

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE

April 1, 2002

1:12 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

MEMBERS ABSENT

Representative Scott Ogan, Vice Chair

COMMITTEE CALENDAR

HOUSE BILL NO. 506

"An Act relating to legislative immunity."

- MOVED HB 506 OUT OF COMMITTEE

PREVIOUS ACTION

BILL: HB 506

SHORT TITLE: LEGISLATIVE IMMUNITY

SPONSOR(S): STATE AFFAIRS

| Jrn-Date | Jrn-Page | | Action |
|----------|----------|-----|------------------------------------|
| 03/19/02 | 2603 | (H) | READ THE FIRST TIME - REFERRALS |
| 03/19/02 | 2603 | (H) | JUD |
| 04/01/02 | | (H) | JUD AT 1:00 PM CAPITOL 120 |

WITNESS REGISTER

RYNNIEVA MOSS, Staff
to Representative John Coghill
Alaska State Legislature
Capitol Building, Room 102
Juneau, Alaska 99801

POSITION STATEMENT: Assisted with the presentation of HB 506
and responded to questions.

JERRY LUCKHAUPT, Attorney
Legislative Counsel
Legal and Research Services Division
Legislative Affairs Agency
Terry Miller Building, Room 329
Juneau, Alaska 99801

POSITION STATEMENT: Testified as the drafter of HB 506.

ACTION NARRATIVE

TAPE 02-39, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:12 p.m. Representatives Rokeberg, James, Coghill, Meyer, and Berkowitz were present at the call to order. Representative Kookesh arrived as the meeting was in progress.

HB 506 - LEGISLATIVE IMMUNITY

Number 0033

CHAIR ROKEBERG announced that the only order of business before the committee would be HOUSE BILL NO. 506, "An Act relating to legislative immunity."

Number 0046

REPRESENTATIVE COGHILL, Alaska State Legislature, testified as the sponsor of HB 506. Representative Coghill informed the committee that one of his staff, Rynnieva Moss, was subpoenaed in regard to a matter that he had requested Ms. Moss work on with a constituent. And because [his office] had filed paperwork with the Division of Family & Youth Services (DFYS) in order to obtain confidential information, he felt that it was not appropriate for Ms. Moss to be subpoenaed. He said that when he found out nothing defines legislative staff immunity, he set forth researching how such immunity could be installed and thus HB 506 was developed.

REPRESENTATIVE COGHILL explained that Section 1(a) is fairly narrow, providing immunity for staff while they are performing legislative duties such as investigating matters of legislative concern and communicating with other legislators, staff, and constituents. He said that Section 1(b) is already in statute and mainly refers to legislators. Section 2 is intent language

providing evidentiary privilege to legislative staff. Representative Coghill pointed out that due to his part-time status [during the interim] and his staff's full-time status, his staff often know more of the details about constituents' needs.

Number 0336

RYNNIEVA MOSS, Staff to Representative Coghill, Alaska State Legislature, informed the committee that the case she was involved in was a DFYS case of a child in need of aid (CINA). In November, a mother and a grandmother met with some of the DFYS employees and herself in order to discuss a plan to reunite the family. On February 28 she received a subpoena, which was issued by the attorney general's office.

CHAIR ROKEBERG asked whether there are statutory privileges granted to legislative staff regarding certain matters such as those involving the DFYS.

MS. MOSS answered that the statutes are very gray in this area. If the case had been taken to the Alaska Supreme Court, it would've probably ruled in Ms. Moss's favor. "It would take a legal action to clarify it because it is gray in statute," she said.

CHAIR ROKEBERG asked whether Ms. Moss was aware of any statutory language that would've granted the right of legislators and staff to have confidential communications with various departments, including the DFYS and the Child Support Enforcement Division (CSED).

MS. MOSS explained that there was a change in statute about three years ago that allowed communication with the DFYS regarding confidential matters as long as [legislators or legislative staff] obtained a constituent's signature on a disclosure form.

CHAIR ROKEBERG asked if this case fit the aforementioned description.

MS. MOSS replied that the disclosure form was filed. In response to Representative Berkowitz, Ms. Moss confirmed that this [subpoena] was quashed after she wrote a memorandum explaining why she felt she had immunity. And although the verbal response from the Department of Law indicated

disagreement with Ms. Moss regarding her immunity, they said that it wasn't a battle they wanted to take on at the time.

REPRESENTATIVE MEYER relayed his belief that this sort of situation has occurred twice.

MS. MOSS confirmed that she is aware of two times in which legislative staff has been subpoenaed, adding that last summer, another legislative staff member was threatened with a subpoena.

REPRESENTATIVE MEYER asked if in either case, legislative staff had to go court.

MS. MOSS indicated [no].

REPRESENTATIVE BERKOWITZ inquired as to whether in the other cases, the subpoenas were quashed or withdrawn.

MS. MOSS deferred to Mr. Luckhaupt.

Number 0660

JERRY LUCKHAUPT, Attorney, Legislative Counsel, Legal and Research Services Division, Legislative Affairs Agency, informed the committee that there have been two subpoenas of legislative staff in the last year, although, over the last few years, there has been [discussion] of a couple other subpoenas that were maybe going to be issued. Also, about eight years ago there was notification that an employee at the Ombudsman's office was to receive a subpoena, but there was success in getting the parties to choose not to issue that subpoena. Mr. Luckhaupt turned to Ms. Moss's case, which he discussed with the Department of Law (DOL), and the gist of the department's intent was as Ms. Moss expressed.

MR. LUCKHAUPT turned to another subpoena, which was issued to Kevin Jardell, who was staff to Representative Joe Green at the time. The subpoena for Mr. Jardell was in regard to the redistricting legislation. That subpoena wasn't completely quashed by the Alaska Supreme Court; that is, the proponents of the subpoena were limited in what they could ask Mr. Jardell. The proponents couldn't ask Mr. Jardell about any conversations he had with legislators or any conversations that legislators had with him. In response to Chair Rokeberg, Mr. Luckhaupt informed the committee that counsel for the Redistricting Board issued the subpoena.

CHAIR ROKEBERG inquired as to why a subpoena had to be issued rather than merely deposing Mr. Jardell.

MR. LUCKHAUPT answered that Mr. Jardell was issued a subpoena because [the Redistricting Board's] pleadings said that Mr. Jardell had attended most of the meetings of the board and participated in its actions. Therefore, the board felt he had a unique perspective to relate.

REPRESENTATIVE BERKOWITZ commented, "And he had his own plan."

MR. LUCKHAUPT answered, "Correct." There was never any attempt to quash the subpoena in regard to those submissions by Mr. Jardell. The pleadings regarding Mr. Jardell are a matter of public record and have been submitted to Legislative Council. In response to Representative Berkowitz, Mr. Luckhaupt confirmed that he acted as Mr. Jardell's attorney in regard to the legislative immunity issue alone.

Number 0919

CHAIR ROKEBERG related his understanding that Mr. Luckhaupt bifurcated the issues.

MR. LUCKHAUPT explained, "To the extent ... they sought to question Mr. Jardell about legislative duties he was engaged in or conversations he had with legislators, then we interjected an objection to that." In regard to information sought in relation to the plan Mr. Jardell submitted or other matters, [legislative counsel] didn't represent Mr. Jardell. In response to Representative Berkowitz, Mr. Luckhaupt recalled that Mr. Jardell acted as counsel for himself on matters not related to his legislative duties.

CHAIR ROKEBERG returned to why a subpoena was issued rather than deposing him.

MR. LUCKHAUPT related [Legislative Legal Services and Research Division's] position that [the Redistricting Board's counsel] wouldn't be able to depose Mr. Jardell in regard to legislative duties. In further response to Chair Rokeberg, Mr. Luckhaupt specified that the subpoena required Mr. Jardell to appear in Alaska Superior Court. Mr. Luckhaupt noted that some of the challengers to the redistricting proposal issued a subpoena to Jim Baldwin, Assistant Attorney General, Governmental Affairs Section, Civil Division (Juneau), Department of Law.

REPRESENTATIVE BERKOWITZ related his understanding that Chair Rokeberg is inquiring as to whether it's standard procedure to issue subpoenas for people "you" want to have appear in a proceeding. He posited that if those individuals don't show, then it would be arguable that there was an effort to secure the person's presence and so his/her failure to appear won't be held against the case or the client.

MR. LUCKHAUPT said that he agreed with that strategy.

Number 1071

CHAIR ROKEBERG inquired as to the theory under which Mr. Luckhaupt defended Mr. Jardell.

MR. LUCKHAUPT answered that prior to [Mr. Jardell's case], the issue of whether legislative immunity extends beyond the legislator had not been resolved by the Alaska Supreme Court. However, the U.S. Supreme Court has repeatedly held that legislative immunity does extend beyond the legislator [and thus to legislative staff]. He pointed out that the U.S. Constitution, like the Alaska State Constitution, includes a clause that refers to members but doesn't specifically mention staff. Therefore, [some might argue that] if information couldn't be obtained from a legislator, then it could be obtained through his/her staff. Although this specific issue hasn't been decided in Alaska, the Legislative Legal Services and Research Division has viewed immunity for [legislative staff] as the law.

MR. LUCKHAUPT turned to a suit brought by the employees of the Alaska Marine Highway System (AMHS). He explained that those employees brought a suit against several members of the House and Senate, including a Senate employee. The AMHS employees argued that they had been defamed by the legislature's inquiry into the cost-of-living-differential payments to various employees of the ferry system who didn't live in Alaska. Mr. Luckhaupt, along with the Attorney General's office, succeeded in getting that suit dismissed. At the time, the [Alaska] Superior Court put forth a decision that the legislative employee had the same immunity from the suit as did the legislators. He noted that although that case is on appeal in the Alaska Supreme Court, it isn't in regard to the issue of the legislative employee.

MR. LUCKHAUPT, in response to Chair Rokeberg, said that Mr. Jardell's and Ms. Moss's cases are the only instances in which

there was an attempt to enforce a subpoena against a legislative employee. In the past when people were informed of a pending subpoena, it was taken care of with a phone call.

REPRESENTATIVE BERKOWITZ inquired as to the meaning of the phrase "held to answer". He asked if that phrase meant that neither [legislators nor their staff] could be called as a defendant or a witness.

MR. LUCKHAUPT said that he would make the same argument for both legislators and their staff. The aforementioned language is the same that is used in the constitution. He explained his position that it prevents [legislators or legislative staff] from being sued or being called as a witness.

Number 1337

REPRESENTATIVE BERKOWITZ posed a hypothetical example in which a legislator witnesses a crime while looking out the window pondering legislation. He related his understanding that Mr. Luckhaupt doesn't believe the legislator would be subject to subpoena as a witness.

MR. LUCKHAUPT clarified that his opinion is that the legislator would be subject to a subpoena in that situation. Although the legislator is in his/her legislative office, witnessing that crime isn't part of the legislator's duties. However, if the legislator was sponsoring legislation dealing with domestic violence and decided to ride along with a peace officer in order to obtain specific information for the legislative duties, then the argument [of immunity] would be appropriate.

REPRESENTATIVE MEYER remarked that he feels that the public has a right to know what he, as holder of a public office, is doing. However, he added, sometimes some fairly confidential material is discussed, so he could understand the need for this immunity. Still, he said, he wondered whether this immunity could or would be abused. Moreover, [legislators and staff] dealing with emotional issues may share those issues with their spouse. He asked if the spouse of a legislator or legislative employee could be subpoenaed.

MR. LUCKHAUPT said that he would advise [legislators and their staff] who are in possession of confidential material to not share it with their spouse. He pointed out that the U.S. Supreme Court has never extended federal legislative immunity to spouses. Although legislative immunity isn't privilege, it's

similar to the law of evidentiary privilege. Therefore, if a legislator chooses to tell people a privileged matter, the legislator has waived his/her privilege by discussing the matter with other people. Choosing to communicate something [confidential] to a spouse is probably a violation of law and probably wouldn't be privileged.

Number 1569

REPRESENTATIVE MEYER said that he didn't disagree. However, he expressed concern that everything he deals with is public, although there is the need to keep some things separate.

CHAIR ROKEBERG remarked that he doesn't believe the issue revolving around confidentiality and confidential disclosure only relates to [legislative immunity] peripherally. "Pillow talk is not covered by this bill," he stated.

REPRESENTATIVE JAMES noted her belief that not everything she does is open to the public, especially when discussing things in a confidential manner. Representative James mentioned that over the years she has been able to do some really good things for people who have been able to confide in her the real facts. If the possibility of being subpoenaed looms, it would have a chilling impact on the people's ability to share with legislators. Representative James said that she has always assumed that she would never be asked to divulge private information that has been shared with her.

CHAIR ROKEBERG asked if Mr. Luckhaupt recalled the passage of enabling statutory language that allows legislators and staff to have confidential communications with various agencies.

MR. LUCKHAUPT recalled that eight to nine years ago, the legislature passed a statute that allowed legislators to have access to the DFYS case files, provided that the information is kept confidential. That statute was in response to legislators being contacted by constituents who would request that the legislator investigate an issue on their behalf. At that time, the DFYS was refusing legislators access to the files even with permission from the constituent. Therefore, the issue was resolved by the passage of the aforementioned statute.

REPRESENTATIVE BERKOWITZ posed a hypothetical example in which a legislator asks his/her staff to do something, which the staff accomplishes by threatening an individual. He asked if that legislative employee would be immune.

MR. LUCKHAUPT pointed out that legislative duties don't include threatening people or committing criminal acts. Therefore, immunity wouldn't extend to such acts.

REPRESENTATIVE BERKOWITZ asked: What if the legislative employee was told by the legislator to obtain something no matter what?

MR. LUCKHAUPT answered that neither the legislator nor the legislative employee would have legislative immunity. He pointed out that there are a number of federal cases that have construed legislative immunity. Legislative immunity extends only to legislative duties, and the federal courts have said that actions such as stealing and threatening people [don't fall under legislative immunity]. In response to Representative Berkowitz, Mr. Luckhaupt pointed out that Watergate pertained to the executive branch and thus the corresponding executive immunity would exist in Alaska.

CHAIR ROKEBERG inquired as to how that [meshed] with the Dankworth case, which alleged criminal activity because Mr. Dankworth [when he was a Senator] attempted to include in the budget an appropriation to purchase a surplus construction camp of which he was part owner. He relayed that the court said, "If the motives for a legislator's legislative activities are suspect, the constitution requires that the remedy be public exposure; if the suspicions are sustained, the sanction is to be administered either at the ballot box or in the legislature itself." Therefore, according to the Dankworth case, he opined, the members of the [Select Committee on] Legislative Ethics and the members of the "fourth estate" are the balancing force. Chair Rokeberg asked, "How do you square that with what you just said?"

MR. LUCKHAUPT explained that in Dankworth, the [Alaska] Court of Appeals decided that the Department of Law was looking at whether it was illegal for Mr. Dankworth to attempt to influence the executive branch into placing a line item in the budget that would purchase property in which he had partial ownership. Therefore, the argument was that the aforementioned was criminal. The Court of Appeals said that because preparation of the budget is a joint legislative and executive concern, Mr. Dankworth's actions of contacting the executive branch weren't illegal in Alaska, per se, and were thus protected under legislative immunity.

Number 1958

MR. LUCKHAUPT pointed out that this is different than what the federal cases have decided. The federal courts have taken a broader view in regard to what may be outside the realm of legislative duties. The court's ruling in the Dankworth case has certainly bothered everyone. Mr. Luckhaupt said he feels the federal view of legislative duties would have come to a different result in the Dankworth case. Mr. Luckhaupt highlighted the fact that the court often points out that the [Alaska] Court of Appeals decided the Dankworth case.

CHAIR ROKEBERG surmised that Mr. Luckhaupt's statements are based on the fact that this was a court of appeals case, and that if the facts in the Dankworth case had been subject to federal law, it probably wouldn't have held up. But under state law, because it hasn't been adjudicated at the supreme-court level, it's still at issue; therefore, he posited that Mr. Luckhaupt would advise a client who is a legislator not to do [what Mr. Dankworth did].

MR. LUCKHAUPT pointed out that there was a major case in Alaska, Kerttula v. Abood, that dealt with legislative immunity. In that case, the Alaska Supreme Court pointed out that there were two broad policies underlying legislative immunity, one of those being the historical policy, which is designed to protect [disfavored] legislators from hostile [executive-branch employees]. The second broad policy is the protection of legislators from the burdens of forced participation in private litigation. Furthermore, both policies further legislative effectiveness. Mr. Luckhaupt reiterated that under the federal system, the issue of whether legislative immunity extends to staff was decided in the 1940s or 1950s.

REPRESENTATIVE BERKOWITZ turned to the two broad policies and said that in Ms. Moss's case, the historical policy is not at play. Representative Berkowitz then referred to the second policy of the protection of legislators from the burdens of forced participation in private litigation, and said that in his view, Ms. Moss's case was a public case, a state case. Representative Berkowitz asked, "If you're going to construe the ... immunity provisions narrowly, how does extension fit within those two broad policy categories as it applies to Ms. Moss's case?"

MR. LUCKHAUPT answered that he doesn't believe private litigation is construed to mean cases that only involve private

parties. He pointed out that Ms. Moss's case involves a state agency and the parents of a child in a matter that isn't public. The parents came to the legislative employee and discussed what was happening to them, which they felt wasn't appropriate. If the parents had contacted the legislator directly, the legislator would clearly be immune and thus couldn't be issued a subpoena in regard to that matter.

Number 2187

MR. LUCKHAUPT explained that because Alaska's legislators are part-time legislators and because there are legislative staff members assisting legislators with their duties, the argument could become that there isn't any immunity. If such were the case, the public would be "chilled" from contacting legislators. He questioned how [legislators] would find out any problems with regard to the interpretation or application of laws if anything the public says to a legislator or legislative staff is subject to discovery in a suit. Mr. Luckhaupt pointed out that the executive branch, in Ms. Moss's case, was the agency that the parents alleged applied the law incorrectly, and now that agency is issuing a subpoena to Ms. Moss. He reiterated the question of why would members of the public discuss with legislators or their staff problems regarding the executive branch if the executive branch can issue subpoenas.

REPRESENTATIVE BERKOWITZ inquired as to what this statute would add to existing case law.

MR. LUCKHAUPT answered that he doesn't believe it adds anything to existing case law because he believes existing case law already provides [immunity for legislative staff]. There is already an Alaska Supreme Court case in which legislative immunity was applied to staff. Furthermore, legislative immunity applies to legislative duties.

REPRESENTATIVE BERKOWITZ surmised, then, that [HB 506] would merely restate in statute what already exists in case law.

MR. LUCKHAUPT said that basically [HB 506] simply provides something that people can point to as the law.

Number 2313

REPRESENTATIVE COGHILL repeated Ms. Moss's earlier comment that [the Department of Law's attorney] had relayed his belief that he didn't believe legislative immunity extended to legislative

staff and that although [the DOL] wasn't willing to fight it now, it would do so someday. Therefore, he opined, [HB 506] is significant.

REPRESENTATIVE BERKOWITZ related his understanding that legislative immunity for staff has never been refuted. However, if legislative immunity for staff is placed in statute, then there is the risk of protecting people who should be held accountable.

CHAIR ROKEBERG returned to Representative Berkowitz's earlier line of questioning in regard to construing Kerttula v. Abood narrowly, and asked why would one want to construe that narrowly. He asked whether any of the principles in the aforementioned case speak to the "Speech and Debate Clause of the U.S. Constitution."

MR. LUCKHAUPT clarified that those principles [of legislative immunity] are also the principles behind the Speech and Debate Clause.

CHAIR ROKEBERG opined that Representative Berkowitz was trying to indicate that if those [principles] were construed narrowly, they wouldn't be broad enough [for members] to even consider or debate on the floor.

REPRESENTATIVE BERKOWITZ pointed out that the Kerttula case says, "We believe that Alaska's [immunity clause should also apply to] non-party legislators."

TAPE 02-39, SIDE B
Number 2378

REPRESENTATIVE BERKOWITZ noted that normally statutes are construed narrowly.

CHAIR ROKEBERG offered that those aren't statutes; they are constitutional dictates.

REPRESENTATIVE BERKOWITZ noted that they are policies that are underlying the statute, which springs from the constitution.

CHAIR ROKEBERG asked if it would be fair to say that [HB 506] attempts to memorialize case law so that there isn't ambiguity in the law and thus the guidelines regarding who is and isn't covered would be clear. He related his belief that this is done fairly frequently.

MR. LUCKHAUPT specified that that's what he is trying to explain in Section 2, which points out that this act creates a privilege. However, Mr. Luckhaupt stated that legislative immunity is greater than a privilege. Basically, privileges are created statutorily, wherein one can't be required to talk about those things that are covered by the privilege, either by issuing a subpoena or by requiring him/her to testify in court in any manner. He pointed out that Section 2 also specifies:

By creating this privilege it is not the intent of the Legislature of the State of Alaska to diminish the effect of the law of legislative immunity as it exists in Alaska under the Constitution of the State of Alaska and the common law. The legislature recognizes that legislative immunity in Alaska rises beyond a mere evidentiary privilege to an immunity that reaches the personal and subject-matter jurisdiction of the courts.

MR. LUCKHAUPT added that the idea behind creating this evidentiary privilege is so that perhaps attorneys would be less likely to issue a subpoena if this were actually in law.

Number 2282

CHAIR ROKEBERG asked if it would be fair to say that the constitutional privilege granted to legislators is clear insofar as it exists, although the breadth is a little less clear, he opined. However, that constitutional privilege doesn't necessarily extend to legislative staff other than in the aforementioned case law, which results in ambiguity. Chair Rokeberg also asked if Mr. Luckhaupt would say that legislative aides are covered by the constitutional privilege.

MR. LUCKHAUPT said he would; that's the law. He directed attention to the U.S. Supreme Court case Gravel v. United States, involving the Pentagon Papers, in which the U.S. Supreme Court said that aides to [then Senator] Mike Gravel had the same privilege he did. In that case, the executive branch was trying to discover from whom [Senator] Gravel obtained the Pentagon Papers, and without issuing a subpoena directly to [Senator] Gravel, they issued a subpoena to his staff. And although staff could be compelled to testify regarding the private publication of the Pentagon Papers because that was not considered part of their legislative duties, they did not have to disclose information about who provided the Pentagon Papers to [Senator]

Gravel initially because the papers were brought forth as matters of legislative concern. So the court found, clearly, that legislative immunity extended to legislative aides.

CHAIR ROKEBERG asked, if HB 506 had been law, would there have been a subpoena issued to Mr. Jardell?

MR. LUCKHAUPT said in that case, yes, because there were also other issues involved.

REPRESENTATIVE BERKOWITZ noted "the irony of Daniel Elsborg and [Representative] Coghill being linked."

REPRESENTATIVE COGHILL pointed out that it is also true that if legislators or legislative staff violate confidentiality, they can be held accountable. So to hold legislative staff accountable and provide for immunity "keeps us consistent," he opined.

Number 2138

REPRESENTATIVE BERKOWITZ asked, "So if you have an instance where a vested interest lobbied a legislator or legislative staff [to do something], could the public compel disclosure of that communication?"

MR. LUCKHAUPT pointed out:

You don't get any more vested than a parent coming to a legislator; I'd say that's a vested interest. A parent coming to a legislator in regards to asking the legislature to investigate or intercede with regard to something that is occurring with [the] DFYS; that's a vested interest.

REPRESENTATIVE BERKOWITZ asked, "If, for example, someone came to a legislator on the question of tax policy, could that be publicly compelled?"

MR. LUCKHAUPT responded that if the legislature itself chose to require legislators to disclose all of their contacts or contacts in regards to something in particular, then, yes, it could. Could the executive branch or a member of the public compel that? No, not under current law unless "that" was not part of legislative duties. For example, if that person approached the legislator and slipped him/her \$500 underneath the table "or something like that," then that is not part of

legislative duties, he said, "and we have clear case law removing that from the legislative duty agreement." But if this is a constituent or a corporation, an oil company, for example, approaching a legislator and expressing displeasure about legislation and what "they" would like to see occur, then that legislator is being contacted regarding his/her legislative duties - the duty to consider certain issues and the duty to vote on those issues. So in that situation, the federal courts have held that corporations are the same as any other constituent.

REPRESENTATIVE BERKOWITZ, referring to the Vice President of the United States and the formulation of an energy policy, asked: If there were an analogous situation involving the legislature, would legislators, under any scenario, be compelled to disclose whom they had communicated with?

Number 2001

MR. LUCKHAUPT noted that he was not sure that the scenario would be exactly the same. He then surmised that if, for example, the legislature had passed a bill creating some special select group of people to look into energy policy for Alaska, then the members of the legislature that were selected to make those selections to the committee would not be compelled to disclose whom they contacted or whom they were contacted by in regard to those selections, unless the legislature itself decided to make those disclosures. He added that the Vice President's situation deals with executive immunity, which is a much narrower concept than legislative immunity.

REPRESENTATIVE BERKOWITZ asked why.

MR. LUCKHAUPT said it is because the executive branch is just carrying out the laws that the legislature enacts and because that's the way it has developed over the years with regard to deliberative matters. He noted that basically, the executive branch is the branch that has all power to harass the legislative branch, who are the ones to whom ulterior motives have been assigned over the years. He also mentioned that there is a case in Alaska involving the "governor's pre-budget papers" - the papers that circulate back and forth before the actual budget comes out - and [the court has determined] that those papers are not public because they are part of that deliberative phase.

REPRESENTATIVE BERKOWITZ, referring to Ms. Moss's case and similar situations that legislative staff find themselves in, said that there are three separate branches of government but they have overlapping functions. In essence, he continued, "when we are helping constituents navigate the bureaucracy, we are performing an executive function, are we not?" That would be a narrowly construed immunity, he opined, "and oughtn't we try and construe immunities as narrowly as possible for the legislature, as well, if we want to continue or strive for a government in the sunshine?" In response to questions, he said "we serve executive function on occasion, just the same way the executive branch has some legislative function."

Number 1879

MR. LUCKHAUPT said that when the legislature is performing administrative functions, neither the legislature nor members of the legislature have any immunity. He recounted that a number of years ago, there was a case, State v. Haley (ph), in which an employee of the Legal and Research Services Division was fired for engaging in partisan political activities, or public political activities. The employee then sued Legislative Council and the legislature, and that suit was allowed because the court determined that there was no legislative immunity, since the hiring and firing of people, particularly for the Legal and Research Services Division, is not a legislative duty per se. Hiring and firing people is neither the process of enacting legislation nor conducting investigations of the executive branch.

MR. LUCKHAUPT said that act of looking into something that the executive branch is doing is a legislative activity. One of the greatest duties of the legislature, he opined, is to see how the law is being carried out and to see whether what the legislature has enacted is being carried out as the legislature intends, and if it isn't, to make changes to the law. He surmised that this is where a lot of these issues arise from - it's from the legislature's actions in observing what is occurring and, one, deciding whether to use the legislature's fiscal power, and, two, making sure that the law is enacted as intended. He said he would not categorize this observation or investigation as an executive-branch function. The legislature's choosing to investigate and oversee what the executive branch is doing is part of that legislative function, he added; "there is nothing beyond the actual passage of laws that is any less of a legislative function than being able to make sure that the laws are being carried out the way the legislature intends."

CHAIR ROKEBERG said he believed that the executive branch, at both the federal and state level, "can talk to anybody they want to when they're formulating their own policies."

REPRESENTATIVE JAMES, on the issue of whether helping a constituent constitutes an executive-branch function, said that she believes that when she is assisting a constituent she is not performing an executive-branch function. "I don't go tell the [executive-branch employee] what they can do, or make the decision; we have a discussion, and sometimes I win and sometimes I lose," she added.

CHAIR ROKEBERG, on the issue of bribery, mentioned that this type of pecuniary crime is a felony, and that the legislator would lose any constitutional immunity for committing such a crime. He added that the primary way that the legislature oversees its own conduct is through the legislative ethics code and the Select Committee on Legislative Ethics, and thus, he opined, the courts are willing, to a large degree, to allow the legislature to police itself.

Number 1607

REPRESENTATIVE BERKOWITZ mentioned that AS [11.56.860] speaks to misuse of confidential information; "If you are a public servant, and you learn confidential information and you disclose it, then you're subject to prosecution for [a class] A misdemeanor."

MR. LUCKHAUPT noted that there is also the crime of official misconduct. He explained that a public servant commits this crime if, with intent to obtain a benefit or to injure or deprive another person of a benefit, the public servant performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that the act is unauthorized; or knowingly refrains from performing a duty which is imposed upon the public servant by law or is clearly inherent in the nature of the public servant's office. He said that this crime is also a class A misdemeanor.

CHAIR ROKEBERG asked if legislators would be constitutionally protected from those misdemeanor crimes since the constitution says members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.

MR. LUCKHAUPT, after noting that this language is also in subsection (b) of HB 506, explained that it merely means that while a legislator is traveling to and from the legislative session, or during the legislative session, the legislator can not be served with that process; the case simply gets delayed until the legislature is done. In response to questions, he confirmed that that portion of legislative immunity only applies to the period of time that the legislature is in session.

Number 1520

MR. LUCKHAUPT went on to say that the way this was developed was more in terms of private litigation:

Let's say you're in the real estate business ... and let's say in regards to that, you were getting sued by someone that had purchased a building ... and ... was alleging that you didn't disclose something in regards to a material defect or something. And you were flying down to Juneau that very day to start the legislative session. They couldn't serve you with that civil process until that legislative session was over. ... It's designed to protect you from having to take time out from the legislative session to deal with this.

REPRESENTATIVE BERKOWITZ advised that one has to assert his/her legislative immunity; otherwise, the courts are inclined to disregard it. Also, he noted that if a legislator is being served or arrested for official misconduct, there is no immunity for that because that is not within the exercise of legislative duties.

CHAIR ROKEBERG, referring to the \$500 bribery example, surmised that that crime could be prosecuted under the official misconduct statute.

MR. LUCKHAUPT said, "That's not part of your legislative duties, it would be illegal ... there's a lot of cases out there that construe it in that particular way." He noted that the Dankworth case is different in regards to the actions that were involved; Mr. Dankworth merely sought to have the executive branch include in the budget submitted to the legislature particular line items that included the purchase of property that he was a part owner of.

CHAIR ROKEBERG noted that Mr. Dankworth had asked to be excused from voting due to a conflict of interest when that item came up in a legislative floor session, but he was required to vote anyway.

MR. LUCKHAUPT said that according to his recollection, the official-misconduct charge against Mr. Dankworth did not stem from his actions during that legislative floor vote. He went on to mention that over the years, there have been some legislators that were prosecuted and convicted for illegal activities.

CHAIR ROKEBERG noted that he has been asked to insert in the "sales tax bill" an exemption for gyms and fitness clubs, and that he owns the Powerhouse Gym. He asked how he should proceed on this issue.

REPRESENTATIVE BERKOWITZ advised Chair Rokeberg to do nothing.

Number 1272

CHAIR ROKEBERG pointed out that if someone else offers such an exemption as an amendment, and he asks to be excused from voting on that issue, in all likelihood he will be required to vote anyway since such requests are generally voted down. "So what do I do?"

MR. LUCKHAUPT said, "just because you're going to be benefited by something does not mean that you're committing a crime at that time or [that] you're not performing a legislative duty." He noted, for example, that the crime of official misconduct requires that a person do the act with the intent to obtain a benefit.

CHAIR ROKEBERG interjected that he would obtain a benefit if such an amendment passed.

MR. LUCKHAUPT continued by pointing out that the act would also have to be an unauthorized exercise of the legislator's official function.

CHAIR ROKEBERG, staying with that example, asked whether his declaration of a conflict of interest and request to be excused would be considered an affirmative defense.

MR. LUCKHAUPT indicated that was correct as long as Chair Rokeberg was not the sponsor of the [amendment]. However, if a legislator does sponsor legislation or an amendment that would

benefit him/her, then that legislator has a duty to disclose certain things and would be treading on thin ice whenever he/she engages in activities that are going to benefit him/her personally. "You invite ... people [to] assign alternative motives to your actions, and you should be careful in those matters," he warned. He opined that those issues are not related to legislative immunity, in and of themselves.

CHAIR ROKEBERG said: "They'd certainly speak to the Dankworth case or things like that if there is conflict of interest, because I presume that that's one thing we're immunized against if there is disclosure."

Number 1185

REPRESENTATIVE JAMES pointed out that the charges against Mr. Dankworth had nothing to do with whether he voted for anything; it had to do with whether he was trying to influence somebody [in the administration].

MR. LUCKHAUPT, in response to a question, confirmed that the legislature does have a code of ethics and has the Select Committee on Legislative Ethics to assist with internal difficulties. He noted, however, that the ethics rules that govern the legislature are rules that only the legislature could adopt and are not something that could be imposed by another body. He pointed out that something that is tangentially related is the idea of public meetings.

MR. LUCKHAUPT explained that there was litigation a number of years back on the issue of whether the legislature could hold meetings that were not public, and the Alaska Supreme Court found that this is something for the legislature itself to consider; if it chooses to open those meetings up, it can. It is not something that another branch of government can impose upon the legislature, and because the legislature has certain rights and duties as a separate branch of government, he added, legislative immunity is one of those things that the other branches of government have to recognize. He noted that framers of constitutions have recognized legislative immunity and that it is important to memorialize it and protect legislators, because they are the ones enacting the laws and overseeing things.

REPRESENTATIVE BERKOWITZ said, "Protecting our heads."

MR. LUCKHAUPT noted that this was literally true 500 or 600 years ago.

CHAIR ROKEBERG asked what the impact would be, now that this legislation has been introduced, if it does not become law. Would the courts consider that the legislature was denying immunity to staff?

MR. LUCKHAUPT assured the committee that he certainly would not accept that argument if such an issue came before the courts. He said that in his opinion, "these are constitutional dimensions, so there isn't any waiver involved." He noted, too, that he does not entirely agree with Representative Berkowitz that legislative immunity is something that must be asserted; "it's our opinion that it's a subject matter jurisdiction of the courts."

REPRESENTATIVE BERKOWITZ said, "they will defer to it but you better raise it."

CHAIR ROKEBERG added that it's a constitutional right; "you could have it in your pleadings."

MR. LUCKHAUPT opined that even if legislative immunity was not raised initially but was raised later on appeal, for example, it's still a subject matter jurisdiction, and so would void any previous act. He explained that subject matter jurisdiction goes to the basic nature of the court to hear that case, and if the court does not have subject matter jurisdiction, then it cannot act. Therefore, he reiterated, it is the opinion of his office that legislative immunity arises to the level of subject matter jurisdiction.

Number 0930

REPRESENTATIVE COGHILL, noting that he has a conflict of interest, moved to report HB 506 out of committee with individual recommendations and the accompanying zero fiscal note.

Number 0922

REPRESENTATIVE BERKOWITZ objected.

CHAIR ROKEBERG called an at-ease from 2:33 p.m. to 2:34 p.m.

Number 0900

A roll call vote was taken. Representatives Coghill, Meyer, Kookesh, James, and Rokeberg voted to report HB 506 from committee. Representative Berkowitz voted against it. Therefore, HB 506 was reported out of the House Judiciary Standing Committee by a vote of 5-1.

ADJOURNMENT

Number 0881

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:35 p.m.