IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, Plaintiff, v. HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, Defendant.	**FILED IN CHAMBERS** STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: KJK ON: Feb. 18, 2021 Case No. 1JU-20-938 CI

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Since before Statehood, Alaska has had a statute providing that, if the Legislature does not either confirm or decline an appointment by the Governor, the appointee is deemed to have been rejected. Following the outbreak of the COVID-19 pandemic, the Legislature in 2020 adjourned without confirming or declining any of the Governor's appointees. The Governor claims this longstanding statute is unconstitutional, and as a result he has directed these appointees to continue to serve in their positions without legislative confirmation.

This case therefore involves a collision between the Governor's power of appointment and the Legislature's power of confirmation. As such, it requires the court to determine where, under our Constitution, the boundary lies between the powers of the executive and legislative branches of Alaska's government.

Separation of powers is one of the core principles of America's system of representative democracy. Under this framework, government is divided into three coequal branches, each of which has defined powers. The doctrine of separation of powers is intended to avoid "tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers."[1] The framers of the United States Constitution deemed the doctrine of separation of powers necessary for two principal purposes:

> [F]irst, to protect the liberty of the citizen; and second, to safeguard the independence of each branch of the government and protect it from domination and interference by the others.[2]

The necessary companion of separation of powers is the doctrine of checks and balances.[3] Under this doctrine, which is "one of the chief features of our triple-department form of government,"[4] each branch is given powers that check the actions of the other branches. Madison expressed the view that, by pitting the branches against one another, the Constitution limits the power of the government itself.[5] As Madison put it, "ambition must be made to counteract ambition."

One of those checks and balances in the United States Constitution is the provision in Article II, section 2 that the President's power to appoint judges and principal officers is

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[1] *Bradner v. Hammond*, 553 P.2d 1, 5 (Alaska 1976).
[2] *Id.* at 6, n. 11, *quoting* C. Antieau, 2 Modern Constitutional Law §11.13 at 200 (1st ed. 1969).
[3] *Id.*
[4] *Continental Ins. Companies v. Bayless & Roberts, Inc.*, 548 P.2d 398, 410, *quoting In re Shortridge*, 34 P. 227 (Cal. 1893).
[5] Federalist No. 51 (J. Madison 1788), https://guides.loc.gov/federalist-papers/text-51-60.

subject to "the Advice and Consent of the Senate." This provision has been termed a "critical 'structural safeguard [] of the constitutional scheme.'"[6]

Like that of most states, Alaska's Constitution contains similar provisions requiring legislative confirmation of certain of the Governor's appointees. Article III, sections 25 and 26, give the Governor power to appoint the heads of principal departments, and members of boards or commissions, respectively, "subject to confirmation by a majority of the members of the legislature in joint session." If a vacancy arises in such a position during the interim between legislative sessions, Article III, section 27 gives the Governor power to make a recess appointment.

The Alaska Territorial Legislature adopted a statute in 1955 which was interpreted by the Territorial court to provide that failure of the Legislature to act on an appointment subject to confirmation is deemed rejection of the appointment.[7] That statute remained in force after Statehood, and it was amended in 1964 to explicitly incorporate that judicial interpretation. Over half a century later, after the last Legislature failed to act on the Governor's appointments, the Governor chose to disregard the statute, contending that it is unconstitutional. The Governor's position is that, because this statute is unconstitutional, his appointees should be able to serve indefinitely without confirmation. The primary issue presented in this case, therefore, is whether this law, enacted before Alaska's Constitution was written, is unconstitutional.

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[6] *NLRB v. SW General*, 137 S.Ct. 929, 935 (2017), *quoting Edmond v. United States*, 520 U.S. 651, 659 (1997).

[7] *See, Munson v. Territory of Alaska*, 16 Alaska 580, 1956 WL 3461 (D. Alaska 1956).

The second issue presented in this case is whether, if the statute is constitutional and the appointments were therefore deemed rejected as a result of the Legislature's inaction, the Governor may then make a recess appointment of the same appointees. Again, although there is a law prohibiting a recess appointment of someone who was rejected by the Legislature, the Governor has chosen to disregard that law, contending that it is unconstitutional.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. The law prior to 2020:

Alaska law on appointments is set out in AS 39.05.080 *et seq.* Section (1) of that statute provides that the Governor shall present the names of persons subject to Legislative confirmation to the Legislature during the first 15 days of its regular session. Any persons appointed after the first 15 days shall be presented immediately upon appointment.

Section (2) of AS 39.05.080 provides that the Legislature "shall, before the end of the regular session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented."

Section (3) of AS 39.05.080 provides that, if the Legislature declines to confirm an appointment, the Governor shall be notified of that action, and a vacancy exists in the position which the Governor shall fill by making a new appointment. The Governor may not reappoint a person whose confirmation was refused during the regular session of the same Legislature, or during the interim between sessions. The final sentence of subsection (3) goes on to provide as follows:

> Failure of the legislature to act to confirm or decline to confirm an appointment during the regular session in which the appointment was presented is tantamount to a declination of confirmation on the day the regular session adjourns.

This section can be traced back to a Territorial statute enacted in 1955,[8] which contained all but the last sentence of what is now AS 39.05.080(3), which we might call the "tantamount clause." Even without that sentence, though, the 1955 statute was interpreted in *Munson v. Territory of Alaska*[9] to provide that failure to vote on confirmation is deemed rejection of an appointee. As Judge McCarrey put it in *Munson,* tacit confirmation as a result of the legislature's inaction "is something foreign to the whole concept of division of powers embodied in the Constitution."[10]

Article XV, section 1 of the Alaska Constitution provides that, upon admission of Alaska into the Union, all then-existing Territorial laws carry forward and become the law of the new State.[11] Thus the 1955 statute became the law of the State, codified as AS 39.05.080. Section (3) of that statute was amended to its present form in 1964 by making minor changes to the wording, and by adding the "tantamount clause," effectively codifying the holding in *Munson* as part of the statute. The 1964 statute appears to have been drawn, almost verbatim, from Judge McCarrey's decision in *Munson.* Thus the statutory provision now challenged by the Governor, establishing that inaction on an appointment equals rejection, has been the law since before Statehood.

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[8] Section 4(d), Ch. 64, SLA 1955.
[9] 16 Alaska 580, 1956 WL 3461 (D. Alaska 1956).
[10] *Id.* at 589.
[11] A similar provision appears in section 8(d) of the Alaska Statehood Act, Pub. L. 85-508, §8(d), 72 Stat. 339.

B. Events in 2020:

The second regular session of the Thirty-First Alaska Legislature convened in Juneau on January 21, 2020. Shortly thereafter, the United States was struck by the COVID-19 pandemic. Just over seven weeks later, on March 11, 2020, Governor Dunleavy declared a public health disaster emergency pursuant to AS 26.23.020(c). The next day, Alaska identified its first positive COVID-19 test.[12]

During the 2020 Legislative session, the Governor presented the Legislature with the names of numerous individuals appointed to various positions, including the Commissioner of Revenue, the Public Defender, and members of various boards and commissions. On March 29, 2020, as a result of the pandemic, the Legislature went on an extended recess without meeting in joint session to act on the Governor's appointments. The Legislature never reconvened to consider those appointments.[13]

Before going into recess, the Legislature passed two bills relevant to this case. On March 26, the Legislature passed HB 309, which set out procedures for confirmation of the Governor's appointments presented during the second regular session of the Thirty-First Alaska Legislature.[14] And on March 28, the Legislature passed SB 241, which (among other things) extended the Governor's declaration of a public health disaster emergency to

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[12] https://gov.alaska.gov/newsroom/2020/03/12/first-case-of-covid-19-confirmed-by-alaska-state-public-health-laboratory-is-an-international-resident/ (viewed January 4, 2021); Section 1(a)(5), FCSSB 241.

[13] The Legislature reconvened briefly in May to consider another issue, but did not take up the Governor's appointments.

[14] Ch. 9, SLA 2020.

November 15, 2020.[15] The Governor signed the two bills into law on April 6 and April 9, respectively.

HB 309 did three basic things. First, section (1)(a)(1) of the statute carried forward the language of AS 39.05.080, which has been in the statute since 1955, requiring the Legislature to act on the Governor's appointments. However, it deleted the requirement that the Legislature act before the end of the regular session, instead providing that the Legislature shall act "at any time."

Second, subsection (1)(a)(2) amended the last sentence of AS 39.35.080(3) to make it clear that failure to act before the end of the 2020 regular session is not tantamount to declination of confirmation as of the last day of the regular session.

Instead, and third, subsection (1)(b) provided that the failure of the Legislature to act will be tantamount to declination of confirmation on a later date, which would be the earlier of:

(1) January 18, 2021; or

(2) 30 days after

(A) expiration of the declaration of a public health disaster emergency issued by the governor on March 11, 2020; or

(B) issuance of a proclamation that the public health disaster emergency identified in the declaration issued by the governor on March 11, 2020, no longer exists.

[15] Ch. 10, SLA 2020.

Because the Legislature, in SB 241, extended the public health disaster emergency to November 15, 2020, this later date was 30 days after that date, or December 15, 2020.[16]

Thus, for purposes of this case, the primary effect of the 2020 legislation was to extend what we might call the "tantamount date" from the end of the regular session until December 15, 2020.

On December 16, 2020, Governor Dunleavy wrote letters to the Senate President and the Speaker of the House setting out his position that all of the appointees who had not received a confirmation vote continue to serve under valid appointments. While it did not say so explicitly, the Governor's letter was apparently a declaration that the Governor would disregard AS 39.05.080 and HB 309 based on his conclusion that those laws were unconstitutional. The Governor went on to say that he was exercising his recess appointment power under Article III, Section 27 "to continue their appointments." The Governor indicated that he would present the names of those persons previously appointed but not confirmed, along with any new appointments, to the Thirty-Second Alaska Legislature by February 3, 2021.

The Legislature filed this action one week later, on December 23, seeking a declaratory judgment that these appointees should be deemed to have been rejected by the Legislature, and seeking injunctive relief prohibiting the Governor's attempt to continue their appointments.

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[16] The court calculates that 30 days from November 15, 2020 is December 15, 2020. It was suggested in the briefing that the relevant date is December 16, 2020. The court does not view the determination of whether or not the appointments were rejected as of December 15 or 16 as being critical to the court's decision. This decision is not intended to resolve that question.

The Governor moved for summary judgment on January 5, 2021. On January 15, 2021, the Legislature opposed the Governor's motion and cross-moved for summary judgment. The Governor opposed the Legislature's motion on February 1, and the Legislature filed a reply on February 8. Oral argument was held on February 17, 2021.[17] Both parties agree that there are no factual issues in this case, and the case presents only questions of law.

III. DISCUSSION

A. Constitutionality of the "Tantamount Clause"

Alaska Statute 39.05.080 provides that the Legislature "shall, before the end of the regular session. . ., in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented." It is clear that the Legislature failed to comply with this statute when it failed to assemble in joint session to act on the appointments by confirming or declining to confirm them by a majority vote.

Since 1964, however, the statute has included language explicitly recognizing the possibility that this might occur, and declaring what this means. AS 39.05.080(3) provides that failure of the Legislature to either confirm or not confirm an appointment by the end of the regular session is "tantamount to a declination of confirmation." The 2020 statute only changed this language by extending the time for the Legislature to act from the last day of the regular session to December 15, 2020.

[17] Oral argument was also held on the previous motion for preliminary injunction, and the court also considers the arguments made at that time in deciding this motion.

The Governor argues that these provisions conflict with the confirmation clauses of the Constitution. As the party raising a constitutional challenge to a statute, the Governor bears the burden of demonstrating the constitutional violation. "A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[18]

If the statutes apply, all of the Governor's appointees were rejected as a result of the Legislature's inaction. The Governor, however, argues that the "tantamount clause" is unconstitutional in both the 1964 and the 2020 statutes. This argument, though, is not based on anything in either the text of the Constitution or anything in the proceedings at the Constitutional convention. Rather, the argument is based almost entirely on the Supreme Court's decision in *Bradner v. Hammond*.[19]

Bradner involved a statute which would have extended the requirement of legislative confirmation to inferior executive branch officials. The Supreme Court found that this statute was unconstitutional, because it conflicted with the separation of powers in the Alaska Constitution. The power of confirmation, according to the Court, is an executive function which is delegated, under Article III, sections 25 and 26, to the legislative branch. The Court held that those provisions "describe the outer limits of the Legislature's confirmation authority."[20] As such, the Legislature may not, by statute, require confirmation of other executive branch officials not named in the constitution.

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[18] *State, Dept. of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001), *quoting Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998).
[19] 553 P.2d 1 (Alaska 1976).
[20] *Id.* at 7.

The Governor argues that the "tantamount clause" of AS 39.05.080 and HB 309, like the statute at issue in *Bradner*, is an attempt to expand the legislative power of confirmation beyond what is granted by Article III, sections 25 and 26.

Before discussing the holding in *Bradner* in detail, it may be helpful to explore the meaning of the constitutional provisions at issue. In particular, what is the effect, under Article III, sections 25 and 26, of a failure on the part of the Legislature to act on appointments. The text of the Constitution is silent on this point. The Constitution merely provides that gubernatorial appointments are "subject to confirmation by a majority of the members of the legislature in joint session." The Constitution does not say what happens if a vote is not held.

Some guidance on how this question might have been viewed at the time of adoption of the Constitution can be found in the decision in *Munson v. Territory of Alaska*.[21] As noted above, the District Court held in *Munson*, applying the 1955 Territorial statute in force at the time, that failure of the Territorial Legislature to act on confirmation should be deemed rejection of the nominee.

The *Munson* case involved appointment of a member to the Alaska Fisheries Board. Because the case was decided before Statehood, it was of course not decided under the Constitution of Alaska. It was decided on the basis of two Territorial statutes. A 1949 statute provided that members of the Alaska Fisheries Board "shall be appointed by the Governor, subject to confirmation by a majority of all the members of the Senate and House of

[21] 16 Alaska 580 (1956).

Representatives in Joint Session assembled."[22] The procedure for confirmation was set out in a 1955 statute, which provided as follows:

> Whenever appointments are presented to the Legislature for confirmation, the Legislature shall, in joint session assembled, act thereon within three days following receipt of the names so presented, by confirming or declining to confirm by majority vote of all of the members thereof the appointments so made and presented.[23]

The Twenty-second Territorial Legislature adjourned in 1955 without voting on the confirmation of Ira Rothwell, whom the Governor had appointed to the Alaska Fisheries Board. The Governor then appointed Albert Munson in Rothwell's place. The Fisheries Board refused to recognize Munson, and allowed Rothwell to sit. Munson sued, seeking Rothwell's seat on the Fisheries Board.

The Territorial statute, like AS 39.05.080, imposed a direct mandate upon the Legislature to act upon appointments by the Governor. Rothwell defended Munson's suit by arguing that the Legislature's failure to meet its obligation under the statute to vote on confirmation should be treated as "tacit confirmation."

The District Court stated the issue in the case as whether the Legislature's inaction was "tantamount to confirmation, rejection, or was it without any legal effect whatsoever."[24] Judge McCarrey interpreted the statute not to require an affirmative act of rejection. Instead, he found that the statutes represented a conclusion by the Legislature that failure to act on confirmation

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[22] Ch. 68, SLA 1949, c. 68, sec. 3(a).
[23] Ch. 64, SLA 1955, Sec. 4(c).
[24] *Id.* at 584.

rendered the nominee ineligible to hold the position. Thus failure to act "is, in effect, rejection."[25]

Judge McCarrey cited multiple cases from other jurisdictions reaching the same conclusion, and noted that his decision was consistent with the "general line of authority."[26] Among the cases on which Judge McCarrey relied was *Marbury v. Madison*, in which Justice Marshall noted that there is no appointment until the Senate affirmatively grants its consent.[27]

Since *Munson* was decided, other cases have reached a result similar to the general line of authority to which Judge McCarrey referred.[28] The most thorough discussion of the issue can be found in the decision of the Delaware Supreme Court in *State ex rel. Oberly v. Troise*. That case presented the issue of whether the Senate's prolonged failure to act on gubernatorial appointments should be deemed constructive consent.

The Delaware Constitution provides that the Governor shall have power to appoint certain officials "by and with the consent of a majority of all the members elected to the Senate. . . ."[29] The case concerned the Delaware Governor's 5 year effort to fill positions on several state boards. The Senate did not vote on any of these positions over three successive

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[25] *Id.* at 588.
[26] *Id.* at 590.
[27] *Id.* at 585, *citing Marbury v. Madison*, 5 U.S. 137, 156 (1803); *see also, State ex rel. McCarthy v Watson*, 45 A.2d 716, 724 (Conn. 1946)("[I]n acting upon an appointment, it [the legislature] is not exercising a prerogative granted it in its own interest or that of its members; there can be no waiver of that duty so that inaction would be the equivalent of a tacit approval of an appointment." [emphasis in original]); *Bell v. Sampson*, 23 S.W.2d 575, 581 (Ky. 1930)("as no vote was ever taken in the Senate upon the appointments of Governor Fields, its nonactino as to such appointments cannot be . . . a confirmation of them.").
[28] *Dunn v. Alabama State University Bd. of Trustees*, 628 So. 2d 519 (Ala. 1993); *Lungren v. Deukmeijian*, 755 P.2d 299 (Cal. 1988)(confirmation by only one house of the Legislature is not deemed confirmation); *State ex rel Oberly v. Troise*, 526 A.2d 898 (Del. 1987).
[29] 526 A.2d at 899, *quoting* Article III, §9 of the Delaware Constitution.

sessions of the General Assembly. In an earlier decision, the Delaware Supreme Court suggested, without actually deciding, that "the Senate's willful and prolonged avoidance of its constitutional duty to confirm a qualified nominee may be deemed an assent to the nomination and the equivalent of a confirmation."[30] In the *Troise* case, the court was asked to adopt that suggestion as a holding of the court.

The *Troise* court engaged in a careful discussion of the doctrine of separation of powers and the history of the legislative power of confirmation. The court recognized that there are legitimate concerns that the State Senate could frustrate the appointment process by inaction. Nevertheless, the court concluded that it would be inappropriate for the judiciary to take upon itself the power of forcing the Senate to act by declaring inaction to be the equivalent of consent. Thus the court denied the request to declare that appointees were entitled to full-term commissions even though they had not been confirmed by the Senate.

The weight of authority has only continued to accumulate since 1956. While there is not an extensive body of caselaw, all cases that have considered the question have held that, absent express Constitutional language providing otherwise, inaction by the Legislature should not be treated as tacit consent. On the contrary, constitutional or statutory provisions requiring confirmation of gubernatorial appointees are generally interpreted to require an affirmative act of consent or confirmation.[31]

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[30] *State ex rel Gebelein v. Killen*, 454 A.2d 737, 744 (Del. 1982).

[31] There are two cases which reached an opposite conclusion. Both, however, were decided under statutory or constitutional provisions which expressly provide that an appointee may serve unless affirmatively rejected by the legislative body. In *Tucker v. Watkins*, 737 So.2d 443, 444 (Ala. 1999), the applicable statute provided that appointments "shall be effective until adversely acted upon by the Senate." Similarly, in *Shadduck v. Ciotoli*, 429 N.Y.S. 2d 293, 294

As noted above, this has always been the rule under the United States Constitution. There is nothing in Article II, section 2 of the United States Constitution expressly providing for what happens if the Senate fails to act. Rather, the Constitution merely states that appointments are "by and with the advice and consent of the Senate." But, in adopting this language, the framers considered and "explicitly rejected" a system in which Senate inaction would be treated as confirmation.[32]

The only place in which this rule is expressly set out in federal law is in the Uniform Rules of the Senate, Rule XXXI(6), which includes the following language:

> Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

Insofar as this rule is not contained in the plain language of Article II, section 2, under the argument made by the Governor here, perhaps the constitutionality of this Senate Rule could be questioned as well. But given the lack of any case reaching this conclusion in the 233 years that Article II, section 2 has been in effect, it would seem reasonable to treat the constitutionality of this Senate rule as a settled matter.

(App. Div. 1980), *aff'd.*, 421 N.E.2d 849 (N.Y. App. 1981), the applicable county charter provided that, if the County Legislature failed to act within 15 days, the appointment "shall be deemed confirmed."

[32] *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 235 (3rd Circuit 2013), *citing* Adam J. White, *Toward the Framers' Understanding of 'Advice and Consent:' A Historical and Textual Inquiry*, 29 Harv. J.L. & Pub. Policy 103, 117-19 (2005); Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers without a Senate Confirmation Vote?* 122 Yale L.J. 940, 964-95 (2013).

The Governor points to Constitutional provisions in several other states which contain language explicitly providing that inaction by the Legislature is treated as tacit confirmation.[33] But the presence of an explicit provision in the Constitution of some states does not tell us how to interpret a Constitution which lacks such a provision.[34]

The Governor does not cite a case from any State whose constitution is silent on this question that has adopted the rule he argues for here. It appears to be the unanimous rule, both under the United States Constitution and under all State Constitutions lacking express language providing otherwise, that failure of a legislative body to act on confirmation of an executive branch appointment is the equivalent of rejection.

Obviously, because *Munson* was decided before Statehood, it cannot, by itself, stand as an interpretation of the Alaska Constitution. And because it was decided after the conclusion of the Constitutional Convention, the Framers of Alaska Constitution cannot be charged with knowledge of the holding of that case.[35] To the extent, though, that the decision in that case set out the "general line of authority" at the time, the court cannot lightly infer that the Framers intended a different result under Alaska's Constitution.

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[33] *See, e.g.,* IL CONST. Art. 5, §9; MI CONST. Art. 5, §6; OH CONST. Art. III, §21; PA CONST. Art. 4, §8.

[34] Indeed, the presence of such provisions in other Constitutions suggests that the framers of Alaska's Constitution, who carefully studied Constitutions of other States, would have included such a provision if they had intended to adopt a similar rule in Alaska.

[35] It bears noting, though, that the Framers were aware of the existence of the 1955 statute. In the context of a discussion about the provision on recess appointments, Delegate Vic Fischer noted his awareness of the statute "enacted by the last session of the legislature," and suggested that it was appropriate to leave "this kind of detailed procedure" to the legislature. 3 PACC at 2264.

There is not a clear discussion of this point in the minutes of the Constitutional Convention. There was, though, a reference to this issue in a different context which suggests that the framers recognized that inaction would mean rejection of an appointment.

The initial committee draft of the recess appointment section had language setting out specific procedures for recess appointments. This language of this proposal, though ultimately not adopted, would have provided as follows:

> After the end of the session no ad interim appointment to the same office shall be made unless the Governor shall have submitted to the Senate a nomination to the office during the session and the Senate shall have adjourned without confirming or rejecting it. No person nominated for any office shall be eligible for an ad interim appointment to such office if the nomination shall have failed of confirmation by the Senate.[36]

The day after this proposal was submitted, delegate Victor Rivers described the Committee's intent:

> Now we have given the governor the power to fill any vacancy occurring during a recess. You will notice there are certain limits upon his power to fill those vacancies. If at the end of the session any of his ad interim appointments expire, or at the end of the next regular session is the way we have put it, but if he nominates somebody and they are sent down for confirmation to the legislature, the legislature does not confirm them during the session, then he may not nominate that same man for an interim appointment after the legislature has adjourned. We felt it was necessary there to have that restriction in order that the governor might not bypass the approving power of the legislature and make an ad interim appointment of somebody the legislature had refused to approve and did not confirm.[37]

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[36] Committee on the Executive Branch Proposal 10(a), January 12, 1956, http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20208.pdf.
[37] 3 PACC 1989.

The Committee's proposal expressly considered the possibility that the Legislature might "have adjourned without either confirming or rejecting it." The proposed recess appointment language recognized that, if this happened, the position would be vacant.

While this early version of the recess appointment clause was not ultimately included in the Constitution, it was not rejected because any delegate objected to any of the language. Rather, the convention initially rejected this language because, as delegate Vic Fischer put it, "the subject can be very adequately covered by legislation."[38] Delegate Fischer, in making this comment, noted his awareness "that we presently have a law to this effect on our statute books [which] was enacted by the last session of the legislature."[39] It seems clear that this comment referred to the 1955 Territorial statute on confirmation of gubernatorial appointments, which eventually became AS 39.05.080. Delegate Mildred Hermann went on to say, with reference to this statute, that "the law that we have at the present time is sufficient to describe it as a statutory measure and as a statutory measure it does not belong in the constitution."[40]

Following these comments, the convention voted to delete the proposed recess amendment from the Committee Proposal.[41] Delegate Mary Nordale then asked if that meant that "the governor has no authority to make interim appointments at all, correct?" Convention President William Egan responded: "Unless it is covered by statutory law, Mrs. Nordale."

Shortly thereafter, Delegate Seaborn Buckalew expressed concern that, without this section being in the Constitution, the Governor would not have authority to make a recess

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[38] *Id.* at 2264.
[39] *Id.*
[40] *Id.* at 2265.
[41] *Id.*

appointment. President Egan responded by noting that "there is a statutory provision that gives the governor of Alaska a right to make interim appointments now and that if the laws are carried over into the new state government by the transitional measure, he will still have that authority."[42]

This discussion makes several things clear. First, the convention was fully aware of the existence of the 1955 statute which was codified at Statehood as AS 39.05.080. Second, the delegates understood the likelihood that the 1955 Territorial statute would carry forward as the law of the new State. And third, no delegate expressed any intention for the Constitution to overturn that statute. Nor is there any hint, anywhere in the deliberations, that the framers intended to create only a veto power on the part of the Legislature, as opposed to requiring an affirmative act of confirmation. Given that, I can find no evidence whatsoever that it was the intention of the framers to render the 1955 statute invalid.

Of course the starting point in interpreting a provision of the Constitution is the text itself. But the Governor does not point to anything at all in the text of the Constitution that supports his argument that these statutes are unconstitutional. Instead, as noted above, his argument is based entirely on the Supreme Court's decision in *Bradner v. Hammond.* That case involved an attempt by the Legislature to expand its confirmation powers, by statute, to lower level executive branch officials.

The Supreme Court concluded that the appointment of executive branch officials is primarily an executive function. The power of confirmation represents a portion of this executive power that is delegated to the legislative branch under Article III, Sections 25 and 26

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[42] *Id.* at 2267.

Because this is an executive function that the Constitution took from the executive and gave to the Legislature, this delegated power describes the outer limits of the Legislature's confirmation authority. The Legislature may not, by statute, expand this power to apply it to other, lower ranking, executive branch officials not named in the Constitution. Justice Rabinowitz, writing for a unanimous court, explained the court's reasoning as follows:

> The lack of ambiguity in Sections 25 and 26 of Article III of the Alaska Constitution mandate that this court interpret these express provisions as embodying not only the maximum parameters of the delegation of the executive appointive authority through the legislative confirmation function but, further, that they delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers. In our view, the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision. To hold otherwise would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the executive by the legislative branch, because there would be no logical termination point to the legislature's confirmation of executive appointments.[43]

The Governor claims that the statutes at issue here, by providing that inaction by the legislature is deemed rejection of an appointee, expand the Legislature's power contrary to the holding of *Bradner*.

It was beyond dispute in *Bradner,* though, that the statute being challenged would have expanded the Legislature's power of confirmation – it would have required Legislative confirmation of a whole class of additional executive branch officials not named in the Constitution. I am not persuaded, though, that the statutes at issue here expand the power of confirmation. No additional officials are subject to confirmation. Confirmation still requires a

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[43] 553 P.2d 1, 7-8 (Alaska 1976)(footnotes omitted).

majority vote of both houses of the Legislature sitting in joint session. The statutes merely prescribe the procedure by which the Legislature exercises that existing power.

One could even say that these statutes narrow the Legislative power of confirmation, because they impose a time limit on the Legislature's action. It is the Governor's position that the Legislature's inaction leaves these appointments still subject to confirmation or rejection. According to the Governor, the Legislature could take no action for years after an appointment is made, and then, if it did not like what an appointee was doing, remove that appointee by voting to reject their appointment. This would allow the Legislature, by deferring action, to turn the power of confirmation into a power of removal, with no time limit at all on the exercise of that power. AS 39.05.080, by establishing a time limit of the end of the regular session, arguably narrows the Legislature's power of confirmation insofar by prohibiting the Legislature from deferring action on an appointee.

The outcome argued for by the Governor would actually encourage the Legislature to follow this procedure. A clever Legislature, if given this power, would elect not to confirm any gubernatorial appointee. The Legislature could reject those nominees of whom it disapproved, while deferring action on all the rest, thus retaining indefinitely the power of removal. I am unable to conclude that this is the procedure our Constitution requires.

The procedure prescribed in the statutes in question is consistent with the Territorial court's interpretation of the statute in effect at the time of the Constitutional convention, with which the delegates were familiar, and which they expected to remain in force after Statehood. That procedure is consistent with the procedure followed in every other State that has considered the question, with the exception of those states whose Constitutions expressly

require a different procedure. And that procedure is consistent with the interpretation given to the United States Constitution for over two centuries. Given that, I am not persuaded that AS 39.05.080, or the 2020 statute that changes the "tantamount date," expands the power of confirmation, or derogates the appointing authority of the executive branch, beyond what Alaska's Constitution calls for.

In summary, I am unable to find anything in the text of the Constitution that conflicts with these statutes. Nothing in the deliberations of the constitutional convention supports the Governor's position that these statutes are unconstitutional. On the contrary, the delegates were well aware of the Territorial statute in force at the time, which was a predecessor of the statute in question. Nothing in the deliberations at the convention suggests that it was the intent of the framers to overturn that statute. The statutes in question are consistent with how similar constitutional provisions are interpreted in other states, and at the federal level. And I am not persuaded that the statutes expand the Legislature's power of confirmation contrary to the Alaska Supreme Court's decision in *Bradner v. Hammond.*

One other point should be made in connection with this. The Governor argues that the Legislature failed to comply with its duty to take up these appointments and vote on them.

It is clear that the Legislature has a duty to act upon the governor's appointments.[44] It is equally clear that the last Legislature did not meet this duty. Whether the court should grant a remedy for that failure in this case, though, is less clear.

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[44] The court noted in *Munson v. Territory of Alaska* that the statute "contains language imposing a direct mandate upon the legislature to act upon the 'nominations' of the governor." 16 Alaska at 588. The language from which that mandate derived remains in the statute today

The parties point the finger of blame in various directions. The Governor blames the Legislature for not voting on confirmations before leaving the Capitol in March, or for not dealing with the issue when the Legislature returned briefly in May, or for not calling itself into special session later in the year.[45] Alternatively, one could attribute the blame to those Members of the Legislature who declined to join in a call for a special session.[46] The Legislature, on the other hand, suggests that the fault is that of the Governor for not exercising his power to call a special session on this subject.

Deciding who to blame for the impasse that exists is precisely the sort of political question that should be left to the political branches of government – and to the voters. Resolution of this question is not necessary to the court's decision, which merely requires the court to decide an issue of law. Given that, it would be inappropriate for the court to express a position on such political questions.

For all of these reasons, I am not persuaded that the "tantamount clause" of AS 39.05.080(3) or HB 309 is unconstitutional. I conclude that these statutes represent a valid exercise of the Legislature's power to prescribe by law the procedure for carrying out the legislative power of confirmation of executive branch appointees. Given that conclusion, I find that the appointees in question were rejected by the second session of Thirty-First Alaska Legislature, effective December 15, 2020.

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at AS 39.05.080(2)(B): "[T]he legislature shall . . . act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented."

[45] Article II, §9 of the Alaska Constitution provides that a special session may be called by the Governor or by vote of two-thirds of the legislators.

[46] Because two-thirds of the 60 members of the Legislature must assent to calling a special session, it would only take 21 members failing to concur in order to prevent a special session.

B. Recess appointments

In light of the conclusion that these appointments were rejected, the court must next consider whether Governor Dunleavy made valid recess appointments. The Governor's December 16, 2020 letter to Senate President Giessel and House Speaker Edgmon contains the following sentence:

> I am also exercising my constitutional authority under the Alaska Constitution, Article III, Section 27 to continue their appointments.

Article III, Section 27 is the Constitutional provision regarding recess appointments. Thus the letter indicates that, if the original appointments were rejected, the Governor is attempting to make a recess appointment of the same appointees.

The Legislature asserts that these recess appointments are invalid, because they violate AS 39.05.080(3), which provides that "[a] person whose name is refused for appointment by the legislature may not thereafter be appointed to the same position or membership during the interim between regular legislative sessions." Under this view, because these appointees were refused for appointment as a result of the Legislature's inaction, they are disqualified from a recess appointment.

The Governor, on the other hand, argues that these are valid recess appointments under Article III, section 27. That provision provides as follows:

> The governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law.

The Governor argues at length that there is nothing in the Constitution that prohibits him from appointing someone who was rejected by the Legislature. But the Legislature's argument is not that the Constitution prohibits the Governor from reappointing the same

appointees. Rather, the Legislature's argument is that the statute prohibits the Governor from reappointing them. AS 39.05.080(3) provides as follows:

> When the legislature declines to confirm an appointment, the legislature shall notify the governor of its action and a vacancy in the position or membership exists which the governor shall fill by making a new appointment. The governor may not appoint again the same person whose confirmation was refused for the same position or membership during the regular session of the legislature at which confirmation was refused. The person whose name is refused for appointment by the legislature may not thereafter be appointed to the same position or membership during the interim between regular legislative sessions.[47]

This statutory language originated in the 1955 Territorial statute discussed above. The 1955 statute provided as follows:

> Whenever the Legislature shall decline to confirm any or all appointments so made and presented to it for confirmation, the Legislature shall notify the appointing authority of its action and a vacancy in such 'position or membership' shall thereupon exist which the appointing authority shall fill by making a new appointment, which new appointment shall be presented for confirmation to the Legislature within twenty calendar days following receipt by the appointing authority of the Legislature's notification aforesaid. If the name of any person has been submitted and has not been confirmed, the appointing authority shall not, upon resubmission of appointments as required by this Act, submit again the name of the person not confirmed for the same 'position or membership' during that session of the Legislature; nor shall such person whose name has been refused or rejected for appointment by the Legislature be thereafter appointed to such 'position or membership' during the interim between legislative sessions.[48]

The highlighted language is essentially indistinguishable from the current language of AS 39.05.080.

The Governor argues that the provision in Article III, section 27 that that the duration of recess appointments shall be prescribed by law means that the Legislature may not prohibit the

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[47] Emphasis added.
[48] Sec. 4(d), Ch. 64, SLA 1955 (emphasis added).

Governor from making recess appointments of individuals who were rejected by the Legislature.

As noted above, delegate Vic Fischer made reference to the 1955 statute in the convention's deliberations about the recess appointment section,[49] and Convention President Egan commented that the "transitional measures will probably call for the adoption of all Territorial laws, laws on the statutes to become the law of the state."[50] This comment proved prescient, as both the Constitution and the Alaska Statehood Act did precisely this.[51]

The text of Article III, section 27 does not prohibit the Legislature from enacting laws governing recess appointment. It merely provides that the "duration" of recess appointments shall be prescribed by law. The question, then, is whether the explicit grant of authority to the Legislature to prescribe the duration of appointments means that the Legislature is prohibited from enacting laws otherwise governing recess appointments.

There is good reason to believe that the delegates to the constitutional convention believed that the Legislature has an implied power to regulate recess appointments, even without an express grant of authority to do so in the Constitution. As noted above, the first draft of the constitution included a provision expressly prohibiting the governor from making a recess appointment of someone who had been rejected by the Legislature. The entire recess appointment clause, including this language, was then deleted because it was already governed

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[49] 3 PACC 2264 (January 13, 1956).
[50] *Id.* at 2267.
[51] Article XV, section 1; Pub. L. 85-508, §8(d), 72 Stat. 339.

by the 1955 statute, and the delegates apparently believed the Legislature already had an implied power to authorize such appointments.[52]

The delegates then, apparently, had second thoughts about removing this provision altogether. Delegate George Sundborg offered another version of the recess appointment clause, which would have provided as follows:

> The Governor may fill any vacancy occurring in any office during a recess of the Legislature, as may be prescribed by law.[53]

Speaking in support of this proposal, delegate Victor Rivers said that this proposal "takes care of nothing that is not already an implied power. The legislature already has the power to provide by law."[54]

The convention initially adopted this proposed language. Later the same day, though, the convention returned to this topic. Delegate Sundborg moved to amend the earlier language to something very close to what was ultimately adopted:

> The Governor may make ad interim appointments to fill vacancies occurring during a recess of the legislature in offices requiring confirmation of either or both houses of the legislature. The duration of such appointments shall be prescribed by law.[55]

Delegate Sundborg gave a somewhat cryptic explanation of the reasons for this change:

> Mr. President, a little while ago I submitted another amendment which I thought accomplished what this says, but I was advised by some of the technical staff it did not actually accomplish what I had intended, in that it left the possibility present that the legislature could by law actually prohibit the governor from even making a recess appointment under the existing language. This new

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[52] 3 PACC 2264-67 (January 16, 1956).
[53] 3 PACC 2268 (January 16, 1956).
[54] *Id.* at 2268-69 (emphasis added).
[55] *Id.* at 2284.

> section says that the governor may make a recess appointment but that the duration of the appointment shall be determined by the legislature.[56]

Unfortunately, the advice given to delegate Sundborg is apparently lost to history. But delegate Sundborg's comment suggests that the purpose of the amendment was only to ensure that the Legislature could not prohibit the Governor from making recess appointments altogether.

In delegate Victor Rivers' discussion of the earlier language, he recognized that the Legislature has the implied power to prohibit the Governor from making a recess appointment of a person whom the Legislature had rejected:

> That amendment does nothing more than give him an implied power that is already here. It doesn't take care of an appointment he may make. Suppose the governor makes an appointment of "Joe Doaks" to be a secretary of some department, or head of some department, the legislature does not confirm him. The governor submits no new name; the legislature goes out of session; the governor then turns around and reappoints "Joe Doaks" interim head until the next session of the legislature meets. By our wording we have taken care of that. By this wording it takes care of nothing that is not already an implied power. The legislature already has the power to provide by law.[57]

The Governor now appears to be arguing, contrary to delegate Rivers' suggestion, that the Legislature does not have this implied power. This would leave the Legislature powerless to prohibit the recess appointment of Joe Doaks after the Legislature rejected his appointment. This would then allow Joe Doaks to remain in office until the Legislature reconvenes to again consider his appointment. If the Legislature did what it has done in every year but 2020, and met in joint session at the end of its regular session to consider appointments, Doaks could serve until the last day of the session while awaiting confirmation. If the Legislature rejected

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[56] *Id.* at 2284-85.
[57] *Id.* at 2268-69 (emphasis added).

Joe Doaks' appointment and then adjourned, the Governor could then make a recess appointment of Joe Doaks the next day, and he could return to his position after a one-day hiatus. He could then serve in that position until the Legislature again met in joint session during the next session. The result would be that a Governor could frustrate the Legislature's power of confirmation indefinitely, and the Legislature would be utterly powerless to enact a law prohibiting the Governor from doing so.

The response might be made that this is an improbable hypothetical, because no Governor would do such a thing. But this is precisely what the Governor did on December 16, 2020. The Legislature rejected his appointees, and he made a recess appointment of the same appointees the next day.

Whether the Legislature's rejection of these appointees by failing to act was a wise or prudent thing to do is not a question for the court to answer. The fact is the appointees were rejected as of December 15, 2020 by operation of law, and the Governor now claims that he had the power to reappoint them by recess appointment the next day, despite a law prohibiting him from doing so.

As noted above, Alaska has had a statute on the books since 1955 prohibiting the Governor from making a recess appointment of someone already rejected by the Legislature. The delegates to the Constitutional convention were aware of this statute, and of the likelihood that it would carry over as a State statute. At no point in the deliberations of the convention was there any suggestion that the Constitution was intended to overturn this statute. And there is nothing in the text of the Constitution that prohibits the Legislature from adopting such a statute. On the contrary, in the discussion of this issue, delegates recognized the implied power

to enact such a law. Given all of those circumstances, I am unwilling to find that the Constitution should be implied to require such a result.

I therefore conclude that the attempted recess appointments contained in the Governor's December 16, 2020 letter were prohibited by AS 39.05.080(3).

C. Did the Governor violate his duty to faithfully execute the laws?

Article III, section 16 of the Alaska Constitution provides that "the governor shall be responsible for the faithful execution of the laws." The Legislature argues that, when the Governor announced in his December 16, 2020 letter that these appointees were validly confirmed, he violated his duty to faithfully execute the law.

The Governor, on the other hand, argues that the laws he is required to faithfully execute include the Alaska Constitution. According to the Governor, he has acted appropriately to faithfully execute the laws by filing a counterclaim asking the court to declare AS 39.05.080(3) and Ch. 9, SLA 2020 unconstitutional.

It was established in *Marbury v. Madison* in 1803 that the judicial branch is the final arbiter of the constitutionality of statutes.[58] Left unstated in *Marbury*, though, was the question of whether, if the executive believes a statute is unconstitutional, the executive must "faithfully execute" the statute before such time as a court passes on its constitutionality.

This is, to be sure, an important question of constitutional theory. It is a question that has been debated at least since President Jefferson declined to enforce the Sedition Acts. There

[58] *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

is some support in caselaw on both sides of the question.[59] The task of this court, however, is merely to determine the legal status of these appointments. It is not necessary, in order to make that determination, to determine whether the Governor has complied with his duty to faithfully execute the laws. Without a need to do so, I decline to decide this abstract question of constitutional theory.

IV. CONCLUSION

For the reasons set forth above, I conclude that the appointments in question were rejected as of December 15, 2020. I further find that the attempt to reappoint the same appointees on December 16, 2020, as recess appointments was prohibited by statute. As a result of those conclusions, the plaintiff's motion for summary judgment is GRANTED, and the defendant's motion for summary judgment is DENIED. Plaintiff's counsel shall submit an appropriate form of declaratory judgment within three (3) business days of the date of this

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[59] *Compare, State v. State Board of Equalizers*, 94 So.2d 681, 682-82 (Fla. 1922)("The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitutional before he will obey it is . . . without merit. The fallacy in it is that every act of the legislature is presumed constitutional until judicially declared otherwise, and the oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined.") *and Lockyer v. City and County of San Francisco*, 95 P.3d 459, 486 (Cal. 2004)("[T]he oath to support and defend the Constitution requires a public official to act within the constraints of our constitutional system, not to disregard presumptively valid statutes and take action in violation of such statutes on the basis of the official's own determination of what the Constitution means.") *with In re Aiken County*, 725 F.3d 255, 261 (D.C. Cir. 2013)("So unless and until a final Court decision in a justiciable case says that a statutory mandate or prohibition on the Executive Branch is constitutional, the President . . . may decline to follow that statutory mandate or prohibition if the President concludes that it is unconstitutional.")(Opinion by Judge Brett Kavanaugh, not joined by the rest of the court).

order. Defendant shall file any objections within three (3) business days. If an objection is filed, plaintiff shall file a reply within three (3) business days.

Entered at Juneau, Alaska this 18th day of February, 2021.

Philip M. Pallenberg
Superior Court Judge

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