SB
328

COMMITTEE REPORT

SENATE

FURTHER:

Date: ____________________

Mr. President:

The Committee on ____________________ has had ____________________

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for ____________________ [ ] same title [ ] new title

and recommends ____________________

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the ____________________ Committee

MEMBERS SIGNING DO PASS

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MEMBERS HAVING OTHER RECOMMENDATIONS:

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CHAIRMAN

S 60 (Rev. 12/78)

REPORT REGARDING THE SCOPE OF LEGISLATIVE IMMUNITY IN ALASKA AND RELATED TOPICS

TO

STATE OF ALASKA
LEGISLATIVE AFFAIRS AGENCY
JUNEAU, ALASKA

DECEMBER 7, 1983

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(3)

During the course of the 1983 Alaska legislative session several key issues surfaced relating to the privileges and immunities to be enjoyed by legislators, and also issues relating to the powers and responsibilities of the Governor. These issues are impacted by both federal and Alaska state law. This report addresses these issues.

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I. INTRODUCTION

The issues under consideration in this report are several, but in general all relate to the extent of protection afforded state legislators by the provisions of the privileges and immunities clause and the Speech or Debate Clause of the Constitution and laws of the United States and the State of Alaska.

The common law origins of these clauses relate back to the struggle for power between the English Parliament and the Stuart and Tudor kings. After years of struggle for legislative independence the clauses developed as a protective measure for members of Parliament against criminal liability and interference from the Crown.

In America, the colonists were often confronted with conflicts between their legislative assemblies and the royal governors as well as conflicts between the assemblies and Parliament. The members of assemblies contended that they possessed some judicial and legislative powers whereas Parliament maintained that only it was vested with such powers.

James Wilson, a member of the committee that drafted the Speech or Debate Clause of the U.S. Constitution explained the primary reason for the clause:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indespensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful to whom the exercise of that liberty may occasion offense. II Works of James Wilson at 38 (R. McCloskey ed. 1967).

Thus, the clause was intended to support the constitutional concept of a separation of powers, the checks and balances system of co-equal branches of government.

In an early case involving a similar clause in the Massachusetts constitution, which has frequently been cited with approval by the U.S. Supreme Court, Chief Justice Parsons stated in Coffin v. Coffin, 4 Mass. 9, 27, 4 Tyng. 1 (1808) "[t]hese privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal."

Throughout the clause's history a major issue has been what form must a legislative act take in order to properly fall within the immunity of the clause. To that issue we now turn.

II. LEGISLATIVE IMMUNITY OF FEDERAL CONGRESSMEN IN FEDERAL COURT

Any analysis of the protections afforded state legislators during the course of their duties necessarily begins with an analysis of the U.S. Constitution. Article 1, Section 6, clause 2 states that Senators and Representatives:

> shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

The first clause of this provision, the privileges and immunities clause, grants Congressmen a privilege from arrest except in cases involving "treason, felony and breach of the peace." In Williamson v. United States, 207 U.S. 425 (1907), a member of the House of Representatives argued that his perjury conviction was not "treason" or a "felony" and was not embraced within the words "breach of the peace," but the Supreme Court rejected the argument and held that the words were understood at the time of adoption of the federal Constitution to exclude from the privilege all arrests for all criminal offenses.

Subsequently, in Long v. Ansell, 293 U.S. 76 (1934), the issue before the Court was whether the word "arrest"

refers only to those few remaining instances of civil arrest where actual detention of the person existed, or, more broadly construed, included service of civil process upon a member of Congress. The Court ruled that the language of Clause 1 was exact and left no room for a construction which would extend the privilege beyond the terms of the grant. Due to the fact that when the Constitution was adopted arrests in civil suits were still common in America, the Court held that it was only to such arrests that the provision applied. From these cases the general rule has emerged, with respect to U.S. Congressmen, that the privilege from arrest clause applies only to arrests in connection with civil suits, requires an actual physical detention, and does not refer to service of process.

The second part of the above-quoted constitutional provision relating to the privileges of U.S. Congressmen has come to be known as the "Speech or Debate Clause." The key to determining whether the U.S. Supreme Court will apply the Speech or Debate Clause in a particular action depends on the Court's construction of the constitutional language "speech or debate in either house."

In Kilbourn v. Thomas, 103 U.S. 168 (1881), the Court opted for a liberal construction of the Speech or Debate

Clause in order to effectuate its purpose of protecting Congressional independence. The phrase "speech or debate in either House" was held to include not only words spoken on the floor of the House, but also to committee reports, resolutions, acts of voting and things "generally done in a session of the House by one of its members in relation to the business before it."

It has also been held that Congressmen may not be subjected to civil suits for their legislative acts regardless of whether the remedy sought is damages, Kilbourn v. Thomas, supra; injunctive relief, Eastland v. U.S. Serviceman's Fund, 421 U.S. 491 (1975); declaratory relief, U.S. v. Johnson, 383 U.S. 169 (1966); or violation of constitutional rights, Stamler v. Willis, 287 F.Supp. 734, (1968) app. dism'd. 393 U.S. 217, vacated on other grounds 393 U.S. 407.

The broad language of these court decisions left open the possiblity that all Congressional activities would fall within the protection of the Speech or Debate Clause. Earlier decisions refrained from defining the scope of a "legislative act." The Kilbourn definition would include within the protection of the clause potentially all acts by a legislator relating to legislative functions. However, more recent decisions have refuted such a broad assertion

when asked to determine what legislative acts properly fall within the constitutionally mandated legislative privilege.

A key concept being utilized in the cases which have attempted to define the scope of legislative acts is the distinction between "political" and "legislative" acts. In U.S. v. Brewster, 408 U.S. 501 (1972), the Court first noted that not all acts of a Congressman in the legislative process are protected by the clause because some acts constitute "political errands" rather than proper legislative acts, and went on to hold that although a U.S. Senator could not be questioned about his motivation for voting in a certain fashion, the Speech or Debate Clause does not prevent evidence not directly tied to such voting from being entered in a criminal prosecution for bribery. And in Gravel v. U.S., supra, it was held that the Speech or Debate Clause does not exempt members of Congress from criminal liability for illegal or unconstitutional conduct in preparing for or in implementing legislative acts. Thus, the Court refused to extend the clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate.

In U.S. v. Johnson, supra, it was held that communications with, or attempts to influence the actions of, federal executive and administrative agencies are not

"legislative acts." Similarly in Hutchinson v. Proxmire, 443 U.S. 111 (1979), the court emphasized that regardless of whether and to what extent the Speech or Debate Clause might protect a Congressman's calls to federal agencies seeking information, it does not protect libelous comments made during the course of those conversations. See also: Gravel, supra.

Another line of cases deals with the republication of statements which were privileged at the time they were made. The Supreme Court has indicated that although the contents of certain remarks may have been privileged under the Speech or Debate Clause at the time a Congressman originally made them, they do not remain privileged when later disseminated to the public in media interviews. Such republication would include the dissemination of newsletters and press releases by Congressmen for public consumption. Doe v. McMillan, 412 U.S. 306 (1973); Hutchinson v. Proxmire, supra; Gravel v. U.S., supra.

One more distinction which has been drawn occurred in U.S. v. Helstoski, 442 U.S. 477 (1979), where it was decided that the protections of the Speech or Debate Clause extend only to legislative acts already performed and do not relate to promises to undertake conduct within the legislative sphere at some future time.

The conclusion to be drawn from these federal cases appears to be that the Burger court has essentially enacted guidelines that indicate that a proper legislative activity is one that is part of the "deliberative and communicative processes" of house proceedings, Gravel, supra, that this activity must be undertaken for legislative and not political reasons, Brewster, supra, and will be examined closely whenever the act occurs outside the walls of Congress, Proxmire, supra. In essence, the scope of the clause will only be extended to what is necessary to preserve the integrity of the legislative process. It thus appears that the Court has placed a spacial test on the clause; one that ignores the content of the speech and instead focuses on where the speech is given. This would seem to explain the rationale behind the Court's distinction between items reported in the Congressional Record which are protected and those items reported outside Congress, which are not, albeit reported verbatim from the Congressional Record.

III. LEGISLATIVE IMMUNITY OF STATE LEGISLATORS IN FEDERAL COURT

Because of the shared origins and justifications for the doctrine of legislative immunity, the federal courts have extended to state legislators a common law immunity for "conduct within the scope of legislative authority" or "within the sphere of traditional legislative activity."

Nevertheless there are distinctions between the scope of the federal and state legislative immunity.

In suits involving Congress or the executive branch, the doctrine of separation of powers limits a federal court's inquiry. Where the court finds a constitutional commitment of the issue in question to a coordinate political department the separation of powers doctrine prohibits the exercise of federal judicial power. Baker v. Carr, 369 U.S. 186 (1962). The reasoning is that such an exercise of judicial review would amount to judicial control over the coordinate branch's action. However, the separation of powers doctrine has no effect on a federal court's power in suits involving state officials; rather, the relevant concern is federalism. Like the separation of powers analysis, the federalism analysis seeks to limit the disruptive effect of federal court action on other sovereign governmental bodies. Federalism, however, does not always preclude federal court disruption of state governmental activities; federal interests carry great weight. Given the federal responsibility for guaranteed constitutional rights, interests of comity generally will yield where state action violates the constitution. Note, Official Immunity in Federal Court: Supreme Court of Virginia v. Consumer's Union of the United States, Inc., Cornell L. Rev. 67:188 (1981).

One of the earliest Supreme Court decisions dealing with the immunities of state legislators in federal actions was Tenney v. Brandhove, 341 U.S. 367 (1951), wherein the Court ruled that state legislators were immune from suits for damages under the Civil Rights Act, 42 U.S.C.A. §1983. This decision, however, was limited to state legislators' liability for damages under the Civil Rights Act, and did not extend to claims of legislative immunity raised in other contexts. With respect to claims for injunctive or declaratory relief, there is strong dicta in Supreme Court of Virginia v. Consumer's Union of the U.S., 446 U.S. 719 (1980), that indicates that Tenney legislative immunity extends to §1983 actions seeking injunctive or declaratory relief.

In U.S. v. Gillock, 445 U.S. 360 (1980), the Supreme Court refused to recognize a state legislator's claim of legislative immunity in a federal criminal prosecution, suggesting a distinction between the scope of federal and state legislative immunity. In this case the court held that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields. Thus, the Court stated that federalism bars federal court actions only where judicial review "results in a direct federal impact on traditional state governmental functions." Gillock, supra, at 371.

In defining the permissible bounds of "legitimate legislative activity" the cases involving state legislators' common law immunity in federal court closely resemble those dealing with federal Congressmen. Such activities as conducting investigations, holding hearings, issuing subpoenas, making committee appointments, enacting laws and passing resolutions, voting, judging election contests and releasing committee reports to the press, for example, are typical of legislative conduct which is protected. Star Distributors, Ltd v. Marino, 613 F.2d 4 (2d Cir. 1980); Gewertz v. Jackman, 467 F. Supp. 1047 (D.C.N.J. 1979); Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976); Porter v. Bainbridge, 405 F. Supp. 83 (D.C. Ind. 1975); Green v. DeCamp, 612 F.2d 368 (8th Cir. 1980). Conduct which has been deemed outside the bounds of "legitimate legislative activity" includes engaging in political activities such as preparing news releases expressing a personal view, acting in an executive or administrative capacity to carry out unconstitutional laws or disobeying a federal court order. Moreover, courts have distinguished legislative committee reports from newsletters and press releases as well as conduct which occurs during the pendency of a committee from that occurring after the committee was dissolved. Cole v. Gray, 638 F.2d 804 reh. den. 642 F.2d 1210 (5th Cir. 1981); Green v. DeCamp, supra.

With respect to the individuals protected, recent cases indicate that the U.S. Supreme Court may be adopting a functional approach to immunity wherein it is not the label attached to the office held but the nature of the functions exercised that determines whether or not the privilege attaches. Butz v. Economou, 438 U.S. 478 (1978) (defendant's duties were "functionally comparable" to those of a judge); Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (defendants' duties were essentially those of a "regional" legislative body); Supreme Court of Virginia, supra, (Virginia Court exercised the state's entire legislative power to regulate attorney conduct).

The following is a brief run-down of the persons who have been extended immunity in federal actions under §1983:

1. Elected lawmakers, Star Distributors, Ltd, supra; Bergman v. Stein, 404 F. Supp. 287 (S.D.N.Y. 1975); Safety Harbor, supra.

2. Certain legislative aides and employees. Gravel, supra; Martone v. McKeithen, 413 F.2d 1373 (5th Cir. 1969) (staff investigators employed by statutory commission); Porter v. Bainbridge, supra (principal clerk, chief door keeper and payroll clerk of Indiana House of Representatives);

Green v. DeCamp, supra, (counsel for select committee); and in certain cases private individuals acting in concert with immune state officials have been extended immunity. Bergman v. Stein, supra. But to the contrary, see: Dennis v. Sparks, 449 U.S. 24 (1980) (conspiracy with judge).

4. Pursuant to the "functional approach," above, certain appointed officials, such as regional administrators, have been granted immunity. Lake Country Estates, supra.

5. Again, pursuant to the "functional approach," State Supreme Court judges have been granted legislative immunity where it was determined that they exercised the state's entire legislative power over the legal profession. Supreme Court of Virginia, supra.

6. Where the Lieutenant Governor of the state was acting in his capacity as president ex officio of the state Senate, legislative immunity has been granted. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) disapproved on other grounds, Supreme Court of Virginia, supra. Also, where a governor was exercising his veto power he was deemed to be acting as a legislator in Saffioti v. Wilson, 392 F. Supp. 1335 (S.D.N.Y. 1975).

IV. LEGISLATIVE IMMUNITY OF STATE LEGISLATORS IN STATE COURT

We turn now to a comparison and analysis of the legislative immunity afforded by specific privileges and immunities clauses of constitutions and statutes of several states. In preparing this section the laws of the states of Alaska, Pennsylvania, Oregon, Illinois, California, Michigan, Texas and New York have been considered. Interpretive cases and comments have been obtained for all the states referred to with the exception of Oregon where it appears that occasion for review of the applicable provisions has not occurred. The interpretive materials from several states are quite inconsistent both in their scope and in the specific issues of their review. This, plus the fact that most of the states' legislative immunity provisions are modeled after the U.S. Constitution, suggests that reference to federal materials is in order.

A. Analysis Of Speech Or Debate Clause Provisions

The first principal issue to be addressed is a comparison and analysis of the existence and scope of the "speech or debate" immunities conferred by state constitutions and statutes.

Initially it should be remarked that all of the states reviewed except California have a constitutional speech or

debate clause. Furthermore, all of these states' constitutional speech or debate clauses bear a striking similiarity to that in the U.S. Constitution, with the exception of Alaska. The U.S. Constitution, Article I, Section 6, in relevant part, provides as follows:

> . . . and for any speech or debate in either house, they shall not be questioned in any other place.

Article II, Section 6 of the Alaska Constitution provides, _inter alia_:

> Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session.

As we have repeatedly observed, decisions in the federal courts dealing with the provisions of the U.S. Constitution as it relates to federal Congressmen are given great weight and frequently followed by state courts when addressing similar issues as a matter of first impression. This point is especially worth repeating in the present context because in none of the states reviewed have the courts had as much opportunity to refine the principles involved as have the federal courts, and therefore there is a greater likelihood

that state judicial proceedings involving legislative immunity will be of first impression.

As noted above, one key issue involves the scope of the term "speech or debate in either house." It will be recalled that Kilbourn v. Thomas, 103 U.S. 168 (1881), created the general standard that the phrase included things "generally done in a session of the House by one of its members in relation to the business before it." Subsequent decisions by the Supreme Court, interpreting the phrase have established further parameters that indicate that a proper legislative activity is one that is part of the "deliberative and communicative process" of house proceedings; that this activity must be undertaken for legislative, and not political reasons and will be examined closely whenever the act occurs outside the walls of Congress.

The language of the Alaska Constitution limiting the privilege to statements "made in the exercise of their legislative duties" has been held to be essentially the same as its federal counterpart; the test for applying the clause being whether or not the statements made or the actions taken by a legislator "directly affect the enactment of legislation or the contents of bills to be submitted to the legislature whether or not the statements or actions occur

in public." State v. Dankworth, _____ P.2d _____, Ak. Ct. App. Op. No. 308, p. 5, November 18, 1983.

For the most part, other states that have examined the phrase have applied the general standard of Kilbourn, but have not developed refined guidelines for application of that standard in particular circumstances.

For example, in Lincoln Building Associates v. Barr, supra, the court stated that the privilege is confined, under the New York constitution, to freedom from civil or criminal suits for utterances and activities of a legislator as a legislator; i.e., only so long as the public good is served. In Texas, the rule is stated that the "the privilege extends to things generally done in a session of either house by one of its members in relation to the business before it," and no court has developed this any further. "Interpretive Commentary" following Article III, Section 21 of the Texas Constitution. In Illinois, members of legislative bodies are accorded an absolute privilege in the performance of "official acts and duties." No elaboration is given. Arlington Heights National Bank, supra. In Pennsylvania it has been held that there is no basis for distinguishing the scope of the Pennsylvania speech or debate clause from that contained in the U.S. Constitution.

Consumers Education and Protective Association v. Nolan, 368 A.2d 675 (1977).

In California, the immunity granted is created by statute and furnishes a privilege from damages for communications made during any legislative, judicial or other official proceeding authorized by law. California Civil Code §47. The California decisions indicate that the statutory privilege is absolute if the statement made before the legislative body "bears some connection to the work of that body," Scott v. McDonnel Douglas Corporation, supra. The statute also requires a "proper discharge of an official duty." Frisk v. Merrihew, supra. The California statutory immunity differs considerably from that contained in Article I, Section 6 in that the statute designates as privileged "publications or broadcasts" in a variety of circumstances not limited to legislative proceedings.

1. Effect of Relief Sought

Regarding the effect, if any, of the relief being sought against a legislator, the federal rule is that regardless of whether the remedy sought is damages, injunctive or declaratory relief, or whether the case is a criminal action, a suit cannot be maintained against a Senator or Representative for his "speech or debate in any house." The major point of

contention then becomes whether or not the particular conduct in question properly falls within the purview of that phrase. (See discussion of Federal Legislative Immunity above.)

With respect to claims for injunctive or declaratory relief, one case out of Pennsylvania, Sweeney v. Tucker, 375 A.2d 698 (1977), recognized that the federal courts extended legislative immunity to such actions and acknowledged that federal cases are useful for guidance, but not binding. The court did not apply the federal standard in this case, however, because the complaint was dismissed as moot insofar as the state legislators were concerned.

In state cases involving criminal charges, a New York court acknowledged that the legislative immunity for speech or debate includes freedom from a criminal suit. Lincoln Building Associates v. Barr, supra. Another case from Texas involved a criminal action for conspiracy to accept a bribe. The court refused to apply the Speech or Debate Clause of the U.S. Constitution by virtue of the Fourteenth Amendment and went on to rule that the state constitutional provision regarding speech and debate was a general provision which did not supersede or conflict with a more specific constitutional provision prohibiting bribery. As such, the court refused to allow the Defendant to avoid prosecution for bribery on the basis of the state speech or debate clause.

In a very recent case out of the Court of Appeals of Alaska, State v. Dankworth, supra, the applicability of Alaska's speech or debate clause was considered in the context of a criminal proceeding. The Court endorsed the position that although the language differs, the state speech or debate clause is essentially the same as its federal counterpart. The Court went on to embrace the distinction between legislative and political activities:

> We thus accept the distinction drawn in the federal cases between the political activities of a legislator which are performed in order to insure reelection, and the legislative activities of a legislator, which are performed in order to directly influence the enactment of specific legislation. Political activities, which include attempts on behalf of constituents to influence the executive branch in carrying out administrative responsibilities, i.e., prosecuting criminals, are not privileged. Legislative activities as we define them are privileged. Id., at p. 5.

The Court held that the Speech or Debate Clause of the Constitution of the State of Alaska does provide legislators with immunity from criminal prosecution for their legislative acts:

> We hold that our constitutional provision protects any statements made or actions taken by a legislator that directly affect the enactment of legislation or the contents of bills to be submitted to the legislature whether or not the statements or actions occur in public. Id.

In determining that the test of "legislative acts" is whether or not the challenged conduct or statement directly affects the enactment or contents of proposed legislation, the court cited, with apparent approval, Dankworth's assertion that "acts other than oral communication and debate are protected . . . if they are purportedly or apparently legislative." (emphasis added) Id., p. 4.

The trial court went even further in discussing the scope of the speech or debate clause in Alaska when it stated: "in regard to the scope of the acts protected [the Alaska speech or debate clause is] broader than its federal counterpart."

The trial court reached this conclusion after comparing the language of Article I, Section 6 of the U.S. Constitution which, textually at least, covers only "speech or debate in either house," with Article II, Section 6 of the Alaska Constitution which protects "any statements made in the exercise of . . . legislative duties." Judge Carpeneti considered this difference to be highly important, as shown by the following quotation from his Memorandum of Decision and Order Re Motion to Dismiss Indictment, p. 6:

> [T]his difference appears to be important. The development of federal law under the federal speech or debate clause has largely been the

> process of defining the concept of "legislative acts" so as to accomodate the Supreme Court's concern that the literal statement of the immunity found in the text was too narrow to serve the great historical purposes of the framers. While that development may well support the result reached herein, . . . it is not strictly necessary to the interpretation of the Alaska Constitutional provision which protects any statement made in the exercise of . . . legislative duties.

It is thus apparent that both the Trial Court and the Court of Appeals consider the scope of the Alaska speech or debate clause to be more extensive then that of the federal version. If this standard survives further appeal it is possible that the scope of the speech or debate clause in Alaska could have much broader application than its federal counterpart.

Because the basis of speech or debate clause immunity is a desire to prevent intimidation by the executive branch and accountability before a possibly hostile judiciary, the courts have been less than unanimous in their treatment of motions to vacate subpoenaes issued to state legislators. In New York the rule appears to be that a legislator can be subpoenaed to testify regarding matters that cannot subject him to suit. Lincoln Building Associates v. Barr, supra. Furthermore, where the subpoena and subsequent warrant for arrest for contempt were issued by a legislative committee the court held that they did not constitute an arrest "in a

civil action or proceeding" as envisioned by the statute. In addition, the court stated that there could be no privilege from arrest asserted against the legislature itself by a legislator. Hastings v. Hofstadter, 180 N.E. 106 (1932).

To the contrary, in Bishop v. Montante, 237 N.W.2d 465 (Mich. 1976), the court ruled that in the absence of proof that the testimony of the legislator was crucial or that facts sought to be discovered were unavailable elsewhere, the privilege from civil process included subpoenaes.

Cases involving restrictions on legislative immunity by state courts are relatively rare. In Pennsylvania, the state Supreme Court considered a challenge to House procedures for expulsion of members. In so doing the Court stated that unless the Constitution unambiguously commits procedures used exclusively and finally to the House it does not bar judicial review for due process violations. Sweeney v. Tucker, supra. In another case, Mutscher v. State, supra, the Texas Court of Criminal Appeals declared flatly that taking a bribe is not a legislative act, citing U.S. v. Brewster, 408 U.S. 501 (1972), and therefore is not protected by the speech or debate clause.

Another possible vehicle for restricting the scope of legislative immunity is presented when the courts are asked to define what is the period of a "session" during which the immunity attaches. In answering this question the courts generally have given the term broad latitude. In Bishop v. Montante, supra, the Michigan court stated that the term "sessions" of the legislature includes regular and special sessions and is not limited to only working sessions when the legislature is actually sitting. The rule in Alaska, where statements made in the exercise of legislative duties are protected only "while the legislature is in session," is that a "session" is the sitting of the Legislature during the period of time that it is convened as a legislature to do business as a legislative body. The immunity runs from the time the member is "going to" or "returning" from a legislative session; 24 hours a day, 7 days a week from the time that the legislature is convened to the time that it adjourns sine die, i.e., indefinitely. 1959 Ak. Op. Att'y. Gen., No. 8. Where a committee was convened when the state Senate was not in session and the committee voted on a nomination by the governor to an executive post, the Pennsylvania Supreme Court held this to be clearly within the legislative sphere. Consumers Protective Association, supra.

From such a dearth of authority it is difficult to draw a generalized conclusion as to how a state court would decide a challenge to the claim of legislative immunity. Federal cases are useful for guidance, but are not binding on state courts. Sweeney v. Tucker, supra. However, because of the shared origins and common language employed, the prudent individual contemplating the exercise of the privilege should not assume that state courts will allow greater latitude in the exercise of legislative immunity than the federal courts have granted to comparable individuals on the national level. This conclusion is called into question, however, by the holding in State v. Dankworth, supra, which expressly adopted the reasoning of the federal line of cases in this area, but only after considering, and implicitly approving, assertions that the protections afforded by the Alaska Constitution are more extensive than those provided by the U.S. Constitution, even though it did so in less than a crystalline fashion.

B. Analysis of State Privileges & Immunities Provisions

In the absence of an express constitutional or statutory provision governing the matter, some conflict has been observed in determining whether or not members of Congress as well as members of state legislatures are exempt from the service of civil process by the applicable privileges and

immunities clauses. Of the states reviewed, Pennsylvania, Oregon, Illinois and Texas have constitutional provisions regarding arrest essentially the same as Article 1, Section 6 of the U.S. Constitution, the only differences being the length of time during which the privilege attaches. The relevant portion of Article 1, Section 6 provides:

> They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during the attendance at the session of their respective houses, and in going to and returning from the same:

With respect to U.S. Congressmen in federal proceedings it has been established, as noted above, that the general rule is that the privilege from arrest clause applies only to arrests in connection with civil suits, requires an actual physical detention and does not prohibit service of process in a civil suit. Williamson v. U.S., 207 U.S. 425 (1907); Long v. Ansell, 293 U.S. 76 (1934). Nonetheless, based on early cases originating in Wisconsin and Pennsylvania, some commentators have noted a conflict in the decisions as to whether or not the privilege from arrest referred to in Article 1, Section 6 also creates an exemption from service of civil process. Annot., 94 A.L.R. 1470.

In these early Wisconsin and Pennsylvania cases, Doty v. Strong, 1 Pinney (Wis.) 84 (1840); Geyer v. Irwin, 4

Dall. (Pa.) 107, 1 L.Ed. 762 (1790) and Bolton v. Martin, 1 Dall (Pa.) 296, 1 L.Ed. 144 (1788), it was held that a delegate to Congress was privileged from the service of civil process in a state court proceeding. In Pennsylvania, this holding has been extended to state legislators so that a legislator is privileged from summons, citation or other civil process during his attendance on the legislative business confided to him. Gray v. Sill, 13 W.N.C. (Pa.) 59 (1883); Ross v. Brown, 7 Pa. Co. Ct. 142 (1889).

Texas follows the general rule that the constitutional privilege from arrest does not confer an immunity on state legislators from service of civil process. Gentry v. Griffith, 27 Tex. 461 (1864).

In Illinois, Phillips v. Browne, 110 N.E. 601 (Ill. 1915), stands for the proposition that §14 of the Illinois Constitution only grants an exemption from arrest with a view to imprisonment, and nothing else. Therefore, the constitution does not exempt state legislators from service of process in civil cases. When this case was decided, however, a statute exempted members of the General Assembly from service of process. The court held that this statute contravened the constitutional provision inhibiting the passage of local or special laws which grant any immunity to individual members of a particular class. The court stated that

there was no good reason why legislators should be singled out as immune from service of process anymore than the members of any other class of public officials. Similarly, People v. Flinn, 362 N.E.2d 3 (Ill. 1977), reiterated that the legislative exemption is only for civil arrests, and not for service of civil process. No other state reviewed has employed this reasoning.

Of the remaining states to be considered, the constitutions of the States of Alaska and California both provide that legislators are "not subject to civil process." Because this clause contains no qualifications, the California courts consider it applicable to any kind or subject matter of a civil lawsuit. Harmer v. Superior Court, 79 Cal. Rptr. 855 (1969). No case from Alaska has interpreted this clause in this context. The Alaskan Constitution contains the further provision that members "are privileged from arrest except for felony or breach of the peace." This additional provision would only prevent arrest in the relatively rare instances in which a civil proceeding is commenced by civil arrest as the initial process. Long v. Ansell, supra. In Alaska, the provisions governing civil arrest are contained in A.S. 09.40.120-220, and although these provisions are not used with any frequency due to the restrictions imposed upon their application, they still retain their validity.
The use of the phrase "not subject to" becomes especially

significant when we consider the possibility that the privilege may be waived. That discussion will follow.

The New York Constitution is silent with regard to a legislator's privilege from arrest or service of process. However, Article 2, §2 of the New York Legislative Law is entitled "Exemption of Members and Officers from Arrest" and grants a "privilege from arrest in a civil action or proceeding." In considering the scope of this provision, the courts have held that a warrant for arrest issued by the legislature following failure to honor a legislative subpoena is not an arrest "in a civil action or proceeding." Hastings v. Hofstadter, 180 N.E. 106 (1932). In Lincoln Building Assoc. v. Barr, 147 N.Y.S.2d 178 (1955) the court ruled that the immunity is confined to freedom from suit, civil or criminal, for his utterances as a legislator, and, therefore, a legislator can be subpoenaed to testify regarding matters that cannot subject him to suit. In another case interpreting the similar language of the U.S. Constitution it was held that a U.S. Representative was immune from civil arrest but not civil process short of arrest. James v. Powell, 274 N.Y.S.2d 192 (1966). From these cases it appears that New York follows the general rule that a legislator cannot be arrested in a civil action nor forced into court for his legislative activites, but is subject to service of process

and may be subpoenaed regarding matters that do not subject him to suit.

In Michigan, the Constitutional provision is unqualified and states that legislators shall be privileged "from civil arrest and civil process." This provision was designed to make it clear that legislators are not immune from arrest on criminal charges. Mich. Op. Atty. Gen. 1926-28, p. 343. The Michigan legislature has enacted statutory provisions which complement and expand this constitutional language.

The Michigan statutes classify those persons who may claim "exemption" from civil arrest and civil process, as distinguished from persons who may claim a "privilege" against civil arrest and civil process, RJA §§1821, 1825, 1831, 1835. The apparent thrust of the distinction is that a "privilege" could be waived if not exercised in a timely manner, whereas a civil arrest made in violation of a statutory "exemption" is void.

The statutory provisions of Michigan declare the following legislative exemptions and privileges:

(1) Officers of both houses are not liable to arrest on civil process while they are "in actual attendance upon"

the duties of their office. This provision was intended to create an exempt status limited to offices of the legislature. RJA §1821(1).

(2) All members and officers of the legislature, are privileged from arrest during sessions and for 15 days before and after each session. RJA §1825(2). The privilege is unqualified, and necessarily covers both civil and criminal arrest, in contrast to the constitutional privilege, which extends only to civil arrest, and for a shorter time. An officer, therefore, is exempt from arrest while in actual attendance upon the duties of his office, but has a privilege against arrest at all other times covered by the statute.

(3) Members, including officers, are exempt from service of civil process during sessions and for 15 days before and after each session. RJA §1831(3). The constitution affords only a privilege against civil process, and for a shorter time of 5 days before and after a session.

(4) The legislature may punish by proceedings in contempt anyone arresting or procuring the arrest of a legislative member or officer, in violation of his privilege. M.C.L.A. §4.82.

As noted above, an arrest in violation of the statutory exemption is void. As a result, the exempt person must be released immediately on motion in the pending proceedings or on application for a writ of habeas corpus, regardless of whether the exemption was claimed at the time of arrest. Miller v. Rosier, 31 Mich. 475 (1875); Dallas v. Garras, 10 N.W.2d 897 (1943). The further consequences of a civil arrest in violation of a statutory exemption are provided by RJA §1821(9). Every person making or procuring the "void" arrest is (1) guilty of contempt of court, (2) liable for double damages, and (3) is also liable for damages in a tort action for false arrest. But the statute further provides that the "officer or person causing the arrest shall not be guilty of contempt nor liable for damages" if the person exempt from arrest has failed to claim his exemption in the manner prescribed. Thus it is clear that the person procuring the void arrest is liable for contempt, double damages, and separate suit for false arrest, regardless of whether the statutory exemption was claimed at the time of arrest; but the officer making the arrest is not liable for any of these consequences, unless the statutory exemption was claimed.

On the other hand, an arrest in violation of privilege is not absolutely "void" and the privilege may be waived if

not exercised in a timely manner. Therefore, it is implicit that the following are consequences of an arrest in violation of the privileges provided by statute:

(1) If the privilege is claimed, the person arrested should be entitled to immediate release on motion in the pending action or on application for a writ of habeas corpus.

(2) The person procuring the arrest and the officer making the arrest contrary to privilege are not liable for contempt of court or for statutory double damages, even if the privilege was claimed at the time of arrest. RJA §1821(8)-(9). However, there may be liability for contempt of the legislature in making or procuring the arrest of a legislator in violation of his privilege.

(3) The party procuring the arrest and the officer making the arrest in violation of privilege may be liable in tort for false arrest, but only if the privilege was claimed at the time of arrest.

Much of the foregoing analysis of the statutory provisions was contained in "Practice Commentary - 1968, by Carl S. Hawkins" which directly followed the individual statutory sections in the Michigan code book.

In Alaska, A.S. 24.40.010 elaborates on legislative immunities. It repeats that a legislator is "not subject to

civil process and is privileged from arrest," specifically provides that the immunities extend to meetings of interim standing or special committees of the legislature and grants a period of 5 days immediately preceeding and following his attendance at such a meeting or other session.

In addition to the foregoing statute, A.S. 09.25.150 *et seq*. grants public officials the right to refuse to disclose the source of information obtained while acting in the course of their duties as public officials.

C. Persons Protected

The next issue to be addressed is to what extent does the Speech or Debate Clause protect individuals, other than elected members of legislative bodies, from liability for their actions on behalf of such members? Two theories have been advanced for the extension of some immunity to legislative aides or employees, neither of which provides absolute immunity.

Numerous cases exist in which courts have indicated that an official is not subject to liability for his discretionary acts but loses any immunity for duties that are merely ministerial in nature. As long as the officer acted within the scope of his legal discretion, his conduct was

lawful and therefore could not subject him to liability. Officers would lose any claim of immunity by abusing their discretion, as by acting in bad faith. In contrast, because ministerial officers had no legal authority to exercise discretion, the law did not legitimate their mistakes.

The concept of official immunity, on the other hand, may protect an official who has violated the Constitution in bad faith. It is, therefore, inconsistent with the idea that an officer who has acted unlawfully is subject to personal liability for his conduct. Thus, the discretionary/ministerial dichotomy, based as it is upon the defense of legal justification, is not pertinent to an officer's immunity in the present context.

The doctrine of official or qualified immunity is derived from Barr v. Matteo, 360 U.S. 564 (1959), and the scope of inquiry under that doctrine is the same under the Speech or Debate Clause. If activities are not protected by the clause they are not shielded by the doctrine of official immunity either. Dickey v. CBS, 387 F. Supp 1332 (D.C. Pa. 1975). In Barr, the Acting Director of the Office of Rent Stabilization was immunized from liability for an alleged libel contained in a press release. The Court held that the executive privilege recognized in prior cases could not be restricted only to those of cabinet rank.

Justice White took pains to examine the history of official immunity as it relates to the Speech or Debate Clause in Gravel, supra. In this case Senator Gravel was under investigation to determine whether violations of federal law had occurred when he read to a subcommittee the Pentagon Papers, which he then placed in the public record. A grand jury investigating the matter subpoenaed an aide to the Senator. The Court of Appeals' granted a protective order regarding the aide that enjoined interrogation with respect to any act that he performed within the scope of his employment. The Supreme Court rejected that decision as being overly broad and held that the aide's immunity would be extended only to legislative acts as to which the Senator himself would be immune. In so doing, the Court established the standard against which the liability of a congressional aide is measured. The Speech or Debate Clause prohibits inquiries into things done by legislative aides or employees as the Congressman's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Congressman personally. The Court reasoned that in light of the complexities of the modern legislative process, "that the day to day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause - to prevent intimidation of legislators by the

Executive and accountability before a possibly hostile judiciary, - will inevitably be diminished and frustrated." Gravel, supra, pp. 616 - 617.

The Court illustrated the application of this test by distinguishing three other cases involving legislative immunity, Kilbourn v. Tompson, supra; Dombrowski v. Eastland, 387 U.S. 82 (1967); and, Powell v. McCormack, 395 U.S. 486 (1969). Referring to Kilbourn, the court stated:

> [T]he Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest. Gravel, supra, at 618.

The case of Dombrowski involved a Senator who was also a subcommittee chairman, and the subcommittee counsel. The record contained no evidence of the Senator's involvement in any activity other than what properly could be termed legislative activity, so the Speech or Debate Clause protected him. On the other hand, the committee counsel was charged with conspiring with state officials to carry out an illegal search of records that the committee sought for its own proceedings. The committee counsel was deemed protected to

some extent by legislative privilege, but it did not "shield him from answering as yet unproved charges of conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize." Gravel, supra at 620.

Powell v. McCormack, supra, involved the validity of legislative actions in the illegal exclusion of a representative-elect. The defendant Members of the House were dismissed from the case, because shielded by the Speech or Debate Clause, from liability for their illegal legislative act and from having to defend themselves with respect to it. Relief also was afforded against House aides seeking to implement the invalid resolutions.

Summarizing the holdings in these three cases, the Court stated:

> The three cases reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings. In Kilbourn, the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the speech or debate clause; in Eastland, the committee counsel was gathering information for a hearing; and in Powell, the Clerk and Doorkeeper were merely carrying out directions that were protected by the Speech or Debate clause. In each case, protecting the

> rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate clause protection did not attach.

> None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In Kilbourn-type situations both aides and members should be immune with respect to committee and House action leading to the illegal resolution. So, to, in Eastland, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves siezed the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Gravel, supra, at 620 - 621.

Of the states reviewed, the courts in Pennsylvania have come closest to adopting the federal standard referred to above. It has been held that while the privilege extends to certain aides of a legislature, it does so only as to legislative matters and is derivative from that accorded to the legislator. In re Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977); and Sweeney v. Tucker, supra, (the court recognized that even where an action against a legislator is barred by the Clause, legislative employees are responsible for their actions.)

On the other hand, an early case out of Texas held that the command of the House to imprison a non-member was a sufficient protection to its Sergeant-at-Arms. Canfield v. Gresham, 17 S.W. 390 (Tx. 1891).

In Illinois and California the acts of private citizens petitioning their legislative bodies are conditionally privileged. Actual malice must be shown to prevail in a tort action. Arlington Heights National Bank, supra, and Scott v. McDonnell Douglas Corp., 112 Cal. Rptr. 609 (1974). None of the other states reviewed have addressed this issue.

D. Waiver

On at least one occasion the U.S. Supreme Court considered the issue of whether a Congressman can waive his immunity under the Speech or Debate Clause, although the Court did not specifically decide the issue. In general, the Court considered that any such waiver would have to be evidenced by some explicit and unequivocal renunciation of the clause's protection. In United States v. Helstoski, 442 U.S. 477 (1979), a member of Congress testified before a grand jury and voluntarily provided evidence of certain legislative acts. The Court assumed that an individual Member of Congress could waive the protection of the Speech or Debate Clause, but stated that the actions referred to did not constitute an explicit and unequivocal waiver of

immunity from prosecution despite the member's apparent willingness to waive the protection of the Fifth Amendment since the Speech or Debate Clause provides a separate and distinct protection.

In U.S. v. Johnson, 383 U.S. 169 (1966), and U.S. v. Brewster, 408 U.S. 501 (1972), the Court declared that it was expressly leaving open the question whether the Speech or Debate Clause prohibits a prosecution which is founded upon a narrowly drawn statute passed by Congress in the exercise of i s legislative power to regulate the conduct of its members, even though the statute possibly entailed inquiry into legislative acts or motivations.

Of the state cases reviewed, four states appear to take the position that the "privilege" from arrest contained in their state constitutions can be waived. Lincoln Building Associates v. Barr, 147 N.Y.S.2d 178 (1955); Mutscher v. State, 514 S.W.2d 905 (Tex. 1974); Geyer v. Irwin, 4 Dall (Pa) [illegible] (1790).

In Michigan the statutory "privilege" against arrest, which is unqualified and covers both civil and criminal arrest, can be waived if not exercised in a timely manner. However, the statutory "exemption" from arrest makes an

arrest in violation thereof "void." The "exemption" is applicable only while officers are "in acutal attendance upon" the duties of their offices. In contrast, the constitutional privilege extends only to civil arrest, and for a shorter time. An officer, therefore, is exempt from arrest while in actual attendance upon the duties of his office, but has a privilege against arrest at all other times covered by the statute.

Due to the particular language of the Alaska Constitution, to the effect that legislators are "not subject to civil process," the rule appears to be that such immunity cannot be waived by the legislator, the rationale being that the Alaska immunity is intended to protect the public as well as serve the convenience of the legislators. 1959 Ak. Op. Att'y. Gen., No. 8.

The conclusion to be drawn from these cases is that where the constitution or statutes grant a "privilege" from arrest such a privilege is capable of being waived. The standard for determining if such a waiver has occurred has not been resolved, but it is likely that the ordinary test of waiver, a voluntary renunciation of specific known rights, will be insufficient. Instead, a demonstration of something akin to a voluntary, explicit and unequivocal waiver of the immunity should be required because of the

public's interest in insuring that the work of the legislature proceed in an unhindered fashion. On the other hand, if the constitution or statutes provide something more than a privilege there is a greater likelihood that waiver will not occur.

V. APPLICABILITY OF STATE LAW IN FEDERAL ACTIONS - FRE RULE 501

Rule 501 of the Federal Rules of Evidence applies when the issue to be determined in actions before federal tribunals is the "privilege of a witness, person, government, State, or political subdivision thereof," and provides as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The Committee on the Judiciary of the House of Representatives stated that the rule left the law of privileges in its present state and further required that privileges "continue

to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases." Notes of the Committee on the Judiciary, House Report No. 93-650.

Rule 501 applies irrespective of the nature of the cause or the basis of jurisdiction and applies at all stages of all actions, cases and proceedings in federal court. FRE 1101(c). As stated in the Rule "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" is the general standard for the law of privilege under Rule 501. That is, the principles of the common law apply whenever neither the state law proviso nor the exception clause requires federal courts to look elsewhere for rules of privilege.

The general rule of privilege in Rule 501 has two components. First, the court must determine how the issue would have been resolved under the "common law." Second, it must then see whether "reason and experience" requires some alteration of the common law rule. Wright & Graham, Federal Practice & Procedure: Evidence §5425. In performing this task, "reason and experie ;e" dictate balancing the public's need for the full develo; .ent of relevant facts in federal litigation against the countervailing demand for confiden-

tiality in order to achieve the objects underlying the privilege in issue. Id. For example, in a criminal case, the need for relevant evidence is much stronger than in a civil case. In civil litigation, the type of civil action, the need of the movant for the information, and the relevancy of the information to the action must all be considered and weighed by the trial judge in determining whether and to what extent a privilege exists. 2 Weinstein & Berger, Weinstein's Evidence, ¶501[03] (1982).

Theoretically, there are several methods by which state law could be applied in a federal court action. When the court is confronted by a claim of privilege not firmly embedded in federal law, the court may consider state law in determining whether "reason and experience" require the particular privilege to be accorded recognition as a principle of the common law. Lora v. Board of Education of the City of New York, 74 F.R.D. 565 (E.D.N.Y. 1977). However, the existence and importance of a state privilege is only one of the factors which the court must balance to see whether a new privilege would be justified.

Another method of incorporating state legislation into the common law for application in federal actions under Rule 501 involves tracing the language of the general rule back through its predecessor, former Criminal Rule 26, to its

point of origin in the decisions of the Supreme Court in Wolfle v. United States, 291 U.S. 7 (1933), and Funk v. United States, 290 U.S. 371 (1933). These cases laid down the standard that was later incorporated in Criminal Rule 26. The Supreme Court considered it permissible to rely upon "general authority" and the spirit of state and federal legislation. Subsequently, one of the reasons given for using the Funk-Wolfle standard in the Criminal Rules was to permit the federal courts to look to "enlightened statutory development in the States." Wright & Graham, supra, p. 709.

The primary vehicle for the use of state privileges law in federal actions is the state law proviso. It applies (1) when the issue arises in a civil action or proceeding; (2) when it concerns an element of a claim or defense; and (3) when the claim or defense is one as to which state law supplies the substantive law. When these three conditions are satisfied, the court must apply the state law of privilege. Wright & Graham, supra, p. 846.

Initially, however, it should be noted that the state law proviso is not binding in federal criminal actions by its own terms, nor in civil cases in which the substantive law being applied is found in some federal statute such as the anti-trust laws, the federal securities laws and the various statutes concerning civil rights. Thus, the deter-

mination of when the state law proviso applies depends on whether or not the Erie doctrine requires federal courts to follow the state law of privilege in diversity actions and other cases in which state law supplies the rule of decision.

In the Conference Report to Rule 501 two situations are presented in an explanation of the phrase "cases in which state law supplies the rule of decision." The Report says that "in those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law." This is because when a federal court chooses to absorb state law in this fashion it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision and state privilege law would not apply.

The converse of this situation arises in diversity cases where the proof is directed to an issue that is governed by federal standards pursuant to state legislation. Where federal law is incorporated as a matter of state choice rather than by reason of the Supremacy Clause, state law supplies the rule of decision so that the state privilege law must be applied. In most other diversity situations the state law proviso requires the application of the state law of privileges in diversity cases.

In defining that portion of the state law proviso referring to "an element of a claim or defense" the Conference Report explains that it makes no difference whether the supposedly privileged matter is direct or circumstantial evidence of a state claim; if it is in a line of proof that culminates in an element of a state claim or defense, then state rules of privilege apply. Wright & Graham, supra, p. 861; Louisell & Mueller, Federal Evidence, 1978, p. 463; 2 Weinstein & Berger, Weinstein's Evidence, ¶501[01] (1982).

However, a second problem involves this same provision. Unanswered is what law of privilege applies when the same bit of evidence is relevant both to a state and a federal claim. The Conference Report is silent on this issue and so Congressional intent is unclear. It has been suggested by commentators that the best rule would be to have no rule and to resolve questions of conflicting privileges on an ad hoc basis. In each case in which the issue arises, courts would try to balance the state and federal interest in the context of the particular lawsuit. Wright & Graham, supra, p. 863; 10 Moore & Bendix, Moore's Federal Practice, 1976, p. V-35.

VI. GOVERNOR'S POWERS TO DISREGARD LEGISLATIVE ENACTMENTS, ARTICLE III, SECTION 16

The next issue for consideration is whether or not under Article III, Section 16 of the Constitution of the

State of Alaska, the Governor has any inherent perogative power to take any actions that disregard or are contrary to procedures established by the Legislature through a validly enacted statute?

Article III, Section 16 of the Constitution of the State of Alaska provides:

> Section 16. Governor's Authority. The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. This authority shall not be construed to authorize any action or proceeding against the legislature.

During the debates of the Alaska Constitutional Convention the scope of the Governor's powers were considered. The delegates were committed to the concept of the "strong executive" and intended to give him many broad powers. Mr. Victor Rivers, Chairman of the Executive Committee, made the following remarks during his original explanation of the proposed constitutional provisions:

> In order to enforce the strong executive and to bulwark his power we have given him power by appropriate actions or proceedings in the court,

> brought in the name of the state, to enforce compliance with any constitution or legislative mandate. That is specifically written into the constitution because we want to have a broad interpretation of the powers of the strong executive. He has no authority however to act in that manner in any proceeding against the legislature. The legislature is the supreme elected body and as such he is answerable to them and to their interpretations and handling of matters of law. Journal of Alaska Constitutional Proceedings, p. 1986.

This excerpt clearly demonstrates the intent of the authors of the Alaska Constitution that although the powers of the governor were intended to be extensive, they were not to overshadow that of the legislative branch of the state government. Thus, the powers of those two departments were intended to be separate and distinct. In addressing this framework of the constitution, the Supreme Court of Alaska observed that "[t]hose who wrote our constitution followed the traditional framework of American government. The governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the judicial." Alaska State-Operated School System v. Mueller, 536 P.2d 99, 103 (Ak. 1975). Taking this one step further the Supreme Court concluded, in Public Defender Agency v. Superior Court Third Judicial District, 534 P.2d 947, 950 (Ak. 1975), ". . . it can be fairly implied that this state does recognize the separation of powers doctrine."

This same doctrine of separation of powers plays an integral role in the framework of the United States Constitution, where the issue of the president's inherent power to take action in disregard of Congressionally enacted procedures has been addressed. In Youngstown Sheet & Tube Co., v. Sawyer, 343 U.S. 579 (1952), the U.S. Supreme Court considered a challenge to then President Truman's executive order to seize private property in the national interest, and a majority of the Court held the President's steel-seizure order invalid. However, the actual grounds of the decision and their meaning for the future are not entirely clear. Here, the decision of the Court was announced in an "Opinion of the Court" delivered by Justice Black. Following that, each of the six Justices who made up the majority of the court delivered a distinct opinion expressing his own individual views of the relevant principles of the case. There was also a separate opinion rendered for the three dissenting Justices. This diversity of opinion makes it nearly impossible to state with certainty what is actually the law of the case.

In the "Opinion of the Court" Justice Black appears to base his decision on the proposition that the President cannot act without Congressional authority in an area where Congress can grant him authority to act. He reasoned that the conflict between the President's action and Congres-

sional will arose out of the provision by Congress in the Taft-Hartley Act of 1947 for a procedure which the President could have followed to deal with the threat of a steel strike and which did not involve seizure. At the time of enactment, Congress specifically rejected a proposal to empower the President to seize any "plant, mine or facility" in which a threatened work stoppage would, in his judgment, "imperil the public health or security." B. Schwartz, A Commentary of the Constitution of the U.S., Part II, Powers of the President, p. 68 (Macmillan Co., N.Y., 1963). Thus, he concluded that the President has no inherent power to seize private property, even if an emergency exists, in the absence of Congressional authorization.

Four of the majority Justices considered that Congress had exercised its power by enacting the Taft-Hartley Act and that power established a procedure that precluded the exercise of any executive seizure authority. Only Justices Black, Douglas and Burton clearly rejected the theory of inherent authority in the President to seize private property in the absence of Congressional authorization. The other four, and probably five, of the Justices (including the three dissenters) expressed agreement with the view that the President does have power himself to deal with what he deems the demands of emergency. Nonetheless, the decision must at least stand for the proposition that even if the

President does possess inherent power in some circumstances, when Congress intervenes and dictates the particular manner and limitations on the exercise of such power by a duly enacted statute, it can only be exercised in that manner. The supremacy of the statute in such a case is the only principle consistent with the doctrine of separation of powers whereby all legislative powers have been vested in Congress.

When the President relies upon inherent powers rather than upon the procedure which the legislature has provided, his actions are necessarily incompatible with the will expressed by Congress. When there is a statute on the subject, Presidential power is rendered most vulnerable to attack and in the least favorable of constitutional postures. B. Schwartz, supra, p. 74, citing Jackson, J., concurring in Youngstown, supra, at 637-40. Whatever perogative may be conceded in the President, it is wholly subject to the legislative power exercised, in our system, by the elected representatives of the people.

Decisions from several states have been reported which coincide with the above analysis of Youngstown. For the most part these decisions hold that the governor of a state and its legislature work as a team in the process of enacting

laws, but each have separate duties and responsibilities. For example, in Opinion of the Justices, 210 A.2d 852, 855 (Del. 1965), the Supreme Court of Delaware held:

> The legislative process for the enactment of law established by our Constitution contemplates the formulating of proposed laws by the House of the General Assembly, and the submission of a proposed law to the Governor for his approval or disapproval. In effect, the Governor and the Houses of the General Assembly are a legislative team, but each has separate and distinct functions in the enactment of laws. It is the function of the Senate and House to agree upon the form and substance of a law and, generally speaking, it is the function of the Governor to act as a check upon the final enactment of that law. In doing so, he must approve or disapprove it as a whole for he has no constitutional power to alter the content of a proposed law submitted to him, except as to appropriations of money.

Accord,: Perry v. Decker, 457 A.2d 357 (Del. 1983); Opinion of the Justices, 174 A.2d 420 (N.H. 1961).

A split of authority exists as to the effect of actions taken by a governor in attempting to alter the content of proposed legislation submitted to him for approval. Where the Governor of the State of California approved legislation on the basis of a legal opinion dealing with the effect of the statute if approved, issued by the affected Commission, the California Supreme Court held that to the extent that the Governor's "disclaimer" was inconsistent with the Legislature's purpose, it was ineffective. The Governor "may not

by qualifying his approval exercise what is in effect an 'item veto.'" California Manufacturer's Assoc. v. Public Utilities Commission, 157 Cal. Rptr. 676, 683, 598 P.2d 836 (1979). Thus, despite the unconstitutional attempt to dictate the effect of the bill, it did become a valid, enforceable law.

Other states follow that procedure as well. In Iowa, the Supreme Court addressed that issue, in dicta, as follows:

> In Iowa our Constitution does not require the Governor's affirmative approval of a bill before it becomes a law, but conversely, does require the Governor's affirmative disapproval in exercising the veto power. It necessarily follows therefore that should the Governor of Iowa exceed his authority and attempt to disapprove an item in a nonappropriation bill, or to disapprove part of an appropriation bill which is in and of itself an "item," the natural result would be that the bill as a whole would become law as though he had approved it or had failed to exercise the affirmative disapproval required by our Constitution. State Ex. Rel. Turner v. Iowa State Highway Commission, 186 N.W.2d 141 (1971).

Conversely, and perhaps because of the unique circumstances of a Delaware case, a recently enacted drunk driving statute was ruled invalid when the Supreme Court of Delaware held that the Governor's failure to approve the bill in its entirety necessitated the conclusion that the law had not been validly enacted. The following was the rationale of the court:

> Consequently, it follows that, even though proposed legislation be an appropriations bill in some respects, if the Governor attempts to veto a portion of the bill, itself, which is not an appropriation but is a matter of general law, that indicates a lack of agreement between the Governor and both Houses of the General Assembly and, therefore, there has been no approval of the proposed legislation as an entirety by the Governor. Accordingly, that absence of approval necessitates the conclusion that the law has not been validly enacted. Opinion of the Justices, 306 A.2d 720, 723-24 (Del. 1973);

For additional cases supporting the foregoing, see: Perry v. Decker, supra; accord, State v. Oklahoma Bd. of Corrections, 614 P.2d 551 (Okla. 1980); Regents of State University v. Trapp, 113 P.910 (Okla. 1911).

In Alaska, the Governor's veto power derives from Article II, Sections 15 and 17 of the Constitution of the State of Alaska, which provide:

> Section 15. Veto. The governor may veto bills passed by the Legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.
>
> Section 17. Bills Not Signed. A bill becomes law if, while the Legislature is in session, the governor neither signs nor vetoes it within fifteen days, Sundays excepted, after its delivery to him. If the Legislature is not in session and the governor neither signs nor vetoes a bill within twenty days, Sundays excepted, after its delivery to him, the bill becomes law.

Article II, Section 15 grants the veto power to the Governor and Section 17 provides that a bill will become law unless it is vetoed. Taken in conjunction, these provisions create a system similar to that used in Iowa, referred to above. The Governor need not give his affirmative approval of a bill before it becomes law but must affirmatively disapprove of the bill in order to exercise the veto power. As such, it appears that the Governor has no power to alter the content of a bill, but instead must either reject the bill in its entirety or the bill as a whole becomes law as though he had approved. The only exception to this general rule is the Governor's power to veto or reduce specific items in appropriations bills.

Closely related to the foregoing issues of the Executive's inherent power to take certain actions in disregard of legislative mandate or to alter the content or impact of a bill after enactment, is the question of whether the Executive can refuse to enforce validly enacted legislation with which he disagrees.

Although there are no Alaska cases on point, the federal courts have considered the question and have refused to permit such a practice. In National Treasury Employees Union v. Nixon, 492 F.2d 587, 160 U.S. App. D.C. 321 (D.C.D.C. 1979), the court held that the constitutional duty obliga-

ting the President to take care that the laws are faithfully executed does not permit the President to refrain from executing laws duly enacted by Congress as those laws are construed by the Judiciary. Similarly, the President was considered bound to take care that laws be faithfully executed and he was not permitted to refrain from executing laws duly enacted by Congress in Haring v. Blumenthal, 471 F.Supp. 1172 (D.C.D.C. 1979).

From the foregoing at least several conclusions are clear. Under our tripartite system of government with its built in checks and balances, the separation of powers doctrine denies the executive department the power to unilaterally create statutory law. The Executive must work in conjunction with the Legislature which has the final control over the content of a proposed law. Furthermore, the Executive is required to faithfully enforce duly enacted legislation and cannot refrain from executing laws passed by the legislature. It is only when the Executive gives some qualified approval, inconsistent with the will of the Legislature, that the unanimity of the authorities breaks down. At that point the courts must determine if the action taken constitutes disapproval of the bill in its entirety or merely amounts to a failure to affirmatively approve of the bill, and requires consideration of the state's consti-

tutional provisions on the manner of exercising executive approval of legislation.

VII. CONCLUSION AND RECOMMENDATIONS

The foregoing demonstrates the concept of "legislative immunity" to be a nebulous one that poses a variety of considerations as individual factual circumstances vary. Because the origins of the concept are deeply rooted in the historical development of our democratic system, it is plain to see why the founding fathers chose to incorporate it into the United States Constitution and the authors of the Constitutions of the several states continued the tradition. However, because of this duplication and dual nature of our state and federal governmental systems, the topic involves substantial concerns of comity between the competing interests of our judicial systems, the policies and concerns of the respective legislative bodies, the interests of the executive branches as well as the relationship of these branches of government *inter se* with respect to separation of powers.

This report has addressed the topic in terms of several principal problem areas involved. Nonetheless, there exist at least two essential factors that permeate the entire work: The State Courts have not had the opportunities to address and refine the issues that the federal bench has enjoyed. Secondly, even where state courts have considered

the issues in terms of that state's public interests and policies, there is no assurance that those interests will be dispositive in an action brought in federal court. These factors simply make efforts at predicting results likely to accompany any modification of existing state law much more arduous.

The foregoing analysis of the existing rules governing legislative immunity in Alaska reveals that for the most part this State is in accord with the majority of the other states of the union and the federal model. In essence, this means that an Alaskan State Legislator is protected against legal action, in either state or federal court, which challenges the actions or statements made by such a legislator in the course of his legislative duties. The central issue in analyizing this "speech or debate" protection comes down to the applicable definition of legislative acts. If the tribunal considers the challenged activity to have occurred during the course of a proper legislative act, no challenge thereto will be entertained. In this regard the recent Court of Appeals decision in State v. Dankworth, supra, defined a legislative act as one which "directly effects the enactment or contents of proposed legislation." This standard, although more concise then its federal counterpart, leaves many questions unanswered regarding the scope of its

coverage, and, therefore, legislation designed to fill the interstices or gaps is advisable. Suggestions towards this end include:

1. Legislation should be enacted to augment and extend the protections granted by the Alaska Constitution. A.S. 24.40.010 currently reiterates the language of the Constitution in providing the immunity only "while the legislature is in session." It is suggested that the first sentence of A.S. 24.40.010 be amended to read as follows:

   A. A Legislator shall not be held to answer before any other tribunal for any statement made in the proper discharge of an official duty in any legislative, judicial or other official proceeding authorized by law.

2. Legislation designed to clarify and supplement A.S. 24.40.010 should be enacted regarding the individuals protected. The Constitution and statute referred to only extend protection to "legislators." Legislation that extends the protection to legislative and committee aides and employees should be enacted to protect their activities performed on behalf of state legislators. The following language is recommended:

   B. Aides and employees of the legislature and duly constituted committees of the legislature shall not be held to answer before any other tribunal for any statement made in the proper discharge of an official duty in any legislative, judicial or other official proceeding authorized by law which would be immune or protected legislative conduct if performed by the legislator himself.

The second area to be examined is the protection afforded by the privileges and immunities provisions of Article II, Section 6, and A.S. 24.40.010. Consideration should be given to the following areas of uncertainty:

1. Existing legislation exempts legislators from service of process during sessions but only extends a privilege from arrest during the same period. This could be amended to provide an exemption or immunity from arrest during specific legislative periods which could not be waived and a privilege from arrest which could be waived at other relevant times. In addition, consideration should be given to the extension of these protections to aides and employees of the legislature, along the lines of the following:

   C. No legislator, legislative aide or employee of the legislature or a duly constituted committee thereof is liable to arrest on civil process while in the proper discharge of an official duty of his office.

   D. Every legislator, legislative aide or employee of the legislature or a duly constituted committee thereof is not subject to arrest or civil process during sessions of the legislature and for 15 days next before the commencement and after the end of each session.

2. It is suggested that specific penalties for violation of these privileges and immunities be provided, as indicated below:

   E. Every arrest made contrary to the above provisions (A) through (B) is void and a contempt of court. The

court or officer before whom any witness is subpoenaed to attend and every justice of the supreme court and every trial court judge has authority to discharge any person arrested contrary to those provisions (A) through (B).

F. Every person making or procuring an arrest contrary to the above provisions (A) through (B) is guilty of contempt of court and is liable to the person arrested in double the amount of damages which a jury finds that he has sustained and also is liable in an action at the suit of any injured person for the loss, hindrance, and damage the injured person has sustained in consequence of the arrest. The officer or person causing the arrest shall not be guilty of contempt nor liable for damages if the person exempt from arrest has failed to mention that he is exempt or, after mentioning that he is exempt, refused the officer's request to sign an affidavit swearing that at the time of his arrest he was either:

(a) an officer of the senate or house of representatives in actual attendance upon the duties of his office, or

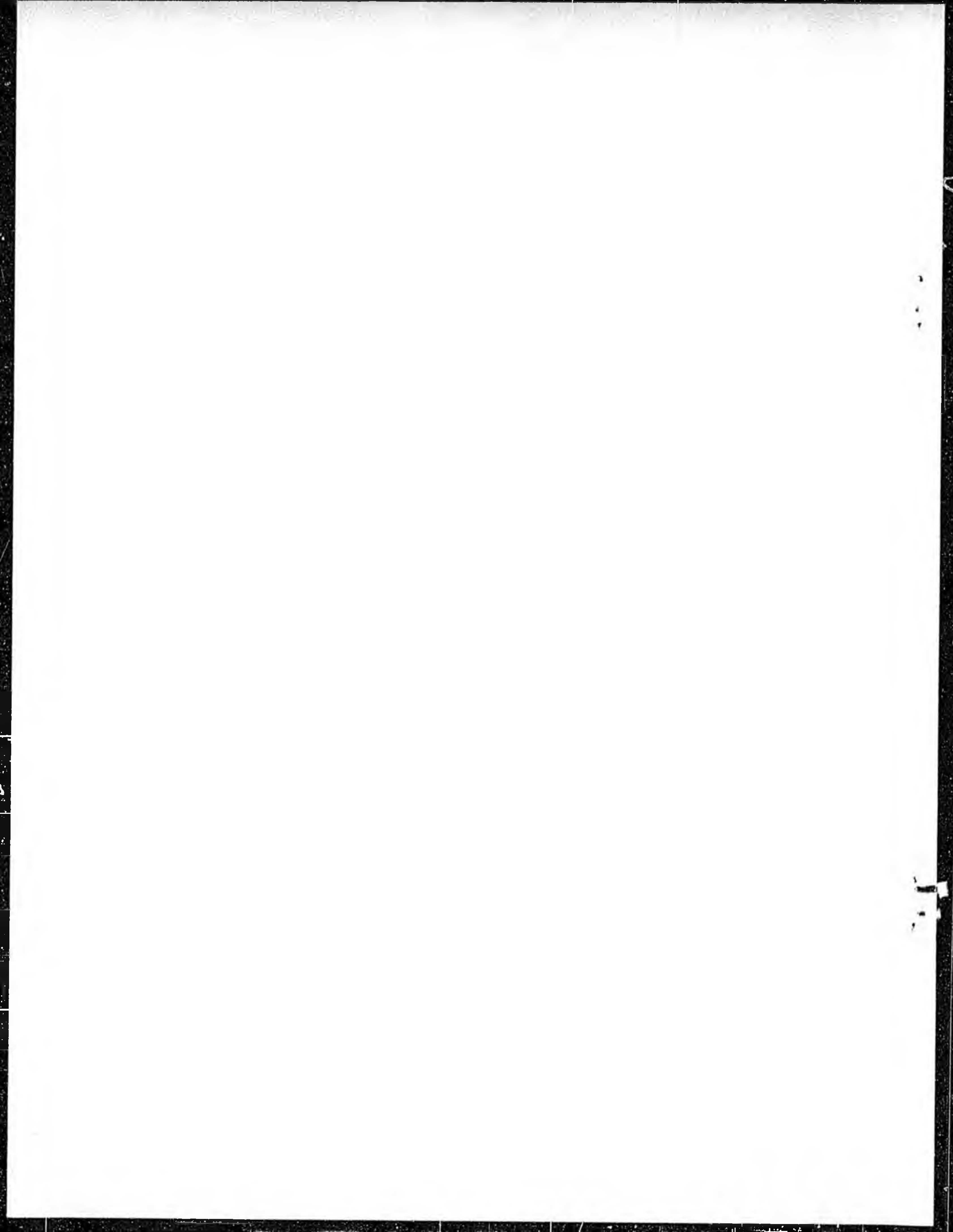
(b) a legislative aide or employee of the legislature or a duly constituted committee thereof, who was performing duties believed to be immune or protected legislative conduct if performed by the legislator himself.

G. Any arrest made contrary ato the above provisions (A) through (B) is void.

The foregoing paragraphs which have been suggested as language to be employed and which have been designated A-G

herein, could be used to supplant the existing provisions of A.S. 24.40.010 in its entirety.

The foregoing suggestions would primarily be useful in clarifying the existing state law. The principles of federalism dictate that such legislation would not necessarily be binding upon a federal court. Nonetheless, such legislation would be applicable in federal actions where state law provides the rule of decision such as in diversity actions. Moreover, the existence of a clearly defined state law of legislative immunity could be useful in other federal actions where the federal court was uncertain of the existing common law rules for legislative immunity.



FILE WITH SB 328

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-3867

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M   January 31, 1984

SUBJECT: Legislative immunity

TO: Senator Bill Ray
Chairman, House Judiciary Committee

FROM: Keith B. Levy KBL
Legislative Counsel

Enclosed is a draft of a Judiciary Committee Substitute for SB 328. At your request, I rewrote the provisions of subsections (a) and (d) of the new draft which refer to the immunity of legislators, and added subsection (b) which refers to the immunity of employees of the legislature. In the new draft, legislators have immunity for acts done in the "exercise of a legislative duty", while employees of the legislature have immunity for acts done in the "proper exercise of a legislative duty".

Subsection (f) of the draft defines "proper exercise of a legislative duty" but it does not define "exercise of a legislative duty." Accordingly, the distinction between the "exercise" and the "proper exercise" of legislative duties is left to the discretion of the courts.

I would recommend adding a definition of the "exercise of a legislative duty" to clarify this point. It appears that the distinction between "exercise" and "proper exercise" of legislative duties is that proper exercise involves acts that are authorized by law. If that is the intent of the committee, I would suggest the addition of the following definition to the bill:

> In this section "exercise of a legislative duty" means performance of an act that directly affects the enactment of legislation or the contents of legislation to be submitted to the legislature; it does not include purely political activities.

The addition of this language would make the legislature's intent clear with respect to what kind of activity is protected.

If I may be of further assistance, please feel free to contact me.

KBL:ojb
J3/020

Levy
2/1/84 ✓

Original sponsor: Ray

1 IN THE SENATE BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 328 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to legislative immunities and privi-
7 leges."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 24.40.010 is repealed and reenacted to read:

10 Sec. 24.40.010. IMMUNITIES AND PRIVILEGES. (a) A legislator
11 may not be held to answer before another tribunal for an act done in
12 the proper exercise of a legislative duty, whether or not the legislature is
13 in session.

14 (b) An employee of the legislature may not be held to answer
15 before another tribunal for an act done in the proper exercise of a
16 legislative duty, whether or not the legislature is in session.

17 (c) A legislator is immune from civil process and from arrest,
18 except for a felony or breach of the peace, during the period from 5
19 days before until 5 days after a regular session, special session, or
20 legislative committee meeting. The immunity provided by this subsec-
21 tion may not be waived.

22 (d) During any period not covered under (b) of this section, a
23 legislator is privileged from civil process and from arrest, except
24 for a felony or breach of the peace, while in the exercise of a legis-
25 lative duty. The privilege provided by this subsection may be waived.

26 (e) The arrest of a person in violation of (a) through (d) of
27 this section is void. A person knowingly making or procuring an
28 arrest in violation of this section is guilty of a class B misdemeanor
29 unless

(1) the person arrested did not inform the arresting officer that the arrest was in violation of this section; or

(2) the person arrested refused to sign an affidavit stating that the arrest was in violation of this section.

(f) In this section "proper exercise of a legislative duty" means performance of an act authorized by law that directly affects the enactment of legislation or the contents of legislation to be submitted to the legislature; it does not include purely political activities.

1959 Opinions of the
Attorney General, No. 8

March 12, 1959

The Honorable Senator Ralph Moody
Chairman, Senate Judiciary Committee
State Capitol
Juneau, Alaska

Re: Immunity of Legislators from
Civil Process and Arrest

Dear Senator:

In compliance with your recent request, this office has researched the law on immunity of legislators from civil process and arrest during a legislative session. At your request, this office has also done research on the question whether an execution upon property would be "civil process". The basic law in Alaska is set forth in Section 6 of Article II of the Constitution of Alaska, as follows:

> "Immunities. Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. 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."

The problems in construing Section 6 and brief answers thereto are as follows:

(1) What is the period of a "session?" Does it include 24 hours a day, seven days a week, during the period that the legislature is convened, or does it indicate a lesser or greater period?

Brief Answer: A "session" is the sitting of the Legislature during the period of time that it is convened as a legislature to do business as a legislative body. The immunity, however, runs from the time the member is "going to"

or "returning" from a legislative session; 24 hours a day, seven days a week from the time that the legislature is convened to the time that it adjourns sine die.

(2) Does the phrase "not subject to civil process" indicate an immunity which cannot be waived by a legislator?

Brief Answer: Such immunity can not be waived by the legislator since the Alaska immunity is intended to protect the public as well as serve the convenience of the legislators.

(3) Are executions included within the definition of the terms "civil process" and therefore within the scope of the immunity clause?

Brief Answer: Executions are "civil process".

"Session" is a continuous period of time beginning from convening of legislature to its adjournment sine die. In Ralls v. Wyand (Okla. 1914) 138 P. 158, the court construed the words "session" as being the "sitting" of a body competent for the transaction of its business; the time during which it is convened and actually engaged in business; and the time during which a legislative body or other assembly sits for the transaction of business. A brief review of the various sections in the Constitution of Alaska which have any relation to "sessions" will indicate that the Oklahoma decision correctly conveys the meaning of the word "session". Thus, § 7 of Article II states that legislators may receive a per diem allowance for expenses while in session. Section 8 provides for regular sessions each year. Section 9 provides for special sessions which are limited to 30 days. Note that there is no language here stating that legislators may not receive per diem allowance for Saturdays and Sundays or any language providing that special sessions are limited to 30 days, not including Saturdays and Sundays. It is clear that the term "session" indicates a continuous running of time. The session runs from the time that it is convened to the time that it adjourns, sine die.

The individual legislator under our Constitution is immune from civil process and cannot waive such immunity. The last sentence, § 6 of Article II, reads as follows:

> "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." (Emphasis added.)

The words "are not subject" indicate an immunity which cannot be waived as opposed to the word "privileged" which indicates a privilege which the holder can use or not use as he chooses. Cook v. Senior (Kan. 1896) 45 P. 127 is a particularly good case on this point since the relevant parts of § 22 of Article II of the Kansas Constitution read much the same as § 6 of Article II of the Alaska Constitution. Section 22 provided:

> ". . . No member of the legislature shall be subject to arrest, except for felony or breach of the peace, in going to or returning from, the place of meeting during the continuance of the session, neither shall he be subject to the service of civil process during its session nor for fifteen days previous to its commencement." (Emphasis added.)

[illegible] the above cited case, a state senator sought to enjoin a sheriff from proceeding to enforce an execution in the hands of a sheriff. The plaintiff was a state senator at the time service of summons was made and was sitting as a member of the legislature which was then acting as a board of impeachment. The Kansas Supreme Court concluded that no court had ever obtained jurisdiction over the senator because of his legislative immunity, and that the judgment obtained against the senator was void. The senator was granted an injunction enjoining the sheriff from serving execution. One of the conclusions of law of the court below, which was affirmed by the Kansas Supreme Court, was:

> "That the words, in said section, 'shall not be subject to the service of any civil process' extend to members of the legislature not merely a 'personal privilege', to be waived unless claimed, but 'absolute immunity' from subjection to the civil jurisdiction of a court during a continuance of their necessary attendance upon the sessions of either house of the legislature."

The court considered the contention that the senator had a personal privilege which he could waive and which he did waive by accepting service. This contention was rejected as follows:

> "The other contention of the plaintiff in error is that provision of section 22 is a personal privilege, that must be exercised by the legislator or may be waived by him. If the framers

> of our constitution had desired to extend a personal privilege to the legislator, they might have done so; but by this section they were evidently guarding the interest of the public, and they have said that a member of the legislature is not 'subject' to the service of civil process during the session. The fact that the usual words, 'privileged from,' were not used, and the words 'subject to' were used, would indicate that it was not the intention to grant a personal privilege to the member, or that the usual interpretation of the word 'privileged from' should be applied. The use of the words 'subject to' means that the member is not 'liable to' the service of civil process. To construe our constitution differently would be to defeat its apparent object. The state is clearly entitled to the services of its members of the legislature during the time sessions of either branch thereof are being held. Our constitution has wisely provided that the members shall not be annoyed with arrest or suits, or be obliged to be absent from their duties . . . .
>
> "The interests of the public are better served by giving the language of our constitution its fair, natural meaning; that is, that a member of the legislature is not liable or subject to the service of civil process during the accepted period, and that the service of original process upon him at such time is void, and gives the court no jurisdiction over the person of such member."

Fuller v. Barton (Mich. 1926) 208 N.W. 696, is a similar case construing a similar constitutional provision. The case held that the state garnishment statute did not authorize garnishment of a legislator's salary while the legislature was in session. A valid judgment had been obtained earlier against the legislator, but the court held that no garnishment could be had on the judgment during the legislative session. The broad protection of the immunity provision is expressed on page 697 of that case, as follows:

> "The idea back of the constitutional provision was to protect the legislators from the trouble, worry, and inconvenience of court proceedings during the session, and for a certain time before

> and after, so that the state could have their undivided time and attention in public affairs. Mr. Culver, as principal defendant, had the right to make a defense to the garnishee proceeding. In the present case the garnishee proceeding succeeded in doing just what the constitutional provision was created to avoid. It harassed the legislator, drove him to make a defense in the garnishee proceeding, and deprived him of the means of subsistence pending the balance of the session. We think the case clearly comes within the constitutional inhibition."

This case also throws light on the meaning of "session" appearing in the immunities clause. It is clear the word "session" means the period of time from the convening of the legislature to the time it adjourns _sine die_. Otherwise, the use of the word "session" in the above-quoted passage would be absurd.

A brief review of the discussions of the 1955 Constitutional Convention for Alaska indicate that the members of that Convention intended a broad immunity. These discussions may be found on pages 35, _et sequitur_ of the transcript for the second session for January 9, 1955, and on pages 119 and 120 of the transcript for the first session for January 10, 1955. On January 9, 1955, the Clerk read an amendment of Delegate Steven McCutcheon to insert "and immunity from service of civil process" after the word "arrest." The amendment was withdrawn on January 10, 1959, and another amendment of Delegate McCutcheon was offered providing for the insertion of "and not subject to civil process" after the word "arrest." Delegate Seaborn J. Buckalew, on January 9, 1955, in defending the amendment offered that day, expressed what appeared to be the intentions of the proponents of the amendment when he said to a delegate who had indicated some opposition to the amendment:

> "Don't you think, for example, that a legislator shouldn't be allowed to be served with a civil suit until after the legislature is over?"

There are many discussions and annotations on legislative immunity, including: 94 ALR 1470 _Immunity of Legislators from Service of Civil Process_; 85 ALR 1340 _Exemption from Service of Civil Process on Ground of Public Policy Independently of Statute_; 56 ALR 601 _Garnishment of Salaries, Wages, or Commissions not Expressly Exempted by Statute_; 81 _Corpus Jurus Secundum_, _States_ § 35. Other annotations on immunity of

legislators from arrest, service of subpoenas, etc., are 8 ALR 754; 79 ALR 1214 and 1 ALR 1156 and American Jurisprudence, Arrest, § 95. Although there are a large number of cases on the waiver of a legislator's privilege, these cases are not relevant here since the language of the Alaska Constitution "not subject to" creates an absolute immunity rather than a privilege which can be waived. A review of those cases will indicate that whenever a legislator can waive his immunity he is often put in the position of not knowing whether he has waived the immunity by some act or some failure to act which might be construed as a waiver, e.g. acceptance of service. The framers of the Alaska immunities clause intended that the legislators be spared any such worries so that the undivided attention of the legislators could be directed to legislative problems.

"Civil Process" includes executions. The Cook case, supra, involved the validity of service of summons. The Fuller case, supra, involved a garnishment, which is a form of execution or attachment. The legislators in both cases were held immune on the ground that the proceedings constituted "civil process." "Civil process" is a term of broad meaning. Webster's Unabridged Dictionary defines the ordinary meaning of the word "civil" to be: Relating to rights and remedies sought by action or suit, distinct from criminal proceedings. See Hockemeyer v. Thompson (Ind.) 49 N. E. 1059. As a legal term, "process is a generic word of very comprehensive signification and many meanings. In its broadest sense, it is equivalent to or synonymous with 'proceedings' or 'procedure' and embraces all the steps and proceedings in a cause from its commencement to its conclusion. . ." See State ex rel. Dresden v. District Court of Second Judicial District in and for Bernalillo County, (N.M.) 112 P. 2d 506.

In conclusion, members of our State Legislature, while "going to", "attending" or "returning" from a legislative session enjoy an absolute immunity against civil process, however, it should be noted they have only a "privilege" from arrest and in this respect the "privilege" must be asserted or it may be deemed waived. This privilege from arrest does not extend to those violations of our law which constitute a "felony or breach of the peace;" in these

two categories a member of the State Legislature stands in the eyes of the law as any other citizen.

Yours very truly,

J. GERALD WILLIAMS
Attorney General

By
Gary Thurlow
Assistant Attorney General

GT:mc
cc:
The Honorable Hugh J. Wade
Acting Governor of Alaska

Mr. Richard Freer, Acting Director
Department of Finance