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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Persons Protected

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate clause protection did not attach.
>
> None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In Kilbourn-type situations both aides and members should be immune with respect to committee and House action leading to the illegal resolution. So, to, in Eastland, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves siezed the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Gravel, supra, at 620 - 621.

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

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

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

D. Waiver

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

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

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

Of the state cases reviewed, four states appear to take the position that the "privilege" from arrest contained in their state constitutions can be waived. Lincoln Building Associates v. Barr, 147 N.Y.S.2d 178 (1955); Mutscher v. State, 514 S.W.2d 905 (Tex. 1974); Geyer v. Irwin, 4 Dall (Pa) 1 7 (1790).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. CONCLUSION AND RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FILE WITH SB 328

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 31, 1984

SUBJECT: Legislative immunity

TO: Senator Bill Ray
Chairman, House Judiciary Committee

FROM: Keith B. Levy KBL
Legislative Counsel

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

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

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

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

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

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

KBL:ojb
J3/020

Levy
2/1/84

Original sponsor: Ray

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 328 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to legislative immunities and privileges."

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

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

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

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

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

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

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

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

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

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

1959 Opinions of the
Attorney General, No. 8

March 12, 1959

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

Re: Immunity of Legislators from
Civil Process and Arrest

Dear Senator:

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

> "Immunities. Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace."

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

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

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

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

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

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

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

Brief Answer: Executions are "civil process".

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

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

> "Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace." (Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

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

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

There are many discussions and annotations on legislative immunity, including: 94 ALR 1470 Immunity of Legislators from Service of Civil Process; 85 ALR 1340 Exemption from Service of Civil Process on Ground of Public Policy Independently of Statute; 56 ALR 601 Garnishment of Salaries, Wages, or Commissions not Expressly Exempted by Statute; 81 Corpus Jurus Secundum, States § 35. Other annotations on immunity of

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

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

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

two categories a member c he State Leg ature stands in the eyes of the law as a.. other citizen.

Yours very truly,

J. GERALD WILLIAMS
Attorney General

By
Gary Thurlow
Assistant Attorney General

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

Mr. Richard Freer, Acting Director
Department of Finance

SB

329

SB 329

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: SB 329
Title: Relating to liquor licenses

Sponsor: Sen. Ziegler by request
Requestor: Senate Judiciary
Date of Request: January 11, 1984

FISCAL DETAIL
Agency Affected: Dept. of Revenue
Program Category Affected: Alcoholic Beverage Control Board
BRU, Program or Subprogram(s) Affected: Public Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Patrick L. Sharrock, Director Phone: 277-8638
Division: Alcoholic Beverage Control Board Date: 1-17-84

Approved by Commissioner: [signature] Date: 1/19/84
Agency: Department of Revenue

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

SB
331

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

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

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

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

and recommends _____

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

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

_____

_____

_____

_____

_____

_____

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

_____

_____

_____

_____

_____

_____

CHAIRMAN

(Rev. 12/78)

A M E N D M E N T to SB 331 By Ferguson

Page 1, line 10 DELETE (NOVEMBER 15) Insert: December 1

Page 1, line 15 DELETE (THIS) Insert: The general appropriations Act

Page 1, line 16 after the word "December 1" Insert: 5

Page 2, lines 1-29 DELETE ALL MATERIAL

Page 3, lines 1-2 DELETE (IMMEDIATELY IN ACCORDANCE WITH AS 01.10.070(c))
Insert: on the effective date of the 1984 amendment to the Alaska Constitution limiting the length of regular sessions of the legislature

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

January 25, 1984

The Honorable Bill Ray
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: SB 331, re preparation of the executive budget

Dear Senator Ray:

On January 23, 1984, you requested that we review SB 331 in advance of the Senate Judiciary Committee meeting scheduled on January 25 at 1:30 p.m. We have identified constitutional issues raised by several provisions of the bill.

The bill provides that the governor shall submit the budget to the legislative finance division by November 15 and to the legislature by December 1. The bill also provides that the agencies shall submit budget information to the legislative finance division by September 1. These provisions potentially conflict with Alaska Constitution article IX, section 12 and article III, section 16.

1. Article III, section 16 provides that the governor is responsible for the faithful execution of the laws. Article IX, section 12 specifically recognizes that preparation of the budget is an executive function. In connection with that function, the legislature is authorized by the constitution only to fix by law a date for submission of the budget to the legislature. The provisions directing earlier submission to the legislative finance division of the budget and budget information could constitute violations of the doctrine of separation of powers. Those requirements on the governor and the agencies may disrupt the performance by the governor of his constitutionally-assigned duty to prepare the budget. See Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), aff'd ___ U.S. ___, 103 S.Ct. 2764 (1983).

2. Article IX, section 12 requires the governor to submit the budget to the legislature at a time fixed by law. One possible interpretation of this provision is that it requires that the legislature be convened at the time the budget is sub-

mitted. Unless it is convened in regular or special session, the legislature is not a body, empowered to act, to which the budget and an appropriation bill can be submitted. Since the legislature will not be in session on December 1, that date may not be a proper time for the legislature to require submission of the budget by the governor.

The bill also provides that the budget is not public information until it is submitted to the legislature. This may codify an existing qualified privilege of confidentiality derived from the doctrine of separation of powers. The provision of the bill requiring the agencies to make budget information public prior to submission of the budget by the governor may violate that qualified privilege of confidentiality, since premature disclosure of the budget information provided by the agencies could conflict with the need of the governor to consider, in confidence, recommendations and information concerning the executive function of budget preparation. Disclosure may be required only upon a showing of an overriding interest or need for the information.

Because of time constraints, we are able only to raise these issues, and are not able to provide detailed analyses of the caselaw concerning the doctrine of separation of powers. Please do not hesitate to contact this office if you require further assistance in this matter.

Sincerely yours,

NORMAN C. CORSUCH
ATTORNEY GENERAL

By: Virginia B. Ragle
Virginia B. Ragle
Assistant Attorney General

VBR/pjg

AUDIT DIVISION
POUCH W — ALASKA OFFICE BUILDING

FINANCE DIVISION
POUCH W — STATE CAPITOL

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE JUNEAU 99801

File
SB 331

M E M O R A N D U M

DATE: November 30, 1985

TO: Senator Frank Ferguson
attn: ~~Mike~~ Scott

FROM: Michael Greany, Director MGreany
Legislative Finance Division

SUBJ: Budget Process

You asked for a suggestion as to how the budget process could be altered to expedite a 120 day session.

One way would be to require the Governor to provide his budget to the Legislature earlier than the statutes currently mandate.

The concept outlined below is generally patterned after Oregon's budget preparation schedule. I found it very workable for Oregon's biennial budget process. The one shortcoming I can forsee in Alaska's annual process is if the session were to extend much beyond 120 days -- agencies would be required to begin preparation of their budget for the second future fiscal year before their next fiscal year budget is enacted.

Except in transition years, the Governor shall prepare a budget in the following manner according to the prescribed statutory schedule:

1. Each state agency shall submit its budget request to the Office of Management and Budget no later than September 1. A copy shall be provided to the Legislative Finance Division. An additional copy is to be maintained in the Office of Management and Budget for public information. The budget request and subsequent revisions become public information at the time they are received in the Office of Management and Budget.

2. Not later than November 15th, the budget shall be completed and prepared for printing.

FILE WITH SB 331

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 24, 1984

SUBJECT: Constitutionality of SB 331
Preparation of Executive Budget

TO: Senator Bill Ray
Chairman, Senate Judiciary Committee

FROM: Billy G. Bexrier
Director
Division of Legal Services

You have asked whether SB 331, an Act relating to the preparation of the executive budget, infringes on constitutional powers of the governor with particular reference to the doctrine of executive privilege.

In my opinion it does not.

Section 12 of Article IX Constitution of the State of Alaska is the authority on which the present law and the amendments proposed by this bill rests. That section reads:

> SECTION 12 BUDGET. The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State. The governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

The time of the submission is clearly within the power of the legislature to provide. It appears beyond question that the legislature may designate one of its agencies as the proper party to whom the required submission is made since the legislature, much like a corporation, may function only

through its agents such as its presiding officers, committees, clerk and secretary, and its agencies.

I see no possibility that the requirements of this statute infringe on the power of the governor under the doctrine of executive privilege. This privilege covers direct advice to the president and in a well known decision. Nixon v. Sirica 487 F2 700 (United States Court of Appeals, District of Columbia Circuit, 1973) the court stated that the law should be sensitive to "intra governmental deliberations comprising part of a process by which governmental decisions and policies are formulated" in requiring disclosures.

Neither factor is involved in the present bill. The bill allows the budget to remain confidential for a period and then requires it be made public in Sec. 1.

In Sec. 3 of the bill it adds to the requirement already in law that specified information furnished the Office of Budget and Management by agencies be furnished to legislative finance division a requirement that this information also be made available to the public. While facially this could appear to be the type material referred to in Nixon v. Sirica cases under the Freedom of Information Act (5 USCA 552) make the distinction between pre-decisional communications by agencies and final submissions. The information contained in the submission under AS 32.07.050(a) would be available to the public in my opinion under the Freedom of Information Act.

While that conclusion does not directly speak to the constitutional question of executive privilege it is clear that information available in civil litigation under court rules or under the Freedom of Information Act is not protected from disclosure by the Constitution.

In my opinion the amendments contained in the bill do not infringe upon the constitutional powers of the executive branch.

BGB:ojb
w2/072

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

January 25, 1984

The Honorable Bill Ray
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: SB 331, re preparation of the executive budget

Dear Senator Ray:

On January 23, 1984, you requested that we review SB 331 in advance of the Senate Judiciary Committee meeting scheduled on January 25 at 1:30 p.m. We have identified constitutional issues raised by several provisions of the bill.

The bill provides that the governor shall submit the budget to the legislative finance division by November 15 and to the legislature by December 1. The bill also provides that the agencies shall submit budget information to the legislative finance division by September 1. These provisions potentially conflict with Alaska Constitution article IX, section 12 and article III, section 16.

1. Article III, section 16 provides that the governor is responsible for the faithful execution of the laws. Article IX, section 12 specifically recognizes that preparation of the budget is an executive function. In connection with that function, the legislature is authorized by the constitution only to fix by law a date for submission of the budget to the legislature. The provisions directing earlier submission to the legislative finance division of the budget and budget information could constitute violations of the doctrine of separation of powers. Those requirements on the governor and the agencies may disrupt the performance by the governor of his constitutionally-assigned duty to prepare the budget. See Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), aff'd ___ U.S. ___, 103 S.Ct. 2764 (1983).

2. Article IX, section 12 requires the governor to submit the budget to the legislature at a time fixed by law. One possible interpretation of this provision is that it requires that the legislature be convened at the time the budget is sub-

mitted. Unless it is convened in regular or special session, the legislature is not a body, empowered to act, to which the budget and an appropriation bill can be submitted. Since the legislature will not be in session on December 1, that date may not be a proper time for the legislature to require submission of the budget by the governor.

The bill also provides that the budget is not public information until it is submitted to the legislature. This may codify an existing qualified privilege of confidentiality derived from the doctrine of separation of powers. The provision of the bill requiring the agencies to make budget information public prior to submission of the budget by the governor may violate that qualified privilege of confidentiality, since premature disclosure of the budget information provided by the agencies could conflict with the need of the governor to consider, in confidence, recommendations and information concerning the executive function of budget preparation. Disclosure may be required only upon a showing of an overriding interest or need for the information.

Because of time constraints, we are able only to raise these issues, and are not able to provide detailed analyses of the caselaw concerning the doctrine of separation of powers. Please do not hesitate to contact this office if you require further assistance in this matter.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:
Virginia B. Ragle
Assistant Attorney General

VBR/pjg

Introduced: 1/9/84
Referred: Judiciary and Finance

IN THE SENATE BY FERGUSON

SENATE BILL NO. 331

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the preparation of the executive budget; and providing for an effective date."

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

* Section 1. AS 37.07.020(a) is amended to read:

(a) ~~By November 15~~ December 15, the [THE] governor shall prepare and submit to the legislative finance division [LEGISLATURE BEFORE THE FOURTH LEGISLATIVE DAY] a budget for the succeeding fiscal year which shall cover all estimated receipts, including all grants, loans, and money received from the federal government, and all proposed expenditures of the state government. This budget is not public information until December 15 at which time the governor shall submit copies to the legislature and make copies available to the public. The budget submitted by the governor shall be organized so that the proposed expenditures for each agency are presented separately. The budget shall be accompanied by a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

* Sec. 2. AS 37.07.020 is amended by adding a new subsection to read:

(e) In a year following a gubernatorial election in which the incumbent governor does not retain office the newly elected governor shall submit a summary budget to the legislature on the first day of the legislative session and a detailed budget by February 1. This subsection does not relieve the outgoing governor of the obligation to submit a budget to the legislature under this section.

* Sec. 3. AS 37.07.050(a) is amended to read:

(a) By September 1 of each fiscal year, each [EACH] state agency, [ON THE DATE AND] in the form and content prescribed by the office, shall prepare, make available to the public, and forward to the office and the legislative finance division

(1) the goals and objectives of the agency programs, together with proposed supplements, deletions and revisions;

(2) its proposed plans to implement the goals and objectives, including estimates of future service needs, planned methods of administration, proposed modification of existing program services and establishment of new program services, and the estimated resources needed to carry out the proposed plan;

(3) the budget requested to carry out its proposed plans in the succeeding fiscal year, including information reflecting the expenditures during the last fiscal year, those authorized for the current fiscal year, those proposed for the succeeding fiscal year, an explanation of the services to be provided, the number of total positions for all persons employed or under contract by the agency for personal services including those rendered for capital improvement projects, the need for the services, the cost of the services, and any other information requested by the office;

(4) a report of the receipts during the last fiscal year, an estimate of the receipts during the current fiscal year, and an estimate for the succeeding fiscal year;

(5) a statement of legislation required to implement the proposed programs and financial plans; and

(6) an evaluation of the advantages and disadvantages of specific alternatives to existing or proposed program policies or administrative methods.

* Sec. 4. This Act takes effect immediately in accordance with AS 01.-10.070(c).

SB
341

COMMITTEE REPORT

SENATE

1/13/84

FURTHER:

Date: _____

Mr. President:

The Committee on JUDICIARY has had SB 341

amending statutory references to the Pacific Time zone: eff.

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

[/] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

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

and recommends _____

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

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____ CHAIRMAN

S 60 (Rev. 12/78)

FISCAL NOTE

Revision Date: 1/13/84

REQUEST
Bill/Resolution No.: SB 341
Title: An Act Amending Statutory References to Pacific Time Zone & Providing for an Effective Date.
Sponsor: Rules Committee
Requestor: Senator V. Fischer
Date of Request: 1-11-84

FISCAL DETAIL
Agency Affected:
Program Category Affected:
BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

This bill will have no fiscal impact on the operations of the State.

ANALYSIS: Attach a separate page for any Analysis

Prepared By: C. J. Gasparek Warren Spencer 1/16/84 Phone: 364-4331
Division: S.E. Planning Date: 1-13-84
Approved by: Deputy Commissioner: Jim Sykes Date: 1/16/84
Department: DOT/PF

Distribution: (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

SB 341

SB 341 is a house cleaning bill to change existing legislation with statutory references to the Pacific Time Zone. In four locations, AS 01.10.070(b), AS 01/10.070(c), AS 01.10.070(d), and AS 45.55.080(c) the reference to Pacific Standard Time is revised to Alaska Standard Time.

This bill also amends AS 24.05.090 by deleting the reference to Pacific Standard Time as it relates to the convening of the Alaska State Legislature.

The reference to Alaska Standard Time is the correct name substitution for the Pacific Standard Time as changed by HR 3959; Public Law 98 wherein the Congress renamed three of the four zones which had been in Alaska to reflect the changes made by the Department of Transportation rulemaking, [OST Docket No. 9; Amendment 71-20].

SB
346

COMMITTEE REPORT

SENATE

FURTHER:

Date _____

Mr. President

The Committee on _____ considered _____

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

[ ] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for _____
[ ] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

_____

_____

_____

_____

MEMBERS HAVING
OTHER RECOMMENDATIONS

_____

_____

_____

_____

_____

_____

_____

Chairman

Chairman recommendation

FILE WITH SB 346

FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: SB 346
Title: "An Act relating to the treatment of mentally ill persons."
Sponsor: Sen. Josephsen
Requestor: Senate HESS
Date of Request: 1/17/84

FISCAL DETAIL
Agency Affected: Department of Law
Program Category Affected: General Government
BRU, Program or Subprogram(s) Affected: Legal Services Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
900 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

RECEIVED

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Pegues/Director Phone: 465-3672
Division: Administrative Services Date: 1-18-84
Approved by Commissioner: Richard L. Pegues/for Norman C. Gorsuch Date: 1-18-84
Agency: Department of Law

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

Fiscal Note
Analysis
SB 346

January 18, 1984

This act amends the state's statutes covering the treatment of mentally ill persons. The amendment clarify existing law and provide additional safeguards for the general public and the relatives of mentally ill persons, while seeking to protect the legal rights of persons suffering from mental illness. The amendments will not require any additional legal services, over those currently being provided, and their enactment will not have a fiscal impact on the department's operations.

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: SB 346
Title: "An act relating to the treatment of mentally ill persons."
Sponsor: Sen. Josephson & Halford
Requestor: Senate HESS
Date of Request: 1-20-84

FISCAL DETAIL
Agency Affected: Public Safety
Program Category Affected: Administration of Justice
BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Francis C. Allan G.C.A. mCK Phone: 269-5691
Division: Alaska State Troopers Date: 01/19/84

Approved by Commissioner: Robert A. Sundberg Date: 1-26-84
Agency: Public Safety

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - SB 346

Support

January 19, 1984

SB 346 - "An act relating to the treatment of mentally ill persons."

This Bill provides law enforcement officers with the latitude to protect both the mentally ill person and the public from the actions of the mentally ill.

Robert J. Sundberg
Commissioner

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

Senate Bill No. 346

"An Act relating to the treatment of mentally ill persons."

In October, 1981, Chapter 84, SLA 1981 became effective. This act completely revised Alaska's involuntary commitment laws for mentally ill persons that required involuntary hospitalization or treatment. Upon its effective date, there was considerable concern that the Act was procedurally cumbersome which would require that an excessive amount of professional treatment staff time be consumed in filling out forms, testifying in court, and other non-treatment related activities. While the Act has proven workable and involuntary commitment of the mentally ill have continued to occur, there are a number of areas in the Act that have proven repeatedly troublesome since its effective date. Senate Bill 346 is an attempt to amend some of those troublesome provisions that have tended to inhibit or hamper the treatment of the involuntarily committed mentally ill patient.

The majority of the amendments that are proposed in Senate Bill 346 are technical rather than substantive in nature, a number of the amendments are intended to change the Act in a way that is seen by many as improving its effectiveness. Those amendments that are considered to require clarification are discussed below:

Page 1, Section 1, Line 20

During the period of time the Act has been in effect, many areas have applied literal interpretation to the requirement that "every" opportunity be afforded to respondents to accept voluntary treatment. The result has been instances in which a prospective involuntary patient has repeatedly refused to accept voluntary treatment until the court hearing is actually in progress or about to begin and then suddenly decides he will accept voluntary treatment. The court proceedings cease and the petition for commitment is dismissed. If, prior to arrival to API for involuntary admission, the patient changes his mind and again refuses voluntary treatment (as has been the case), the entire involuntary commitment process must be started anew.

This has been cause for considerable concern and confusion. The amendment offered would change "every" opportunity to "reasonable" opportunity to accept voluntary treatment. This would allow for some discretion in its interpretation. Thus, if a patient repeatedly refused voluntary treatment, the commitment process would proceed even if the patient requested voluntary treatment at a later time. This would insure that treatment would be possible and the expensive commitment process would not have to be repeated unnecessarily.

Page 2, Section 2, Line 7

Under the Act, the age of majority for purposes of accepting or rejecting voluntary treatment without the consent of a parent or guardian was set at 14 years old. This has created a number of difficulties especially for those children between the ages of 14 and 18 years of age.

For example, a 14 year old child could present himself at API and request admission without the knowledge or approval of the parent or guardian. As A.S. 47.30.845 (Confidential Records) does not give the hospital the authority to release any information to the parents or guardians of a person 14 years of age or older without the permission of the patient, it may not be legal for us to tell parents or guardians the whereabouts or condition of their child.

Also, a 14 year old child that would benefit from evaluation or treatment at API but does not meet involuntary civil commitment standards may not be admitted at the request of the parents or guardian unless the child voluntarily agrees to accept treatment. Thus, some mentally ill children may not receive necessary mental health care and treatment even though their parents or guardian attempt to provide these services for them. In cases such as this, it becomes even more ludicrous if the Division of Family and Youth Services attempts to file a petition to have the court find the youth as a child in need of aid by alleging that the child's medical needs are being neglected. If the parents or guardian sought voluntary hospitalization of the child that is 14 years old but the child refused treatment, then parental neglect, which would support a finding of a child in need of aid status, is not possible.

The amendment proposed would change the age of majority under this section from 14 to 18 years of age. This would be consistent with other statutes that govern the care of treatment of these children and adolescents as well as correct these legal anomalies.

Page 3, Section 5, Line 12

This would increase the period of time for voluntary hospitalization of a minor by 9 days (from 21 to 30 days). This additional time will increase the ability of the hospital to provide a more thorough and comprehensive evaluation and treatment program for mentally ill children.

Page 3, Section 5, Line 22-23

This language would broaden the circumstances under which a minor may be accepted for admission at the hospital if the professional person in charge believes that hospitalization is necessary on a voluntary basis. This added provision could prove very helpful in addressing the treatment needs of mentally ill children and adolescents who are at risk of further deterioration and need hospitalization. Under the existing statutes, unless improvement in their condition can be reasonably expected, admission may not be possible. We believe this added provision will prove helpful in providing necessary care and treatment for this group of patients.

Page 4, Section 6, Lines 6-26

The addition of this language provides needed clarification regarding the circumstances and procedures for releasing or retaining mentally ill minors with or without the consent of the parent or guardian. It is especially pertinent as there have been occasions when the safety of the child or others was questionable and the child was not committable but the parents or guardian have demanded immediate release of the child. This amendment will make it possible to insure the safety of all concerned prior to release of the minor.

Page 5, Section 7, Line 3

By granting mental health professionals the authority to take mentally ill persons into custody under an emergency situation and deliver them to an evaluation facility, a number of problems will be alleviated. Under the existing statutes, if a physician in an emergency room examines an individual that is brought to the hospital by relatives or friends, and the patient is clearly mentally ill and is in need of immediate hospitalization, the physician may have to call the police in order to have a peace officer take the patient into custody and sign an application for the patient's examination. This situation may occur in any hospital in Alaska including API.

Under the proposed amendment, the physician or any other health care professional that is included in the definition of a mental health professional under A.S. 47.30.915(11), can sign the application for examination under A.S. 47.30.705 and have the patient held in custody pending completion of the exam and receipt of an ex part order.

Page 5, Section 7, Lines 9-12

As written, this proposed amendment, if strictly interpreted, could tend to prohibit the completion of examination or evaluations of patients that were detained in jails or correctional centers even if qualified evaluation personal were available. We certainly agree in principle that jails and correctional centers should not be used to hold the non-criminal, mentally ill; however, in practice, we have found that under certain exceptional circumstances, a jail or correctional center may be the only facility available to detain the patient at the local level for purposes of evaluation and insure the safety of the patient and the community.

It has been our experience that the utilization of there types of facilities is neither widespread nor indiscriminate and is used only on a very short-term basis. Nevertheless, when it is necessary to house patients in jails or correctional centers, we proceed with the examination, evaluation, and involuntary commitment process when the necessary resources are locally available. The time spent by these

patients under these circumstances is then counted for purposes of the 24 hour and 72 hour time limit that is required for examinations and evaluations to occur by mental health professionals. This tends to insure that patients are not detained longer than necessary and treatment, if indicated, can commence immediately.

Consequently, we recommend that this amendment be deleted and that the existing language in A.S. 47.30.705 on lines 12-15 (in brackets) should be retained.

Page 5, Section 7, Line 24

This amendment would change the period of time for the first involuntary commitment from 21 to 30 days and is repeated throughout Senate Bill 346. The additional 9 days would tend to reduce the administrative workload of our treatment staff while having little or no effect on the period of time patients are actually involuntarily hospitalized.

Rather than interrupt treatment on the 21st day in order to undergo the 90-day commitment process, treatment could continue for an additional 9 days if necessary. This would allow medications and other forms of therapy an additional period of time to stabilize the patient, possibly resulting in a discharge of the patient between the 21st and 30th day.

Page 9, Section 10, Lines 17-19

This amendment is designed to insure that a less formal courtroom atmosphere is possible during the involuntary civil commitment process. This should make the commitment proceedings less painful and frightening to the mentally ill respondent.

Page 9, Section 10, Lines 27-28

The addition of this provision to allow a respondent to call his own experts or other witnesses to testify on his behalf is not seen as necessarily having an impact on the Division of Mental Health and Developmental Disabilities unless the respondent decides to call experts from API to testify on his behalf. It may, however, have a financial impact on the Alaska Court System if the respondent is indigent and the court has to pay the expenses of the experts and other witnesses called by the respondent on his behalf.

Page 12, Section 13, Line 7

This amendment would change the 120-day commitment to 180 days and is repeated throughout the bill. This change will reduce the administrative and procedural requirements necessary for the long-term, chronic mentally ill patients that require extended periods of involuntary hospitalization.

Page 13, Section 16, Lines 23-26

This additional requirement for notification of a patients family or guardian as well as any person known to been threatened by the patient of his unauthorized absence from the treatment facility is supported by the Division of Mental Health and Developmental Disabilities. We feel that this is an appropriate and necessary measure in cases such as this.

Page 14, Section 18, Lines 8-9

The addition of this language is seen as necessary and will correct what appears to have been an oversight when the he Act was drafted. It simply makes specific that computations of time for a patient being evaluated or a patient being detained for evaluation do not include Saturdays, Sundays, legal holidays, or transportation time and are not to be included in the 72 or 48 hour time limitation prescribed by the Act.

Page 15, Section 19, Lines 6-7

This adds mental health professionals among those that may not be held civilly or criminally liable for detaining and transporting a person under the Act. This amendment is consistent with this section of the Act.

Page 15, Section 20, Lines 15-17

This amendment will require that an adult designated by the respondent must give informed consent in cases in which the patient is unable to give informed consent prior to certain treatments being authorized. We feel this is an appropriate addition to the Act.

Page 15, Section 21, Lines 28-29

This simply requires that an adult designated by the patient must be provided a copy of the patient's discharge plan. This is consistent with A.S. 47.30.845 under the existing statutes regarding confidential information.

Page 17, Section 24, Lines 6-8

This proposed amendment would clarify the circumstances under which the hospital may release confidential information and records to law enforcement agencies when they are concerned that a patient or ex-patient may present as an imminent danger to the community. Under certain circumstances, we feel it is in the best interests of the community and the patient to take such action.

Page 17, Section 24, Line 13

The addition of this language will include hospitals operated by the federal government, such as the PHS facilities, for use as evaluation facilities for purposes of the Act. Under the existing statutes, these facilities are not included in the definition of an evaluation facility and some of these federal facilities have not been able or willing to be utilized in this capacity.

Page 17, Section 24, Lines 21-25

This addition to the definition of a gravely disabled person will significantly clarify and improve our position with respect to the involuntary care and treatment of these patients. An additional period of hospitalization may help prevent further deterioration of gravely disabled persons in order to avoid or reduce the risk of further tragedy and/or agony.

Page 18, Section 27, Line 1

This amendment offered in the bill will reduce the standard upon which a potentially suicidal person may be taken into custody and involuntarily committed. It is our belief that this is both necessary and appropriate given our current rate of death by suicide in Alaska.

Page 18, Section 27, Lines 5-8

As in the previous section, this language will alter the standard for involuntary hospitalization of a person that may present as a danger to others or to the property of others. This may allow some seriously mentally ill persons to be involuntarily committed before they actually harm another person or another person's property.

Page 18, Section 28, Lines 17-20

This simply requires that a psychologist or a psychological associate must be trained specifically in clinical psychology in order to be considered a mental health professional for purposes of screening, examination, and evaluation under the Act.

Page 18, Section 28, Lines 22-24

This amendment is intended to include in the definition of mental health professionals those registered nurses that have experience in psychiatric nursing in a JCAH accredited psychiatric hospital for purposes of screening, examination, and evaluation under the Act. This is considered an appropriate addition to this definition.

POSITION PAPER/Department of Health & Social Services

The Department of Health and Social Services generally supports the amendments contained in Senate Bill 346 and endorses its passage with the exceptions noted above.

Recommended by: Philip R. Shapiro

Philip Shapiro, M.D.,
Director, Division of Mental Health and Developmental Disabilities

Date: 1/30/84

Approved by: Robert London Smith

Robert London Smith, Ph.D.
Commissioner

Date: 1/30/84

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: SB 346
Title: An Act relating to the treatment of mentally ill persons
Sponsor: Josepnson and Halford
Requestor:
Date of Request: 1-11-84

FISCAL DETAIL
Agency Affected: Division of Mental Health and Developmental Disabilities
Program Category Affected: API

BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis * See Attached

Prepared By: James L. Scoles (PS) (PR) Phone: 465-3370
Division: Mental Health & Developmental Disabilities Date: 1-20-84

Approved by Commissioner: Robert London Smith Date: 1/30/84
Agency: Dept of Health & Social Services

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

The Division of Mental Health and Developmental Disabilities does not foresee any increase or decrease in expenditures as a result of the passage of SB 346 at this time. The primary purpose of this bill is mainly directed at reducing the procedural requirements of A.S. 47.30.655 - 47.30.915, changing the age of majority from 14 to 18 years of age, changing the period of time for the initial commitment from 21 to 30 days and the third period of commitment from 120 to 180 days, expanding the definition of peace officers to include mental health professionals, and slightly relaxing the standards for commitment.

We do not believe that any of these proposed amendments will increase or decrease the number of mentally ill persons that will require hospitalization. The amendments should, however, make it easier to commit the mentally ill which should result in more professional staff time available to provide direct patient care and treatment rather than excessive time being expended in the commitment process.