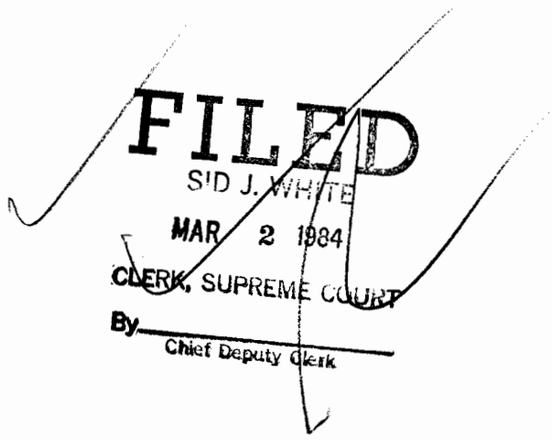
IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,882



H. LEE MOFFITT, as Speaker of the Florida House of Representatives; and CURTIS PETERSON, as President of the Florida Senate,

Petitioners,

vs.

HONORABLE BEN C. WILLIS, a Judge of the Circuit Court, Second Judicial Circuit of Florida,

Respondent,

and

THE MIAMI HERALD PUBLISHING COMPANY, a division of KNIGHT-RIDDER NEWSPAPERS, INC., a Florida corporation; THE TIMES PUBLISHING COMPANY, a Florida corporation; and SENTINEL COMMUNICATIONS COMPANY, a Delaware corporation,

Intervenors.

RESPONSE OF PRESS INTERVENORS
TO THE PETITION FOR WRIT OF PROHIBITION

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., a Florida corporation, The Times Publishing Company, a Florida corporation, and Sentinel Communications Company, a Delaware corporation ("press intervenors" or "intervenors"), by leave of Court intervenors supporting the circuit court's jurisdiction to determine this controversy, submit their Supplemental Appendix[1/] and respond as follows to the Petition for Writ of Prohibition:

SUMMARY OF PROCEEDINGS BELOW

The Petition For Writ Of Prohibition (the "Petition") is directed at the trial judge below because he denied a motion to quash subpoenas served by the press intervenors on certain

1/ References in this Response to "S.A." are to the Supplemental Appendix filed by intervenors pursuant to Fla.R.App.P. 9.100. The entire record of proceedings in the Declaratory Action below is contained in the Supplemental Appendix, including (for chronological contiguity) one selected pleading in petitioners' appendix.

state legislators ("the Legislators" or "Petitioners") in the underlying Chapter 86 Declaratory Judgment Action (the "Declaratory Action"). The recitation of facts and account of the proceedings below provided in the Petition reveals little of that underlying lawsuit. It does not inform this Court that in the Declaratory Action the trial court was asked simply to declare the rights of the press intervenors with respect to certain secret committee meetings held by various state legislators in violation of rules, statutes, and constitutional provisions -- enacted by the Florida Legislature and the people of Florida -- which direct all legislators to open all of their committee meetings to the public. So that this Court may be informed of the actual procedural and factual context of this case, the following summary of the proceedings in the Declaratory Action below is provided.

Florida's Fundamental Commitment To Open Legislative Meetings

Among the more troubling omissions of the Petition is its failure to address or even discuss Florida's profound commitment to a legislative process open to public scrutiny. The Florida Constitution explicitly provides that the work of each Legislative House during the Session shall be conducted in public:

> Sessions of each house shall be public; except sessions of the Senate when considering appointment to or removal from public office may be closed.

Article III, Section 4(b), Florida Constitution. The reason for this fundamental rule is also made clear by the language of the Constitution itself:

> A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.

Article II, Section 8, Florida Constitution. Thus, as this Court has recently noted, the interests served by open government are among the state's "most compelling." Wood v. Marston, 8 F.L.W. 471 (Fla. Dec. 1, 1983).

Recognizing that much of the work of the Session must be done by committee, and to implement the constitutional mandate

that the legislative process be open, both Houses have promulgated rules requiring committee meetings be public. Rule 2.13 of the Rules of the Florida Senate provides:

> All committee meetings shall be open to the public....

Similarly, Rule 6.25 of the Rules of the Florida House of Representatives provides:

> All meetings of all committees shall be open to the public at all times....

But the Legislature was not satisfied with the enactment of House rules. It passed Section 11.142, Florida Statutes, requiring the Legislators of each committee, as a matter of statutory law, to adhere to the Rules promulgated by each House:

> Each standing and select committee shall meet at such times as it shall determine and shall abide by the general rules and regulations adopted by its respective house to govern the conduct of meetings by committee.

In addition, the Legislature has passed the Florida Sunshine Law, Section 286.011, Florida Statutes, mandating that all meetings of any committee of any state authority be open to the public, unless specifically exempted by the Florida Constitution.

Thus, this is not a case in which the press seeks public access to governmental proceedings closed by operation of law. This is a case in which public access is sought to meetings which are to be open by law.

The Secret Meetings

Despite the binding authority of the constitutional and legislative enactments discussed above, in May and June of 1981 certain state legislators excluded the public and the press from a series of secret meetings of House and Senate committees which formulated the Appropriations Act funding the State government for the ensuing year.[2/] Similar secret committee meetings involving the Appropriations Act and other public business have been held by the Legislators in subsequent years. None of these secret

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2/ All factual allegations are taken from the allegations of the complaint for declaratory judgment since no discovery or factual predicate has yet been established in this action. (S.A. 1-5).

meetings have been authorized by any statute or rule enacted by either House, nor has any exemption from the applicable rules, statutes, or constitutional provisions been passed. The Legislators participated in such meetings and have stated that they will continue to conduct or engage in such meetings.

This, then, is a case in which individual state legislators are meeting secretly in committees in violation of rules and statutes passed by the Legislature, but with the apparent approval and participation of the current Legislature's leadership.

The Complaint For Declaratory Relief

By their circuit court complaint filed in January 1982 (S.A. 1-5), now at issue and set for final hearing before the respondent circuit judge on March 16, 1984 (S.A. 184), the press intervenors and other Florida newspaper publishers, as plaintiffs, alleged the ultimate facts giving rise to this continuing controversy and to the need for a declaratory judgment:

> In May and June, 1981, Defendants [House Speaker Ralph H. Haben, Jr. and Senate President W. D. Childers] excluded the public and the press from a series of secret meetings of committees of the Florida House and Senate at which public business was conducted relating to the Budget of the State of Florida. The adoption of a budget for the government of the State of Florida is a public matter of the greatest importance. [¶ 5, S.A. 2.]
>
> Secret meetings of committees of the Florida Legislature from which the public and Plaintiffs are excluded may, and are likely to, recur without otherwise being susceptible to judicial review. [¶ 6, S.A. 2.]
>
> Defendants have asserted and continue to assert the right to hold secret committee meetings without notice to the public and without permitting the public be present at such meetings. [¶ 7, S.A. 2.]

The Complaint was not directed at the Florida Legislature, but rather the Speaker of the Florida House of Representatives and the President of the Florida Senate, because as leaders among the state legislators, they participated in and endorsed the secret committee meetings. The suit asked for a simple declaration as to whether the Legislators' holding such secret committee meetings would constitute violations of the press intervenors' rights

under applicable state rules, statutes, and constitutional provisions, or whether such conduct would infringe the public's First Amendment right to attend governmental proceedings (S.A. 1-5).

The Newspapers' prayer for relief in the Complaint specified the declaration sought:

> WHEREFORE, Plaintiffs [Newspapers] are in doubt as to their rights and respectfully request that this Court enter a declaration that:
>
> (i) Closed Committee meetings of the Legislature violate the Florida Constitution and the Federal Constitution, the laws of Florida, and the Legislature's own rules;
>
> (ii) All committee meetings of the Florida Legislature should be open to the public.

(S.A. 4-5). The Complaint therefore simply requested a decision as to the legality under Florida law of future secret legislative committee meetings.

The Disposition of the Motion to Dismiss

In response to the Complaint, the Defendant Legislators twice moved for continuances invoking Section 11.111, Florida Statutes (1981) (S.A. 6, 7), which stays litigation pending against Legislators for the time period during which they must be preparing for or participating in the Session.[3/] It was not

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3/ Section 11.111, Florida Statutes (1983) provides:

> 11.111 Continuance of certain causes for term of Legislature and period of time prior and subsequent thereto and committee workdays. -- Any proceeding before any court, municipality, or agency of government of this state shall stand continued during any session of the Legislature and for a period of time 15 days prior to any session of the Legislature and 15 days subsequent to the conclusion of any session of the Legislature, and during any period of required committee work and for a period of time 1 day prior and 1 day subsequent thereto, when either attorney representing the litigants is a legislator or when a member of the Legislature is a party or witness or is scheduled to appear before any municipal government, administrative board, or agency, when notice to that effect is given to the covening authority by such member. The immunity herein granted shall extend to any member not an attorney who is engaged in any proceeding before any court or any state, county, or municipal agency or board in a representative capacity for any individual or group or as a witness in any proceeding. After said notice the proceeding may proceed notwithstanding such notice if the party calling such member as a witness shall agree.

Press intervenors do not concede the constitutionality of Section 11.111 under circumstances such as this case where the statute is used repeatedly to interfere with a litigant's right of access to the courts under Article I, Section 21 of the Florida Constitution.

until April 22, 1982, then, that the Legislators filed a responsive pleading, which was a motion to dismiss (S.A. 8-10). Hearing on the motion was not noticed until October 21, 1982 (S.A. 11), and the Legislators so delayed service of their voluminous memorandum of law that only two days were available for the press intervenors' preparation of their comprehensive responsive memorandum (S.A. 12-62, 63-94). The Legislators argued both in their pleadings and at the hearing that the Complaint be dismissed because the issue it presented was moot, the declaratory action was barred by the separation powers doctrine, and the complaint failed to state a claim for declaratory relief.[4/] In their lengthy memorandum, the Legislators nowhere explained why the circuit court lacked jurisdiction under the state separation of powers doctrine to declare the rights of the press intervenors under Legislative enactments which on their face grant members of the public the right to attend Legislative committee meetings, nor could the Legislators cite any case holding a court is barred from interpreting and applying federal and state constitutional provisions directed to state legislators or their committees (S.A. 12-62).

At the conclusion of the October 21 hearing, Judge Willis expressed his view that the press had stated a proper cause of action for declaratory judgment (S.A. 98-99). Also during this hearing, which was held more than 16 months ago, an attorney for the Legislators made it abundantly clear that his client would require the press to take compelled discovery of the Legislators themselves to prove the secret meetings were in fact unlawful:

> [MR. KAHN:] [T]he Court just expressed the idea that this case might not entail extensive evidence taking or discovery. It probably will, your Honor, once we get to the merits of it, because the Florida Senate on those merits will deny, as far as the Senate is concerned, that any violation of the Senate rule ever took place and that any committee meeting of the Senate was held . . .

4/ The transcript of the hearing on Defendants' Motion to Dismiss is set forth at S.A. 95-103.

THE COURT: I see.

MR. KAHN: . . . in violation of that rule. So I suspect that there will be extensive discovery on behalf of the plaintiffs to attempt to prove that. I don't want the Court to leave here today on the idea that this case will not involve evidence or discovery, because I suspect that it will.

(S.A. 100, 101) (emphasis added).

On February 28, 1983, Respondent Judge entered his written order denying the Motion to Dismiss ("the Dismissal Order"), holding:

> 1. The Court is of the opinion that the Plaintiffs [Newspapers] are entitled to a ruling under Chapter 86, Florida Statutes, as to the allegations of the complaint relating to the First Amendment to the United States Constitution, and the corresponding provisions of the Florida Constitution, and also as to § 11.142, Florida Statutes. Accordingly, the Defendants' Motion to Dismiss as to these issues is hereby DENIED.
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> 2. As indicated at hearing, the Court is of the opinion that the remaining provisions of law cited by Plaintiffs are not applicable under the circumstances alleged in the complaint.
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> 3. In accordance with Rule 1.260(d) of the Florida Rules of Civil Procedure, the newly-elected Speaker of the House, H. Lee Moffitt, and President of the Senate, Curtis Peterson, are hereby substituted as parties defendant. The Clerk is directed to amend the caption accordingly.
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> 4. Defendants shall file and serve their answers to the Complaint as indicated in Paragraph 1 above within 30 days of this Order.

(S.A. 104-05).

Despite the explicit terms of this Order, which required the Defendants to file their answer not later than March 30, 1983 (S.A. 105), the Defendants did not file their answer by that date. Nor did they seek appellate review of the Dismissal Order, whose mandatory terms, among other things, necessarily asserted the circuit court's subject matter jurisdiction and its personal jurisdiction over the substituted Defendants, Moffitt and Peterson, and by statement of their counsel entailed compulsory process of the Legislators. Instead, on March 21, 1983, the Defendants again invoked the automatic continuance provisions of the Legislative Immunity Act (S.A. 106), and on June 14, 1983,

Defendants repeated that action (S.A. 107). Finally, on July 27, 1983, over one-and-a-half years after filing of the Complaint, the Defendants filed their Answer (the "Answer") (S.A. 108-111). It is with these procedural ploys in mind that the Legislators' mootness claims, and indeed, the Petition itself must be considered.

The Disposition of the Motion to Quash

On February 9, 1984, Plaintiff The Miami Herald noticed the depositions of four present and former legislators for February 14, 15, 20, 22 and 29, 1984, and caused subpoenas to be issued (S.A. 115-117). Included were the depositions of the current President and the President-designate of the Senate, and the former and current Speaker of the House. Counsel to The Miami Herald represent to this Court that they had, several days previously, advised counsel to the Legislators they would notice such depositions, so they could be completed prior to the advent of another Session of the Florida Legislature and yet another stay order.

On February 10, 1984, Petitioners served "Defendants' Emergency Motion to Quash Plaintiff Miami Herald's Subpoenas for Deposition" ("the Emergency Motion") (S.A. 120-136). The Emergency Motion contained two grounds as to why all six of the subpoenas listed in The Miami Herald's Notice of Taking Deposition should be quashed. The first ground asserted was lack of reasonable notice, based on temporal considerations (S.A. 120-122), the total circumstances (S.A. 122-123), and conflicting schedules (S.A. 123). The second ground asserted was the alleged existence of reasonable limitations on the issuance by the judiciary of coercive process to legislators and legislative staff involving legislative activities (S.A. 123-129). On the same day, February 10, 1984, counsel for the Senate and Peterson filed a Notice of Emergency Hearing to be held before Judge Willis at 3:15 P.M. that day (S.A. 139-140).

At the hearing,[5] Judge Willis ruled from the bench, inter alia, that The Miami Herald's notice previously given with respect to three depositions scheduled for February 14 and 15, 1984 was unreasonably short (S.A. 169-182). Accordingly, on February 14, 1984 the Miami Herald renoticed the deposition of one witness, former Legislator Haben (S.A. 180-181). The renotice stated that counsel for The Miami Herald "will gladly accommodate the requests of opposing counsel to reschedule this deposition to any reasonable time during the week of February 20 to February 24, 1984" (S.A. 180).[6]

Respondent Judge also, from the bench, denied the balance of Defendants' Emergency Motion (S.A. 167-175). Petitioners thereupon filed "Defendants' Emergency Motion for Stay Pending Review," seeking a stay to give Petitioners time to file a petition for writ of certiorari in the First District Court of Appeals.

> Defendants . . . move for a stay of the Order of this Court relating to discovery and show:
>
> 1. Defendants intend to file a petition for writ of certiorari in the District Court of Appeal, First District, pursuant to Rule 9.030(b)(2)(A), Florida Rules of Appellate Procedure, seeking review of the Order of this court entered on this day, within the time period specified in Rule 9.100, Florida Rules of Appellate Procedure.
>
> 2. A stay of the Order of this Court is necessary to provide meaning to such review.
>
> 3. Upon the filing of the petition for writ of certiorari, defendants, as officers of the State of Florida, will be entitled to an automatic stay pending review pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure.
>
> 4. Only one working day intervenes between the date of this Court's Order and the date of the first scheduled deposition, leaving defendants without time to prepare adequately their petition for writ of certiorari, thus denying defendants the automatic stay guaranteed by Rule 9.310(b)(2), Florida Rules of Appellate Procedure.
>
> 5. In order to effectuate the intent of Rule 9.310(b)(2), Florida Rules of Appellate Procedure, in the present situation, this Court must exercise its power to grant a discretionary stay.

(S.A. 137-138).

5/ The transcript of the hearing on Defendants' Emergency Motion to Quash Plaintiff Miami Herald's Subpoenas for Deposition is set forth at S.A. 141-179.

6/ Counsel for The Miami Herald represent to this Court that they had made this offer to counsel for Petitioners prior to the February 10 hearing.

On February 15, 1984, Willis entered a written Order in respect of Defendants' Emergency Motion (the "Discovery Order") (S.A. 182-183). The Discovery Order held the Miami Herald's notice as it pertained to the earliest three depositions described above was unreasonably short (S.A. 182). Willis, however, advised the parties:

> The Court is not quashing these three subpoenas to the extent of rendering them completely illegal, but would say that to require these three men to appear on three days' notice would be unreasonable. Counsel and the parties should seek to find times in which it would be the least inconvenient, with the understanding that these depositions are not to be an extensive process.

(S.A. 182).

Responding to the House and Senate's second ground in their Emergency Motion, Willis held as follows:

> With regard to the Legislature's request that this Court quash the six listed subpoenas in their entirety, the Court orders that the current President and the President-designate of the Florida Senate, and the former and current Speaker of the Florida House of Representatives, as well as one current member and an officer of the Legislature, must, upon reasonable notice, submit to deposition by the Plaintiff.
>
> The Court deems that there is no legislative immunity from obtaining testimony of deponents that would be pertinent to the issues in this case; namely, whether or not legislative committee meetings or subcommittee meetings were held secretly, and whether or not such secret committee or subcommittee meetings violated either statutory law or rules of the respective bodies or the constitution.
>
> The Legislature has moved for sufficient time to seek appellate review of this Order. Accordingly, the effect of Paragraph 2 of this Order is stayed until midnight, February 17, 1984, at which time the stay shall expire unless superceded or extended by the appellate court.

(S.A. 183).

Thus, it appeared the trial court's order was to be reviewed in an orderly and appropriate manner in the First District Court of Appeal, in accordance with the Florida Rules of Appellate Procedure and jurisdictional provisions of the Florida Constitution.

The Petition

Despite the fact the Legislators had represented to Judge Willis their intent to seek review in the First District Court of Appeal of his denial of their motion to quash, and the fact that he had predicated his stay order on this representation, they instead have sued him in this Court by way of a Writ of Prohibition. In short, they have twice disregarded available appellate remedies to argue now to this Court that Judge Willis' adverse ruling on a discovery issue they have anticipated for more than 18 months constitutes an act so in excess of his jurisdiction that it may be remedied only by an extraordinary writ issued against him by this Court. It is that contention which is here at issue.

THE APPROPRIATE DISPOSITION OF THIS CASE

This Court's jurisdiction is doubtful (see infra at pp. 12-14). At any rate, for manifest reasons here detailed, a writ of prohibition issuing from this or any appellate court is inappropriate (see infra at pp. 14-25). The order to show cause should forthwith be discharged and the writ denied, permitting the matter to proceed below to final hearing.

If the Petition is entertained further, on whatever jurisdictional basis may be found in prohibition or otherwise, then to grant complete relief the Court should consider and decide the merits of the entire matter in controversy. As in this society no civil "right" can exist independently of some court's power to declare it, the asserted right of the press intervenors and of other plaintiffs below to observe legislative committee meetings, so to report them publicly, is exactly counterposed to petitioners' asserted immunity from a judicial declaration of that right.

Should the Court's jurisdiction be deemed to have attached to resolve the one issue, that of legislative privilege or immunity from such a declaration, then to provide complete relief in the premises the Court's jurisdiction should be deemed to have attached to resolve the corollary question also, which is

the entire controversy below. This case will otherwise surely return to this Court later, by more conventional means, after needless and exacerbating litigation below. See e.g. Marley v. Saunders, 249 So.2d 30, 32 (Fla. 1971) ("Having concluded that we have jurisdiction of this cause, we retain jurisdiction for all purposes, and in order to avoid needless steps in litigation, decide the cause on its merits."); Zirin v. Charles Pfizer & Co., 128 So.2d 594, 596 (Fla. 1961) ("Piecemeal determination of a cause by our appellate court should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here."); Florida Senate v. Graham, 412 So.2d 360 (Fla. 1982) (Article V, Section 3(6)(7), through "all writs" jurisdiction answering original complaint for declaratory and other relief filed here by Florida Senate).

To complete the record for this Court's disposition, the petitioning Speaker and President, who subjected themselves voluntarily to the jurisdiction of this Court in an original proceeding, should be asked to acknowledge for purposes of this proceeding that in past Sessions members of House and Senate Committees, including the Conference Committee on Appropriations, met together in substantial numbers by prearrangement at times and places unannounced to the press and public, and they then and there excluded the press and public and deliberated and debated official reports to the respective houses on legislative issues committed to the Committee.

ARGUMENT OF PRESS INTERVENORS

I. Limitations on this Court's jurisdiction.

Petitioners conspicuously cite no authority for having invoked the jurisdiction of this Court rather than that of the District Court of Appeal, First District. It is a matter of record that Petitioners induced the respondent circuit judge to grant them a week's stay of normal deposition processes, leading to final hearing on March 16, by saying they intended to "file a petition for writ of certiorari in the District Court of Appeal, First District" (S.A. 137). Instead, they filed the present

Petition for Writ of Prohibition in this Court, without explaining how this Court's jurisdiction is invoked under Article V, Florida Constitution.

Before its amendment in 1980, Article V, Section 3(b)(4), Florida Constitution, provided that the Court might "issue writs of prohibition to courts and commissions in causes within the jurisdiction of the supreme court to review." The 1980 amendment transferred that provision to Section 3(b)(7) and eliminated the phrase "and commissions in causes within the jurisdiction of the supreme court to review." Whereas previously this Court clearly had and claimed no jurisdiction to prohibit proceedings in courts over which it had no ordinary direct review power, State ex rel. Soodhalter v. Baker, 248 So.2d 468 (Fla. 1971), the amendment revives that question. See England and Williams, Florida Appellate Reform One Year Later, 9 Fla.St.L.Rev. 221, 254 (Spring 1981).

Weighty policy considerations militate against this Court exercising extraordinary writ powers shared with the district courts of appeal. The 1980 amendment was presented to the public, and was understood by the public, as necessary to narrow this Court's jurisdiction, so to reduce its caseload selectively. England, Hunter and Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U.Fla.L.Rev. 147, 149, Appendix D (Winter 1980). Should the Court determine that its jurisdiction to issue writs of prohibition is now coextensive with that of the district courts of appeal, in respect to circuit court proceedings, forum-shopping in the appellate structure -- even successive applications to this and other courts -- may be the result. This Court should not permit its jurisdiction to be determined at the choice of a moving party.

Petitioners have referred to no precedent, and we know of none, in which the Court has expounded its present jurisdiction to issue writs of prohibition and any discretionary parameters that must necessarily discipline the exercise of that jurisdiction.

If this case is at all distinguishable from any other in which a party to circuit court proceedings wishes to avoid an

anticipated adjudication, and wishes also to avoid giving a deposition and going to a scheduled final hearing, it is distinguished by Petitioners' claim that Florida courts are powerless even to declare, let alone enforce, statutory and constitutional requirements where they intersect habituated Florida legislative practices.

Petitioners' remarkable claim may indeed distinguish this case. So, if Petitioners' claim for a writ of prohibition is correctly seen as the precise contradiction of press intervenors' claim of statutory and constitutional rights of access, then the press intervenors have no interest in deterring this Court from taking and deciding this case on the merits, if jurisdictionally possible. The parties' assertions being exactly counterposed, it makes abundant sense for this Court to consider and fully decide all issues. Especially is that so with the circuit court's final hearing on March 16 now in jeopardy, on the eve of yet another annual repetition of secret Committee meetings in the sanctuary of Section 11.111, Florida Statutes (1983).

Were it possible to bestow jurisdiction by doing so, then, the press intervenors would stipulate that the Court has Article V jurisdiction not only to decide whether the declaration sought below may be had, but also to make that declaration: Which counterposed assertion prevails: Petitioners' claim that de facto but informal legislative Committee meetings are immune from statutory and constitutional guarantees of public access, and from a judicial declaration of them, or the press intervenors' claims that they are not? All that is required to perfect this Court's record is a forthright acknowledgment of fact by Petitioners.

II. WHETHER SOUGHT IN THIS OR ANY APPELLATE COURT, PROHIBITION AS A REMEDY IS WHOLLY INAPPROPRIATE.

Petitioners' first and basic claim (¶¶ 9.a., 10-17) is that "[t]he constitutional doctrine of separation of powers deprives the court of jurisdiction over the subject matter of this action, the internal operating procedures of the Legislature." Beyond that, Petitioners rely for issuance of the writ of prohi-

bition on claims of "mootness" (¶¶ 18, 19), lack of "jurisdiction over the parties" (¶¶ 20, 21), that "no concrete matter is in issue, save the curiosity of the plaintiffs below about abstract questions of internal legislative procedure" (¶ 22 and to like effect ¶¶ 23 and 24), and that Petitioners have no other adequate remedy save the writ of prohibition (¶¶ 25, 26). These contentions are entirely without merit.

A. No lack of subject-matter jurisdiction.

Viewed as a contention that the circuit court lacks power to determine and declare the effect of statutes or constitutional provisions on legislative processes or practices, and so lacks "subject-matter jurisdiction" of an action requesting such a declaration, Petitioners' basic contention is quite erroneous. None of the authorities cited by the Petition touch the matter of "subject-matter jurisdiction"; each such decision was indeed an exercise of "subject-matter jurisdiction."[7/]

The Article II, Section 3, "separation of powers" clause of the Florida Constitution ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein") would surely prevent the judiciary from making laws or, indeed, from making

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7/ Petitioners cite only seven cases in their discussion of the State Separation of Powers Doctrine. Six of these decisions stand for nothing more than the proposition, with which the press intervenors agree, that one branch of state government may not exercise the prerogatives of another. The remaining case, State ex. rel. Landes v. Thompson, 120 Fla. 860, 163 So. 270 (1935), is inapposite because the legislative rules there at issue did not affect third parties, and their violation did not contravene any statute or constitutional provision, since the provisions applicable here had not yet been enacted. The Florida Constitution was ratified by the people on November 5, 1968. See 25 F.S.A. at 665. The Legislature Rules Statute, Section 11.142, Fla. Stat., was added by Laws 1968, Ex. Sess., c. 68-35, effective November 12, 1968, and amended by Laws 1969, c. 69-52, § 8, effective July 1, 1969, as amended, Laws 1981, c. 81-259, § 2, effective August 4, 1981. Current Senate Rule 2.13, was originally adopted as Senate Rule 5.5 effective January 29, 1968. See 1967-1968 Senate Rules Manual. Thereafter, Rule 5.5 became Rule 2.11. See 1968-1970 Senate Rules Manual. Since 1974 it has been denominated Rule 2.13. See, e.g., 1974-76 Senate Rules Manual. House Rule 6.25 was originally adopted as Rule 6.5 on April 4, 1963. See 1963-64 House Rules Manual. The rule was renumbered as Rule 6.25 on May 26, 1980. See 1980 House Rules Manual.

operating rules for the Legislature. Article III, Section 4(a), Florida Constitution, further provides: "Each house shall determine its rules of procedure." But neither of those clauses abrogates the judiciary's constitutional duty to determine and declare the effect upon the Legislature's processes of constitutional requirements or of statutes whereby the Legislature has "determined" that certain of its rules, relating to the "conduct of meetings" by a Committee, shall have effect as law. Section 11.142, Florida Statutes (1983), provides:

> Each standing committee and each select committee shall meet at such times as it shall determine and shall abide by the general rules and regulations adopted by its respective house to govern the conduct of meetings by such committees.

To determine the effect of this and other laws, and of constitutional provisions, is preeminently the "subject-matter jurisdiction" of courts.

The court did not lack subject-matter jurisdiction to determine and declare (as requested by the Senate) whether, as a result of constitutional standards, the Governor's call for a three-day and two-hour special session of the Legislature was invalid. Florida Senate v. Graham, 412 So.2d 360 (Fla. 1982).

The court did not lack subject-matter jurisdiction to determine and declare (as requested by a House committee) the extent of that committee's constitutional or statutory power to issue a subpoena binding on the Judicial Qualifications Commission. Forbes v. Earle, 298 So.2d 1 (Fla. 1974).

The court did not lack subject-matter jurisdiction of a suit to determine and declare the powers of legislative subcommittees as compared to committees. Johnson v. McDonald, 269 So.2d 1682 (Fla. 1972).

The court did not lack subject-matter jurisdiction to determine and declare the constitutional power of the House to vest its Speaker with authority to create a select committee, having various investigatory powers, between sessions. Johnston v. Gallen, 217 So.2d 319 (Fla. 1969).

The court did not lack subject-matter jurisdiction to determine and declare the constitutional and statutory power of a House committee chairman to subpoena bank records. Hagaman v. Andrews, 232 So.2d 1 (Fla. 1970).

Nor does the court lack subject-matter jurisdiction to determine and declare the statutory and constitutional power of House and Senate committees to exclude the press and public from their sessions.

Whether the branch disputing the judicial power is the legislative or the executive, the fact remains: It is the "duty of this Court 'to say what the law is'." So spake the United States Supreme Court, for this Court as well, and for the respondent circuit judge, in United States v. Nixon, 418 U.S. 683, 704-05 (1974). To declare "whether the action of [another] branch exceeds whatever authority has been committed," said the Court in Nixon, "is the responsibility of this Court as ultimate interpreter of the Constitution." Ibid. That too was spoken for this Court's "subject-matter jurisdiction," and for that of the respondent circuit judge.

When a statute declares that the Governor or other high officer of the executive branch shall conduct his duties in a certain fashion, that officer would not be heard to contend seriously that the judicial branch lacks "subject-matter jurisdiction" to determine and declare the operation and effect of the statute upon him. Shall then the Speaker and the President, because they pertain instead to the legislative branch, specifically exempt themselves and that branch from a statute made by the Legislature explicitly applicable to its own committees, Section 11.142, Florida Statutes (1983), or from constitutional rights of public access to legislative deliberations? Shall they effectively say the judiciary lacks "subject-matter jurisdiction" to determine and declare the effect upon them of the statute or Constitution? No.

What the Speaker and President mean, of course, is that the court lacks "subject-matter jurisdiction" of a statutory or

constitutional issue otherwise cognizable if they, the Speaker and the President, prefer that the courts not determine and declare the effect upon them of the statute or constitutional provision. This is of course a form of interposition, countenanced nowhere in law. Compare Girardeau v. State, 403 So.2d 513, 517 (Fla. 1st DCA 1981), in which the court upheld a contempt judgment against a House member refusing to testify before a grand jury on legislative matters pertinent to the judicial inquiry:

> If there is one principle that emerges clearly from the now legendary "Watergate" episode, it is that even the power of the President of the United States cannot override the power of the judicial branch to compel a full disclosure of the facts in a criminal investigation. [Citing United States v. Nixon, 418 U.S. 683 (1974).]

As surely as Article V and Chapter 86, Florida Statutes (1983), grant to circuit courts "subject-matter jurisdiction" to determine and declare the applicability and effect of Constitutions and laws upon other citizens and institutions, public and private, they grant that in respect to statutes and Constitutions affecting the Speaker, the President and legislative Committees.

B. No Mootness.

The complaint below was filed in February 1982 (S.A. 1-5). Two regular legislative sessions have since come and gone, and judicial resolution of the issues was meanwhile delayed 282 days by Petitioners' retreat to the sanctuary ostensibly provided by Section 11.111, Florida Statutes. In that context, Petitioners' "mootness" claim is that the 1981 General Appropriations Act "has been void since July 1, 1982," hence there is no present need for a judicial declaration of the right of access by press and public to legislative committee meetings on that or any subject (¶ 18). This argument takes no account of the explicit allegations in the 1982 complaint that:

> Secret meetings of committees of the Florida Legislature from which the public and Plaintiffs are excluded may, and are likely to, recur without otherwise being susceptible to judicial review. [¶ 6, S.A. 2]

> Defendants have asserted and continue to assert the right to hold secret committee meetings without notice to the public and without permitting the public to be present at such meetings. [¶ 7, S.A. 2.]

If those allegations alone did not defeat Petitioners' "mootness" claim, surely the continuation in fact of secret committee meetings, during the 1982 and 1983 Legislative Sessions, defeats that claim. This the press intervenors will prove, if still the Speaker and President neither acknowledge the facts nor acknowledge that they "continue to assert the right to hold secret committee meetings . . . without permitting the public to be present . . . ." (S.A. 2). These, of course, are matters the press intervenors had wished to inquire about in the depositions now cancelled as a result of these proceedings.

It is axiomatic that no case is moot, and so not justiciable, if the matter complained of is "capable of repetition, yet evading review." State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1976) (petition for writ of prohibition to review order restraining pretrial publicity held reviewable notwithstanding alleged mootness by conclusion of trial prior to appellate review); The Tribune Co. v. Cannella, 438 So.2d 516 (Fla. 2d DCA 1983) (review pending in this Court on other grounds) (although documents were already provided to members of the press, their action to obtain documents was not moot because the withholding of such materials was capable of repetition, yet evading review); Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367, 1369 (Fla. 5th DCA 1980) (petition to review order controlling pretrial publicity will be heard notwithstanding the fact trial had already begun).

Moreover, Florida courts will entertain even an otherwise moot action if it involves a matter of great public importance on which guidance is needed. See Ervin v. Capital Weekly Post, Inc., 97 So.2d 464 (Fla. 1957) (whether an election law prohibited advertising on behalf of a candidate prior to formal candidacy would be determined notwithstanding technical mootness by actual announcement of candidacy); Times Publishing Co. v. Burke, 375 So.2d 297 (Fla. 2d DCA 1979) (action to compel reporter

to provide civil testimony would be reviewed notwithstanding technical mootness in that reporter had already testified); Plante v. Smathers, 372 So.2d 933 (Fla. 1979) (whether Sunshine Amendment requires full disclosure to qualify for candidacy in 1978 election would be reviewed although election had already occurred). Clearly, the issues raised by the complaint are of the type generally found to be of great public interest, requiring guidelines for future action.

Petitioners acknowledge this exception to the mootness doctrine, but they argue that the issues raised below are moot notwithstanding. Specifically, Petitioners maintain that if a statute is enacted through the use of secret committee meetings, the enacted law can be challenged directly when it is violated. That proposition is not clear, Tolar v. School Board of Liberty County, 398 So.2d 427 (Fla. 1981), and in any case, invalidation is not what plaintiffs seek below. Plaintiffs seek access to observe and report Florida lawmaking, not the invalidation of Florida laws.

C. No lack of jurisdiction over the persons of the Speaker and President.

In the Petition (¶¶ 20, 21), as in their motion to dismiss filed below nearly two years ago (¶ 2, S.A. 8), Petitioners assert a lack of jurisdiction over their persons. In both instances, this apparently is a paraphrase of Petitioners' claim that they are immune from regulation by statutes, by constitutions, and by judicial declarations of statutory and constitutional requirements.

This is not a claim that process was imperfectly served upon the Speaker and the President. It is rather a claim of immunity from judicial process, again a claim of interposition by H. Lee Moffitt and Curtis Peterson by virtue of the offices they hold. Compare Girardeau, supra, 403 So.2d 513 (Fla. 1st DCA 1981).

To the extent that the claim of "no jurisdiction of the person" embodies either Petitioners' basic claim of subject-matter

immunity or some special nuance of that claim, any want of personal jurisdiction was waived by the Speaker's and the President's general appearances in circuit court without reserving "no jurisdiction of the person." The first pleading filed by Petitioners was a motion asserting a legislator's privilege to cause a moratorium in litigation during the session (S.A. 6). Petitioners' second pleading was the same (S.A. 7).

Petitioners' failure to object to personal jurisdiction in their first pleading constituted a waiver and submission to the court's jurisdiction. See Orange Motors of Coral Gables, Inc. v. Rueben H. Donnelley Corp., 415 So.2d 892, 894-95 n. 2 (Fla. 3d DCA 1982) (recognizing that motion for continuance would waive personal jurisdiction if that were first filed motion: "we distinguish that [cited] case from the present in that a motion for continuance at least requests temporal relief and is therefore more than a 'neutral and innocuous piece of paper'"); Consolidated Aluminum Corp. v. Weinroth, 422 So.2d 330 (Fla. 5th DCA 1982), pet. for rev. denied 430 So.2d 450 (Fla. 1983) (failure to object to personal jurisdiction in the first pleading, a motion to vacate default, waived the issue); Miller v. Marriner, 403 So.2d 472, 475 (Fla. 5th DCA 1981) ("The first step which a defendant takes in a case, whether it be the filing of a preliminary motion or a responsive pleading, must raise the issue of personal jurisdiction or that issue is waived."); Green v. Roth, 192 So.2d 537 (Fla. 2d DCA 1966) (motion to discharge lis pendens and motion to increase bond waived personal jurisdiction argument).

If in any sense the circuit court conceivably lacked "jurisdiction over the parties" as claimed, the circuit court's denial of the motion to dismiss a year ago (S.A. 104) was immediately reviewable on that ground by appeal from that nonfinal order. That remedy was clear, complete and fully adequate. Fla.R.App.P. 9.130(a)(3)(C)(i). Because prohibition does not lie if any ordinary remedy is or was available, Joughin v. Parks, 107 Fla. 883, 147 So. 273 (Fla. 1933); Lawrence v. Orange County, 404 So.2d 421 (Fla. 5th DCA 1981), Petitioners' claim to the writ based on immunities expressed as "lack of jurisdiction of the

parties" is groundless. See Holman v. Florida Parole and Prohibition Commission, 407 So.2d 638 (Fla. 1st DCA 1981) ("This Court may not '. . . employ an extraordinary remedy to assist a litigant who has foregone an ordinary one which would have served adequately.'"); Pacha v. Salfi, 381 So.2d 373 (Fla. 5th DCA 1980) (where petitioner had review by interlocutory appeal but failed to do so, court will not extend time for appeal by issuing writ of prohibition).

Petitioners cite two federal cases, Tenney v. Brandhove, 341 U.S. 367 (1951) and Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), in support of their argument here that the circuit court is without personal jurisdiction under state law. In Tenney, the United States Supreme Court held that a state legislator is immune from liability for damages under the predecessor to 42 U.S.C. § 1983 for wrongs allegedly visited upon the plaintiff during a legislative investigation. Petitioners' reliance on this case is puzzling. The case in no way involved personal jurisdiction. Rather, it was an appeal from a reversal of a final judgment dismissing the complaint for failure to state a claim for relief. And the case at point is not a federal civil rights suit seeking damages from Petitioners.

Petitioners' reliance on Lake County Estates, Inc. v. Tahoe, supra, is similarly mistaken. The Supreme Court squarely held that the legislative immunity involved was from "federal damages liability." 440 U.S. at 406. No case holds that legislators are immune from a judicial declaration that they have violated statutes or constitutional provisions directed explicitly at them for the simple reason that such contention is frivolous.

Petitioners also are apparently unaware of the black letter rule of law that even sovereign immunity is simply not available to state officials sued in their representative capacity for the violation of statutory or constitutional duties. Hampton v. State Board of Education, 90 Fla. 88, 105 So. 322 (1925); Louisville & N.R. Co. v. Railroad Commission, 63 Fla. 491, 58 So. 543 (1912); McWhorter v. Pensacola & A.R. Co., 24 Fla. 417, 5 So. 129 (1888); 30 Fla. Jur. ¶ 59.

To press intervenors' knowledge, Florida has never recognized a state legislative privilege from discovery or other compulsory process. This absence of privilege may be because Florida declined to adopt a Speech and Debate Clause for Legislators when the Florida Constitution was ratified. It is the only state to have so declined, and legislative immunity is frequently said to be grounded in such clauses. Tenney v. Brandhove, 341 U.S. 367, 376 n.5 (1951); cf. Girardeau v. State, 403 So.2d 513, 515 n.3 (Fla. 1st DCA 1981). It may also be attributable to the fact that the putative legislative privilege from compelled discovery is most frequently regarded, as Petitioners assert here, a common law privilege. However, no such common law privilege is available for the simple reason that the Legislature has itself withdrawn all common law evidentiary privileges in favor of a statutory evidence code and declined to enact any legislative privilege. Sections 90.102 and 90.501, Florida Statutes; Girardeau v. State, 403 So.2d at 514.

Although this Court could justifiably find that there is no Florida legislative privilege whatsoever, there is no need to discuss the parameters of a privilege in this case. Nevertheless, should the Court feel compelled to address the privilege question with respect to the discovery sought by the press intervenors in the Declaratory Action, recognition of a privilege in this case would itself violate separation of powers by undermining "the basic function of the courts" to ensure "the public's rights to every man's evidence...." Girardeau, 403 So.2d at 517 and n.6 (citing and following United States v. Nixon, 418 U.S. 683 (1974)). To further grant a privilege to Legislators from mere involvement in a suit in their official capacities would be wholly unprecedented. Cf. Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) ("qualified [federal] immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based").

D. No "frivolous" or "useless" purpose in the complaint below; no futility in the declaratory relief requested.

As another variation of their mootness argument, repeated as such (¶ 23, Petition), Petitioners argue that the circuit court should be prohibited from proceeding because a declaratory judgment would be "useless" and because the complaint is frivolous, filed to satisfy plaintiffs' curiosity and in pursuit of "free legal advice" (¶ 22, Petition).

Perhaps Petitioners' contentions in this respect arise from Judge Willis' statements in two hearings below, to the effect that any declaration contrary to Petitioners' perceived interests would likely not be accompanied by coercive process, that "this court would merely enter a declaration and then expect the other branches of the government to accept it if it was authoritatively established judicially, either here or in an appellate court" (S.A. 167; see also S.A. 100). Such judicial respect for a coordinate branch does not render a judicial declaration "useless," nor the seeking of it a "frivolous" pursuit of "free legal advice." The withholding of unnecessary coercive process in such events is judicially appropriate and certainly not unprecedented. See Florida Senate v. Graham, 412 So.2d 359 (Fla. 1982) (issuance of formal process withheld in confidence that Governor would voluntarily comply); Poe v. Gerstein, 417 U.S. 281 (1974) (injunction refused where no allegation or proof that State of Florida would not respect declaratory judgment).

We can only ask the Court to judge whether a declaration of rights of public access so earnestly sought, so doggedly avoided, now so fiercely resisted, can be termed "frivolous". There is no absence of a "concrete matter ... in issue" (¶ 22, Petition). That "concrete matter" is the right of the press and public to observe meetings of legislative Committees (conducting legislative business) which are bound by rules, statutes and constitutional provisions to admit the public to their meetings.

We know of no case in which a Florida appellate court, conceiving that a circuit court declaratory judgment proceeding

is "useless" and "abstract," has interrupted that proceeding and terminated it by writ of prohibition. We daresay there is no such case.

III. THE PRESS AND PUBLIC ARE ENTITLED TO ACCESS TO LEGISLATIVE COMMITTEE MEETINGS, WHETHER OR NOT FORMALLY NOTICED AND CONVENED.

This dispute arose and it continues because Committees of the House and Senate, appointed by and responsible to the Speaker and the President, systematically meet privately and without public notice of time and place, in violation of House and Senate rules but with approval of the Speaker and the President, to deliberate and decide official reports to the respective Houses on certain issues.

The notorious exemplar is the House and Senate Conference Committee on Appropriations, together with its Subcommittees which are explicitly recognized by House and Senate rules, and to which responsibilities are assigned topically, by subject matter of appropriation.

The Committee meetings complained of are those in which substantial numbers of Committee members, by prearrangement of the Speaker or President or other person exercising their authority, meet together at a time and place not publicly noticed; exclude the press and public by secretiveness, closed doors, uniformed guards or other means desired, and then and there deliberate and decide the Committee's report. The Committee meetings complained of are not, as the respondent circuit judge perceptively noted, "a couple of legislators drinking coffee together" (S.A. 176), or "every bull session" of legislators (S.A. 102). Rather they are meetings of Committee members by prearrangement and with purpose, as described, and in substantial numbers, more or less than an absolute majority of Committee members but sufficiently numerous that they and the officer who called the meeting are satisfied that they may effectively deliberate and decide for the Committee.

A. The press and public are entitled to access by Section 11.142, Florida Statutes (1983).

The Florida Constitution provides, "Each house shall determine its rules of procedure." Article 3, Section 4(a), Florida Constitution. Each house has by rule determined that "All committee meetings shall be open to the public" (Senate Rule 2.13) and "All meetings of all committees shall be open to the public at all times" (House Rule 6.25).

If the matter rested there, the public and the public's surrogate to report information, the press, have a sufficient interest in the legislative rules to invoke them judicially, so to access the Committee meetings described. The public's legitimate interest, and consequently that of the press, is in how the public is affected by the process and results of such Committee meetings. Thus, when the construction given legislative rules affects individuals other than the Legislators themselves, "the question presented is of necessity a judicial one." United States v. Smith, 286 U.S. 6, 33 (1932) (Senate rules judicially interpreted to determine whether an appointment confirmed by the Senate can be reconsidered after the appointee's commission was signed and delivered). Repeatedly, the United States Supreme Court has required that committees of the legislature be "meticulous" in obeying their own rules, particularly when they impact non-legislators. See Gojack v. United States, 384 U.S. 702, 708 (1966) (contempt citation overturned because committee was not authorized to investigate by rules of the House, therefore all elements of contempt did not exist); Christoffel v. United States, 338 U.S. 84, 90 (1949) (where committee lacked quorum and House rules precluded it from doing business, a conviction for contempt occurring at that time must be reversed); Yellin v. United States, 374 U.S. 109, 114 (1963) (relying exclusively upon the rules of the House, held the Committee had not followed proper procedures antecedent to contempt conviction):

> It has long been settled, of course, that rules of Congress and its committees are

> judicially cognizable. And a legislative committee has been held to observance of its rules just as, more frequently, executive agencies have been.

Id. at 114 (emphasis added).

If, then, this were simply a matter of requiring legislative Committees to follow their rules as the predicate for other action taken elsewhere affecting nonlegislators, the judiciary must and will require it.

But House Rule 6.25 and Senate Rule 2.13, quoted supra, do not simply stand alone in this case. They are not mere antecedents to lawful action taken elsewhere. The Rules are explicitly for the direct benefit of the public, and they are given the effect of law by Section 11.142, which requires that Committees "shall abide by" rules adopted "to govern the conduct of meetings by such committees." Thus the Houses of the Florida Legislature have not only "determined" their own rules in the sense of formulating them, Article III, Section 4(a), Florida Constitution; they have "determined" their effect as general law, thus requiring as a matter of law that Committee meetings be always open to the public.

Meetings of substantial numbers of Committee members, for the purposes and in the circumstances described above, are de facto meetings of the Committee, certainly no less so than "meetings" of small groups of collegial body members whose "meetings" are unambiguously subject to the Sunshine Law, Section 286.011, Florida Statutes (1983). Hough v. Stembridge, 278 So.2d 288 (Fla. 3d DCA 1973); City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). The press intervenors have, if anything, defined "meetings" with utmost conservatism for purposes of the relief sought with respect to legislative Committee meetings. "[W]hether the meeting is formal or informal," of course, does not determine the applicability of Section 11.142. Compare City of Miami Beach v. Berns, 245 So.2d 38, 41 (Fla. 1971).

B. The press and public are entitled to access by Section 286.011, Florida Statutes (1983).

The Sunshine Law applies to "[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken . . . ." Section 286.011, Florida Statutes (1983).

Though Judge Willis expressed the view that Section 286.011 is not applicable to committee meetings of Legislators (S.A. 100, 104), it is in fact applicable to the Legislature as an "authority" of the State. The Attorney General was correct in concluding that the statutory phrase "except as otherwise provided in the Constitution" has meaning principally in reference to the Legislature. Op. Atty. Gen 077-10 (1977 Annual Report at 17, 18):

> Indeed, had the Legislature which enacted s. 286.011, F.S., not intended to include itself within the act, it is difficult to explain why the words "except as otherwise provided by the Constitution" came to be inserted into s. 286.011, since the only exception in the 1885 Constitution authorizing executive sessions was that found at s. 13, Art. III, State Const. 1885, relating to executive sessions of the Senate. Had the 1967 Legislature not intended to include itself within the Sunshine Law, there would have been no reason to partially exempt itself from the act. Moreover, the history of the Sunshine Law reveals that in 1967, when the law was again reintroduced the Senate was engaged in debate over "executive sessions" and their abuses.

Interpreting the statute "liberally in favor of the public," City of Miami Beach v. Berns, 245 So.2d 38, 40 (Fla. 1971), this statute enacted by the Legislature to govern the deliberations of government should certainly apply to legislative committees, meeting formally or informally.

C. The press and public are entitled to access by the Constitutions of Florida and of the United States.

If the foregoing rules and statutes do not of their own effect assure the press and public access to de facto legislative Committee meetings, and if on those grounds the respondent circuit

judge is not well within his authority in entertaining the action for eventual determination and declaration of that right, then the Constitutions of Florida and of the United States have that effect.

1. Pre-Richmond Newspapers Decisions.

The right to know, the right to attend meetings of governmental bodies, and the right to gather news under the First Amendment are well established by case law. These rights are protected because the public must have knowledge of the affairs and activities of its government for freedom of speech, or of the press, to be meaningful.

It hardly requires proof that much of the Legislature's most significant work is done in committee. Historically, the committee has been the Legislature's "smoke-filled room." But closed government is no longer tolerated in this State. It is no coincidence that the Florida Sunshine Law was adopted in 1967 and a new Constitution and Section 11.142 were adopted the following year. The rules of each House, adopted in accordance with the statutory mandate of the Legislative Rules Statute, require that all committee meetings be duly noticed and open to press and public. The Florida Sunshine Law imposes the same requirement. The First Amendment, as interpreted in recent decisions of the United States Supreme Court, imposes a similar First Amendment right of access to government proceedings, absent compelling reasons to the contrary not here shown.

A key United States Supreme Court case specifically developing the public's right to know under the First Amendment (which contemplates the concommitant right of the press to gather news) was First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). There the Court held that a statute prohibiting corporations from making expenditures for the purpose of expressing corporate opinions on referenda issues violated the First Amendment right of the public to access to government-controlled information:

> Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the

> role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. See Red Lion Broadcasting Co. v. FCC, supra; Stanley v. Georgia, 394 U.S. 557, 564, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969); Time, Inc. v. Hill, 385 U.S. 374, 389, 17 L.Ed.2d 456, 87 S.Ct. 534 (1967). Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification. Winters v. New York, 333 U.S. 507, 510, 92 L.Ed. 840, 68 S.Ct. 665 (1948).

Id. at 783.

First National Bank of Boston followed a line of earlier decisions also recognizing the public's First Amendment right of access to information. For example, in Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977), the Court invalidated an ordinance prohibiting the placement of "for sale" signs on residential lots as a violation of the public's right to know information necessary to make informed decisions concerning the availability of housing:

> The constitutional defect in this ordinance, however, is far more basic. The Township Council here, like the Virginia Assembly in Virginia Pharmacy Bd., acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs -- with offerors communicating offers to offerees -- but with the substance of the information communicated to Willingboro citizens.

Id. at 96; accord, Kleindeinst v. Mandel, 408 U.S. 753 (1972).

The United States Supreme Court in First National Bank of Boston and Linmark thus held that the public's right of access to relevant facts outweighed strong state interests in restricting access to that information even though the speech involved was commercial or corporate speech, the least protected form of expression covered by the First Amendment. The information at

issue here relates directly to operation of government; therefore, access to it serves much greater First Amendment interests and is highly protected. If the constitutional structure (which makes the government answerable to the people and not the reverse) prohibits even relatively minor institutions, such as local town boards, from contracting the spectrum of knowledge and public debate, then the Constitution surely demands that an institution such as the Legislature, which deals with the most crucial issues on which public debate should be freely exercised, not be allowed to circumvent public accountability by closing its doors. If the information controlled by a township board is sufficient to trigger the right to know, then the information considered in meetings of committees of the Legislature easily trigger that right.

2. The trilogy of decisions led by Richmond Newspapers requires press access to legislative committee meetings.

The threads of these antecedent decisions were collected and the First Amendment right of access to important governmental information crystallized in a trilogy of United States Supreme Court cases, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), Globe Newspaper Company v. Superior Court, 457 U.S. 596, 73 L.Ed.2d 248 (1982), and, just last month, Press-Enterprise Co. v. Superior Court, 52 U.S.L.W. 4113 (1984).[8/]

In Richmond Newspapers, Inc. v. Virginia, supra, an overwhelming majority of the United States Supreme Court explicitly recognized for the first time the First Amendment right of

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8/ Recent decisions of the Courts of Appeal have also expressly recognized the public right of access to information controlled by the government. Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) (recognizing applicability of right of access beyond criminal trials); In Re Express-News Corp., 695 F.2d 807, 809 n.2 (5th Cir. 1982) (collecting cases supporting public right of access to information generally).

CONCLUSION

For the foregoing reasons, the Petition should be denied or dismissed, or a declaration should be entered in favor of the press intervenors on the merits.

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access to information held by governmental bodies.[9/] In his plurality opinion for the Court, Chief Justice Burger explained the value of public access:

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Richmond Newspapers, 448 U.S. at 572. The Chief Justice also reaffirmed the Court's general position that the right of access exists because "without some protection for seeking out the news, freedom of the press would be eviscerated." Id. at 576 (quoting with approval, Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

The concurrence of Justice Stevens underscored the significance of the Richmond Newspapers, holding:

> [F]or the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.
>
> * * *
>
> [I] agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government. . . .

Richmond Newspapers, 448 U.S. at 583-84 (Stevens, J., concurring) (emphasis added).

In Globe Newspaper Company v. Superior Court, supra, the Supreme Court reaffirmed the Richmond Newspapers "watershed holding." The Court specifically recognized the First Amendment right of access to the sensitive trial testimony of minor (child)

9/ Seven of the eight Justices participating in Richmond Newspapers recognized that the press enjoys a First Amendment right of access to governmental information. 448 U.S. at 580 (Burger, C.J., plurality opinion joined by Stevens, J. and White, J.); 448 U.S. at 582 (White, J., concurring); 448 U.S. at 584 (Stevens, J., concurring); 448 U.S. at 585 (Brennan, J., concurring and joined by Marshall, J.); 448 U.S. at 604 (Blackmun, J., concurring). Only Justice Rehnquist disagreed. 448 U.S. at 606. The ninth Justice, Mr. Justice Powell, did not participate in Richmond Newspapers, but had already recognized this First Amendment right in earlier cases, including Pell v. Procunier, 417 U.S. 817 (1974); Houchins v. KQED, 438 U.S. 1 (1978); Gannett Co. v. DePasquale, 443 U.S. 368 (1979). Thus, the Richmond Newspapers decision establishes the right of The Miami Herald and the public to scrutinize the operation of the Legislature. Access to the Records by which the Legislature performs its functions is protected by the "transcendent imperatives" of the First Amendment because such information is, as recognized by Richmond Newspapers, vital to public scrutiny of a public agency and to robust public debate concerning the performance of its public duties.

sex-crime victims in a sex-offense trial. The Court emphasized in Globe Newspaper the significance of the First Amendment right of access and the fact that the right serves to guarantee the free and informed debate of public affairs which together seek to "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." Globe Newspaper, 73 L.Ed.2d at 255-56. In an opinion joined by five Justices, the Court eliminated any doubt which may have lingered about the existence of the First Amendment right of access to governmental information. The opinion sets out in unambiguous detail the logic of this right. The Court began by rejecting any narrow conception of First Amendment rights:

> [W]e have long eschewed any "narrow, literal conception" of the Amendment's terms, NAACP v. Button, 371 US 415, 430, 9 L.Ed.2d 405, 83 S. Ct. 328 (1953), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. [citations omitted]

Globe Newspaper, 73 L.Ed.2d at 255. The Supreme Court thereby made it clear that the First Amendment was not limited to a wooden reading of its literal language.

The Court proceeded to articulate the explicit logic of the First Amendment right of access; namely that securing free and informed debate of governmental affairs is one of the principal purposes of the First Amendment, and to achieve that end, the First Amendment necessarily provides access to any information held by government which is relevant for meaningful speech concerning governmental activity:

> Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," Mills v. Alabama, 384 US 214, 218, 16 L.Ed.2d 484, 86 S. Ct. 1434 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. [citations omitted]

Globe Newspaper, 73 L.Ed.2d at 255-56. The Court concluded that the First Amendment right of access could not be frustrated by confining it within the narrow limits of the historical traditions of criminal trials.10/

The Court emphasized instead the structural importance of the right of access and of informed debate in a self-governing society:

> [T]o the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.
>
> Two features of the criminal justice system, emphasized in the various opinions in Richmond Newspapers, together serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. . . .
>
> Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process - an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience. [footnotes omitted]

Globe Newspaper, 73 L.Ed.2d at 256-57 (emphasis added).

The relevance of this language to committee meetings of the Legislature is facially apparent. The First Amendment right of access exists to promote and protect informed discussion of public affairs because such discussion is essential to a self-governing society. Access to courts is granted because such

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10/ See also dissent of Justice Stevens (dissenting solely on the need to hear the case): "We have only recently recognized the First Amendment right of access to newsworthy matter" (citing Richmond Newspapers, supra).

access is necessary to the acquisition of information necessary for meaningful speech about the judicial system. The same is true for committee meetings of the Florida Legislature. The First Amendment right to government-held information exists in order to ensure that speech regarding government will be meaningful, and since relevant information may be obtained by observing the courts (or legislative committees), the First Amendment guarantees such access. In addition, just as trials (proceedings conducted by the Judicial Branch) have traditionally been open to the public, committee meetings of the Legislative Branch of Florida's government have been open by operation of Legislative rules, statutes, and state constitutional provisions.

The most recent case in the Richmond Newspapers line is Press-Enterprise Co., supra, decided last month. There, Chief Justice Burger wrote for the Court, and Justices Blackmun, Stevens, and Marshall filed separate concurrences; all nine Justices agreed that the voir dire examination of prospective jurors must necessarily be open absent some compelling state interest in closure. Following Richmond Newspapers, the Court noted that openness "enhances both the basic fairness . . . and the appearance of fairness so essential to public confidence in the system." Press-Enterprise, 52 U.S.L.W. at 4115. Thus, although closure is not absolutely precluded, the Chief Justice continued, it will still be rare "and only for cause shown that outweighs the value of openness." Id. Quoting Globe Newspaper Co., 457 U.S. at 606-07, the Court concluded:

> Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Press-Enterprise, 52 U.S.L.W. at 4115.

The trilogy of Richmond Newspapers, Boston Globe and Press-Enterprise teach us several things. First, access makes government less mysterious and its actions therefore easier to accept. Richmond Newspapers, 448 U.S. at 572. Second, access, as the Court stressed in Boston Globe, "ensures that the consti-

tutionally protected 'discussion of governmental affairs' is an informed one." Boston Globe, 457 U.S. at 604. Thus, Justice Stevens' concurrence in Press-Enterprise underscored that the Court's decision in that case turned on the public's First Amendment right of access, not on the accused's Sixth Amendment right to a public trial, and that "the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." Id. at 4117. Third, what is crucial is "assuring freedom of communication on matters relating to the functioning of government"; whether those "matters" concern trials or some other government process is irrelevant. Id. (quoting Richmond Newspapers, 448 U.S. at 575 (plurality opinion)).

This expansive right of access is based upon "the common understanding that 'a major purpose of the First Amendment was to protect the free discussion of governmental affairs.' Mills v. Alabama, 384 U.S. 214, 218 (1966)." Boston Globe, 457 U.S. at 604. It is meant to "ensure that the individual citizen can effectively participate in and contribute to our republican form of self-government." Id. Thus, as Justice Stevens observed, the success of an access claim depends upon its "contribution to the process of self-governance." Press-Enterprise, 52 U.S.L.W. at 4118. In this case, access to legislative committee meetings cannot help but increase the public understanding of the Florida Legislature, its method of operation, and the subjects of its consideration. If the public is to be able properly to evaluate its legislators, it must be able to know how they behave in committee meetings as well as in general sessions. The public needs and deserves to know how all the branches of its government function.

3. Other cases make clear that the impact of the Richmond Newspapers trilogy is not confined to the judicial arena.

One other recent analogous decision of the United States Supreme Court bears consideration. There the Court speci-

fically applied the First Amendment right of access in a context involving the asserted discretion of a governmental body, a school board, to restrict public access to materials in its control. Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 73 L.Ed.2d 435 (1982). The precise question before the Court was "whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries." 73 L.Ed.2d at 439-40. In his plurality opinion announcing the judgment of the Court, Justice Brennan, writing for Justices Marshall and Stevens, held that the public has a First Amendment right of access to material controlled by the school board:

> [T]he discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.
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> * * *
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> Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." First National Bank of Boston v. Bellotti, 435 U.S. 765, 783, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965).

73 L.Ed.2d at 445-446. The Island Trees decision therefore expressly extends the First Amendment right of access announced in Globe Newspaper to governmental bodies other than courts.[11/]

11/ Justice Blackmun joined the opinion in part, but wrote separately because he viewed the case as the "obverse" of the plurality's analysis. He focused on the State's decision to single out a particular idea for denial of access. The fifth vote for reversal was cast by Justice White who wrote separately because he believed it to be premature to decide the specific First Amendment issue presented prior to trial, but his recognition of the right to know and the First Amendment right of access have been expressed in other recent decisions of the Court. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 581 (White, J., concurring).

Other cases showing the extension of the public access right to non-judicial contexts include Cable News Network v. American Broadcasting Companies, Inc., 518 F.Supp. 1238 (N.D.Ga. 1981), and Westinghouse Broadcasting Co. v. National Transportation Safety Board, 8 Med.L.Rptr. 1177, 1184 (D.Mass. 1982). The court in Cable News Network issued a preliminary injunction enjoining the White House from totally excluding the television media from coverage of certain White House events. The preliminary injunction was issued because this executive branch policy arbitrarily interfered with:

> ...the rights guaranteed and protected by the First Amendment includ[ing] a right of access to news or information concerning the operations and activities of government. This right is held by both the general public and the press, with the press acting as a representative or agent of the public as well as on its own behalf. Without such a right, the goals and purposes of the First Amendment would be meaningless. However, such a right of access is qualified, rather than absolute, and is subject to limiting considerations such as confidentiality, security, orderly process, and spatial limitation, and doubtless many others.

518 F.Supp. at 1244. Westinghouse Broadcasting held that the First Amendment right of access to important governmental information prevented a federal agency from arbitrarily limiting press access to an airplane crash site to one hour per day, without making an evidentiary showing that there existed "some overriding consideration. . . of security, orderly process, spatial limitation...." 8 Med.L.Rptr. at 1184.

Neither the judicial, executive nor legislative arm of government is immune from the public's right to know and concommitant right of access guaranteed by the First Amendment. No state doctrine, be it separation of powers or another, can withstand it, absent a showing of a compelling state interest requiring closure.

B. Petitioners have shown no compelling state interest in closure.

The right of access is not, of course, absolute. However, before access can be denied, it must be shown that the

denial is required by some compelling state interest and that it is narrowly tailored to serve that interest. Boston Globe, 457 U.S. at 606-07. It is also necessary that the findings leading to the closure be specific enough that a reviewing court may determine the propriety of the closure. Press-Enterprise, 52 U.S.L.W. at 4116. A blanket denial of access to a particular type of proceeding would be per se invalid.

The Legislature could thus never deny access to all committee meetings or any sub-group of committee meetings qua a sub-group. Rather the Legislators would have to show some compelling state interest served by denial of access to the particular committee meeting. Petitioners failed to assert any such interest in the Declaratory Action. They have not shown that access will frustrate the public purposes for which the Legislature exists, nor have they shown that access will endanger the welfare or violate the constitutional rights of the public. Indeed, Moffitt and Peterson have failed to show that their arbitrary exclusion of the public was based on anything other than a desire to abridge free debate and save themselves (and other legislators) from public criticism and scrutiny.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response of Press Intervenors to the Petition for Writ of Prohibition and accompanying Supplemental Appendix of Press Intervenors was served by hand this 2nd day of March, 1984, upon the following:

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