

Report Highlights

Why DLA Performed This Audit

An audit was requested due to concerns that LAW's spending on outside counsel for matters relating to *Janus* violated state law.

What the Legislative Auditor Recommends

1. The legislature should consider whether judicial review and/or ratification is necessary.

A Special Audit of the Department of Law, Spending on Contracts Related to *Janus*

May 19, 2023

Audit Control Number 03-30101-23

REPORT CONCLUSIONS

The audit's opinions on whether the legislature's restrictive Civil Division appropriations were legally constructed and whether the Department of Law's (LAW) expenditures on matters related to *Janus v. AFSCME (Janus)* were allowable per state law are based on an evaluation of opposing legal arguments made by the Alaska Legislative Affairs Division of Legal and Research Services (Legislative Legal) and the attorney general. The basis for the audit's opinions is included in this report; however, it is important to recognize that a final legal determination can only be made by the appropriate court.

The audit concluded that the legislature, through constructing LAW's FY 21 and FY 22 Civil Division appropriations with specific limitations, effectively restricted LAW's ability to contract with outside counsel for *Janus* related matters. The attorney general interpreted the restrictions to be a violation of the Alaska Constitution's confinement clause and an improper encroachment of the powers of a separate branch of government. Based on the attorney general's opinion, LAW disregarded the legislative restrictions and spent a total of \$315,034 during FY 21 and FY 22 for outside counsel services related to the *Janus* decision. The services included assisting the department with cases involving the *Janus* decision in which the State of Alaska, or an executive of the State, was named as defendant, and filing amicus briefs in support of the State's position.

The attorney general, Legislative Legal, and an attorney hired by the legislative auditor analyzed the legality of the Civil Division's restrictive appropriations. The audit's review of these legal analyses

concluded that a court would likely find that the appropriations did not violate the confinement clause or the doctrine of separation of powers since the appropriation language did not prevent the attorney general from fulfilling statutory duties with in-house attorneys.

The audit also concluded that limiting expenditures for specific legal cases was perceived by some as a legislative attempt to inappropriately influence the attorney general's actions, which increased the risk of litigation.

The audit further concluded that LAW's decision to pay outside counsel for services related to *Janus* from an appropriation that expressly prohibited the expenditures likely violated AS 37.07.080(a) and Article IX, section 13 of the Alaska Constitution.

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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July 17, 2023

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24, we have reviewed the Department of Law's spending on contracts relating to *Janus* and the attached report is submitted for your review.

DEPARTMENT OF LAW SPENDING ON CONTRACTS RELATED TO *JANUS*

May 19, 2023

Audit Control Number
03-30101-23

The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Fieldwork procedures utilized in the course of developing the findings and recommendations presented in this report are discussed in the Objectives, Scope, and Methodology.

A handwritten signature in blue ink, appearing to read "Kris Curtis".

Kris Curtis, CPA, CISA
Legislative Auditor

ABBREVIATIONS

| | |
|-------------------|---|
| AFSCME | American Federation of State, County, and Municipal Employees, Council 31 |
| AS | Alaska Statute |
| ASEA | Alaska State Employees Association |
| CISA | Certified Information Systems Auditor |
| Consovoy | Consovoy McCarthy PLLC |
| CPA | Certified Public Accountant |
| DLA | Division of Legislative Audit |
| FY | Fiscal Year |
| <i>Janus</i> | <i>Janus v. AFSCME</i> |
| LAW | Department of Law |
| Legislative Legal | Alaska Legislative Affairs Division of Legal and Research Services |
| SLA | Session Laws of Alaska |
| SSSLA | Second Special Session Laws of Alaska |

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ORGANIZATION AND FUNCTION

Department of Law (LAW)

LAW serves as the legal advisor for the governor and other State officers, prosecutes all violations of state criminal law, and enforces the consumer protection and unfair trade practices laws. The department is organized into three divisions: Civil, Criminal, and Administrative Services. The Civil Division provides legal counsel to the executive branch of government, which includes review of legislation before it is acted upon by the governor, and review of regulations prepared by executive agencies. The Civil Division also defends and prosecutes civil litigation to which the State is a party.

The attorney general is appointed by the governor and is the principal executive officer of the department. The duties and powers of the attorney general are outlined in AS 44.23.020.

Alaska Legislature

The legislature is the branch of state government that has the power to enact law and appropriate. The term “appropriation” is defined in AS 37.07.120(3) as a maximum amount available for expenditure by a state agency for a stated purpose set out in an appropriation act.

The Alaska Legislature is divided into two chambers: the 40-member Alaska House of Representatives and the 20-member Alaska Senate.

State of Alaska Governor

The State of Alaska governor is elected to a four-year term through a general election. Per Article III, section 16 of the Alaska Constitution, the governor is responsible for the faithful execution of laws. The governor has veto authority over legislative appropriations as noted in Article II, section 15 of the Alaska Constitution, which states the governor may veto bills passed by the legislature by striking or reducing items in appropriation bills.

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BACKGROUND INFORMATION

The audit examines the actions taken by the attorney general in response to the US Supreme Court's 2018 decision regarding labor union fees. The audit also examines legislative attempts to restrain the attorney general's spending on such actions.

Janus v. American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)

Janus v. AFSCME (Janus) is a US Supreme Court 2018 decision¹ on US labor law concerning the power of labor unions to collect fees from non-union members. The Supreme Court ruled that such union fees in the public sector violate the First Amendment right to free speech, overturning the 1977 decision in *Abood v. Detroit Board of Education* that previously allowed such fees.

State of Alaska Actions Taken in Response to the *Janus* Decision

After the Supreme Court's decision in *Janus*, Alaska's attorney general under Governor Bill Walker issued a memo dated September 7, 2018, that provided guidance to executive branch departments regarding the rights and duties of public employees and public employers post-*Janus*. The memo, in part, addressed whether the *Janus* decision provided that a public employer may not continue to honor existing union membership dues authorizations. In answer to that question, the attorney general concluded that existing union members were not required to take any action, and that existing membership cards and payroll deduction authorizations by union members should continue to be honored.

After a change in administration, incoming governor Michael Dunleavy asked for a legal opinion from the newly appointed attorney general regarding proposed changes to the State's process for deducting union related dues and fees from employee paychecks in light of *Janus*. On August 27, 2019, the attorney general's opinion concluded, in part, that:

1. The US Supreme Court's decision in *Janus v. AFSCME* significantly limits the manner by which the State can deduct union dues and fees from its employees' wages.

¹ Decided by the Supreme Court on June 27, 2018, in a 5-4 decision.

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2. The *Janus* decision prohibits a public employer from deducting union dues or fees from a public employee's wages unless the employer has "clear and compelling evidence" that the employee has freely waived his or her First Amendment rights against compelled speech.
 3. The State's existing system for payroll deductions of union dues and fees does not ensure "clear and compelling evidence" that every employee has "freely given" consent to the State to withhold those funds.
 - a. For an employee's consent to be valid, it must be reasonably contemporaneous, free from coercion, and be accompanied by a clear explanation of the rights an employee is waiving.
 - b. The State's current payroll deduction system fails to satisfy constitutional standards.
 4. The State must implement a new process for ensuring that an employee's consent to payroll deductions for union dues and fees is knowing, intelligent, and voluntary.

Subsequently, Governor Dunleavy issued Administrative Order 312 on September 26, 2019, to establish procedures to "ensure that the State of Alaska honored the First Amendment free speech rights of state employees to choose whether or not to pay union dues and fees through payroll deduction." The new procedures included, in part, "opt-in" and "opt-out" dues authorization forms, which were to be collected by the State to prevent undue union influence. The opt-in forms were to contain specific language clearly informing employees that they were waiving their First Amendment right to not pay union dues or fees and thereby not to associate with the union's speech. The opt-in and opt-out forms under the administrative order could be submitted at any time.

***Janus* Related Alaska Court Cases**

The Alaska State Employees Association (ASEA), representing over 8,000 state and municipal employees, objected to the governor's administrative order and sued claiming executive overreach. Two additional federal lawsuits were filed against ASEA concerning dues authorization forms. The three lawsuits are described below.

1. *ASEA v. State of Alaska* (3AN-19-09971CI) – The complaint contended the 2019 attorney general opinion and subsequent Administrative Order 312 were an overreach of *Janus* and have no basis. The Alaska Superior Court found in ASEA's favor and issued an injunction against the State. On May 26, 2023, the Alaska Supreme Court upheld and confirmed the Superior Court's injunction.
2. *Creed and Riberio v. ASEA, Commissioner Tshibaka* (20-35743) – This lawsuit was brought by the named employees of the State of Alaska. It asserted, in part, that union dues checkoff authorizations signed by government employees in Alaska before *Janus* cannot constitute affirmative consent by those employees to waive their First Amendment right to not pay union dues or fees. Union members who signed such agreements could not have freely waived their right to not join or pay a union because the Alaska Supreme Court had not yet recognized that right. The courts found in favor of ASEA, and a petition for the US Supreme Court to hear this case under appeal was denied.
3. *Woods v. ASEA, AFL-CIO, et al.* (20-35954) – This lawsuit asserted, in part, that the claimant's First Amendment rights were violated by only allowing them to revoke their dues deduction authorization during one 10-day period each year. Additionally, dues were being collected without clear and compelling evidence First Amendment rights to free speech and association had been waived. The courts found in favor of ASEA, and a petition for the US Supreme Court to hear this case under appeal was denied.

LAW Hired Outside Counsel to Assist with Related *Janus* Cases

To help assist with the cases identified above, the Department of Law (LAW) contracted with the law firm of Consovoy McCarthy PLLC (Consovoy). A contract was first entered into August 2019 for an amount “not to exceed \$50,000” for legal advice “regarding possible constitutional issues concerning dues and agency fees in a bargaining unit agreement.” The contract was amended October 2019 to “not to exceed \$100,000”. In January 2020, a second contract with Consovoy was entered into for an amount “not to exceed \$600,000” to represent the State in its litigation efforts to defend the attorney general’s opinion concerning interpretation of the *Janus v. AFSCME* decision and the governor’s administrative order implementing the decision.

Legislative Restrictions on *Janus* Related Outside Counsel Contracts

During consideration of LAW’s FY 21 proposed operating budget, members of the Alaska Legislature House Finance Subcommittee expressed concerns regarding LAW’s spending on expensive outside counsel. Of specific concern was spending on the Consovoy contract that allowed for rates up to \$600 per hour. The finance subcommittee proposed limiting LAW spending on contracts for outside counsel related to the *Janus* decision by separating the FY 21 authorization² for LAW’s Civil Division into two appropriations:

1. Civil Division Except Contracts Relating to Interpretation of *Janus v AFSCME* (\$48,036,200)
2. Legal Contracts Relating to Interpretation of *Janus v AFSCME* Decision (\$20,000)

After debate regarding fiscal responsibility and the appropriateness of limiting funding for outside counsel, the new appropriation structure was approved by the House Finance Subcommittee and, subsequently, approved by the House Finance Committee and the legislature. The same restrictions were applied to LAW’s FY 22 Civil Division authorization.³

² House Bill 205 – Chapter 8 SLA 2020.

³ House Bill 69 – Chapter 1 SSSLA 2021.

LAW Objected to the Civil Division Appropriation Structure

LAW management questioned the legality of separating the Civil Division's funding into two appropriations. Specifically, LAW's bill review of the FY 21 operating budget noted:

The Department of Law has historically been comprised of a civil division and criminal division and not organizationally separated by particular legal matters. An effort to restrict the spending authority of the Department of Law in such a manner raises issues under the confinement clause of the Alaska Constitution which as set forth above has been interpreted to prohibit an appropriations bill from administering a program of expenditures. The Department of Law carries out the state's legal business and the Alaska Supreme Court has held that in carrying out those functions the Attorney General has the powers and duties ascribed to that position under the common law which includes the authority to bring actions that the Attorney General considers to be in the public interest. See, *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975). Accordingly, language in an appropriations bill that attempts to restrict the Attorney General from entering into contracts regarding particular legal matters, which could range from outside counsel to needed experts for a case, raises significant legal issues and could impede the Attorney General's ability to fulfill his statutory duties as head legal advisor and litigator for the state.

Further, an additional problem with an appropriation structure of this nature is that under Article III sec. 16 of the Alaska Constitution the governor may initiate court action to enforce "any constitutional or legislative mandate." The *Janus v. AFSCME* decision concerned core First Amendment issues and subsequent litigation in relation to that case involves the application of the First Amendment. Thus, the appropriation structure for civil division raises additional significant legal

questions in relation to the governor's authority under Article III, sec. 16.

Governor Dunleavy vetoed the FY 21 and FY 22 appropriations that specifically allowed spending for contracts relating to *Janus*.

REPORT CONCLUSIONS

An audit was requested of the Department of Law's (LAW) spending on outside counsel for matters relating to *Janus v. AFSCME (Janus)* due to concerns that such spending violated state law. Audit objectives include identifying new contracts entered into after FY 20 for related outside counsel, reporting on the services provided by outside counsel, and determining whether related expenditures violated the Alaska Constitution and/or other state law.

The audit's opinions on whether the legislature's restrictive Civil Division appropriations were legally constructed and whether LAW's expenditures on matters related to *Janus* were allowable per state law are based on an evaluation of opposing legal arguments made by the Alaska Legislative Affairs Division of Legal and Research Services (Legislative Legal) and the attorney general. The basis for the audit's opinions is included in this report; however, it is important to recognize that a final legal determination can only be made by the appropriate court.

The audit concluded that the legislature, through constructing LAW's FY 21 and FY 22 Civil Division appropriations with specific limitations, effectively restricted LAW's ability to contract with outside counsel for *Janus* related matters. The attorney general interpreted the restrictions to be a violation of the Alaska Constitution's confinement clause and an improper encroachment of the powers of a separate branch of government. Based on the attorney general's opinion, LAW disregarded the legislative restrictions and spent a total of \$315,034 during FY 21 and FY 22 for outside counsel services related to the *Janus* decision. The services included assisting the department with cases involving the *Janus* decision in which the State of Alaska, or an executive of the State, was named as defendant, and filing amicus briefs in support of the State's position.

The attorney general, Legislative Legal, and an attorney hired by the legislative auditor analyzed the legality of the Civil Division's restrictive appropriations. The audit's review of these legal analyses concluded that a court would likely find that the appropriations

did not violate the confinement clause or the doctrine of separation of powers since the appropriation language did not prevent the attorney general from fulfilling statutory duties with in-house attorneys.

The audit also concluded that limiting expenditures for specific legal cases was perceived by some as a legislative attempt to inappropriately influence the attorney general's actions, which increased the risk of litigation.

The audit further concluded that LAW's decision to pay outside counsel for services related to *Janus* from an appropriation that expressly prohibited the expenditures likely violated AS 37.07.080(a) and Article IX, section 13 of the Alaska Constitution. (See Recommendation 1)

Detailed conclusions are presented below.

LAW contracted with outside counsel for *Janus* related services.

An objective of the audit was to identify all *Janus* related contracts active from FY 21 through FY 22 and report the amount expended. The audit request also directed auditors to determine how the State financially supported amicus briefs filed on behalf of the State related to *Janus*, including the case *Belgau v. Inslee*.

The audit concluded that the only *Janus* related contract from FY 21 through FY 22 was with Consovoy McCarthy PLLC (Consovoy). LAW contracted with Consovoy to provide services "for matters related to the *Janus* decision." Services included representing the State in its litigation efforts to defend the attorney general's opinion concerning interpretation of the *Janus* decision and the governor's administrative order implementing the decision. In addition, LAW

utilized Consovoy to draft and file amicus briefs⁴ on three separate occasions.

The attorney general stated that filing amicus briefs in *Janus* related federal cases was important and necessary because the cases impact “the constitutional rights of Alaska state employees.” The amicus filings were outsourced to Consovoy, a firm with relevant expertise that LAW already had under contract. The attorney general estimated Consovoy’s total costs for preparing one amicus brief to be under \$6,000, which he expected to be less than the cost to prepare using in-house attorneys.

Exhibit 1

| LAW Expenditures for <i>Janus</i> Related Outside Counsel FY 21 through FY 22 | |
|--|------------------|
| Case | Amount |
| <i>State of Alaska v. ASEA</i> | \$263,959 |
| <i>Creed v. ASEA</i> | 7,350 |
| <i>Woods v. ASEA</i> | 23,400 |
| <i>Belgau v. Inslee</i> (amicus briefs) | 12,412 |
| <i>Troesch v. Chicago Teachers Union</i> (amicus brief) | 7,913 |
| Total | \$315,034 |

⁴ According to the Public Health Law Center at Mitchell Hamlin School of Law, amicus curiae (amicus) or “friend-of-the-court” briefs are filed by someone with a strong interest in the subject matter of a lawsuit, but who is not a party to, nor directly involved with, the litigation. Amicus briefs serve multiple purposes, including to: address policy issues; provide a more sympathetic advocate; supplement or bolster a party’s brief; provide historical perspective or technical assistance; endorse a party; or seek to mitigate or expand the effects of a potentially important prior court opinion, depending on whether the opinion is damaging or helpful. Amicus briefs may be filed by a person or an organization, or by a group of people or organizations.

LAW paid a total of \$315,034 for *Janus* related outside contracts during FY 21 and FY 22.

LAW paid \$301,845 during FY 21 and \$13,189 during FY 22 to Consovoy for tasks related to *Janus*. Most of the payments were for legal assistance associated with Alaska *Janus* related cases; however, a total of \$20,325 was paid to Consovoy for drafting three amicus briefs. Exhibit 1 on page 11 summarizes expenditures by related case.

Legislative limits on expenditures for specific cases were perceived by some as an inappropriate attempt to influence executive branch legal actions.

As described in the Background Information section of this report, the FY 21 Civil Division appropriation was split into two separate appropriations. The main appropriation was titled “Civil Division Except Contracts Relating to Interpretation of *Janus v AFSCME*” and included almost all of the division’s expenditure authority, approximately \$48 million. The secondary appropriation was titled “Legal Contracts Relating to Interpretation of *Janus v AFSCME* Decision” and provided \$20,000 of expenditure authority.

During consideration of LAW’s FY 21 budget by the House Finance Committee, some committee members raised concerns that the restrictions were an inappropriate attempt to manage LAW’s decision process by reducing funding for a specific issue that members did not agree with. Other members claimed that the purpose of the amendments was to restrain the use of costly outside counsel, which members considered unjustified and fiscally imprudent. House Finance Committee members in favor of the restrictions highlighted the need for fiscal restraint due to the high cost of outside counsel that had hourly fees up to \$600 per hour. The restrictions were ultimately retained by the Committee and included in the FY 21 operating budget. The restrictions were also incorporated into the FY 22 budget. The attorney general strongly opposed the decision.

As discussed in detail below, the audit concluded that the appropriations were likely legally constructed. Regardless of the legality, which can only be determined by the courts, several House Finance Committee members and the attorney general, perceived appropriation language as an inappropriate attempt to influence executive branch legal actions. Appropriation verbiage

that is interpreted differently between the legislative and executive branches increases the risk of litigation.

The attorney general and LAW management disregarded legislative restrictions.

The governor vetoed the FY 21 and FY 22 appropriations that specifically allowed up to \$20,000 to be spent each year on contracts related to interpretation of the *Janus* decision. Ostensibly, vetoing the only appropriations that allowed payments for *Janus* related contracts would bar LAW from making any payments to Consovoy. However, LAW proceeded to spend \$315,034 on *Janus* related outside counsel using the Civil Division's appropriation⁵ that specifically prohibited funds from being spent on outside counsel for *Janus* related services.⁶

As justification for the unauthorized expenditures, the attorney general stated that the restrictive appropriation language violated the confinement clause by including language which, in effect, amended general law by impeding the attorney general's ability to fulfill statutory duties as the State's head legal advisor and litigator. Under that premise, the attorney general argued that the purported appropriations were not appropriations at all, but instead were improper efforts to utilize an appropriations bill to administer a state program in violation of the confinement clause of the Alaska Constitution.

The attorney general also argued that the appropriations' structure attempted to restrict the governor's ability to initiate court action to enforce "any constitutional or legislative mandate", which is a violation of Article III, section 16 of the Alaska Constitution. As such, the attorney general regarded the appropriations as an improper encroachment on the powers of the executive branch of government.

⁵ The FY 21 appropriation was \$48,036,200; the FY 22 appropriation was \$49,930,400.

⁶ The appropriation was worded the same in both FY 21 and FY 22.

Legal analyses support that *Janus* related appropriation restrictions likely did not violate the Alaska Constitution’s confinement clause.

Article II, section 13 of the Alaska Constitution is referred to as the “confinement clause” and governs the formation of legislation. It states that “Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations...” In other words, the legislature, through an appropriation bill, cannot add substantive language to an appropriation that is not germane to the subject of appropriation. To do so may have the effect of altering existing law. Prior court cases have interpreted the confinement clause as prohibiting the legislature from using an appropriation bill to *administer a program*. Administering programs is an executive branch responsibility.

Legal analyses regarding whether or not the FY 21 and FY 22 Civil Division appropriations violated the confinement clause are included as appendices to this report. Legislative Legal analyses are enclosed as Appendices A and F. Attorney general analyses are included as Appendices B through E. The Legislative Audit outside counsel analysis is included as Appendix G. All the analyses included references to state law and prior court cases as support for the respective arguments and conclusions.

As discussed above, prior case law has interpreted the confinement clause as prohibiting an appropriation bill from administering a program of expenditures. This audit evaluated the legal arguments as to whether the restrictions within the Civil Division’s appropriations equated to administering LAW’s programs by limiting it from carrying out its responsibilities or duties. The attorney general contended that “appropriation language that attempts to restrict the Attorney General from entering into contracts related to a particular legal matter – which would include not only contracts with outside counsel, but also with necessary legal experts – raises significant legal issues and impedes the Attorney General’s ability to fulfill statutory duties as head legal advisor and litigator for the state.” The attorney general also contended “Any attempt to constrain the discretion of the Attorney General through an appropriation bill

violates the confinement clause of the Alaska Constitution and represents an improper encroachment on the powers of a separate branch of government.”

The audit found the attorney general’s argument less persuasive than the counter-argument presented by Legislative Legal. Legislative Legal contended that restrictions did not equate to a programmatic change because the restrictions did not prevent the attorney general from fulfilling statutory duties with in-house attorneys. Especially convincing was Legislative Legal’s reference to the case *Alaska Legislative Council v. Knowles*, in which the Alaska Supreme Court analyzed the constitutionality of contingency language for various appropriations in an appropriations bill. Key aspects of Legislative Legal’s analysis concluded that the Civil Division’s appropriation language does not attempt to administer a program because it only specifies how the appropriation is to be spent, no more and no less. Legislative Legal further concluded that the appropriations did not violate the confinement clause because nothing in the appropriations prevented LAW from pursuing litigation or the attorney general from fulfilling his duties as the State’s head legal advisor and litigator using in-house resources.

Legal analysis supports that *Janus* related appropriation restrictions likely did not violate the separation of powers doctrine.

The attorney general contended that “the Legislature, through the exercise of its appropriation power, sought to exact a monetary punishment on the Office of the Attorney General for the very performance of its duties under the law. This level of political coercion is exactly the issue that the separation of powers doctrine seeks to prevent.” The audit gave careful consideration to this claim, as it was clear that the restrictions were perceived by some as an attempt to inappropriately influence executive branch legal actions. Ultimately, the audit found the claim unconvincing given that the attorney general was never limited from pursuing *Janus* related matters using in-house resources, and legislative meeting minutes support that the restrictions were put in place to rein in costs and promote fiscal responsibility.

The attorney general’s decision to spend without authority appears to have violated state law.

Auditors were persuaded by legal analyses that found the attorney general’s claim that the legislature had no legal right to constrain his position from using outside counsel did not sufficiently recognize the legislature’s power of appropriation. Alaska Statute 37.07.080(a) provides that departments, when administering their programs, are limited by various things, including “appropriations by the legislature” and “other provisions of law.”⁷ Further, AS 44.23.020(d) provides that “the attorney general may, **subject to the power of the legislature to enact laws and make appropriations**, settle actions, cases and offenses...[emphasis added]” The audit was persuaded by legal analyses that concluded these statutes establish that the attorney general’s executive branch power is subject to the legislature’s power of appropriation.

The attorney general communicated in a February 14, 2020, letter to the co-chairs of the House Finance Committee that the Civil Division appropriation restrictions being contemplated by the committee would not have the intended effect and that the attorney general would continue to retain outside counsel as he deemed necessary. Under the attorney general’s guidance, LAW spent monies during FY 21 and FY 22 on outside counsel for *Janus* related services from an appropriation that specifically prohibited the expenditures. The decision appears to have violated AS 37.07.080(a), which states that departments, when administering their programs, are limited by various things including “appropriations by the legislature” and “other provisions of law”; and Article IX, section 13 of the Alaska Constitution, which states:

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred

⁷ AS 37.07.080(a) provides:

Except as limited by executive decisions of the governor, the mission statements and desired results issued by the legislature, appropriations by the legislature, and other provisions of law, the several state agencies have full authority for administering their program service assignments and are responsible for their proper management.

except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

As shown above, the Alaska Constitution states that no expenditure may be made from the public treasury without a valid appropriation by the legislature. The attorney general disagreed and considered the restrictive appropriations to be null and void. The audit found the appropriations were likely legally constructed.

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FINDING AND RECOMMENDATION

Recommendation No. 1: The decision to pay outside counsel for services related to the interpretation of *Janus v. AFSCME (Janus)* from an appropriation that expressly prohibited the expenditures likely violated AS 37.07.080(a) and Article IX, section 13 of the Alaska Constitution.

The legislature should consider whether judicial review and/or ratification is necessary.

The attorney general contended that spending from the appropriation was lawful and justified because restrictive language in the Department of Law’s Civil Division appropriation violated the confinement clause of the Alaska Constitution. As such, the attorney general concluded the restrictive appropriations were an improper effort to utilize an appropriations bill to administer a state program. The attorney general also concluded that the restrictive appropriation language represented an improper encroachment on the powers of a separate branch of government.

In contrast, the Legislative Affairs Division of Legal and Research Services (Legislative Legal), and outside counsel hired by the legislative auditor, concluded that the Civil Division appropriations likely did not violate the confinement clause because the appropriations remained available to finance the litigation of cases or controversies related to *Janus* and nothing prevented the civil division from using its appropriation to pay for staff attorneys to provide the representation necessary to litigate disputes related to the *Janus* decision. The audit found this counter-argument was more convincing. Although the audit concludes that Legislative Legal arguments were more convincing, the issue has not yet been litigated and final determination rests with the courts. As such, the legislature should consider whether judicial review is warranted.

The audit also concluded that the legislature should consider ratifying the FY 21 expenditures of \$301,845 and FY 22 expenditures of \$13,189. Ratification is advised given Legislative Legal concluded the expenditures were unauthorized.

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we have conducted a performance audit of the Department of Law's (LAW) spending on contracts related to *Janus v. AFSCME (Janus)*.

Objectives

The objectives were to:

- Determine whether any funds were expended on *Janus* related contracts (concerning public employees' union membership, union dues, or related matters) since the beginning of FY 21 or whether any new contracts relating to *Janus* were entered into.
- Determine whether and how the State financially supported the work of Consovoy McCarthy PLLC's (Consovoy) filing of the October 2020 amicus brief on behalf of the State of Alaska in *Belgau v. Inslee*, or other filing in Alaska Superior Court, Alaska Federal District Court, or any other courts.
- Determine whether LAW, through expenditures on contracts related to *Janus*, violated AS 37.07.080(a), Article IX, section 13 of the Alaska Constitution or any other state law.
- Follow up on any other related concerns the legislative auditor identified during the audit.

Scope

The audit reviewed LAW open contracts and *Janus* related court cases from FY 21 through FY 22. The audit reviewed expenditures for *Janus* related outside counsel from FY 21 and FY 22.

Methodology

To address the objectives, auditors reviewed and evaluated the following:

- Applicable Alaska Statutes, regulations, and the Alaska Constitution to identify functions, responsibilities, and requirements of the legislature, governor, and LAW.
- House Finance Law Subcommittee and House Finance meeting minutes and audio files concerning restrictive language added to LAW's Civil Division FY 21 operating appropriation bill to learn the reason for the language.
- Legislation, including applicable governor's vetoes, as it relates to LAW's Civil Division budgets for FY 21 through FY 22, to learn about the executive branch's response to the restrictive appropriation language.
- Communications from the attorney general to legislators concerning *Janus* related activities of LAW to understand the executive branch's view of the restrictive appropriation language.
- Attorney general *Janus* related opinions and governor executive orders to identify the legal basis for LAW's actions.
- Newspaper articles, and internet and Westlaw searches, to identify *Janus* related cases where the State of Alaska was a defendant or filed an amicus brief.
- Open contracts for outside counsel between July 1, 2020 and April 30, 2022, to identify *Janus* related contracts by judgmentally selecting LAW contracts for further review.
- LAW listing of *Janus* related court cases or amicus briefs filed by LAW or LAW's outside counsel, which was matched for completeness against independently identified *Janus* related court cases or amicus briefs filed by LAW or LAW's outside counsel.

-
- A listing of LAW FY 21 and FY 22 expenditures for *Janus* related outside counsel, to identify the amount and funding source for those expenditures.
 - Support for all FY 21 and FY 22 *Janus* related outside counsel expenditures, to confirm expenditures were properly supported and charged to the correct fiscal year, and to identify and schedule the associated *Janus* case.

The legality of LAW's *Janus* related outside counsel expenditures was analyzed by obtaining and reviewing:

- Legal analysis from Legislative Affairs Division of Legal and Research Services (Legislative Legal) concerning legality of LAW expenditures on *Janus* related contracts.
- LAW's response to Legislative Legal position on the legality of LAW expenditures on *Janus* related contracts.
- Analysis, from Legislative Legal, of LAW's arguments regarding limitation on LAW Civil Division appropriation language.
- Legal analysis obtained from a Legislative Audit contracted attorney regarding the strength of opposing arguments presented by Legislative Legal and LAW regarding validity of LAW expenditures.

Representation letters were obtained from the attorney general, deputy attorney general - Civil Division, and director of administrative services confirming complete and accurate information was supplied during the audit.

To gain an understanding of LAW procedures over contracting and posting of expenditures, interviews were conducted with LAW staff. No internal controls were tested as no controls were found significant to the audit objectives.

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APPENDICES

SUMMARY

Appendix A: Memorandum from Legislative Legal Attorney Marie Marx to Legislative Auditor Kris Curtis, August 8, 2022

Appendix B: Letter from Acting Attorney General Sniffen to Representative Josephson, October 29, 2020

Appendix C: Letter from Attorney General Clarkson to House Finance Committee Co-Chairs, February 14, 2020

Appendix D: Letter from Acting Attorney General Sniffen to Legislative Council Chair Senator Gary Stevens, December 31, 2020

Appendix E: Letter from Attorney General Taylor to Legislative Auditor Kris Curtis, September 7, 2022

Appendix F: Memorandum from Legislative Legal Attorney Marie Marx to Legislative Auditor Kris Curtis, September 19, 2022

Appendix G: James Baldwin Legal Analysis, January 3, 2023

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APPENDIX A

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

August 8, 2022

SUBJECT: Department of Law expenditures related to the *Janus* decision
(Work Order No. 33-LS0058)

TO: Kris Curtis
Legislative Auditor

FROM: Marie Marx 
Legislative Counsel

You have asked for an opinion regarding the Department of Law's expenditure of funds related to *Janus v. AFSCME*.¹ Specifically, you asked:

1. Did [the Department of Law], by funding contracts related to *Janus* from the FY 21 and FY 22 "Civil Division Except Contracts Relating to the Interpretation of *Janus v. AFSCME*" appropriations, violate AS 37.07.080(a), Article IX, Section 13 of the Alaska Constitution, or any other state law.

2. What laws, court cases, or other legal evidence exists to support or challenge [the Department of Law]'s arguments regarding the legality of the civil division's appropriation language for FY 21 and FY 22, as documented in [the Department of Law]'s letters to Representative Josephson and Senator Stevens, and in [the Department of Law]'s legal review of the FY 21 operating budget.

1. Background.

As part of the FY 21 operating budget, the legislature included the following appropriations for the Department of Law:

| | | | |
|---|-------------------|-------------------|-------------------|
| Civil Division Except Contracts Relating to Interpretation of <i>Janus v</i> <i>AFSCME</i> | 48,036,200 | 21,113,900 | 26,922,300 |
|---|-------------------|-------------------|-------------------|

* * *

¹ 138 S.Ct. 2448 (2018).

APPENDIX A

(Continued)

Kris Curtis
 August 8, 2022
 Page 2

| | | |
|--|---------------|---------------|
| Legal Contracts Relating to Interpretation of Janus v AFSCME Decision | 20,000 | 20,000 |
| Legal Contracts Relating to Interpretation of Janus v AFSCME Decision ² | 20,000 | |

As part of the FY 22 operating budget, the legislature included the following appropriations for the Department of Law:

| | | | |
|---|-------------------|-------------------|-------------------|
| Civil Division Except Contracts Relating to Interpretation of Janus v AFSCME | 49,930,400 | 22,854,200 | 27,076,200 |
|---|-------------------|-------------------|-------------------|

* * *

| | | |
|--|---------------|---------------|
| Legal Contracts Relating to Interpretation of Janus v AFSCME Decision | 20,000 | 20,000 |
| Legal Contracts Janus v AFSCME Decision ³ | 20,000 | |

In both operating budgets, the governor vetoed the appropriation for "Legal Contracts Relating to Interpretation of Janus v AFSCME Decision,"⁴ and the legislature did not override that veto. Under the remaining appropriation in both the FY 21 and FY 22 operating budgets to the Department of Law, Civil Division, the civil division may not therefore expend funds for "Contracts Relating to Interpretation of Janus v AFSCME."

In a letter dated October 29, 2020, from acting Attorney General, Ed Sniffen, Jr., the Department of Law addressed the above restriction in the FY 21 operating budget.⁵ The Department of Law contended that

² Sec. 1, ch. 8, SLA 2020, page 23, line 29, through page 25, line 9.

³ Sec. 1, ch. 1, SSSLA 2021, page 24, line 29, through page 26, line 4.

⁴ See House Journal 2182 - 2184 (May 18, 2020); House Journal 1375 - 1377 (April 16, 2021).

⁵ Letter from Clyde "Ed" Sniffen, Jr. to Representative Andrew Josephson Re: *Letter Dated October 13, 2020* (Oct. 29, 2020) (identifying that the Department of Law, Civil Division, has outsourced work to Consovoy McCarthy in the matter of *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020), cert. denied, 141 S. Ct. 2795, 210 L. Ed. 2d 928 (2021)).

APPENDIX A

(Continued)

Kris Curtis
August 8, 2022
Page 3

[r]estricting the Department's spending authority in this manner raises issues under the confinement clause of the Alaska Constitution which has been interpreted to prohibit an appropriations bill from administering a program of expenditures Accordingly, appropriation language that attempts to restrict the Attorney General from entering into contracts related to a particular legal matter--which would include not only contracts with outside counsel, but also with necessary legal experts--raises significant legal issues and impedes the Attorney General's ability to fulfill statutory duties as head legal advisor and litigator for the state. Further, an appropriation structure of this nature attempts to restrict the governor's ability to initiate court action to enforce "any constitutional or legislative mandate" under art. III, sec. 16, of the Alaska Constitution.⁶

In a subsequent letter dated December 31, 2020, from acting Attorney General, Ed Sniffen, Jr., the Department of Law reiterated its position set forth above and also contended that:

[The] expenditures that have occurred in FY'21 for outside counsel contracts are not expenditures "relating to interpretation of *Janus v. AFSCME*." Outside counsel has not been providing advice on the interpretation of *Janus*; rather, outside counsel has been assisting the State in defense of a few different lawsuits. I hope you will see that the context here differs from the appropriation language and alleged restriction on the Department of Law's ability to spend money on outside counsel.⁷

For the reasons discussed below, the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel in the matter *Belgau v. Inslee* violates art. IX, sec. 13, of the Alaska Constitution and AS 37.07.080(a), and should be remedied.⁸

⁶ *Id.* (citing *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001)).

⁷ Letter from Clyde "Ed" Sniffen, Jr. to Senator Gary Stevens Re: *Legal Contracts Relating to Interpretation of Janus v. AFSCME* (Dec. 31, 2020). The attorney general expressed similar opinions in a memorandum reviewing the FY 21 operating budget. *See* 2020 Op. Alaska Att'y Gen. (April 2).

⁸ Per your request in our telephone call on July 26, 2022, the analysis in this memorandum is limited to the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel in the matter *Belgau v. Inslee*. Evaluation of the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel in other cases relating to the interpretation of *Janus v. AFSCME* would follow a similar analysis. Whether a contract relates to interpretation of *Janus v. AFSCME* would be a fact-specific inquiry.

APPENDIX A

(Continued)

Kris Curtis
August 8, 2022
Page 4

2. Discussion

The legislature's power over appropriations is plenary. Under the Alaska Constitution, no expenditure may be made from the public treasury without a valid appropriation by the legislature.⁹ In order to validly exercise this power, the legislature must comply with the procedural requirements of the state constitution, including the confinement requirement and title requirement (art. II, sec. 13) and, if necessary, the veto override requirement (art. II, sec. 16).

However, the legislature's appropriation power is not unlimited. The governor has some control over state expenditures, most significantly the item veto power over appropriations.¹⁰ The separation of powers doctrine that is implied in the state constitution also limits the extent of the legislature's power.¹¹ The separation of powers doctrine prohibits one branch of government from encroaching upon and exercising powers of another branch. The governor is the state's chief executive and is responsible for the operation of the executive branch of government.¹² The legislature cannot impinge on the power of the governor to control the operation of the executive branch. There is no precise means to determine where the legislature's power ends and the governor's power begins in this area.

In *Legislature v. Hammond*, a superior court was faced with the question of whether a series of appropriations were validly enacted or unconstitutionally invaded the authority of the governor.¹³ After thoughtfully reviewing the development of the legislature's appropriation power in Alaska and decisions in other states, the court began its examination of the challenged appropriations with the presumption that validly enacted legislation (appropriation) is constitutional unless its unconstitutionality can be clearly established. The court then concluded, *inter alia*, the legislature could prohibit the use of specified funds for a particular purpose (ban the use of the court system operating appropriation to move the Supreme Court clerk's office from Juneau),¹⁴ but the legislature could not involve itself in the routine execution of the law (appropriate funds to the legislative council for engineering studies on a public works project; specify a particular brand and model of tractor to be purchased with an appropriation; provide a detailed

⁹ Art. IX, sec. 13, Constitution of the State of Alaska.

¹⁰ Art. II, sec. 15, Constitution of the State of Alaska.

¹¹ *Bradner v. Hammond*, 553 P.2d 1, 5 - 6 (Alaska 1976).

¹² Art. III, secs. 1 and 16, Constitution of the State of Alaska.

¹³ *Legislature v. Hammond*, Case No. 1JU-80-1163 Civil, Memorandum of Decision (May 25, 1983).

¹⁴ *Id.* at 57 - 58.

APPENDIX A

(Continued)

Kris Curtis
August 8, 2022
Page 5

scheme for administration of an appropriation),¹⁵ or impose a duty on an agency as a condition attached to an appropriation.¹⁶

Later, the Alaska Supreme Court, in *Knowles*, (the case cited by the Department of Law in this matter) held:

[The Alaska Constitution] gives the legislature the power to legislate and appropriate. It gives the governor the power to influence the state's budget by requiring him or her to submit a proposed budget and general appropriation bill to the legislature and by striking or reducing items appropriated by the legislature. The governor's item veto power is thus one of limitation. The governor can delete and take away, *but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature.*¹⁷

Thus, in defining the governor's veto powers, the *Knowles* court held:

Altering the purpose of the appropriation by striking descriptive words interferes with that unity because the result is no longer the item the legislature enacted. In comparison, striking the amount is the equivalent of a complete veto of a particular appropriation. And reducing the amount is a result the constitution expressly permits.¹⁸

Therefore, the Alaska Supreme Court recognized the power of the legislature to use descriptive words to describe the purpose of an appropriation, and the governor's lack of power to strike such descriptive words.

Next, the *Knowles* Court adopted the *Hammond* factors used in the superior case cited above to be used in determining compliance with the confinement clause, holding

that to satisfy the confinement clause, the qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not

¹⁵ *Id.* at 20 - 21, 52 - 53, and 54 - 56.

¹⁶ *Id.* at 56 - 57.

¹⁷ *Knowles*, 21 P.3d at 371 (Alaska 2001) (emphasis added).

¹⁸ *Id.* at 371 - 72.

APPENDIX A

(Continued)

Kris Curtis
August 8, 2022
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extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.¹⁹

The extent of the Department of Law's authority to expend funds depends on the corresponding appropriations. AS 37.07.080(a) provides:

Except as limited by executive decisions of the governor, the mission statements and desired results issued by the legislature, appropriations by the legislature, and other provisions of law, the several state agencies have full authority for administering their program service assignments and are responsible for their proper management.

Under this statute and the plain language of the FY 21 and FY 22 operating budgets, the Department of Law's authority to contract for legal services is clearly limited by the scope of the appropriations to the Department of Law. AS 37.07.120(3) defines an appropriation as "a maximum amount available for expenditure by a state agency for a stated purpose set out in an appropriation act[.]" The "appropriation item" is the fundamental unit of an appropriation. An appropriation item is "a sum of money dedicated to a particular purpose" and consists of the amount being appropriated, a source of funds, and a purpose for which the funds are to be expended.²⁰ The executive branch cannot exceed the amount appropriated or vary from the purpose for which the funds are appropriated.²¹ The governor may transfer funds between allocations and objects of expenditure, but the governor may not transfer funds between appropriations.²² Only the legislature may transfer funds between appropriations and it may do so only by passing an act of the legislature.²³

Here, the purpose of the appropriations at issue for the Department of Law were expressly for the "Civil Division *Except* Contracts Relating to Interpretation of *Janus v AFSCME*."²⁴ To use those funds to outsource litigation on matters relating to the interpretation of *Janus* violates the purpose identified by the legislature in making those appropriations.

¹⁹ *Id.* at 377.

²⁰ *Id.* at 374.

²¹ *Knowles*, 21 P.3d at 371; art. II, sec. 15, Constitution of the State of Alaska; AS 37.07.080(a).

²² AS 37.07.080(e).

²³ *Id.*

²⁴ Sec. 1, ch. 8, SLA 2020, page 23, line 29 through page 25, line 9 (emphasis added).

APPENDIX A

(Continued)

Kris Curtis
August 8, 2022
Page 7

The governor has discretion to fashion the manner in which the purposes of each appropriation will be achieved, within the constraints of statutory mandates relating to program execution and to the operation of specific programs. The governor may generally shift positions, functions, and funds and reorganize governmental units as he determines is best to achieve the purposes of an appropriation. In cases where an appropriation funds several different programs or subprograms within an agency, the governor may be able to reduce or eliminate funding to certain programs or subprograms in order to increase funding for other programs so as to best achieve the overall purposes of the appropriation. It is difficult for the legislature to prevent these kinds of internal changes in the executive branch. The approval of the detailed agency and program budgets by the legislative finance committees is evidence of legislative intent and is useful in construing how an appropriation is to be implemented, but because the detailed agency budgets are not part of the budget bill and not voted upon by the entire legislature, those detailed budgets are not binding on the governor.

Here, however, there is an explicit restriction on using funds from the Department of Law, Civil Division, for contracts related to the *Janus* decision. While the legislature cannot manage the operations of the executive branch, or prevent the governor from shifting funds within a particular appropriation, it does have the power to make policy decisions on which programs to fund with public funds. Moreover, despite the Department of Law's assertions, nothing in the appropriation at issue prevents the Department of Law or Attorney General from fulfilling its duties as head legal advisor and litigator. In fact, the Department of Law could use in-house resources to pursue matters related to the *Janus* decision without running afoul of the appropriation language at issue. Thus, the restriction on contracts in no way restricts the governor's power or ability to initiate court action - on the *Janus* matter or any other issue.

The Department of Law further contends that the appropriation language has the effect of administering a program of expenditures. While there is always a risk that if litigated a court might agree, in my opinion, it is more likely that a court would conclude that because the restrictive language is limited to a single appropriation within the comprehensive operating budget, the legislature is not administering a program of expenditures and that the restriction attached to the appropriation must be enforced. Significantly, the legislature appropriated \$20,000 for the explicit purpose of contracting with outside firms to litigate matters relating to the *Janus* decision, and the governor vetoed those funds. It is unlikely that a court would find that the legislature was impermissibly administering a program of expenditures, when the legislature specifically appropriated funds for the expenditure at issue, but the governor vetoed that (nominal) appropriation. Because the governor vetoed funds appropriated for that purpose, the governor may not now expend other funds for that same purpose. To do so would be a violation of an explicit restriction against expenditure, as enacted into law by the legislature.

The Department of Law also contends that its expenditures for outside counsel in the matter *Belgau v. Inslee* are not expenditures relating to interpretation of *Janus*. This is

APPENDIX A

(Continued)

Kris Curtis
August 8, 2022
Page 8

incorrect. AS 01.10.040(a) directs that words and phrases be construed according to their common and approved usage.²⁵ The FY 21 and FY 22 operating budgets' use of "Contracts Relating to Interpretation of Janus v AFSCME Decision" means exactly what it says — any contract related to interpretation of *Janus*. The Department of Law acknowledges it contracted with outside counsel for the preparation of an amicus brief in the matter *Belgau v. Inslee*.²⁶ The state's amicus brief filed with the Ninth Circuit explicitly argues, "Because the [Ninth Circuit's] decision conflicts with the Supreme Court's decision in *Janus* and presents several questions of 'exceptional importance,' Fed. R. App. P. 35(b)(1)(B), the Court should grant the petition for rehearing en banc."²⁷ The state's amicus brief filed with the United States Supreme Court in the matter contended the Court should grant certiorari "because the decision below squarely conflicts with *Janus v. AF-SCME, Council 31*."²⁸ The filings made by outside counsel on behalf of the State of Alaska in *Belgau v. Inslee* explicitly relate to interpretation of *Janus*.

In sum, the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel in the matter *Belgau v. Inslee* violates art. IX, sec. 13, of the Alaska Constitution and AS 37.07.080(a), and should be remedied.

Please let me know if I may be of further assistance.

MYM:mjt
22-277.mjt

²⁵ See also, *Wells v. State*, 102 P.3d 972, 975 (Alaska App. 2004) ("When the legislature uses a word or phrase but does not define it, a court should normally assume that the legislature intended the word or phrase to have its common, ordinary meaning.").

²⁶ Letter from Clyde "Ed" Sniffen, Jr. to Representative Andrew Josephson Re: *Letter Dated October 13, 2020* (Oct. 29, 2020) (identifying that the Department of Law, Civil Division, had outsourced work to Consovoy McCarthy in the matter of *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020), cert. denied, 141 S. Ct. 2795, 210 L. Ed. 2d 928 (2021)).

²⁷ Brief for the State of Alaska as Amicus Curiae at p. 2, *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020), cert. denied, 141 S. Ct. 2795, 210 L. Ed. 2d 928 (2021)).

²⁸ Brief for the States of Alaska, Alabama, Arizona, Arkansas, Idaho, Indiana, Louisiana, Montana, South Carolina, South Dakota, Texas, Utah, and West Virginia as Amici Curiae in Support of Petitioners at * 2, *Belgau v. Inslee*, 2021 WL 1089791 (Mar. 18, 2021).

APPENDIX B



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Main: 907-269-5100
Fax: 907-276-3697

October 29, 2020

Via Email

The Honorable Andrew Josephson
Alaska House of Representatives
Email: Rep.Andy.Josephson@akleg.gov

Re: *Your Letter Dated October 13, 2020*

Dear Representative Josephson:

In your letter dated October 13, 2020, you inquired about the amicus brief prepared by Consovoy McCarthy, PLLC, for *Belgau v. Inslee*, 19-35137 (9th Cir. Oct 12, 2020). As you are aware, attorneys general regularly submit amicus briefs in federal court cases of importance to their states. Alaska has a strong interest in this case because the panel's decision impacts the constitutional rights of Alaska state employees. Alaska's Attorney General issued a legal opinion on August 27, 2019 concluding that the State's payroll deduction process was constitutionally untenable under *Janus v. AFSCME* and recommended actions to bring the state into compliance. The validity of these actions is currently being litigated in state court (*State of Alaska v. ASEA*) and the Attorney General had a duty to consider submitting an amicus brief. Ultimately the work was outsourced to Consovoy McCarthy, a firm with relevant expertise that the Department of Law already had under contract. The Department expects Consovoy McCarthy's total costs for preparing the brief to be under \$6,000, less than what it would have cost to prepare using in-house attorneys.

You raised concern over the Department's use of appropriated funds for outside counsel related to *Janus*. As noted in our review of HB 205 for the Governor (available [here](#), pages 7-8), the appropriation structure adopted for the Department of Law this year was unusual. The Department is comprised of a civil division and a criminal division and not organizationally separated by particular legal matters. Restricting the Department's spending authority in this manner raises issues under the confinement clause of the Alaska Constitution which has been interpreted to prohibit an appropriations bill from administering a program of expenditures. See *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001). In carrying out the state's legal business, the Alaska Supreme Court has held that the Attorney General has the powers and duties ascribed to that position under the common law which includes the authority to bring actions that the Attorney General considers to be in the public interest. See *Public Defender Agency v.*

APPENDIX B (Continued)

Representative Andrew Josephson
Re: *Letter Dated October 13, 2020*

October 29, 2020
Page 2 of 2

Superior Court, 534 P.2d 947 (Alaska 1975). Accordingly, appropriation language that attempts to restrict the Attorney General from entering into contracts related to a particular legal matter—which could include not only contracts with outside counsel, but also with necessary legal experts—raises significant legal issues and impedes the Attorney General’s ability to fulfill statutory duties as head legal advisor and litigator for the state. Further, an appropriation structure of this nature attempts to restrict the governor’s ability to initiate court action to enforce “any constitutional or legislative mandate” under Article III, sec. 16, of the Alaska Constitution. The *Janus v. AFSCME* decision concerned core First Amendment issues and related litigation involves the application of the First Amendment.

Please contact me with any additional questions.

Sincerely,



Clyde “Ed” Sniffen, Jr.
Acting Attorney General

cc: Rep. Matt Claman, House Judiciary Chair (via email)
Miles Bakes, Legislative Director, Governor’s Legislative Office (via email)
Sharla Mylar, Legislative Liaison, Department of Law (via email)

APPENDIX C



THE STATE
of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Main: (907) 269-5100
Fax: (907) 269-5110

February 14, 2020

The Honorable Neal Foster
Co-Chair, House Finance Committee
State Capitol Room 505
Juneau, AK 99801

The Honorable Jennifer Johnston
Co-Chair, House Finance Committee
State Capitol Room 511
Juneau, AK 99801

Re: *Department of Law FY 2021 Budget*

Dear Representative Foster and Representative Johnston:

This week, the House Finance Subcommittee for the Department of Law's Budget approved several amendments that will drastically and significantly reduce our budget, affecting the services we provide to our clients and the public. The net total unrestricted general fund (UGF) reduction recommended by the subcommittee is \$755,000. Coupled with a reduction of \$750,000 to the Civil Division for FY 2020, this is a loss of \$1.5 million in UGF for the Civil Division over two years—on top of an 18.6% reduction to the entire department's UGF since FY 2014.

While I understand the state's fiscal crisis and the need to be very judicious with our budget, my department is already operating on a tight budget and cannot sustain such reductions. Although recently enacted legislation has improved the resources of the Criminal Division, the department still has 55 fewer positions today than it did in FY 2014. Further reductions to the budget will continue to hamper the department's ability to recruit and retain high-quality attorneys and staff for the positions we still have. Recruitment and retention of quality attorneys are already significant problems that we are endeavoring to address with our already reduced budget.

Further, cutting the Department of Law's Civil Division budget is counterproductive to the State's fiscal well-being. The Department of Law represents only slightly over 1% of the state's total budget for all agencies, yet our Civil Division

APPENDIX C

(Continued)

House Finance Committee Chairs
Re: *Department of Law Budget*

February 14, 2020
Page 2 of 3

generates the most revenue for the state of any department. Our efforts to recover taxes and royalties resulted in \$300 million in revenue to the state in calendar year 2019 alone, and billions over the last three decades. Our tort and workers' compensation defense saves the state tens of millions of dollars every year, and our consumer protection function has netted the state over \$11 million in the last fifteen years. These examples of revenue-generating work are all functions of the Civil Division, which is the target of the committee's reductions.

The revenue-generating function of the department is an important service to Alaskans, but is not its only, or even most important, function. A core mission of the department, and a responsibility I take very seriously, is the protection of the constitutional and civil rights of Alaskans. The department often must step forward to engage in legal battles in order to protect the rights of Alaskans. This is particularly and most often true in the areas of consumer protection and criminal prosecution.

The proposed reductions from the subcommittee come from two amendments. The first cuts \$375,000 and three positions from the Special Litigation section. The stated reason for this reduction is confusing, and it appears that the subcommittee has a misunderstanding of a recent realignment. Three positions and associated funding were moved to Special Litigation from our Commercial and Fair Business section in order to accommodate the movement of consumer protection work from one section to another. Removing this funding will compromise our ability to protect consumers.

The second reduction is more straightforward. The subcommittee deleted \$400,000 in UGF from the Labor and State Affairs section, and the stated purpose of this reduction is to constrain my use of outside counsel for the *Janus v. AFSCME* case. The subcommittee has commented often on that case and the amount of that contract, which is \$600,000. But the Labor and State Affairs section performs important work on a wide array of issues, including statewide governance issues and aid-to-agency advice for a broad swath of state government agencies. This is the reason that we assigned this particular contract to the Labor and State Affairs component, just as outside counsel on oil and gas matters would be assigned to the Natural Resources component.

I will always respect those who may disagree with me on various legal issues, but the Committee should understand that significantly reducing the department's budget to try to force me to forego hiring outside counsel for any particular case, including this important case regarding the First Amendment rights of state employees, will not have that effect. The Department of Law will continue to retain outside counsel as I deem necessary based upon the circumstances presented by each case. I urge you to reject these amendments, which will only result in further difficulty for the department in its effort to address critical issues important to the people of Alaska.

APPENDIX C

(Continued)

House Finance Committee Chairs
Re: *Department of Law Budget*

February 14, 2020
Page 3 of 3

Thank you for your consideration. I am available at your convenience to meet with you and other members of the Finance Committee to discuss this in more detail.

Sincerely,



Kevin G. Clarkson
Attorney General

cc: Suzanne Cunningham, Governor's Legislative Office

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APPENDIX D



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Main: 907-269-5100
Fax: 907-276-3697

December 31, 2020

Via Email

The Honorable Gary Stevens
Chair of Legislative Council
Alaska State Senate
Email: senator.gary.stevens@akleg.gov

Re: *Legal Contracts Relating to Interpretation of Janus v. AFSCME*

Dear Chair Stevens:

We have further reviewed concerns by the Legislative Council regarding expenditures related to the *Janus v. AFSCME* decision. As noted in our correspondence dated October 29, 2020 to Representative Josephson regarding the preparation of an amicus brief in *Belgau v. Inslee*, 19-351347 (9th Cir. Oct. 12, 2020), the Department of Law determined that this expenditure on outside counsel was appropriate under the circumstances, and we continue to believe that these types of expenditures are appropriate and lawful.

As previously explained, the Attorney General is responsible for the state's legal business including the defense of lawsuits brought against the State. This responsibility inevitably involves assessing whether the use of outside contractors to perform legal work, participate as expert witnesses in litigation, or to provide other assistance in relation to litigation or legal advice would be helpful. These are strategic decisions that clearly fall within the constitutional and common law authority of the state Attorney General. *See Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975). These strategic decisions are also integral to carrying out the state program assigned to the Department of Law—the state's legal business—and as noted previously the Alaska Constitution prohibits use of an appropriations bill to administer a state program. *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001). If the attempt to restrict the Attorney General's ability to utilize outside contractors violates the confinement clause (which is our position), then article IX, section 13 powers are not implicated because the purported appropriation is not actually an appropriation at all, but instead an improper effort to utilize an appropriations bill to administer a state program.

However, this is not the only reason the expenditures are appropriate. We believe the expenditures that have occurred in FY'21 for outside counsel contracts are not expenditures "relating to interpretation of *Janus v. AFSCME*." Outside counsel has not been providing advice on the interpretation of *Janus*; rather, outside counsel has been assisting the State in defense of a few different lawsuits. I hope you will see that the context here differs from the appropriation language and alleged restriction on the Department of Law's ability to spend money on outside counsel.

APPENDIX D

(Continued)

The Honorable Gary Stevens
Re: *Legal Contracts Relating to Interpretation of Janus v. AFSCME*

December 31, 2020
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The State has been sued in two federal cases regarding the lawfulness of employee payroll deductions made by the State, collective bargaining agreement terms, Alaska statutes and an Administrative Order. *See Creed and Riberio v. ASEA, Comm. Tshibaka 20-35743* (Ninth Circuit); *Woods v. ASEA, Comm. Tshibaka, 20-35954* (Ninth Circuit). The State is also a party to similar litigation in state court. *State of Alaska v. ASEA*, No. 3AN-19-9971 CI. The Ninth Circuit's decision in *Belgau* involved issues very similar to the ones raised in those cases. Therefore, the Ninth Circuit's conclusions were of significant interest to the Department of Law because that case could become a precedent that would apply to the pending Alaska cases. Although the Supreme Court's decision in *Janus* is certainly a part of the legal analysis in the lawsuits filed against the State, it would be an oversimplification to say that the expenditure on outside counsel was merely related to an "interpretation of *Janus v. AFSCME*." In fact, the expenditures in FY'21 have mainly involved litigation strategy and defending the State's position—not on providing an interpretation or assisting the Attorney General in interpreting *Janus*.

Even assuming that the purported restriction in HB 205 (and vetoed) could restrict the Department from utilizing outside counsel to assist the Attorney General in forming a legal opinion on *Janus*, such a restriction could not reasonably be interpreted to hamstring the Department's ability to make the complex and strategic decisions involved in carrying out the Department's mission to conduct the legal affairs of the State. At the heart of this statutory mission is responding to court actions brought against the State.

For these reasons, we maintain our position that the expenditures on outside counsel have been appropriate. We are in the middle of at least two federal court cases for which outside counsel is most up to speed and well-suited for the task. This allows in-house resources, which are also stretched thin, to focus on other pressing matters of the State. It would be difficult to transition the cases midstream, even though we are focused in the long-term on limiting the use of outside counsel for these types of matters.

Nonetheless, we do appreciate the Council's perspective and wish to work cooperatively with the Legislature. Accordingly, our Department will take a careful look at our contracts with outside counsel that relate in some way to the *Janus* decision and will seek to maximize the use of in-house resources and decrease the use of outside counsel when possible and when appropriate.

Sincerely,



Clyde "Ed" Sniffen, Jr.
Acting Attorney General

cc: Miles Baker, Governor's Office Legislative Director
Megan A. Wallace, Legislative Office Legal Services Director

APPENDIX E



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

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September 7, 2022

Kris Curtis, Director
Division of Legislative Audit
P.O. Box 113300
Juneau, Alaska 99811
Email: legaudit@akleg.gov

RECEIVED

SEP 07 2022

LEGISLATIVE AUDIT

Re: Response to August 11, 2022 Letter

Dear Ms. Curtis:

I am writing in response to your August 11, 2022 letter wherein you requested the Department of Law's review and response to Legislative Legal's memorandum on the expenditure of funds for outside counsel contracts related to the interpretation of *Janus v. AFSCME*.¹ This response supplements the letters that have already been provided to your office sent to the legislature when similar questions were raised. As previously stated by this office, any attempt to constrain the discretion of the Attorney General through an appropriation bill violates the confinement clause of the Alaska Constitution² and represents an improper encroachment on the powers of a separate branch of government.³ We disagree with Legislative Legal's conclusion that the legislature can use the appropriations process to limit the way in which the Attorney General can provide legal services to the State and its agencies.

¹ The Department of Law notes that despite the necessity of stating a remedy, Legislative Legal's memorandum does not identify how this could be remedied. The Alaska Supreme Court has warned against the issuance of advisory opinions when no actual relief is available. *Ahtna Tene Nene v. State, Dep't of Fish & Game*, 288 P.3d 452, 457 (Alaska 2012) ("A controversy is a claim that affects the legal rights of a party; it is definite and concrete ... *admitting of specific relief* through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts")(emphasis in original)(internal quotations omitted).

² Art. II, sec. 13, Alaska Const.

³ "The doctrine prohibits one branch from encroaching upon and exercising the powers of another branch." *Bradner v. Hammond*, 553 P.2d 1, 5 n.8 (Alaska 1976).

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(Continued)

Kris Curtis, Director
Re: Letter dated August 11, 2022

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I believe the background of this matter has been well vetted and is known by all interested parties.⁴ And, while we are in general agreement that the legislature has broad appropriation authority, it is not an unfettered power.⁵ The legislature's appropriation authority is still constrained by the Alaska Constitution, both directly⁶ and indirectly.⁷ Moreover, Alaska's constitution recognizes strong executive control over state expenditures⁸ and the Alaska Supreme Court has instructed the legislature to avoid the administration of executive branch activities through the use of appropriation power.⁹ In contrasting the legislature's authority over appropriations and its authority to detail the duties of executive branch agencies, the Court stated:

The process for enacting substantive bills gives meaningful opportunity for public notice and comment. Article II, section 14 of the Alaska Constitution requires three readings of a substantive bill, on three separate days, " 'to ensure that the legislature knows what it is passing' and to ensure an opportunity for the expression of public

⁴ See LTR from AG Clarkson to Chairs of House Finance Committee dated Feb. 14, 2020; LTR from Acting AG Sniffen to Rep. Andy Josephson dated Oct. 29, 2020; LTR from Acting AG Sniffen to Chair Gary Stevens dated Dec. 31, 2020; LTR from AG Taylor to Rep. Andy Josephson dated Jan. 21, 2022; MT Ms. Kris Curtis, Legislative Auditor FRM Marie Marx, Legislative Counsel, dated Aug. 8, 2022.

⁵ See *State v. Alaska Legislative Council*, No. S7612 at p. 16 (Alaska August 12, 2022) ("[The Constitution] create[s] a strong executive branch with a strong control on the purse strings of the State and limit[s] the legislature's power to impose current spending priorities on future governors and legislatures")(internal quotations omitted); *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) ("The confinement clause prevents the legislature from enacting substantive policy outside the public eye. The process for enacting substantive bills gives meaningful opportunity for public notice and comment").

⁶ Art. II, Sec. 13, Alaska Const.

⁷ *State v. Alaska Legislative Council*, No. S7612 at p. 15 (Alaska August 12, 2022)("We acknowledge that none of the Constitution's budgetary clauses expressly prohibit forward funding. We reiterate, however, that 'often what is implied is as much a part of the constitution as what is expressed.' Implicit in the budgetary clauses is a requirement that the budget be determined annually; when examined together, the budgetary clauses, the sources from which they were drawn, the underlying policies they were designed to promote, and our case law all support this conclusion").

⁸ *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977). See also *State v. Alaska Legislative Council*, No. S7612 at p. 15-16 (Alaska August 12, 2022).

⁹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

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opinion and due deliberation.” This opportunity may be stifled if substantive provisions are attached to appropriation bills in the form of conditions. Unlike other legislation, appropriations are not subject to the single-subject requirement of article II, section 13—a requirement meant to avoid logrolling. Allowing substantive enactments in an appropriation bill may also be problematic because appropriation bills are frequently a product of a free conference committee and, as such, must be voted on in their entirety and cannot be amended on the floor. Consequently, as the superior court noted, the confinement clause prevents a legislator seeking to advance unpopular legislation from burying it in a popular appropriation measure. Strict enforcement of constitutional limits helps ensure that the public will be fully informed of proposed legislation.¹⁰

The Alaska Supreme Court has made clear that the legislature is without authority to alter or negate the actions of the executive branch through the use of an appropriation bill.¹¹

CONFINEMENT CLAUSE

While the memorandum enclosed with your letter purports to find a constitutional error, the Alaska Supreme Court has already stated that legislative attempts to limit executive discretion in staffing and managing state programs violate art. II, sec. 13 of the Alaska Constitution.¹² In *Knowles*, the legislature attempted to limit the activities of the Alaska Seafood Marketing Institute (ASMI) by refusing to fund positions outside Alaska paid at a range 21 or higher on the state salary scale.¹³ The Court applied the *Hammond* factors and determined that the attempt to administer the actual operation of a state program in an appropriation bill violated the confinement clause.¹⁴ *Knowles* recognized that the executive branch has wide discretion in the expenditure of appropriated funds. The legislature’s attempt to control which legal matters are pursued by the Department of Law through the use of an appropriation bill ignores the role of the Attorney General in

¹⁰ *Id.* (internal citations omitted).

¹¹ *See State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 117 (W. Va. 2002) (“no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing its inherent constitutional functions”).

¹² *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 380 (Alaska 2001).

¹³ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 370 (Alaska 2001).

¹⁴ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 381 (Alaska 2001).

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determining the nature and course of litigation and the practical operation of the Department of Law.

The appropriations in question identified the “Civil Division Except Contracts Relating to Interpretation of *Janus v. AFSCME*” and “Legal Contracts Relating to Interpretation of *Janus v. AFSCME* Decision.” An effort to restrict the spending authority of the Department of Law based on the subject matter of legal matters raises issues under the confinement clause similar to the legislature’s attempt to control the operation of ASMI in *Knowles*.

The Department of Law carries out the state’s legal business, and the Alaska Supreme Court has held that in carrying out those functions the Attorney General has the powers and duties ascribed to that position under the common law, including the authority to bring actions that the Attorney General considers to be in the public interest.¹⁵ Neither the Alaska Constitution nor the legislation establishing the Department of Law limits or deprives the Attorney General of the power to appoint outside counsel when, in the wide discretion granted, the Attorney General believes such an arrangement to be in the public interest.¹⁶ Accordingly, the language in the fiscal year 2021 and fiscal year 2022 appropriation bills that attempted to restrict the Attorney General from entering into contracts regarding particular legal matters violated the confinement clause because it was an attempt to restrict the Attorney General’s ability to fulfill his statutory duties as head legal advisor and litigator for the state.¹⁷

The legislature is without authority to use an appropriation bill to pick and choose which cases the state will prosecute or defend, just as it is without power to direct where and how state employees are to be employed.

¹⁵ *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975).

¹⁶ *State v. Breeze*, 873 P.2d 627, 634–35 (Alaska App. 1994)(holding appointment of special prosecutor valid in absence of a law limiting the power).

¹⁷ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950–51 (Alaska 1975)(“In that field[control of litigation], the discretion of the Attorney General is plenary. He is a constitutional officer . . . and, as such, the head of the state's legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state”)(*internal citations omitted*). Moreover, the courts have frowned on the state wielding its appropriation power for purely political purposes. *See* Order Granting Summary Judgment, *American Civil Liberties Union of Alaska v. Dunleavy*, Superior Court No. 3AN-19-08349CJ (Oct. 16, 2020).

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SEPARATION OF POWERS

The Office of the Attorney General is established by statute¹⁸ in furtherance of art. III, sec. 16 of the Alaska Constitution. Under law, “[t]he attorney general is the legal advisor of the governor and other state officers.”¹⁹ The Attorney General is required to defend the Constitution of the State of Alaska, bring, prosecute, and defend all necessary and proper actions in the name of the state, and administer state legal services.²⁰

The legislature, through the exercise of its appropriation power, sought to exact a monetary punishment on the Office of the Attorney General for the very performance of its duties under the law. This level of political coercion is exactly the issue that the separation of powers doctrine seeks to prevent. “The doctrine prohibits one branch from encroaching upon and exercising the powers of another branch.”²¹ More specifically, the doctrine is breached when “[o]ne department of government usurps the powers of another department [by] exercise[ing] coercive influence on the other.”²² The Attorney General’s duty to defend and prosecute in the name of the state is so entrenched in law that other executive branch agencies must seek the Attorney General’s approval before seeking legal services outside the Department of Law.²³

The idea that the Department of Law’s budget is dependent on the popularity of its decisions, rather than on the Attorney General’s actual assessment of the legal needs of the state, strikes to the core of the separation of powers doctrine. The particular expenditure at issue, the preparation of an amicus brief for *Belgau v. Inslee*, 19-35137 (9th Ct. Oct. 12, 2020), goes directly to the core functions of the Attorney General.²⁴ The Attorney General has broad powers and discretion in the initiation and maintenance of a lawsuit,²⁵ including the designation of outside counsel as deemed necessary by the

¹⁸ AS 44.23.010.

¹⁹ AS 44.23.020.

²⁰ AS 44.23.020(b)(1) - (5).

²¹ *Bradner v. Hammond*, 553 P.2d 1, 5 n.8 (Alaska 1976).

²² *Solomon v. State*, 364 P.3d 536, 546 (Kan. 2015).

²³ AS 36.30.015(d); *State v. Breeze*, 873 P.2d 627, 633–34 (Alaska App. 1994).

²⁴ *Botelho v. Griffin*, 25 P.3d 689, 692 (Alaska 2001) (“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. 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”)(*internal quotations omitted*).

²⁵ See *Botelho v. Griffin*, 25 P.3d 689, 694 (Alaska 2001).

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Attorney General.^{26 27} “As a general rule the attorney general has control of litigation involving the state and the procedure by which it is conducted.”²⁸ Moreover, “[t]he attorney general’s discretion to bring suit is plenary and is beyond the control of any other state department or officer.”²⁹ Importantly, the Alaska Supreme Court has stated:

Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state’s litigation which he thinks best . . . This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.³⁰

When an act is committed to the discretion of a particular branch of state government, interference with that discretion is a violation of the doctrine of separation of powers.³¹ Accordingly, “no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing” its inherent functions.³² The legislature’s attempt to control the discretion of the Attorney General in the prosecution and defense of state litigation by rearranging the Department of Law’s budget for one specific case violates the separation of powers doctrine.

²⁶ *State v. Breeze*, 873 P.2d 627, 633–34 (Alaska App. 1994).

²⁷ The amicus brief highlighted here is a prime example. With the expertise and previous drafting outside counsel had already done, outside counsel was able to draft the brief in less time and for less costs than would likely have occurred internally. Additionally, if the U.S. Supreme Court had taken up *Belgau*, it would have negated the need for further legal services on the cases in which the State is a party. This would have saved the State significant financial resources. These are the types of litigation decisions properly delegated to the Attorney General.

²⁸ *State v. Hagerty*, 580 N.W.2d 139, 147 (N.D. 1998).

²⁹ *State ex rel. Hatch v. Am. Fam. Mut. Ins. Co.*, 609 N.W.2d 1, 4 (Minn. Ct. App. 2000).

³⁰ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

³¹ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

³² *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 117 (W. Va. 2002).

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ETHICAL, PROFESSIONAL, AND OTHER CONSTITUTIONAL CONCERNS

While the Legislative Legal memorandum is constrained to consideration of the confinement clause, separation of powers, and AS 37.07.080(a)³³, other considerations exist that question whether a legal error exists in the Department of Law's expenditure of funds. Initially, we note that the legislature's attempts to de-fund an existing contract may have implications under art. I, sec. 15, of the Alaska Constitution. While we recognize all state contracts and expenditures are subject to legislative appropriation, circumstances can arise that obligate a state agency to meet its obligations despite a lack of supporting appropriations.³⁴

Finally, certain doctrines of ethical and professional responsibility exist in the context of the practice of law and are applicable to this inquiry. The Attorney General is free to appoint outside counsel to ensure the protection of state laws.³⁵ Under the Rules of Professional Conduct applicable to the Alaska Bar, attorneys must possess the time and competence to represent their respective clients.³⁶ The Attorney General's authority to deploy the Department of Law's resources to uphold these standards is unquestioned.³⁷

The termination of an outside counsel arrangement, or other withdrawal from litigation, must be accomplished in a manner that does not have an adverse material effect on the state's interest.³⁸ Under the professional rules, the supervising attorney has the ultimate say in determining the tactics used to prosecute a matter within the bounds of

³³ The purported violation of AS 37.07.080(a) is vaguely defined in the memorandum. The memorandum explicitly recognizes the executive branch's authority to organize and administer appropriations made by the legislature. Consequently, it seems the reference to AS 37.07.080(a) is an attempt to support the memorandum's conclusory statement that there was a constitutional error. In response, the Department of Law would note that AS 24.08.030 explicitly limits appropriation bills to the subject of appropriations as evidence that the legislature's attempt to control discretionary acts related to a *single* specific legal issue violates the purposes of an appropriation bill.

³⁴ See generally *DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 443 (Alaska 1987)(finding attorney services are property rights under art. I, sec. 18, Alaska Const.).

³⁵ *State v. Breeze*, 873 P.2d 627, 632 (Alaska App. 1994).

³⁶ Alaska Rules of Professional Conduct (ARPC) 1.1.

³⁷ *State v. Breeze*, 873 P.2d 627, 633 (Alaska App. 1994); *State v. Hagerty*, 580 N.W.2d 139, 148 (N.D. 1998)("In general, the Rules of Professional Conduct apply to a lawyer representing a governmental entity in the same manner as they apply to a lawyer for a private client").

³⁸ Cmt. to ARPC 1.16.

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Kris Curtis, Director
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his ethical duties.³⁹ For example, under Rule 3.2, the Attorney General is required to avoid undue delay in the pursuit of litigation. To immediately revoke outside counsel agreements and attempt to transfer complex and fact-intensive projects to Assistant Attorneys General, who are already operating at capacity, based on the political whims of the legislative branch may violate the Attorney General's duty under the professional rules.

CONCLUSION

The Attorney General is vested with broad discretion in the administration of the Department of Law and the prosecution of legal matters on behalf of the state. The legislature's attempt to curtail the Attorney General's discretion in litigation matters through the use of an appropriation bill violates the confinement clause contained in art. II, sec. 13 of the Alaska Constitution, and is a violation of the doctrine of separation of powers. The Alaska Supreme Court has long recognized the Attorney General's plenary authority over the state's legal matters. The actions taken by the Attorney General in relation to the amicus brief for *Belgau v. Inslee* do not result in a constitutional error.

Sincerely,



Treg R. Taylor
Attorney General

³⁹ See *Simeon v. State*, 90 P.3d 181, 184 (Alaska App. 2004). In addition, the simple fact that one can conceive of an alternative approach to the representation does not negate the actions of the supervising attorney. See *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974) (“We are not condoning the second-guessing of trial counsel in making the myriad decisions encountered in a criminal trial, for it is a truism that hindsight furnishes 20-20 vision. All that is required of counsel is that his decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions which might have been taken by an attorney skilled in the criminal law, regardless of the outcome of such decisions”).

APPENDIX F

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
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MEMORANDUM

September 19, 2022

SUBJECT: Follow up to Department of Law expenditures related to the *Janus* decision (Work Order No. 33-LS0058)

TO: Kris Curtis
Legislative Auditor

FROM: Marie Marx 
Legislative Counsel

You have asked for a follow up opinion regarding the Department of Law's expenditure of funds related to *Janus v. AFSCME*.¹ Specifically, you requested that I review and respond to the attorney general's letter to you dated September 7, 2022. The opinion of this office with respect to the issues raised in the attorney general's letter remains unchanged. In addition to the analysis provided in my previous memorandum to your office on this topic, I have the following comments in response to the attorney general's September 7, 2022, letter.

1. Confinement clause. The attorney general's letter argues, "The legislature is without authority to use an appropriation bill to pick and choose which cases the state will prosecute or defend, just as it is without power to direct where and how state employees are to be employed."² In support, the attorney general cites *Alaska Legislative Council v. Knowles*,³ a case in which the Alaska Supreme Court analyzed the constitutionality of contingency language for various appropriations in an appropriations bill. Specifically, the attorney general compares the appropriation at issue here with appropriations in *Knowles* that were contingent on the Alaska Seafood Marketing Institute (ASMI) having no employees classified above Range 21 located outside the state. The court held that this contingency violated the confinement clause.⁴ The *Knowles* court explicitly declined to determine whether the legislature's appropriation power gives the legislature authority to

¹ 138 S.Ct. 2448 (2018).

² Letter from Treg Taylor to Kris Curtis at p. 4 (Sept. 7, 2022).

³ 21 P.3d 367 (Alaska 2001).

⁴ *Id.* at 381.

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Kris Curtis
Legislative Auditor
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decide where executive-branch personnel will be located.⁵ The court found that it did not need to reach that issue, because the ASMI appropriation language impermissibly "administered ASMI's program" by not specifying "how these three [ASMI] appropriations were to be used, and instead addressed staffing funded under separate appropriations."⁶ Unlike the ASMI appropriations, the language at issue here specifies how the appropriation is to be spent, no more and no less.

Further, the appropriation at issue here is more similar to the new community residential centers appropriation also considered in *Knowles*. In *Knowles*, the legislature "appropriated funds to the Department of Corrections for 'new community residential centers' (CRCs)."⁷ The appropriation language stated, "This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community Residential Centers. Contracts will be competitively bid."⁸ The governor vetoed this language, arguing that "because the words 'not owned or controlled by municipalities' prevented the department from using this appropriation to contract with municipalities to provide CRC space, they substantively changed existing law, which allowed the commissioner to contract with municipalities."⁹ Legislative council argued in response that "AS 33.30.031(a) allows for use of public or private facilities, and that a decision to fund one type of facility over the other does not enact new law." The Alaska Supreme Court, agreeing with legislative council, held that the CRC appropriation language was constitutional, explaining

Alaska Statute 33.30.031 *authorizes* the commissioner to contract with municipalities. But it does not *require* the commissioner to put municipalities on footing equal with private enterprise as potential providers of new CRC bed space. The appropriation therefore does not preclude the commissioner from fulfilling the department's statutory mandate. Instead, it specifies the type of CRC space the money covers.¹⁰

⁵ *Id.* at 380 ("Because this language did not specify how these three appropriations were to be spent, we do not need to decide here whether, as the council argues, the appropriation power gives the legislature authority to decide where executive-branch personnel will be located.").

⁶ *Id.*

⁷ *Id.* at 381.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 382. (Second emphasis in original).

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As stated in my August 8, 2022, memorandum, nothing in the appropriation at issue prevents the Department of Law from pursuing litigation or the attorney general from fulfilling his duties as head legal advisor and litigator. The Department of Law could use in-house resources to pursue matters related to the *Janus* decision without running afoul of the appropriation language at issue. Thus, the restriction on contracts in no way restricts the attorney general's power or ability to initiate court action - on the *Janus* matter or any other issue.

The attorney general's letter also states, "Neither the Alaska Constitution nor the legislation establishing the Department of Law limits or deprives the Attorney General of the power to appoint outside counsel when, in the wide discretion granted, the Attorney General believes such an arrangement to be in the public interest."¹¹ Under Alaska law, the attorney general *is authorized* to contract for outside counsel, but is not *required* to do so. Like the CRC appropriation in *Knowles*, the language of the appropriation does not prevent the attorney general from fulfilling his statutory and constitutional duties. The appropriation language at issue just limits the type of services, i.e. public or private, that the appropriation covers. Because nothing in state law requires the attorney general to contract with outside counsel under these circumstances, the decision to provide funding for state attorneys and to limit the amount of funding for contracts likely does not violate the confinement clause.

2. Separation of powers. The attorney general's letter contends that, "The legislature, through the exercise of its appropriation power, sought to exact a monetary punishment on the Office of the Attorney General for the very performance of its duties under the law. This level of political coercion is exactly the issue that the separation of powers doctrine seeks to prevent."¹² The appropriations at issue were not "sought to exact a

¹¹ Letter from Treg Taylor to Kris Curtis at p. 4 (Sept. 7, 2022). In support of this proposition, the attorney general cited *State v. Breeze*, 873 P.2d 627 (Alaska App. 1994), a case related to the attorney general's appointment of a special prosecutor due to the attorney general's perceived conflict of interest in a matter. In *Breeze*, the Alaska Court of Appeals held that, "[T]he proper appointment of a special prosecutor in circumstances where the attorney general believes he and the Department of Law are disqualified by a conflict of interest is within the attorney general's discretionary control over the legal business of the state." *Id.* at 635. The current issue does not involve appointment of a special prosecutor or the attorney general's perceived conflict of interest, and therefore the holding in *Breeze* does not apply to the facts at issue here.

¹² Letter from Treg Taylor to Kris Curtis at p. 5 (Sept. 7, 2022).

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monetary punishment" on the attorney general's office. They were instead a permissible decision by the legislature on how to spend the state's money.¹³

As discussed above, in *Knowles*, the legislature appropriated funds to the Department of Corrections for new community residential centers.¹⁴ The appropriation language stated, "This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community Residential Centers. Contracts will be competitively bid."¹⁵ One of the arguments the governor made for vetoing this language was that it violated the separation of powers doctrine.¹⁶ The Alaska Supreme Court found the appropriation language was constitutional, holding:

The council argues that the policy decision to fund privately owned CRCs rather than publicly owned CRCs was a legitimate exercise of legislative power. We agree with the council. We held above that this language does not preclude the department from fulfilling its statutory mandate. Instead, this language embodies a permissible policy decision on how to spend the CRC money. It therefore does not violate the separation-of-powers principle.¹⁷

In *Legislature v. Hammond*,¹⁸ a superior court case the Alaska Supreme Court found in *Knowles* to be persuasive, the then-governor objected to language in an appropriation that provided, "No funds from this appropriation are to be used to move the clerk of the

¹³ See, e.g., Minutes of House Finance Committee, HB 205 at 02:24:10 (Feb. 26, 2020) (Statements by Representative Andy Josephson (explaining that budget language relating to *Janus* decision was "not a policy call" but "a budget tightening finance call."); Representative Kelly Merrick (stating that she had spoken with the attorney general directly who had assured her that "the Department of Law has highly qualified attorneys capable of handling this issue in-house for a fraction of the cost" and that the spending was a "discretionary expense" that the state could not afford); Representative Jennifer Johnston (explaining that budget language relating to *Janus* decision was "a finance decision.")).

¹⁴ *Knowles*, 21 P.3d at 381.

¹⁵ *Id.*

¹⁶ *Id.* at 382.

¹⁷ *Id.* at 383.

¹⁸ Case No. 1JU-80-1163 Civil, Memorandum of Decision (May 25, 1983).

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(Continued)

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supreme court and the clerks [sic] office and staff from Juneau."¹⁹ The superior court found there was no constitutional violation, holding, "[T]here is nothing in the challenged language which requires that the clerk's office remain in Juneau. It merely prohibits the use of funds from this appropriation for that use. It does not prohibit the use of other funds for that purpose."²⁰

Similarly, here, the appropriation language at issue does not preclude the attorney general from fulfilling his duties. Like the courts found in *Knowles* and *Hammond*, the language is a valid restriction on the use of certain funds appropriated by the legislature. And unlike the complete prohibition in *Hammond*, the legislature did appropriate funds for "Legal Contracts Relating to Interpretation of *Janus v AFSCME* Decision."²¹ The governor vetoed this appropriation, however, leaving no money remaining for contracts relating to interpretation of *Janus*.

The attorney general's letter cites *Public Defender Agency v. Superior Court, Third Judicial District*,²² in support of his argument that, "When an act is committed to the discretion of a particular branch of state government, interference with that discretion is a violation of the doctrine of separation of powers."²³ In *Public Defender Agency*, the Alaska Supreme Court found that a superior court could not order the attorney general to prosecute a civil contempt proceeding for a parent's failure to pay child support.²⁴ The court explained, "we do not have power to control the exercise of the Attorney General's discretion as to whether [the attorney general] will take action in any particular cases of contempt for non-support."²⁵ As discussed above and in my prior memorandum, nothing in the appropriation restriction prohibits the attorney general from pursuing matters related to the *Janus* decision.

3. Ethical concerns. The attorney general's letter states, "To immediately revoke outside counsel agreements and attempt to transfer complex and fact-intensive projects to Assistant Attorneys General, who are already operating at capacity, based on the political

¹⁹ *Id.* at p. 57.

²⁰ *Id.* (Emphasis in original).

²¹ Sec. 1, ch. 8, SLA 2020, page 23, line 29, through page 25, line 9; sec. 1, ch. 1, SSSLA 2021, page 24, line 29, through page 26, line 4.

²² 534 P.2d 947 (Alaska 1975).

²³ Letter from Treg Taylor to Kris Curtis at p. 6 (Sept. 7, 2022).

²⁴ *Public Defender Agency*, 534 P.2d at 950 - 951.

²⁵ *Id.* at 951.

APPENDIX F

(Continued)

Kris Curtis
Legislative Auditor
September 19, 2022
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whims of the legislative branch may violate the Attorney General's duty under the professional rules.²⁶ The letter also argues, "Under the Rules of Professional Conduct applicable to the Alaska Bar, attorneys must possess the time and competence to represent their respective clients."²⁷

This office is not in a position to know whether the attorney general is able to meet his ethical and professional responsibilities applicable to pursuing matters related to interpretation of the *Janus* decision. However, as the attorney general's letter recognizes, "all state contracts and expenditures are subject to legislative appropriation."²⁸ Further, under the Alaska Rules of Professional Conduct (ARPC) 1.16(a)(1), a lawyer is prohibited from representing a client, and where representation has commenced must withdraw from the representation of a client, if "the representation will result in violation of the rules of professional conduct *or other law*."²⁹ The attorney general's use of outside counsel violates an explicit restriction against expenditure, as enacted into law by the legislature. Under ARPC 1.16(a)(1), outside counsel is mandated to withdraw from matters related to interpretation of the *Janus* decision. ARPC 1.16(b)'s "material adverse effect" provision only applies to optional withdrawal, not mandatory withdrawal. ARPC Rule 1.16(d) provides procedures for withdrawal, including the steps a lawyer is required to take to protect a client's interests during withdrawal.

Regarding the attorney general's statement that assistant attorneys general may not possess the competence to represent the state in matters related to interpretation of the *Janus* decision,³⁰ Comment to ARPC 1.1 explains:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A

²⁶ Letter from Treg Taylor to Kris Curtis at p. 8 (Sept. 7, 2022).

²⁷ *Id.* at p. 7.

²⁸ *Id.* The attorney general's letter also states that, "circumstances can arise that obligate a state agency to meet its obligations despite a lack of supporting appropriations." *Id.* However, a contract is void and not subject to specific performance if it is directly and explicitly prohibited by a constitutional law. *See, e.g., Currington v. Johnson*, 685 P.2d 73, 78 (Alaska 1984), quoting *Sheely v. Martin*, 10 Alaska 331, 341 (D. Alaska 1942).

²⁹ Emphasis added.

³⁰ Letter from Treg Taylor to Kris Curtis at p. 7 (Sept. 7, 2022) ("Finally, certain doctrines of ethical and professional responsibility exist in the context of the practice of law and are applicable to this inquiry . . . Under the Rules of Professional Conduct applicable to the Alaska Bar, attorneys must possess the time and competence to represent their respective clients.").

APPENDIX F

(Continued)

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Legislative Auditor
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newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study.

Finally, it should be noted that the appropriation language at issue was first included in the fiscal year 2021 operating budget, which was passed and enacted into law in 2020, and then again in the fiscal year 2022 operating budget. A significant amount of time has passed since the legislature placed a valid restriction on the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel relating to interpretation of *Janus*. It is unclear what action the attorney general has taken since that time to ensure the attorney general's expenditure of funds on outside counsel does not continue to violate state law.

Please let me know if I may be of further assistance.

MYM:mjt
22-291.mjt

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APPENDIX G

JAMES L. BALDWIN

Attorney at law

January 3, 2023

Kris Curtis
Legislative Auditor
PO Box 113300
Juneau, AK 99811-3300

Re: Evaluation of legal opinions regarding FY 21, FY22
Department of Law Civil Division Expenditures

PRIVILEGED – ATTORNEY / CLIENT COMMUNICATION

You requested my advice regarding competing legal opinions of the executive and legislative branches of state government regarding the validity of expenditures by the Alaska Department of Law. The competing opinions differ on the effect of appropriations made by the legislature in fiscal years 2021 and 2022 to cover the expenses of the civil division of the department. The appropriations in question contain an express limitation of the purpose for which the appropriations may be expended. The limitation excludes the payment of expenses from an appropriation made for the civil division of the Department of Law for a legal services contract with a private law firm.

APPENDIX G (Continued)

The description of purpose for authorized expenditures of the Department of Law, civil division appropriation for the fiscal years ending June 30, 2021 and 2022 includes the following words of limitation: “Civil Division Except Contracts Relating to Interpretation of Janus v AFSCME” The exception provision was an amendment to the governor’s proposed budget adopted in the House Finance Committee.

During consideration of the proposed budget bill for Fiscal Year 2021 state operations (HB 205), the House Finance Committee approved an amendment to the budget for the Department of Law offered by Representative Andy Josephson.¹ The exception was added to the civil division component and a special appropriation was also added appropriating \$20,000 which would have covered contractual services related to the *Janus* case. During the Committee meeting, it was explained that the \$600,000 amount for a private law firm was excessive and that the state needed to economize by relying more on the services of staff of the Office of the Attorney General. The FY 2022 operating budget for the succeeding fiscal year carried identical provisions.

The \$20,000 appropriation for expenses arising out of services rendered by outside counsel was vetoed by the governor for fiscal year 2021 and also when it appeared again in the succeeding fiscal year.² The governor’s veto messages for

¹ See House Finance Committee Minutes February 18, 2020 explaining the committee’s intent.

² In the 31st Legislature (2019-2020) the governor struck Page 25, lines 4 – 9 of section 1 , CCSHB 205 (Chapter 8 SLA 20); In the 32nd Legislature (2021 – 2022) the governor struck lines 31 -33 of page 25 and lines 3 and 4 of page 26 of CCS HB 69(BRF SUP MAJ FLD H/S)(Chapter 1 SSLA 21).

APPENDIX G (Continued)

these vetoes do not provide a specific reason other than to say that the intent was to “conserve the Unrestricted General Fund (UGF) dollars from growing the state’s operating footprint.”³ The governor’s vetoes were not overridden by the legislature.⁴ The appropriations which were the source of the disputed expenditures became law in Chapter 8 SLA 20 (fiscal year 2021), and Chapter 1 SSLA 21 (fiscal year 2022).

The Department of Law entered into two contracts for legal services with Consovoy McCarthy, PLLC. (hereinafter “Consovoy”). The first contract (DOL contract 20-207-1092), is dated August 2, 2019 for \$50,000 for legal advice “regarding possible constitutional issues concerning dues and agency fees in a bargaining unit agreement.”⁵ A second contract with that firm (DOL Contract No 20-207-1111) was made on December 29, 2019 to represent the state in its litigation efforts to defend the attorney general’s opinion concerning interpretation of the *Janus v. AFSCME* decision and the governor’s administrative order implementing the decision. The stated amount of this contract was \$600,000.

Notwithstanding the exception stated in the purpose line of the appropriation, the Department of Law obligated and expended amounts from the civil division

³ 31st Ak House Jour. Pages 2182 -2184 (general fund reductions of unsustainable and unnecessary levels of spending); 32nd AK House Jour. Page 1376 (the governor mentions a continued effort to reduce the expenditure of unrestricted general funds).

⁴ It is possible that these appropriations were stricken to avoid a claim that the administration was, in effect, transferring amounts between the civil division appropriation and the separate appropriation for contractual services for the *Janus* litigation. See AS 37.07.080(e) (“Transfers may not be made between appropriations “except as provided in an Act making the transfer between appropriations.”).

⁵ This contract was amended on October 24, 2019 to increase the total contract amount to \$100,000.

APPENDIX G (Continued)

appropriation to cover litigation costs incurred under contracts with Consovoy.⁶ The scope of work stated in the Consovoy contract was nearly identical to the wording of the exception inserted in the statement of purpose for the civil division appropriations.

The attorney general contends that the exception inserted within the civil division appropriation violates the separation of powers doctrine inherent in the Alaska Constitution by interfering with the discretion of the attorney general to employ outside counsel to litigate a case of importance to the state. The attorney general also argues that, in any case, such a restriction of the department's power to litigate could only be accomplished by general law, not by a provision in an appropriation bill which by constitution must be confined to appropriations.⁷ Legislative counsel disputes this characterization by contending that the legislature has the power to determine the purpose of an appropriation and condition it further by providing what objects of expenditure are not covered.

Legislative counsel questions whether the exception added to the civil division appropriation impinges on executive branch powers in the manner alleged by the attorney general. The legislature contends that the civil division appropriation remains available to finance the litigation of cases or controversies involving legal

⁶ \$313,770.10 was charged against the FY21 Civil Division appropriation which carried the exception provision; and through 4/30/2022 \$13,189.30 was charged against the FY22 civil division appropriation which also carried the exception provision.

⁷ Art. II, § 13 Alaska Const.; see also AS 24.08.030 ('Bills for appropriation shall be confined to appropriations and shall include the amount involved and the purpose, method, manner, and other related conditions of payment.').

APPENDIX G (Continued)

issues raised by *Janus*. The legislature argues that nothing prevents the civil division appropriation from being used to finance the cost of staff attorneys of the Attorney General's Office to provide the representation necessary to litigate disputes related to matters raised by the *Janus* decision.

The Confinement Clause Contention

The confinement clause contention centers on the argument that substantive material has been added to an appropriation that is not germane to the subject of appropriations.⁸ The attorney general characterizes the exception language in the appropriations as an amendment to general law which adds a limitation on the power of the executive branch to sue in the name of the state. The Alaska Supreme Court established the following standard of review for confinement clause claims:

"In approaching confinement clause disputes, a court must assume that an act of the legislature is constitutional. The burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases are resolved in favor of constitutionality."⁹

The opposing argument is that the exception provision is germane because it states a purpose for which the appropriation may not be expended. There is

⁸ Alaska Const. Art.II, Sec. 13 provides in pertinent part: "Bills for appropriations shall be confined to appropriations."
⁹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 380 (Alaska 2001).

APPENDIX G (Continued)

“the realization that legislatures do not have to fund or fully fund a program (except possibly constitutionally mandated programs), and in fact may choose to fund programs that are subject to conditions or contingencies.”¹⁰

The description of purpose of the appropriation in question does not require a programmatic change for the department of law. It merely explains “how, when, or on what the money is to be spent. It explains the purpose regarding the appropriation. In my opinion the legislature has the better argument on this contention.

Separation of Powers Contention

The attorney general claims that the legislature has usurped executive power by constraining the discretion of the Attorney General regarding how to staff existing cases brought in the name of the state. That officer portrays the legislature’s exclusion of funding for outside counsel as an encroachment on the common law powers to “perform all other duties required by law or which usually pertain to the office of the attorney general in a state.”¹¹

However, state law expressly provides that: “[t]he attorney general may, subject to the power of the legislature to enact laws and make appropriations, settle actions, cases and offenses. . . .”¹² In a similar vein, the Executive Budget Act states:

Except as limited by executive decisions of the governor, the mission statements and desired results issued by the legislature, appropriations by the

¹⁰ *Id.* at 379.

¹¹ AS 44.23.020(b)(9).

¹² AS 44.23.020(d).

APPENDIX G (Continued)

legislature, and other provisions of law, the several state agencies have full authority for administering their program service assignments and are responsible for their proper management.¹³

It is well established that the attorney general's executive power is subject to the legislature's power of appropriation.¹⁴

The Department of Law claims that discretionary control over the conduct of litigation is a mandatory state function that offsets the power of appropriation. The controversy presented here involves a question of how to finance a case involving the rights of members of certain bargaining units of state government. The question is whether a limit on financing for outside counsel impairs the department's control over state litigation. Or, are the excepted items of expenditure for outside counsel an appropriate exercise of the legislature's power to appropriate in a fiscally responsible manner?

The Alaska Supreme Court has considered a claimed violation of the separation of powers doctrine arising from interference with the funding of a coordinate branch. The case involved the validity of a recall petition which alleged as grounds for recall of Governor Dunlevy a claim that his use of the executive veto violated the separation of powers doctrine. The governor was under threat of recall for vetoing amounts from the court system's budget, which the governor claimed were equivalent to amounts spent by the court in proceedings involving abortion.

¹³ AS 37.07.080(a)(emphasis added).

¹⁴ Even in case of a disaster, the executive must seek legislative appropriations at some point. AS 26.23.025(k).

APPENDIX G (Continued)

Upon concluding that the recall petition stated a valid ground for recalling the governor, the court noted

Other states' courts have held that another branch's blocking of court system funding violates the separation of powers doctrine if it results in underfunding the judicial branch to such an extent that the courts cannot continue to meet their constitutional mandates. The State agrees that funding failure of this magnitude would be unconstitutional.¹⁵

The court further explained that

Separation of powers is a fundamental part of our constitutional structure, and the doctrine may be violated by a governor's 'improper' use of a veto 'to attack the judiciary.'¹⁶

The determining factor is whether the Department of Law can continue to meet constitutional mandates. The restriction on using outside counsel to prosecute a case or cases likely does not constitute a prevention of the Department of Law from performing constitutionally mandated duties. The department retained the ability to perform mandated functions by spending from available civil division appropriations to provide counsel for the litigation. The legislative history consistently cites a cost cutting motive rather than an intent to interfere with the ability of the attorney general to represent state government.

Another factor that weighs against the department's separation of powers claim is that the dispute is between the legislative and executive branches of state government. The court in *Dunleavy* observed:

¹⁵ *State v. Recall Dunleavy*, 491 P.3d 343, 368 (Alaska 2021)(footnote omitted).

¹⁶ *Id* at 371.

APPENDIX G (Continued)

Courts can usually stay out of veto disputes between the legislative and the executive branches without risk to the constitution's distribution of powers; the powers of the legislative and executive branches are close to equipoise, and those two branches can negotiate political issues from positions of roughly equal strength.¹⁷

The circumstances here are similar to a “veto dispute.” It is not unusual for the legislature and an executive branch agency to disagree regarding methods and means. A court may well decide that, at this point, the issues here are in reality political questions that are not justiciable. And that the parties must be left to nonjudicial methods to solve this sort of dispute.

Based on the facts presented, the attorney general has not been foreclosed from defending the interests of the state. Rather, the attorney general was funded in a manner that preferred the use of agency counsel rather than outside counsel. The legislative history of the budget bills supports the contention that exclusion of expenditures for outside counsel was driven by cost considerations. The attorney general had the option of litigating *Janus* issues using house counsel with expenses covered by the civil division appropriation.

It appears that the legislature intended to provide \$20,000 in an appropriation separate from the civil division component that could be used to cover some services

¹⁷ *State v. Recall Dinleary*, 491 P.3d 343, 370 (Alaska 2021) (footnote omitted).

APPENDIX G (Continued)

provided by outside counsel.¹⁸ However, funding for that purpose was made unavailable by the governor's veto. And the legislature did not override those vetoes.

I think the Department of Law has stated a claim for violation of the doctrine of separation of powers that is made in good faith. However, further analysis reveals that this claim is weakened by the alternatives available to such an extent that it would be difficult to meet the standard adopted by the *Dunlevy* court - that the department is rendered "unable to meet its constitutional mandates."

Our separation of powers doctrine must include respect for both the executive and legislative functions.

A problem inherent in applying the doctrine of 'separation of powers' stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers.¹⁹

A court would try to harmonize the competing interests of the involved branches of government in order not to intrude on their powers.²⁰ The appropriate remedy should not disproportionately weaken the check on executive power provided by the legislature's power to appropriate. The attorney general's power is founded on statute and the common law. The legislature's power of appropriation is set out in the Alaska

¹⁸ It is possible that if the attorney general found that the amounts available were less than necessary to conduct effective litigation, a supplemental appropriation could have been requested in due course.

¹⁹ *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976)(citation omitted).

²⁰ *State v. Dupere*, 709 P.2d 493, 497 (Alaska 1985)(finding that claims process administered by executive branch does not violate separation of powers when legislature is required to participate).

APPENDIX G (Continued)

Constitution and is not delegable.²¹ There needs to be a more compelling circumstance to support a claim that the attorney general's discretion to sue must remain unchecked. I do not believe that such a circumstance is present in this matter. It would severely undercut the legislative appropriation power if the attorney general could claim the power to effect a *de facto* reappropriation.

Exercise of Extraordinary Powers

The attorney general declared the exception attached to the civil division appropriations invalid as a violation of separation of powers and the confinement clause. Upon making this determination, the department spent from those appropriations to cover the costs of the Consovoy contracts. In effect, the exception was severed from the appropriations without judicial review and in contravention of the expressed limitation enacted by law.

The attorney general contends the limiting conditions attached to the civil division appropriations were limitations on executive power which violate the confinement clause and cannot be enacted in an appropriation bill. A similar claim was involved when Governor Knowles sought to use the veto power to strike provisions in appropriations that were alleged to violate the confinement clause. However, the Alaska Supreme Court narrowly construed the power to strike or

²¹*State v. Fairbanks Northstar Borough*, 736 P.2d 1140 (Alaska 1987).

APPENDIX G (Continued)

reduce an “item” in an appropriation bill to mean only the elimination or reduction of an amount set out in the bill.

Reducing an item lessens its amount; striking it lessens its amount to nothing. This implies that an ‘item’ must include a sum of money. Likewise, a passage that does not include a ‘sum of money dedicated to a particular purpose’ is not an ‘item’ which the governor can strike or reduce.²²

The *Knowles* court went on to say:

The governor’s item veto power is thus one of limitation. The governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature.²³

The court’s rationale boiled down to a reluctance to give effect to an appropriation that was at odds with what the legislature passed.

It is arguable whether severance of the exception advances the anti-logrolling purpose of the Confinement Clause. But I think the legislature’s power to condition appropriations and to specify what types of expenditures are not covered will be given more weight by a court. I believe that the attorney general would likely not prevail in the claim that the exception preventing spending on outside counsel is invalid. The exception appears to be germane to the appropriation. I also believe that a court would likely not rule that the exception can be severed from the Appropriations Acts thus enabling the attorney general to proceed to spend from the civil division

²² *Alaska Legislative Council v. Knowles*, 21 P.3d 367 at 373 (Alaska 2001).

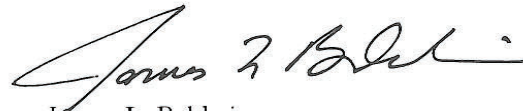
²³ *Id.* (emphasis added).

APPENDIX G (Continued)

appropriation to cover expenditures for the Consovoy contract.²⁴ I believe it would have been better for the attorney general to preemptively seek a judicial resolution rather than undertake a unilateral remedy.

Conclusion.

The conclusions and opinions set out in this memorandum should be tempered with the knowledge that certainty can be obtained on questions of developing areas of state constitutional law only after a final decision by a court of competent jurisdiction.



James L. Baldwin
Attorney at Law

²⁴ See *Lynden Transport v. State*, 532 P.2d 700, 715 (Alaska 1975)(the issue of severability is resolved if legal effect can be given to remaining terms of statute after severance and the legislature intended the remaining parts of the statute to stand).

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Agency Response from the Department of Law



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Ste. 200
Anchorage, AK 99501
Main: (907) 269-5100
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October 6, 2023

RECEIVED

OCT 09 2023

LEGISLATIVE AUDIT

Kris Curtis, Director
Division of Legislative Audit
P.O. Box 113300
Juneau, Alaska 99811
Email: legaudit@akleg.gov

Re: Preliminary Audit Report, Spending on Contracts Related to *Janus*

Dear Ms. Curtis:

You have requested on behalf of the Legislative Budget and Audit Committee a written response to the Legislative Audit Division's May 19, 2023 preliminary audit report entitled *Department of Law, Spending on Contracts Related to Janus*. For the reasons indicated in the enclosed response, the Department of Law disagrees with your conclusion that it acted outside the scope of its budgetary authority in managing its outside contracts.

The preliminary audit essentially attempts to "audit" two competing but reasonable legal opinions, one from the Department of Law, and one, predominantly, from Legislative Legal Services. Although I appreciate the recognition in the audit that "a final legal determination can only be made by the appropriate court,"¹ the preliminary audit nonetheless goes on to assert that the Department of Law's payment of outside counsel for services related to *Janus v. AFSCME* "likely violated" AS 37.07.0S0(a) and Article IX, section 13 of the Alaska Constitution. The adjudication of legal disputes is far beyond the scope of standard auditing procedures and outside the purview of the legislative branch.²

Having dealt with many audits in my private career, the question for the auditor is always whether the entity relied on reasonable legal advice—not whether the legal conclusion is correct. If the client relied on reasonable legal advice, it should be end of story for an auditor.

¹ Preliminary Audit, at pg. 9.

² See *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976).

Kris Curtis
Re: *Spending on Contracts Relating to Janus*

October 6, 2023
Page 2 of 2

As noted in the preliminary audit, reasonable attorneys have offered differing opinions regarding the legality of the legislature's restriction on payment of outside counsel. The Department of Law undertook a detailed review of this question, summarized in the enclosed response, and concluded that the restriction was an unconstitutional violation of the confinements clause and the separation of powers. Nothing in the preliminary audit suggests that this conclusion is unreasonable; in fact, the preliminary audit seems to acknowledge that these legal arguments have merit.

The Department of Law acted in conformity with the reasonable legal advice of its attorneys, which is the normal and prudent practice when navigating a question of unsettled law. The Department is not bound by the legal opinions of Legislative Legal, and certainly not by those of the Division of Legislative Audit.

In terms of the proposed "remedies" for the alleged violations, we do not support resorting to wasteful litigation over this question, which might or might not result in a judicial determination of the merits. Alternatively, while the legislature may moot this question by ratifying the expenditures, the Department does not believe that ratification is necessary.

Sincerely,



Treg Taylor
Attorney General

Enclosure

**Response of the Department of Law to
Preliminary Audit Report: *Spending on Contracts Related to Janus***

I. Background

During the creation of the FY 21 and FY 22 state budgets, the legislature deviated from years of prior practice in constructing the Department of Law budget. Typically, the legislature appropriates funds to the Department at the division level, with one appropriation for the Criminal Division and one appropriation for the Civil Division.¹ However, in FY 21 and FY 22, the legislature bifurcated the Department’s Civil Division budget in an effort to control litigation decisions made by the Attorney General. The appropriations in question are identified as “Civil Division Except Contracts Relating to Interpretation of *Janus v. AFSCME*” and “Legal Contracts Relating to Interpretation of *Janus v. AFSCME* Decision.” Your letter purports to find legal error in the Department of Law’s handling of certain outside counsel contracts in relation to this irregular, and likely illegal, budget structure.

The preliminary audit contends that the Department of Law improperly expended a total of \$315,034 on payments to outside counsel. It contends that these payments violate the FY 21 and FY 22 budget structure described above. It is the opinion of the Department of Law that any payments made to outside counsel within the contested timeframe are valid and fully contained in the appropriations granted to the Department by the legislature. Furthermore, it is the Department of Law’s determination that a legislative effort to restrict the spending authority of the Department based on subject matter, and attempts to dictate the allocation of attorney resources, raises multiple legal issues and is likely a violation of the Alaska Constitution.

As previously stated by this office,² certain attempts to constrain the discretion of the Attorney General through an appropriation bill violates the confinement clause of the Alaska Constitution³ and represents an improper encroachment on the powers of a

¹ Separate allocations exist under each Division, however, the allocation of the appropriations is not relevant to the analysis contained in the preliminary audit.

² See LTR from AG Clarkson to Chairs of House Finance Committee dated Feb. 14, 2020; LTR from Acting AG Sniffen to Rep. Andy Josephson dated Oct. 29, 2020; LTR from Acting AG Sniffen to Chair Gary Stevens dated Dec. 31, 2020; LTR from AG Taylor to Rep. Andy Josephson dated Jan. 21, 2022; LTR from AG Taylor to Division of Legislative Audit dated Sept, 7, 2022.

³ Art. II, Sec. 13, Alaska Const.

separate branch of government.⁴ And, while we are in general agreement that the Legislature has broad appropriation authority, it is not an unfettered power.⁵ The Legislature’s appropriation authority is constrained by the Alaska Constitution, both directly⁶ and indirectly.⁷ Moreover, Alaska’s constitution recognizes strong executive control over state expenditures⁸ and the Alaska Supreme Court has instructed the legislature to avoid the administration of Executive Branch activities through the use of appropriation power.⁹ In contrasting the Legislature’s authority over appropriations and its authority to detail the duties of Executive Branch agencies, the Court stated:

The process for enacting substantive bills gives meaningful opportunity for public notice and comment. Article II, section 14 of the Alaska Constitution requires three readings of a substantive bill, on three separate days, ‘to ensure that the legislature knows what it is passing’ and to ensure an opportunity for the expression of public opinion and due deliberation.’ This opportunity may be stifled if substantive provisions are attached to appropriation bills in the form of conditions. Unlike other legislation, appropriations are not subject to the single-subject requirement of article II, section 13—a requirement meant to avoid logrolling. Allowing substantive

⁴ “The doctrine prohibits one branch from encroaching upon and exercising the powers of another branch.” *Bradner v. Hammond*, 553 P.2d 1, 5 n.8 (Alaska 1976).

⁵ See *State v. Alaska Legislative Council*, No. S7612 at p. 16 (Alaska August 12, 2022) (“[The Constitution] create[s] a strong executive branch with a strong control on the purse strings of the State and limit the legislature’s power to impose current spending priorities on future governors and legislatures”)(*internal quotations omitted*); *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) (“The confinement clause prevents the legislature from enacting substantive policy outside the public eye. The process for enacting substantive bills gives meaningful opportunity for public notice and comment”).

⁶ Art. II, Sec. 13, Alaska Const.

⁷ *State v. Alaska Legislative Council*, No. S7612 at p. 15 (Alaska August 12, 2022) (“We acknowledge that none of the Constitution’s budgetary clauses expressly prohibit forward funding. We reiterate, however, that ‘often what is implied is as much a part of the constitution as what is expressed.’ Implicit in the budgetary clauses is a requirement that the budget be determined annually; when examined together, the budgetary clauses, the sources from which they were drawn, the underlying policies they were designed to promote, and our case law all support this conclusion”).

⁸ *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977). See also *State v. Alaska Legislative Council*, No. S7612 at p. 15-16 (Alaska August 12, 2022).

⁹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

enactments in an appropriation bill may also be problematic because appropriation bills are frequently a product of a free conference committee and, as such, must be voted on in their entirety and cannot be amended on the floor. Consequently, as the superior court noted, the confinement clause prevents a legislator seeking to advance unpopular legislation from burying it in a popular appropriation measure. Strict enforcement of constitutional limits helps ensure that the public will be fully informed of proposed legislation.¹⁰

Consequently, the Legislature is without the authority to alter or negate the actions of the Executive Branch—including by restricting the subject matter of litigation or the deployment of attorney resources—through the use of an appropriation bill.¹¹

II. Confinement Clause

While the audit concludes that the legislature is free to dictate how an executive branch agency deploys its resources,¹² the Alaska Supreme Court has already stated that legislative attempts to limit executive discretion in staffing and managing state programs violate Art. II, Sec. 13 of the Alaska Constitution.¹³ The legislative auditor’s authority does not extend to overturning Alaska Supreme Court decisions.

The Alaska Supreme Court has rejected legislative attempts to defund specific positions in the Executive Branch.¹⁴ In *Knowles*, the Court recognized that the Executive Branch has wide discretion in the expenditure of appropriated funds and that legislative attempts to circumvent that discretion in an appropriation bill violated the confinement clause.¹⁵ Consequently, Legislative Legal’s argument that the Department of Law had sufficient internal resources to accomplish the tasks handled by outside counsel is

¹⁰ *Id.* (internal citations omitted).

¹¹ *See also State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 117 (W. Va. 2002) (“no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing its inherent constitutional functions”).

¹² Preliminary Audit, at pg. 9-10. As noted above, the audit recognizes that “a final legal determination can only be made by the appropriate court” yet nonetheless proceeds to its own legal conclusion, *ipse dixit*.

¹³ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 380 (Alaska 2001).

¹⁴ *Id.*, at 370.

¹⁵ *Id.*, at 381.

meaningless. The legislature is without the power to assign specific employees to specific duties, and stating that sufficient internal resources exist is simply an attempt to administer the program of expenditure in violation of the precedent established in *Knowles* by dictating to the Department in how it should deploy its resources.

Moreover, it is important to note that the Department of Law did not exceed its appropriation limit in FY 21 or FY 22. The Department's expenditures on in-house and outside counsel did not exceed the cap set by the legislature, despite the apparent attempt to reorganize the Department into two different Civil Divisions (one housing all functions except *Janus* contracts and the other solely dedicated to *Janus*).¹⁶ Neither the Alaska Constitution nor the legislation establishing the Department of Law limits or deprives the Attorney General of the power to appoint outside counsel when, in the wide discretion granted, the Attorney General believes such an arrangement to be in the public interest and within the appropriations granted by the legislature.¹⁷ Accordingly, the language in the FY 21 and FY 22 appropriation bills served to restrict the Attorney General from entering into contracts regarding particular legal matters.¹⁸ This attempt to administer a program of expenditures was an overreach by the legislature and thus in violation of the Confinement Clause of the Alaska constitution.¹⁹

¹⁶ The Legislature's attempt to reorganize the Department of Law through an appropriation bill may also be a violation of Art. III, Sec 23, of the Alaska Constitution.

¹⁷ *State v. Breeze*, 873 P.2d 627, 634–35 (Alaska App. 1994) (holding appointment of special prosecutor valid in absence of a law limiting the power).

¹⁸ This differs from the multi-year appropriations in recent years funding efforts related to protecting the state's interests in managing its natural resources. *See, e.g.*, § 69(a), ch. 11 SLA 2022. Those appropriations did not restrict staffing or use of resources within law on certain subject matters. Instead, it provided an additional funding source for specific types of matters, while not restricting the department's overall ability to decide how to staff cases and allocate resources. This is an example of a permissible type of appropriation, whereas the appropriation structure that is the subject of the special audit was not.

¹⁹ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950–51 (Alaska 1975) ("In that field[control of litigation] , the discretion of the Attorney General is plenary. He is a constitutional officer . . . and, as such, the head of the state's legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state")(internal citations omitted). Moreover, the courts have frowned on the State wielding its appropriation power for purely political purposes. *See Order Granting Summary Judgment, American Civil Liberties Union of Alaska v. Dunleavy*, Superior Court No. 3AN-19-08349CJ (Oct. 16, 2020).

The Legislature is without the authority to use an appropriation bill to pick and choose which attorneys will work on a case, just as it is without the power to direct where and how state employees are to be employed or whether contract services are needed.

III. Separation of Powers

In addition to the Confinement Clause issues discussed above, the Legislature's actions and the audit's conclusions represent an encroachment on the powers and duties of the Executive Branch. As discussed in the Department's previous communications, the Office of the Attorney General is established by statute²⁰ in furtherance of Art. III, Sec. 16 of the Alaska Constitution. Under law, "[t]he attorney general is the legal advisor of the governor and other state officers."²¹ The Attorney General is required to defend the Constitution of the State of Alaska, bring, prosecute, and defend all necessary and proper actions in the name of the state, and administer state legal services.²²

As the audit notes,²³ there was debate before the legislature whether the FY 21 and FY 22 appropriations were really fiscally prudent or "an inappropriate attempt to manage LAW's decision process by reducing the funding for a specific issue that members did not agree with."²⁴ By enacting its unique budget structure in FY 21 and FY 22, it appears that the legislature, through the exercise of its appropriation power, sought to exact a monetary punishment on the Office of the Attorney General for the very performance of its duties under the law. This level of political coercion is exactly the issue that the separation of powers doctrine seeks to prevent.²⁵ As was recently noted by the Anchorage Superior Court, one branch of government cannot exercise its power in a manner threatening to undermine the independence of another co-equal branch of government.²⁶

"The doctrine [of separation of powers] prohibits one branch from encroaching upon and exercising the powers of another branch."²⁷ More specifically, the doctrine is

²⁰ AS 44.23.010.

²¹ AS 44.23.020.

²² AS 44.23.020(b)(1)-(5).

²³ Preliminary Audit, at pg. 12.

²⁴ *Id.*

²⁵ *Bradner*, 553 P.2d at 6 n.11 (the purpose of the doctrine of separation of powers is, in part, "to safeguard the independence of each branch of the government and protect it from domination and interference by the others").

²⁶ Order Granting Pl.'s Mot. For Summ. J., *American Civil Liberties Union of Alaska v. Dunleavy*, 3AN-19-08349CI Anc. Superior Court (Oct. 16, 2020).

²⁷ *Bradner*, 553 P.2d at 5 n.8.

breached when “[o]ne department of government usurps the powers of another department [by] exercise[ing] coercive influence on the other.”²⁸ The Attorney General’s duty to defend and prosecute in the name of the State is so entrenched in law that other Executive Branch agencies must seek the Attorney General’s approval before seeking legal services outside the Department of Law.²⁹ It is critical to note that “[t]he attorney general’s discretion to bring suit is plenary and is beyond the control of any other state department or officer.”³⁰ Importantly, the Alaska Supreme Court has stated that:

Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state’s litigation which he thinks best . . . This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.³¹

When an act is committed to the discretion of a particular branch of state government, interference with that discretion is a violation of the doctrine of separation of powers.³² Accordingly, “no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing” its inherent functions.³³ The Legislature’s attempt to control the discretion of the Attorney General in the prosecution and defense of state litigation by rearranging the Department of Law’s budget for one specific case violates the separation of powers doctrine.

IV. Other Concerns

While your letter is constrained to consideration of the confinement clause and the separation of powers doctrine, as the Department has previously stated, other considerations exist that question whether a legal error exists in the Department’s expenditure of funds. The Legislature’s attempts to defund an existing contract may have

²⁸ *Solomon v. State*, 364 P.3d 536, 546 (Kan. 2015).

²⁹ AS 36.30.015(d); *Breeze*, 873 P.2d at 633–34.

³⁰ *State ex rel. Hatch v. Am. Fam. Mut. Ins. Co.*, 609 N.W.2d 1, 4 (Minn. Ct. App. 2000).

³¹ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

³² *Id.*

³³ *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 117 (W. Va. 2002).

implications under Art. I, Sec. 15, of the Alaska Constitution.³⁴ In addition, your letter fails to address the fact that termination of an outside-counsel arrangement, or other withdrawal from litigation, must be accomplished in a manner that does not have an adverse material effect on the state's interest.³⁵

V. Conclusion

The preliminary audit outlined ratification as one specific recommendation, and alluded to potentially remedying the dispute through litigation.³⁶ While the Department of Law does not support wasteful and needless litigation between co-equal branches of government, we believe your recommendation and potential remedy are reasonable conclusions to resolve differing legal opinions if that is what the legislature chooses. Because the Department disagrees with Legislative Legal's opinion that the expenditures in question were unauthorized, we do not believe that ratification is necessary. Nonetheless, the Department agrees that the legislature's ratification would moot the disagreement.³⁷

³⁴ The Department recognizes all state contracts and expenditures are subject to legislative appropriation; nevertheless circumstances can arise that require a state agency to meet its obligations despite a lack of supporting appropriations. *See generally DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 443 (Alaska 1987) (finding attorney services are property rights under Art. I, Sec. 18, Alaska Const.).

³⁵ Cmt to ARPC 1.16. For example, under Rule 3.2, the Attorney General is required to avoid undue delay in the pursuit of litigation. To immediately revoke outside counsel agreements and attempt to transfer complex and fact-intensive projects to Assistant Attorneys General that are already operating at capacity based on the political whims of the legislative branch may violate the Attorney General's duty under the professional rules.

³⁶ Preliminary Audit, at pg. 19.

³⁷ The Department of Law does not believe it acted outside the scope of its appropriation authority.

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Legislative Auditor's Additional Comments

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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October 11, 2023

Members of the Legislative Budget
and Audit Committee:

I have reviewed management's response to this audit. Nothing contained in the response causes me to revise or reconsider the report conclusions and recommendation.

Sincerely,

A handwritten signature in black ink, appearing to read "Kris Curtis".

Kris Curtis, CPA, CISA
Legislative Auditor

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