

Memo

To: Interested Parties
From: Jahna Lindemuth and Scott Kendall
Date: June 22, 2021
Re: FY2022 State Budget and the Governor's Threatened Shut Down

Governor Dunleavy, through Attorney General Treg Taylor, filed a lawsuit seeking a court order blessing the governor's decision not to honor the legislature's validly enacted FY2022 budget. This lawsuit is constitutionally defective. It is also wrong on the merits. According to the Governor, the budget needed a 2/3 vote from both the house and the senate to have an effective date earlier than 90 days after enactment. Not only are appropriation bills different than general legislation in that they simply authorize (and require) the expenditure of state funds, but the legislature included a retroactivity date to confirm its intent that its authorization to fund state government would begin at the start of the fiscal year, July 1, 2021. As discussed below, the Alaska Supreme Court has already confirmed that the legislature may enact valid retroactive legislation without a 2/3 vote.¹ More fundamentally, however, the governor's refusal to implement the legislature's validly enacted budget violates the constitution's separation of powers doctrine and infringes on the legislature's appropriation power. He must fund state government once the budget becomes validly enacted law, either upon his signature or twenty days after transmittal if he refuses to sign.

1. Governor's Lawsuit

Although the legislature may sue the governor, the governor's lawsuit against the legislature violates the constitution. The governor acting through the attorney general may enforce compliance with Alaska's Constitution and other laws, but under the express terms of our constitution, he may not sue the legislature:

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

¹ *ARCO Alaska, Inc. v. State of Alaska*, 824 P.2d 708, 712 (Alaska 1992) ("For the foregoing reasons, we conclude that article II, section 18 does not require a two-third vote of both houses of the legislature for the passage of laws containing retroactive provisions.")

authority shall not be construed to authorize any action or proceeding against the legislature.²

The Alaska Supreme Court addressed this issue in *Legislative Council v. Knowles*,³ holding that the governor could not sue the legislature in order to seek a judicial determination that a legislative vote to override a veto was untimely and invalid under Article II, Section 16 of the Alaska Constitution. It does not matter that the governor used the attorney general to sue, or that the suit was against the Legislative Council. Neither are constitutional bodies, and each is an agent for the executive and legislative branches, respectively. Our constitution makes clear that the executive power of the state is vested in the governor alone,⁴ the Department of Law is “under the supervision of the governor,”⁵ and the attorney general is appointed by and serves at the pleasure of the governor.⁶ The *Knowles* case dealt with this precise scenario—where the sitting governor sued an agent of the legislature—and was barred from bringing suit.

The governor’s lawsuit is not the correct vehicle to resolve this dispute, especially here where the dispute is one created by the governor himself. “The governor shall be responsible for the faithful execution of the laws.”⁷ If he refuses to fund state government according to the legislature’s appropriations enacted into law, the legislature or any affected citizen may sue him to compel his compliance with state law.

As an additional note, the timing and posture of the governor’s present suit is bizarre and seems intended only to heighten the shutdown crisis. Here, the Administration is attacking what will soon be a validly-enacted law, seemingly in violation of its duty to enforce the law. The Administration presumably has had this position on the effective date for some time, and yet did not convey that to legislators during final passage. The timing of the suit—even before the law is enacted—appears to

² Alaska Const. art. III, § 16 (emphasis added).

³ *Alaska Legislative Council v. Knowles*, 988 P.2d 604, 605 (Alaska 1999) (“Though formally filed in the governor’s name against the [Legislative] Council, this suit is in substance an action brought in the name of the state against the legislature. Because article III, section 16 of the Alaska Constitution expressly forbids such actions, we vacate the judgment and direct the superior court to dismiss the action.”).

⁴ See Alaska Const. art. III, § 1.

⁵ See Alaska Const. art. III, § 24.

⁶ See Alaska Const. art. III, § 25.

⁷ See Alaska Const. art. III, § 16.

be filed to create leverage over the budget that the governor does not, and should not, otherwise have.⁸

2. Standard of Review

If a lawsuit is filed to compel the governor's faithful execution of the legislature's appropriations, it will raise issues not directly resolved by our courts before now. As to the budget bill, our courts must assume "that an act of the legislature is constitutional. The burden of showing unconstitutionality is on the party challenging the enactment; doubtful cases should be resolved in favor of constitutionality."⁹ In interpreting our constitution, the courts will consider "precedent, reason, and policy," and "adopt 'a reasonable and practical interpretation in accordance with common sense' based upon 'the plain meaning and purpose of the provision and intent of the framers.'" ¹⁰

3. The Legislature's Appropriation Power

The Alaska Constitution "gives the legislature the power to legislate and appropriate."¹¹ The legislature's power is set forth in article II of the Alaska Constitution, and section 13 of that article addresses the legislature's appropriation power.¹² "[T]he legislature, and only the legislature, retains control over the allocation of state assets among competing needs."¹³ The governor's veto power may be a check on

⁸ If the governor's purpose was to avoid potential harm from a shutdown, it would make more sense for the Administration to negotiate with the House and Senate Majorities, or simply publicly urge a "yes" vote on the effective date issue alone. To our understanding that has not occurred. Failing that, the Administration could enter into an agreement to fund government under HB69 while the legal dispute was resolved. A similar agreement was reached when the Administration disagreed with the legislature's forward funding of education and it worked well to avoid harm to Alaskans.

⁹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 379 (Alaska 2001) [hereinafter *Knowles I*] (footnote omitted) (citing *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998)).

¹⁰ *Id.* at 370 (quoting *Cook v. Botelho*, 921 P.2d 1126, 1128 (Alaska 1996)).

¹¹ *Id.* at 371 (footnote omitted) (first citing Alaska Const. art. II, § 1; then citing Alaska Const. art. II, § 13).

¹² *See* Alaska Const. art. II, § 13.

¹³ *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 898 (Alaska 2004) [hereinafter *Knowles II*] (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988)); *see also State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142-43 (Alaska 1987) (recognizing that the appropriation power resides in the legislature and cannot be delegated to the executive).

the appropriation power, but the executive branch does not share the appropriation power.¹⁴

An appropriation bill is a special kind of legislation. “[O]ne of the fundamental characteristics of an appropriation . . . is that it authorizes governmental expenditure without further legislative action.”¹⁵ The Alaska Supreme Court has repeatedly defined an “appropriation” in Article II as “the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.”¹⁶ To make an appropriation the legislature need only sufficiently describe a monetary asset transfer “to allow identification of the monies involved.”¹⁷

The Alaska Supreme Court broadly construes the legislature’s powers of appropriation because the appropriation power has been expressly delegated to the legislature under the constitution.¹⁸ “Appropriation” is more broadly defined in Article XI of the constitution to confirm that the people do not have the power to enact appropriations through the initiative process; only the legislature may enact appropriations.¹⁹

There are only three limits on the legislature’s power of appropriation, all expressly found in our constitution: (1) the legislature can appropriate public funds only for a public purpose;²⁰ (2) any appropriation bill must be confined to appropriations, and

¹⁴ *Knowles I*, 21 P.3d at 372 (“However the item veto power is characterized, we conclude that it was intended only to limit the legislature’s appropriation power, not to grant the executive a quasi-legislative appropriation power . . .”); *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977) (noting “the item veto power of the governor checks legislative appropriations” (footnote omitted)).

¹⁵ *Hickel v. Cowper*, 874 P.2d 922, 933 (Alaska 1994).

¹⁶ *Knowles II*, 86 P.3d at 898 (quoting *Rosen*, 569 P.2d at 796). The Alaska Supreme Court has also defined it as “a sum of money dedicated to a particular purpose.” *Id.* (quoting *Knowles I*, 21 P.3d at 373).

¹⁷ *Id.* at 898 n.39.

¹⁸ *DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 724-25 (Alaska 1962) (noting that the Alaska Supreme Court is “not inclined to pass judgment on the means selected by the legislature to accomplish legitimate purposes unless they are clearly in violation of the constitution”).

¹⁹ *Knowles II*, 86 P.3d at 893-94. The key reason for this difference in the meaning of appropriation is to ensure that only the legislature retains control over the allocation of state assets. *Id.* at 895.

²⁰ *See* Alaska Const. art. IX, § 6 (“No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.”). This Court defers to the legislature on its findings of public purpose. *Dearmond*, 376 P.2d at 721 (“[W]here the legislature has found that a public purpose will be served by the expenditure or transfer of public funds or

cannot enact substantive legislation even if related to the appropriation;²¹ and (3) the legislature cannot appropriate more than \$2.5 billion annually, adjusted annually for inflation, subject to certain exceptions.²² Thus, in addition to limiting the appropriation power to the legislature, the legislature must treat appropriations differently than substantive legislation, and may not combine appropriations with other substantive legislation.

The governor has the power to line-item veto an appropriation made by the legislature during the short time period set in the constitution, subject to the legislature's ability to override his vetoes.²³ "But this control gives the governor no appropriation power."²⁴ The governor has a defined and limited role, and it is one that only provides a check on the legislature's appropriation power.²⁵ And to maintain the separation of powers, the courts must strictly construe the governor's check on the legislative power of appropriation.²⁶

4. Effective Date

As noted in the Mills June 17, 2021 Memo, state funds cannot be spent without an "appropriation made by law":

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 except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.²⁷

the use of the public credit, this court will not set aside the finding of the legislature unless it clearly appears that such a finding is arbitrary and without any reasonable basis in fact.”).

²¹ Alaska Const. art. II, § 13 (“Bills for appropriations shall be confined to appropriations.”); *see Knowles I*, 21 P.3d at 376; *see also* AS 24.08.030.

²² Alaska Const. art. IX, § 16.

²³ Alaska Const. art. II, §§ 15-17.

²⁴ *Knowles I*, 21 P. 3d at 372.

²⁵ *See id.*

²⁶ *See Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976) (“The lack of ambiguity in . . . the Alaska Constitution mandate[s] that this court interpret these express provisions as embodying . . . the maximum parameters of . . . executive . . . authority . . .”).

²⁷ *See* Alaska Const. art. IX, § 13 (emphasis added).

But the Mills memo ignores the distinction between the date an appropriation bill becomes law and the effective date of a statute. Under AS 01.10.070, the legislature’s budget will become a validly enacted law on the day (1) it is signed by the governor, (2) the legislature overrides his veto, or (3) if not signed or vetoed, 20 days after it is delivered to the governor.²⁸ (Assuming there is no veto, and the governor does not sign a budget bill transmitted June 23, 2021, this will be July 13, 2021.) Thus, the governor currently controls the date the budget becomes law, and can sign the budget bill before July 1, 2021 to avoid a government shutdown.

Although the governor calls the budget “defective” in his rhetoric, the governor has no argument—and is not contending in his legal arguments—that the budget will not become law. Instead, he argues that this validly enacted law will not be effective until long after July 1, 2021, the start of the fiscal year. He relies on article II, section 18, which provides that “Laws passed by the legislature become effective ninety days after enactment.” That provision further provides that the legislature may, “by concurrence of two-thirds of the membership of each house, provide for another effective date.”

Although the legislature failed to achieve a two-thirds vote for an earlier effective date, the legislature did pass a budget with retroactive authorization to fund state government as of July 1, 2021, and the legislature’s intent on that is clear. As noted in the Wallace Memorandum to Speaker Stutes dated July 16, 2021, the legislature historically has used retroactivity provisions in appropriation bills, and prior administrations have given those effect. The current governor’s argument is hyper-technical, and is effectively that he cannot rely on this retroactive authorization to spend state funds until the bill actually goes effective in 90 days. He asserts he has a “cart before the horse” problem. But his argument is in direct conflict with the Alaska Supreme Court’s decision in *ARCO Alaska, Inc. v. State*.²⁹ The Alaska Supreme Court confirmed in that case that the legislature may pass retroactive legislation without a two-thirds vote. Just as the executive branch may rely on retroactive legislation to tax our citizens or industries before the 90-day effective date window, the executive branch may rely on, indeed *must* rely on, its retroactive authorization to spend state funds in the budget bill, as intended and directed by the legislature.

The Alaska Supreme Court discussed the purpose of the 90-day effective date provision in *ARCO*. The central purpose of article II, section 18 is to “afford those affected an opportunity to react to the new legislation by challenging it either through the referendum process or through the courts, as occurred in [that] case.”³⁰ As discussed

²⁸ AS 01.10.070; Alaska Const. art. II, § 17.

²⁹ 824 P.2d 708 (Alaska 1992).

³⁰ *Id.* at 710.

above, appropriation bills are different than regular general legislation. They cannot be passed by initiative, and must be confined to appropriations only. As recognized in an early attorney general opinion, an “appropriation is more like an administrative message passed between branches of government and is distinct from other general law.”³¹ Given the limited powers of the people to impact or undo validly enacted appropriations, there is little reason for the courts not to respect the legislature’s decision to make its authorization to spend state funds retroactive to July 1, 2021, consistent with its ability to pass retroactive legislation as confirmed in the *ARCO* case.

Even if the budget bill did not expressly authorize retroactive spending as of July 1 as allowed in *ARCO*, the executive branch likely has the ability to fund state government once the budget bill becomes enacted law, without waiting for the effective date, as set forth in three early attorney general opinions.³² But in this case the argument is much stronger because the legislature’s intent is made clear by it retroactively authorizing spending as of July 1, 2021, and the Supreme Court decided *ARCO* after these three attorney general opinions.

5. Separation of Powers

The Alaska Supreme Court has often confirmed that those who wrote our constitution followed the traditional framework of American government by dividing governmental authority between the three branches of government.³³ This framework of government in our constitution is the source of the separation of powers doctrine.³⁴

With the goal of “safeguard[ing] the independence of each branch,” and “protect[ing each] from domination and interference” from the other branches, the Court has made clear that separation of powers means that one branch cannot interfere with how another branch exercises its core powers.³⁵ “As Justice Brandeis said, the doctrine

³¹ STATE OF ALASKA, DEP’T OF LAW, INFORMAL OP. ATT’Y GEN. (May 25, 1989); see also *Carr v. Frohmiller*, 56 P.2d 644 (Ariz. 1936) (granting writ to require state to fund pensioner funeral expenses based on the legislature’s intent to fund these expenses, despite it falling between the effective dates of two statutes).

³² STATE OF ALASKA, DEP’T OF LAW, INFORMAL OP. ATT’Y GEN., 1990 WL 518034 (May 18, 1990); STATE OF ALASKA, DEP’T OF LAW, INFORMAL OP. ATT’Y GEN. (May 25, 1989); STATE OF ALASKA, DEP’T OF LAW, OP. ATT’Y GEN., 1981 WL 38705 (July 10, 1981).

³³ See *Bradner*, 553 P.2d. at 5.

³⁴ *Id.*

³⁵ *Id.* at 6 n.11. As the Washington Supreme Court phrases it, “To determine whether a particular action violates separation of powers, we look ‘not [to] whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity

was adopted ‘not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.’ ”³⁶

As discussed above, the appropriation power is a core legislative power. In *State v. Fairbanks North Star Borough*, this Court held that a statute which gave the governor broad authority to reduce the amount the state spent on governmental services to less than that appropriated by the legislature based on actual revenues was unconstitutional.³⁷ This Court held that giving the governor “the exercise of sweeping power over the entire budget with no guidance or limitation” was an unconstitutional delegation of legislative power.³⁸ In this case, the governor’s refusal to fund state expenditures for the first 90 days of the fiscal year impinges on the legislature’s appropriation power, especially as the legislature included a retroactivity provision clarifying the legislature’s intent to fund government as of July 1, 2021. The governor has the duty to faithfully execute this law—and fund state government consistent with the legislature’s appropriations—as he does all laws.³⁹

If the governor consummates his apparent intent to shut down the government in disregard of the legislature’s intent to fund government beginning on July 1, he likely will be in violation of the separation of powers doctrine. This is especially true under the circumstances surrounding this case, where the governor has clearly expressed an intent to *reject* the budget enacted by a majority of the legislature in order to leverage creation of a budget with a larger Permanent Fund Dividend. The governor’s scheme to change a budget approved by a majority of both houses embodies an especially disturbing violation of the doctrine.

or invades the prerogatives of another.’ ” *Brown v. Owen*, 206 P.3d 310, 316 (Wash. 2009) (alteration in original) (quoting *Carrick v. Locke*, 882 P.2d 173, 177 (Wash. 1994)).

³⁶ *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

³⁷ *See generally id.*

³⁸ *Id.* at 1142-43.

³⁹ *See* Alaska Const. art. III, § 16 (“The governor shall be responsible for the faithful execution of the laws.”).