Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.lc.state.or.us

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

November 19, 2013

Senator Floyd Prozanski
900 Court Street NE S415
Salem OR 97301

Re: Adequacy of Senate Joint Resolution 34 (2013) after establishment of independent governing boards for public universities under Senate Bill 270 (2013)

Dear Senator Prozanski:

You asked us two questions. The first question is whether, if it is affirmed by the voters in November 2014, Senate Joint Resolution 34 (2013) would permit judges to teach at a public university that has established an independent governing board. We believe that the answer is no.

Your second question is whether SJR 34 may be amended during the 2014 session of the Legislative Assembly, with the amended SJR 34, rather than the current SJR 34, being referred to the voters in November 2014. We believe that the answer is yes.

Finally, we note that the problems caused by reference to the State Board of Higher Education in SJR 34 also exist under the current language of Article XV, section 8, of the Oregon Constitution, for individuals who wish to both serve as members of the Legislative Assembly and be employed at a public university. The Legislative Assembly may therefore want to address this in amendments to SJR 34 as well.

I. SJR 34 will not allow judges to be employed by a public university with an independent governing board

SJR 34 attempts to permit judges to teach at public universities in Oregon by adding a subsection to Article XV, section 8, of the Oregon Constitution, that states:

> (2) A person serving as a judge of any court of this state may be employed by the Oregon National Guard for the purpose of performing military service or may be employed by the State Board of Higher Education for the purpose of teaching, and the employment does not prevent the person from serving as a judge. (Emphasis added.)

Under SJR 34, a judge's ability to teach at a public university is therefore limited to circumstances in which the judge is "employed by the State Board of Higher

Education for the purpose of teaching." This is problematic because the recently enacted Senate Bill 270 (2013) establishes a framework that contemplates the possibility of all seven Oregon public universities establishing an independent governing board and being completely separate from the State Board of Higher Education. At the current time, the University of Oregon, Oregon State University and Portland State University are scheduled to become independent from the State Board of Higher Education on July 1, 2014.

The transfer of authority from the State Board of Higher Education to universities with independent governing boards is primarily set forth in section 170 of SB 270. In particular, section 170 (2) states, in relevant part:

> All of the duties, functions, powers and lawfully incurred rights and obligations of the State Board of Higher Education that pertain to a university with a governing board are transferred to and vested in the governing board. The transfer shall include but not be limited to all applicable contractual rights and obligations . . . . For the purpose of succession to these rights and obligations, the governing board is considered to be a continuation of the State Board of Higher Education and not a new authority[.]

It is possible that this language would enable judges who are employed by the State Board of Higher Education before a university receives an independent governing board to continue working at the university after the creation of the board. However, we do not believe that this language (or any other language in SB 270) would permit a judge to ever teach at the University of Oregon, Oregon State University or Portland State University. This is because (1) judges are not currently allowed to be employed by the State Board of Higher Education (hence the need for the constitutional amendment); and (2) SJR 34 will not be voted on until November 2014—well after the July 1, 2014, establishment of independent governing boards at these institutions.

Similarly, under SB 270, judges would only have a small window to be employed by the State Board of Higher Education before the remaining four public universities are eligible to receive independent governing boards.

In short, we believe that the text of SJR 34 is insufficient to meet its intended purpose of permitting judges to retain their position while simultaneously teaching at any of Oregon's public universities.

II. The Legislative Assembly may amend SJR 34 and refer the amended version to the voters in November 2014

Given the above-referenced deficiencies in SJR 34, you also asked whether the Legislative Assembly may amend SJR 34 during the February 2014 regular session and refer the revised version of SJR 34 to the voters. While the law remains somewhat unclear, we believe that the answer is yes.

We believe that when the Legislative Assembly refers an Act or constitutional amendment to the voters, the assembly has the freedom to amend or repeal the Act or amendment. An Act may be referred to the people by the Legislative Assembly in two ways: the assembly may add a referral clause to a bill pursuant to Article IV, section 1 (3)(c); or, as is the case here, the assembly may propose an amendment to the Oregon Constitution in a resolution pursuant to Article XVII, section 1. These sections of the Oregon Constitution do not specifically contemplate the question at hand and, therefore, neither section expressly allows nor prohibits the modification or repeal of an Act or constitutional amendment by the Legislative Assembly. We believe that the power of the Legislative Assembly is plenary and because the Oregon Constitution does not prohibit the assembly from amending or repealing its own Acts or constitutional amendments, the assembly may do so. When the Legislative Assembly refers an Act or constitutional amendment to the people by its own action, it seems reasonable that the assembly may effectively change its mind. The contrary argument is that Article XVII, section 1, of the Oregon Constitution, suggests that when the Legislative Assembly refers an Act, it must be submitted to the people for approval or rejection and the assembly's authority to rescind the resolution ends.

This issue was the subject of debate in the 1960s and 1970s and as recently as 2002. During the 1963 regular session, the Legislative Assembly referred a constitutional amendment to the people in House Joint Resolution 20. At the subsequent special session, HJR 20 was repealed and HJR 8 was adopted instead. Likewise, in the 1967 special session, the Legislative Assembly rescinded HJR 58, which was adopted during the regular session, and proposed a modified amendment on the same subject. In both cases, the modifications made during the special sessions were submitted to and approved by the voters, and we have found no evidence of challenge to the legality of the proposals or the manner of modification.

In 2002, however, the Legislative Assembly challenged in court the Secretary of State's refusal to rescind a measure that was to have been placed on the ballot. During the first special session, the Legislative Assembly adopted Senate Joint Resolution 50, which proposed a constitutional amendment. At the second special session, the Legislative Assembly adopted HJR 76, which rescinded SJR 50 and replaced it with a new proposed constitutional amendment. The Secretary of State refused to accept the rescission of SJR 50 and proceeded with plans to place both SJR 50 and HJR 76 on the ballot. However, the authority of the Legislative Assembly to rescind a proposed amendment to the Oregon Constitution and to refer a different proposed amendment to the voters was upheld by the Marion County Circuit Court. See State ex rel. Simmons v. Bradbury, No. 02C11917 (March 12, 2002). Only HJR 76 appeared on the ballot at the May primary election and the measure was defeated by the voters. The case was not appealed.

The power to change or repeal a constitutional amendment or an Act referred to the voters by the Legislative Assembly is not limitless, however, and must be executed in a timely manner. For example, we do not believe the Legislative Assembly could exercise this power on the date of the election or even shortly beforehand. We believe the Legislative Assembly may amend or repeal a measure referred by legislative action only if it does so in a timely manner to avoid problems in election preparation, including the printing of ballots and the voters' pamphlet. We believe that amending SJR 34, or rescinding and substituting a new measure, during the February 2014 regular session would fall well within a permissible time frame.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

By
Daniel R. Gilbert
Deputy Legislative Counsel