

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

---

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.

---

## **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....

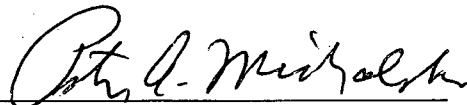
Even if there had been a violation under this statute, this is not an issue for the court. AS 24.60.030 belongs to a chapter entitled Standards of Conduct. See 24.60.010-995. AS 24.60.010(8) notes "the purpose of this chapter is to establish standards of conduct for state legislators and legislative 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