1/28/09

INQUIRY RE: ISSUANCE OF LEGIS. SUBPOENAS

Dana Strommen

From: Tillery, Craig J (LAW) [craig.tillery@alaska.gov]

Sent: Tuesday, February 03, 2009 9:09 AM

To: Rep. Kurt Olson

Cc: Rep. Jay Ramras

Subject: House Judiciary Committee information request

Dear Representative Olson,

At the House Judiciary Committee overview for the Department of Law, you asked how much time and money was spent by the attorney general's office fighting the legislative subpoenas. Our records indicate that the Department of Law spent 101.6 hours, at a cost of $13,784, on litigation and other activities related to the legislative subpoenas.

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Sec. 24.25.010. Issuance and form of subpoena.

(a) A subpoena requiring the attendance of a witness before either house of the legislature may be issued by the president or the speaker.

(b) A subpoena requiring the attendance of a witness before a standing or special committee of the legislature may be issued by the chairman of a committee when authorized to do so by a majority of the membership of the committee and with the concurrence of the president or the speaker, or with the concurrence of the house or the senate.

(c) A subpoena requiring the attendance of a witness before an interim committee established by either house of the legislature, or by both, may be issued by the chairman of a committee when authorized to do so by a majority of the membership of the committee and with the concurrence of the president or the speaker.

(d) The subpoena is sufficient if

(1) it states before whom the proceeding is held;

(2) it is addressed to the witness;

(3) it requires the attendance of the witness at a time and place certain;

(4) it is signed

(A) by the president or the speaker under (a) of this section, or

(B) by the committee chairman with the concurrence of the president or the speaker under (b) and (c) of this section.

(e) This section does not apply to the legislative council or to the Legislative Budget and Audit Committee.

Sec. 24.25.020. Service of subpoena.

A person over the age of 19 years who is competent as a witness in the state courts may serve the subpoena. The person's affidavit that the person delivered a copy to the witness is evidence of service.

AS
Sec. 24.25.030. Disobeying subpoena or refusing to testify.

If a witness neglects or refuses to obey a subpoena, or neglects or refuses to testify or to produce upon reasonable notice any material and proper books, papers, or documents in the possession or under the control of the witness, the senate or house of representatives may by resolution entered on its journal commit the witness for contempt. If contempt is

committed before a committee, the committee shall report the contempt to the senate or house of representatives, as the case may be, for such action as may be considered necessary.

Sec. 24.25.040. Arrest for disobedience to subpoena.

A witness who neglects or refuses to attend in obedience to subpoena may be arrested by the sergeant-at-arms and brought before the senate or house of representatives, as the case may be. The only warrant or authority necessary authorizing arrest is a copy of a resolution of the senate or house of representatives signed by the president of the senate or speaker of the house of representatives, as the case may be, and countersigned by the secretary of the senate or the clerk of the house of representatives, as the case may be.

Sec. 24.25.050. Witness fees and mileage.

A person appearing before either house, or both, or a legislative committee in response to a subpoena is entitled to $20 for each day's attendance, and for the time necessary in coming and returning to the person's place of residence and mileage at the rate of 15 cents a mile for the distance traveled in going to and returning from the place of attendance. The witness fee and mileage fee shall be paid out of the state treasury upon presentation of a certificate of attendance and mileage due, signed by the presiding officer of the house that authorized issuance of subpoena.

Sec. 24.25.060. Oath and penalty for violation of oath.

The president of the senate and speaker of the house of representatives and the chairman of every committee of either body may administer an oath to a witness appearing before the respective bodies. A person who wilfully swears or affirms falsely concerning any matter material to the subject under investigation or inquiry is guilty of perjury and upon conviction is punishable by imprisonment for not less than one year nor more than five years.

Sec. 24.25.070. Grant of immunity on claim of privilege of self-incrimination.

(a) A person called as a witness before the senate, house of representatives, or a committee of either or both, who refuses to answer any question or to produce any book, paper, or document relating to the matter under inquiry, on the ground that the answer or the production may tend to incriminate the person, may be granted immunity from punishment for the offense to which the question or evidence relates by resolution of the house that is conducting the inquiry. The resolution shall be entered upon its journal, and the witness may then be compelled to answer the question or produce the evidence.

(b) If a witness is granted immunity and compelled to testify or produce evidence after claiming the privilege of self-incrimination, the witness may not thereafter be prosecuted in any court for the offense to which the question or evidence relates.

Sec. 24.25.080. Punishment for disobedience to subpoena or refusal to testify.

A person subpoenaed as provided in this chapter who fails, neglects, or refuses to attend at the time and place where the person's presence is required, or fails, neglects, or refuses to produce the books, papers, or instruments or other evidence designated in the subpoena, or who having attended in response to the subpoena, or having appeared voluntarily, refuses to testify as to any material and proper matter within the power of the senate, house of representatives, or a committee to investigate, upon conviction, is punishable by a fine of not less than $100 nor more than $500, or by imprisonment for not less than 30 days nor more than six months.

Chapter 24.30. ENACTMENT OF STATUTES

Sec. 24.30.010. - 24.30.100l [Renumbered as AS 24.08.010 - 24.08.100].

Repealed or Renumbered

Westlaw.

AS § 44.23.010

C

West's Alaska Statutes Annotated Currentness
Title 44. State Government
Chapter 23. Department of Law
→ § 44.23.010. Attorney general

The principal executive officer of the Department of Law is the attorney general.

CREDIT(S)

SLA 1959, ch. 64, § 9.

LIBRARY REFERENCES

Attorney General ⇨ 6.
Westlaw Key Number Search: 46k6.
C.J.S. Attorney General §§ 26 to 78.
C.J.S. Parent and Child § 251.

AS § 44.23.010, AK ST § 44.23.010
Current through the 2008 Second Regular and Fourth Special Session of the 25th Legislature

END OF DOCUMENT

C
West's Alaska Statutes Annotated Currentness
Title 44. State Government
Chapter 23. Department of Law
→ § 44.23.020. Duties; and powers; waiver of immunity

(a) The attorney general is the legal advisor of the governor and other state officers.

(b) The attorney general shall

(1) defend the Constitution of the State of Alaska and the Constitution of the United States of America;

(2) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;

(3) represent the state in all civil actions in which the state is a party;

(4) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(5) administer state legal services, including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs; and give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature;

(6) draft legal instruments for the state;

(7) make available a report to the legislature, through the governor, at each regular legislative session

(A) of the work and expenditures of the office; and

(B) on needed legislation or amendments to existing law;

(8) perform all other duties required by law or which usually pertain to the office of attorney general in a state; and

(9) prepare, publish, and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law before publication.

(c) Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or in any case in which the state seeks to allocate fault to the federal government or a federal employee under AS 09.17.080, waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States. The expiration on January 1, 1999, of the attorney general's authority to waive the state's Eleventh Amendment immunity does not affect existing waivers in ongoing cases.

(d) The attorney general may, subject to the power of the legislature to enact laws and make appropriations, settle actions, cases, and offenses under (b) of this section.

(e) There is established within the Department of Law the function of public advocacy for regulatory affairs. The attorney general shall participate as a party in a matter that comes before the Regulatory Commission of Alaska when the attorney general determines that participation is in the public interest.

(f) The attorney general shall designate not less than one-half attorney position in the Department of Law for the purpose of prosecuting actions for fraudulent acts related to workers' compensation under AS 23.30.

(g) The attorney general may, in cases that involve compliance, discharge, or enforcement of responsibilities assumed by the Department of Transportation and Public Facilities under AS 44.42.300, waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States.

CREDIT(S)

SLA 1959, ch. 128, § 1; SLA 1959, ch. 64, § 9; SLA 1976, ch. 8, § 1; SLA 1995, ch. 21, § 89; SLA 1997, ch. 3, § 1; SLA 2000, ch. 112, §§ 1, 2; SLA 2003, ch. 35, § 60; 2003 E.O. No. 111, § 3; 1st Sp. Sess. 2005, ch. 10, § 72; SLA 2006, ch. 50, § 1, eff. June 2, 2006.

Prior Codifications: ACLA 1949, § 9-1-5.

HISTORICAL AND STATUTORY NOTES

For transitional provisions relating to the 2003 transfer of the functions and responsibilities of the former public advocacy section from the Regulatory Commission of Alaska to the Department of Law, see § 5, E.O. 111.

LIBRARY REFERENCES

Attorney General ⇨ 5.
Westlaw Key Number Search: 46k5.
C.J.S. Aliens §§ 409 to 411.
C.J.S. Attorney General §§ 26 to 78.

C.J.S. Parent and Child § 251.

NOTES OF DECISIONS

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1. Distribution of governmental powers

Under the separation of powers doctrine, court does not have power to control the exercise of the Attorney General's discretion as to whether he will take any action in any particular cases of contempt for nonsupport of child. AS 44.23.020. Public Defender Agency v. Superior Court, Third Judicial Dist., 1975, 534 P.2d 947. Constitutional Law ⚿ 2543

2. Powers and duties, generally

Attorney general had standing to sue corporations from which Multiple-Beneficiary-Permittees (MBPs) purchased gaming supplies and leased facilities, alleging that corporations violated state's gaming laws by charging member charities of MBPs unreasonably high expenses; although Department of Revenue had statutory authority to administer state's gaming law, and to issue orders prohibiting acts in violation of those provisions, Department of Revenue lacked statutory power to prosecute offenses against gaming laws. AS 05.15.010, 05.15.060, 44.23.020(b)(4). Botelho v. Griffin (2001) Alaska, 25 P.3d 689. Attorney General ⚿ 7

Reading of statutory authorization for Department of Law operations suggests intent to leave offices and their functions broad, general and flexible, even when circumstances do not involve disqualification of Attorney General, and demonstrate that the legislature contemplated retention of services of counsel outside the Department of Law. AS 36.30.015, 36.30.850(b)(32), 44.23.050. State v. Breeze, 1994, 873 P.2d 627. Attorney General ⚿ 6

In light of the substantial state interest in the enforcement of child support orders, contempt of such an order is a violation of state law within meaning of statute providing that the Attorney General shall prosecute all cases involving violation of state law. AS 09.55.210, 11.35.010, 11.35.090, 25.25.010 et seq., 44.23.020, 47.25.310 et seq. Public Defender Agency v. Superior Court, Third Judicial Dist., 1975, 534 P.2d 947. Attorney General ⚿ 7

Attorney General's discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases. AS 44.23.020. Public Defender Agency v. Superior Court, Third Judicial Dist., 1975, 534 P.2d 947. Attorney General ⚿ 7

United States Attorney General and district attorneys have authority to prosecute all suits in which United States are concerned. U.S. v. Lynch, 1927, 7 Alaska 568, Unreported. Attorney General ⚿ 7; Descent And Distribution ⚿ 9

3. Common law powers

Department of Revenue's authority to proceed administratively against gaming law offenses does not limit the attorney general's statutory and common law authority to bring suit to uphold the state's gaming laws. AS 05.15.010, 05.15.060, 44.23.020(b)(4). Botelho v. Griffin (2001) Alaska, 25 P.3d 689. Attorney General ⚿ 7

Under the common law, the attorney general has the power to bring any action which he thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce Alaska's statutes. Botelho v. Griffin (2001) Alaska, 25 P.3d 689. Attorney General ⚿ 7

Generally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. AS 44.23.020(b)(8). Botelho v. Griffin (2001) Alaska, 25 P.3d 689. Attorney General ⚿ 6

Attorney General has common-law power to bring any action which he thinks necessary to protect public interest. Berger v. State, Dept. of Revenue, 1996, 910 P.2d 581. Attorney General ⚿ 7

Record did not show that Attorney General lacked consent of the principal so as to bar appointment of special prosecutor by Attorney General under common-law doctrine of delegatus non potest delegare. State v. Breeze, 1994, 873 P.2d 627. Attorney General ⚿ 6

Under the common law, an Attorney General is empowered to bring any action which he thinks necessary to protect the public interest and possesses the corollary power to make any disposition of the state's litigation which he thinks best. AS 44.23.020. Public Defender Agency v. Superior Court, Third Judicial Dist., 1975, 534 P.2d 947. Attorney General ⚿ 7

Generally, an Attorney General has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. AS 44.23.020. Public Defender Agency v. Superior Court, Third Judicial Dist., 1975, 534 P.2d 947. Attorney General ⚿ 6

4. Defense duties

The Attorney General is authorized to appear either individually or through United States Attorneys and their assistants and defend civil and criminal actions against government officials, employees and military personnel for acts done in performance of their official duties. 5 U.S.C.A. §§ 309, 316. Swanson v. Willis, 1953, 14 Alaska 399, 114 F.Supp. 434, affirmed 15 Alaska 501, 220 F.2d 440. Attorney General ⚿ 6

Governor has a duty to defend a law that was enacted through the people's initiative powers and that duty is executed by the Attorney General. Alaskans for a Common Language, Inc. v.

Kritz (2000) Alaska, 3 P.3d 906, on remand 2002 WL 34220502. Attorney General ⚿ 6; States ⚿ 41

Department of Law has responsibility of defending laws passed by the legislature against constitutional attack. Gray v. State, 1974, 525 P.2d 524. Attorney General ⚿ 6

5. Special prosecutors

Special prosecutor hired by Attorney General did not exceed the scope of his authority in securing indictments of target of investigation; appointment letter authorized special prosecutor to investigate other related matters and to serve as special counsel in "other matters that may arise in the course of the investigation," and Attorney General made it clear that special prosecutor had acted within the scope of authority intended. AS 44.23.020(b)(3). State v. Breeze, 1994, 873 P.2d 627. Attorney General ⚿ 6

Even if special prosecutor appointed by Attorney General were found to have technically exceeded the scope of his appointment, special prosecutor was a de facto officer and indictments obtained by him remained valid pursuant to that authority, absent showing of prejudice by the person indicted; special prosecutor had at least a fair color or right of title and acted for such length of time as to afford presumption of appointment, appointment process was reported publicly, target of investigation himself urged state to get on with the investigation, and questions regarding special prosecutor's authority had no demonstrated bearing on grand jury's determination to return indictments. AS 44.23.020. State v. Breeze, 1994, 873 P.2d 627. Attorney General ⚿ 6

Person who was investigated by special prosecutor and against whom indictments returned did not have the same standing as the Attorney General to challenge whether special prosecutor exceeded the scope of his appointment by the Attorney General. State v. Breeze, 1994, 873 P.2d 627. Attorney General ⚿ 6

State Constitution and applicable statutes did not express or imply restriction on Attorney General's authority to properly delegate certain duties of the office, by appointing special prosecutor, where Attorney General maintained appropriate supervision, direction and control over special prosecutor, who was required to submit claims for services to the Department of Law and who was subject to termination by the Attorney General at any time. Const. Art. 3, § 22; AS 44.17.010, 44.17.040, 44.23.020(b)(3, 7). State v. Breeze, 1994, 873 P.2d 627. Attorney General ⚿ 6

Appointment of special prosecutor by Attorney General as remedy to Attorney General's perceived conflict of interest was both appropriate and authorized pursuant to statute; Attorney General is obligated under statute to investigate and prosecute law violations, and if Attorney General and Department of Law are disqualified, Attorney General is nevertheless "required by law" to ensure that investigation and prosecution are conducted by someone who is qualified, whether that person is denominated special counsel, special prosecutor, or some other title. AS 44.23.020, 44.23.020(b)(3, 7). State v. Breeze, 1994, 873 P.2d 627. Attorney General ⚿ 6

6. Negligence of subordinates

Governor and attorney general could not be held liable for negligence of their subordinates unless they had actually cooperated in alleged acts. Bujaki v. Egan, 1965, 237 F.Supp. 822. Attorney General ⚿ 6; States ⚿ 79

7. Actions for administration or enforcement of charitable trusts

Even if charities that were members of Multiple-Beneficiary-Permittees (MBPs) did not consent to attorney general acting on their behalf in asserting claim against corporations from which MBPs purchased gaming supplies and leased facilities, alleging that corporations violated state's gaming laws by charging member charities of MBPs unreasonably high expenses, attorney general's authority to enforce charitable trusts gave him power to bring such action if charities' trustees dismissed or compromised charities' claims for less than charities were due under state's gaming laws. AS 05.15.160(a, c, d), 44.23.020(b)(4); Restatement (Second) of Trusts § 391. Botelho v. Griffin (2001) Alaska, 25 P.3d 689. Charities ⚿ 50

AS § 44.23.020, AK ST § 44.23.020
Current through the 2008 Second Regular and Fourth Special Session of the 25th Legislature

END OF DOCUMENT

LEGAL OPINIONS

LEGAL SERVICES

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MEMORANDUM January 23, 2009

SUBJECT: Legislative investigations and power of subpoena
(Work Order No. 26-LS0418)

TO: Representative Jay Ramras
Chair of the House Judiciary Committee
Attn: Jane W. Pierson

FROM: Tamara Brandt Cook
Director TBC

(1) What is a scope of the power of the legislature to issue subpoenas?

The legislature enjoys broad investigative power, but it is limited to obtaining information on matters that fall within its field of legislative action. (Mason's Manual, Secs. 795(6) and 797(7)) Lawmaking is the central legislative activity, but there are others that may justify investigatory pursuits. It is stated in Mason's Manual, Sec. 795(10): "An investigation into the management of the various institutions of the state and the departments of the state government is at all times a legitimate function of the legislature." The Supreme Court of Alaska has specifically acknowledged that the legislature has broad powers of investigation relating to its lawmaking activities and also has specifically identified the confirmation power as carrying with it an implied power and duty to investigate both the status of the relevant appointed offices and the qualification of individuals appointed to fill them. (Cook v. Botelho, 921 P.2d 1126 (Alaska 1996)) In addition to the two legislative activities recognized by the court, based on the reasoning of the case, it is expected that other legislative activities also carry with them the implied power to investigate. (See for example, art. X, sec. 12 (power of the legislature to disapprove certain local boundary changes); art. II, sec. 20 (power of the legislature to impeach civil officers of the State))

The power of the legislature to issue subpoenas coincides with the power of the legislature to investigate. Mason's Manual points out in Sec. 795(5):

> The inherent and auxiliary power reposed in legislative bodies to conduct investigations in aid of prospective legislation carries with it the power in proper cases to compel the attendance of witnesses and the production of books and papers by means of legal process. Also, the legislature has the power to institute and carry to the extent of punishment, contempt proceedings in order to compel the attendance of such witnesses and the production of such documentary evidence as may be legally called for in

> the course of such proceedings, whether conducted by the legislative body or a branch thereof, directly or through its properly constituted committees.

The power of the legislature to investigate was recently recognized again in Alaska. Certain legislative plaintiffs sought a temporary injunction and to restrain the Legislative Council and other named defendants from conducting an investigation into Governor Sarah Palin's removal of Walter Monegan from his position as Commissioner of the Alaska Department of Public Safety on the grounds that the investigation exceeded the Legislative Council's statutory authority and violated principles of separation of powers and due process. Executive branch plaintiffs challenged the validity of subpoenas issued pursuant to the investigation. The two cases were consolidated and the Superior Court denied the motions and dismissed the action, concluding that many of the issues raised by the plaintiffs involved procedures of the legislative branch and were, thus, nonjusticiable. The court further found no constitutional due process or fair and just treatment violation. (Keller v. French, Case No. 3AN-08-10489CI; Kiesel v. Seven Subpoenas, Case No. 3AN-08-10780CI; Consolidated, Superior Court, Third Judicial District, Order dated October 2, 2008) The order of dismissal by the Superior Court was affirmed by the Supreme Court. (Keller v. French, Supreme Court No. S-13296, Order dated October 9, 2008) The Supreme Court has not yet issued an opinion in that case.

(2) May an attorney advise a client not to respond to a legislative subpoena?

It strikes me that an attorney might do so under certain circumstances, such as when the attorney has a good faith belief there is a legitimate question regarding the validity of the subpoena, especially if the attorney is making an effort to quash the subpoena. The attorney also has a responsibility to explain to the client the risk entailed in failing to respond to a legislative subpoena. (See AS 24.25.030 and AS 24.25.080) Probably the attorney has a duty to explain all options to the client, so that the client may participate in the final decision.

Ms. Jane Pierson has asked me to consider Rule 503(d)(1) of the Rules of Evidence, Alaska Court Rules. It states that there is no attorney/client privilege: "If the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." However, failure to abide by an invalid subpoena is not a crime nor is it fraud. Consequently, it is possible that this Rule will not apply when the validity of a subpoena is in question. Note that the Evidence Rules Commentary to Rule 503(d)(1) observes: "The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised that a proposed action is within the law." Determining the exact scope of the advice given is, itself, a sensitive task. The Commentary goes on to explain:

> While any general exploration of what transpired between attorney and client would, of course, be inappropriate, it is sometimes feasible, either at the discovery stage or during trial, so to focus the inquiry by specific

> questions as to avoid any broad inquiry into attorney-client communications. In some cases it will not be possible to probe without substantially invading the privileged area. When these cases arise, the court may require that a prima facie case of wrongdoing be established by independent evidence before the privilege is denied. Even where the perimeter of the privileged relationship can be analyzed without probing too deeply into confidential communications, such analysis will not be necessary if independent evidence of wrongdoing is available.

(3) *What amendments would strengthen AS 24.25.010?*

AS 24.25.010, setting out the process for issuing subpoenas, could be clarified with respect to the treatment of the subpoena power of the permanent interim committees, which is dealt with in other statutes. However, the public policy issue presented by this statute is whether and to what extent the power of committees to investigate should be clarified. A committee of the legislature exercises only those powers conferred upon it by the legislature. The power of committees to investigate is implied from the grant of the subpoena power to committees. Ought the power to investigate be made specific and, if so, to what extent should committees be granted the power to investigate by statute? To what extent should investigatory procedures by committees be addressed in statute? An example of a specific grant of the authority to investigate, along with specific procedures to be used, can be found in AS 24.60.170 - 24.60.178, involving proceedings before the Select Committee on Legislative Ethics. (See Mason's Manual, Sec. 799, legislative investigating committees)

TBC:ljw
09-042.ljw

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

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September 9, 2008

The Honorable Kim Elton
State Senate
State Capitol, Room 506
Juneau, AK 99801-1182

Re: Legislative Investigation re Office of the Governor

Dear Senator Elton:

The purpose of this letter is twofold: First, to explain why the Department of Law decided not to proceed with the depositions of Department of Administration employees last week and why, unless the current manner of pursuing the investigation changes, the Department of Law may find it necessary to move to quash subpoenas issued to compel the testimony of those witnesses and seek other relief from the courts. And second, to express our concerns with the conduct of this investigation.

First, with respect to our decision to not proceed with the depositions. Within the past week the project director appears to have adopted an incorrect interpretation of law regarding access to state employees' personnel files under the State Personnel Act. This incorrect interpretation could lead the witnesses to believe that they could face criminal prosecution for what is actually legal conduct. An improper threat of potential prosecution is totally inconsistent with the constitutional requirement that the "right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed." Alaska Const. art. I, sec. 7.[1]

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[1] The framers explained the reason for this provision as follows:

> The McCarthy hearings brought out the great issue that existed here a couple years ago. McCarthy was making charges against people under the exercise of the powers of a congressional legislative committee. The people, individuals were sorely abused under the guise of the exercise of the power of the legislature to investigate. The only subject that a legislature is supposed to investigate upon is something that will bear upon the state code or prospective legislation that might be under consideration. But under the guise of looking into legislative matters they call hearings and then maybe subject people to very bad treatment and ruin their reputations and assassinate them from a character standpoint....

Proceedings of the Alaska Constitutional Convention at 1448-49.

On September 2, 2008, Senator French apparently publicly expressed his view that if the Governor's Office obtained confidential information from Trooper Wooten's personnel file, "it would be a violation of state law." "October Surprise Over Palin Investigation?" ABC News, Sept. 2, 2008. On September 3, 2008, Senator French also apparently disclosed that the scope of the investigation has now expanded to include whether other persons within the Palin administration have abused power. "Palin Seeks Review of Monegan Firing Case," Anchorage Daily News, Sept. 3, 2008.

If, as Senator French's comments indicate, he believes that the governor and her staff members may not review executive branch employees' personnel files, the Department of Law disagrees. It does not violate the State Personnel Act for Department of Administration staff to provide confidential personnel information to the governor or her staff – or for the governor or her staff to receive that information – in the course and scope of their official duties.

The governor has supervisory authority over all executive branch employees. The Alaska Constitution provides that "[t]he executive power of the State is vested in the governor," that all executive and administrative offices must be allocated by law within principal departments, that the governor is "responsible for the faithful execution of the laws," and that "[e]ach principal department shall be under the supervision of the governor." Alaska Const. art. III, secs. 1, 16, 22, 24. Likewise, Alaska's statutes provide that "the governor is the appointing authority for all officers and employees of the executive branch," and she may delegate that authority. AS 39.25.020(a)(2).

As the supervisory chief of the executive branch, the governor has a right of access to information in the personnel files of employees in the branch she supervises. Her right of access extends also to the staff members who assist and advise her, including heads of the principal departments. AS 44.17.040.

The governor or her staff may, in the course and scope of their official duties, review a confidential personnel file to ensure, for example, that an employee is adequately supervised, appropriately evaluated, and appropriately disciplined. In appropriate cases, the governor may also direct the termination of a state employee. These powers are inherent in the governor's constitutional authority – and duty – to supervise the executive branch.

The framers of our constitution gave these broad powers to the governor because they intended to have a strong governor. Delegate Lundborg explained that intent as follows:

> We in our Committee felt that it would be the wishes of the majority of the Convention to have a strong executive. By that we did not mean a dictator, one who would get into power and be the absolute power in the state, but one who through appointive powers would be able to select his

> co-workers down through the various offices so that when the state's functions would be successful we could say that we had a good governor, and when they would not be successful we would know who to blame and could vote accordingly at the next election.

Proceedings of the Alaska Constitutional Convention at 2222. *See also Bradner v. Hammond*, 553 P.2d 1, 3 n.3 (Alaska 1975).

The Department of Law agrees that state employees' personnel records are confidential. The State Personnel Act provides that such records "are confidential and are not open to public inspection." AS 39.25.080(a). But that does not mean that the governor or her staff cannot review those records or receive information contained in them. Review by the governor or her staff of a confidential personnel file in the course and scope of their official duties is neither a violation of employee confidentiality nor a public inspection.

To the extent that, in the course and scope of their official duties, any employees of the Department of Administration disclosed Trooper Wooten's personnel file or any information contained in the file to the governor or her staff, that disclosure was both lawful and consistent with the Department of Administration's regulations. *See* 2 AAC 07.910(c)(5).

All that being said, the Department of Law recognizes the possibility that a confidential personnel file could be handled inappropriately. If the contents of a confidential personnel file were disclosed inconsistently with the applicable statutes and regulation, including 2 AAC 07.910, the Department of Law agrees that it would violate the State Personnel Act. At this point, the Department of Law knows of no evidence that suggests that any Department of Administration employees violated the State Personnel Act in handling Trooper Wooten's personnel file.

Generally speaking, the Department of Law has no objection to the legislature seeking to ascertain the facts with respect to how Trooper Wooten's personnel file was handled. The Department of Law does object, however, to the project manager's current implication that appropriate disclosures of an employee's confidential personnel information to the Office of the Governor violate the law.

That implication concerns us because the stakes for these Department of Administration employees are high. If Senator French's apparent legal view is correct, it is theoretically possible that these employees could be subjected to criminal prosecution and forfeiture of their jobs if they are determined to have committed a willful violation of the State Personnel Act. AS 39.25.900. It also raises serious questions about the Department of Law's ability to continue to provide them with legal representation.

If Senator French's reading of the law is incorrect, then conducting these depositions under an improper threat of potential prosecution is unfair. It fails to accord these persons the fair and just treatment that the Alaska Constitution guarantees them.

To represent the Department of Administration employees adequately, the Department of Law wishes to confirm that the Legislative Council agrees with the department's reading of the law. If we cannot reach agreement on the proper interpretation of the State Personnel Act, the Department of Law is prepared to seek declaratory judgment in court on this issue. But if the Legislative Council will acknowledge in writing its agreement with the Department of Law's interpretation, the Department of Law will drop its objections and the depositions may proceed without subpoenas.

We shall now turn to our concerns regarding the manner in which this investigation is being conducted. The Department of Law has endeavored, consistent with its legal obligations, to cooperate with the legislature's investigation. But at this point, we think the Legislative Council may wish to review this investigative process and consider the following seven concerns.

1. **Selection of the Investigator:** On July 30, 2008, at the outset of this investigation, we expressed a concern to the project manager and the Chair of Legislative Council that an investigative process that did not use established procedures could run the risk of violating due process. Moreover, we recommended that consideration be given to selecting an investigator with an unquestioned reputation for objectivity and political neutrality, such as a retired judge. Our suggestion was dismissed, and the response we received was that a prosecutor would be selected and that a prosecutor's primary duty is to seek justice.

2. **Investigative Tactics:** Unfortunately, as we have watched this process unfold, it appears our fears have been realized. At present the investigation is using such tactics as a tipline and secret depositions in which witnesses are asked under oath to testify to rumor and gossip. Those tactics raise questions about the scope and true purpose of the investigation. These tactics also appear to violate legislative procedures established by statute which require the Legislative Council to conduct depositions in the same manner as required by court rules. *See* AS 24.20.060(2).

3. **Investigative Targets:** The investigation now apparently has new and unidentified targets. We have two concerns in this regard. First, from a basic due process perspective, the persons who are the new targets of this investigation have a right to know whether they are targets. Second, the process used by legislative committees is not well suited to protecting the rights of persons suspected of committing a crime. This is recognized in Mason's Manual of Legislative Procedure, where a rule of procedure is established that "[t]he legislature has no right to conduct an investigation for the purpose of laying a foundation for the institution of criminal proceedings." Mason's Manual of

Legislative Procedure, sec.797(2) (2000). We urge caution in these matters and counsel you to consider deferring to ongoing means of investigation that provide adequate due process.[2]

4. Threats of Criminal Prosecution: Even if the purpose of the investigation is not to lay the foundation for criminal proceedings, as noted above, the project director has apparently made comments that mistakenly characterize legal conduct as potentially criminal conduct. An improper threat of potential prosecution is inconsistent with the due process requirement that legislative investigations accord fair and just treatment to all persons. Alaska Const. art. I, sec. 7.

5. Prejudgment of the Matters Being Investigated: We are also concerned about indications that the project director may have prejudged the outcome of this investigation. Before this investigation began, Senator French stated publicly that this was a personnel matter that "just went way out of bounds" and characterized the conduct at issue as a "huge mistake." KUDO interview, July 21, 2008. More recently, Senator French apparently stated publicly that the investigation report will be damaging to the governor. "October Surprise Over Palin Investigation?" ABC News, Sept. 2, 2008. Can such statements possibly reflect a process that accords "fair and just" treatment to the governor? We are highly concerned with the prejudicial nature of such statements, particularly given the fact that the project director is the direct supervisor of the investigator and this investigation. We doubt that it is possible to retract these statements in a manner that will alleviate their prejudicial impact on the conduct and outcome of this investigation.

6. Delegation of Authority to Investigator: We believe that there are serious legal defects in the manner in which the Legislative Council has purported to delegate its investigative authority to a private investigator. Alaska Statute 24.25.060(2) only permits the Legislative Council to issue subpoenas to compel attendance at a public hearing before the Legislative Council. We understand that under this delegation the standing Judiciary Committees of the legislature will meet to consider issuing subpoenas to compel the attendance of witnesses. We ask you to carefully consider whether there is authority in the state constitution, state statutes or the Uniform Rules for these committees to validly issue subpoenas at this time. We also question the basic premise whether the Legislative Council may delegate its investigative powers to a single legislator acting through a private investigator. After detailing these issues for your consideration we continue to recommend that our clients cooperate with the investigation in the belief that the Legislative Council will not completely abrogate its responsibilities.

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[2] We note that on July 21, 2008, prior to the Legislative Council's authorization of this investigation, Senator French stated publicly that the investigation would be conducted in the same manner as the investigation of a "complex crime." KUDO interview, July 21, 2008.

But we reserve the right to revisit whether the public interest is truly being served by the manner in which this investigation is currently being conducted.

7. Timing of the Investigation: The timing of this investigation has been suspect. The original due date of October 31 for the investigation report was highly suspect because it comes so close to the November election date. The new due date of October 10 is really no less suspect. It only heightens the original perception that this process is a rush to judgment for ends that may have little to do with justice. Our concern regarding timing has been heightened even further with the recent news that there are approximately 1.3 million e-mails that the executive branch has preserved for purposes of this investigation. It will take time, potentially a significant amount of time, to search through these to find the e-mails that are pertinent to this investigation, and ensure that appropriate security and confidentiality are preserved, that privileges are maintained, and, if such privileges are to be waived, that they be waived in a knowing and informed manner.

Unchecked investigative enthusiasm is not consistent with our foundational principle of due process and the Alaska Legislature's consistent practice of providing fair treatment of persons appearing before legislative committees. Bluntly and to the point, we think there is a legitimate concern that this investigation is no longer being conducted in a fair manner—and therefore is potentially violative of Alaska's constitutional due process safeguards.

The eyes of the nation have now turned upon us. If this investigation is to continue, the governor, the people of Alaska, and the people of this country deserve a process that is entirely consistent with the foundational principle of due process.

We request that you carefully consider our concerns.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By: Michael A. Barnhill
Michael Barnhill
Senior Assistant Attorney General

MAB/krk

cc: Hon. Nancy Dahlstrom
Hon. John Coghill
Hon. John Harris

Hon. Ralph Samuels
Hon. Bill Stoltze
Hon. Peggy Wilson
Hon. David Guttenberg
Hon. Bettye Davis
Hon. Lyda Green
Hon. Lyman Hoffman
Hon. Gary Stevens
Hon. Gary Wilken

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MEMORANDUM January 25, 2005

SUBJECT: Civil Process Immunity (Work Order No. 24-LS0439)

TO: Representative Max Gruenberg

FROM: James P. Crawford
Assistant Revisor

I am responding to the immunity-based question you posed to Ms. Tam Cook at the end of last week. As an initial matter, the question was phrased in terms of "legislative immunity from civil process," and you should be aware that these are, strictly speaking, two separate immunities. One is "legislative immunity," and the other is "civil process immunity."[1] Both immunities protect legislators and the legislative process, but there are distinctions between the two immunities, and each has its own jurisprudence. The gist of your question suggests that "civil process immunity" is the immunity at issue.

Civil process immunity arises from Art. II, sec. 6, among other places. Section 6 provides that "[m]embers attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace."[2] You ask whether there are any circumstances under which a legislator may participate in proceedings from which the legislator would normally be protected by civil process immunity.[3] The answer is "yes," but several notes of caution are in order.

First, although they usually fly under everyone's radar, proceedings against legislators, legislative committees, or the legislature do arise. Early on, such proceedings may initially appear innocuous or, at worst, faintly irritating, only to mutate later into something far more serious in terms of reputation, political, economic, or criminal considerations. The course a given proceeding may ultimately take is not predictable, which should be taken into account in deciding to forgo immunity's protections.

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[1] There is also a "privilege" from arrest, which does not appear to be relevant presently.

[2] In Alaska, there are actually three sources of immunities: (1) the common law, originally handed down from England where immunity was developed before and especially during the reign of Queen Elizabeth I; (2) AS 24.40.010; and (3) the constitution, as noted above.

[3] Although you did not specifically ask, the ultimate conclusion of the AG Opinion cited in your request is sound: civil process immunity is absolute and may not be waived -- while it lasts. Its absolute nature makes it similar to the *other* immunity -- legislative immunity.

Second, if a legislator is observed to be embroiled in *one* otherwise avoidable (but voluntarily submitted to) proceeding, enterprising litigants-at-large may assume that the "brakes are off" as a general matter and thus become emboldened to pursue *additional* proceedings against the legislator. The sources of suits against legislators are legion and include other legislators and various entities in the executive branch or municipal government. Even if such suits are disposed of quickly through a motion to dismiss under Civil Rule 12, the resources and expense consumed in producing a stream of such motions could quickly mount.

Admittedly, the scenario presented here would probably most likely arise in the context of proceedings implicating legislative immunity (the *other* immunity), but this office nonetheless counsels taking advantage of all immunities. It is true that civil process immunity only delays proceedings until a time following legislative sessions, but it could well be the case in a given situation that a delay would be critically important.

Third, though other courts have ruled on the non-waivability of legislative and civil process immunity, the Alaska Supreme Court has not yet done so.[4] From a legislative perspective, no impediments to the court reaching that non-waivability conclusion should be erected. The issue of waiver in the immunities context is very important and is intertwined with the issue of the personal and subject matter jurisdiction of the courts, or more particularly, the limits of jurisdiction.

In the immunity context, these jurisdictional limit issues relate to checks on the power of courts being raised against the legislative branch, whether in criminal or civil proceedings, and whether raised against a legislator directly (e.g., a proceeding against a legislator, including suits for damages, injunctions, or declaratory judgments) or indirectly (e.g., subpoenaing a legislator to be a witness in a case against someone else). Historically, immunity arose when judges were merely appointed lackeys of the Tudor and Stuart monarchs engaged in a struggle against parliament; today, it is a separation of powers boundary across which the power of the judicial branch may not be extended to disrupt the legislative branch.

That immunity is not waivable means, among other things, that separation of powers protections cannot be mistakenly or improvidently surrendered. It also means that if an attorney not familiar with immunity fails to assert it at trial, it may still be raised for the first time on appeal. This happens frequently; non-waivability has saved many legislators. It also means that immunity may, in a second, separate case, provide the basis for a collateral attack on a first case decided against a legislator, even if the first case proceeded all the way through the appellate process to a final decision without

[4] As you are aware, the Department of Law views the immunity as not being subject to waiver. Additionally, the argument that immunity cannot be waived has been worked into briefing filed by attorneys in the Office of Legal Services in at least five different lawsuits. Each time, however, the argument was essentially a subsidiary one to a separate, main argument, and each time, the case in question was resolved without mentioning, much less reaching and resolving, the non-waiver issue.

immunity ever being mentioned (because the first attorney(s) were soundly asleep at the switch).

If legislators begin to make a habit of waiving, trying to waive, or engaging in conduct that is analogous to waiving immunity, the Alaska Supreme Court might be persuaded not to follow the lead of other states when the issue reaches the court and instead hold that immunity can actually be waived. A great deal would be lost by such a ruling. Legislator-driven encouragement of it should be avoided if at all possible.[5] Again, much of this reasoning applies mainly to legislative immunity, but a ruling by our court that civil process immunity may be waived makes a ruling that the arguably more important legislative immunity may be waived all the easier to reach, and vice versa.

Turning now to the answer to the question asked, after careful consideration by a legislator and discussion with the legislator's lawyer, a legislator could indeed attempt to participate in a proceeding against which immunity would normally provide a shield. Participation could occur simply by the legislator not asserting the immunity to which the legislator is entitled. If no one else raised the immunity issue, it would likely be a non-factor. However, the legislator should not mention -- in court or out -- the term "waiver" in conjunction with or in explanation of the legislator's considered and always-discussed-with-an-attorney-before-hand decision to appear in a proceeding normally subject to immunity.[6]

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05-015.lmb

[5] The list of reasons set out in this memo for not waiving immunity is not intended to be exhaustive.

[6] Civil process and legislative immunities protect legislators, legislative committees, and the legislature. All of these players have an interest in immunity issues and in the course of the development of immunity jurisprudence. All of them could be affected to some degree by a precedent restricting the scope of immunity or allowing waiver of immunity. This gives any one of the players a general interest in any case in which a legislator is choosing to not assert an available immunity, whether through an affirmative attempt to waive it or through silence coupled with actual attendance. In addition, the specifics of a given "non-assertion" case may give any of the players a second, more particularized interest in the case. Either type of interest may lead any of the legislative players to attempt to intervene in the case as a party or to participate as an *amicus* and raise the non-waiver issue. If so, it is likely that the courts would consider any immunity-related arguments presented by a player wishing to be heard. Because immunity protects the legislative process generally, even a constituent wishing to be heard might get the courts to listen.

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MEMORANDUM July 20, 2006

SUBJECT: Oath and subpoena of witness before a standing committee

TO: Representative Max Gruenberg

FROM: Tamara Brandt Cook
Director

May an oath be administered to a person testifying before a standing committee of the legislature?

The matter is addressed in AS 24.25.060 which states in full (emphasis added):

> Sec. 24.25.060. Oath and penalty for violation of oath. The president of the senate and speaker of the house of representatives and **the chairman of every committee of either body may administer an oath to a witness appearing before the respective bodies**. A person who wilfully swears or affirms falsely concerning any matter material to the subject under investigation or inquiry is guilty of perjury and upon conviction is punishable by imprisonment for not less than one year nor more than five years.

It is my impression that when a standing committee chair has administered an oath the form that has been used is that used in court: "Do you solemnly swear (or affirm) that the testimony you are about to give in this matter will be the truth, the whole truth, and nothing but the truth so help you God?"

May a standing committee or the chair of a standing committee issue a subpoena?

Again the matter is addressed by statute. Provisions dealing with the subpoena process are found at AS 24.25.010 - 24.25.080. With respect to your precise question, AS 24.25.010(b) states in full:

> (b) A subpoena requiring the attendance of a witness before a standing or special committee of the legislature may be issued by the chairman of a committee when authorized to do so by a majority of the membership of the committee and with the concurrence of the president or the speaker, or with the concurrence of the house or the senate.

Attached is a copy of a proposed committee subpoena form.

TBC:med
06-436.med

Enclosure

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MEMORANDUM October 17, 2006

SUBJECT: Meetings of standing committees during the interim (Work No. 25-LS0128)

TO: Representative Max Gruenberg

FROM: Tamara Brandt Cook
Director

(1) May a standing committee subpoena the governor to appear at a meeting to be held after the legislature has adjourned sine die?

Mason's Manual states in sec. 445(5): "Committees, specially authorized, may sit after adjournment sine die." (See also, sec. 622) Uniform Rule 21(c) grants to standing committees the power to meet between sessions. A committee that meets between sessions may consider "any legislative matter which is consistent with the jurisdiction of the committee."

It is my understanding that you are interested in the possibility of the House Judiciary Committee conducting an investigative meeting to determine whether the Governor intends to execute a contract dealing with construction of a natural gas pipeline without submitting the contract to the legislature for its approval. It is clear that the legislature has broad authority to investigate and that the investigation may be conducted through a committee. (Mason's Manual, sec. 795) However, I must caution that Uniform Rule 20(a) does not specifically grant jurisdiction to the Judiciary Committee to conduct investigations, nor has the House referred the pipeline contract matter to the Judiciary Committee. Indeed, it appears that under Uniform Rule 20(a) the State Affairs Committee may have a claim to jurisdiction over the pipeline contract since it is charged with "programs and activities of the Office of the Governor" and that the Resources Committee might also have a claim to jurisdiction. Nonetheless, it is consistent with the past practice of the legislature for legal issues, such as those involving separation of powers, to be considered by the Judiciary Committee. Consequently, it is unlikely that the Judiciary Committee would be deemed to be acting outside of its authority to meet between sessions under Uniform Rule 21(c) if it conducting a hearing to ascertain the status of the pipeline contract.

A standing committee has broad statutory power to subpoena a witness under AS 24.25.010(b). Note that the subpoena must be authorized "by a majority of the membership of the committee and with the concurrence of . . . the speaker . . ."

(2) May a standing committee place a person under oath at a meeting held during the interim?

The chair of a standing committee has broad authority to administer an oath at any meeting of the committee. AS 24.25.060 states in part: "the chairman of every committee of either body may administer an oath to a witness appearing before the respective bodies. A person who willfully swears or affirms falsely concerning any matter material to the subject under investigation or inquiry is guilty of perjury and upon conviction is punishable by imprisonment for not less than one year nor more than five years."

TBC:ljw
06-344.ljw

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MEMORANDUM September 9, 2008

SUBJECT: Inquiry regarding issuance of subpoenas in legislative investigations

TO: Representative Max F. Gruenberg, Jr.

FROM: Jack Chenoweth
Assistant Revisor

In conjunction with the current legislative investigation initiated by the Legislative Council, I looked back to January 1975 for examples of use of subpoenas issued in conjunction with legislative inquiries or investigations.

The Sheffield impeachment provides the chief example of authorization of subpoenas. Enclosed are the minutes, from the Senate Journal of the Special Session, setting out the authorization for subpoenas by the Senate Rules Committee in July 1985 in conjunction with that effort. As you can see, the authorization is "generic" in that it does not specifically name a witness or witnesses to whom the subpoenas are to be addressed.

There is, in the public record, a 1980 Opinion or memo of the Attorney General to former Representative Alvin Osterback concerning issuance of legislative subpoenas that also provides guidance. A copy of the memo is provided.

If I am able to find any other examples in the days to come, I will make copies and send them along. However, this office would not be involved in or necessarily be aware of a committee action to issue a subpoena. Nor is that fact likely to find its way into House or Senate Journals.

JBC:med
08-384.med

Enclosure

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MEMORANDUM September 10, 2008

SUBJECT: Legislative Council Investigation (Work Order No. 26-LS0098)

TO: Representative Max Gruenberg

FROM: Tamara Brandt Cook
Director

(1) Does the Legislative Council have the authority to initiate and maintain the investigation under the contract authorized during the last special session?

A committee generally may perform those functions that have been delegated to it or referred to it by the full legislative body. No statute or Uniform Rule grants specific authority to a committee to conduct investigations, nor does a statute or rule restrict the power of investigation. The legislative council has been assigned certain powers and duties by law and, arguably, those grants of authority carry with them the implied power to conduct investigations necessary to carry out those functions. Indeed, the grant of the power to depose witnesses and to issue subpoenas under AS 24.20.060 is evidence of a direct rather than implied grant of investigatory power to the legislative council. Probably the legislative council can investigate any matter that falls within its duty to provide administrative services to the legislature (AS 24.20.061) as well as its power to participate in the lawmaking function through the introduction of legislation (AS 24.08.060(b)).

The legislative council does not have explicit authority to investigate activities of executive branch agencies or officers. However, lawmaking is a central legislative activity that justifies broad investigatory pursuits. It is stated in Mason's Manual, sec. 795(10): "An investigation into the management of the various institutions of the state and the departments of the state government is at all times a legitimate function of the legislature." The legislative council contract directs the consultant to "investigate the circumstances and events surrounding the termination of former Public Safety Commissioner Walt Monegan and potential abuses of power and/or improper actions by members of the executive branch" and to prepare a report that includes "any recommendations for action by the Legislature . . . ." (Clause I, Statement of Work) It is possible, for example, that the recommendations contained in the report prepared under the investigation contract will consist of proposed legislation and fall squarely within the lawmaking function exercised by the legislative council when it considers the introduction of legislation or that the recommendations contained in the report will fall under the council's administrative duties which could include bringing matters involving

public policy and the administration of state government to the attention of the legislature for what actions it chooses to take if any.

(2) Is this, in fact, an investigation being conducted by the Senate or House Judiciary Committees that is supported by Legislative Council funding, the Legislative Council being the entity that has general responsibility for legislative matters generally when the legislature is not in session?

The Legislative Council has entered into a contract for the investigation. It is the Council that can terminate the contract. The final report by the consultant is to be submitted to the Council, not to another committee, and it is the Council that must determine whether to release the report or portions of it to the public. It must be concluded that this is an investigation by the Legislative Council.

(3) Does the use of one or more Judiciary Committees to issue subpoenas in connection with the investigation amount to an internal decision within the legislative branch as to how best to initiate and maintain the investigation which is nonjusticiable?

The method whereby the activities of the consultant are to be supported through the issuance of subpoenas appears to be a nonjusticiable question based on principles of separation of powers. The court has shown a willingness to examine legislative procedures in some detail and to invalidate a legislative action when the court finds that the legislature fails to comply with constitutionally mandated procedure or requirements. (Plumley v. Hale, 594 P.2d 497 (Alaska 1979); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980)) However, the court will not consider questions regarding the procedure of the legislature itself because of separation of powers considerations. (Malone v. Meekins, 650 P.2d 351 (Alaska 1982)) This is true even when the legislature does not follow procedures for the legislature that are set out in statute. (Abood v. League of Women Voters of Alaska, 743 P.2d 333 (Alaska 1987))

(4) Does the Speech and Debate provision, the first sentence of Art. II, sec. 6 of the state constitution, provide a basis to contend that no other forum may inquire as to the legislature's decision regarding the methods used to conduct this investigation, particularly given that the decision to initiate the investigation was taken by the legislative council during a special session?

Yes. Article II, sec. 6 states in part: "Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session."

However, legislative immunity applies when legislators are acting in the scope of legislative duties. Unconstitutional acts may not be protected because they are not in the scope of legislative duties. (But, for the breadth of legislative immunity see State v. Dankworth, 672 P.2d 148 (Alaska App. 1983).

Note in this regard that in addition to the constitutional provision, legislative immunity is a matter of statute. AS 24.40.010 provides somewhat broader protection than the constitutional provision in that it extends immunity to a "legislator attending, going to, or returning from a meeting of an interim standing or special committee of the legislature of which the legislator is a member." Furthermore, legislative immunity has been recognized to be part of the common law. (Tenny v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 91 L.Ed. 1019 (1951)) The common law is made part of state law under AS 01.10.010. Accordingly, in Alaska immunity is also part of Alaska's common law. Common law immunity is broader than the constitutional immunity. (In re the Subpoena Issued to Kevin Jardell, S-10457, Dec. 20, 2001, Order on Original Application for Relief; wherein the court unanimously extended legislative immunity to state legislative employees involved in the performance of legislative duties during the interim)

TBC:lmb
08-214.lmb

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MEMORANDUM September 11, 2008

SUBJECT: Legislative investigation: claims of executive privilege; disposition and enforcement of subpoenas

TO: Representative Max F. Gruenberg, Jr.

FROM: Jack Chenoweth
Assistant Revisor

These are responses to the several questions set out below.

1. THE ADMINISTRATION'S PRIVATE COUNSEL HAVE INDICATED THAT THEY MAY INTERPOSE AN "EXECUTIVE PRIVILEGE" OBJECTION TO SUBPOENAS ISSUED THAT ARE ADDRESSED TO EXECUTIVE BRANCH EMPLOYEES REQUIRING THEM TO TESTIFY BEFORE THE LEGISLATIVE COUNCIL'S INVESTIGATOR.

CONSIDERING COURT DECISIONS IN THIS JURISDICTION AND OPINIONS OF THE ATTORNEY GENERAL, WHAT IS THE EXTENT OF "EXECUTIVE PRIVILEGE" DOCTRINE UNDER THE LAW OF THIS STATE?

The genesis of contemporary executive privilege analysis as a qualified executive privilege is *United States v. Nixon*, 418 U.S. 683, 705 - 713 (1974).

State judicial recognition of the executive privilege doctrine first appears in *Doe v. Alaska Superior Court, Third Judicial Dist.*, 721 P.2d 617 (Alaska 1986), a defamation action brought by a medical doctor who had been unsuccessful in gaining appointment to the State Medical Board; the doctor sought production of the governor's file compiled when the doctor's nomination was under consideration by the executive. Having already noted the existence of the separation of powers principle, the court concluded that the public policy rationale that applies to give recognition to the privilege in the federal and certain other state courts was equally valid in this state. The privilege, the court said, as applied in other courts:

> . . . is only a qualified one, is applicable to internal advice, opinions and recommendations, and is intended to protect the deliberative and mental processes of decision-makers.

721 P.2d at 623. Moreover, the court was prepared to apply the doctrine only as to "internal communications," that is, communications involving or initiated by persons engaged within the executive branch:

> In cases such as [those in other jurisdictions that the court cited in its analysis], the requested disclosure involved either internal communications stating the opinions and recommendations of state employees, or information directly solicited by government officials. In such cases the rationale underlying the executive privilege doctrine -- the need to encourage candid opinions and debate among government officials during the decision-making process -- is directly applicable. Furthermore, there often is an express or at least an implied understanding of confidentiality attached to such communications.

721 P.2d at 625. Letters from the public were therefore necessarily excluded from the doctrine's coverage.

Thereafter, the court summarized its understanding of the doctrine:

> The doctrine of executive privilege recognizes that chief executives sometimes have a qualified power to keep confidential certain internal governmental communications "so as to protect the deliberative and mental processes of decision-makers." *Doe*, 721 P.2d at 622-23 (footnote omitted). The doctrine is designed to ensure the availability to executive decision-makers of candid advice.

Anchorage v. Anchorage Daily News, 794 P.2d 584, 593 (Alaska 1990) (citing *United States v. Nixon*, 418 U.S. 683, 708, 94 S. Ct. 3090, 3107-08, 41 L. Ed. 2d 1039, 1064 (1974)) and the statement in that opinion that "the primary impetus for the qualified privilege is the need to protect '. . . [t]he public interest in candid, objective, and even blunt or harsh opinions in presidential decision making. A president and those who assist him must be free to explore alternatives . . . and to do so in a way many would be unwilling to express except privately.'"

Two other court decisions warrant mention. *Capital Information Group v. Office of the Governor*, 923 P.2d 29 (Alaska 1996), examined the distinction between the separation of powers-based doctrine of executive privilege and the common law-grounded deliberative process privilege in the context of public access to budget impact statements and legislative proposals forwarded for the governor's consideration. This distinction was amplified in *Gwich'in Steering Committee v. Office of the Governor*, 10 P.3d 572, 578 - 579 (Alaska 2000):

> We stated in *Capital Information Group v. State, Office of the Governor* that we considered the terms "executive privilege" and "deliberative process privilege" to be synonymous for purposes of that

> discussion. But the two terms are not identical. Instead, the deliberative process privilege is a "branch" of a broader group of governmental privileges. The roots of the deliberative process privilege lie in the common law; it protects the mental processes of government decision makers from interference, not constitutional notions of separation of powers. Therefore, the question is not whether the communication relates to a duty mandated in article III of the Alaska Constitution, but whether disclosure of the communication sought would affect the quality of governmental decisionmaking.

The Department of Law identified "executive privilege" as a device by which to protect assertedly confidential information against public disclosure about two years in advance of the *Doe* decision, but did so in the context of protection for executive branch decision making:

> [A] privilege that has been recognized by courts is the "executive privilege," which protects from public disclosure those predecisional documents prepared by governmental agencies that reflect the "decisionmaking" or "deliberative process" of the agency. This privilege has received most attention from the federal courts, in cases addressing the issue of whether documents are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (1966). The privilege has yet to be recognized by the Alaska Supreme Court, but there is little reason to believe that the court will not do so, at least to some extent, when presented with the issue.

1984-1 Op. A.G. (Inf.), June 25, 1984, at 5. With respect to the more recent opinions of the attorney general treating with executive privilege, the distinction first drawn by the court between "executive privilege" and "deliberative process privilege" breaks down. The analysis offered in two opinions, Op. A.G. 1993 (January 1, 1993), No. 221-92-0553, and 1994 Op. A.G. No. 1 (November 24, 1994), seems almost to eliminate the distinction between the two. Both opinions were prepared and issued before the decisions in *Capital Information Group* and *Gwich'in Steering Committee*, so their value may be considered questionable.[1]

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[1] For the record, a recent (2007) "Comment" in Capital University Law Review, "Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials," 35 Cap. U. L. Rev. 983, notes that the doctrine applies in these jurisdictions: Alaska (*Doe v. Alaska Super. Ct.*, 721 P.2d 617, 623 (Alaska 1986)); California (*Times Mirror Co. v. Super. Ct.*, 813 P.2d 240, 250-52 (Cal. 1991)); Delaware (*Guy v. Jud. Nominating Comm'n*, 659 A.2d 777, 785 (Del. Super. Ct. 1995)); Kentucky (*Courier-Journal v. Jones*, 895 S.W.2d 6, 8-9 (Ky. Ct. App. 1995)); Maryland (*Hamilton v. Verdow*, 414 A.2d 914, 924 (Md. 1980)); New Jersey (*Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978)); New Mexico (*N.M. ex rel. Attorney General v. First Jud. Dist. Ct. of N.M.*, 629 P.2d 330, 333 (N.M. 1981)); Vermont (*Killington, Ltd. v. Lash*, 572 A.2d

The author of the Capital University Law Review cited in this memo suggests that the court's analysis in *Capital Information Group* modifies the qualified executive privilege into something approximating a deliberative process privilege examination, at least in the first instance:

> At first glance, the Alaska Supreme Court appears to have adopted the chief executive communications privilege recognized in *Nixon*. Using the separation-of-powers rationale in *Nixon*, the court explained: "While we have not had occasion to address the executive privilege doctrine in the context of Alaska's Constitution, the doctrine has been widely recognized by both federal and state courts based on their respective constitutions." The *Doe* Court, citing *Nixon*, found that executive privilege presumptively attached upon a formal and particularized claim.
>
> A detailed analysis of the court's decision in *Doe*, however, reveals the implementation of a series of strict procedural requirements analogous to those required by the deliberative process privilege. First, the burden of proof lies with the government to "specifically identify and describe the documents sought to be protected and explain why they fall within the scope of the executive privilege." To meet this burden, the government must introduce affidavits based on a "personal examination of the documents by the affiant official." Once these procedural requirements are satisfied, the court must engage in the balancing test elucidated in *Nixon*. Finally, upon a sufficient showing of need, the trial court must engage in an in camera review of the documents to determine whether disclosure is appropriate.
>
> Nearly a decade later, the Alaska Supreme Court clarified its holding regarding executive privilege in *Capital Information Group v. State*. Initially, the court acknowledged its prior acceptance of the constitutionally based executive privilege articulated in *Nixon*. Then, it stated: "[T]he term 'executive privilege' in *Doe* encompasses what other commentators have called the deliberative process privilege." In doing so, the court adopted the substantive requirements underlying the deliberative process privilege--namely, that the materials be both deliberative and predecisional. Accordingly, purely factual material falls outside the scope of the privilege unless disclosure "'would reveal the deliberative process,

---

1368, 1375 (Vt. 1990)); and Virginia (*Taylor v. Worrell Enters., Inc.*, 409 S.E.2d 136, 139 (Va. 1991)). The same source also relates that the Commonwealth of Massachusetts has refused to recognize any form of executive privilege. *Babets v. Sec'y of Exec. Office of Human Servs.*, 526 N.E.2d 1261, 1266 (Mass. 1988). 35 Cap. U.L. Rev. at 985, note 7.

> or if the facts are "inextricably intertwined" with the policymaking process.'"
>
> At this point, the strict procedural requirements imposed by *Doe* apply. If a formal and particularized privilege claim is asserted, "there is a presumption in favor of nondisclosure and the party seeking access to the document must overcome that presumption." In essence, the Alaska Supreme Court [has] adopted a skeleton of the deliberative process privilege . . . .

35 Cap. U. L. Rev. at 999 - 1001 (notes omitted).

Alaska's recognition of the privilege, as in the other jurisdictions, does not treat it as one that is absolute. The procedural requirements that attach to claim of the privilege direct that the privilege be asserted with specificity. Once requisite specificity has been demonstrated, the presumption of the privilege applies and the court will look at the executive's asserted need for confidentiality against the opposing party's claim for production.

WOULD THE CLAIM OF "EXECUTIVE PRIVILEGE" PROVIDE A VALID DEFENSE OR SHIELD THAT WOULD PERMIT AN EXECUTIVE BRANCH EMPLOYEE FROM ANSWERING QUESTIONS PUT TO HIM OR HER IN A LEGISLATIVE INVESTIGATION OR FROM PROVIDING COPIES OF RECORDS UNDER A SUBPOENA DUCES TECUM IN A LEGISLATIVE INVESTIGATION?

If the claim is to operate at all, it probably would operate only in a narrowly limited sphere.

First, while the judicial decisions of the courts in this state speak in terms of "communications," leaving open the possibility that a claim of executive privilege might be asserted as to verbal communications, the *Doe* decision, by its terms, describes the privilege as applicable only to "internal governmental communications" and discusses the privilege in terms of the considerations bearing on the eventual examination and production of physical evidence:

> . . . we find the state's claim of privilege ***potentially valid with respect to the internal memoranda and "miscellaneous papers"*** in the appointment file. We do not know their exact content. However, at least some of the documents clearly are internal communications, and they may contain advisory opinions and recommendations. If so, they would constitute the type of internal deliberative communication the privilege is designed to protect.

721 P.2d at 625 (emphasis added). If the purpose of the subpoena is to elicit testimony (as distinct from a document or record), the claim of executive privilege is probably not available.

Second, at least in the context of its operation in the federal courts, the executive privilege applies only as to communications running between the president and his or her principal subordinates:

> . . . the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President. Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President. We are aware that such an extension, unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers.

In re Sealed Case, 121 F.3d 729, 751 - 75 (D.C. Cir. 1997). Again, based on federal court precedents, the claim of executive privilege does not apply to "communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisers." *Judicial Watch v. Department of Justice*, 365 F.3d 1108 (D.C.Cir. 2004), at 1116 (citing *In re Sealed Case*, 121 F.3d at 752) (emphasis added); see *In re Sealed Case*, 121 F.3d at 752 ("[T]he privilege should not extend to

staff outside the White House in executive branch agencies."). Thus, "the privilege become[s] more attenuated the further away the advisers are from the President operationally," *Judicial Watch*, 365 F.3d at 1114-15, and, in the event of a challenge, determining how far down the line of advisors constitutional protection provided by the executive privilege doctrine should extend in the context of balancing the needs of the executive and the Congress will be a fact-intensive inquiry. If the same test were to be applied in the application of executive privilege under the doctrine as identified by the state court, the test could eliminate assertions of executive privilege by commissioners and subordinates in the 14 principal executive departments.

Finally, at least under my review of the line of federal decisions, the executive privilege, whether applied to a conversation with the president or to fact gathering in preparation for that sort of conversation, is intended to promote candid communications by and with the president concerning the execution of his Article II duties--and nothing more:

> See *Nixon*, 418 U.S. at 705 (referring to "the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers"); *Id.* at 708 (President and advisers "must be free to explore alternatives in the process of shaping policies and making decisions"); *Id.* at 711 (privilege covers communications "in performance of the President's responsibilities"); *In re Sealed Case*, 326 U.S. App. D.C. 276, 121 F.3d 729, 744 (D.C. Cir. 1997) (privilege can be invoked when subpoenaed documents "reflect presidential decisionmaking and deliberations"); 121 F.3d at 742 (privilege protects "the confidentiality of conversations that take place in the President's performance of his official duties") (quoting *Nixon v. Sirica*, 159 U.S. App. D.C. 58, 487 F.2d 700, 717 (D.C. Cir. 1973) (en banc)); see also *Clinton v. Jones*, 520 U.S. 681, 137 L. Ed. 2d 945, 117 S. Ct. 1636, 1649 n.39 (1997) ("special caution is appropriate if the materials or testimony sought by the court relate to a President's official activities"). Like a President's immunity from particular civil damage suits, executive privilege is "grounded in 'the nature of the function performed, not the identity of the actor who performed it.'" *Jones*, 117 S. Ct. at 1644 (quoting *Forrester v. White*, 484 U.S. 219, 229, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1988)); . . . . Executive privilege applies to executive acts -- not to private acts undertaken by the individual who is (in the words of the Supreme Court) "the current occupant of that office." *Jones*, 117 S. Ct. at 1639.

In re Grand Jury Proceedings, 1998 U.S. Dist. LEXIS 7735 (D.D.C. May 26, 1998). See also *Nixon v. Administrator of General Services*, 433 U.S. 425, 449, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977) (noting that the privilege is "limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions'".

The comparable application to the state's chief executive under the Alaska constitution is,

of course, the performance of article III duties, and it is possible that the court might provide the parameters of the privilege a measure of greater latitude if the governor should assert that the communications involved action identified under article III, section 16:

> **Governor's Authority.** The governor shall be responsible for the faithful execution of the laws. [The governor] may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. . . . .

IS THE "EXECUTIVE PRIVILEGE" DOCTRINE AVAILABLE AS A DEFENSE OR SHIELD IN AN IMPEACHMENT PROCEEDING? IF IT IS NOT, IS THERE THE BASIS FOR AN ARGUMENT THAT, BECAUSE THE DOCTRINE IS NOT AVAILABLE AS A DEFENSE IN AN IMPEACHMENT PROCEEDING, IT OUGHT NOT ALSO BE AVAILABLE IN A PRELIMINARY LEGISLATIVE INQUIRY SEEKING TO DETERMINE WHETHER THERE MAY BE A REASONABLE BASIS TO UNDERTAKE A FORMAL IMPEACHMENT PROCEEDING?

Judicial decisions suggest that a claim of executive privilege is weakest in conjunction with an actual impeachment and that executive privilege may be attenuated or eliminated when an impeachment proceeding has been initiated. So, for example, in *Office of the Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 583 (Conn. 2004), the Connecticut Supreme Court wrote regarding a separation of power-based challenge brought by the governor to a subpoena issued in conjunction with the impeachment of the state's chief executive:

> . . . precisely because the present case is related to the impeachment process, the legislature is acting at the height of its powers and the plaintiff's [governor's] claim to categorical immunity is at its nadir. Thus, we believe that alleged misconduct of a chief executive that is sufficient to warrant an impeachment inquiry should not, as the plaintiff's contention suggests, present a reason for exempting him from accountability; rather, it should have the opposite effect. "The impeachment power necessarily implies a congressional power to inquire about presidential wrongdoing, as well as a corresponding obligation on the part of the president to respond to such inquiries." F. Bowman III & S. Sepinuck, "'High Crimes & Misdemeanors': Defining the Constitutional Limits on Presidential Impeachment," 72 S. Cal. L. Rev. 1517, 1539 (1999); see M. Gerhardt, "The Constitutional Limits to Impeachment and its Alternatives," 68 Tex. L. Rev. 1, 93 (1989) ("the president is not above the . . . law, there is no sound reason for exempting him from accountability, especially in the impeachment process"); A. Cox, "Executive Privilege," 122 Penn. L. Rev. 1383, 1435 (1974) ("history gives no affirmative support to presidential

> claims of privilege to withhold information from the House of Representatives while it is considering impeachment").

Office of the Governor v. Select Comm. of Inquiry, 858 A.2d 709 (Conn. 2004), at 738 - 739. Since separation of powers principles underpin the claim of executive privilege, *Doe*, 721 P.2d at 623, we may hope that an Alaska court would follow the reasoning of the Connecticut decision and reach the same result.

DOES GOVERNOR PALIN'S ASSERTED EXPRESSION OF WILLINGNESS TO COOPERATE VOLUNTARILY EFFECTIVELY WAIVE ANY LATER CLAIM THAT SHE MAY HAVE REGARDING "EXECUTIVE PRIVILEGE"?

Very unlikely. A general expression, even from the chief executive, would likely be treated as insufficient to constitute a general waiver. Courts have been hesitant to impute a waiver of executive privilege and have generally applied a case- or document-specific standard:

> The President's privilege cannot, therefore, be deemed absolute. . . . [A]pplication of executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case. . . . [T]he President asserts that the tapes should be deemed privileged because of the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties. This privilege [is] intended to protect the effectiveness of the executive decision-making process . . . .
>
> We recognize this great public interest, and agree with the District Court that such conversations are presumptively privileged. . . .
>
> In his public statement of May 22, 1973, the President said: "Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up." We think that this statement and its consequences may properly be considered as at least one factor in striking the balance in this case. Indeed, it affects the weight we give to factors on both sides of the scale. On the one hand, the President's action presumably reflects a judgment by him that the interest in the confidentiality of White House discussions in general is outweighed by such matters as the public interest . . . . ***Although this judgment in no way controls our decision***, we think it supports our estimation of the great public interest that attaches to the effective functioning of the present grand jury. . . .

Nixon v. Sirica, 487 F.2d 700, 716 - 718 (D.C. Circ. 1973) (notes and citations omitted) (emphasis added).

2. IN A LEGISLATIVE INVESTIGATION, HOW DOES THE LEGISLATURE OR A LEGISLATIVE COMMITTEE SECURE ENFORCEMENT OF ITS SUBPOENAS? IS IT AN AUTHORITY THAT IS SELF-EXECUTING (I.E. ENFORCEMENT WITHIN THE LEGISLATIVE BRANCH) OR MUST THE LEGISLATURE REFER THE RECALCITRANT WITNESS TO THE GRAND JURY OR THE PROSECUTOR TO INITIATE JUDICIAL ENFORCEMENT OF THE CONTEMPT AUTHORITY?

Because the state statutes on this matter, AS 24.25, roughly parallel federal enactments, let me start by examining the federal law.

As recently as 1971, the United States Supreme Court acknowledged an inherent legislative right to protect the legislature's own process and existence by punishing contemptuous conduct:

> The past decisions of this Court expressly recognizing the power of the Houses of the Congress to punish contemptuous conduct leave little question that the Constitution imposes no general barriers to the legislative exercise of such power. E.g., *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Anderson v. Dunn*, 6 Wheat. 204 (1821). There is nothing in the Constitution that would place greater restrictions on the States than on the Federal Government in this regard. See *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881).

Groppi v. Leslie, 404 U.S. 496, 499 - 500 (U.S. 1972). The *Groppi* decision went on to note that:

> Legislatures are not constituted to conduct full-scale trials or quasi-judicial proceedings and we should not demand that they do so although they possess inherent power to protect their own processes and existence by way of contempt proceedings. For this reason, the Congress of the United States, for example, no longer undertakes to exercise its contempt powers in all cases but elects to delegate that function to federal courts.

Id. Consequently, currently, at the Congressional level, for the House of Representatives,[2] the remedy is entirely statutory. Under 2 U.S.C. 192:

> **Refusal of witness to testify or produce papers.** Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint

[2] The Senate has authority to seek civil enforcement of its subpoenas. 2 U.S.C. 288d.

> or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

A federal appellate court decision, *Fields v. United States*, 164 F.2d 97 (D.C. App. 1947), cert den (1948) 332 U.S. 851, 92 L.Ed. 421, 68 S.Ct. 355, reh den (1948) 333 U.S. 839, 92 L.Ed. 1123, 68 S.Ct. 607, relates that the Congress was only implementing conceded power when it enacted this section, that the section serves to supplement contempt power implied to the two houses of Congress, enforcement of which, prior to enactment of § 192, involved a procedure that apparently was cumbersome and troublesome; and that the section's objective was to facilitate gathering of information deemed pertinent to purpose of an investigating committee. 164 F.2d at 100.

Enforcement of the federal statute contemplates a criminal prosecution. In *Quinn v. United States*, 349 U.S. 155, 166 (1955), the United States Supreme Court determined as follows:

> Section 192, like the ordinary federal criminal statute, requires a criminal intent -- in this instance, a deliberate, intentional refusal to answer. This element of the offense, like any other, must be proved beyond a reasonable doubt. Petitioner contends that such proof was not, and cannot be, made in this case.
>
> Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under § 192. Thus if [a witness] raises an objection to a certain question -- for example, lack of pertinency or the privilege against self-incrimination -- the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent. Or the committee may disallow the objection and thus give the witness the choice of answering or not. Given such a choice, the witness may recede from his position and answer the question. And if he does not then answer, it may fairly be said that the foundation has been laid for a finding of criminal intent to violate § 192. In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question.

Quinn, noting *In re Chapman*, 166 U.S. 661 (1897), directed attention to an earlier Congressional initiative to lend support for enforcement of the contempt authority:

> The history of Congressional investigations demonstrates the difficulties under which the two Houses have labored, respectively, in compelling unwilling witnesses to disclose facts deemed essential to taking definitive action, and we quite agree with Chief Justice Alvey, delivering the opinion of the Court of Appeals, "that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions"; and that it was to effect this that the act of 1857 was passed. It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof. We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but, because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account.

166 U.S. 671 - 672.[3]

Finally, under 2 U.S.C. 194, Congress determined that prosecutions under 2 U.S.C. 192, above, were to be initiated by grand jury indictment:

> **Certification of failure to testify or produce; grand jury action.** Whenever a witness summoned as mentioned in section 102 [2 USCS § 192] fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the

[3] Before 1857, Congress had relied on its inherent powers of civil contempt to compel information. Under the procedure in use until that date, the witness who refused to testify was committed to the sergeant-at-arms of the respective house until the witness was willing to "purge" himself of his contempt by supplying the requested information, but confinement could not extend beyond the term of the session and could be challenged by habeas corpus. *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), at 676.

> case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

The federal scheme contemplates certification of the circumstances giving rise to the contempt as a prerequisite to possible prosecution.

The comparable state statutes are not dissimilar to these federal models. Conceding under the *Groppi* analysis that the state has inherent authority to punish, the punishment provision appears in AS 24.25.080 which, because of similarity of language to the federal Act, I assume our courts would also treat as a criminal statute:

> **Punishment for disobedience to subpoena or refusal to testify.** A person subpoenaed as provided in this chapter who fails, neglects, or refuses to attend at the time and place where the person's presence is required, or fails, neglects, or refuses to produce the books, papers, or instruments or other evidence designated in the subpoena, or who having attended in response to the subpoena, or having appeared voluntarily, refuses to testify as to any material and proper matter within the power of the senate, house of representatives, or a committee to investigate, upon conviction, is punishable by a fine of not less than $100 nor more than $500, or by imprisonment for not less than 30 days nor more than six months.

The certification requirement appears in AS 24.25.030:

> **Disobeying subpoena or refusing to testify.** If a witness neglects or refuses to obey a subpoena, or neglects or refuses to testify or to produce upon reasonable notice any material and proper books, papers, or documents in the possession or under the control of the witness, the senate or house of representatives may by resolution entered on its journal commit the witness for contempt. If contempt is committed before a committee, the committee shall report the contempt to the senate or house of representatives, as the case may be, for such action as may be considered necessary.

Note that the section's concluding language ("for such action as may be considered necessary") suggests that the outcome shall be determined or directed collectively by the body, typically by adoption of a resolution.

There are no reported cases construing or applying the two state statutes. The federal experience would probably provide useful guidance to a state court.

Possible legislative remedies for contempt may include referral for criminal prosecution under AS 24.25.080, censure, or impeachment if the witness is a civil officer of the state. The practicality of these remedies aside, there is also authority for the proposition that a

house of a legislature may imprison, for the duration of the legislature, a witness who refuses to testify. *Anderson v. Dunn*, 6 Wheat. 204 (1821). For discussions of this and related issues, see *McGrain v. Daugherty*, 273 U.S. 135 (1927) and *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975).

3. IN A LEGISLATIVE INVESTIGATION, MAY A WITNESS PROCEED TO TRY TO QUASH A SUBPOENA AND, IF SO, HOW MAY HE OR SHE DO SO?

In other jurisdictions, the process typically is initiated by or involves a motion submitted to the appropriate trial court or, in some instances, a separate action initiated to enjoin implementation of the subpoena. A court may refuse to grant the motion to quash based on speech and debate clause, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (U.S. 1975), or other separation of powers considerations.

*

I trust this is useful for your purposes.

JBC:med
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MEMORANDUM September 29, 2008

SUBJECT: Power of a committee to investigate after adjournment sine die (Work Order No. 26-LS0098)

TO: Representative Max Gruenberg

FROM: Tamara Brandt Cook
Director

(1) To what extent is the holding in Dickinson v. Johnson, 117 Ark. 587, 176 S.W. 116 (Ark. 1915) likely to be followed in Alaska?

The Dickinson case involved concurrent resolutions passed, before the Legislature adjourned sine die, that authorized the presiding officers to appoint two joint committees for the purpose of investigating certain state activities. The committees were to make their final report to the Governor. The court recognized that an investigation into the management of state agencies is "at all times" a legitimate function of the Legislature. However, the court noted that a committee dies when the body creating it dies, unless the committee is continued by law. Therefore, the court concluded that a committee could not be empowered by resolution to conduct an investigation after adjournment sine die, although the legislature could authorize a committee to do so by enacting law.

This case has been followed in several other states. The Supreme Court of California held that a House resolution could not lawfully create a legislative investigating committee with power to sit after the legislature adjourned sine die. (The Special Assembly Interim Committee on Public Morals of the California Legislature v. Southard, 90 P.2d 304 (Cal. 1939); see also Petition of Special Assembly Interim Committee on Public Morals of California Legislature, 83 P.2d 932 (Cal. 1938))

The Supreme Court of Montana also agreed with the holding in the Dickinson case and went further, holding that the Legislature could not create by statute a committee with authority to act after adjournment of the body. (State ex rel. Mitchell v. Holmes, 274 P.2d 611 (Montana 1954)) Significantly, three years later, portions of the holding in that case was specifically overruled. In upholding a statute establishing an interim committee, the court noted ". . . investigative power exists in the legislative branch which may be exercised after final adjournment as well as during the session." (State ex rel. James v. Aronson, 324 P.2d 847 (Mont. 1958))

When confronted with the argument that the Legislature is without authority to establish by resolution any committee to function after adjournment sine die, the Supreme Court of Washington decided that the Legislature has inherent power to investigate and that, in the absence of a constitutional restriction, the Legislature has the power to establish an investigatory committee by resolution to act after adjournment of the Legislature. (State ex rel. Robinson v. Fluent, 191 P.2d 241 (Wash. 1948); see also State v. James, 221 P.2d 482 (Wash. 1950), cert denied 341 U.S. 911, 95 L.Ed 1348, 71 S.Ct. 615 (1951), rehearing denied 341 U.S. 937, 95 L.Ed 1365, 71 S.Ct. 851 (1951))

While it is yet to be determined how a court in this state will respond to the holding in the Dickinson case, it is safe to say that the case has not been uniformly followed on other states. In addition there are several factors that distinguish the situation in this state from that in Arkansas. Article II, sec. 11, Constitution of the State of Alaska provides in part: "There shall be a legislative council, and the legislature may establish other interim committees. The council and other interim committees may meet between legislative sessions." In addition to establishing several interim committees by statute, apart from the Legislative Council, arguably the Legislature has conferred interim powers on standing, special and joint committees under Uniform Rule 21(c) which states in part:

> A standing committee may meet between sessions. A special or joint committee may meet during the session or between sessions, or both, as authorized by the resolution which establishes the committee. A standing, special, or joint committee which acts between legislative sessions may consider any legislative matter which is consistent with the jurisdiction of the committee. A standing, special, or joint committee which acts between legislative sessions constitutes a subcommittee of the Legislative Council for administrative purposes. A special or joint committee may expend money only in accordance with an appropriation made for the work of the committee.

Also, it should be noted that the Legislature in Alaska may call itself into special session even after it adjourns from regular session sine die. (Art. II, sec. 9) This is not true in Arkansas. While it is usual in state constitutions for the Governor to have the power to call a special session, at the time the Alaska Constitution was under consideration, the Legislature had the power to call itself into special session in only ten states: Arizona, Connecticut, Georgia, Louisiana, Massachusetts, Nebraska, New Hampshire, New Jersey, Virginia, and West Virginia. (Constitutional Studies 1955, prepared on behalf of the Alaska Statehood Committee for the Alaska Constitutional Convention, Volume 2, page 23) The proposition that the Legislature is terminated after adjournment sine die and, therefore, cannot authorize a committee to work after that point seems less powerful when the Legislature retains the power to reconstitute itself by calling itself into special session.

Finally, I note that the court in the Dickinson case, while holding that an interim investigatory committee could not be established by resolution, also agreed that the

committee could be established by statute. The Legislative Council is constitutionally mandated and is established by statute. Under Uniform Rule 21(c) the Judiciary Committees are subcommittees of the Legislative Council for administrative purposes when they meet during the interim. Therefore, a reasonable argument can be made that the Legislative Council may investigate a matter during the interim and that it may rely on the Senate Judiciary Committee, in its capacity as a subcommittee for administrative purposes and which has the statutory power to issue subpoenas, to issue subpoenas that may be needed to further the investigation. In any case, in view of the power of the legislature to adopt its own rules and in view of separation of powers considerations, it may be that it is up to the Legislature rather than the courts to restrain a committee that exceeds the investigatory authority granted to it by the Legislature. (Art. II, sec. 12; Malone v. Meekins, 650 P.2d 351 (Alaska 1982); Abood v. League of Woman Voters, 743 P.2d 333 (Alaska 1987))

(2) Is there any discussion in the Constitutional Proceedings of the meaning of "between sessions" as used in Art. II, sec. 11 which authorizes the Legislature to establish interim committees that "may meet between legislative sessions"?

That section is discussed in the Alaska Constitutional Convention Proceedings, part 3, at pages 1698 - 1701, attached. I found in the historical records only one thing pertinent to your question. The Alaska Constitutional Convention Commentary on the Legislative Article states:

> (Sec. 10. Legislative Council and Interim Committees)
> Provision for these is also now almost standard. Their authorization is desirable lest a question be raised about the legislature's constitutional ability to designate committees to act when the legislature is no longer in session.

TBC:lmb
08-246.lmb

Enclosure

LEGISLATIVE COUNCIL MEETING TRANSCRIPT

July 28, 2008 Legislative Council Meeting Transcript

Time indicators correspond to the Gavel to Gavel archive file available at www.ktoo.org

3:45

Senator Elton: We are now under other business.

Represnative Dahlstrom: Mr. Chair, I move the Legislative Council delegate their authority to the council chairman to solicit, award and expend Legislative Council funds in an amount not to exceed $100,000 for the purpose of contracting for legal services to investigate the circumstances and events surrounding the termination of former Public Safety Commissioner Monegan and potential abuses of power and/or improper actions by members of the executive branch and prepare a report. Senator Hollis French will serve as the project director for the contract. It is the intent of the Legislative Council that the investigation be professional, unbiased, independent, objective and conducted at arms length from the political process. The report shall be submitted to the Legislative Council, Senate Judiciary committee and the House Judiciary committee in a timely manner.

Speaker Harris: I'm going to object for the purpose of discussion anyway.

4:45

Senator Elton: Speaker Harris.

Speaker Harris: Are we going to, under this motion, are we going to allow subpoena powers or any other kind of powers necessary to get the information needed?

Senator Elton: To the speaker, it is going to be an initial decision that will be made by the project director if subpoenas are issued it would have to be through either one of the judiciary committees.

Speaker Harris: Ok, thank you. I remove my objection to the (inaudible).

Senator Elton: Senator Wilken.

5:20

Senator Wilken: Thank you Mr. Chair, just a couple of questions. This is something that this committee doesn't do very often, certainly not since I've been on the committee, I wonder just for all of our comfort that if I could ask someone with a legal background the authority under which this council can undertake this type of an action, just put that on the record. Then my second question is what do we expect as a deliverable, what is the end of this, what will we get, what is going to come back to us, what do we think that is going to be? So those are two questions if I could.

Senator Elton: Thank you Senator Wilken. Tam, could you sit at the end of the table for us at the mic, then introduce yourself for the record.

Tam Cook: Mr. Chair and members of the committee, I'm Tamara Cook and I'm the director of the Legislative Affairs Agency Legal Services division.

Senator Elton: And Tam, did you hear the first component of the question, under what legal authorities are we stepping forward?

Tam Cook: Right. The first part goes to the issue of whether Leg. Council has the power to, I believe the motion will be to prepare a report. Leg. Council has the power to conduct investigations, including to issue subpoenas itself, and to compel the testimony of witnesses, and administer an oath, but if you look at the statement of the powers and duties of Leg. Council, those powers are limited to carrying out actions that the Leg. Council has to undertake under its own statutory references which have to do with providing bill drafting services, administrative services, etc. So Leg. Council does not have broad, open ended investigatory powers, it has the ability to investigate with respect

to administrative duties. However, in this case, apparently we are going to be considering entering into a contract for the purpose of hiring someone to look into a situation and to prepare a report , as such the council will not be conducting an investigation. The report could include items that the council can participate in, such as a recommendation for amendments to legislation. Leg. Council has the authority to introduce legislation to the Rules committee. I think there is a good question about whether Leg. Council could itself conduct an investigation into a matter that is outside of its jurisdiction entirely, I believe that this would not be an administrative matter of the legislature.

8:15

Senator Elton: Thank you. Before we proceed, and it looks like the Senator has a follow up question. I'd like to welcome a member, Representative Stoltze, should also note in the audience and I hope I don't miss anybody, Senators French, Senator Ellis, Senator Therriault, Representative Ramras, Representative Wilson, Senator Stedman, Representative Mike Kelly... I hope I haven't missed anybody. Was I correct in assuming that you have a follow-up question, Senator Wilken?

Senator Wilken: Yes, thank you Mr. Chair. So Tam, what I am hearing you say is that the motion that we are voting on is within the purview of the Legislative Council to move ahead to hire someone to conduct this investigation?

Tam Cook: Senator, through the chair, yes, I think that the council can conduct some, can hire someone to look into the matter and to prepare a report. If as a result of the report, for example, the council was faced with a recommendation that the legislature conduct an actual investigation into one or more issues that are uncovered as a result of the report, I doubt that Leg. Council would be the body that could conduct the investigation. At that point, it strikes me, the report would need to be turned over by Leg. Council to the house and the Senate to take appropriate action... Either the House or the full Senate has the power to investigate, and fundamentally the standing committees of

each body have constitutionally based powers of investigation, but the Leg. Council's power to investigate is a limited one.

9:50

Senator Wilken: Thank you Tam. The next question was, and I'm not sure it was for Ms. Cook, but it is certainly for all of us. What is the deliverable, what are we going to get back in the process, and when do we expect that to happen?

Senator Elton: To Senator Wilken, the motion itself reads in a timely manner. I think we've struggled with what would be an appropriate amount of time, and that gets to the first part of your question, what the deliverable will be. The first paragraph of the motion speaks to what the investigator will be doing. I think it is difficult to presuppose what the report will be, and quite frankly, I think that the intent here is to make sure that, as much as possible, that that direction comes from the person who is doing the review rather than from the legislature itself.

Senator Wilken: Will the report come back to all of us, just to the chairs, and will it be confidential?

10:55

Senator Elton: And I'm kind of looking at Tam Cook in response to the question, this is Kim Elton again, the motion provides that the report will be made to the Legislative Council, made available to the Legislative Council, will be made available to both the House and the Senate Judiciary committees, and so it will have a broad distribution and I don't think, and I'm... this may be an opportunity for further discussion. I don't think it should be a confidential report.

Senator Wilken: I don't know one way or another, other than we probably want to talk about that before we get a report back, about how broadly it is spread. It is obviously a

personnel issue in some respects, and we always guard those quite closely, so, I just throw it on the table so we go through it before we start.

11:48

Senator Elton: I think that is a good point, I mean I guess it'd probably be something that, if in fact there were personnel issues, we'd have to sit down with the project director and with Legislative Council.

Tam Cook: If I may, through the chair, to the extent that the report identifies specific information such as personnel information that is confidential by law, it would be necessary for that portion of the report not to be included in whatever the public portion might be, and it would probably be necessary for Leg. Council to receive that portion of the report in executive session.

Senator Elton: Representative Coghill

Representative Coghill: Actually, the second question was my question. Thank you.

Senator Elton: Further discussion?

Senator Wilken: Should we put in the motion, then, something about that fact? So that two months, or four months from now, there isn't any discussion of whether or not parts of it are kept confidential? That will put us in a very difficult spot if we make that decision later rather than now.

13:04

Senator Green: What was the question? I'm sorry.

Senator Wilken: What part of the report, all or, what part of the report will be confidential, or will any of it be confidential, or will all of it be confidential.

Senator Elton: Senator Green.

Senator Green: My understanding about the initial report will just come in with, you know, findings, and then if there is anyone being questioned that will not cooperate with the investigator, we might have to go under, you know, be sworn in, and that of course is public. And so the initial report, I don't think, is the critical piece of having it public, it's the follow-up that will be the thing, and then there will be a final action or report, and uh...

Senator Elton: I guess my initial response is this report will not be contrary to any law, and if in fact there is a personnel issue that would otherwise be confidential, in working with Legislative Council I think we can ensure that the call is correct and the report will not be contrary to law.

14:20

Senator Wilken: And that is good, and should there be an amendment to this motion that says that, so we don't have to wrestle with that months from now?

Senator Elton: To Senator Wilken, I don't know that there needs to be, I think that if we have it on the record here, and if there is no objection, I'm not sure that we need to figure out the wordsmithing. Representative Coghill?

Representative Coghill: So that brings to mind one of the questions of the deliverable, then. Are we looking for information that says there should be further action, or is this the further action contemplated that it would be a report that would automatically go to the Judiciary committees that would require action. So, when I first heard the motion, I was thinking, ok, this would come back to advise us if there was further action needed, but it

would be automatic: There would be no Council action necessary or would it go directly to the Judiciary committees for their consideration?

15:27

Senator Elton: I'm going to respond, and if other people want to jump into the discussion, I mean there is nothing that precludes one avenue over another. It could be a two step process, it could be a three step process, it could be a one step process, and to some extent it may be difficult to codify in the motion, what that process is not knowing at this point in time where we are going. I think that everybody has noticed that, in the motion, it designates a project director, somebody who has been a prosecutor, and somebody that I think will be working closely with the contractor, and I guess I'm comfortable that if in fact there are significant decisions that seem to vary from this, that they are going to be coming back to me, and I will bring it to the Council. But right now it is relatively difficult, I guess, Representative Coghill, to answer your question not knowing, before we take the first step, not knowing what the second, third or fourth step is.

16:42

Representative Coghill: Then I may object to the motion, because it seems to me that I would rather have us come before the committee a report that said there is reason to proceed, than to give the Judiciary committee an expectation that they must proceed, based on a preliminary report. So, that is kind of how, when I first saw the motion, I just thought it was going to be a preliminary look to see if there is anything, and then my next question is going to be why do we need $100,000 to do that, or up to $100,000? But just to make sure that it is a clean process where, if there is something that is worthy of further investigation, then those committees that do have subpoena power would get clear direction from the Council. Absent that, I don't know if this language helps me in that, because what we are saying is that we are going to turn that over to the Judiciary committee of each body before we even know what the report is, and there is the expectation then that the Judiciary committees will probably have to proceed before we

really understand that report as brought before the Council. So, maybe some further discussion on that aspect of it.

17:59

Senator Elton: So, just two responses, and I'm going to speak to the second one first, and that it is the $100,000 dollars. I certainly hope that this can be accomplished for a lot less than that, and that is my expectation. One of the things, and this gets to both points, one of the things that I think is of concern is, you'll notice in the motion that we have, we will be doing this in a timely manner. I don't think anybody wants to create a recipe for the review that could push us, for example, into the holiday season, and certainly I don't think that it would be wise, certainly, to get this done well before the seating of the next legislature. So I guess some of the thought behind this is, on both the amount of money, which I expect is more than enough, and a two step process is the timeliness issue.

[Brief at ease - 19:20 of recording to 19:26 of recording]

Senator Elton: We are coming back to order. There were a couple of side bar conversations going on at the time. At some point here, the next person on the list is Representative Wilson and then we will ask the named project director to take a seat next to [inaudible]. And it was mentioned during one of the side bar conversation that it is probably important that we know that the project director will not be paid for his additional duties [laughter]... that question came up, and so sorry Senator French! Representative Wilson?

20:04

Representative Wilson: Well, I kind of have a little bit of concern that Representative Coghill does. If this turns out to be a personnel issue that that is totally confidential, and it automatically goes to both Judiciary committees without us designated, at least going

over it and deciding whether we should proceed or not, I have a concern that how many people this is going out to, so, uh, anyway, I just do have a concern about it.

Unidentified: You need to move closer to your mic, they are having trouble hearing you.

Senator Elton: I'm looking towards the end of the table, to the point that Representative Wilson has made, and I'm looking at Ms. Cook. I am assuming that any report that is given to Leg. Council and to the Judiciary Committees will have, if there are questions of law about what can be revealed, that those parts of the report will be redacted. If any of the committees wish to know what was in the redacted component, that it would require the meeting of one of the committees, and they would then go into executive session for the purpose of discussing matters which are otherwise prohibited by law from being done in a public meeting. Is that correct?

21:24

Tam Cook: I think, Mr. Chairman, that that is essentially what would have to occur is that if the report actually does contain information that is confidential by law, and certain personnel information is made confidential by law, that information cannot be included in the body of a report that is going to be made public. It would have to be in a separate, confidential addendium. The confidential material, when it involves a consideration of a matter that has been made confidential by law, requires... A committee is authorized at that point if it wishes to consider it, to go into executive session for that purpose. And that would be, I would think, the way that both the Leg. Council would consider it in the first instance, and any other committee that was interested in the subject would need to consider the confidential part by going into executive session.

22:23

Senator Elton: Thank you. During one of the sidebar questions we were asked to bring the named project director to the table in case there were questions that people had of the project director. Representative Stoltze.

Representative Stoltze: Thank you Mr. Chairman. I just had to grab a copy of the uniform rules to refresh myself, and just which committee if the presiding officers were making a jurisdictional referral of an issue, and State Affairs has the activities of the office of the Governor, as well as public safety. Did, uh, was State Affairs considered as an appropriate referral in both bodies? Just following our Uniform Rules... Rule 20.

Senator Elton: To my knowledge, no. Senator Green.

Senator Green: It is not unprecedented for items of this type to be sent to the Judiciary, in the past.

Speaker Harris: Thank you. Just on a point surrounding the issue. I think it should be made very clear that, because there have been conversations about personnel matters, that the issues really that we are dealing here is not the termination of the Public Safety commissioner. I think every one of us understand all those commissioners serve at the pleasure of the governor, and they can be terminated for just about any reason they want to be terminated for. I think what it really gets down to is, after the comma ends, potential abuses of power and improper actions is really, I think, what we are looking at, not, or, at least, proposing to look at, not the termination of the commissioner. Certainly in my view that is what we are looking at because I'd be the first one to say that the governor has every authority to terminate their commissioners for whatever reason they want to, and wouldn't look at that at all, its just, are there abuses of power that may have occurred above and beyond that termination.

24:31

Senator Elton: Senator Wilken.

Senator Wilken: Thank you Mr. Chair. I guess I'd ask Senator French, and throw onto the table for discussion, would it be more manageable and more precise if we, in the motion, eliminated the Judiciary committees from the motion. So what would happen is this report would be done, channeled through Senator French, to us, and we would get the first look at it, the report, and if any, the redacted information. We would then be able to send that out to the appropriate bodies if there was some action that we thought should be taken, so I guess I'd ask Senator French if it helps us to broadcast this out to three different groups, or if it is better to just bring it back to where it started for a first review.

25:25

Senator French: Through the chair, Senator Wilken, and for the record my name is Hollis French, I represent Senate District M in the State Senate, I think it depends on how complete you want the report to be and how many phases you see it being conducted in. The way it is structured now, I think you have the flexibility to do this in one sort of process if you will. Delegate, you know, the power of the chair to hire someone, hire that individual, send that person out to conduct interviews, and what is likely to happen in the process of conducting those interviews is that some people will not be willing to speak without having them subpoenaed. And so at that point you are going to need a proper venue, if you will, for the taking of that testimony under subpoena. And what that venue is is suggested in the motion as being the Judiciary committees, because, as Ms. Cook made clear, those standing committees have the authority to conduct investigations which may be outside the purview of this committee.

Senator Wilken: So would it be more helpful to just bring the report, whatever form it is in, just back to this table, before sending it out to other committees, so that we got first look at it?

Senator French: Through the chair, it is possible that I misunderstood your question, and I think that is a question for the committee. You know, where the report goes once it is completed, that is a question for the committee.

27:01

Senator Elton: I will attempt a short, brief answer to Senator Wilken's question also. I mean, it certainly is one way of doing things. I mean, it would require an action by the committee, and because we are trying to do this in a relatively timely way, I guess the concern would be that trying... given what is happening the rest of the year, and given the political nature of what is happening the rest of the year, as well as all of the other things that are happening, including family vacations that have been postponed because of this special session, I'm worried about timeliness, I'm worried about the ability of getting a quorum for the Legislative Council, so that we could then take the necessary action to further distribute the report. Representative Stoltze?

27:53

Representative Stoltze: Thank you Mr. Chairman. Have there been any official complaints filed against the Governor under the executive ethics act and taken up by the personnel board yet?

Senator Elton: Representative Stoltze I'm going to attempt to answer and somebody may have better knowledge than I. It is my understanding that if in fact those kind of actions have been filed they are confidential, and so we wouldn't have access to that kind of information. I'm looking to see if I getting a nod of agreement from our Legislative Counsel at the end of the table, she is nodding in the affirmative.

Representative Stoltze: Mr. Chairman, affirmative that something has been filed or that we wouldn't know. When we are nodding I get confused.

Senator Elton: Representative Stoltze, I think what I was saying is that if an action has been filed or a complaint has been filed we would have no way of knowing that because that action is confidential within the executive branch. Representative Stoltze?

28:53

Representative Stoltze: Normally, the experiences similar to previous complaints against the executive branch and legislative branch there is usually a press release that goes along with that... that... so, I'll nod on that one I guess... I'm just, wondering if... I want to get to the bottom of anything that is inappropriate but sometimes, I just want to make sure that we take the right route and definitely, when we ever get to the motion I'd sure like to maybe start this and then find out what it is actually going to cost and prepare a budget. I remember back in the Sheffield impeachment there was a lot of, I mean, we had one senator that wanted to hire the top, you know, was trying to hire one of the Watergate prosecutors and we found he was a great guy but only dead, you know... I mean, you know, sometimes these get on a life and I just don't want our branch... I have a lot of confidence in Senator French's expertise and knowing what this is going to take to pursue something, I don't know if it is in the scope of $100,000 or $20,000 or $200,000... I'd be very comfortable if we start him off with authority and then him come back with a budget.

Senator Elton: Just in, Representative Stoltze, I think your concern is a very valid concern, and I don't know if this helps or not...

Representative Stoltze: Which one?

Senator Elton: Your concern about kind of an open ended amount of money, and I don't know if this allays your concern at all, but the first act of my serving as chairmanship is to prove that I am fiscally prudent, and it is also my understanding that the contract is a public document that people can review. Is that correct Ms. Cook?

30:38

Unidentified Voice: mhmm.

Representative Stoltze: And Mr. Chairman, just, I think I have just about a perfect attendance record, I'm just probably the biggest nitpicker on every issue, I'm not picking this one, I've probably voted against more issues...

Senator Elton: We appreciate your work Representative Stoltze. Tam, is my representation about the public nature of the contract correct?

Tam Cook: Mr. Chair, all contacts essentially that are by Leg. Council are public and the billings are normally made public. There has been one or two exceptions where we have entered into contracts, this is not of that type, but where we have had to enter into a contract where the person that was providing this service... this occurred in a publication contract. One of their clauses required us to keep some portions of the contract confidential as a trade secret or proprietary evidence. And in that case we actually have a contract with an addendum that we collected all the confidential parts that were covered by the trade proprietary evidence issue, and put it into a separate document. So even as to that contract, the contract itself, except for the addendum and the billings is made public on request.

32:00

Senator Elton: Further discussion? Representative Guttenberg?

Representative Guttenberg: Thank you Mr. Chairman. Talking about the fiscal conservative nature of the contract and trying to keep the parameters, I'm also concerned about where this investigation issue can go in the event that there are other things that can be discovered that are not on this point. Is it your intent that, if we get a report back that

deals with this situation that is solely on this issue or if there are other potential abuses or things that are noted can that be an addendum to this?

Senator Elton: Representative Guttenberg, that is a good question, and I am going to attempt to answer, I mean I think that what Alaskans want to know is what the purview of this review is going to be. The purview is in paragraph 1. It is my anticipation that if in fact there is something that requires a secondary decision, that it is going to have to, it should come back to me as the contract administrator, and it would come back to me if the project director, and I've worked with the project director on many different issues and I'm sure he would come back to me if he had any questions. And this is not a review that is being conducted by Senator Hollis French or Senator Kim Elton this is an authorization from Legislative Council to work on the issues as outlined here. If there is a broader issue that is of significant import, absolutely I think it needs to come back here. Speaker Harris?

33:52

Speaker Harris: Just for clarificiation, at least so I am clear and I understand. Earlier in the conversation we talked about there being an effort then to go out and find information and to come back to the Legislative Council with a statement I guess from whomever French or whoever else is involved saying whether or not there is actually if they find any reason they find then to move forward. In other words, if they look at what they have seen to that point and say it doesn't look like there is anything out there that is worth spending any more money investigating they are going to come forward and say that, and at that point in time, if that is what comes forward we are dropping this... is that right?

34:38

Senator Elton: Speaker Harris, if I understood your question, if the report comes back that there is no need for further action absolutely. At that point I would view the contract as having been terminated.

Speaker Harris: That, but what I am saying is is there not two parts to this, Mr. Chairman? In other words, we have said an amount not to exceed $100,000, but we also have said that we want this investigator, under the direction of Senator French and the Judiciary committee I assume, to notify us whether they think there is something that is serious and probably something that would need to be dealt with in executive session, or we then say, yeah go ahead and keep going and, you know, spend the whole $100,000 if that is what it takes to do your job.

35:35

Senator Elton: Yes, Speaker Harris, if I am missing the essence of the question I apologize. Under the situation that you are describing, it would seem to me there are a couple decisions that need to be made. The first by the project director and the second by me, and potentially a third by Leg. Council. And not knowing kind of what the fact situation is, that is kind of the progression that I see on the issue. The challenge or the mandate that we are giving to the investigator is encompassed in paragraph 1 of the motion, and so I view that as kind of the mandate that is being given to the director and to the investigator, but I guess I am stopping short of trying to identify a point at which things get kicked back to the Council, not knowing where that point would be or what the fact situation might be. Senator French, do you to...

36:50

Senator French: If I could, thank you Mr. Chairman... Let's just play it out a little bit. We are going to hire an investigator, we're going to turn that person loose, that person is going to have the ability to gather evidence, and if necessary, come back to a joint House and Senate Judiciary committee for the issuance of subpoenas. Some people just won't talk without a subpoena. At the end of that process, that person is going to write a report, and I think the report is going to take, you know, one of three forms: No evidence of wrongdoing, some evidence of wrongdoing, clear evidence of wrongdoing. That will

come back to us, to your committee, and at that point the body has to make a decision, much like a district attorney makes a decision: Is this evidence strong enough to proceed on or not? But it is going to come back to us for our ultimate action, right? The investigator doesn't have that authority, I don't have the authority, and I don't think the committee does.

37:40

Senator Elton: Speaker Harris.

Speaker Harris: Can I cross examine the witness here for just a second? [laughter] So what you are saying is that the $100,000 dollars in this motion is the maximum amount that could be gotten under that, under that scenario that you have put forward.

Senator French: Through the chair, that is correct.

Senator Elton: Senator Davis.

Senator Davis: Back to the motion then, would it be appropriate to make an amendment at this time? And if it is I'd like to amend the motion to say that we delete Senate Judiciary committee and House Judiciary committee and you would end with the report shall be submitted to the Leg. Council in a timely manner.

Senator Elton: And, a question of the maker of the motion... That would not preclude me as chair of Legislative Council from providing the report to either committee? Or is the intent of your motion, ah...

38:35

Senator Davis: Through the director he would, uh, the project director would let you know if they need to subpoena, they'd have the authority to do that. You don't have to

give them the report to do that. The final report is all we address in there... will come strictly to Leg. Council and no one else. Because the way you have it here it is going to three different bodies.

Senator Elton: I will respond just briefly under discussion on the motion that I think that kind of the thought of including the Judiciary committees, this council is a bipartisan committee, a bipartisan council, um, part of the discussion was where is an appropriate committee for subpoenas to be issued since as, I hope I'm not misrepresenting this, Ms. Cook has indicated that the subpoena power for this council is relatively limited to administrative matters. So at that point it was decided that the Judiciary committees in both bodies, maintaining the bicameral authorities of each body, would have the ability to do that, and so I think that is how the Judiciary committees got involved, and at this point I think I should also point out that it didn't make sense and we have talked to the member of the Judiciary committee in the other body, it did not make sense to have two project directors, and I think there was a comfort level that both of them had that this would work having just one member from one body being the project manager. I'm not sure that I answered everything, but that is how the Judiciary committees got included in the distribution of the report.

40:37

Senator Davis: I understand that, I know that is how they got included, and taking them out of the receiving the report will not keep them from issuing subpoenas if we should decide it has to be done. It doesn't have to be with here in the report will go to them. The report will go to us and then we will decide at that point if it should be turned over to them.

Senator Elton: Ok, under debate on the motion, Representative Stoltze.

Representative Stoltze: Yes, thank you, on Senator Davis motion to delete those committees from this motion, my question is, are we precluded from... I think we are, if

we get an investigation product, I mean, it could have a lot of places to go, it might be the Attorney General's office, it might be Senate, the Personnel Board, I think we preclude ourselves by setting that, and I think it interjects what some see as a political process, and its, uh, lets find the facts and then, before the conclusion, and I think it could head in a lot of different directions, even a dead end to serious issues, and I think by naming that committee jointly to start talking about subpoenas, as much as we all want to get the answers, lets let the investigation, I think that is more in the purview of this committee to delegate, and find out what that yields before we see what step B is, and so that would lead me to support Senator Davis's motion.

42:05

Senator Elton: Representative Wilson, then Representative Samuels.

Representative Wilson: Thank you Mr. Chairman. My question – can I ask Ms. Cook a question?

Senator Elton: Uh, yeah, right now were under debate on the motion.

Representative Wilson: Yes, uh, this will make a difference how I vote on the motion.

Senator Elton: Please.

Representative Wilson: Tam, can we right now, if those words are taken out, so that the report only goes to Leg. Council, do they still have the authority if they can't, if they need to subpoena somebody, that they can go and get that done?

Tam Cook: Under the form of the motion, through the chair, there is nothing that prohibits the investigator that I'm aware of, unless the contract is written in some restrictive fashion, from requesting the aid of, say, the Senate Judicary committee or some other standing committee in issuing the subpoenas pursuant to preparing that report.

43:10

Representative Wilson: Then, uh, having that information I agree that we probably do not need to have that wording in there, and that [static] we then decide whether we are going to go forward or not, and then where its going to go.

Senator Elton: I would just repeat, I would like as people consider the motion, to think about the timeline, because I think that one of the things that we don't want to get into is we don't want to get into a situation in which the recipe itself pushes the timeline for a couple of reasons: one is we're coming up on the holiday season and we're coming up on a new legislature, and I think that in fairness to all of the parties, working on this in a timely manner. So, just a quick response. Can we have a brief at ease for a moment, and then we will come back to Representative Samuels and Senator Hoffman.

[At ease 44:12 of recording, back on record at 44:21 of recording]

Senator Elton: The council will come back to order. During the at ease a question came up, Ms. Cook, that you can help us. If we were going to the last sentence in the motion... If we put a period after council and say the final report shall be submitted to the Legislative Council, does that in any way inhibit the ability of either of the Judiciary Chairs from issuing a subpoena?

Tam Cook: I'm sorry I missed the last bit of your sentence.

Senator Elton: If in fact we strike the language, we put a period after council and we say the final report shall be submitted to the Legislative Council, does that in any way inhibit the ability of the Judiciary Chairs from issuing subpoenas to compel testimony from those who may prefer to give testimony under a subpoena?

45:20

Tam Cook: No. If I may, through the chair, if you are talking about subpoenas that might be issued in the course of preparing the report, versus any following up on any recommendation that results from the report, I don't see anything in the motion that prevents the investigator from requesting the assistance of a standing committee in issuing subpoenas if the investigator chooses to do so, and if the project director is in agreement. Once the report, if you were to put a period there, then the report would only go to Leg. Council. That would not prevent any member of the public or legislator or legislative chair of any committee from obtaining a copy of the report with respect to the public portion. With respect to the confidential portion, I don't believe that that would prevent a legislative committee from, if there is a confidential portion, I don't believe that a legislative committee would be prevented from getting a copy of the confidential portion also at its own request if it chose to do so, as long as it took the matter up under executive session. Now, the third possibility is that if you have a period at the end of Leg. Council and you get a recommendation that seems to be directed to further action on the part of the legislature, the council itself as a formal matter, could elect to take no action, or could formally, with a cover letter, submit the report to either the two presiding officers for whatever interest each of the bodies may have in the recommendation, or to the appropriate committees that Leg. Council finds might have an interest in the contents of the report. Leg. Council could, in fact, I suppose, include its own recommendation as to whether or not whatever this recommendation is in the report ought to be followed or ought not to be followed as far as that goes. So it is a question possibly of just the formality of whether Leg. Council wishes to reserve to itself the opportunity to comment on the report, if it elects to send it to another legislative entity.

47;37

Senator Elton: And, Ms. Cook, if I could ask a follow-up question. Are we better off, then, in the last sentence modifying the report by saying the final report? Does that make the latitudes that you just described easier to apply?

Tam Cook: I don't think that it is significant – I presume the report refers to the report that is being contracted for which would be the final report. The only issue that I see is whether or not there is a question in someone's mind about the role of one of the standing committees in issuing a subpoena in conjunction with the preparation of the report, and at this point, unless that is somehow other restricted, I think that the investigator could make that request.

48:28

Senator Elton: I would just note that, in response to Ms. Cook's final comment, I mean I think because it is the intent of the Legislative Council that the investigaton be professional, unbiased and independent, objective, I think that the thought behind that was that the Judiciary committees would not be involved in helping to draft the report... Is that the understanding that the other members of the council have? [Silence] OK. So, I'm speaking now to the maker of the motion, Senator Davis do you have a problem with the form of your motion being that in the final sentence it reads the final report submitted to the Legislative Council period?

49:27

Senator Davis: Your question was? That was what I meant.

Senator Elton: So that conforms to the intent of your motion?

Senator Davis: Yes.

Unknown: Mr. Chairman, was it our intent to delete in a timely manner as well?

Senator Elton: In that motion, in a timely manner is deleted. It would be simple to just say the final report shall be submitted to the Legislative Council in a timely manner.

Unknown: That was your motion right?

Senator Davis: That was my motion. [Laughter]

Senator Elton: We'll consider that, then, a friendly amendment. Is there further discussion? Representative Samuels, I'm sorry, we never did get to you.

Representative Samuels: Thank you Mr. Chairman, my point was going to be in a far less articulate manner the same as Ms. Cook's thing: Once it goes public it is public, and if any elected official wants to see the redacted portions, if any, then they are going to do that. So it all becomes a bit of a moot point to me. I believe that the best way to keep politics out of it as best you can, is to set up the process going as far down the road as you can. If we think that if the report comes out and says, you know, this is, there is nothing here, don't worry about it, then it dies. And if it says you might want to investigate a couple of other things the further we go down with saying here is our process, from day one here is our process, we're not going to get to day twenty and say, well now, because the report said this it is going to go here go there. I think we are better off as a legislature setting up the process now. We know where this report is going to go, and as far down the road as it goes, it could stop here, it could stop after the next thing if something happens we don't know what is going to be said, but I think that we are better off keeping politics out of it as best we can, I mean it is a political arena we are in, but we're better off having the language as is, saying here is what our process is going to be, and come back and change it, but don't be accused of playing politics with that thirty days from now saying well I did this because the report said that. Doesn't matter what the report says, here is our process. So I'm going to maintain an objection to the motion.

51:47

Senator Elton: I'm going to use the prerogative of the chair here and speak to a member not of the council. There is a meeting scheduled for two o'clock in this room, I'm going to give my best guestimate that it is not necessary to delay that meeting for a long period

of time, I sense that we are getting close to a vote on the motion, and then close to a vote on the final motion. With that sense, and since I see nobody shaking their head vigorously back and forth, I'm just going to suggest that it is not going to be much longer for the next committee. Does everybody understand the motion? Further discussion on the motion?

[The Council then voted on the amendment proposed by Senator Davis, as modified by Senator Elton in the friendly amendment, to the motion. Amendment adopted 11-1. Elton read the final paragraph, and the final vote was taken – 12-0.]

56:05

Senator Elton: And before I call for adjournment, I just want to put in the minutes something that is not included in the motion, and that is that there is a request that the Governor instruct her employees to cooperate as fully as possible with the investigator.

[Meeting adjourned.

COURT CASES

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

REPRESENTATIVE WES KELLER,
REPRESENTATIVE MIKE KELLY,
SENATOR FRED DYSON,
SENATOR TOM WAGONER, and
REPRESENTATIVE BOB LYNN,

Plaintiffs,

vs.

SENATOR HOLLIS FRENCH,
SENATOR KIM ELTON,
STEPHEN E. BRANCHFLOWER, and
THE ALASKA LEGISLATIVE COUNCIL,

Defendants.

DIANNE KIESEL, ANNETTE KREITZER, JANICE MASON, NICKI NEAL, MICHAEL NIZICH, KRISTINA PERRY, and BRAD THOMPSON

Plaintiffs,

vs.

SEVEN SUBPOENAS,
SENATOR HOLLIS FRENCH,
SENATOR LYDA GREEN, and the
SENATE JUDICIARY COMMITTEE,

Defendants.

Case No. 3AN-08-10489CI
Case No. 3AN-08-10780CI
(Consol.)

Order on Motion to Dismiss and Temporary and Preliminary Injunction

Two now consolidated cases seek to stop a legislative investigation.

The court finds that Malone v. Meekins, 650 P.2d 351 (Alaska 1982), is dispositive. Much of what the plaintiffs raise is not justiciable, that is, it is business to be left to the legislative branch. The issues of constitutional merit which the court may review are that of due process and construction of the Alaska Constitution's fair and just treatment clause. The court finds no due process or fair and just treatment violation.

The motion to dismiss the action for declaratory judgment is granted. The motions for a temporary restraining order and the application for a permanent injunction are denied and the case is dismissed.

I. Facts

This case concerns the investigation of the Alaska Legislature into Governor Sarah Palin's discharge of Public Safety Commissioner Walter Monegan. On July 28, 2008, the Legislative Council passed a motion approving "an amount not to exceed $100,000 for the purpose of contracting for legal services to investigate the circumstances and events surrounding the termination of former Public Safety Commissioner Monegan, and potential abuses of power and/or improper actions by members of the executive branch." Senator Hollis French, Chairman of the Senate Judiciary Committee, was chosen by the Legislative Council to act as Project Manager. French selected former state prosecutor,

Stephen Branchflower, as Special Counsel. Branchflower was asked to produce a report by October 31, 2008. The date was later moved to October 10, 2008.

Two cases have been consolidated on this motion for a temporary restraining order, preliminary injunction, and motion to dismiss. In the first case, Alaska State Senators and Representatives are asserting claims against the Alaska Legislative Council, Senator Hollis French, Senator Kim Elton, and investigator Stephen Branchflower. In the second case, employees of the state of Alaska who have been subpoenaed to appear before the Senate Judiciary Committee are asserting claims against Senator Hollis French, Senator Lyda Green, and the Senate Judiciary Committee.

II. Analysis

A. Can the Legislature Engage in This Investigation?

Plaintiffs claim the legislature does not have investigative power over the conduct of the governor in the management and operation of the executive branch and its departments. Monegan, as the head of the Department of Public Safety, serves "at the pleasure of the governor." Alaska Const. Art. III, § 25. However, Monegan, as Commissioner of Public Safety, is subject to confirmation by the Alaska Legislature. Alaska Const. Art III, § 25. It is legitimately within the scope of the legislature's investigatory power to inquire into the circumstances surrounding the termination a public officer the legislature had previously confirmed. This investigation may lead to

changes in the confirmation process or other actions within the legislature's power such as proposing constitutional amendments.

B. Did the Legislative Council Have the Authority to Investigate?

Article II, section 11 of the Alaska Constitution expressly creates "a legislative council" and authorizes it to "perform duties and employ personnel as provided by the legislature."

The Alaska Legislative Council is a permanent interim committee of the legislature. AS 24.20.010. The Alaska Statutes govern the affairs of the Legislative Council. See AS 24.20.010-140. The Plaintiffs assert that these statutes do not grant the Legislative Council power to initiate an investigation over this matter. The statutes, however, grant the Legislative Council broad powers. See, e.g., AS 24.20.060(1) ("organize and adopt rules for the conduct of its business"); AS 24.20.060(2) ("to hold public hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and production of papers, books, accounts, documents, and testimony, and to have the deposition of witnesses taken"); AS 24.20.060(4)(C) ("to execute a program for the oversight of the administration and construction of laws by state agencies and the courts through regulations, opinions, and rulings"); AS 24.20.060(4)(E) ("to do all things necessary to carry out legislative directives and law, and the duties set out in the uniform rules of the legislature"); AS 24.20.120 ("submit memorandum reports to the legislature on matters referred to it or coming before it").

These statutes relate to the internal organization of the legislature. In Malone v. Meekins, the Supreme Court of Alaska was asked to determine whether members of the Alaska House of Representatives violated several Alaska Statutes and Uniform Rules. 650 P.2d 351, 353 (Alaska 1982). The court found the statutes at issue related "solely to the internal organization of the legislature, a subject which has been committed by our constitution to each house." Id. at 356; see also id. at 359. The Alaska Supreme Court did not mean the court was powerless to consider constitutional violations. The court noted, "the judicial branch of government has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." Id. at 356.

Thus, under the Malone rationale, the court can only evaluate whether the Legislative Council is complying with the Alaska Constitution. The constitution authorizes the Legislative Council to "perform duties and employ personnel as provided by the legislature." Alaska Const. Art II, § 11. It is clear that the constitution intended the Legislative Council to be governed internally by the legislature. Under Malone, this is a matter for the legislative branch, not the judicial branch.

C. Is It Improper for Senator French to Manage the Investigation Created by the July 28, 2008 Motion?

Consistent with the Malone decision, this issue is not justiciable. As noted in Part II.A, the investigation is a proper function of the legislative branch. Because the

constitution does not speak to this issue, if there are any violations of the internal rules, that is a matter for the legislative branch, not the judicial branch.

D. Did the Legislative Council Authorize the Senate Judiciary Committee to Investigate?

Consistent with the Malone decision, this issue is not justiciable. As noted in Part II.A, the investigation is a proper function of the legislative branch. Because the constitution does not speak to this issue, if there are any violations of the internal rules, that is a matter for the legislative branch, not the judicial branch.

E. Does the Legislative Council Have the Authority to Delegate the Investigation to the Senate Judiciary Committee?

Consistent with the Malone decision, this issue is not justiciable. As noted in Part II.A, the investigation is a proper function of the legislative branch. Because the constitution does not speak to this issue, if there are any violations of the internal rules, that is a matter for the legislative branch, not the judicial branch.

F. Does the Senate Judiciary Committee Have the Authority to Meet in an Interim Session?

Consistent with the Malone decision, this issue is not justiciable. As noted in Part II.A, the investigation is a proper function of the legislative branch. The constitution governs when the legislature can meet in regular session. Alaska Const. Art. II, § 8. However, the constitution gives the legislature the power to establish interim committees which may meet between legislative sessions to perform duties provided by the

legislature. Alaska Const. Art. II, § 11. It is clear that the constitution intended to give the legislature discretion in this matter. If the Senate Judiciary Committee is violating the boundaries the legislature has given it, that is a matter for the legislative branch, not the judicial branch.

G. Did the Senate Judiciary Committee Authorize Senator French to Issue Subpoenas to the Plaintiffs Requiring Them to Bring All Relevant Material?

AS 24.25.010(b) gives the Senate Judiciary Committee subpoena power: "A subpoena requiring the attendance of a witness before a standing or special committee of the legislature may be issued by the chairman of a committee when authorized to do so by a majority of the membership of the committee and with the concurrence of the president or the speaker, or with the concurrence of the house or the senate." Two sections, AS 24.25.010-020, govern the form and service of subpoenas. The plaintiffs do not assert the subpoenas were deficient on their face or that service was improper. If they were, the Malone decision would not apply to this argument. Malone provided some applicable limiting language: "However, except in extraordinary circumstances, as where the rights of persons who are not members of the legislature are involved, it is not the function of the judiciary to require the legislature follow its own rules." Malone, 650 P.2d at 359 (emphasis added).

Instead, the issue before the court is that the process within the legislature was deficient. Because the committee has subpoena power and the legislature is operating

within the constraints of the constitution, Malone applies for the reasons stated in Part II.B. Thus, this issue is also not justiciable.

Plaintiffs have pointed to this limiting language to assert that Malone also would not apply to any violation of the legislature's internal rules because these violations ultimately affected the subpoenaed individuals. This rationale ignores the purpose of the rules in question. Any internal rules, such as those involving delegation or scope of authority within the legislature, that may have been violated exist primarily to structure the internal operations of the legislature. This is not true of AS 24.25.010 governing legislative subpoenas. This rule governs both the internal operations of the legislature and provides notice to parties outside the legislature. When a legislative rule creates no right for an outside party, its violation does not fall within the Malone limitations.

H. Are the Subjects of the Subpoenas Outside the Jurisdiction of the Senate Judiciary Committee?

AS 24.25.010 gives the legislature and the Senate Judiciary Committee's subpoena power. Because the investigation is a proper subject for the legislature, any allegation that the Senate Judiciary Committee has stepped outside its boundaries is, under Malone, an issue for the legislative branch, not the judicial branch.

I. Does the Investigation Violate the Constitutional Prohibition Found in Article I, Section 7?

The plaintiffs allege that the Legislative Council's investigation is being managed by Senator French and conducted by Branchflower in violation of the due process clause

of the constitution, specifically the "[t]he right of all persons to fair and just treatment in the course of legislative ... investigations." Alaska Const. Art. I, § 7. Defendants argue that the power to interpret this provision is solely within the province of the legislature. This position is incorrect. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Plaintiffs allege that the investigation is being handled in violation of the constitutional right to fairness of those actually being investigated. It is not claimed that the subpoenas issued to the plaintiffs do not comply with AS 24.25.010. It appears that the due process claim is that the wrong committee was assigned to the task. But even if the process leading up to the issuance of the subpoenas, such as the delegation of the authority within the legislature or the boundaries within which certain committees can act, were in fact violated, it is still within the constitutional bounds of the legislature to subpoena these witnesses.

The constitution guarantees the right to "fair and just treatment" in legislative investigations. The idea of fairness is an ambiguous and subjective concept. Fairness must be evaluated in the context of the investigation taking place. Because the legislature is a political branch, the expectations of fairness are not the same as the expectations of fairness when dealing with the judicial branch. In evaluating claims of unfair treatment by the legislature, the court must carefully balance the rights of the individuals being investigated while still respecting the province of the legislature. Where reasonable

minds may differ as to whether individuals are being treated fairly, the court should defer to the legislature. The violation must also be of a sufficient magnitude to warrant judicial intervention. Surely the constitution would not authorize the judicial branch to enjoin a legislative investigation because, e.g., an investigator treated them rudely.

The appearance of impropriety is what plaintiffs argued was the violation of the right to fairness of those actually being investigated. Assuming that the plaintiffs have standing to assert such claims, the court finds the conduct of Senator French, Senator Elton, and investigator Branchflower do not rise to the level of a violation of the any individuals' right to fairness. Fairness within a legislative context is different than fairness within a judicial context. It is expected that legislators will belong to some party and will support the positions of their party, often publicly. The legislature is, by its nature, a political branch. It would be assumed that review, e.g., of Wall Street's financiers might be founded on a strongly held and expressed belief that somebody did something wrong. In this case, the allegations of the appearance of partiality among the individuals involved in the investigation do not rise to the level of a constitutional violation.

J. Does the Appointment of Certain Individuals Violate the Prohibitions on Conflicts of Interest and Unethical Conduct?

Plaintiffs have alleged that the individuals associated with the investigation are engaging in unethical conduct. More specifically, plaintiffs have alleged violations of AS 24.60.030 which states:

> (a) A legislator or legislative employee may not ...
> (2) use public funds, facilities, equipment, services, or another government asset or resource for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of either the legislator, legislative employee, or another person....

Even if there had been a violation under this statute, this is not an issue for the court. AS 24.60.030 belongs to a chapter entitled Standards of Conduct. See 24.60.010-995. AS 24.60.010(8) notes "the purpose of this chapter is to establish standards of conduct for state legislators and legislative employees and to establish the Select Committee on Legislative Ethics to consider alleged violations of this chapter and to render advisory opinions to persons affected by this chapter." Thus, any remedy for such violations is within the province of the legislature, not the courts.

III. Conclusion

The motions for a temporary restraining order and the action for a preliminary injunction are denied. The case is dismissed.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 2nd day of October 2008.

PETER A. MICHALSKI
Superior Court Judge

In the Supreme Court of the State of Alaska

Representative Wes Keller;	)	
Representative Mike Kelly;	)	
Senator Fred Dyson;	)	
Senator Tom Wagoner;	)	
Representative Carl Gatto; and	)	
Representative Bob Lynn,	)	Supreme Court No. **S-13296**
	)	
	)	
Appellants,	)	
v.	)	**Order**
	)	
Senator Hollis French;	)	
Senator Kim Elton; Stephen E.	)	
Branchflower; Alaska Legislative	)	
Council; Senator Lyda Green;	)	
Senate Judiciary Committee;	)	
Dianne Kiesel; Annette Kreitzer;	)	
Janice Mason; Nicki Neal;	)	
Michael Nizich; Kristina Perry;	)	
and Brad Thompson,	)	**Order No. 64 – October 9, 2008**
	)	
Appellees.	)	
	)	

Trial Court Case # **3AN-08-10489CI**

Before: Matthews, Eastaugh, Carpeneti, and Winfree, Justices. [Fabe, Chief Justice, not participating.]

Appellants are six legislators who claim that the Alaska Legislative Council's investigation into the dismissal of Public Safety Commissioner Walter Monegan is unlawful and should be enjoined. The superior court denied the appellants' Motion for Temporary Restraining Order and granted the Motion to Dismiss submitted by the Alaska Legislative Council and the other defendants.

At the request of the appellants for a decision no later than today, October 9, 2008, we heard the appeal on an expedited basis. On consideration of the October 6, 2008 appellants' brief, the October 6, 2008 amicus curiae brief, the October 7, 2008 appellees' brief, and the oral argument held on October 8, 2008,

IT IS ORDERED: The order of the superior court issued on October 2, 2008 granting the Motion to Dismiss is **AFFIRMED**. An opinion will follow.

Entered at the direction of the full court.

Clerk of the Appellate Courts

for Marilyn May

cc: Supreme Court Justices
Judge Peter Michalski
Anchorage Appeals Division
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LEXSEE 988 P2D 604

LEGISLATIVE COUNCIL, Appellant and Cross-Appellee, v. TONY KNOWLES, Governor for the STATE OF ALASKA, Appellee and Cross-Appellant.

Supreme Court Nos. S-8143, S-8144, No. 5185

SUPREME COURT OF ALASKA

988 P.2d 604; 1999 Alas. LEXIS 132

October 1, 1999, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Larry R. Weeks, Judge. Superior Court No. 1JU-96-1276 CI.

DISPOSITION: VACATED the superior court's order declaring C.S.S.B. 162 invalid and REMANDED for entry of an order of dismissal.

COUNSEL: Pamela Finley and James P. Crawford, Legislative Affairs Agency, Division of Legal and Research Services, Juneau, for Appellant and Cross-Appellee.

James L. Baldwin, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee and Cross-Appellant.

JUDGES: Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.

OPINION BY: BRYNER

OPINION

[*605] *OPINION*

BRYNER, Justice.

During a special session, the Alaska legislature overrode Governor Tony Knowles's veto of a bill that it had passed in regular session. The governor sued the Legislative Council, claiming that the legislature's override [**2] vote was untimely and did not affect his veto. The superior court agreed, declaring the override vote invalid and the veto effective. The Council argues that the Alaska Constitution barred the governor from filing this suit and that the superior court thus erred in deciding the governor's claim on its merits. We conclude that the Council's argument has merit. Though formally filed in the governor's name against the Council, this suit is in substance an action brought in the name of the state against the legislature. Because *article III, section 16 of the Alaska Constitution* expressly forbids such actions, we vacate the judgment and direct the superior court to dismiss the action.

I. *FACTS AND PROCEEDINGS*

On April 26, 1996, during its second regular session, the Nineteenth Alaska Legislature passed Committee Substitute for Senate Bill (C.S.S.B.) 162, an act relating to land used for agricultural purposes. [1] On May 7, after the regular session expired, the governor called a special session, which convened the next day. On May 14 the legislature recessed its special session until June 3. Before recessing, it delivered C.S.S.B. 162 to Governor Knowles for his consideration. [**3] Governor Knowles vetoed the bill on May 30, transmitting his veto message to the legislature a day later. On June 6 the legislature, having resumed its special session, voted to override the governor's veto.

1 C.S.S.B. 162(FIN), 19th Leg. 2d Sess. (1996). The act was printed as Ch. 1, FSSLA 1996.

These events set the stage for the present controversy. The day after the legislature voted to override his veto, Governor Knowles, acting in his own name as governor of Alaska, filed a complaint in superior court alleging that the legislature's vote to override his veto of C.S.S.B. 162 had been untimely under *article II, section 16 of the Alaska Constitution.* [2] The complaint requested a judgment declaring that the governor's veto of the bill remained in effect and named as defendants the Legislative Council and fourteen individual legislators who compose it. [3] The Council counterclaimed against the

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

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

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

[**4]

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

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

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

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

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

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

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

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

II. *DISCUSSION*

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

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

6 *See* Ch. 20, SLA 1997.

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

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

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

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

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

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

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

10 *Alaska Const. art. III, § 16.*

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

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

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

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

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

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

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

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

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

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

We find the Council's arguments persuasive.

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

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

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

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

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

13 *Alaska Const. art. III, § 16.*

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

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

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

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

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

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

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

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

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

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

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

21 *Id.*

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

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

III. *CONCLUSION*

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

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

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

[**19]

ETHICS

LAW

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

APPENDIX A

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

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

Chapter 60. Standards of Conduct.

Article

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

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

Article 1. Purpose and Applicability.

Section

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The committee may not bring a complaint against a person based upon information voluntarily given to the committee by the person in connection with a good faith request for advice under AS 24.60.158 or 24.60.160, and may not use that information against the person in a proceeding under AS 24.60.170. This section does not preclude the committee from acting on a complaint concerning the subject of a person's request for advice if the complaint is brought by another person, or if the complaint arises out of conduct taking place after the advice is requested, and does not preclude the committee from using information or evidence obtained from an independent source, even if that information or evidence was also submitted with a request for advice.
(§ 28 ch 127 SLA 1992)

Sec. 24.60.170. Proceedings before the committee; limitations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PT. Sec 39.52.310 (j)

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

Article 01. DECLARATIONS

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

(a) It is declared that

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

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

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

(B) improve standards of public service; and

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

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

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

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

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

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

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

Article 02. CODE OF ETHICS

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

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

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

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

Sec. 39.52.250. Advice to former public officers.

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

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

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

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

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

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

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

Sec. 39.52.270. **Disclosure statements.**

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

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

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

Article 04. COMPLAINTS; HEARING PROCEDURES

Sec. 39.52.310. **Complaints.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HOUSE & SENATE JOURNALS

STATE OF ALASKA

FOURTEENTH LEGISLATURE

First Special Session

July 15, 1985 - August 5, 1985

M55

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LEGISLATIVE AFFAIRS AGENCY
Juneau, Alaska

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

MESSAGES FROM THE GOVERNOR

HCR 39

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

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

Legislative Resolve No. 26

STANDING COMMITTEE REPORTS

Received July 22, 1985:

AUTHORIZATION FOR ISSUANCE OF SUBPOENAS

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

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

Senator Jack Coghill
Date

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

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

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

I hereby concur.

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

"August 5, 1985

SENATE RULES COMMITTEE

INQUIRY INTO THE JULY 1, 1985 GRAND JURY REPORT

Dear Mr. President:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCURRED IN BY:

/s/ Tim Kelly
Senator Tim Kelly, Chairman
Chairman

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

/s/ Jan Faiks
Senator Jan Faiks

/s/ Don Bennett
Senator Don Bennett

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

"Supplemental Report of Senator Josephson

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

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

Governor Sheffield should not be impeached.

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

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

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

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

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

A. The Grand Jury Report.

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

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

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

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

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

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

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

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

B. The Fifth Avenue Center Procurement.

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

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

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

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

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

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

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

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

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

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

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

C. Perjury

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

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

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

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

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

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

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

D. Recommendations.

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

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

The executive branch needs to learn lessons, too.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTRODUCTION OF SENATE RESOLUTIONS

SR 5

SENATE RESOLUTION NO. 5 by Senator Vic Fischer,

Requesting Judicial Council recommendations on grand jury investigative procedures,

was read the first time.

18 of 20 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA

NO NUMBER IN ORIGINAL

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

May 5, 1980

TYPE: INFORMAL OPINION

SYLLABUS:
[*1]

Re: Alaska Renewable Resources Corporation Subpoena.

REQUESTBY:

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

OPINIONBY:

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

OPINION:

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

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

- an affidavit of service.

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

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

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

SUBPOENA DUCES TECUM

TO: Philip Hubbard, Trustee

Dean Olson, Trustee

William Spear, Trustee

Alaska Renewable Resources Corp.

2nd Floor, Madsen Building

Juneau, Alaska 99801

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

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

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

3. Major problems currently facing ARRC.

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

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

DATED: , 1980

Juneau, Alaska

Alvin Osterback, Co-chairman

Resources Committee

House of Representatives

Alaska State Legislature

Bill Miles, Co-chairman

Resources Committee

House of Representatives

Alaska State Legislature

CONCUR:

Terry Gardiner

Speaker of the House

Alaska State [*3] Legislature

Legal Topics:

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

Order Code RL31836

Report for Congress

Congressional Investigations: Subpoenas and Contempt Power

April 2, 2003

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

Congressional Investigations: Subpoenas and Contempt Power

Summary

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

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

This report will be updated as events warrant.

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Congressional Investigations: Subpoenas and Contempt Citations

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

Congressional Investigations

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

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

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

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

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

[4] Id. at 341.

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

Early Precedents

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] Id. at 305.

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

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

[15] Id. at 171-245.

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

[17] Id. at 111-12.

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

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

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

Judicial Guidelines

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

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[19] Id. at 123.

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

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

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

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

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

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

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

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

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

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

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

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

[28] Id.

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

[30] Id. at 175.

[31] Id. at 177.

[32] Id.

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

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

Subpoenas

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

Issuing a Subpoena

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

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[33] Id.

[34] Id. at 180.

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

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

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

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

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

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

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

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

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

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

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

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

[42] Id. at 515.

[43] Id. at 518.

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

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

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

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

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

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

[47] 2 U.S.C. §§ 192-194 (2000).

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

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

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

[51] Id. at 30.

CONSTITUTIONAL CONVENTION MINUTES

PRESIDENT EGAN: Would the messenger please bring the proposed amendment to the Secretary's desk? Would the Chief Clerk please read the proposed amendment?

CHIEF CLERK: "Section 6, page 2, line 23, add to the section the following sentence: 'The right of a person to due process of law shall not be infringed by use of the Legislature's investigative power.'"

PRESIDENT EGAN: What is your pleasure, Mr. Rivers?

V. RIVERS: I move for the adoption of the amendment.

PRESIDENT EGAN: Mr. Victor Rivers moves the adoption of the proposed amendment.

McCUTCHEON: I second the motion.

PRESIDENT EGAN: The matter is open for discussion, Mr. Taylor.

TAYLOR: Mr. President, I would just like for the purpose of information, ask Mr. Rivers to explain the reason for the amendment.

V. RIVERS: I would be glad to do that. I was intending to do that, Mr. President. It has been my observation that in the later years there has been a great deal of congressional and legislative investigation throughout the states and some in Alaska in which the right of the individual has been infringed, in that he is publicly brought into a body by accusation of certain things, is indicted, and then by sensationalism in the press is condemned, without any fair previous hearing or consideration as to whether he should be subject to that type of thing or not. It has been particularly noticeable that the investigative power of congressional groups and committees has been extremely abused in the last ten years. It seems to me that I would not want to limit the investigative power of the legislature but would I like to see them do it in an orderly manner. In such a way that individuals are not castigated and character is not assassinated without properly knowing that the individual has some grounds upon which to approach the individual as to his presumed guilt. It seems to me that there is a drastic field for abuse unless it is curbed in some manner by proper legislative procedure established by law, that there can be an abuse again by the right of the individual subject to the legislative investigative power. Does that answer your question?

PRESIDENT EGAN: Mr. Johnson.

JOHNSON: I would like to ask Mr. Rivers a question. "Don't you think, Mr. Rivers, that under the section as it now stands that those guarantees could still be secured? You referred to legislative processes and guaranteeing the rights of people before legislative investigations, and I am wondering if under this provision as it now stands whether that same right is not already given or protected?

V. RIVERS: All I can answer that is by saying is this, that under similar provisions in other constitutions the right of the individual to due process in legislative investigations has not been protected and many of the areas in which investigations have been held have been held under similar clauses and it has not applied.

PRESIDENT EGAN: Mr. Davis.

DAVIS: I am sorry I did not get the proposed amendment.

PRESIDENT EGAN: Would the Chief Clerk please read the amendment. Read it slowly.

CHIEF CLERK: "Section 6, page 2, line 23, add to the section the following sentence: 'The right of a person to due process of law shall not be infringed by use of the Legislature's investigative power.'"

PRESIDENT EGAN: Is there further discussion of the proposed amendment? Mr. Barr.

BARR: I certainly see eye to eye with Mr. Rivers on this. It is true that our rights are protected in the Federal Constitution and other state constitutions in a general way, but I must point out that the trend in recent years has been to give more power to the state on investigations and they seem to abuse that power in certain cases. I believe in spite of any other guarantees in the constitution that we should mention that, only I would go a little further than Mr. Rivers. He said that the people should be protected from the legislative investigative power. I should say from the "investigative power of the state" because we do have certain departments that investigate persons of it.

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: I don't want to take up too much time, but I did want to say that I thought the words "legislative investigative power", the investigative power in any event would have to be delegated by the legislature to either a committee or agencies or departments of government and that it would all be inclusive under the term "legislative power". That was my thought in the matter.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: Mr. President, speaking as a lawyer, I don't think that clause means anything. I don't think it is going to reach Mr. Rivers' point, what he is trying to do. Apparently he is trying to require the legislature to set up certain rules of evidence, certain procedures by which a witness could be entitled to counsel, but "due process" does not mean that. I would like to hear from Mr. McLaughlin. That is my opinion.

PRESIDENT EGAN: Mr. McLaughlin.

McLAUGHLIN: I have no ideas. I am frankly puzzled by the amendment. I think this was taken obviously from the 14th Amendment of the Constitution. I believe the wording

is exactly the 14th Amendment. We have a mess of cases, probably more cases decided under the due process clause than under any other clause of the constitution, except possibly the interstate commerce clause, and I am puzzled, frankly, Mr. Rivers, by the amendment.

V. RIVERS: It seems to me that on the basis of past and present you might not have a case that applies in this particular instance. Do you not believe that suitable laws could be established by the legislature to protect the right of the individual in appearing before investigative committees or investigative departments of the legislature or departments to which their power had been delegated so that they were not castigated publicly before they were indicted or before they were convicted. Do you think that is beyond the realm or the power of or scope of our law to do such a thing?

McLAUGHLIN: I do not think it beyond the scope of our law, but my recollection is that there are certain members of this Convention who were obviously desirous of securing an opinion from the Attorney General, in substance, to determine whether or not they could libel in this legislative power. I don't know how we could curb the power of the hearings from blasting any individual or any group of individuals right on the floor of the house. He would be subject to the castigation apparently we are attempting to avoid. I think the intent is good, but I think you could not possibly curb your legislature to such an extent that they could not say anything nasty about anyone until they were present with counsel. That is why I am puzzled.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: I can see the problem. Depriving a person of life, liberty or property points squarely to the judiciary process. A man cannot be required to testify against himself where he is charged with a crime and they cannot take his property, say like under an eminent domain proceedings without due process of law. There is a real problem. The McCarthy hearings brought out the great issue that existed here a couple of years ago. McCarthy was making charges against people under the exercise of the powers of a congressional legislative committee. The people, individuals were sorely abused under the guise of the exercise of the power of the legislature to investigate. The only subject that a legislature is supposed to investigate upon is something that will bear upon the state code or prospective legislation that might be under consideration. But under the guise of looking into legislative matters they call hearings and then maybe subject people to very bad treatment and ruin their reputations and assassinate them from a character standpoint, and unless some thought is flagged, even though not too much could be done with this thought, the thought would be there that our constitution is warning the legislature under the guise of its power to investigate; that it shall observe some type of due process and respect for the individual. Now that is the problem. Whether Mr. Rivers' particular brief amendment would clearly pave the way to accomplish that purpose, I don't know, but at least it flags the present abuse.

PRESIDENT EGAN: Miss Awes.

AWES: I am perfectly sympathetic to what Mr. Rivers is trying to achieve, but I am doubtful that this language does it. Frankly, I have read this amendment over several times, and I don't know what the language used does mean.

PRESIDENT EGAN: Mr. Taylor.

TAYLOR: Mr. President, this is a matter I think we should all concern ourselves with because as Mr. Rivers has said, over the past number of years we have seen some very shameful episodes in the national life which was more clearly exemplified by the actions of a man whose name very seldom appears in the newspapers anymore, Senator Joe McCarthy. We feel there was a pattern laid by that, I was going to call him a gentlemen, but I will not do so, which we should not allow to be emulated by any department of the Territory. There was a pattern set by him that under the guise of a legislative procedure, or investigation, he indulged in vilification, character assassination, and an intimation of guilt by association. I understand we had some legislative assistant or head of the legislative investigating committee in Alaska who attempted in his own feeble way to emulate that ignoble example set by McCarthy. I don't know as Mr. Rivers' amendment goes far enough, but if it will go to any extent to curb such activities and prevent such shameful episodes from occurring in the Territory of Alaska, I will go along with it. We can't tell but what we might have some "McCarthy" showing up here sometime that wants to bask in the limelight and he will attempt to follow those methods as set by Mr. McCarthy.

PRESIDENT EGAN: Mr. Johnson.

JOHNSON: Mr. President, I am still puzzled about my original inquiry. I don't see that the rights Mr. Rivers seeks to protect cannot be obtained under the law as it now stands because certainly there is no prohibition in the Constitution or in Section 6 that would prevent the legislature from setting up a set of rules of procedure for its own investigations and, after all, that is the problem, and I don't see that adding this language will strengthen or detract from that rule.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: I thought I tried to clarify that in response to your inquiry when I said that it is now directed only to depriving a man of his life, liberty or property. We know that the congressional committees don't put a man in jail, and they don't take any property away from him, they just ruin him period. I don't think the present language reaches the problem we are trying to solve.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: I just want to caution the body that there is no point in voting on anything if we don't know what it means. I am going to vote against it. I am opposed to these legislative examining committees and I might add that the latest expression of the people

of Alaska was to abolish the so-called Stringer Committee by an overwhelming vote, so the problem really does not exist in Alaska.

R. RIVERS: There is one other amendment that is being rewritten submitted by Mr. Riley, and I think this could bear a little thought and go over it and be held over. I am not too satisfied with the wording "due process" which has to do with judicial proceedings, although it could be applied in a broad way. I think we have to study that a little bit more. I would ask unanimous consent that this go over until such time as we take up the matter after lunch.

PRESIDENT EGAN: Mr. Ralph Rivers has asked unanimous consent that we hold this particular amendment in abeyance until after the noon recess. Is there objection? If there is no objection, the particular amendment then of Mr. Victor Rivers will be held in abeyance until the afternoon session. Mr. Kilcher.

KILCHER: I have an amendment.

PRESIDENT EGAN: Would the Sergeant at Arms bring Mr. Kilcher's proposed amendment forward. The Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Section 14, line 8, strike the comma and the words 'invasion or imminent peril' and substitute the words 'or actual and imminent invasion'."

PRESIDENT EGAN: What is your pleasure, Mr. Kilcher?

KILCHER: I move and ask unanimous consent that the amendment be adopted.

McCUTCHEON: I object.

PRESIDENT EGAN: Objection is heard. Is there a second to the motion?

BUCKALEW: I second the motion.

PRESIDENT EGAN: The question is open for discussion. Mr. Robertson.

ROBERTSON: May we have it read, Mr. President?

PRESIDENT EGAN: Would the Chief Clerk please read the proposed amendment.

CHIEF CLERK: "Section 14, line 8, strike the comma and the words 'invasion or imminent peril' and substitute the words 'or actual and imminent invasion'."

PRESIDENT EGAN: Is there discussion on this proposed amendment? Mr. Taylor.

TAYLOR: Just for the purpose of clarification, I would like to state that I believe the two words "imminent" and "actual" are inconsistent. A thing cannot be imminent and actual

at the same time. If it is imminent there is a possibility it will occur shortly. If it is actual, it is actually there. It can't be actual and imminent both.

KILCHER: I am afraid that might be the case. I was in doubt myself whether it should be "and actual or imminent", or whether it should be "and imminent or actual". I think that is a matter of Style and Drafting, that is the substance of it, the amendment. I admit that yesterday there was a similar amendment, not quite the same, had been on the floor, and I would like to read Section 14 as it would read as amendment. "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion, or actual and imminent invasion the public safety requires it." There are several state constitutions who never want their habeas corpus suspended. Several others have a saving clause that only in rebellion and invasion may it be suspended. I am afraid that this here Section 14 as it stands now, with the words "imminent peril" in it as a vague clause, that with many others if we don't think thoroughly we will open the road of invasion not of a foreign enemy but of an internal one. It is to me that the clause "imminent peril" in times of turmoil, political restlessness, and so on, can be abused and can be construed to mean almost anything. I am surprised in thinking over, I have given it quite a bit of thought since yesterday, in going over this in my mind, over Mr. Hellenthal's flowery but not quite logical speech of yesterday, where he worried not enough about the right of the people's habeas corpus, and today he seems to worry very much about people's privacy. Personally, I am worrying about both, but if I had a choice, I would worry more about the habeas corpus than about people's privacy in other matters. This imminent peril clause can be construed, and that is what we have to worry about. It can be construed to be almost everything and in case of rebellion, invasion, actual or imminent, that should be the only exceptions to the right of habeas corpus. We have solid precedent, but with all the other constitutions, the imminent peril clause is dangerous and should be stricken.

PRESIDENT EGAN: Mrs. Sweeney.

SWEENEY: When Mr. Kilcher read Section 14, I am wondering if he put in some language that we did not adopt yesterday. I did not follow him. He was putting in words that he did not include in the amendment he was offering now. At least, I did not get them.

PRESIDENT EGAN: Would the Chief Clerk please read the section as it would appear if Mr. Kilcher's amendment were adopted.

CHIEF CLERK: "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion, or actual and iminent invasion, the public safety requires it."

AWES: I wonder if Mr. Kilcher would amend his amendment by changing the word "and" to "or".

KILCHER: I think it would make better sense, and I ask unanimous consent.

PRESIDENT EGAN: Mr. Kilcher asks unanimous consent to change the word "and" to "or". If there is no objection, the proposed amendment to the amendment is ordered adopted. Mr. Hurley.

HURLEY: I have a distinct feeling that this section as it stands now is subject to two different interpretations and as it seeks to be amended, and I think with the "or" it definitely sets it up with one interpretation, although as I recall yesterday, we cleared that thing up and then voted down the amendment, but I certainly think something should be done to this to decide whether we want the writ of habeas corpus suspended in the event of imminent peril or only want it in the event of imminent peril of invasion. If I am convinced that this amendment takes care of it, I am in favor of it.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: Mr. President, I can see now where the Committee left it open for some doubt. In Committee, the majority of the Committee understood that the courts in construing invasion and the expression "imminent peril" would have to consider the two together; "imminent peril" and "invasion" go together. Delegate Hellenthal is a lawyer and his interpretation of what this section meant was strange and novel to me, and I can see where the court could have the same interpretation as Mr. Hellenthal, and for that reason I am going to support Delegate Kilcher's amendment. I think it is an excellent amendment because I don't think that the right of habeas corpus should be suspended unless danger of invasion by a foreign enemy.

PRESIDENT EGAN: Miss Awes.

AWES: I would like to say that I agree with Mr. Buckalew, with what he has just said. When the Committee adopted this language it was personally my understanding that it meant just about what Mr. Kilcher's amendment says, but from what was said on the floor yesterday, evidently even the Committee was not in agreement, and I am still inclined to think that Section 14 could be interpreted, but I think Mr. Kilcher's amendment would clarify the matter and I am in favor of it.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as amended and offered by Mr. Kilcher be adopted by the Convention?" All those in favor of the adoption of the proposed

amendment will signify by saying "aye", all opposed by saying "no". The Chief Clerk will call the roll. The shouting confuses the Chair very often.

(The Chief Clerk called the roll with the following result:

Yeas: 30 - Armstrong, Awes, Boswell, Buckalew, Coghill, Collins, H. Fischer, V. Fischer, Gray, Harris, Hermann, Hilscher, Hurley, Kilcher, Knight, Lee, Longborg, McNees, Marston, Nerland, Nolan, Peratrovich, Poulsen, R. Rivers, V. Rivers, Smith, Stewart, Sundborg, VanderLeest, Mr. President.

Nays: 23 - Barr, Cross, Davis, Doogan, Hellenthal, Hinckel, Johnson, King, Laws, McCutcheon, McLaughlin, McNealy, Metcalf, Nordale, Reader, Riley, Robertson, Rosswog, Sweeney, Taylor, Walsh, White, Wien.

Absent: 2 - Cooper, Emberg.)

CHIEF CLERK: 30 yeas, 23 nays, and 2 absent.

PRESIDENT EGAN: The "yeas" have it and the proposed amendment is ordered adopted. Are there other amendments? Mr. Riley, your amendment has not been mimeographed?

RILEY: I prefer to put it off rather than to recess now to consider it again.

PRESIDENT EGAN: Are there other amendments other than to Section 11 at this time? Mr. Victor Rivers.

V. RIVERS: May I ask a question, Mr. President? It seems to me that this is the day in which the body by their rules have foreclosed themselves from introducing individual proposals.

PRESIDENT EGAN: The 8th is Sunday. The understanding of the Chair was that after we discovered that it was a Sunday that it would be held over until Monday. Is the Chair correct in recalling that?

UNIDENTIFIED DELEGATE: Yes.

GRAY: If there are no further amendments, I would like to have about ten minutes privilege of the floor.

PRESIDENT EGAN: If there is no objection you may be granted the floor. The subject is on apportionment.

(Mr. Gray spoke after being granted the privilege of the

floor.)

PRESIDENT EGAN: Mr. Nerland.

NERLAND: Mr. President, in view of the fact that we have quite a long week coming up next week with the evening sessions, etc., in order to give the delegates time to take care of personal affairs in view of the fact they will not have evenings next week available, I will move and ask unanimous consent that we stand adjourned until 9 a.m. Monday.

TAYLOR: I second the motion.

PRESIDENT EGAN: The question is, "Shall the Convention stand adjourned until 9 a.m. Monday?" The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 17 - Barr, Boswell, Collins, Cross, H. Fischer, Johnson, McLaughlin, McNealy, McNees, Nerland, Nolan, Poulsen, R. Rivers, V. Rivers, Robertson, Taylor, Wien.

Nays: 36 - Armstrong, Awes, Buckalew, Coghill, Davis, Doogan, V. Fischer, Gray, Harris, Hellenthal, Hermann, Hilscher, Hinckel, Hurley, Kilcher, King, Knight, Laws, Lee, Londborg, McCutcheon, Marston, Metcalf, Nordale, Peratrovich, Reader, Riley, Rosswog, Smith, Stewart,.Sundborg, Sweeney, VanderLeest, Walsh, White, Mr. President.

Absent: 2 - Cooper, Emberg.)

LONDBORG: May I change my vote to "no".

PRESIDENT EGAN: Mr. Londborg asks that his vote be changed to "no".

CHIEF CLERK: 17 yeas, 36 nays,and 2 absent.

PRESIDENT EGAN: So the "nays" have it and the Convention has not adjourned. Mr. Sundborg.

SUNDBORG: Mr. President, I move and ask unanimous consent that we recess until 1:30 p.m. today.

PRESIDENT EGAN: Mr. Sundborg moves and asks unanimous consent that the Convention recess until 1:30 p.m. today. Is there objection? If there is no objection, it is so ordered, and the Convention will stand at recess.

RECESS

PRESIDENT EGAN: The Convention will come to order. Mrs. Sweeney.

SWEENEY: Mr. President, in the report of the Juneau hearings in the section concerning apportionment, we heard from Mr. Curtis G. Shattuck and the report states he is submitting a written statement. The written statement just reached me and I am filing this with the Secretary of the Convention and copies have been distributed among the committee members on the Apportionment Committee so anyone who would like to see them can.

PRESIDENT EGAN: Thank you, Mrs. Sweeney. Would the Chief Clerk read the communication. Are there other communications to be read at this time? Would you desire that this be read or filed?

SWEENEY: No, just have it filed for the information of the delegates.

PRESIDENT EGAN: Miss Awes has requested that this information which was in her possession and it relates to this section that we will soon be on, if there is no objection it can be read. It is one page.

(The Chief Clerk read a memorandum from the Alaska

Department of Health regarding Section 1 of Proposal No. 7,

Health, Education and Welfare and Section 19 of Proposal

No. 5 on the Legislative Branch, prohibiting the

expenditure of public funds for the direct aid or benefit

of religious or private institutions.)

CHIEF CLERK: There are three attachments. Do you want those read?

PRESIDENT EGAN: If there is no objection, the communication can be filed.

RILEY: I think it would be of interest to the delegates to know the names of the institutions.

PRESIDENT EGAN: The Chief Clerk may read them.

(The Chief Clerk read the tables showing the hospitals

receiving aid.)

PRESIDENT EGAN: The communication will be filed and it will be available to any delegates who wish to see it. Are there other communications?

ARMSTRONG: Mr. President, I have here a letter from Don Dafoe, Commissioner of Education, relative to the hearings in Juneau, particularly on the section on education, Section 1 on Health, Education, and Welfare, pertinent to public education. I shall file this with the Clerk, and if anyone cares to read it, I think it should be there for the record and then transmission to Miss Awes, Chairman of the Committee on Bill of Rights.

PRESIDENT EGAN: If there is no objection, that is the way it will be handled. Mr. Buckalew.

BUCKALEW: I would like to have it read. We have read the other.

V. FISCHER: I would like to suggest that we defer the reading of this letter until we come to that particular proposal. We will probably get to it later today or Monday.

PRESIDENT EGAN: Would that be in line with what you had in mind, Mr. Buckalew? Perhaps we might bring up both of these communications at that time.

BUCKALEW: I will concede.

PRESIDENT EGAN: We will proceed with Committee Proposal No. 7. The Chief Clerk will read the proposed amendment as offered by Mr. Riley?

RILEY: This is offered by a number of people whose names appear on the amendment. I might add that those of the members who have it before them, should have inserted four additional words to be in the form submitted. That is on the fourth line from the bottom, following the word "searched" there should be inserted "the information sought or".

PRESIDENT EGAN: Mr. Riley, the proposal I have has no name on it.

RILEY: The names are Robertson, Davis, Hellenthal, R. Rivers, Mrs. Nordale and Riley.

PRESIDENT EGAN: What was the wording?

RILEY: Fourth line from the bottom following the word "searched" there should be inserted "the information sought or" and the word "and" is stricken.

PRESIDENT EGAN: If there is no objection that will be included in the proposed amendment, and the Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Section 11. The right of the people to privacy and to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches, seizures, or other invasions of privacy shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the information sought or the persons or things to be seized. Information secured in violation of this section shall not be admissible evidence in any judicial or other proceeding."

PRESIDENT EGAN: Mr. Robertson, what is your pleasure? Mr. Riley, would you care to move the adoption of the amendment?

RILEY: Mr. President, I move the adoption of the amendment as read.

WHITE: I second the motion.

PRESIDENT EGAN: The question is open for discussion. Mr. Riley.

RILEY: Mr. President, I think that this amendment is not so positive in its terms, not so rigid in its terms, and that it is not so short term in its application or its knowledge of the particular problem that confronts us in its knowledge of technological advance that could perhaps put an absurd twist on a recital of various devices that we may be concerned about. I think as such that it meets many of the objections raised this morning in simply adapting Section 11 by extension of the right of privacy of the individual. The underscored matter on the amendment before you is all new matter. Otherwise, the section is as it appeared originally coming from the Committee.

PRESIDENT EGAN: Mr. Kilcher.

KILCHER: Mr. President, I don't think that the section has been improved very much. If anything, I think it has been further confused or a veil thrown over some of the facts that I pointed out this morning. In bunching together the invasion of the home for purposes of arrest and search for material things and in bunching together with it the obtaining of other information and not mentioning the devices, it does not simplify the matter which in itself would be commendable but it confuses the matter by putting together incompatibles in my opinion. This morning on the floor and in several recesses we have discussed this matter and not due consideration has been given to those among us delegates who said we would like to see the search warrants as of old applied to things that they have always applied for, but the specific search warrant for obtaining information should not by all means be treated by any other search warrants to be applied by anybody, district judge, inferior judge, etc. That should be treated separately, if permissible at all. Unless such an amendment will be offered, I think I can only vote against it and advise everybody else to do the same because there are hidden dangers in here. It makes it too easy in times of confusion, in times of public panic or mentality to exert pressure upon the lower courts, and it is tantamount to giving up our most precious civil rights.

PRESIDENT EGAN: Mr. Riley, if the Chair might just ask one question, and that would be in considering the wording, "or other invasions of privacy". Do you think that could or ever would be interpreted in the courts as meaning for instance taking a photograph of someone could be considered invading the rights of privacy?

RILEY: I would not think that any responsible court would think that a casual photograph or snapshot such as was suggested this morning would enter the picture here at all.

McCUTCHEON: Mr. President, on the contrary, if such a casual photograph shows a person to their derogation, it is an invasion of their private rights, and the courts have held on many occasions.

WHITE: I think "unreasonable" applies to searches or seizures or invasion of privacy.

BUCKALEW: Mr. President, I have only one thing to say about this amendment, and I am not being funny even though the flower of the Alaska Bar is supporting this proposed amendment. I challenge any lawyer that put his name on this to explain to this

Convention the extent of this amendment. It is dangerous and ought to be voted down now.

GRAY: Mr. Chairman, I kind of feel the same way. I don't know what we have here. I hesitate fully to take 15 minutes and write a bill of rights. The previous established bill of rights we have read and read them. We know what they are, but I am hesitant of all this new material, this projection in the future. I read these things over, I am an ordinary person, we are all ordinary, we don't know what they mean. We are projecting in the future. It might be perfectly all right, but I would like to see more than 15 minutes deliberations on such a subject.

HELLENTHAL: I will try to answer any questions, Mr. Gray.

GRAY: What is the extent of privacy?

HELLENTHAL: The courts during the last 50 years have started a trend of decisions which has reached its culmination in defining the right of privacy. It is a well-defined right. Any unreasonable interference with your personal privacy, if you were, has been held illegal by the courts, and under this constitutional amendment, the practice would be sanctioned in the new State of Alaska. Privacy means precisely what it says, the right to be alone, to be secure in your home, you and your family; the right to be free from interference by unauthorized people, people looking over your transom, those people invade your right of privacy. People who photograph you without authority, they invade your right of privacy, people who break into your yards, climb over your fence, those people invade your right to privacy. Courts have had no difficulty in defining this right. Now it is true, you could ask someone what is an unreasonable seizure and people could spend hours sitting and citing examples of what were unreasonable seizures. I don't think they could tell you all of them. Each one depends on the particular facts of the unreasonable seizure, but courts have had no trouble with that. For 200 years unreasonable seizures have been defined as the need arose by the courts. No one has been concerned about it at all. As the need arises the definitions are amplified and the same thing would happen here. The courts are the protectors of our liberties. We have had faith in our courts for 200 years. They have not let us down and they won't in the future.

BUCKALEW: Question.

PRESIDENT EGAN: Mr. Doogan.

DOOGAN: Mr. Chairman, I hesitate but I feel that I have to make a statement again. I am wondering what this group is thinking of. What do they mean when they mean the invasion of privacy. It appears to me that most of the people that are worried about their invasion of privacy are worried because of some overt act that they may commit. Myself, I have no worry about there being any invasion of my privacy because at the moment I don't intend that I am going to do anything that is going to cause the law to come into my place and make a search or a seizure. However, if something does happen, they are welcome to come in. To me it is just exactly like being caught speeding. There is nothing

wrong with speeding as long as you get away with it, but you are against the marshal that arrests you because he caught you. It seems to me we are beginning to beg the question quite a little on all of this argument that goes on. As long as we provide for the fundamental rights in the constitution, let us leave it at that and let's put some faith in our legislature and in our police officers and any other administrative officials that we might have to see that we are protected.

PRESIDENT EGAN: Mr. Davis.

DAVIS: Mr. President, in answer to what Mr. Doogan has said, I consider the right to privacy a fundamental right. That is one of the fundamental rights, and I intend, so far as I am concerned at least, that if this amendment is adopted, that is going to try to get at the same problem that we tried to reach this morning when we were talking about wire tapping and use of other devices to invade a person's home, I can't agree with Mr. Doogan that I am going to leave everything to the police and I can't agree with him that only people who expect to do something wrong are going to object to having their privacy invaded. The difficulty is that a police officer in a police state figures that he is carrying out the will of the state and the rights of the individual don't matter and that is what I am trying to get away from here. Now it is very true that as of today our police cannot invade our private lives to the extent that they do in a totalitarian state, but that is what we are trying to preserve. It is only a question of time if police officials or government officials can eavesdrop on what is done in a person's home in the privacy of his home. It's only a question of time until we don't have any liberties left, one step after another. Eventually everything will be in the hands of the government and our whole theory of government here is that the people are bigger than the government and the people control the government and the whole tendency of the government is to try to invade those rights little by little and each case the invasion is made for a proper purpose supposedly. We talk about kidnapping. We talk about subversives. We talk about that sort of thing and we are all against it, but what we don't realize is that when we nibble away here and there, after awhile there is no liberty left. I consider that the right to privacy in a person's home, in his papers, in his effects, is just as much a fundamental right as the right to free speech. Now certainly, had this problem been before the framers of the United States Constitution they would have had to deal with it because they were conscious of searches and seizures that had been made by the King's men prior to the Revolution. That is why they were so conscious of the right to assemble, the right to petition, the right not to have their persons or their homes violated. Now, as was pointed out this morning, under the present state, a scientific development, anybody including government officials, can invade my home and your home without even coming near the home. That is something that was not envisioned at the time the Federal Constitution was adopted, and it is something that we should protect against now.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: I want to say one more thing. I feel that I should say it and I don't believe that the proponents of this amendment have answered the question in my opinion. As a lawyer, it completely destroys the protection provided us by the Fourth Amendment of

the Federal Constitution and our Section 11 was extracted almost in toto from the Federal Constitution. This is a novel innovation that allows police officers to get search warrants to secure information, as I read it, and you talk about playing in the hands of a totalitarian state, you are not nibbling at it, you are taking one great big gulp and handing the people's privacy to persons in authority.

MARSTON: May I ask Mr. Davis a question?

PRESIDENT EGAN: You may, Mr. Marston.

MARSTON: Does this Proposal No. 7 protect people as you have talked on here?

DAVIS: Mr. Marston, in my opinion it does.

BUCKALEW: Mr. President, could I ask Mr. Davis a question?

PRESIDENT EGAN: If there is no objection you may rise and ask the question.

BUCKALEW: Mr. Davis, under this article in your opinion does it give police officers permission and authority to tap a wire for example for any type of crime if they make a search showing to the court?

PRESIDENT EGAN: Mr. Davis, do you care to answer that?

DAVIS: Well, I will try to answer it. I think probably it would if they made the proper showing to the court and if they got the proper warrant, the same as the same individual can have his house invaded upon a showing and the issuance of a warrant by the proper court.

PRESIDENT EGAN: Mr. Kilcher.

KILCHER: If this amendment here is defeated, where are we at then? I am getting confused.

PRESIDENT EGAN: We are back to the original Section 11 if this amendment would be defeated. Mr. Harris.

HARRIS: Mr. President, I would like to point out one thing I think we are overlooking here. We keep talking about searches and seizures. I would like to point out that that is one house, when you tap a telephone in one house you have tapped every telephone in any place in the United States that have called that house. You are not tapping one phone but all of them.

PRESIDENT EGAN: Mr. McNees.

McNEES: I find the same fault with this amendment that I have found with most of the others presented on this same section. I had no particular quarrel originally with the section as it came out of Committee. However, I do feel there is a certain amount of legislation written into it. I am wondering what the thinking of the Committee would be, also I am asking the same question of the proposers of this particular amendment now, what would your particular thinking be if we terminated this particular amendment on the 4th line following the word "violated" and inserted a clause "except as provided specifically by law". The same thing could be done to the original article following the word "violated" giving the same effect that is apparent in my thinking. I feel that here we are trying to legislate against the many evils of our private affairs where perhaps we should, if we are going to legislate at all, legislate specifically against particular evils or violations. Therefore, I would say leave it up to the legislature to provide the specific times and means, the particular instance if you please, whereby the search, the seizure, the violation of a private individual's rights might be made.

PRESIDENT EGAN: Miss Awes.

AWES: Mr. McNees asked what the Committee thought of the suggestion which he had to stop after the word "violated" and add "except as provided by law". As I recall, Section 11 was taken word for word from the Federal Constitution. That particular section in the Federal Constitution has stood for quite a number of years, it has been interpreted by the courts. We know what it means and as long as it means what we want it to say, I think it would be just as well to use it and not change it. Also, I think there is objection to Mr. McNees' section because if you say "except as provided by law", I think that phrase is broad enough to give the legislature authority to pass such exceptions that you would practically nullify the section. You might as well not have it.

PRESIDENT EGAN: Mr. Hurley.

HURLEY: Mr. President, how I yearn for the days when I had simple decisions to make, such as if the voters should be 17, 18 or 19. This morning I was against the amendment that was submitted, primarily for the reason that the mentioning of these electronic devices frightened me. In going over this thing as carefully as I have had time to do, I do not share Mr. Buckalew's fears and I think that it is a proper recognition of a privacy which was not recognized in days gone by, and I therefore support the amendment.

BUCKALEW: Question.

PRESIDENT EGAN: If there is no further discussion, the question is, "Shall the proposed amendment as offered by Mr. Riley and other delegates be adopted by the convention?"

JOHNSON: May we have a roll call?

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 27 - Armstrong, Coghill, Cross, Davis, V. Fischer, Hellenthal, Hermann, Hilscher, Hinckel, Hurley, King, Marston, Nerland, Nordale, Peratrovich, Poulsen, Reader, Riley, R. Rivers, V. Rivers, Robertson, Rosswog, Smith, Stewart, Sundborg, Walsh, White.

Nays: 21 - Awes, Boswell, Buckalew, Collins, Doogan, Gray, Harris, Johnson, Kilcher, Knight, Laws, Lee, Londborg, McCutcheon, McLaughlin, McNees, Metcalf, Nolan, Sweeney, VanderLeest, Mr. President.

Absent: 7 - Barr, Cooper, Emberg, H. Fischer, McNealy, Taylor, Wien).

CHIEF CLERK: 27 yeas, 21 nays, and 7 absent.

PRESIDENT EGAN: So the "yeas" have it and the proposed amendment is ordered adopted. The Chair would like to state at this time that it is not in good courtesy for other delegates, when a delegate's name is called, to attempt to tell him how to vote and the Chair has noted that on several occasions, and undoubtedly it at times confuses delegates to have other delegates do that thing, and the Chair would request that that not happen again, if possible to avoid it. Are there other amendments to Section 11? The Chief Clerk may read the proposed amendment.

V. RIVERS: Mr. Chairman, this is a revision of the amendment submitted before recess.

CHIEF CLERK: "Section 6, page 2, line 23, add to the section the following sentence: 'The right of the people to be protected from unjust abuse in the course of legislative investigations shall not be infringed, to this end the legislature shall prescribe adequate investigative procedures.'"

DOOGAN: Point of order. It seems to me that that is identical to the question we have already acted upon.

PRESIDENT EGAN: We held it over, Mr. Doogan, as the Chair recalls. This was a new amendment, was it not, Mr. Victor Rivers? Would you ask unanimous consent that your original amendment be withdrawn?

V. RIVERS: I will ask unanimous consent to withdraw the original amendment and substitute this in its place in lieu of the other one.

PRESIDENT EGAN: Mr. Victor Rivers asks unanimous consent to withdraw the original amendment and substitute this amendment in its place in lieu thereof. Mr. Boswell.

BOSWELL: Could we have this read more slowly, Mr. President?

PRESIDENT EGAN: Is there objection to withdrawing the original amendment as proposed by Mr. Victor Rivers? If not, that amendment is ordered withdrawn. The Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Section 6, page 2, line 23, add to the section the following sentence: 'The right of the people to be protected from unjust abuse in the course of legislative investigations shall not be infringed, to this end the legislature shall prescribe adequate investigative procedures.'"

PRESIDENT EGAN: What is your pleasure, Mr. Victor Rivers?

V. RIVERS: I will move that the amendment be adopted.

PRESIDENT EGAN: Mr. Victor Rivers moves that the amendment be adopted. Is there a second to the motion?

R. RIVERS: I second the motion.

PRESIDENT EGAN: The question is open for discussion. Mr. Ralph Rivers.

R. RIVERS: The last sentence there is to this end that the legislature shall prescribe adequate procedures. There should be a period ahead of the word "to".

V. RIVERS: I will accede to that.

PRESIDENT EGAN: If there is no objection, that correction is ordered made. Mr. Ralph Rivers.

R. RIVERS: Mr. President, I consulted with some of the members of the bar in regard to the expression "due process" as it would apply to the legislature. We decided that "due process" actually focused squarely upon judicial proceedings, and it would not be applicable to a legislative operation. You would not have a judge sitting there passing upon the admissibility of evidence and making the other determinations that enter into, generally speaking, a type of hearing or proceedings which is characterized by the matters that are brought before a court of law. What we are trying to get at is that the legislature in the exercise of its powers to investigate could very well set up a code of ethics or rules of procedure which would adequately protect principles and witnesses from abusive treatment, such as has occurred in the past. We cannot, outside of leaving it to the legislature to prescribe such adequate proceedings, we cannot spell it our here. We can flag it. We can tell them to treat the citizens properly in a legislative investigating proceedings, so Mr. Rivers gave up the idea of trying to extend the due process to legislative proceedings and endeavored to simply highlight the point by asking that the legislature set up proper and adequate procedures to safeguard witnesses and principals against abusive treatment in legislative procedures. I might say that after the McCarthy hearings last year Congress itself appointed a committee or in some other manner initiated steps to set up some rules and ethics for the conduct of Congressional hearings. I

don't know what happened to that, but I know that was Congress' thought and that is what we are trying to flag for our legislature here.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: Mr. Rivers, would it perhaps not be better to couch the proposed amendment in affirmative language and recite it as a right that, in other words, the right of a person to fair and just treatment rather than put in the negative provision?

R. RIVERS: I did not help Mr. Victor Rivers draft this. I refer the question to Mr. Victor Rivers.

V. RIVERS: I used the term "unjust abuses" and it would seem to me that perhaps Mr. Hellenthal's suggestion has merit. I used the term, I don't remember exactly the term, "The right of the people to be protected from unjust abuse in the course of legislative investigations shall not be infringed".

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: One more question. As a directive as to the scope of the amendment, it seems to me, I may be wrong, that there are also executive investigations which likewise, at which the witness should be treated fairly and justly.

V. RIVERS: Mr. President, I will ask for a two-minute recess.

PRESIDENT EGAN: If there is no objection, the Convention will stand at recess for two minutes.

RECESS

PRESIDENT EGAN: The Convention will come to order. Mr. Victor Rivers.

V. RIVERS: Mr. President, I have now placed the matter in the affirmative in a slightly different form. I will ask unanimous consent to substitute this amendment in lieu of the one previously discussed. The substance is the same.

PRESIDENT EGAN: Mr. Victor Rivers asks unanimous consent to substitute a new amendment in place of the original amendment. Is there objection? If there is no objection, it is so ordered.

STEWART: I did not hear what was said.

PRESIDENT EGAN: Mr. Victor Rivers asks unanimous consent that a new amendment be substituted for the original amendment. If there is no objection, it is so ordered and the Chief Clerk will read the proposed amendment.

CHIEF CLERK: "Section 6, page 2, line 23, add to the section the following sentence: 'The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.'"

V. RIVERS: Mr. President, I will move for the adoption of the amendment.

PRESIDENT EGAN: Mr. Victor Rivers moves that the amendment be adopted. Is there a second to the motion?

SMITH: I second the motion.

AWES: May we have that read once more?

PRESIDENT EGAN: The Chief Clerk will please read the proposed amendment.

CHIEF CLERK: "Section 6, page 2, line 23, add to the section the following sentence: 'The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.'"

PRESIDENT EGAN: Is there discussion of the proposed amendment? Mr. Victor Rivers.

V. RIVERS: Mr. President, I am merely trying to effectuate the statement I made this morning in regard to past experiences that we have had in the later years at least in the matter of legislative and governmental investigations. I think this covers it and would flag, as Ralph has said, the legislature to take the necessary action and set up adequate procedures to see that their rights under this clause were protected.

BUCKALEW: Mr. President, I feel sort of constrained to speak on this subject. It seems like when I do, it almost insures its passage. In my opinion this article is completely unenforceable and it has no meaning in law. It can afford no protection to anybody before these legislative and examining committees. What does it mean? Are we going to follow the rules of evidence as we know in our trial courts? It is a matter for the legislature, for the voters, and there is no way I know of in this short article that you can protect a citizen from some fireball, or whatever you want to call him, a legislator that is running one of these examining committees. The damage is going to be done, and then you are going to get a political question more or less before the courts and the courts are going to have to determine whether he had a fair hearing so to speak before this so-called committee and there is no way that anyone can mandamus the legislature to provide certain rules. I think it is just going to clutter up the bill of rights and my opinion is that it is just a lot of gibberish and is completely unenforceable and should be defeated.

PRESIDENT EGAN: Mr. Smith.

SMITH: I think Mr. Buckalew has pointed out very effectively how this very provision can be made effective. The fact that the legislature, as he has put it, once sets up the rules, or even if there should appear to be a violation of this particular provision, then once the

courts have taken the matter in hand and made a ruling of any kind, then they have definitely established something under this provision.

PRESIDENT EGAN: Mr. Johnson.

JOHNSON: Mr. President, well, I am of the same opinion now as I was this morning regarding the first proposal. It seems to me that it is entirely unnecessary. A great deal of question was raised during the argument as to the meaning of the words, "due process of law". Well, many many years ago the Supreme Court of the United States settled it by pointing out that by the Fifth Amendment it was introduced into the Constitution of the United States as a limitation upon the powers of the national government and by the Fourteenth as a guarantee against encroachment upon an acknowledged right of citizenship by the legislatures of the states. Well, under that language certainly "due process of law" not only includes the procedure in our courts but would include any procedure involving the acknowledged right of citizenship, so I don't see but what there is under the proposal as it was originally framed by the Committee and as it is now contained in Section 6, I don't see why the very same protection cannot be afforded without the amendment, and certainly as Mr. Ralph Rivers points out, when there seems to have been an abuse created in a senatorial investigation, Congress immediately took steps to correct it, but it did not take an amendment to the Constitution to do that. The Congress operated under the exact language to correct that abuse by passing suitable legislation, and I think the legislature could certainly do the same thing.

PRESIDENT EGAN: Mr. Stewart.

STEWART: Mr. President, my recollection was that that abuse continued for several years before there was even an attempt to correct it.

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: Mr. President, in closing this discussion, I just want to say that I have sat in the legislature and on quite a number of investigations. Certain of those groups had fairly orderly procedures that were set up as they went along. Oftentimes it took the form originally of an executive session at which the information was discussed in a preliminary manner. There was no pattern set to follow, but I imagine there was no pattern set to follow when our founding fathers adopted the words "due process". I can look around any lawyer's office and see shelf after shelf of books in which they tried to effectuate, no doubt, the meaning of the term "due process". I can see how in the legislative body after the experiences we have gone through, that there will be revised and improved procedures for protecting the rights of individuals in investigative procedures of this kind, investigations by the legislature and the executive. I don't say you'd have a body of court of law set up, but I imagine that in due time there would be a body of precedence set up by which succeeding legislatures would learn one from the other the best method in which these matters had been handled before and how they could be improved in future handling. It seems to me that we are laying a cornerstone here to flag them and to bring to their attention the fact that we feel there has been an

abuse of this legislative investigative power and asking them in a nice way to be sure that in a fair and just manner the abuses are not continued further. It seems to me the least we can do is to bring this forcibly to their attention and try and start this matter of investigative procedures on a healthy track.

PRESIDENT EGAN: Would the Chief Clerk please read the proposed amendment?

CHIEF CLERK: "Section 6, page 2, line 23, add to the section the following sentence: 'The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.'"

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Victor Rivers be adopted by the Convention?" All those in favor of the adoption of the proposed amendment will signify by saying "aye", all opposed by saying "no". The "ayes" have it and the proposed amendment is ordered adopted. Are there other amendments to the article? Mr. Harris.

HARRIS: Mr. President, may I have the floor on a matter of personal privilege?

PRESIDENT EGAN: If there is no objection, Mr. Harris, you may have the floor on the matter of personal privilege.

(Mrs. Harris spoke on a matter of personal privilege.)

PRESIDENT EGAN: Are there other amendments to sections of the proposal on the bill of rights? If not, we will proceed to the section of the article that deals with questions of health, education and welfare. Mr. Victor Fischer.

V. FISCHER: I would like to make an inquiry, Mr. President. This is the second instance where the same committee has prepared two separate articles for the constitution. Would it not be a good idea to separate them henceforth both for purposes of engrossment and enrollment as well as for purposes of work by Style and Drafting and by the Convention in third reading, since they are proposed as separate articles of the constitution?

PRESIDENT EGAN: Mr. Fischer, it would take a complete change in the title and it would entail, as it were, a lot of mimeographing, a lot of work, and you would have to waive that in lieu of what we would feel would be the cumbersomeness of the present procedure, so you would run into a lot of work if you did it. Just how it happened in this form, it would entail more and we have it before us in this form. Mr. Doogan.

DOOGAN: I thought it was my understanding that when these matters got to Style and Drafting that it was the prerogative of Style and Drafting to take various sections and move them around in placement in regular order in the constitution. Is that not correct?

PRESIDENT EGAN: Mr. Doogan, in a manner all right is what Style and Drafting will do, whether it applies to this particular thing, of course, the articles will follow each other probably in this case. Mr. Fischer.

V. FISCHER: Mr. President, the only thing I had in mind was possibly simplification so things could move a little faster through the remaining process. If it means the mimeographing of even one extra page, I am not in favor of it.

PRESIDENT EGAN: Mr. Sundborg.

SUNDBORG: Mr. President, do I recall that several days ago when we had a similar double-barreled proposal that by consent, the first part when we had finished with it, went to the Engrossment and Enrollment Committee so they could start work on it?

PRESIDENT EGAN: You are correct, Mr. Sundborg.

SUNDBORG: If there are no more amendments to the preamble and bill of rights, I would ask unanimous consent that that process

be followed with that part of it.

PRESIDENT EGAN: It went with this provision that if after we finish the article that is in the same proposal, if at that time anyone desired to amend the proposed article, that if it was sent to Engrossment and Enrollment before we were through with this, it would still be open for amendment.

SUNDBORG: With that proviso, I would like to make that request.

LONDBORG: Would there be any necessity of it? They can start work on it at their desk any time they want to.

PRESIDENT EGAN: In this manner, Mr. Londborg, the chairman of the committee could then call the committee together. It would be official. Mrs. Sweeney.

SWEENEY: Before we get onto this new section in Committee Proposal No. 7, I would like to move that we adjourn until 9 o'clock Monday morning rather than get started on something else. I so move.

V. FISCHER: I second the motion.

PRESIDENT EGAN: It has been moved and seconded that the Convention stand adjourned until 9 a.m. on Monday. The question is, "Shall the Convention stand adjourned until 9 a.m. on Monday?" The Chief Clerk will call the roll. Mr. Kilcher.

KILCHER: Point of order. There is quite a good possibility that notice might want to be given for reconsideration which had been, discussion leading up to that possibility discussions were expected to be held at the normal recess of 3 o'clock.

PRESIDENT EGAN: Mr. Kilcher, your notice of reconsideration is in order if you so desire to make it, even now after the motion to adjourn has been placed, if the question has not been put. Do you wish to make it?

KILCHER: What I am trying to drive at is this, in a short recess awhile ago the possibility has arisen that further discussion at the normal recess at 3:30 would lead up to a sound solid reconsideration if it is cut off now would be impossible.

PRESIDENT EGAN: Mr. Kilcher, that is up to the delegates. We have the motion to adjourn. However, under our rules, a motion of reconsideration or a reconsideration can be considered even at this time even if it is pending. Now, if the Convention voted to adjourn, it would cut off that reconsideration if you did not make it now.

KILCHER: Would a motion for a short recess be in order now?

PRESIDENT EGAN: No, it would not. Mr. Hurley.

HURLEY: In order to allay the fears, having voted on the prevailing side of the question of amending Section 11 by the adoption of Mr. Riley's amendment, I ask now that I be allowed to reconsider.

PRESIDENT EGAN: Mr. Hurley serves notice of his reconsideration of his vote on the adoption of the amendment to Section 11. The question is, "Shall the Convention stand adjourned until 9 a.m. on Monday?" The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 21 - Armstrong, Boswell, Coghill, Collins, Cross, Doogan, Harris, Johnson, Londborg, McLaughlin, Metcalf, Nerland, Poulsen, Reader, R. Rivers, V. Rivers, Robertson, Stewart, Sundborg, Sweeney, VanderLeest.

Nays: 26 - Awes, Buckalew, Davis, V. Fischer, Gray, Hellenthal, Hermann, Hinckel, Hurley, Kilcher, King, Knight, Laws, Lee, McCutcheon, McNees, Marston, Nolan, Nordale, Peratrovich, Riley, Rosswog, Smith, Walsh, White, Mr. President.

Absent: 8 - Barr, Cooper, Emberg, H. Fischer, Hilscher, McNealy, Taylor, Wien.)

CHIEF CLERK: 21 yeas, 26 nays, and 8 absent.

PRESIDENT EGAN: The "nays" have it and so the motion has failed of adoption. The Convention will come to order. Mr. Sundborg.

CORRESPONDENCE

Alaska State Legislature

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

Committee Members:
Senator Charlie Huggins
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Gene Therriault

Senate Judiciary Committee

November 18, 2008

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

Dear Senator Green,

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

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

The individuals who submitted written interrogatories are:

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

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

Sincerely,

Senator Hollis French

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

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

Senate Judiciary Committee

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

September 26, 2008

Dear Senator Green,

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

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

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

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

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

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

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

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

Ms. Kris Perry was served with her subpoena on September 23, 2008, in Wasilla, Alaska.

Ms. Janice Mason was served with her subpoena on September 21, 2008, in Juneau, Alaska.

All of the subpoenas listed above commanded the witness to appear here today, September 26, 2008, at 10:00 a.m., to give testimony to the Judiciary Committee. None of the witnesses have appeared.

Alaska Statute 24.25.030 sets out our procedure in this particular situation. The statute reads as follows: "If a witness neglects or refuses to obey a subpoena ... the senate or the house of representatives may by resolution entered on its journal commit the witness for contempt. If contempt is committed before a committee, the committee shall report the contempt to the senate or house of representatives, as the case may be, for such action as may be considered necessary." Please consider this letter as satisfying the dictates of the statute.

Sincerely,

Senator Hollis French

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-2133
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September 25, 2008

The Honorable Kim Elton
State Senate
State Capitol, Room 506
Juneau, Alaska 99801-1182

Re: Your September 19, 2008 Letter

Dear Senator Elton:

I understand the frustration expressed in your letter of September 19. But your expression of that frustration fails to account for the fact that, while lawyers may advise their clients, those clients must decide whether, for example, to appear and testify voluntarily. The Department of Law represents seven individual state employees, each of whom decided not to testify voluntarily under threat of subpoena. Given the circumstances, their choice is understandable.

I do not, of course, believe that responding to properly issued subpoenas is voluntary. But I do believe that subpoenaed persons have the right to challenge the validity of the subpoenas when that validity is suspect. We have stated our legal concerns about the validity of the Senate Judiciary Committee's subpoenas in other correspondence, most recently in the September 19 letter to Senator Wielechowski that you also received. We have also filed in superior court, on behalf of our seven subpoenaed clients, a complaint for declaratory relief, seeking a declaration on the validity of the subpoenas.

Contrary to the media reports you cited, the Department of Law did not contract with Mr. Van Flein because my contact with former Commissioner Monegan about Trooper Wooten created a conflict of interest. I have confirmed with bar counsel that my contact with former Commissioner Monegan did not create a conflict of interest.

Finally, as you noted in your letter, I did not respond to your questions concerning specific advice and conversations. As I hope you can appreciate, my obligations to my clients prevent me from disclosing such information.

Sincerely,

Talis J. Colberg
Attorney General

cc: Senator Bettye Davis
Senate President Lyda Green
Senator Lyman Hoffman
Senator Gary Stevens
Senator Gary Wilken
Representative Nancy Dahlstrom
Representative John Coghill
Representative David Guttenberg
Speaker of the House John Harris
Representative Ralph Samuels
Representative Bill Stoltze
Representative Peggy Wilson
Senator Hollis French

Alaska State Legislature

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

Senate Judiciary Committee

September 19, 2008

Dear Senator Green,

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

Since that time, six of the witness subpoenas were served and seven were not. The subpoenas that were served commanded the witnesses to appear at 10:00 am today, September 19th, 2008, before the Judiciary Committee. Subpoenas were served on attorneys representing Mr. Frank Bailey, Ms. Ivy Frye, Mr. Todd Palin, Mr. Randy Ruaro, and Ms. Murlene Wilkes. By an agreement between Mr. Branchflower and Mr. Bailey's attorney, a copy of the sworn statement that Mr. Bailey gave to Mr. Thomas Van Flein has been given to Mr. Branchflower and will satisfy Mr. Bailey's obligation to comply with his subpoena. Mr. John Bitney was served personally by Mr. Branchflower and Mr. Bitney, accompanied by his attorney, elected to give a statement to Mr. Branchflower in his office, thus satisfying Mr. Bitney's obligation under his subpoena. The subpoena for Mr. Bailey's cell phone records was served on ACS, Inc., and that company has turned the records over to Mr. Branchflower. Finally, Ms. Wilkes, through her attorney, has agreed to give a statement to Mr. Branchflower this afternoon, thus satisfying her obligations under her subpoena.

Ms. Frye, Mr. Palin, and Mr. Ruaro, all having been served with subpoenas through their legal counsel, have neither given statements, nor appeared today in compliance with their subpoenas. Alaska Statute 24.25.030 sets out our procedure in this particular situation. The statute reads as follows: "If a witness neglects or refuses to obey a subpoena ... the senate or the house of representatives may by resolution entered on its journal commit the witness for contempt. If contempt is committed before a committee, the committee shall report the contempt to the senate or house of representatives, as the case may be, for such action as may be considered necessary." Please consider this letter as satisfying the dictates of the statute.

Subpoenas were not served on Ms. Dianne Kiesel, Ms. Annette Kreitzer, Ms. Nicki Neal, Mr. Brad Thompson, Mr. Michael Nizich, Ms. Kris Perry and Ms. Janice Mason. The reason that those seven subpoenas were not served is because Mr. Branchflower relied on the written offer of cooperation that Assistant Attorney General Michael Barnhill issued in a letter to Chairman of the Legislative Council Committee, Senator Kim Elton, dated September 9, 2008. Senator Elton accepted the offer in a letter sent to Mr. Barnhill on Friday, September 12, 2008, which was the same day the Senate Judiciary Committee issued its subpoenas. Mr. Barnhill spoke to Mr. Branchflower late that Friday afternoon, to begin scheduling depositions.

The next day, Saturday, September 13, 2008, Mr. Barnhill sent an e-mail to Mr. Branchflower, confirming the details of their phone conversation. The e-mail in relevant part reads as follows:

> Steve - this shall confirm our phone conversation of late yesterday afternoon.
>
> As a consequence of Sen. Elton's letter to me of 9/12/08, Law agrees that the depositions of the four Department of Administration employees, Annette Kreitzer, Dianne Kiesel, Nicki Neal and Brad Thompson, may proceed. Law appreciates the Legislative Council's willingness to agree with our interpretation of the laws governing confidential state employee personnel files as set forth in our letter of 9/9/08.
>
> Each of these four individuals has confirmed that they wish to proceed with their deposition without service of a subpoena, and that they have elected to have representation from Law at their deposition. Law will provide that representation.
>
> As I explained during our call, Tom van Flein requested on Friday (9/12) that the Department of Law resume representation of these employees in the Office of the Governor who have not sought private counsel. At this point, my understanding is those employees include Mike Nizich, Kris Perry and Janice Mason. When you return on Tuesday, please give me a call and I will report on the status of Law's representation of those employees within the Office of the Governor who have not secured private counsel and their availability for deposition.

That cooperation agreement was abrogated by the Tuesday, September 16, 2008, letter from Attorney General Talis Colberg. The Judiciary Committee's, and Mr. Branchflower's, reliance on the two written promises of the Department of Law is regrettable. Because the subpoenas were not served, there is no legal basis upon which to take any action today regarding them. The original, unserved subpoenas are still in the hands of Mr. Branchflower. He will begin the process of serving them on the seven remaining witnesses, with a return date of Friday, September 26, 2008.

Sincerely,

Senator Hollis French

SENATOR KIM ELTON

September 19, 2008

Talis Colberg, Attorney General
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300

Dear Attorney General:

I'm in receipt of your letter dated today. I expect that continued dialogue can lead to a quick resolution of the impasse.

I want to begin by thanking you for your straight-forward acknowledgement that I met the condition set by you on interpretation of law. I thank you also for your additional acknowledgement that you recognize that my acceptance constituted a deal that allowed state employees to testify.

You then note in today's letter: "However, a new circumstance intervened—supporting the Governor's decision to cooperate only with the Personnel Board investigation." That is a shorter reiteration of your statement in the September 16 letter. On September 16, you wrote:

> "As state employees, our clients have taken an oath to uphold the Alaska Constitution and for that reason they respect the legislature's desire to carry out an investigation in support of its law-making powers. However, our clients are also loyal employees subject to the supervision of the governor. Your subpoena places them in the difficult position of choosing either to support the Governor's decision to cooperate only with the Personnel Board investigation or to voluntarily comply with the subpoenas issued by the committee."

My short response is: 1) I hope you are not asserting that being a loyal employee subject to the supervision of the governor is of equal weight to the constitution or the rule of law; 2) I trust you really don't want to suggest to folks who are subject to the Department of Law's power to subpoena that response to any subpoena is voluntary in nature; and 3) I

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SENATOR_KIM_ELTON@LEGIS.STATE.AK.US

hope you have weighed the consequences of cancelling this written agreement and its potential chilling effect upon the willingness of other parties in the vast array of complex civil and criminal matters you deal with (if you can break this deal, can you break their deals?).

I'm very puzzled also by any argument that suggests you had to break the deal because a "new circumstance intervened." That circumstance, you say in today's letter, is "supporting the Governor's decision to cooperate only with the Personnel Board investigation." A September 2 press release from the law firm Clapp, Peterson, Van Flein, Tiemessen, Thorsness quotes the governor saying: "(L)ast night, I initiated a proceeding before the state personnel board because that is the agency charged by law with addressing the complaints about hiring and firing matters." The complaint filed by the governor the night before, on September 1, says the personnel board "is the only body in Alaska with the legal authority to do so."

So, prior to the consummation of our deal on September 12, you knew she felt the board was the agency she wanted to investigate the circumstances surrounding the dismissal of Commissioner Walt Monegan and you knew she was alleging the board was the only entity with the legal authority.

Your knowing, 11 days prior to consummating the agreement with the Legislative Council, that the governor felt the board was the only entity with legal authority makes it difficult to assert, as you do, that you need to break the deal because after the deal the governor decided to cooperate only with the board's investigation. Let me be absolutely clear—you made the deal 11 days after the governor made the claim that only the board had authority. Why would you argue you had to break a deal because that "new" circumstance intervened?

It's important I note here that I also disagree strongly with any assertion by the executive branch that limits the legislature's power in this instance. Our legal authority is clear.

At this point, I must raise a difficult issue so that I can better understand the nature and scope our correspondence. The *Anchorage Daily News* reported September 2 the Department of Law hired Thomas Van Flein "because Attorney General Talis Colberg has a potential conflict of interest and shouldn't represent the governor, Van Flein said Monday." The national news service *Bloomberg* reported September 11 that "Attorney General Talis Colberg, a Palin appointee, recused himself." And NBC news September 1 reported the "Department of Law had a potential conflict of interest, because Mr. Colberg, Attorney General Colberg, made contact with Mr. Monegan about Trooper Wooten, Van Flein said."

Given the analysis by Mr. Van Flein, an attorney first hired by the Department of Law, and given the reporting by *Bloomberg*—which is unchallenged as far as I know—that you recused yourself, I'm confused when you refer to the state employees in both the September 16 letter and the September 19 letter as "our clients."

I ask for clarification of your status without challenging your ability to fairly represent state employees. I understand that serving at the pleasure of the governor and statements made through the media by others can morph into extremely unfair character challenges. I have a visceral understanding of how difficult that can be given that I'm accused of bias in this matter. In short, I feel your pain but do think it is important to understand what may have changed since the comments about your conflict of interest were made.

Finally, I note that my letter dated September 17 asked for further information on two points: "when and where the governor, as you note in your letter, 'so strongly stated that the subpoenas issued are of questionable validity;'" and for any advice you may have given her that would raise a question of the validity of subpoenas. I trust you have set in motion a review of these two explicit requests and hope you can respond quickly.

Sincerely,

Sen. Kim Elton
Chair, Legislative Council

Cc: Legislative Council
Sen. Hollis French

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-2133
FAX: (907)465-2075

September 19, 2008

The Honorable Kim Elton
State Senate
State Capitol, Room 506
Juneau, Alaska 99801-1182

Re: Your September 17, 2008 Letter

Dear Senator Elton:

We sincerely appreciate your clarification of a very important concern of this office—settling on the meaning and requirements of AS 39.25.080, which was being interpreted (wrongly in our view) to prohibit certain employees in the executive branch from viewing state personnel records. We were troubled by exposing Department of Administration employees to interviews with Mr. Branchflower when we were hearing misrepresentations in the media about the law's requirements with implicit threats that some of these employees may have criminal exposure. We communicated to you that once this point was clarified the four employees we then represented were willing and available to meet with Mr. Branchflower and would do so voluntarily.

However, a new circumstance intervened—supporting the Governor's decision to cooperate only with the Personnel Board investigation. Our September 16 letter to Senator French was an effort to communicate the difficult position this places our clients in—having to choose between supporting the Governor's position and voluntarily complying with the subpoenas. Withdrawing those subpoenas (and the demand for the interviews) would relieve our clients of that difficult choice. However, we made clear in our letter that we continue to have reservations about the validity of the subpoenas. These reservations exist—regardless of the level of cooperation you are provided.

I acknowledge our position has changed—because our clients are no longer willing to participate voluntarily in your process. In light of these circumstances, our clients' decisions should be understandable.

Sincerely,

Talis J. Colberg
Attorney General

cc: Senator Bettye Davis
Senate President Lyda Green
Senator Lyman Hoffman
Senator Gary Stevens
Senator Gary Wilken
Representative Nancy Dahlstrom
Representative John Coghill
Representative David Guttenberg
Speaker John Harris
Representative Ralph Samuels
Representative Bill Stoltze
Representative Peggy Wilson
Senator Hollis French

SENATOR KIM ELTON

September 17, 2008

Talis Colberg, Attorney General
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300

Dear Attorney General:

This is a response to your letter dated yesterday and received by my office via email at 3:27 p.m.

I want to remind you of previous correspondence from your office to me in my capacity as chair of Legislative Council. On September 9, Senior Assistant Attorney General Michael Barnhill signed a letter for you that made a substantive offer. That offer was:

> "(T)he Department of law wishes to confirm that the Legislative Council agrees with the department's reading of the law. If we cannot reach agreement on the proper interpretation of the State Personnel Act, the Department of Law is prepared to seek declaratory judgment in court on this issue. But if the Legislative Council will acknowledge in writing its agreement with the Department of Law's interpretation the Department of Law will drop its objections and the depositions may proceed without subpoenas."

That offer is clear—acknowledge in writing and depositions may proceed without the need for subpoenas. On September 12, as chair of the Legislative Council and on behalf of the Council, I noted in writing that, after consultation with the legal staff at Legislative Affairs, Legislative Council agreed with the legal analysis put forward by you in your capacity as attorney general. My precise response to the offer made by the Department of Law was:

> "I stipulate in my role as chair of the Legislative Council and on behalf of the Council, that your interpretation of the law is correct."

I further noted:

> "Given our agreement on this important point, and given your offer on page 4 of your letter to drop your objections and allow the depositions to

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SENATOR_KIM_ELTON@LEGIS.STATE.AK.US

> proceed 'if the Legislative Council will acknowledge in writing its agreement with the Department of Law's interpretation,' I'd appreciate it if you would contact Mr. Branchflower so that depositions may proceed in a timely manner."

Mr. Barnhill, after receipt of the letter and after the Senate Judiciary Committee issued subpoenas, on the same day contacted Mr. Branchflower so that depositions from the state employees could be scheduled. I was grateful for the breakthrough

Your letter yesterday quite clearly breaks that deal. Bluntly, I feel like Charlie Brown after Lucy moved the football.

Not only was the letter of September 9 explicit in its offer, it had further strength given the public pronouncements by the governor, including:

> "We would never prohibit, or be less than enthusiastic about any kind of investigation. Let's deal with the facts and you do that via an investigation;" and
>
> "I'm happy to comply, to cooperate. I have absolutely nothing to hide. No problem with an independent investigation."

Further, staff and others speaking for the governor said: the governor will fully cooperate and her staff will cooperate also (Leighow, July 29); the governor "has directed all her staff to cooperate fully with Branchflower" (press release, August 13); Frank Bailey will fully cooperate with the investigation (McAllister, August 19); that with Frank Bailey still a state employee the governor "can direct him to assist Mr. Branchflower, thereby fulfilling her pledge to Alaskans to cooperate fully with the investigation" (Leighow, August 20); and the governor's office welcomes the inquiry and will cooperate (the governor's private attorney, September 2).

Despite your previous offer, explicitly stated and accepted, and despite repeated assertions of cooperation, you now are not allowing state employees encouraged to cooperate to do so. In four paragraphs, you've broken a deal that was accepted by your office and received by Mr. Branchflower after the Senate Judiciary Committee issued subpoenas. Further, your brand new position eviscerates weeks of comments on the record by several parties, including the governor.

I'd note, also, that while subpoenas have been requested, the only witnesses served with subpoenas are witnesses not employed by the executive branch. I understood the legislature's investigator did not feel the need to serve them following his conversation with Mr. Barnhill. A decision to not serve the subpoenas made sense given the fact it was: not necessary; and, since it was unnecessary, could give the appearance of confrontation where none was apparent.

Given the statements of cooperation by you on September 9, by the governor, and by spokespeople for the governor, it may help me to understand when and where the governor, as you note in your letter, "so strongly stated that the subpoenas issued by (the Senate Judiciary Committee) are of questionable validity." If you have so advised the governor before she made a statement I don't recall, I'd appreciate it if you could make that advice part of the public record so that we can understand the rationale behind the statement.

Sincerely,

Sen. Kim Elton

cc: Legislative Council members
Sen. Hollis French

STATE OF ALASKA

Sarah Palin, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
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FAX: (907)465-2075

September 16, 2008

The Honorable Kim Elton
State Senate
Alaska State Legislature
State Capitol, Room 506
Juneau, AK 99801-1182

Re: Executive Branch Subpoenas

Dear Senator Elton:

Please see the attached letter, which was sent today to the members of the Judiciary Committees.

Sincerely,

Talis J. Colberg
Attorney General

Attachment
cc: Senator Bettye Davis
Senate President Lyda Green
Senator Lyman Hoffman
Senator Gary Stevens
Senator Gary Wilken
Representative Nancy Dahlstrom
Representative John Coghill
Representative David Guttenberg
Speaker of the House John Harris
Representative Ralph Samuels
Representative Bill Stoltze
Representative Peggy Wilson

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

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PHONE: (907)465-2133
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September 16, 2008

The Honorable Hollis French, Chair
Senate Judiciary Committee
Alaska State Legislature
716 West Fourth Avenue, Suite 420
Anchorage, Alaska 99501-2133

Re: Executive Branch Subpoenas

Dear Senator French:

Your committee has subpoenaed certain employees of the executive branch of state government represented by the Office of the Attorney General. These persons serve within the exempt and partially exempt service at the will of their employer, the State of Alaska. As you know, the State Personnel Board has undertaken a separate ethics investigation into the same matter for which the subpoenas were issued. For this and other reasons, such as separation of powers, the Governor has declined to participate in the investigation initiated by the Legislative Council.

As state employees, our clients have taken an oath to uphold the Alaska Constitution and for that reason they respect the legislature's desire to carry out an investigation in support of its law-making powers. However, our clients are also loyal employees subject to the supervision of the Governor. Your subpoena places them in the difficult position of choosing either to support the Governor's decision to cooperate only with the Personnel Board investigation or to voluntarily comply with the subpoenas issued by the committee.

You can appreciate that this is an untenable position for our clients because the Governor has so strongly stated that the subpoenas issued by your committee are of questionable validity. Moreover, two lawsuits have been filed challenging the legitimacy of the investigation. On behalf of our clients, we respectfully ask that you withdraw the subpoenas directed to our clients and thereby relieve them from the circumstance of having to choose where their loyalties lie.

If the subpoenas are not withdrawn by the Senate Judiciary Committee, our clients will not appear in response to the subpoenas until either the Senate or the full legislature convenes to issue a resolution requiring their presence before the appropriate legislative committee.

Sincerely,

Talis J. Colberg
Attorney General

cc: Senator Kim Elton, Chair, Legislative Council
Senator Charlie Huggins
Senator Lesil McGuire
Senator Gene Therriault
Senator Bill Wielechowski
Senator Bettye Davis
Senate President Lyda Green
Senator Lyman Hoffman
Senator Gary Stevens
Senator Gary Wilken
Representative Nancy Dahlstrom
Representative John Coghill
Representative David Guttenberg
Speaker of the House John Harris
Representative Ralph Samuels
Representative Bill Stoltze
Representative Peggy Wilson
Stephen Branchflower

Alaska State Legislature

Senate

Official Business

September 12, 2008
State Capitol
Juneau, AK. 99801-1182

Michael Barnhill
Senior Assistant Attorney General
Attorney General's Office
123 4th St., 6th Floor
Box 110300
Juneau, AK 99811-0300

Dear Mr. Barnhill:

After receipt of your letter to me dated September 9, I asked the Legislature's Legal staff to review your interpretation with the law regarding the appropriate handling of state employee personnel records. I also shared a copy of your letter with Sen. Hollis French and investigator Stephen Branchflower.

Following this review of your legal analysis of the laws governing personnel records, I stipulate in my role as chair of the Legislative Council and on behalf of the Council, that your interpretation of the law is correct.

Given our agreement on this important point, and given your offer on page 4 of your letter to drop your objections and allow depositions to proceed "if the Legislative Council will acknowledge in writing it's agreement with the Department of Law's interpretation," I'd appreciate it if you would contact Mr. Branchflower so that depositions may proceed in a timely manner.

Sincerely,

Sen. Kim Elton
Chair, Legislative Council

Cc: Members of Legislative Council
Sen. Hollis French

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

P.O. BOX 110300
DIMOND COURT HOUSE, 6TH FLOOR
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FAX: (907)465-6735

September 4, 2008

Via e-mail: sebranchflower@gmail.com

Stephen E. Branchflower
310 K Street Suite 200
Anchorage, AK 99501

Re: Depositions of Department of Administration Personnel
Our File: 223-09-0013

Dear Mr. Branchflower:

The Department of Law has become increasingly concerned that the legislative investigation is no longer solely concerned with the reasons why Governor Palin terminated Commissioner Monegan, but rather whether the Alaska Personnel Act was violated. As you know, under AS 39.25.900, conviction of a willful violation of the Alaska Personnel Act carries the penalties of a misdemeanor and forfeiture of the employee's position.

In an August 16 phone call with me, you first raised the issue of whether Mr. Bailey had violated the Alaska Personnel Act. More recently, Senator French has apparently publicly expressed his view that if the Governor's Office obtained confidential information from Trooper Wooten's personnel file, "it would be a violation of state law." *"October Surprise Over Palin Investigation?"* ABC News, Sept. 2, 2008. Yesterday, the Anchorage Daily News reported Senator French disclosing that the scope of the investigation has now expanded to include whether other persons within the Palin administration have abused power. *"Palin Seeks Review of Monegan Firing Case,"* Anchorage Daily News, Sept. 3, 2008.

The Alaska Personnel Act provides that personnel records "are confidential and are not open to public inspection." AS 39.25.080(a). The Department of Law believes that it is not a violation of the Alaska Personnel Act for the governor or members of the governor's staff within the course and scope of their official responsibilities to review a confidential personnel file. The governor is the ultimate employer of every employee in the executive branch. Review by the governor or members of the governor's staff within the course and scope of their official responsibilities of a confidential personnel file is not a violation of employee confidentiality nor does it constitute a public inspection.

It appears from Senator French's reported comments in the press that he disagrees with this reading of Alaska law and his legal opinion differs from that of the Department of Law. While we disagree with his legal position, to the extent that Senator French is correct,

it would therefore follow that individuals within the Department of Administration who have disclosed matters related to an employee's personnel file to the Office of the Governor have potentially violated AS 39.25.080, and could theoretically have personal criminal exposure under AS 39.25.900.

Given the fact that the focus of this investigation has now apparently expanded beyond the governor's termination of Commissioner Monegan, the fact that Senator French appears to believe that the Office of the Governor may not review confidential employee files or perhaps even discuss matters pertaining to a state employee's employment, and the fact that this view of the law, if correct, could potentially expose individuals in the Department of Administration to criminal sanctions including forfeiture of their employment, we must inform you of the following:

- The Department of Law must re-assess this matter in order to determine whether Department of Administration employees should be advised to seek private counsel.
- All depositions of Department of Administration employees are cancelled until further notice.
- Unless we notify you otherwise, the Department of Law is, for purposes of your investigation, representing all Department of Administration employees who had involvement with Trooper Wooten's personnel or workers' compensation files.

I regret to inform you of these actions, but we believe we have no choice given the recent evolution of this investigation. The Department of Law will continue to work with you on your requests for records as we have previously discussed.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By: Michael A. Barnhill
Michael Barnhill
Senior Assistant Attorney General

MAB/krk

cc: Commissioner Annette Kreitzer
Senator Hollis French
Senator Kim Elton
Representative Nancy Dahlstrom

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM September 3, 2008

SUBJECT: Investigations by the legislature (Work Order No. 26-LS0088)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Tamara Brandt Cook
Director TBC

You have supplied me with a letter from Mr. Thomas V. Van Flein and Mr. John J. Tiemessen, who are representing the Governor and various staff members, and asked me to consider points raised in the letter.

[redacted]

To the extent that the thrust of this comment in the letter goes to the power of the legislature to investigate, I observe that the legislative power of investigation is limited to obtaining information on matters which fall within its field of legislative action. (Mason's Manual, Secs. 795(6) and 797(7)) Lawmaking is a central legislative activity, but there are other legislative activities that may justify investigatory pursuits. It is stated in Mason's Manual, sec. 795(10): [redacted]

The Alaska Supreme Court has acknowledged that the legislature has broad powers of investigation relating to its lawmaking activities and has also specifically identified the confirmation power as carrying with it an implied power and duty to investigate both the status of the relevant appointed offices and the qualification of individuals appointed to fill them. (Cook v. Botelho, 921 P.2d 1126 (Alaska 1996)) [redacted] example, Art X, sec. 12 (power of the legislature to disapprove certain local boundary changes; Art. II, sec. 20 (power of the legislature to impeach civil officers of the State))

If this comment is intended to precisely apply to the power of the legislative council to investigate, [redacted]

as well as its power to participate in the law-making function through the introduction of legislation (AS 24.08.060(b)). The legislative council does not have explicit authority to investigate activities of executive branch agencies or officers. It is not clear to me whether the broad power to provide administrative services would be considered to be sufficient authority for the legislative council to undertake a preliminary investigation that might lead to the need for other actions on the part of the legislature or another legislative committee, but it might. In addition, it is possible that the recommendations contained in the report prepared under the investigation contract will consist of proposed statutory changes and fall squarely within the law-making function exercised by the legislative council when it considers the introduction of legislation.

(2) The legislature may lack jurisdiction to spend public monies to investigate a co-equal branch of government.

Clearly, expenditure of public money appropriated to the legislative branch must be used for a legislative purpose as well as for a public purpose. If the legislature does have the power to conduct the investigation in question, then it has the authority to spend money for that purpose. Mason's Manual notes in sec. 795(13) "In the exercise of its power to make investigations, a legislature may incur reasonable, necessary expenses payable out of the public funds."

(3) The general legislative power to issue subpoenas is clearly prohibited relative to the Legislative Council. (See AS 24.25.010(e))

It is correct that the legislative council is not authorized to issue a subpoena under AS 24.25.010. It has separate subpoena authority under AS 24.25.060(2). That power is granted "when consistent with the powers and duties assigned to the council by AS 24.20.010-24.20.140." As I previously noted, it is not clear whether the investigation at issue is consistent with those powers and duties.

(4) Art. I, sec. 7 entitles the Governor to "fair and just treatment" in the course of legislative investigations.

This is correct. I have attached a discussion of this provision from the Alaska Constitutional Convention Proceedings, Part 4, pages 1446 -1450 and pages 1464 - 1471. As you can see, the delegates did not reach an understanding of what "fair and just treatment" might be with regard to a legislative investigation. It appears that the expectation was that the legislature would adopt specific procedures that apply to ensure that investigations are fair or that, through court challenges based on actual legislative investigations, a body of law would evolve to clarify the matter. However, the legislature has not adopted specific procedures for investigations and the case law dealing with the last sentence of Art. I, sec. 7 that I found in a quick search has involved executive branch investigations (administrative procedures) rather than legislative branch investigations.

(5) A complaint has been filed with the Personnel Board under the executive branch ethics law which gives the Board jurisdiction over this investigation. Will you suspend your investigation pending the outcome of the Personnel Board investigation?

The investigation of an incident by one governmental entity does not normally deprive another governmental entity of authority to look into the matter also, although one of the entities might agree to curtail its activities out of deference to the other. Assuming that a complaint has been filed under the executive branch ethics law, both the complaint and all information regarding an investigation as a result of the complaint are confidential until the initiation of formal proceedings. (AS 39.52.340) An investigation can only involve alleged violations of the ethics law and there is no way to tell what the scope of the investigation in this situation might be. It certainly cannot be determined that the legislature's investigation will be identical with an investigation being conducted under the executive branch ethics law. [redacted] (Cook v. Botelho, 921 P.2d 1126 (Alaska 1996) quoting from Barrett v. Duff, 217 P. 918 (Kan. 1923) pages 925 - 926)

I caution you not to mention any complaint or investigation that may be in progress under the executive branch ethics act in a letter you make public because these complaints are confidential. I have no comment with respect to whether the legislature should suspend its investigation.

(6) The letter calls into question keeping certain aspects of the legislative investigation secret.

It is usual for the investigatory stage to be conducted on a confidential basis before any formal charge is made or formal proceeding initiated. This protects the privacy of individuals who may be under investigation, of witnesses, and of the investigatory process itself. After all, an investigation may not uncover facts that lead to a formal proceeding. (See generally AS 40.25.120(a)(4); AS 45.50.521; AS 45.66.190; AS 47.30.845; AS 47.32.180) Under the public records law, in determining whether a particular record is subject to public disclosure, the court will weigh the public interest in disclosure against the interest in confidentiality. (Gwich'in Steering Comm. v. State Office of the Governor, 10 P.3d 572 (Alaska 2000); Fuller v. City of Homer, 75 P.3d 1059 (Alaska 2003)) A reasonable argument can be made for the proposition that the interest in protecting the legislature's investigatory function and the privacy interest of potentially innocent parties outweighs the public interest in disclosure, particularly when the investigation may not lead to any formal procedure.

(7) There is no reason to conduct ex parte interviews with represented parties.

This seems to be a fair assertion.

(8) Mr. Branchflower attempted to contact Mr. Todd Palin on a secure line which represents a security breach. The letter requests immediate disclosure of the names of persons who provided the secure phone number.

The letter suggests that the security breach may be reported to the Secret Service. I have no knowledge of federal security laws or how they may interface with an ongoing legislative investigation.

(9) If "you agree to submit to proper jurisdictional process, we can check the Governor's schedule to see when she and the First Gentleman are available for an interview."

Does this mean that, despite the objections in the rest of the letter, an interview will be granted in the course of the legislative investigation? I think you will have to consult with Mr. Thomas V. Van Flein on the meaning of his last two paragraphs.

* * * * * * * * * * * * *

With respect to all this, I observe that if a person refuses to provide information to the investigator or to respond to a subpoena by a legislative committee, it may be that the lack of cooperation must simply be noted in the report. Because the power to investigate is a legislative power that has not been clearly delegated in this instance to a committee, ultimately, the House or Senate or legislature as a whole may have to decide whether to formally initiate an investigation through the adoption of a resolution charging a committee to conduct it.

[redacted] It may be that the legislature must use its own disciplinary powers; formal censure through adoption of a resolution or impeachment proceedings. (See AS 24.25.030) [redacted]

TBC:lmb
08-210.lmb

Enclosure

CLAPP • PETERSON
VAN FLEIN • TIEMESSEN • THORSNESS
LLC

ANCHORAGE

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Monique R. Renner
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Liam J. Moran, Of Counsel
James D. Gilmore, Of Counsel
Jonathan P. Hegna, Of Counsel

FAIRBANKS

John J. Tiemessen
Lisa C. Hamby
Marcus R. Clapp, ret.

September 2, 2008

Stephen Branchflower, Esq. EMAIL: sebranchflower@gmail.com

Re: In Re: Investigation Into The Termination Of Walt Monegan

Dear Mr. Branchflower:

As you are no doubt aware, Senator French sent a letter to our office on September 1, 2008. Although Senator French is an attorney, we do not believe a client can waive the prohibition on *ex parte* contact without confirmation from his counsel. Accordingly, please consider this letter a response to your client's September 1, 2008 letter. If you would prefer in the future that we correspond directly with Senator French, please advise in writing and we would be happy to do so. Until you confirm this, our correspondence will be with you.

As attorneys, we feel that it is our job to keep our clients focused on the objective goals of this process, finding out the truth about what happened. While our clients may have political differences, we would like to think that our offices can rise above those differences and remain focused on a fair, deliberate inquiry that is consistent with the laws and constitution of the State of Alaska and the principles of due process. Unfortunately, Senator French's letter seems to be advocating a different direction. We will rely on you to focus him in a more positive direction.

As you are now aware, a complaint has now been filed with the Personnel Board. This would seem to render Senator French's objection moot. Now that the complaint has been filed, it appears that the Board has jurisdiction over this matter. Will you suspend your investigation pending the outcome of the Personnel Board investigation or resolution of the jurisdictional issue? If not, please explain why. If the stated goal of the Legislative Council is a fair and neutral investigation, then we believe it will embrace the process the Legislature itself created.

While the Legislative Council does have some limited investigatory power, those powers seem to be limited to investigations related to proposed or current laws. We are not aware of any such proposed legislation. In fact, we are suggesting that the Legislature may lack jurisdiction to

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spend public monies to investigate a co-equal branch of the government. While Governor Palin does not have anything to hide, you certainly can appreciate why she would insist that the investigation be conducted fairly, consistent with Alaska Statutes, and free from even the suggestion of political influence. Senator French suggests that this position is somehow "at odds with our state's constitution." We are not aware of which provision of the constitution he refers to but would be happy to reconsider this position if you point us to it. In fact, Mr. French may have overlooked this part of the State Constitution:

> The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Art. I, Sec. 7. The Governor is a "person" and is entitled to "fair and just treatment" as part of this investigation. Following state law, including the personnel board process, would comply with the Constitution. However, even if the Legislative Council has some plenary power to conduct secret investigations—which it does not—due process is still required. The Governor is entitled to notice of the allegation, discovery, and subpoena powers (all set forth in the Legislative Council's statute, which as adopted the civil rules for its process). We remain perplexed why Mr. French would want a secret proceeding, in violation of the Legislative Council's own enacting statute.

As a further example, the general legislative power to issue subpoenas is clearly prohibited relative to the Legislative Council. *See* AS 24.25.010(e) ("This section does not apply to the legislative council or to the Legislative Budget and Audit Committee").

We believe that it would benefit the truth-seeking goal of any investigation if the parties disclosed witness statements and other information they independently gather. There is certainly precedent for this in the Civil Rules which would require such disclosure. However, it is our understanding that you have already agreed to informal sharing of information with the Attorney General's office. Surely you and Mr. French are not the sort of gentlemen where we must confirm agreements in writing. Again, if this understanding is in error, please advise.

We appreciate the scheduling problems that our recent appearance in this case may have caused. However, that is no reason to conduct *ex parte* interviews with represented parties. Simple professional courtesy as well as the prohibition against *ex parte* contact requires that these interviews and depositions be coordinated with all counsel and parties. Many of these staffers have their own counsel as well, and we need to coordinate with them.

Further, we are informed that Mr. Branchflower attempted to directly contact Todd Palin on a secure and confidential line. This represents a serious security breach that we may be obligated to report to the Secret Service. We ask that you immediately disclose the names of any person who provided you with Mr. Palin's secure phone number.

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We ask again that neither you nor any of your staff have *ex parte* contact with any represented parties as this is a significant violation of Alaska Rule of Professional Conduct 4.2. If you desire a formal list of the represented parties, we will provide one. Suffice it to say that we represent the Governor and the Office of the Governor and all persons associated with that office. Many staff members have private counsel with whom we need to coordinate.

Please confirm your willingness to shift this process to the Personnel Board. We can then use it's procedures to coordinate interviews. We understand that you have a self-imposed deadline of the Friday before the general election. In addition to complying with state law, we think that you would agree that the concerns of finding the truth and not violating anyone's right to counsel or due process trump any desire to create a pre-election media event.

Assuming you agree to submit to proper jurisdictional process, we can check the Governor's schedule to see when she and the First Gentleman are available for an interview. Per Senator French's letter, we will check on possible late September dates. In order to avoid some date conflicts, both I and Mr. Tiemessen will be available to attend these interviews. We will need your dates of availability also. We will also check the schedules of Mr. Nizich and Mr. Ruraro. It seems to make little sense to throw dates at you unless we know your schedule. Perhaps a conference call to schedule these would be the best way to coordinate these deposition and other jurisdictional and procedural concerns? We ask for your prompt cooperation.

Please do not hesitate to call if you have any questions or concerns.

Very truly yours,

Thomas V. Van Flein and
John J. Tiemessen, for
Clapp, Peterson, Van Flein
Tiemessen & Thorsness, LLC

Cc: Governor Sarah Palin
Mike Nizech, Chief of Staff
Lisa Hamby, Esq.
Talis Colberg, Attorney General
Michael Barnhill, Assistant Attorney General

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Alaska State Legislature

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

Senate Judiciary Committee

September 1, 2008

Mr. Thomas V. Van Flein
Clapp, Peterson, Van Flein, Tiemessen and Thorsness, LLC
711 H Street, Suite 620
Anchorage Alaska 99501

Dear Mr. Van Flein:

I am in receipt of your letter dated August 29, 2008, sent to Stephen Branchflower on August 30, 2008. It's worth pointing out that we have not received any notice from the Department of Law that the Governor was retaining private counsel. Given the nature of your letter, it seemed more appropriate that I reply to it, rather than Mr. Branchflower.

You assert in your letter that you believe that the Personnel Board is "statutorily mandated to oversee these proceedings." I don't see it that way. The Personnel Board oversees complaints brought against the Governor under the state's ethics laws. While the Board may be engaged now in investigating an ethics complaint, that process is held confidential until the Board makes a finding of probable cause. Indeed, the Board would not have jurisdiction unless someone has filed a complaint. I am unaware of one being filed. Perhaps you know differently.

Your letter goes on to request that Mr. Branchflower work with you "in adhering to state law and submitting these issues to the body properly vested with primary jurisdiction." I confess that I may be misunderstanding your point. The Legislature, of course, has its own separate powers of investigation. I hope you are not suggesting that the Legislature does not have the authority to investigate potential violations of law by members of the Executive Branch. Governor Palin has repeatedly stated that she has nothing to hide and that she and her administration will cooperate fully with this investigation. Is your client aware that you seem to be challenging the Legislature's jurisdiction? Such a position is at odds with our state's constitution, and with your client's public statements.

Your letter also requests a copy of all witness statements that Mr. Branchflower has secured. I have instructed him to not comply with that request. I think you will agree that it would be highly unusual for an investigator to share information with one of the targets of the investigation. I am unaware of any precedent for such an arrangement. Furthermore, the Attorney General is conducting his own inquiry into this matter on behalf of the Governor. As the Governor's lawyer, I feel sure that you will have access to information developed through General Colberg's efforts.

Likewise, I have instructed Mr. Branchflower to adhere to the witness interview schedule that he has worked assiduously to set up. It is very important that the interviews take place as previously arranged by Mr. Branchflower. Delays in witness interviews will jeopardize the timely conclusion of this investigation. Indeed, delays would cause me to convene a meeting of the Judiciary Committee and ask that subpoenas be considered.

With regard to the Governor's deposition, Mr. Branchflower made his initial request for an interview with the Governor last Thursday morning. There has not been a response to his request. Clearly the Governor's new political role will make it more challenging for her to make time for this investigation. Nevertheless, her repeated promises to cooperate fully with the investigation, as well as her statements that her new role as the Republican Vice Presidential nominee will not interfere with the day-to-day functioning of state business, should result in a concrete willingness to schedule and conclude her deposition. In sum, I am requesting that you set a September date for the Governor's deposition, as well as the deposition of Mr. Mike Nizich, and Mr. Randy Ruaro, by the close of business this Friday, September 5, 2008.

I appreciate your stated willingness to cooperate with the Legislature's investigation. Please keep in mind that it was the initial cooperation from the Administration with regards to witness depositions that allowed us to avoid the issuance of subpoenas. I have stated publicly that while the Governor's new status raises the profile of this investigation, it does not change the steps we must go through to see to its completion. I trust that the Governor feels the same way.

Sincerely yours,

Hees R

Senator Hollis French

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John J. Tiemessen
Lisa C. Hamby

Marcus R. Clapp, ret.

August 29, 2008

Stephen Branchflower, Esq. VIA EMAIL sebranchflower@gmail.com

Re: *In Re: Investigation Into The Termination of Walt Monegan*

Dear Mr. Branchflower:

We have been retained to represent the Governor and the Governor's Office relative to the Legislative Council's investigation into the termination of Mr. Monegan, the alleged Executive Branch Ethics violation, and the alleged Personnel Act violation.

We fully welcome a fair inquiry into these allegations, and believe that the Personnel Board is statutorily mandated to oversee these proceedings. We trust you have no objection to following state law in that regard and will work with us in adhering to state law and submitting these issues to the body properly vested with primary jurisdiction.

We have considerable information to review to get up to speed. The Attorney General is forwarding to us information it collected and already shared with you. It is my understanding that there is an informal agreement to share information the parties obtain through their own inquiries. Accordingly, I would appreciate a copy of all witness statements you have (if not transcribed, then we can copy the CD), all documentary evidence you have, any witness list you have, and a copy of the complaint or other charging document upon which you are basing your investigation. The obvious exception to this is I do not expect you to exchange your communications with Sen. French, as you no doubt would not expect, nor be entitled to, our communications that are protected by the attorney client privilege.

711 H Street, Suite 620 • Anchorage, Alaska 99501-3454
phone • 907-272-9272 email • anch@cplawak.com fax • 907-272-9586

Further, please know that we intend to cooperate with this investigation and will reciprocate the exchange of information consistent with our duty to ensure compliance with due process and within constitutional parameters. I would like to review our calendars to schedule depositions of witnesses (and, of course, we need to coordinate with those witnesses as well, particularly as hunting season is here). For those witnesses outside of the Governor's Office, but within the employ of the State, we will have to coordinate with Mr. Barnhill as well, as those State employees are entitled to representation. I will be representing members of the Office of the Governor at any deposition.

If you are in town, I think a sit down meeting with you would be beneficial so we can map out the logistics. In the meantime, I would ask that you have no *ex parte* contact with members of the Governor's Office, and we will not contact Sen. French. If you consider anyone to be your client in addition to Sen. French, please identify them for us so we do not inadvertently have *ex parte* contact as we perform our own due diligence.

We are looking forward to resolving this matter as expeditiously and fairly as possible.

Very truly yours,

Thomas V. Van Flein, for
Clapp, Peterson, Van Flein
Tiemessen & Thorsness, LLC

Cc: Sarah Palin, Governor
Michael Nizich, Chief of Staff
Kris Perry, Governor's Anchorage Office Director
Michael Barnhill, Esq.
John Tiemessen, Esq.
Lisa Hamby, Esq.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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Juneau, Alaska 99801-1182
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MEMORANDUM August 13, 2008

SUBJECT: Senate Judiciary Committee issuance of subpoenas relevant to the Legislative Council-initiated investigation of alleged improper actions of executive branch officers and employees.

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Jack Chenoweth
Assistant Revisor

The Legislative Council has authorized the above-captioned investigation and entered into an agreement with Stephen E. Branchflower to undertake it. The contract with Mr. Branchflower indicates that you are to serve as "project director," "authorized to oversee and direct the activities of [Mr. Branchflower] under [the] contract." I've been told, though it is not reflected in the draft minutes of the Council's July 28th meeting at which that activity was authorized, that the Legislative Council understood that the Senate Judiciary Committee would serve as the entity through which the Council's contractor could expect to secure and enforce the production of documentary evidence and witnesses relevant to the investigation.

Cindy Smith of your office has requested our consideration of each of the following questions in conjunction with the above-captioned matter.

1. May the Senate Judiciary Committee authorize issuance of one or more subpoenas for the production of records, some of which may be held in the custody of a state employee, relevant to the above-captioned investigation?

Yes. The legislature has broad authority to investigate and an investigation may be conducted through a legislative committee. [redacted] Additionally, Uniform Rule 21(c) grants to standing committees the power to meet between sessions. A committee that meets between sessions may consider "any legislative matter which is consistent with the jurisdiction of the committee." Alone among standing committees, Uniform Rule 20 declares that the standing Judiciary Committees have jurisdiction as to "the legal and substantive review of bills referred to it ... for that purpose," suggestive that the Judiciary Committee is the logical body by which to secure completion of a successful investigation.

Under AS 24.25.010(b), a legislative standing committee has broad statutory power to subpoena a witness including, under AS 24.25.030, a witness who can produce "upon reasonable notice any material and proper books, papers, or documents in the possession or under the control of the witness[.]" [redacted] "

2. May the Senate Judiciary Committee meet by teleconference to authorize issuance of the subpoena(s)?

Yes. Action by teleconference is authorized by AS 44.62.310(a), part of the so-called Open Meetings Act (AS 44.62.310 - 44.62.312). This provision is made applicable to standing committees of the legislature by AS 24.60.037's directive that legislative committees abide by open meetings guidelines. This office has consistently taken the position that, absent an explicit prohibition against a standing committee meeting by teleconference, consistent legislative practice has been to allow standing committees to conduct business by teleconference.

3. To avoid public disclosure of the identities of the person or persons to whom subpoenas may issue, may the committee act to authorize the subpoenas in executive session?

No. Certain matters may be considered in executive session:

> (c) The following subjects may be considered in an executive session:
>
> (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;
>
> (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
>
> (3) matters which by law, municipal charter, or ordinance are required to be confidential;
>
> ***(4) matters involving consideration of government records that by law are not subject to public disclosure.***

I'm assuming, for reasons examined and discussed later in this memo, that paragraph (c)(4) would provide the basis for an executive session in which committee members may discuss the propriety of authorizing subpoenas for specific witnesses and records. However, for purposes of legislative business, open meetings principles, applicable to legislative standing committees by AS 24.60.037, fairly require that the committee's decision and vote to approve or withhold issuance of a subpoena be conducted in public. Under AS 24.60.037(b),

> (b) For purposes of the legislative open meetings guidelines, a meeting occurs when a majority of the members of a legislative body is present and ***action, including voting, is taken or could be taken***, or if a primary purpose of the meeting is the discussion of legislation or state policy. . . . .

There must be a formal record that the authority for the committee chair to issue the subpoena was given "by a majority of the membership of the committee." AS 24.25.010(b). For each subpoena to be authorized, if you conduct the committee meeting by teleconference, you must call the roll of the yeas and nays of the committee members attending ["The vote at a meeting held by teleconference shall be taken by roll call." -- AS 44.62.310(a)]; if all committee members participating are physically present in one place, you may ask for and obtain the members' unanimous consent.

4. To avoid public disclosure of the identities of the person or persons to whom subpoenas may issue, may the committee issue the subpoena addressed in a way that does not name the person?

Unless the committee is prepared to act creatively, probably not. The procedural requirement relating to issuance of a subpoena, including a subpoena to a witness who can produce "upon reasonable notice any material and proper books, papers, or documents in the possession or under the control of the witness," is explicit. Under AS 24.25.010(d),

> (d) The subpoena is sufficient if
> (1) it states before whom the proceeding is held;
> (2) ***it is addressed to the witness***;
> (3) it requires the attendance of the witness at a time and place certain;
> (4) it is signed
> (A) . . . , or
> (B) by the committee chairman with the concurrence of the president or the speaker under (b) . . . of this section.

As you well know, common practice is to enter the name of the person to whom the subpoena is addressed at the appropriate place on the face of the subpoena. I am not aware of any authority by which a subpoena may be issued "generically" ("to the person having custody of the following described records: ___") or using an identifier intended to mask the subpoena recipient's actual identity so as to prevent the subpoena recipient's identity from being otherwise disclosed.[1]

---

[1] I have had one thought about taking a public vote as to the issuance of the subpoena without identifying the person to whom the subpoena will issue. If each subpoena to be approved for service on a prospective witness were to have, in addition to

*

This conclusion may prompt the question as to whether a subpoena itself is to be considered and treated as a public record, disclosable to the press and public.

Among exceptions to the public records provisions, under AS 40.25.125(a)(6), certain "law enforcement related records or information" are exempt from disclosure:

> (6) records or information compiled for law enforcement purposes [are excepted from disclosure], but only to the extent that the production of the law enforcement records or information
>
> (A) could reasonably be expected to interfere with enforcement proceedings;
>
> (B) would deprive a person of a right to a fair trial or an impartial adjudication;
>
> (C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness;
>
> (D) could reasonably be expected to disclose the identity of a confidential source;

---

the name of the witness, an identifying number unique to that witness subpoena, it might be possible, it seems to me, to have the committee's approval motion expressed in terms of approving subpoena number 1, or subpoena number 2, rather than referring to the name of the individual. In the public session, the motion would be expressed in terms of an approval of subpoena number ___ ("I move that the committee approve the issue of the subpoena identified as 'subpoena no. 1'") rather than by a motion expressing the names of the individual who would be served. This approach would work, however, only if you are able to reasonably ensure that committee members attending by teleconference have the drafted and numbered subpoenas at hand, so that each committee member would readily understand that the subpoena identified as number 1 or number 2, as appropriate, would be issued to a specific witness for production of specific materials ["Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable." -- AS 44.62.310(a); "[a]ction taken contrary to this section is voidable." -- AS 44.62.310(f)]. At the conclusion of the meeting, it would be in order to collect from the participants the draft documents for disposal.

I have no idea whether this would be a practical solution, though I think it is legally defensible so long as the subpoena to be served does bear the identity of the witness on whom it is to be served.

You'd be well advised to consider this and any other reasonable alternatives with Mr. Branchflower; he has more experience in securing evidence under subpoena than I.

> (E) would disclose confidential techniques and procedures for law enforcement investigations or prosecutions;
>
> (F) would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law; or
>
> (G) could reasonably be expected to endanger the life or physical safety of an individual[.]

While some may argue that subparagraph (6)(A) may provide the committee sufficient authority, none of these, in my judgment, would authorize an exception from disclosure for a document such as a subpoena. Additionally, it is not clear to me that records and information secured in the course of a legislative investigation would qualify as material "compiled for law enforcement purposes" within the meaning of the exception.

If the information compiled in the course of the committee's investigative efforts is to enjoy protection against disclosure as a public record, it appears that the protection would have to be provided under one or more constitutional provisions as suggested by a 1987 Opinion of the Attorney General. That opinion considered whether the file of a then-active Alaska Public Offices Commission investigation would be available for review by the press. The Attorney General's office declined the press request (except as to certain material that were made expressly available for review by statute or commission regulation), relying on state common law precedents. With apologies for its length, set out below is the text of the relevant portion of the opinion:

> As you know, AS 09.25.110 [now AS 40.25.110], commonly known as the "Public Records Act," provides generally that all records of an agency of state government "are public records and are open to inspection by the public under reasonable rules during regular office hours." A second statute, AS 09.25.120 [now AS 40.25.120], sets out limited exceptions to the general rule of disclosure. The only exception relevant here is for "records required to be kept confidential by a federal law or regulation or by state law . . . ." This office has consistently concluded that the phrase "state law" includes state common law. 1985 Inf. Op. Att'y Gen. (Oct. 21; 366-202-84); 1985 Inf. Op. Att'y Gen. (Sept. 24; 366-113-86); see *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1319 (Alaska 1982); see also AS 01.10.010.
>
> The Alaska Supreme Court has recognized a common law exemption from disclosure where a demonstrable need for confidentiality outweighs the public's proprietary interest in public records and its interest in knowing what government officials are doing. *Kenai Peninsula Newspapers*, 642 P.2d at 1319. In our view, there are at least three demonstrable public and private interests which, at least in the aggregate, outweigh the public's right to have access to APOC's active investigation files.

First, numerous courts have recognized that the agency and the public have an interest in preserving the integrity and effectiveness of law enforcements investigations, and that that interest may be jeopardized by the release of active investigative files. *State ex rel. City of Bartow v. Public Employees Relations Commission*, 341 So. 2d 1000 (Fla. Ct. App. 1976); *Stone v. Consolidated Publishing Company*, 404 So.2d 678 (Ala. 1981); *Church of Scientology v. City of Phoenix Police Department*, 594 P.2d 1034 (Ariz. 1979); *Grodjesk v. Faghani*, 487 A.2d 759 (N.J. App. Div. 1985). Release of active investigation files creates the possibility that the subject of the investigation will interfere with the investigation by, among other things, destroying documents or discouraging witnesses from cooperating with the agency. *Public Employees Relations Commission*, 341 So. 2d 1000. In the agency's experience, witnesses contacted in the course of an active investigation are often reluctant to provide sworn testimony or agree to "go public" with their information unless they are satisfied that independent investigation by the agency tends to substantiate their testimony. Such witnesses would be more reluctant to provide information to the APOC if their information is immediately subject to public scrutiny. See *People ex rel. Better Broadcasting Council, Inc. v. Keane*, 309 N.E.2d 362, 364 (Ill. 1973); *Lopez v. Fitzgerald*, 390 N.E.2d 835 (Ill. 1979).

Second, the investigatory information you seek has not yet been subject to full administrative evaluation, and no decision has yet been made whether there is substantial evidence indicating that any laws have been violated. Release of such unevaluated information to the public may unfairly impair the reputation of the subjects of the investigation, and may come perilously close to violating their due process rights guaranteed by the state and federal constitutions. *Lopez v. Fitzgerald*, 390 N.E.2d at 840-41. The courts have recognized that "the public good is not served by disclosures which undermine the sense of security for individual rights." *Lopez v. Fitzgerald*, 390 N.E.2d at 840 (citing with approval *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 222, 71 Cal. Rptr. 193, 199 (Cal. 1968)).

Third, we believe that Alaska's constitutional right to privacy requires APOC to use extreme caution in disclosing unverified or unevaluated charges or materials obtained by the agency in the course of an investigation. *Lopez v. Fitzgerald*, 390 N.E.2d at 840; see *Falcon v. Alaska Public Offices Commission*, 570 P.2d 469 (Alaska 1977); *Messerli v. State*, 626 P.2d 81 (Alaska 1980). The persons whose privacy rights are at stake can waive the right. In this case, the subjects of the investigation have declined to do so.

> In reaching the conclusion that the public and private interests in nondisclosure of these investigative files outweigh the public's interest in disclosure, we are influenced by the fact that, under 2 AAC 50.460(d), investigation reports will be prepared by the APOC staff upon conclusion of the investigations. Investigation reports are generally made available to the public, and are always provided to the persons whose complaints triggered an investigation. Because an investigation report will be produced in due course, we believe the public's interest in early disclosure of the information is not great. See *Public Employees Relation Commission*, 341 So. 2d 1000.

1987-1 Op. (Inf.) Atty. Gen. Alas. 291, April 30, 1987, at 2 - 6 (notes omitted). Although the Council-initiated investigation may not properly be characterized as one made for "law enforcement purposes," nonetheless the principles identified and discussed in the preceding opinion as warranting confidential treatment of an active investigation -- most significantly, considerations bearing on the release of "unevaluated information" as bearing on the due process rights of the investigation's subjects -- would appear to apply equally to the matter that the Council has under consideration. Significantly for your purposes, as with the outcome of the APOC investigation noted in the quoted portion of the opinion, the Council's contract with Mr. Branchflower anticipates completion of an investigative report and contemplates eventual release of the report in a form that may be disclosed to the public.

JBC:med
08-370.med

PRESS RELEASES

Daily News editorial distorted Troopergate inquiry's facts - COMPASS: Other points of view

Anchorage Daily News (AK) - Friday, October 24, 2008

Author: *TALIS J. COLBERG; Commentary*

The "Bottom Line" of the October 20 Daily News editorial was that Alaskans do not need an elected attorney general. That conclusion may be correct, but along the way the editorial also found "plenty of reasons to criticize" me. Those reasons are not supported by the facts.

First, the editorial inappropriately suggests that the Department of Law may have tampered with witnesses by conducting an inquiry before Stephen Branchflower began his legislative investigation in the matter known as Troopergate. The facts show otherwise.

When Mr. Branchflower interviewed me as part of the Legislature's investigation, he said that the department's inquiry "resulted in material that (was) very helpful to (him) in doing (his) job," that it was "very much appreciated," and that "without (my) willingness to share that evidence ...the ultimate production of (his) report would have been delayed."

Second, the Department of Law did not hire a private lawyer to represent Governor Palin because of any perceived conflict of interest on my part. We did so because I was concerned that having state attorneys represent Governor Palin in the investigation would hamper the department's ability to effectively perform its other statutory duties.

By statute, the attorney general's duties include serving as legal adviser to state officers, representing the state in litigation, prosecuting violations of state law, and administering state legal services. Normally the attorney general gives legal advice both to the governor and to other state departments, including the Department of Public Safety. But the point of the Legislature's investigation was to consider whether Governor Palin used her public office for a personal purpose. Without separate counsel to represent the governor, the department's effectiveness as legal counsel to both the governor and other state agencies might have been impaired.

To address those concerns, the department hired Mr. Van Flein to represent the governor and other members of her office, expressly limiting the representation to their official actions. The department remained involved in the legislative investigation because its attorneys continued to represent employees of other state agencies.

Mr. Van Flein later expanded his representation to Governor Palin in her personal capacity and to Todd Palin. That work was never covered by his contract with the state. But because Mr. Van Flein assumed these new responsibilities, he decided that he could no longer represent other members of the governor's office, so the department resumed representation of those employees.

The editorial incorrectly asserts that I said at a press conference that Mr. Van Flein was no longer a state contractor. In fact, I confirmed at the press conference that Mr. Van Flein was still under contract to represent Governor Palin in her official capacity. I have never stated otherwise. (Editor's note: A correction on this point appeared Thursday on

page A-3.)

Third, contrary to the editorial's assertion, I did not advise state employees that compliance with subpoenas is voluntary. Subpoenas are never mandatory until they are served. Before the employees were served with the subpoenas, the department asked legislators to consider withdrawing them. Once the subpoenas were served, the department filed a court action seeking a ruling on their validity. Although the editorial suggests that the department delayed in challenging the subpoenas, in fact the department filed the lawsuit just two days after service was completed.

Finally, the court in that case did not, as the editorial suggests, decide that the subpoenaed employees had no grounds for challenging the subpoenas' validity. Instead, the court declined to address that issue, concluding that the challenges must be resolved by the Legislature, not a court.

Bottom Line: The Daily News editorial was based on a distorted view of what actually happened.

Talis J. Colberg is attorney general of the State of Alaska.

Caption: Photo 1: 24edit_Talis J Colberg_102408.jpg

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Daily News editorial distorted Troopergate inquiry's facts - COMPASS: Other points of view

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adn.com
Anchorage Daily News

Legislative subpoenas go unanswered

CONTROVERSY: Seven Palin aides follow attorney general's advice and refuse to be interviewed.

By SEAN COCKERHAM
scockerham@adn.com

(09/27/08 03:53:07)

With state officials again defying legislative subpoenas in the investigation of whether Gov. Sarah Palin abused her power, the war between state lawmakers and Alaska's attorney general is escalating.

The governor's chief of staff, Mike Nizich, and six other Palin aides didn't show up Friday to honor subpoenas ordering them to testify in front of the Senate Judiciary Committee. The committee chairman, Anchorage Democratic Sen. Hollis French, said they could be found in contempt when the full Legislature convenes in January, a finding that carries potential jail time.

Alaska Attorney General Talis Colberg, a Palin appointee, filed a lawsuit late Thursday asking the courts to declare the subpoenas invalid so the state employees would not be punished for ignoring them.

Colberg said his office has told the employees they had a choice to disobey the legislative subpoenas -- advice that has state legislators furious.

"We have advised people that is an option. And that we think the subpoenas have flaws," he said.

Fairbanks Republican Rep. Jay Ramras, chair of the House Judiciary Committee, charged "there is likely very irresponsible behavior coming from the attorney general."

Anchorage Democratic Sen. Bill Wielechowksi, a lawyer who is on the Judiciary Committee, said he is not impressed, either.

"I just can't imagine any attorney advising a client that a subpoena is voluntary," he said.

Colberg's lawsuit argues that the Judiciary Committee did not have the authority to issue the subpoenas, a claim contested by the legislators. Colberg on Friday asked the lawmakers to suspend their subpoenas until the court makes its ruling -- a process that could run well beyond the Nov. 4 election where Palin is on the Republican ticket for vice president. French refused, saying the attorney general didn't even ask the court for a quick ruling and "has put its lawsuit on a slow track."

Colberg said he didn't ask for a quick ruling on his lawsuit because it's the Legislature that has imposed a deadline for the investigation to be completed. The lawmakers can ask for an expedited ruling if they want, he said.

"If there is urgency, let it be on the other party to explain why this would be on par with, for example a child in need of aid or somebody in danger," he said.

GROWING CRITICISM

Steve Branchflower, the investigator hired by the Legislative council, is supposed to give his report on the investigation Oct. 10. At issue is whether Palin dismissed public safety commissioner Walt Monegan because he wouldn't fire a state trooper who went through an ugly divorce with her sister. The bipartisan Legislative Council passed a resolution that directs Branchflower "to investigate the circumstances and events surrounding the termination of former Public Safety Commissioner Monegan, and potential abuses of power and/or improper actions by members of the executive branch."

Palin initially said she'd cooperate with the investigation -- then changed course after her nomination as vice president, saying the Legislature's investigation was politicized. Palin said the state personnel board, not the Legislature, has jurisdiction and she'd cooperate with its investigation.

That one is out of public view and may not be done before the election.

Colberg is coming under growing fire from legislators and other critics for how he's handled the battle between Alaska's legislative and executive branches. One of the stated aims of a planned "Hold Palin Accountable" protest to be held in Anchorage today is to demand the attorney general's resignation.

"There's talk of the AG, should he be disbarred and could he be disbarred, I just don't know," said Kenai Republican Rep. Mike Chenault.

North Pole Republican Sen. Gene Therriault -- who sides with Palin in the investigation -- told reporters that "it's my understanding somebody has lodged a complaint" against Colberg. Therriault had no confirmation. Such a complaint likely would be filed with the Alaska Bar Association, but those are confidential.

"I haven't been informed on (a complaint) yet," Colberg said. "But given the number of references to that type of thing I guess that's possible."

'GOOD LEGAL GROUND'

Colberg has defenders in the state Legislature, including North Pole Republican Rep. John Coghill, who said he believes the legislative investigation is tainted by politics and should be delayed until after the election.

"I think they have some good legal ground, I think the Legislature dangerously went beyond its authority," he said.

Anchorage talk radio has carped on Colberg for going on vacation last week as the controversy raged. Colberg said September is ordinarily a good time for a cabinet member to travel, and the Legislature is not in session.

Colberg said he obviously had no idea when he planned the trip that there would be an investigation or that Palin would be nominated for vice president.

"So in June, I had made arrangements to go on a personal vacation to the four states that I had never been to, focusing on Kansas. And I had made this arrangement with my college roommate of 30 years ago and we had talked about this for about three decades. ... So my trip for one week did occur and I did see all 50 states and I enjoyed the state of Kansas. It's a very nice place, at this time of year especially so," he said.

Colberg said he actually spent most of the trip on the phone dealing with what's become known as the Troopergate investigation.

Colberg said the Legislature's investigation is politicized. He said he's trying to insert some objectivity into the process by taking the subpoenas to court so a judge can sort it out.

WHO IS PAYING THE BILLS?

Colberg said an example showing how the investigation is flawed was lawmakers choosing not to subpoena former Palin chief of staff Mike Tibbles, now managing U.S. Sen. Ted Stevens' campaign for re-election.

"(Tibbles is) a key witness by any measure, and they said we won't subpoena you and the explanation that is given is -- 'there is no political will.' Now what does that say about the process?"' Colberg said.

The legislators also didn't subpoena Palin, saying they wanted to "de-escalate" the standoff with the governor. They did subpoena Palin's husband, Todd.

Todd Palin and two others refused last week to honor the Legislature's subpoenas.

Sarah and Todd Palin are both represented in the Troopergate investigation by an Anchorage attorney, Thomas Van Flein. There's some dispute over just whom Van Flein is working for. Colberg said Friday that Van Flein is on contract with the state to represent the governor, although the state has nothing to do with his representation of Todd.

But Van Flein, who has been getting advice from a lawyer working on the McCain-Palin campaign, insists he canceled the state contract on Sept. 12.

Colberg said he does not think Van Flein has received any money from the state. Palin's gubernatorial spokesman Bill McAllister said that's his understanding as well. Van Flein said the state is not paying his fees and that the Palins are responsible. But he wouldn't say whether they were paying directly, or if the money is coming from the McCain campaign or some other source.

Find Sean Cockerham online at adn.com/contact/scockerham or call him at 257-4344. Daily News reporter Tom Kizzia contributed to this story.

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Subpoenaed Palin aides could be found in contempt

BY SEAN COCKERHAM
scockerham@adn.com

(09/26/08 21:14:05)

With state officials again defying legislative subpoenas in the investigation of whether Gov. Sarah Palin abused her power, the war between state lawmakers and Alaska's attorney general is escalating.The governor's chief of staff, Mike Nizich, and six other Palin aides didn't show up Friday to honor subpoenas ordering them to testify in front of the Senate Judiciary Committee. The committee chairman, Anchorage Democratic Sen. Hollis French, said they could be found in contempt when the full Legislature convenes in January, a finding that carries potential jail time.

Alaska Attorney General Talis Colberg, a Palin appointee, filed a lawsuit late Thursday asking the courts to declare the subpoenas invalid so the state employees would not be punished for ignoring them.

Colberg said his office has told the employees they had a choice to disobey the legislative subpoenas - advice that has state legislators furious.

"We have advised people that is an option. And that we think the subpoenas have flaws," he said.

Fairbanks Republican Rep. Jay Ramras, chair of the House Judiciary Committee, charged "there is likely very irresponsible behavior coming from the attorney general." Anchorage Democratic Sen. Bill Wielechowksi, a lawyer who is on the Judiciary Committee, said he is not impressed, either.

"I just can't imagine any attorney advising a client that a subpoena is voluntary," he said.

Colberg's lawsuit argues that the Judiciary Committee did not have the authority to issue the subpoenas, a claim contested by the legislators. Colberg Friday asked the lawmakers to suspend their subpoenas until the court makes its ruling - a process that could run well beyond the Nov. 4 election where Palin is on the Republican ticket for vice president. French refused, saying the attorney general didn't even ask the court for a quick ruling and "has put its lawsuit on a slow track."

Colberg said he didn't ask for a quick ruling on his lawsuit because it's the Legislature that has imposed a deadline for the investigation to be completed. The lawmakers could ask for an expedited ruling if they want, he said.

"If there is urgency, let it be on the other party to explain why this would be on par with, for example a child in need of aid or somebody in danger," he said.

GROWING CRITICISM

Steve Branchflower, the investigator hired by the Legislative council, is supposed to give his report on the investigation Oct. 10. At issue is whether Palin dismissed public safety commissioner Walt Monegan because he wouldn't fire a state trooper who went through an ugly divorce with her sister. The bipartisan Legislative Council passed a resolution that directs Branchflower "to

investigate the circumstances and events surrounding the termination of former Public Safety Commissioner Monegan, and potential abuses of power and/or improper actions by members of the executive branch."

Palin initially said she'd cooperate with the investigation - then changed course after her nomination as vice president, saying the Legislature's investigation had been politicized. Palin said the state personnel board, not the Legislature, has jurisdiction and she'd cooperate with its investigation.

That one is out of public view and may not be done before the election.

Colberg is coming under growing fire from legislators and other critics for how he's handled the battle between Alaska's legislative and executive branches. One of the stated aims of a planned "Hold Palin Accountable" protest to be held in Anchorage today is to demand the attorney general's resignation.

"There's talk of the AG, should he be disbarred and could he be disbarred, I just don't know," said Kenai Republican Rep. Mike Chenault.

North Pole Republican Sen. Gene Therriault - who sides with Palin in the investigation - told reporters that "it's my understanding somebody has lodged a complaint" against Colberg. Therriault had no confirmation. Such a complaint likely would be filed with the Alaska Bar Association, but those are confidential.

"I haven't been informed on (a complaint) yet," Colberg said. "But given the number of references to that type of thing I guess that's possible."

'GOOD LEGAL GROUND'

Colberg has defenders in the state Legislature, including North Pole state Rep. John Coghill, who said he believes the legislative investigation is tainted by politics and should be delayed until after the election.

"I think they have some good legal ground, I think the Legislature dangerously went beyond its authority," he said.

Anchorage talk radio has carped on Colberg for going on vacation last week as the controversy raged. Colberg said September is normally a good time for a cabinet member to travel, and the Legislature is not in session.

Colberg said he obviously had no idea when he planned the trip that there would be an investigation or that Palin would be nominated for vice president.

"So in June, I had made arrangements to go on a personal vacation to the four states that I had never been to, focusing on Kansas. And I had made this arrangement with my college roommate of 30 years ago and we had talked about this for about three decades. ... So my trip for one week did occur and I did see all 50 states and I enjoyed the state of Kansas. It's a very nice place, at this time of year, especially so," he said.

Colberg said he actually spent most of the trip on the phone dealing with what's become known as the Troopergate investigation.

Colberg said the Legislature's investigation is politicized. He said he's trying to insert some objectivity into the process by taking the subpoenas to court so a judge can sort it out.

WHO IS PAYING THE BILLS?

Colberg said an example showing how the Legislature's investigation is flawed was lawmakers choosing not to subpoena former Palin chief of staff Mike Tibbles, who is now managing U.S. Sen. Ted Stevens' campaign for re-election.

"(Tibbles is) a key witness by any measure, and they said we won't subpoena you and the explanation that is given is - 'there is no political will.' Now what does that say about the process?" Colberg said.

The legislators also didn't subpoena Palin, saying they wanted to "de-escalate" the standoff with the governor. They did subpoena Palin's husband, Todd.

Todd Palin and two others refused last week to honor the Legislature's subpoenas.

Sarah and Todd Palin are both represented in the Troopergate investigation by an Anchorage attorney, Thomas Van Flein. There's some dispute over just whom Van Flein is working for. Colberg said Friday that Van Flein is on contract with the state to represent the governor, although the state has nothing to do with his representation of Todd.

But Van Flein, who has been getting advice from a lawyer working on the McCain-Palin campaign, insists he canceled the state contract on Sept. 12.

Colberg said he does not think Van Flein has received any money from the state. Palin's gubernatorial spokesman, Bill McAllister, said that's his understanding as well. Van Flein said the state is not paying his fees and that the Palins are responsible. But he wouldn't say whether they were paying directly, or if the money is coming from the McCain campaign or some other source.

Find Sean Cockerham online at adn.com/contact/scockerham or call him at 257-4344. Daily News reporter Tom Kizzia contributed to this story.

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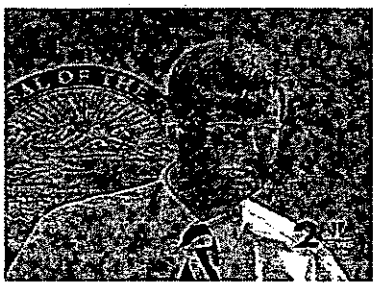
Investigation file

McCain-Palin campaign accused of co-opting department of law



Attorney General Talis Colberg says state workers will not comply with subpoenas in the Legislature's investigation. (Scott Jensen/KTUU-TV)

The attorney general made an offer to Sen. Kim Elton to protect state workers from criminal prosecution. (Scott Jensen/KTUU-TV)

After the hearing with Branchflower, Elton wrote back to the Department of Law agreeing. (Scott Jensen/KTUU-TV)

Elton now accuses Colberg of compromising the investigation of the firing of Walt Monegan. (Scott Jensen/KTUU-TV)

by Jason Moore
Wednesday, Sept. 17, 2008

ANCHORAGE, Alaska-- The battle over subpoenas issued to Palin administration officials raged on Wednesday, with accusations that the John McCain-Sarah Palin campaign has co-opted the state Department of Law.

There was reaction from the head of the Legislative Council, a day after Attorney General Talis Colberg announced state workers will not comply with subpoenas in the Legislature's investigation.

Legislative Council Chair Sen. Kim Elton accused the attorney general of breaking his word on a deal the attorney general proposed. And Colberg's rejection of the subpoenas is prompting allegations that the McCain-Palin campaign has taken over the state's Department of Law.

Days before investigator Steve Branchflower appeared before lawmakers seeking subpoenas in his probe into the governor's firing of Walt Monegan, the attorney general made an offer to Elton to protect state workers from criminal prosecution if they had looked at personnel files.

Senior Assistant Attorney General Mike Barnhill wrote to Elton on Sept. 9, saying, "If the legislative council will acknowledge in writing its agreement with the department of law's interpretation, the department of law will drop its objections and the depositions may proceed without subpoenas."

Then after the hearing with Branchflower, Elton wrote back to the Department of Law agreeing.

I stipulate in my role as a chair of the Legislative Council and on behalf of the council that your interpretation of the law is correct," Elton wrote.

Elton thought he had a deal until Tuesday night when Colberg announced state workers will not testify. Colberg did not cite any legal reason for ignoring the subpoenas.

And after the announcement, officials said Colberg hopped on a plane to Kansas for a vacation.

"It appears that the department is in complete disarray," said Sen. Bill Wielechowski. "It appears that the McCain campaign is co-opting our Department of Law and basically calling the shots and I think that's pretty clear from some of the actions we've seen over the past couple of days."

In a letter to Colberg Wednesday from Elton, Elton accuses Colberg of compromising the investigation.

"In four paragraphs, you've broken a deal that was accepted by your office and received by Mr.Branchflower after the Senate Judiciary Committee issued subpoenas," Elton writes. "Further your brand new position eviscerates weeks of comments on the record by several parties, including the governor."

The governor's office issued an additional statement Wednesday evening that said "the department of law remains separate and will continue to remain separate from the presidential /vice presidential campaign."

The House and Senate Judiciary committees are scheduled to meet Friday to discuss the status of the investigation.

Contact Jason Moore at jmoore@ktuu.com

Investigation file

September 17, 2008

Lawsuit Is Filed to Halt Alaska Dismissal Inquiry

By SERGE F. KOVALESKI and JO BECKER

ANCHORAGE — Five Republican state lawmakers on Tuesday filed a lawsuit seeking to halt an inquiry into Gov. Sarah Palin's dismissal of her public safety commissioner, arguing that the Legislature has exceeded its authority by conducting a "McCarthyistic investigation."

The lawsuit, filed in the state's Superior Court, comes as the McCain-Palin campaign has escalated its involvement in the bipartisan inquiry, providing Ms. Palin's lawyer with help and mounting a public relations offensive.

The legal action marks the most aggressive challenge yet to the two-month-old investigation, which Ms. Palin initially said she would cooperate with.

The campaign said Tuesday that it had no involvement in the decision to file the lawsuit.

The lawmakers are being represented by a local lawyer, Kevin G. Clarkson, and the Liberty Legal Institute, which is based in Texas and has a history of taking up conservative causes.

Hiram Sasser, director of litigation for the institute, said he had not spoken with anyone at the McCain campaign, but was contacted by Mr. Clarkson, who sought him out because of his constitutional expertise. Mr. Sasser's co-counsel in the case is Kelly J. Shackelford, who founded the institute. He told reporters at the Republican convention that Mr. McCain's selection of Ms. Palin "resurrected" the party's social conservative base.

The lawsuit, consisting of 26 pages, was filed against two Democrats, State Senator Hollis French, who is overseeing the investigation, and Senator Kim Elton, who is the chairman of the Legislative Council, which voted on July 28 to open the inquiry; and Stephen E. Branchflower, the independent investigator, a former Anchorage prosecutor who now lives in South Carolina.

The plaintiffs said they hoped to persuade the Legislative Council, a bipartisan body of House and Senate members who can convene to make decisions when the Legislature is not in session, to drop the inquiry by naming it in the lawsuit.

At the heart of the lawsuit is the argument that the inquiry exceeds the Legislature's constitutional power and that the process has been handled in a politically biased fashion intended to besmirch Ms. Palin's reputation and affect the outcome of the November elections.

"The defendants are conducting a 'McCarthyistic' investigation in an unlawful" and "partial and partisan political manner," the lawsuit said.

The ethics case has its roots in Ms. Palin's decision this summer to dismiss Alaska's public safety commissioner, Walt Monegan, who contends that he was dismissed for refusing to fire Ms. Palin's former brother-in-law, Mike Wooten, a state trooper.

Ms. Palin has denied that, saying his dismissal stemmed from his "insubordination" over budget matters.

Tuesday's lawsuit contends that the investigators have a "predisposition to make findings against Governor Palin" and are manipulating the timing of the inquiry "so as to affect the outcome of elections" by not agreeing to release the report after Nov. 4. Lawmakers have said the report would be completed by Oct. 10 to give both sides ample time to respond. "There is no nonpartisan reason that" the investigation "needs to be completed prior to the election on Nov. 4, 2008," the lawsuit said.

The lawsuit singles out Mr. French and Mr. Elton, pointing out that Mr. Elton gave $2,000 to the Obama campaign and citing comments in which Mr. French called Mr. McCain's selection of Ms. Palin a "bad choice." It also accuses Mr. Branchflower of having a conflict of interest because his wife once worked under Mr. Monegan. Mr. Elton said in a written statement that while the lawsuit is a distraction, the investigation would continue.

Among the five lawmakers who filed the suit was Representative Wes Keller, an elder in Ms. Palin's church whom she appointed to his seat.

The reaction among their Republican colleagues was mixed. The House Speaker, John Harris, asked the Legislative Council to convene a meeting within the week to discuss the status of the investigation. "What started as a bipartisan and impartial effort is becoming overshadowed by public comments from individuals at both ends of the political spectrum," Mr. Harris said in a letter to Mr. Elton.

State Senate President Lyda Green, a Republican who has frequently clashed with Ms. Palin over policy, said the lawmakers who filed it were all "step-by-step followers" of Ms. Palin.

"The McCain campaign is the one that has made this partisan," Ms. Green said. "This was 100 percent bipartisan effort on the part of the Legislature to ask questions that deserve to be answered."

The attorney general told lawmakers Tuesday that members of Ms. Palin's administration who had been subpoened would not cooperate with the investigation.

Ms. Palin's lawyer has sought to move the investigation to the state Personnel Board, whose members are appointed by the governor for four-year terms. But on Tuesday, Ed O'Callaghan, a former senior Justice Department official advising the campaign and Ms. Palin's lawyer, said that even if Ms. Palin succeeds she had not yet decided if she would testify.

A person briefed on the campaign activities in Anchorage also said outside lawyers in coordination with the campaign had volunteered legal advice to Ms. Palin's lawyer. One volunteer is currently in Anchorage, and one or two others have been here to plot legal strategy over the past few weeks, the source said. Taylor Griffin, a campaign spokesman, declined to identify the lawyers by name.

A handful of Alaskans, several of them prominent Republican donors, sought to have the investigation thrown out.

Michael Powell contributed reporting.

SENATOR KIM ELTON

Senator Elton Responds to Lawsuit

For Immediate Release: September 16, 2008

(JUNEAU) - The Judiciary, the third branch of government, is now part of the drama surrounding the Legislative Council's investigation into "the circumstances and events surrounding the termination of former Public Safety Commissioner Monegan and potential abuses of power and/or improper actions by members of the executive branch." Five legislators now are asking the courts to stop an investigation unanimously endorsed by the Legislative Council several weeks before Gov. Sarah Palin was elevated to the Republican national ticket as a vice presidential nominee.

The suit filed in the Superior Court of the State of Alaska seeks "declaratory and injunctive relief in the investigation," according to the attorney hired by Reps. Wes Keller, Mike Kelly, and Bob Lynn along with Sens. Tom Wagoner and Fred Dyson.

Named in the suit in addition to the Council were: Sens. Kim Elton, chair of the Council; Hollis French, project director for the investigation; and Steven Branchflower, the investigator hired by the Council.

"While the suit is a distraction," Sen. Elton said today, "I'm comfortable with the notion that the court will review the substance of the suit and find the Council acted properly and that the decisions made during the course of the investigation so far are appropriate and well within the mandate of the Council." He added the investigation will continue pending a ruling from the court.

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"The silver lining in this action initiated by the five lawmakers," Elton said, "is that some of that debate now has been kicked to the judicial branch which, unlike the legislature and the governor's office, is more insulated from the red-hot passion of presidential politics."

Elton noted an attorney will be hired to represent the named parties in the suit though a decision on who that attorney will be has not yet been made.

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Ethics Adviser Warned Palin About Trooper Issue

Letter Described Situation as 'Grave,' Called for Apology

By JIM CARLTON
September 11, 2008; Page A8

ANCHORAGE, Alaska -- An informal adviser who has counseled Gov. Sarah Palin on ethics issues urged her in July to apologize for her handling of the dismissal of the state's public safety commissioner and warned that the matter could snowball into a bigger scandal.

Associated Press

Alaska State Trooper Mike Wooten (right) answers questions about the 'Troopergate' investigation on Tuesday.

He also said, in a letter reviewed by The Wall Street Journal, that she should fire any aides who had raised concerns with the chief over a state trooper who was involved in a bitter divorce with the governor's sister.

In the letter, written before Sen. John McCain picked the Alaska governor as his running mate, former U.S. Attorney Wevley Shea warned Gov. Palin that "the situation is now grave" and recommended that she and her husband, Todd Palin, apologize for "overreaching or perceived overreaching" for using her position to try to get Trooper Mike Wooten fired from the force.

Mr. Shea was acting on his own in writing the letter, with no official capacity. In late 2006, Gov. Palin asked him to co-write an ethics report for Gov. Palin with then-House Democratic leader Ethan Berkowitz that recommended new financial-disclosure rules for elected and appointed officials in the statehouse. That report served as a key document for the ethics bill she later signed into law.

MORE

Read the letters from Wevley Shea to Gov. Palin and her aides.

After his initial letter in July, Mr. Shea followed up with another letter, dated Aug. 4, in which he told Gov. Palin that she probably couldn't legally shun a legislative investigation into the firing of Public Safety Commissioner Walt Monegan.

Gov. Palin has taken the opposite tack, hiring a private attorney to advise in a matter that has become known as "Troopergate." Seven Palin administration employees have refused to meet with the independent investigator. The McCain-Palin campaign has argued that the state legislature has no right to look into the matter. Palin spokesmen say the state personnel board is the appropriate investigative body, setting up a showdown between the state's legislative and executive branches.

The McCain-Palin campaign referred comment on the letters to the governor's office, which confirmed receipt of them. "While we can't always act on every idea, Gov. Palin thanks Mr. Shea for his counsel," Sharon Leighow, the

governor's deputy press secretary, said in a statement.

Members of the House and Judiciary committees overseeing the probe -- which lawmakers want wrapped up by early October -- meet Friday to consider issuing subpoenas to the governor's staff.

Associated Press

Alaska Gov. Sarah Palin in Juneau, Alaska, on Sept. 5, 2007.

Mr. Shea, in his Aug. 4 letter, warned Gov. Palin against taking her current approach. "My feeling is this is not a personnel matter. It doesn't have anything to do with the governing of the state of Alaska," he said in an interview this week.

The governor has denied any wrongdoing in the matter and said the commissioner was removed over an unrelated budget dispute. After bipartisan committees of the state legislature in late July approved $100,000 to hire an independent investigator to see if any laws were broken, Gov. Palin pledged the full cooperation of herself and her staff.

Write to Jim Carlton at jim.carlton@wsj.com

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Palin May Move to Block Subpoenas in Trooper Case

Bloomberg.com

Timothy J. Burger and Tony Hopfinger
Thu Sep 11, 12:02 PM ET

Sept. 11 (Bloomberg) -- A top law enforcement official in Alaska Governor Sarah Palin's administration is considering steps to block a legislative probe into allegations she improperly fired the state's No. 1 police official.

The legislature's report on the conduct of Republican vice presidential nominee Palin may be released next month, just weeks before the presidential election.

Senior Assistant Attorney General Michael Barnhill, in a letter to Alaska lawmakers, questioned whether the investigation is biased and threatened to try to quash subpoenas for seven Palin administration officials who have refused to be interviewed in the probe. Legislative leaders meet tomorrow to consider issuing the subpoenas.

``The eyes of the nation have now turned upon us," Barnhill said in the letter. ``We think there is a legitimate concern that this investigation is no longer being conducted in a fair manner." The chief investigator ``may have prejudged the outcome," he said.

Barnhill's seven-page letter said Hollis French, a Democratic senator, has publicly commented that Palin or her aides may have broken the law by allegedly obtaining personnel files of the fired state public safety commissioner, Walt Monegan.

Attorney General Talis Colberg, a Palin appointee, recused himself in the case. Barnhill works for Colberg.

Delaying the Probe

The Sept. 9 letter to Alaska State Senator Kim Elton, a Democrat, and other lawmakers suggests Palin's supporters are trying to delay completion of the so-called Troopergate investigation until well past its Oct. 10 target date and the Nov. 4 election that will decide whether Palin becomes vice president under John McCain. French didn't return calls seeking comment.

Lawmakers are reviewing whether Palin dismissed Monegan on July 11 after he resisted pressure to fire a state trooper, Mike Wooten, who was involved in a contentious divorce from the governor's sister.

Monegan told the Anchorage Daily News that the pressure came from Palin, her husband, Todd, and some of her aides. Palin has denied exerting any pressure on Monegan and says she dismissed Monegan to take the department in a new direction.

Barnhill said issuing subpoenas would violate a clause in the state's constitution that protects individual reputations from McCarthy-like smear tactics. Alaska became a state in 1959, a few years after hearings led by Wisconsin Senator Joseph McCarthy ruined the careers of many government employees who were accused of having ties to the Communist Party.

McCarthy Hearings

Barnhill's letter cited a reference to the McCarthy hearings from the state's constitutional convention.

The moves by Palin's attorney general's office could precipitate a ``little mini constitutional crisis," Jay Ramras, a Republican representative who chairs the House Judiciary Committee, said in a phone interview. ``It's a shame because Alaska is going to air its dirty laundry in front of the national public in a politically charged environment."

``We have to prevent this because it is going to diminish the reputation of Alaska," Ramras said.

Since McCain picked Palin, seven of her aides have declined to be interviewed by an investigator hired by the Alaska legislature, according to the House and Senate Judiciary committees. The committees meet tomorrow in Anchorage to decide whether to issue subpoenas.

Reviewing Personnel Files

Barnhill said in the letter that it is legal and part of the governor's job for her and her staff to review personnel files, though such

files could theoretically ``be handled inappropriately." He said, ``At this point, the Department of Law knows of no evidence that suggests that any Department of Administration employees violated the State Personnel Act in handling Trooper Wooten's personnel file."

Barnhill said he may take the matter to court if lawmakers don't give written assurance that they agree with his reading of the law -- and that the Palin administration isn't in danger of prosecution.

``The stakes for these" employees, Barnhill wrote, ``are high," because if French's ``apparent legal view is correct, it is theoretically possible that these employees could be subjected to criminal prosecution and forfeiture of their jobs" if found to have violated the law.

Barnhill also questioned the legislative investigation on an array of other grounds, including the selection of its investigator, its tactics, indications that it is broadening to ``new and unidentified targets," alleged prejudging of the case, and -- with the presidential election drawing near -- its timing.

``We continue to recommend that our clients cooperate with the investigation," assuming the Legislature doesn't ``completely abrogate its responsibilities," Barnhill wrote.

``But we reserve the right to revisit whether the public interest is truly being served by the manner in which this investigation is currently being conducted," he wrote.

To contact the reporter on this story: Timothy J. Burger in Anchorage at tburger2@bloomberg.net ; Tony Hopfinger in Anchorage at thopfinger@gci.net

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Partisan flap

No need to change overseer of Legislature's Troopergate work

Published: September 9th, 2008 10:26 PM
Last Modified: September 9th, 2008 11:00 PM

State Senate Judiciary Chairman Hollis French is still "project manager" for the legislature's investigation into Gov. Palin's Troopergage -- and there's nothing wrong with that.

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Partisan flap

Motherhood question should never be a campaign issue

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Fundamentalist issues drive conservatives

A Republican attempt to remove the Anchorage Democrat from overseeing the investigation has fizzled. Led by North Pole Rep. Jack Coghill, a supporter of John McCain, it was a partisan overreaction to comments Sen. French made about where the investigation, now being done independently by a former prosecutor, might lead.

The key word there is "might."

Yes, Sen. French said things that, stripped of context, might sound like he prejudged the outcome. Early on, he mentioned the I-word -- the findings might lead to "impeachment." Recently, he said the final report might produce an "October surprise" in the presidential election.

The key word, again, is "might." He was discussing the full range of possibilities, from no wrongdoing by the governor to the possibility of removal from office.

When he used the I-word -- speaking to the Wall Street Journal -- he was talking about "a worst-case scenario," as the Journal's July 30 story indicated. It was a statement of possible outcomes, not a prediction.

Around the same time in July, Sen. French told the Daily News that accusations of wrongdoing by Gov. Palin are "not a slam-dunk. She's got a defense." (See our July 22 editorial.)

Sen. French realized from the beginning that politics could interfere with a responsible, objective investigation into the case. "We need to hand this off to someone," Sen. French said at the time -- and that's what the Legislature did. All the investigative work is being done by a respected former prosecutor, Steve Branchflower.

"Steve Branchflower is the one gathering facts and writing the report," Sen. French said Monday. "And facts are facts. I can't create them or destroy them."

One troubling fact is already out on the table -- because Gov. Palin herself put it there. She released the tape on which her aide Frank Bailey is telling a trooper lieutenant that "Sarah and Todd" can't figure out why her ex-brother-in-law is still a trooper. Bailey also refers to information about the brother-in-law that may have come from confidential personnel or workers compensation files.

When French told ABC News the Legislature's report on Troopergate is "likely to be damaging to the governor's administration," he was stating the obvious. It will include Bailey's phone call, which has already been "damaging" to her administration.

Nonetheless, Sen. French could have handled the national media frenzy over Troopergate better --

as he himself admits.

"I should have had my project director hat screwed on more tightly and kept my mouth shut," he said Monday.

Sen. French and his Republican colleagues running the House Judiciary Committee have tried to de-escalate the politically charged environment surrounding Troopergate.

They have moved up the target date for issuing investigator Branchflower's report, so it will come out several weeks before the November election. They told Gov. Palin the Legislature doesn't plan to subpoena her, in hopes she'll honor her promise to cooperate and agree to be interviewed.

Still, the McCain campaign and its allies at Fox News are on the attack against Sen. French. Tuesday, the campaign sent e-mails about a Fox News broadcast that echoes Republican Rep. John Coghill's partisan charges and fingers Sen. French as a partisan supporter of Barack Obama.

And their point is?

"It's not surprising each side is supporting the nominee of our party," French said Monday. "That's why I'm not doing the investigation. That's why Jack Coghill is not doing the investigation. That's why Steve Branchflower is doing the investigation."

BOTTOM LINE: Democrats and Republicans alike should chill out and let the Legislature's independent investigator do his work on Troopergate.

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Anchorage Daily News

Attorney challenges Monegan firing inquiry

By LISA DEMER
ldemer@adn.com
(09/02/08 00:33:41)

The state has hired a private lawyer to represent Gov. Sarah Palin's office in the Legislature's investigation into the firing of former Public Safety Commissioner Walt Monegan. The lawyer already has challenged whether lawmakers even have authority to oversee the inquiry.

The state Department of Law hired Thomas Van Flein, an Anchorage attorney with expertise in employment law and professional liability, because Attorney General Talis Colberg has a potential conflict of interest and shouldn't represent the governor, Van Flein said Monday.

His work started Aug. 21. He's being paid $185 an hour, lower than his usual rate, to represent Palin and others in the governor's office, he said. He is initially authorized to spend up to $95,000.

The state's Legislative Council, a bipartisan panel of senators and representatives, authorized the investigation last month and approved spending of $100,000. They've hired a special counsel, retired state prosecutor Steve Branchflower.

The investigation concerns whether Palin or others in her administration abused their power or improperly pressured Monegan to fire a state trooper who is Palin's ex-brother-in-law. Palin and her father have said Trooper Mike Wooten was a "loose cannon" who made threats against them. The investigation has received national attention since Sen. John McCain, the apparent Republican nominee for president, chose Palin as his running mate Friday.

A four-page backgrounder on the Wooten matter put out Monday by the McCain/Palin campaign says that Palin's husband, Todd, and members of her staff had made inquiries "about the appropriate Department of Public Safety procedures for dealing with someone they considered a dangerous person and rogue trooper."

Palin has denied pressuring Monegan. The campaign says she only recently became aware of efforts by Todd and others.

Because Colberg has acknowledged contacting Monegan about Wooten, he's a potential witness, Van Flein said Monday. So an outside law firm needed to be brought in to represent the governor's office, he said.

He said the governor's office welcomes the inquiry and will cooperate.

WHOSE JURISDICTION?

Van Flein said the investigation should be handled by the state Personnel Board, not the Legislature, because it's "statutorily mandated" to handle ethics cases. The three-member Personnel Board is appointed by the governor.

In a letter to Branchflower, Van Flein also asked for all witness statements, documents and other materials collected in the course of the investigation.

"No" to both requests, said state Sen. Hollis French, an Anchorage Democrat and former state prosecutor who is project director for the legislative investigation.

The Legislature has its own power of investigation, French wrote to Van Flein on Monday.

"Governor Palin has repeatedly stated that she has nothing to hide and that she and her administration will cooperate fully with this investigation. Is your client aware that you seem to be challenging the Legislature's jurisdiction?" French wrote.

As to witness statements, French said he had instructed Branchflower not to provide them. Colberg conducted a separate inquiry for the governor, and the governor can get statements from him, French noted.

"I think you will agree that it would be highly unusual for an investigator to share information with one of the targets of the investigation," French wrote. "I am unaware of any precedent for such an arrangement."

The back-and-forth quickly escalated.

"Our concern is that Hollis French turns into Ken Starr and uses public money to pursue a political vendetta rather than truly pursue an honest inquiry into an alleged ethics issue," Van Flein said in an interview.

"How does he explain the unanimous vote (to pursue the investigation) by the Republican-dominated Legislative Council?" French shot back.

Later in the day, French added, "It's too bad the governor has stooped to hiring a name-calling lawyer. That doesn't seem very open and transparent does it?"

WAITING FOR PALIN

Branchflower hasn't been able to set up an interview with Palin. French said the state will fly Branchflower to wherever Palin is on the campaign trail if needed.

"Clearly the governor's new political role will make it more challenging for her to make time for this investigation," French wrote. But Palin needs to be interviewed sometime in September, he said.

Van Flein said the investigation is "bad timing" in the middle of a presidential campaign. He said he couldn't guarantee her availability this month.

If witnesses aren't available, French wrote, he'll ask the Senate Judiciary Committee, which he chairs, to issue subpoenas.

Van Flein said several people from the McCain campaign contacted him about the Wooten matter as part of the vetting process, before Palin was announced as McCain's pick.

The lawyer said he thinks Palin will be vindicated.

"We have a governor that exercised her constitutional right to terminate a commissioner. We have a family concerned about their safety. We have them asking what do you do with a trooper ... who

might pose a threat.

"We don't have any sex. We don't have any drugs. And there's no blue dress. Nor are there any shady real estate deals here," Van Flein said. "In the big picture, I think people are going to be disappointed that this is not a scandal."

Find Lisa Demer online at adn.com/contact/ldemer or call 257-4390.

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September 2, 2008

GOVERNOR PALIN CALLS FOR FORMAL REVIEW OF REPLACEMENT OF COMMISSIONER MONEGAN

In 2005 and early 2006, State Trooper Mike Wooten was the subject of a court-imposed Domestic Violence Protective Order and, as I learned in 2008, an order suspending him from the Alaska State Troopers for violent behavior. Some of this violent behavior was directed against my family (including my sister, who was divorced from Trooper Wooten in 2006), and included threats against my father. Over the past several weeks, there has been a suggestion that these events are somehow connected to my decision in 2008 to replace Public Safety Commissioner Walt Monegan, whom I appointed to the position after becoming Governor and after the events involving Trooper Wooten had occurred. There is no such connection. To put these matters to rest, on Monday, September 1, 2008, I formally asked the Alaska Personnel Board to investigate the allegations that have been made in the media about my replacement of Walt Monegan.

Concerns about Trooper Wooten's behavior were aired both by members of my family and others before Mr. Monegan ever took office as Public Safety Commissioner. There is absolutely nothing improper about voicing concerns about Trooper Wooten -- including threats to "bring" the governor and family members "down" -- with Mr. Monegan or his predecessor—complaints about State Troopers are supposed to go to the Commissioner.[1] Nor is there anything wrong with Mr. Monegan or his predecessor receiving information about threats specifically directed at me or my family. Threats of violence against a public official, and his or her family, fall within the responsibilities of the Department of Public Safety. In any event, the details about Trooper Wooten's behavior are outlined in my filing, and I will not repeat them here. Suffice it to say that both the Anchorage Superior Court and the Department of Public Safety issued orders and findings concluding that he had engaged in serious, violent misconduct.

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Neither my decision to appoint Walt Monegan as Public Safety Commissioner in 2006 nor my decision to replace him in 2008 had anything to do with Trooper Wooten. Mr. Monegan has publicly stated that "no one ever said fire Wooten. Not the governor. Not Todd. Not any of the other staff." The fact of the matter is that, while I was impressed with Mr. Monegan's abilities in many respects, he and I had differences of opinion on budget matters that have been a priority of my administration since the beginning, and I therefore decided to appoint a replacement commissioner and asked Mr. Monegan to take another leadership position in the government that was better suited to his skills and less prone to friction over budget matters. As Governor, I have the authority to hire and fire Public Safety Commissioners and other cabinet members and agency heads for any reason.[2] Mr. Monegan himself recognized as much in a letter he wrote at the time of his departure.

Last night, I initiated a proceeding before the state personnel board because that is the agency charged by law with addressing complaints about hiring and firing matters, and ethical issues in general, involving the Governor.[3] It is important to note that no one has actually filed a complaint against me, including Mr. Monegan, who would have had an obligation to notify the Personnel Board if he believed there had been misconduct in connection with his replacement.[4] Nonetheless, the people of Alaska—and of the nation—deserve to have a decision from the proper tribunal putting their minds at ease that suggestions of misconduct that have circulated on the Internet and in some media outlets are not true. I therefore am waiving the confidentiality that usually covers personnel board complaints,[5] and look forward to the personnel board's investigation and to moving forward with the people's business.

---

[1] See Department of Law, FAQ: "I want to complain about . . . a state trooper. Who can help me? Complaints against a state trooper must be filed in writing with the Juneau Office of the Commissioner." www.law.state.ak.us./department/faq.

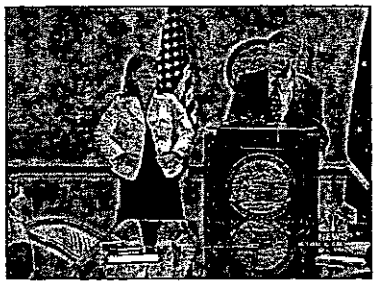
[2] Under our State Constitution, Article III, Sec. 25, the "head of each principal department shall be a single executive . . . appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, **and shall serve at the pleasure of the governor** . . . ." State statutory law is the same: "Each principal executive officer serves at the pleasure of the governor." AS 39.05.030.

[3] AS 39.52.310(c) ("If a complaint alleges a violation of AS 39.52.110--39.52.190 by the governor, lieutenant governor, or the attorney general, the matter **shall** be referred to the personnel board."

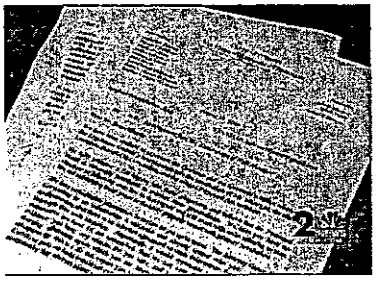
[4] AS 39.52.210(a) ("A public employee who is involved in a matter that may result in a violation of AS 39.52.110--39.52.190 shall (1) refrain from taking any official action relating to the matter until a determination is made under this section; and (2) **immediately disclose the matter in writing** to the designated supervisor and the attorney general").

[5] AS 39.52.340(c).

Palin hires attorney for public safety controversy



Palin will not be represented by Attorney General Talis Colberg. (KTUU-TV)



Palin's new lawyer requested special investigator Steve Branchflower's early findings. (Phil Walczak/KTUU-TV)

Sen. Hollis French, D-Anchorage, is overseeing the investigation. (Phil Walczak/KTUU-TV)

by Rebecca Palsha
Monday, September 1, 2008

Anchorage, Alaska -- While Sarah Palin heads toward her official nomination at the Republican National Convention, she's taking steps here at home to get legal advice on the controversy over her firing of Public Safety Commissioner Walt Monegan.

Palin has hired an attorney, and he has a list of demands.

Her attorney, Thomas Van Flein wants to know what the investigator hired by the Legislature knows.

But Sen. Hollis French, D-Anchorage, who is the project director for the investigation, said that's not going to happen.

It was back in August when the announcement came down.

"As a result of the inquiry by the Department of Law, I do now have to tell Alaskans that such pressure could have been perceived to exist, although I have only now become aware of it," Palin said in an August 13 statement.

Some allege the governor's staff pushed to get the governor's former brother-in-law, Trooper Mike Wooten, fired, and that Palin fired Commissioner Monegan because he wouldn't terminate Wooten.

Those allegations led to an investigation by the Legislature.

And, most recently, the governor hired a private attorney to represent her.

Thomas Van Flein now represents Palin and her office.

"The governor is entitled to representation through council, and her attorney general was unable to provide it in this case," Van Flein said. "There's nothing unusual or surprising about that."

Van Flein said he was hired by the Department of Law because Attorney General Talis Colberg is unable to represent Palin.

"The Department of Law had a potential conflict of interest, because Mr. Colberg, Attorney General Colberg, made contact with Mr. Monegan about Trooper Wooten," Van Flein said. "That would make him a potential witness, and thus there's a potential conflict."

But there are about 200 lawyers currently on the state pay roll that should be able to handle the matter, French said.

Van Flein wrote a letter asking to see what, if anything, the Legislature's investigator, Steve

Branchflower, had uncovered.

But Van Flein was told that Blanchflower wouldn't be sharing anything.

"I've instructed Mr. Branchflower to not comply with that request," French said. "I think it's fairly unusual for the lawyer that's representing one of the targets of the investigation to ask to see the evidence, so we're -- Mr. Branchflower I don't think will be sharing evidence."

Van Flein said he was not surprised by French's response, but he is disappointed.

"It's starting to take on aspects of a secret proceeding, a political proceeding, much in the vein of Ken Star," Van Flein said.

French has other concerns, too, he said.

"The governor said over and over she has nothing to hide, she's open and transparent, she's willing to sit down and talk, but I'm concerned about some of the implications of the letter, about scheduling, working it out with this person or that person, or whether we're going to get some delays out of that," French said.

The investigation is certainly a challenge to a vice presidential contender, with an outcome expected just before the presidential election.

French said he expects Branchflower's findings by Oct. 31but hopes for it to be finished sooner.

Contact Rebecca Palsha at rpalsha@ktuu.com

ANDREW HALCRO .COM

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COMING SEPTEMBER 2

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Halcro/Palin Argument on the Eddie Burke Show (MP3 Format, 3 MB)

Just for the record.....

On Tuesday, Governor Sarah Palin's appointed Attorney General sent a letter to state Sen. Hollis French, the Democrat overseeing the "Troopergate" investigation, and asked that the subpoenas that were issued last week to comple testimony be withdrawn.

Attorney General Talis Colberg also stated the employees would refuse to appear unless either the full state Senate or the entire Legislature votes to compel their testimony.

According to Colberg, the employees are caught between their respect for the Legislature and their loyalty to the governor, who initially agreed to cooperate with the inquiry but has increasingly opposed and has attempted to delay it since beoming John McCain's running mate.

"This is an untenable position for our clients because the governor has so strongly stated that the subpoenas issued by your committee are of questionable validity," Colberg wrote.

Last week, the Senate Judiciary Committee subpoenaed 13 people. They include 10 employees of Palin's administration and three who are not: her husband, Todd Palin; John Bitney, Palin's former legislative liaison who now is chief of staff for Republican House Speaker John Harris; and Murlene Wilkes, a state contractor.

> This is quite a change of tune for Colberg, who just a month ago came under questions for talking to potential witnesses ahead of special investigator Steve Branchflower.
>
> Both Palin and Colberg stated at the time he was gathering evidence to hand over to Branchflower for the investigation.

However today, four weeks later, both Colberg and Palin are questioning the validity of the investigation.

Also on Tuesday, the McCain campaign rolled out what they're calling their "Truth Squad", which consists of former Palin spokesperson Meg Stapleton and a New York lawyer named Ed O'Callahan.

During there initial press conference they claimed that Democratic State Senator Hollis French, manipulated the witness list by leaving off the name of Palin's former Chief of Staff Mike Tibbles.

However they were wrong; Franch had nothing to do with leaving Tibbles name of the list. The move was made by Republican Representative Jay Ramras who felt that Tibbles should be left off because he is now in the private sector and doesn't have the advantage of a state lawyer to defend himself.

So on their first day, the McCain truth squad came up with a false accusation.

> So just for the record, we'll share the actual truth with the Meg and Ed about this investigation so they'll know better next time:

Lawmakers seek outside inquiry of Monegan firing - KTUU-TV - July 18, 2008:

Some lawmakers are asking for more answers to the reasons Palin had for firing Monegan. Palin, in Wasilla for the Governor's Picnic, said she would not fight such an effort to look into this matter by an independent investigator.

"We would never prohibit, or be less than enthusiastic about any kind of investigation. Let's deal in the facts, and you do that via investigation," Palin said.

Senate will look into Monegan firing - KTUU-TV – July 19, 2008:

While the governor said there is no need for an investigation from an outside investigator, she said she will answer any questions from lawmakers, media and the public.

Public Safety already headed in 'new direction,' some say - Anchorage Daily News - July 22, 2008:

The governor denies any wrongdoing, and says she welcomes any questions on the matter.

Palin under fire – Legislature appears poised to appoint investigator - Aftermath of Monegan Dismissal, Anchorage Daily News - July 22, 2008:

"I've said all along, hold me accountable," Palin told reporters in Juneau. "And I'm telling the truth when I say there was never pressure put on Commissioner Monegan."

Lawmakers move to investigate Monegan ouster, KTUU-TV – July 24, 2008:

The governor says she welcomes the investigation. "I have absolutely nothing to hide and am happy to answer any questions," she said. "I'm happy to answer any questions between now and when they do conduct an investigation also."

Gov. Palin said last weekend that she did not think an independent investigator was needed. "That being the route that they choose, then so be it," she said. "I'm happy to comply, to cooperate. I have absolutely nothing to hide. No problem with an independent investigation."

Hired help will probe Monegan dismissal - $100,000: Legislators vote to have independent investigator look into controversial firing - Anchorage Daily News –July 29, 2008:

"The governor has said all along that she will fully cooperate with an investigation and her staff will cooperate as well," Leighow said.

Branchflower to investigate in Monegan firing - KTUU-TV – August 1, 2008:

"I've heard (Branchflower's) name, or course, over the years in Alaska," Palin said. "I know he's a prosecutor, probably a heavy duty prosecutor, and so that kind of puzzles us why we are going down that road when we are very, very open to answering any questions anybody has of me or administrators."

PRESS RELEASE: GOVERNOR TO TURN OVER FINDINGS - Office of the Governor – August 13, 2008:

Governor Palin has directed all her staff to cooperate fully with Branchflower.

Palin administration cooperating with investigator - KTUU-TV – August 15, 2008:

Lawmakers had wanted to know if Steve Branchflower needed them to issues subpoenas to require witnesses to talk to him about Gov. Sarah Palin's decision to fire Monegan and about the actions of her staffers. But State Sen. Hollis French says the meeting was cancelled because there's no need for subpoenas at this point.

Palin aide Frank Bailey placed on administrative leave - KTUU-TV – August 19, 2008:

"We figured, if there is an investigation going on with an unknown outcome – we don't know exactly what (special investigator) Mr. Branchflower is going to conclude – that Mr. Bailey just needed to step away from the situation, although be available to the investigator," [Palin spokesman] McAllister said. The governor's office also says that Bailey will cooperate fully with the investigation.

Palin aide put on leave in firing flap, BAILEY: Official who made all inquiring about trooper taken "out of the mix." - Anchorage Daily News – August 20, 2008:

Spokeswoman Sharon Leighow said that with Bailey still a state employee, Palin "can direct him to assist Mr. Branchflower, thereby fulfilling her pledge to Alaskans to cooperate fully with the investigation."

Re: Governor Palin and Trooper Investigation - McCain Campaign Press Release – August 30, 2008:

Governor Palin is an open book on this – she did nothing wrong and has nothing to hide. As a reformer and a leader on ethics reform, she has been happy to cooperate fully in the inquiry of this matter.

Attorney challenges Monegan firing inquiry – Anchorage Daily News – September 2, 2008:

He [Governor Palin's Lawyer Mr. Van Flein] said the governor's office welcomes the inquiry and will cooperate. Palin has made repeated public statements that she'll cooperate, and that hasn't changed at this point, Van Flein says.

Any questions?

Andrew Halcro's blog |
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If...

Submitted by KT (not verified) on Wed, 2008-09-17 08:06.

If there was no crime, why work so hard on the cover up?

» reply

Submitted by JimAK (not verified) on Wed, 2008-09-17 08:00.

http://abcnews.go.com/images/Blotter/Van%20Flein%20final%20reponse%20pdf.pdf *** French says the McCain campaign failed to contact any of the Senators involved in the investigation during the vetting process of Gov. Palin. "If they had done their job they never would have picked her," said French. "Now they may have to deal with an October surprise," he said, referring to the scheduled release Oct. 31 of the committee's final report. The Alaska state senator running an investigation of Gov. Palin says the McCain campaign is using stall tactics to prevent him from releasing his final report by Oct. 31, four days before the November election. "It's likely to be damaging to the Governor's administration," said Senator Hollis French, a Democrat, appointed the project manager for a bi-partisan State Senate Legislative Counsel Committee investigation of claims that Palin abused her office to get the Alaska public safety commissioner, Walt Monegan, fired. ***

» reply

I have 2 serious questions:

Submitted by JJUS (not verified) on Wed, 2008-09-17 07:07.

(1) How can she credibly claim that Monegan was insubordinate when she previously praised his work and offered him another job on the Alcohol Control Board (ABC)? See **KTVA 8-15-08 article, "Governor and staff's latest explanations leave more questions"** (But weeks ago she praised Monegan for his abilities to solve those same issues when offering him a job as the director of the Alcohol Beverage Control Board. "I recognized Frank Bailey, Boards and Commissions Director that Walt's interests and strengths could be put to good use as he could concentrate exclusively on a couple of issues that were his interest, that be bootlegging and alcohol problems in rural Alaska," said Palin on July 17th.); see also Gov. Palin Press RELEASE No. 08-122 (7/17/08). (2) How can she claim she fired him because he wasn't doing enough to combat bootlegging and alcohol abuse problems, yet offer him a new job in precisely that field? See **KTVA 8-15-08 article** ("I was concerned also that we were not doing enough on continuing alcohol abuse issues that I wanted to see tackled, including the bootlegging issues in rural Alaska"); See also **CNBC interview ('What does a VP do?' video)** ("it was the Commissioner that we were seeking more results, more action to fill, uh, vacant trooper positions, to deal with bootlegging and alcohol abuse problems in our rural villages especially. Um, just needed some new direction, a lot of new energy in that position. That is why the replacement took place there of the Commissioner of public safety.") There are only 2 options here: (A) She is lying, and in the process willing to playing politics with state procedure and to smear the reputation of a well-respected police chief (not to mention lying about ever contacting or pressuring Monegan about Wooten); or (B) She is not lying, and she is so irrational that she offered a job to a guy to head up the ABC -- a task force she thinks is important (alcohol abuse/bootlegging, etc.) -- even though she claims she fired that same guy for failing to control alcohol abuse/bootlegging AND who she now accuses of insubordination. Which one is it?

» reply

Sara Leaves a Lot In Her Wake

Submitted by Anonymous (not verified) on Wed, 2008-09-17 06:35.

Another casuality of the Sara-normal behavior we are watching is that where I once enjoyed listening to radio hosts such as Rush, Hanity and Oreily I can now not stand to hear a word that comes out of their mouths. I always knew they each had their own bent and bias but thought they all were pretty intelegent men who did their research. They all sound like total idiots now as they discuss Sara Palin. I am someone who voted for Palin before I knew what a vicious wacko she really is. Just like Murkowski, Stevens, Young and Ruderich these radio hosts will realize they have been duped. Rush, Hanity and Oreily have not yet realized that Sara Palin despises them and every conservative value they hold. They are the "good old boys" she wants to throw under the bus and as others have said "it is getting really crowded under that bus".

» reply

AK Legislature- Property of John McCain

Submitted by Bill R. (not verified) on Wed, 2008-09-17 06:15.

It's Official! The Alaska legislature now belongs to John McCain. They are doing his bidding and shutting down the investigation of Sarah Palin. COVER-UP!, COVER-UP!, COVER-UP!, COVER-UP!!!!!!!!!!!!!!!!!!!!

» reply

adn.com
Anchorage Daily News

Palin staff pushed to have trooper fired

Governor says she's learned calls were made about Wooten's ouster

By SEAN COCKERHAM
cockerham@adn.com

(08/14/08 01:34:27)

Gov. Sarah Palin on Wednesday revealed an audio recording that shows an aide pressuring the Public Safety Department to fire a state trooper embroiled in a custody battle with her sister.

Palin, who has previously said her administration didn't exert pressure to get rid of trooper Mike Wooten, also disclosed that members of her staff had made about two dozen contacts with public safety officials about the trooper.

"I do now have to tell Alaskans that such pressure could have been perceived to exist although I have only now become aware of it," Palin said.

But Palin said her decision to fire Public Safety Commissioner Walt Monegan last month had nothing to do with his refusal to dump trooper Mike Wooten.

The governor said evidence of what she called a "smoking gun" conversation, and other calls made by her aides, only recently surfaced as the attorney general started an inquiry at her request into the circumstances surrounding her firing of Monegan. Palin wanted the review because a special investigator hired by the Legislature is about to investigate the firing and a legislator has been quoted in a newspaper story talking about impeachment.

The majority of the calls came from Palin's chief of staff at the time, Mike Tibbles, according to information gathered by the state attorney general's office. Attorney General Talis Colberg and Palin's husband, Todd, also contacted Monegan about the trooper.

Palin said she'd only known about some of the contacts and never asked anyone on her staff to get in touch with state public safety officials about Wooten.

"Many of these inquiries were completely appropriate. However, the serial nature of the contacts could be perceived as some kind of pressure, presumably at my direction," she said.

Palin said the "most disturbing" was a phone call Frank Bailey, the governor's director of boards and commissions, made to trooper Lt. Rodney Dial in February. The Public Safety Department recorded the call, as it does routinely.

Palin, who said she'd only just learned of the call, released a recorded copy of it to the press on Wednesday. In it, Bailey clearly pressures the lieutenant.

'HORRIBLE RECRUITING TOOL'

Bailey told him during the conversation that Palin and her husband want to know why Wooten still has a job.

"Todd and Sarah are scratching their heads, 'Why on earth hasn't this, why is this guy still representing the department?' He's a horrible recruiting tool, you know," Bailey told the lieutenant.

Bailey made several accusations against Wooten in the call, including that he lied on his application. Dial asked Bailey how he knew about any issue with the application.

"I used to be a recruiter. I know a lot of times that information is extremely confidential," Dial told him.

Bailey replied he was reluctant to say but saw the application as part of Wooten's worker's compensation claim. Bailey, later in the call, then brought up Monegan again.

"I'm telling you honestly, you know, she really likes Walt a lot, but on this issue, she feels like it's, she doesn't know why there is absolutely no action for a year on this issue. It's very, very troubling to her and the family. I could definitely relay that," Bailey said.

Palin said Bailey wasn't speaking on her behalf and his comments were "just wrong."

Bailey said in a Wednesday interview that no one asked him to make the call and he doesn't know why he indicated in the call that he was speaking on behalf of the Palins. He said he was calling lieutenant Dial, who was the state troopers liaison to the Legislature and had volunteered on Palin's campaign, in order to try to get information about the troopers union and then brought up Wooten.

Bailey said he'd heard at a security briefing right after Palin was elected that Wooten had made a threat against Palin's family. He said he also had casual conversations with Todd Palin about the trooper. Bailey said Todd had expressed "general frustration with the situation" but never asked him to do anything about it.

"My fear was (Wooten) could fly off the handle and do something that was irreversible," Bailey said. "That concern, that fear, has always been in the back of my mind."

Palin said it's under discussion whether Bailey is going to keep his job in the administration.

COLBERG'S PHONE CALL

Attorney General Colberg also disclosed Wednesday that he'd made a call about Wooten. Colberg said he called Monegan several months ago after Todd Palin asked him about "the process" for when state troopers make death threats against the first family.

"I made an inquiry and was told by commissioner Monegan that there was a process in place and that it was handled and it was over. And I reported back to the first gentleman that there was nothing more that could be done," Colberg said.

Palin said her husband also contacted Monegan about a threat made by Wooten but backed off when Monegan indicated he couldn't get into the matter.

The family had alleged the threat in 2005, before Palin became governor. They said Wooten had told Palin's sister he would shoot their father if he got the sister a lawyer.

Wooten denied saying anything like that. But a trooper investigation concluded he did, although it wasn't a crime because he didn't threaten the father directly. Wooten's actions did violate trooper policy, the investigator found.

Palin said she was meeting with the investigator hired by the Legislature, Steve Branchflower, on Wednesday and would turn over everything gathered as part of the attorney general's inquiry. The Bailey phone call was the only one that Palin singled out as being wrong. Assistant Attorney General Mike Barnhill said all the calls from then-chief of staff Tibbles, who is now running Sen. Ted Stevens' re-election campaign, regarding Wooten looked to be appropriate.

"It's absolutely appropriate that a chief of staff was checking on staff issues and personnel, policy and procedure," Palin said.

Palin said no one from the Department of Public Safety -- including Monegan before his firing -- had complained they felt pressured regarding Wooten.

KOPP'S SEVERANCE PACKAGE

Colberg also disclosed Wednesday that Chuck Kopp, who Palin had appointed to replace Monegan as public safety commissioner, received a $10,000 state severance package after he resigned following just two weeks on the job.

It was in light of the fact that he left a comfortable 19-year career on the Kenai Peninsula and took a job that lasted less than two weeks," Colberg said.

Kopp, the former Kenai chief of police, resigned July 25 following disclosure of a 2005 sexual harassment complaint and letter of reprimand against him.

Monegan said in a Wednesday interview that he didn't get any severance package from the state.

WHY PALIN FIRED MONEGAN

Monegan was a Palin appointee, and she had a right to fire him for any reason. She's previously refused to say exactly why she got rid of him, but laid out several reasons Wednesday, saying she's decided to talk about it because Monegan is.

Palin said he wasn't doing enough to fill state trooper vacancies and battle alcohol abuse issues. She said he "did not turn out to be a team player on budgeting issues."

Palin said it's fine to have debates during cabinet meetings over the budget but Monegan went further and indicated to legislators she wasn't proposing enough spending. Palin's acting chief of staff, Mike Nizich, said Monegan asked legislators for spending that hadn't been authorized by the governor.

"The response he got was don't come to us and ask for more money when you cannot fill the 56 or 58 trooper positions that were vacant," Nizich said. "So he was making a pitch for additional funding when he couldn't even fill what he currently had available to him."

Monegan questioned that but declined to comment further, saying he's already started talking to the special investigator hired by the Legislature to look into his firing.

Find Sean Cockerham online at adn.com/contact/scockerham or call him at 257-4344.

let's start a investigation file w/ this

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Question

Should Wooten be a trooper? Let's have an independent look

Published: July 22nd, 2008 11:10 PM
Last Modified: July 22nd, 2008 02:52 AM

That's a question Alaskans are asking after learning of trooper Mike Wooten's suspension in 2006 for illegally shooting a moose, giving his stepson a jolt with his state-issued Taser and drinking beer during the operation of a marked Alaska State Trooper patrol vehicle. For those offenses, substantiated by a trooper investigation, he received a 10-day suspension, later cut to five days.

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Time to vote

Investigate

Begich bade Chief Monegan fond farewell from city post

The disciplinary letter, issued nine months before Gov. Palin took office, painted a harsh picture of trooper Wooten.

It cited "a significant pattern of judgment failures" and "a course of conduct totally at odds with the ethics of our profession."

"Your unacceptable conduct appears to have continued and even escalated."

Gov. Sarah Palin and her family have also accused the trooper of threatening her and her family. He's still in a bitter custody battle with the governor's sister. The troopers found that most of the allegations from Gov. Palin's family and friends -- which included verbal and physical abuse, intimidation, steroid use, irresponsible drinking, threats of physical violence and suggestions that he misused his position as a trooper -- were unfounded or unsustained by the evidence.

Should he have been fired?

The Alaska State Troopers didn't think so. They did their own investigation and concluded suspension sufficed, along with a warning that the suspension was Wooten's "last chance."

That investigation doesn't necessarily inspire total public confidence. The initial work was done by administrative investigator Sgt. Ron Wall. He dismissed two witnesses' report that Wooten was drinking during the operation of a marked trooper car as unfounded, but he didn't tape-record the interviews. Julia Grimes, then director of the troopers, re-interviewed the witnesses, found them credible and included the incident in her disciplinary report.

It's unclear whether troopers investigated a report that Wooten was dismissed from his post as an assistant football coach at Wasilla High School because of a profane outburst, directed at his niece, on school grounds. If he was not fit to coach youths, you'd have to wonder if he's also fit to carry a gun and use deadly force on behalf of the public.

Trooper Wooten has his defenders.

Trooper Rob Cox is a 17-year AST veteran and president of the troopers' union. He's a friend of Wooten and has worked with him in the field, and said he had no question about going into any situation with Wooten. He said he'd count on him to do his job, cover his partner and protect the

public.

Both Cox and trooper union executive director John Cyr paint a picture of Wooten that contradicts Gov. Palin, her family and others. Where the Palin family sees a dangerous, abusive man in a position of power, Cyr and Cox see what Cox called a trooper who is "gentlemanly, calm, confident." Guilty of some bad judgment, but a good trooper.

One the one side, you have a family rallying around a member in the middle of a messy divorce. On the other side, you have union officials defending one of their ranks.

The only third-party investigation into these conflicting claims was done by fellow troopers. That investigation found enough evidence to impose a stiff sanction, but not enough to fire him.

There's plenty of ground here for an independent investigation. It wouldn't be the first time a law enforcement agency went easy on its own.

Lawmakers appear ready to hire an independent investigator to examine the firing of Public Safety Commissioner Walt Monegan and the actions of Gov. Palin, family members and staffers and whether they pressured Monegan to fire Wooten.

An independent investigator should look at the troopers' review of Wooten as well. Alaskans need to know if an incurable bad apple is still in the ranks -- and if the troopers need more authority to fire those who are unfit.

There's a lot riding on this -- public faith in the integrity of the governor and the Alaska State Troopers. Did the governor abuse her position? Is Wooten fit to be a trooper? Is it too hard for the troopers to dismiss troublesome officers from their ranks?

Public interest trumps confidentiality here. It's time for transparency all the way around -- the kind that independent investigators can demand.

BOTTOM LINE: An independent investigator should look at the Wooten case.

Cowdery

A step in the right direction

Who was head of the council that will be responsible for a possible investigation of the governor's actions?

Oops: Sen. John Cowdery of Anchorage, who was indicted earlier this month on federal corruption charges.

He was chairman of the Senate-House Legislative Council until he resigned from the job Monday.

Cowdery is in poor health besides being under indictment. He cited his health when he relinquished the position.

Whatever the reason, he made the right choice for the state when he decided this week to step down as council chairman.

The council conducts the business of the Legislature between sessions, and the chairman will direct an investigation of the governor's actions regarding the Public Safety Department, if there is such an investigation.

Cowdery is accused of bribery and conspiracy for scheming with Veco Corp. executives to buy the vote of another senator on oil tax legislation.

While he has yet to be tried, it's already clear that his ethical compass is off base.

Cowdery has no business continuing to serve in the Legislature, much less as chairman of a committee with subpoena powers.

BOTTOM LINE: Sen. Cowdery's resignation as chair of the Legislative Council is the right move.

Comments

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Subject

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6 Wednesday, July 23, 2008 - 7:19am | **black33**

Huh?

"It's unclear whether troopers investigated a report that Wooten was dismissed from his post as an assistant football coach at Wasilla High School because of a profane outburst, directed at his niece, on school grounds. If he was not fit to coach youths, you'd have to wonder if he's also fit to carry a gun and use deadly force on behalf of the public."Where did this one come from? What was th ...

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5 Wednesday, July 23, 2008 - 7:10am | **nomekid**

Investigation

Even if their is an investigation, nothing can be done, since Wooten was already punished. You can't punish a person and then 2-3 years down the road say "we relooked at his and you are now fired". He would be able to sue his employers (the State). Maybe we'd better keep the $500 million that they are planning to give Transalaska, just in case.

4 Wednesday, July 23, 2008 - 6:11am | **ArtChance**

And who's doing the investigation?

I can count on my fingers the people in Alaska who could wend their way through the disciplinary processes under the PSEA contract with any confidence, and all of them are present or former employees of either the State or PSEA. Going Outside won't help because each state's laws and bargaining environments are unique, and you'll quickly find that Alaska's police discipline is generally more stric ...

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3 Wednesday, July 23, 2008 - 5:02am | **lstrm**

I agree

Trooper Wooten's behavior should be reviewed independently. The following needs to be determined: Can the Troopers police their own; Can they investigate their own; Do they have the authority to get rid of unworthy candidates; Do they have the resources to retain worthy candidates; and, Does Trooper Wooten behave differently with men vs women.

2 Wednesday, July 23, 2008 - 4:19am | **sissyboy**

Where are the charges?

The Princess knew that a crime had been committed (Illeagal Moose kill), yet she choses not to make law enforcement aware of it until it can help her sisters divorce. Nice set of Ethics you have there Sarah. Since she has admitted to this in writing, why has she and the others involved not been charged?When are people going to wake up?Mat-Maid debacle, the implosion of the DOC, now this me ...

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1 Wednesday, July 23, 2008 - 12:35am | **JULY**

BOTTOM LINE: ABUSE OF POWER!

I have three simple questions:Who signed the moose tag?Who cleaned the moose?Who ate the moose?

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Palin's Ethics Scrapes May Undercut Pledge to End Old Politics

By Timothy J. Burger and Tony Hopfinger

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Sept. 11 (Bloomberg) -- John McCain's choice of Sarah Palin as his running mate sent a signal that he would end business as usual and cronyism in government. Her record shows the Alaska governor engaged in some of the same practices she and McCain now condemn.

Palin's office approved a state job for a friend and campaign aide with whom she shared a land investment, financial records and interviews over the past two weeks show. She hired a former lobbyist for a pipeline company to help oversee a multibillion-dollar deal with that same company.

She named a police chief accused of harassment to head the state police. And she sent campaign e-mails on her city hall account while serving as mayor of Wasilla -- conduct for which she later turned in an oil commissioner on ethics charges.

These incidents raise ``some serious questions about her judgment and serious questions about her standards of ethics in public service," said James Thurber, director of American University's Center for Congressional and Presidential Studies in Washington. Suggesting a real estate investment partner for a job ``may be acceptable in Alaska; it would not be acceptable in Washington, D.C., a place whose norms she wants to change."

Palin defeated an incumbent governor, a fellow Republican, in 2006 charging that her party's old guard had committed ethical lapses and become too cozy with special interests, including oil companies. A central theme in this year's presidential campaign has been that Palin's record demonstrates the change a McCain administration would bring to Washington.

Recent statements by the governor may erode that claim. In her acceptance speech last week, she suggested that she opposed the infamous ``Bridge to Nowhere," a $223 million earmark for a bridge to an island where only 53 people lived.

For It, Against It

When Palin, 44, campaigned for governor, however, she said she was in favor of the bridge. In 2007, she canceled the project in the face of national outrage. The state never returned the money allocated by the federal government, with some of the funds going toward other state and local projects.

And as mayor of Wasilla, a job she held for six years until 2002, Palin hired lobbyists to get federal funding for local projects. Wasilla secured $27 million in earmarks for the town of about 9,000 that included a rail project and a youth center.

Shortly after she was elected governor, Palin's office signed off on hiring Deborah Richter -- who attended college for a year then worked in bookkeeping and finance jobs -- as director of a division that distributes dividends to Alaskans from the state's oil-wealth savings account.

Richter, who said she's known Palin for 13 years, was Palin's gubernatorial campaign treasurer and ran her inaugural committee.

Sharing an Investment

The Richters and Palins also shared an investment: 30 acres of rural property near a lake in Petersville, Alaska, worth $47,300, according to Matanuska-Susitna Borough data.

"It sounds like a patronage deal for someone who ran your campaign; that's pretty normal," said Bill Buzenberg, executive director of the Center for Public Integrity in Washington. "What's not normal is that they have business dealings together."

No evidence has emerged to suggest that laws were broken in the appointment, and Richter said she "didn't go in there with any promises from the governor or the chief of staff or anybody. I turned in my resume" to the governor's transition team "and I didn't know if anyone was going to call me."

"She was qualified," said Pat Galvin, commissioner of the Department of Revenue and Richter's boss. Galvin said he also interviewed other people for the job and that Richter has done well. He said Palin's office approved his selection of Richter.

Not Palin's Decision

Palin's gubernatorial spokesman, William McAllister, said the decision to hire Richter was Galvin's. "I have no knowledge of land ownership or college degrees," he said.

Deborah Richter gave up her share of the property last September in a divorce settlement that followed an affair with Palin's legislative director, John Bitney. Bitney and Richter both acknowledged the affair in interviews. Bitney said Palin fired him over it; Richter is still on the job. They are now married.

Last month, Palin signed a law granting TransCanada Corp., Canada's largest pipeline company, an exclusive state license and up to $500 million in subsidies to proceed with work on a $27 billion pipeline, which would carry natural gas from Alaska to other U.S. markets.

Once a Lobbyist

Marty Rutherford, the chief coordinator behind Palin's pipeline effort, once worked as an Alaska lobbyist for a TransCanada pipeline subsidiary, according to state records. Rutherford, deputy commissioner at the Alaska Department of Natural Resources, earned $40,200 as a lobbyist for 10 months in 2003 working for Foothills, the subsidiary.

Rutherford said in an interview that she only did consulting work for the company, including reviewing natural gas legislation. She said the work had no bearing on her future job as coordinator of Palin's pipeline team.

"I intended to leave state government when I went to Jade North, but as time went on I realized my heart was in government," she said, referring to the firm she briefly worked for.

Palin told the Anchorage Daily News last December that Rutherford's work with Foothills wasn't a conflict because it had been five years earlier.

Trooper Investigation

The governor already has triggered an investigation by the Alaska legislature into whether she fired the state commissioner of public safety, Walt Monegan, for not removing a state trooper involved in a contentious divorce from Palin's sister.

Palin has denied exerting any pressure on Monegan and said she dismissed him because she wanted to take the department in a new direction.

Since McCain picked Palin, seven Palin aides have declined to be interviewed on the matter by an investigator hired by the Alaska legislature, according to the House and Senate Judiciary committees.

Earlier this year, Palin found herself apologizing for her handling of Monegan's replacement. About six weeks before she learned McCain wanted her to be his vice president, she named Kenai, Alaska, police chief Charles Kopp to replace Monegan.

On July 25, two weeks after being appointed, Kopp resigned amid scrutiny

over a 2005 sexual-harassment complaint against him while he was chief in Kenai. The complaint resulted in a letter of reprimand from the city, which Palin told reporters she never knew about and had believed that the allegations were unsubstantiated, according to the Anchorage Daily News.

Not a Harasser

In a July press conference, Kopp denied any harassment. ``I've always done every job I've ever done with honor and integrity,'' he said. ``There is one thing I am not. I am not a sex harasser.'' Attempts to reach him were unsuccessful.

Asked about these episodes in Palin's career, McCain campaign spokesman Tucker Bounds lauded her reform efforts. Bounds said Palin has allowed the public to scrutinize state financial information, ``cut wasteful spending by a quarter of a billion dollars just last year and ushered in landmark ethics legislation.''

The moment that crystallized her image as a reformer came when she turned in state Republican chairman Randy Ruedrich after discovering he was using his state e-mail account to conduct party business.

Palin and Ruedrich were serving together as commissioners on the Alaska Oil and Gas Conservation Commission, a state regulatory agency, at the time. Ruedrich resigned from the commission in November 2003, and was later fined $12,000, according to a 2004 article in the Anchorage Daily News.

In 2006, Palin found herself asking forgiveness for a similar offense from her past, according to a July 28, 2006, article in the Anchorage Daily News. She had sent campaign e- mails from her Wasilla mayor's office in 2002, when she made an unsuccessful run for lieutenant governor.

``For any mistakes like that (were) made, I apologize,'' Palin said of the e-mail controversy in July 2006, according to the Anchorage Daily News.

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ABCNEWS

McCain Ally in Alaska Criticizes Troopergate Investigation

Calls For Removal of Probe's Director

By MEGAN CHUCHMACH

Sept. 6, 2008—

On the same day Alaska state Sen. Hollis French announced he would speed up the investigation into whether Gov. Sarah Palin abused her power by firing a public safety commissioner, a top ally of Sen. John McCain in the Alaskan House called to unseat French as the head of the commission.

Representative John Coghill of North Pole, Alaska, said French, a Democrat, is "steering the direction of the investigation, its conclusion, and its timing in a manner that will have maximum partisan political impact on the national and state elections."

Coghill, a longtime McCain backer, said the McCain camp knew of his letter before it was sent to the legislative council (aides were "generally supportive," he said) and reiterated his support of the McCain-Palin ticket.

"I actually called them when Palin got picked and said, 'Hey, I'm your boy now," said Coghill. "I want to help them as much as I can now, but this is totally different from that."

Reached by phone in the North Pole Friday afternoon, Coghill accused French of stepping out of bounds by making what he said were politically-fueled comments.

Coghill cited French's recent interview with ABCNews.com, in which the senator said the report was going to be an "October surprise" and would "likely be damaging to the administration," as an example of what he considers to be the senator's bias.

"When we decided to look into this issue, everybody on the committee, including the chairman, agreed that we need to be an arms-length away from this," said Coghill, "and it's just ended up in the political arena because of Sen. French."

When asked about his involvement with McCain aides now, Coghill said he isn't working on the presidential campaign but plans on putting out a yard sign and passing out bumper stickers to help, even though, he said, his political support should not be confused with his pushing for French to step down.

"I will do whatever I can to help them, believe me," Coghill said. "I'm trying to separate this issue from that."

His call came the same day French announced that the investigation's findings will be delivered nearly three weeks early to avoid being too close to election day and that the governor will not be subpoenaed,

a move Coghill said was a coordinated effort. He wanted the issues to be presented equally, he said, and had to rush to get his letter ready since he knew French was slated to make his announcement Friday morning.

"I wanted to make sure that I was bringing this issue up," Coghill said, adding that he wanted the messages to be presented together.

Coghill and French spoke Thursday, and French was aware that the letter was to be released, according to both men. But French said he has no plans to step down and said he'll attend a house and senate judiciary meeting Sept. 12 where the council will consider issuing subpoenas to witnesses who have cancelled depositions.

"The thing to keep in mind is that I'm not the investigator, Steve Branchflower is," French said, referring to the retired state prosecutor who is the lead investigator in the case. "He's working independently of me and everybody else. He's going to gather the facts, prepare a report, release the report and, ultimately, it will be him that defends the report."

The investigation began in July, months before it was announced that Palin would be the GOP vice presidential candidate.

Last week, the commissioner whose firing prompted the probe told ABC News that he was dismissed because he refused to fire the governor's former brother-in-law, a state trooper.

"I think that my unwillingness to take special action against her former brother-in-law was not well received," Walt Monegan said. The trooper, Mike Wooten, had gone through a messy custody battle with Palin's sister.

Palin has denied any wrongdoing and has retained private lawyers to represent her in the matter. She has said she dismissed Monegan over an honest disagreement over budget priorities.

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AP (left); ABC

"Disparaging will not be tolerated": The governor; her ex-brother-in-law

'TROOPERGATE'

Warned by the Court

A judge repeatedly told Palin and family not to badmouth her sister's ex

By Mark Hosenball | Newsweek Web Exclusive
Sep 9, 2008 | Updated: 7:36 p.m. ET Sep 9, 2008

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An Anchorage judge three years ago warned Sarah Palin and members of her family to stop "disparaging" the reputation of Alaska State Trooper Michael Wooten, who at the time was undergoing a bitter separation and divorce from Palin's sister Molly.

Allegations that Palin, her husband Todd, and at least one top gubernatorial aide continued to vilify Wooten—after Palin became Alaska's governor and pressured state police officials to take action against him—are at the center of "Troopergate," a political and ethical controversy which has embroiled Palin's administration and is currently the subject of an official inquiry by a special investigator hired by the state legislature.

Court records obtained by NEWSWEEK show that during the course of divorce hearings three years ago, Judge John Suddock heard testimony from an official of the Alaska State Troopers' union about how Sarah Palin—then a private citizen—and members of her family, including her father and daughter, lodged up to a dozen complaints against Wooten with the state police. The union official told the judge that he had never before been asked to appear as a divorce-case witness, that the union believed family complaints against Wooten were "not job-related," and that Wooten was being "harassed" by Palin and other family members.

Court documents show that Judge Suddock was disturbed by the alleged attacks by Palin and her family members on Wooten's behavior and character. "Disparaging will not be tolerated—it is a form of child abuse," the judge told a settlement hearing in October 2005, according to typed notes of the proceedings. The judge added: "Relatives cannot disparage either. If occurs [sic] the parent needs to set boundaries for their relatives."

A spokesperson for the law firm that represented Palin's sister, now known as Molly Hackett, said Hackett's lawyer would have no comment because custody issues are still in litigation. Other lawyers representing Sarah Palin in connection with the state legislative investigation--which is examining

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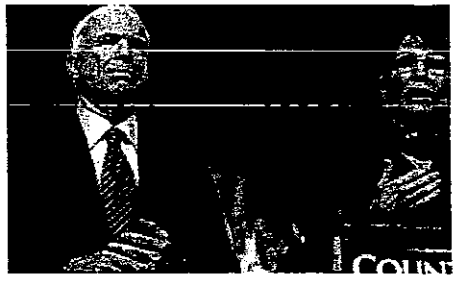

GALLERY
Who is Sarah Palin?
From beauty queen to vice-presidential candidate. A look at the life and career of John McCain's historic choice for a running mate.

whether she abused her powers as governor in trying to have Wooten fired or disciplined—had no immediate comment. Palin's official gubernatorial spokeswoman did not respond to e-mails and a phone message requesting comment.

Wooten's lawyer also did not respond to messages requesting comment. John Cyr, executive director of the State Troopers union, who testified at the divorce hearing and is acting as Wooten's spokesman, said Wooten has avoided giving media interviews because he wants to avoid criticizing his former relatives (to date, Wooten has granted just one interview, to CNN).

As the divorce case dragged on, the judge's concern about family "disparagement" appeared to deepen. In an order signed Jan. 31, 2006, which granted Palin's sister and Wooten a final divorce decree, Judge Suddock continued to express concern about attacks by Palin's family on Wooten. The judge even threatened to curb Palin's sister's child custody rights if family criticism of Wooten continued.

In monitoring how a joint-custody arrangement worked out, the judge said in his order that he would pay particular attention to problems noted by a "custody investigator," specifically "the disparagement of the father [Wooten] by the mother [Molly Hackett, Sarah Palin's sister] and her family members."

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Posted By: Diane12 @ 09/10/2008 11:43:09 AM

Comment: This is very relative to her being the VP of the USA and if you fail to see that then you have issues! This shows abuse of power in office, which has been ongoing for the past 7 years. I guess when you become accustomed to lies and abuse it is hard to stand for the truth. Take off the blinders and actually think for yourself. If you make over $250,000 a year then I guess you will vote to continue receiving your wonderful tax incentives and credits. For those who do not make over $250,000 or have family that is not in that income bracket will listen to true facts,not lies, and vote for true change. You were bamboozled into electing GWB for another 4 years and where did that get the USA???

Posted By: rocnde @ 09/10/2008 11:42:54 AM

Comment: ahhh mrzoid, my favorite poster, please go on your rant again defending obama and bidens support of infanticide and partial birth abortion, that was your best work ever. something about anal as i recall, what a classy post...

Posted By: SavethisCountry @ 09/10/2008 11:42:10 AM

Comment: Bravo. Well said. Unfortunately most of the Palinites are voting from the heart. not the head. Love your dress, so you'd be great in the white house. Our destiny has to come from knowing everything about who we are choosing and weighing it across the board (Hey Palin, why are you so scared to speak alone to the press? A McCain got your tongue, or is it another lobbyist) to getting us out of this mess we are in today. There is a lot to fix.

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EDITORIALS

Alaska's Family Feud

Meddlesome Sarah Palin does not come off well.

Monday, October 13, 2008; Page A20

IN THE scheme of things -- that is to say, in the larger context of a financial meltdown -- the special counsel's report concluding that Sarah Palin engaged in an unethical abuse of power in trying to have her former brother-in-law fired as an Alaska state trooper is a relatively minor event. But the report nonetheless offers a revealing and relevant portrait of the governor. It shows her and her husband pursuing a personal vendetta against the trooper, Mike Wooten, despite repeated warnings that they were impermissibly intruding into internal -- and already concluded -- disciplinary issues. Likewise, Ms. Palin's decision to repudiate her earlier pledge to cooperate fully with the inquiry does not offer assurance about how she would conduct herself as vice president. The McCain-Palin campaign's response to the inquiry has been internally contradictory -- simultaneously assailing the investigation as a partisan witch hunt and mischaracterizing as vindication the report's finding that Ms. Palin was within her rights as governor to remove the commissioner who had refused to act against her former brother-in-law.

THIS STORY
What McCain Hasn't Tried
Alaska's Family Feud
Cue 'Barracuda'

The amount of attention that the newly elected governor, her husband and her subordinates -- her personnel director, attorney general and chief of staff, among others -- devoted to getting Mr. Wooten fired was extraordinary. Within a few weeks of Ms. Palin's inauguration, her newly installed public safety commissioner, Walter Monegan, was summoned to a meeting with the governor's husband, Todd Palin, at which the "First Gentleman" pressed Mr. Monegan to reexamine the already concluded disciplinary case against Mr. Wooten. The governor herself called Mr. Monegan, e-mailed him and met with him in person to discuss her unhappiness with Mr. Wooten's continuation on the force. Equally extraordinary was the Palins' persistence in the face of warnings that their intervention could run afoul of personnel rules and risked creating precisely the kind of public uproar that ensued.

Ms. Palin's refusal to cooperate with investigator Stephen Branchflower reflects poorly on her. So, too, does Ms. Palin's mischaracterization of the report as finding that there was "no unlawful or unethical activity on my part" and "no abuse of authority at all in trying to get Officer Wooten fired." In fact, Mr. Branchflower concluded that Ms. Palin "knowingly

permitted a situation to continue where impermissible pressure was placed on several subordinates in order to advance a personal agenda, to wit: to get Trooper Michael Wooten fired." It's unfortunate that Ms. Palin does not understand -- or chooses not to acknowledge -- the seriousness of the mess she helped create.

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Monegan lawyer responds to Petumenos report

Posted by Alaska_Politics
Posted: November 11, 2008 - 3:53 pm

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After the Daily News ran **this editorial** on investigator Tim Petumenos' less-than-convincing exoneration of Sarah Palin in Troopergate, we received this further critique of the report from Walt Monegan's lawyer, Jeff Feldman.

-- Matt Zencey, editorial page editor

FROM JEFF FELDMAN:

A close reading of the report issued by the investigator hired by the Alaska Personnel Board reveals a variety of errors and weaknesses. Some examples:

(1) The investigator's report omits discussion of and disregards substantial evidence, including multiple instances in which evidence seriously conflicted with statements made by the Governor (see discussion below)

(2) The investigator's report misapprehends the applicable law, and suggests that the relevant provision in the ethics statutes does not mean what, on its face, it says

(3) The investigator's report addresses only the direct evidence (and, at that, only some of the direct evidence). The report ignores critical circumstantial evidence. The law accords circumstantial evidence the same weight as direct evidence, so the absence of any analysis of the circumstantial evidence reflects a significant omission and weakness in the report. For example, the report ignores the number, sequence, timing, and content of communications by the Governor, her husband, her staff, and her cabinet officers to former Commissioner Monegan and others at the Department of Public Safety. But the fact that:

* Eight different individuals

* All of whom either were, worked for, or were related to the Governor

* Contacted Former Commissioner Monegan or other officials at the Department of Public Safety

* To complain about the fact that Trooper Wooten was still employed as a trooper

* More than three dozen times

* Over an 18 month period

* Frequently using the same words and relating the same stories and events

* And some of whom stated that they were speaking on behalf of the Governor

would reasonably permit an inference that the Governor knew of and/or directed their activities, notwithstanding assertions to the contrary by the Governor and her staff.

It is possible that a neutral fact-finder would find the denials by the Governor and others (the direct evidence) to be the most persuasive evidence on this point. But it's also possible (and some might say, much more likely) that a neutral fact-finder would conclude that the denials are contradicted and outweighed by the inference that reasonably can be drawn from the circumstantial evidence that the Governor knew of

Alaska Politics Blog

This is the place to talk about Alaska politics -- state, local, national. Public life in the Last Frontier has probably never been more interesting than right now -- the governor as candidate for vice president, the broad and still-evolving corruption investigation, a big election, powerful members of Congress under scrutiny, and the usual hardball Alaska politics. Come here for news, tidbits and information, and join the discussion. **Keep your comments civil and on point. Avoid personal attacks. Do not use profanity. Posts that violate the Terms of Use will be deleted. Repeat offenders will be banned.**

Contributors

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Sean Cockerham writes about Alaska state politics. He spent three years based in Juneau for the ADN before joining the Tacoma News-Tribune to write about Washington state politics. He went to Iraq twice for the News Tribune, and previously wrote about Alaska government and politics for the Fairbanks Daily News-Miner. E-mail Sean at scockerham@adn.com

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Kyle Hopkins covers politics and other stories for the ADN. He covered the 2008 campaign for governor, has blogged extensively about Alaska politics, covered Anchorage city government and was a reporter based in the Mat-Su. He grew up in Southeast Alaska and previously was a reporter at the Fairbanks Daily News-Miner and Anchorage Press. E-mail Kyle at khopkins@adn.com

Features

2008 Election


At one point the races with Sen. Ted Stevens and Rep. Don Young promised to be the highest-profile campaigns in Alaska history.

SECTION
Palin coverage

The nation was captivated by Sarah Palin's run to the White House, and now Alaska awaits the return of their governor.

Photo galleries

Alaska's Top Jobs all 71 top jobs

Health Care Services
Clinical Systems Analyst
Central Peninsula Hospital

Management/Professional
Administrative Services Manager
USKH

Health Care Services
Materials Management Director
Central Peninsula Hospital

Health Care Services
Palliative and Elder Care Coordinator
Bristol Bay Area Health Corporation

Management/Professional
Chief Operating Officer
CIRI Alaska Tourism Corporation

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2 of 7

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2 of 13

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and /or directed the various communications to Commissioner Monegan by her staff and husband. On that basis alone, there was more than sufficient evidence for a finding of probable cause.

(4) The investigator's report leaves important dots unconnected by failing to consider the evidence as a whole and by misapplying the legal standard of "probable cause" (see above). Consider the following illustration: The fact that an individual has a one-way ticket from Bogata to Miami might not be deemed, in itself, suspicious. Nor the fact that the individual was traveling alone. Nor that he carried no baggage. Nor that he went to the bathroom on the plane every hour. Nor that he was sniffling a lot and had some odd white power on his pants. Nor that he was perspiring and shifting in his seat and looking around a lot. But, taken in the aggregate, a person reasonably could conclude that those circumstances combined to establish probable cause to believe that the individual was engaged in criminal behavior. The report by the Personnel Board's investigator suffers the weakness of looking at the evidence in isolation and, as a result, of failing to see the broader picture.

(5) Consider one example of how the investigator's report misapprehended the evidence and failed to address obvious conflicts between the Governor's testimony and other available and credible evidence:

Former Commissioner Monegan testified that the Governor called him in January 2007 to talk about Trooper Wooten. Governor Palin denied that the conversation occurred. Both individuals testified under oath. The existence of the two conflicting statements, alone, normally would suffice for a finding of probable cause, with the final determination as to which version was most credible to be by a neutral fact-finder made at a formal hearing. But there was additional evidence available on this issue, beyond the two sworn statements by Governor Palin and Commissioner Monegan.

In the last paragraph on page 31 of the report, the investigator for the Personnel Board accepts at face value the Governor's claim that the call to Commissioner Monegan never occurred; the investigator points to Todd Palin's testimony (also taken at face value) as confirming the fact that Mr. Palin had never talked to the Governor about his meeting with Commissioner Monegan. The investigator's report states:
"Governor Palin, in any event, has testified under oath that she was unaware that Todd Palin made these early 2007 inquires to Commissioner Monegan. Todd Palin confirmed that he did not discuss either the Monegan meeting or Commissioner Monegan's follow up call with the Governor at any time until the matter became the subject of scrutiny in 2008."

But in making this finding, the investigator's report ignores an e-mail that the Governor sent to Former Commissioner Monegan on February 7, 2007, shortly after the date of the disputed phone call. In her February 7 e-mail, the Governor expressed her concern about the Wooten situation in terms that unequivocally establish: (1) the Governor's knowledge that Commissioner Monegan already knew of her own concerns, and (2) the Governor's knowledge that Todd Palin had already directly informed Commissioner Monegan of her family's concerns. The Governor's February 7 email states:

"Just my opinion - I know you know I've experienced a lot of frustration with this issue. I know Todd's even expressed to you a lot of concern about our family's safety after this trooper threatened to kill a family member - ..."

If the January phone call never occurred (as the Governor claimed in her deposition testimony), how did the Governor know on February 7 (when she sent her email) that Commissioner Monegan already knew of her frustration? And if the Governor truly was unaware of any contacts between Commissioner Monegan and Todd Palin, how could she claim to know that Mr. Palin had expressed the family's concern to Commissioner Monegan?

Even though the e-mail seriously undermines the Governor's denial of the January phone call and directly refutes her claim that she knew nothing of Todd Palin's communications with Former Commissioner Monegan, the report by the Personnel Board's investigator all but ignores the e-mail's contents. This omission and others like it raise a question whether the report reflects a careful and critical examination of all available evidence designed to discover the truth or merely a hasty review aimed at meeting an election-eve deadline.

(6) An example of another conflict left unaddressed by the investigator's report: The Governor claimed

at one point that Todd Palin complained to her so frequently about the handling of the Wooten matter that she had to tell him to stop. How does that square with the contention in her deposition testimony that she was completely unaware of Mr. Palin's activities?

(7) An example of another conflict left unaddressed by the investigator's report: At page 13, the report states that the Palins met with representatives of the Alaska State Troopers in November of 2006, shortly after the Governor's election, and expressed their concern that Trooper Wooten presented a "security threat." The Personnel Board's investigator apparently accepted their statements about this discussion as true, without any acknowledgement or consideration of the substantial evidence to the contrary.

At page 44 of his report, Mr. Branchflower (the investigator for the Alaska Legislative Council) described the sworn testimony of Gary Wheeler, a witness who should possess substantial credibility by virtue of his position and longevity as an state trooper since 1981 assigned to protect to Governor of Alaska. No one has suggested that Mr. Wheeler has any motive or bias in connection with this matter. Mr. Wheeler recalled the November 2006 meeting the Palin's described, but he recalled it quite differently. Mr. Wheeler stated that he asked the Palins "whether they perceived any threats from any individual or were afraid of any individual" and that he received a negative response. Oddly, the Personnel Board's investigator did not interview Mr. Wheeler, himself. While the report states that the Personal Board's investigator carefully considered all of the testimony that Mr. Branchflower gathered and made available to the Personnel Board, the omission of this significant conflict in the evidence and the absence of reference to Mr. Wheeler's testimony strongly suggests the contrary.

(8) The Personnel Board's investigator criticized Mr. Branchflower for not interviewing certain witnesses, most notably the Palins. Putting aside for a moment the obvious observation that the only reason Mr. Branchflower did not talk to the Palins is because they refused to make themselves available to him, the criticism is misplaced because the personnel Board's investigator also failed to talk with a number of critical individuals -- including Audie Holloway and John Glass of the Alaska Department of Public Safety, both of whom were critical fact witnesses. Some individuals who were not contacted by the Personnel Board's investigator were direct recipients of communications about Trooper Wooten from the Governor or her husband and would have contradicted testimony provided by the Palins and relied on by the Personnel Board's investigator. John Glass, for example, testified that he told Todd Palin that Trooper Wooten had already been penalized for his actions [Branchflower Report, page 63]. But the Personnel Board's Report states that Todd Palin claimed that "he did not learn from anyone" that there was any consequence of significance imposed on Wooten, and the Report omits entirely that there was credible sworn testimony that directly contradicted that claim.

In light of these and other errors and omissions, there is substantial reason to question the conclusions drawn by the Personnel Board's Report.

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mooseluver
wrote on 11/13/2008 09:09:15 AM:

Palin Offered Cooperation with Investigation – Media/Press Release Quotes

Lawmakers seek outside inquiry of Monegan firing - KTUU-TV – July 18, 2008:

> Some lawmakers are asking for more answers to the reasons Palin had for firing Monegan. Palin, in Wasilla for the Governor's Picnic, said she would not fight such an effort to look into this matter by an independent investigator.
>
> "We would never prohibit, or be less than enthusiastic about any kind of investigation. Let's deal in the facts, and you do that via investigation," Palin said.

Senate will look into Monegan firing - KTUU-TV – July 19, 2008:

> While the governor said there is no need for an investigation from an outside investigator, she said she will answer any questions from lawmakers, media and the public.

Public Safety already headed in 'new direction,' some say - Anchorage Daily News - July 22, 2008:

> The governor denies any wrongdoing, and says she welcomes any questions on the matter.

Palin under fire – Legislature appears poised to appoint investigator -Aftermath of Monegan Dismissal, Anchorage Daily News - July 22, 2008:

> "I've said all along, hold me accountable," Palin told reporters in Juneau. "And I'm telling the truth when I say there was never pressure put on Commissioner Monegan."

Lawmakers move to investigate Monegan ouster, KTUU-TV – July 24, 2008:

> The governor says she welcomes the investigation. "I have absolutely nothing to hide and am happy to answer any questions," she said. "I'm happy to answer any questions between now and when they do conduct an investigation also."
>
> Gov. Palin said last weekend that she did not think an independent investigator was needed. "That being the route that they choose, then so be it," she said. "I'm happy to comply, to cooperate. I have absolutely nothing to hide. No problem with an independent investigation."

Hired help will probe Monegan dismissal - $100,000: Legislators vote to have independent investigator look into controversial firing - Anchorage Daily News – July 29, 2008:

> "The governor has said all along that she will fully cooperate with an investigation and her staff will cooperate as well," Leighow said.

Branchflower to investigate in Monegan firing - KTUU-TV – August 1, 2008:

> "I've heard (Branchflower's) name, or course, over the years in Alaska," Palin said. "I know he's a prosecutor, probably a heavy duty prosecutor, and so that kind of puzzles us why we are going down that road when we are very, very open to answering any questions anybody has of me or administrators."

PRESS RELEASE: GOVERNOR TO TURN OVER FINDINGS - Office of the Governor – August 13, 2008:

> Governor Palin has directed all her staff to cooperate fully with Branchflower.

Palin administration cooperating with investigator - KTUU-TV – August 15, 2008:

> Lawmakers had wanted to know if Steve Branchflower needed them to issues subpoenas to require witnesses to talk to him about Gov. Sarah Palin's decision to fire Monegan and about the actions of her staffers. But State Sen. Hollis French says the meeting was cancelled because there's no need for subpoenas at this point.

Palin aide Frank Bailey placed on administrative leave - KTUU-TV – August 19, 2008:

> "We figured, if there is an investigation going on with an unknown outcome – we don't know exactly what (special investigator) Mr. Branchflower is going to conclude – that Mr. Bailey just needed to step away from the situation, although be available to the investigator," [Palin spokesman] McAllister said.
>
> The governor's office also says that Bailey will cooperate fully with the investigation.

Palin aide put on leave in firing flap, BAILEY: Official who made all inquiring about trooper taken "out of the mix." - Anchorage Daily News – August 20, 2008:

> Spokeswoman Sharon Leighow said that with Bailey still a state employee, Palin "can direct him to assist Mr. Branchflower, thereby fulfilling her pledge to Alaskans to cooperate fully with the investigation."

Re: Governor Palin and Trooper Investigation - McCain Campaign Press Release – August 30, 2008:

> Governor Palin is an open book on this – she did nothing wrong and has nothing to hide. As a reformer and a leader on ethics reform, she has been happy to cooperate fully in the inquiry of this matter.

Attorney challenges Monegan firing inquiry – Anchorage Daily News – September 2, 2008:

> He [Governor Palin's Lawyer Mr. Van Flein] said the governor's office welcomes the inquiry and will cooperate.
>
> Palin has made repeated public statements that she'll cooperate, and that hasn't changed at this point, Van Flein says.

Committee Minutes
House JUDICIARY Minutes

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 14, 2007
1:08 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Chair
Representative Nancy Dahlstrom, Vice Chair
Representative John Coghill
Representative Bob Lynn
Representative Ralph Samuels
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Representative Bill Stoltze

COMMITTEE CALENDAR

CONFIRMATION HEARING(S)

Attorney General [Continued from 3/2/07]

Talis Colberg - Palmer

- CONFIRMATION(S) ADVANCED

HOUSE BILL NO. 175
"An Act relating to the prohibition of the exercise of the power of eminent domain against a recreational structure for the purposes of developing a recreational facility or project."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 175
SHORT TITLE: EMINENT DOMAIN; RECREATIONAL STRUCTURES
SPONSOR(S): REPRESENTATIVE(S) JOHNSON

03/05/07	(H)	READ THE FIRST TIME - REFERRALS
03/05/07	(H)	JUD, FIN
03/14/07	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

TALIS COLBERG, Appointee
Attorney General
Palmer, Alaska
POSITION STATEMENT: Testified as appointee to the position of Attorney General.

REPRESENTATIVE CRAIG JOHNSON
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 175.

DAVE FEEKIN
Alaska Association of Realtors (AAR)
Kenai, Alaska
POSITION STATEMENT: During discussion of HB 175, provided comments and asked the committee to support the bill and report it from committee.

DICK MYLIUS, Acting Director
Central Office
Division of Mining, Land and Water
Department of Natural Resources (DNR)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 175.

ACTION NARRATIVE

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 1:08:05 PM. Representatives Coghill, Samuels, Lynn, Holmes, Dahlstrom, and Ramras were present at the call to order. Representative Gruenberg arrived as the meeting was in progress. Representative Stoltze was also in attendance.

^CONFIRMATION HEARING(S)
^Attorney General

1:08:29 PM

CHAIR RAMRAS announced that the first order of business would be the consideration of the appointment of Talis Colberg to the position of Attorney General.

REPRESENTATIVE COGHILL asked Mr. Colberg whether he would be willing to draft a letter to the federal government asking it to address the issue of tribal status in Alaska.

1:11:02 PM

TALIS COLBERG, Appointee, Attorney General, indicated that he would draft such a letter but only if the governor asks him to do so, because that is her decision to make, not his.

REPRESENTATIVE SAMUELS asked Mr. Colberg what his legal advice to the governor would be should she decide to pursue that issue.

MR. COLBERG said he would endeavor to provide the governor with the best legal advice available that would support her policy choices to the extent that they are consistent with the law. In response to a comment, he opined that it is not inconsistent to provide legal advice to the governor and to the legislature on individual issues but still give deference to the person who appointed him.

REPRESENTATIVE SAMUELS asked whether he should assume that any legal advice he receives from the Department of Law (DOL) will simply coincide with the governor's policies.

MR. COLBERG opined that it would be wrong to assume that the attorney general will always say only what the governor wants to hear, and suggested that his advice to the governor concerning a university regent demonstrates that point.

1:21:40 PM

REPRESENTATIVE SAMUELS offered his understanding that in that situation, the governor had not publicly expressed a desire one way or the other, and surmised that if the governor does express an opinion publicly about a matter, then legislators would need to get separate counsel on that issue if they don't agree with her, because Mr. Colberg would simply be promoting the governor's viewpoint.

MR. COLBERG clarified that in the aforementioned situation, the governor only asked for his advice after she had already asked for the regent's resignation. In response to a question, he indicated that he still wishes to address the issues that arise between the Native and non-Native populations in Alaska.

CHAIR RAMRAS suggested that Mr. Colberg will bring a fresh perspective to the job. He then asked Mr. Colberg to speak about some of the disharmony that exists in both the Fairbanks and Anchorage district attorney offices - because he has been told that it stems from a morale problem rather than a compensation problem - what Mr. Colberg perceives as being some of the personnel issues, and what Mr. Colberg intends to do to resolve them.

The committee took an at-ease from 1:31 p.m. to 1:33 p.m.

MR. COLBERG said that Richard Svobodny - Chief Assistant Attorney General, Criminal Division - would be looking into those issues for him. Mr. Colberg mentioned that Mr. Svobodny is currently in the Kenai office looking into why there is a disproportionate prosecution failure rate compared to the offices in rest of the state. Mr. Colberg said he is comfortable with Mr. Svobodny's efforts to constructively address members' concerns about the Anchorage and Fairbanks offices.

1:36:22 PM

REPRESENTATIVE SAMUELS pointed out that in addition to having sufficient legal expertise, an attorney general must have the ability to manage the 280 attorneys currently working for the DOL. He said that how the personnel issues pertaining to the two most recent previous directors of the Criminal Division have been handled gives him pause [and raises questions regarding] Mr. Colberg's management skills, particularly given that managing the personnel at the DOL is the bigger part of the job of attorney general. Representative Samuels sought assurance that Mr. Colberg's management skills are up to the task.

REPRESENTATIVE DAHLSTROM suggested that it is unreasonable to expect a candidate for confirmation to not take any action in his/her prospective role before being confirmed. She cautioned that many of the facts regarding the aforementioned situations are not yet known by either legislators or the public, and that for Mr. Colberg to disclose more information about those situations could breach confidentiality and the law.

REPRESENTATIVE COGHILL suggested that the committee merely wants to have a discussion regarding Mr. Colberg's management style.

REPRESENTATIVE SAMUELS concurred, reiterating his view that an attorney general's management skills are more important than his/her legal skills.

MR. COLBERG concurred, recounted his experience while serving on the Matanuska-Susitna (Mat-Su) Borough assembly, acknowledged that most of his management experience relates to offices with a small number of personnel, and assured the committee that he doesn't expect to have to hire a new director of the Criminal Division every few months.

REPRESENTATIVE LYNN observed that without knowing more about the situations that were presented to Mr. Colberg, it will be difficult for the committee to evaluate his actions.

CHAIR RAMRAS offered his understanding that the district attorney office in Fairbanks has lost many high-profile cases, including cases involving rape and murder, and yet the office appears to be pursuing many charges of misconduct involving a controlled substance in the sixth degree. He asked, therefore, whether Mr. Colberg feels that a reallocation of prosecutorial resources at the Fairbanks office would be in order. Chair Ramras also asked Mr. Colberg how he intends to address the issue of low morale in that office.

1:46:15 PM

MR. COLBERG offered his recollection that the district attorney office in Fairbanks has only lost one high-profile sexual assault case - two years ago - and that the aforementioned misconduct charges were not occurring independently but rather in tandem with other charges such as DUI. He suggested, therefore, that any morale problem which exists in that office has no correlation to the allocation of prosecutorial resources. He mentioned that he has been presented with information suggesting that any morale problems that exist in the various district attorney offices existed before the new administration took office, and reiterated that Mr. Svobodny will be addressing those problems. Mr. Colberg, on the question of prosecutorial resource allocation, surmised that the information he has received differs greatly from that which Chair Ramras has received, and offered his belief that resources are not

currently being allocated in favor of the aforementioned misconduct charges.

CHAIR RAMRAS asked Mr. Colberg whether he is satisfied with the prosecutorial resource allocation in the Fairbanks office, and again asked Mr. Colberg what he intends to do about the low-morale situation to ensure that the district attorney offices do a better job of protecting the public.

MR. COLBERG said he will be relying on Mr. Svobodny's recommendations. He offered his understanding that at one office, the actual physical location of the building is contributing to low morale. In response to a question, Mr. Colberg said he has asked Mr. Svobodny to look into all the issues arising at the state's various district attorney offices.

1:52:22 PM

REPRESENTATIVE SAMUELS asked whether there is a specific policy in place at the DOL wherein [legislators'] requests for information must be forwarded up the chain of command before being fulfilled.

MR. COLBERG said he has not established such a policy himself, but acknowledged that perhaps at one point there might have been a policy in place wherein DOL employees were supposed to document legislative contacts. Furthermore, perhaps some people simply feel that they should inform their supervisor when a legislator contacts them.

REPRESENTATIVE HOLMES said she has recently come across individuals at the DOL who believe that there is a policy in place such as Representative Samuels described. She recommended, therefore, that Mr. Colberg make efforts to inform all of his staff that they are free to disseminate information to legislators when they request it.

CHAIR RAMRAS, notwithstanding Mr. Colberg's comments that he intends to rely on Mr. Svobodny's recommendations, opined that there is no substitute for a hands-on approach to managing a department.

MR. COLBERG agreed to issue a statement to his staff regarding how he would like them to deal with legislative requests for information.

CHAIR RAMRAS asked Mr. Colberg to comment on the issues raised as a result of the passage of certain ballot measures.

MR. COLBERG indicated that the DOL is establishing a new position that will deal with the legal issues which could arise from the "cruise ship initiative," and said he expects that [that initiative] will engender litigation. In response to a question, he indicated that he is not sure whether the same legal arguments could be raised regarding Washington's container tax as might be raised regarding the cruise ship initiative, should litigation result from either or both. In response to a further question, he said that the DOL's position would be to defend, to the best of its ability, what the voters passed.

2:07:07 PM

REPRESENTATIVE SAMUELS referred to an upcoming ballot measure pertaining to establishing a gaming commission, and asked Mr. Colberg whether he thinks gambling would be good for Alaska.

MR. COLBERG opined that gambling can be very corrosive to society. In response to further questions, he indicated that [the state] is currently involved in litigation regarding the interpretation of the aforementioned ballot measure, and explained that the National Indian Gaming Commission (NIGC) requires that the federal ordinances allowing for Indian gambling must stipulate that the tribe comply with its state's laws on gambling.

CHAIR RAMRAS, referring to the State v. Amerada Hess, et al. settlement money, asked Mr. Colberg what proactive approach he will take regarding any funds engendered by the "cruise ship head tax" and any ensuing litigation.

MR. COLBERG said he is not aware of any action pending on that particular tax.

CHAIR RAMRAS suggested to Mr. Colberg that he provide counsel to the legislature regarding that issue.

REPRESENTATIVE GRUENBERG asked Mr. Colberg to explain the status of possible litigation against the actuaries responsible for the Public Employees' Retirement System and Teachers' Retirement System (PERS/TRS) funds.

MR. COLBERG said the DOL has made a request for an appropriation of $12 million to pursue that litigation, and that the case is on hold pending funding. He added that the DOL feels that there is a good cause of action and recommends going forward with it. In response to a further question, he said that moneys appropriated thus far for that purpose have already been spent.

REPRESENTATIVE GRUENBERG indicated that he would want the State to not let the statute of limitations run out on that case.

MR. COLBERG, in response to a question regarding the McDowell v. State case, said, "I think the majority was right."

CHAIR RAMRAS asked Mr. Colberg whether he believes that the "advocacy section" that weighs in on the regulatory filing in front of the Regulatory Commission of Alaska (RCA) should [continue to] be located within the Office of the Attorney General.

MR. COLBERG said yes. He opined that from an institutional perspective, it is a bad concept for agencies to develop their own separate legal departments, because doing so could create consistency problems.

2:26:04 PM

CHAIR RAMRAS referred to Mr. Colberg's 3/13/07 letter regarding the Alaska Gasline Inducement Act (AGIA), and asked Mr. Colberg to elaborate.

MR. COLBERG said:

> There's been a lot written on that. You have not only about a 31-page opinion from [former] Attorney General Marquez talking about that that's, in his view, citing many of the same cases, older even, that there are reasons to argue that fiscal certainty could be justified for 30-45 years, you have at the other end Senator French wrote a very long opinion saying that nothing over 2 years, beyond the term of any legislature, could be found legitimate. And then ultimately, almost all of the opinions agree that there's no certainty about the fiscal certainty short of a court decision.
>
> Now, what it gets into is, always, an interpretation of Article IX, Section 1, in tandem with Article IX, Section 4, [of the Alaska State Constitution]. And Alaska, like about almost 30 states, has this "do not surrender your taxing authority" coming out of an old, old, old Georgia case, which is perhaps more than 150 years old, where states anticipating issues arising from a surrender by one legislature of powers creating serious problems down the line.
>
> In the limited case law that's available in Alaska that gives hints about it and from the minutes of the [Alaska] Constitutional Convention, Delegate Nerland specifically talked about inducements, and for industry, and he used the word "inducements" in there, and the concept is that here, this is a 10-year period that is triggered by the initiation of giving something. It's not something that we're promising in advance of any commitment; it's in response to a commitment and investment made - it's for a limited duration.

MR. COLBERG continued:

> And can it be challenged? Of course. And who is going to decide? The precedent is pretty slim all the way around. But we think it's much more defensible to make, under the terms described, in the AGIA, a 10-year concept that's not promised before anything's done, but after there's been a commitment and an investment that can be justified and defensible in court. And ... even [former Attorney General Marquez's] opinion can be defended, we just think it's too much of a stretch.
>
> And so the opposite end is Senator French saying nothing over 2 years will prevail, and he laid out a very thorough set of arguments. But there is a qualifier in Article IX, Section 1, that leaves open the door for some exceptions, and if it had no purpose - and every word has a purpose in that type of thing is the presumption - there'd be no reason for that, and we think this ... fits into the gist of the comments made when it was created as to what's an appropriate use for that terminology.

MR. COLBERG, in response to a question regarding [Indian] gaming, offered his understanding that Kake and Klawock [are only requesting permission from the NIGC to offer] bingo and pull-tabs, both of which are currently allowed under state law.

2:31:16 PM

REPRESENTATIVE DAHLSTROM made a motion to advance from committee the nomination of Talis Colberg to the position of Attorney General. There being no objection, the confirmation was advanced from the House Judiciary Standing Committee.

The committee took an at-ease from 2:32 p.m. to 2:38 p.m.

HB 175 - EMINENT DOMAIN; RECREATIONAL STRUCTURES

2:38:17 PM

CHAIR RAMRAS announced that the final order of business would be HOUSE BILL NO. 175, "An Act relating to the prohibition of the exercise of the power of eminent domain against a recreational structure for the purposes of developing a recreational facility or project."

2:39:05 PM

REPRESENTATIVE CRAIG JOHNSON, Alaska State Legislature, sponsor, relayed that legislation last year set limitations on the exercise of eminent domain and elevated someone's personal residence such that eminent domain could not be exercised for the purpose of developing a recreational facility or project unless the homeowner consented to the taking of his/her residence. House Bill 175 would extend that limitation to a person's recreational structure, and establishes a limit regarding the amount of land that would be protected to a radius 250 linear feet around the recreational structure itself - the same amount of land that would apply in situations involving a residence; HB 175 would not interfere with a government entity's exercise of eminent domain for other legitimate purposes. He relayed that although last year's legislation struck a fine balance between all interested parties, recreational structures were not included, and so he is now bringing this issue forward because he believes that private ownership constitutes the greatest use of Alaska's land. He mentioned that HB 175 would not apply to recreational structures owned by partnerships or businesses.

2:43:12 PM

DAVE FEEKIN, Alaska Association of Realtors (AAR), spoke about last year's legislation, relayed that the property rights of "second home" owners is of key importance, and opined that HB 175 protects the values of those properties. Realtors have heard from many Alaskans about the importance of recognizing and protecting a key element for many families and their Alaskan

lifestyles - the ownership and enjoyment of recreational properties and cabins. He concluded by asking the committee to support HB 175 and move the bill from committee.

CHAIR RAMRAS, after ascertaining that no one else wished to testify, closed public testimony on HB 175.

REPRESENTATIVE JOHNSON, in response to a question, said, "It is standard practice to have access to your land ...; I believe that that right-of-way does exist, and [the government] ... couldn't condemn the area to prohibit you from having access to your property ...."

REPRESENTATIVE GRUENBERG questioned whether the term, "recreational structure" could be construed to mean a structure that was constructed for just one season, and asked whether the bill ought to require some form of permanency with regard to recreational structures.

REPRESENTATIVE JOHNSON said it is not the intention of HB 175 to allow someone with recreational property to merely put up a tent and move it from place to place in order to protect all of the property; HB 175 is intended to protect the owner of a permanent recreational structure. He indicated that he doesn't have an objection to clarifying that point.

REPRESENTATIVE GRUENBERG indicated a willingness to offer a conceptual amendment that would alter Section 3 such that the concept of permanence would be incorporated into the definition of "recreational structure".

2:52:21 PM

DICK MYLIUS, Acting Director, Central Office, Division of Mining, Land and Water, Department of Natural Resources (DNR), in response to a question, said that the department doesn't have any objection to [the bill or the aforementioned proposed change], and that the department has never exercised eminent domain in order to acquire recreational properties or access to recreational opportunities without the consent of the property owner. He opined that it would be good to better define the term, "recreational structure", particularly given that both tent camps and million-dollar structures are all considered to be recreational structures. In response to a further question, Mr. Mylius provided comments regarding a particular university land transfer.

REPRESENTATIVE JOHNSON, in response to a question, reiterated that the bill is intended to only protect the land that is within 250 linear feet of the structure, whether that structure is someone's personal residence or recreational structure. In response to a comment and question, he indicated that he would be amenable to an amendment that would clarify that point. In response to a further question, he said he intends for the protections afforded by the bill to apply only to a landowner who holds legal title to the recreational structure.

REPRESENTATIVE DAHLSTROM surmised that several members believe that the issue of how much land is going to be protected still needs to be clarified in the bill.

REPRESENTATIVE GRUENBERG suggested that the issues raised by the committee be addressed via a committee substitute.

[HB 175 was held over.]

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:58 p.m.
