MEMORANDUM

State of Alaska
Department of Law

TO: Mike Nizich
Chief of Staff
Office of the Governor

DATE: July 1, 2010

FILE NO.: N.A.

TEL. NO.: 269-5100

FROM: Daniel S. Sullivan DSS
Attorney General

SUBJECT: Alaska Constitution Article II, Section 5: The Ineligibility Clause

I. Overview

In this opinion, we revisit legal advice the Department of Law has given to the Governor's Office and a legislator regarding the eligibility of a former legislator to assume a position in the executive branch when the position did not previously exist and the legislator resigned for the stated purpose of taking the position. The Department of Law has previously advised that a former legislator would likely be eligible as long as the position was not formally established until after the resignation.

After undertaking additional thorough research and analysis, we conclude that our earlier advice was not based on all relevant considerations and case law and that, although the question is a close one, an Alaska court may disagree with the advice we previously provided. We also conclude that the Governor's Office and former Representative Nancy Dahlstrom, who resigned from the Legislature to assume the position of Senior Military Affairs Advisor, have acted in good faith and consistently with the law as interpreted by the Department of Law throughout this entire process.

II. The Issue

The Alaska Constitution's Ineligibility Clause, Article II, section 5, states in relevant part: "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." The particular legal question at issue here is whether a legislator is eligible to assume a position in the executive branch when the position did not previously exist and the legislator resigned for the stated purpose of taking the position. The issue has arisen in the context of Ms. Dahlstrom, but the conclusions of this opinion would apply generally to similar situations.

III. The Governor's Office and Representative Dahlstrom Relied on the Department of Law's Advice

Because legislators are knowledgeable about Alaskan public policy issues and the workings of government, they are attractive candidates for high-level executive branch positions. In May of this year, prior to her resignation, Ms. Dahlstrom sought advice from the Department of Law on whether she was eligible for the Senior Military Affairs Advisor position. An assistant attorney general expressed the Department of Law's past view that positions in the Governor's office are not created until a personnel classification number is assigned and that in the past such personnel classification numbers were assigned after a legislator's resignation to take a newly created position. Ms. Dahlstrom relied on that advice as part of her decision to resign from the Legislature and take the position. In offering the position to Ms. Dahlstrom, the Governor's Office also relied on advice by the Department of Law and on the long-standing nature of this practice. The Department of Law's advice was based in turn on AG opinions[1] and on institutional knowledge of how newly created positions had been filled by legislators in at least three previous Administrations.[2] Our research does not reveal any instances in which the Department of Law had told the Governor's Office not to make such an appointment. To the contrary, previous AG opinions have generally supported this long-standing practice.[3]

IV. The Department of Law's Earlier Advice, Based on a Strict Interpretation of the Ineligibility Clause, Was Not Unreasonable

---

[1] *See, e.g.,* 1992 Alaska Op. Atty. Gen. 251, 1992 WL 564976 (Dec. 1, 1992) ("The constitution does not, however, prohibit the appointment of a former legislator to a position that was created after the legislator is no longer a member . . . . While we believe that a strict reading of the constitutional prohibition allows such an appointment, and that the constitutional provision should be strictly read, you should also bear in mind when considering this matter that it is important that the legislature avoid not only impropriety, but also the appearance of impropriety." (internal citation and quotation marks omitted)).

[2] For example, Bill Hudson, Robin Taylor and Alan Austerman left the Legislature and filled positions in the Murkowski administration; Jim Duncan left the Legislature and took a position in the Knowles Administration; and Keith Specking left the Legislature and took a position in the Hammond Administration.

[3] *See* 1992 Alaska Op. Atty. Gen. 251; see also Legislative Affairs Agency, Division of Legal and Research Services, Memorandum of August 18, 2003 ("[I]f a legislator first resigns and then the office is created, it appears that the former legislator is not prohibited from taking that office.").

The Department of Law's advice that a legislator who resigns for the purpose of taking a newly created position is eligible for the position was not unreasonable and, as discussed below, certain jurisdictions would likely endorse it. The crux of the issue centers on when an executive branch position is "created" for purposes of the Ineligibility Clause. Alaska courts have not directly addressed that question. Indeed, our research indicates no other court in the country has specifically addressed that question.[4] Other courts, however, have interpreted similar ineligibility clauses in their own state constitutions strictly.[5] These interpretations have been based on policy considerations, such as avoiding an undue restriction on the ability of experienced public servants, who have great institutional knowledge, to continue their service in government.[6]

In the closest legal authority on point, the U.S. Department of Justice's Office of Legal Counsel also construed strictly a similar provision in the federal Constitution in concluding that a sitting congressman could be chosen to fill a new ambassadorship so long as the official appointment occurred after his term expired.[7] Even though the

---

[4] The analyses of most other state courts on the issue do not illuminate this particular issue because the laws in these states prohibit a legislator from assuming an office that was newly created *during his term*. *See, e.g., Chenoweth v. Chambers*, 164 P. 428, 433-435 (Cal. 1917) (assemblyman could not by resigning evade California's Ineligibility Clause, which prohibit legislators from accepting other office *during the term* for which elected); *Crovatt v. Mason,* 28 S.E. 891, 895 (1897) ("resignation could not affect the time for which he was chosen"); *Wachter v. McEvoy,* 93 A. 987, 990 (Md. 1915) ("The term was not ended by . . . resignation. . . . If the Legislature had intended to limit the disqualification to the time of actual service or to the period of actual incumbency, it would have so stated"). Alaska's Ineligibility Clause, by contrast, merely prohibits an appointment of a legislator to a position that was newly created *while was a member* of the legislature, but does not necessarily prohibit appointment to a position that was created during his *term*.

[5] *See, e.g., Cannon v. Garner,* 611 P.2d 1207, 1211 (Utah 1980) (construing provision in favor of eligibility for elected office in order to give effect to the citizenry's right to vote); *Carter v. Comm'n on Qualifications for Judicial Appointments,* 93 P.2d 140, 142 (Cal. 1939) ("At the outset it should be noted that the right to hold public office, either by election or appointment, is one of the valuable rights of citizenship. . . . The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office.").

[6] *See Warwick v. State,* 548 P.2d 384, 389 (Alaska 1976) (citing *Shields v. Toronto,* 395 P.2d 82 (1964); *State v. Gray,* 74 So.2d 114, 117-18 (Fla. 1954)).

[7] *Memorandum Opinion to the Counsel to the President: Nomination of Sitting Member of Congress to be Ambassador to Vietnam*, Christopher Schroeder, Acting Assistant Att'y Gen., U.S. Dept. of Justice, Office of Legal Counsel (July 26, 1996) ("The tradition of interpreting the Clause [in the United States Constitution] has

congressman was nominated by the President and went through confirmation hearings while still a member of Congress, the President delayed the formal creation of the new ambassador position by officially appointing the congressman after his term expired. The Office of Legal Counsel concluded that this practice did not violate the Ineligibility Clause because "[t]he act of creating the office must be distinguished from the preparatory steps leading to its creation. The preparatory acts indicate that the President *intends* to create the office; they do not in themselves constitute its creation."[8]

These authorities, embracing a strict or technical interpretation of similar ineligibility clauses, support the Department of Law's previous advice that a legislator is eligible for a new position so long as the position is formally established after the legislator resigns.[9]

V. An Alaska Court Would Probably Construe the Ineligibility Clause Broadly

Although the Department of Law's advice, which is based on a strict reading of the Ineligibility Clause, was not unreasonable, upon further research and analysis, we believe an Alaska court would probably construe the clause broadly.

Delegates to the Alaska constitutional convention viewed the Ineligibility Clause broadly to encompass the relationship between the Governor's Office and the Legislature.[10] Based in part on the delegates' intent, the Alaska Supreme Court has

---

been "formalistic" rather than "functional," and our analysis comports fully with the literal meaning of the text."); *accord* THE INELIGIBILITY CLAUSE'S LOST HISTORY: PRESIDENTIAL PATRONAGE AND CONGRESS, 1787-1850, 1787-1850, 123 Harv. L. Rev. 1727, 1727, 1747 (2010) (explaining that "Republican and Democratic administrations . . . have restricted the [ineligibility] clause to its narrowest, most formalistic meaning.").

[8] U.S. Dept. of Justice Office of Legal Counsel Memorandum, *supra* note 7 (emphasis in original).

[9] Previous analysis of Alaska's Ineligibility Clause suggests Alaska courts could strictly construe it. 1992 Alaska Op. Atty. Gen. 251 ("Because prohibitions like this are contrary to general public policy which favors eligibility of citizens to seek public office, they are usually given a strict construction and are rarely expanded beyond their express terms.").

[10] *See Begich v. Jefferson,* 441 P.2d 27, 30 n.7 (Alaska 1968) ("It is generally agreed that the temptation to create jobs or to increase the salary in existing jobs which legislators would then accept ought to be removed. There have been instances in which legislators have virtually coerced governors into appointing them to state offices as the price for their action on the governor's program; such deals would be prevented by requiring a year to elapse before eligibility." (quoting commentary from the Alaska Constitutional Convention's Committee on the Legislative Branch)).

determined that Alaska's Ineligibility Clause has several related purposes: preventing legislators from creating government positions with an eye to then occupying those positions; avoiding the appearance of impropriety; and protecting members of the Legislature from influence – either conscious or subconscious – on their judgment and conduct created by personal interest in newly created offices.[11] The Alaska Supreme Court has signaled it will construe the Ineligibility Clause broadly in light of those purposes, including the purpose of avoiding the appearance of impropriety.[12]

Because an Alaska court would probably construe the Ineligibility Clause broadly, it could conclude that the clause's bar against eligibility applies not only to legislatively-created positions, but also to positions created by the executive branch.[13] Additionally, an Alaska court might not endorse a strict, formalistic interpretation of when a position is "created." The opportunity to hold a newly created position may, or may be perceived to, exert an undue influence on a legislator's judgment. That undue influence, or the public perception of it, will not be prevented simply because certain administrative tasks involved in creating a position occur only after the legislator resigns. Interpreting the term "created" formalistically, so that it depends upon when such an administrative task is completed, could permit such an outcome. An Alaska court may conclude that such an interpretation frustrates one of the purposes behind the Ineligibility Clause and thus adopt a broader interpretation of when a position is "created."

VI. Conclusions

A. An Alaska Court May Disagree with the Department of Law's Earlier Analysis

There is no case law in Alaska or in other jurisdictions that directly addresses the question raised here. The long-standing practice of legislators resigning from the Legislature for the purpose of accepting a newly created position in the executive branch, supported by the Department of Law's advice, is based on a strict construction of Alaska's Ineligibility Clause and important policy considerations. Legal authorities in other jurisdictions generally support this strict construction approach. On the other hand,

---

11 *Warwick*, 584 P.2d at 388.

12 *See id.* at 390-91 (rejecting argument that Ineligibility Clause's prohibition should be narrowed to cases where it is shown the legislator seeking the office acted with bad motives).

13 *Cf.* 1979 Alaska Op. Atty. Gen. (Inf.) No. 661-79-0368, 1979 WL 23014 (Feb. 28, 1979) ("[T]he constitutional bar against employment of a legislator immediately following the increase in salary does not specify that the position must be created or enhanced only through legislative enactment. Executive action might just as easily create the position or increase the salary.").

the Alaska Supreme Court has broadly construed the Ineligibility Clause in other contexts. Moreover, the court has emphasized that the purposes of the Ineligibility Clause include protecting legislators from either conscious or subconscious influences and avoiding even the appearance of impropriety.

Given these considerations, although the Department of Law's earlier advice was not unreasonable, there is an appreciable risk that an Alaska court may not concur with the analysis on which that advice was based.

B. The Governor's Office and Ms. Dahlstrom Acted in Good Faith and Consistently with the Law as Interpreted by the Department of Law

It is clear that those who relied on the Department of Law's previous advice, including the Governor's Office and Mrs. Dahlstrom, have acted in good faith and consistently with the law as interpreted by the Department of Law throughout this process. Indeed, if any mistakes occurred during this process, they were made by the Department of Law.[14] This situation closely resembles what happened in the *Warwick* case where the Hammond Administration appointed a legislator to become a commissioner based on the Department of Law's advice that the Ineligibility Clause did not call into question his appointment. The Alaska Supreme Court subsequently ruled that the Department's interpretation of the Ineligibility Clause had shortcomings.[15] In the process of explaining why it was changing what was previously understood to be the correct interpretation of the Ineligibility Clause, the Alaska Supreme Court's decision in *Warwick* emphasized the innocent circumstances surrounding the appointment:

> This opinion in no manner implies any impropriety on the part of Mr. Warwick or the appointing authority, Governor Jay S. Hammond. There is nothing in the record, and there has been no contention made that Mr. Warwick had any improper motive . . . . [A]t the time that his appointment was made, there was a prior superior court opinion upholding an appointment of a legislator made under similar circumstances. We do not believe that thinking Alaskans will impugn the honor of either Mr.

---

[14] It should be noted that this is not the first time the Department of Law has changed course in giving advice on the Ineligibility Clause. *Compare* Letter from Avrum M. Gross, Attorney General, to the Hon. Chancey Croft, President of the Senate, February 21, 1975 *with* 1979 Alaska Op. Atty. Gen. (Inf.) No. 661-79-0368, 1979 WL 23014 (Feb. 28, 1979).

[15] *Warwick*, 548 P.2d at 390-91 (rejecting position put forward by Department of Law).

> Warwick or the Governor under the innocent circumstances here involved.[16]

The same observations and conclusions apply to this situation.

C. Agencies Should Be Able To Revisit Past Conclusions

As noted above, the Governor's Office and Ms. Dahlstrom have relied on the Department of Law's legal analysis. We are now changing our analysis. We apologize for this. We do not lightly change past conclusions, but we must always attempt to ensure our legal analysis is consistent with the law as we believe Alaska courts will interpret it.

---

16 *Id.* at 396.