APPENDIX F

LEGAL SERVICES

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MEMORANDUM September 19, 2022

SUBJECT: Follow up to Department of Law expenditures related to the *Janus* decision (Work Order No. 33-LS0058)

TO: Kris Curtis
Legislative Auditor

FROM: Marie Marx
Legislative Counsel

You have asked for a follow up opinion regarding the Department of Law's expenditure of funds related to *Janus v. AFSCME*.[1] Specifically, you requested that I review and respond to the attorney general's letter to you dated September 7, 2022. The opinion of this office with respect to the issues raised in the attorney general's letter remains unchanged. In addition to the analysis provided in my previous memorandum to your office on this topic, I have the following comments in response to the attorney general's September 7, 2022, letter.

1. Confinement clause. The attorney general's letter argues, "The legislature is without authority to use an appropriation bill to pick and choose which cases the state will prosecute or defend, just as it is without power to direct where and how state employees are to be employed."[2] In support, the attorney general cites *Alaska Legislative Council v. Knowles*,[3] a case in which the Alaska Supreme Court analyzed the constitutionality of contingency language for various appropriations in an appropriations bill. Specifically, the attorney general compares the appropriation at issue here with appropriations in *Knowles* that were contingent on the Alaska Seafood Marketing Institute (ASMI) having no employees classified above Range 21 located outside the state. The court held that this contingency violated the confinement clause.[4] The *Knowles* court explicitly declined to determine whether the legislature's appropriation power gives the legislature authority to

[1] 138 S.Ct. 2448 (2018).

[2] Letter from Treg Taylor to Kris Curtis at p. 4 (Sept. 7, 2022).

[3] 21 P.3d 367 (Alaska 2001).

[4] *Id.* at 381.

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decide where executive-branch personnel will be located.[5] The court found that it did not need to reach that issue, because the ASMI appropriation language impermissibly "administered ASMI's program" by not specifying "how these three [ASMI] appropriations were to be used, and instead addressed staffing funded under separate appropriations."[6] Unlike the ASMI appropriations, the language at issue here specifies how the appropriation is to be spent, no more and no less.

Further, the appropriation at issue here is more similar to the new community residential centers appropriation also considered in *Knowles*. In *Knowles*, the legislature "appropriated funds to the Department of Corrections for 'new community residential centers' (CRCs)."[7] The appropriation language stated, "This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community Residential Centers. Contracts will be competitively bid."[8] The governor vetoed this language, arguing that "because the words 'not owned or controlled by municipalities' prevented the department from using this appropriation to contract with municipalities to provide CRC space, they substantively changed existing law, which allowed the commissioner to contract with municipalities."[9] Legislative council argued in response that "AS 33.30.031(a) allows for use of public or private facilities, and that a decision to fund one type of facility over the other does not enact new law." The Alaska Supreme Court, agreeing with legislative council, held that the CRC appropriation language was constitutional, explaining

> Alaska Statute 33.30.031 *authorizes* the commissioner to contract with municipalities. But it does not *require* the commissioner to put municipalities on footing equal with private enterprise as potential providers of new CRC bed space. The appropriation therefore does not preclude the commissioner from fulfilling the department's statutory mandate. Instead, it specifies the type of CRC space the money covers.[10]

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[5] *Id.* at 380 ("Because this language did not specify how these three appropriations were to be spent, we do not need to decide here whether, as the council argues, the appropriation power gives the legislature authority to decide where executive-branch personnel will be located.").

[6] *Id.*

[7] *Id.* at 381.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 382. (Second emphasis in original).

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As stated in my August 8, 2022, memorandum, nothing in the appropriation at issue prevents the Department of Law from pursuing litigation or the attorney general from fulfilling his duties as head legal advisor and litigator. The Department of Law could use in-house resources to pursue matters related to the *Janus* decision without running afoul of the appropriation language at issue. Thus, the restriction on contracts in no way restricts the attorney general's power or ability to initiate court action - on the *Janus* matter or any other issue.

The attorney general's letter also states, "Neither the Alaska Constitution nor the legislation establishing the Department of Law limits or deprives the Attorney General of the power to appoint outside counsel when, in the wide discretion granted, the Attorney General believes such an arrangement to be in the public interest."[11] Under Alaska law, the attorney general *is authorized* to contract for outside counsel, but is not *required* to do so. Like the CRC appropriation in *Knowles*, the language of the appropriation does not prevent the attorney general from fulfilling his statutory and constitutional duties. The appropriation language at issue just limits the type of services, i.e. public or private, that the appropriation covers. Because nothing in state law requires the attorney general to contract with outside counsel under these circumstances, the decision to provide funding for state attorneys and to limit the amount of funding for contracts likely does not violate the confinement clause.

2. Separation of powers. The attorney general's letter contends that, "The legislature, through the exercise of its appropriation power, sought to exact a monetary punishment on the Office of the Attorney General for the very performance of its duties under the law. This level of political coercion is exactly the issue that the separation of powers doctrine seeks to prevent."[12] The appropriations at issue were not "sought to exact a

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[11] Letter from Treg Taylor to Kris Curtis at p. 4 (Sept. 7, 2022). In support of this proposition, the attorney general cited *State v. Breeze*, 873 P.2d 627 (Alaska App. 1994), a case related to the attorney general's appointment of a special prosecutor due to the attorney general's perceived conflict of interest in a matter. In *Breeze*, the Alaska Court of Appeals held that, "[T]he proper appointment of a special prosecutor in circumstances where the attorney general believes he and the Department of Law are disqualified by a conflict of interest is within the attorney general's discretionary control over the legal business of the state." *Id.* at 635. The current issue does not involve appointment of a special prosecutor or the attorney general's perceived conflict of interest, and therefore the holding in Breeze does not apply to the facts at issue here.

[12] Letter from Treg Taylor to Kris Curtis at p. 5 (Sept. 7, 2022).

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monetary punishment" on the attorney general's office. They were instead a permissible decision by the legislature on how to spend the state's money.[13]

As discussed above, in *Knowles*, the legislature appropriated funds to the Department of Corrections for new community residential centers.[14] The appropriation language stated, "This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community Residential Centers. Contracts will be competitively bid."[15] One of the arguments the governor made for vetoing this language was that it violated the separation of powers doctrine.[16] The Alaska Supreme Court found the appropriation language was constitutional, holding:

> The council argues that the policy decision to fund privately owned CRCs rather than publicly owned CRCs was a legitimate exercise of legislative power. We agree with the council. We held above that this language does not preclude the department from fulfilling its statutory mandate. Instead, this language embodies a permissible policy decision on how to spend the CRC money. It therefore does not violate the separation-of-powers principle.[17]

In *Legislature v. Hammond*,[18] a superior court case the Alaska Supreme Court found in *Knowles* to be persuasive, the then-governor objected to language in an appropriation that provided, "No funds from this appropriation are to be used to move the clerk of the

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[13] *See, e.g.*, Minutes of House Finance Committee, HB 205 at 02:24:10 (Feb. 26, 2020) (Statements by Representative Andy Josephson (explaining that budget language relating to *Janus* decision was "not a policy call" but "a budget tightening finance call."); Representative Kelly Merrick (stating that she had spoken with the attorney general directly who had assured her that "the Department of Law has highly qualified attorneys capable of handling this issue in-house for a fraction of the cost" and that the spending was a "discretionary expense" that the state could not afford); Representative Jennifer Johnston (explaining that budget language relating to *Janus* decision was "a finance decision.")).

[14] *Knowles*, 21 P.3d at 381.

[15] *Id.*

[16] *Id.* at 382.

[17] *Id.* at 383.

[18] Case No. 1JU-80-1163 Civil, Memorandum of Decision (May 25, 1983).

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supreme court and the clerks [sic] office and staff from Juneau."[19] The superior court found there was no constitutional violation, holding, "[T]here is nothing in the challenged language which requires that the clerk's office remain in Juneau. It merely prohibits the use of funds from this appropriation for that use. It does not prohibit the use of other funds for that purpose."[20]

Similarly, here, the appropriation language at issue does not preclude the attorney general from fulfilling his duties. Like the courts found in *Knowles* and *Hammond*, the language is a valid restriction on the use of certain funds appropriated by the legislature. And unlike the complete prohibition in *Hammond*, the legislature did appropriate funds for "Legal Contracts Relating to Interpretation of Janus v AFSCME Decision."[21] The governor vetoed this appropriation, however, leaving no money remaining for contracts relating to interpretation of *Janus*.

The attorney general's letter cites *Public Defender Agency v. Superior Court, Third Judicial District*,[22] in support of his argument that, "When an act is committed to the discretion of a particular branch of state government, interference with that discretion is a violation of the doctrine of separation of powers."[23] In *Public Defender Agency*, the Alaska Supreme Court found that a superior court could not order the attorney general to prosecute a civil contempt proceeding for a parent's failure to pay child support.[24] The court explained, "we do not have power to control the exercise of the Attorney General's discretion as to whether [the attorney general] will take action in any particular cases of contempt for non-support."[25] As discussed above and in my prior memorandum, nothing in the appropriation restriction prohibits the attorney general from pursing matters related to the *Janus* decision.

3. Ethical concerns. The attorney general's letter states, "To immediately revoke outside counsel agreements and attempt to transfer complex and fact-intensive projects to Assistant Attorneys General, who are already operating at capacity, based on the political

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[19] *Id.* at p. 57.

[20] *Id.* (Emphasis in original).

[21] Sec. 1, ch. 8, SLA 2020, page 23, line 29, through page 25, line 9; sec. 1, ch. 1, SSSLA 2021, page 24, line 29, through page 26, line 4.

[22] 534 P.2d 947 (Alaska 1975).

[23] Letter from Treg Taylor to Kris Curtis at p. 6 (Sept. 7, 2022).

[24] *Public Defender Agency*, 534 P.2d at 950 - 951.

[25] *Id.* at 951.

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whims of the legislative branch may violate the Attorney General's duty under the professional rules."[26] The letter also argues, "Under the Rules of Professional Conduct applicable to the Alaska Bar, attorneys must possess the time and competence to represent their respective clients."[27]

This office is not in a position to know whether the attorney general is able to meet his ethical and professional responsibilities applicable to pursing matters related to interpretation of the *Janus* decision. However, as the attorney general's letter recognizes, "all state contracts and expenditures are subject to legislative appropriation."[28] Further, under the Alaska Rules of Professional Conduct (ARPC) 1.16(a)(1), a lawyer is prohibited from representing a client, and where representation has commenced must withdraw from the representation of a client, if "the representation will result in violation of the rules of professional conduct *or other law*."[29] The attorney general's use of outside counsel violates an explicit restriction against expenditure, as enacted into law by the legislature. Under ARPC 1.16(a)(1), outside counsel is mandated to withdraw from matters related to interpretation of the *Janus* decision. ARPC 1.16(b)'s "material adverse effect" provision only applies to optional withdrawal, not mandatory withdrawal. ARPC Rule 1.16(d) provides procedures for withdrawal, including the steps a lawyer is required to take to protect a client's interests during withdrawal.

Regarding the attorney general's statement that assistant attorneys general may not possess the competence to represent the state in matters related to interpretation of the *Janus* decision,[30] Comment to ARPC 1.1 explains:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A

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[26] Letter from Treg Taylor to Kris Curtis at p. 8 (Sept. 7, 2022).

[27] *Id.* at p. 7.

[28] *Id.* The attorney general's letter also states that, "circumstances can arise that obligate a state agency to meet its obligations despite a lack of supporting appropriations." *Id.* However, a contract is void and not subject to specific performance if it is directly and explicitly prohibited by a constitutional law. *See, e.g.*, *Currington v. Johnson*, 685 P.2d 73, 78 (Alaska 1984), quoting *Sheely v. Martin*, 10 Alaska 331, 341 (D. Alaska 1942).

[29] Emphasis added.

[30] Letter from Treg Taylor to Kris Curtis at p. 7 (Sept. 7, 2022) ("Finally, certain doctrines of ethical and professional responsibility exist in the context of the practice of law and are applicable to this inquiry . . . Under the Rules of Professional Conduct applicable to the Alaska Bar, attorneys must possess the time and competence to represent their respective clients.").

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> newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study.

Finally, it should be noted that the appropriation language at issue was first included in the fiscal year 2021 operating budget, which was passed and enacted into law in 2020, and then again in the fiscal year 2022 operating budget. A significant amount of time has passed since the legislature placed a valid restriction on the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel relating to interpretation of *Janus*. It is unclear what action the attorney general has taken since that time to ensure the attorney general's expenditure of funds on outside counsel does not continue to violate state law.

Please let me know if I may be of further assistance.

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APPENDIX G

JAMES L. BALDWIN

Attorney at law

January 3, 2023

Kris Curtis
Legislative Auditor
PO Box 113300
Juneau, AK 99811-3300

Re: Evaluation of legal opinions regarding FY 21, FY22
Department of Law Civil Division Expenditures

PRIVILEGED – ATTORNEY / CLIENT COMMUNICATION

You requested my advice regarding competing legal opinions of the executive and legislative branches of state government regarding the validity of expenditures by the Alaska Department of Law. The competing opinions differ on the effect of appropriations made by the legislature in fiscal years 2021 and 2022 to cover the expenses of the civil division of the department. The appropriations in question contain an express limitation of the purpose for which the appropriations may be expended. The limitation excludes the payment of expenses from an appropriation made for the civil division of the Department of Law for a legal services contract with a private law firm.

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The description of purpose for authorized expenditures of the Department of Law, civil division appropriation for the fiscal years ending June 30, 2021 and 2022 includes the following words of limitation: "Civil Division Except Contracts Relating to Interpretation of Janus v AFSCME" The exception provision was an amendment to the governor's proposed budget adopted in the House Finance Committee.

During consideration of the proposed budget bill for Fiscal Year 2021 state operations (HB 205), the House Finance Committee approved an amendment to the budget for the Department of Law offered by Representative Andy Josephson. [1] The exception was added to the civil division component and a special appropriation was also added appropriating $20,000 which would have covered contractual services related to the *Janus* case. During the Committee meeting, it was explained that the $600,000 amount for a private law firm was excessive and that the state needed to economize by relying more on the services of staff of the Office of the Attorney General. The FY 2022 operating budget for the succeeding fiscal year carried identical provisions.

The $20,000 appropriation for expenses arising out of services rendered by outside counsel was vetoed by the governor for fiscal year 2021 and also when it appeared again in the succeeding fiscal year. [2] The governor's veto messages for

[1] See House Finance Committee Minutes February 18, 2020 explaining the committee's intent.
[2] In the 31st Legislature (2019-2020) the governor struck Page 25, lines 4 – 9 of section 1 , CCSHB 205 (Chapter 8 SLA 20); In the 32nd Legislature (2021 – 2022) the governor struck lines 31 -33 of page 25 and lines 3 and 4 of page 26 of CCS HB 69(BRF SUP MAJ FLD H/S)(Chapter 1 SSLA 21).

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these vetoes do not provide a specific reason other than to say that the intent was to "conserve the Unrestricted General Fund (UGF) dollars from growing the state's operating footprint."[3] The governor's vetoes were not overridden by the legislature. [4] The appropriations which were the source of the disputed expenditures became law in Chapter 8 SLA 20 (fiscal year 2021), and Chapter 1 SSLA 21(fiscal year 2022).

The Department of Law entered into two contracts for legal services with Consovoy McCarthy, PLLC. (hereinafter "Consovoy"). The first contract (DOL contract 20-207-1092), is dated August 2, 2019 for $50,000 for legal advice "regarding possible constitutional issues concerning dues and agency fees in a bargaining unit agreement."[5] A second contract with that firm (DOL Contract No 20-207-1111) was made on December 29, 2019 to represent the state in its litigation efforts to defend the attorney general's opinion concerning interpretation of the *Janus v. AFSCME* decision and the governor's administrative order implementing the decision. The stated amount of this contract was $600,000.

Notwithstanding the exception stated in the purpose line of the appropriation, the Department of Law obligated and expended amounts from the civil division

[3] 31st Ak House Jour. Pages 2182 -2184 (general fund reductions of unsustainable and unnecessary levels of spending); 32nd AK House Jour. Page 1376 (the governor mentions a continued effort to reduce the expenditure of unrestricted general funds).
[4] It is possible that these appropriations were stricken to avoid a claim that the administration was, in effect, transferring amounts between the civil division appropriation and the separate appropriation for contractual services for the *Janus* litigation.See AS 37.07.080(e) ("Transfers may not be made between appropriations "except as provided in an Act making the transfer between appropriations.").
[5] This contract was amended on October 24, 2019 to increase the total contract amount to $100,000.

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appropriation to cover litigation costs incurred under contracts with Consovoy. [6] The scope of work stated in the Consovoy contract was nearly identical to the wording of the exception inserted in the statement of purpose for the civil division appropriations.

The attorney general contends that the exception inserted within the civil division appropriation violates the separation of powers doctrine inherent in the Alaska Constitution by interfering with the discretion of the attorney general to employ outside counsel to litigate a case of importance to the state. The attorney general also argues that, in any case, such a restriction of the department's power to litigate could only be accomplished by general law, not by a provision in an appropriation bill which by constitution must be confined to appropriations.[7] Legislative counsel disputes this characterization by contending that the legislature has the power to determine the purpose of an appropriation and condition it further by providing what objects of expenditure are not covered.

Legislative counsel questions whether the exception added to the civil division appropriation impinges on executive branch powers in the manner alleged by the attorney general. The legislature contends that the civil division appropriation remains available to finance the litigation of cases or controversies involving legal

[6] $313,770.10 was charged against the FY21 Civil Division appropriation which carried the exception provision; and through 4/30/2022 $13,189.30 was charged against the FY22 civil division appropriation which also carried the exception provision.
[7] Art. II, § 13 Alaska Const.; see also AS 24.08.030 ('Bills for appropriation shall be confined to appropriations and shall include the amount involved and the purpose, method, manner, and other related conditions of payment.').

issues raised by *Janus*. The legislature argues that nothing prevents the civil division appropriation from being used to finance the cost of staff attorneys of the Attorney General's Office to provide the representation necessary to litigate disputes related to matters raised by the *Janus* decision.

The Confinement Clause Contention

The confinement clause contention centers on the argument that substantive material has been added to an appropriation that is not germane to the subject of appropriations. [8] The attorney general characterizes the exception language in the appropriations as an amendment to general law which adds a limitation on the power of the executive branch to sue in the name of the state. The Alaska Supreme Court established the following standard of review for confinement clause claims:

> "In approaching confinement clause disputes, a court must assume that an act of the legislature is constitutional. The burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases are resolved in favor of constitutionality. [9]

The opposing argument is that the exception provision is germane because it states a purpose for which the appropriation may not be expended. There is

[8] Alaska Const. Art.II, Sec. 13 provides in pertinent part: "Bills for appropriations shall be confined to appropriations."
[9] *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 380 (Alaska 2001).

> "the realization that legislatures do not have to fund or fully fund a program (except possibly constitutionally mandated programs), and in fact may choose to fund programs that are subject to conditions or contingencies."[10]

The description of purpose of the appropriation in question does not require a programmatic change for the department of law. It merely explains "how, when, or on what the money is to be spent. It explains the purpose regarding the appropriation. In my opinion the legislature has the better argument on this contention.

Separation of Powers Contention

The attorney general claims that the legislature has usurped executive power by constraining the discretion of the Attorney General regarding how to staff existing cases brought in the name of the state. That officer portrays the legislature's exclusion of funding for outside counsel as an encroachment on the common law powers to "perform all other duties required by law or which usually pertain to the office of the attorney general in a state."[11]

However, state law expressly provides that: "[t]he attorney general may, subject to the power of the legislature to enact laws and make appropriations, settle actions, cases and offenses. . . ." [12] In a similar vein, the Executive Budget Act states:

> Except as limited by executive decisions of the governor, the mission statements and desired results issued by the legislature, appropriations by the

[10] *Id* at 379.
[11] AS 44.23.020(b)(9).
[12] AS 44.23.020(d).

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> legislature, and other provisions of law, the several state agencies have full authority for administering their program service assignments and are responsible for their proper management.[13]

It is well established that the attorney general's executive power is subject to the legislature's power of appropriation. [14]

The Department of Law claims that discretionary control over the conduct of litigation is a mandatory state function that offsets the power of appropriation. The controversy presented here involves a question of how to finance a case involving the rights of members of certain bargaining units of state government. The question is whether a limit on financing for outside counsel impairs the department's control over state litigation. Or, are the excepted items of expenditure for outside counsel an appropriate exercise of the legislature's power to appropriate in a fiscally responsible manner?

The Alaska Supreme Court has considered a claimed violation of the separation of powers doctrine arising from interference with the funding of a coordinate branch. The case involved the validity of a recall petition which alleged as grounds for recall of Governor Dunlevy a claim that his use of the executive veto violated the separation of powers doctrine. The governor was under threat of recall for vetoing amounts from the court system's budget, which the governor claimed were equivalent to amounts spent by the court in proceedings involving abortion.

[13] AS 37.07.080(a) (emphasis added).
[14] Even in case of a disaster, the executive must seek legislative appropriations at some point. AS 26.23.025(k).

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Upon concluding that the recall petition stated a valid ground for recalling the governor, the court noted

> Other states' courts have held that another branch's blocking of court system funding violates the separation of powers doctrine if it results in underfunding the judicial branch to such an extent that the courts cannot continue to meet their constitutional mandates. The State agrees that funding failure of this magnitude would be unconstitutional.[15]

The court further explained that

> Separation of powers is a fundamental part of our constitutional structure, and the doctrine may be violated by a governor's 'improper' use of a veto 'to attack the judiciary.[16]

The determining factor is whether the Department of Law can continue to meet constitutional mandates. The restriction on using outside counsel to prosecute a case or cases likely does not constitute a prevention of the Department of Law from performing constitutionally mandated duties. The department retained the ability to perform mandated functions by spending from available civil division appropriations to provide counsel for the litigation. The legislative history consistently cites a cost cutting motive rather than an intent to interfere with the ability of the attorney general to represent state government.

Another factor that weighs against the department's separation of powers claim is that the dispute is between the legislative and executive branches of state government. The court in *Dunleavy* observed:

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[15] *State v. Recall Dunleavy*, 491 P.3d 343, 368 (Alaska 2021)(footnote omitted).
[16] *Id* at 371.

> Courts can usually stay out of veto disputes between the legislative and the executive branches without risk to the constitution's distribution of powers; the powers of the legislative and executive branches are close to equipoise, and those two branches can negotiate political issues from positions of roughly equal strength.[17]

The circumstances here are similar to a "veto dispute." It is not unusual for the legislature and an executive branch agency to disagree regarding methods and means. A court may well decide that, at this point, the issues here are in reality political questions that are not justiciable. And that the parties must be left to nonjudicial methods to solve this sort of dispute.

Based on the facts presented, the attorney general has not been foreclosed from defending the interests of the state. Rather, the attorney general was funded in a manner that preferred the use of agency counsel rather than outside counsel. The legislative history of the budget bills supports the contention that exclusion of expenditures for outside counsel was driven by cost considerations. The attorney general had the option of litigating *Janus* issues using house counsel with expenses covered by the civil division appropriation.

It appears that the legislature intended to provide $20,000 in an appropriation separate from the civil division component that could be used to cover some services

[17] *State v. Recall Dunleavy*, 491 P.3d 343, 370 (Alaska 2021) (footnote omitted).

provided by outside counsel.[18] However, funding for that purpose was made unavailable by the governor's veto. And the legislature did not override those vetoes.

I think the Department of Law has stated a claim for violation of the doctrine of separation of powers that is made in good faith. However, further analysis reveals that this claim is weakened by the alternatives available to such an extent that it would be difficult to meet the standard adopted by the *Dunlevy* court - that the department is rendered "unable to meet its constitutional mandates."

Our separation of powers doctrine must include respect for both the executive and legislative functions.

> A problem inherent in applying the doctrine of 'separation of powers' stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers. [19]

A court would try to harmonize the competing interests of the involved branches of government in order not to intrude on their powers.[20] The appropriate remedy should not disproportionately weaken the check on executive power provided by the legislature's power to appropriate. The attorney general's power is founded on statute and the common law. The legislature's power of appropriation is set out in the Alaska

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[18] It is possible that if the attorney general found that the amounts available were less than necessary to conduct effective litigation, a supplemental appropriation could have been requested in due course.

[19] *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976)(citation omitted).

[20] *State v. Dupere*, 709 P.2d 493, 497 (Alaska 1985)(finding that claims process administered by executive branch does not violate separation of powers when legislature is required to participate).

Constitution and is not delegable. [21] There needs to be a more compelling circumstance to support a claim that the attorney general's discretion to sue must remain unchecked. I do not believe that such a circumstance is present in this matter. It would severely undercut the legislative appropriation power if the attorney general could claim the power to effect a *de facto* reappropriation.

Exercise of Extraordinary Powers

The attorney general declared the exception attached to the civil division appropriations invalid as a violation of separation of powers and the confinement clause. Upon making this determination, the department spent from those appropriations to cover the costs of the Consovoy contracts. In effect, the exception was severed from the appropriations without judicial review and in contravention of the expressed limitation enacted by law.

The attorney general contends the limiting conditions attached to the civil division appropriations were limitations on executive power which violate the confinement clause and cannot be enacted in an appropriation bill. A similar claim was involved when Governor Knowles sought to use the veto power to strike provisions in appropriations that were alleged to violate the confinement clause. However, the Alaska Supreme Court narrowly construed the power to strike or

[21] *State v. Fairbanks Northstar Borough*, 736 P.2d 1140 (Alaska 1987).

reduce an "item" in an appropriation bill to mean only the elimination or reduction of an amount set out in the bill.

> Reducing an item lessens its amount; striking it lessens its amount to nothing. This implies that an `item' must include a sum of money. Likewise, a passage that does not include a `sum of money dedicated to a particular purpose' is not an `item' which the governor can strike or reduce. [22]

The *Knowles* court went on to say:

> The governor's item veto power is thus one of limitation. The governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature. [23]

The court's rationale boiled down to a reluctance to give effect to an appropriation that was at odds with what the legislature passed.

It is arguable whether severance of the exception advances the anti-logrolling purpose of the Confinement Clause. But I think the legislature's power to condition appropriations and to specify what types of expenditures are not covered will be given more weight by a court. I believe that the attorney general would likely not prevail in the claim that the exception preventing spending on outside counsel is invalid. The exception appears to be germane to the appropriation. I also believe that a court would likely not rule that the exception can be severed from the Appropriations Acts thus enabling the attorney general to proceed to spend from the civil division

[22] *Alaska Legislative Council v. Knowles*, 21 P.3d 367 at 373 (Alaska 2001).
[23] *Id .(emphasis added).*

appropriation to cover expenditures for the Consovoy contract.[24] I believe it would have been better for the attorney general to preemptively seek a judicial resolution rather than undertake a unilateral remedy.

Conclusion.

The conclusions and opinions set out in this memorandum should be tempered with the knowledge that certainty can be obtained on questions of developing areas of state constitutional law only after a final decision by a court of competent jurisdiction.

James L. Baldwin
Attorney at Law

[24] *See Lynden Transport v. State*, 532 P.2d 700, 715 (Alaska 1975)(the issue of severability is resolved if legal effect can be given to remaining terms of statute after severance and the legislature intended the remaining parts of the statute to stand).

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