

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.

Case No. 3AN-08-10489 CI

**COPY**  
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SEP 24 2008

Clerk of the Trial Courts

**MOTION TO DISMISS COMPLAINT**

It is hard to imagine a lawsuit more dangerous to Alaska's tripartite form of government than one that asks the courts to instruct the Legislature that there are certain executive actions that are off-limits to legislative inquiry, certain legislators who are too "partisan" to be assigned responsibility in legislative investigations, and certain people whom the Legislature cannot employ as investigators. That is what this suit does. Fortunately, under Alaska's separation-of-powers principles and case law, the Complaint is clearly meritless as a matter of law. The court should dismiss it.

**BACKGROUND**

The Complaint seeks to halt a legislative fact-finding inquiry that was authorized by a 12-0 bipartisan vote of the Alaska Legislative Council on July 28, 2008, "to

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investigate the circumstances and events surrounding the termination of former Public Safety Commissioner Monegan and potential abuses of power/improper action by the executive branch.” *See* Complaint, ¶ 20. Senator Hollis French, Chair of the Senate Judiciary Committee, was chosen by the Legislative Council to act as Project Manager. He in turn, as he was authorized to do, selected former state prosecutor Stephen Branchflower as Special Counsel and asked him to produce a report by October 31, 2008. *See* Complaint, ¶¶ 20, 21, 22. This date was later moved to October 10, 2008, to avoid any claim that the timing was tied to Election Day, November 4, 2008. *See* Complaint, ¶ 22.

The Governor initially promised her full cooperation and that of her staff, but she reneged on that promise once she was selected as the Republican candidate for Vice President in August. The McCain Campaign and its supporters, having apparently convinced themselves that the facts would cause serious damage to the Republican ticket if publicly known before the national election, are now moving on many fronts – including this one – to slow and to stop Mr. Branchflower’s fact-finding inquiry and to prevent his issuance of the report authorized by the Legislative Council.

The claims made in the Complaint are extraordinary and ultimately baseless. Essentially, the Complaint asks the court to decide two political questions: (1) that the termination of Commissioner Monegan and related “potential abuses of power/improper action by the executive branch” are subject areas that are off-limits to the Legislature; and (2) that Senator French and Senator Elton are too “partisan” (*i.e.*, Democrats who

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openly support their party's nominees) to be assigned roles in legislative investigations of a Republican executive. The challenged actions of the Legislative Council, however, are purely legislative acts, and they are certainly not subject to second-guessing by the judiciary.

## ARGUMENT

### **A. The Legislature Has Inherent and Broad Investigative Authority**

It would be a mistake of constitutional dimension for this court to instruct the Legislature that certain potential abuses of power by the executive are off-limits for legislative investigation. That the Alaska Legislature has a broad and inherent power to investigate is implicit in our tripartite constitutional system and explicit in reams of case law.

Plaintiffs ask the court to find that the Legislative Council's investigation is *ultra vires* because it is "(a) not derivative of, in furtherance of, or related to the Legislature's expressly granted legislative power; and (b) is designed to second-guess the Governor's decisions and actions in managing and operating the Executive Branch and the Department of Public Safety." Complaint at 22, ¶ 41. Plaintiff goes so far as to say that the Alaska Legislature "has no power to investigate alleged 'abuse of power' by either of the other branches of government" (*id.*, ¶ 42), a claim that should come as an unsettling surprise to generations of Americans who have watched congressional hearings into CIA abuses (the Church hearings), Iran-Contra, the U.S. Attorney firings, and countless other executive "decisions and actions" that the people's elected

representatives believed should be investigated, whether or not the executive agreed with them.

Like that of the U.S. Congress, the Alaska Legislature's power is not limited to its "expressly granted legislative power;" it has inherent powers as well, including a broad fact-finding power. And "the Governor's decisions and actions in managing and operating the Executive Branch and the Department of Public Safety" fall well within its scope.

In the tripartite form of government shared to some degree by every one of the U.S. states, the legislature has a broader inherent power of investigation than any other branch.

The power to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.

*Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544-45 (1963), quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957).<sup>1</sup>

The Alaska Legislature enjoys these same "broad powers of investigation necessary to its law-making activities." *Cook v. Botelho*, 921 P.2d 1126, 1131-32 (Alaska 1996). In particular, "[t]he constitutional grant of the confirmation power

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<sup>1</sup> See also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505 (1975) ("the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change'), quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

implies a coincident power and duty to investigate the status of the appointed offices as well as the qualifications of the individuals appointed to those offices.” *Id.*<sup>2</sup> Having investigated Commissioner Monegan’s fitness for appointment to executive office, coincident to its confirmation power,<sup>3</sup> the Legislature has every right to investigate the Governor’s (evolving) claim that he was not fit for that office after all. Whether this might lead ultimately to changes in the confirmation process, remedial legislation, censure, or any other action within the Legislature’s purview is for the Legislature to decide, not the courts or the executive.

In *Cook*, Governor Wally Hickel, near the close of his term, had appointed a new commissioner to the Alaska Public Utilities Commission. When Governor Tony Knowles took office he declined to formally present the appointee’s name for confirmation pursuant to AS 39.05.080, opting to choose someone else instead. The Legislature confirmed Governor Hickel’s appointee anyway.

The Alaska Supreme Court ruled that the Legislature had acted well within its authority; knowing that an appointment had been made, it did not have to await the formal act of presentment. The Court also noted that the Legislature’s constitutionally-

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<sup>2</sup> A very recent federal example is the investigation into the Bush Administration’s “forced resignations” of nine U.S. Attorneys, which a few months ago prompted the U.S. District Court for the District of Columbia to reaffirm both Congress’s “standing to assert its investigatory power” and its power to “designate a member to act on its behalf” in the issuance of subpoenas. *See Committee on the Judiciary v. Miers*, 558 F.Supp.2d 53, 67 (D.D.C. 2008).

<sup>3</sup> The Commissioner of Public Safety is subject to confirmation by the Alaska Legislature. *See* Alaska Const. Art. III, § 26.

delegated power to confirm appointments “implies both a power, and a duty, to investigate the status of appointed offices.” *Cook*, 921 P.2d at 1131. The Court quoted extensively from a Kansas case it found “convincing” on the broad reach of the legislature’s inherent fact-finding power:

Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether the respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. . . . *The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. No other branch of the government exercises the power of investigation to the same degree as does the legislative branch.*

...

*Cook*, 921 P.2d at 1131 (emphasis added), quoting with approval *Barrett v. Duff*, 217 P. 918, 925-26 (Kan. 1923).

Case law from Washington is persuasive. In *State v. Yelle*, 185 P.2d 723 (Wash. 1947), the court considered the status of a “State Legislative Council,” consisting of ten senators and eleven representatives, that had been created by the Washington Legislature to carry on certain aspects of legislative business between formal sessions. A member of the Council submitted his expense accounts to the state auditor, who refused to pay them on grounds that the Council member, a legislator, was statutorily barred from holding a “civil office” that he had helped create. The court, however, held that the legislator was still acting as a legislator while serving on the Council, that his actions did not violate the statute, and that he was entitled to his expenses.

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Along the way, the court discussed the nature of the Legislative Council in language that is relevant here. First, it noted that many state legislatures had such councils: “The authorities are in accord that, by statute, a legislative committee may be created and authorized to sit during the interim between sessions for any proper purpose, and empowered to take testimony, compel the attendance of witnesses, punish for contempt, and be directed to report its findings to the next legislature.” *Yelle*, 185 P.2d at 727. The court strongly disagreed with the auditor’s argument that the Council had no powers of investigation other than those necessary “to lay the groundwork for possible future legislation”:

A legislative committee may be created to investigate the management of various state institutions and departments of the state in order to ascertain facts as a basis for possible remedial legislation. . . . *The powers of such committees need not, however, be restricted to investigations upon matters pertinent only to legislation; legislative committees may be created to investigate into any subject legitimately within the scope of the powers, functions, and duties of the legislature, and to secure information necessary to the proper discharge thereof.*

*Yelle*, 185 P.2d at 718, quoting 49 Am.Jur. 260 (emphasis added). *See also Parker v. Riley*, 113 P.2d 873, 875-76 (Cal. 1941); *State v. Aronson*, 314 P.2d 849, 857-59 (Mont. 1957); *State v. Kinnear*, 492 P.2d 1012, 1015 (Wash. 1972); *State v. Sims*, 43 S.E.2d 805, 811 (W.Va. 1947).<sup>4</sup>

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<sup>4</sup> “[T]he duty of correlating information and making recommendations is the kind of subsidiary activity which the legislature could perform through its own members, or which it could delegate to others to perform. Intelligent legislation upon the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators and *any reasonable procedure for securing*

The law thus clearly holds that the Alaska Legislature is not restricted to specific constitutional grants of investigatory power; by its very nature it has an “implied” authority to investigate “any subject legitimately within the scope of [its] powers, functions, and duties.” The Legislature may delegate this authority to the Legislative Council. The Alaska Constitution, Article II, § 11, expressly creates “a legislative council” and authorizes it to “perform duties and employ personnel *as provided by the legislature.*” (Emphasis added.) Separation-of-powers principles prevent the courts from interfering with the Legislature’s exercise of its investigative authority, whether it is exercising it through the Council or otherwise.

**B. The Constitution Prevents the Courts from Overruling the Legislative Selection of Project Manager and Investigator**

The bulk of the Complaint is devoted to buttressing the absurdly obvious charge that Senator Hollis French – the Chair of the Senate Judiciary Committee, designated as Project Manager by the Legislative Council – is a Democrat who, like every other member of the Legislature, is likely to vote for his own party’s national ticket in November. The Complaint also alleges – in part by taking quotes out of context or ignoring clarifications – that Senator French believes Governor Palin has something to cover up (a belief apparently held by Plaintiffs here).

The allegation that Senator French is disqualified by bias from acting in his legislative role until the election is over is factually spurious; furthermore, and more

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*such information is proper.” Parker, 113 P.2d at 877 (emphasis added); Aaronson, 314 P.2d at 857 (quoting Parker).*

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important on this Motion to Dismiss, it is legally without merit. Express constitutional direction as well as fundamental separation-of-powers principles prevent the courts from second-guessing whether a sitting Senator, Democrat or Republican, is qualified to perform the legislative role that his fellow legislators have seen fit to assign to him. Those same principles prevent the courts from second-guessing the legislative choice of investigator.

In *Malone v. Meekins*, 650 P.2d 351, 353 (Alaska 1982), eleven members of the State House brought suit against 26 other members of the House, asking the court to declare that the defendants' replacement of Representative Jim Duncan with Representative Joe Hayes as Speaker of the House "was illegal and unconstitutional." The plaintiffs argued that the defendants' parliamentary maneuvers violated the Uniform Rules of the Alaska State Legislature and also ran afoul of statutes, particularly AS 24.10.020, governing the Legislature's organization and operation.

The Alaska Supreme Court declined even to consider the merits of the plaintiffs' claims. It held that even if the plaintiffs were right about the violation of statute, the Legislature's internal organization is "a subject which has been committed by our constitution to each house."

Insofar as compliance with such a statute is concerned, we believe that a proper recognition of the respective roles of the legislature and the judiciary requires that the latter not intervene.

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*Malone*, 650 P.2d at 356. This decision, the Court held, was “in accord with the established principle that courts should not attempt to adjudicate ‘political questions.’”

*Id.*

Particularly shielded from judicial interference is the Legislature’s selection of its officers and employees. Article II, section 12 of the Alaska Constitution provides, in part: “Each house may choose its officers and employees. *Each is the judge of the election and qualifications of its members. . . .*” (Emphasis added.) Besides this express constitutional directive, “also involved here is the element of due respect which the judiciary owes to the independent and coequal legislative branch of government.”

One of the primary purposes of our separation of powers system is “to safeguard the independence of each branch of the government and protect it from domination and interference by the others.” *For the courts to assume responsibility for overseeing the officer selection process of a legislative body would be highly intrusive and, in our opinion, inconsistent with the respect owed the legislature by the judiciary.*

*Malone*, 650 P.2d at 357 (citations omitted; emphasis added). The Court’s deference is even more appropriate in cases like this one involving the Legislative Council, since the Constitution expressly authorizes it to “perform duties and employ personnel *as provided by the legislature.*” Alaska Const. Art. 11, § 11 (emphasis added). If – and this is a big, hypothetical “if” – Mr. Branchflower were too “biased” to be employed by the Alaska Legislature in the role of investigator, and if – again, this is a big, hypothetical “if” – Senator French were too “partisan” to be selected by his fellow legislators to serve as Project Manager, those are issues that the Constitution expressly

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delegates to the Legislature itself to address, not the courts or the executive or the McCain Campaign.

**C. Counts 2 and 4 of Plaintiffs' Complaint Also Raise Political Questions**

Plaintiffs also charge that Mr. Branchflower's investigation "has expanded beyond the Legislative Council's own adopted motion." Complaint, ¶¶ 45-46 (Count 2). The legislative authorization, as quoted by the Complaint, was "to investigate the circumstances and events surrounding the termination of former Public Safety Commissioner Monegan and potential abuses of power/improper action by the executive branch." See Complaint, ¶ 20. The Complaint contains not a single allegation of any investigative activity that falls outside the scope of that explicit authorization.

If there were such an allegation, it would be up to the Legislature to address it. *Malone* demonstrates that Alaska's courts are not going to even *consider* allegations by some legislators that other legislators are wrongly manipulating legislative procedures; the internal structure and management of the Legislature is for the Legislature itself to deal with. To interfere would show a lack of "the respect owed the legislature by the judiciary." *Malone*, 650 P.2d at 357.

The Complaint also alleges that Senators French and Elton "are using public funds, public facilities, equipment, services and/or other government assets and resources for non-legislative purposes." Complaint, ¶¶ 56-58 (Count 4). Again, there is not a single allegation in the Complaint of an expenditure of money or resources for

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anything other than Mr. Branchflower’s investigation. And even if there were, the Legislature is in control of its own administrative budget. This is true both because of the same basic separation-of-powers principles outlined in *Malone* and because Alaska Statute 24.20.140 requires it. The Legislative Council, by law, submits its operating expenditures to the Legislature and subjects those expenditures to “an independent audit that shall be made annually.” If any of the plaintiff legislators truly believe this particularly scurrilous allegation against their colleagues – and it is hard to believe that they do – then they will have the opportunity to address it when the Legislative Council’s allocation of funds comes up for legislative review. In the meantime, it is not for the courts to interfere.

**D. Plaintiffs’ “Due Process” Claim Fails for Lack of Standing**

Plaintiffs contend that the legislative investigation violates due process, though whose rights are being violated is left vague. As specific as the Complaint gets is its allegation that the investigation “is not affording *any witnesses or participants* notice and opportunity to be heard, to defend their interests, to be represented by counsel, and/or to protect themselves from self-incrimination.” Complaint at 24, ¶ 52 (emphasis added).

Whoever these unnamed “witnesses or participants” are, they can defend their own due process rights if they seriously believe they are in jeopardy. Plaintiffs here have no standing to assert vicariously the due process rights of others. With limited exceptions not applicable here,

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the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged “injury in fact,” and, second, *whether the proponent is asserting his own legal rights and interest rather than basing his claim for relief upon the rights of third parties.*

*G.R. v. State*, 638 P.2d 191, 205 (Alaska App. 1981), quoting *Rakas v. Illinois*, 439 U.S. 128, 139; *see also Davis v. U.S.*, 411 U.S. 233, 253-54 (1973) (noting “the general rule that no one has standing to assert the rights of others”).

Any exception to these standing rules requires “that a party seeking third-party standing make two additional showings”:

First, we have asked whether the party asserting the right has a “close” relationship with the person who possesses the right. Second, we have considered whether there is a “hindrance” to the possessor’s ability to protect his own interests.

*Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (citations omitted). The required “‘close’ relationship” has included, for example, doctors suing on behalf of their patients’ privacy rights, but it has not included attorneys suing on behalf of their clients’ rights to appointed counsel. *Compare id.* at 130-32; *Falcon v. Alaska Public Offices Comm’n*, 570 P.2d 469, 474-75 (Alaska 1977). There is no indication in the Complaint that Plaintiffs have any relationship at all with the unnamed “witnesses or participants” whose rights are allegedly being threatened, let alone a relationship that is analytically akin to the close doctor/patient relationship that justified third-party standing in *Falcon*.

Nor is there any reason for the court to assume that the unnamed “witnesses or participants” face any “hindrance” to protecting their own interests. Indeed, recent events demonstrate that “witnesses or participants” who want to stonewall Mr.

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Branchflower's fact-finding inquiry can count on plenty of assistance from lawyers and McCain Campaign operatives, with even the highest law enforcement officer in the State – the Attorney General – stepping in to advise affected state employees that whether to comply with legislative subpoenas is a matter of choice. In short, there is no evidence whatsoever from which this court could conclude that any third parties need Plaintiffs' help in asserting their due process rights, and the due process claims must be dismissed for lack of standing.

### CONCLUSION

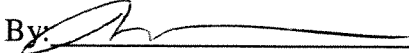
The Complaint in this case is a political, not a legal, document. It spends many paragraphs impugning the fairness and integrity of Senator French, Senator Elton, and Special Counsel Branchflower, but it does so apparently only in an attempt to taint the investigation, since its legal claim is that the Legislature “has no power to investigate alleged ‘abuse of power’ by either of the other branches of government” no matter who is in charge (*see* Complaint, ¶ 42). The Complaint's legal claims fail as a matter of law. The survival of Alaska's tripartite form of government requires that each branch act as a check on the power of the others. The Legislature's power of investigation is therefore inherent and broad. The Legislature's assignment of Project Manager, and the Project Manager's selection of an investigator, are the Legislature's own business, not the court's. And Plaintiffs' claims that unnamed “witnesses or participants” may have complaints about their due-process rights fail as a matter of law for lack of standing. Plaintiffs' Complaint should be dismissed on its merits.

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DATE: Sept. 24, 2008

By:   
Peter J. Maassen  
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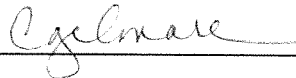
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**ORDER**

Defendants Senator Hollis French, Senator Kim Elton, Stephen Branchflower, and the Alaska Legislative Council having moved to dismiss the Complaint on grounds that it fails to state a claim on which relief can be granted, and the court having considered the motion and any opposition to it,

IT IS ORDERED that the motion be and hereby is GRANTED.

DATE: \_\_\_\_\_

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Stephanie Joannides  
Superior Court Judge

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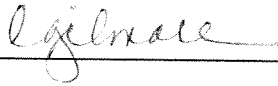
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