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ing on the policy underlying this holding, the Pacius court quoted Rawlings v. DM Oliver Inc., 159 Cal.Rptr. 119, 124 (1979) for the following proposition:

> Fundamental fairness has been sought through a balancing of the rights of the injured party against the rights of those engaged in business, including the latter's reasonable commercial expectations. Placing the economic burden on those *best able to pay* for those costs, while permitting the transfer to those most culpable is consistent with the equitable considerations inherent in the resolution of the difficult problems which have been judicially posed. The thrust from our high court as a matter of first priority has been to *maximize recovery for the victim.*

Id. at 157 (emphasis added).

Recently, however, New Jersey has reigned in the "deep pocket" approach set forth above by the *Pacius* court. In Saez v. S & S Corrugated Paper Machinery Co., 695 A.2d 740 (N.J.Super.App.Div.1997), the court expressed disagreement both with the decision of the *Pacius* court and with this Restatement's earlier characterization of New Jersey law. The court first noted that, in contrast to the holding in *Pacius*, in order for a successor corporation to be liable under New Jersey law, the corporation must not only benefit from the predecessor's goodwill but must also continue to manufacture the predecessor's product. Id at 16. Moreover, the court stated that the question to answer in determining whether successor liability has been triggered is "not whether there was 'any benefit that the successor obtain[ed] from the acquisition of the assets of its predecessor' or if the successor eliminated a competitor [since] [s]o broad a test would be no test at all." Id.

Several other jurisdictions have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or a common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala.1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D.N.H.1994).

Comment d. Agreement for successor to assume liability.

1. For general authority that agreements to assume liability will be enforced in favor of plaintiffs with products liability claims, see cases cited in the Reporters' Note to Comment *c*.

2. General assumption of a predecessor's liability, even without specific mention of products liability, will be interpreted to include liability for products liability claims. See, e.g., Bouton v. Litton Indus., Inc., 423 F.2d 643 (3d Cir.1970) (applying New York law); Grugan v. BBC Brown Boveri, Inc., 729 F.Supp. 1080 (E.D.Pa.1990). If the contractual obligation as to the successor's assumption of products liability is subject to conflicting interpretations, the issue is for the trier of fact. See, e.g., Gee v. Tenneco, Inc., 615 F.2d 857, 862–63 (9th Cir.1980) (applying California law); Florom v. Elliott Mfg., 867 F.2d 570, 574–76 (10th Cir.1989) (applying Colorado law); Davis v. Loopco Indus., Inc., 609 N.E.2d 144 (Ohio 1993).

3. Contractual agreements by the successor to repair or service a product sold by the predecessor do not amount to an agreement to assume products liability for injuries caused

by the predecessor's defective products. See, e.g., Schwartz v. McGraw–Edison Co., 92 Cal.Rptr. 776 (Cal.Ct. App.1971) (disapproved on other grounds in Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)); Shane v. Hobam, Inc., 332 F.Supp. 526 (E.D.Pa.1971) (applying New York law). Whether agreements to service a predecessor's products may create an independent duty to warn about defects is discussed in connection with § 13.

Comment e. Fraudulent transfer in order to avoid debts or liabilities. For the reason set forth in the Comment, this exception has rarely been used to impose successor liability for products liability claims. However, in Schmoll v. AC & S, Inc., 703 F.Supp. 868 (D.C.Or.1988), the court found that a complex corporate restructuring was undertaken to avoid both pending and future liability to persons who were certain to suffer asbestos-related illness and was thus the functional equivalent of a fraudulent transfer. See also Morgan v. Cavalier Acquisition Corp., 432 S.E.2d 915 (N.C.Ct.App.1993) (reversing summary judgment when plaintiff's evidence raised a question of fact as to whether the defendant had purchased assets from the predecessor corporation in order to avoid creditors' claims); Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267 (N.C.Ct.App.1988); Mullen v. Alarmguard of Delmarva, Inc., No. CIV. A. 90C–11–40–1–CV, 1993 WL 258696 (Del.Super.Ct., Jun.16, 1993).

A much closer question is whether a successor corporation's actual or constructive knowledge that the predecessor's products are defective and likely to cause injury in the future is sufficient to render the transaction sufficiently tainted so as to come within the umbrella of this exception. There is little authority on the issue. In Nissen Corp. v. Miller, 594 A.2d 564, 569 n. 2 (Md.1991), the court noted that either knowledge of pending claims or knowledge of product defects might be sufficient to expose a successor liability since either would put in question the bona fides of the transaction.

Comment f. Consolidation or merger. For a discussion of what constitutes a "de facto merger," see Fletcher, Cyclopedia Corporations, § 7124.20; American Law of Products Liability § 7:10; Frumer and Friedman, Products Liability § 7.04[5]; Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All, 21 Ohio N.L. Rev. 297, 313 nn.136–137 (1994) (describing de facto merger and "mere continuation" doctrines). When the successor purchases the assets of the predecessor for cash, a de facto merger will not be found to have occurred. See, e.g., Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir.1977) (applying Indiana law); Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir.1995) (applying Maine law); Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989); Hamaker v. Kenwel–Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986); Leannais v. Cincinnati, Inc., 565 F.2d 437, 439–40 (7th Cir. 1977) (applying Wisconsin law). Only courts applying the "continuity of enterprise" exception will impose liability when the successor corporation purchased the assets of the predecessor for cash and there is evidence of continuity of the original business. See Reporters' Note to Comment *c*.

Comment g. Continuation of the predecessor. For a discussion of the "mere continuation" exception, see Fletcher, Cyclopedia Corporations

§ 7124.10; American Law of Products Liability § 7:14; Frumer and Friedman § 7.04[4]. Also see Winch v. Yates Am. Mach. Co., Inc., 613 N.Y.S.2d 980 (N.Y.App.Div.1994); Swayze v. A.O. Smith Corp., 694 F.Supp. 619 (E.D.Ark.1988); Florom v. Elliott Mfg., 867 F.2d 570, 578 n. 3 (10th Cir.1989) (applying Colorado law); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1146 (Colo.Ct.App. 1992); Nissen Corp. v. Miller, 594 A.2d 564, 567 (Md.1991); Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir.1981) (applying Missouri law); Chemical Design, Inc. v. American Standard, Inc., 847 S.W.2d 488 (Mo. Ct.App.1993); U.S. v. Atlas Minerals & Chem., Inc., 824 F.Supp. 46 (E.D.Pa.1993); Hamaker v. Kenwel–Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986).

In analyzing continuation questions, some courts require purchase of stock or other benchmarks in order to establish the requisite continuity. See, e.g., Gehin–Scott v. Newson, Inc., 848 F.Supp. 585 (E.D.Pa.1994); Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996) ("[t]he exception has no application without proof of continuity of management and ownership between the predecessor and successor corporations"); Harris v. T.I., Inc., 413 S.E.2d 605 (Va.1992) (also requiring a common identity of officers, directors, and stockholders). Other courts deny a merger if no transfer of assets has taken place, as in Carreiro v. Rhodes Gill & Co., 68 F.3d 1443 (1st Cir. 1995). Contra, Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir. 1995) (applying Maine law) (holding that purchase of assets is not sufficient to warrant a finding of a de facto merger); Lemelle v. Universal Mfg. Corp., 18 F.3d 1268 (5th Cir. 1994) (applying Louisiana law). But several other states have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala. 1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D. N.H. 1994). See generally Sweatland v. Park Corp., 587 N.Y.S.2d 54 (N.Y.App.Div.1992).

§ 13. Liability of Successor for Harm Caused by Successor's Own Post–Sale Failure to Warn

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and

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RESPONSE TO HOUSE BILL 499

The Alaska Academy of Trial Lawyers and the Alaska Action Trust oppose House Bill 499. This bill erases successor liability in Alaska and does so retroactively. This change in public policy is one that will ensure injured citizens of Alaska will have no recourse against negligent businesses that have changed hands. The Supreme Court of Alaska has adopted the successor liability standard because it is the rule of law that is most persuasive in light of precedent, reason, and policy.

Successor liability, which this bill erases, is part of products liability law. If a company puts a defective product on the market, it is that company that should bear the cost of the injuries the product causes, not the injured person. This bill undermines the principles that govern products liability law.

Generally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company. There are exceptions, however, and this bill encourages the use of mere "continuation of business" transfers and other sham transactions used to deceive. An example of an allowable action under this bill might be the sale of Enron's accountancy firm, Arthur Anderson, in which the liabilities brought on by Arthur Anderson's egregious and illegal actions were unacquired by the purchasing company.

Honest businesses attempting to buy or sell will negotiate a rational price that takes account of any potential claims; any incremental insurance premiums then become part of those negotiations. Any claims to the contrary are mere speculation and cannot outweigh the potential for harm to Alaskans.

In addition, the applicability clause of this legislation, which makes this bill apply to any business disposition "before, on, or after" the effective date is potentially in conflict with the federal constitution under the impairment of contracts clause.

Subject: Comment on HB 499
Date: Mon, 18 Mar 2002 14:24:15 -0900
From: Kimberlee Colbo <KAC@htlaw.com>
To: "'Representative_Norman_Rokeberg@legis.state.ak.us'" <Representative_Norman_Rokeberg@l
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"'Representative_Albert_Kookesh@legis.state.ak.us'" <Representative_Albert_Kookesh@legis.s
CC: "'Heather_Nobrega@legis.state.ak.us'" <Heather_Nobrega@legis.state.ak.us>

My name is Kimberlee Colbo and I am a member of Hughes Thorsness Powell Huddleston & Bauman, attorneys for Allstate Insurance Company and Certain Underwriters at Lloyd's of London, the insurers for Western Auto Supply Company in the matter involving an injury to Kevin Taylor and a claim for successor liability against Savage Arms, Inc. I am writing to urge you to vote against HB 499 as currently proposed.

Summary of Lawsuit Involving Claims Against Savage Arms

Savage Industries, Inc. manufactured a Stevens Model 125, .22 caliber rifle in July, 1982. In November, 1992, Western Auto Supply Company ("Western Auto") sold the rifle to a retail store in Bucksport, Maine. In approximately December, 1986, Jack Taylor purchased the rifle from The Swap Shop in Soldotna, Alaska for his son. On April 8, 1989, 11 year old Kevin Taylor was severely injured when the rifle fell apart in his hands and he was shot in the head near Nikiski, Alaska.

In late 1990, a lawsuit was filed on Kevin's behalf. On May 13, 1992, Western Auto filed a third-party complaint against Savage Arms seeking implied indemnity from Savage Arms. Kevin's claims against Western Auto were tried in early 1994, resulting in a defense verdict. However, the court granted Kevin a new trial and found the gun was defective as a matter of law. Subsequently, Western Auto and its insurers settled with Kevin for $5.4 million and began pursuing the third-party complaint against Savage.

Savage Industries was a Massachusetts corporation that manufactured firearms for nationwide distribution and sale, including the Stevens Model 125 .22 caliber rifle found to be defective by the court in our case. On February 2, 1988, Savage Industries filed for Chapter 11 protection under the Bankruptcy Code. On March 29, 1988, less than two months later, Savage Arms was incorporated in Texas as a "shell corporation" which was intended "to be the corporate vehicle . . . to handle [the Savage Industries] asset sale." The asset sale was concluded on November 1, 1989.

Traditionally, a purchasing corporation assumes the liabilities of a selling corporation where: (1) there is an express or implied assumption of liability; (2) the transaction amounts to consolidation or merger; (3) the transaction was fraudulent; (4) some of the elements of a purchaser in good faith were absent; or (5) the transferee corporation was a mere continuation or reincarnation of the old corporation. All of these bases for imposing successor liability are well accepted and have been accepted in Alaska since at least the early 1970s. The "continuity of enterprise" theory adopted by the Alaska Supreme Court in Savage Arms, Inc. v. Western Auto Supply Company is a doctrine that only applies in strict products liability cases.

The following factors, among others, serve as the basis for the claim against Savage Arms in the pending lawsuit:
(1) Savage Arms acquired substantially all of Savage Industries' assets;
(2) Savage Arms was formed shortly before, and for the sole purpose of,

acquiring Savage Industries' assets;
(3) Savage Industries ceased operations on October 31, 1989 and Savage Arms began operations on November 1, 1989;
(4) there was commonality of Savage Arms' and Savage Industries' officers and directors (Ronald Coburn, President of Savage Industries, became President of Savage Arms, David Tolly, Vice President of Corporate Affairs of Savage Industries, became Vice President of Corporate Affairs of Savage Arms, and Thomas Humphrey, Controller of Savage Industries, became Vice President and Controller of Savage Arms);
(5) Savage Arms manufactured the same or similar products as Savage Industries;
(6) Savage Arms took over all of Savage Industries' offices and production facilities;
(7) Savage Arms hired no new employees and retained all employees employed by Savage Industries at the time of the asset transfer;
(8) Savage Arms assumed the liabilities and obligations of Savage Industries ordinarily necessary for continuation of normal business operations;
(9) Savage Arms did business using Savage Industries' trade names, patents, trade secrets, business goodwill, and customer information; and
(10) Savage Arms held itself out as a continuation of Savage Industries through its representations in its sales catalogs (i.e. "For almost 100 years, the Savage name has stood for quality, value and dependability in firearms.") and by manufacturing under the Savage name.

As the acquiring corporation, Savage Arms was just a new hat for, or reincarnation of, the Savage Industries. The only practical difference between the two companies was that on October 31, 1989, the company was called Savage Industries and faced large potential liability for products liability claims and on November 1, 1989, the company was called Savage Arms and thought it had eliminated its liability for products liability claims.

After a lengthy delay pending the Alaska Supreme Court's decision on petitions for review filed by Savage Arms, this case is set for trial in November, 2002. In this lawsuit, Savage Arms has consistently argued that it should not be held liable for the damage done by the defective rifle manufactured by Savage Industries because it did not manufacture the gun. What Savage Arms ignores is that Western Auto did not manufacture the gun either. Rather, Western Auto was an innocent retailer who did nothing more than pass on an already defective gun in the chain of distribution. Nonetheless, Western Auto's insurers had to pay to settle the claims resulting from injuries caused by the defective gun, even though, in contrast to Savage Arms, Western Auto has not taken advantage of, and benefited from, the goodwill of Savage Industries for the last 13 years. That is the reason Savage Arms may be held liable in this case.

Concerns With Respect to HB 499

We have two primary concerns with respect to HB 499 as it is currently drafted. First, to the extent that Section 8 of HB 499 is intended to shield, retroactively, Savage Arms, Inc. from liability in the currently pending litigation, it constitutes an unconstitutional ex post facto law. If the Committee is interested in clarifying Alaska law so that the "continuity of enterprise" theory will not be recognized as a basis for imposing successor liability in the strict products liability setting, then that goal can be met by crafting more narrowly drawn language and by making the change in the law effective for causes of action that accrue on or after the effective date of the Act.

Second, the broadly drafted bill will encourage fraud. For instance, if the Exxon Valdez oil spill were to occur tomorrow, all Exxon would have to do to avoid all liability for the consequences of such a spill would be to form a new corporation with a slightly different name, "sell" its assets to the new company and walk away from the liability. This is exactly what happened in connection with the "Savage Industries/Savage Arms" transaction. Such a result would be bad public policy. At a minimum, the Committee should amend

the legislation to recognize the traditional and well accepted bases for imposing successor liability when the successor corporation is a "mere continuation" of the predecessor corporation or where there has been a defacto merger and to recognize successor liability in situations involving fraud.

Successor liability rarely arises. It is a unique doctrine intended to address very unique and unusual business transactions that are not done on an arm's length basis. It has no applicability in the usual "run-of-the mill" corporate transaction that is truly done on an arm's length basis. The reason Allstate and Underwriters have a claim against Savage Arms is because the transaction whereby Savage Industries' assets were transferred to Savage Arms was not done at arm's length and, in fact, contains any number of indicia of fraud. Therefore, on behalf of Allstate and Underwriters, we urge you to vote against HB 499 as currently proposed.

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Response to Memo from Western Auto's counsel

To: Heather Nobrega
From: Ted Pease
Date: March 19, 2002

This is written to provide a response to the memo of Kim Colbo sent to the Judiciary Committee on March 18, 2002. This response will address the significant points in the order presented in Ms. Colbo's memo.

The first three paragraphs recite the history of the facts and largely appear to be accurate with the exception of quotes which are not attributed to any source and are of uncertain origin. The first significant dispute we have with her memo is a statement in the fourth paragraph. After listing the "traditional exceptions", she says that "all of these bases for imposing successor liability are well accepted and have been accepted in Alaska since at least the early 1970's." The truth of this statement is disputed. Even the Supreme Court in the *Savage Arms* opinion said: "neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case." *See Opinion* at page 5. In other words, the law regarding successor liability was not addressed before the Supreme Court opinion in 2001, and certainly has not been settled in Alaska since the early 1970's, and this proposed legislation would not be undoing decades of law.

Ms. Colbo then articulates her version of the asset purchase and concludes that "Savage Arms was just a new hat for, or reincarnation of, Savage Industries." What Ms. Colbo omits are the full facts regarding the asset purchase. The asset sale was part of a transaction whereby those assets were purchased by Challenger, Ltd., a publicly traded company, which was a distinct and separate company from Savage Industries or the owners of Savage Industries. In other words, the assets were not just shuffled to a new company managed by the same owners, but instead went to an independent third-party beyond the control of the original owners. It is Challenger, Ltd. and its then new division, Savage Arms, that sought to shield themselves from unknown and unwanted liabilities, just like any purchaser of assets, particularly those from a bankrupt estate would seek to accomplish. And just so that it is clear, the acquisition closed on November 1, 1989 and the underlying personal injury lawsuit was not filed until November 1990, a *year later.* Therefore, this case does not involve a situation where a seller was trying to defraud a creditor, because no "creditor" existed for another year.

Ms. Colbo then expresses her two primary concerns with HB 499. The first is that it constitutes an *ex post facto* law. Interestingly, she did not have that concern for Savage Arms when the Supreme Court adopted the new successor liability standard and made it retroactive to apply to Savage Arms. In any event, this is not an *ex post facto* law, and is merely the Alaska legislature availing itself of the powers enumerated in AS 01.10.090 to

extend the protection of this statute to acquisitions that have previously occurred and for which purchasers should not be exposed to unknown liabilities.

Ms. Colbo's second concern is that the "drafted bill would encourage fraud." Nothing could be further from the truth. This legislation does not seek to protect fraudulent transactions entered into with the intent to hinder, delay or defraud creditors. To underscore this, we are willing to add language to the bill to the effect that "unless otherwise expressly provided by another statute *or unless it results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor",* the purchaser will not be liable unless it expressly assumes the liability. The example of the Exxon case whereby Exxon could have another oil spill and merely transfer assets to another corporation it owned and avoid liability on the basis of this bill is ridiculous. Again, if the asset sale was a fraudulent conveyance designed to hinder creditors, as the Exxon example would be, then there would be no protection under this bill.

Of some significance, Western Auto has never sued Savage Arms for fraud or fraudulent conveyance. Therefore, when Ms. Colbo concludes that this asset sale "in fact, contains any number of indicia of fraud", she is welcome to sue on that theory, either because she says it has been the law of Alaska since the early 1970's or because such a theory is not prohibited by this Bill. The fact that Western Auto has not sued for fraud may be an indication of the "strength" of that case and may explain why Western Auto is pursuing these other more nebulous standards.

We feel the best way to proceed in light of the valuable goal of providing clarity and certainty to the buyers and sellers of assets, is to only allow successor liability when there is an express assumption by the buyer or there has been fraud with the intent to hinder a creditor. Any other standard, including "mere continuation", "de facto merger" or "continuity of enterprise" would only result in considerable litigation and a great deal of uncertainty about when the buyer acquires liabilities because these terms are not susceptible of certain definition. This legislation seeks to bring certainty while not prohibiting fraudulent transactions.

MEMORANDUM

TO: House Judiciary Committee Members

FROM: Jim Powell

RE: Retroactivity of Laws and Constitutional Takings (CSHB 499).

DATE: April 12, 2002

Retroactive Application of Law In Alaska

"It is a fundamental principle of jurisprudence that retroactive application of new laws is usually unfair." Norman J. Singer, Statutes and Statutory Construction, §41.2 (6th ed. 2001). Alaska has acknowledged this principle and placed statutory safeguards to prevent retrospective application of laws in all but the most narrow instances. Alaska Statute 01.10.090 states that "no statute is retrospective unless expressly declared therein." Before AS 01.10.090, the courts followed the "'well established rule of statutory construction that in absence of a clear expression to the contrary a law is presumed to operate prospectively only.'" Juneau v. Commercial Union Insurance Co., 598 P.2d 957, 958-59 (Alaska 1979).

While AS 01.10.090 allows retroactive application of statutory changes in certain limited circumstances, it is clear that Alaska law disfavors retroactive application of newly enacted statutes. The Alaska Supreme Court explained that "[r]etrospective laws are, indeed, generally unjust, and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." Watts v. Seward Sch. Bd., 421 P.2d 586 (Alaska 1966), vacated, 391 U.S. 592, 88 S. Ct. 1753, 20 L. Ed. 2d 842 (1968), judgment reinstated, 454 P.2d 732 (Alaska 1969) (citations omitted).

One strong policy reason that Alaska, along with numerous other states, disfavors retroactivity is that "people in conducting their business should be able to rely on existing laws with reasonable certainty." Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985).

It is true that statutes may be applied retroactively if the language used by the legislature clearly indicates such. However, the mere fact that retroactive application *can* occur, does not mean that it *should* occur. In this case, should the Legislature choose to make the legislation retroactive, it would constitute a compensable taking.

Compensable Takings in Alaska

Article I, Section 18 of the Alaska Constitution prohibits the taking of private property for a public purpose without just compensation. Alaska Const. Art. I, §18. "The underlying intent of the clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the public generally." DeLisio v. Alaska Superior Court, 740 P.2d 437, 439 (Alaska 1987). In order for the court to fulfill that purpose, "a liberal construction of the clause in favor of the private property owner is required." Id. at 439-440. The Supreme Court explained, "[w]e liberally interpret Alaska's Takings Clause in favor of property owners, whom it protects more broadly than the federal takings Clause. The Clause's protection extends to personal as well as real property." Waiste v. State, 10 P.3d 1141, 1154 (Alaska 2000) (emphasis added).

Alaska Statute 01.10.060, defines "personal property," for the purposes of the laws of this state, to include "things in action." A "thing in action" is a chose in action

(*Black's Law Dictionary* 1479 (6th ed. 1990)), and "a chose in action, such as [a] claim for personal injuries, is a form of property." Bush v. Reid, 516 P.2d 1215, 1219 (Alaska 1973); see also United States v. Stonehill, 83 F.3d 1156 (9th Cir. 1996) (a chose in action in contract or tort is considered personal property in California); and Bergen v. Estate of Kauppinen, 686 F.Supp. 786 (D. Alaska 1988) (a cause of action for bad faith failure to settle constitutes personal property). The cause of action currently pending against Savage Arms is a chose in action and hence, personal property under AS 01.10.060. Since Alaska's takings clause extends to personal property, any statutory enactment which would interfere with that cause of action (and in the case of HB 499 or CSHB 499, potentially defeat it entirely) would constitute a compensable taking under Alaskan law.

The simple solution to avoid this potential $14.5 million liability on the part of the State of Alaska is to make the changes applicable prospectively only.

165058

MEMORANDUM

FROM: Theodore M. Pease, Jr., Esq.

DATE: April 9, 2002

RE: Constitutionality of CSHB-499

This memorandum is submitted in response to Chairman Rokeburg's invitation to Jim Powell of Hughes Thorsness and Ted Pease of Burr, Pease & Kurtz to submit legal memoranda on the contention, raised at the House Judiciary Committee hearing on HB-499 on April 5, 2002, that the State of Alaska might be held monetarily liable to Allstate in the pending litigation if CSHB-499 is made retroactive in application. The possibility of such liability was suggested by Therese Bannister, legislative counsel, in her February 12, 2002 memorandum to Chairman Rokeburg in which she stated that a retroactive application of HB-499, ". . . may result in a taking by the state for which just compensation is required under Article 1, Section 18 of the Alaska Constitution."[1] Mr. Powell, in his April 5th testimony, stated, without citation to any legal authority, that the State of Alaska could become liable to his clients, Lloyds of London and Allstate, if HB-499 were given retroactive effect. This memorandum addresses the following:

1. Even if the court should find (which it will not) that the retroactive application of HB-499 to the Savage Arms case would constitute a taking of a vested property right, or would be a constitutionally prohibited *ex post facto* law,

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[1] "Eminent Domain. Private property shall not be taken or damaged for public use without just compensation." Constitution of Alaska, Article 1, Section 18.

under no possible procedural scenario could the State be found liable to Allstate and Underwriters.

2. Retroactive application of HB-499 to the Savage Arms case would not amount to the taking of or impairment to a property right.

3. Retroactive application of HB-499 is not an *ex post facto* law prohibited by Section 15, Article I of the Alaska Constitution.

1. **Under No Procedural Scenario Could the State of Alaska be Found Liable to Allstate and Underwriters.**

There has been no final judgment in *Savage Arms*; this is an on-going case that has been remanded to the Superior Court in Kenai (Judge Link) with a trial set for November 2002. (The procedural history and status of this case is described in a memorandum dated February 12, 2002 previously submitted. A copy of that memorandum is attached hereto for ready reference.) Under no possible outcome could the State of Alaska be found liable to anyone. Consider the following scenarios which are all the possible outcomes of the litigation if HB-499 is retroactive:

A. Judge Link recognizes the retroactivity of HB-499 and refuses to instruct the jury on the continuity of enterprise doctrine adopted by the Supreme Court. The case is submitted to the jury on other theories of liability and Allstate wins. The issue is now moot.

If, however, Allstate loses and there is a defense verdict, Allstate would then appeal to the Supreme Court advancing its claims that the retroactive application of HB-499 constitutes the taking of a vested property right or that retroactive application of HB-499 is an *ex post facto* law. If the Supreme Court rejects those arguments, upholds

Judge Link, and finds that there is no taking of property or impairment of a contract or an *ex post facto* law, the case is over. If, however, the court agrees with Allstate and finds that the retroactive application of HB-499 is constitutionally prohibited, it would vacate the judgment and send the case back to Judge Link to retry the case before a jury on the continuity of enterprise doctrine. If Allstate then wins, it has a judgment against Savage Arms; if it loses it has nowhere else to turn.

B. Alternatively, suppose Judge Link declines to recognize the retroactivity provision of HB-499 and presents the case to the jury on the continuity of enterprise doctrine. If the jury finds Savage Arms not liable under the continuity of enterprise doctrine, Allstate has had its day in court and the case is over. If the jury finds Savage Arms liable to Allstate and Underwriters under the continuity of enterprise doctrine, Savage Arms could then appeal to the Supreme Court asking the Supreme Court to uphold the retroactive application of HB-499 and find that there is no impairment of a vested property interest or an *ex post facto* law. If Savage Arms is unsuccessful in that appeal, then Allstate and Underwriters are free to pursue their judgment against Savage Arms. If, however, the Supreme Court agrees with Savage Arms and holds that HB-499 must be given retroactive effect, the case would be over and Allstate would have no claims against the State of Alaska or anyone else with the court having found that there is no taking of a property right, nor an impairment of a contract, nor an *ex post facto* law.

2. **Retroactive Application of HB-499 to the Savage Case Does Not Impinge on Any Vested Property Right.**

Vested property rights are protected against state action by the Fourteenth Amendment of the United States Constitution. Moreover, Article I § 7 of the Alaska state constitution further protects vested property rights: "No person shall be deprived of life, liberty, or property, without due process of law."

A right is vested when it has been so far perfected that it cannot be taken away by statute. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985). A "vested rights" analysis is not ordinarily used in determining whether a statute is retroactive; rather, it is traditionally used in determining whether a retroactive statute is unconstitutional. *Id.* at 1092; *see also Underwood v. State*, 881 P.2d 322, 327 (Alaska 1994), *cert. denied* 115 S.Ct. 1694, 514 U.S. 1064 (1995) (noting that in determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights).

Allstate and Underwriters Have No Vested Property Right in a Continuity of Enterprise Cause of Action. In *Kitchen v. United States*, 741 F.Supp. 182, 185 (D. Alaska 1989) (copy of decision attached), the United States District Court in Alaska rejected the plaintiff's claim that the retroactive application of a statute to her case deprived her of vested rights. In that case, Congress enacted a statute that effectively abolished the plaintiff's state law claims against the defendant. The plaintiff complained that the retroactivity of the statute, which was amended after she had filed suit in state

court and which provided protection for the defendant from the plaintiff's medical malpractice claim, deprived her of her state law causes of action.

The court held that the plaintiff had no vested rights in her state law causes of action. *Id.* The court noted that the question whether the rights asserted in the plaintiff's state law causes of action were "vested" could not be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress enacted the statute. *Id.* Quoting the United States Supreme Court, the court held that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *Id.* The court stated that this is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. *Id.* The court concluded that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. *Id.* Because rights in tort do not vest until there is a final, unreviewable judgment, the court held that Congress abridged no vested rights of the plaintiff by enacting the statute and retroactively abolishing the plaintiff's cause of action in tort. *Id.* In making this ruling the District Court relied on the following quote from *Hammond v. U.S.*, 786 F.2d 8, 12:

> No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced the principle in *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. For a more recent and stringent application of this rule, *see 149 Madison Avenue Corp.* v

> *Asselta,* 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947).
>
> Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting §2212 and retroactivity abolishing her cause of action in tort. *Id.*

Likewise, the Alaska Supreme Court has, on numerous occasions, upheld the retrospective application of statutes. For example, in *Underwood v. State* (copy of decision attached), the court held that the plaintiffs had no vested right to a 1993 permanent fund dividend (PFD). 881 P.2d 322, 327 (Alaska 1994). In that case, the Underwoods timed their move from Texas to Alaska with the specific intention of becoming Alaska residents in time to qualify for a 1993 PFD. The Underwoods understood that in order to qualify for the 1993 PFD, they had to be state residents on or before April 1, 1992. The Underwoods moved to Alaska on March 25, 1992.

On March 31, 1992, however, the governor of Alaska signed a statute that amended the eligibility requirements for a PFD to coincide with the calendar year. As a result, to be eligible for a 1993 PFD, applicants had to show Alaskan residency as of January 1, 1992. Accordingly, persons who established Alaskan residency between January 2, 1992 and April 1, 1992 were not eligible for a 1993 PFD, whereas under prior law they would have been eligible.

The Underwoods sued in superior court, challenging the constitutionality of the enactment. They specifically claimed that it violated the equal protection and due process guarantees of the federal and state constitutions, that it constituted an *ex post facto* law, that it was an impermissible taking of property, and that the state was equitably

stopped from amending the law. The superior court granted summary judgment in favor of the state on all of the Underwoods' claims and the Underwoods appealed.

Addressing the Underwoods' due process claim, the court noted that vested property rights are protected against state action by the due process clauses of the Alaska and United States Constitutions. *Id.* The court, however, rejected the Underwoods' claim that upon their arrival in Alaska in March 1992 they had a vested right to 1993 PFDs, subject only to their continuing residence, reasoning that at that time, the Underwoods possessed nothing more than an inchoate expectancy of a 1993 PFD that is not afforded constitutional protection. *Id.*

In addition, the court discarded the Underwoods' assertion that the 1992 amendment constituted an *ex post facto* law in violation of the Alaska Constitution. *Id.* The court noted that in determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights. *Id.* The court noted that the Underwoods had no vested right to a 1993 PFD as of March 31, 1992, just as no Alaskan had a vested right to a 1993 dividend at that time. *See also, Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 574 n. 12 (Alaska 1989) (holding that a statutory change which merely disappoints economic expectations and does not affect vested rights is not an *ex post facto* law); *Bidwell v. Scheele*, 355 P.2d 584, 586–87 (Alaska 1960); and memo of February 12, 2002 attached hereto entitled: Can the Alaska legislature act and affect a pending case in which the Alaska Supreme Court has previously decided the law?

3. **Summary.**

Based on the above authority, making this statute retroactive will not deprive Allstate or any other party of any vested rights and the state of Alaska would not be exposed to liability. Specifically, a supposed deprivation of property rights argument advanced by Allstate, wherein it might assert that it has a vested property right in the judicially announced Alaska law regarding successor liability, fails because no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained.

Here, the Alaska Supreme Court has simply announced the law and remanded the case back for trial under the applicable standards. Allstate has not yet received a final, unreviewable judgment. Consequently, its alleged right to this judicially announced law has not yet vested.

Furthermore, logically, any action for a deprivation of rights would necessarily have to involve some element of reliance on the law in existence at the time a party's conduct occurred. In this case, Allstate settled the case years before the Supreme Court adopted the continuity of enterprise theory and therefore it cannot claim to have relied upon that theory when making the settlement.

MEMORANDUM

RE: Procedural Status of Western Auto Supply Co. (now Allstate Insurance Company and Certain Underwriters at Lloyd's of London) pending in the Superior Court for the State of Alaska, Third Judicial District at Kenai, Case No. 2KN-90-922 CI

DATE: February 12, 2002

Western Auto v. Savage Arms, Inc. is still a pending case in the Kenai Superior Court. The decision of the Supreme Court in *Savage Arms, Petitioner v. Western Auto Supply Co., Respondent*, 18 P.3d 49 (Alaska 2001) was an interlocutory decision by the Supreme Court on a petition for review. Western Auto and Savage Arms, Inc. filed cross-motions for summary judgment on the question of whether Savage Arms was liable as the "legal successor to Savage Industries, Inc." Judge Link, the Superior Court judge in Kenai, ruled in favor of Western Auto. This was not a final judgment as there were other issues remaining unresolved which would have to be decided by trial if not disposed of by additional pretrial motions.

Only final judgments of the Superior Court can be appealed to the Alaska Supreme Court. However, Appellate Rule 610 provides for an interlocutory review by the Supreme Court, before there has been a final judgment, at the discretion of the Alaska Supreme Court for issues which meet the criteria set forth in Appellate Rule 610. One of the grounds is if the decision of the lower court:

"... involves a controlling question of law on which there is a substantial ground

for difference of opinion and an immediate review of the order may materially advance the termination of the proceedings . . .."

Savage Arms petitioned the Supreme Court for a review of Judge Link's decision under this procedure. The Supreme Court granted the petition and ordered full briefing. Proceedings in the Superior Court were stayed pending the decision by the Supreme Court on the petition for review. After the Supreme Court decision (first handed down on March 2, 2001, with rehearing denied on April 4, 2001) the case was remanded to Judge Link for further proceedings. Trial has been scheduled by Judge Link for November of 2002.

(In its decision, the Supreme Court also ruled that because all of Western Auto's defense costs and attorney's fees and the entire amount of the settlement by Western with the plaintiff, Taylor, had been paid by Western Auto's insurers, Allstate and Certain Underwriters at Lloyd's, those insuring entities were the proper parties plaintiff and in compliance with that ruling, Allstate and Certain Underwriters at Lloyd's have been substituted in place of Western Auto as the plaintiff.)

Thus, *Allstate Insurance Company and Certain Underwriters of Lloyd's v. Savage Arms, Inc.* is very much still a pending case and there has been no final judgment. If legislation past by the legislature is made specifically retroactive and/or curative, it could be expected that the Alaska courts would apply such new legislation to the pending case in spite of the Supreme Court's prior ruling. *See Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980).

MEMORANDUM

RE: Western Auto's Insurers v. Savage Arms

DATE: February 12, 2002

ISSUE

Can the Alaska legislature act and affect a pending case in which the Alaska Supreme Court has previously decided the law?

BRIEF ANSWER

Yes. The Alaska legislature is empowered by well-established statutory and case law authority to apply a statute retroactively. Further, even if the Alaska legislature does not expressly provide for retrospective application of a statute, legislation that is "curative" may be applied retroactively.

DISCUSSION

A. Retroactivity Expressly Provided

Restrospective legislation is not in and of itself unconstitutional. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985). In fact, a nearly forty-year old Alaska statute explicitly provides the legislature with authority to apply a statute retroactively. Specifically, Alaska statute Section 01.10.090 states: "No statute is retrospective unless expressly declared therein." The Alaska Supreme Court has also recognized the legislature's authority to apply statutes retroactively. *See, e.g., Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 948 (Alaska 1989) (stating statutes will be applied to causes of action arising prior to their enactment when the legislature so intends, either expressly or impliedly); *State v. Kaatz*, 572 P2d 775, 779 (Alaska 1977); *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 (Alaska 1985); *Brice v. State*, 669 P.2d 1311, 1315 (Alaska 1983); *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 711 (Alaska 1992); *State v. Alaska Pulp America, Inc.*, 674 P.2d 268, 272 (Alaska 1983); *Stephens v. Rogers Const Co.*, 411 P.2d 205, 208 (Alaska 1966) (noting

whether or not a statute operates retrospectively depends upon the language of the statute).

B. Curative Legislation

Even if the Alaska legislature does not expressly provide for retrospective application of a statute, the Alaska Supreme Court has recognized an exception to the general rule against retroactivity for legislation that is "curative." Curative legislation is legislation promptly enacted by the legislature in response to a particular judicial decision with which the legislature disagrees. *See, e.g., Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980) (discussing the curative legislation exception to the general rule against retroactivity). In *Zurfluh*, the Alaska legislature acted within two months following an Alaska Supreme Court decision and statutorily instituted incarceration as a condition to a suspended sentence after the Alaska Supreme Court had decided against such a condition. Despite the lack of retroactive language in the newly enacted statute, the Alaska Supreme Court deemed the statute "curative" and applied it retroactively to the pending case, effectively overruling their own recent opinion.

Specifically, in *Zurfluh*, the defendant broke into a store and stole a safe containing over $42,000. In October 1978, the defendant turned himself in and pled no contest. Incarcerating a defendant as a condition of a suspended sentence was a common practice in Alaska before December 1, 1978, when the Alaska Supreme Court in *State v. Boyne*, held that the courts did not have the authority to do so. In response to *Boyne*, the next session of the Legislature, which began in January 1979, enacted a statute effective May 2, 1979, which allowed for incarceration as a condition of a suspended sentence.

The issue in *Zurfluh* was whether the newly enacted statute could be applied retrospectively to the 153-day period between the *Boyne* decision on December 1, 1978 and May 2, 1979, the statute's effective date. It was during this period that the defendant was sentenced.

After citing the general rule that "[n]o statute is retrospective unless expressly declared therein," the court noted that the new statute did not expressly provide for retrospective application. *Zurfluh*, 620 P.2d at 693. The court found, however, that the timing of the legislation and the hearing testimony on the bill indicated the statute was curative legislation proposed in reaction to the ruling in *Boyne*. *Id.* The court stated that curative legislation was an exception to the general rule against retroactivity and emphasized that retroactivity would be

ascribed to curative legislation more readily than to that which might disadvantageously, though legal, affect past relations and transactions. *Id.* Consequently, the court held that on remand the trial judge was to apply the new statute when he considered the defendant's sentence. *Id.*

CONCLUSION

The Alaska Legislature has well-established authority to enact a statute and apply it retroactively to pending cases. The legislature should expressly state that the statute is to be applied retroactively to all pending cases. Alternatively, or in addition, the statute should state that it is curative legislation in response to the Alaska Supreme Court's decision in *Savage Arms, Inc. v. Western Auto Supply Co.*

Goodwill. Vocation rehabilitation had closed their file on Williams as rehabilitated. (Tr. p. 200).

When reviewing agency decisions concerning disability benefits, questions of fact, including the credibility of a claimant's subjective testimony, are primarily for the Secretary to decide, not the courts. To engage in fact-finding in a Social Security case is not within the province of a federal court. *Benskin v. Bowen*, 830 F.2d 878, 882–83 (8th Cir.1987). The Secretary's decision must be affirmed if it is supported by substantial evidence. 42 U.S.C. § 405(g); *Clark v. Heckler*, 733 F.2d 65 (1984). "Substantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.'" *Metcalf v. Heckler*, 800 F.2d 793, 794 (8th Cir.1986), *quoting Consolo v. Federal Maritime Commission*, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate support for a conclusion." *Clark v. Heckler*, 733 F.2d at 68.

I find that the decision of the ALJ is supported by substantial evidence.

JUDGMENT

IT IS THEREFORE ORDERED that the decision of the Secretary is affirmed.

Lucy KITCHEN, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. N89-001 Civ.

United States District Court, D. Alaska.

June 30, 1989.

Medical malpractice plaintiff moved to remand suit against Indian contractor to state court. The District Court, Holland, Chief Judge, held that Federal Tort Claims Act was plaintiff's exclusive remedy upon certification by Attorney General that contractor was federal employee acting within scope of his employment.

Motion denied.

1. Removal of Cases ⇐2

Removal statute for suits against federal employees, as amended in 1988, was applicable to pending state court case; moreover, amendment's requirement that removal motion be made within 60 days of enactment of amendment was not applicable to case which was not tried in state court. 28 U.S.C.A. § 2679(d)(2).

2. Removal of Cases ⇐21

Indian contractor was federal "employee" for purposes of removing medical malpractice claim against contractor to federal court; Federal Tort Claims Act was plaintiff's exclusive remedy upon certification by Attorney General that contractor was federal employee acting within scope of his employment. 28 U.S.C.A. §§ 1346(b), 2671 et seq., 2679(d)(2); Public Health Service Act, § 244(a), as amended, 42 U.S.C.A. § 233(a).

3. Constitutional Law ⇐253(4)
Removal of Cases ⇐2

Medical malpractice plaintiff had no vested right in state law cause of action prior to judgment such as would render unconstitutional retroactive application of statute pursuant to which case was removed to federal court. U.S.C.A. Const. Amend. 5.

William G. Azar, Anchorage, Alaska, for plaintiff.

Larry Card, Office of the U.S. Atty., R. Collin Middleton, Middleton, Timme & McKay, Anchorage, Alaska, Leon B. Taranto, Torts Branch, Civ. Div. U.S. Dept. of Justice, Washington, D.C., for defendant.

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The District Court, Holland, held that Federal Tort Claims intiff's exclusive remedy upon by Attorney General that con- federal employee acting within employment

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malpractice plaintiff had no in state law cause of action gment such as would render nal retroactive application of uant to which case was re- deral court. U.S.C.A. Const.

Azar, Anchorage, Alaska, for

l, Office of the U.S. Atty., R. eton, Middleton, Timme & orage, Alaska, Leon B. Taran- inch, Civ. Div. U.S. Dept. of ington, D.C., for defendant.

ORDER

Motion to Strike & Motion to Remand Denied

HOLLAND, Chief Judge.

The court has now before it plaintiff Lucy Kitchen's motion to remand this case to the Superior Court for the State of Alaska, Second Judicial District at Nome. The plaintiff has also filed a motion to strike the notice substituting the United States as the party defendant. Said motions are opposed by the defendant, United States of America. Plaintiff has requested oral argument, but the court does not deem oral argument necessary to the disposition of these motions.

This is a medical malpractice action originally brought against Norton Sound Health Corporation for the alleged negligence of one of its doctor employees. Plaintiff alleges that as a result of said doctor's negligence, while acting within the scope of his employment, plaintiff suffered severe permanent brain injuries

[1] The United States removed the instant case pursuant to 28 U.S.C. § 2679(d)(2). Plaintiff argues that said statute is inapplicable to this case. In the first place, plaintiff contends that Section 2679(d)(2) is applicable only to suits against federal employees arising out of their operation of motor vehicles in the scope of their employment. This argument is largely based on the assumption that Section 2679, as amended in 1988,[1] is not applicable to this case. Plaintiff also argues that, even if Section 2679(d)(2) is applicable to this case, the United States' removal of this case was untimely.

Section 2679(d)(2) provides:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a state court shall be removed without bond *at any time before trial* by the Attorney General to the District Court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(Emphasis added.) Section 2679(d)(2) of Title 28, United States Code, by its express, plain language, has application to pending state court cases such as this. This case was not tried in state court. It was properly and timely removed before trial.

Plaintiff contends that Public Law No. 100-694 at Section 8(c)[2] applies in this case. Public Law No. 100-694 at Section 8(c) provides as follows:

> (c) Pending State Proceedings.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

This case was not removed within sixty days of enactment of Public Law No. 100-694. However, because the instant case was not *tried* in state court, the time for removal has not expired. Section 8(c) of Public Law No. 100-694 has no application to this case.

Returning to plaintiff's contention that Section 2679 applies to suits against federal employees arising from their operation of motor vehicles, the plain language of Public Law No. 100-694 makes it clear that this

1. Public Law No. 100-694

2. Federal Employees Liability Reform & Tort Compensation Act of 1988, Pub.L. No. 100-694, 1989 U.S.Code Cong. & Admin. News (102 Stat.) 4563, 4566.

amendment has application to all claims which are cognizable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* The amendment to Section 2679(b)(1) makes no mention of suits against federal employees arising out of their operation of motor vehicles.[3] Plaintiff is mistaken in her contention that the removal statute in question applies only to suits against federal employees arising out of their operation of motor vehicles in the scope of their employment.

[2] Plaintiff also contends that "[n]o 'employee' was ever a Defendant in this action." Section 2679(d)(2) provides:

> This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

In the instant case, the attorney general has certified that Norton Sound Health Corporation was an employee acting within the scope of its employment. The question of whether or not an Indian contractor is an "employee" for purposes of Section 2679(d)(2) is answered by Public Law No. 100–446 which became law on September 27, 1988, and which provides in pertinent part:

> [F]or purposes of ... 42 U.S.C. § 233(a) ... with respect to claims by any person for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental or related functions ... an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under Sections 102 or 103 of this Act is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees ... *are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.*[4]

Title 42 U.S.C. § 233(a) provides:

> (a) The remedy against the United States provided by Sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under Section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental or related functions, including the conduct of clinical studies or investigation by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

By virtue of the reference to 42 U.S.C. § 233(a), in Public Law No. 100–446, it is clear that the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.*, is the exclusive remedy for claims such as plaintiff's and that Indian contractors are "employees" protected by Public Law No. 100–446. Thus, Norton Sound Health Corpora-

3. "[I]f the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."
Kremer v. Chemical Construction Corp., 456 U.S. 461, 468, 102 S.Ct. 1883, 1890, 72 L.Ed.2d 262 (1982), *quoting Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976).
28 U.S.C. § 2679(b)(1), as amended by Public Law No. 100–694, now provides for actions against "any employee". 28 U.S.C. § 2679(b)(1) states:
(b)(1) The remedy against the United States provides by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

4. Public Law No. 100–446 modified Public Law No. 100–202, which preceded Public Law No. 100–446 (emphasis supplied)

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tion was an employee acting within the scope of its employment for purposes of 28 U.S.C. § 2679(d)(2) upon certification by the attorney general.

[3] Next, the court considers the plaintiff's contentions that Public Law No. 100-446 is unconstitutional because it is the product of illegal lobbying activities by Norton Sound Health Corporation, and/or because the retroactive application of Public Law No. 100-446 unconstitutionally deprives plaintiff of a vested right.

In the first place, the plaintiff has failed to provide the court with any authority whatsoever that "illegal lobbying efforts" by a defendant can have the effect of depriving a plaintiff of due process of law. Furthermore, plaintiff complains that the retroactivity of Public Law No 100-446 to her case deprives her of vested rights. Plaintiff filed her action in state court which, she claims, provided her with: "a trial by jury; liberal tolling of the statute of limitations in cases of brain injury; the ability to sue a private corporation for its acts of negligence; a convenient forum; the ability to place the action on a fast track system for quick resolution; and, the availability of the insurance coverage of the North Sound Health Corporation." Plaintiff's reply memorandum at 10.

Quite simply, the plaintiff has no vested rights in her state law causes of action.

The question whether the rights asserted in plaintiff's state-law causes of action are "vested" cannot be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress enacted § 2212. "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced the principle in *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. For a more recent and stringent application of this rule, *see 149 Madison Avenue Corp. v. Asselta*, 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947).

Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort.

Hammond v. United States, 786 F.2d 8, 12 (1st Cir.1986) (citations and footnote omitted).

On the foregoing authority, this court rejects plaintiff's argument that the retroactive application of Public Law No. 100-446 unconstitutionally deprives her of vested rights is contrary to established precedent.

For the foregoing reasons, the plaintiff's motions for remand and to strike notice of substitution of the United States as the party defendant are hereby denied.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff,

v.

Paula MARQUA, Personal Representative of the Estate of Jennifer W. Chamberlain, Defendant.

Brian CHAMBERLAIN and Paula Marqua, Personal Representative of the Estate of Jennifer W. Chamberlain, Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Defendant.

No. A87-574 Civ.

United States District Court, D. Alaska.

Nov. 8, 1989.

Husband and wife were named insureds under automobile policy, and suits

but will merely enforce the shifted obligation, as contemplated in the written agreement.[7]

B. *Equitable Estoppel Argument*

Deborah argues that the doctrine of equitable estoppel should apply to prevent a parent who has not actually had custody of the child from asserting a claim for child support arrearages. Deborah acknowledges that such an approach would violate the rigid rule against child support modifications, but she cites a line of Illinois cases which she claims have continued to apply equitable estoppel even after adopting the strict federal prohibition on retroactive modifications.

Regardless of the merits of the argument, the entire equitable estoppel discussion is moot in this appeal. Deborah acknowledges that the application of equitable estoppel would not entitle her to an award of child support for the period in question (October 1991 to March 1992). She merely claims that the doctrine should prevent Billy from asserting a claim for child support for this same period. This argument is moot because Billy has asserted both to the superior court and this court that he is not attempting to collect child support for this period, but merely for January 1991 to September 1991.

IV. *CONCLUSION*

For the reasons stated above, the order of the superior court is AFFIRMED.

7. Billy also disagrees with the master's failure to include the September 1991 payment in Deborah's past due obligation, and with her finding that Billy's obligation of $868.50 began in September and not October of 1991, even though Scott did not move out of his father's residence until sometime late in September. Billy did not raise this issue in his Statement of Points on Appeal, and therefore we consider it waived. *See Welcome v. Jennings*, 780 P.2d 1039, 1042 n. 4 (Alaska 1989)

Charles E. UNDERWOOD, Jr., Susie G. Underwood, and Anthony C. Underwood, Appellants,

v.

STATE of Alaska, Governor Walter J. Hickel and Department of Revenue, Appellees.

No. S-5802.

Supreme Court of Alaska.

Sept. 30, 1994.

Residents, who moved into state prior to April 1 of year in which statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, took effect, filed action claiming that denial of PFD violated constitutional rights. The Superior Court, Fourth Judicial District, Fairbanks, Mary E. Greene, J., granted summary judgment in favor of state. Residents appealed. The Supreme Court, Moore, C.J., held that: (1) enactment of amendment did not deprive residents of equal protection; (2) enactment of amendment did not violate due process rights of residents; (3) amendment was not impermissible "ex post facto" law; and (4) state was not estopped from denying PFD to residents.

Affirmed.

1. **Constitutional Law** ⇐234.6
States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not deprive residents who moved into state prior to April 1 of year in which change took effect of equal protection; changed qualifying date was fairly and substantially related to goal of improving overall

ERWOOD, Jr., Susie
and Anthony C.
l, Appellants,

v.

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September. Billy did not
Statement of Points on
e consider it waived. *See*
80 P.2d 1039, 1042 n. 4

efficiency of PFD program. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14; AS 43.23.005(a).

2. Constitutional Law ⇐211(2)

Under sliding scale approach to equal protection questions adopted by Alaska Supreme Court, applicable standard of review for given case is to be determined by importance of individual rights asserted and by degree of suspicion with which Supreme Court views resulting classification scheme; as level of scrutiny selected moves up the sliding scale, the asserted governmental interest must be relatively more compelling, and legislation's means-to-ends fit must be correspondingly closer. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐213.1(2)

Under minimum level of scrutiny applicable to equal protection challenge regarding economic interest, state must show that challenged enactment was designed to achieve a legitimate governmental objective, and that means bear a fair and substantial relationship to accomplishment of that objective. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐291.6
States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not violate due process rights of residents who moved into state prior to April 1 of year in which change took effect; upon move into state, residents possessed nothing more than inchoate expectancy of PFD. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14; AS 43.23.005(a).

5. Constitutional Law ⇐197

"Ex post facto" law is law passed after occurrence of fact or commission of act, which retrospectively changes legal consequences or relations of such fact or deed. Const. Art. 1, § 15.

See publication Words and Phrases for other judicial constructions and definitions.

6. Constitutional Law ⇐188

In determining whether statute affecting preenactment conduct is unconstitutionally retrospective, one inquiry is into whether statute affects vested rights. Const. Art. 1, § 15.

7. Constitutional Law ⇐199
States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not constitute impermissible "ex post facto" law in violation of Alaska Constitution, where at time of amendment, no Alaskan had vested right to dividend, and change did not unfairly or unreasonably impinge upon any property rights or settled expectations. Const. Art. 1, § 15; AS 43.23.005(a)

8. Estoppel ⇐62.2(2)

State was not estopped from denying permanent fund dividend (PFD) to residents who moved into state prior to April 1 of year in which amendment changing eligibility requirements for PFD to coincide with calendar year, rather than the former date of April 1, took effect; residents took calculated risk when they decided to move to state prior to April 1, rather than later date they would allegedly have otherwise preferred, and state engaged in no conduct encouraging residents' action or guaranteeing that residents would qualify for PFD if they arrived prior to April 1. AS 43.23.005(a).

Robert John, Law Office of Robert John, Fairbanks, for appellants.

Vincent L. Usera, Asst. Atty. Gen., and Bruce M. Botelho, Atty. Gen., Juneau, for appellees.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

MOORE, Chief Justice.

At issue in this appeal is the constitutionality of a 1992 amendment to the permanent fund dividend (PFD) statutes, Chapter 4,

section 4, SLA 1992. The amendment changed the qualifying date set forth in AS 43.23.005(a) for a 1993 PFD. Charles E. Underwood, Jr., along with his wife and son, Susie G. Underwood and Anthony C. Underwood (the Underwoods), allege that they were unlawfully denied 1993 PFDs as a result of the change. They instituted this action against the State of Alaska, Governor Walter J. Hickel and the Department of Revenue (collectively "the State"), claiming that the amendment violated a number of their constitutional rights and that the State was estopped from denying their dividend applications. The superior court granted summary judgment in favor of the State. We affirm.

I. *FACTS AND PROCEEDINGS*

The facts are not in dispute. The Underwoods timed their move from Texas to Alaska with the specific intention of becoming Alaska residents in time to qualify for a 1993 PFD. According to Charles Underwood, he understood that in order to qualify for the 1993 PFD, the family members had to be state residents on or before April 1, 1992. Although Charles otherwise would have preferred to remain at his job in Texas until May 1992, he resigned in March. Had Charles remained at his job until late May as he desired, Charles claims he would have earned roughly another $3,000 in after tax wages. The family arrived in Alaska on March 25, 1992.

On March 31, 1992, Governor Hickel signed Chapter 4, section 4, SLA 1992, which amended AS 43.23.005 by changing the eligibility requirements for a PFD to coincide with the calendar year. As a result, to be eligible for a 1993 PFD, applicants had to show Alaska residency as of January 1, 1992. Accordingly, persons who established Alaskan residency between January 2, 1992 and April 1, 1992 were not eligible for a 1993 PFD, whereas under prior law they would have been eligible.

The Underwoods brought suit in superior court challenging the constitutionality of the enactment. They specifically claimed that it violated the equal protection and due process guarantees of the federal and state constitutions, that it constituted an ex post facto law, that it was an impermissible taking of property, and that the State was equitably estopped from amending the law.

The superior court granted summary judgment in favor of the State on all of the Underwoods' claims. The Underwoods appeal.

II. *DISCUSSION*

The parties agree that there are no issues of material fact, and that this case may be properly resolved as a matter of law. The constitutional and other purely legal questions at bar are issues to which this court will apply its independent judgment. *State v. Anthony*, 810 P.2d 165, 166–67 (Alaska 1991); *Croft v. Pan Alaska Trucking*, 820 P.2d 1064, 1066 (Alaska 1991).

A. *The Challenged Enactment Does Not Violate The Underwoods' Constitutional Rights.*

Alaska Statute 43.23.005 governs the eligibility requirements for a PFD. Following the enactment of Chapter 4, section 4, SLA 1992, the statute provided that:

> (a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if
>
> ....
>
> (3) the individual was a state resident for at least the calendar year immediately preceding *January 1* of the current dividend year; ....

AS 43.23.005(a)(3) (emphasis added). Prior to the 1992 amendment, the statute required Alaska residency for the twelve month period immediately preceding *April 1* of the current dividend year. AS 43.23.005(a)(2) (effective June 11, 1991).

1. *Equal Protection*

[1] The Underwoods assert that the 1992 enactment denied them equal protection and opportunity under both the Federal and Alaska Constitutions. *See* U.S. Const. amend. XIV; Alaska Const. art. I, § 1. Because Alaska's equal protection clause "is more protective of individual rights than the

federal equal protection clause," *State v. Anthony*, 810 P.2d at 157, we focus our analysis on the Alaska Constitution.[1]

[2] We have adopted a sliding scale approach to equal protection questions. *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978). Under this approach, "'[t]he applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.'" *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (quoting *State v. Ostrosky*, 667 P.2d 1184, 1192-93 (Alaska 1983)). As the level of scrutiny selected moves up the sliding scale, the asserted governmental interests must be relatively more compelling, and the legislation's means-to-ends fit must be correspondingly closer. *Ostrosky*, 667 P.2d at 1193. Conversely, "if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-ends fit will be tolerated." *Id.* (footnote omitted).

[3] We have held that an individual's interest in a PFD "is merely an economic interest and therefore is entitled only to minimum protection under our equal protection analysis." *Anthony*, 810 P.2d at 158. Under this minimum level of scrutiny, the State must show that the challenged enactment was designed to achieve a legitimate governmental objective, and that the means bear a "fair and substantial" relationship to the accomplishment of that objective. *Cosio*, 858 P.2d at 629; *Anthony*, 810 P.2d at 158-59.[2]

The State asserts that the purpose of the challenged legislation was to improve the overall efficiency of the PFD program. By moving the qualifying date to coincide with the calendar year, the PFD division of the Department of Revenue gains three months to process applications. This additional time should result in earlier detection of ineligible applicants and fewer improperly paid PFDs, less need for temporary staff to process applications, and quicker resolution of questioned applications, thereby decreasing the number of delayed payments. The State also asserts that the amendment was intended to simplify the PFD program, thereby decreasing public confusion and minimizing the many date-related errors that result in missed dividends.

These objectives are legitimate ones, and we reject the Underwoods' argument to the contrary. The Underwoods contend that the cited objectives are not legitimate because they are based on cost savings and efficiency. *See Herrick's Aero-Auto-Aqua Repair Serv. v. State, Dep't of Transp.*, 764 P.2d 1111, 1114 (Alaska 1988) ("[C]ost savings alone are not sufficient government objectives under [Alaska's] equal protection analysis."). However, the challenged legislation here is distinguishable from that in *Herrick's*. It is not justified solely by cost savings that are "achieved by excluding a class of persons from benefits they would otherwise receive." *Id.* (quoting *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 272 (Alaska 1984)). Moreover, the State's goals of improved efficiency and consumer understanding represent different objectives than the mere goal of cost savings discussed in *Herrick's* or in *Brown*. *See id.; Brown*, 687 P.2d at 272. We therefore conclude that the goals of the 1992 amendment pass the legitimacy test.

The means-to-ends tailoring of the amendment also satisfies the "fair and substantial relation" test. In arguing to the contrary, the Underwoods largely look to the fact that the State extended the application period for

1. Article I, section 1 of the Alaska Constitution states, "[t]his constitution is dedicated to the principle[ ] that ... all persons are equal and entitled to equal rights, opportunities, and protection under the law...." Although the parties do not specifically address the issue, the class allegedly subject to disparate treatment under the amendment includes all persons who would have been eligible for a 1993 PFD but for the three month change in the qualifying date.

2. Although the Underwoods acknowledge that the rational basis test ordinarily applies to a person's interest in a PFD, they assert that the 1992 enactment interferes with their right to travel, thereby implicating strict scrutiny analysis. However, the issues in this case do not implicate the right to travel and are properly subject to rational basis review.

1993 PFDs through June 1992.[3] Their argument is that, because the *application* period for 1993 PFDs was extended, the legislature also could and should have extended the *eligibility* period for 1993 PFDs.

However, the extended application period was specifically intended to reduce public confusion resulting from the 1992 statutory amendments, and it is substantially related to the purpose of the legislation. Moreover, the fact that the application time was extended says little about the claims at issue in this case. The State does not assert that it rejected the Underwoods' applications because of the additional burden in processing them. The issue is merely whether the changed qualifying date is fairly and substantially related to the goals of the 1992 amendments. Certainly, the State *could* have elected to permit applicants to achieve the one year residency requirement any time during the extended 1993 application period, thereby resulting in acceptance of the Underwoods' applications. However, the State's decision not to extend the qualifying date along with the application deadline does not mean that the enactment fails to satisfy the fair and substantial relation test. To the contrary, viewing the goals and means of the challenged legislation, we conclude that the State was not constitutionally required to extend the eligibility period for 1993 PFDs simply because it was feasible to do so.

The Underwoods next rely on *Isakson v. Rickey*, 550 P.2d 359, 363–65 (Alaska 1976), to argue that the exclusion of people in their situation from 1993 PFD eligibility fails the fair and substantial relation test. However, *Isakson* does not control the outcome in this case. There, the purpose of the challenged statute was to allocate limited entry commercial fishing permits, with selection to be based upon certain hardship standards. *Id.* at 360. To demonstrate hardship, the statute specified that the applicant must have been the holder of a gear license prior to a cut-off date of January 1, 1973. *Id.* at 360–61. It was assumed that holders of gear licenses obtained after January 1, 1973 could not show hardship. We determined that the January 1, 1973 cut-off date was not fairly and substantially related to identifying the hardship necessary for an entry permit. *Id.* at 365. We found that the cut-off date was both overbroad and underinclusive. It was overbroad because it would include pre-1973 gear license holders who were no longer involved in commercial fishing and could not show hardship; it was underinclusive because it would exclude other persons who actively participated in and were economically dependent upon the fishery. *Id.*

The statute at issue in *Isakson* cannot be logically compared to the challenged amendment in this case. Unlike the extremely loose tailoring in *Isakson*, the action moving the qualifying date for 1993 PFDs by three months is fairly and substantially related to the purpose of simplifying the PFD program in order to decrease public confusion and to improve efficiency and accuracy in administering the program. There is no significant danger of over or underinclusiveness as a result of the State's action.

Because the challenged amendment derives from a legitimate governmental objective, and the means bear a fair and substantial relation to that objective, the 1992 amendment to AS 43.23.005(a) survives minimal scrutiny under Alaska's Constitution. Accordingly, the Underwoods' equal protection claim fails.

2. *Due Process*

[4] The Underwoods next assert that the enactment violated their due process rights because upon their arrival in Alaska in March 1992, they had a vested right to 1993 PFDs, subject only to their continuing residence.[4] We disagree.

3. The PFD application period is governed by AS 43.23.011, which became effective on January 1, 1993 and requires that applications for PFDs be filed between January 2 and March 31 of the dividend year. Chapter 4, section 19(b), SLA 1992 provided that, notwithstanding this section, the application period for 1993 would extend through June 30, 1993.

4. Article I, section 7 of the Alaska Constitution provides:

"No person shall be deprived of life, liberty, or property, without due process of law...." The Fifth Amendment to the United States Constitution contains a similar guarantee.

We are satisfied that this change did not unfairly or unreasonably impinge upon any property rights or settled expectations. Thus, we find that the amendment does not violate the constitutional prohibition against retroactive legislation. The Underwoods' claim on this ground therefore fails. *See, e.g., ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710-12 (Alaska 1992) (upholding a tax law amendment which retroactively applied to a seven month period); *Wien Air Alaska, Inc. v. State, Dep't of Revenue*, 647 P.2d 1087 (Alaska 1982) (assuming the constitutionality of amendments to a tax statute retroactively applying to a six month period).

B. *The State Is Not Equitably Estopped From Denying the Underwoods Their 1993 PFDs.*

[8] The Underwoods lastly claim that the State should be estopped from enforcing the 1992 amendment as to them because they acted in detrimental reliance on the prior law. We reject this claim. In short, the Underwoods undertook a calculated risk when they decided to move to Alaska in March rather than May of 1992. The State engaged in no conduct encouraging this action, or in any way guaranteeing that the Underwoods would qualify for a 1993 PFD if they arrived in March. Thus, while it is unfortunate that the Underwoods' calculated risk did not pay off, the State is not obligated to pay for any losses incurred by the Underwoods as a result of their decision to move to Alaska in March.

III. *CONCLUSION*

The State's amendment to the eligibility statute for 1993 PFDs did not violate the Underwoods' constitutional rights. Nor is the State equitably estopped from denying the Underwoods a 1993 dividend. Accordingly, the superior court's order granting summary judgment in favor of the State is AFFIRMED.

Joseph M. RUDDEN, Appellant,

v.

STATE of Alaska, Appellee.

No. A-4769.

Court of Appeals of Alaska.

Sept. 30, 1994.

Defendant was convicted by jury of attempted first-degree murder of service station mechanic during unprovoked attack following trial in the Superior Court, First Judicial District, Thomas E. Schulz, J. Defendant challenged 35-year sentence on appeal. The Court of Appeals, Bryner, C.J., held that: (1) failing to give greater weight to rehabilitation as sentencing goal was not clear mistake; (2) declining to treat crime as aggravated first-degree assault was not clear mistake; and (3) sentence was not excessive.

Affirmed.

1. Criminal Law ⇐986.2(1)

Determining priority and relationship of various goals of sentencing is primarily a matter for the sentencing court; the court need not emphasize rehabilitation in all cases, or even in all cases involving first offenders.

2. Homicide ⇐358(1)

Emphasizing sentencing goals other than rehabilitation for defendant convicted of attempted murder was not a clear mistake given defendant's poor prospects for rehabilitation and seriousness of crime. AS 11.31.100(a), 11.41.100(a)(1), 12.55.125(b).

3. Homicide ⇐358(1)

Declining to treat attempted first-degree murder as aggravated case of first-degree assault during sentencing was not clear mistake given that sentencing judge recognized that victim had not been killed and crime verged on completed act of murder. AS 11.31.100(a), 11.41.100(a)(1), 12.55.125(b).

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As of March 31, 1992, the Underwoods had been Alaska residents for approximately six days, far short of the twelve month requirement of AS 43.23.005 as it existed when the Underwoods arrived. At that time, the Underwoods possessed nothing more than an inchoate expectancy of a 1993 PFD that is not afforded constitutional protection. *See Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 n. 4 (Alaska 1985) (vested property rights are protected against state action by the due process clauses of the Alaska and United States Constitutions); *Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960) (same).

The Underwoods cite to real property cases from other jurisdictions to support their claim that their reliance on AS 43.23.005 at the time of their move to Alaska should give them a vested right in the law as it existed on the date of their move. The Underwoods' analogy between real property transactions and the present case is unpersuasive. Unlike real property situations in which the complaining party indisputably possesses property rights in specific land, the Underwoods had no property right whatsoever in a 1993 PFD.[5] Accordingly, there is no due process violation in this case.

3. *Ex Post Facto Law*

[5] The Underwoods next assert that the 1992 amendment constitutes an ex post facto law in violation of the Alaska Constitution.[6] An ex post facto law is a law "'passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.'" *Danks v. State*, 619 P.2d 720, 722 n. 3 (Alaska 1980) (quoting *Black's Law Dictionary* 520 (5th ed. 1979)).

[6, 7] In determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights. *See Norton*, 695 P.2d at 1092; *see also Black's Law Dictionary* 1317–18 (6th ed. 1990) (A "retrospective" or "retroactive" law is generally defined as a law which "takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty or attaches a new disability in respect to transactions or considerations already past.") (citation omitted). The Underwoods had no vested right to a 1993 PFD as of March 31, 1992, just as no Alaskan had a vested right to a 1993 dividend at that time.[7] Therefore, under a vested rights inquiry, the amendment clearly does not constitute an impermissible ex post facto law in violation of the Alaska Constitution. *See Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 574 n. 12 (Alaska 1989) (a statutory change which merely disappoints economic expectations and does not affect vested rights is not an ex post facto law).

The Underwoods alternatively urge us to reject a vested rights inquiry and instead review the challenged enactment for fairness and reasonableness. *See Norton*, 695 P.2d at 1092–93 (noting the deficiencies of the vested rights analysis in determining whether a statute is in fact retroactive and whether it is unconstitutional); 2 Norman J. Singer, *Sutherland Statutory Construction* § 41.05, at 369–71 (5th ed. 1992) (fairness considerations represent a more meaningful standard of evaluating retroactive laws than a vested rights analysis). Even under such a standard, however, we find that the 1992 amendment at issue in this case withstands constitutional scrutiny.

The effective date of the 1992 amendment to AS 43.23.005 was January 1, 1993. The amendment made state residency during calendar year 1992 relevant to eligibility for a 1993 PFD, thereby bearing some relation to events dating back to January 1, 1992, instead of April 1, 1992 as under the prior law.

5. Similarly, because the Underwoods had nothing more than an inchoate expectancy of a 1993 PFD, they had no property that could have been the subject of a taking in violation of the Fifth Amendment of the Federal Constitution and Article I, section 18 of the Alaska Constitution. Accordingly, this argument also fails.

6. Article I, section 15 of the Alaska Constitution provides that "[n]o bill of attainder or ex post facto law shall be passed...."

7. In fact, because the entire dividend program is a creature of the legislature, it could have been abolished during the 1992 legislative session, so that no Alaskan received a 1993 PFD.

Alaska Action Trust

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(907) 258-4040 • FAX (907) 258-8751

April 16, 2002

The Honorable Norman Rokeberg
Chairman, House Judiciary Committee
State Capitol
Juneau, Alaska 99801
BY FAX: (907) 465-2040

Re: HCS 499 (Jud) for HB 499

Dear Chairman Rokeberg:

At the time of my testimony before the House Judiciary, I did not have a copy of the committee substitute for House Bill #499. I had several concerns regarding the original bill as proposed.

First, while I understood that the legislative intent was to overturn the Supreme Court's decision in Savage Arms, Inc., the bill went much further. As I understood the bill, it would not only apply to tort actions, but commercial and contractual disputes as well. Additionally, it would afford protection to a transferring corporation from not only tort liability (existing or potential) but, as worded, for debts and other obligations as well. In short, it would have made it much easier to escape a tort liability or other liability (including debts and other obligations to creditors including lending institutions and stockholders) by merely selling or transferring the corporation to an Alaskan corporation and not expressly assuming the debt or liability regardless of the ongoing nature of the enterprise. This would have made Alaska a sanctuary for unscrupulous foreign corporations transferring assets to avoid financial exposure. Moreover, it would place corporate executives or major shareholders of a corporation in a much better position than declaring bankruptcy. The sale or transfer of the assets in exchange for cash or stock would be without the burden of a set aside for preferential transfers in bankruptcy. This would also, arguably, protect foreign corporations as well since the cause of action relating to tort liability would always be in Alaska and if the choice of law provisions applied Alaska law after this statute was promulgated, the foreign corporation would, in all likelihood, be protected as well. I have personally been involved in two different contract/tort cases where this statute would have potentially adversely impacted Alaskans.

The committee substitute for House Bill #499 is much clearer in its intent. It is still very broad in that it allows a corporation to escape liquidated and unliquidated liabilities and existing debts from any source. In other words, it is still much broader in scope than necessary to address the Savage Arms' issue and encompasses cases in addition to tort. The language remains the same, i.e., "in tort or otherwise, for a liability or an obligation . . . ." This could leave not only Alaskan victims of tortuous activity without a remedy, it could also leave Alaskan creditors literally holding the bag. The potential commercial impact of this bill would probably be greater than the tort impact.

Subsection B addresses many of my concerns and, as worded, would provide adequate protection to the commercial case that I described during my testimony before the House Judiciary. That said, while I believe that the committee substitute is a much better bill, I agree with Mr. Powell's assessment that proving fraud can indeed be a daunting hurdle to overcome. I suspect that in most cases where this becomes an issue, the committee substitute will result in more litigation than leaving the holding in Savage Arms intact.

I hope that this adequately responds to the committee's questions.

Very truly yours,

DILLON & FINDLEY, P.C.

s/ RB by maf

Ray R. Brown

RRB/lk/maf

HB 501

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: February 27, 2002 **FURTHER REFERRALS:**

Date of Committee Action: 3.15.02

The JUDICIARY Committee considered: **HB 501**

HOUSE BILL NO. 501 **UNCLAIMED PROPERTY & RESTITUTION**

"An Act relating to the use of unclaimed property to pay court-ordered restitution; and providing for an effective date."

Recommends it be replaced with _____CS_____(_____) [ ] Same Title [ ] New Title
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev. for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				✓
REV				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
K. Meyer	Meyer	✓			
John Coghill	Coghill			✓	
Ralph Rokkowitz	Rokkowitz			—	
Scott Ogan	OGAN			✓	
[illegible]	JAMES	✓			
[illegible]					
Chair: Norman Rokeberg	ROKEBERG	✓			
Chair:					

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
Fax: (907) 465-2040

Heather M. Nobrega
Counsel to Committee

Sponsor Statement for HB 501

This legislation would amend Alaska's Unclaimed Property Code, AS 34.45, to give the Department of Revenue the authority to pay to the state or an individual or business as restitution, or to satisfy a judgment, any unclaimed property owed to a criminal. The department already has the authority to take unclaimed property owed to criminals and to use the assets to pay toward the individual's child support, but the department cannot use the assets to pay other claims without additional court action.

The need for this legislation became apparent last year when the Department of Revenue received several claims for property from prisoners serving sentences in state correctional facilities. The staff at the Unclaimed Property Section inquired if any of the property owners owed restitution or court-appointed attorney fees associated with their criminal cases. The staff learned that in two cases there were unpaid court judgments against the property owners.

In both cases, the Unclaimed Property Section had little choice under existing statute but to release the funds to the inmates with a letter reminding them of their outstanding judgments. As one might imagine, both inmates promptly deposited the checks into their own accounts. Each unclaimed property payment was in excess of $500.

Under existing statute, the Department of Law, an individual or a business must file a Writ of Execution with the court to obtain approval to seize any unclaimed property and to apply the money toward unpaid judgments. The resources used to research, process and file another court document when an existing judgment to pay restitution or attorney fees is already on file seem redundant.

Enacting this legislation would allow the Department of Law to submit proof of court-ordered restitution orders or judgments in criminal and delinquency cases to the Department of Revenue, which would then honor the orders and forward to the appropriate party any unclaimed property owned by incarcerated criminals. This legislation would not apply to judgments in civil cases.

Although this legislation would not affect many cases each year, it would ensure that criminals do not receive unclaimed property until they have first satisfied all of the court judgments against them. This legislation would not diminish the priority of child support cases, which would retain first position for any unclaimed property owned by criminals.

The committee urges your support of this bill.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 501
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to the use of unclaimed property to pay court-ordered restitution; . . ."
BRU Civil Division
Component Collections and Support
Sponsor House Judiciary Committee
Requester House Judiciary Committee
Component No. 2210

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill allows the use of unclaimed property to satisfy restitution and related interest, collection costs, and attorneys fees that are ordered by the court and owed by the owner of the property. Under the bill, if the owner of unclaimed property owes restitution as a result of a criminal or delinquent act, the Department of Revenue would be able to pay the victim the fair market value of the unclaimed property to satisfy the judgment.

Passage of this legislation is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 3/8/02 8:37 AM
Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General
Date 3/8/2002
Agency Department of Law

(Revised 9/2001 OMB)

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FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 501
( ) Publish Date:

Revision Date/Time (Note if correction):
Dept Affected: Revenue
Title: Unclaimed Property & Restitution
RDU: Revenue Operations
Component: Treasury Division
Sponsor: House Judiciary Committee
Requester: House Judiciary Committee
Component No.: 121

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would not require an increased appropriation for the division.

This legislation would allow the Department of Revenue's Unclaimed Property Section to pay -- as restitution or to satisfy a judgment -- any unclaimed property owed to a convicted criminal.

Prepared by: Larry Persily, Deputy Commissioner
Phone 465-5469
Division: Department of Revenue
Date/Time 3/13/02 4:59 PM
Approved by: Larry Persily, Deputy Commissioner
Date 3/13/2002
Agency: Department of Revenue

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF REVENUE

TREASURY DIVISION

333 WILLOUGHBY AVENUE, 11TH FLOOR
P.O. BOX 110405
JUNEAU, ALASKA 99811-0405
PHONE: (907) 465-2350
FAX: (907) 465-2394

March 7, 2002

The Honorable Norman Rokeberg
Chair, House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Dear Representative Rokeberg:

The Department of Revenue Treasury Division manages the Unclaimed Property Program of the State of Alaska. We would like to offer our support for HB501, which amends AS 34.35 and gives us the authority to pay unclaimed property owed to a criminal as restitution or to satisfy a judgment against that criminal.

In the past, we have paid claims to criminals even though we knew they owed restitution or had outstanding attorney fees. Under the existing law we had no way to use the criminal's unclaimed property to help satisfy those obligations. The best we have been able to do is send them a letter with their payment, reminding them of their obligation. Of course, none have chosen to use the money to reduce the restitution or judgments due.

Truthfully, passage of this bill will not result in a large increase in the amount of money available to pay restitution claims. However, it will take the burden away from the victims, as they will no longer have to file a Writ of Execution to collect the criminal's unclaimed property. Filing another court document (the writ) when a judgment already exists is onerous and simply works to the benefit of the criminal not the persons owed the restitution.

Finally, we already have the authority to use criminal's unclaimed property to pay child support. Child support payments would continue to have priority over restitution and judgments.

Thank you and the House Judiciary Committee for sponsoring this legislation.

Sincerely,

Betty Martin

Betty Martin
State Comptroller and Unclaimed Property Manager

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)278-3458

March 8, 2002

Representative Norman Rokeberg
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Re: *House Bill 501- Unclaimed Property*

Dear Chairman Rokeberg:

This letter concerns House Bill 501, relating to the use of unclaimed property to pay court-ordered restitution. Last year, the Alaska Legislature enacted legislation which authorized the Department of Law to collect restitution on behalf of crime victims. The legislation recognized that victims often do not receive the restitution ordered by the court because the victims do not have the resources to hire an attorney or the sophistication to pursue collection on their own. Under the new laws, the Department of Law's collections unit, which is also responsible for collecting criminal and civil judgments owed to the state, may collect court-ordered restitution from criminal defendants and disburse that money directly to victims.

Because the unit collects this restitution at state expense, it is important that the collections occur in the most efficient and cost-effective manner possible. House Bill 501 would further this goal by creating a simple procedure allowing the Department of Law to attach unclaimed property belonging to criminal defendants. Under the bill, the Department of Law would submit proof of court-ordered restitution directly to the Department of Revenue. This would avoid the necessity of first obtaining a writ of execution through the court system. Thus, the process would be streamlined, requiring less paperwork and other resources to complete. It would also assure that unclaimed property is used to pay restitution owed by criminal defendants, rather than being returned to the defendants.

Thank you for your consideration. Of course, if you have any questions, please do not hesitate to contact me.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Diane L Wendlandt
Diane L. Wendlandt
Assistant Attorney General

cc: Michael K. Abbott
Larry Persily
Deborah Behr
Chrystal Smith

DLW\dg

HB 506

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: March 19, 2002 **FURTHER REFERRALS:**

Date of Committee Action: 1 APR 2002

The JUDICIARY Committee considered: **HB 506**

HOUSE BILL NO. 506 **LEGISLATIVE IMMUNITY**

"An Act relating to legislative immunity."

Recommends it be replaced with _____CS_____(_____) [ ] Same Title [ ] New Title

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

[ ] attach amendments

[ ] add new referral to _____Committee

[ ] Letter of Intent _____Committee

List of Abbrev. for Depts.:
ADM
CEL
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAA				X

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
Jeannette James	JAMES	✓			
[illegible]	Berkowitz		✓		
[illegible]	Meyer	✓			
[illegible]	Coghill	✓			
[illegible]	Kookesh	✓			
Chair: Norman Rokeberg	ROKEBERG	✓			
Chair:					

ALASKA STATE HOUSE OF REPRESENTATIVES

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Fax# (907)-456-8245

Session Contact:
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FAX# (907)-465-3258
State Capitol
Room 102

REPRESENTATIVE JOHN COGHILL

HB 506 Legislative Immunity
Sponsor Statement

Imagine how many constituents legislators would have entrust their concerns about state government and state agencies if they thought their conversations with legislators or legislative staff could be repeated in court. In the last year, two legislative staffers have been subpoenaed to testify in court about conversations they had with constituents and legislators. One legislative aide was threatened with a subpoena. I introduced HB 506 to clarify in statute that conversations between legislators, legislative staff, and constituents that occur in the line of legislative duties is confidential and unanswerable before any tribunal.

When Alaskans have problems with state agencies such as DFYS, CSED or public assistance, their only ombudsman is their legislative office. They reveal very personal and revealing information about themselves and family members. They are revealing this information with the understanding that the information is confidential and that the legislator has a fiduciary responsibility to handle that information discreetly and to the best interest of the constituent. If a legislator testified to that confidential information in a court of law that is trying the constituent as a defendant, he or she would be violating that fiduciary responsibility. In fact, AS 24.60.060 provides that a legislator or legislative employee may be subject to prosecution if they knowingly makes "unauthorized disclosure of information that is made confidential by law and that the person acquired in the in the course of official duties."

The Alaska State Constitution provides immunity for legislators, but AS 24.60.010 does not clearly establish in statute that this immunity exists. In *Gravel v, United States*, 408 U.S. 606(1972), the U.S. Supreme Court established that a legislative aide has the same immunity as a legislator.

In one recent incident, the Department of Law said they would release the legislative aide from the subpoena, not because her interpretation of the Alaska Constitution and several court cases were correct, but because " they weren't willing to fight that battle right now." This statutory change will clarify that legislative immunity.

Representative_John_Coghill@LEGIS.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 506
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Legislature
Title "An Act relating to legislative immunity."
BRU All
Component All
Sponsor House State Affairs Committee
Requester House Judiciary Committee
Component No. 783

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

HB506 provides that Legislators and their staff may not be held to answer before any other tribunal for actions undertaken in the exercise of their legislative duties. Actions undertaken in the exercise of legislative duties include communications with other legislators, staff, and constituents, and investigatory activities on matters of legislative concern. HB506 also specifies time periods when a legislator is not subject to civil penalties and is privileged from arrest except for felony or breach of the peace.

HB 506 has zero fiscal impact on the Legislative Affairs Agency.

Prepared by: Karla Schofield, Deputy Director
Phone 465-3852
Division Legislative Affairs Agency
Date/Time 3/28/02 3:31 PM
Approved by: Pamela Varni, Executive Director
Date 3/28/02
Agency Legislative Affairs Agency

(Revised 9/2001 OMB)

Article II

Section 6. Immunities

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

Immunities of this kind are granted to members of state legislative bodies as a general principle of law, although the federal constitution and most state constitutions explicitly extend them to legislators. These immunities protect the public's interest in having legislators attend meetings of the assembly, express themselves freely without fear of retribution and devote themselves to state business without legal harassment by their political enemies inside or outside of government.

The purpose of the first sentence is to ensure free speech and debate in the legislative assembly by protecting members from all civil and criminal prosecutions that might otherwise arise from their single-minded devotion to legislative work. This immunity applies to all things said and done in pursuit of legislative duties, whether occurring in open meetings or behind closed doors. That this long-standing principle of parliamentary immunity should be interpreted literally was emphasized by the Alaska Supreme Court in the case of *State v. Dankworth* (672 P.2d 148; Court of Appeals, 1983). Here the attorney general prosecuted a state senator for his attempt to insert in the budget an appropriation to purchase a surplus construction camp of which he was part owner. The state argued that because the senator's action was covert, and his intent criminal, he should forfeit his legislative immunity. The justicies demurred: if the senator's actions were legislative in nature, and they clearly were, then he was immune from prosecution by the terms of this section. They wrote: "If the motives for a legislator's legislative activities are suspect, the constitution requires that the remedy be public exposure; if the suspicions are sustained, the sanction is to be administered either at the ballot box or in the legislature itself."

The case of *Schultz v. Sundberg* (759 F.2d 714, 1985) grew out of a contentious joint session of the Alaska legislature convened by the governor in 1983. State troopers, acting at the behest of the senate president, compelled Representative Richard Schultz to attend. Representative Schultz brought suit in federal court for violations of civil rights and for assault and battery, false imprisonment and false arrest. The U.S. Ninth Circuit Court of

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Appeals dismissed the suit because compelling attendance of members was within the "legitimate legislative sphere." Referring to legislative immunity, the court said: "The shield . . . extends to those actions necessary to preserve the legislative process and not beyond them."

The original committee draft of this section presented to the constitutional convention was amended on the floor to insert the phrase "while the legislature is in session." This was to forestall McCarthy-like abuse of the immunity privilege by legislators conducting investigative hearings between sessions.

While the second sentence unequivocally protects legislators from civil suits during session (including travel time to and fro), it extends only a limited "privilege" from arrest for criminal matters. The exception for "a felony or breach of the peace" is very broad, and there is little in the way of serious criminal activity for which a legislator could escape prosecution under state law by this section if the offense was not directly related to legislative activity.

Section 12 of the Territorial Organic Act of 1912 was the predecessor to this provision in Alaska. It stated: "That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same: *Provided*, that such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way."

Section 7. Salary and Expenses

> **Legislators shall receive annual salaries. They may receive a per diem allowance for expenses while in session and are entitled to travel expenses going to and from sessions. Presiding officers may receive additional compensation.**

How legislators should be compensated, and how much this compensation should be, are questions that vexed Congress when it authorized a legislature for Alaska in 1912, as well

LEXSEE 686 p2d 1197

Senator Jalmar KERTTULA, Appellant, v. Mitchell E. ABOOD, Jr., et al., Appellees, and Norman C. Gorsuch, et al., Appellees

File No. S-257, No. 2858

Supreme Court of Alaska

686 P.2d 1197; 1984 Alas. LEXIS 335

July 27, 1984

PRIOR HISTORY:
[**1]

Original Application for Relief from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karl S. Johnstone, Judge.

COUNSEL:

Jonathan K. Tillinghast, Birch, Horton, Bittner, Pestinger & Anderson, Juneau, and Susan A. Burke, Gross & Burke, Juneau, for Appellant.

James T. Robinson and David A. Devine, Smith, Robinson & Gruening, Anchorage, for Appellees Mitchell E. Abood, Jr., et al.

James L. Baldwin, Assistant Attorney General, Juneau, Norman C. Gorsuch, Attorney General, Juneau, for Appellees Norman C. Gorsuch, et al.

JUDGES:

Burke, Chief Justice, Rabinowitz, Matthews, Compton, and Moore, Justices.

OPINIONBY:

MATTHEWS

OPINION:

[*1199] This is an appeal from the superior court's denial of Senator Jalmar Kerttula's motion to quash a subpoena which required him to appear and give testimony at a deposition noticed by the plaintiffs in *Abood v. Gorsuch*, 3AN-83-5980 Civil.

We heard the appeal on an expedited basis. Following oral argument we entered a memorandum order which reversed the order of the superior court and directed that the subpoena be quashed and indicated that an opinion would follow. This opinion expresses the reasons for that action.

The [**2] plaintiffs in *Abood v. Gorsuch* are certain members of the current majority coalition of the Alaska House of Representatives. The defendants are Attorney General Norman C. Gorsuch and other state officials whose appointments to the positions they hold were confirmed at a joint session of the legislature on June 8, 1983. The plaintiffs challenge the legality of the joint session and thus the validity of the confirmation votes. It is unnecessary to state in detail the legal theories on which the plaintiffs' complaint is based because the question of the merits of the complaint is not before us. The following information is sufficient to set the context of this case.

In late May of 1983 the Speaker of the House of Representatives notified the Governor and Senate President Kerttula that the House was willing to attend a joint confirmation session on June 10, 1983. On June 3, the Governor issued a proclamation scheduling a joint session for June 7. n1 On [*1200] the same day, the House adjourned. On June 6, 1983 the House reconvened, and again adjourned. On June 7, Senator Kerttula called a joint session to order. A majority of the members of the Alaska House were not present [**3] at any time on June 7 and the joint session was either adjourned or recessed until the next day. On June 8, Senate President Kerttula again called the joint session to order; a call of the House was then placed and the session was recessed until 2:00 p.m. Upon reconvening, twenty of the forty House members were present. The presence of some had been compelled by the Alaska State Troopers. The session then proceeded to confirm the appointments of the defendants. n2

n1 The governor has the authority to convene the two houses of the legislature in joint session pursuant to Alaska Const. art. III, § 17:

Whenever the governor considers it in the public interest, he may convene the legislature, either house, or the two houses in joint session.

n2 These votes were taken pursuant to Alaska Const. art. III, § § 25 and 26 which provide:

Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

[**4]

Senator Kerttula is not a party in the *Abood v. Gorsuch* litigation. The plaintiffs, however, wished to depose him concerning conversations he had with the Governor pertaining to the Governor's convening of the June 1983 joint session. In particular, the plaintiffs sought to elicit information which would cast light on the Governor's motive in convening the session. Among the plaintiffs' legal theories is a claim that the Governor convened the joint session in an effort to preclude the House from investigating and holding hearings regarding the qualifications of Gorsuch and certain other defendants which "constituted an unwarranted intrusion of the Executive branch into the rights, duties, prerogatives, and powers of the Legislative branch of government ...."

I. APPEALABILITY

We first consider the appropriate method of review of the denial of the motion to quash. Had Senator Kerttula failed to appear at a scheduled deposition and been cited for contempt, the contempt order (to a non-party) would have been appealable as a final judgment. *Surina v. Buckalew, 629 P.2d 969, 972 (Alaska 1981).* n3 However, Senator Kerttula has sought relief before being cited for contempt. [**5] In the federal system, orders compelling discovery are generally not final judgments subject to appeal. *Alexander v. United States, 201 U.S. 117, 50 L. Ed. 686, 26 S. Ct. 356 (1906); Socialist Workers Party v. Grubisic, 604 F.2d 1005, 1007 (7th Cir. 1979).* The policy behind this rule is efficient judicial administration. Allowing early appeal of discovery orders would lead to "piecemeal" appellate litigation. *Cobbledick v. United States, 309 U.S. 323, 325, 84 L. Ed. 783, 785, 60 S. Ct. 540 (1940); Borden Co. v. Sylk, 410 F.2d 843, 845 (3d Cir. 1969).* We implicitly adopted the federal rule in *Surina* where we held that the proper method of review for a discovery order was an original application for relief pursuant to Appellate Rule 404. n4 *629 P.2d at 972-73.*

n3 Contempt citations against a party are immediately appealable only if the contempt citation is criminal in nature. The proper avenue of review of civil contempt citations against a party is a petition for review pursuant to Appellate Rules 402 and 403. *Surina, 629 P.2d at 972 n.4.*

n4 Appellate Rule 404 provides in part:

(a)(1) An original application for relief may be filed with the appellate court or a judge or justice thereof in any matter within its jurisdiction, whenever relief is not available from any other court and cannot be obtained through the process of appeal, petition for review, or petition for hearing. Grant of the application is not a matter of right but of sound discretion sparingly exercised.

[**6]

[*1201] The federal courts have recognized two narrow exceptions which permit the appeal of discovery orders. First, an order is appealable under the "collateral order" exception if it falls "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial*

Industrial Loan Corp., 337 U.S. 541, 546, 93 L. Ed. 1528, 1536, 69 S. Ct. 1221 (1949). Second, the Supreme Court held in *United States v. Nixon, 418 U.S. 683, 690-92, 41 L. Ed. 2d 1039, 1054-55, 94 S. Ct. 3090 (1974),* that President Nixon need not be cited for contempt in order to appeal a discovery order requiring him to produce evidence. The Court reasoned that to require the President to disobey a court order would cause unnecessary constitutional confrontation between two branches of government. *Id. at 691-92, 41 L. Ed. 2d at 1054.*

While we appreciate the policies underlying these two federal exceptions and recognize the need for appellate review in special situations [**7] that do not constitute a final judgment, we decline to adopt either the "collateral order" or *"Nixon"* exception. As indicated above, review of a discovery order is available in Alaska as an original application for relief. We believe the policy considerations underlying the federal exceptions are adequately met by our discretionary power to grant review under this procedure. *See, e.g.,* 9 J. Moore, Moore's Federal Practice para. 110.10, at 136 (2d ed. 1983) (recommending that the "collateral order" exception be revoked if supervisory mandamus, an analogous procedure to that authorized by Alaska Appellate Rule 404, is available for the review of new, important, and unsettled questions).

In conclusion, we elect to treat Senator Kerttula's appeal as an original application for relief. n5 We have granted the application because it concerns interpretation of the legislative immunity clause of the Alaska Constitution, an important issue of first impression before this court. Additionally, as was the case in *Nixon,* forcing Senator Kerttula to defy a court order in order to assert his claim would raise the possibility of confrontation between two branches of the government. [**8]

n5 This court has the discretionary power to treat a matter filed as an appeal as an original application for relief. *See, e.g., Surina, 629 P.2d at 972 n.5* (matter filed as petition for review may be treated as appeal); *see also Jordan v. Reed, 544 P.2d 75, 78-79 (Alaska 1975); In re E.M.D., 490 P.2d 658, 661 (Alaska 1971).*

II. LEGISLATIVE IMMUNITY

Art. II, § 6 of the Alaska Constitution provides in relevant part:

> 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.

This single sentence is reflective of an historic tradition of legislative immunity rooted in the struggles between the English parliament and the Tudor and Stuart monarchs. *See United States v. Johnson, 383 U.S. 169, 178, 15 L. Ed. 2d 681, 687, 86 S. Ct. 749 (1966).* Some form of legislative immunity is now encompassed in the constitutions of most of our sister states, *Tenney v. Brandhove,* [**9] *341 U.S. 367, 375, 95 L. Ed. 1019, 1026-27, 71 S. Ct. 783 n.5 (1951),* and in the speech or debate clause of the federal Constitution. n6

n6 United States Const. art. I, § 6 provides: "for any speech or debate in either house, they [senators and representatives] shall not be questioned in any other place."

The framers of the Alaska Constitution, in developing art. II, § 6, acknowledged the general similarity of the Alaska provision to the federal speech or debate clause, and used the legislative immunity clause of the proposed Hawaiian constitution as a drafting model. n7 The only difference which was [*1202] specifically identified by the framers between the Alaska and federal Constitutions pertains to the in-session limitation in our document. n8 This limitation is not relevant to this case.

n7 Alaska Const. Convention Comm. Proposal No. 5, Commentary on the Legislative Article II, § 6 at 2 (Dec. 14, 1955); Alaska Const. Convention, Style and Drafting Workfile, Art. II. [**10]

n8 Delegate Stanley McCutcheon made the following comments when offering this amendment:

> The Committee thinking behind this matter is that it was the idea of the Committee that a legislator should be given proper immunity for any of his actions during an active session of the legislature, but that that immunity should not continue to any investigative interim committee where he might utilize that immunity to the detriment of others. That is the reason why the Committee asks unanimous consent for the adoption of this amendment.

4 Proceedings of the Alaska Const. Convention 3100 (Jan. 25, 1956).

Two broad policies underlie legislative immunity. The historical policy is that of protecting disfavored legislators from intimidation by a hostile executive. *Gravel v. United States, 408 U.S. 606, 617, 33 L. Ed. 2d 583, 597, 92 S. Ct. 2614 (1972).* The second policy is the protection of legislators from the burdens of forced participation in private litigation. *Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503, 44 L. Ed. 2d 324, 336, 95 S. Ct. 1813 (1975); Dombrowski* **[**11]** *v. Eastland, 387 U.S. 82, 85, 18 L. Ed. 2d 577, 580, 87 S. Ct. 1425 (1967);* Comment, *Speech or Debate Clause Immunity for Congressional Hiring Practices: Its Necessity and its Implications, 28 U.C.L.A. L. Rev. 217, 237-243 (1980).* Both policies share a common purpose of furthering legislative effectiveness, while the historical policy is also concerned with legislative independence.

Alaska's legislative immunity clause protects legislators from statements made "in the exercise of their *legislative duties* ...." The emphasized words, and their counterpart in federal jurisprudence, "legislative acts," *Gravel, 408 U.S. at 625, 33 L. Ed. 2d at 602,* have a core meaning which is clear. It necessarily includes activities internal to the legislature such as voting, speaking on the floor of the House or in committee, authoring committee reports, introducing legislation, and questioning witnesses in legislative hearings.

The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House **[**12]** proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Id. However, the extent to which "legislative duties" reach beyond these core activities is not clear, and the answer probably cannot be gained by reference to any single phrase or formula.

Legislative acts, that is those acts subject to legislative immunity, were initially broadly defined by the United States Supreme Court to encompass "things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson, 103 U.S. (13 Otto) 168, 204, 26 L. Ed. 377, 392 (1880).* However, in practice the immunity which has actually been afforded has not been as broad as suggested by this generalization. n9

n9 "In no case has this Court ever treated the [speech or debate] Clause as protecting all conduct *relating* to the legislative process." *United States v. Brewster, 408 U.S. 501, 515, 33 L. Ed. 2d 507, 519, 92 S. Ct. 2531 (1972)* (footnote omitted).

[13]**

Legislative acts in federal law do not include the act of a legislator of informing the public of action taken in the legislature. n10 However, there is state authority to the contrary when the information given to the public is directly related to the legislative **[*1203]** function. n11 Under federal law a legislator's promise to deliver a speech or to vote in a certain way or to do some other internal legislative act is not itself a legislative act, n12 nor are attempts by legislators to influence the administration of a federal statute by executive officers. n13 However, in *State v. Dankworth, 672 P.2d 148 (Alaska App. 1983),* our court of appeals held as privileged a state legislator's attempt to persuade an executive official to include an item in the Governor's proposed budget. The item in question arguably would have led the state to purchase property owned by the legislator. The court of appeals ruled that the preparation of the budget was a joint executive and legislative responsibility and thus federal precedent involving interference with purely executive action was not on point. *Id. at 151 n.4.*

n10 *Hutchinson v. Proxmire, 443 U.S. 111, 61 L. Ed. 2d 411, 99 S. Ct. 2675 (1979).* **[**14]**

n11 *See Mehau v. Gannett Pacific Corp., 66 Haw. 133, 658 P.2d 312 (Hawaii 1983); Abercrombie v. McClung, 55 Haw. 595, 525 P.2d 594 (Hawaii 1974); see also Van Riper v. Tumulty, 26 N.J. Misc. 37, 56 A.2d 611 (N.J. Super. 1948); State v. Nix, 295 P.2d 286 (Okla. 1956).*

n12 *United States v. Helstoski, 442 U.S. 477, 489-90, 61 L. Ed. 2d 12, 23-24, 99 S. Ct. 2432 (1979).*

n13 *United States v. Johnson, 383 U.S. 169, 172, 15 L. Ed. 2d 681, 684, 86 S. Ct. 749 (1966); see also Gravel, 408 U.S. at 625, 33 L. Ed. 2d at 602.*

Where criminal prosecutions are involved, the United States Supreme Court has shown considerable reluctance to extend the scope of protected legislative acts beyond core legislative activity. The court has taken

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.

Gravel, 408 U.S. at 620, 33 L. Ed. 2d at 599. This **[**15]** view, making protection of the speech or debate clause dependent on a determination of whether the legislator's actions were illegal, necessarily is in conflict to some degree with one of the most consistently expressed themes in the legislative immunity cases, that a legislator's motive for a legislative act may not be questioned. *United States v. Johnson, 383 U.S. at 180, 15 L. Ed. 2d at 688; United States v. Brewster, 408 U.S. 501, 509, 33 L. Ed. 2d 507, 516, 92 S. Ct. 2531 (1972).* "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove, 341 U.S. at 378, 95 L. Ed. at 1027-28* (footnote omitted).

The closest analogy for purposes of the present case is presented by those authorities which deal with preparation by a legislator for a legislative act. One such case is *Gravel v. United States.* **One of the holdings of *Gravel* is that Senator Gravel's aide, who had the same immunity as the Senator,** could not be questioned concerning whom he had contacted and what conversations he had had in preparing for a senate committee **[**16]** hearing, except as relevant to criminal charges.*408 U.S. at 629, 33 L. Ed. 2d at 605.* The Fourth Circuit, in *United States v. Dowdy, 479 F.2d 213, 224-25 n.20 (4th Cir. 1973),* explained *Gravel* as follows:

Much of our analysis with respect to the indictment and the proof is premised on the holding in *Gravel* that the speech or debate clause bars inquiry into a Congressman's preparation for a subcommittee hearing .... *Gravel* articulated two exceptions to this rule. Inquiry would be permissible: (a) "[if] it proves relevant to investigating possible third party crime," and (b) If the Congressman's act is itself criminal .... Although these exceptions, if read literally, might conceivably be applied in this case, we conclude that the context in *Gravel* - alleged theft and receipt of stolen classified papers - limits their application to cases where the inquiry focuses on the manner and methods of obtaining certain information, and **[*1204]** not to cases where the inquiry focuses on the Congressman's motivations for obtaining certain information. Otherwise, these exceptions would engulf the rule.

The court in *Dowdy* held that acts of a congressman **[**17]** in contacting and conversing with officials within the executive branch arguably to gather information for a committee investigatory hearing were shielded by legislative immunity. Similarly, the court in *Miller v. Transamerican Press, Inc., 709 F.2d 524, 530-31 (9th Cir. 1983),* held that questions as to the source of information which was inserted by a congressman into the Congressional Record were barred by the privilege.

As previously noted, under the Alaska Constitution executive department heads and members of boards and commissions are to be appointed by the governor and confirmed by a majority of the members of the legislature in joint session. n14 The governor has the authority to convene the legislature in joint session. n15 The president of the senate is the presiding officer at joint sessions n16 and as such has the duty to call a joint session to order, once it has been convened by the governor, n17 and to preside over it. At the joint session, Senator Kerttula thus had a general duty to vote on the Governor's appointees and specific duties to perform as Senate President. His conversations with the Governor may properly be seen as acts in preparation for the performance **[**18]** of these duties. n18 As such they are privileged. n19

n14 *See* note 2, *supra.*

n15 *See* note 1, *supra.*

n16 Rule 51, Uniform Rules of the Alaska State Legislature.

n17 P. Mason, Manual of Legislative Procedure § 575.1(a), at 416 (1979), incorporated by reference as a rule of the legislature by Rule 4, Uniform Rules of the Alaska State Legislature.

n18 The plaintiffs argue that art. III, § 17 of the Alaska Constitution, which authorizes the Governor to convene a joint session of the legislature, precludes Senator Kerttula from relying on legislative immunity. We disagree. The proper focus of analysis is on the Senator's legitimate legislative duties and whether immunity is justified based on these duties. We conclude that it is.

n19 There are no criminal charges relating to this case. It is therefore unnecessary for us to decide whether the criminal exception, articulated in *Gravel,* to the rule banning inquiry into

preparation for the performance of a legislative act is applicable under the Alaska Constitution.

Plaintiffs suggest that there should also be an exception to the rule of privilege for unconstitutional behavior in preparation for legislative acts which does not involve criminal conduct. We decline to adopt this suggestion. We are not aware of any case that has so held. Further, the breadth and vagueness of some constitutional doctrines, due process for example, would make the exception nearly always available to a knowledgeable litigant.

[19]**

The plaintiffs argue that even if the conversations are privileged, n20 Senator Kerttula, who is not a party in the underlying action, cannot assert privilege. They note that there is a textual difference between the federal speech or debate clause, which states that congressmen "shall not be questioned in any other place," and the Alaska immunity clause, which states that **"legislators may not be held to answer before any other tribunal ...."** The federal speech or debate clause has been held to insulate members of Congress from compulsory testimony in actions in which they are not parties. *Miller v. Transamerican Press, Inc., 709 F.2d at 530; United States v. Peoples Temple of the Disciples of Christ, 515 F. Supp. 246, 248-49 (D.D.C. 1981).* n21 We believe that **[*1205]** Alaska's immunity clause should also apply to non-party legislators.

n20 In addition to desiring discovery into the substance of the Senator's conversations, the House Coalition mentioned in a footnote in its brief that it wishes to learn the names of other legislators present when the conversations took place. We conclude that disclosure of the names of persons present at a meeting held to discuss legitimate legislative duties is also entitled to immunity because the disclosure of such information would "reveal information as to a legislative act." *Helstoski, 442 U.S. at 489, 61 L. Ed. 2d at 23. See also Miller v. Transamerican Press, Inc., 709 F.2d 524, 530-31 (9th Cir. 1983)* (congressman cannot be forced to reveal identities of persons providing information on legislative concerns). **[**20]**

n21 *See also State v. Beno, 116 Wis. 2d 122, 341 N.W.2d 668, 678 (Wisc. 1984)* (reaching the same conclusion under the Wisconsin legislative immunity clause).

First, there is no indication in the constitutional history accompanying the preparation of Alaska's Constitution that a narrower meaning was intended. Second, the phrase "may not be held to answer" is as broad as the federal language. It conveys a meaning of non-accountability - as, for example, immunity from suit - and a connotation of testimonial immunity regardless of party status. The Supreme Court of the United States has used the analogous phrase "made to answer" in both senses:

We have no doubt that Senator Gravel may not be made to answer - either in terms of questions or in terms of defending himself from prosecution ....

Gravel, 408 U.S. at 616, 33 L. Ed. 2d at 597. Third, one of the purposes of legislative immunity, that of assuring the effectiveness of the legislature, is implicated when legislators are forced to testify concerning their legislative acts, whether or not a legislator is a party to **[**21]** a particular action. **Forced testimony can be burdensome and disruptive of legislative business and can serve to deter the performance of legislative acts or the flow of information to a legislator.** "The [legislator] might censor his remarks or forego them entirely to protect the privacy of his sources, if he contemplated that he could be forced to reveal their identity in a lawsuit." *Miller v. Transamerican Press, Inc., 709 F.2d at 531.*

For the above reasons we have concluded that Senator Kerttula may not be compelled to give testimony in *Abood v. Gorsuch.*

LEXSEE 408 us 606

GRAVEL v. UNITED STATES

No. 71-1017

SUPREME COURT OF THE UNITED STATES

408 U.S. 606; 92 S. Ct. 2614; 33 L. Ed. 2d 583; 1972 U.S. LEXIS 21

April 19-20, 1972, Argued

June 29, 1972, Decided *

*** Together with No. 71-1026, United States v. Gravel, also on certiorari to the same court.**

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

DISPOSITION:

455 F.2d 753, vacated and remanded.

SYLLABUS:

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

1. The Speech or Debate Clause applies not only to a Member of Congress but also to his aide, insofar as the aide's conduct would be a protected legislative act if performed by the Member himself. *Kilbourn v. Thompson, 103 U.S. 168; Dombrowski v. Eastland, 387 U.S. 82;* and *Powell v. McCormack, 395 U.S. 486,* distinguished. Pp. 613-622.

2. The Speech or Debate Clause does not extend immunity to the Senator's aide from testifying before the grand jury about the alleged arrangement for private publication of the Pentagon Papers, as such publication had no connection with the legislative process. Pp. 622-627.

3. The aide, similarly, had no nonconstitutional testimonial privilege from being questioned by the grand jury in connection with its inquiry into whether private publication of the Papers violated federal law. P. 627.

4. The Court of Appeals' protective order was overly broad in enjoining interrogation of the aide with respect to any act, "in the broadest sense," that he performed within the scope of his employment, since the aide's immunity extended only to legislative acts as to which the Senator would be immune. And the aide may be questioned by the grand jury about the source of classified documents in the Senator's possession, as long as the questioning implicates no legislative act. The order in other respects would suffice if it forbade questioning the aide or others about the conduct or motives of the Senator or his aides at the subcommittee meeting; communications between the Senator and his aides relating to that meeting or any legislative act of the Senator; or steps of the Senator or his aides preparatory for the meeting, if not relevant to third-party crimes. Pp. 627-629.

COUNSEL:

Robert J. Reinstein and Charles L. Fishman argued the cause for petitioner in No. 71-1017 and for respondent in No. 71-1026. With them on the briefs were Harvey A. Silverglate and Alan M. Dershowitz.

Solicitor General Griswold argued the cause for the United States in both cases. With him on the briefs were Assistant Attorney General Mardian, Jerome M. Feit, Allan A. Tuttle, and Robert L. Keuch.

Sam J. Ervin, Jr., and William B. Saxbe argued the cause for the Senate of the United States as amicus curiae. With them on the brief were James O. Eastland, John O. Pastore, Herman E. Talmadge, Norris Cotton, Peter H. Dominick, Charles McC. Mathias, Jr., Philip B. Kurland, and Edward I. Rothschild.

Briefs of amici curiae were filed by Melvin L. Wulf and Sanford Jay Rosen for the American Civil Liberties Union; by Frank B. Frederick and Henry Paul Monaghan for the Unitarian Universalist Association; and by Morton Stavis and Doris Peterson for Leonard S. Rodberg.

JUDGES:

White, J., wrote the opinion of the Court, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ., joined. Stewart, J., filed an opinion dissenting in part, post, p. 629. Douglas, J., filed a dissenting opinion, post, p. 633. Brennan, J., filed a dissenting opinion, in which Douglas and Marshall, JJ., joined, post, p. 648.

OPINIONBY:

WHITE

OPINION:

[*608] [*592] [**2618]** Opinion of the Court by MR. JUSTICE WHITE, announced by MR. JUSTICE BLACKMUN.

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

Among the witnesses subpoenaed were Leonard S. Rodberg, an assistant to Senator Mike Gravel of Alaska and a resident fellow at the Institute of Policy Studies, and Howard Webber, Director of M. I. T. Press. Senator Gravel, as **[**2619]** intervenor, n1 **[***593]** filed motions to quash the **[*609]** subpoenas and to require the Government to specify the particular questions to be addressed to Rodberg. n2 He asserted that requiring these witnesses to appear and testify would violate his privilege under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1.

n1 The District Court permitted Senator Gravel to intervene in the proceeding on Dr. Rodberg's motion to quash the subpoena ordering his appearance before the grand jury and accepted motions from Gravel to quash the subpoena and to specify the exact nature of the questions to be asked Rodberg. The Government contested Gravel's standing to appeal the trial court's disposition of these motions on the ground that, had the subpoena been directed to the Senator, he could not have appealed from a denial of a motion to quash without first refusing to comply with the subpoena and being held in contempt. *United States v. Ryan, 402 U.S. 530 (1971); Cobbledick v. United States, 309 U.S. 323 (1940).* The Court of Appeals, *United States v. Doe, 455 F.2d 753, 756-757 (CA1 1972)*, held that because the subpoena was directed to third parties, who could not be counted on to risk contempt to protect intervenor's rights, Gravel might be "powerless to avert the mischief of the order" if not permitted to appeal, citing *Perlman v. United States, 247 U.S. 7, 13 (1918)*. The United States does not here challenge the propriety of the appeal.

n2 Dr. Rodberg, who filed his own motion to quash the subpoena directing his appearance and testimony, appeared as *amicus curiae* both in the Court of Appeals and this Court. Technically, Rodberg states, he is a party to No. 71-1026, insofar as the Government appeals from the protective order entered by the District Court. However, since Gravel intervened, Rodberg does not press the point. Brief of Leonard S. Rodberg as *Amicus Curiae* 2 n. 2.

It appeared that on the night of June 29, 1971, Senator Gravel, as Chairman of the Subcommittee on

Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee and there read extensively from a copy of the Pentagon Papers. He then placed the entire 47 volumes of the study in the public record. Rodberg had been added to the Senator's staff earlier in the day and assisted Gravel in preparing for and conducting the hearing. n3 Some weeks later there were press reports that Gravel had arranged for the papers to be published by Beacon **[*610]** Press n4 and that members of Gravel's staff had talked with Webber as editor of M. I. T. Press. n5

n3 The District Court found "that 'as personal assistant to movant [Gravel], Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.'" *United States v. Doe, 332 F.Supp. 930, 932 (Mass. 1971).*

n4 Beacon Press is a division of the Unitarian Universalist Association, which appeared here as *amicus curiae* in support of the position taken by Senator Gravel.

n5 Gravel so alleged in his motion to intervene in the Webber matter and to quash the subpoena ordering Webber to appear and testify. App. 15-18.

The District Court overruled the motions to quash and to specify questions but entered an order proscribing certain categories of questions. *United States v. Doe, 332 F.Supp. 930 (Mass. 1971).* The Government's contention that for purposes of applying the Speech or Debate Clause the courts were free to inquire into the regularity of the subcommittee meeting was rejected. n6 **[***594]** Because **[**2620]** the Clause protected all legislative **[*611]** acts, it was held to shield from inquiry anything the Senator did at the subcommittee meeting and "certain acts done in preparation therefor." *Id., at 935.* The Senator's privilege also prohibited "inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *Id., at 937-938.* n7 The trial court, however, held the private publication of the documents was not privileged by the Speech or Debate Clause. *Id., at 936.* n8

n6 The Government maintained that Congress does not enjoy unlimited power to conduct business and that judicial review has often been exercised to curb extra-legislative incursions by legislative committees, citing *Watkins v. United States, 354 U.S. 178 (1957); McGrain v. Daugherty, 273 U.S. 135 (1927); Hentoff v. Ichord, 318 F.Supp. 1175 (DC 1970),* at least where such incursions are unrelated to a legitimate legislative purpose. It was alleged that Gravel had "convened a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), for the purpose of reading the documents and thereafter placed all unread portions in the subcommittee record, with Dr. Rodberg soliciting publication following the meeting." App. 9. The District Court rejected the contention: "Senator Gravel has suggested that the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations." *United States v. Doe, 332 F.Supp., at 935.* Cases such as *Watkins, supra,* were distinguished on the ground that they concerned the power of Congress under the Constitution: "It has not been suggested by the Government that the Subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action. Also, the individual rights at stake in these proceedings are not those of a witness before a congressional committee or of a subject of a committee's investigation, but only those of a congressman and member of his personal staff who claim 'intimidation by the executive.'" *332 F.Supp., at 936.*

n7 The District Court thought that Rodberg could be questioned concerning his own conduct prior to joining the Senator's staff and concerning the activities of third parties with whom Rodberg and Gravel dealt. *Id., at 934.*

n8 The protective order entered by the District Court provided as follows:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about

Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting." *Id., at 938.*

The Court of Appeals affirmed the denial of the motions to quash but modified the protective order to reflect its own views of the scope of the congressional privilege. *United States v. Doe, 455 F.2d 753 (CA1 1972).* Agreeing that Senator and aide were one for **[*612]** the purposes of the Speech or Debate Clause and that the Clause foreclosed inquiry of both Senator and aide with respect to legislative acts, the Court of Appeals also viewed the privilege as barring direct inquiry of the Senator or his aide, but not of third parties, as to the sources of the Senator's information used in performing legislative **[***595]** duties. n9 Although it did not consider private publication by the Senator or Beacon Press to be protected by the Constitution, the Court of Appeals apparently held that neither Senator nor aide could be questioned about it because of a common-law privilege akin to the judicially **[**2621]** created immunity of executive officers from liability for libel contained in a news release issued in the course of their normal duties. See *Barr v. Matteo, 360 U.S. 564 (1959).* This privilege, fashioned by the Court of Appeals, would not protect third parties from similar inquiries before the grand jury. As modified by the Court of Appeals, the protective order to be observed by prosecution and grand jury was:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with **[*613]** his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

n9 The Court of Appeals thought third parties could be questioned as to their own conduct regarding the Pentagon Papers, "including their dealing with intervenor or his aides." *United States v. Doe, 455 F.2d, at 761.* The court found no merit in the claim that such parties should be shielded from questioning under the Speech or Debate Clause concerning their own wrongful acts, even if such questioning may bring the Senator's conduct into question. *Id., at 758 n. 2.*

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

I

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

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained **[***596]** by Law, and paid out of the Treasury of the United **[*614]** States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

[*HR1]** **[***HR2]** **[***HR3]** **[***HR4]** **[***HR5]** The last sentence of the Clause provides Members of Congress with two distinct privileges.

Except in cases of "Treason, Felony and Breach of the Peace," the Clause shields Members from arrest while attending or traveling to and from a session of their House. History reveals, and prior cases so hold, that this part of the Clause exempts Members from arrest in civil cases only. "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." *Long v. Ansell, 293 U.S. 76, 83 (1934)* (footnote omitted). "Since ... the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without **[**2622]** merit ...." *Williamson v. United States, 207 U.S. 425, 446 (1908).* n10 Nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters, *Long v. Ansell, supra, at* **[*615]** *82-83,* or as a witness in a criminal case. "The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a *subpoena*, in such cases." *United States v. Cooper, 4 Dall. 341 (1800)* (Chase, J., sitting on Circuit). It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. *Williamson v. United States, supra;* cf. *Burton v. United States, 202 U.S. 344 (1906).* Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons. T. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 92-1, p. 437 (1971).

n10 Williamson, United States Congressman, had been found guilty of conspiring to commit subornation of perjury in connection with proceedings for the purchase of public land. He objected to the court's passing sentence upon him and particularly protested that any imprisonment would deprive him of his constitutional right to "go to, attend at and return from the ensuing session of Congress." *Williamson v. United States, 207 U.S. 425, 433 (1908).* The Court rejected the contention that the Speech or Debate Clause freed legislators from accountability for criminal conduct.

[*HR6]** **[***HR7]** **[***HR8]** In recognition, no doubt, of the force of this part of § 6, Senator Gravel disavows any assertion of general immunity from the criminal law. But he points out that the last portion of § 6 affords Members of Congress another vital privilege -- they may not be questioned in any other place for **[***597]** any speech or debate in either House. The claim is not that while one part of § 6 generally permits prosecutions for treason, felony, and breach of the peace, another part nevertheless broadly forbids them. Rather, his insistence is that the Speech or Debate Clause at the very least protects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible. **[*616]** The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer -- either in terms of questions or in terms of defending himself from prosecution -- for the events that occurred at the subcommittee meeting. Our decision is made easier by the fact that the United States appears to have abandoned whatever position it took to the contrary in the lower courts.

[*HR9]** **[***HR10]** Even so, the United States strongly urges that because the Speech or Debate Clause confers a privilege only upon "Senators and Representatives," Rodberg himself has no valid claim to constitutional immunity from grand jury inquiry. In our view, both courts below correctly rejected this position. We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be "treated as one," *United States v. Doe, 455 F.2d, at 761;* or, as the District Court put it: the "Speech or **[**2623]** Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *United States v. Doe, 332 F.Supp., at 937-938.* Both courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the **[*617]** Members' performance that they must be treated as the

latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause -- to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson, 383 U.S. 169, 181 (1966)* -- will inevitably be diminished and frustrated.

The Court has already embraced similar views in *Barr v. Matteo, 360 U.S. 564 (1959)*, where, in immunizing the Acting Director of the Office of Rent Stabilization from liability for an alleged libel contained in a press release, the Court held that the executive privilege recognized in prior cases could not be restricted to those of cabinet rank. As stated by Mr. Justice Harlan, the "privilege is not a badge or emolument of exalted office, but an expression of **[***598]** a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id., at 572-573* (footnote omitted).

[*HR11]** **[***HR12]** It is true that the Clause itself mentions only "Senators and Representatives," but prior cases have plainly not taken a literalistic approach in applying the privilege. The Clause also speaks only of "Speech or Debate," but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. Committee reports, resolutions, and the act of voting are equally covered; "in short, ... things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson, 103 U.S. 168, 204 (1881)*, quoted **[*618]** with approval in *United States v. Johnson, 383 U.S., at 179*. Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator. We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.

[*HR13]** Nor can we agree with the United States that our conclusion is foreclosed by *Kilbourn v. Thompson, supra, Dombrowski v. Eastland, 387 U.S. 82 (1967)*, and *Powell v. McCormack, 395 U.S. 486 (1969)*, where the speech or debate privilege was held unavailable to certain House and committee employees. Those cases do not hold that persons other than Members of Congress are beyond the protection of the Clause when they perform or aid in the performance of legislative acts. In *Kilbourn*, the Speech or Debate **[**2624]** Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest. The Court quoted with approval from *Stockdale v. Hansard, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K. B. 1839)*: "'So if the speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue **[*619]** officer,'" *103 U.S., at 202*. n11 The Speech or Debate Clause could not be construed **[***599]** to immunize an illegal arrest even though directed by an immune legislative act. The Court was careful to point out that the Members themselves were not implicated in the actual arrest, *id., at 200*, and, significantly enough, reserved the question whether there might be circumstances in which "there may ... be things done, *in the one House or the other*, of an extraordinary character, for which the members who take part in the act may be held legally responsible." *103 U.S., at 204* (emphasis added).

> n11 In *Kilbourn v. Thompson, 103 U.S. 168, 198 (1881)*, the Court noted a second example, used by Mr. Justice Coleridge in *Stockdale v. Hansard, 9 Ad. & E. 1, 225-226, 112 Eng. Rep. 1112, 1196-1197 (K. B. 1839)*: "Let me suppose, by way of illustration, an extreme case; the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the House is pleaded as a justification. ... In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege; and no lawyer can seriously doubt that it exists: but the argument confounds them, and forbids us to enquire, in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this.'"

Dombrowski v. Eastland, supra, is little different in principle. The Speech or Debate Clause there protected

a Senator, who was also a subcommittee chairman, but not the subcommittee counsel. The record contained no evidence of the Senator's involvement in any activity that could result in liability, *387 U.S., at 84*, whereas the committee counsel was charged with conspiring with state officials to carry out an illegal seizure of records that the committee sought for its own proceedings. *Ibid.* The committee counsel was deemed protected to **[*620]** some extent by legislative privilege, but it did not shield him from answering as yet unproved charges of conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize.

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

[*HR14]** None of these three cases adopted the simple proposition that immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection. **[**2625]** 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 **[***600]** *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 **[*621]** 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.

[*HR15]** **[***HR16]** **[***HR17]** None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So, too, in *Eastland*, as in this 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 seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States v. Johnson, 383 U.S. 169 (1966).* n12

n12 Senator Gravel is willing to assume that if he personally had "stolen" the Pentagon Papers, and that act were a crime, he could be prosecuted, as could aides or other assistants who participated in the theft. Consolidated Brief for Senator Gravel 93.

[*HR18A]** **[***HR19A]** **[***HR20]** The United States fears the abuses that history reveals have occurred when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws. But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the **[*622]** privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf, n13 and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that

[***601] Rodberg is for all purposes exempt from grand jury questioning.

[***HR19B]

n13 It follows that an aide's claim of privilege can be repudiated and thus waived by the Senator.

II

[***HR21A] We are convinced also that the Court of Appeals correctly determined [**2626] that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers was not protected speech or debate within the meaning of Art. I, § 6, cl. 1, of the Constitution.

[***HR22] Historically, the English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House. *Stockdale v. Hansard, 9 Ad. & E., at 114, 112 Eng. Rep., at 1156,* recognized that "for speeches made in Parliament by a member to the prejudice of any other person, or hazardous [*623] to the public peace, that member enjoys complete impunity." But it was clearly stated that "if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher" n14 [*624] This was accepted in *Kilbourn* v. *Thompson* as a "sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England" and as a reasonable basis for inferring "that the framers of the Constitution meant the same thing by the use of language borrowed from that source." *103 U.S., at 202.*

n14 *Stockdale* extensively reviewed the precedents and their interplay with the privilege so forcefully recognized in the Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2. From these cases, including *Rex v. Creevey, 1 M. & S. 273, 105 Eng. Rep. 102 (K. B. 1813); Rex* v. *Wright,* 8 T. R. 293, *101 Eng. Rep. 1396 (K. B. 1799); Rex v. Abingdon, 1 Esp. 226, 170 Eng. Rep. 337 (N. P. 1794); Rex* v. *Williams,* 2 Show. K. B. 471, *89 Eng. Rep. 1048 (1686),* it is apparent that to the extent English precedent is relevant to the Speech or Debate Clause there is little, if any, support for Senator Gravel's position with respect to republication. Parliament reacted to *Stockdale* v. *Hansard* by adopting the Parliamentary Papers Act of 1840, 3 & 4 Vict., c. 9, which stayed proceedings in all cases where it could be shown that publication was by order of a House of Parliament and was a bona fide report, printed and circulated without malice. See generally C. Wittke, The History of English Parliamentary Privilege (1921).

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

[***HR23] Prior cases have read the Speech or Debate Clause "broadly to effectuate its purposes," *United States v. Johnson, 383 U.S., at 180,* and have included within its reach anything "generally done in a session of the House by [***602] one of its members in relation to the business before it." *Kilbourn v. Thompson, 103 U.S., at 204; United States v. Johnson, 383 U.S., at 179.* Thus, voting by Members and committee reports are protected; and we recognize today -- as the Court has recognized before, *Kilbourn v. Thompson, 103 U.S., at 204; Tenney v. Brandhove, 341 U.S. 367, 377-378 (1951)* -- that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a

Member because that conduct is within the "sphere [**2627] of legitimate legislative activity." *Id., at 376.* n15

> n15 The Court in *Tenney v. Brandhove, 341 U.S. 367, 376-377 (1951),* was equally clear that "legislative activity" is not all-encompassing, nor may its limits be established by the Legislative Branch: "Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby v. White, 2 Ld. Raym. 938, 3 id.* 320. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn v. Thompson, 103 U.S. 168; Marshall v. Gordon, 243 U.S. 521;* compare *McGrain v. Daugherty, 273 U.S. 135, 176.*"

[***HR24] [***HR25] [***HR26] But the Clause has not been extended beyond the legislative [*625] sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies -- they may cajole, and exhort with respect to the administration of a federal statute -- but such conduct, though generally done, is not protected legislative activity. *United States* v. *Johnson* decided at least this much. "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." *383 U.S., at 172.* Cf. *Burton v. United States, 202 U.S., at 367-368.*

[***HR27] [***HR28] [***HR29] Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." *United States v. Doe, 455 F.2d, at 760.*

[***HR21B] [***HR30] Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as [***603] to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. The Senator [*626] had conducted his hearings; the record and any report that was forthcoming were available both to his committee and the Senate. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication. n16 We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

> n16 The sole constitutional claim asserted here is based on the Speech or Debate Clause. We need not address issues that may arise when Congress or either House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports, or other materials. Of course, Art. I, § 5, cl. 3, requires that each House "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy ...." This Clause has not been the subject of extensive judicial examination. See *Field v. Clark, 143 U.S. 649, 670-671 (1892); United States v. Ballin, 144 U.S. 1, 4 (1892).*

[***HR31] [***HR32] [***HR33] [***HR34] There are additional considerations. Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate [**2628] Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the Speech or Debate Clause. It also appears that the grand jury was pursuing this very subject in the normal course of a valid investigation. The Speech or Debate Clause does not in our view extend immunity to Rodberg, as a

Senator's aide, from testifying before the grand jury about the arrangement between Senator Gravel and Beacon Press or about his own participation, if any, in the [*627] alleged transaction, so long as legislative acts of the Senator are not impugned.

III

[***HR35] [***HR36] [***HR37] Similar considerations lead us to disagree with the Court of Appeals insofar as it fashioned, tentatively at least, a nonconstitutional testimonial privilege protecting Rodberg from any questioning by the grand jury concerning the matter of republication of the Pentagon Papers. This privilege, thought to be similar to that protecting executive officials from liability for libel, see *Barr v. Matteo, 360 U.S. 564 (1959),* was considered advisable "to the extent that a congressman has responsibility to inform his constituents ...." *455 F.2d, at 760.* But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute. The so-called executive privilege has never been applied to shield executive officers from prosecution for crime, the Court of Appeals was quite sure that third parties were [***604] neither immune from liability nor from testifying about the republication matter, and we perceive no basis for conferring a testimonial privilege on Rodberg as the Court of Appeals seemed to do.

IV

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

[***HR18B] [***HR38] [***HR39] [***HR40] Focusing first on paragraph two of the order, we think the injunction against interrogating Rodberg with respect to any act, "in the broadest sense," performed by him within the scope of his employment, overly restricts [*628] the scope of grand jury inquiry. Rodberg's immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune. The grand jury, therefore, if relevant to its investigation into the possible violations of the criminal law, and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangements, if any, with respect to republication or with respect to third-party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator. Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions. n17

n17 The Court of Appeals held that the Speech or Debate Clause protects aides as well as Senators and that while third parties may be questioned about the source of a Senator's information, neither aide nor Senator need answer such inquiries. The Government's position is that the aide has no protection under the Speech or Debate Clause and may be questioned even about legislative acts. A contrary ruling, the Government fears, would invite great abuse. On the other hand, Gravel contends that the Court of Appeals insufficiently protected the Senator both with respect to the matter of republication and with respect to the scope of inquiry permitted the grand jury in questioning third-party witnesses with whom the Senator and his aides dealt. Hence, we are of the view that both the question of the aide's immunity and the question of the extent of that immunity are properly before us in this case. And surely we are not bound by the Government's view of the scope of the privilege.

[**2629]

[***HR41] [***HR42A] [***HR43A] Because the Speech or Debate Clause privilege applies both to Senator and aide, it appears to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's [*629] conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee; n18 (2) concerning the [***605] motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing. We leave the final form of such an order to the Court of Appeals in the first instance, or, if that court prefers, to the District Court.

[***HR42B] [***HR43B]

n18 Having established that neither the Senator nor Rodberg is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either Rodberg or third parties on this subject. If it proves material to establish for the record the fact of publication at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose. We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third-party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the Executive Branch.

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

So ordered.

DISSENTBY:
STEWART (In Part); DOUGLAS; BRENNAN

DISSENT:

[**2644contd] MR. JUSTICE STEWART, dissenting in part.

The Court today holds that the Speech or Debate Clause does not protect a Congressman from being forced to testify before a grand jury about sources of information [*630] used in preparation for legislative acts. This critical question was not embraced in the petitions for certiorari. [**2645] It was not dealt with in the written briefs. It was addressed only tangentially during the oral arguments. Yet it is a question with profound implications for the effective functioning of the legislative process. I cannot join in the Court's summary resolution of so vitally important a constitutional issue.

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

The Court of Appeals for the First Circuit recognized the importance of the information-gathering process in the performance of the legislative function. It held that the Speech or Debate Clause bars all grand jury questioning of a member of Congress regarding the sources of his information. The Court of Appeals reasoned that to allow a "grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them." *United States v. Doe, 455 F.2d 753, 758-759.* [***606] The Government *did not seek review of this ruling*, but rather sought certiorari on the question whether the [*631] Speech or Debate Clause bars a grand jury from questioning congressional aides about privileged actions of Senators or Representatives. n1

n1 As stated in its petition for certiorari, the Government asked us to consider:

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

The Government also asked us to consider:

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

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

The Court, however, today decides, *sua sponte*, that a Member of Congress may, despite the Speech or Debate Clause, be compelled to testify before a grand jury concerning the sources of information used by him in the performance of his legislative duties, if such an inquiry "*proves relevant to investigating possible third-party crime.*" *Ante*, at 629 (emphasis supplied). n2 In my view, this ruling is highly dubious in view of the basic purpose of the Speech or Debate Clause -- "to prevent intimidation [of Congressmen] by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson, 383 U.S. 169, 181.*

n2 See also *ante*, at 622, 628.

Under the Court's ruling, a Congressman may be subpoenaed by a vindictive Executive to testify about informants who have not committed crimes and who have no knowledge of crime. Such compulsion can occur, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers; grand jury investigations are not limited in scope **[*632]** to specific criminal acts, and standards of materiality and relevance are greatly **[**2646]** relaxed. n3 But even if the Executive had reason to believe that a Member of Congress had knowledge of a specific probable violation of law, it is by no means clear to me that the Executive's interest in the administration of justice must *always* override the public interest in having an informed Congress. Why should we not, given the tension between two competing interests, *each* of constitutional dimensions, balance the claims of the Speech or Debate Clause against the claims of the grand jury in the particularized contexts of specific cases? And why are not the Houses of Congress the proper institutions in most situations to impose sanctions upon a Representative or Senator who withholds information about crime acquired in the course of his legislative duties? n4

n3 See, *e. g., Wilson v. United States, 221 U.S. 361; Hendricks v. United States, 223 U.S. 178; United States v. Johnson, 319 U.S. 503.* See generally *Holt v. United States, 218 U.S. 245; Costello v. United States, 350 U.S. 359.*

n4 During oral argument, the Solicitor General virtually conceded, in the course of arguing that aides should not enjoy the same testimonial privilege as Congressmen, that a Senator could *not* be called before the grand jury to testify about the sources of his information:

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

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

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

"A. I am not contending to the contrary. ..." Tr. of Oral Arg., Apr. 20, 1972, pp. 27-28.

The following exchange also took place:

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

"A. Yes, Mr. Justice.

"Q. You can't.

"A. Yes." *Id.*, at 29.

At another point in the oral argument, the Solicitor General said that even when a Senator or Representative has knowledge of crime as a result of legislative acts "they can't even be required to respond to questions with respect to their speeches and debates. That is a great and historic privilege which ought to be maintained which I fully support but which does not extend to any other persons than Senators and Representatives." *Id.*, at 32.

[*633] I **[***607]** am not prepared to accept the Court's rigid conclusion that the Executive may always compel a legislator to testify before a grand jury about sources of information used in preparing for legislative acts. For that reason, I dissent from that part of the Court's opinion that so inflexibly and summarily decides this vital question.

[2629contd]** MR. JUSTICE DOUGLAS, dissenting.

I would construe the Speech or Debate Clause n1 to insulate Senator Gravel and his aides from inquiry concerning the Pentagon Papers, and Beacon Press from inquiry concerning publication of them, for that publication was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the conception and pursuit of the so-called "war" in Vietnam. Alternatively, I would hold

that Beacon Press is protected by the First Amendment from prosecution or investigations for publishing or undertaking to publish the Pentagon Papers.

n1 The Speech or Debate Clause included in Art. I, § 6, cl. 1, of the Constitution provides as respects Senators and Representatives that "for any Speech or Debate in either House, they shall not be questioned in any other Place."

Gravel, Senator from Alaska, was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He convened a meeting of the Subcommittee and read to it a summary of the so-called Pentagon Papers. He then introduced "the entire Papers, allegedly some 47 volumes and said to contain seven million words, as an **[*634]** exhibit." *455 F.2d 753, 756.* Thereafter, he supplied a copy of the papers to the Beacon Press, a Boston publishing house, on the understanding that it would publish the papers without profit to the Senator. A grand jury was investigating the release of the Pentagon Papers and subpoenaed one Rodberg, an aide to Senator Gravel, to testify. Rodberg moved to quash the subpoena; **[**2630]** and on the same day the Senator moved to intervene. Intervention was granted and in due course the Court of Appeals entered the following order which is now before us for review:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the **[***608]** activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

I

Both the introduction of the Pentagon Papers by Senator Gravel into the record before his Subcommittee and his efforts to publish them were clearly covered by **[*635]** the Speech or Debate Clause, as construed in *Kilbourn v. Thompson, 103 U.S. 168, 204:*

"It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it." n2

n2 And see *United States v. Johnson, 383 U.S. 169, 172, 177;* and *Tenney v. Brandhove, 341 U.S. 367, 376.*

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

In all other situations, however, the judiciary's view of the motives or germaneness of a Senator's conduct **[*636]** before a committee is irrelevant. For, "the claim of an unworthy purpose does not destroy the privilege." *Tenney v. Brandhove, 341 U.S. 367, 377.* If there is an abuse, there is a remedy; but it is legislative, not judicial.

As to Senator Gravel's efforts to publish the Subcommittee record's contents, wide dissemination of this material as an educational service is as much a part of the Speech or Debate Clause philosophy as mailing under a frank a Senator's or a Congressman's speech across the Nation. As mentioned earlier, " **[***609]** it is the proper duty of a representative body to look diligently into every affair of **[**2631]** government and to talk much about what it sees. ... The informing function of Congress should be preferred even to its

legislative function." W. Wilson, Congressional Government 303 (1885), quoted with approval in *Tenney v. Brandhove, supra, at 377 n. 6.* "From the earliest times in its history, the Congress has assiduously performed an 'informing function,'" *Watkins v. United States, 354 U.S. 178, 200 n. 33.* "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them." *Bond v. Floyd, 385 U.S. 116, 136.*

We said in *United States v. Johnson, 383 U.S. 169, 179,* that the Speech or Debate Clause established a "legislative privilege" that protected a member of Congress against prosecution "by an unfriendly executive and conviction by a hostile judiciary" in order, as Mr. Justice Harlan put it, to ensure "the independence of the legislature." That hostility emanates from every stage of the present proceedings. It emphasizes the need to construe the Speech or Debate Clause generously, not niggardly. If republication of a Senator's speech in a newspaper carries the privilege, as it doubtless does, then republication of the exhibits introduced **[*637]** at a hearing before Congress must also do so. That means that republication by Beacon Press is within the ambit of the Speech or Debate Clause and that the confidences of the Senator in arranging it are not subject to inquiry "in any other Place" than the Congress.

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

II

The secrecy of documents in the Executive Department has been a bone of contention between it and Congress from the beginning. n3 **[***610]** Most discussions have **[*638]** centered on the scope of the executive privilege in stamping documents as "secret," "top secret," "confidential," and so on, thus withholding them from the eyes of Congress and the press. The practice **[**2632]** has reached large proportions, it being estimated that

(1) Over 30,000 people in the Executive Branch have the power to wield the classification stamp. n4

(2) The Department of State, the Department of Defense, and the Atomic Energy Commission have over 20 million classified documents in their files.

(3) Congress appropriates approximately $ 15 billon annually without most of its members or the public or the press knowing for what purposes the money is to be used. n5

n3 See Developments In The Law -- The National Security Interest and Civil Liberties, *85 Harv. L. Rev. 1130, 1207-1215 (1972);* Note, The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, *57 Va. L. Rev. 885-887 (1971);* Berger, Executive Privilege v. Congressional Inquiry, *12 U. C. L. A. L. Rev. 1044 (1965);* Schwartz, Executive Privilege and Congressional Investigatory Power, *47 Calif. L. Rev. 3 (1959);* Executive Privilege: The Withholding of Information by the Executive, Hearing on S. 1125 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). There is no express statutory authority for the classification procedure used currently by the bureaucracies, although it has been claimed that Congress has recognized it in such measures as the exemptions from the disclosure requirements of the Freedom of Information Act, *5 U. S. C. § 552* (b) and the espionage laws, *18 U. S. C. § § 792-799.* Rather, the classification regime has been implemented through a series of executive orders described in Developments In The Law, *supra,* at 1192-1198. It has also been claimed that several sections of Art. II (such as the designation of the President as Commander in Chief of the Army and Navy) confer upon the Executive an inherent power to classify documents. See Report of the Commission on Government Security, S. Doc. No. 64, 85th Cong., 1st Sess., 158 (1957).

n4 Hearings on S. 1125, *supra,* n. 3, at 517-518. One estimate of the number of officials who can classify documents is even higher. In the Department of Defense alone, 803 persons have the authority to classify documents Top Secret; 7,687 have permission to stamp them Secret, and 31,048 have the authorization to denominate papers Confidential. United States Government Information Policies and Practices -- The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. 2, p. 599 (statement of David Cooke, Deputy Assistant Secretary of Defense).

n5 Senator Fulbright, chairman of the Senate Foreign Relations Committee, recently testified that his committee had been so unsuccessful in obtaining accurate information about the Vietnam war from the Executive Branch that it was required to hire its own investigators and send them to Southeast Asia. Hearings on S. 1125, *supra*, n. 3, at 206.

The problem looms large as one of separation of **[*639]** powers. Woodrow Wilson wrote about it in terms of the "informing function" of Congress: n6

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we **[***611]** sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes the demands of public opinion."

n6 Congressional Government 303-304 (1885).

Classification of documents is a concern of the Congress. It is, however, no concern of the courts, as I see it, how a **[*640]** document is stamped in an Executive Department or whether a committee of Congress can obtain the use of it. The federal courts do not sit as an ombudsman refereeing the disputes between the other two branches. The federal courts do become vitally involved whenever their power is sought to be invoked either to protect the press against censorship as in *New York Times Co.* v. *United States, 403 U.S. 713,* or to protect the press against punishment for **[**2633]** publishing "secret" documents or to protect an individual against his disclosure of their contents for any of the purposes of the First Amendment.

Forcing the press to become the Government's coconspirator in maintaining state secrets is at war with the objectives of the First Amendment. That guarantee was designed in part to ensure a meaningful version of self-government by immersing the people in a "steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination." *Branzburg* v. *Hayes, post,* at 715 (DOUGLAS, J., dissenting); *Brandenburg v. Ohio, 395 U.S. 444; Stanley v. Georgia, 394 U.S. 557, 564; Lamont v. Postmaster General, 381 U.S. 301, 308* (BRENNAN, J., concurring); *New York Times Co.* v. *Sullivan, 376 U.S. 254, 270.* As I have said, in dissent, elsewhere, *e. g., Branzburg, supra; Kleindienst* v. *Mandel, post,* at 771, that Amendment is aimed at protecting not only speakers and writers but also listeners and readers. The essence of our form of governing was at the heart of Mr. Justice Black's reminder in the Pentagon Papers case that "the press was protected so that it could bare the secrets of government and inform the people." *403 U.S., at 717* (concurring opinion). Similarly, Senator Sam Ervin has observed: "When the people do not know what their government is doing, those who govern are not accountable for their actions -- and accountability is basic to the democratic system. By using devices of secrecy, the government **[*641]** attains the power to 'manage' the news and through it to manipulate public opinion." n7 Ramsey Clark as Attorney General expressed a similar sentiment: "If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy." n8 And see Meiklejohn, The First Amendment Is An Absolute, *1961 Sup. Ct. Rev. 245;* Press Freedoms Under Pressure: **[***612]** Report of the Twentieth Century Fund Task Force on the Government and the Press 109-117 (1972) (background paper by Fred Graham on access to news); M. Johnson, The Government Secrecy Controversy 39-41 (1967).

n7 Secrecy in a Free Society, 213 Nation 454, 456 (1971).

n8 Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, *20 Ad. L. Rev. 263, 264 (1967).*

Jefferson in a letter to Madison, dated December 20, 1787, posed the question "whether peace is best preserved by giving energy to the government, or information to the people," and then answered, "This last is the most certain, and the most legitimate engine of government." 6 Writings of Thomas Jefferson 392 (Memorial ed. 1903).

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

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

Yet, as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin "incident," and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights **[*642]** favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold information which in "99 1/2%" of the cases would present no danger to national security. n9 To refuse to publish "classified **[**2634]** " reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if he printed only the press releases or "leaks" he would become an arm of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government. n10 By that test Beacon Press could **[***613]** with **[*643]** impunity reproduce the Pentagon Papers inasmuch as their content "is all history, not future events. None of it is more recent than 1968." *New York Times Co.* v. *United States, 403 U.S., at 722 n. 3* (concurring opinion).

n9 United States Government Information Policies and Practices -- The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. 1, p. 97; Cong. Horton, The Public's Right to Know, 77 Case & Comm. 3, 5 (1972). We are told that the military has withheld as confidential a large selection of photographs showing atrocities against Vietnamese civilians wrought by both Communist and United States forces. Even a training manual devoted to the history of the Bolshevik revolution was dubbed secret by the military. Hearings, *supra*, pt. 3, at 966, 967 (testimony of former classification officer). And ordinary newspaper clippings of criticism aimed at the military have been routinely marked secret. *Id.*, pt. 1, at 100. Former Justice and former Ambassador to the United Nations Arthur Goldberg has stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time." *Id.*, pt. 1, at 12.

n10 Moreover, I would not even permit a conviction for the publication of documents related to future and sensitive planning where the jury was permitted, as it was in *United States v. Drummond, 354 F.2d 132, 152* (CA2), to consider the fact that the documents had been classified by the Executive Branch pursuant to its present overbroad system which, in my view, unnecessarily sweeps too much nonsensitive information into the locked files of the bureaucracies. In general, however, I agree that there may be situations and occasions in which the right to know must yield to other compelling and overriding interests. As Professor Henkin has observed, many deliberations in Government are kept confidential, such as the proceedings of grand juries or our own Conferences, despite the fact that the breadth of public knowledge is the. by diminished. Henkin, The Right To Know And The [illegible] To Withhold: The Case Of The Pentagon Papers, *120 U. Pa. L. Rev. 271, 274-275 (1971).*

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

My view is quite different. When the press stands before the court as a suspected criminal, it is the duty of the court to disregard what the prosecution claims is the executive privilege and to acquit the press or overturn the ruling or judgment against it, if the First Amendment and

the assertion of the executive privilege conflict. For the executive privilege -- nowhere made explicit in the Constitution -- is necessarily subordinate to the express commands of the Constitution.

United States v. Curtiss-Wright Corp., 299 U.S. 304, involved the question whether a proclamation issued by the President, pursuant to a Joint Resolution of the **[*644]** Congress, was adequate to sustain an indictment. The Court, in holding that it was, discussed at length the power of the President. The Court said that the **[**2635]** power of the President in the field of international relations does not require as a basis an Act of Congress; but it added that his power "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id., at 320.*

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

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

Mr. Chief Justice Marshall in the trial of Aaron Burr ruled "that the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted." *United States v. Burr, 25 F. Cas. 187, 191* (No. 14,694) (CC Va. 1807). Yet he "may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production." *Ibid.* A letter to the President, he said, "may relate to public concerns" and not be "forced into public view." *Id., at 192.* But where the paper was shown "to be essential to the justice of the case," *ibid.*, "the paper [should] be produced, or the cause be continued." *Ibid.*

[*614]** *Jencks v. United States, 353 U.S. 657,* is in that tradition. It was a criminal prosecution for perjury, the telling evidence against the accused being the testimony of Government investigators. The defense asked for contemporary notes made by agents at the time. Refusal **[*645]** was based on their confidential character. We held that to be reversible error. n11

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

n11 In *Alderman v. United States, 394 U.S. 165,* we took a like course in requiring the prosecution to disclose to the defense records of unlawful electronic surveillance:

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

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

Congress enacted the so-called Jencks Act, *18 U. S. C. § 3500,* regulating the use of Government documents in criminal prosecutions. We sustained that Act. *Scales v. United States, 367 U.S. 203, 258.* Under the Act a defendant "on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and **[*646]** competent statements of a government witness in possession of the Government touching the events or activities as to which the witness has testified at the trial. ... The command of the statute is thus designed to further the fair and just administration of criminal **[**2636]** justice, a goal of which the judiciary is the special guardian." *Campbell v. United States, 365 U.S. 85, 92.* And see *Clancy v. United States, 365 U.S. 312.*

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

133, 136, override the Government's desire for secrecy, whether the identity of an informer or the executive privilege be involved. And see *Smith v. Illinois, 390 U.S. 129.*

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

III

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

To summon Beacon Press through its officials before the grand jury and to inquire into why it did what it did **[*647]** and its publication plans is "abridging" the freedom of the press contrary to the command of the First Amendment. In light of the fact that these documents were part of the official Senate record, n12 Beacon Press has violated no valid law, and the grand jury's scrutiny of it reduces to "exposure purely for the sake of exposure." *Uphaus v. Wyman, 360 U.S., at 82* (BRENNAN, J., dissenting). As in *United States v. Rumely, 345 U.S. 41,* where a legislative committee inquired of a publisher of political tracts as to its customers' identities, "if the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship." *Id., at 57* (concurring opinion). Under our Constitution the Government has no surveillance over the press. That includes, as we held in *New York Times Co.* v. *United States, 403 U.S. 713,* the prohibition against prior restraints. Yet criminal punishment for or investigations of what the press publishes, though a different species of abridgment, is nonetheless within the ban of the First Amendment.

n12 Republication of what has filled the Congressional Record is commonplace. Newspapers, television, and radio use its contents constantly. I see no difference between republication of a paragraph and republication of material amounting to a book. Once a document or a series of documents is in the record of the Senate or House or one of its committees it is in the public domain.

The story of the Pentagon Papers is a chronicle of suppression of vital decisions to protect the reputations and political hides of men who worked an amazingly successful scheme of deception on the American people. They were successful not because they were astute but because the press had become a frightened, regimented, submissive instrument, fattening on favors from those in power and forgetting the great tradition of reporting. To allow the press further to be cowed by grand **[*648]** jury inquiries and prosecution is to carry the concept of "abridging" the press to frightening proportions.

What would be permissible if Beacon Press "stole" the Pentagon Papers is irrelevant **[**2637]** to today's decision. What Beacon Press plans to publish is matter introduced into a public record by a Senator acting under the full protection of the **[***616]** Speech or Debate Clause. n13 In light of the command of the First Amendment we have no choice but to rule that here government, not the press, is lawless.

n13 It is conceded that all of the material which Beacon Press has undertaken to publish was introduced into the Subcommittee record and that this record is open to the public. See Brief for United States 3.

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

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

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

tasks that are vital to the workings of our democratic system.

[*649] I

In holding that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers is not shielded from extra-senatorial inquiry by the Speech or Debate Clause, the Court adopts what for me is a far too narrow view of the legislative function. The Court seems to assume that words spoken in debate or written in congressional reports are protected by the Clause, so that if Senator Gravel had recited part of the Pentagon Papers on the Senate floor or copied them into a Senate report, those acts could not be questioned "in any other Place." Yet because he sought a wider audience, to publicize information deemed relevant to matters pending before his own committee, the Senator suddenly loses his immunity and is exposed to grand jury investigation and possible prosecution for the republication. The explanation for this anomalous result is the Court's belief that "Speech or Debate" encompasses only acts necessary to the internal deliberations of Congress concerning proposed legislation. "Here," according to the Court, "private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate." *Ante*, at 625. Therefore, "the Senator's arrangements with Beacon Press were not part and parcel of the legislative process." *Id.*, at 626.

Thus, the Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator's duty to inform the public about matters affecting the administration of government. That this "informing function" falls into [***617] the class of things "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson, 103 U.S. 168, 204 (1881)*, was explicitly acknowledged by the Court in *Watkins* [*650] *v. United States, 354 U.S. 178 (1957)*. In speaking of the "power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government," the Court noted that "from the earliest [**2638] times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id., at 200 n. 33.*

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

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

"It is the proper duty of a representative body to look diligently into every affair of government [*651] and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." Congressional Government 303 (1885).

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

"With the decline of Congress as an original source of legislation, this function of keeping the government in touch with public opinion and of keeping public opinion in touch with the conduct of the government becomes increasingly important. Congress [***618] no longer governs the country; the Administration in all its ramifications actually governs. But Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized." The Reorganization of Congress, A Report of the Committee on Congress of the American Political Science Association 14 (1945).

Though I fully share these and related views on the educational values served by the informing function, there is yet another, and perhaps more fundamental, interest at stake. It requires no citation of authority to state that public concern over current issues -- the war, race relations, governmental invasions of privacy -- [*652] has transformed itself in recent years into what many believe is a crisis of confidence, in our system of government and its capacity to meet the needs and reflect the wants of the American people. Communication between Congress and the electorate tends to alleviate that doubt by exposing and clarifying the workings of the political system, the policies underlying new laws and the role [**2639] of the Executive in their administration. To the extent that the informing function succeeds in fostering public faith in the responsiveness of Government, it is not only an "ordinary" task of the legislator but one that is essential to the continued vitality of our democratic institutions.

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

Nor can it be supported by history. There is substantial evidence that the Framers intended the Speech or Debate Clause to cover all communications from a Congressman to his constituents. Thomas Jefferson clearly expressed that view of legislative privilege in a [*653] case involving Samuel Cabell, Congressman from Virginia. In 1797 a federal grand jury in Virginia investigated the conduct of several Congressmen, including Cabell, in sending newsletters to constituents critical of the administration's policy in the war with France. The grand jury found that the Congressmen had endeavored "at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and to increase or produce a foreign influence, ruinous to the peace, happiness, and independence of these United States." Jefferson immediately drafted a [***619] long essay signed by himself and several citizens of Cabell's district, condemning the grand jury investigation as a blatant violation of the congressional privilege. Revised and joined by James Madison, the protest was forwarded to the Virginia House of Delegates. It reads in part as follows:

"That in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives [*654] could go home to their several counties and confer with their constituents.

...."That when circumstances required that the ancient confederation of this with the sister States, for the government of their common concerns, should be improved into a more regular and effective form of general government, the same representative principle was preserved in the new legislature, one branch of which was to be chosen directly by the citizens of each State, and the laws and principles [**2640] remained unaltered which privileged the representative functions, whether to be exercised in the State or General Government, against the cognizance and notice of the co-ordinate branches, Executive and Judiciary; and for its safe and convenient exercise, the intercommunication of the representative and constituent has been sanctioned and provided for through the channel of the public post, at the public expense.

...."That the grand jury is a part of the Judiciary, not permanent indeed, but in office, *pro hac vice* and responsible as other judges are for their actings and doings while in office: that for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary,

if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department [*655] under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be [***620] lawful among themselves were they in the personal transaction of their own business; is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive ... ; and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods." 8 The Works of Thomas Jefferson 322-327 (Ford ed. 1904).

Jefferson's protest is perhaps the most significant and certainly the most cogent analysis of the privileged nature of communication between Congressman and public. Its comments on the history, purpose, and scope of the Clause leave no room for the notion that the Executive or Judiciary can in any way question the contents of that dialogue. Nor was Jefferson alone among the Framers in that view. Aside from Madison, who joined in the protest, James Wilson took the position that a member of Congress "should enjoy the fullest liberty of speech, and ... should be protected from [*656] the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." 1 Works of James Wilson 421 (R. McCloskey ed. 1967). Wilson, a member of the Committee responsible for drafting the Speech or Debate Clause, stated in plainest terms his belief in the duty of Congressmen to inform the people about proceedings in the Congress:

"That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the [**2641] exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former." *Id.*, at 422.

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

The Court, however, offers not a shred of evidence concerning the Framers' intent, but relies instead on the English view of legislative privilege to support its interpretation of the Clause. Like the Court itself, *ante*, at 623-624, n. 14, I have some doubt concerning the relevance of English authority to this case, particularly [***621] authority post-dating the adoption of our Constitution. But [*657] in any event it is plain that the Court has misread the history on which it relies. The Speech or Debate Clause of the English Bill of Rights was at least in part the product of a struggle between Parliament and Crown over the very type of activity involved in this litigation. During the reign of Charles II, the House of Commons received a number of reports about an alleged plot between the Crown and the King of France to restore Catholicism as the established religion of England. The most famous of these reports, Dangerfield's Narrative, was entered into the Commons Journal and then republished by order of the Speaker of the House, Sir William Williams, with the consent of Commons. In 1686, after James II came to the throne, informations charging libel were filed against Williams in King's Bench. Despite the arguments of his attorney, Sir Robert Atkyns, that the publication was necessary to the "counselling" and "enquiring" functions of Parliament, Williams' plea of privilege was rejected and he was fined # 10,000. Shortly after Williams' conviction James II was sent into exile, and a committee was appointed by the House of Commons to report upon "such things as are absolutely necessary for securing the Laws and Liberties of the Nation." 9 Debates of the House of Commons, coll. by A. Grey, 1763, p. 37. In reporting to the House, the chairman of the committee stated that the provision for freedom of speech and debate was included "for the sake of one ... Sir William Williams, who was punished out of Parliament for what he had done in Parliament." *Id.*, at 81. Following consultation with the House of Lords, that provision was included as part of the English Bill of Rights, and the judgment against Williams was declared by Commons