

act as and exercise temporarily the duties of the Chaplain of the House of Representatives following the death of the Chaplain

of the House, Rev. Bernard Braskamp.

Rev. Latch served as acting Chaplain until the end of the 89th Congress.⁽²⁰⁾

D. AS PARTY DEFENDANT OR WITNESS

§ 23. In General; Immunities

This division focuses on the liability to suit or to judicial process of House officials or employees for acts committed by them in the performance of their duties for the House. Immunity arising under the Speech or Debate Clause of the U.S. Constitution (art. I, §6) is discussed. Court opinions dealing with aides of individual legis-

lators⁽¹⁾ and committee employees⁽²⁾ are also taken up here.⁽³⁾

In the exercise of official duties, an officer of the House may become involved in litigation by receiving a summons to appear as a party defendant,⁽⁴⁾ in which case he informs the Speaker,⁽⁵⁾ and may request legal representation by the United States Attorney for the district in which the action is brought.⁽⁶⁾ Or he may receive a

20. See §16.9, *supra*, for the election of Rev. Latch as Chaplain.

1. See *Gravel v United States*, 408 U.S. 606 (1972), for example, which is discussed at §23.13, *infra*. See also Ch. 7, *infra*, for a discussion of litigation involving Members generally.
2. *Dombrowski v Eastland*, 387 U.S. 82 (1967), *Stamler v Willis*, 415 F2d 1365 (7th Cir. 1969); cert. den. 399 U.S. 929 (1970), and *Doe v McMillan*, 412 U.S. 306 (1973), which are discussed at §§23.10, *infra*, 23.12, *infra*, and 23.14, *infra*, respectively.
3. See Ch. 11, which includes a discussion of the privilege of the House as related to subpoenas served on Members or on House officers or employees.

4. See the reports of the Joint Committee on Congressional Operations Identifying Court Proceedings and Actions of Vital Interest to the Congress, for the record of legal actions involving House officers, beginning with the first cumulative report dated Oct. 20, 1971.

5. See §§23.1 and 23.2 *infra*, for precedents relating to receiving a summons and notifying the Speaker.

6. See USC §118.

See §§93.3, *infra*, and 23.5, *infra*, for examples of requests for representation from the Clerk and the Sergeant at Arms, respectively.

subpena to appear and testify as a witness (subpena ad testificandum) or to produce records (subpena duces tecum), in which case he informs the Speaker who lays the matter before the House,⁽⁷⁾ which may grant leave for the withdrawal of papers from its files.⁽⁸⁾

At one time, immunity from suit under the Speech or Debate Clause was considered to be broader for Members of Congress than for nonmembers who acted on their behalf, including officers of legislative bodies, staff personnel of committees, and aides to individual Members. For example, in *Kilbourn v Thompson*, 103 U.S. 168 (1881),⁽⁹⁾ the U.S. Supreme Court held that although damages for false imprisonment could not be recovered in that case against Members of the House, they could be recovered against the Sergeant

Compare §23.6, *infra*, for an instance in which the House by resolution authorized the Speaker to appoint and fix the compensation of special counsel to represent officers, Members, and the House in *Powell v McCormack*.

7. See §§23.7–23.9, *infra*, for precedents relating to receiving subpoenas and notifying the Speaker.
8. Rule XXXVII, *House Rules and Manual* §933 (1973).
9. See 2 Hinds' Precedents §1611, for a discussion of *Kilbourn v Thompson*.

at Arms, who executed an arrest warrant pursuant to a resolution found to be an unconstitutional exercise of judicial authority by a legislative body. Likewise in *Dombrowski v Eastland*, 387 U.S. 82 (1967)⁽¹⁰⁾ a criminal suit was dismissed as to a Senate subcommittee chairman, but remanded for a finding of facts on alleged illegal activities by the subcommittee counsel.

This double standard was applied in *Powell v McCormack*, 395 U.S. 606 (1969),⁽¹¹⁾ in which the Court dismissed a suit for declaratory, injunctive, and mandatory relief as to Members, but held that the Clerk, Sergeant at Arms, and Doorkeeper of the House could be held liable for refusal to perform services for a Member-elect who had been excluded from the office by an unconstitutional resolution. In *Stamler v Willis*, 415 F2d 1365 (7th Cir. 1969), cert. den. 399 U.S. 929 (1970),⁽¹²⁾ a suit against members of a House committee, a lower federal court on its own motion granted plaintiffs leave to amend their complaint to include committee personnel to

10. See §23.10, *infra*.

Collateral reference: *Dombrowski v Eastland* Id—A Political Compromise and Its Impact. 22 Rutgers Law Review 1.27 (Fall 1967).

11. See §23.11, *infra*.
12. See §23.12, *infra*.

ensure that adequate relief could be obtained. At the same time, the Court dismissed the action as to the Members on the ground that their activities were protected by the Speech or Debate Clause.

The practice of recognizing greater immunity for Members than their agents was modified in *Gravel v United States*, 408 U.S. 606 (1972),⁽¹³⁾ a criminal action which arose when an aide to the Senator who publicized the contents of the Pentagon Papers refused to respond to a subpoena to appear before a grand jury and answer questions relating to assistance given by him to the Senator. Intervening to quash the subpoena, the Senator contended that requiring the aide to testify about such assistance would violate the Senator's privilege under the Speech or Debate Clause. Adopting the position of the Senate, which filed a friend of the court brief and argued the cause, the Supreme Court held that the legislative process is such as to make the work of an aide so critical that he must be treated as a Member's alter ego to avoid frustration of the central purpose of the constitutional immunity. The Court ruled that "the Speech or Debate Clause applies not only to a Member, but also to his aides

13. See §23.13. infra.

insofar as the conduct of the latter would be protected if performed by the Member himself." One year later the Court extended the Speech or Debate Clause immunity, granted to aides of individual Members in *Gravel*, to committee employees. See *Doe v McMillan*, 412 U.S. 306 (1973).⁽¹⁴⁾

Receipt of Summons

§ 23.1 When the Clerk receives a summons to appear as a party defendant in a court action, he informs the Speaker who lays the matter before the House.⁽¹⁵⁾

For example, on Oct. 24, 1967,⁽¹⁶⁾ the Speaker, John W.

14. See §23.14, infra.

Collateral reference: *Constitution of the United States of America: Analysis and Interpretation*, "Privilege of Speech or Debate, Congressional Employees," pp. 120-22, S. Doc. No. 92-82, 92d Cong. 2d Sess.

15. See, for example, 113 CONG. REC. 6035, 6036, 90th Cong. 1st Sess., Mar. 9, 1967 (Clerk's receipt of summons in *Powell v McCormack*); 113 CONG. REC. 29821, 90th Cong. 1st Sess., Oct. 24, 1967 (receipt of summons in *Wilkinson v United States and Clerk of the House of Representatives*); 117 CONG. REC. 1503, 1504, 92d Cong. 1st Sess., Feb. 3, 1971 (receipt of summons in *Eckert v House of Representatives*).

16. 113 CONG. REC. 29821, 90th Cong. 1st Sess.

McCormack, of Massachusetts, laid before the House the following communication from the Clerk:

OCTOBER 19, 1967.

Re civil action file No. 2643-1967.
The Honorable the SPEAKER, HOUSE OF REPRESENTATIVES.

DEAR SIR: By this letter I am transmitting to you a summons in a civil action directed against the United States of America and the Clerk of the House of Representatives of the Congress of the United States.⁽¹⁷⁾ I was served with this petition on the 17th of October by a Deputy United States Marshal. In addition to notifying you of this action in accordance with 2 U.S. Code 118 a copy of this summons is being forwarded to the U.S. District Attorney for the District of Columbia. In accordance with the provisions of this statute I am requesting the U.S. District Attorney to enter an appearance, file an answer and defend this civil action. Additionally I am notifying the Attorney General of the United States that this suit has been filed against me in my official capacity as Clerk of the House of Representatives of the Congress of the United States. Copies of these letters and notification are attached hereto.

This summons is attached and the matter is presented for such action as the House in its wisdom may see fit to take.

Respectfully submitted.

W. PAT JENNINGS,
Clerk,

U.S. House of Representatives.

17. The suit referred to in the letter, *Wilkinson v United States of America et al.*, Civil Action File No. 26431967, sought statutory death benefits for the daughter of a deceased House employee.

THE SPEAKER: Without objection, the summons and pleadings will be printed in the Record.

There was no objection.

§ 23.2 When the Sergeant at Arms receives a summons to appear as a party defendant in a court action, he informs the Speaker who lays the matter before the House.

For example, on June 6, 1963,⁽¹⁸⁾ the Speaker, John W. McCormack, of Massachusetts, laid before the House the following communication from the Sergeant at Arms:

JUNE 6, 1963.

Hon. JOHN W. McCORMACK,
Speaker, U.S. House of Representatives, Washington, D.C.

DEAR MR. SPEAKER: I have in my official capacity as Sergeant at Arms of the House of Representatives been served in a civil action in the U.S. District Court for the District of Columbia (civil action file No. 137163).⁽¹⁹⁾ Having in mind that the privileges of the House of Representatives may be involved, I am bringing this matter to your attention.

I did, on June 5, 1963, address letter to the Honorable David C. Acheson, U. S. attorney for the District

18. 109 CONG. REC. 10359, 88th Cong. 1st Sess.

19. *Parliamentarian's Note*: The civil action referred to above alleged the failure of the Sergeant at Arms to withhold the salary of a Member (Adam C. Powell [N.Y.]) for periods of alleged absence from the House. It was dismissed with prejudice.

of Columbia, requesting assignment of counsel to represent the Sergeant at Arms as provided for in 2 United States Code 118. A copy of that letter is attached hereto.

Sincerely,
ZEAKE W. JOHNSON, JR.,
Sergeant at Arms.

Legal Representation

§ 23.3 When named as a party defendant in a legal action involving performance of official duties, the Clerk has requested representation from the United States Attorney for the district in which the action was brought.

A statute⁽²⁰⁾ provides that any officer of either House may request legal representation in any action involving the discharge of official duties. A representative illustration of one of these requests, a letter to the United States Attorney for the district in which the action was brought, was laid before the House by the Speaker, John W. McCormack, of Massachusetts, on Oct. 24, 1967:⁽¹⁾

OCTOBER 19, 1967.

Re civil action file No. 2643-1967.
Hon. DAVID G. BRESS,
U.S. Attorney for the District of Columbia,
U.S. Courthouse, Washington, D.C.

DEAR MR. BRESS: I am sending you a copy of a summons in a civil

action that was served on me in my official capacity as Clerk of the House of Representatives of the Congress of the United States. This service was accomplished on October 17 by a Deputy U.S. Marshal.

In accordance with 2 U.S. Code 118 I respectfully request that you enter an appearance, file an answer or take such other action as you may deem necessary in defense of this suit against the United States of America and the Clerk of the U.S. House of Representatives of the Congress of the United States.

This office will assist you in any way possible in preparation of your answer and defense. If you have any questions regarding this matter or if you need additional information please contact my legal advisor, Mr. Bill Hollowell.

Respectfully submitted.

W. PAT JENNINGS,
Clerk,
U.S. House of Representatives.

§ 23.4 In addition to informing the United States Attorney for the district in which the action was brought, an officer named as a party defendant sometimes notifies the Attorney General, although this latter notification is not required by statute.

For example, on Oct. 24, 1967,⁽²⁾ the Speaker, John W. McCormack, of Massachusetts, laid before the House the following letter from the Clerk:

²⁰. 2 USC § 118.

1. 113 CONG. REC. 29821, 90th Cong. 1st Sess.

2. 113 CONG. REC. 29821, 90th Cong. 1st Sess.

OCTOBER 19, 1967.

Re civil action file No. 2643-1967.

Hon. RAMSEY CLARK,
Attorney General of the United States,
Department of Justice, Washington, D.C.

DEAR MR. CLARK: I am sending you a copy of a summons in a civil action filed against the United States of America and the Clerk of the House of Representatives of the Congress of the United States. I was served with this summons on October 17 by a Deputy U.S. Marshal.

In accordance with 2 U.S. Code 118 I have sent a copy of this action to the U.S. District Attorney for the District of Columbia requesting that he enter an appearance and defend this action. Realizing that the defense of this action will be conducted under the supervision and direction of the Attorney General I am also sending you a copy of the summons as well as a copy of the letter that I am forwarding to the U.S. District Attorney.

Respectfully submitted.

W. PAT JENNINGS,
Clerk,

U.S. House of Representatives.

§ 23.5 The Sergeant at Arms has requested representation of the United States Attorney for the district where the action was brought in a lawsuit involving his official duties.

For example, on June 6, 1963,⁽³⁾ the Speaker, John W. McCormack, of Massachusetts, laid before the House the following communication requesting representation

3. 109 CONG. REC. 10359, 88th Cong. 1st Sess.

from the United States Attorney pursuant to 2 USC § 118:

JUNE 6, 1963.

Hon. DAVID C. ACHESON,
U.S. Attorney for the District of Columbia, U.S. Courthouse, Washington, D.C.

DEAR MR. ACHESON: I respectfully request that you assign counsel to represent the Sergeant at Arms of the House of Representatives, Zeake W. Johnson, Jr., in a civil action in the U.S. District Court for the District of Columbia (civil action file No. 1371-63) pursuant to 2 United States Code 118. I was served in my official capacity, on June 4, 1963, with instructions to answer the complaint within 60 days after service.

I am enclosing herewith a copy of the summons which was served on me. I may add that I will be available at any time to confer with any counsel that you may assign to this case.

Very truly yours,

ZEAKE W. JOHNSON, JR.,
Sergeant at Arms.

§ 23.6 In an action where both Members and officers were named as defendants, the House authorized the Speaker to appoint special counsel to represent both groups.

Although House officers by statute⁽⁴⁾ may request representation by the United States Attorney in any action involving the discharge of their official duties, they did

4. 2 USC § 118.

See § 23.3, supra, for a discussion of the procedure for requesting representation by the United States Attorney.

not exercise this authority in *Powell v McCormack*, 395 U.S. 606 (1967), a suit where both officers and Members were named as defendants. Instead, they were represented by special counsel appointed by the Speaker and paid out of the contingent fund.⁽⁵⁾

Thus, on Mar. 9, 1967, in the 90th Congress,⁽⁶⁾ Mr. Hale Boggs, of Louisiana, offered and the House adopted House Resolution 376. The proceedings were as follows:

MR. BOGGS: Mr. Speaker, I rise to a question of the privilege of the House, and offer a resolution (H. Res. 376) which I send to the Clerk's desk.

THE SPEAKER [John W. McCormack, of Massachusetts]: The gentleman submits a resolution relating to the privilege of the House, which the Clerk will report.

The Clerk read as follows:

H. RES. 376

Whereas Adam Clayton Powell, Jr., et al., on March 8, 1967, filed a suit in the United States District Court for the District of Columbia,

5. See 2 Hinds' Precedents § 1611, n. 1, for references to other instances in which the House by resolution authorized an officer (the Sergeant at Arms) to retain counsel in a legal action (*Kilbourn v Thompson*, 103 U.S. 168 [1881]). These resolutions were passed prior to passage of 2 USC § 118.
6. See 113 CONG. REC. 6040 et seq., 90th Cong. 1st Sess.

naming as defendants certain Members and officers of the House of Representatives, and contesting certain actions of the House of Representatives; and

Whereas this suit raises questions concerning the rights and privileges of the House of Representatives, the separation of powers between the legislative and judicial branches of the Government and fundamental constitutional issues: Now, therefore, be it

Resolved, That the Speaker of the House of Representatives of the United States is hereby authorized to appoint and fix the compensation of such special counsel as he may deem necessary to represent the House of Representatives, its Members and officers named as defendants, in the suit filed by Adam Clayton Powell, Jr., et al. in the United States District Court for the District of Columbia, as well as in any similar or related proceeding brought in any court of the United States; and be it further

Resolved, That any expenses incurred pursuant to these resolutions, including the compensation of such special counsel and any costs incurred thereby, shall be paid from the contingent fund of the House on vouchers authorized and signed by the Speaker of the House of Representatives and approved by the Committee on House Administration; and be it further

Resolved, That the Clerk of the House of Representatives transmit a copy of these resolutions to the aforementioned court and to any other court in which related legal proceedings may be brought.

The resolution was agreed to. And on Feb. 17, 1969, in the 91st Congress⁽⁷⁾ it was continued in ef-

7. 116 CONG. REC. 3359, 91st Cong. 1st Sess.

fect when a Member, Carl Albert, of Oklahoma, offered and the House-adopted the resolution (H. Res. 243) below.:

MR. ALBERT: Mr. Speaker, I offer a privileged resolution (H. Res. 243) and ask for its immediate consideration.

The Clerk read the resolution as follows:

H. RES. 243

Resolved, That the provisions of House Resolution 376, Ninetieth Congress, are hereby continued in effect during the Ninety-first Congress; and be it further

Resolved, That the Clerk of the House of Representatives transmit a copy of this resolution to the Supreme Court of the United States and to any other court in which related legal proceedings may be pending or brought.

Receipt of Subpena

§ 23.7 When the Sergeant at Arms receives a subpoena, he informs the Speaker who lays the matter before the House.

In his capacity as custodian of Members' bank accounts, payroll and other information pertaining to Members,⁽⁸⁾ the Sergeant at Arms sometimes receives subpoenas to appear before or present documents to grand juries and courts. Upon receipt of a subpoena,

8. See summary of § 19, *supra*, for discussion of duties of the Sergeant at Arms.

he sends a copy of it with a covering letter to the Speaker who lays them before the House,⁽⁹⁾ which then considers whether a response to the subpoena should be authorized.⁽¹⁰⁾

9. See for example, 99 CONG. REC. 5523, 5524, 83d Cong. 1st Sess., May 25, 1953 (notice of a subpoena duces tecum to appear before a grand jury empaneled to investigate possible violations of 18 USC § 1001 by Ernest King Bramblett); 100 CONG. REC. 1162, 83d Cong. 2d Sess., Feb. 2, 1954 (notice of a subpoena ad testificandum to appear as a witness in *U.S. v Ernest King Bramblett* [No. 971-53, criminal docket]); 106 CONG. REC. 4393, 86th Cong. 2d Sess., Mar. 3, 1960 (notice of a subpoena ad testificandum to appear as a witness in *U.S. v Adam Clayton Powell* [No. 35-208]); 111 CONG. REC. 5284, 5285, 89th Cong. 1st Sess., Mar. 18, 1965 (notice of a subpoena duces tecum to appear before a grand jury in *People of the State of New York v Adam Clayton Powell*); 111 CONG. REC. 16529, 89th Cong. 1st Sess., July 13, 1965 (notice of a subpoena ad testificandum to appear as a witness in *U.S. v Ernestine Washington, et al.* [crim. cases U.S. 5379-65 and U.S. 5380-65]); 113 CONG. REC. 17561, 17562, 90th Cong. 1st Sess., June 27, 1967 (notice of a subpoena duces tecum to appear before a grand jury in *U.S. v In re Possible Violations of 18 USC Sections 201, 287, 371, 641, and 1001* [concerning Adam Clayton Powell]).

10. See Rule XXXVII, *House Rules and Manual* § 933 (1973), which provides

For example, on July 13, 1965,⁽¹¹⁾ the Speaker, John W. McCormack, of Massachusetts, laid before the House the following letter from the Sergeant at Arms, Zeake W. Johnson, Jr., who had received a subpoena ad testificandum to appear as a witness in *United States v Ernestine Washington, et al.*:

JULY 13, 1965.

DEAR MR. SPEAKER: I have received a subpoena from the District of Columbia court of general sessions, criminal division, directing me as Sergeant at Arms of the House of Representatives to appear as witness for the defendants.

The rules and practice of the House of Representatives indicate that the Sergeant at Arms may not, either voluntarily or in obedience to a subpoena appear without the consent of the House being first obtained.

The subpoena in question is herewith attached and the matter is presented for such action as the House in its wisdom may see fit to take.

Sincerely,

ZEAKE W. JOHNSON, JR.,
Sergeant at Arms.

Mr. Hale Boggs, of Louisiana, offered and the House passed House Resolution 456, authorizing the Sergeant at Arms to appear as a Witness⁽¹²⁾

that no document presented to the House shall be withdrawn without its leave.

11. 111 CONG. REC. 16529, 89th Cong. 1st Sess.
12. *Id.*

Similarly, on June 27, 1967,⁽¹³⁾ the Speaker, John W. McCormack, of Massachusetts, laid before the House the following letter from the Sergeant at Arms, Zeake W. Johnson, Jr., who had received a subpoena duces tecum to appear and produce records before a grand jury empaneled to investigate alleged illegal activities by Adam Clayton Powell in *United States v In re Possible Violations of 18 USC Sections 201, 287, 371, 611, and 1001*:

DEAR MR. SPEAKER: From the United States District Court for the District of Columbia, I have received a subpoena directing the Sergeant at Arms or authorized representative to appear before the said Court and to bring with him certain records under his jurisdiction.

The rules and practice of the House of Representatives indicate that the Sergeant at Arms may not, either voluntarily or in obedience to a subpoena duces tecum, produce such papers without the consent of the House being first obtained. It is further indicated that he may not supply copies of certain of the documents and papers requested without such consent.

The subpoena in question is herewith attached and the matter is presented for such action as the House in its wisdom sees fit to take.

Sincerely,

ZEAKE W. JOHNSON, JR.,
Sergeant at Arms.

Following presentation of this letter, Mr. Carl Albert, of Okla-

13. 113 CONG. REC. 17561, 90th Cong. 1st Sess.

homa, offered and the House passed House Resolution 674, authorizing the Sergeant at Arms to appear before the grand jury, but not to take with him original documentary evidence, and to supply certified copies of evidence deemed material and relevant by the court.⁽¹⁴⁾

§ 23.8 When the Clerk receives a subpoena, he informs the Speaker who lays the matter before the House.

As custodian of House files, the Clerk sometimes receives subpoenas to appear or present documents before courts and grand juries. He sends a copy: of the subpoena with a covering letter to the Speaker who lays the matter before the House,⁽¹⁵⁾ which then con-

1948 (notice of receipt of a subpoena duces tecum in *U.S. v Albert Maltz*); 96 CONG. REC. 565, 81st Cong. 2d Sess., Jan. 18, 1950 (notice of receipt of a subpoena duces tecum in *U.S. v Christoffel*); 96 CONG. REC. 1695, 81st Cong. 2d Sess., Feb. 8, 1950 (notice of receipt of subpoena duces tecum for minutes of an executive session of a committee in *U.S. v Christoffel*; see also p. 1765, Feb. 13, 1950, for resolution adopted by the Judiciary Committee in response to this subpoena duces tecum); 97 CONG. REC. 3403, 3404, 82d Cong. 1st Sess., Apr. 6, 1951 (notices of receipt of subpoenas duces tecum in *U.S. v Patterson* and *U.S. v Kamp*); 97 CONG. REC. 3800, Apr. 12, 1951 (notice of receipt of subpoena duces tecum in *U.S. v Brehm*); 104 CONG. REC. 7262, 7263, 85th Cong. 2d Sess., Apr. 24, 1958 (notice of receipt of subpoena duces tecum from a superior court in North Carolina); 104 CONG. REC. 7636, 85th Cong. 2d Sess., Apr. 29, 1958 (notice of receipt of subpoena duces tecum to appear before a grand jury investigating alleged violations of 26 USC §145(b) by Representative Adam C. Powell [N. Y.]); 113 CONG. REC. 29374, 90th Cong. 1st Sess., Oct. 19, 1967 (notice of receipt of a subpoena ad testificandum to appear before a grand jury investigating alleged violations of 18 USC §§101, 201, 287, 371, 641, and 1505 by Representative-elect Adam Clayton Powell [N.Y.]); 115 CONG. REC. 80, 81, 91st Cong. 1st Sess., Oct. 29, 1969 (notice of receipt of a subpoena duces tecum to produce records required by the Corrupt Practices Act before a grand jury investigating ac-

14. 113 CONG. REC. 17561, 90th Cong. 1st Sess., June 27, 1967.

15. See for example, 76 CONG. REC. 5581, 72d Cong. 2d Sess., Mar. 3, 1933 (notice of receipt of subpoena duces tecum referred to Judiciary Committee); 94 CONG. REC. 2266, 80th Cong. 2d Sess., Mar. 5, 1948 (notice of receipt of subpoena duces tecum in *U.S. v Marshall*); 94 CONG. REC. 5066, 5067, 80th Cong. 2d Sess., Apr. 29, 1948 (notice of receipt of subpoena duces tecum in contempt cases; see also p. 5161, Apr. 30, 1948, for memorandum on Clerk's immunity in responding to a subpoena duces tecum); 94 CONG. REC. 5432, 80th Cong. 2d Sess., May 6,

siders whether it should permit the Clerk to answer the subpoena.⁽¹⁶⁾

For example, on Jan. 16, 1968,⁽¹⁷⁾ the Clerk, W. Pat Jennings, who had received a subpoena to appear and present original House records before a federal grand jury empaneled to investigate alleged violations of law by Member-elect Adam Clayton Powell, notified the Speaker, John W. McCormack, of Massachusetts, who laid before the House the following letter:

JANUARY 9, 1968.

The Honorable the SPEAKER,
House of Representatives.

DEAR SIR: On this date I, W. Pat Jennings, Clerk of the United States House of Representatives and the Honorable Zeake W. Johnson, Jr.,

activities of the Seafarer's Political Activities Donations Committee); 117 CONG. REC. 2744, 92d Cong. 1st Sess., Feb. 17, 1971 (notice of receipt of a subpoena duces tecum to appear before a general court martial and produce certain executive session testimony taken by a subcommittee in *U.S. v Lt. William L. Calley, Jr.*).

16. See Rule XXXVII, *House Rules and Manual* §933 (1973) which gives the House authority to grant leave to remove paper from House files. Jefferson's Manual, *House Rules and Manual* §352 (1973) provides that the Clerk should allow no documents to be taken from his custody.
17. 114 CONG. REC. 80, 81, 90th Cong. 2d Sess.

Sergeant at Arms of the United States House of Representatives were served with subpoenas issued under the authority of the United States District Court for the District of Columbia. These subpoenas direct that Mr. Johnson and myself, as officers of the United States House of Representatives produce documents, papers and records belonging to the United States House of Representatives. The subpoenas were issued in connection with a Grand Jury investigation of possible violations of Title 18 U.S. Code, Sections 201, 287, 371, 641, 1001 and 1505. It is noted that these subpoenas command our appearance and production of the House records mentioned therein on Thursday the 18th of January 1968 at 10:00 a.m. The subpoenas themselves outline the House records that we were requested to produce.

The rules and practices of the House of Representatives indicate that no official of the House may, either voluntarily or in obedience to a subpoena duces tecum, produce such papers without the consent of the House being first obtained.

The subpoenas in question are herewith attached, and this matter is presented for such action as the House may deem appropriate.

Sincerely yours,

W. PAT JENNINGS,
Clerk, U.S. House of Representatives.

Following presentation of this letter, Mr. Hale Boggs, of Louisiana, offered and the House passed House Resolution 1022, authorizing the Clerk and Sergeant at Arms to appear and deliver original House documents to the grand jury.⁽¹⁸⁾

18. 114 CONG. REC. 80, 81, 90th Cong. 2d Sess., Jan. 16, 1968.

§ 23.9 The Doorkeeper reports receipt of a subpoena duces tecum to the Speaker, who lays the matter before the House.

On Apr. 13, 1961,⁽¹⁹⁾ the Speaker, Sam Rayburn, of Texas, laid before the House the following communication, which was read by the Clerk:

OFFICE OF THE DOORKEEPER,
HOUSE OF REPRESENTATIVES,
Washington, D.C., April 13, 1961.

Hon. SAM RAYBURN,
U.S. House of Representatives,
Washington, D.C.

DEAR SIR: As Doorkeeper of the House of Representatives, I have received a subpoena from the U.S. District Court for the District of Columbia to appear regarding the case of Claude Anderson Taylor (criminal case No. 965-60).

The subpoena directed me to appear before said court as a witness in the case and to bring with me certain and sundry papers therein described in the House of Representatives.

Since the development of this case has extended into the 87th Congress, and it is well recognized that each House controls its own papers, this matter is presented for such action as the House, in its wisdom, may see fit to take.

Respectfully yours,

WM. M. MILLER,
Doorkeeper, House of Representatives.

Mr. John W. McCormack, of Massachusetts, offered and the House passed House Resolution

19. 107 CONG. REC. 5851, 87th Cong. 1st Sess.

256 authorizing the Doorkeeper to appear before the court but not take with him any papers or documents on file in his office or under his control or in possession or control of the House of Representatives, except those documents which the court determines to be material and relevant.⁽²⁰⁾

Immunities of Officers and Employees; Dombrowski v Eastland

§ 23.10 The Speech or Debate Clause of the U.S. Constitution (art. I, §6) does not immunize a committee counsel from civil liability for tortious conduct, and such an action will not be dismissed when there is substantial testimony regarding his alleged participation in unconstitutional activity.

In *Dombrowski v Eastland*, 387 U.S. 82 (1967), a suit alleging that the Chairman and Counsel of the Subcommittee on Internal Security of the Senate Judiciary Committee tortiously participated in a conspiracy to seize petitioners' property and records in violation of the fourth amendment, the Supreme Court dismissed the action as to the Chairman, but remanded

20. 107 CONG. REC. 5852, 87th Cong. 1st Sess., Apr. 13, 1961.

it for a finding of facts of alleged illegal activity by the Counsel. A significant consideration was the Court's interpretation of the state of the law at that time, that immunity under the Speech or Debate Clause was "less absolute, although applicable, when applied to officers or employees, rather than to legislators themselves," and that, when applied to a legislator, the clause "deserves greater respect than where an official acting on behalf of the legislator is sued."

The Court also noted that the record showed no involvement by the Chairman "in any activity that could result in liability," whereas it revealed "controverted evidence . . . which afford[ed] more than merely colorable substance to petitioners assertions . . . sufficient to entitle petitioners to go to trial" as to the Counsel.⁽¹⁾

Powell v McCormack

§ 23.11 An officer who executes an order pursuant to a House resolution held to be unconstitutional is not immune from suit.

In *Powell v McCormack*, 395 U.S. 486 (1969),⁽²⁾ a civil action

1. *Dombrowski v Eastland*, 387 U.S. 82, 84 (1967).
2. See 115 CONG. REC. 17326-42, 91st Cong. 1st Sess., June 25, 1969, for

for declaratory and injunctive relief, the Clerk, Sergeant at Arms, and Doorkeeper of the House, along with several Members, were sued individually and in their Representative capacities for executing House Resolution 278, which denied administration of the oath to the plaintiff, Adam C. Powell, a Member-elect from New York, in the 90th Congress.⁽³⁾

The complaint in *Powell* alleged as actionable the Clerk's threat to refuse to perform for the plaintiff those services to which a duly elected Member was entitled, the Sergeant at Arms' refusal and threat to continue to refuse to pay salary and other moneys to which a duly elected Member was entitled, and the Doorkeeper's refusal and threat to continue to refuse to admit the plaintiff to the Hall of the House.⁽⁴⁾ The complaint ex-

full text of the Court's opinion. See also 113 CONG. REC. 8729-62, 90th Cong. 1st Sess., Apr. 10, 1967, for memoranda of counsel.

3. See 113 CONG. REC. 4997 et seq., 90th Cong. 1st Sess., Mar. 1, 1967, for the text of H. Res. 278 providing for imposition of a fine, and for the text of amendment providing for exclusion of Mr. Powell.
4. *Powell v McCormack*, 395 U.S. 486, 493 (1969). The resolution of exclusion [H. Res. 278], appearing in 113 CONG. REC. 6036-39, 90th Cong. 1st Sess., Mar. 9, 1967, neither expressly ordered the officers to refuse

pressly stated that these refusals by the respective officers were made “under color of the authority and mandate of House Resolution 278.” The Supreme Court dismissed the action against the Members without determining whether they would be immune,⁽⁵⁾ and held that the naming of the House officers provided a sufficient basis for judicial review.⁽⁶⁾

In finding that Congress was not authorized to exclude a Member-elect who met the constitutional qualifications of age, inhabitancy, and citizenship, a finding which rendered unconstitutional House Resolution 278 of the 90th Congress, the Court held, “That House employees are acting pursuant to express orders of the House does not bar judicial review . . .”⁽⁷⁾ and “. . . petitioners are entitled to maintain their action against House employees and to

to pay or perform services for Powell nor provided that he should no longer be entitled to the salary and perquisites of office. Nonetheless, these refusals were implied because the resolution excluded him from membership in the 90th Congress.

5. See Chs. 7 and 12, *infra*, for discussion of this case as it relates to Members.
6. See *Powell v McCormack*, 395 U.S. 486, 506 (1969).
7. *Powell v McCormack*, 395 U.S. 486, 504 (1969).

judicial review of the propriety of the decision to exclude petitioner Powell.⁽⁸⁾ The Court also indicated that Powell could sue the Sergeant at Arms to determine entitlement to mandatory relief for salary withheld pursuant to an unconstitutional House resolution.⁽⁹⁾

In reaching these conclusions, the Court relied on *Kilburn v Thompson*, 103 U.S. 168 (1881),⁽¹⁰⁾ which allowed a contumacious witness, Hallet Kilbourn, to bring an action for false imprisonment against John G. Thompson, the Sergeant at Arms of the House, who had executed the warrant for Kilbourn’s arrest pursuant to a House resolution which the Court found to be an unconstitutional exercise of a judicial function by a legislative body. In *Kilbourn*, the Court first articulated the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participate in an unconstitutional activity are responsible for their

8. *Powell v McCormack*, 395 U.S. 486, 506 (1969).

9. *Powell v McCormack*, 395 U.S. 486, 500, n. 16 (1969).

10. See 2 Hinds’ Precedents §1612, for a discussion of *Kilbourn*.

acts.⁽¹¹⁾ Kilbourn eventually recovered \$20,000.⁽¹²⁾

The Court in *Powell* concluded that the factual situation did not fall within the scope of the Speech or Debate Clause, the purpose of which is “. . . to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.”⁽¹³⁾

11. See *Powell v McCormack*, 395 U.S. 486, 504, 505 (1969), stating that, in *Kilbourn*,” the Sergeant at Arms was held liable for false imprisonment even though he did nothing more than execute the House Resolution that Kilbourn be arrested and imprisoned.”

12. *Kilbourn v Thompson*, 11 McArth. & M. 401, 432 (Sup. Ct. D.C. 1883). The 48th Congress appropriated \$20,000 to pay Kilbourn directly for the judgment against Thompson (see 23 Stat. 467, Mar. 3, 1885).

13. “A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee’s affirmative action than he would be by the employee’s failure to act. Nor is the distraction or hindrance increased because the litigation questions action taken by the employee within rather than without the House. Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves.” *Powell v McCormack*, 395 U.S. 486, 505 (1969).

Stamler v Willis

§ 23.12 Leave to join legislative employees as additional parties defendant may be granted following the dismissal, under the Speech or Debate Clause, of an action against various Members and officials to declare unconstitutional a House rule and to enjoin enforcement of a committee contempt citation.

In *Stamler v Willis*, 415 F2d 1365 (7th Cir. 1969); cert. den. 399 U.S. 929 (1970),⁽¹⁴⁾ persons who were being prosecuted for contempt of Congress filed suit to declare Rule XI of the House rules violative of the first amendment and to enjoin enforcement of the contempt citation of the Committee on UnAmerican Activities. The named defendants were certain Members of the House, and two prosecuting officials, the Attorney General of the United States and the United States Attorney for the Northern District of Illinois. The district court dismissed the complaint under the Speech or Debate Clause as to the Members and, without considering

14. See also 287 F Supp 734 (N.D. Ill., 1968) for the district court opinion which dismissed the action under the Speech or Debate Clause as to Members of Congress.

whether this immunity applied to executive officials, held that the action against the Attorney General and United States Attorney, being “ancillary to the claims against the Congressional defendants,” must also be dismissed.⁽¹⁵⁾

On appeal, the circuit court affirmed the dismissal of the complaint as to the Members of Congress, but reversed the dismissal as to the prosecuting officials, holding that they would have to defend their actions in court. In addition, the court on its own motion granted leave to amend the complaint to add additional parties defendant, such as committee officials, “. . . for the sole purpose of making effective relief possible in this declaratory and injunctive action.” The court offered this opportunity to the plaintiffs, if they desired to use it, because:

. . . [I]n view of our decision to dismiss the Congressional defendants from this action, it may develop that complete relief cannot be accorded plaintiffs in the event that they are successful on the merits unless the appropriate agents of the House committee are served and joined as defendants below.⁽¹⁶⁾

Gravel v United States

§ 23.13 The Supreme Court has extended the immunity arising

15. *Stamler v Willis*, 287 F Supp 734, 739 (N.D. Ill., 1968).
16. *Stamler v Willis*, 415 F2d 1365, 1368 (7th Cir. 1969); cert. den. 399 U.S. 929 (1970).

ing under the Speech or Debate Clause to aides to legislators for actions committed in performance of duties that are within the sphere of legitimate legislative activity.

In *Gravel v United States*, 408 U.S. 606 (1972), which arose out of a grand jury investigation of possible criminal conduct in the release and publication of the so called Pentagon Papers, the Supreme Court held, “. . . 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.”⁽¹⁷⁾ The Court adopted the view argued by the Senate that the day-to-day work of aides and assistants in the modern legislative process is so critical that they must be treated as the legislator’s alter ego; failure to recognize them as such would diminish and frustrate the purpose of the Speech or Debate Clause—to prevent intimidation of legislators by the other branches of government.⁽¹⁸⁾ Rejecting the

17. *Gravel v United States*, 408 U.S. 606, 618 (1972). See Ch. 7, *infra*, for further discussion of *Gravel*.

18. *Id.* at pp. 616, 617. The position of the Senate was presented in its amicus curiae brief, which is reprinted in full in “Constitutional Immunity

government's contention that this holding was foreclosed by *Kilbourn v Thompson*, 103 U.S. 168 (1881), *Dombrowski v Eastland*, 387 U.S. 82 (1967), and *Powell v McCormack*, 395 U.S. 486 (1969), the Court observed, "Those cases do not hold that persons other than Members of Congress are beyond the protection of the [Speech or Debate] Clause when they perform or aid in the performance of legislative acts."⁽¹⁹⁾

The immunity of an aide is viewed in *Gravel* as a privilege which the legislator may repudiate or waive; it is invocable by the aide only on behalf of the legislator and is confined to those services that would be protected if performed by the legislator himself.⁽²⁰⁾ The Speech or Debate Clause does not protect criminal conduct which threatens the security of the person or property of others, nor immunize a legislator

of Members of Congress," Hearings Before the Joint Committee on Congressional Operations, 93d Cong. 1st Sess., pp. 94-117. Senators Sam J. Ervin, Jr. (N.C.) and William B. Saxbe, (Ohio) personally advocated the cause for the Senate by special leave of the Supreme Court.

19. *Gravel v United States*, 408 U.S. 618 (1972).

20. *Gravel v United States*, 408 U.S. 606, 621, 622 (1972).

or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about a legislative act.⁽¹⁾ Furthermore, not all activities performed by a legislator and his aides are entitled to protection. The immunity may be invoked only as to matters that are an integral part of the legislative process.⁽²⁾

1. *Id.* at pp. 622, 626, the Court saying: ". . . Article I, §6, cl. 1 [the Speech or Debate Clause], as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."

See also *Kilbourn v Thompson*, 103 U.S. 168 (1881), which held that an arrest by the Sergeant at Arms pursuant to a House order found to be unconstitutional was subject to judicial review.

2. "The heart of the clause," said the Court in *Gravel*, is "speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the con-

Doe v McMillan

§ 23.14 Immunity arising under the Speech or Debate Clause has been extended to committee staff personnel for conduct held to be within the sphere of legitimate legislative activity.

In *Doe v McMillan*, 412 U.S. 306 (1973), the parents of District of Columbia school children, under pseudonyms, sought damages and declaratory and injunctive relief for invasion of privacy which allegedly resulted from dissemination of a report of the Special Subcommittee of the Committee on the District of Columbia

sideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." In their dissents, Mr. Justice Brennan stated and Mr. Justice Douglas implied that the majority also excluded from the protected sphere of legislative activities the "informing function" defined in *Watkins v United States*, 354 U.S. 178, 200 (1957) as "the power of Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." The basis of their belief was the majority's holding that Gravel's alleged arrangement for a private publication of the Pentagon Papers was not shielded from inquiry. *Gravel v United States*, 408 U.S. 606, 649 (1972).

on the D.C. school system,⁽³⁾ which identified students by name in derogatory contexts. Named as defendants were, among others, the Chairman of the House District Committee,⁽⁴⁾ plus its members, clerk, staff director, and counsel, as well as a consultant to that committee; the Superintendent of Documents and the Public Printer (officials of the Government Printing Office); officials and employees of the D.C. school system; and the United States.

The U.S. Supreme Court held that the congressional committee members, staff officials, and the investigator and consultant were absolutely immune under the

3. This report, H. Rept. No. 91-1681 (1971), which was submitted to the Speaker of the House on Dec. 8, 1970, was authorized by H. Res. 76 (see 115 CONG. REC. 2784, 91st Cong. 1st Sess., Feb. 5, 1969), and was referred to the Committee of the Whole House on the state of the Union and ordered printed (see 116 CONG. REC. 40311, 91st Cong. 1st Sess., Dec. 8, 1970). It was subsequently published and distributed by the Government Printing Office pursuant to 44 USC §§501 and 701. *Doe v McMillan*, 412 U.S. 306, 307-30X (1973).

4. Named in the caption of the case is John L. McMillan (S.C.), who was Chairman of the House District Committee at the time this suit was filed and decided.

Speech or Debate Clause.⁽⁵⁾ The Court ruled that authorizing an investigation and holding hearings to gather information, preparing a report which contains the information, and authorizing the report's publication and distribution, because they are integral parts of the deliberative and communicative processes by which Members participate in the consideration of proposed legislation, are protected by the Speech or Debate Clause, even though potentially libelous information may be involved. In reaching this deci-

5. See *Doe v McMillan*, 412 U.S. 306, 312 (1973): ". . . [I]t is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee Members, from the committee staff, from the consultant, or from the investigator, for introducing material to the Speaker of the House, and for voting for publication of the report. Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees and institutional or individual legislative functionaries. At least in these respects, the actions upon which petitioners sought to predicate liability were legislative acts, *Gravel v United States*, supra, [408 U.S. 606], at p. 618 [1972], and, as such, were immune from suit."

sion, the Court followed *Gravel v United States*, 408 U.S. 606, 618 (1972), which held 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."⁽⁶⁾

Focusing on the applicability of Speech or Debate Clause immunity to the officials who disseminated the report—the Superintendent of Documents and the Public Printer—the Court in *Doe*

6. The Court in *Doe v McMillan* applied Speech or Debate Clause immunity to committee officials and employees, citing *Gravel* as precedent. *Gravel*, however, dealt only with the immunity of an aide to an individual legislator. The applicability of a Member's immunity to persons other than personal aides was not even discussed in *Gravel* by way of dicta; in fact, the Court expressly disclaimed the need to discuss "issues which may arise when Congress or either House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports or other materials." (*Gravel*, supra, at 626, n. 16). The extension of the *Gravel* holding to committee staff members supports the inference that the Court in a future case which raises the issue would apply Speech or Debate Clause immunity to officers of the House insofar as they act within the sphere of legitimate legislative activity.

v McMillan framed the issue as whether informing the public “simply because authorized by Congress, must always be considered ‘an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings’ [citing *Gravel*] with respect to legislative and other matters before the House.” This question was answered in the negative. Observing that republication of a libel, even where the initial publication is privileged, is generally not protected, the Court in *Doe v McMillan* held that “the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distribution of actionable material beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity.”

The Court in *Doe v McMillan* limited the scope of its holding by saying that the Speech or Debate Clause immunity does not protect those who, at the direction of Congress or otherwise, distribute actionable material to the public at

large beyond the Halls of Congress and its functionaries, and beyond the apparent needs of the due functioning of the legislative process.⁽⁷⁾ With respect to the dismissal of the suit as to committee members and personnel, the Court pointed out they had not acted outside the sphere of legitimate legislative activity.

It does not expressly appear from the complaint, nor is it contended in this Court, that either the Members of Congress or the Committee personnel did anything more than conduct the hearings, prepare the report, and authorize its publication.⁽⁸⁾

7. The Court noted that it did not decide whether or under what circumstances the clause would immunize distributors of allegedly actionable materials from grand jury questioning, criminal charges, or a suit by the executive to restrain distribution, where Congress has authorized the particular public distribution.
8. *Doe v McMillan* at p. 317. Presumably, an allegation that the Members or committee personnel had participated in the public dissemination of actionable material would have caused a different result.