

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

March 22, 2024

1:31 p.m.

MEMBERS PRESENT

Senator Matt Claman, Chair
Senator Jesse Kiehl, Vice Chair
Senator James Kaufman
Senator Cathy Giessel

MEMBERS ABSENT

Senator Löki Tobin

COMMITTEE CALENDAR

SENATE BILL NO. 165

"An Act relating to legal representation of public officers in ethics complaints."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 165

SHORT TITLE: DEFENSE OF PUB. OFFICER: ETHICS COMPLAINT

SPONSOR(S): SENATOR(S) CLAMAN

01/16/24	(S)	PREFILE RELEASED 1/8/24
01/16/24	(S)	READ THE FIRST TIME - REFERRALS
01/16/24	(S)	JUD, FIN
02/28/24	(S)	JUD AT 1:30 PM BUTROVICH 205
02/28/24	(S)	Heard & Held
02/28/24	(S)	MINUTE(JUD)
03/22/24	(S)	JUD AT 1:30 PM BUTROVICH 205

WITNESS REGISTER

JAHNA LINDEMUTH, representing self
Anchorage, Alaska

POSITION STATEMENT: Testified by invitation as a former attorney general in support of SB 165.

ACTION NARRATIVE

[1:31:00 PM](#)

CHAIR MATT CLAMAN called the Senate Judiciary Standing Committee meeting to order at 1:31 p.m. Present at the call to order were Senators Giessel, Kiehl, and Chair Claman. Senator Kaufman arrived shortly thereafter.

SB 165-DEFENSE OF PUB. OFFICER: ETHICS COMPLAINT

[1:31:31 PM](#)

CHAIR CLAMAN announced the consideration of SENATE BILL NO. 165 "An Act relating to legal representation of public officers in ethics complaints."

CHAIR CLAMAN said this is the second hearing of this bill in the Senate Judiciary Committee. The intention is to hear invited testimony from former Attorney General Jahna Lindemuth.

[1:32:20 PM](#)

JAHNA LINDEMUTH, representing self, Anchorage, Alaska, testified by invitation as a former attorney general in support of SB 165. She stated that she served as attorney general (AG) under former Governor Bill Walker from August 2016 to December 2018. She offered her testimony, which is paraphrased below:

I fully support the passage of SB 165. The Department of Law (DOL) regulations that took effect in November 2023 are inconsistent with the Executive Ethics Act and the Alaska Constitution. Rather than resolving this issue in the courts, the legislature should clarify that the Attorney General's Office may not defend either the attorney or the governor, and that they should be treated as any other state employee who may ask for reimbursement of fees if exonerated from an Ethics Act complaint by adopting this bill. This is consistent with the attorney general's opinion issued by then Attorney General Dan Sullivan, now a U.S. Senator, on August 5, 2009.

In a nutshell, the Executive Ethics Act prohibits using one's position for personal gain, per AS 39.52.120(a); using state resources for personal interest, per AS 39.52.120(a)(3); or taking action in a matter where the officer has a personal interest, per AS 39.52.120(a)(4).

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MS. LINDEMUTH continued testifying:

The attorney general is the state officer charged with ensuring compliance with the Executive Ethics Act.

- The attorney general issues advisory opinions to state employees under AS 39.52.240.
- The designated ethics supervisors throughout the state submit quarterly reports to the attorney general under section AS 39.52.260.
- The attorney general is the primary prosecutor for any ethics violations:
 - The attorney general can initiate a complaint based on information in the quarterly report or otherwise known to the attorney general under subsection AS 39.52.310(a).
 - Citizens may file complaints directly with the attorney general under subsection AS 39.52.310(b).
 - If a hearing is required, the attorney general is a party and presents charges and has the burden of proving the charges by a preponderance of the evidence under AS 39.52.360(c).
- The only instance where the attorney general (AG) is not the prosecutor is where the allegation is against the AG himself or against the Governor, the AG's boss who can remove the AG without cause. In that instance, the Personnel Board will hire independent counsel to serve in the AG's usual role because the law recognizes that the attorney general has a conflict of interest.

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MS. LINDEMUTH continued testifying:

This conflict of interest precluding the AG from prosecuting the attorney general or the governor does not mean and should not mean that the Attorney

General's Office is then free to defend the attorney general or the governor, for reasons such as:

1. There is inherent conflict with the attorney general's primary role as the main enforcer of the Executive Ethics Act.
 - As noted by the 2009 Sullivan Opinion, footnote 46, such a situation could result in the Department of Law arguing a provision of the Act is unconstitutional or should be more narrowly construed than the AG had previously asserted in other proceedings.
 - It could even happen that a complaint is filed against the attorney general or the governor and one or more subordinates. Thus, the AG could be prosecuting someone in the Governor's Office, for example, while the Department of Law is defending the governor on the same allegation.

[1:35:39 PM](#)

MS. LINDEMUTH continued testifying:

2. More importantly, the regulations authorizing the Department to defend the attorney general and the governor are inconsistent with the overall role of the AG. The AG is the attorney for the whole state, not any one officer, even the governor himself, and the AG acts through all the assistant attorney generals working under him or her. Stated another way, neither the AG nor any other attorney at the Department of Law can serve as the personal attorney for any state employee.

In response, the AG may point out that the Attorney General's Office regularly defends state employees in court cases. But when defending a tort claim, say, against a commissioner or corrections officer, the Department is defending the actions of that state employee taken within the scope of his or her state employment. That is not usually at issue.

Ethics Act cases are different because the nature of the claim is that the state employee, the governor, or the attorney general used his or her position for personal gain or used state resources for a personal interest.

The irony here is that the regulations passed by the Attorney General's Office sanctions further additional state assets being used for the attorney general or governor's personal interest if the allegations are indeed true.

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MS. LINDEMUTH continued testifying:

3. Which brings me to the final and third point. The November regulations are inconsistent with only using public monies for a public purpose, as required by our constitution.

I want to point out that most ethics complaints do not make it out of the gate and are summarily dismissed. Alaska Statute 39.52.310(d) allows the AG to dismiss claims before an investigation if the allegations are not facially sufficient to make out a complaint.

Even when not summarily dismissed, most complaints never advance to a formal complaint stage. Only those complaints where there is probable cause may proceed, per AS 39.52.320, which states: "If, after investigation, it appears there is no probable cause to believe a violation of this chapter has occurred, the attorney general shall dismiss the complaint.

If there is a probable cause to find that either the governor or the attorney general violated the Executive Ethics Act by using state resources for personal benefit, there is simply no public purpose to then use state resources to defend that claim. Just like every other state employee, the attorney general and the governor should have to personally defend, and seek reimbursement if exonerated.

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MS. LINDEMUTH continued testifying:

Stated another way, if they are indeed guilty, by definition the fees are not for a public purpose as required by art. IX, sec. 6, Constitution of the State of Alaska.

The regulations purport to require the AG to certify that defending the governor is in the public interest and require the governor to certify that defending the AG is in the public interest, but in making such certifications both have a conflict of interest, and not simply because they are both the direct beneficiaries of these regulations.

Given that the AG serves at the pleasure of the governor and is his subordinate, the AG does not have the neutrality to make this determination and is conflicted. There are also no side boards in the regulations as to what constitutes a public purpose. I expect the AG would take the position that defense of any allegation against the AG or governor satisfies this test, regardless of the merits of the allegation.

I also point the committee's attention to corporate law as an analogy to when payment of a defense should be allowed. AS 10.06.490 allows a corporation to indemnify, in other words, pay back, the attorney's fees a corporate officer incurs in defending claims if that officer acted in good faith and in the best interests of the corporation. However, by law, a corporation cannot reimburse if a person has been adjudged liable for negligence or misconduct in the performance of corporate duties, unless a court finds that indemnification is fair and reasonable to the corporation itself, per section .490.

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MS. LINDEMUTH continued testifying:

This corporate standard for reimbursement is consistent with Attorney General Sullivan's 2009 opinion, which remains good law if SB 165 is enacted and the regulations are negated. That opinion outlines a four-part test required for indemnification:

- (1) The public officer is exonerated.
- (2) The public officer acted within the scope of state employment.
- (3) The fees are reasonable.

- (4) There is a source of public funds available, in other words, an appropriation.

Here, because the regulations authorize the Department to defend the AG and the governor regardless of the merit or outcome of the complaint, and in the face of a probable cause finding, the current regulations allow the state to illegally spend state resources on the defense even if the governor or AG actually violated the Executive Ethics Act. SB 165 is needed to cure this, and I urge that it be passed.

[1:40:58 PM](#)

CHAIR CLAMAN invited committee members to ask questions.

CHAIR CLAMAN thanked Ms. Lindemuth for her testimony. He asked her to email her testimony if it was already in a written format.

MS. LINDEMUTH responded that she would do that.

[1:41:21 PM](#)

CHAIR CLAMAN revisited a question raised at a prior hearing regarding whether legislators can be reimbursed for legal expenses. He stated that he had inquired with the Select Committee on Legislative Ethics, which informed him that there is no specific provision in law allowing for the reimbursement of a legislator for proceedings before the committee.

CHAIR CLAMAN noted that this silence suggests there may be some opportunity for a legislator to apply to Legislative Council to reimburse those fees. He expressed his belief that during his time on Legislative Council, requests for the reimbursement of legal fees or other expenses were denied. He does not believe there are any legal provisions to reimburse legislators or their legal fees. He does not think that it is exclusively prohibited, but the odds of getting reimbursed are fairly low.

[1:42:43 PM](#)

SENATOR GIESSEL expressed her understanding that the Ethics Act was previously unclear, and consequently, a regulation was written which permitted DOL to defend or advise the governor, lieutenant governor, and other public officers. She sought confirmation that SB 165 clarifies that the Department of Law may not represent those public officials.

[1:43:25 PM](#)

CHAIR CLAMAN replied that is correct. He believes Ms. Lindemuth would agree that existing law aligns with the Sullivan memorandum, which does not support the regulations adopted in the fall by the current AG. There is an argument that the regulations themselves are illegal. He stated that the passage of SB 165 would resolve any doubt.

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SENATOR KAUFMAN joined the meeting.

[1:44:04 PM](#)

CHAIR CLAMAN deferred to Ms. Lindemuth.

MS. LINDEMUTH replied that is consistent with her testimony. She stated her belief that the regulations adopted in the fall are inconsistent with statute and are not authorized by it. While the AG expressed his belief that the regulations are consistent with statute, she disagrees. She said that SB 165 would clarify the law and clarify that DOL may not defend the attorney general or the governor.

[1:44:39 PM](#)

SENATOR GIESSEL asked about the statutory language that served as the basis for writing the regulation.

[1:44:53 PM](#)

CHAIR CLAMAN deferred to Ms. Lindemuth to comment on what the current statute provides.

CHAIR CLAMAN said this version of SB 165 originated from related legislation that was introduced in the House during his tenure in that body. After committee debate, discussion, and research, it was concluded that no more needed to be said. The tendency is to add multiple layers, but it is unnecessary. SB 165 just needs to state that it is not permitted.

[1:45:37 PM](#)

MS. LINDEMUTH expressed her belief that there is no language in current statute that allows these regulations to have been passed.

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SENATOR GIESSEL sought confirmation that no statute assigns the Department of Law, or by extension, the attorney general, a role in defending ethics complaints.

CHAIR CLAMAN replied, correct.

SENATOR GIESSEL sought confirmation that SB 165 fills a void.

CHAIR CLAMAN replied, yes and sought agreement from counsel.

[1:46:42 PM](#)

MS. LINDEMUTH concurred. She stated that, as outlined in her testimony, the statute designates the attorney general as the primary prosecutor under the Executive Ethics Act and does not authorize the attorney general to provide a defense of any Ethics Act complaint.

[1:47:14 PM](#)

SENATOR GIESSEL asked why former Attorney General Sullivan wrote the analysis issued on August 5, 2009.

CHAIR CLAMAN expressed his understanding that there were similar discussions during the former AG's tenure, specifically questioning whether the Department of Law could represent the governor in ethics complaints. He stated his belief that, prior to that time, there were no provisions for reimbursing legal fees related to Ethics Act complaints.

CHAIR CLAMAN expressed his belief that the same questions asked today were raised then, and the conclusion reflected in the August 5, 2009 memo was that the attorney general cannot represent the governor. However, the state could reimburse those fees if the governor hired counsel and prevailed.

CHAIR CLAMAN expressed his belief that the former AG issued the memo in response to a wave of ethics complaints filed against then-Governor Sarah Palin, which raised concerns over mounting legal expenses. He believes the memorandum was the former AG's resolution to those issues.

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SENATOR GIESSEL sought confirmation that the issue was never fully clarified and now, approximately 15 years later, the legislature is attempting to resolve it through statute.

[1:49:04 PM](#)

CHAIR CLAMAN offered historical context, recounting the current administration's efforts to allow the AG to represent the governor on ethics matters. He stated objections were raised, legislation was introduced, and while that legislation was pending, the AG withdrew the regulations. As a result, the

legislature did not proceed with its legislation. The state continued to operate under the framework established by the 2009 Sullivan memorandum. In the fall, the current AG introduced a different version of the same concept.

1:50:02 PM

SENATOR GIESSEL remarked, that was super helpful.

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At ease.

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CHAIR CLAMAN reconvened the meeting.

CHAIR CLAMAN held SB 165 in committee.

1:51:19 PM

There being no further business to come before the committee, Chair Claman adjourned the Senate Judiciary Standing Committee meeting at 1:51 p.m.