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ANGIE SPARKS, Clerk of District Court
By *[Signature]* Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

**BOARD OF REGENTS OF HIGHER
EDUCATION OF THE STATE OF
MONTANA,**

Petitioner,

v.

**THE STATE OF MONTANA, by and
through Austin Knudsen, Attorney
General of the State of Montana in his
official capacity,**

Respondent.

Cause No. BDV-2021-598

**BRIEF OF AMICUS CURIAE
DAVID W. DIACON**

(email)

COMES NOW David W. Diacon, pro se, and hereby submits this brief of Amicus Curiae pursuant to the Order Denying Intervention Motions and Briefing Schedule, dated July 16, 2021, as modified by the Amended Order Setting Briefing Schedule, dated September 1, 2021.

I. Background

The Board of Regents [hereinafter Board] asserts that the Montana Legislature [hereinafter Legislature] lacks authority to regulate firearms on the

Montana University System [hereinafter MUS] properties. Petition for Declaratory Relief, May 27, 2021. The Board claims that its authority under Montana Constitution § X gives it sole authority to regulate firearms on MUS properties to the complete exclusion of the constitutional authority of the Legislature. *Id.* The Board seeks declaratory judgment that HB 102 is unconstitutional as applied to the Board, MUS, and properties thereof. *Id.* ¶ 35.

In addressing the Boards assertions, the broad language of Montana Constitution Article X § 9 must not be read or construed in isolation and must stand in relation to other relevant provisions found in the constitution. *Board of Regents v. Judge*, 168 Mont. 433, 443, 543 P.2d 1323, 1329 (1975). The Montana Supreme Court set forth the following rules of construction for such issues in *Judge*:

1. [T]he Constitution must receive a broad and liberal interpretation consistent with the purpose of the framers and the people in adopting it, that it may serve the needs of a growing state; the proper interpretation of any constitutional provision requires us to remember that it is a part of the organic law -- organic not only in the sense that it is fundamental, but also in the sense that it is a living thing designed to meet the needs of a progressive society, amid all the detail changes to which a progressive society is subject.
2. The Montana Constitution, unlike the Constitution of our United States, is a prohibition upon legislative power, rather than a grant of power.
3. A constitution, or provision thereof, should receive a reasonable and practical interpretation in accord with common sense.
4. All provisions of the Constitution bearing upon the same subject matter are to receive appropriate attention and be construed together.
5. Since the constitutional analysis will determine the validity or invalidity of legislative acts, the presumption of constitutionality and burden on the party

seeking to overcome the presumption stated in *State ex rel. Mills v. Dixon*, 66 Mont. 76, 84, 213 P. 227, 229, is also appropriate: the constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt.

6. The court must harmonize in a practical manner the constitutional power of the legislature to [pass laws mandating certain obligations] with the constitutional power of the Regents to supervise, coordinate, manage and control the university system.

Id. at 443-444, 213 P.2d at 1329-1330 (internal quotes and citations omitted).

The following sections apply these rules of construction to the issue at Bar.

II. The Board of Regents is a constitutionally created executive agency.

The powers of the government are divided into three distinct branches – legislative, executive, and judicial. Mont. Const. Art. 3 § 1. To harmonize the relevant provisions of the constitution, the boards established by Montana Constitution Article X must fall within one of the enumerated branches. The Board, although not under direct supervision of the governor, is an executive agency. This status is supported by the inclusion of the governor and superintendent of public instruction, two elected executive officers, as *ex officio* non-voting members of the board. Mont. Const. Art. X § 9(2)(b). Inclusion of executive officers on the board but restricting their voting status indicates that the Board is an executive body that is insulated from direct control by those elected executive officers. Prospective Board members are selected by the governor and

approved by the senate, a procedure that comports with selection of other executive agency officers. Mont. Const. Arts. X § 9(2)(b), VI §8(2).

Because the “full power and authority” of the Board as an executive agency must be construed in relation to Legislature’s authority to pass laws relating to the Board, the purpose for which the Board was established and the powers which were contemplated by the delegates to the 1972 Constitutional Convention are germane. From the proceedings of the Convention, the Board’s executive function is clear.

1. There were good reasons to establish a board of regents.

Delegate Champoux, the chairman of the Education and Lands Committee, presented the reasoning for establishing a board of regents. Higher education was in the process of becoming a complex undertaking and was not merely another state service, and the control of education therefore needed to stand apart from the executive branch business-as-usual. Conv’n Tr. 6283:7-16.¹ Bureaucratic control was the biggest impending threat to quality education and was viewed as a modern problem of political development that was only becoming more severe. Conv’n Tr. 6275:13-18, 6284:16-21, 6285:6-10. The core problem arose from the bureaucrats hired to administer laws. Conv’n Tr. 6285:11-12, 16-18. Academic

¹ Conv’n Tr.: Transcripts of Proceedings, Montana Constitutional Convention, Vol. 8 pp 5721-6408, March 10-11, 1972; Transcript of Proceedings, Montana Constitutional Convention, Vol. 9 pp 6409-7045, March 13-14, 1972. Relevant pages of the transcripts are attached hereto as Exhibit A.

quality would suffer at the hands of “state budget officers, state auditors, comptrollers, purchasing departments, personnel offices, central building agencies,” along with older forms of control found in legislative riders on appropriations. Conv’n Tr. 6286:10-14, 17-23. These influences indicated that higher education would need “long range planning and administrative decentralization” (away from the centralized executive branch). Conv’n Tr. 6287:3-10. Champoux asserted that higher education needed “a strong board of regents to make long-range plans which are appropriate to the needs of higher education and free from short term political whims.” Conv’n Tr. 6289:10-12. If a board of higher education has the responsibility for higher education, it needs the authority to carry out that responsibility and it must be free from political changes of fortune and immune from external political or ideological pressure. Conv’n Tr. 6297:15-6298:1. With these reasons in mind, Champoux demonstrated the governmental interference that posed a threat to higher education.

2. The committee had specific examples of administrative agency interference.

Specific examples of executive branch interference in higher education are in the Constitutional Convention record demonstrating what the Education and Lands Committee sought to insulate the Board from. The music department in Missoula was not able to purchase pianos that its faculty deemed appropriate because an accountant in the department of administration had to submit the

purchase for the lowest bid. Conv'n Tr. 6294:16-24. The department of administration tried to impose an archaic accounting system on the university system that was not appropriate for educational institutions and for which the university system had an appropriate system. Conv'n Tr. 6295:5-12. The same department also wanted to incorporate university connected funds into the state general fund and to administer research grants through the senate. Conv'n Tr. 6295:17-19, 24-25. The highly paid department chair of the University of Montana philosophy department spent hours of his professional time requisitioning typewriters, paper, and paperclips. Conv'n Tr. 6469:7-6470:5. Access to reference materials at a university library was disrupted for unreasonable periods of time because of lack of continuity in contracts for book binding; the process was also inefficient and increased costs. Conv'n Tr. 6548:7-6549:12.

In addition to bureaucratic interference, regular political interference was also a threat to higher education.

3. External political and ideological pressure was detrimentally applied to faculty.

Specific examples of political interference in higher education are in the Constitutional Convention record demonstrating what the Education and Lands Committee sought to insulate the Board from. One faculty member gave a politically controversial speech about business cooperatives and economics for which his salary was eliminated from the budget during the next legislative session

and another faculty member was suspended for researching and promulgating controversial mine taxation views. Conv'n Tr. 6297:3-14.

For these reasons the committee sought to create a constitutional board to protect higher education from these influences.

4. The Constitutional Convention did not create an autonomous body in the Board of Regents.

To insulate higher education from executive branch and political influence, the committee originally proposed that the board would be a body corporate – “There shall be a board of regents of higher education, a body corporate, which shall govern and control the academic, financial, and administrative affairs of the Montana university system...” Conv'n Tr. 6267:4-7. The purpose of this term was that it: provided legal recognition of the board apart from a normal administrative or executive agency; limited liability of board members; maintained continuity as members changed; defined the legal rights and responsibilities of the board; and generally allowed the board to govern the internal affairs of the university system. Conv'n Tr. 6280:10-6281:4. The committee acknowledged that the powers of such a body would be determined by charter and articles of incorporation, be especially assigned, or be delegated to it, and that such powers are normally subordinate and local. Conv'n Tr. 6281:3-25. The purpose was to be “master of your own house” and be able to hire and fire employees, and to set curriculum. Conv'n Tr. 6282:11-13. Of special relevance, Champoux noted that

the delegates had been loosely using the term autonomy, which he defined as freedom and complete independence, which he said was not necessary to the authority of the board of regents. Conv'n Tr. 6282:14-18.

Because of contention regarding the use of the term body corporate, Delegate Rollins submitted an amendment that replaced that term: "The government and control of Montana's university system shall be vested in a board of regents..." Conv'n Tr. 6480:24-6481:1.

In proposing this amendment, I'm trying to achieve certain things and to avoid certain types of objections. I'm trying to achieve a board of regents that has the essential powers to carry on the work of the university system and such other educational institutions as might be assigned by law to that board of regents. In my opinion, the major duty of higher education is education. The only reasons why there should be administrative control would be to make it so that it can carry out its primary task with the additional need for accountability to the people who support it. So, I think this amendment indicates a board of regents with the powers to make the necessary decisions to conduct higher education. I am willing to sacrifice the idea of body corporate. I didn't understand it too well anyway, and apparently many others don't.

Conv'n Tr. 6481:23-6482:12

Further debate questioned the scope of "manage and control". Conv'n Tr. 6505:14-15. Rollins opined that the grant of authority applied toward the academic function of educating people without undue influence from outside authorities.

Conv'n Tr. 6506:20-25. Champoux stated "for the record" that the "committee does not want to set up a separate unit of government," but instead asserted that the authority sought for a board of regents extended to requisitioning supplies,

determining disposition of faculty, supervise building projects of the university system, and provide oversight to all university campuses. Conv'n Tr. 6513:20-6514:13. Delegate Heliker bolstered Champoux's reasons for the grant of authority with similar examples. Conv'n Tr. 6516:18-6519:2

There was general support among the delegates for some level of insulation of higher education from executive and legislative influence but with lingering concern about creating an entity that was "an island by themselves completely nonresponsible to anyone." E.g., Conv'n Tr. 6520:23-6521:2, 6549:20-22.

The amendment process eventually produced the current Article X § 9 of the Montana Constitution that states in pertinent part, "The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system..."

Based on review of the convention transcripts, the nature of the Board's executive power and authority can be inferred. "Government," as it pertains to the Board, does not mean that the Board is its own government that can enact laws. Rather, government means the continuous exercise of authority over and performance of functions for the university system.² In this light, the Board is

² See Merriam-Webster Dictionary at <https://www.merriam-webster.com/dictionary/government>, accessed Sept. 16, 2021.

placed in continuous exercise of authority and performance of functions and control over the MUS, without that authority and control being spread across, diluted by, and interfered with, by other executive branch agencies. The Board is insulated from normal, direct executive control by the governor. The Board is also insulated from direct line-item budgetary control of educational functions by the Legislature. *See Judge*, 168 Mont. at 450, 543 P.2d at 1333. The Board alone is the administrative body of the MUS, separate from direct supervision by the executive branch. The Board alone can be held responsible to the people for the proper and efficient governance of higher education. The Board can purchase supplies, contract, hire and fire faculty and staff, and purchase equipment necessary for operations. The Board determines and responds to the needs of the organization as it pertains to conducting higher education. The Board brings the separate universities and colleges under one controlling body. The Board performs the functions necessary to coordinate personnel and other resources to achieve the duty of providing higher education to students. The Board can rent MUS facilities for the financial benefit of the MUS. *See Duck Inn v. Mont. State Univ. N.*, 285 Mont. 519, 949 P.2d 1179 (1997). However, nowhere in the Constitutional Convention transcripts is there evidence that the Board was intended to have the power to write and enact laws, let alone determine law regulating the carrying of firearms on MUS property.

The Board's business is providing higher education. The constitutional grant of broad power and authority supports its status as a constitutionally isolated, stand-alone executive agency with commensurate power provide for the functioning of the agency. The Board's power and authority are limited to administering a system of efficient and quality higher education. The Board's constitutional power as an executive body does not equate to the constitutional power of the Legislature to enact laws.

III. The power to set public policy and laws regulating firearms in Montana rests solely with the Montana Legislature.

The Montana Legislature has plenary power to regulate firearms in the State of Montana. Legislative power of the State is vested in a legislature consisting of a senate and a house of representatives. Mont. Const. Art. V § 1. Legislative powers include authority to make, amend, and repeal laws, as well as the power to control fiscal matters such as budgets, appropriations, and levying of taxes. *Kock v. Yellowstone Cnty.*, 243 Mont. 447, 451, 795 P.2d 454, 457 (1990).

The power of the Legislature to make laws and regulations for the protection of public health, safety, welfare and morals is plenary and commonly referred to as police power. *In re Sonsteng*, 175 Mont. 307, 314, 573 P.2d 1149, 1153 (1975).

Local government units are also granted police power under Montana Constitution Article XI, which is acquired by and through the adoption of a self-government

charter. Mont. Const. Art. XI §§ 4, 5. The exercise of local government police powers is subordinate to the laws passed by the Legislature. *Id.* at § 6.

The right to bear arms is subject to the police power of the state. *State v. Fadness*, 2012 MT 12, ¶ 31, 363 Mont. 322, 268 P.3d 17. The right to bear arms is “inextricably tied to the concept of the virtuous citizen” and may be appropriately restricted in cases of criminal conviction because the person has shown his disregard for others in society and his possession of a firearm threatens the security of his fellow citizens. *Id.* (internal citations omitted). Additionally, even though HB 102 implements a self-executing right, the Legislature may implement laws in furtherance of the purpose, enforcement of, or better protection of the right secured by the constitution. *Missoula v. Mtn. Water Co.*, 2018 MT 139, ¶ 13, 391 Mont. 422, 419 P.3d 685. Therefore, the Legislature has authority through its police power to enact laws regulating who may carry firearms and where firearms may be carried.

The Board does not have police power. The Board does not have legislative power expressly given to it anywhere in the Montana Constitution. *See generally* Mont. Const. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted. Mont. Const. Art. III § 1. Without an express constitutional grant of legislative authority,

the Board lacks any such power, which is consistent with its status as an executive agency. Neither is the Board a local government unit under Montana Constitution Article XI. *Mitchell v. University of Montana*, 240 Mont. 261, 783 P.2d 1337 (1989). Because it is not a local government unit, the Board does not obtain legislative power from Article XI. The Board simply and clearly lacks legislative power.

Because the Board does not have legislative power and firearm regulation is subject to the police power of the state, the Board does not have independent authority to regulate firearms. The Board lacks independent authority to regulate firearms, therefore the Legislature did not violate the Board's constitutional authority by implementing HB 102.

IV. The Legislature properly delegated authority to the Board to regulate firearms by enacting HB 102.

Section 6 of HB 102 [attached hereto as Exhibit B] properly delegates legislative authority to the Board to regulate firearms on MUS property. The Legislature may delegate its legislative powers to an administrative body so long as it sets forth a policy, rule, or standard for guidance and does not vest it with arbitrary and uncontrolled discretion. *State v. Spady*, 2015 MT 218, ¶ 19, 380 Mont. 179, 354 P.3d 590. The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. *Bacus v. Lake Cnty.*, 138 Mont. 69, 78, 354 P.2d 1056, 1061 (1960). The Board

has inappropriately exercised administrative discretion by regulating firearms for years. See Pet'n Decl. Relief ¶ 28 May 27, 2021. The Legislature recognized the Board's inappropriate violation of the Legislature's constitutional authority and specifically addressed the matter in HB 102 § 3. Ex. B. The Legislature then delegated certain authority to the Board in HB 102 § 6. *Id.* In section 6, the Legislature provided specific rules and standards by which the Board could "prohibit or regulate" specified activities pertaining to carrying of firearms on MUS property. *Id.*

V. The Board's authority to create policies and rules for the implementation of a system of higher education does not rise to the level of legislative authority.

The authority granted to the Board by Article X § 9(2) of the Montana Constitution does not equate to legislative power. It is the exclusive power of the Legislature to enact the laws of this State and the exclusive power of the Executive branch to implement and enforce those laws. *MEA-MFT v. McCulloch*, 2012 MT 211, ¶ 29, 366 Mont. 266, 291 P.3d 1075. Most executive agencies must promulgate their rules under the Montana Administrative Procedures Act. Mont. Code Ann. Title 2, chapter 4. However, the Board is exempt from the requirements of the Act in promulgating its policies and rules. Mont. Code Ann. § 2-4-102. This ability to independently promulgate policies and rules is consistent with the Board's authority to govern the university system. However, the authority

to make administrative rules is not a delegation of legislative power, nor can such rules be raised from an administrative to a legislative character (even in cases where a violation of the administrative rule is punishable as a public offense). *State v. Stark*, 100 Mont. 365, 373, 52 P.2d 890, 894 (1935) (citing *Union Bridge Co. v. United States*, 204 U.S. 364, 27 S. Ct. 367 (1907)).

The Board may make rules and policies to execute its duty to provide a system of higher education, but such rules and policies are not equal to or prohibitive of a law regulating the carrying of firearms passed by the Legislature pursuant to its police powers.

VI. Conclusion.

Enactment of HB 102 in its entirety is constitutional as applied to Board of Regents, the Montana University System, and campuses and locations. The Board is an executive agency without legislative power and because the Board does not have legislative power, the Legislature's enactment of HB 102 is not violative of the Board's authority granted by the Montana Constitution Article X § 9.

Neither does HB 102 violate the Board's constitutional purpose of providing continuous administration of a system of higher education. The Legislature has properly and appropriately delegated to the Board certain and specific power to regulate firearms on MUS property. HB 102 provides guidance by which the Board may implement its administrative rulemaking regarding firearms on campus.

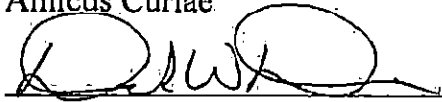
The Board has offered no support that the carrying of firearms directly and negatively impacts the education function of the units of the university system, and thus there is no direct impact on the Board's ability to administer the system of higher education. *See Glass v. Paxton*, 900 F.3d 233, 2018 U.S. App. LEXIS 22843 (5th Cir. 2018) (Professors could not manufacture standing in a First Amendment claim by self-censuring speech based on speculation that concealed carry license holders would, through their actions, intimidate professors and students in the classroom).

Based on the foregoing, the enactment of HB 102, as applied to the Board of Regents, Montana University System and properties thereof, was a proper exercise of legislative power under Montana Constitution Article V; the Legislature did not violate the separation of powers under Montana Constitution Article III § 1; the Board of Regent's power and authority granted by Montana Constitution Article X § 9 is consistent with the Board's executive branch functions; the Board of Regents does not have legislative authority; the Board of Regents, as an executive branch agency, is limited to enforcing the laws of the State of Montana; the Board of Regent's rule making authority is limited to managing a system of higher education, subject to and limited by the laws enacted by the Legislature; and, the Board of Regents does not have independent power to regulate firearms.

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Respectfully submitted to the Court this 22nd day of September, 2021.

Amicus Curiae

A handwritten signature in black ink, appearing to read 'D. W. Diacon', written over a horizontal line.

David W. Diacon, pro se

Certificate of Service

I, the undersigned, hereby certify that I served a true and correct copy of the foregoing *Brief of Amicus Curiae David W. Diacon* via email, as stipulated to by the parties, upon the following:

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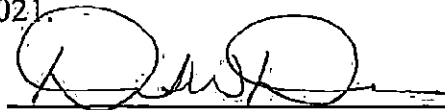
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Signed this 22nd day of September, 2021.



David W. Diacon

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EXHIBIT

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1 tendent of public instruction shall be ex officio non-voting
2 members of the board. The duties of this board and the super-
3 intendent of public instruction shall be prescribed by law.
4 Section eleven, Board of Regents of Higher Education: There
5 shall be a board of regents of higher education, a body corp-
6 orate, which shall govern and control the academic, financial,
7 and administrative affairs of the Montana university system,
8 and shall supervise and coordinate other public educational
9 institutions which may be assigned by law. Said board shall
10 consist of seven members appointed by the governor to six year
11 overlapping terms, subject to confirmation by the senate, under
12 regulations provided by law. The board shall appoint its ex-
13 ecutive officer and prescribe his term and duties. The gov-
14 ernor and superintendent of public instruction shall be ex
15 officio non-voting members of this board. (End reading) Mr.
16 Chairman, sections nine, ten and eleven.

17 CHAIRMAN GRAYBILL: Very well.

18 Mr. Champoux.

19 DELEGATE CHAMPOUX: Mr. President, fellow Delegates,
20 at this point I would like to spend some time going over what
21 the two-board concept is and in the process telling you about
22 some of the ramifications in terms of what will happen, for
23 instance. I also intend to define body corporate along the
24 way. Oh -- I move that when this committee does arise that we
25 adopt nine, ten and eleven. Is that proper at this time?

1 it? A board of lay people watching over this, having a check
2 on the state superintendent's office, and so forth? The need
3 for a separate board for public education promises then to
4 become even greater in the future. The present trends indi-
5 cate the assumption of much greater role in educational fin-
6 ancing by state and federal, possibly as much as ninety per-
7 cent -- and I don't want to go into that because this is ac-
8 cording to Serrano and there's a variance factor there that
9 constitutional lawyers say there's somewhere between ten and
10 twelve percent, but we don't know. Well, a well-informed and
11 representative board would provide a much needed balance to
12 decisions on administrative policies, and that is one of the
13 things that I want to emphasize. In this whole business of
14 the boards, we have to keep in mind all the time that the
15 legislature is not going to be here in session all the time,
16 that the representatives of the people are not going to be
17 here administering this, and the greatest fear is the bureau-
18 cracy. The greatest fear is the bureaucracy. A large major-
19 ity of witnesses who testified on the subject, including key
20 state officials and many educators, spoke in favor of the two-
21 board concept. As a matter of fact, every major person in-
22 volved in education, like the state superintendent of public
23 instruction, the presidents of all the university systems,
24 community -- the university units -- the community college
25 presidents, the Montana Education Association, the largest



1 for education is a board of regents of higher education. The
2 same reasons which apply to the need for specialization and
3 concentration on the public school board hold also for the
4 board of regents. Higher education is fundamentally different
5 from public school education in goals, curriculum, financing,
6 control, operation, and so forth, and it must be administered
7 accordingly. There is very little in common between the public
8 school system and higher education, other than a shared need
9 to provide a smooth transition for students between the two
10 systems. Now, I have a kind of a suspicion that some of you
11 are interested in what this word, a body corporate, means, so
12 at this point I want to stop and define a body corporate and
13 tell you a little bit about it, and at the end of this -- my
14 little lecture here today, I'm going to tell you what we see
15 as happening if this occurs and what we see as not happening
16 if it occurs. All right, let's look at the definition of a
17 body corporate. This is from Black's Law Dictionary. One:
18 it provides legal recognition as an entity apart from a normal
19 administrative or executive agency. It limits liability of
20 directors or members. And that point was brought up by some
21 board members in terms that they can be sued without this.
22 Under this the board can but not members. It recognizes the
23 perpetuation of the body between individual membership. It
24 generally grants right to purchase or sell property, hold
25 title to property, sue, contract, adopt a seal, and so forth.

1 It generally grants right to the body to govern its own inter-
2 nal operations, and that should be emphasized. That is what
3 the key to all of this is about, the power to govern its own
4 internal operations, according to articles of charter or in-
5 corporation -- in other words, the grant of power. It has this
6 power to exercise all powers necessary or convenient to affect
7 any or all of the purposes for which the organization is or-
8 ganized, sell things and what-have-you. Now, the following
9 states have a body corporate: Alaska, California, Colorado,
10 Georgia, Hawaii, Idaho, Louisiana, Michigan, Minnesota, New
11 York and Florida. A body corporate is also a term applied to
12 corporations, public and private, and is a term particularly
13 applied to a public corporation having powers especially as-
14 signed. It indicates the distinguishing characteristics of a
15 corporation -- and what are the distinguishing characteristics?
16 Is an artificial person a legal entity, capable of acting
17 through its corporate offices and agents, of suing, being sued,
18 taking and holding property, contracting in its own name, and
19 of continuing to exist independently of the individuals who
20 compose it? All right. A public corporation is one created
21 by the state for political purposes and to act as an agency in
22 the administration of civil powers delegated to it. Generally
23 within a particular territory a subdivision of the state and
24 usually invested for that purpose with subordinate and local
25 powers, and so forth. Now, all school districts in the state

1 of Montana by statute are body corporates. All school dis-
2 tricts in the state of Montana by statute are body corporates.
3 If you look at the Revised Codes, 75-6501, it says any district
4 shall be a body corporate. Every community college in the
5 state of Montana -- community college district -- is a body
6 corporate. If you look at the Revised Codes, 75-8102, these
7 are by statutes however, all vo-tech schools -- centers which
8 are administered by local school districts come under the pow-
9 ers of a body corporate. The university system is the only
10 educational unit in the state that is not a body corporate.
11 Now, what does it mean, really? It means that you are master
12 in your own house, that you can set your own curriculum, that
13 you can hire and fire, and I'll go into detail later on as to
14 what the limitations on this power are. We've been using the
15 term, autonomy, around here. I think that we've been using it
16 rather loosely because autonomy means freedom, complete inde-
17 pendence, and this isn't necessary to the case as we shall
18 point out with this board. All right. A recognition of the
19 particular needs and problems of higher education has led all
20 but two states in the Union -- all but two -- to establish
21 separate state governing boards for higher education. Now,
22 they have either established it by constitutional status or
23 by legislative status. Montana and Idaho remain the only two
24 states which retain a single board for both public schools and
25 the university system. Some states have more than two boards

1 for their educational system. Some have three and four, but the
2 generally recognized principle is that different educational
3 tasks require different administrative structures. As noted
4 in the comments to the previous sections, major studies of
5 education in Montana have recommended the creation of two
6 separate boards. The Durham report, 1958, and so forth. In add-
7 ition to administrative questions, another fundamental reason
8 exists for the establishment of a separate board of regents of
9 higher education. Higher education is not simply another
10 state service. The administrative structure of higher educa-
11 tion cannot be considered an ordinary state agency. The uni-
12 que character of the college and university stands apart from
13 the business-as-usual of the state. Higher learning and re-
14 search is a sensitive area which requires a particular kind of
15 protection not matched in other administrative functions of
16 the state. Few would dispute the vital importance of academic
17 freedom to the process of higher learning. Such freedom is
18 the essence of the American higher educational system. The
19 great movements of mankind have come out of the great modern
20 schools, the modern university system, ever since the time of
21 the Renaissance, and the greatest of these movements have
22 come out of the schools that were unfettered by controls that
23 would tend to stifle them. Only in an atmosphere of independ-
24 ent and unfettered inquiry can an objective pursuit of know-
25 ledge be conducted which is unhindered by prejudice and vested

1 interest. The great contributions to both scientific and
2 humanistic learning which have emerged from American colleges
3 and universities can be attributed in large part to the free-
4 dom traditionally enjoyed by the teachers and students in such
5 institutions.. This was the idea implicit in the founding of
6 both private and public colleges and universities in the United
7 States. And here I want to stop for a minute and say some-
8 thing --

9 (Laughter)

10 DELEGATE CHAMPOUX: You're awake. How about that?

11 CHAIRMAN GRAYBILL: You're entitled to one mistake,
12 Mr. Champoux. Go ahead.

13 DELEGATE CHAMPOUX: I'm sure going to make more of
14 you when I get through -- saying something about that.

15 (Laughter)

16 DELEGATE CHAMPOUX: Oh, we needed a pause. In the
17 beginning these schools were established independently. If
18 you go back in the Renaissance -- only in modern times have
19 we found this tendency for more state and bureaucratic control
20 and it's getting worse and worse, as I will show you, all the
21 time. The society as a whole accepts the principle unreserv-
22 edly -- excuse me -- this was the idea implicit in the found-
23 ing of both private and public colleges and universities in
24 the United States, and it is an idea which still prevails.
25 The society as a whole accepts the principle unreservedly.

1 Rarely does a direct attack come upon the concept of free in-
2 quiry. However, a more subtle kind of coercion has made its
3 appearance, and it is of the sort which is likely to become
4 an even greater threat to the integrity of higher education
5 in the future and this is the growing power of the centralized,
6 bureaucratic state. Without overtly intending to curtail free-
7 doms, the modern state has absorbed an increasing amount of
8 power and control in the name of efficiency. A pervasive
9 form of influence and manipulation has grown hand in hand with
10 the emerging predominance of the government form and the com-
11 puter. What do I mean by that? Laws are made by legislators
12 but the bureaucrats administer them and that's the problem.
13 We hear all the time about the unresponsive government, the
14 unresponsive government, and so many times we think of it as
15 being the governor, the attorney general, the legislators, and
16 so forth. The greatest danger in this country is not from
17 our elected officials but the ones that are hired to administer
18 the laws. I'll never forget the day two years ago, in a
19 speech, Senator Metcalf said, in Kalispell, that he had been
20 in the Congress for I don't know how many years and all of a
21 sudden he heard about an agency down in the cellar of some
22 building there that had fought at something he wanted to do.
23 He looked into this and he found out about an agency that had
24 been never authorized by anyone, anywhere, and here it was
25 administering programs. Not only that, Senator Goldwater --

1 boy, I've hit both sides of the fence there, haven't I -- over
2 in Spokane made the same claim. I've got the right and left
3 in on it now -- that the greatest danger is from this bureau-
4 cratic control. A warning of this social trend was voiced
5 in a landmark study of the condition of the American univer-
6 sity conducted in the late 1950's under the chairmanship of
7 Dr. Milton Eisenhower under a Ford Foundation grant. Now I've
8 got good old Ike on my side. The study described a variety of
9 creeping controls on university systems which have appeared in
10 recent years across the country. It warns that strict adher-
11 ence by institutions of higher learning to a bewildering array
12 of centralized bureaucratic controls will ultimately endanger
13 the academic as well as the administrative freedom of the
14 colleges in this country. This is from a book by -- it's in
15 a book called The Campus and the State by Malcolm Moos and
16 Francis Bourke. Among the sources of growing controls which
17 increasingly impinge on universities are state budget offices,
18 state auditors, comptrollers, purchasing departments, person-
19 nel offices, central building agencies, and a variety of older
20 forms of control, such as legislative riders, which are being
21 used in new ways to affect colleges and universities. The
22 informal controls associated with these direct means often ex-
23 ert an even stronger influence on the educational process.
24 The study concludes that the maintenance of the system of
25 higher education free from unnecessary bureaucratic and polit-

1 ical interference is important not only to a healthy academic
2 atmosphere but also to the administrative efficiency of the
3 system of higher education. Creative research, and I quote,
4 by its very nature, requires freedom to move in a different
5 direction if the facts uncovered require it. The further away
6 budget authority lies and the more time consuming it is to get
7 permission for such changes, the less will be accomplished.
8 Research and instruction at the higher levels are not services
9 for which specifications can be written in advance, and for
10 which one seeks the lowest bidder. They are venture capital
11 investments where one successful strike in a multitude, either
12 in the form of a new ideal, or a trained individual capable
13 of producing them, may spell the difference between a forward-
14 moving or a retrograding nation. The power to coordinate and
15 operate the system of higher education is one which belongs
16 primarily, properly, to an informed board of regents who have
17 the knowledge and ability to determine rationally the course
18 of higher education. Master plans have been suggested for the
19 guidance of higher education in Montana but have failed to be
20 applied because of a lack of power. We could have a master
21 plan in this state where all of the higher education units
22 would be coordinated--all of them--so we wouldn't have this
23 duplication of forces, this duplication of programs, and also
24 the duplication of our units, if we only had power in a board
25 that could enforce its own mandates in terms of its internal

1 control, and that is going to be one of the greatest benefits
2 -- and I want to put that on the record as the intent of this
3 committee -- that this unit would tend to put the house of
4 higher education in proper order. A board of regents empowered
5 to carry out its informed judgments would be an important force
6 for efficiency in the higher educational system. It is this
7 factor of efficiency which is highlighted in the study chaired
8 by Dr. Eisenhower. The primary conclusion of the study is
9 that freedom actually enhances efficient operation of a univer-
10 sity system. You might say, you know, why, we'll give them
11 freedom and they're going to go off and do their own thing.
12 They're going to be very aware of public opinion, and once
13 they can put their own house in order -- they've got the
14 control to do it -- they will. The fact that higher education
15 very largely owes its autonomous position in state government
16 to the belief that freedom promotes rather than limits effec-
17 iency -- . In the future there is one point that colleges
18 and universities will need to make to the public and its
19 elected representatives very persuasively. This is simply
20 that the goal of efficiency in higher education can be realized
21 without non-educational officials intervening in the fiscal
22 affairs of colleges and universities. The factors in partic-
23 ular add to the efficiency of a university -- two factors --
24 which is relatively free to control its own affairs--one, long
25 range planning. We've seen a lot of instant expert work in

1 this very floor here. All the time. What would you feel like
2 if you were a professor that planned something a long time and
3 had come up, tried to get it passed in the legislature, com-
4 pletely fail, and then some guy in the back row got up and
5 decided, well, this is a brilliant idea and passed it and
6 you'd have to administrate it, oftentimes without money to
7 finance it. In the future there is one point that colleges
8 and universities will need -- well, -- long range planning
9 and administrative decentralization. There is a clear need
10 for a strong board of regents to make long-range plans which
11 are appropriate to the needs of higher education and free from
12 short term political whims. The limits of decentralization --
13 centralization in government -- oftentimes operations have
14 become apparent, particularly in such an unpredictable and
15 flexible field as higher education. A board of regents which
16 is given the power to control and manage its own affairs would
17 enormously improve the planning situation for higher education
18 in Montana. Well, I want to get to something here now. Last
19 Thursday on the floor of this assembly was distributed a let-
20 ter to certain Delegates from the office of the department of
21 administration. I heard about it. I finally acquired a copy,
22 and I want to read you that letter. It says: The department
23 of administration is in favor of safeguarding the academic
24 freedom of the university system in the Constitution. However,
25 the proposed change goes far beyond the question of academic



1 buy second hand equipment because of a state regulation, even
2 from Helena, the city of Helena. Now, the problem comes when
3 you have eight year old Sears and Roebuck pianos. You ought
4 to listen to some of those students and their piano playing.
5 The state department of administration has been attempting for
6 two years to impose an accounting system on the university
7 system which is simply not appropriate to educational institu-
8 tions. The university system has, in fact, been using a far
9 more modern double entry accounting system than the state has
10 used for years. The same system that is recommended by the
11 American Council of Education and used nationally in all major
12 universities for educational accounting. The university sub-
13 mits the most detailed and well prepared financial reports in
14 the state, double entry, twice a year. The obvious solution
15 to this problem is simply to write a computer program that goes
16 along with the university system and include it in the state
17 system. I wonder if they've thought of that yet? The state
18 administration department has expressed desire to incorporate
19 other university connected funds into the state general fund,
20 which is dormitories, fraternities, sororities, and so forth.
21 These funds are self-sustaining and self-liquidating. It
22 would be silly to bring them all the way up here when they're
23 going to have to be turned over so many times at Missoula,
24 Bozeman, and so forth. Research grants by the government --
25 they want to administer them all through the state senate.

1 But one of the better ones is the motor pool. This has been
2 a fiasco from the start. The university was paying eight cents
3 per mile previously. Now it pays eight point six percent.
4 Well, that may be inflation. Even after handing over approx-
5 imately a hundred and fifty cars to the state, enormous in-
6 convenience and extra cost in time is wasted in going to and
7 from the depots, adding mileage and time to the cost of going
8 out of the way is probably greater than the savings. It takes
9 seven months to get billing. Not only that, anyone who uses
10 a car permanently assigned to him must send in daily -- daily
11 a report on its use. The man at the agricultural experiment
12 station has to drive eighteen miles each way, each day, to get
13 gas for his car. The state is in the process of getting into
14 the gas station business -- competing with private industry.
15 All of this resulted from the bright idea of a bureaucrat that
16 the car pool in Helena should be made statewide. Look at in-
17 vestment. In its review of the university investment policy
18 the legislative audit committee complimented the university
19 system on its fine record and said it should continue until the
20 state could do as well. The state is making three percent on
21 its investments; the university is making six percent.

22 CHAIRMAN GRAYBILL: Mr. Champoux, I wonder if you
23 could conclude as quickly as possible.

24 DELEGATE CHAMPOUX: I will right now.

25 CHAIRMAN GRAYBILL: I think you've had plenty of

1 time.

2 DELEGATE CHAMPOUX: Here it is. O.K. If you look
3 at also some other problems, a tax on people, individuals, in
4 the system -- some of you remember Dr. Morton Borden here a
5 few years ago because of a speech he made out in Minnesota, I
6 guess it was, on cooperatives and the economic system before
7 the Farmers Union. He was severely attacked on this floor.
8 They tried to eliminate his salary from the budget. As a
9 result, Borden is now teaching, head of the graduate program
10 at the university of Santa Barbara. Dr. Louis Levine made
11 extensive studies of mine taxation and because of their con-
12 troversial nature with respect to powerful mining interests,
13 the chancellor, under pressure from the legislature and a
14 threat to cut appropriations, suspended Dr. Levine. He re-
15 signed and went to New York. Well, if a board is created for
16 higher education and given the responsibility for education
17 but not the authority to carry out such responsibility, how
18 can they be held accountable to the people. If the real auth-
19 ority for carrying out the policies of higher education is
20 dispersed among the bureaucratic political frameworks of other
21 agencies, who, then, is accountable to the public. A healthy
22 post-secondary educational system must have freedom from pol-
23 itical changes of fortune while still maintaining its respon-
24 sibility and accountability to the state. The institutions
25 themselves, the centers of teaching and learning, must be

1 immune from external political or ideological pressures. Thank
2 you very much for the time I've spent.

3 CHAIRMAN GRAYBILL: Very well, the issues under con-
4 sideration is sections nine, ten and eleven. Mr. Rygg, you
5 have an amendment. Do you want us to read it?

6 DELEGATE RYGG: Yes, would you read it, please?

7 CHAIRMAN GRAYBILL: Will the Clerk read Mr. Rygg's
8 amendment to section nine?

9 CLERK HANSON: Mr. Chairman (reading): I move to
10 amend by deleting in their entirety sections nine, ten and
11 eleven on pages twenty-four, twenty-five, twenty-seven and
12 thirty-one of the Education and Public Lands Committee proposal
13 number ten, and by substituting in lieu thereof the following
14 section: (quote) Section ten. The general control and super-
15 vision of the state university and the various other state
16 educational institutions shall be vested in a commissioner of
17 education whose powers and duties shall be prescribed and
18 regulated by law. Signed, Rygg. (End reading)

19 Mr. Chairman.

20 DELEGATE RYGG: Mr. Chairman.

21 CHAIRMAN GRAYBILL: Mr. Rygg has proposed an amend-
22 ment to eliminate sections nine, ten and eleven and put in
23 place thereof a section nine, which would set up a commissioner
24 of education.

25 Mr. Rygg.

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1 legislative audit can get its work done there. I don't think
2 this amendment of Delegate Heliker does the job.

3 CHAIRMAN GRAYBILL: Mrs. Bugbee.

4 DELEGATE BUGBEE: Mr. Chairman. I'd like to say,
5 first of all, that no one has asked me to speak on this and
6 I'd like to describe something to you that I know fairly in-
7 timately. My husband is chairman of the philosophy depart-
8 ment at the University of Montana and I think you would agree
9 with me that he's a rather highly paid person for the state
10 of Montana. Perhaps I shouldn't say this, but he has been
11 offered four chairmanships of other departments in the rest
12 of the country. All four of them were more than what he is
13 being paid now and he has turned them down. I consider, and
14 I think a number of people in this room who have had children
15 who have worked with him -- He's very competent at what he
16 does, but at the same time, within his daily work, he has
17 an enormous amount of paper work to face. He has told me
18 that every year it gets worse. This is not talking about the
19 point of view of the top of the university itself, but what
20 happens to someone who is a professor in the system. With
21 this increase in paper work, it means that this is what he
22 does more and more. The very requisitioning of a typewriter
23 in his department becomes something that has consumed hours
24 of his time. The real question I want to ask is -- This has
25 to do with autonomy and also how funds of the university are



1 spent. Do you really want him -- Does the state of Montana
2 want him to work at something he does very well? Do they
3 want him to spend this sizable amount of time, which increases
4 with every year, requisitioning paper clips, typewriters,
5 paper, etc.? I would like to read from the Eisenhower Report.
6 Mr. Champoux spoke about it the other day, but it expresses
7 better than I can part of the problem which I think we should
8 think about at this point. For the greater part of the cen-
9 tury, the relations between public institutions of higher
10 education and state government have been marked by increasing
11 anxiety. This tension has been more visibly and deeply felt
12 by educators than by state officials. The point of depart-
13 ure for this development cannot, of course, be precisely
14 fixed by the way this was written in 1957, I think. Generally
15 speaking, it may be said to commence with the movement be-
16 ginning around 1917 to regroup state administrative units
17 into a more centralized orbit and to bring them under tighter
18 executive control. This won't take me very long. The state
19 budget office beyond question is now in the position to wield
20 more actual or potential influence over higher education than
21 any other state administrative agency. With the development
22 of the executive budget, in state after state, the budget
23 office has moved forward to a point where its recommendations
24 can have a decisive effect on the judgments reached by both
25 the governor and the legislature on appropriations for higher

1 possibly some minor amendments that might come up. At this
2 time, we already have Mr. Heliker's amendment, section eleven
3 plus the last sentence of Rollins'. Mr. Rollins, I would
4 entertain a motion to amend that by adding your section
5 eleven. After you've spoken, I would entertain a motion from
6 you, Mr. Barnard, to put a substitute motion. That would
7 get your three before us and then we can get Mr. Rygg's
8 before us if we ever get there.

9 DELEGATE ROLLINS: Mr. Chairman.

10 CHAIRMAN GRAYBILL: Mr. Rollins.

11 DELEGATE ROLLINS: At the time you were speaking
12 about me, someone else came to speak to me. Would you say
13 that again please?

14 CHAIRMAN GRAYBILL: Mr. Rollins, is there any
15 question which one you're going to listen to now? I'm
16 just kidding you. Mr. Rollins, would you like to move your
17 section eleven as an amendment to Mr. Heliker's motion?

18 DELEGATE ROLLINS: Yes, Mr. President. I move that
19 my amendment be read as an amendment to Mr. Heliker's.

20 CHAIRMAN GRAYBILL: All right. Will the clerk please
21 read Mr. Rollins' amendment?

22 CLERK HANSON: (Reading) Mr. Chairman. I move to
23 amend the Heliker amendment by adding the following language
24 before his sentence. Section eleven: The government and
25 control of Montana's university system shall be vested in a

1 board of regents who shall be selected as provided herein.
2 The regents shall have full power, responsibility and author-
3 ity to supervise management and control of the Montana uni-
4 versity system and shall supervise and coordinate other public
5 educational institutions which may be assigned by law. Said
6 board shall consist of seven members appointed by the governor
7 to overlapping terms, subject to confirmation by the senate,
8 under regulations provided by law. The board shall appoint
9 its executive officer and describe his term and duties. The
10 governor and the superintendent of public instruction shall
11 be ex officio, nonvoting members of this board. The regents
12 shall present a unified budget request to the legislative
13 assembly. Signed, Rollins.

14 CHAIRMAN GRAYBILL: Then, Mr. Rollins' does, of
15 course, incorporate the rest of that sentence there because
16 it's an amendment to Mr. Heliker's. So, it does have the
17 funds and appropriations under control of the regents shall
18 be subject to the same legislative audit provisions as other
19 funds of the state. Is that correct, Mr. Rollins?

20 DELEGATE ROLLINS: Yes, Mr. President. I'd like
21 to speak to that a moment please.

22 CHAIRMAN GRAYBILL: Very well.

23 DELEGATE ROLLINS: In proposing this amendment, I'm
24 trying to achieve certain things and to avoid certain types
25 of objections. I'm trying to achieve a board of regents that

1 collections as revenue in the general fund to the extent the
2 costs were involved in appropriated monies. Seven, seek
3 legislation to provide the statutory authority for waiver
4 or reduction of fees in those circumstances where such waiver
5 or reduction is in the best interest of the state. Eight,
6 establish a uniform university accounting system which meets
7 management's needs and is compatible with the state wide
8 system currently in operation. With regard to the university
9 fees, the legislative auditor's report found that over six
10 hundred and twenty-five thousand dollars in fees were waived
11 by the university during fiscal year 1969 and 1970. Of this
12 amount, five hundred and twenty-five thousand, eight seventy-
13 seven in fees were waived under circumstances which were not
14 specifically authorized by law. The department of adminis-
15 tration is in the process of implementing an accounting in
16 the budget system and the legislative audit is just reporting
17 the facts as they are. I think that anyone that knows some-
18 thing about the competition that exists between the univer-
19 sity units, how one president at one time has been in suprem-
20 acy and the other president has been again, you could find
21 reasons for the legislature to be concerned and the executive
22 department to have some concern for some sort of a coordin-
23 ating policy on this proposition. In my opinion, I think
24 that we shouldn't turn around and give and delegate all of
25 the powers to a board of regents or to a commissioner of

1 education.

2 DELEGATE CHAMPOUX: I'd like to ask Mr. Nutting one
3 question for the record please.

4 DELEGATE NUTTING: Yes.

5 DELEGATE CHAMPOUX: Now, just to clarify this, if
6 I may, when you said after the fact, you mean post audit. Is
7 that correct, sir? You do not mean pre audit.

8 DELEGATE NUTTING: That's what an audit discussion
9 is.

10 DELEGATE CHAMPOUX: Thank you very much, sir.

11 CHAIRMAN GRAYBILL: Mr. Mahoney.

12 DELEGATE MAHONEY: Mr. Chairman. I am a little bit
13 perturbed here or worried or whatever the word that we could
14 use -- disturbed -- yes, maybe that's good. When we get
15 down here in this line that says manage and control, how
16 supreme is that? I'd like to have Mr. Rollins define that
17 for me, if he would. How complete should the control of the
18 board of regents be of the university system?

19 DELEGATE ROLLINS: I can't answer that categorically,
20 Mr. Mahoney, but I feel that the board of regents should
21 have the powers needed to carry out the academic functions
22 of the university system without undue harassment from out-
23 side forces. We're in the business of educating people. We
24 are not in the business of running a business according to
25 certain things. We're not trying to make a profit. I think

1 we set them up subject to the general laws of the state of
2 Montana. That would be to all of the laws affecting all of
3 the other divisions of state government. We have a provision,
4 of course, in here that would limit the legislature from
5 passing punitive laws directly against the university system.
6 The last paragraph is identical to the proposal of the Edu-
7 cation Committee in section number eleven. I just introduce
8 this as a subject for discussion and that we might be able
9 to work something out of it that all of us might agree with
10 and would be workable with the university system. That's
11 all I have, Mr. President.

12 CHAIRMAN GRAYBILL: Mr. Champoux.

13 DELEGATE CHAMPOUX: May I, first of all, direct a
14 question to Mr. Mahoney and then react to Mr. Barnard?

15 CHAIRMAN GRAYBILL: Yes, you may.

16 DELEGATE CHAMPOUX: Charlie, I agree -- where did
17 Charlie go?

18 CHAIRMAN GRAYBILL: Let's skip his question, shall
19 we?

20 DELEGATE CHAMPOUX: All right. For the record, I'm
21 going to state what I want to state about it anyway. The
22 committee does not want to set up a separate unit of govern-
23 ment here. We feel -- I do, by the Rollins' amendment, that
24 it provides all kinds of controls, but I certainly don't
25 think the governor wants to hire and fire the university