

EMERGENCY MOTION

IN THE SUPREME COURT FOR THE STATE OF ALASKA

REPRESENTATIVE WES KELLER;)
REPRESENTATIVE MIKE KELLY;)
SENATOR FRED DYSON;)
SENATOR TOM WAGONER;)
REPRESENTATIVE CARL GATTO; and)
REPRESENTATIVE BOB LYNN,)

Plaintiffs,)

v.)

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

Defendants.)

Supreme Court No. S-13296
Superior Court Case No.
3AN-08-10489 CI

EMERGENCY MOTION FOR EXPEDITED APPEAL

Appellants hereby move the Court pursuant to Alaska R. App. P. 504 for an order expediting the briefing, argument and decision of this appeal so that a decision is rendered by no later than close of business, 4:30 p.m., Thursday, October 9, 2008. The Appellants, therefore, require a decision from this Court regarding this Motion for Expedited Appeal by close of business today, October 3, 2008.

**STATEMENT OF FACTS SHOWING THE NATURE OF
THE EMERGENCY AND THE DATE AND THE HOUR FOR
WHICH A DECISION IS NEEDED**

On October 10, 2008, prior to the upcoming November 4, 2008, general election in which Governor Sarah Palin will appear on the ballot as the vice-presidential running mate

of United States Senator John McCain, the Appellees intend to complete an unconstitutional and unlawful legislative investigation of “the circumstances and events surrounding the termination of former Public Safety Commissioner [Walter] Monegan and potential abuses of power/improper conduct by the executive branch.” At that time, Appellees also intend to release an “October surprise” that, in the words of Senator Hollis French, is “likely to be damaging to the Governor’s administration.” If this unconstitutional and unlawful investigation is allowed to continue, is completed, and if the resulting report is released as planned, Plaintiffs and Alaskans in general will suffer irreparable harm. Plaintiffs and Alaskans have a substantial interest in the enforcement of the Alaska Constitution and in requiring the Alaska Legislature, its subcommittees, and its Council to comply with Constitutional and statutory mandates and norms. When a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. *E.g., Mich. Rehab Clinic Inc., P.C. v. Detroit*, 310 F. Supp. 2d 867, 871 (E.D. Mich. 2004); *Goldie’s Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466, 472 (9th Cir. 1984) (“An alleged constitutional infringement will often alone constitute irreparable harm.”). *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976).

On July 28, 2008, the Alaska Legislative Council authorized an investigation into “the circumstances and events surrounding the termination of former Public Safety Commissioner [Walter] Monegan and potential abuses of power/improper conduct by the executive branch.” The Council directed that the investigation was to be conducted in a manner that was “professional, unbiased, independent, objective, and conducted at arm’s length from the

political process.” By this action, plaintiffs seek (1) a declaratory judgment that the Legislative Council’s investigation is unconstitutional and unlawful because it exceeds the Legislative Council’s statutory purpose and powers, and violates principles of separation of powers and due process; and (2) an injunction enjoining defendants from the conduct of the investigation, or enjoining the manner and timing in which it has been and is being conducted in violation of the “fair and just treatment” Clause of art. I, § 7 of the Alaska Constitution.

The superior court’s decision in this case represents an evisceration of the Alaska Judiciary’s power to review the conduct of the Alaska Legislature for compliance with the Alaska Constitution and Alaska’s statutes in the course of legislative investigations. Alaska’s Constitution, unlike that of any other state in this nation, includes within its Due Process Clause an affirmative individual fundamental right to “fair and just treatment in the course of legislative . . . investigations.” According to art. I, § 7, this right is one that “shall not be infringed.” Contrary to the superior court’s decision, at a bare minimum the “fair and just treatment” Clause of art. I, § 7 requires the Alaska Legislature, its subcommittees, and its Council to follow and abide by the statutes, rules and regulations that the Legislature has enacted in the course of conducting legislative investigations.

Further, the Delegates to Alaska’s Constitutional Convention specifically stated their intent that the “fair and just treatment” Clause prohibit, not allow, the lowest and most base level of political conduct by legislators when they are conducting legislative investigations. And contrary to the superior court’s conclusion, the Delegates, who specifically referenced their disdain for how the Congress’s McCarthy investigations had slandered and

sensationalized individuals in the media and press without “indictment” or any semblance of due process, did not intend to allow politicians to be politicians in their treatment of individuals during the course of legislative investigations. The Delegates clearly intended to hold Alaska’s legislators to a higher standard. If the superior court’s decision, which effectively places the meaning, effect, and enforcement of “fair and just treatment” under art. I, § 7, into the hands of the very legislators it is intended to constrain, then borrowing the words of Justice Marshall, Alaska’s state government will cease to be “deserv[ing] of the high appellation” attributed to “a government of laws and not men.” *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803). It “cannot be presumed that any clause in the Constitution is intended without effect.” *Id.*

**ALL GROUNDS ADVANCED IN SUPPORT OF THE APPELLANTS’
REQUEST FOR RELIEF WERE SUBMITTED TO THE SUPERIOR COURT**

The superior court’s decision is wrought with error and it must be reversed. The superior court dismissed the Appellants’ complaint pursuant to a Civil Rule 12(b)(6) Motion to Dismiss that (a) was not yet ripe for decision, and (b) had not yet been opposed or argued because the deadline established by the Civil Rules for an Opposition to be filed had not yet arrived and consideration of the Motion had not been expedited. This error is particularly poignant given that one of the primary issues before the court was the Legislative Council’s violation of due process under art. I, § 7 of the Alaska Constitution. The superior court dismissed the plaintiffs’ complaint for lack of sufficient proof of a violation of the “fair and just treatment” clause of art. I, sec. 7 of the Alaska Constitution (“The court finds no due

process or fair and just treatment violation”) after having denied plaintiffs the opportunity to present any evidence in the form of witnesses or documentary exhibits.

The superior court incorrectly ruled that the “fair and just treatment” Clause of art. I, § 7 of the Alaska Constitution does not require the Legislature, its subcommittees and its Council to follow statutes duly enacted by the Legislature and the Legislature’s own rules and regulations regarding jurisdiction, authority and procedure, when they conduct investigations that involve and impact third-parties who are not members of the Legislature. According to the superior court the judiciary has no power to review these issues. The Court misinterpreted and misapplied Malone v. Meekins, 650 P.2d 351 (Alaska 1982) and the nonjusticiability doctrine. The superior court incorrectly ruled that the judiciary lacks the power to adjudicate the Legislative Council’s violation of AS 24.20.010-.140 in ways that impact the rights of third-parties not members of the Legislature.

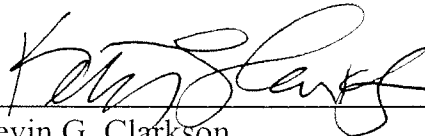
Oposing counsel, Peter Maassen, was hand-delivered a copy of this motion and the Notice of Appeal and Statement of Points on Appeal at or about 1:30 p.m. today.

CONCLUSION

For the reasons stated above, and because the Plaintiffs and Alaskans will suffer irreparable harm if the investigation at issue continues and if the resulting investigative report issues as planned on October 10, 2008, the Appellants should be granted an expedited appeal in this matter so that briefing, argument and decision occur no later than close of business, 4:30 pm, October 9, 2008.

DATED this 3rd day of October, 2008.

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CERTIFICATE OF SERVICE

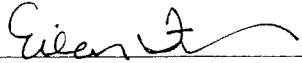
I hereby certify that on Oct. 3, 2008, a true and correct copy of the foregoing was served by ___mail, ___e-mail, ___fax, hand-delivery, upon:

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