

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 3, 2021

1:39 p.m.

MEMBERS PRESENT

Representative Matt Claman, Chair
Representative Harriet Drummond
Representative Liz Snyder
Representative Jonathan Kreiss-Tomkins
Representative David Eastman
Representative Christopher Kurka

MEMBERS ABSENT

Representative Sarah Vance

OTHER LEGISLATORS PRESENT

Representative Sara Hannan

COMMITTEE CALENDAR

PRESENTATION: GOVERNOR'S APPOINTMENTS & ALASKA LEGISLATIVE
COUNCIL VS. DUNLEAVY

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

MEGAN WALLACE, Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Services
Juneau, Alaska

POSITION STATEMENT: Presented on Governor's Appointments &
Alaska Legislative Council vs. Dunleavy

ACTION NARRATIVE

[1:39:00 PM](#)

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 1:39 p.m.

Representatives Drummond, Claman, and Snyder (via teleconference) were present at the call to order. Representatives Kurka, Eastman, and Kreiss-Tompkins (via teleconference) arrived as the meeting was in progress.

Presentation: Governor's Appointments & Alaska Legislative Council vs. Dunleavy

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CHAIR CLAMAN announced that the only order of business would be a Presentation, titled "Governor's Appointments & Alaska Legislative Council vs. Dunleavy."

CHAIR CLAMAN remarked that the House Judiciary Standing Committee had previously submitted written questions, provided in the committee packet, to Legislative Legal Services, and its Director, Megan Wallace, was scheduled to present the committee with answers.

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MEGAN WALLACE, Director, Legislative Legal Services, Legislative Affairs Agency, in offering an answer to the first question regarding what issues Judge Pallenberg addressed in the final order, first, provided a synopsis in advance of addressing the committee's previously submitted questions. She said that, during the Thirty-First Alaska State Legislature, House Bill 309 was passed and enacted, which extended the time for the legislature to confirm or decline to confirm an appointment presented by the governor. She added that the specific provision at issue provided that the failure of the legislature to act on appointments during the second regular session would become tantamount to a declination [of the appointment] the earlier of either January 18, 2021, or thirty days after expiration of the declaration of disaster from March 11, 2020. She explained that the expiration of the declaration was November 15, 2020, and 30 days after that date was December 15, 2020.

MS. WALLACE further explained that on December 16, 2020, the governor issued letters to the then-presiding officers that the appointees who had not yet been confirmed would continue to serve valid appointments. She explained that the continuation

of the service of [the appointees] was the determining factor for the Legislative Council at the time to file suit in December of 2020. She referred to the summary judgment issued by Judge Pallenberg, and she stated that a final judgment in the case, entered on February 25, 2021, that found that the legislature enacted House Bill 309 validly and that a violation of neither the Alaska State Constitution nor the separation of powers doctrine was found.

MS. WALLACE explained that, as a result of the lawsuit brought by the Legislative Council, the governor filed a cross motion for summary judgment claiming that House Bill 309 and the procedural statute governing appointments, Alaska Statute (AS) 39.05.080(3) were both unconstitutional, neither of which was found in the judgment. She added that the final judgment found that Article 3, Sections 25 and 26 of the Alaska State Constitution does not require the legislature to meet in joint session to decline appointments. She added that the final judgment also confirms that the appointments presented by the governor during the second legislative session of the Thirty-First Legislative Session became tantamount to declination on December 15, 2020, and that the governor had no legal authority to continue the appointments nor to reappoint the same persons to those positions after their appointment became tantamount to declination.

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MS. WALLACE added that the final judgment further provides that the appointments were not valid from December 16, 2020, until the time at which those appointments were presented to the first session [of the Thirty-Second Alaska State Legislature]. She drew attention to the final paragraph of the final judgment stating that the court expressed no opinion on the ability for a person to contest the action of a person whose appointment was not valid during the time in question.

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MS. WALLACE referred to the next question by the committee, which read [original punctuation provided]:

How did the final order differ from his earlier decision denying the request for injunctive relief?

MS. WALLACE explained that, after the Legislative Council filed its complaint in [the Alaska] Superior Court, it sought a

preliminary injunction preventing the governor from permitting the continuation of appointments as he did through his December 16, 2020, letter to the then-presiding officers. She stated that the order of the injunction was not based on its merits but on purely legal issues and no factual disputes, which led to summary judgment.

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MS. WALLACE suggested that the primary question related to the judgment is the third question asked by the committee, which read [original punctuation provided]:

What is the impact of Judge Pallenberg's decision on re-appointment of commissioners who were never confirmed?

MS. WALLACE explained that the legislature never disputed the governor's power to reappoint persons that had been considered declined by apparition of law. She added that the reason that the ability of the governor to reappoint appointees was not contested is due to language in AS 39.05.080(3) which read:

. The governor may not appoint again the same person whose confirmation was refused for the same position or membership during the regular session of the legislature at which confirmation was refused. The person whose name is refused for appointment by the legislature may not thereafter be appointed to the same position or membership during the interim between regular legislative sessions.

MS. WALLACE explained that since the restriction on reappointment was only in the interim between regular sessions, the governor, under AS 39.05.080(3) the governor was free to reappoint those persons at the beginning of [the first regular session of the Thirty-Second Alaska State Legislature], which, in large p[art, is what he did.

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MS. WALLACE drew attention to question 3. a. by the committee, which read as follows [original punctuation provided]:

Is the federal structure different than our state structure?

MS. WALLACE explained that the difference between state appointments and federal appointments is that state appointments may begin serving immediately, whereas federal appointees must await confirmation before serving.

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MS. WALLACE next addressed the fourth question, which asked how the Pallenberg decision affected several categories of appointees, the first listed read as follows [original punctuation included]:

A Governor's appointee named in 2020 before the legislature adjourned (example: Lucinda Mahoney, Revenue Commissioner);

MS. WALLACE restated that it had not been disputed that the governor had the power to reappoint persons who had previously been considered declined by apparition of House Bill 309 for consideration in [the Thirty-Second Alaska State Legislature] and the legislature is free to consider appointments made during the current legislative session for confirmation in a joint session.

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MS. WALLACE addressed the next category of appointees listed which read as follows [original punctuation provided]:

A Governor's appointee named in 2020 after the legislature adjourned or 2021 (example: Treg Taylor, Attorney General);

MS. WALLACE stated that the lawsuit and Pallenberg decision specifically addressed only appointments submitted to the legislature during the second regular session of the Thirty-First Alaska State Legislature and that any appointments made after that time would follow the prescribed statutory confirmation process, which she stated her understanding to be what had occurred with the example asked by the committee.

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MS. WALLACE addressed the next category of appointees listed which read as follows [original punctuation included]:

A Governor's appointee named in 2020 before the legislature adjourned who was subject to a statutory process before the governor's appointment (example: Samantha Cherot, Public Defender);

MS. WALLACE stated that she did not feel comfortable to offer a specific opinion on any statutory appointments, adding that there exist statutory appointments which have their own statutory requirements. She advised that because there is ongoing litigation, the committee should ask the Alaska Judicial Council any questions about the impact of the lawsuit on the Public Defender's appointment or the council's position on the matter.

[1:55:52 PM](#)

MS. WALLACE addressed the final category of appointees listed, which read as follows [original punctuation provided]:

A Chief Justice's appointee named in 2020 before the legislature adjourned (example: a public member appointee to the Select Committee on Legislative Ethics).

MS. WALLACE explained that appointments to the Select Committee on Legislative Ethics is governed by AS 24.160.130 and requires that appointees be ratified by two-thirds of the membership of both legislative bodies; however, it does not specify that a joint session is required. She stated her understanding to be that those appointments had been ratified by each body prior to the extended recess in 2020. She stated her understanding that the Pallenberg decision would not have any impact on those appointments.

[1:57:16 PM](#)

MS. WALLACE drew attention to question 5 by the committee, which read as follows [original punctuation provided]:

Does a committee that holds a confirmation hearing have the option of:
a. Not moving that nomination forward following a hearing in the committee and, having "held" a nomination in committee, thereby have the power to

prevent the joint session from considering that nomination?

b. Not holding a confirmation hearing in committee and, similar to 6.a., thereby have the power to prevent the joint session from considering that nomination?

c. What is the impact in scenario 6.a. or 6.b. (one body not moving a nomination forward) if the other body forwards that nomination to the joint session?

MS. WALLACE said AS 39.05.080, which governs the procedure for appointments, "contemplates" that committees will consider the governor's appointees prior to a joint session; however, "those provisions related to committee action are legislative procedural statute." She said the courts are, in general, unwilling to invalidate actions wherein the legislature should fail to follow its own rules of procedure, as long as the constitutional requirement is not impacted by that procedural violation. She added that the issue had, to her knowledge, never been litigated, "so it would be a matter of first impression." She continued as follows:

I think when you look at the Alaska Supreme Court's decisions regarding the unwillingness to weigh in in matters of legislative procedure in the absence of a constitutional requirement, that the committees' failure ... to take up ... an appointment or to not pass it out or to hold the appointment in committee would not impact the legislature's ability to hold a vote on that appointment in joint session. In other words, the Alaska Constitution, for example, doesn't require the ... appointee to pass out of a committee before the legislature has the power to confirm that individual. So, ... it's my opinion that even if a committee were unable or unwilling to forward the name, that when the ... body gets together in joint session and becomes the unicameral body, that the body can still act on that ... appointment that was presented to the legislature.

[2:00:45 PM](#)

MS. WALLACE drew attention to question 6 by the committee, which read as follows [original punctuation provided]:

Is the Governor raising any issues on appeal that Judge Pallenberg did not decide?

MS. WALLACE stated that the appeal is just getting underway. She said that the statement of points on appeal indicates that has been filed indicates that the Superior Court erred in granting summary judgment in favor of the legislature and concluding that AS 39.05.080(3) and House Bill 309 purport to authorize the legislature to reject appointments by inaction and do not violate Article 3, Sections 26 and 27 of the Alaska State Constitution. She continued as follows:

They also contest that this governor didn't have recess appointment authority under Article 3, Section 27 of the Alaska State Constitution.

MS. WALLACE offered to entertain additional questions from the committee and cautioned that there is ongoing litigation, so she may not be able to answer all questions.

[2:03:32 PM](#)

CHAIR CLAMAN asked whether a federal appointee whose appointment was declined could be reappointed by the President.

[2:04:05 PM](#)

MS. WALLACE stated her understanding that the President may not reappoint a person who has been declined, citing that this historically has not occurred. She disclosed that she is not an expert on the federal appointment process.

[2:04:36 PM](#)

CHAIR CLAMAN asked whether the governor's 2020 appointments were reappointed with a new date of appointment or the same date and whether [the date of reappointment] was significant.

MS. WALLACE answered that the documents that she had seen contained the same dates. She added that a large number of appointments had been submitted on January 19, 2021, which was prior to the decision by the court. She stated her uncertainty regarding the position of the governor pertaining to the reappointments since the ruling, and she noted that the term dates of the appointments had not changed.

2:07:01 PM

REPRESENTATIVE EASTMAN asked what the committee's intention would be to proceed considering the information put forward in the presentation.

2:07:37 PM

CHAIR CLAMAN stated that the committee would proceed by conducting confirmation hearings on appointees referred to the committee, and that the length of the hearings would be based on public participation.

2:08:23 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:08 p.m.