HB
502

STATE OF ALASKA
THE LEGISLATURE

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	2/28/86	1:30 pm
" "	3/18/86	7-10 pm
" "	3/20/86	1:30 pm

HOUSE

COMMITTEE REPORT

(7)

Date referred: 3/12/86
(Judiciary added 3.12)

FURTHER REFERRALS:

DATE: ______________

The JUDICIARY Committee has considered HB 502

"An Act relating to the disclosure of state tax assessments of the Department of Revenue."

and recommends:

[ ] do pass

[ ] do not pass

[ ] do pass with attached amendment(s)

[ ] no recommendation

[ ] replace with CSHB 502 (JUD) [ ] same title
[ ] new title

and recommends ______________

[ ] further referral to the ______________ Committee

and attaches:
[ ] letter of intent
[ ] first fiscal note
[ ] new fiscal note
[ ] zero fiscal note

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Robin L. Taylor (NO REC)

no rec!

NO REC

Chairman

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M   March 11, 1986

SUBJECT: Waiver of constitutional rights by a legislator [CSHB 502 (Finance)]

TO: Representative Terry Martin

FROM: Richard A. Bradley
Legislative Counsel

You have asked that I comment on the question of the waiver by a legislator of rights granted to the legislator by the Alaska Constitution. The issue is complex and deserves a more comprehensive response than the one possible in the time remaining.

The right that the legislator possesses is granted by art. II, sec. 6 of the Alaska Constitution. The provision provides, in part:

> SECTION 6 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. * * *

I agree that the rights granted to a legislator, at least with regard to the "speech and debate" clause, is not only for the benefit of the legislator but for the public benefit. I do not think that any court case need be cited for that proposition; it is self-evident: a legislator who is free to address a question considered by the legislator to be important is thought to be more likely to be protective of the less popular concerns.

I believe that the Alaska Supreme Court was protective of the rights of legislators as legislators in State v. Dankworth, 672 P.2d 148 (Alaska 1983). The difficulty for predicting the result in this case is that opposed to the constitutional prerogatives of legislators is the equally protected, equally constitutional rights of citizens protected by the right to

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ALASKA OPERATIONS
WESTERN DIVISION

LARRY M. SMEDLEY
AREA MANAGER

March 19, 1986

Representative Sam Cotten
Alaska State Legislature
Pouch V (MS 3100)
Juneau, AK 99811

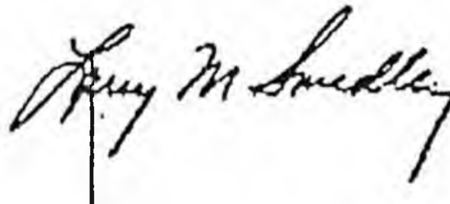
Dear Representative Cotten:

We understand that at last night's House Judiciary hearing on H.B. 502, you commented that Exxon only recently opposed this bill through our submission of written testimony to the House Judiciary Committee. For your information, Exxon has opposed this bill in each of the forms it has taken. At an earlier House Finance Committee hearing, we had prepared testimony to submit only to find that the Committee had changed the bill's language just prior to the hearing and you indicated that our testimony on the earlier version would not be appropriate.

As we expressed in testimony submitted to the House Judiciary Committee, we believe that H.B. 502 would significantly impede the resolution of tax disputes which is not in the interest of the state or the taxpayer.

We would be happy to discuss our opposition to this bill with you in more detail if you so desire.

Sincerely,



LMS:THG:cas/323

c: Representative Al Adams - Chairman, House Finance Committee
Senator Jan Faiks - Co-Chair, Senate Finance Committee
Senator John Sackett - Co-Chair, Senate Finance Committee
Representative Mike Miller - Chairman, House Judiciary Committee
House Judiciary Committee
Revenue Commissioner Mary Nordale

privacy granted by art. I, sec. 22 of the Alaska Constitution.

The question whether the right of privacy protects corporations remains open. But whatever rule the court eventually uses to reach that result, I consider that the courts are likely to offer protection to a corporation's proprietary and similar sensitive information-- like the taxation it pays.

In drafting CSHB 502(finance), I asked the same question that you asked me of Deborah Vogt, an Assistant Attorney General who was, I believe, one of the principal drafters of CSHB 502 (Finance). She replied that she had done some research on the question, that it appeared that members of Congress have waived their analagous privileges under the Federal Constitution, and that she thought that members of the Alaska legislature could waive their privileges.

But she also agreed that the matter was delicate, was very complex, and that because of the issues involved, one could only seek to predict a decision by the Alaska Supreme Court. Since that Court has not addressed the question, it was entirely unclear what its decision might be.

She also shared with me two memoranda that she had prepared on the subject. Because they address the issues that you raise, I have enclosed a copy of them for your information.

And if you would like us to prepare a more thorough analysis of the question, I would be pleased to examine the question further.

If I may be of further assistance, please advise.

RAB:csh
c6/034

REPRESENTATIVE
SAM COTTEN
DISTRICT 15

P.O. BOX 296, EAGLE RIVER, AK 99577
POUCH V, JUNEAU, AK 99811

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

MEMO

TO: All House members

FROM: Rep. Sam Cotten

DATE: March 10, 1986

RE: HB 502

Dear Colleague;

Attached please find a copy of HB 502, an Act relating to confidential tax information of the department of Revenue. The purpose of this legislation is to allow the legislature to exercise its oversight authority in regard to compliance with tax laws and examination of assessments versus collections.

Please read the findings and purpose section of the bill for more detailed information.

I would be happy to meet with you at your convenience should you have any questions or concerns with the bill.

Offered: 3/5/86
Referred: Rules

Original sponsor: Rules/Legislative
Budget and Audit

1 IN THE HOUSE BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 502 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to confidential tax information of
7 the Department of Revenue; and providing for an
8 effective date."

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

10 * Section 1. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature
11 finds that

12 (1) the majority of the state's revenue is derived from taxa-
13 tion;

14 (2) tax revenue enables the state to provide essential services
15 to the citizens of the state to ensure the public health and welfare;

16 (3) the elected representatives of the people of the state must
17 be assured that the state is receiving all of the income to which it is
18 entitled and that the tax laws are operating in the manner intended by the
19 legislature;

20 (4) the legislature must exercise its oversight authority to
21 assure that tax revenue collection by the Department of Revenue is effi-
22 cient, fair, prompt and in the best interest of the state;

23 (5) there is a legitimate and compelling governmental interest
24 in the legislature having adequate access to tax related information to
25 allow responsible oversight;

26 (6) without sufficient information, the legislature cannot
27 adequately determine that the state's tax revenue collection functions are
28 properly administered and that tax revenue due the state is promptly re-
29 ceived;

1 (7) tax returns and return information contain confidential
2 information, often regarding sensitive business information;
3 (8) taxpayers have protections against public disclosure of
4 certain tax information;
5 (9) exchange agreements with the Internal Revenue Service re-
6 quire that certain tax information not be publicly disclosed;
7 (10) protection of confidentiality fosters full disclosure by
8 taxpayers to taxing authorities and therefore promotes effective adminis-
9 tration of tax programs; and
10 (11) legislators and legislative employees who improperly dis-
11 close confidential tax information should be subject to the same sanctions
12 imposed against executive branch employees.
13 (b) The purpose of this Act is to ensure that
14 (1) the state is receiving all the tax revenue due the state;
15 (2) oversight of the tax revenue collection function is effec-
16 tively provided; and
17 (3) tax revenue due to the state is available to provide for the
18 public health and welfare of the citizens of the state;
19 (4) taxpayers have protections against improper disclosure of
20 tax information;
21 (5) the exchange agreements with the Internal Revenue Service
22 regarding tax information are not jeopardized; and
23 (6) tax programs are administered fairly.
24 * Sec. 2. AS 24.10 is amended by adding a new section to article 2 to
25 read:
26 Sec. 24.10.070. CONFIDENTIALITY OF INFORMATION. A present or
27 former employee or agent of the legislature may not disclose tax
28 information contained in a report or return filed under AS 43 with the
29 Department of Revenue and furnished to the person under

1 AS 43.05.230(h).

2 * Sec. 3. AS 24.60.060 is amended by adding a new subsection to read:

3 (b) A person to whom this chapter applies may not disclose tax
4 information contained within a report or a return filed under AS 43
5 with the Department of Revenue and furnished to the person under
6 AS 43.05.230(h).

7 * Sec. 4. AS 24.60 is amended by adding a new section to read:

8 Sec. 24.60.172. SPECIAL PROCEEDINGS BEFORE THE COMMITTEE.
9 Notwithstanding AS 24.60.170, if a complaint before the committee
10 involves an allegation that a person to whom this chapter applies has
11 violated AS 43.05.230(i) and the taxpayer or a third party whose tax
12 information is alleged to have been improperly disclosed does not
13 agree to the public disclosure of the identity of the taxpayer, the
14 third party, or the tax information,

15 (1) the hearing may not be held in open session;

16 (2) a transcript containing confidential tax information
17 must be edited to prevent the disclosure of the confidential informa-
18 tion;

19 (3) a decision, if made public, must be edited to prevent
20 the disclosure of the tax information and to protect the identity of
21 the taxpayer or the third party; and

22 (4) a public statement may not contain information identi-
23 fying the taxpayer, a third party, or the tax information.

24 * Sec. 5. AS 43.05.230(f) is amended to read:

25 (f) A wilful violation of the provisions of this section is <u>a</u>
26 <u>felony and is</u> punishable by a fine of not more than $5,000, or by
27 imprisonment for not more than two years, or by both.

28 * Sec. 6. AS 43.05.230 is amended by adding new subsections to read:

29 (h) A legislative committee, after identifying the scope of an

investigation or inquiry relating to matters of taxation and the adoption by either house of a simple resolution giving the committee authority to receive confidential tax information, may request the commissioner of revenue to provide confidential taxpayer returns or return information; the request by the committee shall be in writing and may identify, directly or indirectly, a particular taxpayer. On adoption of the resolution, the commissioner of revenue shall provide the committee with the requested returns or return information. If specific returns or return information concerning a particular taxpayer are provided to a legislative committee under this subsection, the commissioner of revenue shall notify the particular taxpayer of the request and of the delivery to the committee of the information. The committee may designate legislative employees or agents to inspect returns and return information. The committee may consider information made available under this subsection only in executive session unless the taxpayer and a third party whose tax information is being considered consent in writing to a disclosure in open session.

(i) Notwithstanding art. II, sec. 6, Constitution of the State of Alaska, the disclosure of information made confidential by this section by a present or former member of the legislature or by a present or former employee or agent of the legislative committee constitutes a violation of this section. Each member of the legislature and each employee or agent of the committee, before receiving or reviewing information provided by the commissioner under (h) of this section, shall acknowledge, on a form prepared by the commissioner, that the information is confidential, that a disclosure of the information is prohibited by law, and that the member, employee, or agent is waiving rights granted by art. II, sec. 6, Constitution of the State of Alaska.

1 (j) The legislative committee and the commissioner of revenue
2 shall establish procedures governing the transmittal, receipt, safe-
3 keeping, and use of the confidential information provided by the
4 commissioner under (h) of this section.
5 (k) This section does not permit the disclosure to the legisla-
6 ture of confidential information provided by the Internal Revenue
7 Service under exchange agreements with the department.
8 * Sec. 7. This Act takes effect immediately in accordance with AS 01.-
9 10.070(c).

MEMORANDUM State of Alaska

TO: Louann Cutler
House Finance Committee

DATE: February 21, 1986

FILE NO.

TELEPHONE NO. 465-3600

FROM: Harold M. Brown
Attorney General

By: Deborah Vogt DV
Assistant Attorney General
Oil, Gas and Mining-Juneau

SUBJECT: Disclosure of confidential tax information

HB 502, as currently drafted, would permit the Department of Revenue to disclose to the legislature the name of a taxpayer and the amount of an assessment levied against that taxpayer by the Department. You have asked me to look into what the United States and other states permit in the way of legislative oversight of tax matters, and to consider whether Alaska might follow those examples. You have further asked me to draft a proposed committee substitute for HB 502 permitting disclosure to the legislature, but prohibiting disclosure to the public.

26 U.S.C. 6103 is the Internal Revenue statute dealing with the confidentiality of tax information on the federal level. Like AS 43.05.230, it generally requires that information on a federal tax return be kept confidential. Section (f) of that statute permits the IRS to disclose otherwise confidential material to designated committees of Congress. Those committees are the "tax writing" committees -- House Ways and Means, Senate Finance and the Joint Committee on Taxation. Like Alaska's law, if the information does not identify particular taxpayers, it may simply be given to Congress. If, however, the information would disclose or identify a particular taxpayer, it may only be provided to those committees in executive session. Taxpayer-specific information may also be provided to the chief of staff of the joint committee, to other committees under more limited circumstances, and to the "agents" of the tax-writing committees (staff) that are designated by the chairman.

I have made a cursory survey of the laws of other states, and have located one (California) which permits disclosure to the legislature. Corporate income tax information is disclosable under California Statute § 26453, and personal income tax information under § 19285. I have attached copies of those statutes for your review. California provides that it is a misdemeanor for a member of

a committee or its staff to disclose the particulars of tax information.

<u>Considerations</u>.

1. <u>Accountability</u>. The present confidentiality statute imposes criminal penalties for unauthorized disclosure of tax information. That criminal penalty is probably an effective deterrent to unintentional disclosure: I know it makes me take very seriously the confidentiality of taxpayer information. It may be that here in Alaska it is especially important to consider accountability since our major taxpayers are few in number, and as a result the contents of their tax returns may be more memorable than would be any particular return in a state like California or at the federal level. Although neither California nor the United States appear to have dealt with the question of legislative immunity, I believe it is appropriate to consider whether a criminal penalty would have any effect should a legislator disclose confidential tax information in the course of legislative debate. (I do not believe that any question of immunity arises in the event that a legislator were to disclose information in another context -- for example, to a friend or relative in a social context.)

The speech and debate immunity appearing in the Alaska Constitution, like that in the United States Constitution, was designed to "preserve the constitutional structure of separate, coequal, and independent branches of government. The English and American history of the privilege suggests that any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities." <u>United States v. Helstoski</u>, 442 U.S. 477, 490. Thus, the immunity is more than an individual privilege protecting legislators; its purpose is to protect, as well, the constituents of those legislators, who have an interest in ensuring free debate by their legislature. As a result, since it is not a personal privilege, it is not clear whether the immunity may be waived by a legislative body.

In <u>Helstoski</u>, the Court suggested (but did not decide) that Congress could "enlist the aid of the Executive Branch and the courts" in disciplining its members by a "narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its

members." Id. at 492. Although the issue apparently has never arisen, the Internal Revenue Service takes the position that Congress has done just that in section 6103, so that members of Congress are not immune from penalties for disclosure. The attached draft bill, then, specifically provides that a legislator would not be immune from penalties for unauthorized disclosure of tax information.

The legislature may, of course, take any action it deems appropriate to regulate the conduct of its own members. The draft bill, then, provides that disclosure of tax information is a violation of the standards of conduct set out in AS 24.60. Thus, even if a legislator who disclosed confidential information were to successfully argue that he or she was immune from the penalties of AS 43.05.230, that legislator would nonetheless have violated the legislature's standards of conduct, and would be subject to the provisions of that chapter.

2. Information exchange with the Internal Revenue Service. The state is currently entitled to information from the IRS, so long as the state has certain confidentiality protections. In amending the confidentiality provisions, it is appropriate to consider whether the exchange of information with the IRS would be affected. There are two relevant provisions of federal law.

The first is 26 U.S.C. § 6103 (d), which authorizes the IRS to disclose information generated by the IRS directly to the states so long as the information is protected by the state. An example of this type of information would be the results of a federal a Windfall Profit Tax audit. The information is available only to the agency charged with administering the tax laws; it may not even be disclosed to the governor. Thus, information received by Alaska under this section would not be available to the legislature under the draft bill. However, the draft bill would not effect the receipt of this information by the state.

The second relevant provision is more indirect, and deals with federal tax information that is provided to the state by the taxpayer. For example, a state may require that the federal return be attached to the state return, or that certain information from the federal return be entered on the state return. Since this information comes directly

from the taxpayer, the United States has no control over the use to which the information is put. However, § 6103(p)(8) provides that if the state does not protect the confidentiality of this information, the IRS will no longer provide the direct information under § 6103(d). I have checked with the IRS disclosure attorneys in Washington, and they tell me that disclosure to the legislature, but not to the public, should have no effect on the exchange of information. They have also said that the IRS will work with us to determine the potential effect of any legislation before it is passed. I also spoke with California, which discloses information to its legislature, and the attorney there told me that disclosure did not effect the exchange of information with the IRS.

3. Effect of proposed bill on legislative involvement in settlement of tax disputes. The confidential nature of the recent settlement of severance tax issues with Arco raises the question of what the the effect of the proposed bill would be on the settlement process. The bill would permit (subject to the restrictions against public disclosure) legislators to review settlements to the extent that they now may do so with respect to non-tax matters. In other words, the bill removes the bar of tax confidentiality, no more and no less. The bill would not expand the legislature's ability to participate in the settlement process beyond its present parameters in non-tax matters.

Summary of the Proposed Bill

The draft bill provides that confidential information will be provided to a committee designated by the speaker of the house or the senate president. For example, the speaker might request that information be provided to the house finance committee. The committee may review and consider confidential information only in a closed, executive session (unless the taxpayer consents to an open hearing). If the committee desires that legislative staff have access to materials, it must first define the scope of an inquiry or investigation and then designate specific staff members who are authorized to review otherwise confidential information. Legislative employees would include, for example, the house research agency, so long as the committee, acting as a whole, designated those employees. The proposed bill restates that disclosure of information received under the subsection is not permitted,

and specifically notes that this is true notwithstanding the statute setting out legislative immunity. 1/ It further would require that any individual, before receiving or reviewing information, must sign a statement acknowledging that he or she knows the information is confidential and that disclosure is prohibited.

The bill would add a new subsection in the legislative standards of conduct chapter, prohibiting disclosure of information received under the amendments proposed in the bill. Thus, even if a legislator successfully argued immunity under the speech and debate clause, he or she would still be subject to the provisions of that chapter.

DV:jl

1/ The intent, here, is to waive the speech and debate immunity, not the protections from being subjected to court proceedings during the legislative session. A court would probably find that the latter protection was not waived by the draft bill, but it may be that this should be clarified.

it shall be a misdemeanor for such committee or any member, clerk or other officer or employee thereof to divulge or make known in any manner any particulars of the information so furnished except to law enforcement officers for the purpose of aiding the detection or prosecution of crimes committed in violations of this part.

Added Stats 1949 ch 557 § 1, effective July 1, 1951.

Prior Law:

(a) Stats 1929 ch 13 § 35 subd (a) 1st par 1st sent p 34, as amended by Stats 1931 ch 1066 § 8 p 2229, Stats 1935 ch 275 § 24 p 983, Stats 1939 ch 1050 § 20 p 2972, Stats 1943 ch 37 § 21 p 212, ch 352 § 25 p 1464.

(b) Stats 1937 ch 765 § 29 subd (a) 1st par 1st sent p 2201, as amended by Stats 1939 ch 1049 § 22 p 2932, Stats 1943 ch 38 § 21 p 349, ch 351 § 23 p 1400.

Cross References:

Definition of misdemeanor and penalties therefor: Pen C §§ 17, 19, 19a.

Collateral References:

71 Am Jur 2d State and Local Taxation §§ 590, 601.
Corresponding federal statute: 26 USCS § 6103(d).

§ 26453b. Inspection of returns by Attorney General or other legal representatives of State

The Attorney General or other legal representatives of the state may inspect the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or any penalty imposed by this part. In addition, the Attorney General may inspect any report or return required under this part when required in the enforcement of any public or charitable trust or in compelling adherence to any charitable purposes for which any nonprofit corporation is formed.

Added Stats 1949 ch 557 § 1, effective July 1, 1951; Amended Stats 1969 ch 603 § 8.

Prior Law:

(a) Stats 1929 ch 13 § 35 subd (a) 1st par 2d sent p 34, as amended by Stats 1931 ch 1066 § 8 p 2229, Stats 1935 ch 275 § 24 p 983, Stats 1939 ch 1050 § 20 p 2972, Stats 1943 ch 37 § 21 p 212, ch 352 § 25 p 1464.

(b) Stats 1937 ch 765 § 29 subd (a) 2d par 1st sent p 2201, as amended by Stats 1939 ch 1049 § 22 p 2932, Stats 1943 ch 38 § 21 p 249, ch 351 § 23 p 1400.

Amendments:

1969 Amendment: Added the second sentence.
Note—See note 1 to § 24837 respecting the applicability of the provisions of Stats 1969 ch 603 effecting changes in the computation of taxes.

Cross References:

Nonprofit corporation generally: Corp C §§ 9000 et seq.
Attorney General's powers generally: Gov C §§ 12510 et seq.

Added Stats 1943 ch 659 § 1, effective June 5, 1945.

Prior Law: Stats 1935 ch 329 § 33 subd (a) 1st sent p 1122, as amended by Stats 1937 ch 668 § 19 p 1860, Stats 1939 ch 915 § 21 p 2565, Stats 1941 ch 1226 § 21 p 3084.

Collateral References:

Witkin Evidence 2d pp 805, 806.
Cal Jur 2d Income Taxes § 48.

NOTES OF DECISIONS

Copies of income tax reports filed with State and federal government, as best evidence procurable, were competent, in grand jury investigation of lobbying and bribery of State legislators. Samish v Superior Court (1938) 28 CA2d 685, 83 P2d 305.

Purpose of this section and § 19282 is to facilitate tax enforcement by encouraging taxpayer to make full and truthful declarations in his return without fear that his statements will be revealed or used for other purposes; such privilege should not be nullified by permitting third parties to obtain information by adopting indirect procedure of demanding copies of the tax returns. Webb v Standard Oil Co. (1957) 49 C2d 509, 319 P2d 621; Vogan v McLaughlin (1959) 172 CA2d 65, 342 P2d 18; Davis v Lucas (1960) 180 CA2d 407, 4 Cal Rptr 479.

In action by buyer of motel against sellers for fraud in inducing sale, sellers, not having objected to producing copies of their income tax returns, or to offer of copies in evidence, on ground that copies were privileged or were inadmissible could not raise such questions on appeal and waived right to claim on appeal that copies were inadmissible or privileged, and it was error to admit copies of returns in evidence. Vogan v McLaughlin (1959) 172 CA2d 65, 342 P2d 18.

§ 19284. Furnishing information to committee of Legislature: Disclosure by committee a misdemeanor

Such information may upon request of a committee appointed by either the Assembly or the Senate, or both, be furnished to the committee, but it is a misdemeanor for the committee or any member, clerk, or other officer or employee thereof to disclose in any manner any particulars of the information so furnished except to law enforcement officers for the purpose of aiding the detection or prosecution of crimes committed in violation of this part.

Added Stats 1943 ch 659 § 1, effective June 5, 1945.

Prior Law: Stats 1935 ch 329 § 33 subd (a) 1st sent p 1122, as amended by Stats 1937 ch 668 § 19 p 1860, Stats 1939 ch 915 § 21 p 2565, Stats 1941 ch 1226 § 21 p 3084.

Collateral References:

Cal Jur 2d Income Taxes § 48.

§ 19285. Inspection by Attorney General or other legal representative of state

The Attorney General or other legal representatives of the state may inspect the report or return of any taxpayer who brings an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or any penalty imposed by this part. In addition, the Attorney General may inspect any report or return required under this part when required in the enforcement of any public or charitable trust or in compelling

CALIFORNIA

§ 26452. "Business affairs"

The term "business affairs," as used in this article means the details relative to the business activities of the taxpayer as disclosed by the return but shall exclude extraneous matters, such as the exact corporate title, corporate number, the date of commencement of business in this State, taxable year adopted, filing date of return, name, date and title of persons signing affidavit to the return, due date of taxes, taxes unpaid, taxpayer's address, private address of officers and directors.

Added Stats 1949 ch 557 § 1, effective July 1, 1951.

Prior Law:

(a) Stats 1929 ch 13 § 35 subd (a) 2d par p 34, as amended by Stats 1931 ch 1066 § 8 p 2229, Stats 1935 ch 275 § 24 p 983, Stats 1939 ch 1050 § 20 p 2972, Stats 1943 ch 37 § 21 p 212, ch 352 § 25 p 1464.

(b) Stats 1937 ch 765 § 29 subd (a) 3d par p 2201, as amended by Stats 1939 ch 1049 § 22 p 2932, Stats 1943 ch 38 § 21 p 249, ch 351 § 23 p 1400.

§ 26453. Disclosure of information under judicial order

Such information may be disclosed in accordance with proper judicial order in cases or actions instituted for the enforcement of this part or for the prosecution of violations of this part.

Added Stats 1949 ch 557 § 1, effective July 1, 1951.

Prior Law:

(a) Stats 1929 ch 13 § 35 subd (a) 1st par 1st sent p 34, as amended by Stats 1931 ch 1066 § 8 p 2229, Stats 1935 ch 275 § 24 p 983, Stats 1939 ch 1050 § 20 p 2972, Stats 1943 ch 37 § 21 p 212, ch 352 § 25 p 1464.

(b) Stats 1937 ch 765 § 29 subd (a) 1st par 1st sent p 2201, as amended by Stats 1939 ch 1049 § 22 p 2932, Stats 1943 ch 38 § 21 p 349, ch 351 § 23 p 1400.

Collateral References:

Witkin Evidence 2d p 806.
Cal Jur 2d Taxation § 384.
71 Am Jur 2d State and Local Taxation §§ 590, 601.

NOTES OF DECISIONS

The "cases or actions" are those brought by the state. Franchise Tax Board v Superior Court (1950) 36 C2d 538, 225 P2d 905.

A taxpayer in asserting a claim for a refund does not "enforce" the statute within the exception of this provision permitting disclosure, in actions to enforce the statute, of certain information required in tax returns. Franchise Tax Board v Superior Court (1950) 36 C2d 538, 225 P2d 905.

§ 26453a. Furnishing information to Assembly and Senate committees

Such information may upon request of the committee appointed by either the Assembly or the Senate be furnished to the committee, but

Added Stats 1943 ch 659 § 1, effective June 5, 1945.

Prior Law: Stats 1935 ch 329 § 33 subd (a) 1st sent p 1122, as amended by Stats 1937 ch 668 § 19 p 1860, Stats 1939 ch 915 § 21 p 2565, Stats 1941 ch 1226 § 21 p 3084.

Collateral References:

Witkin Evidence 2d pp 805, 806.
Cal Jur 2d Income Taxes § 48.

NOTES OF DECISIONS

Copies of income tax reports filed with State and federal government, as best evidence procurable, were competent, in grand jury investigation of lobbying and bribery of State legislators. Samish v Superior Court (1938) 28 CA2d 685, 83 P2d 305.

Purpose of this section and § 19282 is to facilitate tax enforcement by encouraging taxpayer to make full and truthful declarations in his return without fear that his statements will be revealed or used for other purposes; such privilege should not be nullified by permitting third parties to obtain information by adopting indirect procedure of demanding copies of the tax returns. Webb v Standard Oil Co. (1957) 49 C2d 509, 319 P2d 621; Vogan v McLaughlin (1959) 172 CA2d 65, 342 P2d 18; Davis v Lucas (1960) 180 CA2d 407, 4 Cal Rptr 479.

In action by buyer of motel against sellers for fraud in inducing sale, sellers, not having objected to producing copies of their income tax returns, or to offer of copies in evidence, on ground that copies were privileged or were inadmissible could not raise such questions on appeal and waived right to claim on appeal that copies were inadmissible or privileged, and it was error to admit copies of returns in evidence. Vogan v McLaughlin (1959) 172 CA2d 65, 342 P2d 18.

§ 19284. Furnishing information to committee of Legislature: Disclosure by committee a misdemeanor

Such information may upon request of a committee appointed by either the Assembly or the Senate, or both, be furnished to the committee, but it is a misdemeanor for the committee or any member, clerk, or other officer or employee thereof to disclose in any manner any particulars of the information so furnished except to law enforcement officers for the purpose of aiding the detection or prosecution of crimes committed in violation of this part.

Added Stats 1943 ch 659 § 1, effective June 5, 1945.

Prior Law: Stats 1935 ch 329 § 33 subd (a) 1st sent p 1122, as amended by Stats 1937 ch 668 § 19 p 1860, Stats 1939 ch 915 § 21 p 2565, Stats 1941 ch 1226 § 21 p 3084.

Collateral References:

Cal Jur 2d Income Taxes § 48.

§ 19285. Inspection by Attorney General or other legal representative of state

The Attorney General or other legal representatives of the state may inspect the report or return of any taxpayer who brings an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or any penalty imposed by this part. In addition, the Attorney General may inspect any report or return required under this part when required in the enforcement of any public or charitable trust or in compelling

of kin, or beneficiary has a material interest which will be affected by information contained therein; and

(F) in the case of the return of a trust—

(i) the trustee or trustees, jointly or separately, and

(ii) any beneficiary of such trust, but only if the Secretary finds that such beneficiary has a material interest which will be affected by information contained therein.

(2) Incompetency. If an individual described in paragraph (1) is legally incompetent, the applicable return shall, upon written request, be open to inspection by or disclosure to the committee, trustee, or guardian of his estate.

(3) Deceased individuals. The return of a decedent shall, upon written request, be open to inspection by or disclosure to—

(A) the administrator, executor, or trustee of his estate, and

(B) any heir at law, next of kin, or beneficiary under the will, of such decedent, or a donee of property, but only if the Secretary finds that such heir at law, next of kin, beneficiary, or donee has a material interest which will be affected by information contained therein.

(4) Bankruptcy. If substantially all of the property of the person with respect to whom the return is filed is in the hands of a trustee in bankruptcy or receiver, such return or returns for prior years of such person shall, upon written request, be open to inspection by or disclosure to such trustee or receiver, but only if the Secretary finds that such receiver or trustee, in his fiduciary capacity, has a material interest which will be affected by information contained therein.

(5) Attorney in fact. Any return to which this subsection applies shall, upon written request, also be open to inspection by or disclosure to the attorney in fact duly authorized in writing by any of the persons described in paragraph (1), (2), (3), or (4) to inspect the return or receive the information on his behalf, subject to the conditions provided in such paragraphs.

(6) Return information. Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

(f) Disclosure to committees of Congress.

(1) Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation. Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular

taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(2) Chief of Staff of Joint Committee on Taxation. Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(3) Other committees. Pursuant to an action by, and upon written request by the chairman of, a committee of the Senate or the House of Representatives (other than a committee specified in paragraph (1)) specially authorized to inspect any return or return information by a resolution of the Senate or the House of Representatives or, in the case of a joint committee (other than the joint committee specified in paragraph (1)) by concurrent resolution, the Secretary shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.

(4) Agents of committees and submission of information to Senate or House of Representatives.

(A) Committees described in paragraph (1). Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(B) Other committees. Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through

no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(g) Disclosure to President and certain other persons.

(1) In general. Upon written request by the President, signed by him personally, the Secretary shall furnish to the President, or to such employee or employees of the White House Office as the President may designate by name in such request, a return or return information with respect to any taxpayer named in such request. Any such request shall state—

(A) the name and address of the taxpayer whose return or return information is to be disclosed,

(B) the kind of return or return information which is to be disclosed,

(C) the taxable period or periods covered by such return or return information, and

(D) the specific reason why the inspection or disclosure is requested.

(2) Disclosure of return information as to Presidential appointees and certain other Federal Government appointees. The Secretary may disclose to a duly authorized representative of the Executive Office of the President or to the head of any Federal agency, upon written request by the President or head of such agency, or to the Federal Bureau of Investigation on behalf of and upon written request by the President or such head, return information with respect to an individual who is designated as being under consideration for appointment to a position in the executive or judicial branch of the Federal Government. Such return information shall be limited to whether such individual—

(A) has filed returns with respect to the taxes imposed under chapter 1 for not more than the immediately preceding 3 years;

(B) has failed to pay any tax within 10 days after notice and demand, or has been assessed any penalty under this title for negligence, in the current year or immediately preceding 3 years;

(C) has been or is under investigation for possible criminal offenses under the internal revenue laws and the results of any such investigation; or

Alaska State Legislature

Official Business

House of Representatives

Al Adams
Chairman
Committee on Finance

January 30, 1986

WHILE IN SESSION
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State Capitol
Juneau, Alaska 99811
(907) 465-3706

OUT OF SESSION
P.O. Box 333
Kotzebue, Alaska 99752
(907) 442-3320

1024 W. 6th
Anchorage, Alaska 99501
(907) 274-0615

MEMORANDUM

TO: Representative Sam Cotten

FROM: Louann Cutler

SUBJ: HB 502

Attached are proposed amendments to HB 502. The changes are presented in the form of a proposed committee substitute so that they are readily understood. They were drafted in consultation with Deborah Vogt.

The major change suggested is that the bill apply only to taxation of oil and gas production and pipeline activity instead of taxation of all corporate activity. This change is proposed to narrow the scope of the bill to those taxpayers with which the legislature is most concerned. Thus, the findings and purpose sections (1 and 2) are amended to reflect this change, and the language of sections 3 and 4 permitting disclosure refer specifically to AS 43.55 (the severance tax), AS 43.20.072 (the modified apportionment section of the corporate income tax), and former AS 43.21 (the separate accounting income tax).

Two technical amendments are proposed. A new section 3 is added in order to amend another part of the statutes referring to tax information so that disclosure is allowed. Also, an immediate effective date has been included.

Attachment

PROPOSED CS HB 502 (FIN)

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

* Section 1. LEGISLATIVE FINDINGS. (a) The legislature finds that

(1) the state's oil and gas resources are exploited only to benefit the citizens of the state;

(2) oil and gas production and pipeline activities in the state presently dwarf all other taxable economic activities in the state;

(2) the majority of the state's revenue is derived from taxation of oil and gas production and pipeline activities;

(3) state government provides a wide range of essential services to the citizens of the state to ensure the public health and welfare.

(b) The legislature further finds that

(1) the citizens of the state must be assured that the state is receiving all of the income to which it is entitled;

(2) since revenue from oil and gas production and pipeline activities is derived from relatively few taxpayers. the consequences of any error or delay in the collection of taxes from those taxpayers are significant;

(3) the legislature must exercise its oversight authority to assure that tax revenue collection by the Department of Revenue is conducted efficiently, fairly, promptly and in the best interest of the state;

(4) there is a legitimate and compelling governmental interest in the legislature and the public having adequate access to information regarding the tax revenue owed to the state from oil and gas production and pipeline activities to allow responsible oversight;

(5) without sufficient information, the legislature cannot adequately determine that the state's tax revenue collection functions are properly administered and that tax revenue due the state is promptly received; and

(6) the public interest may best be served if, when the Department of Revenue has made an assessment against a taxpayer under former AS 43.55, AS 43.20.072 or AS 43.21, the identity of the taxpayer and the amount of the assessment is disclosed, whether or not the taxpayer agrees that the amount is due and whether or not any amount is delinquent.

*Sec. 2. LEGISLATIVE PURPOSE. Pursuant to the findings set out in section 1 of this Act, the legislature adopts this Act to ensure that

(1) the state is receiving all the tax revenue due the state;

(2) oversight of the tax revenue collection function is sufficiently provided; and

(3) tax revenue due to the state is available to provide for the public health and welfare of the citizens of the state.

*Sec. 3. AS 09.25.100 is amended to read:

DISPOSITION OF TAX INFORMATION. Information in the possession of the Department of Revenue which discloses the particulars of the business or affairs of a taxpayer or other person is not a matter of public record, except for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, <u>or prohibit the publication of assessments made by the Department of Revenue against taxpayers under AS 43.55, AS 43.20.072, or former AS 43.21</u> or prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information which may assist in the collection of delinquent taxes.

*Sec. 4. AS 43.05.230(e) is amended to read:

(e) <u>*This section does not prohibit</u> [NOTHING IN THIS SECTION PROHIBITS] the publication of statistics [SO] classified [AS] to prevent the identification of particular returns or reports<u>, the publication of assessments made by the department against taxpayers under AS 43.55, AS 43.20.072 or former AS 43.21</u> or the publication of delinquent lists showing the names of taxpayers who have failed to pay their taxes at the time and in the manner provided by law, together with other relevant information

which in the opinion of the department may assist in the collection of delinquent taxes.

* Sec. 5. This Act takes effect immediately in accordance with AS 01.10.070(c).

Revenue

2/28/86

PROPOSED AMENDMENTS FROM THE
DEPARTMENT OF REVENUE TO
CS FOR HOUSE BILL NO. 502 (Finance)

1. Insert at page 2, line 24 a new section 2 to read:

*Sec. 2. AS 24.10 is amended by adding a new section to read:

Sec. 24.10..070. CONFIDENTIALITY OF INFORMATION. A present or former employee or agent of the legislature may not disclose tax information contained within a report or return filed under AS 43 with the Department of Revenue and furnished to the person under AS 43.05.230(h).

(renumber sections accordingly)

2. Delete at page 4, line 4 the following language:

"but the committee may not designate an employee or agent who has responsibility for a different investigations of the same taxpayer or third part".

3. Insert at page 4, line 23 after "receipt," the word "safekeeping,".

4. Insert at page 4, line 26 a new subsection (k) to read:

(k) Nothing in this section permits the disclosure to the legislature of confidential information provided by the Internal Revenue Service under exchange agreements with the department.

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

FINANCE DIVISION
POUCH WF–STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3795

M E M O R A N D U M

DATE: January 7, 1986

TO: Sen. Jay Kerttula, Chairman
Legislative Budget and Audit Committee

FROM: Mike Greany, Director
Legislative Finance Division

SUBJ: Tax Information Legal Opinions

At the Committee's direction, I have requested legal opinions from Legislative Counsel and the Attorney General regarding access to taxpayer information currently held in confidence by the Department of Revenue.

Attached is Legislative Counsel's opinion that there is no Constitutional prohibition and draft legislation for the necessary statutory changes.

The Attorney General's office (Deborah Vogt) is working on their opinion which should be forthcoming soon. (ATTACHED).

31-01LH

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M December 17, 1985

SUBJECT: Legislative access to certain taxpayer information (Work Order No. 14-1468)

TO: Mike Greany, Director
Legislative Finance Division

FROM: Richard A. Bradley
Legislative Counsel

You have requested that we comment on the extent of legislative and public access to certain information regarding taxpayers. The information that you seek is the identity of corporate taxpayers against whom assessments have been issued. I gather that the disclosure you seek is not of a confidential legislative oversight character and that your request is essentially that there be a public disclosure of the facts involved.

Your request notes the provisions of AS 43.05.230(1); the section establishes criminal penalties for

> a current or former officer, employee, or agent of the state to divulge the amount of income or the particulars set out or disclosed in a report or return made under this title, except
>
> > (1) in connection with official investigations or proceedings of the department, whether judicial or administrative, involving taxes due under this title:
>
> * * *

While considering this section, however, note the provisions of sec. 230(e); it provides, in part:

> (e) Nothing in this section prohibits the publication of . . . delinquent lists showing the names of taxpayers who have failed to pay their taxes at the time and in the manner provided by law, together with other relevant information which in the opinion of the department may assist in the collection of delinquent taxes.

This latter subsection appears to reflect a present legislative determination that information regarding taxpayers who are delinquent in their responsibilities to the state does not enjoy a privileged status and the Department of Revenue may disclose that information if the department believes that the disclosure will assist in the collection of the taxes.

In my opinion, the department may disclose that information under existing law on the date that the taxes due are delinquent. I agree that an assessment will typically occur before there is any delinquency and thus sec. 230(e) is not wholly responsive to your request; I also agree that a disclosure that remains within the discretion of the Department of Revenue is not a solution to your request.

A solution is to provide that the identity of a taxpayer against whom an assessment has been made is a public record, whether the taxpayer agrees that the amount is due or not and regardless of delinquency.

It should be noted that the timing of the disclosure of the assessment raises valid public policy issues that may be complex considering the different kinds of taxes collected by the state. As the economic and business incidents that become the occasion of a tax become more complex and perhaps more ambiguous, the time at which the events give rise to an assessment may similarly become more ambiguous.

What I consider clear is that the taxpayer has no valid claim for protection from this disclosure under the "privacy amendment" [art. 1, sec. 22 of the Alaska Constitution] or under similar provisions or concepts of the U.S. Constitution. While the Alaska Constitution offers an explicit guarantee of privacy (art. I, sec. 22), unlike the Federal Constitution, the tests for the existence of the right to privacy in a particular context are first, whether the person has exhibited an actual (or subjective) expectation of privacy and, second, whether there is an expectation that

society is prepared to recognize that as a reasonable right. Hilbers v. Municipality of Anchorage, 611 P.2d 31 (Alaska 1980). Whether a corporation has a lesser expectation of privacy than an individual in the matters that are the subject of this memorandum or not, it is clear that the assessment of taxation by properly constituted taxing authorities is a responsibility of government that, once done, is not expected to remain private and, in fact, public policy concerns demand that it be done publicly.

The department may, of course, maintain as confidential proprietary information submitted by a taxpayer in appropriate circumstances.

A bill amending sec. 230(e) in the manner suggested is enclosed.

If I may be of further assistance, please advise.

RAB:mkr
M1:141

Enclosure

14-1468
Bradley
12/17/85

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE BUDGET AND AUDIT COMMITTEE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the disclosure of state tax assessments of the Department of Revenue."

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

* Section 1. AS 43.05.230(e) is amended to read:

(e) This section does not prohibit [NOTHING IN THIS SECTION PROHIBITS] the publication of statistics [SO] classified as to prevent the identification of particular returns or reports, together with other relevant information that, in the opinion of the department, may assist in the collection of taxes. The assessments made by the department against taxpayers and [OR THE PUBLICATION OF] delinquent lists showing the names of taxpayers who have failed to pay their taxes at the time and in the manner provided by law are public records [, TOGETHER WITH OTHER RELEVANT INFORMATION WHICH IN THE OPINION OF THE DEPARTMENT MAY ASSIST IN THE COLLECTION OF DELINQUENT TAXES].

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 998[illegible]
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 3, 1986

SUBJECT: Tax information and the legislature [CSHB 502(Finance)]

TO: Representative Sam Cotten

FROM: Richard A. Bradley
Legislative Counsel

I believe that several comments should be made on the enclosed draft.

First, I have a[illegible] the amendment suggested by the Department of Revenue [illegible] AS 24.10.070; the provision provides that an employee of the legislature may not disclose tax information contained within a report or return filed under AS 43 with the Department and furnished to the person under AS 43.05.230(h)." The material does not really belong there; I could find, however, no better place for it. And the material actually constitutes "overkill"; the bill already contains two separate and different provisions making the same point.

Thus AS 24.60.010 provides that a "person to whom this chapter applies may not disclose tax information contained within a report or return filed under AS 43 with the Department of Revenue and furnished to the person under AS 43.05.230(h)." And later in the bill, at the amendment to AS 43.05.230 adding subsection 230(i), the provision provides that the "disclosure of information made confidential by this section by a . . . . present or former employee of the legislative committee constitutes a violation of this section." And "violation of this section" constitutes a felony. See sec. 4 of the bill; AS 43.05.230(f).

As you understand, there are valid legislative drafting reasons for not stating the same principle in numerous provisions of the statutes. Should the legislature change its mind and delete several but less than all of the provisions,

confusion in the law results. I suggest that the provision be deleted.

Second, there has been a question raised about the power of the legislature to "waive" a provision of the Alaska Constitution. See AS 43.05.230(i) as added in the bill. It is fair to say that waivers of constitutional rights are generally not favored.

I have discussed this question with Assistant Attorney General Deborah Vogt and she believes that there are some other jurisdictions where this kind of waiver of a constitutional provision has actually been implemented. In discussing the matter with her, however, she agreed that the question was open in this state until the Supreme Court of Alaska has occasion to examine the question.

Finally, I note that the change in sec. 5 of the bill from "written concurrence of the speaker . . . or the president" to the concept of a simple resolution effectively prevents a committee that did not anticipate the need for return information during the legislative session from getting the information during the interim. I will be preparin' an amendment for use addressing the matter.

If I may be of further assistance, please advise.

RAB:csh
m3/104

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

REPLY TO:

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☐ POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

January 17, 1986

Mike Greany, Director
Legislative Finance Division
Legislative Budget and Audit Committee
Pouch WF - State Capitol
Juneau, Alaska 99811

Dear Mr. Greany:

You have asked whether the Departments of Law and Revenue are prohibited, under AS 43.05.230, from disclosing to the Legislature or the public information relating to outstanding assessments against corporate taxpayers, including the identity of those taxpayers. You have further asked whether, if the statute currently prohibits that disclosure, it would be legal to amend it to permit disclosure. We conclude that AS 43.05.230 prohibits the contemplated disclosure, but that, within certain limitations, it might be possible to amend the statute to permit some disclosure to the Legislature.

AS 43.05.230 provides that, with certain exceptions, it is unlawful to divulge the particulars set out or disclosed on a return or report made under Title 43. The exceptions include disclosure to the taxpayer or in connection with an official investigation of the Department of Revenue, and exchange agreements with other states, the United States and the Multistate Tax Commission. The exceptions, then, do not include disclosure to the Legislature or to the public.

AS 43.05.230(e) provides that the section does not prohibit the publication of statistics that do not disclose particular taxpayers. Thus, under this language, the Department may disclose the aggregate amounts that have been assessed against categories of taxpayers under various taxes. I understand that this information is currently available to the Legislature.

That subsection further permits publication of the names of delinquent taxpayers. Our office has recently analyzed this section, and concluded that publication should not be made until the appeal period under AS 43.05.240 has run. Inf. A.G. Op. August 21, 1985. Thus, a taxpayer who has filed a protest and appealed an assessment is not a "delinquent taxpayer" for the purposes of this section.

Thus, AS 43.05.230, as presently drafted, prohibits the release of the contemplated information to the Legislature or to the public. Your question then becomes whether the constitutions of Alaska and the United States would permit amendment of the statute to authorize the disclosure.

Before turning to the constitutional analysis, it will be helpful to set out the rationale for laws protecting the confidentiality of tax information. There are several. The most obvious is the protection of the privacy interest of the taxpayer, coupled with concern with protection from self-incriminatory demands. Since tax returns are mandatory, governments have long been sensitive to the "substantial and difficult constitutional questions [posed by obligatory reports which] touch upon intimate areas of an individual's personal affairs [and which] can reveal much about a person's activities, associations, and beliefs." California Bankers Assn. v. Shultz, 416 U.S. 21, 78-79 (1973). Thus, tax confidentiality statutes reflect legislative protection of an individual's Fifth Amendment (self-incrimination), Fourth Amendment (search and seizure), and First Amendment (free association) rights, as well as the right to privacy.

Tax confidentiality statutes are also based on a legislative recognition that our tax laws rely heavily on voluntary assessment and compliance, and that compliance is enhanced when the information provided is protected. Thus, the "purpose of ... statutory provisions prohibiting disclosure is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that these

statements will be revealed or used against him for other purposes." Webb v. Standard Oil Co., 319 P.2d 621, 624.

The constitutional underpinnings of confidentiality statutes primarily protect the rights of individuals. At least under the United States Constitution, these protections may not as strong for corporations. California Bankers, supra, at 55, 65-66. However, the United States Supreme Court has held that the Fourth Amendment protection from unreasonable searches and seizures extends to business premises at least to the extent of requiring a warrant before a search. G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977). Probably the strongest constitutional protection at issue here would be the right to privacy set out in the Alaska Constitution, article I, section 22.

Former Attorney General John Havelock expressed the opinion that Alaska's tax confidentiality statute protected information "within the ambit of the protection intended to be afforded by the Right of Privacy" in the Alaska Constitution. 1973 Op. Att'y Gen. #8. It is not clear whether that provision protects corporations. In Hilbers v. Municipality of Anchorage, 611 P.2d 31, 43 (Alaska 1980), the court held that the "'[c]ommercial and public' aspects of appellants' massage parlor activities remove the shield of privacy from these activities." However, in Woods & Rohde, Inc. v. State, Dept. of Labor, 565 P. 2d 138 (Alaska 1977), the court, in holding that the Alaska constitution prohibits warrantless searches of business premises, stated that its conclusion was "bottomed on the amendment to our constitution found in article I, section 22..." We will assume that Alaska's privacy protection extends, at least to some degree, to corporations. It may be that our court would hold, for example, that the constitutional provision protects a corporation's proprietary or sensitive information. In addition, the line between personal activity and corporate activity may be a thin one, particularly in the case of small, closely held corporations.

Further, a business may have a privacy interest unrelated to proprietary information: it could be argued that the simple disclosure of the existence of an assessment could be embarrassing, since it might imply delinquency or tax evasion. The Department of Revenue tells me that a great many assessments against taxpayers are reduced during the review process within the department. That is, the taxpayer may prevail, before the department, on one or more issues at the informal conference

level, after a formal conference, or after a hearing. A taxpayer who is making a legitimate, good faith (and perhaps successful) argument that an assessment is not due is in a very different position from one against whom the issues have been decided and who still does not pay. If the Department were to disclose the amounts of contested assessments, taxpayers would likely challenge that disclosure as an invasion of a privacy interest.

The test for interests protected under the Alaska Constitution's privacy amendment is that a person have an actual expectation of privac and that the expectation be one society is prepared to recognize as reasonable. Hilbers, supra, 611 P.2d at 42. If a privacy interest is implicated, then that interest must be balanced against the public interest in disclosure. At least as far as certain competitive information is concerned, it is likely that our court would hold that the privacy interest in non-disclosure is fairly strong -- at least unless and until a taxpayer is actually delinquent. Your request for an opinion does not articulate any particular legislative need-to-know, or public interest, against which to balance this privacy interest. As a result, it is difficult to predict how our court would balance the competing interests.

The Department of Revenue has expressed concern that the simple disclosure of the amount of an assessment might reveal sensitive information about taxpayers. As an example, the fisheries business tax involves a very simple calculation, and revealing a taxpayer's liability under that act would be tantamount to revealing the volume of fish processed by the taxpayer. Similarly, in the oil industry, it is possible that disclosure of assessments could allow one taxpayer to learn valuable information about the transportation costs or valuation practices of its competitors.

It is possible that some disclosure could be made to the legislature that would not reveal sensitive or proprietary information. At least in the case of a large, publicly held corporation, whose shareholders are often entitled to tax records (see, 26 U.S.C. 6103(e)), an expectation of privacy with regard to at least some tax information might not be very strong, and might be outweighed by legitimate public interest. However, in view of the potential for the inadvertent revelation of sensitive information, I believe that the legislature should approach any amendment to the non-disclosure statute with caution.

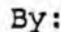
One final consideration should be discussed. The state presently receives tax information from the United States -- and is authorized to receive information from other states -- so long as that information is kept strictly confidential. Federal regulations adopted under 26 U.S.C. 6103 authorize the IRS to terminate the exchange of information if the state makes unauthorized disclosure of federal tax return information received under the agreement. The Department of Revenue is concerned that the disclosure contemplated by this opinion request may jeopardize the exchange agreement with the IRS.

In conclusion, without an articulation of the public purpose to be accomplished by the proposed changes, it is impossible to assess whether our supreme court would find a violation of the state's privacy amendment. It is possible that a fairly strong public purpose would outweigh the privacy interests of at least some types of corporate taxpayers, with respect to at least some types of information. If this legislation is pursued, the public purpose sought to be accomplished should be clearly articulated. It then would be advisable to limit an amendment to AS 43.05.230 to the narrowest range of situations that would meet the legislature's need for information. The Department of Revenue should be consulted concerning the potential for inadvertent disclosure of proprietary information. Legislation might be limited to public corporations, and/or to assessments in excess of a certain dollar amount, or in excess of a certain fraction of the taxpayer's reported income. In any event, disclosure should be limited to the name of the taxpayer and the amount of the assessment, and not include the underlying data or calculations that went into making the assessment, since that information is often proprietary.

Please let me know if our office can be of any further assistance.

Sincerely,

HAROLD M. BROWN
ATTORNEY GENERAL



By:
Deborah Vogt
Assistant Attorney General

DV:jf

STATE OF ALASKA

AUDIT DIVISION
POUCH W
JUNEAU ALASKA 99811

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

January 31, 1984

Robert D. Heath
Commissioner
Department of Revenue
Pouch S
Juneau, Alaska 99811

RECEIVED
ALASKA DEPARTMENT OF REVENUE
JAN 31 1984
OFFICE OF THE COMMISSIONER

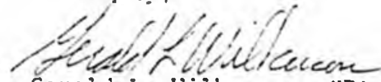
Dear Commissioner Heath:

This is to reaffirm the working relationship under which the Division of Legislative Audit will have access to confidential information during the course of its financial compliance audit of the Alaska Department of Revenue's Fiscal Year 1983 operations.

The inter-agency agreement between the Alaska Department of Revenue and the Division of Legislative Audit dated December 1, 1980, permits the Division of Legislative Audit access to confidential records for audit purposes only, and provides that no confidential information shall be released in any audit reports or other reports, or by verbal communication.

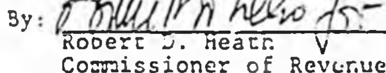
If you agree to continue this agreement, please sign below and return the original copy of this letter to us.

Sincerely,

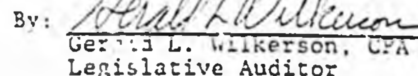


Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

Department of Revenue

By: 
Robert D. Heath
Commissioner of Revenue

Division of Legislative Audit

By: 
Gerald L. Wilkerson, CPA
Legislative Auditor

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING
JUNEAU, ALASKA 99811

April 7, 1982

Joseph K. Donohue
Deputy Commissioner -
  Taxation
Department of Revenue
Pouch S
Juneau, Alaska 99811

Dear Commissioner Donohue:

This is to reaffirm the working relationship under which the Division of Legislative Audit will have access to confidential information during the course of its audit of the shared taxes program in the Alaska Department of Revenue.

The inter-agency agreement between the Alaska Department of Revenue and the Division of Legislative Audit dated December 1, 1980, permits the Division of Legislative Audit access to confidential records for audit purposes only, and provides that no confidential information shall be released in any audit reports or other reports, or by verbal communication.

If you agree to continue this agreement please sign below and return the original copy of this letter to us.

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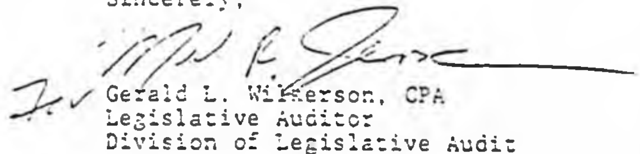
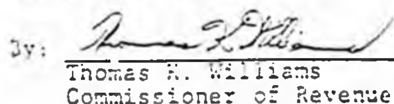
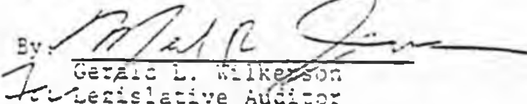


Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

Department of Revenue

By: 
Thomas H. Williams
Commissioner of Revenue

Division of Legislative Audit

By: 
Gerald L. Wilkerson
Legislative Auditor

INTER-AGENCY AGREEMENT

This agreement entered into this 2nd day of December, 1980, is made by and between the Department of Revenue of the State of Alaska, herinafter referred to as the "Department", and the Legislative Audit Division hereinafter referred to as the "Division."

WHEREAS, under AS 24.20.271 the Division is empowered to have access at all times to the books, accounts, reports, or other records, whether confidential or not, of every state agency.

WHEREAS the Department is prohibited from disclosing or permitting the disclosure of tax information under AS 09.25.100 and AS 43.05.230.

WHEREAS tax information is required to be kept confidential under AS 09.25.100 and AS 43.05.230 and

WHEREAS the Attorney General has determined in an Opinion dated November 21, 1972 which opinion was reaffirmed orally on November 27, 1980 that the conflicting responsibilities of the Department and the Division may be reconciled in a carefully drawn set of procedures regarding the audit of the Department by the Division and its access to Department files.

NOW THEREFORE the Department and the Division agree as follows:

I. The Department agrees that the auditors of the Division may have access to the records and files of the Department when it is conducting an audit of the Department of Revenue and at no other time.

2. If the Division in the conduct of its audit determines that it must have access to information made confidential by AS 43.05.230 and AS 09.25.100, it will select a large sample of files on a random basis for use in the audit.

3. The Department will designate those persons of the department who shall be responsible for locating and delivering files to the auditors of the Division and the Division will obtain files and records only through these designated persons.

4. The Department shall provide the sample of files for the auditors in a secured area within the offices of the department of Revenue.

5. The Department shall provide a lockable file cabinet in the Department of Revenue's secured file area for the purpose of storing the Division work papers, records, and files used in the audit. The Divison shall be given all keys to that cabinet and the cabinet shall remain in the possession of the Department.

II. RECORDS

1. All records, files, work papers, and other material which disclose the particulars of the taxpayer shall not be removed from the possession of the Department.

2. All records, files, work papers, and other materials used by the Division in its audit shall be kept in a locked file cabinet in the Department's secure file area of which the Division has the only keys.

3. After an audit has been completed, the Division and the Department shall go through all files, records, and

work papers to determine those items which may be removed from the Department without disclosing the particulars of a taxpayer. The Department and the Division shall excise all identifying particulars from the work papers and supporting documents which are removed. The Commissioner of the Department of Revenue shall make the final determination on what materials may be removed from the Department; however, all Division work papers not containing taxpayer identifying information may be removed from the Department to be held by the Divison.

III. NONDISCLOSURE OF INFORMATION

The Division agrees that it will not disclose the particulars of any taxpayer's tax return or report which are revealed during an audit. Confidential information shall not be included in any report, statement or other disclosure of the Divison or its employees and shall not be disclosed to anyone outside the Division including members of the Legislative Budget and Audit Committee. As stipulated in the Legislative Budget and Audit Committee policies and procedures, the Division will notify the Committee that an audit is scheduled that will include information considered confidential by law. The Division will obtain written waivers from each member of the Committee which will allow the Division to withhold all confidential information from the Committee. The Department may request proof of such waivers prior to releasing confidential records and particulars.

IV. DECLARATIONS OF CONFIDENTIALITY BY EMPLOYEES OF THE DIVISION

All employees of the Division conducting an audit or having access to information of the audit shall sign a confidentiality statement provided by the Department which shall remain on file with the Department.

DEPARTMENT OF REVENUE

By: [signature]
Thomas K. Williams
Commissioner of Revenue

DIVISION OF LEGISLATIVE AUDIT

By: [signature]
Gerald L. Wilkerson
Legislative Audito

APPROVED:

WILSON L. CONDON
ATTORNEY GENERAL

By: [signature]
Susan Burke
Assistant Attorney General

CONFIDENTIALITY STATEMENT

I acknowledge that I have read and understand the following and that I will be subject to any penalties provided by law for breach of this trust.

> In accordance with AS 43.05.230 and Internal Revenue Code Section 7213, it is in violation of Alaska Statutes and federal code for any person having information relating to a taxpayer which is obtained during the performance of duties in the Department of Revenue to discuss this information with anyone not having a need and legal right to know.

____
Signature

1-16-84
Date

RECEIVED
ALASKA DEPARTMENT OF REVENUE

JAN 26 1984

OFFICE OF THE COMMISSIONER

STATE OF ALASKA

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH S
JUNEAU, ALASKA 99811
PHONE: (907) 465-2300

January 22, 1986

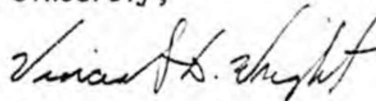
The Honorable Sam Cotten
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Cotten:

The enclosed information pertains to your request that I provide you with the statutory authority that precludes my releasing details about payments by company relative to the TAPS case.

The two statutes are Section 09.25.100, which you cited at yesterday's hearing, and the other is Section 43.05.230.

Sincerely,



Vincent D. Wright
Chief of Research

VDW:mkw
86-17

Enclosure

04-D2LH

REPRESENTATIVE
SAM COTTEN
DISTRICT 15

P.O. BOX 296, EAGLE RIVER, AK 99577
POUCH V, JUNEAU, AK 99811

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

January 27, 1986

Vince Wright
Dept. of Revenue
MS 0400

Dear Mr. Wright,

Thank you for the copies of the statutes. As you are well aware, I own a set of Alaska Statutes and therefore do not need you to go to the expense and trouble of copying these sections.

I asked for some information about money coming to the State of Alaska from SOHIO in relation to the TAPS settlement.

Your response indicates that you made no effort to cooperate with the House Finance committee.

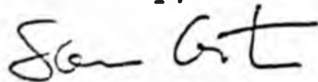
We understand the law, we don't want you to break it by exposing confidential information.

I expected that whatever "statistics presented in a manner that prevents the identification of particular reports and items[1] (or returns[2])" would be presented rather than using the valuable time of your employees to needlessly operate a xerox machine.

In regard to your letter of January 24 on the subject of tax reductions, I did not ask for the effect of elimination of the ELF, rather the dollar amount of the reduction as a result of the existing law.

I conclude that those numbers are $179 million and $169 million respectively for FY 88 and FY 89. Please advise if I'm not correct.

Sincerely,



Rep. Sam Cotten

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1. AS.09.25.100
2. AS.43.05.230(e)

cc Jim Ayers, Director of Legislative Relations
Mary Nordale, Commissioner, Dept. of Revenue
House Finance Committee Members

from changing that factor. Mr. Logsdon said it would lower the effective tax rate from approximately 14% to 11%.

Representative Cotten asked that the Department of Revenue provide the members with the amount involved with the tax reductions they anticipate for Prudhoe in FY 88. Mr. Logsdon said he would get those figures to the committee members. Representative Cotten asked if Sohio was making payments prior to their settlement. Mr. Wright said money was coming in from Sohio. Mr. Wright said that would relate partially to the refund and legal expenses. Mr. Logsdon explained that the people who produce and ship the oil were not necessarily one in the same. He said the companies who produce oil on the North Slope purchase transportation services from other companies. He said with regard to the settlement, it was the pipeline owners who settled, not the producers.

Representative Cotten asked that a memo be prepared for the committee members describing what information is available to them according to statute and what is confidential information.

Representative Cotten referenced news paper articles which state future oil prices looking disastrous and asked what the best way to evaluate their statements would be. Mr. Logsdon said they should watch for announcements regarding Domestic oil producers lowering their posted prices. He said those normally translate into dollar for dollar reductions in North Slope oil.

Senator Vic Fischer referenced the chart provided by Mr. Logsdon which projected a stable revenue flow after 1988 and asked if that was based on inflated dollars. Mr. Logsdon said they were nominal dollars and the purchasing power would decline.

Chairman Adams asked Mr. Wright if they would be providing the Administration with a monthly revenue forecast because of the daily price fluctuations, verses the normal quarterly revenue forecast. Mr. Wright said he did not feel that would be necessary at this point in time, but if they did supply them with additional information, they would also provide the finance committee members with the same information. Chairman Adams referenced a recent article in Business World magazine which stated Sohio was writing off approximately $1.1 billion and asked if that would affect the March revenue projection. Mr. Wright informed members that had already been taken into consideration and was included in their calculations.

Representative Ringstad referenced the chart on attachment #3 and asked, from a budget point of view, if it was the Department's suggestion that the legislature would have approximately $2 billion a year to spend from 1988 through 1992. Mr. Wright said that was correct. Mr. Logsdon stated if they went with the 30% case, the number would be lower in the long run. He said the 30% number would become a lot lower than the average number the

STATE OF ALASKA

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH S
JUNEAU, ALASKA 99811
PHONE: (907) 465-2300

January 24, 1986

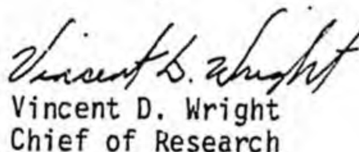
The Honorable Sam Cotten
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Cotten:

Per your request, I have examined the revenue impact of eliminating the ELF from North Slope severance tax calculations. Based on the December 85 mean case forecast, elimination of the ELF will yield approximately 244 million additional dollars from North Slope production in FY 1988 of which approximately 179 million comes from the Sadlerochit formation.

Similarly, using the December 85 mean case forecast, elimination of the ELF will yield approximately 258 million additional dollars from North Slope production in FY 1989 of which approximately 169 million comes from the Sadlerochit formation.

Sincerely,



Vincent D. Wright
Chief of Research

VDW:AZ:mkw
86-21

04-D2LH

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF REVENUE

POUCH S
JUNEAU, ALASKA 99811
PHONE: (907) 465-2300

OFFICE OF THE COMMISSIONER

January 22, 1986

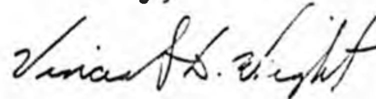
The Honorable Sam Cotten
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Cotten:

The enclosed information pertains to your request that I provide you with the statutory authority that precludes my releasing details about payments by company relative to the TAPS case.

The two statutes are Section 09.25.100, which you cited at yesterday's hearing, and the other is Section 43.05.230.

Sincerely,



Vincent D. Wright
Chief of Research

VDW:mkw
86-17

Enclosure

04-D2LH

to the money, instrument, or property, or the person waives it. If the objection is to the amount of money, the terms of the instrument, or the amount or kind of property, the person shall specify the amount, terms, or kind which the person requires, or is precluded from objecting later. This section shall not be construed to modify or change in any manner corresponding provisions of the Uniform Commercial Code (AS 45.01 — 45.09). (§ 3.20 ch 101 SLA 1962)

NOTES TO DECISIONS

It is not necessary to tender cash. Ward v. Miller, 13 Alaska 752 (1952).

And a check, unobjected to, would constitute a proper tender. Ward v. Miller, 13 Alaska 752 (1952).

Sec. 09.25.100. Disposition of tax information. Information in the possession of the Department of Revenue which discloses the particulars of the business or affairs of a taxpayer or other person is not a matter of public record, except for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, or prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information which may assist in the collection of delinquent taxes. (§ 3.21 ch 101 SLA 1962)

Collateral references. — Validity, construction, and effect of state laws requiring state officials to protect confidentiality of income tax returns and information. 1 ALR4th 959.

Sec. 09.25.110. Inspection and copies of public records. Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records and are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of costs a certified copy of the public record. (§ 3.22 ch 101 SLA 1962)

Cross references. For proof of public records, see Evid. R. 1005; for management and preservation of public records, see AS 40.21.

(e) A penalty imposed by this section shall be collected at the same time, in the same manner, and as a part of the original tax. However, if the original tax is paid before neglect or fraud is discovered, the penalty shall be collected in the same manner as the original tax. Interest may not be collected on a penalty imposed by this section. (§ 2 ch 166 SLA 1976; am § 1 ch 113 SLA 1980; am § 1 ch 39 SLA 1982)

Effect of amendments. — The 1980 amendment, in subsection (a), inserted "at the time or times required by law or regulation" in the first sentence and deleted the former third sentence, which read: "The penalty shall be collected at the same time, in the same manner and as a part of the original tax; but if the original tax is paid before the neglect is discovered, the penalty shall be collected in the same manner as the original tax", and added subsections (b)-(e).

The 1982 amendment, added the present third sentence of subsection (a).

Sec. 43.05.225. Interest on taxes. Unless otherwise provided, when a tax levied in this title becomes delinquent it bears interest at the rate of 12 percent a year. (§ 2 ch 166 SLA 1976; am § 2 ch 82 SLA 1982)

Effect of amendments. — The 1982 amendment increased the rate of interest from eight percent to 12 percent.

Sec. 43.05.230. Disclosure of tax returns and reports. (a) It is unlawful for a current or former officer, employee, or agent of the state to divulge the amount of income or the particulars set out or disclosed in a report or return made under this title, except

(1) in connection with official investigations or proceedings of the department, whether judicial or administrative, involving taxes due under this title;

(2) in connection with official investigations or proceedings of the child support enforcement agency, whether judicial or administrative, involving child support obligations imposed or imposable under AS 25 or AS 47;

(3) as provided in AS 38.05.036 pertaining to audit functions; and

(4) as otherwise provided in this section.

(b) The department, upon written request, shall furnish to the taxpayer a copy of the taxpayer's tax return upon payment of a fee of $1 per page.

(c) The department may permit the proper officer of the United States or of a state, territory or possession of the United States or of the Dominion of Canada or of a province or territory of Canada, or the officer's authorized representative, to inspect tax returns or reports filed with the department, or may furnish to the officer or representative a copy of the tax return, if the other jurisdiction grants substantially similar privileges to the department or its representative or to counsel for the state; and if the department determines that the

other jurisdiction provides adequate safeguards for the confidentiality of the returns and reports, and that the returns and reports will be used for tax purposes only. The department may also permit the employment security division of the Alaska Department of Labor to inspect tax returns or reports filed with the department or may furnish a copy of the tax returns for tax purposes only.

(d) The commissioner of revenue may furnish to the Multistate Tax Commission or other authorized agent information contained in the tax returns, reports, related schedules and documents filed under an audit or investigation of a multistate business made by the department. This information may be furnished for tax purposes only. The Multistate Tax Commission or other authorized agent may make the information available to the tax officials of other states, the District of Columbia, the United States and its territories for tax purposes only.

(e) Nothing in this section prohibits the publication of statistics so classified as to prevent the identification of particular returns or reports or the publication of delinquent lists showing the names of taxpayers who have failed to pay their taxes at the time and in the manner provided by law, together with other relevant information which in the opinion of the department may assist in the collection of delinquent taxes.

(f) A wilful violation of the provisions of this section is punishable by a fine of not more than $5,000, or by imprisonment for not more than two years, or by both.

(g) The information contained in a license issued by the commissioner of revenue under AS 43.50, 43.60, 43.65, 43.70, and 43.75 is public information. (§ 2 ch 166 SLA 1976; am § 32 ch 126 SLA 1977; am § 5 ch 61 SLA 1980; am §§ 2, 3 ch 113 SLA 1980)

Revisor's notes. — The two 1980 amendments have been reconciled.

Cross references. — For purpose of 1977 amendatory act, see § 1, ch. 126, SLA 1977 in the Temporary and Special Acts.

Effect of amendments. — The first 1980 amendment rewrote subsection (a).

The second 1980 amendment substituted "a current or former" for "an" preceding "officer" near the middle of subsection (a) as it existed prior to the first 1980 amendment and added subsection (g).

Opinions of attorney general. — Division of audit to have access to records of state agencies, whether confidential or not. 1972 Op. Att'y Gen., issued under former AS 43.20.190.

A legislative auditor may not examine confidential records on file for state income tax returns and wage information submitted by employees and employers to the Department of Labor in connection with the administration of the State Employment Security Act to determine if persons receiving assistance from the Department of Health and Social Services under their Adult Public Assistance and Aid to families with dependent children were eligible. Such data is within the ambit of protection intended to be afforded the right of privacy under § 22, art. I, of the Alaska Constitution. 1972 Op. Att'y Gen., issued under former AS 43.20.190.

NOTES TO DECISIONS

Constitutionality. — Given the lack of connection between most information sought on a tax return and a person's more intimate concerns and the confidentiality protections afforded by this section, the state's interest in the implementation of its tax system justifies and outweighs any privacy rights violated by compulsion to fill out tax forms or testify before a revenue agent. State, Dep't of Revenue v. Oliver, Sup. Ct. Op. No. 2441 (File Nos. 4755, 5049), 636 P.2d 1156 (1981).

Subsection (c) provides adequate protection for an invasion of privacy rights that might occur as the result of the implementation of the state tax system. Cogan v. State, Dep't of Revenue, Sup. Ct. Op. No. 2597 (File No. 6528), 657 P.2d 396 (1983).

An individual's privacy rights were not violated by the state's computation of tax liability based on W-2 forms after that person failed to file a tax return because the state did not ask the person anything but rather simply imposed a tax based on available information. Cogan v. State, Dep't of Revenue, Sup. Ct. Op. No. 2597 (File No. 6528), 657 P.2d 396 (1983).

Cited in State, Dep't of Revenue v. Oliver, Sup. Ct. Op. No. 2441 (File Nos 4755, 5049), 636 P.2d 1156 (1981).

Collateral references. — Validity, construction, and effect of state laws requiring public officials to protect confidentiality of income tax returns or information, 1 ALR4th 959.

Sec. 43.05.240. Taxpayer remedies. (a) A person aggrieved by the action of the department in fixing the amount of a tax or in imposing a penalty may apply to the department within 60 days from the date of mailing the notice required to be given to the person by the department, giving notice of the grievance, and requesting an informal conference. At the conference the person aggrieved may present arguments and evidence relevant to the amount of tax or penalty due the state. If the department determines that a correction is warranted, the department shall make the correction.

(b) A person aggrieved by the action of the department in fixing the amount of a tax or in imposing a penalty may apply to the department and request a formal hearing

(1) in place of the informal conference provided for in (a) of this section, within 60 days from the date of mailing the notice required to be given to the person by the department; or

(2) within 30 days after decision resulting from an informal conference.

(c) At the formal hearing the department may subpoena witnesses and may administer oaths and make inquiries necessary to determine the amount of the tax or penalty due the state. The person aggrieved may present arguments and evidence relevant to the amount of the tax or penalty due the state. If the department determines that a correction is warranted, the department shall make the correction.

(d) Within 30 days after the formal hearing and decision by the

Statement of
EXXON COMPANY, U.S.A.

Judiciary Committee
House Bill 502

Alaska House of Representatives

March 18, 1986

Exxon is opposed to House Bill 502. Our concerns relate to the possible abrogation of the separation of powers provided by the State's constitution; the creation of a potential conflict between the bill's penalty provision and the legislative immunities provided in the constitution; and the provision for a potential abuse of power by the legislature. The latter relates to language in the bill that allows information gathered through the State's tax authority to be used to further the State's role as a business competitor. It is also our view that the bill could be a significant deterrent to the timely resolution of tax disputes.

Separation of Powers

The writers of the Alaska Constitution followed the traditional framework of the U. S. Constitution and distributed the power of government in relatively equal parts to the Executive, Legislative and Judicial branches. The disclosure to the Legislative Branch of proprietary tax information used by the Executive Branch to enforce the tax laws could upset this balance between the Executive and Legislative branches, thereby violating the Alaska Constitution.

Legislative Immunities

The penalty provisions of HB-502 also create conflict with the section of the State's Constitution relating to legislative immunity. On the one hand, the Constitution provides that "Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties ..." On the other, HB-502 would provide a penalty of a $5,000 and/or two years in jail for willful disclosure of tax information received under the bill's provisions. If the constitutional immunity prevails, this penalty cannot be enforced against a legislator. If the bill's penalty prevails, the legislative immunity intended to provide free and open debate is compromised.

Business Considerations

Alaska's position is unique since the state is both a governmental body with the power to tax, and a business competitor in crude oil markets. Currently, the separation of powers and confidentiality rules within the Department of Revenue adequately guard competitively sensitive information provided in the tax returns and audits of oil producing companies. This information includes customer lists, selling prices and contract terms that are normally proprietary. Dissemination of this information to legislators, legislative staff and even contract employees as provided by HB-502 would risk the public release of this information and competitive damage to the taxpayer. Also, since almost all taxpayer information deals with third parties (both customers and suppliers), the potential harm from disclosure radiates far beyond the oil producer/taxpayer to third parties with no direct relationship to the tax under dispute.

House Bill 502 could do irreparable harm to the State's open relationship with its taxpayers and in the long run, cost the state money by chilling negotiations for settlement of tax payments under dispute. While instances of disputed taxes are relatively few in number, most are made inevitable by differing interpretations of complex and often confusing tax regulations and accounting procedures. When they occur, a negotiated resolution of the issue is normally in the best interest of both the government and the taxpayer.

Conclusion

There is considerable constitutional question over the provisions of HB-502. In addition, the disclosure requirements would significantly deter negotiated settlements which are often to the advantage of both the State and the taxpaye . Accordingly, we ask the Committee to reject HB-502.

3/17/86

HALVONIK, CHARLES C. MARSON, A. L. WIRIN, FRED OKRAND, and LAWRENCE R. SPERBER filed brief for American Civil Liberties Union and American Civil Liberties Unions of Northern and Southern California, as amici curiae.

Nos. 71-1017 AND 71-1026

Mike Gravel, United States Senator, 71-1017 *v.* United States. United States, Petitioner, 71-1026 *v.* Mike Gravel, United States Senator.	On Writs of Certiorari to the United States Court of Appeals for the First Circuit.

[June 29, 1972]

Syllabus

A United States Senator read to a subcommittee from classified documents (the Pentagon Papers), which he then placed in the public record. The press reported that the Senator had arranged for private publication of the Papers. A grand jury investigating whether violations of federal law were implicated, subpoenaed an aide to the Senator. The Senator, as an intervenor, moved to quash the subpoena, contending that it would violate the Speech or Debate Clause to compel the aide to testify. The District Court denied the motion but limited the questioning of the aide. The Court of Appeals affirmed the denial but modified the protective order, ruling that congressional aides and other persons may not be questioned regarding legislative acts and that, though the private publication was not constitutionally protected, a common-law privilege similar to the privilege of protecting executive officials from liability for libel, see *Barr* v. *Matteo*, 360 U. S. 564, barred questioning the aide concerning such publication. *Held:*

1. The Speech or Debate Clause applies not only to a Member of Congress but also to his aide, insofar as the aide's conduct would be a protected legislative act if performed by the Member himself. *Kilbourn* v. *Thompson*, 103 U. S. 168; *Dombrowski* v. *Eastland*, 387 U. S. 82; and *Powell* v. *McCormack*, 395 U. S. 486, distinguished.

2. The Speech or Debate Clause does not extend immunity to the Senator's aide from testifying before the grand jury about the alleged arrangement for private publication of the Pentagon Papers, as such publication had no connection with the legislative process.

3. The aide, similarly, had no nonconstitutional testimonial privilege from being questioned by the grand jury in connection with its inquiry into whether private publication of the Papers violated federal law.

4. The Court of Appeals' protective order was overly broad in enjoining interrogation of the aide with respect to any act, "in the broadest sense," that he performed within the scope of his employment, since the aide's immunity extended only to legislative acts as to which the Senator would be immune. And the aide may be questioned by the grand jury about the source of classified documents in the Senator's possession, as long as the questioning implicates no legislative act. The order in other respects would suffice if it forbade questioning the aide or others about the conduct or motives of the Senator or his aides at the subcommittee meeting; communications between the Senator and his aides relating to that meeting or any legislative act of the Senator; or steps of the Senator or his aides preparatory for the meeting, if not relevant to third-party crimes

455 F. 2d 753, vacated and remanded.

WHITE, J., wrote the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion dissenting in part. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

Opinion of the Court by MR. JUSTICE WHITE, announced by MR. JUSTICE BLACKMUN.

These cases arise out of the investigation by a federal grand jury into possible criminal conduct with respect to the release and publication of a classified Defense Department study entitled "History of the United States Decision-Making Process on Viet Nam Policy." This document, popularly known as the "Pentagon Papers," bore a Defense security classification of Top Secret-Sensitive. The crimes being investigated included the retention of public property or records with intent to convert (18 U. S. C. § 641), the gathering and transmitting of national defense information (18 U. S. C. § 793), the concealment or removal of public records or documents (18 U. S. C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U. S. C. § 371).

Among the witnesses subpoenaed were Leonard S. Rodberg, an assistant to Senator Mike Gravel of Alaska and a resident fellow at the Institute of Policy Studies, and Howard Webber, Director of M. I. T. Press. Senator Gravel, as intervenor,[1] filed motions to quash the subpoenas and to require the Government to specify the particular questions to be addressed to Rodberg.[2] He asserted that requiring these witnesses to appear and testify would violate his privilege under the Speech or

[1] The District Court permitted Senator Gravel to intervene in the proceeding on Dr. Rodberg's motion to quash the subpoena ordering his appearance before the grand jury and accepted motions from Gravel to quash the subpoena and to specify the exact nature of the questions to be asked Rodberg. The Government contested Gravel's standing to appeal the trial court's disposition of these motions on the ground that, had the subpoena been directed to the Senator, he could not have appealed from a denial of a motion to quash without first refusing to comply with the subpoena and being held in contempt. *United States* v. *Ryan*, 402 U. S. 530 (1971); *Cobbledick* v. *United States*, 309 U. S. 323 (1940). The Court of Appeals, *United States* v. *Doe*, 455 F. 2d 753, 756-757 (CA1 1972), held that because the subpoena was directed to third parties, who could not be counted on to risk contempt to protect intervenor's rights, Gravel might be "powerless to avert the mischief of the order" if not permitted to appeal, citing *Perlman* v. *United States*, 247 U. S. 7, 13 (1918). The United States does not here challenge the propriety of the appeal.

[2] Dr. Rodberg, who filed his own motion to quash the subpoena directing his appearance and testimony, appeared as *amicus curiae* both in the Court of Appeals and this Court. Technically, Rodberg states, he is a party to 71-1026, insofar as the Government appeals from the protective order entered by the District Court. However, since Gravel intervened, Rodberg does not press the point. Brief of Leonard S. Rodberg as *Amicus Curiae* 2, n. 2.

Debate Clause of the United States Constitution, Art. I, § 6, cl. 1.

It appeared that on the night of June 29, 1971, Senator Gravel, as Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee and there read extensively from a copy of the Pentagon Papers. He then placed the entire 47 volumes of the study in the public record. Rodberg had been added to the Senator's staff earlier in the day and assisted Gravel in preparing for and conducting the hearing.[3] Some weeks later there were press reports that Gravel had arranged for the papers to be published by Beacon Press[4] and that members of Gravel's staff had talked with Webber as editor of M. I. T. Press.[5]

The District Court overruled the motions to quash and to specify questions but entered an order proscribing certain categories of questions. *United States* v. *Doe*, 332 F. Supp. 930 (Mass. 1971). The Government's contention that for purposes of applying the Speech or Debate Clause the courts were free to inquire into the regularity of the subcommittee meeting was rejected.[6] Because the Clause protected all legislative acts, it was held to shield from inquiry anything the Senator did at the subcommittee meeting and "certain acts done in preparation therefor." *Id.*, at 935. The Senator's privilege also prohibited "inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *Id.*, at 937–938.[7] The trial court, however, held the private republication of the documents was not privileged by the Speech or Debate Clause.[8]

The Court of Appeals affirmed the denial of the motions to quash but modified the protective order to reflect its own views of the scope of the congressional privilege. *United States* v. *Doe*, 455 F. 2d 753 (CA1 1972). Agreeing that Senator and aide were one for the purposes of the Speech or Debate Clause and that the Clause foreclosed inquiry of both Senator and aide with respect to legislative acts, the Court of Appeals also viewed the privilege as barring direct inquiry of the Senator or his aide, but not of third parties, as to the sources of the Senator's information used in performing legislative duties.[9] Although it did not consider private republication by the Senator or Beacon Press to be protected by the Constitution, the Court of Appeals apparently held that neither Senator nor aide could be questioned about it because of a common law privilege akin to the judicially created immunity of executive officers from liability for libel contained in a news release issued in the course of their normal duties. See *Barr* v. *Matteo*, 360 U. S. 564 (1959). This privilege, fashioned by the Court of Appeals, would not

[3] The District Court found "that, 'as personal assistant to movant [Gravel], Dr. Rodberg assisted in preparing for disclosure and subsequently disclosing to movant's colleagues and constitutents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.'" *United States* v. *Doe*, 332 F. Supp. 930, 932 (Mass. 1971).

[4] Beacon Press is a division of the Unitarian Universalist Association, which appeared here as *amicus curiae* in support of the position taken by Senator Gravel.

[5] Gravel so alleged in his motion to intervene in the Webber matter and to quash the subpoena ordering Webber to appear and testify. App. 15–18.

[6] The Government maintained that Congress does not enjoy unlimited power to conduct business and that judicial review has often been exercised to curb extra-legislative incursions by legislative committees, citing *Watkins* v. *United States*, 354 U. S. 178 (1957); *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (CADC 1970), at least where such incursions are unrelated to a legitimate legislative purpose. It was alleged that Gravel had "convened a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), for the purpose of reading the documents and thereafter placed all unread portions in the subcommittee record, with Dr. Rodberg soliciting publication after the meeting." App. 9. The District Court rejected the contention: "Senator Gravel has suggested that the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting inquiry into matters of legislative purpose and operations." *United States* v. *Doe*, 332 F. Supp. 930, 935 (Mass. 1971). Cases such as *Watkins*, *supra*, were distinguished on the ground that they concerned the power of Congress under the Constitution: "It has not been suggested by the government that the subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action. Also, the individual rights at stake in these proceedings are not those of a witness before a congressional committee or of a subject of a committee's investigation, but only those of a congressman and member of his personal staff who claim 'intimidation by the executive.'" *Id.*, at 736.

[7] The District Court thought that Rodberg could be questioned concerning his own conduct prior to joining the Senator's staff and concerning the activities of third parties with whom Rodberg and Gravel dealt. *United States* v. *Doe*, 332 F. Supp. 930, 934 (Mass. 1971).

[8] The protective order entered by the District Court provided as follows:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

[9] The Court of Appeals thought third parties could be questioned as to their own conduct regarding the Pentagon Papers, "including their dealing with intervenors or his aides." *United States* v. *Doe*, 455 F. 2d 753, 761 (CA1 1972). The court found no merit in the claim that such parties should be shielded from questioning under the Speech or Debate Clause concerning their own wrongful acts, even if such questioning may bring the Senator's conduct into question. *Id.*, at 758, n. 2.

protect third parties from similar inquiries before the grand jury. As modified by the Court of Appeals, the protective order to be observed by prosecution and grand jury was:

> "(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.
>
> "(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

The United States petitioned for certiorari challenging the ruling that aides and other persons may not be questioned with respect to legislative acts and that an aide to a Member of Congress has a common-law privilege not to testify before a grand jury with respect to private republication of materials introduced into a subcommittee record. Senator Gravel also petitioned for certiorari seeking reversal of the Court of Appeals insofar as it held private republication unprotected by the Speech or Debate Clause and asserting that the protective order of the Court of Appeals too narrowly protected against inquiries that a grand jury could direct to third parties. We granted both petitions. 405 U. S. 916 (1972).

I

Because the claim is that a Member's aide shares the Member's constitutional privilege, we consider first whether and to what extent Senator Gravel himself is exempt from process or inquiry by a grand jury investigating the commission of a crime. Our frame of reference is Art. I, § 6, cl. 1, of the Constitution:

> "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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 last sentence of the clause provides Members of Congress with two distinct privileges. Except in cases of "Treason, Felony and Breach of the Peace," the clause shields Members from arrest while attending or traveling to and from a session of their House. History reveals, and prior cases so hold, that this part of the clause exempts Members from arrest in civil cases only. "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." *Long* v. *Ansell*, 293 U. S. 76, 83 (1934) (footnote omitted). "Since . . . the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit . . . ." *Williamson* v. *United States*, 207 U. S. 425, 446 (1908).[10] Nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters, *Long* v. *Ansell*, *supra*, at 82–83, or as a witness in a criminal case. "The constitution gives to every man, charged with an offense, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a *subpoena*, in such cases." *United States* v. *Cooper*, 4 Dall. 341 (1800) (per Chase, J., sitting on Circuit). It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. *Williamson* v. *United States*, *supra*; cf. *Burton* v. *United States*, 202 U. S. 344 (1906). Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 91-2 437 (1971).

In recognition, no doubt, of the force of this part of Clause 6, Senator Gravel disavows any assertion of general immunity from the criminal law. But he points out that the last portion of Clause 6 affords Members of Congress another vital privilege—they may not be questioned in any other place for any speech or debate in either House. The claim is not that while one part of Clause 6 generally permits prosecutions for treason, felony and breach of the peace, another part nevertheless broadly forbids them. Rather, his insistence is that the Speech or Debate Clause at the very least pro-

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[10] Williamson, United States Congressman, had been found guilty of conspiring to commit subornation of perjury in connection with proceedings for the purchase of public land. He objected to the court passing sentence upon him and particularly protested that any imprisonment would deprive him of his constitutional right to "go to, attend at and return from the ensuing session of Congress." *Williamson* v. *United States*, 207 U. S. 425, 432–433 (1908). The Court rejected the contention that the Speech or Debate Clause freed legislators from accountability for criminal conduct.

tects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible. The Speech or Debate Clause was designed to assure a coequal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting. Our decision is made easier by the fact that the United States appears to have abandoned whatever position it took to the contrary in the lower courts.

Even so, the United States strongly urges that because the Speech or Debate Clause confers a privilege only upon "Senators and Representatives," Rodberg himself has no valid claim to constitutional immunity from grand jury inquiry. In our view, both courts below correctly rejected this position. We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be "treated as one," *United States* v. *Doe*, 455 F. 2d 753, 761 (CA1 1972); or, as the District Court put it: The "Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *United States v. Doe*, 332 F. Supp. 930, 937–938 (Mass. 1971). Both courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' 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, *United States* v. *Johnson*, 383 U. S. 169, 181 (1966)—will inevitably be diminished and frustrated.

The Court has already embraced similar views in *Barr* v. *Matteo*, 360 U. S. 564 (1959), where in immunizing the Acting Director of the Office of Rent Stabilization 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 to those of cabinet rank. As stated by Mr. Justice Harlan, the "privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id.*, at 572–573 (footnote omitted).

It is true that the clause itself mentions only "Senators and Representatives," but prior cases have plainly not taken a literalistic approach in applying the privilege. The clause also speaks only of "Speech or Debate," but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. Committee reports, resolutions, and the act of voting are equally covered; "[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U. S. 168, 204 (1881), quoted with approval in *United States* v. *Johnson*, 383 U. S. 169, 179 (1966). Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threaten to control his conduct as a legislator. We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.

Nor can we agree with the United States that our conclusion is foreclosed by *Kilbourn* v. *Thompson*, *supra*, *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967), and *Powell* v. *McCormack*, 395 U. S. 486 (1969), where the speech or debate privilege was held unavailable to certain House and committee employees. Those cases do not hold that persons other than Members of Congress are beyond the protection of the clause when they perform or aid in the performance of legislative acts. In *Kilbourn*, the 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. The Court quoted with approval from *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 112 K. B. 1112 (1839): "'So if the Speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer.'" 103 U. S., at 202.[11] The Speech or Debate

[11] In *Kilbourn*, 103 U. S., at 198, the Court noted a second example, used by Mr. Justice Coleridge in *Stockdale*, 9 Ad. & E., at 225–226, 112 K. B., at 1196–1197: "'Let me suppose, by way of

Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act. The Court was careful to point out that the Members themselves were not implicated in the actual arrest, *id.*, at 200, and, significantly enough, reserved the question whether there might be circumstances in which "there may . . . be things done, *in the one House or the other*, of an extraordinary character, for which the members who take part in the act may be held legally responsible." 103 U. S., at 204 (emphasis added).

Dombrowski v. *Eastland, supra*, is little different in principle. The Speech or Debate Clause there protected a Senator, who was also a subcommittee chairman, but not the subcommittee counsel. The record contained no evidence of the Senator's involvement in any activity that could result in liability, 387 U. S., at 84, whereas the committee counsel was charged with conspiring with state officials to carry out an illegal seizure of records which the committee sought for its own proceedings. *Ibid.* 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.

Powell v. *McCormack* reasserted judicial power to determine the validity of legislative actions impinging on individual rights—there the illegal exclusion of a representative-elect—and to afford relief against House aides seeking to implement the invalid resolutions. The Members themselves were dismissed from the case because shielded by the Speech or Debate Clause both from liability for their illegal legislative act and from having to defend themselves with respect to it. As in *Kilbourn*, the Court did not reach the question "whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against the members of Congress where no agent participated in the challenged action and no other remedy was available." 395 U. S., at 506 n. 26.

None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. 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 aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So too in *Eastland*, as in this case, 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 execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States* v. *Johnson*, 383 U. S. 169 (1966).[12]

The United States fears the abuses that history reveals have occurred when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws. But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf,[13] and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it immunize Senator or aide from testifying at trials

illustration, an extreme case: the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the House is pleaded as a justification. . . . In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege; and no lawyer can seriously doubt that it exists; but the argument confounds them, and forbids us to enquire, in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this.'"

[12] Senator Gravel is willing to assume that if he personally had "stolen" the Pentagon Papers, and that act were a crime, he could be prosecuted, as could aides or other assistants who participated in the theft. Consolidated Brief of Senator Gravel 93.

[13] It follows that an aide's claim of privilege can be repudiated and thus waived by the Senator.

or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

II

We are convinced also that the Court of Appeals correctly determined that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers was not protected speech or debate within the meaning of Art. I, § 6, cl. 1, of the Constitution.

Historically the English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House. *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 114, 112 K. B. 1112, 1156 (1839), recognized that "[f]or speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity." But it was clearly stated that "if the calumnious or inflamatory speeches should be reported and published, the law will attach responsibility on the publisher." [14] This was accepted in *Kilbourn* v. *Thompson* as a "sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England" and as a reasonable basis for inferring "that the framers of the Constitution meant the same thing by the use of language borrowed from that source." 103 U. S., at 202.

Prior cases have read the Speech or Debate Clause "broadly to effectuate its purposes." *United States* v. *Johnson*, 383 U. S., at 180, and have included within its reach anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U. S., at 204; *United States* v. *Johnson*, 383 U. S., at 179. Thus, voting by Members and committee reports are protected; and we recognize today—as the Court has recognized before, *Kilbourn* v. *Thompson*, 103 U. S., at 204; *Tenney* v. *Brandhove*, 341 U. S. 367, 3[illegible]-378 (1951)—that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the "sphere of legitimate legislative activity." *Id.*, at 376.[15]

But the clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. *United States* v. *Johnson* decided at least this much. "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 U. S., at 172. Cf. *Burton* v. *United States*, 202 U. S. 344, 367–368 (1906).

Legislative acts are not all-encompassing. The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As

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[14] *Stockdale* extensively reviewed the precedents and their interplay with the privilege so forcefully recognized in the Bill of Rights of 1689: "That the freedome of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament." 1 W. & M., Sess. 2, c. 2. From these cases, include *Rex* v. *Creevy*, 1 M. & S. 273, 105 Eng. Rep. 102 (K. B. 1813); *Rex* v. *Wright*, 8 T. R. 293, 101 K. B. 1396 (1799); *Rex* v. *Abingdon*, 1 ESP 226, N. P. Cas. 337 (K. B. 1794); *Rex* v. *Williams*, 2 Show. K. B. 471, 89 Eng. Rep. 1048, it is apparent that to the extent English precedent is relevent to the Speech or Debate Clause there is little, if any, support for Senator Gravel's position with respect to republication. Parliament reacted to *Stockdale* v. *Hansard* by adopting the Parliamentary Papers Act of 1840, 3 and 4 Vict., c. 9, which stayed proceedings in all cases where it could be shown that publication was by order of a House of Parliament and was a bona fide report, printed and circulated without malice. See generally C. Wittke, The History of English Parliamentary Privilege (1921).

Gravel urges that *Stockdale* v. *Hansard* was later repudiated in *Wason* v. *Walter*, [1868] 4 Q. B. 73, which held a proprietor immune from civil libel for an accurate republication of a debate in the House of Lords. But the immunity established in *Wason* was not founded in parliamentary privilege, *id.*, at 84, but upon analogy to the privilege for reporting judicial proceedings. *Id.*, at 87–90. The *Wason* court stated its "unhesitating and unqualified adhesion" to the "masterly judgments" rendered in *Stockdale* and characterized the question before it as whether republication, quite apart from any assertion of parliamentary privilege, was "in itself privileged and lawful." *Id.*, at 86–87. That the privileges for nonmalicious republication of parliamentary and judicial proceedings—later established as qualified—were construed as coextensive in all respects, *id.*, at 95, further underscores the inappositeness of reading *Wason* as based upon parliamentary privilege, which like the Speech or Debate Clause is absolute. Much later Holdsworth was to comment that at the time of *Wason* the distinction between absolute and qualified privilege had not been worked out and that the "part played by malice in the tort and crime of defamation" probably helped retard recognition of a qualified privilege. 8 Holdsworth's History of English Law 377 (1926).

[15] The Court in *Tenney*, 341 U. S., at 376–377, was equally clear that "legislative activity" is not all-encompassing, nor may its limits be established by the Legislative Branch: "Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.*, 20. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn* v. *Thompson*, 103 U. S. 168; *Marshall* v. *Gordon*, 243 U. S. 521; compare *McGrain* v. *Daugherty*, 273 U. S. 135, 176."

the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." *United States* v. *Doe*, 455 F. 2d 753, 760 (CA1 1972).

Here private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the House; nor does questioning as to private publication threaten the integrity or independence of the House by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings, the record and any report that was forthcoming were available both to his committee and the House. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication.[16] We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

There are additional considerations. Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers was a crime under an Act of Congress, it was not entitled to immunity under the Speech or Debate Clause. It also appears that the grand jury was pursuing this very subject in the normal course of a valid investigation. The Speech or Debate Clause does not in our view extend immunity to Rodberg, as a Senator's aide, from testifying before the grand jury about the arrangement between Senator Gravel and Beacon Press or about his own participation, if any, in the alleged transaction, so long as legislative acts of the Senator are not impugned.

III

Similar considerations lead us to disagree with the Court of Appeals insofar as it fashioned, tentatively at least, a nonconstitutional testimonial privilege protecting Rodberg from any questioning by the grand jury concerning the matter of republication of the Pentagon Papers. This privilege, thought to be similar to that protecting executive officials from liability for libel, cf. *Barr* v. *Matteo*, 360 U. S. 564 (1959), was considered advisable "to the extent that a congressman has responsibility to inform his constituents . . . ." 455 F. 2d, at 760. But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute. The so-called executive privilege has never been applied to shield executive officers from prosecution for crime, the Court of Appeals was quite sure that third parties were neither immune from liability nor from testifying about the republication matter and we perceive no basis for conferring a testimonal privilege on Rodberg as the Court of Appeals seemed to do.

IV

We must finally consider, in the light of the foregoing, whether the protective order entered by the Court of Appeals is an appropriate regulation of the pending grand jury proceedings.

Focusing first on paragraph two of the order, we think the injunction against interrogating Rodberg with respect to any act, "in the broadest sense," performed by him within the scope of his employment, overly restricts the scope of grand jury inquiry. Rodberg's immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune. The grand jury, therefore, if relevant to its investigation into the possible violations of the criminal law and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangements, if any, with respect to republication or with respect to third party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator. Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.[17]

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[16] The sole constitutional claim asserted here is based on the Speech or Debate Clause. We need not address issues which may arise when Congress or either House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports or other materials. Of course, Art. I, § 5, cl. 3, requires that each House "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ." This Clause has not been the subject of extensive judicial examination. *See Field* v. *Clark*, 143 U. S. 649, 670–671 (1892); *United States* v. *Ballin*, 144 U. S. 1, 4 (1892).

[17] The Court of Appeals held that the Speech or Debate Clause protects aides as well as Senators and that while third parties may be questioned about the source of a Senator's information, neither aide nor Senator need answer such inquiries. The Government's position is that the aide has no protection under the Speech or Debate Clause and may be questioned even about legislative acts. A contrary ruling, the Government fears, would invite great abuse. On the other hand, Gravel contends that the Court of Appeals insufficiently protected the Senator both with respect to the matter of republication and with respect to the scope of inquiry permitted the grand jury in questioning third party witnesses with whom the Senator and his aides dealt. Hence, we are of the view that both the question of the aide's immunity and the question of the extent of that immunity are properly before us in this case. And surely we are not bound by the Government's view of the scope of the privilege.

Because the Speech or Debate Clause privilege applies both to Senator and aide, it appears to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee;[18] (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing. We leave the final form of such an order to the Court of Appeals in the first instance, or, if that court prefers, to the District Court.

The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEWART, dissenting in part.

The Court today holds that the Speech or Debate Clause does not protect a Congressman from being forced to testify before a grand jury about sources of information used in preparation for legislative acts. This critical question was not embraced in the petitions for certiorari. It was not dealt with in the written briefs. It was addressed only tangentially during the oral arguments. Yet it is a question with profound implications for the effective functioning of the legislative process. I cannot join in the Court's summary resolution of so vital important a constitutional issue.

In preparing for legislative hearings, debates and roll calls, a member of Congress obviously needs the broadest possible range of information. Valuable information may often come from sources in the Executive Branch or from citizens in private life. And informants such as these may be willing to relate information to a Congressman only in confidence, fearing that disclosure of their identities might cause loss of their jobs or harassment by their colleagues or employers. In fact, I should suppose it to be self-evident that many such informants would insist upon an assurance of confidentiality before revealing their information. Thus, the acquisition of knowledge through a promise of nondisclosure of its source will often be a necessary concomittant of effective legislative conduct, if the members of Congress are properly to perform their constitutional duty.

The Court of Appeals for the First Circuit recognized the importance of the information gathering process in the performance of the legislative function. It held that the Speech or Debate Clause bars all grand jury questioning of a member of Congress regarding the sources of his information. The Court of Appeals reasoned that to allow a "grand jury to question a Senator about his sources would chill both the vigor with which legislators seek facts and the willingness of potential sources to supply them." *United States* v. *Doe*, 445 F. 2d 753, 758–759. The government *did not seek review of this ruling*, but rather sought certiorari on the question whether the Speech or Debate Clause bars a grand jury from questioning congressional aides about privileged actions of Senators or Representatives.[1]

The Court, however, today decides, *sua sponte*, that a member of Congress may, despite the Speech or Debate Clause, be compelled to testify before a grand jury concerning the sources of information used by him in the performance of his legislative duties if such an inquiry *"proves relevant to investigating possible third party crime." Ante*, at 22 (emphasis supplied).[2] In my view, this ruling is highly dubious in view of the basic purpose of the Speech or Debate Clause—"to prevent intimidation [of Congressmen] by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson*, 383 U. S. 169, 181.

Under the Court's ruling, a Congressman may be subpoenaed by a vindictive Executive to testify about informants who have not committed crimes and who have no knowledge of crime. Such compulsion can occur because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers; grand jury investigations are not limited in scope to specific criminal acts, and standards of materiality and

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[18] Having established that neither the Senator nor Rodberg is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either Rodberg or third parties on this subject. If it proves material to establish for the record the fact of publication at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose. We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the Executive Branch.

[1] As stated in its petition for certiorari, the Government asked us to consider

"Whether Article 1, Section 6, of the Constitution providing that . . . 'for any Speech or Debate in either House, the Senators and Representatives' . . . 'shall not be questioned in any other Place' bars a grand jury from questioning aides of members of Congress and other persons about matters that may touch on activities of a member of Congress which are protected Speech or Debate."

The Government also asked us to consider

"Whether an aide of a member of Congress has a common law privilege not to testify before a grand jury concerning private republication of material which his Senator-employer had introduced into the record of a Senate subcommittee."

We granted certiorari on both questions. 405 U. S. 916.

[2] See also ante, [illegible]

··levance are greatly relaxed.[3] But even if t' e Executive ··on to believe that a member of Congress had ··owledge of a specific probable violation of law, it is by no means clear to me that the Executive's interest in the administration of justice must *always* override the public interest in having an informed Congress. Why should we not, given the tension between two competing interests, *each* of constitutional dimensions, balance the claims of the Speech or Debate Clause against the claims of the grand jury in the particularized contexts of specific cases? And why are not the Houses of Congress the proper institutions in most situations to impose sanctions upon a Representative or Senator who withholds information about crime acquired in the course of his legislative duties?[4]

I am not prepared to accept the Court's rigid conclusion that the Executive may always compel a legislator to testify before a grand jury about sources of information used in preparing for legislative acts. For that reason, I dissent from that part of the Court's opinion that so inflexibly and summarily decides this vital question.

[3] See, *e. g.*, *Wilson* v. *United States*, 221 U. S. 361; *Hendricks* v. *United States*, 223 U. S. 178, *United States* v. *Johnson*, 319 U. S. 503. See generally, *Holt* v. *United States*, 218 U. S. 245; *United States* v. *Costello*, 350 U. S. 359.

[4] During oral argument, the Solicitor General virtually conceded, in the course of arguing that aides should not enjoy the same testimonial privilege as Congressmen, that a Senator could *not* be called before the grand jury to testify about the sources of his information:

"Q. Mr. Solicitor, am I correct that you wouldn't be able to question the Senator as to where he got the papers from?

"A. Oh, Mr. Justice, we are not able to question the Senator about anything insofar as it relates to speech or debate.

"Q. Well, this was related, you agree, to speech and debate?

"A. I am not contending to the contrary. . . ."

The following exchange also took place:

"Q. You can't ask a Senator where you got the material you used in your speech.

"A. Yes, Mr. Justice.

"Q. You can't.

"A. Yes."

At another point in the oral argument, the Solicitor General said that even when a Senator or Representative has knowledge of crime as a result of legislative acts "[t]hey can't be required to respond to questions with respect to their speeches and debates. That is a great and historic privilege which ought to be maintained which I fully support but which does not extend to any other persons than Senators and Representatives."

MR. JUSTICE DOUGLAS, dissenting.

I would construe the Speech and Debate Clause[1] to insulate Senator Gravel and his aides from inquiry concerning the Pentagon Papers, and Beacon Press from inquiry concerning publication of them, for that publication was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the conception and pursuit of the so-called "war" in Vietnam. Alternatively, I would hold that Beacon Press is protected by the First Amendment from prosecution or investigations for publishing or undertaking to publish the Pentagon Papers.

Gravel, Senator from Alaska, was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He convened a meeting of the Subcommittee and read to it a summary of the so-called Pentagon Papers. He then introduced "the entire papers, allegedly some 47 volumes and said to contain seven million words, as an exhibit." — F. 2d —. Thereafter, he supplied a copy of the papers to the Beacon Press, a Boston publishing house, on the understanding that it would publish the papers without profit to the Senator. A grand jury was investigating the release of the Pentagon Papers and subpoenaed one Rodberg, an aide to Senator Gravel, to testify. Rodberg moved to quash the subpoena; and on the same day the Senator moved to intervene. Intervention was granted and in due course the Court of Appeals entered the following order which is now before us for review:

> "(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.
>
> "(2) Dr. Leonard S. Rodberg may not be questioned about his own actions, in the broadest sense, including observations and communications, oral or written, by or to him, or coming to his attention, while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

I

Both the introduction of the Pentagon Papers by Senator Gravel into the record before his Subcommittee and his efforts to publish them were clearly covered by the Speech and Debate Clause, as construed in *Kilbourn* v. *Thompson*, 103 U. S. 168, 204:

> "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things

[1] The Speech and Debate Clause included in Art. I, § 6, Cl. 1, of the Constitution provides as respects Senators and Representatives that "for any Speech or Debate in either House, they shall not be questioned in any other Place."

generally done in a session of the House by one of its members in relation to the business before it." [2]

One of the things normally done by a member "in relation to the business before it" is the introduction of documents or other exhibits in the record the committee or subcommittee is making. The introduction of a document into a record of the Committee or subcommittee by its Chairman certainly puts it in the public domain. Whether a particular document is relevant to the inquiry of the committee may be questioned by the Senate in the exercise of its power to prescribe rules for the governance and discipline of wayward members. But there is only one instance, as I see it, where supervisory power over that issue is vested in the courts, and that is where a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range. See *Uphaus* v. *Wyman*, 360 U. S. 72; *Kilbourn* v. *Thompson*, *supra*, at 190.

In all other situations, however, the judiciary's view of the motives or germaneness of a Senator's conduct before a committee is irrelevant. For, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney* v. *Brandhove*, 341 U. S. 367, 377. If there is an abuse, there is a remedy; but it is legislative, not judicial.

As to Senator Gravel's efforts to publish the Subcommittee record's contents, wide dissemination of this material as an educational service is as much a part of the Speech and Debate Clause philosophy as mailing under a frank a Senator or a Congressman's speech across the Nation. As mentioned earlier, "[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . The informing function of Congress should be preferred even to its legislative function." W. Wilson, Congressional Government 303 (1885), quoted with approval in *Tenney* v. *Brandhove*, 341 U. S. 367, 377 n. 6. "From the earliest times in its history, the Congress has assiduously performed an 'informing function.'" *Watkins* v. *United States*, 354 U. S. 178, 200 n. 33. "Legislators have an obligation to take positions in controversial political questions so that their constituents can be fully informed by them." *Bond* v. *Floyd*, 385 U. S. 116, 136.

We said in *United States* v. *Johnson*, 383 U. S. 169, 179, that the Speech and Debate Clause established a "legislative privilege" that protected a member of Congress against prosecution "by an unfriendly executive and conviction by a hostile judiciary" in order, as Mr. Justice Harlan put it, to ensure "the independence of the legislature." That hostility emanates from every stage of the present proceedings. It emphasizes the need to construe the Speech and Debate Clause generously, not niggardly. If republication of a Senator's speech in a newspaper carries the privilege, as it doubtless does, then republication of the exhibits introduced at a hearing before Congress must also do so. That means that republication by Beacon Press is within the ambit of the Speech and Debate Clause and that the confidences of the Senator in arranging it are not subject to inquiry "in any other place" than the Congress.

It is said that though the Senator is immune from questioning as to what he said and did in preparation for the committee hearing and in conducting it, his aides may be questioned in his stead. Such easy circumvention of the Speech and Debate Clause would indeed make it a mockery. The aides and agents such as Beacon Press must be taken as surrogates for the Senator and the confidences of the job that they enjoy are his confidences that the Speech and Debate Clause embrace.

II

The secrecy of documents in the Executive Department has been a bone of contention between it and Congress from the beginning.[3] Most discussions have centered on the scope of the Executive privilege in stamping documents as "secret," "top secret," "confidential" and so on, thus withholding them from the eyes of Congress and the press. The practice has reached large proportions, it being estimated [4] that

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[2] And see *United States* v. *Johnson*, 383 U. S. 169, 172, 177; and *Tenney* v. *Brandhove*, 341 U. S. 367, 376.

[3] See Note, Developments In The Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1207-1215 (1972); Note, The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 Va. L. Rev. 885, 885-887 (1971); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U. C. L. A. L. Rev. 1044 (1965); Schwartz, Executive Privilege and Congressional Investigatory Power, 47 Calif. L. Rev. 3 (1959); Executive Privilege: The Withholding of Information by the Executive, Hearings on S. 1125 before the Subcommittee on Separation of Power of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). There is no express statutory authority for the classification procedure used currently by the bureaucracies, although it has been claimed that Congress has recognized it in such measures as the exemptions from the disclosure requirements of the Freedom of Information Act, 5 U. S. C. § 552 (b) and the espionage laws, 18 U. S. C. §§ 792-799. Rather, the classification regime has been implemented through a series of executive orders described in Note, Developments In The Law, *supra*, at 1192-1198. It has also been claimed that several sections of Art. II (such as the designation of the President as Commander-in-Chief of the Army and Navy) confer upon the Executive an inherent power to classify documents. See Report of the Commission on Government Security, S. Doc. No. 64, 85th Cong., 1st Sess., 158 (1957).

[4] Executive Privilege: The Withholding of Information by the Executive, Hearing on S. 1125, Subcommittee on Separation of Powers, S. Judiciary Committee 92d Cong., 1st Sess., 517-518 (1971). One estimate of the number of officials who can classify documents is even higher. In the Department of Defense alone, 803 persons have the authority to classify documents Top Secret; 7,687 have permission to stamp them Secret, and 31,048 have the authorization to denominate papers Confidential. United States Government Information Policies and Practices—The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Oper-

(1) Over 30,000 people in the Executive Branch have the power to wield the classification stamp.

(2) The Department of State, the [illegible]partment of Defense, and the Atomic Energy C[illegible]ion have over 20 million classified documents in the[illegible]es.

(3) Congress appropriates approximately $15 billion annually without most of its members or the public or the press knowing for what purposes the money is to be used.[5]

The problem looms large as one of separation of powers. Woodrow Wilson wrote about it in terms of the "informing function" of Congress.[6]

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration. but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes and demands of public opinion."

That is a concern of the Congress. It is, however, no concern of the courts, as I see it, how a document is stamped in an Executive Department or whether a committee of Congress can obtain the use of it. The federal courts do not sit as an *ombudsman*, refereeing the disputes between the other two branches. The federal courts do become vitally involved whenever their power is sought to be invoked either to protect the press against censorship as in *New York Times Co.* v. *United States*, 403 U. S. 713, or to protect the press against punishment for publishing "secret" documents or to protect an individual against his disclosure of their contents for any of the purposes of the First Amendment.

Forcing the press to become the Government's co-conspirator in maintaining state secrets is at war with the objectives of the First Amendment. That guarantee was designed in part to ensure a meaningful version of self-government by immersing the people in a "steady, robust, unimpeded and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal and re-examination." *Caldwell* v. *United States*, *ante*, —, —; *Brandenburg* v. *Ohio*, 395 U. S. 444; *Stanley* v. *Georgia*, 394 U. S. 557, 564; *Lamont* v. *Postmaster*, 381 U. S. 301, 308; *N. Y. Times Co.* v. *Sullivan*, 376 U. S. 254, 270. As I have said elsewhere, *e. g.*, *Caldwell*, *supra; Kleindienst* v. *Mandel*, *ante*, —, —, that Amendment is aimed at protecting not only speakers and writers but also listeners and readers. The essence of our form of governing was at the heart of Justice Black's reminder in the Pentagon Papers case that "[t]he press was protected so that it could lay bare the secrets of Government and inform the people." 403 U. S., at 717. Similarly, Senator Sam Ervin has observed: "When the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion."[7] Ramsey Clark as Attorney General expressed a similar sentiment: "If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy."[8] And see Meiklejohn, The First Amendment is Absolute, 1961 Sup. Ct. Rev. 254; Press Freedoms Under Pressure: Report of the Twentieth Century Fund Task Force on the Government and the Press 109–117 (1972) (Background Paper by Fred Graham on "Access [t]o News"); M. Johnson, The Government Secrecy Con[trov]ersy 39–41 (1967).

[Jeff]e[rs]on in a letter to Madison dated December 20, 17[illegible], asked "whether peace is best preserved by giving e[n]ergy to the government, or information to the people." [A]nd he answered, "This last is the most certain, and the most legitimate engine of government." 6 Writings of Thos. Jefferson 392 (Memorial ed. 1903).

Madison at the time of the Whiskey Rebellion spoke in the House against a resolution of censure against the groups stirring up the turmoil against that rebellion.

ations, 92d Cong., 1st Sess., pt. 2, at 599 (statement of David Cooke, Deputy Assistant Secretary of Defense).

[5] Senator Fulbright, chairman of the Senate Foreign Relations Committee, recently testified that his committee had been so unsuccessful in obtaining accurate information about the Vietnam war from the Executive Branch that it was required to hire its own investigators and send them to Southeast Asia. Executive Privilege; The Withholding of Information By The Executive, Hearings before the Subcommittee on Separation of Power of the Senate Committee on the Judiciary 206 (1971).

[6] W. Wilson, Congressional Government, 303–304 (1885).

[7] Ervin, Secrecy in a Free Society, 213 The Nation 454, 456 (1971).

[8] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 20 Ad. L. Rev. 263, 264 (1967).

> "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Brant, The Madison Heritage, 35 N. Y. U. L. Rev. 882, 900.

Yet, as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin "incident," and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold information which in "99½%" of the cases would present no danger to national security.[9] To refuse to publish "classified" reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if it printed only the press releases or "leaks" it would become an arm of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government.[10] By that test Beacon Press could with impunity reproduce the Pentagon Papers inasmuch as their content "is all history, not future events. None of it is more recent than 1968." *New York Times Co.* v. *United States*, 403 U. S. 713, 722, n. 3.

The late Justice Harlan in the Pentagon Papers case said that in that situation the courts had only two restricted functions to perform: *first*, to ascertain whether the subject matter of the dispute lies within the proper compass of the President's constitutional power; and *second* to insist that the head of the Executive Department concerned—whether State or Defense—determine if disclosure of the subject matter "would irreparably impair the national security." Beyond those two inquiries, he concluded, the judiciary may not go. 403 U. S., at 757–758.

My view is quite different. When the press stands before the court as a suspected criminal, it is the duty of the court to disregard what the prosecution claims is the executive privilege and to acquit the press or overturn the ruling or judgment against it, if the First Amendment and the assertion of the executive privilege conflict. For the executive privilege— nowhere made explicit in the Constitution—is necessarily subordinate to the express commands of the Constitution.

United States v. *Curtiss-Wright Corp.*, 299 U. S. 304, involved the question whether a proclamation issued by the President, pursuant to a Joint Resolution of the Congress, was adequate to sustain an indictment. The Court, in holding that it did, discussed at length the power of the President. The Court said that the power of the President in the field of international relations does not require as a basis an Act of Congress; but it added that his power "like every other governmental power, must be exercised in subordination to applicable provisions of the Constitution." *Id.*, at 320.

When the executive launches a criminal prosecution against the press, it must do so only under an Act of Congress. Yet Congress has no authority to place the press under the restraints of the executive privilege without "abridging" the press within the meaning of the First Amendment.

In related and analogous situations, federal courts have subordinated the executive privilege to the requirements of a fair trial.

Chief Justice Marshall in the trial of Aaron Burr ruled "That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession is not controverted." *United States* v. *Burr*, 25 Fed. Cas. 187, 191. Yet he "may have sufficient motives for declining to produce a particular paper and these motives may be such as to restrain the Court from enforcing its production." *Ibid.* A letter to the President, he said, "may relate to public concerns" and not "forced into public view." *Id.*, at 192. But where the paper was shown "to be essential to the justice of the case," *ibid.*, "the paper should be produced or the cause be continued." *Ibid.*

Jencks v. *United States*, 353 U. S. 657, is in that tradition. It was a criminal prosecution for perjury, the telling evidence against the accused being the testimony of Government investigators. The defense asked for contemporary notes made by agents at the time. Refusal

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[9] Hearing before Subcommittee on Foreign Operations and Government Information of the House Committeee on Government Operations 97 (1971); Cong. Horton, The Public's Right to Know, 77 Case & Comm. 3, 5 (1972). We are told that the military has withheld as confidential a large selection of photographs showing atrocities against Vietnamese civilians wrought by both communist and United States forces. Even a training manual devoted to the history of the Bolshevik revolution was dubbed secret by the military. Hearings, *supra*, at 966, 967 (testimony of former classification officer). And, ordinary newspaper clippings of criticism aimed at the military have been routinely marked secret. Hearings, *supra*, at 100. Former Justice and former Ambassador to the United Nations Arthur Goldberg has stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10% genuinely required restricted access for any significant period of time." United States Government Policies and Practices—The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. I, at 12 (1971).

[10] Moreover, I would not even permit a conviction for the publication of documents related to future and sensitive planning where the jury was permitted, as it was in *United States* v. *Drummond*, 354 F. 2d 132, 152 (CA2), to consider the fact that the documents had been classified by the Executive Branch pursuant to its present overbroad system which, in my view, unnecessarily sweeps too much nonsensitive information into the locked files of the bureaucracies. In general, however, I agree that there may be situations and occasions in which the right to know must yield to other compelling and overriding interests. As Professor Henkin has observed, many deliberations in Government are kept confidential, such as the proceedings of grand juries or our own Conferences, despite the fact that the breadth of public knowledge is thereby diminished. Henkin, The Right To Know And The Duty To Withhold: The Case Of The Pentagon Papers, 120 U. Pa. L. Rev. 271, 274–275 (1971).

was based on their confidential character. We held that to be reversible error.[11]

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro* v. *United States*, 353 U. S. 53, 60–61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Id.*, at 672.

Congress enacted the so-called Jencks Act, 18 U. S. C. § 3500, regulating the use of government documents in criminal prosecutions. We sustained that Act. *Scales* v. *United States*, 367 U. S. 203, 258. Under the Act a defendant "on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in possession of the Government touching the events or activities as to which the witness has testified at the trial . . . . The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian." *Campbell* v. *United States*, 365 U. S. 85, 92. And see *Clancy* v. *United States*, 365 U. S. 312.

The prosecution often dislikes to make public the identity of the informer on whose information its case rests. But his identity must be disclosed where his testimony is material to the trial. *Roviaro* v. *United States*, 353 U. S. 53. In other words, the desire for Government secrecy does not override the demands for a fair trial. And see *Scher* v. *United States*, 305 U. S. 251, 254. The constitutional demands for a fair trial, implicit in the concept of due process, *In re Murchison*, 349 U. S. 133, 136, override the Government's desire for secrecy, whether the identity of an informer or the executive privilege be involved. And see *Smith* v. *Illinois*, 390 U. S. 129.

The requirements of the First Amendment are not of lesser magnitude. They override any claim to executive privilege. As stated in *United States* v. *Curtiss-Wright Corp.*, *supra*, the class of executive privilege "like every other governmental power, must be exercised in subordination to applicable provisions of the Constitution." 299 U. S., at 320.

III

Aside from the question of the extent to which publishers can be penalized for printing classified documents, surely the First Amendment protects against all inquiry into the dissemination of information which, although once classified, has become part of the public domain.

To summon Beacon Press through its officials before the grand jury and to inquire into why it did what it did and its publication plans is "abridging" the freedom of the press contrary to the command of the First Amendment. In light of the fact that these documents were part of the official Senate record,[12] Beacon Press has violated no valid law, and the grand jury's scrutiny of it reduces to "[e]xposure purely for the sake of exposure." *Uphaus* v. *Wyman*, *supra*, at 82 (dissenting opinion). As in *United States* v. *Rumely*, 345 U. S. 41, where a legislative committee inquired of a publisher of political tracts as to its customers' identities, "[i]f the present inquiry were sanctioned: the press would be subject to harassment that in practical effect might be as serious as censorship." *Id.*, 57 (concurring opinion). Under our Constitution the Government has no surveillance over the press. That includes, as we held in *New York Times Co.* v. *United States*, 403 U. S. 713, the prohibition against prior restraints. Yet criminal punishment for or investigations of what the press publishes, though a different species of abridgment, is nonetheless within the ban of the First Amendment.

The story of the Pentagon Papers is a chronicle of suppression of vital decisions to protect the reputations and political hides of men who worked an amazingly successful scheme of deception on the American people. They were successful not because they were astute but because the press had become a frightened, regimented, submissive instrument, fattening on favors from those in power and forgetting the great tradition of reporting. To allow the press further to be cowed by grand jury inquiries and prosecution is to carry the concept of "abridging" the press to frightening proportions.

What would be permissible if Beacon Press "stole" the Pentagon Papers is irrelevant to today's decision. What Beacon Press plans to publish is matter introduced into a public record by a Senator acting under the full protection of the Speech and Debate Clause.[13]

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[11] In *Alderman* v. *United States*, 394 U. S. 165, we took a like course in requiring the prosecution to disclose to the defense records of unlawful electronic surveillance:

"It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant." *Id.*, at 184.

A different rule obtains in civil suits where the government is not the moving party but is a defendant and has specified the terms on which it may be sued. *United States* v. *Reynolds*, 345 U. S. 1, 12.

[12] Republication of what has filled the Congressional Record is commonplace. Newspapers, television, and radio use its contents constantly. I see no difference between republication of a paragraph and republication of material amounting to a book. Once a document or a series of documents is in the record of the Senate or House or one of its committees it is in the public domain.

[13] It is conceded that all of the material which Beacon Press has undertaken to publish was introduced into the Subcommittee

In light of the command of the First Amendment we have no choice but to rule that here government, not the press, is lawless.

I would affirm the judgment of the Court of Appeals except as to Beacon Press in which case I would reverse.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL, join, dissenting.

The facts of this case, which are detailed by the Court, and the objections to over-classification of documents by the Executive, detailed by my Brother DOUGLAS, need not be repeated here. My concern is with the narrow scope accorded the Speech or Debate Clause by today's decision. I fully agree with the Court that a Congressman's immunity under the Clause must also be extended to his aides if it is to be at all effective. The complexities and press of congressional business make it impossible for a member to function without the close cooperation of his legislative assistants. Their role as his agents in the performance of official duties requires that they share his immunity for those acts. The scope of that immunity, however, is as important as the persons to whom it extends. In my view, today's decision so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system.

I

In holding that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers is not shielded from extra-senatorial inquiry by the Speech or Debate Clause, the Court adopts what for me is a far too narrow view of the legislative function. The Court seems to assume that words spoken in debate or written in congressional reports are protected by the Clause, so that if Senator Gravel had recited part of the Pentagon Papers on the Senate floor or copied them into a Senate report, those acts could not be questioned "in any other place." Yet because he sought a wider audience, to publicize information deemed relevant to matters pending before his own committee, the Senator suddenly loses his immunity and is exposed to grand jury investigation and possible prosecution for the publication. The explanation for this anomalous result is the Court's belief that "Speech or Debate" encompasses only acts necessary to the internal deliberations of Congress concerning proposed legislation. "Here," according to the Court, "private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the House." *Ante*, at 19. Therefore. "the Senator's arrangements with Beacon Press were not part and parcel of the legislative process." *Ibid.*

Thus the Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator's duty to inform the public about matters affecting the administration of government. That this "informing function" falls into the class of things "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn* v. *Thompson*, 103 U. S. 168, 204 (1881), was explicitly acknowledged by the Court in *Watkins* v. *United States*, 354 U. S. 178 (1957). In speaking of the "power of Congress to inquire into and publicize corruption, maladministration or inefficiency in the agencies of Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.*, at 200, n. 33.

We need look no further than Congress itself to find evidence supporting the Court's observation in *Watkins*. Congress has provided financial support for communications between its members and the public, including the franking privilege for letters, telephone and telegraph allowances, stationery allotments, and favorable prices on reprints from the Congressional Record. Congressional hearings, moreover, are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern. The list is virtually endless, but a small sampling of contemporaneous hearings of this kind would certainly include the Kefauver hearings on organized crime, the 1966 hearings on automobile safety, and the numerous hearings of the Senate Foreign Relations Committee on the origins and conduct of the war in Vietnam. In short, there can be little doubt that informing the electorate is a thing "generally done" by the members of Congress "in relation to the business before it."

The informing function has been cited by numerous students of American politics, both within and without the Government, as among the most important responsibilities of legislative office. Woodrow Wilson, for example, emphasized its role in preserving the separation of powers by ensuring that the administration of public policy by the Executive is understood by the legislature and electorate:

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." W. Wilson, Congressional Government 303 (1885).

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record and that this record is open to the public. See Government's Brief, at 3.

Others have viewed the give-and-take of such communication as an important means of educating both the legislator and his constituents:

> "With the decline of Congress as an original source of legislation, this function of keeping the government in touch with public opinion and of keeping public opinion in touch with the conduct of the government becomes increasingly important. Congress no longer governs the country; the Administration in all its ramifications actually governs. But Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized." The Reorganization of Congress, A Report of the Committee on Congress of the American Political Science Association 14 (1945).

Though I fully share these and related views on the educational values served by the informing function, there is yet another and perhaps more fundamental interest at stake. It requires no citation of authority to state that public concern over current issues—the War, race relations, governmental invasions of privacy—has transformed itself in recent years into what many believe is a crisis of confidence, in our system of government and its capacity to meet the needs and reflect the wants of the American people. Communication between Congress and the electorate tends to alleviate that doubt by exposing and clarifying the workings of the political system, the policies underlying new laws and the role of the Executive in their administration. To the extent that the informing function succeeds in fostering public faith in the responsiveness of Government, it is not only an "ordinary" task of the legislator but one that is essential to the continued vitality of our democratic institutions.

Unlike the Court, therefore, I think that the activities of Congressmen in communicating with the public are legislative acts protected by the Speech or Debate Clause. I agree with the Court that not every task performed by a legislator is privileged; intervention before Executive departments is one that is not. But the informing function carries a far more persuasive claim to the protections of the Clause. It has been recognized by this Court as something "generally done" by Congressmen, the Congress itself has established special concessions designed to lower the cost of such communication, and, most important, the function furthers several well-recognized goals of representative government. To say in the face of these facts that the informing function is not privileged merely because it is not necessary to the internal deliberations of Congress is to give the Speech or Debate Clause an artificial and narrow reading unsupported by reason.

Nor can it be supported by history. There is substantial evidence that the Framers intended the Speech or Debate Clause to cover all communications from a Congressman to his constituents. Thomas Jefferson clearly expressed that view of legislative privilege in a case involving Samuel Cabell, Congressman from Virginia. In 1797 a federal grand jury in Virginia investigated the conduct of several Congressmen, including Cabell, in sending newsletters to constituents critical of the administration's policy in the war with France. The grand jury found that the Congressmen had endeavored "at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and to increase or produce a foreign influence, ruinous to the peace, happiness, and independence of these United States." Jefferson immediately drafted a long essay signed by himself and several citizens of Cabell's district, condemning the grand jury investigation as a blatant violation of the congressional privilege. Revised and joined by James Madison, the protest was forwarded to the Virginia House of Delegates. It reads in part as follows:

> ". . . that in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should be of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.
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> "That when circumstances required that the ancient confederation of this with the sister States, for the government of their common concerns, should be improved into a more regular and effective form of general government, the same representative principle was preserved in the new legislature, one branch of which was to be chosen directly by the citizens of each State, and the laws and principles remained unaltered which privileged the representative functions, whether to be exercised in the State or General Government, against the cognizance and notice of the coordinate branches, Executive and Judiciary; and for its safe and convenient exercise, the intercommunication of the representative and constituent has been sanctioned and provided for through the channel of the public post, at the public expense.
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> "That the grand jury is a part of the Judiciary,

> not permanent indeed, but in office, *pro hac vice* and responsible as other judges are for their actings and doings while in office: that for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business; is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive . . . ; and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods." 8 The Works of Thomas Jefferson 322–327 (Ford ed. 1904).

Jefferson's protest is perhaps the most significant and certainly the most cogent analysis of the privileged nature of communication between Congressman and public. Its comments on the history, purpose and scope of the Clause leave no room for the notion that the Executive or Judiciary can in any way question the contents of that dialogue. Nor was Jefferson alone among the Framers in that view. Aside from Madison, who joined in the protest, James Wilson took the position that a member of Congress "should enjoy the fullest liberty of speech, and . . . should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence." I Works of James Wilson 421 (McCloskey ed. 1967). Wilson, a member of the Committee responsible for drafting the Speech or Debate Clause, stated in plainest terms his belief in the duty of Congressmen to inform the people about proceedings in the Congress:

> "That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former." *Id.*, at 422.

Wilson's statements, like those of Jefferson and Madison, reflect a deep conviction of the Framers, that self-government can succeed only when the people are informed by their representatives, without interference by the Executive or Judiciary, concerning the conduct of their agents in government. That conviction is no less valid today than it was at the time of our founding. I would honor the clear intent of the Framers and extend to the informing function the protections embodied in the Speech or Debate Clause.

The Court, however, offers not a shred of evidence concerning the Framers' intent, but relies instead on the English view of legislative privilege to support its interpretation of the Clause. Like the Court itself, *ante*, at n. 14, I have some doubt concerning the relevance of English authority to this case, particularly authority postdating the adoption of our Constitution. But in any event it is plain that the Court has misread the history on which it relies. The Speech or Debate Clause of the English Bill of Rights was at least in part the product of a struggle between Parliament and Crown over the very type of activity involved in this case. During the reign of Charles II, the House of Commons received a number of reports about an alleged plot between the Crown and the King of France to restore Catholicism as the established religion of England. The most famous of these reports, Dangerfield's Narrative, was entered into the Commons Journal and then republished by order of the Speaker of the House, Sir William Williams, with the consent of Commons. In 1686, after James II came to the throne, informations charging libel were filed against Williams in King's Bench. Despite the arguments of his attorney, Sir Robert Atkyns, that the publication was necessary to the "counselling" and "enquiring" functions of Parliament, Williams' plea of privilege was rejected and he was fined £10,000. Shortly after Williams' conviction James II was sent into exile, and a committee was appointed by the House of Commons to report upon "such things as are absolutely necessary for securing the Laws and Liberties of the Nation." 9 Grey's Debates 37. In reporting to the House, the chairman of the committee stated that the provision for freedom of speech and debate was included "for the sake of one, . . . Sir William Williams, who was punished out of Parliament for what he had done in Parliament." *Id.*, at 81. Following consultation with the

House of Lords, that provision was included as part of the English Bill of Rights, and the judgment against Williams was declared by Commons "illegal and subversive of the freedom of parliament." I Townsend, Memoirs of the House of Commons 414 (2d ed. 1844).

Although the origins of the Speech or Debate Clause in England can thus be traced to a case involving republication, the Court, citing *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 112 K. B. 1112 (1839), says that "English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House." *Ante*, at 16. That conclusion reflects an erroneous reading of precedent. *Stockdale* did state that "if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher." *Id.*, at 114, 112 K. B., at 1156. But *Stockdale* concerned only the publisher's liability, not that of a member of Parliament; thus it has little bearing on the instant case. Furthermore, contrary to the Court's assertion, *ante*, at n. 14, even the narrow result of *Stockdale* was repudiated 30 years later in *Wason* v. *Walter*, [1868] 4 Q. B. 73, for reasons strikingly similar to those expressed by Jefferson in his protest.[1] In my view, therefore, the English precedent, if relevant at all, supports Senator Gravel's position here.

Thus, from the standpoint of function or history, it is plain that Senator Gravel's dissemination of material, placed by him in the record of a congressional hearing, is itself legislative activity protected by the privilege of speech or debate. Whether or not that privilege protects the publisher from prosecution or the Senator from senatorial discipline, it certainly shields the Senator from any grand jury inquiry about his part in the publication. As we held in *United States* v. *Johnson*, 383 U. S. 169 (1966), neither a Congressman, nor his aides, nor third parties may be made to testify concerning privileged acts or their motives. That immunity, which protects legislators "from deterrents to the uninhibited discharge of their legislative duty," *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951), is the essence of the Clause, designed not for the legislators' "private indulgence but for the public good." *Id.*, at 377.

That privilege, moreover, may not be defeated merely because a court finds that the publication was irregular or the material irrelevant to legislative business. Legislative immunity secures "to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office . . . whether the exercise was regular, according to the rules of the house, or irregular and against their rules." *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808). Thus, if the republication of this committee record was unauthorized or even prohibited by the Senate rules, it is up to the Senate, not the Executive or Judiciary, to

[1] In *Wason* the proprietor of the London Times was sued for printing an account of a libellous debate in the House of Lords. The Court agreed with *Stockdale* that the House did not have final authority to determine the scope of its privileges and thus could not confer immunity on any publisher merely by ordering a document printed and then declaring it privileged. Indeed the *Wason* Court gave its "unhesitating and unqualified adhesion" to *Stockdale* on that point. *Id.*, at 86. The only issue for the Court, therefore, was whether the publication "is, independently of such order or assertion of privilege, in itself privileged and lawful." *Id.*, at 87. On that issue the Court severely criticized the reasoning of earlier cases, including *Stockdale*, stating that two of the Justices in that case had expressed a "very shortsighted view of the subject." *Id.*, at 91. The Court held that so long as the republication was accurate and in good faith, it could not be the basis of a libel action; and the member himself was privileged to publish his speech "for the information of his constituents." *Id.*, at 95. Relying not on the Parliamentary Papers Act of 1840, which was enacted in response to *Stockdale*, but on the analogy to judicial reports and the need for an informed public, the Court stated:

"It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secresy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large?" *Id.*, at 89.

The fact that the debate was published in violation of a standing order of Parliament was held to be irrelevant. "Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings . . . . [A]ny publication of its debates made in contravention of its orders would be a matter between the house and the publisher." Id., at 95.

Whether *Wason* was based on parliamentary privilege or on an analogy to the publication of judicial proceedings is unimportant. What is important to the instant case is that *Wason* firmly rejected any implication in *Stockdale* that the informing function was not among the legislative activities that a member of Parliament was privileged to perform. Indeed that same conclusion was reached by Sir Gilbert Campion, a noted scholar, in his memorandum to the House of Commons' Select Committee on the Official Secrets Acts. After reviewing the republication cases through *Wason*, the memorandum concluded:

"If . . . a member circulated among his constituents a speech made by him in Parliament in which he had disclosed information [otherwise subject to the Official Secrets Acts], it might be held on the analogy of the principles which have been said to apply to prosecutions for libel that he could not be proceeded against for disclosing it to his constituents, unless, of course, the speech had been made in a secret session. Even if the suggested analogy is not admitted, it would be repugnant to common sense to hold that though the original disclosure in the House was protected by parliamentary privilege, the circulation of the speech among the member's constituents was not." Minutes of Evidence Taken before the Select Committee on the Official Secrets Acts 29 (1939).

fashion the appropriate sanction to discipline Senator Gravel.

Similarly, the Government cannot strip Senator Gravel of the immunity by asserting that his conduct "did not relate to any pending Congressional business." Brief, at 41. The Senator has stated that his hearing on the Pentagon Papers had a direct bearing on the work of his Subcommittee on Buildings and Grounds, because of the effect of the Vietnam war on the domestic economy and the lack of sufficient federal funds to provide adequate public facilities. If in fact the Senator is wrong in this contention, and his conduct at the hearing exceeded the subcommittee's jurisdiction, then again it is the Senate that must call him to task. This Court has permitted congressional witnesses to defend their refusal to answer questions on the ground of nongermaneness. *Watkins* v. *United States*, 354 U. S. 178 (1957). Here, however, it is the Executive that seeks the aid of the judiciary, not to protect individual rights, but to extend its power of inquiry and interrogation into the privileged domain of the legislature. In my view the Court should refuse to turn the freedom of speech or debate on the Government's notions of legislative propriety and relevance. We would weaken the very structure of our constitutional system by becoming a partner in this assault on the separation of powers.

Whether the Speech or Debate Clause extends to the informing function is an issue whose importance goes beyond the fate of a single Senator or Congressman. What is at stake is the right of an elected representative to inform, and the public to be informed, about matters relating directly to the workings of our Government. The dialogue between Congress and people has been recognized, from the days of our founding, as one of the necessary elements of a representative system. We should not retreat from that view merely because, in the course of that dialogue, information may be revealed that is embarrassing to the other branches of government or violates their notions of necessary secrecy. A member of Congress who exceeds the bounds of propriety in performing this official task may be called to answer by the other members of his chamber. We do violence to the fundamental concepts of privilege, however, when we subject that same conduct to judicial scrutiny at the instance of the Executive.[2] The threat of "prosecution by an unfriendly executive and conviction by a hostile judiciary," *United States* v. *Johnson*, 383 U. S., at 179, which the Clause was designed to avoid, can only lead to timidity in the performance of this vital function. The Nation as a whole benefits from the congressional investigation and exposure of official corruption and deceit. It likewise suffers when that exposure is replaced by muted criticism carefully hushed behind congressional walls.

[2] Different considerations may apply, of course, where the republication is attacked, not by the Executive, but by private persons seeking judicial redress for an alleged invasion of their constitutional rights.

II

Equally troubling in today's decision is the Court's refusal to bar grand jury inquiry into the source of documents received by the Senator and placed by him in the hearing record. The receipt of materials for use in a congressional hearing is an integral part of the preparation for that legislative act. In *United States* v. *Johnson*, 383 U. S., 169 (1966), the Court acknowledged the privileged nature of such preparatory steps, holding that they, like the act itself and its motives, must be shielded from scrutiny by the Executive and Judiciary. That holding merely recognized the obvious—that speeches, hearings, and the casting of votes require study and planning in advance. It would accomplish little toward the goal of legislative freedom to exempt an official act from intimidating scrutiny, if other conduct leading up to the act and intimately related to it could be deterred by a similar threat. The reasoning that guided that Court in *Johnson* is no less persuasive today, and I see no basis, nor does the Court offer any, for departing from it here. I would hold that Senator Gravel's receipt of the Pentagon Papers, including the name of the person from whom he received it, may not be the subject of inquiry by the grand jury.

I would go further, however, and also exclude from grand jury inquiry any knowledge that the Senator or his aides might have concerning how the source himself first came to possess the Papers. This immunity, it seems to me, is essential to the performance of the informing function. Corrupt and deceitful officers of government do not often post for public examination the evidence of their own misdeeds. That evidence must be ferreted out, and often is, by fellow employees and subordinates. Their willingness to reveal that information and spark congressional inquiry may well depend on assurances from their contact in Congress that their identity and means of obtaining the evidence will be held in strictest confidence. To permit the grand jury to frustrate that expectation through an inquiry of the Congressman and his aides can only dampen the flow of information to the Congress and thus to the American people. There is a similar risk, of course, when the member's own House requires him to break the confidence. But the danger, it seems to me, is far less if the members' colleagues, and not an "unfriendly executive" or "hostile judiciary," are charged with evaluating the propriety of his conduct. In any event, assuming that a Congressman can be required to reveal the sources of his information and the methods used to obtain that information, that power of inquiry, as required by the Clause, is that of the Congressman's House, and of that House only.

I respectfully dissent.

ROBERT J. REINSTEIN, Philadelphia, Pa., and CHARLES L. FISHMAN, Washington, D.C. (HARVEY A. SILVERGLATE, ALAN M. DERSHOWITZ, and ZALKIND & SILVERGLATE,

with them on the brief) for petitioner in No. 71-1017 and respondent in No. 71-1026, and SAM J. ERVIN, JR., Washington, D.C., and WILLIAM B. SAXBE, Washington, D.C. (JAMES O. EASTLAND, JOHN O. PASTORE, HERMAN E. TALMADGE, NORRIS COTTON, PETER H. DOMINICK, CHARLES McC. MATHIAS, JR., PHILIP B. KURLAND, and EDWARD I. ROTHSCHILD, with them on the brief) for United States Senate, as amicus curiae, for petitioner in No. 71-1017 and respondent in No. 71-1026; ERWIN N. GRISWOLD, Solicitor General (ROBERT C. MARDIAN, Assistant Attorney General, JEROME M. FEIT and ALLAN A. TUTTLE, Assistants to the Solicitor General, ROBERT L. KEUCH and WILLIAM M. PIATT, Justice Dept. attorneys, with him on the brief) for respondent in No. 71-1017 and petitioner in No. 71-1026; JAMES REIF, DORIS PETERSON, MORTON STAVIS, and PETER WEISS filed brief for Dr. Leonard Rodberg, as amicus curiae, seeking reversal and affirmance; MELVIN L. WULF, JOEL M. GORA, SANFORD JAY ROSEN, WILLIAM BIRTLES, and EARL NEMSER filed brief for American Civil Liberties Union, as amicus curiae, seeking reversal and affirmance; FRANK B. FREDERICK, WILLIAM B. DUFFY, JR., JOHNSON, CLAPP, STONE & JONES, and HENRY PAUL MONAGHAN filed brief for Unitarian Universalist Assn., as amicus curiae, seeking reversal and affirmance.

No. 69-5001

Lyman A. Moore, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[June 29, 1972]

Syllabus

Moore, who was convicted of murder and sentenced to death for the shotgun slaying of a bartender at a Lansing, Illinois, tavern, claimed that he was denied a fair trial and due process because the State failed to make pretrial disclosure of several items of evidence helpful to the defense, failed to correct false testimony of one Henley Powell, and succeeded in introducing into evidence a shotgun that was not the murder weapon. The evidence not disclosed consisted of a pretrial statement by Virgle Sanders that Moore was known to him as "Slick" and that he had first met "Slick" some six months before the killing, and documents and testimony that established that Moore was not the man known to others in the area as "Slick." Powell testified that he observed the killing, and the State did not introduce into evidence a diagram that, Moore claims, illustrates that Powell did not see the shooting. The State Supreme Court rejected the claim that evidence had been suppressed and false evidence had been left uncorrected, and held that the shotgun was properly admitted into evidence as a weapon in Moore's possession when he was arrested and suitable for commission of the crime charged. Moore also attacks the imposition of the death penalty for noncompliance with the standards of *Witherspoon* v. *Illinois*, 391 U. S. 510. *Held:*

1. The evidentiary items (other than the diagram) on which Moore bases his suppression claim relate to Sanders' misidentification of Moore as "Slick" and not to the identification, by Sanders and others, of Moore as the person who made the incriminating statements in the Ponderosa Tap. These evidentiary items are not material under the standard of *Brady* v. *Maryland*, 373 U. S. 830. The diagram does not support Moore's contention that the State knowingly permitted false testimony to remain uncorrected, in violation of *Napue* v. *Illinois*, 360 U. S. 264, since the diagram does not show that it was impossible for Powell to see the shooting.

2. Moore's due process claim as to the shotgun was not previously raised and therefore is not properly before this Court, and in any event the introduction of the shotgun does not constitute federally reversible error.

3. The sentence of death may not be imposed on Moore. *Furman* v. *Georgia*, *post*, p. —.

42 Ill. 2d 73, 246 N. E. 2d 299, reversed in part and remanded.

BLACKMUN, J., delivered the opinion of the Court, in wh BURGER, C. J., and BRENNAN, WHITE, and REHNQUIST, JJ., joi MARSHALL, J., delivered an opinion concurring in part and dissent in part, in which DOUGLAS, STEWART, and POWELL, JJ., joined.

MR. JUSTICE BLACKMUN delivered the opinion of t Court.

This state murder case, with the death penalty i posed by a jury, comes here from the Supreme Co of Illinois. The grant of certiorari, 403 U. S. 953 (197 was limited to three of four questions presented by t petition. These concern the nondisclosure to the fense of allegedly exculpatory evidence possessed by t prosecution or the police; the admission into evidence a shotgun that was not the murder weapon; and t rejection of eight veniremen who had voiced gene objections to capital punishment. The first and th issues respectively focus on the application of *Brady Maryland*, 373 U. S. 83 (1963), and *Witherspoon Illinois*, 391 U. S. 510 (1968).

I

Petitioner Lyman A. Moore was convicted in 19 of the first degree murder of Bernard Zitek. Moo appeal to the Supreme Court of Illinois was held abeyance while he petitioned the trial court for pc conviction relief. After a hearing on January 1967, t petition was denied. Moore's appeal from the denial consolidated with his appeal from the conviction a sentence. With one justice dissenting and another participating, the Illinois court affirmed the judgme 42 Ill. 2d 73, 246 N. E. 2d 299 (1969).

II

The homicide was committed on April 25, 1962. facts are important:

A. The victim, Zitek, operated a bar-restaurant the village of Lansing, southeast of Chicago. Patr Hill was a waitress there. Donald O'Brien, Charles Mayer, and Henley Powell were customers.

Another bar called the Ponderosa Tap was loc in Dolton, also southeast of Chicago. It was ow by Robert Fair. William Joyce was the bartender. of Fair's customers was Virgle Sanders.

A third bar known as Wanda and Del's was in Chic Delbert Jones was the operator. William L. on Tho son was a patron.

The Westmoreland Country Club was in Wilm about 50 miles north of Lansing. The manager t was Herbert Anderson.

B. On the evening of April 25 Zitek was tending at his place in Lansing. Shortly before 10 p. m. men, one with a moustache, entered and ordered Zitek admonished the pair several times for using fane language. They continued in their profanity shortly, Zitek ejected them. About an hour lat man carrying a shotgun entered. He laid the wea on the bar and shot and killed Zitek. The gunman out, pursued by patrons, and escaped in an automo

Original sponsor: Rules/Legislative
Budget and Audit

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 502 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to confidential tax information of
7 the Department of Revenue; and providing for an
8 effective date."

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

10 * Section 1. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature
11 finds that

12 (1) the majority of the state's revenue is derived from taxa-
13 tion;

14 (2) tax revenue enables the state to provide essential services
15 to the citizens of the state to ensure the public health and welfare;

16 (3) the elected representatives of the people of the state must
17 be assured that the state is receiving all of the income to which it is
18 entitled and that the tax laws are operating in the manner intended by the
19 legislature;

20 (4) the legislature must exercise its oversight authority to
21 assure that tax revenue collection by the Department of Revenue is effi-
22 cient, fair, prompt and in the best interest of the state;

23 (5) there is a legitimate and compelling governmental interest
24 in the legislature having adequate access to tax related information to
25 allow responsible oversight;

26 (6) without sufficient information, the legislature cannot
27 adequately determine that the state's tax revenue collection functions are
28 properly administered and that tax revenue due the state is promptly re-
29 ceived;

1 (7) tax returns and return information contain confidential
2 information, often regarding sensitive business information;
3 (8) taxpayers have protections against public disclosure of
4 certain tax information;
5 (9) exchange agreements with the Internal Revenue Service re-
6 quire that certain tax information not be publicly disclosed;
7 (10) protection of confidentiality fosters full disclosure by
8 taxpayers to taxing authorities and therefore promotes effective adminis-
9 tration of tax programs; and
10 (11) legislators and legislative employees who improperly dis-
11 close confidential tax information should be subject to the same sanctions
12 imposed against executive branch employees.
13 (b) The purpose of this Act is to ensure that
14 (1) the state is receiving all the tax revenue due the state;
15 (2) oversight of the tax revenue collection function is effec-
16 tively provided; and
17 (3) tax revenue due to the state is available to provide for the
18 public health and welfare of the citizens of the state;
19 (4) taxpayers have protections against improper disclosure of
20 tax information;
21 (5) the exchange agreements with the Internal Revenue Service
22 regarding tax information are not jeopardized; and
23 (6) tax programs are administered fairly.
24 * Sec. 2. AS 24.10 is amended by adding a new section to article 2 to
25 read:
26 Sec. 24.10.070. CONFIDENTIALITY OF INFORMATION. A present or
27 former employee or agent of the legislature may not disclose tax
28 information contained in a report or return filed under AS 43 with the
29 Department of Revenue and furnished to the person under

1 AS 43.05.230(h).

2 * Sec. 3. AS 24.60.060 is amended by adding a new subsection to read:

3 (b) A person to whom this chapter applies may not disclose tax
4 information contained within a report or a return filed under AS 43
5 with the Department of Revenue and furnished to the person under
6 AS 43.05.230(h).

7 * Sec. 4. AS 24.60 is amended by adding a new section to read:

8 Sec. 24.60.172. SPECIAL PROCEEDINGS BEFORE THE COMMITTEE.
9 Notwithstanding AS 24.60.170, if a complaint before the committee
10 involves an allegation that a person to whom this chapter applies has
11 disclosed tax information contained within a report or return filed
12 under AS 43 with the Department of Revenue and furnished to the person
13 under AS 43.05.230(h) and the taxpayer or a third party whose tax
14 information is alleged to have been improperly disclosed does not
15 agree to the public disclosure of the identity of the taxpayer, the
16 third party, or the tax information,

17 (1) the hearing may not be held in open session;

18 (2) a transcript containing confidential tax information
19 must be edited to prevent the disclosure of the confidential informa-
20 tion;

21 (3) a decision, if made public, must be edited to prevent
22 the disclosure of the tax information and to protect the identity of
23 the taxpayer or the third party; and

24 (4) a public statement may not contain information identi-
25 fying the taxpayer, a third party, or the tax information.

26 * Sec. 5. AS 43.05.230(f) is amended to read:

27 (f) <u>An intentional</u> [A WILFUL] violation of the provisions of
28 this section is <u>a class C felony</u> [PUNISHABLE BY A FINE OF NOT MORE
29 THAN $5,000, OR BY IMPRISONMENT FOR NOT MORE THAN TWO YEARS, OR BY

BOTH].

* Sec. 6. AS 43.05.230 is amended by adding new subsections to read:

(h) A legislative committee, after identifying the scope of an investigation or inquiry relating to matters of taxation and the adoption by either house of a simple resolution giving the committee authority to receive confidential tax information, may request the commissioner of revenue to provide confidential taxpayer returns or return information; the request by the committee shall be in writing and may identify, directly or indirectly, a particular taxpayer. On adoption of the resolution, the commissioner of revenue shall provide the committee with the requested returns or return information. If specific returns or return information concerning a particular taxpayer are provided to a legislative committee under this subsection, the commissioner of revenue shall notify the particular taxpayer of the request and of the delivery to the committee of the information. The committee may designate legislative employees or agents to inspect returns and return information. The committee may consider information made available under this subsection only in executive session unless the taxpayer and any third party whose tax information is being considered consent in writing to a disclosure in open session.

(i) The legislative committee and the commissioner of revenue shall establish procedures governing the transmittal, receipt, safekeeping, and use of the confidential information provided by the commissioner under (h) of this section.

(j) This section does not permit the disclosure to the legislature of confidential information provided by the Internal Revenue Service under exchange agreements with the department.

* Sec. 7. This Act takes effect immediately in accordance with AS 01.-10.070(c).