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OPINION	:	No. 80-1014
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The Honorable Newton R. Russell, State Senator, Twenty-First District, has requested an opinion on the following question:

Would the appointment of a state legislator by the Governor to the Board of Regents of the University of California violate any provision of the California Constitution?

CONCLUSION

The appointment of a state legislator by the Governor to the Board of Regents of the University of California would violate article IV, section 13 of the California Constitution.

ANALYSIS

California Constitution, article IX, section 9, subdivision (a) provides for the appointment by the Governor of the appointive members of Board of Regents of the University of California.

> "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services. Said corporation shall be in form a board composed of seven ex officio members, which shall be: the Governor, the Lieutenant Governor, the Speaker of the Assembly, the Superintendent of Public Instruction, the president and the vice president of the alumni association of the university and the acting president of the university, and 18 appointive members appointed by the Governor and approved by the Senate, a majority of the membership concurring; . . . ."

The question presented is whether the appointment by the Governor of a state legislator to the Board of Regents would violate any provision of the California Constitution.

In our view, such an appointment is proscribed under California Constitution, article IV, section 13:

> "A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office."

With regard to another constitutional provision, then article VI, section 18,[1] providing that a *judge of a court of record* "shall be ineligible to any other office or public employment than a judicial office or employment," it was concluded in 20 Ops. Cal. Atty. Gen. 229 (1952) that such provision did not preclude the appointment of a judge as a member of the Board of Regents. The issue presented was whether the position of a regent constituted a public office or public employment. We traced the history of California Constitution,

[1] Article VI, section 17 (formerly § 18) now provides that a judge of a court of record "as ineligible for public employment or public office other than judicial employment or judicial office.

article IX, section 9, and determined that membership on the Board of Regents continued to be a "private trust, as originally characterized in the Organic Act of 1868. (And *cf. Regents of the University of California v. Superior Court [Karst]* (1970) 3 Cal. 3d 529, 539, fn. 12.)[2]

Assuming the continued validity of the rationale set forth in our prior opinion, the characterization of individual membership on the Board of Regents as a private or public trust or office does not provide the focal point of the present analysis. Rather, the question which arises under article IV, section 13, is whether an individual membership on the Board of Regents constitutes "any office or employment under the state."

The University of California is a public corporation *(Regents of the University of California v. Superior Court [Regan]* (1976)17 Cal. 3d 533, 536) and constitutes a branch of the state government equal and coordinate with the Legislature, the judiciary and the executive (30 Ops. Cal. Atty. Gen. 162, 166 (1957)). The University is administered by a Board of Regents which has been variously described as "an institution of the state," "a public corporation," "a governmental agency," "a public trust," "a governmental institution," "a constitutional department or function of the state government, "a governmental function," "a state institution," and "a branch of the state itself." *Ishimatsu v. Regents of the University of California* (1968) 266 Cal. App. 2d 854, 863–864; *Regents of the University of California v. Superior Court [Karst]*, *supra*, 3 Cal. 3d at p. 534.) As stated *in Newmarker v. Regents of the University of California* (1958) 160 Cal. App. 2d 640, 645, "common sense and the weight of authority indicate that the board of regents is a public legal entity charged with the government of a public trust." It is clear, therefore, that a member of the Board of Regents, although not a public officer (*Caminetti v. Pac. Mut. Life Ins. Co.* (1943) 22 Cal. 2d 344, 360) is a member of a public entity which is charged with a public trust. (20 Ops. Cal. Atty. Gen. 229, *supra*.)

The term "office . . . under the state" has a broader literal signification than "public office." We undertake, therefore, to examine the fundamental objectives and purposes of the provision in which the term appears, to determine whether its application with respect to membership on the Board of Regents is either appropriate or contraindicated. (*Cf.* 27 Ops. Cal. Atty. Gen. 5, 10–11 (1956).) In *Satterwhite v. Garrison* (1917) 34 Cal. App. 734, 736, the court, holding the provision applicable to the position of deputy district attorney, stated:

[2] lnsofar as membership may be deemed a private trust, we would have no occasion to consider the common law doctrine of incompatibility of public offices. (*Cf.* 62 Op. Cal. Atty. Gen. 615, 616 (1979); 9 Op. Cal. Atty. Gen. 277, 281, (1947).) In any event, such consideration is not warranted in view of the conclusion reached herein.

> "Upon the merits of the whole case we are of the opinion that the intent and purpose of the framers in proposing, and of the people in adopting, this constitutional provision was the preclusion of members of the law-making branch of the state government from seeking or holding *any appointive office or employment in or under any department or subdivision of the general state government*, by the seeking or holding of which his independent action as such member of the legislature might be in any wise influenced or affected." (Emphasis added.)

In *Parker v. Riley* (1941) 18 Cal. 2d 83, 87, the court expounded:

> "It is clear, therefore, that the purpose of the constitutional provision here involved is to prevent the acceptance by a legislator of any position under the state, whether an office or merely employment, which creates the opportunity for private aggrandizement, pecuniary in nature or otherwise.

See also, 9 Ops. Cal. Atty. Gen. 277, 278 (1947).

Further evidence of the purpose of article IV, section 13 was provided in the ballot pamphlet arguments submitted to the voters in conjunction with the 1916 election. Particularly pertinent is the following summary of the proponents' argument, by the opponents to the measure:

> " . . . those who urge its adoption are loud in their cries that it will prevent the governor from bartering for legislative votes by appointing senators and assemblymen who favor administration measures to state offices, and that it will further destroy the incentive for members of the legislature to vote with the governor in the hope of obtaining a state position in reward thereof."

Hence, the purposes may be summarized: (1) to preclude any adverse influence or affect upon the independent action of a legislator, (2) to foreclose the opportunity for private aggrandizement, pecuniary or otherwise, and (3) to prevent the Governor from bartering for legislative votes, and members of the Legislature from voting with the Governor in the hope of obtaining an appointment. Manifestly, the opportunity for appointment of legislators by the Governor to the Board of Regents presents a danger of the kind and nature which the constitutional provision in question was designed to avoid.[3]

[3] By express constitutional mandate, the Speaker of the Assembly and the Lieutenant Governor, as well as the Governor and the Superintendent of Public Instruction, are ex officio members of the board. (Cal. Const., art. IX, § 9, subd. (a).)

Hence, a member of the Board of Regents which is a public entity, administering the affairs of the University which is a government agency, and charged thereby with a public trust, holds an office "under the state" within the purview of article IV, section 13.[4]

While it may be asserted that the University is intended to operate as independently of the state as possible (Cal. Const., art. IX, § 9 it does not follow that it is free of legislative regulation to such an extent as to obviate any significant conflict of interest as a member of the Legislature and of the Board of Regents. As stated in *San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal. 3d 785, 789:

> It is true the university is not completely free from legislative regulation. In addition to the specific provisions set forth in article IX, section 9, there are three areas of legislative regulation. First, the Legislature is vested with the power of appropriation, preventing the regents from compelling appropriations for salaries. (*California State Employees' Assn. v. Flournoy*, *supra*, 32 Cal.App. 3d 219,233; *California State Employees' Assn. v. State of California*, *supra*, 32 Cal. App. 3d 103, 109–110.)
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> "Second, it is well settled that general police power regulations governing private persons and corporations may be applied to the university. (*Regents of University of California v. Superior Court*, *supra*, 17 Cal. 3d 533, 536–537; *City Street Imp. Co. v. Regents* (1908) 153 Cal. 776, 778 *et. seq*. [96 P. 801]; *Estate of Royer* (1899) 123 Cal. 614, 624 [56 P. 461].) For example, workers' compensation laws applicable to the private sector may be made applicable to the university.
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> "Third, legislation regulating public agency activity not generally applicable to the public may be made applicable to the university when the

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[4] Article IV, section 13, provided, prior to its amendment in 1966 (then art. IV, § 19):

"No senator or member of assembly shall, during the term for which he shall have been elected, hold or accept any office, *trust*, or employment under this state; provided that this provision shall not apply to any office filled by election by the people." (Emphasis added.)

No substantive changes were intended by the amendment. The term "trust," which was deleted, was deemed by the Constitutional Revision Commission to be subsumed within the terms "office" and "employment." There can be no doubt, therefore, that membership on the Board of Regents is an "office" or "employment" as those terms are employed in present text. (Cal. Const. Revision Commission, Proposed Revisions, Feb. 1966, p. 37; *cf*. 27 Ops. Cal. Atty. Gen. 5, *supra*, at p. 10.)

> legislation regulates matters of statewide concern not involving internal university affairs. (*Tolman v. Underhill* (1952) 39 Cal. 2d 708, 712 [249 P.2d 280].)"

In this regard it may be observed that the position of a legislator with respect to the University and with respect to the Governor is significantly different than that of a member of the judiciary. Thus, the result which we reach in connection with the appointment by the Governor of members of the Legislature as distinguished from judges, to membership on the Board of Regents, is founded not only upon the literal comparison of the respective constitutional provisions, but also upon rational premises. (Compare 20 Ops. Cal. Atty. Gen. 229, *supra*, at pp. 232–233.)

It is concluded that the appointment by the Governor of a state legislator to the Board of Regents would violate article IV, section 13, of the California Constitution.[5]

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[5] In view of this conclusion, we express no opinion as to whether such an appointment would also violate any other provision of the California Constitution.