



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

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

Re: *Constitutionality of Alaska Judicial Council Bylaw Article II, Section 3*
AGO No. 2025102802

Dear Governor Dunleavy:

You requested an opinion addressing the constitutionality of article II, section 3 of the Alaska Judicial Council's bylaws. This bylaw purports to authorize the Council to determine whether a person appointed to the Council is legally qualified to serve.

Short Answer

This bylaw is unconstitutional. Any application of it would violate the Alaska Constitution's carefully calibrated appointment process for the Judicial Council, which provides no role for the Council itself to determine the qualifications of its members. Any application would also violate the separation of powers doctrine by usurping the roles of the executive and legislative branches. This bylaw undercuts the Governor's power to appoint non-attorneys to the Council, including while the legislature is not in session, and it undercuts the legislature's confirmation and lawmaking powers.

Analysis

The Alaska Judicial Council is created by article IV, section 8 of the Alaska Constitution.¹ It consists of three attorney members appointed by the Alaska Bar Association, three non-attorney members appointed by the Governor and confirmed by the legislature, and the Chief Justice as chair. Except for the Chief Justice, no member “may hold any other office or position of profit under the United States or the State.”² The Council acts with the agreement of four or more members “and according to rules which it adopts.”³ One such rule is article II, section 3 of the Council’s bylaws, which states:

The chair of the Council shall administer the oath of office to each new member, following a determination by the Council that the person selected has met the qualifications for membership as set forth by law.⁴

While we are not aware of any instance where the Council has applied this bylaw to reject an appointee, it could be applied in multiple ways.

The Council claims the ability to “determin[e]” an appointee’s “qualifications for membership as set forth by law” before the appointee joins the Council. The bylaw does

¹ This article reads:

The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

² Alaska Const. art. IV, § 8.

³ *Id.*

⁴ Alaska Judicial Council Bylaws, Article II, Section 3, <https://www.ajc.state.ak.us/about/bylaws.html>.

not specify what legal qualifications the Council could consider, or when. The Council could determine that an appointee does not meet the constitutional qualifications for membership because he or she is not an “attorney” or “non-attorney,” or because he or she holds an “office or position of profit” for the state or federal government. Relatedly, the Council could point to other language in article IV, section 8 and conclude the appointment was made without “due consideration to area representation” or with “regard to political affiliation.”

Alternatively, the Council could look beyond article IV, section 8 and determine that an appointee does not meet some other constitutional qualification, like loyalty to the state and federal government.⁵ The Council could even determine that an appointee was not qualified based on state law, rather than the constitution, or based on some other reason entirely. The bylaw could allow the Council to make this determination at any time, even after the legislature has confirmed the appointee.

Any application of this bylaw would violate the constitution. The constitution leaves no room for the Council to play a role in the appointment process. Instead, the constitution reserves this power solely to the Governor and the legislature.

I. The constitution does not allow the Judicial Council to determine the qualifications of its members.

Article IV, section 8 of the constitution describes the appointment process for members of the Judicial Council. It strikes a careful balance between the interests of the legal community, the public, and the elected branches of government in the appointment of judges. It grants no role to the Council itself.

In interpreting the constitution, Alaska courts “first ‘look to the plain meaning and purpose of the provision and the intent of the framers.’”⁶ “Legislative history and the historical context, including events preceding ratification, help define the constitution.”⁷

⁵ Article 12, section 4 of the Alaska Constitution, Disqualification for Disloyalty, provides:

No person who advocates, or who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the United States or of the State shall be qualified to hold any public office of trust or profit under this constitution.

⁶ *Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020) (quoting *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017)).

⁷ *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016).

The text of article IV, section 8 plainly does not allow the Council to determine the qualifications of its members. Attorney members are appointed by the Alaska Bar and non-attorney members are appointed by the Governor and confirmed by the legislature. Nowhere is the Council granted the power to reject an appointment of an attorney or non-attorney by the Bar or the Governor, respectively, before or after confirmation by the legislature. Article IV, section 9 specifies “additional duties” for the Council. But these are studies, reports, recommendations, and “other duties assigned by law.” These additional duties cannot expand the Council’s powers beyond their constitutional limits.

These sections of article IV stand in contrast to section 12 of article II, which addresses the legislature. This provides that the senate and house of representatives are each “the judge of the election and qualifications of its members.” If the framers had intended the Council to similarly judge the qualifications of its members, the constitution would say so.

Instead, the framers adopted an appointment process with balanced roles for the Bar, Governor, and legislature, but not the Council. George McLaughlin, the chair of the Committee on the Judicial Branch at the Constitutional Convention, advocated a “theory” of the Judicial Council, where “the laymen on it are fairly balanced, having one representative of the judiciary, three lawyers and three laymen,” who “represent the public at large, rather than any professional group.”⁸ The attorney members would be “selected because they would represent in theory the best thinking of the bar, and they are there solely because they represent their craft.”⁹ The non-attorney members would be selected by the Governor and subject to confirmation by the full legislature to ensure “popular representation.”¹⁰

This balance would be upset if the Council, by a vote of four or more, could reject an attorney or non-attorney appointee. The non-attorney members, with one attorney member, could deny the legal community’s interest in judicial appointments by rejecting the Bar’s appointee. Or the attorney members, with one non-attorney, could deny the interests of the public, Governor, and legislature by rejecting the Governor’s appointee. Either scenario would contravene the express intent of those who designed the Council.

Neither the text of the constitution nor the intent of the framers allows the Council to use this bylaw to determine the qualifications of an attorney or non-attorney appointee.

⁸ Proceedings of the Alaska Constitutional Convention (PACC) 732 (Dec. 12, 1955) (statement of Del. McLaughlin).

⁹ *Id.* at PACC 687.

¹⁰ *Id.*

II. The Council's bylaw violates the separation of powers doctrine.

If the Council ever used article II, section 3 of its bylaws to reject the appointment of a member, it would violate the separation of powers doctrine by infringing on the powers of two branches of government. “The Alaska Constitution vests legislative power in the legislature; executive power in the governor; and judicial power in the courts.”¹¹ “Derived from this ‘distribution of power among the three branches of government’ is the separation of powers doctrine, which ‘limits the authority of each branch to interfere in the powers that have been delegated to the other branches.’”¹² “Although not specifically named in the Constitution, ‘the separation of powers and its complementary doctrine of checks and balances are part of the constitutional framework of this state.’”¹³

A. The bylaw usurps the Governor's power to appoint non-attorneys to the Council, including during a recess.

The Council could use this bylaw to reject a Governor's appointment of a non-attorney to the Council, before or after the legislature confirmed the appointment. Doing so would undercut the Governor's power to appoint non-attorney members, granted by article IV, section 8 of the constitution: “Three non-attorney members shall be appointed . . . by the governor” The Council cannot assume the executive power and override the governor's appointment—and implied determination that the appointee is qualified—by rejecting the appointee as not qualified.

In the context of other appointments, the Alaska Supreme Court has affirmed that appointment is an executive power over which even the legislature has limited control.¹⁴ Under the constitution, the Judicial Council has no greater power than the legislature to override an appointment by the Governor and while the legislature confirms the governor's appointments to the Council, the Council does not. By rejecting a Governor's appointment, the Council would not only exceed its authority under the constitution but also coopt authority given to the Governor, violating the separation of powers.

The Governor's appointment power applies equally to recess appointments to the Council. Article III, section 27 of the constitution allows the Governor to “fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature.” Non-attorney members of the Council require confirmation, so the Governor

¹¹ *State v. Recall Dunleavy*, 491 P.3d 343, 367 (Alaska 2021) (cleaned up).

¹² *Id.* (quoting *Alaska Pub. Interest Res. Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007)).

¹³ *Id.* (quoting *Alaska Pub. Interest Res. Grp.*, 167 P.3d at 34–35).

¹⁴ *E.g., Bradner v. Hammond*, 553 P.2d 1, 6–7 (Alaska 1976).

may appoint them during a recess. The Alaska Supreme Court has indicated that recess appointments are effective upon appointment.¹⁵ If the Council used its bylaw to reject a Governor’s recess appointment, the Council would violate not just the constitutional provisions creating the Council and the separation of powers doctrine but also the recess appointment provision.

The Council would also violate one of its other bylaws. Article II, section 2(A) states:

Non-attorney members shall have full voting rights effective upon the appointment date, unless and until denied confirmation by the Legislature.

This bylaw implicitly recognizes the Governor’s power to appoint a non-attorney to the Council, whether or not the legislature is in session, and without an initial qualification determination by the Council. It should control, rather than the contrary and unconstitutional bylaw in article II, section 3.

B. The bylaw usurps the legislature’s powers of confirmation and lawmaking.

If the Council used this bylaw to reject a Governor’s appointment of a non-attorney it would also undercut the legislature’s authority to confirm. The constitution gives this power to the legislature and not the Council in article IV, section 8: a Governor’s appointee is “subject to confirmation by a majority of the members of the legislature in joint session.” Whether it rejected an appointee before or after confirmation, the Council would negate the legislature’s role under the constitution. The Alaska Supreme Court has recognized that confirmation authority is a “part of the appointment power” and “implies a coincident power and duty to investigate the status of the appointed offices as well as the *qualifications* of the individuals appointed to those offices.”¹⁶ The constitution simply does not give any of this power to the Council.

The Council’s bylaw also infringes on the legislature’s lawmaking power. Article IV, section 8 of the constitution permits the Council to “act . . . according to rules which it adopts.” The Alaska Supreme Court has equated this constitutional text to a “reservation of authority . . . to promulgate its own procedural rules.”¹⁷ Procedural law contrasts with substantive law, which “is the province of the legislature.”¹⁸ “[A]s a

¹⁵ *Cook v. Botelho*, 921 P.2d 1126, 1130 n.4 (Alaska 1996).

¹⁶ *Id.* at 1131–32 (emphasis added).

¹⁷ *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 67 n.106 (Alaska 2023).

¹⁸ *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 96 (Alaska 2007); *see* Alaska Const. art. II, § 14.

general rule, ‘substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights.’”¹⁹ Substantive law is more closely related “to matters of public policy properly within the sphere of elected representatives.”²⁰

Here, any application of the Council’s bylaw would make it substantive, not procedural. This bylaw does not explain the process or timing of any of the Council’s duties. For example, it is not like the bylaw in article II, section 2(A), which explains that a non-attorney joins the Council immediately upon appointment and serves “unless and until” the legislature does not confirm. Instead, this bylaw purports to create a new right of the Council to determine the qualifications of its members. It also relates to significant matters of public policy—the appointment and confirmation of Council members—that the constitution explicitly and exclusively places within the sphere of our elected representatives.

Conclusion

Article II, section 3 of the Judicial Council’s bylaws is unconstitutional. Any way the Council used this bylaw would exceed the authority the constitution grants to the Council and infringe on the authorities the constitution grants to the Governor and the legislature.

Sincerely,

Treg Taylor
Attorney General

¹⁹ *Nunapitchuk*, 156 P.3d at 396 (quoting *Ware v. City of Anchorage*, 439 P.2d 793, 794 (Alaska 1968)).

²⁰ *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1043 (Alaska 1981).