governor, seeking a declaration that the override vote was valid.

2 *Article II, section 16 of the Alaska Constitution*, provides:

> Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature. Other vetoed bills become law by affirmative vote of two-thirds of the membership of the legislature. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered by the legislature sitting as one body no later than the fifth day of the next regular or special session of that legislature. Bills vetoed after adjournment of the second regular session shall be reconsidered by the legislature sitting as one body no later than the fifth day of a special session of that legislature, if one is called. The vote on reconsideration of a vetoed bill shall be entered on the journals of both houses.

[**4]

3 The Legislative Council is a permanent interim committee of the Alaska Legislature created under *article II, section 11 of the Alaska Constitution* and comprises fourteen legislators. *See Alaska Const. art. II, § 11; AS 24.20.020.*

All parties eventually filed dispositive motions: The governor moved for summary judgment, the Council cross-moved for summary judgment, and all of the defendants -- the individually named legislators and the Council -- moved for dismissal.

The superior court granted the individual legislators' dismissal motions, concluding that the legislators were entitled to legislative [*606] immunity under *article II, section 6 of the Alaska Constitution.* [4] But because the court believed that neither this constitutional grant of legislative immunity nor article III, section 16 -- which prohibits the governor from suing the legislature -- barred a suit against the Council, the court denied the Council's motion to dismiss.

4 *Article II, section 6 of the Alaska Constitution* provides:

> Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending to, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.

[**5] Moving to the merits raised in the competing motions for summary judgment, the court ruled in favor of the governor, declaring that the legislature's override vote was untimely, that the governor's veto remained in effect, and thus that C.S.S.B. 162 had not been enacted into law. [5]

5 Specifically, the court, construing the "fifth day" clause of *article II, section 16 of the Alaska Constitution* (set out above in footnote 2), ruled that when the governor delivers a vetoed bill to the legislature after a first special session convenes, the legislature can override the veto within five days of delivery -- even if the deadline falls after the fifth day of the first special session. But the court also ruled that the five-day deadline is not tolled by a recess or adjournment that does not terminate the special session. Because the legislature had not voted by the fifth day after delivery of the vetoed bill -- June 5, 1996 -- the court concluded that its override vote was untimely and that C.S.S.B. 162 had not been enacted into law. Our disposition of this appeal makes it unnecessary to consider the superior court's analysis or the parties' arguments concerning the proper interpretation of article II, section 16.

[**6] The Council appeals these rulings; the governor cross-appeals.

II. *DISCUSSION*

A. *The "Public Interest" Exception to the Mootness Doctrine Applies to the Issue of Whether Article III, Section 16 of the Alaska Constitution Bars the Governor's Suit against the Council.*

At the outset, we confront the issue of mootness. In 1997, the year after this controversy arose, the legislature enacted and the governor signed into law a bill covering essentially the same subject matter as C.S.S.B. 162. [6] Thus the question of whether C.S.S.B. 162 was validly enacted is technically moot.

6 *See* Ch. 20, SLA 1997.

But this court has long recognized a "public interest" exception to the mootness doctrine. [7] In determining whether to apply the public interest exception, we consider three factors designed to identify issues whose importance and ability to evade review justify an immediate decision, despite technical mootness:

7 *See Department of Health & Soc. Servs. v. Alaska State Hosp. & Nursing Home Ass'n, 856 P.2d 755, 766 (Alaska 1993); Doe v. State, 487 P.2d 47, 53 (Alaska 1971).*

[**7] 1) whether the disputed issues are capable of repetition, 2) whether the mootness doctrine, if applied, may repeatedly circumvent review of the issues and, 3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.[8]

8 *Department of Health & Soc. Servs., 856 P.2d at 766.*

The primary constitutional issue presented here -- whether article III, section 16 forbids the governor's suit against the Council -- easily meets the first and third criteria for an exception. This issue is certainly capable of repetition. And it is also unquestionably an issue of great public importance, for it goes to the heart of the delicate constitutional balance between the powers of two coordinate branches of government. [9]

9 *See Thomas v. Rosen, 569 P.2d 793, 795 (Alaska 1977)* (granting review under the public interest exception of whether the governor's exercise of a line-item veto was constitutional, commenting that it "pits the political branches of our state government in a fundamental separation of powers confrontation").

[**8] The second factor's presence is not as obvious. It is of course conceivable that the question of whether article III, section 16 bars the governor from suing the Council [*607] over the timeliness of a veto could arise again and be decided before being mooted by new legislation. But the express harm that the constitution protects against in barring the governor from bringing actions "in the name of the State . . . against the legislature" [10] occurs when the action is brought, not when it is concluded.

10 *Alaska Const. art. III, § 16.*

Considering the importance and unique nature of the protection embodied in article III, section 16, we conclude that the question of whether this section applies in the circumstances presented here merits an exception to the mootness doctrine.

B. *Article III, Section 16 Bars This Suit by the Governor against the Council.* [11]

11 *We review constitutional issues independently, giving no deference to the trial court's decision. See Hickel v. Cowper, 874 P.2d 922, 926 (Alaska 1994).* In construing a constitutional provision, we must give it a "reasonable and practical interpretation in accordance with common sense" and consonant with "the plain meaning and purpose of the provision and the intent of the framers." *ARCO Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992).*

[**9] Section 1 of article III of the Alaska Constitution vests the executive power of the state in the governor. [12] Article III, section 16 gives the governor broad power to sue in the name of the state but at the same time bars the governor from turning this power against the legislature:

12 *Article III, section 1 of the Alaska Constitution* provides: "The executive power of the State is vested in the governor."

> The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. This authority shall not be construed to authorize any action or proceeding against the legislature.

In concluding that this provision did not forbid the governor to sue the Council, the superior [**10] court reasoned that "plaintiff brought this lawsuit in the name of the Governor as head of the executive branch of state government and not in the name of the State of Alaska" and that "[a] suit against the Legislative Council, a permanent interim committee with separate legal existence under *Article II, § 11 of the Alaska Constitution*, is not a suit against the Legislature."

The Council disputes both bases of the superior court's ruling, arguing that the governor should not be allowed to evade article III, section 16's restrictions by simply altering the form of his complaint. The Council asserts that although the governor has sued in his own name as governor of Alaska, this is in substance an action brought in the name of the state. Similarly, it asserts that by opting to proceed against a functional equivalent of the legislature -- the Council -- the governor has effectively sued the legislature itself.

The governor responds that article III, section 16 "was not intended to prevent the governor from protecting his power from usurpation by the legislature." In the governor's view, "the Court must have jurisdiction to determine the rights of the coordinate branches of state [**11] government." Insisting that the Council reads section 16's language barring actions against the legislature too broadly, the governor urges us to hold the constitutional bar inapplicable here because this suit "was

brought in the Governor's capacity as head of the executive branch of state government," "did not request [that] the legislature . . . be enjoined or compelled to do anything," and "was brought not against the legislature but its agent the Council."

We find the Council's arguments persuasive.

1. *Although filed by Tony Knowles, as "Governor for the State of Alaska," this suit is an action brought in the name of the state.*

This suit does not confine itself to internal matters concerning only the governor, the governor's office, or the executive [*608] branch of government. Rather, as we have indicated above in Part II.A., it raises important constitutional questions of the allocation of powers among coordinate branches of government. Because the suit tests the basic constitutional structure of Alaska's tripartite system of government, it necessarily involves a matter of general public importance -- one that transcends the executive branch's parochial interests and implicates [**12] interests common to all Alaska citizens. And although article III, section 16 authorizes the governor to sue in the name of the state, it confers no express power to sue in any narrower capacity. No other provision in article III expressly empowers the governor to raise issues of general public importance by suing in the name of the governor's office or of the executive branch. By any realistic measure, this suit involves the interests of the state as a whole.

Moreover, the governor asks for a ruling "that the Nineteenth Alaska Legislature . . . did not have authority under *art. II, sec. 16 of the Alaska Constitution* to consider a vote to override CSSB 162(FIN)," "that CSSB 162(FIN) cannot become law until the legislature properly exercises the veto override provisions of *art. II, sec. 16 of the Alaska Constitution*," and "that Governor Knowles'[s] veto of CSSB 162(FIN) remains in effect." By making these requests, the governor plainly seeks to enforce compliance with a constitutional mandate and to restrain violation of a constitutional power.

By so concluding, we necessarily reject the governor's suggestion that declaratory judgment actions are categorically exempt from the strictures [**13] of article III, section 16 because such actions merely seek judgments declaring the law without directly enforcing compliance or enjoining or compelling conduct. To determine whether an action or proceeding is brought to enforce compliance with a constitutional provision or restrain violation of a constitutional power in violation of article III, section 16, we must consider the practical goal of the action rather than the procedural path it employs to attain that goal.

Using substance rather than form as a measure of constitutional compliance, we hold this suit to be an "action or proceeding brought in the name of the State [to] enforce compliance with . . . [a] constitutional . . . mandate, or restrain violation of [a] constitutional . . . power." [13]

13 *Alaska Const. art. III, § 16.*

2. *Although filed against the Council, this suit is an action against the legislature.*

The remaining question is whether by naming the Council and its individual legislator-members as defendants, the [**14] governor evades section 16's third sentence, which prohibits him from bringing actions in the name of the state "against the legislature." Again, the question pits form against substance, and again, we conclude that substance must prevail.

The Alaska Constitution establishes the Council to "meet between sessions" and "perform duties . . . as provided by the legislature." [14] Under law, the Council comprises legislators from both houses, [15] who exercise a broad range of legislative powers and serve as the legislature's embodiment between sessions. [16] The Council's members also supervise a permanent staff, headed by an executive director, [17] that performs an array of administrative services for the legislative branch and the general public. [18]

14 *Alaska Const. art. II, § 11.*
15 *See AS 24.20.020.*
16 *See AS 24.20.060.*
17 *See AS 24.20.050.*
18 *See AS 24.20.060(4).*

The governor asserts that this [**15] suit escapes section 16's prohibition because it names the Council not in its interim legislative capacity but only in its service-agency capacity. [19] But the governor's pleadings belie this assertion. Neither the original nor the amended complaint gives any indication that the governor [*609] named the Council as a defendant in its limited capacity as a service agency. Both complaints name the Council as a defendant only in its capacity as "a permanent interim committee of the legislature." And both also name individual legislators only in their general capacity as legislators and Council members.

19 *See AS 24.20.010* ("The Alaska Legislative Council is established as a permanent interim committee and service agency of the legislature.").

More significant is that the complaints assert no particular service-related acts or functions as a basis for proceeding against the Council or its individual legisla-

tor-members. By asserting that "the legislature's vote to override the governor's veto of CSSB [**16] 162(FIN) is in violation of *art. II, sec. 16 of the Alaska Constitution*," the complaints aim beyond the Council, targeting an act of the legislature that is purely and quintessentially legislative.

An action of this kind falls squarely within the originally intended scope of section 16's prohibition. Delegate Victor Rivers, Chairman of the Constitutional Convention's Committee on the Executive Branch, described the relationship between the broad grant of authority given to the governor under the second sentence of section 16 and the restriction of that authority set out in the section's third sentence. He explained that despite the governor's power by appropriate actions or proceedings in the court, brought in the name of the state[] to enforce compliance with any constitutional or legislative mandate[,] . . . [the governor] has no authority . . . to act in that manner in any proceeding against the legislature. The legislature is the supreme elected body and as such [the governor] is answerable to [it] and to [its] interpretations and handling of matters of law.[20]

20 3 Proceedings of the Alaska Constitutional Convention 1986 (January 13, 1956).

[**17] By directing against the legislature's interim alter ego an action questioning the propriety of a purely legislative act, the governor effectively seeks to hold the legislature itself "answerable" to him for its "interpretations and handling of matters of law." [21] The substance of this suit thus infringes upon the legislature's constitutional domain in precisely the manner that the Constitution's drafters intended to prohibit.

21 *Id.*

We readily acknowledge the legitimacy of the governor's expressed interest in preserving the broad powers of litigation "that, in essence, makes him the strong executive that the framers intended." But in our view, the governor could have asserted these powers readily and effectively without directing a suit across the clear constitutional line that separates legislative and executive powers. [22] We would ignore the constitution's intended meaning if we held, in circumstances like these, that the governor could successfully evade section 16's restrictions [**18] by suing the Council instead of the legislature.

22 For example, as the Council observes in its briefs, "The Governor could have sued the commissioner responsible for enforcing the law, as was done in *State ex rel Hammond v. Allen, 625 P.2d 844 (Alaska 1981)* . . . ."

III. *CONCLUSION*

We therefore hold that this suit is an action brought "in the name of the State" and "against the legislature." Because article III, section 16 forbids such actions, we VACATE the superior court's order declaring C.S.S.B. 162 invalid and REMAND for entry of an order of dismissal. [23]

23 Our conclusion that under the circumstances presented in this case a suit against the Council is equivalent to a suit against the legislature also compels dismissal of the suit as to individual legislators named in their capacity as Council members. We do not understand the suit to name these Council members as parties solely in their capacity as legislators. Accordingly, we need not consider whether dismissal of Council members would independently be required under article II, section 6, which provides legislators with immunity in performing their legislative duties: "Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session."

Our disposition also makes it unnecessary to address the timing issues raised by the governor under *article II, section 16 of the Alaska Constitution.* Although the timing issues that the Council affirmatively raised before the superior court in its counterclaim and that it now asserts before this court on cross-appeal might not be barred by article III, section 16, the governor's declaratory judgment action obviously prompted the Council's assertion of these issues; at oral argument, the Council consented to our treatment of its affirmatively raised timing arguments as a contingent cross-appeal.

[**19]

please see items noted on pages:
A-2: Sec. 24.60.010 (z)
A-28: Sec. 24.60.170 (b)
31: Sec. 24.60.170 (p)

APPENDIX A

Legislative Ethics Law, AS 24.60 as amended 2007 by HB 109 Chapter 47

2008 sections amended by
HB 281, HB 305, HB 317 & HB 368
(new or changed language in "bold", an explanation in "italics", and or language being removed in "brackets")

Chapter 60. Standards of Conduct.

Article

Cross references. — For limitation of applicability of this chapter to acts committed after July 18, 1984, see § 4, ch. 36, SLA 1984 in the Temporary and Special Acts.

Administrative Code. — For legislative financial disclosure, see 2 AAC 50, art. 5.

Article 1. Purpose and Applicability.

Section

Section

Sec. 24.60.010. Legislative findings and purpose. The legislature finds that

(1) high moral and ethical standards among public servants in the legislative branch of government are essential to assure the trust, respect, and confidence of the people of this state;

(2) a fair and open government requires that legislators and legislative employees conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts of interest or even appearances of conflicts of interest;

(3) the public's commitment to a part-time citizen legislature requires legislators be drawn from all parts of society and the best way to attract competent people is to acknowledge that they provide their time and energy to the state, often at substantial personal and financial sacrifice;

(4) a part-time citizen legislature implies that legislators are expected and permitted to earn outside income and that the rules governing legislators' conduct during and after leaving public service must be clear, fair, and as complete as possible; the rules, however, should not impose unreasonable or unnecessary burdens that will discourage citizens from entering or staying in government service;

(5) in order for the rules governing conduct to be respected both during and after leaving public service, the code must be administered fairly without bias or favoritism;

(6) no code of conduct, however comprehensive, can anticipate all situations in which violations may occur nor can it prescribe behaviors that are appropriate to every situation; in addition, laws and regulations regarding ethical responsibilities cannot legislate morality, eradicate corruption, or eliminate bad judgment;

(7) compliance with a code of ethics is an individual responsibility; thus all who serve the legislature have a solemn responsibility to avoid improper conduct and prevent improper behavior by colleagues and subordinates;

(8) the purpose of this chapter is to establish standards of conduct for state legislators and legislative employees and to establish the Select Committee on Legislative Ethics to consider alleged violations of this chapter and to render advisory opinions to persons affected by this chapter. (§ 1 ch 36 SLA 1984; am § 1 ch 127 SLA 1992)

Sec. 24.60.020. Applicability; relationship to common law and other laws.

(a) Except as otherwise provided in this subsection, this chapter applies to a member of the legislature, to a legislative employee, and to public members of the committee. This chapter does not apply to

(1) a former member of the legislature or to a person formerly employed by the legislative branch of government unless a provision of this chapter specifically states that it applies;

(2) a person elected to the legislature who at the time of election is not a member of the legislature.

(b) The provisions of this chapter specifically supersede the provisions of the common law relating to legislative conflict of interest that may apply to a member of the legislature or a legislative employee. This chapter does not supersede or repeal provisions of the criminal laws of the state. This chapter does not exempt a person from applicable provisions of another law unless the law is expressly superseded or incompatibly inconsistent with the specific provisions of this chapter.

(§ 1 ch 36 SLA 1984; § § 2, 3 ch 113 SLA 1986; am § 1 ch 167 SLA 1988; am § 2 ch 127 SLA 1992); am § 18 ch 47 SLA 2007)

Effect of amendments. — The 1998 amendment, effective January 1, 1999, rewrote this section.

The 2007 amendment, effective July 10, 2007, inserted "the committee, the Alaska Public Offices Commission" and made stylistic changes in the first sentence of subsection (a), substituted the last three sentences of subsection (b) for the last sentence, which provided for the confidentiality of advisory opinions.

Related Advisory Opinions: 84-02, 84-03, 84-04

Sec. 24.60.165. Use of information submitted with request for advice.

The committee may not bring a complaint against a person based upon information voluntarily given to the committee by the person in connection with a good faith request for advice under AS 24.60.158 or 24.60.160, and may not use that information against the person in a proceeding under AS 24.60.170. This section does not preclude the committee from acting on a complaint concerning the subject of a person's request for advice if the complaint is brought by another person, or if the complaint arises out of conduct taking place after the advice is requested, and does not preclude the committee from using information or evidence obtained from an independent source, even if that information or evidence was also submitted with a request for advice.

(§ 28 ch 127 SLA 1992)

Sec. 24.60.170. Proceedings before the committee; limitations.

(a) The committee shall consider a complaint alleging a violation of this chapter if the alleged violation occurred within **five** [TWO]years before the date that the complaint is filed with the committee[AND, WHEN THE SUBJECT OF THE COMPLAINT IS A FORMER MEMBER OF THE LEGISLATURE, THE COMPLAINT IS FILED WITHIN ONE YEAR AFTER THE SUBJECT'S DEPARTURE FROM THE LEGISLATURE]. The committee may not consider a complaint filed against all members of the legislature, against all members of one house of the legislature, or against a person employed by the legislative branch of government after the person has terminated legislative service. However, the committee may reinstitute proceedings concerning a complaint that was closed because a former employee terminated legislative service [OR BECAUSE A LEGISLATOR LEFT THE LEGISLATURE] if the former employee[OR LEGISLATOR] resumes legislative service, whether as an employee or a legislator, within **five** [TWO] years after the alleged violation. [THE TIME LIMITATIONS OF THIS SUBSECTION DO NOT BAR PROCEEDINGS AGAINST A PERSON WHO INTENTIONALLY PREVENTS DISCOVERY OF A VIOLATION OF THIS CHAPTER.] **changed language*: **effective January 1, 2009**

(b) A complaint may be initiated by any person. The complaint must be in writing and signed under oath by the person making the complaint and must contain a statement that the complainant has reason to believe that a violation of this chapter has occurred and describe any facts known to the complainant to support that belief. The committee shall upon request provide a form for a complaint to a person wishing to file a complaint. Upon receiving a complaint, the committee shall advise the complainant that the committee or the subject of the complaint may ask the complainant to testify at any stage of the proceeding as to the complainant's belief that the subject of the complaint has violated this chapter. The committee shall respond to a complaint concerning the conduct of a candidate for election to state office received during the campaign period in accordance with (o) of this section. The committee shall treat a complaint concerning the conduct

of a candidate for election to state office that is pending at the beginning of a campaign period in accordance with (p) of this section. The committee shall immediately provide a copy of the complaint to the person who is the subject of the complaint.

(c) When the committee receives a complaint under (a) of this section, it may assign the complaint to a staff person. The staff person shall conduct a preliminary examination of the complaint and advise the committee whether the allegations of the complaint, if true, constitute a violation of this chapter and whether there is credible information to indicate that a further investigation and proceeding is warranted. The staff recommendation shall be based on the information and evidence contained in the complaint as supplemented by the complainant and by the subject of the complaint, if requested to do so by the staff member. The committee shall consider the recommendation of the staff member, if any, and shall determine whether the allegations of the complaint, if true, constitute a violation of this chapter. If the committee determines that the allegations, if proven, would not give rise to a violation, that the complaint is frivolous on its face, that there is insufficient credible information that can be uncovered to warrant further investigation by the committee, or that the committee's lack of jurisdiction is apparent on the face of the complaint, the committee shall dismiss the complaint and shall notify the complainant and the subject of the complaint of the dismissal. The committee may ask the complainant to provide clarification or additional information before it makes a decision under this subsection and may request information concerning the matter from the subject of the complaint. Neither the complainant nor the subject of a complaint is obligated to provide the information. A proceeding conducted under this subsection, documents that are part of a proceeding, and a dismissal under this subsection are confidential as provided in (l) of this section unless the subject of the complaint waives confidentiality as provided in that subsection.

(d) If the committee determines that some or all of the allegations of a complaint, if proven, would constitute a violation of this chapter, or if the committee has initiated a complaint, the committee shall investigate the complaint, on a confidential basis. Before beginning an investigation of a complaint, the committee shall adopt a resolution defining the scope of the investigation. A copy of this resolution shall be provided to the complainant and to the subject of the complaint. As part of its investigation, the committee shall afford the subject of the complaint an opportunity to explain the conduct alleged to be a violation of this chapter.

(e) If during the investigation under (d) of this section, the committee discovers facts that justify an expansion of the investigation and the possibility of additional charges beyond those contained in the complaint, the resolution described in (d) of this section shall be amended accordingly and a copy of the amended resolution shall be provided to the subject of the complaint.

(f) If the committee determines after investigation that there is not probable cause to believe that the subject of the complaint has violated this chapter, the committee shall dismiss the complaint. The committee may also dismiss portions of a complaint if it finds no probable cause to believe that the subject of the complaint has violated this chapter as alleged in those portions. The committee shall issue a decision explaining its dismissal. Committee deliberations and vote on the dismissal order and decision are not open to the public or to the subject of the complaint. A copy of the dismissal order and decision shall be sent to the complainant and to the subject of the complaint. Notwithstanding (l) of this section, a dismissal order and decision is open to inspection and copying by the public.

(g) If the committee investigation determines that a probable violation of this chapter exists that may be corrected by action of the subject of the complaint and that does not warrant sanctions other than correction, the committee may issue an opinion recommending corrective action. This

(o) The committee shall return a complaint concerning the conduct of a candidate for state office received during a campaign period to the complainant unless the subject of the complaint permits the committee to assume jurisdiction under this subsection. If the committee receives a complaint concerning the conduct of a candidate during the campaign period, the committee shall immediately notify the subject of the complaint of the receipt of the complaint, of the suspension of the committee's jurisdiction during the campaign period, and of the candidate's right to waive the suspension of jurisdiction under this subsection. The candidate may, within 11 days after the committee mails or otherwise sends notice of the complaint to the candidate, notify the committee that the candidate chooses to have the committee proceed with the complaint under this section. If the candidate does not act within that time or if the candidate notifies the committee that the candidate is not waiving the suspension of committee jurisdiction, the committee shall return the complaint to the complainant with notice of the suspension of jurisdiction under this subsection and of the right of the complainant to file the complaint after the end of the campaign period.

(p) When the committee has a complaint concerning the conduct of a candidate for state office pending before it at the beginning of a campaign period that has not resulted in the issuance of formal charges under (h) of this section, the committee may proceed with its consideration of the complaint only to the extent that the committee's actions are confidential under this section. The committee may not, during a campaign period, issue a dismissal order or decision under (f) of this section, issue an opinion under (g) of this section, or formally charge a person under (h) of this section. If the committee has formally charged a person under (h) of this section and the charge is still pending when a campaign period begins, the committee shall suspend any public hearings on the matter until after the campaign period ends. The parties to the hearing may continue with discovery during the campaign period. If a hearing has been completed before the beginning of a campaign period but the committee has not yet issued its decision, the committee may not issue the decision until after the end of the campaign period. Notwithstanding the suspension of public proceedings provided for in this subsection, a candidate who is the subject of a complaint may notify the committee in writing that the candidate chooses to have the committee proceed with the complaint under this section.

(q) A campaign period under this section begins on the later of 45 days before a primary election in which the legislator or legislative employee is a candidate for state office or the day on which the individual files as a candidate for state office and ends at the close of election day for the general or special election in which the individual is a candidate or on the day that the candidate withdraws from the election, if earlier. For a candidate who loses in the primary election, the campaign period ends on the day that results of the primary election showing that another individual won the election are certified.

(r) At any point in the proceedings when the subject of a complaint appears before the committee, the subject of a complaint may choose to be accompanied by legal counsel or another person who may also present arguments before the committee. The choice of counsel or another person is not subject to review and approval or disapproval by the committee. The choice by the subject of a complaint to be accompanied under this subsection does not constitute a waiver of any confidentiality provision of this chapter.

(§ 1 ch 36 SLA 1984; am § 13 ch 113 SLA 1986; am § 7 ch 167 SLA 1988; am § 29 ch 127 SLA 1992; am §§ 44 — 52 ch 74 SLA 1998; am §§ 2 — 4 ch 135 SLA 2004; am § 41 ch 47 SLA 2007)

Effect of amendments. — The 1998 amendment, effective January 1, 1999, rewrote subsections (a)-(c)

The 2004 amendment, effective July 1, 2004, in subsection (j), inserted the second sentence, inserted

PT. Sec 39.52.310 (j)

Chapter 39.52. **ALASKA EXECUTIVE BRANCH ETHICS ACT**

Article 01. DECLARATIONS

Sec. 39.52.010. **Declaration of policy.**

(a) It is declared that

(1) high moral and ethical standards among public officers in the executive branch are essential to assure the trust, respect, and confidence of the people of this state;

(2) a code of ethics for the guidance of public officers will

(A) discourage those officers from acting upon personal or financial interests in the performance of their public responsibilities;

(B) improve standards of public service; and

(C) promote and strengthen the faith and confidence of the people of this state in their public officers;

(3) holding public office or employment is a public trust and that as one safeguard of that trust, the people require public officers to adhere to a code of ethics;

(4) a fair and open government requires that executive branch public officers conduct the public's business in a manner that preserves the integrity of the governmental process and avoids conflicts of interest;

(5) in order for the rules governing conduct to be respected both during and after leaving public service, the code of ethics must be administered fairly without bias or favoritism;

(6) no code of conduct, however comprehensive, can anticipate all situations in which violations may occur nor can it prescribe behaviors that are appropriate to every situation; in addition, laws and regulations regarding ethical responsibilities cannot legislate morality, eradicate corruption, or eliminate bad judgment; and

(7) compliance with a code of ethics is an individual responsibility; thus all who serve the state have a solemn responsibility to avoid improper conduct and prevent improper behavior by colleagues and subordinates.

(b) The legislature declares that it is the policy of the state, when a public employee is appointed to serve on a state board or commission, that the holding of such offices does not constitute the holding of incompatible offices unless expressly prohibited by the Alaska Constitution, this chapter and any opinions or decisions rendered under it, or another statute.

Article 02. CODE OF ETHICS

Sec. 39.52.110. **Scope of code.**

(a) The legislature reaffirms that each public officer holds office as a public trust, and any effort to benefit a personal or financial interest through official action is a violation of that trust. In addition, the legislature finds that, so long as it does not interfere with the full and faithful discharge of an officer's public duties and responsibilities, this chapter does not prevent an officer from following other independent pursuits. The legislature further recognizes that

(1) in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without personal and financial interests in the decisions and policies of government;

(2) people who serve as public officers retain their rights to interests of a personal or financial nature; and

Sec. 39.52.250. Advice to former public officers.

(a) A former public officer may request, in writing, an opinion from the attorney general interpreting this chapter. The attorney general shall give advice in accordance with AS 39.52.240(a) or (b) and publish opinions in accordance with AS 39.52.240(h).

(b) A former public officer is not liable under this chapter for any action carried out in accordance with the advice of the attorney general issued under this section, if the public officer fully disclosed all relevant facts reasonably necessary to the issuance of the advice.

Sec. 39.52.260. **Designated supervisor's report and attorney general review.**

(a) A designated supervisor shall quarterly submit a report to the attorney general which states the facts, circumstances, and disposition of any disclosure made under AS 39.52.210 - 39.52.240.

(b) The attorney general shall review determinations reported under this section. The attorney general may request additional information from a supervisor concerning a specific disclosure and its disposition.

(c) The report prepared under this section is confidential and not available for public inspection unless formal proceedings under AS 39.52.350 are initiated based on the report. If formal proceedings are initiated, the relevant portions of the report are public documents open to inspection. The attorney general shall, however, make available to the public a summary of the reports received under this section, with sufficient deletions to prevent disclosure of a person's identity.

(d) The attorney general shall submit to the personnel board a copy of the quarterly reports received from designated supervisors under (a) of this section together with a report on the attorney general's review conducted under (b) of this section.

Sec. 39.52.270. **Disclosure statements.**

(a) A public officer required to file a disclosure statement under this chapter shall meet the requirements of this subsection in making the disclosure. When the public officer files a disclosure statement under this chapter, the public officer signing the disclosure shall certify that, to the best of the public officer's knowledge, the statement is true, correct, and complete. The disclosure must state that, in addition to any other penalty or punishment that may apply, a person who submits a false statement that the person does not believe to be true is punishable under AS 11.56.200 - 11.56.240.

(b) A designated supervisor who receives a disclosure statement under AS 39.52.110 - 39.52.220 shall review it. If the designated supervisor believes that there is a possibility that the activity or situation reported in a disclosure statement filed under AS 39.52.110 - 39.52.190 may result in a violation of this chapter, the designated supervisor shall take appropriate steps under AS 39.52.210 - 39.52.240. Failure of the designated supervisor to proceed under AS 39.52.210 - 39.52.240 does not relieve the public officer of the public officer's obligations under those statutes.

(c) In this section, "disclosure statement" means a report or written notice filed under AS 39.52.110 - 39.52.220.

Article 04. COMPLAINTS; HEARING PROCEDURES

Sec. 39.52.310. **Complaints.**

(a) The attorney general may initiate a complaint, or elect to treat as a complaint, any matter disclosed under AS 39.52.210, 39.52.220, 39.52.250, or 39.52.260. The attorney general

may not, during a campaign period, initiate a complaint concerning the conduct of the governor or lieutenant governor who is a candidate for election to state office.

(b) A person may file a complaint with the attorney general regarding the conduct of a current or former public officer. A complaint must be in writing, be signed under oath, and contain a clear statement of the details of the alleged violation.

(c) If a complaint alleges a violation of AS 39.52.110 - 39.52.190 by the governor, lieutenant governor, or the attorney general, the matter shall be referred to the personnel board. The personnel board shall return a complaint concerning the conduct of the governor or lieutenant governor who is a candidate for election to state office as provided in (j) of this section if the complaint is initiated during a campaign period. The personnel board shall retain independent counsel who shall act in the place of the attorney general under (d) - (i) of this section, AS 39.52.320 - 39.52.350, and 39.52.360(c) and (d). Notwithstanding AS 36.30.015(d), the personnel board may contract for or hire independent counsel under this subsection without notifying or securing the approval of the Department of Law.

(d) The attorney general shall review each complaint filed, to determine whether it is properly completed and contains allegations which, if true, would constitute conduct in violation of this chapter. The attorney general may require the complainant to provide additional information before accepting the complaint. If the attorney general determines that the allegations in the complaint do not warrant an investigation, the attorney general shall dismiss the complaint with notice to the complainant and the subject of the complaint.

(e) The attorney general may refer a complaint to the subject's designated supervisor for resolution under AS 39.52.210 or 39.52.220.

(f) If the attorney general accepts a complaint for investigation, the attorney general shall serve a copy of the complaint upon the subject of the complaint, for a response. The attorney general may require the subject to provide, within 20 days after service, full and fair disclosure in writing of all facts and circumstances pertaining to the alleged violation. Misrepresentation of a material fact in a response to the attorney general is a violation of this chapter. Failure to answer within the prescribed time, or within any additional time period that may be granted in writing by the attorney general, may be considered an admission of the allegations in the complaint.

(g) If a complaint is accepted under (f) of this section, the attorney general shall investigate to determine whether a violation of this chapter has occurred. At any stage of an investigation or review, the attorney general may issue a subpoena under AS 39.52.380.

(h) A violation of this chapter may be investigated within two years after discovery of the alleged violation.

(i) The unwillingness of a complainant to assist in an investigation, the withdrawal of a complaint, or restitution by the subject of the complaint may, but need not in and of itself, justify termination of an investigation or proceeding.

(j) The personnel board shall return a complaint concerning the conduct of the governor or lieutenant governor who is a candidate for state office received during a campaign period to the complainant unless the governor or lieutenant governor, as appropriate, permits the personnel board to assume jurisdiction under this subsection. If the personnel board receives a complaint concerning the conduct of the governor or lieutenant governor who is a candidate during the campaign period, the personnel board shall immediately notify the subject of the complaint of the receipt of the complaint, of the suspension of the personnel board's jurisdiction during the campaign period, and of the candidate's right to waive the suspension of jurisdiction under this subsection. The candidate may, within 11 days after the personnel board mails or otherwise sends notice of the complaint to the candidate, notify the personnel board that the candidate chooses to have the personnel board proceed with the complaint under this section. If the

candidate does not act within that time or if the candidate notifies the personnel board that the candidate is not waiving the suspension of jurisdiction, the personnel board shall return the complaint to the complainant with notice of the suspension of jurisdiction under this subsection and of the right of the complainant to file the complaint after the end of the campaign period.

(k) A campaign period under this section begins on the later of 45 days before a primary election in which the governor or lieutenant governor is a candidate for state office or the day on which the individual files as a candidate for state office and ends at the close of election day for the general or special election in which the individual is a candidate or on the day that the candidate withdraws from the election, if earlier. For a candidate who loses in the primary election, the campaign period ends on the day that results of the primary election showing that another individual won the election are certified.

Sec. 39.52.320. **Dismissal before formal proceedings.**

If, after investigation, it appears that there is no probable cause to believe that a violation of this chapter has occurred, the attorney general shall dismiss the complaint. The attorney general shall communicate disposition of the matter promptly to the complainant under AS 39.52.335(c) and to the subject of the complaint.

Sec. 39.52.330. **Corrective or preventive action.**

After determining that the conduct of the subject of a complaint does not warrant a hearing under AS 39.52.360, the attorney general shall recommend action to correct or prevent a violation of this chapter. The attorney general shall communicate the recommended action to the complainant and the subject of the complaint. The subject of the complaint shall comply with the attorney general's recommendation.

Sec. 39.52.335. **Summary of disposition of complaints and review by personnel board.**

(a) When the attorney general initiates or receives a complaint under AS 39.52.310, the attorney general shall immediately forward a copy of the complaint to the personnel board.

(b) Each month, the attorney general shall file a report with the personnel board concerning the status of each pending complaint and the resolution of complaints that have been closed since the previous report.

(c) If a complaint is dismissed under AS 39.52.320 or resolved under AS 39.52.330, the attorney general shall promptly prepare a summary of the matter and provide a copy of the summary to the personnel board and the complainant. The summary is confidential unless the

(1) dismissal or resolution agreed to under AS 39.52.320 or 39.52.330 is public; or

(2) superior court makes the matter public under (h) of this section.

(d) Within 15 days after receipt of a summary under this section, a complainant may file comments with the personnel board regarding the disposition of the complaint.

(e) At its next regular meeting that begins more than 15 days after receipt of a summary under this section, the personnel board shall review the summary and comments, if any, filed by the complainant. The personnel board may compel the attendance of the subject of the complaint or the complainant at the meeting and may compel the production of documents. Attendance may be by teleconference. The attorney general or the attorney general's designee shall be available to respond to questions from the personnel board concerning the disposition of the complaint.

(f) After review of the summary, the personnel board may issue a report on the disposition of the complaint. If the matter is confidential and the board determines that

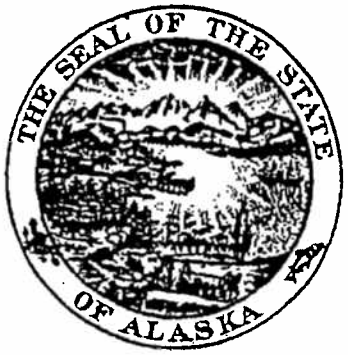
HOUSE & SENATE JOURNALS

STATE OF ALASKA

FOURTEENTH LEGISLATURE

First Special Session

July 15, 1985 - August 5, 1985



LEGISLATIVE AFFAIRS AGENCY
Juneau, Alaska

Senator Halford moved and asked unanimous consent that the journals for the first through the twenty-first legislative days of the First Special Session of the Fourteenth Alaska Legislature and Senate Supplement No. 41 be approved as certified by the Secretary. Without objection, it was so ordered.

MESSAGES FROM THE GOVERNOR

HCR 39

Message of July 17 was read, stating the Governor read the following resolution and transmitted the engrossed and enrolled copies to the Lieutenant Governor's Office for permanent filing:

HOUSE CONCURRENT RESOLUTION NO. 39
(Authorizing a recess by the Senate or the House of Representatives for a period of more than three days)

Legislative Resolve No. 26

STANDING COMMITTEE REPORTS

Received July 22, 1985:

AUTHORIZATION FOR ISSUANCE OF SUBPOENAS

The undersigned members of the Rules Committee hereby authorize the committee chair to issue subpoenas requiring the attendance of witnesses before the Rules Committee to testify in connection with the Rules Committee's inquiry into the report of the Grand Jury concerning the Governor's involvement in the State's award of the lease to the Fifth Avenue Center in Fairbanks. This authorization is given in accordance with Alaska Statute 24.25.010(b).

/s/ Tim Kelly
Senator Tim Kelly, Chairman
Date: 7/18/85

Senator Jack Coghill
Date

/s/Don Bennett
Senator Don Bennett
Date: 7/18/85

/s/ Jan Faiks
Senator Jan Faiks
Date: 7/18/85

/s/ Joe Josephson
Senator Joe Josephson
Date: 7/18/85

I hereby concur.

/s/ Don Bennett
Don Bennett, President
Alaska State Senate
Date: 7/18/85

"August 5, 1985

SENATE RULES COMMITTEE

INQUIRY INTO THE JULY 1, 1985 GRAND JURY REPORT

Dear Mr. President:

Pursuant to your instruction of July 15, 1985, the Senate Rules Committee has inquired into the July 1, 1985 Grand Jury Report and reports back as follows:

1. On July 2, 1985, the Superior Court, First Judicial District released a Grand Jury Report regarding the circumstances surrounding a state lease of the Fifth Avenue Center in Fairbanks. That Grand Jury had been investigating the lease since April 24, 1985.

2. The Grand Jury Report stated that the evidence disclosed 'serious abuse of office by Governor William Sheffield and his Chief of Staff'. The Grand Jury made eight specific recommendations. The first of these recommendations was that the Alaska Legislature be called into Special Session to consider the evidence for the express purpose of initiating impeachment procedures against the governor.

3. In response to this clear call by the Grand Jury, the Alaska Legislature convened in special session on July 15, 1985. Alaska's Constitution charges the State Senate with the responsibility of originating a motion for impeachment and the House of Representatives with the responsibility of trial on impeachment. The Constitution provides that 'the motion for impeachment shall list fully the basis for the proceeding' and requires a two-thirds vote for passage. The impeachment process is difficult as it rightfully should be difficult.

4. Impeachment is unprecedented in our state and rare in the history of our nation. It is a matter of utmost importance and the Senate approached this matter with the gravity that it deserved. Acting on the limited precedent provided by the expulsion of a former state senator from the legislature, the Senate President referred the matter to the Senate Rules Committee. The Senate retained the services of Samuel Dash, one of the most knowledgeable attorneys it could find in this rare area of legal expertise, to act as Chief Counsel.

5. As a first order of business, the Rules Committee adopted rules of procedure. It was determined that all twenty senators would be invited to attend and participate in all meetings. Although the Constitution does not expressly require that a Governor be allowed to participate in Senate impeachment hearings, the committee voted to allow the Governor and his counsel full participation, in order to assure due process in every stage of the hearing.

6. The Committee then adopted a burden of proof of 'clear and convincing evidence' and narrowed the scope of the inquiry to matters referred to the Senate by the Grand Jury. The chairman made plain that a wide latitude of debate and questioning concerning areas mentioned in the Grand Jury Report would be allowed. The last major item of procedural business by the committee was to adopt a definition of impeachable offenses. The Committee defined impeachable offenses as 'serious misconduct in office, such as treason, malfeasance, misfeasance, corruption or perjury'.

7. In their search to determine the truth in this matter, members of the Senate have reviewed twelve volumes of Grand Jury transcripts, which include almost 3,000 pages and the testimony of forty-four witnesses. We have reviewed the transcripts of statements by witnesses obtained during the investigation and considered numerous legal briefs and oral arguments by counsel to the Senate, counsel to the Governor and the Legislative Affairs Agency. We have heard testimony by nine witnesses, including Governor Sheffield, and developed our own printed record of more than 3,000 pages over twelve days of hearings.

8. Although the financial and civic costs of this special session have been high we believe that in the long run it will serve Alaska's public well. Some costs were inevitable due to the timing of the Grand Jury's action, such as the need for convening a special session of the Legislature rather than taking up the matter during a regular Legislative session. We also believe that the national attention given Alaska's impeachment proceedings and the importance of our inquiry as a legal precedent required the retention of expert legal advice. The benefits of this experience may not be seen immediately but will be felt in years to come in the form of solving existing problems brought to light through this process and avoidance of future public expenses.

9. Probably every one of the twenty senators has his or her own opinion of exactly what happened to cause us to have to sit together in this unhappy judgment. None of us can look inside another's heart or mind, however, and Governor Sheffield says he cannot remember a number of the events, the recollection of which would have clarified his personal involvement in this matter and made our judgment easier.

10. It is the opinion of a majority of the Rules Committee that the evidence that an impeachable offense occurred, though substantial, does not rise to the level of 'clear and convincing evidence'. The Rules Committee also believes that sufficient support to approve one or more articles of impeachment is not available in the full Senate.

11. We therefore offer this report as an affirmation to the members of the public and those state employees who came forward and put their careers in jeopardy and as a condemnation of those within the state system who have, according to the record we ourselves have developed, abused the public trust and brought discredit upon themselves and this administration.

12. A lack of a recommendation to impeach the governor should not be interpreted, however, as in any way condoning the standard of behavior that has brought us here. The Governor's Chief of Staff has admitted to lying to prosecutors and destroying evidence. There is also testimony that other evidence was directed to be destroyed. There is a clear pattern of persons in the Governor's Office being more concerned with deniability than accountability. We find that there was clear failure on the part of the Governor to set the tone for his administration: a failure to declare standards of appropriate conduct for his appointees in achieving the Governor's goals.

13. This report should not be viewed in any way as critical of Governor Sheffield's expressed goal of state office consolidation in our major urban areas. We believe these goals are in the broadest public interest, and we feel this affair should not stop or delay future consolidation. However, the manner in which the Fairbanks office consolidation lease contract was awarded is absolutely unacceptable and we urge that all future efforts in this direction be above reproach.

14. There is direct evidence that at the Governor's request, a request for proposals was sent to a member of a partnership which was a potential bidder on the Fairbanks Office Consolidation lease, giving that bidder a definite competitive advantage over other potential bidders. While release of the R.F.P. is not in itself a criminal offense it is clearly contrary to the standards and practices for contracting of the Division of General Services & Supply, Department of Administration. Political or personal relationships are not a justification for the advanced release of any information in state government. We recommend that the regulations of the Governor's office in this area be promptly modified to include this common-sense principle with specific exceptions left to the individual departments.

15. There is further evidence that at a later date the competitive bid process was changed to a sole source contract. This change to a sole source contract could well have been rationalized with public policy goals, but the Governor's total lack of memory of a key meeting precipitating this change, even after hearing detailed accounts of it by the other participants, raises serious doubts to his credibility.

16. In fact the whole pattern of the Governor's memory lapses is disturbing. During his testimony, the Governor exhibited almost verbatim recall of conversations and events that were favorable to him and a substantial lack of recall of events that might reflect upon him unfavorably.

17. The Grand Jury Report states: 'The evidence from a substantial number of witnesses also indicates that employees in the Department of Administration and the Department of Law may have eventually acquiesced in the intervention by the Governor's Office in part because they perceived that this was not an isolated instance but one that followed a series of other such episodes'. In the process of the Senate hearings on impeachment, a number of other issues of concern were touched on but it was not appropriate to follow up these issues because of the established scope of the hearings, the resources of the committee and the time available. It is recommended that the Department of Law review the transcripts of the Senate Rules hearings to determine whether other items, such as the Anchorage Office Lease and the Frontier Office Building lease might be appropriate subjects for separate review or investigation.

18. In this connection, we believe that the Attorney General was remiss in failing to insist upon direct access to the Governor, when the subject matter directly or potentially involved members of the Governor's Office staff.

19. In addition to its first recommendation regarding impeachment, the Grand Jury made seven additional recommendations. The Grand Jury's eighth recommendation was that the state lease of the Fifth Avenue Center be voided. On July 2, 1985, the Attorney General issued an opinion stating the lease should be voided.

20. The remaining six recommendations of the Grand Jury are: an executive branch code of ethics, adoption of revised procurement procedures, state employee awareness of ethical obligations, legislative review of problems presented by access to government officials to promote private pecuniary interests, implementation of procedures to promote the competitive bidding process, and adoption of standards pertaining to bid waivers. We strongly endorse these recommendations and believe that the legislative and executive branches must work together to achieve them. The impeachment hearings have emphasized the need for an executive branch code of ethics. They have also made evident the need for improved campaign financing laws, a subject currently under intensive study by the Senate State Affairs Committee.

21. The Constitution of Alaska provides: 'The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended'. The committee believes that this power has served the public and State well and will continue to do so in the future. However, it is also believed that the Senate Rules Hearings have made evident that a better understanding about the limits of the powers of a Grand Jury would have made it easier to devote our attention to the relevant issues during the hearings. In particular, the Grand Jury should have been instructed that impeachment is a political process and not a substitute for judicial remedies.

22. It is our hope that these matters will be taken up as a matter of highest priority, at the beginning of the Second Session of the Fourteenth Alaska Legislature. To help facilitate this we urge the full Senate to pass the attached resolution calling for the President of the Senate to appoint a select interim committee on procurement practices and procedures. We also recommend that a resolution requesting Judicial Council recommendations on grand jury investigative procedures be approved.

23. The committee agrees with the Grand Jury that, '...government officials must always aim for what is best for the public, not merely for what might be 'okay'. Every public official has a duty of loyal, faithful and honest service which is clearly inherent in the responsibilities of public office at all levels'.

24. The 15 citizens sitting on the Grand Jury have expressed goals that everyone in public service must aspire to but were plainly lacking in the conduct of some of the Administration officials involved here. Alaskans will not tolerate those who violate this duty.

CONCURRED IN BY:

/s/ Tim Kelly
Senator Tim Kelly, Chairman
Chairman

/s/ J B Jack Coghill
Senator Jack Coghill,
Vice Chairman

/s/ Jan Faiks
Senator Jan Faiks

/s/ Don Bennett
Senator Don Bennett

/s/ Joe Josephson: I concur in paragraphs 1-9 and 17-24 but do not concur in significant portions of paragraphs 10-16. A supplemental report is attached. JPJ
Senator Joe Josephson"

"Supplemental Report of Senator Josephson

I have concurred in the majority report because I agree with the operative result of the report, and especially the recommendations for the adoption of the two resolutions to which the report referred.

I am noting, however, my specific nonconcurrence with significant proportions of numbered paragraphs 10-16 of the majority report, and accordingly, I submit herewith my separate or supplemental views.

Governor Sheffield should not be impeached.

It has been said that any impeachment hearing has about it an aura of sadness. But I also see reasons to be hopeful about Alaska's future as a result of these proceedings.

First, Alaskans have seen State government in close-up. Interest in government is increased, and the constituency for statutory reforms is enlarged.

Second, our legal system, displayed in these proceedings through good research, cross-examination and advocacy, has proved again its great value for truth-finding.

Third, the Legislature has received information and gained insights that will help in assessing legislation relating to ethics, procurement practices, and grand jury procedures.

Fourth, an undercurrent of gossip, rumors, and innuendo has been replaced by truth.

A. The Grand Jury Report.

The Grand Jury report called on the Senate to consider impeachment. The Senate has responded, and considered the report and other materials and testimony. To conclude that impeachment is not appropriate, and that Governor Bill Sheffield committed no impeachable offense, is not to reflect adversely upon the grand jurors or their work.

The grand jurors, the record shows, were serious, diligent, and thoughtful. But they did not know the whole story. It is no criticism of the prosecutors to note that grand juries are not, and never were, created for the purpose of providing full and fair hearings that go to the merits of a charge. That is why a Grand Jury indictment, even when rendered -- and there was no indictment here -- is nothing more than an accusation, and why a person indicted is presumed to be innocent of the accusation unless convicted after trial.

The grand jurors were told to consider impeachment, but they were never told what constitutes an impeachable offense, under the historical precedents or the debates in the Alaska Constitutional Convention.

The grand jurors heard arguments of lawyers, but they never heard the arguments of Governor Sheffield's attorneys or the mature reflections of Senate Chief Counsel Sam Dash.

The grand jurors saw documents, but they did not see all the documents that the Rules Committee saw.

And at least some of the witnesses before the Grand Jury, including Anselm Staack and Bill Sheffield, were directed to answer the questions that would satisfy the prosecutors' notions of relevancy and materiality rather than the witnesses' desire to give a full and balanced account of the surrounding circumstances and the context in which events or conversations took place.

Apart from the question of impeachment, the Grand Jury made legislative recommendations, pointing out the need to reassess the existing statutes involving conflict-of-interest, ethics, procurement practices (including bid waivers and sole source procurement), and employee awareness of ethical obligations.

The record of these proceedings confirms the urgency of these recommendations. They reflect that existing laws and regulations are confusing, inconsistent, insufficient, and obscure. The Senate should establish a Select Interim Committee to address these problems forthwith.

B. The Fifth Avenue Center Procurement.

Since the Rules Committee has voted to narrow the scope of the inquiry to the question of perjury, little comment is necessary about the procurement process which led to the State's lease of office space at the Fifth Avenue Center in Fairbanks.

However, a brief commentary is in order. I find no impeachable conduct. I do not find by clear and convincing evidence that the conduct of Chief of Staff, John Shively, prior to the commencement of the criminal investigation by Prosecutor Hickey, was improper.

Mr. Shively was confronted with a bureaucratic element well practiced in what Mr. Staack called 'end run', 'slow roll', and 'creeping commitment' techniques for thwarting administrative policy. Mr. Shively, and Governor Sheffield, came to government as doers and movers and as action-oriented leaders. Mr. Shively conveyed strong views to the Department of Administration, but that is the job of the Chief of Staff.

Mr. Shively knew that Governor Sheffield favored the consolidation of office space for certain state agencies in Fairbanks, in the downtown area. He never interfered in the negotiation of the lease, either by dictating or pressuring for prices favorable to the owners or for the owners' desire for a lease of more square footage. He acquiesced in recommendations by the Department of Law and the Department of Administration for a bid waiver procedure, and was personally involved in the decision to reject the 'footprint' for the

smallest qualifying zone for lease space which Mr. Arsenault presented on October 2. Finally, it appears that the ultimate result, the lease itself, gave the State high-quality space at a fair price in the area of town where local civic groups and community leaders had recommended the consolidation to be.

Assuming, for purposes of discussion only, that John Shively acted improperly in his contacts with the Department of Administration with regard to the Fairbanks consolidation project, the evidence did not show that his improper actions came at the direction of Governor Sheffield. On the contrary, the evidence is clear that Mr. Shively himself never considered that he was acting upon the Governor's instructions or directions -- except for the appropriate general direction to keep forward progress on the consolidation project and to secure consultation and reaction to the 'footprint' or development zone presented by Mr. Arsenault on behalf of the owners.

It is true, of course, that any elected official must be answerable to the electorate for the actions of his or her subordinates. That is only fair; since politicians take credit for the good that subordinates do, they must also be prepared to take the blame for subordinates' mistakes.

But that is a political consideration, and is fittingly raised in traditional give and take of free, robust debate of the political process.

For impeachment purposes, an official is not responsible for the actions of subordinates unless those actions came about through the active participation of the official, or at the official's instructions or directions.

'Serious misconduct', as defined, includes 'misfeasance' and 'malfeasance', not nonfeasance or a failure of supervision.

In summary, I find that the Chief of Staff did not intervene improperly with respect to the Fifth Avenue Center, and that even if he did, his conduct is not imputable to Governor Sheffield for purposes of impeachment without a showing of 'serious misconduct', 'misfeasance', or 'malfeasance' on the part of Governor Sheffield, established by clear and convincing evidence. Accordingly, there was no impeachable conduct.

C. Perjury

From the outset, I determined that perjury constitutes an impeachable offense. A democratic society cannot operate effectively if its chief executive were to knowingly lie to a grand jury under oath. If clear and convincing evidence established that Governor Sheffield committed perjury before the Grand Jury, I would have voted to impeach Governor Sheffield without hesitation.

But there is no such clear and convincing evidence. Reviewing the Governor's testimony, former Attorney General Gorsuch found 'confusion' and possible 'inconsistency' with Mr. Gorsuch's own recollections; those findings, if believed, do not establish perjury.

I will not debate here at length all of the reasons for my conclusion that clear and convincing evidence was not presented to establish perjury. But some of the reasons follow:

1. By the time the Governor testified, he had received a detailed briefing about the investigation by Prosecutor Hickey. Therefore, the Governor must have had great difficulty in sorting out, as he testified, those matters that he knew from his own memory and those matters that he knew from the briefing only. Obviously, it would have been improper and inappropriate for the Governor to tell the Grand Jury propositions of fact which had been recited to him in the briefing, unless he had personal knowledge of the same matters. (Criminal Rule of Procedure 6(r); see 'Memorandum Concerning Norman Gorsuch's Testimony And the Questioning of the Governor Before the Grand Jury' by Messrs. Conway and Lacovara.)

2. It is clear from the testimony of Mr. Shively and Mr. Arsenault that nothing occurred at the October 2, 1984, meeting they attended with Governor Sheffield which was improper, or which involved a direction or instruction from Governor Sheffield to 'rig' the Fairbanks lease. Therefore, there is no motive ascribable to the Governor that would explain a deliberate falsehood.

3. Governor Sheffield acknowledged with candor that it was 'highly probable' that the October 2 meeting took place, and he added that he was 'not doubting' that the meeting occurred and that the subject of Mr. Arsenault's requests were discussed. (GJ Tr. 1762).

4. Persuasive extrinsic evidence to corroborate the notion that Governor Sheffield deliberately and knowingly lied with respect to any issue was not presented. In fact, as Professor Dash said in his closing statement, the whole case against the Governor rested on circumstantial evidence only. While evidence of a fact can be circumstantial as well as direct, the record reveals at least as many circumstances to suggest that Governor Sheffield attempted to tell the truth to the Grand Jury as there were to suggest the contrary.

D. Recommendations.

From these hearings, many lessons can be learned. The legislative branch, as noted above, needs to address the public policy issues raised by the Grand Jury, in a thorough review of procurement practices, conflict-of-interest laws, proposals for a code of ethics for the executive branch, and related subjects. In addition, legislation is needed to require that future grand jury reports, when released, meet the tests applied by Judge Sirica when he authorized delivery to

the Judiciary Committee of the House of Representatives in Congress of a Watergate grand jury report, or to assure that any unindicted officer who is the subject of such a report will be given a simultaneous opportunity to comment upon its contents, as required under federal law since 1970.

The executive branch needs to learn lessons, too.

The bureaucracy has an especially difficult task. On the one hand, it must bring to the attention of competent higher authority concerns about possible misunderstandings or violations of applicable laws, regulations and policies. The government of Alaska is still relatively small; it is certainly not a military or paramilitary organization, and even in the armed forces, procedures exist to bring problems to the attention of those at the highest level of the command chain. Accordingly, Governor Sheffield and his immediate advisors must reiterate their willingness to hear and consider the advice of the bureaucracy, and the bureaucracy must be willing to give that advice.

But on the other hand, the bureaucracy must understand the distinction between legal constraints and mere policy difference. It must respect the right of the people, who are sovereign, to impose their will on the bureaucracy through the people's elected officials. When the policies are set, and violate no laws or regulations, the bureaucracy must respond. When laws are enacted, they must be implemented.

Governor Sheffield came to office determined to have an 'open door' operation and an open government. I find from this record that this determination has always existed. For example Governor Sheffield testified that he told John Shively that the files on the Fairbanks office lease case should be given to the News-Miner, whether or not it contained 'politically embarrassing' materials. But around the Governor, there developed an atmosphere of over protectiveness. The trauma of these proceedings give the administration a new opportunity to implement the spirit of the Governor's determination for open government.

The Grand Jury report closed by noting that 'government officials must always aim for what is best for the public, not merely for what might be 'okay'.'

I concur. If we do not aspire to the best, we will not attain the good.

At the same time, let us never be so righteous, or self-righteous, as to think that we will have, or that we are entitled to have, an infallible government. In a free nation, government is people, and people are fallible.

Probably the greatest executive the American nation has seen was Abraham Lincoln. He was also the most villified leader we have ever had.

Abraham Lincoln held no malice towards those who criticized him. He said: 'I shall try to correct errors when shown to be errors; and I shall adopt new views so fast as they shall appear to be true views.'

And I hope it is a comfort to Governor Bill Sheffield to recall Lincoln's peace of mind in the secure knowledge that he was doing the best he could:

> 'If I were to try to read, much less answer, all the attacks made on me, this shop might as well be closed for any other business.'
> 'I do the very best I know how -- the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference.'

In closing, I want to commend Chairman Kelly of the Rules Committee for the manner in which he conducted the proceedings in these difficult days. The people of Alaska can be satisfied, whatever their conclusions or their views, or their political affiliation, that all points of view have been expressed, and that Governor Sheffield received due process of law.

/s/ Joe P. Josephson
Joe P. Josephson
Member, Senate Rules Committee"

Senator Halford moved and asked unanimous that the preceding Rules Committee Report be spread. Without objection, it was so ordered.

Senator Halford stated for the record that the report represents the views of the members of the Rules Committee and not the Senate as a whole.

Senator Ferguson moved and asked unanimous consent that his Senate floor statement of today be spread. Without objection, it was so ordered.

"SENATE FLOOR STATEMENT
DUE PROCESS: RIGHTS OF THE ACCUSED
SENATOR FRANK R. FERGUSON
MONDAY AUGUST 5, 1985

Up until Saturday, August 3, the Senate Rules Committee proceedings were open and fair because the accused had an avenue for presenting facts to challenge the validity of certain documents.

However, during the Saturday hearing, the Rules Committee 'failed' to give the accused the opportunity to challenge the validity of the Draft Rules Committee Reports and/or Resolutions.

Since these proceedings were an investigation, the Senate Rules Committee had a constitutional obligation to allow the accused to have direct access to the Rules Committee meeting to challenge the validity of various accusations which is exactly what the Grand Jury failed to do.

'Two wrongs....don't make a right'

Even a governor is entitled to due process of the law especially under legislative investigations as required by the State Constitution. The fact in point is the 'Declaration of Rights' Article I, Section 7: DUE PROCESS

Quote - 'No person shall be deprived of life, liberty, or property without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed'. End Quote

This clause in the 'Declaration of Rights' has been elevated to a prominent principle of justice and fair play that may never be violated by any branch of government.

The Alaska Constitutional delegates incorporated novel language in this section by explicitly extending the due process principle to both legislative and executive investigations. This was done in reaction to the blusterous 'anti-communist' investigations of Senator Joseph McCarthy in the mid-1950's that offended the public sense of fair treatment by government investigations.

While I find nothing wrong with a grand jury, when authorized, to release a report containing recommendations concerning the public welfare and safety, I find the legal basis of allowing a grand jury to issue a report naming a public official without returning an indictment to be deliberately or unprofessionally negligent.

I cannot support this report in good conscience because we did not give the accused due process in the final segment of the Senate Rules Committee's Legislative Investigation as envisioned by the framers of the Alaska State Constitution."

INTRODUCTION OF SENATE RESOLUTIONS

SR 5

SENATE RESOLUTION NO. 5 by Senator Vic Fischer,

Requesting Judicial Council recommendations on grand jury investigative procedures,

was read the first time.

18 of 20 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA

NO NUMBER IN ORIGINAL

[redacted]. *AG LEXIS 611;* 1980 Op. (Inf) Atty Gen. Alas.

May 5, 1980

TYPE: INFORMAL OPINION

SYLLABUS:
[*1]

Re: Alaska Renewable Resources Corporation Subpoena

REQUESTBY:

The Honorable Alvin Osterback
Co-chairman
House Resources Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

OPINIONBY:

AVRUM M. GROSS, ATTORNEY GENERAL; Arthur H. Peterson, Assistant Attorney General

OPINION:

As requested by your committee's assistant, Diane Morrison, you will find the following documents attached for your use:

- a subpoena duces tecum for the three trustees of the Alaska Renewable Resources Corporation;

- an affidavit of service.

In order to make this subpoena valid, you must have the authorization of a majority of your committee and get Speaker Gardiner's concurrence, in accordance with *AS 24.25.010(b)*. Also it must be served in accordance with *AS 24.25.020*.

RESOURCES COMMITTEE
HOUSE OF REPRESENTATIVES
ALASKA STATE **LEGISLATURE**

In the Matter of the Investigation)
)
of Certain Matters Concerning the)
)
Alaska Renewable Resources Corporation)
)
)

SUBPOENA DUCES TECUM

TO: Philip Hubbard, Trustee

Dean Olson, Trustee

William Spear, Trustee

Alaska Renewable Resources Corp.

2nd Floor, Madsen Building

Juneau, Alaska 99801

Under the authority of art. II of the Alaska Constitution, [*2] and in accordance with *AS 24.25.010(b)*, the Resources Committee of the Alaska House of Representatives directs you to appear at Room 116 of the State Capitol Building, Juneau, Alaska, on May 8, 1980, at 10:00 a.m., to give testimony on:

1. The reasons for the resignation of Jack Milnes as a trustee of the Alaska Renewable Resources Corporation (ARRC).

2. The recent financial assistance agreement between ARRC and TEPA, Inc.

3. Major problems currently facing ARRC.

In addition, you are to produce at that time and place all correspondence, applications, and other records pertaining to items 1 and 2 above.

Information made confidential by AS 37.12.120, and which is required by this **subpoena** to be produced, must be identified as such by ARRC. The House Resources Committee and all other **legislators** and staff participating in this investigation will keep that information confidential.

DATED: , 1980

Juneau, Alaska

Alvin Osterback, Co-chairman

Resources Committee

House of Representatives

Alaska State Legislature

Bill Miles, Co-chairman

Resources Committee

House of Representatives

Alaska State Legislature

CONCUR:

Terry Gardiner

Speaker of the House

Alaska State [*3] Legislature

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasGovernmentsState & Territorial GovernmentsLegislatures

Order Code RL31836

Report for Congress

Congressional Investigations: Subpoenas and Contempt Power

April 2, 2003

Louis Fisher
Senior Specialist in Separation of Powers
Government and Finance Division

Congressional Investigations: Subpoenas and Contempt Power

Summary

When conducting investigations of the executive branch, congressional committees and Members of Congress generally receive the information required for legislative needs. If agencies fail to cooperate or the President invokes executive privilege, Congress can turn to a number of legislative powers that are likely to compel compliance. The two techniques described in this report are the issuance of subpoenas and the holding of executive officials in contempt. These techniques usually lead to an accommodation that meets the needs of both branches. Litigation is used at times, but federal judges generally encourage congressional and executive parties to settle their differences out of court. The specific examples in this report explain how information disputes arise and how they are resolved.

For legal analysis see CRS Report 95-464A, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry*, by Morton Rosenberg, and CRS Report RS30319, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, by Morton Rosenberg. A number of legislative tools, including subpoenas and contempt citations, are covered in CRS Report RL30966, *Congressional Access to Executive Branch Information: Legislative Tools*, by Louis Fisher. For a general report on oversight methods, see CRS Report RL30240, *Congressional Oversight Manual*.

This report will be updated as events warrant.

Contents

Congressional Investigations: Subpoenas and Contempt Citations

When conducting investigations of the executive branch, congressional committees and Members of Congress generally receive the information required for legislative needs. If agencies fail to cooperate or the President invokes executive privilege, Congress can turn to a number of legislative powers that are likely to compel compliance. The two techniques described in this report are the issuance of subpoenas and the holding of executive officials in contempt. These procedures usually lead to an accommodation that meets the needs of both branches. Litigation is used at times, but federal judges generally encourage congressional and executive parties to settle their differences out of court. The specific examples in this report explain how information disputes arise and how they are resolved.

Congressional Investigations

Although the congressional power to investigate is not expressly provided for in the Constitution, the framers understood that legislatures must oversee the executive branch. Under British precedents, lawmakers were expected to hold administrators accountable. James Wilson, one of the framers and later a Justice on the Supreme Court, expected the House of Representatives to "form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things."[1] In an essay in 1774, he described members of the British House of Commons as "grand inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censures; and have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults."[2]

At the Philadelphia Convention, George Mason emphasized that Members of Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices."[3] Charles Pinckney submitted a list of congressional prerogatives, including: "Each House shall be Judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same."[4] The Constitution, however, provided no express powers for Congress to investigate, issue subpoenas, or to punish for contempt. What was

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[1] 1 The Works of James Wilson 415 (1967 ed.).

[2] 2 Id. 731 (essay "Consideration on the Nature and Extent of the Legislative Authority of the British Parliament").

[3] 2 The Records of the Federal Convention of 1787, at 206 (Farrand ed. 1937). See also Mason's comments as reported by Madison, id. at 199.

[4] Id. at 341.

left silent would be filled within a few years by implied powers and legislative practice.

Early Precedents

During the First Congress, the House debated a request from Robert Morris to investigate his conduct as Superintendent of Finance during the period of the Continental Congress. The matter was referred to a select committee consisting of three Members.[5] The Senate adopted a different approach, preferring to authorize President George Washington to appoint three commissioners to look into the matter and report the results to Congress.[6] The House persisted with its committee, which issued a report on February 16, 1791.[7] The House committee investigation did not produce a total collision between the two branches because the area of inquiry concerned activities that occurred during the previous Continental Congress. Nevertheless, the House inquiry is significant because the House decided, as noted by James Madison, that it was necessary for Congress to acquire information in order to "do justice" to the country and to public officers.[8]

A 1790 request from Treasury Secretary Alexander Hamilton to Congress, seeking financial compensation for Baron von Steuben, triggered an early executive-legislative clash over access to documents. Although Hamilton initially withheld some materials from Congress, lawmakers received sufficient access to documents to permit passage of a bill for Steuben.[9] In this confrontation the leverage of Congress was formidable. Without cooperation from the Administration, Congress could refuse to pass the bill.

In 1792, the House conducted a major investigation by appointing a committee to inquire into the heavy military losses suffered by the troops of Maj. Gen. Arthur St. Clair to Indian tribes. The committee was empowered "to call for such persons, papers, and records, as may be necessary to assist their inquiries."[10] According to the account of Thomas Jefferson, President Washington convened his Cabinet to consider the House request. The Cabinet considered and agreed,

> first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to

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[5] 1 Annals of Cong. 1168, 1204 (February 8, 10, 1790).

[6] Id. at 1233 (February 11, 1790).

[7] 2 Annals of Cong. 2017 (February 16, 1791).

[8] Id. at 1515 (March 19, 1790).

[9] 6 Stat. 2 (1790); 1 Annals of Cong. 972, 978-80; 2 Annals of Cong. 1572, 1584, 1606, 1609-10 (April 6, 19, May 7, 10, 1790); Kenneth R. Bowling and Helen Veit, eds., The Diary of William Maclay 265-74 (1988); 6 The Papers of Alexander Hamilton 221, 326-27 (Syrett ed. 1962).

[10] 3 Annals of Cong. 493 (March 27, 1792).

> exercise a discretion. Fourth, that neither the committee nor the House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.[11]

The Cabinet concluded that "there was not a paper which might not be properly produced."[12] The House committee examined papers furnished by the executive branch, listened to explanations from department heads and other witnesses, and received a written statement from General St. Clair.[13] The general principle of executive privilege had been established because the President could refuse papers "the disclosure of which would injure the public." The injury had to be to the *public*, not to the President or his associates.

The first use of the investigative power to protect the dignity of the House occurred in 1795. William Smith, a Representative from South Carolina, announced that a Robert Randall had confided in him a plan to seek a grant of some twenty million acres from Congress, to be divided into forty shares. More than half that amount would be reserved to lawmakers who assisted him. The House passed a resolution directing the Sergeant at Arms to arrest Randall and one of his associates, Charles Whitney.[14] On January 6, 1796, the House concluded that Randall had been guilty of contempt and a breach of House privileges by attempting to corrupt the integrity of its Members. He was brought to the bar of the House, reprimanded, recommitted to custody, and released a week later.[15]

Four years later, the Senate opened an investigation into material published by William Duane, editor of the *Aurora* newspaper.[16] The Federalist Senate, voting 20 to 8 along party lines, regarded language in the newspaper as "false, defamatory, scandalous, and malicious; tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States."[17] Duane was ordered to appear at the bar of the Senate to defend his conduct. He appeared and asked for the assistance of counsel, which the Senate granted. He then refused to return, explaining that he was "bound by the most sacred duties to decline any further voluntary attendance upon that body, and leave them to pursue such measures in this case as, in their *wisdom*, they may deem meet."[18]

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[11] 1 The Writings of Thomas Jefferson 304 (Bergh ed. 1903).

[12] Id. at 305.

[13] 3 Annals of Cong. 1106-13 and Appendix (1052-59, 1310-17).

[14] Annals of Cong., 4th Cong., 1st Sess. 155-70 (1795).

[15] Id. at 171-245.

[16] Annals of Cong., 6th Cong., 1st-2d Sess. 63 (February 26, 1800).

[17] Id. at 111-12.

[18] Id. at 122 (emphasis in original).

It was for that action, and not the published material, that the Senate voted 16-12 to hold him in contempt.[19] A warrant was issued for his arrest, but Duane managed to stay a step ahead of the Sergeant at Arms.[20] The Senate adopted a resolution (13 to 4) requesting the President to prosecute Duane in the courts. He was indicted by a federal grand jury, but after several postponements was never convicted.[21]

The first committee witness punished for contempt of the House was Nathaniel Rounsavell, a newspaper editor, charged in 1812 with releasing sensitive information to the press. After being held in custody, he admitted that part of the source of his story was overhearing a conversation between Members of the House, but refused to identify the lawmakers or say where the conversation took place. In a letter he disclaimed any intention of showing disrespect to the House. Rep. John Smilie then identified himself as the Member who Rounsavell overheard, stating that the information that appeared in the newspaper was "of no importance" and that if the House wanted a victim he offered himself as a substitute for Rounsavell. The Speaker asked Rounsavell whether he was willing to answer questions put to him. After he agreed that he was, the House voted that he had purged himself of contempt and he was released.[22]

Judicial Guidelines

The Supreme Court first placed limits on congressional investigations in *Anderson* v. *Dunn* (1821). Rep. Lewis Williams informed the House that a Col. John Anderson had offered him $500 if he would reciprocate with certain favors. The House ordered the Sergeant at Arms to take Anderson into custody. After interrogation by the Speaker, the House voted Anderson in contempt and in violation of the privileges of the House. The Speaker reprimanded him and released him from custody.[23] The Supreme Court upheld the House action as a valid exercise in self-preservation. Without the power to punish for contempt, the House would be left "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may mediate against it."[24] However, the Court ruled that the power to punish for contempt was not unlimited. The House had to exercise the least possible power adequate to fulfill legislative needs (in this case, the power of imprisonment), and the duration of punishment could not exceed the life of the legislative body. Thus, imprisonment had to cease when the House adjourned at the end of a Congress.[25]

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[19] Id. at 123.

[20] James Morton Smith, Freedom's Fetters: The Alien and Sedition Law and American Civil Liberties 297-98 (1956).

[21] Id. at 306; Annals of Cong., 6th Cong., 1st-2d Sess. at 184.

[22] Annals of Cong., 12th Cong., 1st Sess. 1255-74.

[23] Annals of Cong., 15th Cong., 1st Sess. 580-83, 592-609, 777-90 (1818).

[24] Anderson v. Dunn, 6 Wheat. 204, 228 (1821).

[25] The Senate, a continuing body, is not limited by the expiration of a Congress; McGrain v. Daugherty, 273 U.S. 135, 181-82 (1927).

As a result of this decision, it would be possible for someone to violate the dignity of the House in the closing days of a Congress and be punished only for the remaining period. To handle such situations, Congress passed legislation in 1857 to enforce the attendance of witnesses on the summons of either House. If an individual fails to appear or refuses to answer pertinent questions, that person can be indicted for misdemeanor in the courts.[26] Witnesses can invoke their Fifth Amendment right not to incriminate themselves.

Initially the Court defined the legislative power to investigate somewhat narrowly. In 1881, it spoke of Congress investigating only with "valid legislation" in mind.[27] That particular case concerned the power of Congress to investigate the affairs of private citizens engaged in a real-estate pool. If the individuals committed a crime or offence, the Court said the judiciary would be the proper branch to act. The Court worried about "a fruitless investigation into the personal affairs of individuals."[28]

Later judicial rulings came to recognize a much greater sweep to congressional authority. In 1927, the Court faced a situation where Congress looked not into the activities of people in the private sector but rather the conduct of the executive branch, particularly the administration of the Justice Department. The Court first stated that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary of the legislative function."[29] Congress could not legislate "wisely or effectively in the absence of information."[30] Unlike the decision in 1881, the Court in 1927 did not confine congressional investigations to "valid legislation." Congress had a right to seek information "for legislative purposes."[31] The Court recognized that the Senate resolution that launched the investigation of the Justice Department

> does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or mistreated, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited.[32]

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[26] 11 Stat. 155 (1857), amended by 12 Stat. 333 (1862). The 1857 law, as amended, was upheld by the Supreme Court; In re Chapman, 166 U.S. 661 (1897). As amended in 1936 (49 Stat. 2041) and 1938 (52 Stat. 942), this law is codified at 2 U.S.C. § 192-94 (2000).

[27] Kilbourn v. Thompson, 103 U.S. 168, 195 (1881).

[28] Id.

[29] McGrain v. Daugherty, 273 U.S. at 174.

[30] Id. at 175.

[31] Id. at 177.

[32] Id.

It was enough, said the Court, that the subject of investigation "was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."[33] That is, a *potential* for legislation was sufficient. A congressional investigation could have legislation as a possible, but not a necessary, outcome. Investigation as pure oversight into the operations of the executive branch was adequate justification.

To accomplish the purpose of legislation or oversight, each House is entitled to compel witnesses to provide testimony pertinent to the legislative inquiry.[34] Even the "potential" theory too narrowly circumscribes legislative investigations. Courts recognize that committee investigations may take researchers up "blind alleys" and into nonproductive enterprises: "To be a valid legislative inquiry there need by no predictable end result."[35]

Subpoenas

The Supreme Court has described the congressional power of inquiry as "an essential and appropriate auxiliary to the legislative function."[36] The issuance of a subpoena pursuant to an authorized investigation is "an indispensable ingredient of lawmaking."[37] This section describes how committee subpoenas are used to force testimony and the release of documents, and how Congress can grant immunity to individuals who exercise their Fifth Amendment privilege against self-incrimination. The particular examples of subpoena power selected here include these actions: Rep. John Moss arrayed against the Federal Trade Commission, a House subcommittee requesting documents regarding Justice Department policy on seizing suspects abroad, a conflict between a House committee and the Justice Department involving the Inslaw affair, and a Senate committee seeking documents on Whitewater.

Issuing a Subpoena

Lawmakers and their committees usually obtain the information they need for legislation or oversight without threats of subpoenas. They understand that committee investigations have to satisfy certain standards. Legislative inquiries must be authorized by Congress, pursue a valid legislative purpose, raise questions relevant to the issue being investigated, and inform witnesses why questions put to them are pertinent.[38] Congressional inquiries may not interfere with adjudicatory

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[33] Id.

[34] Id. at 180.

[35] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975).

[36] McGrain v. Daugherty, 272 U.S. 135, 174 (1927).

[37] Eastland v. United States Servicemen's Fund, 421 U.S. at 505.

[38] Wilkinson v. United States, 365 U.S. 399, 408-09 (1961); Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 305 (1976).

proceedings before a department or agency.[39] Other arguments may be offered to resist a subcommittee subpoena, such as the need to protect confidential trade secrets or to protect information within the Justice Department,[40] but those justifications can be overridden by legislative needs.

Federal courts give great deference to congressional subpoenas. If the investigative effort falls within the "legitimate legislative sphere," the congressional activity—including subpoenas—is protected by the absolute prohibition of the Speech or Debate Clause, which prevents Members of Congress from being "questioned in any other place." In a 1975 case, the Supreme Court ruled that such legislative activities are immune from judicial interference.[41] A concurrence by Justices Marshall, Brennan, and Stewart did not agree that "the constitutionality of a congressional subpoena is always shielded from more searching judicial inquiry."[42] In a dissent, Justice Douglas rejected the majority's position regarding broad legislative immunity from judicial review.[43]

As a tool of legislative inquiries, both Houses of Congress authorize their committees and subcommittees to issue subpoenas to require the production of documents and the attendance of witnesses regarding matters within the committee's jurisdiction. Committee subpoenas "have the same authority as if they were issued by the entire House of Congress from which the committee is drawn."[44] If a witness refuses to testify or produce papers in response to a committee subpoena, and the committee votes to report a resolution of contempt to the floor, the full House or Senate may vote in support of the contempt citation.

Committees and subcommittees are authorized to request, by subpoena, "the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary." For a committee or subcommittee to issue a subpoena, a majority must be present, although the power to authorize and issue subpoenas may be delegated to the committee chairman.[45] Committee rules can vary the procedures for issuing subpoenas.

A congressional subpoena identifies the name of the committee or subcommittee; the date, time, and place of the hearing a witness is to attend; and the

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[39] Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966).

[40] See John C. Grabow, Congressional Investigations: Law and Practice 79-85 (1988); James Hamilton & John C. Grabow, "A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas," 21 Harv. J. Legis. 145 (1984); James Hamilton, The Power to Probe 57-78 (1977); and Raoul Berger, "Congressional Subpoenas to Executive Officials," 75 Colum. L. Rev. 865 (1975).

[41] Eastland v. United States Servicemen's Fund, 421 U.S. at 501.

[42] Id. at 515.

[43] Id. at 518.

[44] Exxon Corp. v. FTC, 589 F.2d 582, 592 (1978), cert. denied, 441 U.S. 943 (1979).

[45] House Rule XI(2)(m). See also Senate Rule XXVI(1).

particular kind of documents sought. A subpoena may state that if the documents are delivered by a particular date, the person who has custody over the documents need not appear. Congressional subpoenas are typically served by the U.S. Marshal's office or by committee staff. The Senate has statutory authority to seek civil enforcement of its subpoenas over private individuals.[46] The House relies on its rules and criminal contempt statutes.[47]

It is rare for an executive official to wholly sidestep a congressional subpoena. In 1989, a House subcommittee issued a subpoena to former Housing and Urban Development Secretary Samuel Pierce. He appeared, but invoked his constitutional right not to incriminate himself. He became the first former or current Cabinet official to invoke the Fifth Amendment since the Teapot Dome scandal of 1923.[48] In 1991, Secretary of Commerce Robert Mosbacher became the first sitting Cabinet officer to refuse to appear before a congressional committee to explain why he would not comply with a subpoena.[49]

In 1981, Attorney General William French Smith issued an opinion that analyzed how the Administration should respond to a congressional subpoena. He concluded that when Congress issues a subpoena as part of a "legislative oversight inquiry," access by Congress has less justification than when it seeks information for legislative purposes.[50] He acknowledged that Congress "does have a legitimate interest in obtaining information to assist it in enacting, amending, or repealing legislation." Yet "the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question."[51] This distinction between legislation and oversight is not so crisp. It is well established that Congress has as much constitutional right to oversee the execution of a law as to pass it. Moreover, even if such a distinction could be created, Congress could easily erase it by introducing a bill to "justify" every oversight proceeding.

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[46] 2 U.S.C. §§ 288b(b), 288d (2000); 28 U.S.C. § 1365 (2000).

[47] 2 U.S.C. §§ 192-194 (2000).

[48] Valerie Richardson and Jerry Seper, "House Committee Subpoenas Pierce," Washington Times, September 21, 1989, at A5; Gwen Ifill, "Pierce Invokes Fifth Amendment," Washington Post, September 27, 1989, at A1; Haynes Johnson, "Teapot Dome of the '80s," Washington Post, September 29, 1989, at A2.

[49] Susan B. Glasser, "Secretary Spurns Census Subpoena," Roll Call, December 12, 1991, at 1.

[50] 5 O.L.C. 27, 29-30 (1981).

[51] Id. at 30.

Correspondence

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Senate Judiciary Committee

November 18, 2008

Senate President Lyda Green
600 E. Railroad Avenue, Suite 1
Wasilla, Alaska 99654

Dear Senator Green,

In two letters dated September 19, 2008 and September 26, 2008, you received notification from my office discussing the status of the subpoenas issued by the Senate Judiciary committee. These notifications were required under Alaska Statute 24.25.030 after many of the subpoenaed individuals failed to appear before the committee.

The purpose of this letter is to inform you that some subpoenaed individuals voluntarily provided answers to written interrogatories that related to the Legislative Council investigation. Their answers were received on Wednesday, October 8, 2008, two days before the report was released.

The individuals who submitted written interrogatories are:

1. Todd Palin
2. Randy Ruaro
3. Dianne Kiesel
4. Annette Kreitzer
5. Nicki Neal
6. Brad Thompson
7. Michael Nizich
8. Kris Perry
9. Janice Mason
10. Ivy Frye

This letter is not required by Alaska Statute 24.25.030, but I think it is only appropriate for the record to acknowledge the written responses that were provided during the final days of the investigation.

Sincerely,

Senator Hollis French

Cc: Members of the Senate Judiciary Committee
David Jones, Senior Assistant Attorney General
Thomas V. Van Flein
Michael L. Lessmeier
Wayne Anthony Ross

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Senate Judiciary Committee

The Honorable Lyda Green, Senate President
600 E. Railroad Ave. Suite 1
Wasilla, AK 99654

September 26, 2008

Dear Senator Green,

On September 12, 2008, the Senate Judiciary Committee authorized the issuance of fourteen subpoenas; thirteen were for witnesses and the last was for Mr. Frank Bailey's cell phone records. Senate President Lyda Green concurred in that action, thus satisfying the statutory requirements of Alaska Statute 24.25.010(b). The purpose of the subpoenas was to assist Mr. Stephen Branchflower in his investigation into the events and circumstances surrounding the termination of former Public Safety Commissioner Walt Monegan.

Last week I reported to you on the status of these subpoenas. At that time, six of the witness subpoenas had been served and seven had not been served. Last week's report covered the six witness subpoenas that were served, and the document subpoena for Frank Bailey's cell phone records. Today I am reporting on the seven subpoenas that were not served.

The subpoenas that had not been served as of last Friday, September 19, 2008 were for Ms. Dianne Kiesel, Ms. Annette Kreitzer, Ms. Nicki Neal, Mr. Brad Thompson, Mr. Michael Nizich, Ms. Kris Perry and Ms. Janice Mason. Taking them in the order listed:

Ms. Dianne Keisel, was served with her subpoena on September 23, 2008, in Dutch Harbor, Alaska.

Ms. Annette Kreitzer was served with her subpoena on September 21, 2008, in Juneau, Alaska.

Ms. Nicki Neal was served with her subpoena on September 21, 2008, in Juneau, Alaska.

Mr. Brad Thompson was served with his subpoena on September 21, 2008, in Juneau, Alaska.

Mr. Michael Nizich was served with his subpoena on September 21, 2008, in Juneau, Alaska.