

IN THE SUPREME COURT OF THE STATE OF ALASKA

Representative Wes Keller;)	
Representative Mike Kelly;)	
Senator Fred Dyson;)	
Senator Tom Wagoner;)	
Representative Carl Gatto; and)	
Representative Bob Lynn,)	
)	Supreme Court No. S-13296
Appellants,)	
)	Trial Case #3AN-08-10489CI
v.)	
)	
Senator Hollis French;)	
Senator Kim Elton; Stephen E.)	
Branchflower; and The Alaska)	
Legislative Council,)	
)	
Appellees.)	

**BRIEF AMICUS CURIAE OF LAW PROFESSORS AND LEGAL SCHOLARS
IN SUPPORT OF APPELLANTS**

LAW OFFICES OF
ROSS & MINER
A PROFESSIONAL CORPORATION
327 EAST FIREWEED LANE, SUITE 201
ANCHORAGE, ALASKA 99503
TELEPHONE (907) 276-5307

Brief Amicus Curiae
Supreme Court Case No. S-13296

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF INTEREST OF AMICI 2

STATEMENT OF THE CASE 4

ARGUMENT 9

I. A Legislative Committee’s Violation Of Its Own
Rules And Jurisdictional Statutes In An Investigation
Of Individuals Outside The Legislative Branch Is Fully
Justiciable 9

II. The Numerous Violations Of Jurisdictional Statutes
And Rules Inherent In The Present Legislative
Investigation Amount To A Deprivation Of Due Process 18

CONCLUSION 23

LAW OFFICES OF
ROSS & MINER
A PROFESSIONAL CORPORATION
327 EAST FIREWEED LANE, SUITE 201
ANCHORAGE, ALASKA 99503
TELEPHONE (907) 276-5307

TABLE OF AUTHORITIES

ALASKA CASES

Keller v. French, No. 3AN-08-10489CI
 (Alaska Super. Ct. Oct. 2, 2008) 5, 6, 9

Malone v. Meekins,
 650 P.2d 351 (Alaska 1982) 6, 7, 9

FEDERAL AND OUT-OF-STATE CASES

Baker v. Carr, 369 U.S. 186 (1962) 17

Christoffel v. United States, 338 U.S. 84 (1949) 13, 19

Murphy v. Collins,
 312 N.E.2d 772 (Ill. App. Ct. 1974) 15-17, 20

United States v. Smith, 286 U.S. 6 (1932) 9, 12

Watkins v. United States, 354 U.S. 178 (1957) 6, 11-14, 21

Wilson v. United States,
 369 F.2d 198 (D.C. Cir. 1966) 10

Yellin v. United States, 374 U.S. 109 (1963) 10, 14-15

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Alaska Const. art. I § 7 5, 15

LAW OFFICES OF
ROSS & MINER
 A PROFESSIONAL CORPORATION
 327 EAST FIREWEED LANE, SUITE 201
 ANCHORAGE, ALASKA 99503
 TELEPHONE (907) 276-5307

Alaska R. App. P. 212(c)(9)	1
AS § 24.20.010	18-19
AS § 24.20.060	19
AS § 24.60.170	21
AS § 39.52.310	21
Alaska State Legislature Uniform Rule 20	20

LAW OFFICES OF
ROSS & MINER
A PROFESSIONAL CORPORATION
327 EAST FIREWEED LANE, SUITE 201
ANCHORAGE, ALASKA 99503
TELEPHONE (907) 276-5307

JURISDICTIONAL STATEMENT

This Court accepted jurisdiction over this appeal by order dated October 3, 2008, and ordered expedited briefing. Pursuant to Alaska R. App. P. 212(c)(9), amici curiae have filed a motion with the Court for leave to file this brief, and are conditionally filing this brief as permitted by rule.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a state legislative committee's violations of the Alaska Constitution, state statutes, and the Alaska State Legislature Uniform Rules in the course of investigating individuals outside the legislative branch are insulated from review by any Alaska court under the political question doctrine.

2. Whether a state legislative committee violates the due process clause of the Alaska Constitution by (a) authorizing an investigation that is not connected to any ascertainable legislative purpose and that has no reasonably ascertainable subject matter, (b) issuing subpoenas from a different legislative committee that lacks jurisdiction over the Executive Branch offices in which the subpoena recipients

are employed, and (c) mandating completion of an investigative report in the waning days of a campaign period in which the principal subject of the investigation - the Governor of Alaska - is a candidate for high federal office.

STATEMENT OF INTEREST OF AMICI

Amici are law professors and legal scholars; they speak in their individual capacity, and their institutions are listed for identification purposes only.

Amicus John S. Baker, Jr., is Dale E. Bennett Professor of Law at Louisiana State University Law Center. He has taught a number of courses on separation of powers with Justice Antonin Scalia, and served as a consultant to the U.S. Senate Judiciary Subcommittee on Separation of Powers.

Amicus Patrick McKinley Brennan is John F. Scarpa Chair in Catholic Legal Studies and Professor of Law at Villanova University School of Law.

Amicus Theresa S. Collett is Professor of Law at University of St. Thomas School of Law.

Amicus Theodore H. Frank is on leave of absence from his job as Director of the AEI Legal Center for the Public

Interest and Resident Fellow at the American Enterprise Institute for Public Policy.

Amicus Andrew W. Lester is Adjunct Professor at Oklahoma City University School of Law and a former United States Magistrate Judge for the Western District of Oklahoma.

Amicus Michael W. Lewis is Assistant Professor of Law at Ohio Northern University Pettit College of Law.

Amicus Michael A. Livingston is Professor of Law at Rutgers-Camden School of Law.

Amicus John O. McGinnis is Stanford Clinton Sr. Professor of Law at Northwestern University.

Amicus Michael Moreland is Assistant Professor of Law at Villanova University School of Law.

Amicus Philip D. Oliver is Byron M. Eiseman Distinguished Professor of Law at the William H. Bowen School of Law at University of Arkansas-Little Rock.

Amicus Carmenelisa Perez-Kudzma is Professor at Florida A&M University College of Law.

Amicus Maimon Schwarzchild is Professor of Law at the University of San Diego.

Brief Amicus Curiae
Supreme Court Case No. S-13296

Page 3 of 23

Amicus Andrew C. Spiropoulos is Professor of Law at Oklahoma City University School of Law, and the former Senior Counselor to the Speaker of the Oklahoma House of Representatives.

Amicus Byron G. Stier is Associate Professor of Law at Southwestern Law School.

Amicus Victor Williams is Clinical Assistant Professor at Columbus School of Law, Catholic University of America.

Amici are law professors and legal scholars from across the United States who are interested in issues of separation of powers and constitutional checks and balances. Amici are concerned that the position taken by the Alaska Legislative Council and the lower court that legislative investigations are unreviewable could be a precedent that undermines the centuries-old understanding that United States citizens can rely upon the courts to protect them from overreaching by the legislature.

STATEMENT OF THE CASE

The court below held that a legislative committee that seeks to investigate individuals outside the legislature -

including both Executive Branch employees and private citizens - may violate its own jurisdictional statute, ignore the Alaska State Legislature Uniform Rules, and flout other provisions without any opportunity for judicial review, all because the political question doctrine makes such violations "a matter for the legislative branch, not the judicial branch." Keller v. French, No. 3AN-08-10489CI, slip op. at 6 (Alaska Super. Ct. Oct. 2, 2008). That is a startling proposition in a state that adopted its Constitution in the shadow of the McCarthy hearings, and that accordingly saw fit to constitutionalize a special right to "fair and just treatment in the course of legislative and executive investigations" not found in any other state constitution. ALASKA CONST. art. I § 7. It also contravenes a century of case law from the Supreme Court of the United States and other courts around the country, and turns American constitutional history on its head. As the U.S. Supreme Court observed in one McCarthy-era case, the power of the judiciary to review legislative investigations that exceed their proper jurisdiction was understood and accepted at the founding of the Republic precisely because of the "evil effects of

absolute power" associated with the British Parliament. Watkins v. United States, 354 U.S. 178, 192 (1957). Left intact, the decision of the court below insures that Alaskans who are improperly subpoenaed by state legislative committees will have no judicial recourse to protect their rights, no matter how gross the violation may be.

The sole justification given by the trial court for its decision is this Court's decision in Malone v. Meekins, 650 P.2d 351 (Alaska 1982) (cited in Keller, slip op. at 5, 6, 7, 8). Malone stands for the unexceptionable proposition that, because the legislature has the exclusive right to determine its own internal procedures, the political question doctrine precludes a court from interfering with the legislature's selection of its leadership and its related decisions regarding legislative committee assignments. But the Court made plain in Malone that the political question doctrine does not preclude judicial review of legislative rule violations that affect individuals outside the legislature. Malone squarely held that it is the function of the judiciary to require the legislature to follow its own rules "where the rights of persons who are not members of the legislature are

involved.” Id. at 359. That is precisely the situation here: In what is surely the most procedurally irregular legislative investigation in Alaska’s history, two different legislative committees acting in tandem are in the process of violating the rights not of members of the state legislature, but of the Governor, other Executive Branch employees, and a number of private citizens. Nothing about Malone insulates this travesty of due process from judicial review.

When the legislative investigation at issue is reviewed under normal standards of judicial review, it is clear that a due process violation of historic proportions is in progress. As an initial matter, neither legislative committee involved in the investigation has jurisdiction over the subject matter of the investigation. The investigation was initiated by the Legislative Council, whose investigative powers are limited by statute to investigations related to pending legislation. The Legislative Council’s lack of jurisdiction here is evidenced by the fact that, when it came time to issue subpoenas, the Legislative Council did not issue them (despite its statutory power to issue subpoenas in certain enumerated circumstances); instead, the Legislative Council turned to the Judiciary

Committee to issue the subpoenas. But under the Uniform Rules that govern the Alaska legislature, it is the State Affairs Committee, and not the Judiciary Committee, that has exclusive authority over the three Executive Branch agencies that are the subject of the investigation. If the procedure by which the subpoenas were issued was improper, the substance of the subpoenas is equally problematic. Those subpoenas call for testimony concerning all "potential abuses of power," with no definition as to what that could possibly mean. And the Legislative Council has demanded that a report of the investigation be completed by October 10, 2008 - just three weeks before Governor Palin is to stand for election for Vice President of the United States - despite the fact that statutory provisions governing ethics investigations regarding Executive Branch hiring and firing decisions require that such investigations be put on hold during campaign periods so as to protect against the use of the investigative device for partisan political purposes. These violations abrogate clear statutory and regulatory provisions that are within the judicial competence to interpret and decide. The court below erred in sidestepping its judicial duty to do so. Its

decision should be reversed.

ARGUMENT

I. A Legislative Committee's Violation of its Own Rules and Jurisdictional Statutes in an Investigation of Individuals Outside the Legislative Branch Is Fully Justiciable.

The trial court's decision dismissing this action was based on the misapprehension that the claims at issue related "solely to the internal organization of the legislature" and thus, under the political question doctrine, cannot be decided by the courts. Keller, slip op. at 5. That assertion, if it is accurate at all, has no application where - as here - the subjects of a legislative investigation are not themselves members of the legislature. This Court itself has made clear that, "where the rights of persons who are not members of the legislature are involved," the judiciary has the power to enter orders ensuring that the legislature follow its own rules. Malone, 650 P.2d at 359. The U.S. Supreme Court has repeatedly reiterated the same principle: "As the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one." United States v. Smith, 286 U.S. 6, 33 (1932); see

also, e.g., Yellin v. United States, 374 U.S. 109, 114 (1963) ("It has been long settled, of course, that rules of Congress and its committees are judicially cognizable" in actions involving individuals under investigation who are not members of Congress); Wilson v. United States, 369 F.2d 198, 200 (D.C. Cir. 1966) ("That the statute involved is one pertaining to the conduct of the affairs of Congress does not remove its interpretation from the province of the courts.") (citing cases). The investigation at issue here obviously involves individuals who are not members of the legislature; the subject of the investigation is Governor Palin, and the individuals who have received subpoenas in connection with the investigation include other Executive Branch employees and a number of private citizens. As a matter of black-letter law, this action thus is fully justiciable, and the political question doctrine does not apply.

The error of the court below is illustrated powerfully by the history of the power of judicial review of legislative acts in the United States and England. Before the American founding, English law recognized a distinction between "lex parliamenti" (the law of Parliament) and "lex terrae" (the law

of the land). This distinction "precluded judicial review of the exercise of the contempt power or the assertion of privilege. Parliament" - like the trial court in this case - "declared that no court had jurisdiction to consider such questions." Watkins, 354 U.S. at 189. "It seems inevitable that the power claimed by Parliament would have been abused." Id. And so it was: In case after case throughout the sixteenth, seventeenth, and eighteenth centuries, citizens were subjected to "cruel and humiliating" treatment by Parliament with no opportunity for judicial review. Id. at 189-90. For just that reason, American constitutional law from the outset permitted judicial review of legislative investigations that exceeded the investigating committee's jurisdiction. As the Supreme Court explained:

In the early days of the United States, there lingered the direct knowledge of the evil effects of absolute power. Most of the instances of use of compulsory process by the first Congresses concerned matters affecting the qualification or integrity of their members or came about in inquiries dealing with suspected corruption or mismanagement of government officials. ***Unlike the English practice, from the very outset the use of contempt power by the legislature was deemed subject to judicial review.***

Id. at 192 (emphasis added).

Applying the principle that courts have the power to decide whether legislative committees have followed their own rules, numerous decisions of numerous courts have granted relief where the decision of the trial court here would have refused to do so. In United States v. Smith, for example, the Supreme Court considered a dispute between the United States Senate and an appointee to the Federal Power Commission. The Senate had voted to confirm a chairman of the Federal Power Commission and had communicated that confirmation to the President, and then the following day attempted to revisit the confirmation vote and rescind the confirmation. The question thus was whether Senate rules permitted such a reconsideration and, if not, whether a court had the power to review the matter or whether judicial review was barred under the political question doctrine. The Supreme Court held that "the question presented is of necessity a judicial one," and further held that the Senate's interpretation of its own rules, while potentially persuasive, was not dispositive. 286 U.S. 6, 33 (1932). On the merits, the Court ruled in favor of the commissioner, holding that his rights had been violated by

the Senate's violation of its own rules and concluding that the commissioner was properly appointed to his position under the original Senate confirmation vote.

The Supreme Court extended the judicial power to review legislative committee acts in a series of cases arising out of the highly politicized investigations of the House Committee on Un-American Activities in the 1940s and 1950s. In Christoffel v. United States, 338 U.S. 84 (1949), for example, the Court held that the relevant legislative committee had no power to take sworn testimony when it lacked the quorum provided for in applicable committee rules. The Court rejected the proposition that the challenge to the committee presented a nonjusticiable political question, reasoning:

Congressional practice in the transaction of ordinary legislative business is of course none of our concern, and by the same token the considerations which may lead Congress as a matter of legislative practice to treat as valid the conduct of its committees do not control the issue before us. . . . ***The question is rather what rules the House has established and whether they have been followed.***

Id. at 88-89.

Watkins v. United States presented a broader question: Whether the judiciary has the power to examine the questions

Brief Amicus Curiae
Supreme Court Case No. S-13296

Page 13 of 23

asked by an investigative committee of Congress to determine whether the questions were within the jurisdiction of the committee in the first instance. Noting that "[a]buses of the investigative process may imperceptibly lead to abridgment of protected freedoms," the Court held that the judicial branch must closely scrutinize delegations of legislative power to investigative committees to ensure that the investigation is related to a permissible legislative purpose. Rejecting the suggestion that such scrutiny would involve the courts in nonjusticiable political questions, the Court stated:

We cannot simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.

354 U.S. at 198-99.

The Supreme Court revisited the justiciability of legislative investigations in Yellin v. United States, 374 U.S. 109 (1963), where a witness challenged a legislative committee's denial of his request to be heard in executive

session as permitted under a standing committee rule. The Court began by noting that “[i]t has been long settled . . . that rules of Congress and its committees are judicially cognizable. . . . And a legislative committee has been held to observance of its rules . . . just as, more frequently, executive agencies have been.” Id. at 115 (citations omitted). Stating that witnesses in legislative investigations have a “reasonable expectation . . . that the Committee actually does what it purports to do, adhere to its own rules,” the Court observed that “[t]he Committee prepared the groundwork for prosecution in Yellin’s case meticulously. It is not too exacting to require that the Committee be equally meticulous in obeying its own rules.” Id. at 123-24.

These McCarthy-era decisions are particularly relevant here, since Article I § 7 of the Alaska Constitution was adopted specifically because of the state founders’ concern about similar abuses in Alaska legislative investigations. But the legal principle they reflect has been recognized in more garden-variety legislative investigations. For example, in a case closely analogous to this action, the Illinois Appellate Court considered a challenge to the manner in which

the chairman of one legislative committee delegated investigative powers to a subcommittee, which in turn purported to issue subpoenas to various witnesses. Contrary to the decision of the trial court here, which would have deemed the matter a nonjusticiable political question, the Illinois court stated that "[t]he purported subcommittee seeking to require the plaintiff's testimony must be competent and have jurisdiction to comply with the principles of due process." Murphy v. Collins, 312 N.E.2d 772, 777 (Ill. App. Ct. 1974). Holding that the judiciary is not only competent, but duty-bound, to review cases alleging that a legislative committee has exceeded its authority in conducting an investigation, the court stated:

The plaintiff in the instant controversy was seeking an adjudication as to whether a subcommittee of the Executive Committee of the House of Representatives was legally constituted and if it had the power to issue him a subpoena. The order and injunction of the trial court did not infringe upon or interfere with the powers and privileges of the legislative branch of government but rather restrained an integral part of the legislative branch, an investigating subcommittee, from proceeding in a manner that would violate the constitutional rights of a citizen of Illinois. This was a proper role for the judicial branch

of government to assume and merely constituted a restraint on the legislative branch and a prohibition against it exceeding its sphere of authority. As we previously stated, the courts have a duty to protect individuals from actions by the legislative branch of government that exceed its scope of authority.

Id. at 782.

In short, the trial court's reflexive conclusion that this action presents a nonjusticiable political question merely because it involves a political body's compliance with its own rules is certainly wrong. The trial court's error is understandable in the sense that the legislature is one of the political branches of government. But the mere fact that politics are involved does not change the judiciary's obligation to decide cases involving government's infringement of individual rights based on the government's violation of rules that are ascertainable by and administrable by the courts. The doctrine on which the trial court relied, after all, "is one of 'political questions,' not one of 'political cases.'" The courts cannot reject as 'no lawsuit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." Baker v. Carr, 369 U.S. 186, 217 (1962). The Court thus should reverse and remand the

Brief Amicus Curiae
Supreme Court Case No. S-13296

Page 17 of 23

decision of the trial court for further proceedings on the merits.

II. The Numerous Violations of Jurisdictional Statutes and Rules Inherent in the Present Legislative Investigation Amount to a Deprivation of Due Process.

Had the trial court not declined on justiciability grounds to address the merits of plaintiffs' complaint, it likely would have found several different violations of jurisdictional statutes and legislative rules that collective constitute an unconstitutional deprivation of due process. First, it is reasonably clear that the Legislative Council - the committee that authorized the investigation in the first place - lacks authority to conduct an investigation concerning the Governor's termination of an Executive Branch department head, or, for that matter, other undefined "potential abuses of power." The Legislative Council was established for a limited purpose - namely, to address "the need of the legislature for full-time technical assistance in accomplishing the research, reporting, bill drafting, and examination and revision of statutes, and general administrative services essential to the development of sound

legislation in the public interest." AS § 24.20.010. The Legislative Council does not have general investigative or oversight functions, much less law-enforcement functions. Indeed, while the Legislative Council has limited authority to hold hearings, administer oaths, and have the deposition of witnesses taken, that authority may only be used "when consistent with the powers and duties assigned to the Council" - in other words, when consistent with its role in the development of specific legislation. *Id.* § 24.20.060. If there were any question about the Legislative Council's lack of authority to investigate the Governor's termination of the state public safety commissioner or any other matter involving the Office of the Governor, it is answered by the fact that the Legislative Council never authorized the issuance of subpoenas as part of the investigation; subpoenas in this matter were only issued by the Judiciary Committee, thus demonstrating that the Legislative Council, which authorized the underlying investigation pursuant to which the subpoenas were issued, lacked statutory jurisdiction over the subject matter. Courts have invalidated legislative investigations where the legislative committee lacked proper jurisdiction. See, e.g., Christoffel, 338 U.S. 84.

Brief Amicus Curiae
Supreme Court Case No. S-13296

Page 19 of 23

The issuance of subpoenas by the Judiciary Committee, however, only compounds the rule violations inherent in the investigation. The Alaska State Legislature Uniform Rules govern the jurisdiction of legislative committees. Those rules limit the Judiciary Committee's jurisdiction to matters relating to "the programs and activities of the Alaska Court System and the Department of Law, and the legal and substantive review of bills referred to it for that purpose." Uniform Rule 20. The investigation has nothing to do with those subjects. The investigation relates to the Office of the Governor, the Department of Administration, and the Department of Public Safety. Under Uniform Rule 20, the State Affairs Committee - not the Judiciary Committee - has exclusive jurisdiction over those subjects. For this additional reason, the investigation and the subpoenas to carry it out have not been authorized as required by the rules governing the relevant legislative committees. Courts have also invalidated legislative investigations on this ground. See, e.g., Murphy, 312 N.E.2d 772 (invalidating investigation where subcommittee lacked proper jurisdiction, even though full committee had jurisdiction).

The subpoenas issued by the Judiciary Committee appear to be invalid as a substantive matter as well. The subpoenas do not call for information limited to any articulable subject matter; instead, they call for testimony concerning all "potential abuses of power" that the Judiciary Committee or any given witness might believe have been committed by the Governor. Such an indefinite and open-ended subpoena fails to provide either the fair notice due process demands or the necessary assurance that the scope of the investigation is consistent with the authority delegated to the investigative body, and for this additional reason the trial court should not have dismissed plaintiff's complaint challenging the validity of the investigation. Cf. Watkins, 354 U.S. at 201-02 (reversing contempt conviction of legislative investigation witness because "[b]roadly drafted and loosely worded . . . resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress.").

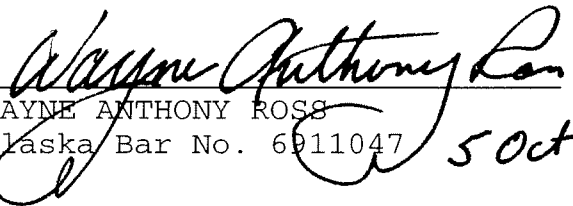
Finally, the reported timing of the report of the investigation - with an apparent mandate that the report be

issued in advance of the upcoming Presidential election, regardless of the status of the facts adduced or any other consideration - itself is inconsistent with Alaska law. The Alaska Executive Branch Ethics Act, which specifically addresses investigations into hiring and firing decisions of the Governor, provides that such investigations must be stayed during any "campaign period" for state office. AS § 39.52.310. A similar requirement applies to legislative ethics investigations. See id. § 24.60.170. Though not directly applicable to legislative investigations of Executive Branch officials, these statutory provisions establish a principle of Alaska law that ethics charges are not to be manipulated during campaign periods to achieve political benefits for the investigators or other political opponents of the subject of an investigation. (While the law is limited to "state office," AS § 39.52.310(k), there is no reason to treat state offices different than federal offices.) These provisions thus are relevant to the due process analysis the trial court should undertake on remand.

CONCLUSION

For the foregoing reasons, the amici respectfully request that the Court reverse the judgment of the court below and remand for further proceedings on the merits.

ROSS & MINER, P.C.
Attorneys for Plaintiff

By: 
WAYNE ANTHONY ROSS
Alaska Bar No. 6911047 5 Oct 08

LAW OFFICES OF
ROSS & MINER
A PROFESSIONAL CORPORATION
327 EAST FIREWEED LANE, SUITE 201
ANCHORAGE, ALASKA 99503
TELEPHONE (907) 276-5307