejected a proposed residency requirement for department heads by a large margin.⁶³ When debating the proposal, Delegate Riley stated, “I think if we were to have a strong executive who is to be charged with the responsibility for conducting a strong administration, he should properly be able to look over the entire field to find the proper people for administration of particular departments, especially in technical fields where not necessarily will he find in Alaska the people for such responsibilities.”⁶⁴ Delegate Taylor agreed, stating, “Now as I see it, the entire theory of the strong executive can only be justified on the basis of efficiency and it appears to me neither reasonable nor logical to set up an executive branch on that basis and then deny the governor the right to select the best men available, wherever they may be.”⁶⁵ Thus, delegates rejected excessive limitations on the governor’s ability to choose the best candidates to help him administer executive departments.

Ultimately, the convention made only two substantive changes to Committee Proposal 10(a)’s provision on board and commission appointments. The provision was amended to specify that appointees must be citizens of the United States and that appointments should be confirmed by the legislature in joint session rather than by the senate alone.⁶⁶

These proceedings make clear that the framers—and the public—generally understood article III as creating a strong executive with broad appointment power. Attempts to dilute the governor’s appointment power faced strong opposition and were roundly rejected. The convention explicitly considered and rejected the idea that a third party should screen the governor’s choices for appointments, citing nondelegation concerns. Throughout the convention, delegates expressed that a strong appointment power was desirable because it would keep the governor directly responsible for the

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 2225–26.

⁶³ *Id.* at 2244.

⁶⁴ *Id.* at 2233.

⁶⁵ *Id.* at 2241.

⁶⁶ *See Alaska Constitutional Convention: Committee Proposal No. 10/a: Report of the Committee on the Executive Branch: Article on the Executive 8, § 17* (Jan. 16, 1956).

administration of government, unlike Alaska's experience under the territorial government. By vesting the appointment power in the governor, article III preserves a clear line of political accountability: the electorate can blame the governor when execution of the law goes wrong and credit the governor when it goes right.

With this framing in mind, statutes limiting the governor to choosing board and commission members from private-entity nomination lists very likely violate article III, section 26 if the board or commission in question helps the governor execute the law (as opposed to serving a merely advisory function). The framers purposefully designed article III, section 26 to give the governor broad appointment power over boards and commissions, such that he would be able to choose his "co-workers."⁶⁷ That way, government would function more efficiently, and the electorate could hold the governor directly accountable if it did not. Forcing the governor to choose from a short list of nominees chosen by a private entity subverts those goals.

II. Alaska caselaw establishes that the governor has exclusive power to appoint executive officers, subject only to explicit limitations in the Constitution.

The Alaska Supreme Court has not decided the precise issue considered in this opinion. However, the Court's broader caselaw on appointments and confirmation suggest that the governor has broad and exclusive appointment power, subject only to narrow limitations explicitly set forth in the Constitution.

In *Bradner v. Hammond*, the Court confirmed that "under Alaska's constitution the appointment of subordinate executive officers by the governor is an executive function."⁶⁸ There, the legislature had passed a statute requiring legislative confirmation of the deputy heads of each principal executive department and directors of many divisions.⁶⁹ The Court held this requirement was unconstitutional because it violated the doctrine of separation of powers, which is "implicit in Alaska's constitution."⁷⁰ The legislature argued that the power to enact legislative confirmation requirements fell "within the ambit of the constitution's general grant of legislative power to the legislative branch."⁷¹ But the Court disagreed, reasoning that "the appointment of executive officers is an executive function; for without such power, the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too great a concentration of power in one branch, would be defeated."⁷² In the Court's view, "confirmation is not a distinct legislative power, but rather a part of the

⁶⁷ 55 PACC 2222 (Jan. 16, 1956) (Delegate Londborg).

⁶⁸ 553 P.2d 1, 7 (Alaska 1976).

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 6–8.

⁷¹ *Id.* at 4.

⁷² *Id.* at 6–7.

executive power of appointment which has in turn been delegated in some specific instances by [the] constitution to the legislative branch of government.”⁷³ Thus, the Court concluded that “Sections 25 and 26 mark the full reach of the delegated, or shared, appointive function to Alaska’s legislative branch of government.”⁷⁴ Those provisions “delineate the full extent of the constitution’s express grant to the legislative branch of checks on the governor’s power to appoint subordinate executive officers.”⁷⁵

In the years following *Bradner*, the Court has continued to take a broad view of the governor’s appointment power. In *Dunleavy v. Alaska Legislative Council*, the Court held that when the governor makes appointments to positions requiring legislative confirmation, the “appointments continue indefinitely unless and until the legislature acts to decline them.”⁷⁶ Citing *Bradner*, the Court reasoned that “[a]llowing inaction to substitute for a joint session vote” would push beyond the “outer limits of the legislature’s confirmation authority” as delineated in article III, sections 25 and 26.⁷⁷

Relatedly, the Court has also indicated that the separation of powers prevents the legislature from delegating authority that belongs to another branch of government. In *Alaska Public Interest Research Group v. State*, the Court explained that “[t]he legislature may constitutionally delegate some adjudicative power to an executive agency, but it may not delegate judicial power.”⁷⁸ The Court framed this principle as an aspect of the separation of powers.⁷⁹ Under this reasoning, just as the legislature cannot delegate judicial power, it cannot delegate an executive power—the appointment power—to a private entity.

While the Alaska Supreme Court has not considered the precise issue examined in this opinion, the issue has arisen at least once in the superior court. In the 2006 case *NEA v. Murkowski*, the superior court considered whether AS 37.10.210 unconstitutionally limited the governor’s appointment power by requiring him to select several appointees for the Alaska Retirement Management (ARM) Board from lists provided by private entities.⁸⁰ As discussed above, AS 37.10.210 requires the governor to appoint two ARM trustees from a list of nominees submitted by the teachers’ retirement system bargaining

⁷³ *Id.* at 7.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 498 P.3d 608, 614 (Alaska 2021).

⁷⁷ *Id.*

⁷⁸ 167 P.3d 27, 35–36 (Alaska 2007).

⁷⁹ *Id.* at 36 & n.38.

⁸⁰ Judgment Finding AS 37.10.210 Constitutional and Enjoining the Appointment of Dr. Solie to the ARM Board, *Nat’l Educ. Ass’n-Alaska v. Murkowski et al.*, No. 1JU-06-00988CI (Alaska Super. Ct. Dec. 4, 2006).

units (NEA-Alaska).⁸¹ Governor Murkowski had appointed a trustee to the ARM Board who was not on NEA-Alaska's nomination list, and NEA-Alaska sued the governor and the ARM Board.⁸² In response, the State argued that the statute violated article III, section 26 of the Alaska Constitution under the reasoning of *Bradner v. Hammond*.⁸³ The superior court disagreed with the State and concluded that the statute's limitations on the governor's appointment power are constitutional.⁸⁴ The court reasoned that the "nomination of persons from constituent groups" was not "materially different from other limits accepted by the Governor as constitutional," such as reasonable qualifications like education, age, or occupation.⁸⁵ This decision came out amid the transition between administrations, and the new administration chose not to appeal the superior court's ruling to the Alaska Supreme Court.

Though the superior court in *NEA v. Murkowski* reached a different conclusion than this opinion does, that case should generally not dictate the outcome in potential future cases challenging similar appointment statutes. Unlike Alaska Supreme Court cases, superior court decisions are not binding precedent.⁸⁶ And there is good reason to think the Alaska Supreme Court would reach a different decision than the superior court based on the precedent discussed above.⁸⁷

⁸¹ AS 37.10.210(b)(2)(D).

⁸² Judgment, *Nat'l Educ. Ass'n-Alaska*, No. 1JU-06-00988CI, at 3.

⁸³ *Id.* at 3, 6–7.

⁸⁴ *See generally id.*

⁸⁵ *Id.* at 11–12, 19.

⁸⁶ *State v. United Cook Inlet Drift Ass'n (UCIDA)*, 895 P.2d 947, 950 (Alaska 1995).

⁸⁷ Collateral estoppel is a potential concern, but in most cases, it would not apply. The Alaska Supreme Court has allowed the use of nonmutual collateral estoppel against the State, but it has recognized an exception permitting the State to relitigate "unmixed questions of law" so long as the subject matter of the second case is unrelated to that of the first. *UCIDA*, 895 P.2d at 950–54 (Alaska 1995) (citing *Montana v. United States*, 440 U.S. 147, 162 (1979)). Such an exception is of "particular importance in constitutional adjudication," *Montana*, 440 U.S. at 162–63, and the Alaska Supreme Court has expressed that nonmutual collateral estoppel should not apply when "strict application . . . might foreclose the highest court of the state from performing its function of developing the law." *UCIDA*, 895 P.2d at 952–53. Thus, for boards and commissions other than the ARM board, collateral estoppel would not apply to this issue. And even for the ARM board, reconsideration would be warranted if future "independent developments in the area of law at issue call into question the legal underpinning of the earlier rule." *Id.* at 952.

Thus, apart from the nonbinding superior court decision in *NEA v. Murkowski*, Alaska caselaw also supports the conclusion that the statutes listed above are unconstitutional. The Alaska Supreme Court has characterized the appointment power as purely executive in nature, and encroachments on that power beyond what is explicitly authorized in the constitution violate the separation of powers.

III. Previous Attorney General and Legislative Council opinions indicate that private-entity nomination lists are unconstitutional.

This opinion aligns with previous Attorney General and Legislative Council opinions, which have consistently advised that statutes or bills requiring the governor to appoint from a list submitted by a private party or non-executive governmental entity are unconstitutional unless the board or commission is merely advisory.

The Legislative Council has seemingly only addressed this issue once. In 1962, soon after statehood, the House directed the Legislative Council to examine existing professional and occupational licensing boards and suggest legislation with respect to such boards.⁸⁸ In its report, the Council noted that “[t]he governor is required to appoint members to two boards [the Boards of Dental Examiners and of Nursing] from a list of nominees presented to him by private organizations.”⁸⁹ In the Council’s view, “this restriction seem[ed] contrary to the policy of Section 26 of Article III of the Constitution, which seems to be to make the governor responsible for appointments.”⁹⁰ The report recommended that these statutes be amended “to remove the requirement that the governor appoint from a list of nominees submitted by private associations.”⁹¹

Since the 1970s, the Department of Law has issued several attorney general opinions all concluding that requiring the governor to choose appointees from a nomination list is unconstitutional in most cases. In 1979, the Department was asked whether the governor would need to follow a proposed statute requiring him to appoint members to the Advisory Council on Cultural Facilities from a list provided by the State Council on the Arts.⁹² The Department opined that the statute was “directly in opposition to the principal purpose of the executive article of the constitution, that is, to place the administration of the executive department of the government in the hands of a single chief executive who is responsible to the electorate for all of the successes and failures of his administration.”⁹³ Because “the governor is the appointing authority” under the

⁸⁸ Alaska Legislative Council, *Report on Occupational and Professional Licensing Boards* (1963).

⁸⁹ *Id.* at 2 & n.4.

⁹⁰ *Id.* at 2.

⁹¹ *Id.*

⁹² 1979 Inf. Op. Att’y Gen. (Sept. 17; J-66-164-80), 1979 WL 22920.

⁹³ *Id.*

Alaska Constitution, the Department advised that he could still appoint someone not on the State Council on the Arts' list.⁹⁴

The following year, in 1980, the Department considered the nomination process for the Wood-Tikchik Management Council, which requires the governor to appoint members from lists submitted by various public and private entities.⁹⁵ The Department walked back its 1979 opinion slightly, concluding that the selection process was constitutional, but only because the council is "largely advisory in nature."⁹⁶ If the council were *not* largely advisory, the selection method "would very likely be unconstitutional" because "unlike the constitutions of other states, the Alaska Constitution does not provide for election or appointment of state officials as the legislature may direct."⁹⁷ The Department explained that the framers "ma[de] the entire executive branch of the government directly responsible to the people for the performance of its duties," which means the governor "must have authority to select the subordinates through whom he performs his duties" rather than having them selected by others.⁹⁸

Another 1980 attorney general opinion considered the selection process for members of the Alaska Public Offices Commission.⁹⁹ The Department advised that "[t]he statutory requirement that the governor limit his choice of appointees to those nominated by the two major political parties clearly and unduly interferes with his power of appointment under section 26."¹⁰⁰

In 1981, the Department concluded that a proposed bill creating the Council on Domestic Violence and Sexual Assault was unconstitutional as drafted because it required the governor to make appointments to the council from a list submitted by the Network on Domestic Violence and Sexual Assault.¹⁰¹ This would "unduly impair[] the appointment authority of the chief executive, transferring it, as it were, to a special interest group."¹⁰² The opinion reasoned that "[w]hile reasonable qualifications may unquestionably be prescribed by law for those appointments, the power of selection

⁹⁴ *Id.*

⁹⁵ 1980 Inf. Op. Att'y Gen. (May 28; J-66-739-80), 1980 WL 27759.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 1980 Inf. Op. Att'y Gen. (June 2; J-66-749-80), 1980 WL 27763.

¹⁰⁰ *Id.*

¹⁰¹ 1981 Inf. Op. Att'y Gen. (April 23; J-66-698-81), 1981 WL 38632.

¹⁰² *Id.*

cannot be shared except as the constitution itself provides.”¹⁰³ The Department suggested modifying the draft bill to require only consultation with the Network on Domestic Violence,¹⁰⁴ and the bill was so modified.¹⁰⁵

Last, in 1991, an attorney general opinion recommended that the governor veto a bill creating the Alaska State Pension Corporation because the bill required the governor to choose appointees from a nomination list submitted by public employers.¹⁰⁶ The opinion described this provision as being of “questionable validity” because “[t]he power of appointment is an executive function,” and the “bill would require that a part of the governor’s power of appointment would be delegated to governmental entities outside of the executive branch of state government.”¹⁰⁷

IV. Other jurisdictions have reached the same conclusion as this opinion based on separation of powers and nondelegation concerns.

Authority from other jurisdictions has limited persuasive value because those cases do not interpret the Alaska Constitution. Further, as delegates at the Constitutional Convention identified, many other state constitutions do not provide the governor with the same strong appointment power that the Alaska Constitution does.¹⁰⁸ Other state courts have recognized this distinction when considering constitutional issues related to the appointment power. For example, the California Supreme Court has cited *Bradner v. Hammond* when explaining that some states, unlike California, view appointment power as an “exclusively executive function” “based upon language in a particular state constitution.”¹⁰⁹

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See AS 18.66.020(a)(1).

¹⁰⁶ 1991 Inf. Op. Att’y Gen. (June 11; 883-91-0071), 1991 WL 541989.

¹⁰⁷ *Id.*

¹⁰⁸ See also Memorandum from Gordon S. Harrison, Legislative Research Agency 2 (Mar. 21, 1991), <https://archives2.akleg.gov/PublicImageServer.cgi?lra/1991/91-165m.pdf> (describing the governor’s appointment authority as “[t]he single most important source of gubernatorial power in Alaska” and observing that Alaska’s “constitutional scheme contrasts sharply with that of many other states, in which executive authority is diffused and fragmented among numerous agencies with heads who are popularly elected or appointed by an authority other than the governor”).

¹⁰⁹ *Marine Forests Soc’y v. Cal. Coastal Comm’n*, 113 P.3d 1062, 1085–86 (Cal. 2005); see also *Cooper v. Berger*, 822 S.E. 2d 286, 298 (N.C. 2018) (drawing a similar distinction and explaining that *Bradner v. Hammond* and similar cases “rest[ed] on a different premise that arises from different texts and histories”).

To the extent it has persuasive value, out-of-state authority is mixed but overall supports the position that the Alaska Constitution does not permit the legislature to require the governor to appoint from private-entity nomination lists.

When state courts find constitutional the delegation of appointment powers to private persons or organizations, it is usually because the state constitution “permitted the legislature to prescribe the manner in which public offices created by it were to be filled, where the constitution itself did not so prescribe.”¹¹⁰ In *Marks v. Frantz*, for example, the Kansas Supreme Court relied on such a provision when upholding the constitutionality of a statute requiring the governor to choose members of the Board of Examiners in Optometry from a list submitted by the Kansas Optometric Association.¹¹¹ The court cited article 15, section 1 of the Kansas Constitution, which provides that “[a]ll officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law.”¹¹² Other courts upholding the constitutionality of private-entity nominations have relied on similar constitutional provisions.¹¹³ Given these common state constitutional provisions, the majority position appears to be that statutes may constitutionally delegate the power to nominate candidates for public office to private persons or organizations.¹¹⁴ However, the Alaska Constitution contains no equivalent provision,¹¹⁵ so the reasoning of these cases is not persuasive.

¹¹⁰ See J. Kraut, Annotation, *Validity of Delegation to Private Persons or Organizations of Power to Appoint or Nominate to Public Office* § 3(b), 97 A.L.R.2d 361 (1964). (Though this annotation was originally published in 1964, the ALR databases are updated weekly with relevant new cases.)

¹¹¹ 298 P.2d 316 (Kan. 1956).

¹¹² *Id.* at 322.

¹¹³ See, e.g., *Clark v. State ex rel. Miss. State Med. Ass’n*, 381 So. 2d 1046, 1050 (Miss. 1980) (concluding “[t]he only general power of appointment vested in the governor is that conferred upon him by legislative enactment” based on constitutional provision stating that “[i]n all cases, not otherwise provided for in this constitution, the legislature may determine the mode of filling all vacancies, in all offices”); *Opinion of the Justices*, 316 A.2d 174, 176 (N.H. 1974) (citing part II, article 5th of the New Hampshire Constitution, which gives the legislature power to “provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for”); *Seidenberg v. N.M. Bd. of Med. Exam’rs*, 452 P.2d 469, 472 (N.M. 1969) (reasoning that the New Mexico constitution authorizes the legislature to prescribe qualifications and standards for appointed positions when the constitution does not explicitly delegate appointment power to the governor).

¹¹⁴ See Kraut, *supra* note 110, § 3(b).

¹¹⁵ See generally Alaska Const., art. II.

The states that have reached the opposite conclusion—holding that statutes requiring the governor to choose from private-entity nomination lists are unconstitutional—have offered different rationales. In *Westlake v. Merritt*, the Florida Supreme Court relied on the separation of powers doctrine to hold that a statute was unconstitutional when it provided that the governor must appoint members of the Board of Chiropractic Examiners from a list of candidates recommended by the Florida Chiropractors’ Association.¹¹⁶ Like the Alaska Supreme Court, the Florida Supreme Court views the appointment power as “lodged solely in [the governor] by the Constitution.”¹¹⁷ Thus, the statute was unconstitutional because “an appointment made by the Governor under [it] would be merely the ratification or confirmation of certain selections made by the association, and not an exercise by the Governor of his exclusive constitutional right of appointment.”¹¹⁸ Given Florida’s similar view of the appointment power, *Westlake* is persuasive authority indicating that private-entity nomination lists are unconstitutional.

In *Rogers v. Medical Association of Georgia*, the Georgia Supreme Court relied instead on a nondelegation rationale.¹¹⁹ There, a statute required the governor to make appointments to the Board of Medical Examiners from a list submitted by the state’s medical association.¹²⁰ The court concluded that “the delegation of the power of appointment to public office to a private organization is unconstitutional.”¹²¹ It reasoned

¹¹⁶ 95 So. 662 (Fla. 1923).

¹¹⁷ *Id.*; see also *State v. Daniel*, 99 So. 804, 808 (Fla. 1924) (“Where the Constitution in express terms confers upon the Governor the power to appoint all officers that may be appointed and are not otherwise provided for by the Constitution or by laws made pursuant to constitutional authority on the particular subject, the Legislature may properly prescribe the qualifications of those who may be appointed to statutory offices, but it cannot directly or indirectly, or under guise of prescribing qualifications or otherwise, unduly limit or encroach upon the power of the Governor to appoint officers to fill statutory offices . . .”).

¹¹⁸ *Westlake*, 95 So. at 662. The Kentucky Supreme Court recently expressed a similar view in *Beshear v. Coleman*, --- S.W.3d ---, 2026 WL 1839841 (Ky. June 25, 2026). Discussing a previous decision, the court implied that requiring the governor to pick from a one-time list of nominees would be unconstitutional because it would “control executive decision-making” and “allow for the removal of executive discretion.” *Id.* at *7 (citing *Ky. Ass’n of Realtors, Inc. v. Musselman*, 817 S.W.2d 213 (Ky. 1991)). The statute examined in the previous decision was only constitutional because it allowed the governor to “reject the entire list, demand a new list, and continue rejecting all names submitted until the list included a person whom the Governor deems suitable,” thus ensuring that “the appointment power remained with the Governor.” *Id.*

¹¹⁹ 259 S.E.2d 85 (Ga. 1979).

¹²⁰ *Id.* at 86 & n.1.

¹²¹ *Id.* at 87.

that “[f]undamental principles embodied in [the Georgia] constitution dictate that the people control their government. . . . This is accomplished through elected representatives to whom is delegated, subject to constitutional limitations, the power to regulate and administer public affairs, including the power to provide for the selection of public officers.”¹²² Other states have expressed similar nondelegation concerns when striking down statutes that give direct appointment power to private entities.¹²³ These concerns are similar to the worry expressed during the Alaska Constitutional Convention that diffusing the appointment power would make it more difficult for the electorate to hold the governor accountable.

In *State ex. rel. Hadley v. Washburn*, the Missouri Supreme Court relied on a third rationale when striking down a statute that required the governor to choose some members of the Board of Election Commissioners from a list submitted by the “leading party politically opposed to that to which the chairman and secretary belong.”¹²⁴ The court reasoned that this violated a Missouri constitutional provision stating that no law could “grant[] to any corporation, association or individual any special or exclusive right, privilege, or immunity.”¹²⁵ But like the *Westlake* and *Rogers* courts, the Missouri Supreme Court was also concerned about the separation of powers and nondelegation. The court viewed the nomination process as equivalent to allowing the political parties to make the appointments themselves and stated that while the legislature may “pass a law prescribing the manner in which an appointment shall be made, . . . [the constitution] does not authorize the general assembly to make the appointment itself, nor to authorize any one unconnected with the government to do so. To provide by law the manner in which an appointment shall be made is one thing, to make the appointment is another; the one is in its nature legislative, the other is essentially executive.”¹²⁶

¹²² *Id.*

¹²³ See, e.g., *Gamel v. Veterans Memorial Auditorium Comm’n*, 272 N.W.2d 472, 474–76 (Iowa 1978) (holding statute impermissibly delegated sovereign power by giving private groups control of appointment of public officials with power to spend public funds); *Hetherington v. McHale*, 329 A.2d 250, 253 (Penn. 1974) (stating that “[t]he power to select those who make public decisions is too vital a part of our scheme of government to be delegated to private groups”); *State ex rel. James v. Schorr*, 65 A.2d 810, 812–13 (Del. 1948) (holding statute unconstitutional when it “deprive[d] the Governor of the power of appointing to office the members of the Department of Elections” by “authoriz[ing] persons outside of the framework of the government” to appoint members).

¹²⁴ 67 S.W. 592, 593 (Mo. 1902).

¹²⁵ *Id.*

¹²⁶ *Id.* at 594–95.

In sum, authority from other jurisdictions provides limited value but overall supports this opinion's conclusion that appointment statutes are unconstitutional when they require the governor to pick from private-entity nomination lists. Though a majority of other states to consider the issue have allowed such statutes, those decisions relied on state constitutional provisions giving the legislature a significant share of appointment power. Such a provision does not exist in the Alaska Constitution. By contrast, Florida—a state that shares Alaska's view of the appointment power as purely executive—has held that forcing the governor to choose from a list of private-entity nominees violates the separation of powers. And other states that have held such statutes unconstitutional have expressed nondelegation concerns that echo the sentiments of delegates to the Alaska Constitutional Convention.

Conclusion

Statutes requiring the governor to choose board and commission appointees from a nomination list provided by a private entity are very likely unconstitutional, unless the board or commission is purely advisory in nature. Such statutes violate the separation of powers by intruding on the governor's appointment power, which is an exclusively executive power cabined only by explicit limitations in the Alaska Constitution. Allowing the legislature to delegate away an executive power also reduces the governor's direct accountability for the administration of government, which the framers rejected. Statements and materials from the Constitutional Convention, Alaska Supreme Court caselaw, former Attorney General opinions, and caselaw from other jurisdictions all support this conclusion.

Sincerely,

Cori Mills
Acting Attorney General