

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

May 5, 2001

2:05 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Scott Ogan, Vice Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz

MEMBERS ABSENT

Representative Albert Kookesh

OTHER LEGISLATORS PRESENT

Representative Andrew Halcro

COMMITTEE CALENDAR

HOUSE BILL NO. 268

"An Act relating to the constitutional right to privacy."

- MOVED HB 268 OUT OF COMMITTEE

CS FOR SENATE BILL NO. 176(L&C) am

"An Act prohibiting certain coercive activity by distributors; relating to certain required distributor payments and purchases; prohibiting distributors from requiring certain contract terms as a condition for certain acts related to distributorship and ancillary agreements; allowing dealers to bring certain court actions against distributors for certain relief; and exempting from the provisions of the Act franchises regulated by the federal Petroleum Marketing Practices Act, situations regulated by the Alaska gasoline products leasing act, and distributorship agreements relating to motor vehicles required to be registered under AS 28.10."

- BILL HEARING POSTPONED

PREVIOUS ACTION

BILL: HB 268

SHORT TITLE:LIMITS ON RIGHT TO PRIVACY
SPONSOR(S): REPRESENTATIVE(S)GREEN

Jrn-Date	Jrn-Page		Action
05/04/01	1531	(H)	READ THE FIRST TIME - REFERRALS
05/04/01	1531	(H)	JUD
05/05/01	1572	(H)	COSPONSOR(S): KOTT
05/05/01		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE JOE GREEN
Alaska State Legislature
Capitol Building, Room 403
Juneau, Alaska 99801
POSITION STATEMENT: Sponsor of HB 268.

ACTION NARRATIVE

TAPE 01-80, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 2:05 p.m. Representatives Rokeberg, Ogan, Coghill, and Meyer were present at the call to order. Representatives James and Berkowitz arrived as the meeting was in progress.

HB 268 - LIMITS ON RIGHT TO PRIVACY

Number 0069

CHAIR ROKEBERG announced that the committee would hear HOUSE BILL NO. 268, "An Act relating to the constitutional right to privacy."

Number 0087

REPRESENTATIVE JOE GREEN, Alaska State Legislature, sponsor of HB 268, explained that Article I, Section 22, of the Alaska State Constitution, which goes back to [1972], indicates that the right of the people to privacy is recognized and shall not be infringed. He said it further states that the legislature shall implement this section, and he offered that this implementation is the goal of HB 268. While this right [of privacy] is a very significant right, he continued, it does not

necessarily guarantee, or create any further right to receive money, public benefit, or public service. He opined that although in the past, the right of privacy has been used as a justification for certain decisions in court proceedings, HB 268 is a way of explaining to the courts what "we" believe the right of privacy was instituted for.

REPRESENTATIVE GREEN said that although the federal government does not have [the right of privacy] in the U.S. Constitution, several states do have it in their constitutions. He said he believes - although there is not a record following the implementation of it - that the concept of the right of privacy does not indicate that "that's" what was intended when they passed the right of privacy. He paraphrased the definition of the right of privacy from the dictionary as, "a seclusion, a right to not be peeked in on, if you will." To then stretch that meaning to include some sort of a funding definition, he opined, goes beyond what was intended at the time of implementation. He offered that HB 268 is simply a method of saying to the courts, "this is the way we believe:" There should be a severance between the right of privacy - as it was intended - and any funding demand.

REPRESENTATIVE BERKOWITZ asked Representative Green how he knew what the intent was of the framers of this particular [constitutional] amendment, and what he thinks is the extent of the right to privacy: what did it mean to him.

Number 0348

REPRESENTATIVE GREEN responded that it is speculation as to what was meant [by the framers] since there is no record. Returning to a meaning from the dictionary, he paraphrased, "as opposed to being in the public, you're in the private." He said that the [right of privacy] was implemented back when there was a breakthrough in the electronic surveillance industry, and "we're" assuming that the intention was that a person wouldn't have to worry about electronic intrusion. He related his belief that the right of privacy provides that a person in his/her home shouldn't have to worry about government intrusion without proper warning. Furthermore, it also includes being able to hook up a computer at home and not worry about some other person or group being able to electronically gather information via that computer.

REPRESENTATIVE BERKOWITZ observed that a reasonable expectation of privacy is already contained within the Fourth Amendment [of

the U.S. Constitution]; he posited, therefore, that Article I, Section 22, does nothing that is not already addressed at the federal level.

REPRESENTATIVE GREEN countered that [Article 1, Section 22] does more. He suggested that it clarifies [the right of privacy] with regard to the breakthrough in electronic surveillance, which created an opportunity for private information to be attached and disseminated electronically.

CHAIR ROKEBERG questioned the assertion that the U.S. Constitution has a guarantee of right to privacy.

REPRESENTATIVE BERKOWITZ pointed out that it is in the "penumbra [doctrine] of rights," and that under the Fourth Amendment, every citizen has a right to be free from unreasonable search and seizure from government, which means that a government can't unreasonable intrude into peoples' lives, and which would include things like "snooping on their computers" or electronically eavesdropping absent a valid warrant.

CHAIR ROKEBERG acknowledged that case law has held with the [penumbra doctrine], although he questioned whether there was a specific "recitation" in the U.S. Constitution on the issue [of the right of privacy].

REPRESENTATIVE BERKOWITZ explained that because the privacy clause is specific to the Alaska State Constitution, it is broader than in the U.S. Constitution.

Number 0609

REPRESENTATIVE OGAN noted that [page 44] of Gordon S. Harrison's Alaska's Constitution A Citizen's Guide, addresses Article I, Section 22, and includes reference to the fact that the delegates to the constitutional convention had considered but then rejected language regarding unreasonable searches and seizures. He also noted that this book refers to the Department of Public Safety's Alaska Justice Information System (AJIS) as the impetus for this constitutional amendment due to fear of a "Big Brother" government information bureaucracy. Representative Ogan surmised that Mr. Gordon apparently had to research some record in order to obtain this information, and therefore, he said, this book could be considered a credible source. Representative Ogan, paraphrasing information found in Mr. Gordon's book, said that many privacy cases in Alaska have arisen in the context of searches and seizures, and the

legislature has not yet provided the statutory implementation that was referred to in [Article I, Section 22]. Representative Ogan posited: "that was all we're trying to do here."

REPRESENTATIVE BERKOWITZ argued:

That's not all we're trying to do here. It seems pretty clear to me what this is: this is a trapdoor to get away from the language that's contained in the Senate budget. I can read the writing on the wall. There's a good number of you on this committee who are co-sponsors of this, and I know which way it's going to go. I think it's really unfortunate that when you're attacking the constitution the way this section does, that we don't have a full vetting. I think that's really tragic.

Number 0788

CHAIR ROKEBERG warned that regardless of personal feelings, the issue here is whether the legislature has the right to implement this particular constitutional amendment - [Article I, Section 22]. He said that he thinks [Article I, Section 22] very clearly states that the legislature does have that right. He added that the question then becomes whether this is the proper course of action, and he suggested that "this" is what "we" should be speaking to.

REPRESENTATIVE BERKOWITZ suggested then that they look at what the amendment - Article I, Section 22 - says, and he paraphrased: The right of privacy is recognized and shall not be infringed. He then referred to HB 268 and paraphrased: The right of privacy does not create a right. He opined that [the language in HB 268] is infringing on the right of privacy just by its very definition, and he questioned how rights can create other rights; rights exist on their own, he added, rights are not created.

REPRESENTATIVE GREEN said:

That's exactly why it says that; it does not create a right. You're absolutely right. This is just trying to say the obvious, but there are people, and certainly courts who perhaps attach that and create a right. This says "no, that does not" - the wording in the constitution does not create a right to any of

this kind of financing. It doesn't say it does; it says it does not.

REPRESENTATIVE BERKOWITZ countered that it's not just financing; it's money, benefit, or service. He asked whether anyone had done any investigation into what types of money, benefit, or services would be impacted by this provision [of HB 268]. To clarify his question he said, "What's the impact? What is this legislation intending to reach? Which public moneys? Which public benefits? Which public services will be reached?"

CHAIR ROKEBERG requested that decorum be maintained.

REPRESENTATIVE GREEN responded:

What does it affect? It doesn't affect anything. If we said, on the other hand, that this creates a right to public money, public benefit, public service, then that question would have much more relevance - it would say what does this affect. All we're saying is, the legislature shall implement this section, which says that the right of privacy exists. It says it does not create a right in any other thing. [It] has nothing to do with what it's going to affect; it's what it's not going to affect.

REPRESENTATIVE BERKOWITZ pointed out that there is case law "out there" - Alaska Wildlife Alliance v. Rue - that held that under the right of privacy provision, the Alaska Department of Fish and Game (ADF&G) was entitled to redact the names of public employees and private contractors from time sheets requested under the Public Records Acts when those individuals had received threats against their lives. "So, public officials whose privacy rights protect the disclosure of personal information now will not have [that] privacy protection because they are receiving a public benefit derived from the privacy right," he predicted.

Number 0982

REPRESENTATIVE JAMES suggested that, "he's got his arms three feet long reaching into something that doesn't really apply in this case. We're not talking about those kinds of benefits."

REPRESENTATIVE BERKOWITZ questioned what case she was referring to, and what kind of benefits they were talking about. He emphasized that he would still like a response to his questions

regarding which type of benefits, which type of money, and which type of services were being discussed.

REPRESENTATIVE OGAN suggested that the discussion pertained to entitlements, and not necessarily to the case that Representative Berkowitz used as an example. [People] are not entitled to an entitlement based on privacy, he added.

REPRESENTATIVE BERKOWITZ asked how the committee is defining entitlement.

REPRESENTATIVE OGAN defined it as "free money."

REPRESENTATIVE BERKOWITZ pointed out that HB 268 does not refer specifically to entitlement.

CHAIR ROKEBERG reminded the committee that HB 268 does refer specifically to public money. He added that HB 268 is clearly speaking to an appropriation issue. He used, as an example, the relationship to public funding of abortions, which, he suggested, is the genesis of HB 268; to this example he said that the issue is whether the courts can direct an appropriation by the legislature. The courts, by their case law, have taken the stance that they can force the legislature to make appropriations, he added. He mentioned that he is referring to "Judge Sen Tan's Superior Court case that goes back to the Matanuska Valley case ... that made a statement to the effect that there was a right for abortion in the state of Alaska; it didn't say that there was a right to publicly funded abortion."

Number 1121

REPRESENTATIVE BERKOWITZ said: "So, I just want to be clear what we're doing here. We're interceding before the supreme court has made a final decision on the subject of ... what y'all think is a pretty significant issue of public policy. Is that correct?" He asked whether they were interceding based on a superior court case or a supreme court case.

REPRESENTATIVE GREEN explained: "We're interceding just to implement the right [since] it says that the legislature shall implement this section. That's all this bill is doing...."

CHAIR ROKEBERG interjected:

I think there's a level of frustration on the part of the legislature ... when we're, in fact, talking about

separation of powers. I think that my vote, and any support I may give this bill will be ... on that basis. ... And I think if the courts wish to direct the legislature - under the guise of privacy - to make public expenditures, that's what this particular bill is about.

REPRESENTATIVE BERKOWITZ again asked: "Which supreme court case are we doing this on? He went on to suggest that if they were doing this based on a trial court decision, it is premature.

CHAIR ROKEBERG asked whether the administration has issued a [statement] with regard to the superior court ruling. He also asked whether [the state] is still funding abortions [based on that ruling].

REPRESENTATIVE GREEN said, "there have been several." He then mentioned that the administration has provided him with some information regarding abortions.

CHAIR ROKEBERG asked whether "Hyde Amendment" abortions were continuing in Alaska.

REPRESENTATIVE GREEN said yes, and that according to his recollection, 15 such abortions were performed in the last two years.

Number 1259

CHAIR ROKEBERG said:

That's what I think I'm a little bit troubled by. This is becoming some kind of a big abortion issue when it really isn't the case. Because, under the Medicare Options and the instructions through the legislature to the department, if they're just doing therapeutic abortions that are allowed under the Hyde Amendment, ... that's what they're doing. If they're doing more than that, then it becomes an issue.

REPRESENTATIVE GREEN clarified that during the years 2000 and 2001, there were 15 Hyde Amendment abortions and 228 court-ordered abortions.

CHAIR ROKEBERG surmised, then, that the court has ordered the abortions, and the administration is then following the [order of] the superior court. He then questioned Representative

Berkowitz: [Don't you think] that the legislature has a right or even an obligation or responsibility to implement "that" if "they" don't agree with it?

REPRESENTATIVE BERKOWITZ responded that he would like to know "what we're talking about here. Are we going to talk about abortion, are we going to talk about separation of powers, [or] are we going to talk about taking the right to privacy away?"

CHAIR ROKEBERG said he thinks [the topic] is separation of powers, with abortion being used as an example.

REPRESENTATIVE BERKOWITZ opined that taking liberties from individual Alaskans is a peculiar way to combat the judiciary, and he suggested that this is what is occurring [via HB 268].

Number 1325

REPRESENTATIVE GREEN said:

That's not it at all. It was the court who first enacted this right of privacy to ... violate the separation of powers issue. If the legislature is the empowering body to determine how monies are going [to be spent], and the court then uses the tie to the right of privacy to say "No, you're also going to do this," I think that's a violation of the separation of powers doctrine. So, what we're doing by this is trying to go back to what we have interpreted ... as the intent. Albeit it's not direct, but Representative Ogan and I have both alluded to the fact that this doctrine ... , this Section 22, was adopted in the '70s when the electronic surveillance - the tendency to come in -- that's what they were focusing on. The judge, then, has come along ... saying, "No, you're also going to distribute money according to that right of privacy," and we're saying that's not what the intent is; the right of privacy does not give you that right.

REPRESENTATIVE BERKOWITZ suggested that if this legislation is designed to handle a conflict between the judiciary and the legislature, [but] there is an ongoing court case - the Tan decision, which is going up to the supreme court, and which will give a higher, and hence, better decision upon which to determine what legislative action would be appropriate - then to intervene following a superior court case is vastly premature.

CHAIR ROKEBERG noted that he disagreed with Representative Berkowitz, and suggested putting that issue aside for the moment.

REPRESENTATIVE OGAN said he thinks that the court's appropriate role in interpreting legislation, whether it be a constitutional amendment or a statute, is to consider what the legislative intent is: what the people, via their elected representatives, intended when legislation is written. He opined that there is a record that establishes what the intent is with regards to the right of privacy, and he suggested that the courts have misinterpreted that intent and are violating the separation of powers [doctrine] by telling the legislature what it can and can't appropriate money for. He added that notwithstanding [Representative Berkowitz] bringing up the issue of abortion, he considers this to be a separation of powers issue.

REPRESENTATIVE BERKOWITZ said:

If this is a separation of powers issue, and Representative Ogan talked about the right of privacy being misinterpreted by the courts, ... I haven't seen any evidence of that; I haven't seen any evidence of what the original intent was of those who framed that constitutional amendment. In fact, the testimony from Representative Green was [that] he didn't know what the intent was and that there was an assumption that this was done in response to electronic measures that were developing in the early '70s. ... I would submit, then, that there was a lot of other development relating to privacy at that time that probably [was] involved, but I don't know, because there's no evidence in front of us.

Number 1503

CHAIR ROKEBERG said he thinks that there is evidence. The history of the passage of the constitutional amendment is clear regarding what was on people's minds at that time, he said; it was to protect individual privacy particularly from the new computer age. And, even before the [term] "new economy" was invented, there were concerns about the trading and dispersion of data and the level of privacy that individuals would enjoy at that time. He offered that this is the simple baseline history behind the passage of that amendment [to the constitution]. What has happened subsequent to passage is the utilization of

that particular constitutional amendment by the Alaska Supreme Court and the lower courts of this state to determine whether a person can smoke marijuana in his/her home, or to determine "the potential for use of cocaine." He added that he believed the courts, by their utilization of that amendment in their decisions, have corrupted the intent of that amendment. Therefore, he opined, when Representative Berkowitz posits that the legislature, to protect its own power, should wait until the appellate courts have reached the final determination on this issue, is disingenuous in terms of the legislature's responsibility.

REPRESENTATIVE BERKOWITZ, in review of the three branches of government, said there is the executive branch - it administers the law; there is the legislative branch - it makes the law; and there is the judiciary branch - it interprets the law. He went on to say that in essence, what he is being told is that the judiciary branch interpreted the law incorrectly. However, he added, it would seem to him that those who support HB 268 for that reason are violating the separation of powers rather than supporting it. He said he would like to know at what point do "you" think it's appropriate for the courts to actually interpret a constitutional amendment.

Number 1628

REPRESENTATIVE GREEN said:

The judiciary branch, in and of itself, has various levels. Those are in there to perhaps agree, perhaps to disagree with their own decisions that are made. You go from a first court to the second court, which may, in fact, change the decision; go to another court - may change it back. And that's why we finally have a supreme court; that decision is final. But to say that because we feel that there has been a ... decision reached that was in error, that we as a body do not have the right to appeal -- we have that right, we've exercised that right, and we have actually had the supreme court overturn superior courts because this body intervened. So I think the Minority Leader is way out of line there. The other thing I think, Mr. Chairman, when he says that we should sit back on our hands and wait 'til this issue is decided in the courts, [is that] in the meantime ... we're spending 15 times as much money to perform abortions as the Hyde Amendment to the U.S. Constitution provides. And

I think ... it is time that we interact and say, "Hey, wait a minute, you're continuing, while this case is being appealed, to require the state to spend money," which is not in line with what ... this body, ... empowered by the constitution, determine[s] how the general fund is [spent].

REPRESENTATIVE JAMES said:

I would like to set another stage here, and [let's just] say that right after we passed this constitutional amendment in 1972 - where it says that ... the legislature shall implement this section - had we, at the next legislative session, determined to say that "the right of privacy under Article I, Section 22, does not create a right to receive public money, a public benefit, or a public service", I am quite sure there wouldn't have been very much objection to that.

Number 1735

The problem - what we have here now - is because the subject of this issue is driving this argument, and I think that [it] is incorrect for us to allow that to happen. I think that why we're here today, is because ... the legislature did not implement this section as the constitutional amendment required us to do. And so here we are, in the ninth hour, trying to protect ourselves from what we believe is an improper decision based on nothing being there to give them any guidance. And I think that we as a legislature need to give them that guidance.

Just thinking of another example: What if somebody didn't want to tell anybody how old they were, for their own privacy? Would you get a longevity bonus without telling people how old you are? You can keep your privacy and not say, but you're not going to get the money. It's all the other different things - the benefits that we have for people - if you don't want to give up your private information, ... you don't get the money. So, this is a simple thing of saying that right to privacy is [an] entirely different section of law than ... having a benefit of public money and public benefits that we set out for people [within] certain categories.

Number 1793

So I think this is entirely proper; I think the argument is prefaced here because of the subject of the issue and the court decision that we're talking about. Let's say that was all gone - wasn't even here before us - this is a good piece of legislation, and we ought to look at it on its face and see whether or not we have the authority to say that privacy doesn't give you any benefits, any more than anyone else, but you have a right to privacy. Certainly, I think this does that, and I think the argument should be in that regard, and not all this peripheral information.

CHAIR ROKEBERG reminded the committee that there are those in the state who wish to be able to get a driver's license without divulging their social security number, and he used this as an example of how privacy and benefit fit together.

REPRESENTATIVE BERKOWITZ, on that point, said that people are required in many instances to put their social security numbers on all kinds of documents. According to this legislation, and assuming the state does not respect the privacy attendant to the social security number, the individual would have no cause for complaint, because the individual with privacy interests in his/her social security number couldn't use Article I, Section 22, to complain about the failure to receive public money, public benefit, or public service.

CHAIR ROKEBERG said he disagreed.

REPRESENTATIVE OGAN, with regard to Representative Berkowitz's point that the judiciary interprets law, said that there have recently been a number of supreme court cases on the "clear statement" doctrine, which he paraphrased as saying "they can't read into things - into laws - something that isn't expressly stated." He went on to say that the fact that the legislature hasn't expressly "interpreted" that section of the constitution, begs a legislative solution. He offered that this is what the legislature is attempting to do [via HB 268], and that this [attempt] is entirely appropriate. He reiterated his belief that "the court should interpret what the will of the peoples' representatives are, not what their own personal biases are."

REPRESENTATIVE BERKOWITZ interpreted this to mean, "the will of the people as seen through your eyes." The danger of legislative intent - and it's recognized in a whole string of

court decisions - is that no two legislators have the same intent, he added. Further, there can be [different] expressions by the framers of an amendment, and people can support legislation or oppose legislation for entirely separate reasons; this is why courts are there to interpret language. He noted that courts are also supposed to interpret [statutory language] based on the face [of it].

CHAIR ROKEBERG again requested decorum be maintained.

Number 1981

REPRESENTATIVE COGHILL remarked that the issue of whether the right to public funds is protected by the right of privacy has been brought to light by Judge Tan's decision and the administration's appeal to the supreme court. He added that he thinks the legislature, as well as any other branch of government, needs to make a policy call. He said that HB 268 is attempting to say that "public funding is not meant to take away a right, but, certainly, that right does not confer the right to the public coffer."

REPRESENTATIVE BERKOWITZ noted that members keep returning to the abortion issue, and he opined that if the intent of HB 268 is to express the legislature's will that public funds shall not be used to fund abortions, then that's what the legislation ought to say. He suggested that failure to do so is constitutionally overbroad.

CHAIR ROKEBERG reminded Representative Berkowitz that the legislature has already spoken on the abortion issue but since the courts have "thrown that out," [separation of powers] is the issue here. [The courts] have overturned the will of the legislature in its right to appropriate; that's why this is clearly a separation of powers issue, he added. He agreed with prior comments that had the legislature acted on [the implementation provision of Article I, Section 22] when it was first adopted, there would be no need for this whole discussion. But, he added, the legislature didn't; instead, the legislature allowed the courts to implement the right to privacy [for] the citizens of Alaska. All [the legislature is doing via HB 268], he offered, is taking a step towards asserting its constitutional right to implement [Article I, Section 22] as [the legislature] perceives is correct. He opined that the legislature would be remiss if it did not take action to defend its constitutional right of appropriation. He also opined that the issue is not abortion; the issue is separation of powers.

He then mentioned that he and Representative Berkowitz probably share a similar point of view with regard to the [issue of abortion], but he also "stands with" the other members of the committee with regard the separation of powers issue.

Number 2106

REPRESENTATIVE BERKOWITZ, after noting that the conversation alternates between abortion and separation of powers, said that on the separation of powers argument he wished to read a few lines from a case he had looked up:

Although the legislature has the exclusive appropriations power, this does not mean that the exercise of that power is without limit and not subject to judicial scrutiny. Since Marbury v. Madison, courts have imposed constitutional requirements on the exercise of executive and legislative power. The Alaska Supreme Court has held that when an infringement of a constitutional right results from legislative action, the court can not defer to the legislature.

REPRESENTATIVE BERKOWITZ asked whether Chair Rokeberg agreed with the premise that when infringement of a constitutional right results from legislative action, the court cannot defer to the legislature.

CHAIR ROKEBERG said the issue is debatable with regards to what is considered a true constitutional right.

REPRESENTATIVE BERKOWITZ questioned whether Chair Rokeberg's argument is that the right to privacy is not a true constitutional right.

CHAIR ROKEBERG responded:

Not at all. I think we're talking about, basically, the power of appropriation. And, as you say, the courts will endeavor to limit that power of appropriation as they have here in the state of Alaska. And the Kasayulie case is another example: we're not spending enough, so that's another issue. It happens all the time where there is a conflict and friction between the different branches of government and [is] what makes America a great country, but it's up to us to try to assert our rights also. Don't we

have that right? Don't we have that obligation to assert our rights when we think it's being infringed?

REPRESENTATIVE BERKOWITZ said he thinks [the legislature] has the obligation to assert its rights in a constitutionally permissible way, and when [the legislature] is pondering legislation that is on its face unconstitutional as a way of generating a court challenge, that's impermissible; that's an unlawful and a wrongful exercise of authority.

CHAIR ROKEBERG argued that [HB 268] is not unconstitutional on its face.

Number 2202

REPRESENTATIVE COGHILL said that although he can appreciate Representative Berkowitz's argument, it is off base because with certain constitutional rights, the right is to be implemented by law. He added, however, that there are certain basic rights in the Bill of Rights that aren't interpreted by law that are fundamental. He indicated he was quoting from the court case appeal to the supreme court: "In conclusion, the Alaska privacy right is not absolute." He added that otherwise there would not be an implement-by-law section in it. And although the right to privacy is guaranteed, he surmised that the implementation of that right becomes problematic. He opined that the courts have "brought us to the place where that distinction needs to [be] made now, and certainly on funding issues it's important. ... It is just [that] the abortion issue happens to be right in the center of that funding debate." He still asserted, though, that the legislature has the right to "implement by law," and that the right of privacy does not guarantee funding.

REPRESENTATIVE GREEN said he takes issue with the statement made by Representative Berkowitz that if HB 268 is an abortion bill, then it should say abortion in it. He offered that HB 268 is not an abortion bill; it is broader than that. He recounted that a few years ago, the legislature categorized which afflictions would be first [funded], and that the court "has reached in and taken the bottom one and said 'No, this one's going be up here.' If we were going to make this an abortion issue, then we would probably have to do the same thing with mental surgery, arm surgery, leg surgery," and he opined that this is the reason that "this is particularly broad."

CHAIR ROKEBERG surmised that Representative Green is making the argument that the courts are saying [the legislature] should chose dental care over eyeglasses.

REPRESENTATIVE GREEN said, "they would have the right, according to Representative Berkowitz"

CHAIR ROKEBERG added: "It's like saying if you have breast cancer you have a greater right to the money than somebody that has colon cancer. That's not right."

Number 2301

REPRESENTATIVE JAMES said:

While you're having this little debate, I've been ... thinking about all the benefits that we provide for the people in this state, and every benefit that I can think of requires them to give up some of their private information to get it. Now, we do a very good job, I think, in this state, to try to keep that information as private as we can so that it's not out there for the general population to know about But we still, by them having to divulge a lot of their very personal private information to get these benefits, we're saying here that the right to privacy doesn't necessarily give them these benefits. In other words, there's no direct relationship to their right to privacy; they can claim their right to privacy right down to the bare nothing, and they get nothing, because almost every benefit - I'm sure every benefit - that we have, requires you giving some of your personal information to get it, which, according to this, is what I think privacy is all about. Privacy is keeping ... who you are, where you are, and everything about you personally, private. And so I think that this language in here that says that it doesn't give them a right to receive public money, public benefit, or public service is the way we have been managing our government for a long time. And except for this one little infraction that we have here, by the court making a decision based on the fact that we have never implemented this constitutional amendment, is only here because of the controversial nature of the subject of this. However, it is imperative, I believe, that we get this in as soon as

possible so we don't have this same issue on another subject.

REPRESENTATIVE OGAN paraphrased from the powers-of-the-legislature section, [page 53], in Gordon S. Harrison's Alaska's Constitution A Citizen's Guide:

Delegation of legislative power must be sufficiently narrow and specific to give the administrative agent reasonable standards to follow and the courts a basis for determining when the agent had exceeded the bounds of the delegated authority. Measures that fail this test are unconstitutional.

REPRESENTATIVE OGAN opined that this constitutes a "clear statement doctrine," and he made the argument that [the legislature, via HB 268,] is trying to give the administrative agents (and the courts) some clear direction such that the right to privacy is not an entitlement to an appropriation, which is well within the powers of the legislature.

Number 2410

CHAIR ROKEBERG noted that the Legal Services' opinion indicates that although saving money is a legitimate goal, it may not rise to the level that would allow for an infringement on the right of privacy, if, in fact, the court found it to be a right of privacy. He asked Representative Green to comment on whether he thought that the legislature's right to appropriate is paramount, vis-a-vis "just the mere act of the court's appropriation of money."

REPRESENTATIVE GREEN opined: "definitely; it's an absolute right for the legislature, and we should defend it with vigor. And that's what this is all about. We're trying to defend that, and that's where we, I think, come head on in this conflict between separation of powers."

REPRESENTATIVE BERKOWITZ said:

First of all, again, this is the wrong forum to be fighting a separation of powers; we don't pass laws in order to fight a separation of powers issue. We file lawsuits, and we do a lot of those. Secondly, as to what Representative Ogan said, if this is such a clear direction that we're offering to the agencies, again, I reiterate my request - tell me which services, which

monies, which benefits are going to be impacted; give me a list. Itemize them for me. And, finally, I'd point out, for those of you who are trying to challenge the Sen Tan decision - and I realize that's a large chunk of the intent here - let me read the last sentence of the decision: "The conclusion I've reached is based upon the right of the individual to the constitutional right of privacy. Not on the right of women to government funding." So, there is no government funding here based on the right of privacy.

TAPE 01-80, SIDE B
Number 2461

REPRESENTATIVE BERKOWITZ concluded by saying, "this bill, as it's written, doesn't even do what it sets out to do."

CHAIR ROKEBERG asked whether there was anyone else who wished to testify on HB 268. Noting there was no response, he closed public testimony.

Number 2444

REPRESENTATIVE OGAN moved to report HB 268 out of committee with individual recommendations and the accompanying "zero" fiscal note.

Number 2440

REPRESENTATIVE BERKOWITZ objected.

Number 2420

A roll call vote was taken. Representatives James, Ogan, Coghill, Meyer, and Rokeberg voted for HB 268. Representative Berkowitz voted against it. Therefore, HB 268 was reported out of the House Judiciary Standing Committee by a vote of 5-1.

ADJOURNMENT

Number 2408

There being no further business before the committee, Chair Rokeberg announced at approximately 3:00 p.m. that the House Judiciary Standing Committee meeting would recess until 5/6/01.