

**ALASKA STATE LEGISLATURE
JOINT MEETING
HOUSE JUDICIARY STANDING COMMITTEE
SENATE JUDICIARY STANDING COMMITTEE**

February 24, 2003

1:05 p.m.

MEMBERS PRESENT

HOUSE JUDICIARY

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative John Coghill
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

SENATE JUDICIARY

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

MEMBERS ABSENT

HOUSE JUDICIARY

All members present

SENATE JUDICIARY

All members present

COMMITTEE CALENDAR

CONFIRMATION HEARINGS

Select Committee on Legislative Ethics

Dennis E. "Skip" Cook - Fairbanks
Herman G. Walker, Jr. - Anchorage
Shirley A. McCoy - Juneau

- CONFIRMATIONS HEARD AND HELD [Confirmations of Mr. Cook and Mr. Walker addressed again on 3/5/03]

PREVIOUS ACTION

No previous action to record

WITNESS REGISTER

TED POPELY, Majority Counsel
Majority Legal Office
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Provided comments during the confirmation hearings regarding the "Ron Irwin case."

DENNIS E. "SKIP" COOK, Appointee
Select Committee on Legislative Ethics
Fairbanks, Alaska

POSITION STATEMENT: Testified as appointee to the Select Committee on Legislative Ethics, and responded to questions regarding the "Ron Irwin case."

HERMAN G. WALKER, JR., Appointee
Select Committee on Legislative Ethics
Anchorage, Alaska

POSITION STATEMENT: Testified as appointee to the Select Committee on Legislative Ethics, and responded to questions regarding the "Ron Irwin case."

SHIRLEY A. McCOY, Appointee
Select Committee on Legislative Ethics
Juneau, Alaska

POSITION STATEMENT: Testified as appointee to the Select Committee on Legislative Ethics, and responded to questions regarding the "Ron Irwin case."

ACTION NARRATIVE

TAPE 03-12, SIDE A [House JUD tape]

Number 0001

CHAIR LESIL McGUIRE called the joint meeting of the House and Senate Judiciary Standing Committees to order at 1:05 p.m. Present at the call to order from the House Judiciary Standing Committee were Representatives McGuire, Anderson, Holm, and Samuels; Representatives Coghill, Gara, and Gruenberg arrived as

the meeting was in progress. Present at the call to order from the Senate Judiciary Standing Committee were Senators Seekins, Therriault, Ellis, and French; Senator Ogan arrived as the meeting was in progress. Chair McGuire then turned the gavel over to Chair Seekins.

CONFIRMATION HEARINGS

Select Committee on Legislative Ethics

Number 0092

CHAIR SEEKINS said:

The purpose of our meeting today is joint confirmation hearings ... and ... we have several people on line, and so I know that Herman Walker is going to be on line, but ... is not yet with us. So I thought we'd start out by just giving him some time. And I think Ted Popely, majority counsel -- are you on line with us, right now, Ted?

Number 0100

TED POPELY, Majority Counsel, Majority Legal Office, Alaska State Legislature, indicated that he was on line.

CHAIR SEEKINS said, "Ted, ... if you would introduce yourself and provide what testimony you have for us this morning, we'd appreciate it.

MR. POPELY said:

Mr. Chairman, my name's Ted Popely; I'm majority counsel for the House and the Senate. I guess I'm here primarily to answer any questions that I can about my recent interaction with the [Select Committee on Legislative Ethics] more than I am to testify. I was asked to be available for questions in that I was party to the ... [Select Committee on Legislative Ethics's] recent deliberations regarding the "Ron Irwin case." He was the Senate press secretary who was recently convicted of an ethics violation after a full public hearing up here in Anchorage. And I was originally asked by the majority to represent Ron as counsel in his hearing. I did so for a period of time, and then, for a variety of reasons, withdrew my

representation of him, and participated just as an observer in his public hearing.

I think it was a two-day hearing, after which he was convicted, found probable cause - I'm not sure what ... terminology ... the [Select Committee on Legislative Ethics] uses - but he was found to have violated the statutes on certain ethical procedures relating to his job, and had an opportunity to participate in the process to some limited extent. And I understand that the several members of that committee are up for confirmation, and there may be some areas that come up that if I can assist in any way [by] relaying some of my observations as an attorney who assisted in the process, I'd be happy to do that.

CHAIR SEEKINS said, "Okay; well, ... we'll hold you on line, then, through the procedures." He indicated that they would next hear from Dennis E. "Skip" Cook, but noted that because Herman G. Walker, Jr., has a time constraint, the committees may interrupt Mr. Cook for the purpose of hearing from Mr. Walker when he becomes available via teleconference. He then asked Mr. Cook to tell the committees why he is "considering doing this job again."

Number 0341

DENNIS E. "SKIP" COOK, Appointee, Select Committee on Legislative Ethics, said:

I've been a member of the Select Committee on Legislative Ethics since 1998. So I've served two terms and was asked to serve again, and am willing to because I enjoy the work and the challenge of serving on the [Select Committee on Legislative Ethics]. The [committees], I think, [have] our biographical data. I ... could review that briefly if the [committees] wanted to, or you could simply ask ...

CHAIR SEEKINS interjected to ask whether any members wished to have that [biographical information] reviewed. Hearing no response, he suggested that Mr. Cook could skip through that [information].

MR. COOK continued, then, with his testimony:

I'm from Fairbanks; I was born and raised in Fairbanks, and have lived there except for a few years when I lived here in Juneau, and being out to school. I come from a large family in Fairbanks, and I have a large family, myself; I have 7 children and 18 grandchildren. I attended school at [Massachusetts Institute of Technology (MIT)] and then got a master's [degree] at Northwestern [University] and went to law school at Willamette [University]. And I've been practicing with the same firm since I graduated in 1970. Although the firm has changed, it's been the same; it's now called Cook Schuhmann & Groseclose, Inc., and it was called a lot of things before that, but we have a firm with 10 attorneys in Fairbanks.

I've been involved in a lot of activities in the community over the years: very active in the Boy Scouts [of America]; and in my church; and other community endeavors - Rotary Club [of Fairbanks] and so on. The work of the [Select Committee on Legislative Ethics], I think, is important. It's established by the legislature, in a sense to keep a check on the legislature itself. ... There's a lot of detailed questions to be reviewed, and it's challenging work, but I've enjoyed it and am willing to continue if I'm confirmed again. I came down in person this time because there has been a bit of controversy lately about some things that have happened on the [Select Committee on Legislative Ethics], and I wanted to be here to answer, in person, if there are any questions that surrounded what some of the members here have heard and some have not.

Number 0512

CHAIR McGUIRE said:

Thank you, Mr. Cook, for coming here today in person - I appreciate that. I'd like to preface the questions that I intend to ask you today by saying that I appreciate your hard work - that you've done on the [Select Committee on Legislative Ethics] - and I appreciate the hard work of the others that are up here today for confirmation. I think it's a tremendous sacrifice on the part of a person who is a member of the public, to give up their other livelihood to serve on the ... [Select Committee on

Legislative Ethics], so I'd like to preface my comments by saying that.

My concerns center mainly around the process itself. I believe the legislature ought to be held to highest ethical standards, and its staff as well. So, for me, it's not a partisan issue at all, and it makes it more delicate to bring up the questions I do, because it happened to be my [political] party involved in Mr. Irwin's ethical proceedings. So I want to be very careful to make sure that the record is clear, that I don't have any reservation regarding the verdict that came out or any complaints about partisan politics. My complaints go directly to the process itself.

So, with that, Mr. Cook, I'd like to ask you ..., [as] someone who has a law degree who's looked through the process, looked through the minutes, what you see as any flaws in the proceedings themselves - and what I mean is from complaint filed, all the way through selection of hearings officer, all the way through proceedings, and then ultimate results - if there are any flaws that you see in the process that we have currently in statute.

Number 0623

MR. COOK responded:

I don't see a flaw, necessarily, as long as the procedures are followed well. I know there's been a real challenge to the idea that counsel to the [Select Committee on Legislative Ethics] itself, who we look to for advice throughout the year in general terms, could then be counsel in an actual hearing. And ... that procedure has been questioned in the past, clear back in the "Jacko proceedings" ... a number of years ago. And it was held that that was alright ... - to use the same attorney - as long as that attorney, once we went into a specific hearing, was no longer the advisor to the [Select Committee on Legislative Ethics] but simply acted as the presenter of the evidence ..., and then [that] he did not have any participation, whatsoever, in the deliberation process of the committee from that point on. He was simply like an attorney in court, presenting evidence, but he didn't have any part in the deliberations.

We follow that rather carefully and, in this past "Irwin hearing," that was followed. I believe there was a statement, in the previous hearing before [Legislative Affairs Agency ("LAA")] down here, that said that - or that assumed that - he had been with us when we were deliberating. And that's simply not the case; there was no part, whatsoever, in the deliberation process. Now, if -- and there are other areas in the state, I believe, where that processes is used, where there's that same separation of responsibilities of an attorney to step aside from being a part of the advisory process and just simply being a presenter of evidence. And we've tried to follow that ... division very carefully in this past hearing. So I don't see that as a problem as long as that division of responsibility is followed.

Now, there was another kind of a challenge to the [Select Committee on Legislative Ethics's] work in ... the Irwin case. What we considered to be the violation was actually corrected by advice from the [Select Committee on Legislative Ethics] before [the complaint] ever happened. And, yet, the technical violation of the statute had already happened, and we got a complaint after the correction was made and the meeting was not held on state premises. Then we got a complaint that it should have never been scheduled there, and so on, and that resources should never have been used.

Number 0787

MR. COOK continued:

We don't have a choice about dealing with that complaint. We don't have the luxury of just saying, "Sorry, ... that event didn't happen there, so there was no violation." We had to go through the process, and we did. We said ..., "It was corrected - there's no sanctions necessary; end of story." On the other hand, the subject of the complaint wished to take it to formal hearing, in spite of the fact that there were no sanctions, and then we had to go through the formal hearing process. So, the degree -- I mean that could be considered a flaw, you know, that the degree

of the violation might set into motion a rather long and involved process, a rather careful process.

We went through the same process in the sense that was gone through in the Jacko hearing, except it wasn't as long a hearing by any means. But we still had to go through a public hearing process because we had a complaint and the person who was the subject of the complaint insisted that it go to a public hearing. But ... that can be a protection for the accused - or ... the subject of the complaint - as well as for the committee.

CHAIR McGUIRE asked, "Are you aware of any point in time where your counsel to the [Select Committee on Legislative Ethics, Brent Cole,] signed pleadings for the complainant?"

MR. COOK queried, "Signed pleadings for the complainant?"

CHAIR McGUIRE said, "It's brought to my attention, and I just wanted to find out ..."

MR. COOK replied:

I'm not aware that he signed pleadings for the complainant; I'd have to see what specific document's being referred to, but I'm not aware. There was -- oh, I'm sorry, wait a minute, I may be aware of what you're talking about. There was a pleading that was filed, and this was clarified at the public hearing, where it did say something about he said that -- it had that phrase in there, "counsel for the complainant." And it was apparently inadvertent; he apologized for that at the hearing and made it very clear that he'd never represented the complainant.

Number 0925

CHAIR McGUIRE said:

And I guess my concern - thank you for answering that - and I guess my concern, you being a lawyer, it just seems to me like at that point in time, I don't know how you go back from that, I guess is my question. And I wonder if you had any solutions or if you felt like, as chairman of the [Select Committee on Legislative Ethics] itself -- there are several places

along the process where I felt like it fell apart, and I'm wondering whether you felt like you had the tools to handle it. This is one of the places where I feel like it fell apart: ... Mr. Cole holding himself out, at least on paper, as counsel to the complainant.

MR. COOK replied:

Well, I think everybody on the [Select Committee on Legislative Ethics] ... and everybody actually involved with the whole process understood that he was, by no means, counsel for the complainant. ... That was clearly, as far as I'm concerned, inadvertent error in his office. But I don't think that the complainant ever thought that she was represented by him; ... he certainly didn't, the committee didn't think that, and I don't think that the subject of the complaint ever thought that [Mr. Cole] was representing the complainant.

In fact, the [Select Committee on Legislative Ethics] ... came down very, very hard on the complainant because the complainant had signed her ethics complaint on television, on a complaint form that said confidential. And so our initial decision in the case was probably harder on the complainant than it was on the subject of the complaint almost. We were very unhappy.

Number 1015

CHAIR McGUIRE noted that the committee is in the process of drafting a bill that will look at a new method of approaching ethics [violation] hearings. She elaborated:

It's my belief that they're quasi-criminal and rise to a higher level ... of standards and due process, then, than the other administrative hearings that are out there. And, so, as I work through that bill and my committee works through that bill, we'd be interested in any more suggestions that you have about the process. But just one final [concern] that I have, while you're here, is with regard to the confidentiality. ... One of the things ... we want to be very careful about in these ethics committee hearings, in my opinion, is that they are not used as political arenas.

I think that's very important because of the impact, not just in the short term but in the long term, for a person who is convicted of an ethical violation. As I said at the outset, I think your job is very important; we have to be held to the highest ethical standards, but we want to make sure that someone isn't allowed to simply [make an allegation] and bring us into an arena and mar our record.

My concern is, at the moment at which, that evening, ... the complainant went on Channel 2 News, and then to National Public Radio, and it was made clear to the [Select Committee on Legislative Ethics]. Did you feel that you had any power, as a chairman of that committee, to take action? In some courts of law, it's a mistrial, or other types of punitive measures take place [when] the complainant has compromised the integrity of the committee process and the integrity of the complaint. And I just wondered whether you felt like you had any power or discretion at your hands.

Number 1126

MR. COOK said:

No, we felt like we didn't, to do more than we did with regard to the complainant. We don't have jurisdiction over the complainant. She was not a legislator or a legislative employee. She didn't fall under the jurisdiction of the Act, with regard to us. All we could do, with regard to her directly, was to put ... [a] statement in our decision that said this was highly improper to ... breach the confidentiality by signing [the complaint form] on television.

On the other hand, our procedures and the charge that we've been given by the legislature says that if we have a complaint that, if valid on its face, would constitute a violation, then we have to act on that. Some people had said, "Well, gee, since she signed that in public, why didn't you just throw the complaint out?" We don't have the luxury to do that. If we have a complaint before us that, if true, would constitute a violation, then we have to deal with it

as a committee. And so we had to go through the process on the complaint.

CHAIR McGUIRE asked Mr. Cook whether there is anything the legislature could do, via legislation, that would help the [Select Committee on Legislative Ethics] deal with a compromised complaint such as in the aforementioned situation.

MR. COOK indicated that only by extending the jurisdiction of the [Select Committee on Legislative Ethics's] authority would it be able to deal with a complainant who is neither a legislator nor a legislative employee.

CHAIR McGUIRE used the analogy of search-and-seizure procedures: if evidence is obtained in violation of those procedures, it is not allowed to be used. With regard to the ethics-complaint process, even if a complaint is true, compromising the integrity of the process ought to render the complaint invalid, she opined.

MR. COOK said the legislature has to choose whether to let ethics violators go unpunished in instances when the complainant violates the process. Currently, that is not an option for the [Select Committee on Legislative Ethics]. He commented that it would be helpful if the legislature could provide a better definition for some of the terms used in the statute governing the [Select Committee on Legislative Ethics], for example, "partisan political activity."

CHAIR SEEKINS noted that Mr. Walker was on line, and asked Mr. Cook to stand by. He asked Mr. Walker to tell the committees a little bit about his background and why he is willing to accept an appointment to the [Select Committee on Legislative Ethics].

Number 1353

HERMAN G. WALKER, JR., Appointee, Select Committee on Legislative Ethics, informed the committee that he is an attorney, had moved to Alaska in 1992/1993, has worked for the Office of Public Advocacy and various law firms, and owns a retail business selling bath and body products. He said that his interest in serving on the committee stems from a desire to serve the state of Alaska.

SENATOR FRENCH remarked that he and Mr. Walker have appeared in court together when Mr. Walker was a public defender. Senator French complimented Mr. Walker on his work at that time: "I

thought that you were always well prepared, that you were fair to both sides, and, unlike some folks on the other side, you never attacked the government needlessly." Senator French said he supports Mr. Walker's appointment.

REPRESENTATIVE GRUENBERG also complimented Mr. Walker for the work he did as co-counsel in cases involving Representative Gruenberg's law firm. "I know you have been very fair and very ethical, and I appreciate your willingness to serve," he added.

SENATOR THERRIAULT opined that an earlier question posed to Mr. Cook centered around the fact that the way the system works currently, the person who would be acting in the prosecutor's role in an ethics violation is the same person who would have advised the [Select Committee on Legislative Ethics] up to the start of that proceeding. He said that there is some concern regarding whether that is appropriate. Senator Therriault asked Mr. Walker to provide his thoughts on whether the prosecutor's role should be completely separate.

SENATOR THERRIAULT also asked Mr. Walker:

How you would compare it to, if you were to go into court right now defending a client and you knew that the person that's prosecuting the case works very closely with the judge on a daily basis, and perhaps they're no longer conferring or they've separated themselves on this particular case, but you know that there's ... years of interaction between the prosecutor and the judge and his or her staff, and whether it would be your suggestion that we should take some formalized steps in the statutes to make more of a separation there.

Number 1593

MR. WALKER replied:

It's an interesting question because, coming from a criminal-defense background, you always have some concerns about ... the nature of what you're just stating. But we work so closely with the prosecutors and the judges, and in such a small community, there's going to be some overlap. Now, my concern, of course, is the inherent nature of the conflict, which is just as you stated, that you have someone who's investigating the case, possibly bringing the case

forward, and yet they're also working hand in hand with the judge in a sense.

... I was involved in that process. I was on board "pro tem" throughout Mr. Irwin's hearings, and I felt that we were stuck [with] no other means to do the situation, based on the resources and the way the law is written. I believe if the legislature is going to look at this, within the framework that [you have] stated it, I think we might, in fact, want to look at possibly having a separate individual, which, of course, would also raise the cost of these hearings on one hand. I think that under the circumstances that we were faced with, I think Mr. Cole did an excellent job in separating the two and doing his job as [he] saw the need to.

But I think this is something the legislature might want to look at, because there is an inherent conflict, on some level, because he is involved in the [prosecutorial] process and then involved in the hearing at the same level. I don't have any exact suggestions at this time, but I think it is something that the legislature might want to look at for the future.

Number 1684

SENATOR THERRIAULT remarked:

The other issue that was brought up was the lack of a good, solid definition for "partisan political activity." And I'm just wondering if you have any recommendations or thoughts on how that can be fleshed out, because, as Mr. Cook indicated, ... the [Select Committee on Legislative Ethics] works with the statutes as they currently read. And it's been suggested that that's an area that needs further definition.

MR. WALKER said:

I would agree with Mr. Cook - we are stuck with what we're dealt with. As an attorney, of course, and I would assume as a politician, where you have a two-house system, you're going to get interpretations on all sides. I'm going to leave that defining moment up

to you to decide, because, at this time, I would not know how to go about trying to clearly define what is "partisan political activity." I think on some level the framework would need to be done within what the job is - what the nature of the job is. One of the questions that did come up was ..., clearly, "What was the role of the lieutenant governor as the lieutenant governor versus her role as a gubernatorial candidate?"

You may find some guidance by looking down that line of reasoning when you try to define what "partisan political activity" is. Then that could be overly burdensome, on the other hand, because then you have to look at everyone's role within the whole process of the legislature, and it could just get ... -- (indisc.) they could get out of hand and crazy. So, I think we were stuck with what we had, I think it (indisc.) clearly needs to be redefined, and I don't know where to begin with that process because it's a big question and you're going to have opinions on both sides.

Number 1757

SENATOR THERRIAULT said:

I'm just trying to remember back to when a lot of these statutes were hammered out here in the legislature, and it seems to me, although I've not gone back and reviewed extensively the committee records, that the "partisan political activity" was to refer to ... running campaign activities out of your office or using your staff to field campaign phone calls, and to make it clear that we were supposed to separate that kind of activity.

The difficulty comes in the fact that we live in a political system, and the ... particular activity that was in place -- I know that Senator [John] Torgerson tried to bring an explanation to the [Select Committee on Legislative Ethics] on just ... what it was that we do on a daily basis, and I'm wondering how you separate ... the purely campaign-type activity -- and right now the majority versus the minority is the way we spar on a sort of a daily basis.

That's the way that the system is made up. But the majority is comprised of Republicans and Democrats - at times, due to coalitions - so it doesn't break right along a Republican and Democratic line. So, I guess I'm just wondering -- you can let me know what was on your mind as far where you were going to draw that line.

MR. WALKER replied:

Being new to the [Select Committee on Legislative Ethics], I pretty much took my calling from other members - and being new to the process. ... I had my own interpretations of it. A couple of things that came into my mind, without getting into any of our exact deliberations, was clearly the lieutenant governor had job duties that she had to meet. This was a gubernatorial candidacy, and one of the issues that came before us was, ... was it part of the legislative response to react the way they did to a gubernatorial candidate's speech. In other words, calling out, using the e-mail to establish a press conference to respond to a gubernatorial candidate.

Number 1877

And not fully understanding the process of what this legislature [does], that was one of the questions I had in my mind: was this an appropriate response some of them made under the given circumstances? It was not a response to [then-Lieutenant Governor] Fran Ulmer's budget, it was a response to [a] gubernatorial candidate's proposed budget or proposed fiscal plan. So, for me, ... I needed to understand the process of what a natural legislative response would be. And once I -- during some of the hearings ... Senator [Dave Donley] and different people tried to give me the necessary information for that process to be understood. And that's pretty much where I came down. I need to understand the process - I need understand what you did, when you did it, and was this something that you would normally do - in order for me to help make my decision.

SENATOR THERRIAULT asked Mr. Walker whether his review of other issues that have come before the [Select Committee on Legislative Ethics] have brought any other area of the statutes

to his attention as needing further clarification or structural change.

MR. WALKER indicated that currently, since he has not yet had a chance to thoroughly review the remainder of the pertinent statutes, he did not have any particular suggestions. He surmised, however, that there are probably quite a few areas that need more definition and clarity in order for the [Select Committee on Legislative Ethics] to do its job.

CHAIR McGUIRE asked Mr. Walker, "Do you believe that the defendant, if you will, the person who's been claimed against, ought to have counsel?"

MR. WALKER said: "I believe they have a right to be represented at this hearing, yes, I do. Whether the state should pay that, I don't have a comment on."

CHAIR McGUIRE asked, "Were you aware that Ted Popely, who's the majority counsel, was acting as counsel to Mr. Irwin during the proceedings?"

MR. WALKER said yes.

CHAIR McGUIRE asked, "At what point did you become aware that Mr. Popely was asked not to be counsel to the judiciary or face ethical charges."

MR. WALKER replied, "Not 'til the actual hearing began."

CHAIR McGUIRE said, "Can you tell me a little bit more about that, how you became aware of it?"

Number 1998

MR. WALKER replied:

At some point, I think it was [as] the actual hearing began or some point not too far before that, it just was brought up. Ted came before us and wanted to speak about a letter that was sent to him, and I'm not sure [who] the letter was from, from the [Select Committee on Legislative Ethics] regarding -- and if I understand the nature of the letter, the letter didn't actually state that he could face ethical charges. I think the nature of the letter was, it'd been brought to the [Select Committee on Legislative Ethics's]

attention that there could potentially be a violation. But I found that out just ... shortly before the hearing or at the time of the hearing.

CHAIR McGUIRE asked:

Just having practiced as an attorney and all the things we're talking about, about making this process better, do you feel - after I think [it] was roughly three months of having represented Mr. Irwin through the ins and outs of the proceedings - that it was appropriate for the committee to send him a letter advising him - of course, now his "bar card" is on the line - that if he proceeded to represent Mr. Irwin, he may be subject to an ethical violation? Do you think that would have a chilling effect on Mr. Irwin's representation?

MR. WALKER replied:

Well, it obviously had some effect, because Mr. Popely decided not to represent him any further. And I don't have -- if that's what your question is. If your question is, do I think if that situation rises again that it's going to have any chilling effect on whoever represents someone in that similar situation, well, I think it possibly could, when you start throwing around ethics violations. But I'm not sure that that's what the nature of the letter was intended. And I don't have enough information to comment on it.

Number 2188

CHAIR McGUIRE asked Mr. Popely to briefly describe the letter he received and at what point in the process he received it.

MR. POPELY said:

I, ... in the beginning, was asked to represent Ron Irwin as his attorney. He wanted to go to a full public hearing relating to his violations, and I agreed to do that. I cleared that with my employers. [It] appeared to be appropriate, being that the violations occurred within the scope and course of Ron's normal day-to-day duties as press secretary. And shortly before his hearing, I got a letter from, I think it was signed by Joyce Anderson, the [Select

Committee on Legislative Ethics's] staff, on behalf of Chairman Cook, suggesting that there were, I believe the exact phrase in the letter was, "potential ethical ramifications" of my continued representation of Mr. Irwin. That's all I got.

It definitely had a chilling effect in that I did ultimately make the decision to withdraw my representation, for several reasons: one, to protect myself, and, two, to keep the focus away from me and on the merits of Mr. Irwin's case. ... You raise the question, and I think there is an issue there for discussion; I mean, what's done is done, it's over with, Ron hired an attorney. Ultimately, part of those expenditures were paid by the state. Part of the problem with the order that it occurred, I suppose -- the troublesome part for Mr. Irwin having to retain private counsel at the eleventh hour was that the letter came without any support, came without any legal basis, came without any research suggesting that there was a reason for it.

Number 2027

MR. POPELY continued:

And, as has been suggested, it came from outside the [Select Committee on Legislative Ethics] somewhere; I don't exactly [know] how that would happen. Again, these [Select Committee on Legislative Ethics's] processes are supposed to be highly confidential, I don't know who besides the committee members knew that I was representing Mr. Irwin at that point. I also don't know who the anonymous person who may have raised this issue was.

I asked Legislative Legal [and Research] Services over the Christmas holiday, which was shortly before the formal hearing began, to prepare an opinion for me based on whether or not I did have an ethical problem representing Mr. Irwin, and the answer came back that I did not, that it was appropriate for me as a state-paid employee to provide legal representation under those circumstances. So, despite that, I withdrew my representation. Ron was able to find a private attorney at his own expense, and we went forward, and it is what it is.

CHAIR McGUIRE asked, "What changes would you make with respect to representation?"

MR. POPELY said:

Based on the memorandum that was prepared by Legislative Legal [and Research Services], there are circumstances where it's appropriate for a legislator or an employee to receive paid representation. I think there are circumstances where it would be inappropriate. For example, if Ron Irwin was accused of something that benefited him personally, with no respect to his official duties, the answer is probably no, ... it would be inappropriate for the state to provide representation for him.

But if a legislator or a legislative employee had been accused of an ethics violation within the normal course and scope of his employment, I think it is appropriate for somebody to represent that person. ... Mr. Cook made much of the fact that Ron requested a full formal hearing. I don't think that that's unusual at all. It's only unusual in that it doesn't happen very often. Whether the [Select Committee on Legislative Ethics] recommended sanctions against him or not, the man still has an ethics violation on his permanent record.

Number 2251

MR. POPELY concluded.

And whether his future intentions included pursuit of different professional activities or civic organizations, maybe even public office, it's a significant impairment on his permanent record, and I think somebody would be foolish to proceed with a formal hearing without proper representation.

CHAIR SEEKINS, addressing Mr. Walker, said:

You said you have a problem defining "partisan political activity." But let me ask you this: based on the findings of this last inquiry, do you believe that a majority response prepared by a majority press aide to an allegation against an action taken by a

legislative committee is a "partisan political activity?"

MR. WALKER sought clarification: "Are you asking me to give you an answer regarding what went on in deliberations?"

CHAIR SEEKINS said, "No, just asking you if, in your opinion, that constitutes a "partisan political activity."

MR. WALKER said:

It was a tough question for me. I believe that, based on my understanding, that ... you have a right to respond to whenever the other side gives a policy statement of some sort. The question for me under this scenario was, ... was it a natural thing that the state legislature's majority would have done under (indisc.) circumstance. If it's something that they would normally have done in their course of business, then I wouldn't have any problems with it being a ... nonpartisan political activity, it's just a part of you doing your job. And that's [where] I would probably leave the question. If it's part of what you do, then no, I don't have a problem with it. I would see that [as] being not "partisan political activity," but just a response, as a legislature majority body, ... [in] your normal course of doing business.

Number 2325

CHAIR SEEKINS said, "So any public allegation attacking a decision made within a legislative committee could, then, in your opinion, justify a response from a majority press aide, without it being an ethical violation."

MR. WALKER said, "Yes, I would think so."

CHAIR SEEKINS said:

I just wanted to take a look at one other thing. ... As a public defender, in your past history, would you feel comfortable going to court knowing that an advisor to the jury, a trusted advisor to the jury was the ultimate selector of the judge and then became the prosecutor, would you feel comfortable for your client under those circumstances?

MR. WALKER replied: "Let me make sure I understand your facts scenario. If a trusted advisor to the jury?"

CHAIR SEEKINS said, "Right."

CHAIR MCGUIRE added, "Counsel."

CHAIR SEEKINS then remarked:

As counsel. Let's say that that -- we know that the jury doesn't hire legal counsel, but let's just say that they had someone here instructing them and that that was counsel to the jury, and that that same counsel basically selected the judge and then became the prosecutor, would you feel comfortable for your client under those circumstances, as a public defender?

MR. WALKER replied: "As a public defender, my answer would be no. There would be no way I'd feel comfortable under the scenario that you presented, because it has its inherent biases. That's just the appearance of biasness and conflict of interest."

CHAIR SEEKINS asked, "Wouldn't that same basic bias carry over into the scenario that was ... compelled upon the hearing ... in this [case]?"

TAPE 03-12, SIDE B [House JUD tape]

Number 2387

CHAIR SEEKINS continued: "I'm not accusing anyone. I'm saying it appears that the process may ... need to be ... changed here. But wouldn't that same inherent -- would you feel comfortable if you were Mr. Popely, now, and you were ... taking that spot for your client under this circumstance?"

MR. WALKER responded:

Under the circumstance that was presented to us, Mr. Cole was an advisor as to whether or not a violation had been -- and ... I'm thinking out loud just trying to clarify your question factually in my mind. Mr. Cole was advisor to the [Select Committee on Legislative Ethics] as to whether or not a violation had been committed. Then he prosecuted - in your terms, using your language. The way this system is set up, and it's my understanding -- like I said, once

again, I followed the people [who'd] been on the [Select Committee on Legislative Ethics] further, I didn't really question whether Mr. Cole had an inherent conflict or not. I can understand where Mr. Popely might have some hesitation based on the factual scenario that you've presented, if you're trying to equate it to the public defender scenario. But I can't comment as to whether ... that affected Mr. Irwin's case or not, at this time.

CHAIR SEEKINS said:

I'm not trying to cast aspersions on the ability for anybody to come up with ... a proper decision, or to accuse the people that were involved. It just seems to me that ..., where I grew up, that [we would have] ... called that a kangaroo court. ... Without casting any aspersions on the people, I'm just saying it would have made me nervous if I was the defendant. ... And we're not trying to attack that; ... I guess we're looking at the process. And part of our responsibility as a legislature, it appears to me, is to make that process as lily white as we can make it, and make it seek out absolute justice in the final decision.

Number 2309

And, to me, there's a color to this process that just doesn't seem to be lily white - ... not interjecting anything for the judgment or the credibility of the people that were involved. It's a process [that] just doesn't seem to ... engender a lot of good feelings, in ... the back of [my] mind, about this. So, I was just wondering if you felt that that process could be improved some to eliminate that perception.

MR. WALKER replied:

Well, yeah, I definitely think the process could be fine-tuned. I've only been on the [Select Committee on Legislative Ethics a] very short term, but ... the way it could be fine-tuned was ... you allocate funds so that a neutral third party - like you said, independent prosecutor, which they've done in other scenarios - gets retained to prosecute the case and the advisory counsel still remains as advisory

counsel. ... It's a simple fix, and I definitely agree with you that the process could always be fine-tuned. The statutes could be fine-tuned to make our job more clearly defined.

(Indisc.) ethics is a murky business. ... And this scenario is much different than me as a practicing attorney; ... we have ethics laws that we have to abide by. But it seems like this ethics in this scenario is a little bit ... murkier than what I'm used to dealing with as an attorney, mainly because of the language that's in the rules itself, and the process. So, I totally agree with you, it can definitely be refined to make [it] clear, easier, and - to use your words - lily white.

CHAIR SEEKINS said, "My intent is that the [Select Committee on Legislative Ethics] act in a totally ethical manner in investigating ethics complaints; ... that's my intent here."

Number 2229

MR. WALKER said, "And I agree with you, but I would also have to say that I don't think any of the processes that were done in this scenario was done with any malfeasance or unethical intent - at least from my perspective.

CHAIR SEEKINS countered: "Probably because you were involved and knew the players, but if you didn't know the players, you might have a different viewpoint." He then asked Mr. Popely whether he'd adequately described the perceptions that Mr. Popely had, coming into the hearing.

MR. POPELY replied:

Mr. Chairman, yes. ... The issue's been raised by several people to me and by myself during the proceeding, and you've articulated it perfectly. The appearance of conflict is evident, very evident. And let me preface it by saying this is the way administrative hearings are conducted in Alaska and in other states. It's not -- this isn't the first administrative process where the counsel to the administrative trier of fact is also the hearing investigator/prosecutor, depending on what the tribunal is. However, in this case, ... you as chairman of the Senate Judiciary [Standing] Committee,

you have raised a very good issue for people to consider.

... If people are going to go forward with ethical hearings and full public processes, is it appropriate? ... Senator Therriault raised a good analogy. In a criminal case, certainly, the defendant in a case [is] not going to be comfortable with, to use an analogy, the law clerk to a judge - the person the judge or the jury, in Senator Seekins's example, turns to for advice, for counsel, for interpretations of law, for interpretations of procedure throughout the process - [who] on the day of the trial shows up and changes hats and says, "I'm no longer advising the judge; starting from this moment forward, I'm exclusively acting as prosecutor."

Number 2149

MR. POPELY continued:

Nobody's said that [the Select Committee on Legislative Ethics] did anything wrong in this procedure. Nobody could ever know that except those people. The point is, you're trying to avoid any appearance of impropriety, and it's from a defendant and from the public's perspective that we have to make that judgment. Does the scene look fair and reasonable to the person who has to stand there and defend himself? And I think you answered the question yourself; the answer is clearly no.

I, personally, would not want to be prosecuted by the person who had been providing legal advice and counsel for weeks and even months to the people who are going to hopefully make the decision about my violation. ... It's easy to see the conflict, very easy to see the conflict. And it's a money question. Of course it costs more, and that's a question the legislature has to make as policy makers: What's the price of this ... ethics process to look as impartial and as proper as possible?

REPRESENTATIVE GRUENBERG said: "Mr. Popely, I wasn't a member of the legislature when this occurred, I'm not too familiar with the situation, so pardon my ignorance if I ask you some basic questions. At the time, were you a legislative employee?"

MR. POPELY replied, "Yes, and I still am."

REPRESENTATIVE GRUENBERG asked, "And what was your position?"

MR. POPELY said, "I'm legal counsel for the Senate and House majority."

REPRESENTATIVE GRUENBERG asked, "Was it within your job description to be defending this person?"

MR. POPELY replied, "My job description evolves daily, and I was instructed by the majority leadership to pursue a defense on behalf of Mr. Irwin; so, yes."

REPRESENTATIVE GRUENBERG asked, "Do you think it was appropriate for the state to be paying for the legal defense of this individual?"

Number 2074

CHAIR SEEKINS interjected to say: "Basically, the state decided they were going to do that, [Representative] Gruenberg, already, so, you know, I don't know whether it's appropriate or not, but I believe the state has already made that commitment in earlier committee hearings. Am I correct?"

REPRESENTATIVE GRUENBERG said, "I'm just wondering if Mr. Popely would answer my question."

CHAIR SEEKINS told him to go ahead.

REPRESENTATIVE GRUENBERG repeated, "Mr. Popely, do you think it was appropriate?"

MR. POPELY replied:

Yes. Specifically, in order to answer that question as objectively as possible, I asked Legislative Legal [and Research Services] to provide me an objective legal opinion. As you know, they are a nonpartisan legal organization designed to answer questions of that nature. And their answer to me was unequivocal: "Yes, it's appropriate." When Mr. Irwin, as press secretary, was acting within the scope/course of his employment, and was accused of an ethical violation based on that, it's appropriate for the state to

provide a defense. Should his violation have taken a different form, for example, had he done something that benefited him personally and exclusively and had nothing to do with his job, say he was trying to promote his business on his own state computer, or something of that nature, the answer would be no. So, in my opinion, yes, I agree with Legislative Legal [and Research] Services' opinion that it was appropriate ... at the time.

CHAIR SEEKINS again interjected to say, "And the Legislative Council has already agreed with that as well, and authorized the payment of that fee."

Number 2029

REPRESENTATIVE GRUENBERG said, "I appreciate your comment Mr. Chairman; I would also appreciate being allowed to finish my questions."

CHAIR SEEKINS replied, "No problem; please finish this question and we'll move on."

REPRESENTATIVE GRUENBERG said:

Thank you very much. And, again, I certainly wasn't here, and I'm just trying to improve the process too. Do you think that there should be some standards set up as to how these services -- or whether the state should continue to pay that? My question is, do you think that that is appropriate?

MR. POPELY replied, "I do think that's appropriate."

CHAIR SEEKINS, after acknowledging that Mr. Walker had another engagement to attend to, thanked him for participating.

The committee took an at-ease from 2:07 p.m. to 2:14 p.m.

CHAIR McGUIRE asked Mr. Cook to comment on the letter sent to Mr. Popely. "There was a question about who raised the concern regarding Mr. Popely's representation, ... and Mr. Walker also made mention of it, that he wasn't sure where that complaint came from," she added.

MR. COOK responded:

Okay. Let me, perhaps, try to put it in perspective - what happened. There are a couple of things that were important about this hearing. One was that we wanted to complete the hearing before the turnover in ... [the Select Committee on Legislative Ethics] and before the legislative session ... started - when our terms ran out. So, we had a fairly short timeframe, particularly because of the holidays; ... this thing was shaping up over the holidays, and we needed to keep our - I think it was - January 8 hearing date or we were going to lose it and have a complete turnover in the committee.

Number 1912

Mr. Popely had been representing Mr. Irwin, and that was fine with the [Select Committee on Legislative Ethics]. However, the [Select Committee on Legislative Ethics's] staff did get several inquiries and questions as to whether it was appropriate for him to be represented by counsel. We certainly didn't want that issue to be raised for the first time when the hearing convened, and to throw the hearing completely off track, and cause us not to be able to finish our work.

So, we were debating what to do to make certain that that didn't happen. We contacted [Legislative Affairs Agency (LAA), Legislative Legal and Research Services], and although we couldn't discuss the case specifically with them, we described the general situation [and asked], "What do you do in this situation, when [we're] getting inquiries that may result in complaints and we're headed for a hearing and we don't want it to happen?" And there was some discussion. And a letter was written, and actually with the participation of LAA [Legislative Legal and Research Services] as to the wording of it.

And what it said was -- I don't have a copy of the letter, I'm sorry I don't, because it's been talked about a lot, but nobody's ever given you a copy; ... the people that went to ... the past hearing talked about the letter but didn't ever give a copy of the letter. The letter simply said, "We've received a couple of inquiries as to whether this is appropriate; this should be checked out before the hearing." That

was what that letter said. Indeed, ironically, as Mr. Popely said, they went to LAA [Legislative Legal and Research Services], got an opinion from the very same person who helped draft the [first] letter, [who then] said it's perfectly fine.

Number 1862

MR. COOK continued:

We [couldn't] have cared less. ... We just didn't want the issue to come up at the hearing and derail our hearing. We were not trying to pick counsel for anybody; we were trying to make sure an issue didn't come up. And I don't know why, when they got an opinion from LAA [Legislative Legal and Research Services] that said it was perfectly fine for him to represent him, that he stepped back. That was certainly not our intent; we simply said, "Check it out so you don't face future ethical complaints from somebody." And I'm not at liberty to say who those came from; I don't know who they came from. They came into our staff, and there were several. So, it was a concern to people who were in a position to make future complaint. That was one area.

There's one other area ..., perhaps, that came up in the interim that I could just comment on. And that was the administrative versus criminal or quasi-criminal nature of the proceedings. In the past, during my time on the [Select Committee on Legislative Ethics] - and I think even before, clear back to the beginning of the [Select Committee on Legislative Ethics], when we had some major cases like the Jacko case and the Sanders case - they've been treated as administrative procedures.

MR. COOK concluded:

And that's what the question is now ...: should we continue to treat them as administrative procedures, where it's appropriate - ... in that setting, an advisor to the [Select Committee on Legislative Ethics] oftentimes does also act as a presenter of evidence at a hearing - or are we going to treat it more as a criminal or quasi-criminal proceeding. And that's ... certainly appropriate to be looked at. In

the past, we haven't thrown around words like "defendant" and "prosecutorial" and so on. It's been an administrative proceeding, not cast in criminal terms. But if the legislature wants to consider this a criminal proceeding or a quasi-criminal proceeding, then it would be appropriate to separate those functions out.

Number 1763

CHAIR MCGUIRE thanked Mr. Cook for his testimony, and said:

That's why it's my intent to just tackle the [Select Committee on Legislative Ethics] versus the entire Administrative [Procedure] Act as I know [Senate] President Therriault is. I believe that it is different, and I believe it is a quasi-criminal proceeding because the consequences are so severe, professionally and so on. ... I recognize you were dealing with very limited precedents in this area of having gone to a full trial and so on. But it's clear to me that we're not doing the complainant justice, and we're not doing the person who's being complained against justice in the process, and the public.

SENATOR FRENCH said, "I just had a question about the letter that was sent from Legislative Legal [and Research Services] authorizing Mr. Popely to represent."

MR. COOK remarked, "I've never seen it; it was never presented to the [Select Committee on Legislative Ethics]; we've never ..."

CHAIR SEEKINS interjected to say, "(Indisc.) a copy here."

MR. COOK replied, "Well, I've asked for it before and it would not be released to the [Select Committee on Legislative Ethics] by the ..."

CHAIR SEEKINS again interjected to say, "I just got a copy here, Senator French."

CHAIR MCGUIRE informed Mr. Cook that committee staff would make a copy of the aforementioned letter and distribute it to him.

SENATOR FRENCH said, "And really my only question had to do with timing." He confirmed that he was referring to the letter from

Barbara Craver to Senator Halford, attention Ted Popely, and that this letter is in response to Mr. Popely's request ...

CHAIR SEEKINS interjected to say: "The letter that Mr. Popely received and then he requested that the [Legislative Legal and Research Services] give him an opinion. Is that correct, Mr. Popely?"

MR. POPELY replied, "More or less, that's correct."

Number 1683

SENATOR FRENCH queried: "And this is December 23, 2002? And this was subsequent to the hearing/trial of Mr. Irwin?"

MR. COOK said, "No, no, it was before."

SENATOR FRENCH asked, "And how much before?"

MR. COOK replied:

Well, I think the hearing was on the 8th of January, I believe. And I think the letter that Ms. Craver helped us draft to Mr. Popely was just a few days before this. So they rather promptly got an opinion that it was fine, and yet he stepped back for some reason and they got other counsel.

SENATOR FRENCH asked Mr. Cook and Mr. Popely if either of them knew when it was that Mr. Irwin secured Mr. Jacobus to represent him.

MR. POPELY said:

I don't know the answer to that. But in response to the first question - why did Popely withdraw - the [Legislative Legal and Research Services'] opinion is not binding on the [Select Committee on Legislative Ethics] in any respect. So the reason I withdrew was because I have no idea what the [Select Committee on Legislative Ethics] is going to determine is or is not an ethics violation. All I have is guidance from [Legislative Legal and Research Services].

And the fact that the same attorney who drafted that opinion is the same one who helped with the letter, I think suggests even more strongly that the letter was

a little too terse and bordering on irresponsible to say -- what the letter said - I don't have a copy in front of me, either, but I remember verbatim - it says that there are potential ethical ramifications that have been raised.

Number 1599

So, yes, I withdrew my representation, even though I had an opinion from the same person, apparently - I'm learning that, as I'm listening right now. If the [Select Committee on Legislative Ethics] received the same advice that I received, that it was appropriate, I'm still left wondering why I got a letter saying there are potential ethical ramifications.

And I don't know who outside of [Mr. Cole], advisor to the [Select Committee on Legislative Ethics], knew that I was representing Mr. Irwin. And I got the distinct impression that the [Select Committee on Legislative Ethics] would have preferred, and Mr. Cole would have preferred, if Mr. Irwin attended his hearing unrepresented. If you want me to come right out and say it, that's the problem I have with the whole "letter" scenario.

SENATOR FRENCH noted, "We don't have a copy of the letter that you received, which scared you off, so to speak."

MR. POPELY replied, "I'm sure it's there, floating around somewhere, and I can make arrangements to get a copy to you, if you'd like; I'm sure Mr. Irwin has it in his file, he's got a complete file (indisc.)"

MR. COOK said the [Select Committee on Legislative Ethics] could certainly provide a copy to members. In response to comments made by Mr. Popely, Mr. Cook said:

I believe the letter suggested that he should check to see if there were any ethical violations. The letter certainly didn't say that the [Select Committee on Legislative Ethics] had found that there were any ethical violations. It said, "We've got these complaints - you might want to check this out to see if there's any ethical ramifications to this representation." And that's all the letter said.

Number 1545

REPRESENTATIVE GARA said:

Let me ask the Chairman's permission. When I came here, this hearing was noticed as a confirmation hearing. I didn't realize that we were going to spend so much time looking into the Ron Irwin case. But now I have questions about the Ron Irwin case so I can understand everybody's concerns about that case. So, ... I have a few questions that I'd like to direct at Mr. Popely.

CHAIR SEEKINS said:

Well, why don't we finish with Mr. Cook, here. I mean, the reason that we are bringing ... this case in, I believe, has to do with the -- we are considering the confirmations and the actions, probably, of some the folks that are in front of us for confirmation [in regard] to this particular case. And while it's a little broader than maybe it was noticed, I think it's -- rather than getting too much more into this line with Mr. Popely, I'd like to address the folks who've traveled here today for confirmation and any particular concerns we may have with that process, if we could. And we can reserve some time toward the end, if you'd like, for Mr. Popely.

REPRESENTATIVE GARA said:

That would be fine. Then I do have some questions for Mr. Cook. Thank you, Mr. Cook. And I didn't study the Ron Irwin decision on my way coming in here, so with so many questions focusing on the findings against Mr. Irwin, I guess if I could ask you to summarize the [Select Committee on Legislative Ethics's] conclusions and the legal basis for them, that would help me understanding whether or not there are valid concerns about those findings.

MR. COOK noted that since the [case] had already been through a public hearing, there was no longer the need for confidentiality that there would have been otherwise; therefore, he remarked, he could talk about most of what happened, though perhaps not so

much about [the Select Committee on Legislative Ethics's] deliberations. He said:

The case arose when Fran Ulmer made a speech out in Eagle River presenting her fiscal plan, to be implemented if she were elected governor. In response to that, Ron Irwin was contacted by Representative Mulder - and he was the Senate-side press secretary, but he was contacted by Representative Mulder - who said, "We have a response to that planned for the Republican Party headquarters." And he was asking Ron to set that up. Well, Ron Irwin -- there was considerable discussion about who was going to participate in it, and ... Ron Irwin decided that it was a legislative response to [then-Lieutenant Governor] Ulmer's [speech], so it was okay for that to be held in the Legislative Information Office [LIO].

Number 1391

Quite frankly, what happened was that we began getting calls about that - the [Select Committee on Legislative Ethics] - as to whether this was appropriate to be holding this in the LIO. Staff and I took a look at it, decided that Fran Ulmer's speech was clearly a political campaign speech, this was clearly a political response - wasn't appropriate to hold it in the LIO - and a letter was sent saying this is probably something that should not be held there. And it wasn't; it was changed.

Then we got a complaint, afterwards, that ... state resources should never have been use to set it up or to plan it there in the first place. That was the complaint we dealt with, and all the way through. And, ultimately, the [Select Committee on Legislative Ethics] decided that minimal though they had been in the sense of using the state e-mail to schedule this thing and so on, that there had been a technical violation. But it had been corrected. No sanctions. And that was our initial finding. Then Ron Irwin wanted that to be the subject of [a] public hearing; we went through a public hearing and, essentially, upheld that decision.

MR. COOK continued:

There was considerable evidence taken as to a lot of things, some of which was what were Fran Ulmer's duties ..., as lieutenant governor, with regard to presenting fiscal plans. And there was some evidence that that wasn't part of her job duties, ... and [that] it was clearly a campaign speech out there. It was talking about what would happen, ... not what would happen within the administration she was currently working with, but what would happen under a future administration if she won. So, in essence, the [Select Committee on Legislative Ethics] drew a line and said even though "partisan political activity" may be a little hard to define, holding a press conference using state facilities in response to a clearly campaign speech is crossing the line.

Number 1287

MR. COOK went on to say:

Now, Senator Torgerson, who some of you heard from before at the LAA hearing, wrote a dissenting opinion to our opinion, and he raised a question a number of times. And I think he raised it in that LAA hearing. He said, "Does that mean that a legislature can't answer questions to constituents about campaign matters if the constituent calls them at their legislative office?" For example, if somebody had called a legislator ... to ask questions about the speech given by Fran Ulmer out in Eagle River, would it be inappropriate for the legislator to answer that question.

And we said four or five times in that hearing, "That's not what the [Select Committee on Legislative Ethics] is addressing." That's not a problem. A legislator can always answer constituent questions, no matter what the subject matter, if a constituent is calling them in their legislative office. There are certain campaign things they can't do. But that's considerably different from calling a press conference in response, and so that was where we broke with the difficulty of "partisan political activity." A press conference was felt to have been definitely a partisan political response to a campaign activity. But we certainly didn't try to place any limits on the

ability of a legislator to respond to constituents about any subject matter.

REPRESENTATIVE GARA said:

Thank you, Mr. Cook; that explains the first question I had. So, in essence, we have Lieutenant Governor Ulmer running for governor; she gives a campaign speech; we have certain members of the Republican Party who want to respond to her campaign speech; and the ruling, in essence, was that they were not allowed to use state resources to essentially throw back a campaign salvo against what was a campaign speech. And ... so, ... the legal lynchpin, the rule that would have been violated by that had they used state office space to do that, that's this rule governing "partisan political activity?"

Number 1186

MR. COOK replied:

Right. Can't use state resources for "partisan political activity." Now, there are some real ironic aspects to that law. For example, in our hearings, it became clear to us [in the Select Committee on Legislative Ethics] that both the legislative majority and the minority have press secretaries. And the press secretaries' responsibility is to make ... the legislative members of particular parties look good. And the question was raised, "Isn't that 'partisan political activity' in and of itself?" And it probably is. [It's a] tough question. So, ... that's where there are some things the legislature might want to look at. You've prohibited partisan political activities and yet you employ people who are specifically paid by state resources to perform those.

SENATOR THERRIAULT said:

I think that is why ... Senator Torgerson dissented. And I think that's why there's been concern, here in the legislature, on the structure of the statutes, the definitions of the statutes, and ..., from this particular case, what we might do to clarify and draw the lines in a brighter manner. Mr. Chairman, I know that generally, we have names that are proposed for

different commissions and we look at the resume and we look at a person's work history, and hopefully ... whoever's suggested the name has looked to see if there's DWI [driving while intoxicated] violations or ... criminal history.

But when we have instances like this, where we've got members whose names are proposed and we can look at the history - similar to the Board of Fish nominations that we've gotten, there's very controversial decision made recently - that I think that when the overview is done, there are going to be questions on that particular meeting and the decision - the thought process - and so I don't think that asking questions of a particular case, here, is out of line for this hearing today.

Number 1098

SENATOR THERRIAULT continued:

I think what I've discerned from the discussion so far is, Mr. Cook, ... he says, "We've got the statutes, ... there might be some structural problems with the statutes, but that's what ... we felt that we were bound to and we try to stick to those statutes." And I applaud him for that. The issue, though - I just want to go back - weren't there also some ... campaigning-activity charges that were leveled in this case, too? And the [Select Committee on Legislative Ethics] committee decided to dismiss them, didn't they? Weren't there a number of allegations, and the campaigning stuff was dismissed.

MR. COOK replied:

That's one area of the statute that could probably stand to be cleaned up a little bit; ... there's a section that ... mentions "partisan political activity" and then mentions "campaign" down below. And the committee ended up proceeding under the "partisan political activity" as opposed to the "campaign". We weren't in the campaign period, and the person running for office -- the campaigning part of it seemed to apply to candidates running for office. Ron Irwin wasn't a candidate running for office, so the campaigning part was not proceeded

with. It was under the "partisan political [activity]".

SENATOR THERRIAULT said, "That's one of the things that was confusing to me ...: if this was a an activity to influence ... then-Lieutenant Governor Ulmer's campaign, if the campaign stuff was all dismissed ..."

MR. COOK said, "I think the committee looked at the campaign portion of the statute as applying to people who are campaigning for office themselves ..., and that's why that dropped out."

Number 0971

SENATOR THERRIAULT said:

Then the other thing just deals with the vagueness of the term "partisan political activity". In my earlier comments, I said that from the way I remembered the discussion when the law was passed, ... if you were sending out campaign brochures or having your staff answer ... campaign calls in your office, it was clearly out of line. A part of the problem here is that we, as sitting legislators, when we get to an election year, we wear multiple hats. And so, at any given time, am I ... Senator Therriault or am I candidate Therriault?

And it becomes difficult where to draw the line on those two things. So, was there any discussion [by the Select Committee on Legislative Ethics] just saying basically, "This issue has been brought to us, but with the definition that we have in statute - the lack of definition in statute - we can't render a decision?" And it wouldn't be unusual for the courts, at times, to render a section of statute inoperable on a particular set of circumstances in a case brought to it, I think, due to their vagueness.

MR. COOK replied:

I think the majority of the [Select Committee on Legislative Ethics] equated this more closely to what you said before: You cannot use your office, you cannot use your equipment - state-provided equipment - for campaigning. And we felt that - I believe, speaking for the [Select Committee on Legislative

Ethics] - that this fell clearly enough into that, that it was clearly enough a campaign response, that you couldn't use ... state facilities or the state communication system

Representative Mulder was probably right in the first place when he called Ron Irwin and said ..., "We're going to do this response at Republican Party headquarters." That's where the committee felt it should have been done. But with Ron Irwin's help, it got steered into the ... Legislative Information Office, which was, in a sense, akin to a legislator using his private office to do actual campaign activity. So I don't think it was that -- ... I think we were able to draw that line, here, but we can certainly see a lot of other ... arenas in which the "partisan political activity" could be tightened up.

Number 0847

SENATOR THERRIAULT remarked that Mr. Cook's explanation clarified things for him, since he'd been under the impression that the campaign charges had simply been dismissed.

MR. COOK reiterated that because Ron Irwin was not a candidate, the [Select Committee on Legislative Ethics] did not consider the offense to be a campaign activity.

SENATOR THERRIAULT noted that Mr. Irwin, as press secretary, is simply a technician. He elaborated: "I say, 'Set up a press conference,' and he makes the calls to make it happen. The content of the press ... release, the content of what I say when I step to the microphone is my call. All he does is set up the workings."

MR. COOK responded:

It was very difficult for us to figure out the lines of authority under which Mr. Irwin was working, because he was employed by the Senate, contacted by the House and other people, and it was very murky as to how this got changed from Republican Party headquarters to the LIO, but, clearly, Mr. Irwin was a player in making that change - a little more than a technician.

SENATOR THERRIAULT pointed out that, ultimately, the venue chosen by Mr. Irwin would have had to have been approved by a legislator. He noted that Mr. Popely's letter was dated just before Christmas, a time of flux for legislative leadership; he surmised that the timing of the letter probably added to the confusion of the issues.

MR. COOK remarked that all parties were under a lot of time pressure.

CHAIR SEEKINS thanked Mr. Cook, and indicated that they would next hear from Shirley McCoy. He asked Ms. McCoy to identify herself and give the committees an opening statement.

Number 0718

SHIRLEY A. McCOY, Appointee, Select Committee on Legislative Ethics, introduced herself. She said:

I'm Shirley McCoy, I live here in Juneau, I've been a resident of Juneau for approximately 13 years, [and I] moved over here after having lived about 26 years [in] Sitka, Alaska. [I] was involved pretty extensively in city politics while I was in the Sitka area, and was appointed to the [Select Committee on Legislative Ethics], as it was newly formed, shortly after coming to Juneau.

MS. McCOY went on to say:

So, I ... guess I'm the only surviving - [chuckling] and I use that term loosely - member of the originally re-established [Select Committee on Legislative Ethics] that you have that was adopted to have a majority of public members versus legislative members on it. As to why I'd even be interested in serving another term is a really good question right about now [chuckling]. One of the things that comes to mind is, you need somebody with common sense, and if I'm not on [Select Committee on Legislative Ethics], you've got [an] overrun of attorneys [chuckling].

[Some members of the committees laughed and offered additional joking comments.]

MS. McCOY continued:

I was basically asked to consider having my name resubmitted for the fact that I have more history than a lot of our members. We've had a substantial turnover in the last few years, and that in itself is one reason. You know yourself, if you've been in your position, how difficult it is sometimes when you have a turnover of staff or committee members, you end up almost reinventing the wheel each time. So there is something to be said about the historical experience, I guess. That's pretty much it.

SENATOR OGAN said, "I can't resist this one ...: Are you saying that having attorneys on an ethics committee is an oxymoron?"

[Some members of the committees laughed.]

MS. McCOY answered, "I usually say, 'Actually, having a legislative ethics committee is an oxymoron,'" and laughed too.

[Some members of the committees laughed and made additional joking comments.]

Number 0552

CHAIR McGUIRE thanked Ms. McCoy for coming and for her years of public service. She went on to say:

I'll say the same thing I said to Mr. Cook, and I don't say it lightly. I think it's a big deal, the commitment that members of the public make to serve on these boards without compensation - and a whole lot of grief. So, thank you. I remained concerned about the process. Ron Irwin's case happens to be the one that came up; as Representative Gara pointed out, we are spending a lot of time talking about it. I think that happens a lot, when you've got a committee set up to do a job and there isn't a lot of precedence out there. When it does do its job, people start taking notice of how it's doing it, and what procedures are in place, and those kinds of things. So, I hope you don't feel that we're attacking you; I really want to understand [what happened].

One of my concerns -- there are two different things in the public transcript that concern me, and I just want to understand, having sat on the [Select Committee on Legislative Ethics], what you believe

your role to be in terms of the procedures. There are two different portions of the proceedings that took place. One was a probable cause hearing. And I want to know, or understand from you, what you believe to be a probable cause hearing versus the actual public hearing itself, as it's been explained to you, either via the committee guidelines that you have or the Administrative [Procedure] Act.

MS. McCOY replied:

If I understood you correctly, the ethics code has very strict guidelines that we have to adhere to, and when we have a complaint that's filed, the first thing that we have to look at is, was it filed appropriately - is it notarized, is it signed. The public person, who is normally the one that's filing an ethics complaint, is not expected to have the level of expertise that you would have. In other words, they don't have to list a code that they feel is being violated.

Number 0402

When the legislators set up the ethics code, they pretty much left it open for public members to have that freedom to come and present a complaint without feeling that they were going to be chastised or questioned or ridiculed. ... They pretty much gave them an open book. They can -- a person can actually read a newspaper article, and say, "I think there's been an ethics violation," and file a complaint with that newspaper article attached.

So, you have given the public pretty much free rein to file an ethics complaint. There's been some considerable discussion as to ... should that process be changed. That in itself is debatable because the one thing you don't want to do is cut off the public. You don't want to make them feel it is difficult to file a complaint; you want them to feel that they have access and they have a hearing.

CHAIR MCGUIRE posited that she was unclear in her question. She said she agrees with what Ms. McCoy is saying and does not want to change that [aspect of the process]. She elaborated:

I think that is the beauty of it. We should be held to the highest ethical standards and so should our employees. You ought to be able to bring the complaint based on what want. But, then, what I'm now asking is -- your job, as a committee member, is to determine probable cause before you go on the next step. And I'm asking you what your understanding of that is.

MS. McCOY, in response, continued with her explanation of the process:

Then you investigate the allegations. You see what their complaint is, based on what the statutes say. You try to line up a statute that would address that. And, ultimately, you start an investigation. You talk with people that are involved. You send a letter to the person that the complaint's filed against, first of all. Normally they contact you post-haste. So you start a process of inquiring - getting information - talking to anyone that has an involvement in it, and you try to do this, as much as possible, holding the confidentiality of the person that the complaint's filed against.

Number 0242

CHAIR McGUIRE asked: "How do you compare the probable cause portion of the hearing to the actual hearing itself - the actual portion of the trial, if you will, [or] quasi-criminal trial, however you want to call it ...? How do you compare those two?"

MS. McCOY replied:

It's pretty much as most of you have indicated; you wear different caps. ... You put a different cap on [and] you're in a different ball game at this point. The probable cause situation is now behind you. You appoint a hearing officer. Each party has counsel. The [Select Committee on Legislative Ethics] has their counsel. The person that's before us, if they desire, have their own counsel. The hearing officer is there to make sure that the process runs smoothly and to establish the guidelines, but, ultimately, it's the [Select Committee on Legislative Ethics] that is the determining ...

CHAIR McGUIRE interjected to say, "You become the jury."

MS. McCOY said, "Exactly; it's pretty much the same as a grand jury type of hearing."

CHAIR McGUIRE said:

My concern, Ms. McCoy -- you've answered it exactly as I would have hoped, because I believe that those are two very distinct parts of the hearing process itself. Again, not to compare it to criminal, but it's much like making that ... initial indictment or that [initial] charge - however you want to call that prior decision - but distinct from the process that a jury or a committee would go through in eliciting facts and looking at evidence, through the [hearing] officer, to then ultimately make a decision.

Number 0122

My concern, in reading over some of the public testimony - transcript, pardon me - is there is a point in the actual hearing where ... Mr. Irwin's attorney offered into evidence - through the hearings officer, who is the decision maker over what is admitted or not - made a motion to enter into evidence a series of press releases. Press releases that would show a comparison of the types of activities that were normally conducted by himself during similar points in time.

And the statement that you made after the motion failed -- you were the only person to vote against the motion, which isn't up for question right now - at all. Please understand that. It's what you said that disturbed me, and I'd just like to hear some comment about it. You said, "Apparently, the motion will fail, but this is my thinking: we heard his argument prior to making our probable cause findings, so I don't know that he would present anything new or different than we've already heard before." That concerns me and I ... really want to hear ...

MS. McCOY interjected with the following:

Well, we were talking about the specifics of the newspaper clippings that he wanted to bring in. We

already had a copy of those in front of us, so I'd already read through them. I think my thinking at the time was that they really ... had no bearing on the case, at any portion, because we weren't dealing with what had happened in another situation. We were dealing with an ethics violation that was before us right now, on one situation. Historical evidence [didn't change the code]. [The preceding bracketed portion was not on tape, but taken from the Gavel to Gavel recording on the Internet.]

TAPE 03-13, SIDE A [House JUD tape]

Number 0001

MS. McCOY continued:

It didn't give us freedom to say, "Oh, well, this has been done in the past, so that's the way we'll do it now. So the newspaper articles - or the clippings - that he wanted to bring into evidence were obsolete as far as I was concerned.

CHAIR McGUIRE said:

It's an interesting job that we're tasked with right here. And those of us who will be pushing the button on the floor, in a way, we're asking whether you're qualified to be a member of the [Select Committee on Legislative Ethics]; in a way, we're asking whether you're qualified to be a judge; in a way, we're asking you whether you're qualified to be a member of a jury - passing judgment on your peers.

And it's a real interesting question, and I only bring it out because I think this ... gets right back to ... why I think this process is so flawed. But as a member of a jury, it did concern me to read that your thinking was that you had already addressed a subject during a probable cause hearing and, therefore, any new facts or any new evidence that were being offered, in your mind, should be dismissed. Because I would ...

MS. McCOY interjected to say: "No, I think you're stretching my thinking and the terminology when you say, 'any new evidence,' because it was not new evidence; it was evidence that we already

had before us that I didn't feel was pertinent to what we were dealing with at the time."

Number 0131

CHAIR McGUIRE said:

And then I just have one final question, and that is, again, just looking at conduct/character of things that are said. I say things I don't mean, a lot; you could write a whole chapter on it. There was a point in your testimony where you looked at Mr. Erwin prior to the probable cause hearing and you said - oh, you pointed to a hook in the ceiling - you said, "Do you see that hook? That's the hook that we're going to hang you from." And I just wanted your response to that particular statement.

MS. McCOY replied, "I have no idea." She asked of Mr. Cook, "Did I make a statement like that?" Turning back to Chair McGuire, she said, "I have no idea what you're referring to and -- what time was this supposed to have taken place?"

CHAIR McGUIRE said, "Prior to the probable cause hearing." She then asked Mr. Popely whether he could testify to that statement.

MR. POPELY said: "It sounds vaguely familiar, but I really -- I can't. I think Ron mentioned that was in the transcripts being reviewed, at one point; he'd probably be a better person to testify as to what's in them."

MS. McCOY said:

I -- sorry, I have ... no recollection of making a comment like that. And, quite frankly, Mr. Irwin and I joked back and forth on a couple of situations. There may have been -- unfortunately, in a transcript, you don't get the tone of a person's voice or their comment.

CHAIR McGUIRE remarked, "Again, I believe these hearings are very serious and quasi-criminal in nature, and I was just concerned."

MS. McCOY replied, "I am quite positive that that didn't take place in a hearing. It might have taken place in ... another meeting with Mr. Irwin, but not in a public hearing."

CHAIR McGUIRE surmised, "So, if it took place, you didn't mean it and it was just a joke."

Number 0306

MS. McCOY said:

I don't remember making the comment at all. And it falls outside of my total thinking, over the whole process anyway. The only thing that I found was - that I personally had a problem with - was the fact that Mr. Irwin felt that it even needed to come to a public hearing. The [Select Committee on Legislative Ethics] had filed no sanctions. If we had any way of getting out of even going through with the probable cause [hearing], we probably would.

And [Senator] Therriault's earlier comments about the one portion that was dropped, [it] was basically done after a substantial amount of discussion, where we felt we found a loophole, that we could get out from under that one. And I'm sure you can all appreciate loopholes, but none of us appreciated the way this complaint was filed, the manner in which it was filed, and the timeframe in which it was filed. But we still have a responsibility under the code that we have been authorized to deal with, and we moved forward as best we could, given the tools that we had to work with.

CHAIR McGUIRE said, "Now I have a different concern; I'm concerned about your statement regarding his choice of having a public hearing."

MS. McCOY replied:

Well, your statements in the committee meeting have bordered this on a criminal action. This was a minor infraction and, basically, didn't take place at all. But the [Select Committee on Legislative Ethics] established guidelines from the very first year, that an attempt to violate an ethics code was the same as violating it. We've acted under that premise since [the Select Committee on Legislative Ethics] has been

formed. And the reason for that is to try to limit ethics complaints. So, when a person attempts to violate a ... [code], it's handled pretty much the same way, although there's no sanctions because it didn't take place.

Number 0420

CHAIR McGUIRE said, "I know you didn't mean to say that Mr. Irwin wouldn't be entitled to a full public hearing, should he choose to clear his name."

MS. McCOY replied, "Obviously, he was entitled to it; I just felt that it was minimal in the original charge, anyway."

SENATOR THERRIAULT said:

I think Senator Torgerson, though, tried to impress upon the committees, even though minor infraction no sanctions, what the potential chilling effect would ... be on the workings in this building. A staff person performing his job at the direction of a legislator -- where do we draw the line, then? And then, the next time I ask my staff to do something, the whole aspect of whether we provide them with legal representation: "Oh, yeah, boss? What if somebody brings me up on charges? You going to be there to pick up the legal tab for that? Or am I left out hanging to dry?" On the activity that I think most of us can agree, that part of the political process that we live in, is the bantering back and responding to the things that come up on a daily basis. So, it may have seemed to be a very minor infraction that tipped this whole thing off, but the consequences of the decision could be large.

MS. McCOY replied:

I'm sorry, not in my opinion. With maybe one exception, there is no person that's come before the [Select Committee on Legislative Ethics] that's been found even guilty of a violation that hasn't ran for reelection and been voted back in their office. A person coming up on ethics charges [does] not [have] a black mark on their political career.

Number 0572

SENATOR THERRIAULT replied: "That not what I'm alleging. It's that - whether it causes a problem for somebody, politically, in the future - but just the problems that it causes in the process.

MS. McCOY replied:

And that's the whole point in going with the attempt, is to keep that from happening in the future. In the first place, Mr. Irwin was not instructed to call the conference and use the LIO. That was his choice. That was not -- had he done what his boss had asked him to do, we would have never been here, or been there. It would have just never happened. He made the choice, and the [Select Committee on Legislative Ethics], given the code that we have to work with, determined that there was probable cause and that there was an attempt to violate the ethics code by the actions that he took. We did it in a manner that was minimal to him, but set out a clear message to future possibilities that this was not acceptable under the current ethics code.

SENATOR THERRIAULT remarked:

If he had done what he was originally instructed, that would have been to call a press conference at the Republican Party headquarters, I would think that that would be a huge violation: using state time and energies to call something at a political headquarters.

MS. McCOY replied it would have been at the Republican Party headquarters and not in state facilities.

SENATOR THERRIAULT argued that the legislature would still have used his time and his e-mail account to send out the notice.

Number 0687

MS. McCOY pointed out that she did not know the particulars of Mr. Irwin's job description. "As Mr. Cook said, this was the first time that we'd been made aware that there's press secretaries on both sides that are paid to do just exactly what they have to do for their individual parties," she added. She

posited, "Maybe you're going to have to isolate them from this "partisan political activity" statute; ... that's your decision.

SENATOR THERRIAULT asked her to offer her definition of "partisan political activity".

MS. McCOY suggested that "partisan political activity" might include anything involving a campaign situation and/or having nothing to do with a person's legislative responsibilities.

CHAIR SEEKINS noted that the committees were running out of time. He expressed appreciation to Mr. Cook for traveling to the hearing and to Mr. Popely for attending via teleconference. After remarking that Ms. McCoy's hearing was strategically planned to be last - since she was local - he asked her to return for further questioning at another time.

SENATOR THERRIAULT asked Chair Seekins if he wanted a motion to forward the names of the appointees.

CHAIR SEEKINS said, "No, I think we're going to carry [the hearing] forward; there are issues still remaining here and some people that have some questions and haven't had an opportunity to present them"

REPRESENTATIVE GARA said:

Mr. Chair, there was some information that came up during this hearing that I was wondering whether or not you might request so that we could see it. There was an allegation about a comment that [Ms. McCoy] made about hanging on a hook, and I suppose if we're going to charge her with making that comment ... - I suppose if we're going to wonder out loud whether or not she made the comment - I'd like to see ..."

CHAIR SEEKINS interjected to say, "We'll do that and we'll look at a couple of other things that (indisc.) bring up for the next time around."

[The House Judiciary Standing Committee considered the appointments of Dennis "Skip" Cook and Herman G. Walker, Jr., again on 3/5/03; the Senate Judiciary Standing Committee considered the appointments of Dennis "Skip" Cook and Herman G. Walker, Jr., again on 3/5/03, and the appointment of Shirley A. McCoy again on 4/16/03.]

ADJOURNMENT

Number 0788

There being no further business before the committees, the joint meeting between the House Judiciary Standing Committee and the Senate Judiciary Standing Committee was adjourned at 3:00 p.m.