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STATE OF NEBRASKA
OFFICIAL
MAR 1 1991
DEPT. OF JUSTICE

DATE: February 28, 1991

SUBJECT: Constitutional amendment to provide for recall of elected constitutional officers.

REQUESTED BY: Senator Ron Withem, 14th Legislative District

WRITTEN BY: Don Stenberg, Attorney General
Harold Mosher, Senior Assistant Attorney General

You have asked whether an amendment to the Nebraska Constitution is needed to permit the recall of an elected State constitutional officer. Specifically, your question pertains to members of the University of Nebraska Board of Regents (hereinafter, Board of Regents).

It should be noted at the outset that Neb.Const., Art. VII, §10, states that the general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a board of not less than six nor more than eight regents. It mandates that the voting members thereof shall be elected (except vacancies) from and by districts and fixes the term of the elected members at six years each. It also provides for three students of the University of Nebraska who serve as nonvoting members and fixes the terms of their office. The Board of Regents are thus constitutional officers who serve a fixed term.

Traditionally, Nebraska has afforded constitutional officers more protection than statutory officers in terms of the possible ways such officers may be removed from office. See and compare, State ex rel. Lottman v. Board of Education of School District No. 103, 201 Neb. 486, 268 N.W.2d 435 (1978) with Fitzgerald v. Kuplinger, 163 Neb. 286, 79 N.W.2d 547 (1956). Lottman dealt with

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and permitted the recall of the members of a board of education. Fitzgerald dealt with a suit brought by the Douglas County Attorney to enjoin the county election commissioner from placing the names of two candidates for county attorney on the general election ballot. In its opinion, the Nebraska Supreme Court addressed at length the removal or suspension of constitutional officers. It then held the provisions of Neb.Const., Art. III, §23, "as to removal and vacation, are exclusive as to constitutional offices and the Legislature has no power to add other or different grounds." It thereupon declared Neb.Rev.Stat. §32-503 (Supp. 1955), to the extent that it was attacked in that case, unconstitutional, null and void.

Based upon Fitzgerald, it would seem that the Legislature has no power to provide by statute for the removal of a member of the Board of Regents. However, Neb.Const., Art. III, §23, which sets out the exclusive provisions for removal of State constitutional officers, and upon which the holding in Fitzgerald was based, was repealed in 1972.

The legislative history of the repeal of Neb.Const., Art. III, §23, states that the content thereof was to be provided for in Neb.Const., Art. IV. Subject to certain exceptions which are not pertinent to this inquiry, Neb.Const., Art. IV, §11, provides for the appointment of elected state offices created by the Constitution which became vacated by "death, resignation, or otherwise." It does not elaborate on the word "otherwise." It seems logical that it refers to and means causes stated in the Constition, other than death or resignation, by which elected State constitutional offices can become vacant. One such cause, for example, is by impeachment, Neb.Const., Art. III, §17 and Neb.Const., Art. IV, §5. Another is refusal to take the Oath of Office or the violation of said oath, as provided by Neb.Const., Art. XV, §1. See also, Neb.Const., Art. XV, §2.

Last, but not least important, it should be noted that Fitzgerald has not been overruled. In fact, Fitzgerald is the latest in a line of cases. See, for example, Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1936); and Conray v. Hallowell, 94 Neb. 794, 144 N.W. 895 (1913). We are, therefore, of the opinion that elected State constitutional officers can only be removed from office for those reasons enumerated in the Nebraska Constitution. We are of the further opinion that an appropriate constitutional

amendment would be required to permit the recall of a State constitutional officer, including members of the Board of Regents.

Respectfully submitted,

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Approved By:

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