

sented, among other claims, that the Speech and Debate Clause of the Constitution was an absolute bar to Mr. Powell's suit.<sup>(1)</sup>

When the litigation reached the Supreme Court, the Court held that the Speech and Debate Clause barred suit against the respondent Congressmen but did not bar action against the legislative officials charged with unconstitutional activity.<sup>(2)</sup>

### § 17. For Legislative Activities

The constitutional clause prohibiting questioning of a Member

See 113 CONG. REC. 8729-62 for further briefs, memoranda, and the opinion of the U.S. District Court Judge dismissing the original complaint.

1. See Point II (A) of Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss in *Powell v McCormack* (No. 559-67, U.S. Dist. Ct. for D.C.), reprinted at 113 CONG. REC. 8743-45, 90th Cong. 1st Sess., Apr. 10, 1967.
2. The Court stated that the fact that the House officials were acting pursuant to express orders of the House did not preclude judicial review of the constitutionality of the underlying legislative decision, 395 U.S. at 501-506, and applied the doctrine that, "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." 395 U.S. at 504.

about any speech or debate in the House is not confined merely to remarks delivered in the Chamber and printed in the *Congressional Record*.<sup>(3)</sup> As long as legislators are "acting in the sphere of legitimate legislative activity,"<sup>(4)</sup> they are protected not only from the consequence of litigation but also from the burden of defending themselves.<sup>(5)</sup> The immunity may also extend to congressional aides and employees where they assist in an integral way in the legislative process.<sup>(6)</sup> Thus, Members of

3. The courts have stated that the protection of the clause, at U.S. Const. art. I, §6, clause 1, extends to every "act resulting from the nature and in the execution of the office," including an act "not within the walls of the Representatives' chamber," *Coffin v Coffin*, 4 Mass. 1, 27 (1808), and to "committee reports, resolutions, and things generally done in a session of the House by one of its Members in relation to the business before it," *Powell v McCormack*, 395 U.S. 486, 502 (1969), quoting *Kilbourn v Thompson*, 103 U.S. 168, 204 (1881).
4. *Tenney v Brandhove*, 341 U.S. 367, 376 (1951).
5. *Dombrowski v Eastland*, 387 U.S. 82, 85 (1967); *Powell v McCormack*, 395 U.S. 486, 505 (1969).
6. The Supreme Court stated in *Gravel v U.S.*, 408 U.S. 606, 616, 617 (1972) (J. White) (analyzed at §17.4, *infra*), "that it is literally impossible, in view of the complexities of the modern legislative process . . . for Mem-

the House and certain staff, engaged in legislative activities, are immune in preparing and submitting committee reports, but officials such as the Public Printer may or may not be immune, depending on the legislative necessity of their actions.<sup>(7)</sup>

The activities of congressional committees when pursuing investigations are absolutely privileged as to Members of Congress.<sup>(8)</sup>

bers of Congress to perform their legislative tasks without the help of aides and assistants; that the day to day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech and Debate Clause . . . will inevitably be diminished and frustrated." See also *Doe v McMillan*, 412 U.S. 306 (1973) for the immunity of committee staff engaged in legitimate legislative acts.

Compare *Kilbourn v Thompson*, 103 U.S. 165 (1881), wherein the Sergeant at Arms of the House was held liable for false imprisonment where he executed an unconstitutional resolution.

7. See §17.1, *infra*.

8. See the cases noted to §17.1, *infra*.

In *Coleman v Newark Morning Ledger Co.*, 29 N.J. 357, 149 A.2d 193 (1959) (see case comment, 28 Fordham L. Rev. 363 [1959]), a state court held that a press conference given by a Senator was privileged, where he was acting as the voice of the subcommittee, and informing the

However, not every legislative activity is protected by the Speech and Debate Clause. Congressmen have been convicted for conspiracy and bribery in relation to activities which, but for the illegal compensation involved, are often undertaken by Congressmen within the scope of their duties.<sup>(9)</sup> In the 1972 case of *Gravel v United States*,<sup>(10)</sup> the court restricted protected legislative activities to those which are an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or

public of the results of the investigation. Another state court held in *Hancock v Burns*, 158 Cal. App. 2d 785, 333 P.2d 456 (1st Dist. 1958) (see case comment, 11 Stan. L. Rev. 194 [1958]) that a letter sent to a citizen's employer describing him as a security risk was privileged, since the letter was an ordinary means adopted by a state legislative committee to publicize its investigative results.

9. See *Burton v U.S.*, 202 U.S. 344 (1906) (intercession before Post Office Department); *May v U.S.*, 175 F.2d 994 (D.C. Cir. 1949) (services rendered before governmental departments for citizen); *Johnson v U.S.*, 383 U.S. 169 (1966) (intercession before Justice Department).

10. 408 U.S. 606 (1972) (see §17.4, *infra*).

with respect to other matters which the Constitution places within the jurisdiction of either House.”<sup>(11)</sup> Therefore, a legislative aide to a Congressman could be subpoenaed by a grand jury in order to testify about the source of classified government documents and about private arrangements for republication of the documents.<sup>(12)</sup>

In *Gravel* and in *Brewster v United States*, decided in the same term,<sup>(13)</sup> the court excluded from the protection of the clause those activities it considered only peripheral to legislative activity and essentially political in nature, such as constituent service in general and obtaining and dissemi-

nating information in particular.<sup>(14)</sup>

14. In *Gravel*, 408 U.S. at 627, the court rejected the opinion of the Court of Appeals below, *U.S. v Doe*, 455 F2d 753, 760 (1st Cir. 1972), that a common law privilege attached to the official informing role of Congressmen.

In *Brewster*, 408 U.S. at 512, 513, Chief Justice Burger stated for the majority: “It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate ‘errands’ performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the court in prior cases.” In his dissent, Justice White stated at 557: “Serving constituents is a crucial part of a legislator’s duties. Congressmen receive a constant stream of complaints and requests for help or service. Judged by the volume and content of a Congressman’s mail, the right to petition is neither theoretical nor ignored. It has never been thought unethical for

11. 408 U.S. at 625.

12. See § 17.4, *infra*.

Compare *McGrain v Daugherty*, 273 U.S. 135, 174, 175 (1927): “A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which is not infrequently true—recourse must be had to others who do possess it.” See also *Hill Parents Ass’n., Inc. v Giaimo*, 287 F Supp 98 (D. Conn. 1968) and *Preston v Edmundson*, 263 F Supp 370 (N.D. Okla. 1967) (Congressmen acting under color of office when informing public through press releases and television interviews).

13. 408 U.S. 501 (1972)

Many Congressmen viewed those decisions as posing a threat to the independence of congressional speech and of legislative activities.<sup>(15)</sup> Congressional hearings have been held on the subject.<sup>(16)</sup>

a Member of Congress whose performance on the job may determine the success of his next campaign not only to listen to the petitions of interest groups in his state or district, which may come from every conceivable group of people, but also to support or oppose legislation serving or threatening those interests.”

15. See Ervin (Senator, N.C.), *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 Va. L. Rev. 175 (1973). Senator Ervin stated *id.* at p. 186 that the Supreme Court's definitions of unprotected political activity reflected a “shocking lack of understanding of the essential elements of the legislative process and the representative role of the legislative branch.” James C. Cleveland, Representative from New Hampshire, stated in *Legislative Immunity and the Role of the Representative*, 14 N.H. Bar Jour. 139 (1973) that the court “had undertaken to threaten gravely the independence of Congress as a co-equal branch of government.”

See also, for critical commentaries on the decisions, Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973); Note, *Immunity Under the Speech or Debate Clause for Republication and from Questioning About Sources*, 71 Mich. L. Rev. 1251 (1973). Another commen-

### Cross References

Immunity of officers, officials and employees, see Ch. 6, *supra*.

### Collateral References

Absolute Tort Immunity for Legislative Correspondence?, 11 Stan. L. Rev. 194 (Dec. 1958).

Blacklisting Through the Official Publication of Congressional Reports, 81 Yale L. Jour. 188 (Dec. 1971).

Congressional Papers and Judicial Subpoenas, 23 U.C.L.A. L. Rev. 57 (1975).

Defamation—Publication of Defamatory Statements Made by U.S. Senator at Press Conference is Qualifiedly Privileged, 28 Fordham L. Rev. 363 (1959).

*Dombrowski v Eastland*—A Political Compromise and Its Impact, 22 Rutgers L. Rev. 137 (1967).

First Amendment—Congressional Investigations and the Speech or Debate Clause, 40 U. Missouri at Kansas City L. Rev. 108 (1971).

tator suggested in Brewster, Gravel and Legislative Immunity, 73 Col. L. Rev. 125, 147, 148 (1973) that the reliance of the court in *Brewster* and in *Gravel* upon English precedents, in order to conclude that republication of congressional materials and dissemination of information was not privileged, was misplaced, since at the time of the English precedents legislators had no responsibility to inform their constituents of governmental activities and policies.

16. Hearings, Constitutional Immunity of Members of Congress (legislative role in gathering and disclosing information), Joint Committee on Congressional Operations, 93d Cong. 1st Sess. (Mar. 1973).

Speech or Debate Clause—Declaratory and Injunctive Relief Against a Congressional Committee, 1970 Wisc. L. Rev. 1216 (1970).

The Scope of Immunity for Legislators and Their Employees, 7 Yale L. Jour. 366 (1967).

United States Constitution Annotated, Library of Congress, S. Doc. No. 9282, 117-122, 92d Cong. 2d Sess. (1972).

### *Committee Activities, Reports, and Employees*

**§ 17.1 Where an injunction was sought to restrain the publication of a committee report alleged to defame certain persons identified therein, the Supreme Court held that: (1) members of the committee and staff were immune under the Speech and Debate Clause insofar as engaged in legislative acts in relation to the report; (2) persons with authorization from Congress performing the nonlegislative function of distributing materials infringing on individual rights are not absolutely immune under the clause; and (3) the Public Printer and the Superintendent of Documents were immune under the common-law doctrine of official immunity to the extent they served legitimate legislative**

### **functions in publishing and distributing the report.**<sup>(17)</sup>

17. *Doe v McMillan*, 412 U.S. 306 (1973).

For further information on the immunity of committee activities and the immunity of committee employees, see *Dombrowski v Eastland*, 387 U.S. 82 (1967), *Barsky v U.S.*, 167 F2d 241 (1948), and *Stamler v Willis*, 415 F2d 1365 (1969), cert. denied, 399 U.S. 929 (1970).

In *Dombrowski*, the Court dismissed an action for damages for conspiracy to seize records unlawfully that had been brought against members of the Senate Internal Security Subcommittee of the Judiciary Committee; the Court stated that since the subject matter of the records was within the subcommittee's jurisdiction, issuance of subpoenas to a Louisiana legislative committee to obtain the records was privileged as to subcommittee members. The Court remanded as to a subcommittee employee, whose immunity was not absolute.

In *Barsky*, the court upheld a conviction for willful failure to produce records for the House Committee on Un-American Activities and dismissed the defense of improper committee conduct, since the enabling resolution authorized the inquiry in question, and the inquiry was protected legislative activity.

In *Stamler*, where citizens complained of hindrance of free speech by members and employees of the House Committee on Un-American Activities, the Federal Court of Appeals for the 7th Circuit upheld the

On Feb. 5, 1969, the House passed House Resolution No. 76, authorizing the Committee on the District of Columbia to investigate and report upon the organization, operation, and management of any subdivision of the District of Columbia government.<sup>(18)</sup> Pursuant to that resolution, the committee prepared and submitted to the House a report, entitled "Investigation and Study of the Public School System of the District of Columbia."

Suit was filed in a federal court by persons named in the report, alleging the report to be defamatory and praying for a declaratory judgment and an injunction against further publication and distribution of the report. The suit named as defendants members of the Committee on the District of

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immunity of committee members from suit, but stated that officials of the committee could be held personally liable for following orders given to them by the legislature. The court stated that it had been clearly established that "liability, including personal tort liability, could be imposed on an official for following orders given to him by the legislature, even though the legislators could not be held personally liable." *Stamler v Willis*, 415 F2d 1365, 1368 (7th Cir. 1969), cert. denied, 399 U.S. 929 (1970).

18. 115 CONG. REC. 2784, 91st Cong. 1st Sess.

Columbia, the clerk, staff director, and counsel of the committee, a consultant and investigator for the committee, the Superintendent of Documents and the Public Printer, officials of the District of Columbia government, and the United States of America. The Federal Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the case, on the grounds that the committee members and their staff were immune from suit under the Speech and Debate Clause and that the Public Printer, Superintendent of Documents and D.C. officials were protected under the doctrine of official immunity (*Barr v Mateo*, 360 U.S. 564). The court had been advised that the members of the committee were not in fact seeking further publication or distribution of the report.<sup>(19)</sup>

The Supreme Court reversed in part, affirmed in part, and remanded to the Court of Appeals. The Court found that the congressional committee members, members of their staff, the committee consultant and the committee investigator were absolutely immune under the Speech and Debate Clause insofar as they were engaged in legislative acts of com-

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19. *Doe v McMillan*, 459 F2d 1304, 1322 (D.C. Cir. 1972).

piling the report, submitting it to the House, and voting for its publication.<sup>(20)</sup> Said the Court:

Without belaboring the matter further, it 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 at Committee hearings that identified particular individuals, for referring the report that included the 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, at 618, and, as such, were immune from suit.<sup>(1)</sup>

The Court found, however, that other persons acting under the orders of Congress were not absolutely immune under the clause:

Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, *Kilbourn v Thompson*, supra, but the Speech or Debate Clause no

more insulates legislative functionaries carrying out such nonlegislative directives than it protected the Sergeant at Arms in *Kilbourn v. Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be "without authority." 103 U.S. at 200. See also *Powell v McCormack*, 395 U.S., at 504; cf. *Dombrowski v. Eastland*, 387 U.S. 82 (1967). The Clause does not protect "criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction." *Gravel v United States*, supra, at 622. Neither, we think, does it immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function.<sup>(2)</sup>

The Court discussed the common-law principle of official immunity (*Barr v Mateo*, 360 U.S. 564) in relation to the Public Printer and Superintendent of Documents:

We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. See *Dombrowski v Eastland*, 387 U.S. 82 (1967). The scope of inquiry becomes equivalent to the inquiry in the context

20. 412 U.S. 306, 311–313.

1. 412 U.S. at 312.

2. 412 U.S. at 315, 316.

of the Speech or Debate Clause, and the answer is the same. The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S., at 376, they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.

Because we think the Court of Appeals applied the immunities of the Speech or Debate Clause and of the doctrine of official immunity too broadly, we must reverse its judgment and remand the case for appropriate further proceedings. We are unaware, from this record, of the extent of the publication and distribution of the report which has taken place to date. Thus, we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded. These matters are for the lower courts in the first instance.<sup>(3)</sup>

**§ 17.2 When the Senate and the House in the 84th Congress ordered printed as a Senate document an allegedly libelous committee report, a federal court held that, under the Speech and Debate Clause, it could not enjoin the printing and distribution of the report.<sup>(4)</sup>**

3. 412 U.S. 324, 325.

4. *Methodist Federation for Social Action v Eastland*, 141 F Supp 729 (D.D.C. 1956).

On Jan. 16, 1956, the Senate adopted Senate Concurrent Resolution No. 62, to authorize the printing of a committee report as a Senate document and to authorize the printing of 75,000 additional copies thereof.<sup>(5)</sup> The report had been issued by the Subcommittee on Internal Security of the Senate Judiciary Committee, and was entitled "The Communist Party of the United States—What It Is—How It Works—a Handbook for Americans."

On Apr. 23, 1956, Senate Concurrent Resolution No. 62 was called up in the House.<sup>(6)</sup> Mr. Wayne L. Hays, of Ohio, stated in reference to the resolution:

May I say . . . that this resolution is a Senate resolution and there was quite a good deal of discussion in the committee about it. The House Administration Committee took the position that we had no authority to go behind the Senate resolution and verify the contents of the document. If the other body certified it, it was our belief that we could not go behind the resolution and I would like to read to you just two lines. When the resolution was reported out a motion was made by the gentleman from Ohio [Mr. Schenck], seconded by the gentleman from Louisiana [Mr. Long], and in the motion this language was included:

5. 102 CONG. REC. 534, 84th Cong. 2d Sess.

6. 102 CONG. REC. 6777, 84th Cong. 2d Sess.

This committee takes no responsibility for the contents of this pamphlet, *Handbook for Americans*. The responsibility rests entirely on the Senate Subcommittee on Internal Security of the Committee on the Judiciary.

The House agreed to the resolution.<sup>(7)</sup>

Subsequently, the Methodist Federation for Social Action filed suit in federal court seeking to enjoin the release of the committee report, on the ground that the report falsely, defamatorily, and without a hearing, declared that the federation was a Communist front organization.<sup>(8)</sup>

The court declined to order relief, holding that since the report was ordered printed by the Public Printer and Superintendent of Documents, pursuant to a congressional resolution of both the House and Senate, the court had no power to prevent publication under the Speech and Debate Clause of the Constitution.

**§ 17.3 In order to extend the immunity of speech and debate to the printing of a committee report, the House in the 91st Congress authorized by resolution the printing of the report where a federal**

7. *Id.* at p. 6778.

8. *Methodist Federation for Social Action v Eastland*, 141 F Supp 729 (D.D.C. 1956).

**court had previously enjoined the Public Printer from such printing.**

On Dec. 14, 1970, Mr. Richard H. Ichord, of Missouri, offered a resolution (H. Res. 1306) in relation to a report prepared by the Committee on Internal Security, which he chaired.<sup>(9)</sup> The report (H. Rept. No. 91-1607) was entitled "Limited Survey of Honoraria Given Guest Speakers for Engagements at Colleges and Universities." Various plaintiffs had argued in federal court that the printing of the report should be enjoined, since it acted to hinder the free speech of private citizens. The federal court had enjoined the Public Printer from publishing the report, but had declined to act against the committee or its members, since they were immune under the Speech and Debate Clause of the Constitution.<sup>(10)</sup>

9. 116 CONG. REC. 41355, 91st Cong. 1st Sess.

10. The U.S. District Court of the District of Columbia had held, in *Hentoff v Ichord*, 318 F Supp 1175 (D.D.C. 1970), that it could enjoin the Public Printer from publishing the committee report which it found hindered the exercise of free speech by citizens, but that it could not enjoin the committee members from any action, since they could not be questioned for any speech or debate in the House. The opinion of the

Mr. Ichord offered House Resolution No. 1306 by which the House could authorize the printing of the report and thereby prevent the federal court from enjoining its publication.<sup>(11)</sup> After debate on the resolution, the resolution was agreed to by the House and the committee report was ordered printed.<sup>(12)</sup>

***Disclosure of Classified Material ("Pentagon Papers")—Immunity of Legislative Aide***

**§ 17.4 Where a Senator convened a subcommittee meeting to read into the record of the meeting portions of a classified Defense Department study ("Pentagon Papers") and then arranged for private republication of the study, an aide who assisted him in those activities was held by the Supreme Court not immune from grand jury questioning.<sup>(13)</sup>**

court is reprinted at 116 CONG. REC. 41365-68, 91st Cong. 2d Sess., Dec. 14, 1970.

11. See the text of the resolution, *id.* at pp. 41355-57, incorporating the history of the preparation of the report and the history of the court case. See also Mr. Ichord's remarks, *id.* at pp. 41358-64, for his analysis of the constitutional issues involved.
12. *Id.* at p. 41372.
13. *Gravel v U.S.*, 408 U.S. 606 (1972). Senator Maurice R. Gravel (Alaska)

On the night of June 29, 1971, Senator Gravel, Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee at which he read extensively from a classified Defense Department study on the history of United States policy during the Vietnam conflict. He then placed the entire 47 volumes of the study in the public record of the committee meeting.<sup>(14)</sup> He then arranged

had intervened to quash grand jury subpoenas directed to his aide. The Supreme Court reviewed and modified protective orders issued by a U.S. District Court, *U.S. v Doe*, 332 F Supp 930 (D. Mass. 1971) and by a U.S. Court of Appeals, *U.S. v Doe*, 455 F2d 753 (1st Cir. 1972), which orders had limited the questions which could be asked of the Senator's aide (Dr. Leonard Rodberg).

14. 408 U.S. at 609. See Senator Gravel's subsequent explanation of his actions at the subcommittee meeting, 117 CONG. REC. 23578, 92d Cong. 1st Sess., July 6, 1971. The text of Senator Gravel's statement made at the subcommittee meeting immediately prior to reading the study was reprinted at 117 CONG. REC. 23723, 92d Cong. 1st Sess., July 7, 1971.

The Supreme Court held, in *New York Times Co. v U.S.*, 403 U.S. 713 (1971), that the government could not restrain the press from publishing the study read by Senator Gravel, commonly termed the "Pentagon Papers."

with a private publisher for republication of the text of the study.<sup>(15)</sup> One of Senator Gravel's aides, Dr. Leonard Rodberg, had assisted Senator Gravel in preparing for and conducting the hearing, and in arranging for private republication of the study.<sup>(16)</sup>

The Justice Department initiated a grand jury investigation into possible criminal conduct in relation to the reading and republication of the study, and subpoenaed Dr. Rodberg to testify before the grand jury.<sup>(17)</sup>

Senator Gravel intervened in the proceedings in order to quash the subpoenas to Dr. Rodberg and

others, and in order to require the government to specify the questions to be asked of Dr. Rodberg.<sup>(18)</sup> A United States District Court<sup>(19)</sup> and then a United States Court of Appeals<sup>(20)</sup> issued protective orders restricting the questions which could be asked of Dr. Rodberg.

The Supreme Court agreed with the lower courts' findings that the arrangements for the unofficial publication of the committee record were outside the protection of the Clause, but, contrary to those courts' conclusions, included the Senator and his aide as both vulnerable to questioning and possible liability regarding those arrangements. "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach," the Court stated, "it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing leg-

15. See 408 U.S. at 609, 610.

16. See 408 U.S. at 609-611.

17. 408 U.S. at 608. See the remarks of Senator Sam Ervin (N.C.) on Sept. 20, 1972, analyzing the Justice Department inquiry and subpoenas, and maintaining that the investigation was violating the immunity of Congressmen and their aides for speech and debate and legislative activities, 117 CONG. REC. 32444-49, 92d Cong. 1st Sess. Senator Ervin inserted into the Record relevant court decisions on the Speech and Debate Clause, *id.* at pp. 32449-62 (*Tenney v Brandhove*, 341 U.S. 367 [1951]; *Kilbourn v Thompson*, 103 U.S. 168 [1880]; *U.S. v Johnson*, 383 U.S. 169 [1966]; *Powell v McCormack*, 395 U.S. 386 [1969]; *Cochran v Couzens*, 42 F2d 783 [1930], cert. denied, 282 U.S. 874 [1930]; *Dombrowski v Eastland*, 387 U.S. 82 [1967]).

18. For a compilation of legal motions, letters, affidavits, and orders concerning the subpoena to Dr. Rodberg, see 117 CONG. REC. 42752-822, 92d Cong. 1st Sess., Nov. 22, 1971 (extension of remarks of Senator Gravel).

19. *U.S. v Doe*, 332 F Supp 930 (D. Mass. 1971).

20. *U.S. v Doe*, 455 F2d 753 (1st Cir. 1972).

islative acts.” The Court found the protective orders to be overly restrictive of the scope of the grand jury inquiry, particularly in not allowing questions relating to the source of the Pentagon documents.<sup>(1)</sup> The Court held that: (1) the Senator’s aide was immune only for legislative acts for which the Senator would be immune;<sup>(2)</sup> (2) the arrangement for republication of the Defense Department study was not protected under the Speech and Debate Clause;<sup>(3)</sup> (3) the aide (or the Senator himself) could be questioned by the grand jury about any criminal third-party conduct or republication arrangements where the questions did not implicate legislative action of the Senator.<sup>(4)</sup>

**§ 17.5 The Senate adopted a resolution authorizing payment from its contingent fund of expenses incurred by a Senator as a party in litigation involving the Speech and Debate Clause of the United States Constitution, and providing for the appointment of a select committee to appear as amicus curiae before the United**

1. 408 U.S. at 626–629.

2. 408 U.S. at 621, 622.

3. 408 U.S. at 622, 625, 626.

4. 408 U.S. at 628, 629.

**States Supreme Court and to file a brief on behalf of the Senate in the action.**

On Mar. 23, 1972,<sup>(5)</sup> the Senate discussed Senate intervention in the case of *Gravel v United States*, involving the Speech and Debate Clause of the Constitution and pending in the Supreme Court of the United States, Senator Maurice R. Gravel, of Alaska, being a party thereto. The Senate adopted Senate Resolution 280 and President pro tempore Allen J. Ellender, of Louisiana, appointed Members of the Senate pursuant to the resolution:

RESOLUTION

Authorizing Senate intervention in the Supreme Court proceedings on the issue of the scope of article I, section 6, the so-called speech and debate clause of the Constitution

Whereas the Supreme Court of the United States on Tuesday, February 22, 1972, issued writs of certiorari in the case of Gravel against United States; and

Whereas this case involves the activities of the junior Senator from Alaska, Mr. Gravel; and

Whereas in deciding this case the Supreme Court will consider the scope and meaning of the protection provided to Members of Congress by article I, section 6, of the United States Constitution, commonly referred to as the

5. 118 CONG. REC. 9902, 9907, 9915, 9920, 9921, 92d Cong. 2d Sess.

“Speech or Debate” clause, including the application of this provision to Senators, their aides, assistants, and associates, and the types of activity protected; and

Whereas this case necessarily involves the right of the Senate to govern its own internal affairs and to determine the relevancy and propriety of activity and the scope of a Senator’s duties under the rules of the Senate and the Constitution; and

Whereas this case therefore concerns the constitutional separation of powers between legislative branch and executive and judicial branches of Government; and

Whereas a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole; and

Whereas the United States Senate has a responsibility to insure that its interests are properly and completely represented before the Supreme Court: Now, therefore, be it

*Resolved*, That the President pro tempore of the Senate is hereby authorized to appoint a bipartisan committee of Senators to seek permission to appear as amicus curiae before the Supreme Court and to file a brief on behalf of the United States Senate; and be it further

*Resolved*, That the members of this bipartisan committee shall be charged with the responsibility to establish limited legal fees for services rendered by outside counsel to the committee, to be paid by the Senate pursuant to these resolutions; be it further

*Resolved*, That any expenses incurred by the Committee pursuant to

these resolutions including the expense incurred by the Junior Senator from Alaska as a party in the above mentioned litigation in printing records and briefs for the Supreme Court shall be paid from the contingent fund of the Senate on vouchers authorized and signed by the President pro tempore of the Senate and approved by the Committee on Rules and Administration; be it further

*Resolved*, That these resolutions do not express any judgment of the action that precipitated these proceedings; and be it further

*Resolved*, That the Secretary of the Senate transmit a copy of these resolutions to the Supreme Court.

MR. [MICHAEL J.] MANSFIELD [of Montana]: Mr. President, there are some recommendations relative to the counsel to be appointed from the Democratic side and three associate counsel to assist the chief counsel. Would the Chair make those nominations at this time on behalf of the majority?

THE PRESIDENT PRO TEMPORE: Under the resolution just agreed to, the Chair appoints the Senator from North Carolina (Mr. Ervin) chief counsel, and the Senator from Mississippi (Mr. Eastland), the Senator from Rhode Island (Mr. Pastore), and the Senator from Georgia (Mr. Talmadge) as associate counsel.

THE PRESIDING OFFICER (Mr. Stafford) subsequently stated: The Chair, on behalf of the President pro tempore, under Senate Resolution 280, makes the following appointments to the committee established by that resolution: The Senator from New Hampshire Mr. Cotton), the Senator from Colorado

(Mr. Dominick), the Senator from Maryland (Mr. Mathias), and the Senator from Ohio (Mr. Saxbe).

## § 18. From Arrest

Article I, section 6, clause 1 of the Constitution states of Senators and Representatives that “they shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.”<sup>(6)</sup> Unlike the Speech and Debate Clause, which was not judicially defined until the 20th century,<sup>(7)</sup> issues relating to the immunity from arrest were litigated soon after the adoption of the Constitution.<sup>(8)</sup>

6. See, in general, *House Rules and Manual* §90 (1973) (comment to the constitutional provision). For Jefferson’s comments, see *House Rules and Manual* §§287–292, 300–309 (1973). See also, for early commentary, Story, *Commentaries on the Constitution of the United States*, §§856–862, Da Capo Press (N. Y. repute. 1970). Story attributed to Congress the power of contempt to punish those who unlawfully arrest Members, *id.* at §860, but the House has no such general contempt power. See *Kilbourn v Thompson*, 103 U.S. 189 (1881) and *Marshall v Gordon*, 243 U.S. 521 (1917).

7. See § 16, *supra*.

8. The first cases on the constitutional privilege were *Coxe v M’Clenachen*, 3

The immunity from arrest has been extensively discussed on the floor of the House, since subpoenas, summonses, and arrests of Members while the House is in session are presented to the House as questions of privilege. The House has decided that a summons or subpoena to a Member to appear in court, or before a grand jury, while the House is in session invades the rights and privileges of the House.<sup>(9)</sup> The permission of the House is required for a Member to attend upon a court during sessions of Congress; the House usually by resolution permits

Dall. 478 (Sup. Ct. Pa. 1798) and *U.S. v Cooper*, 4 Dall. 341 (U.S. Cir. Ct. D. Pa. 1800).

9. See § 18.1, *infra*.

Subpoenas, summonses, and arrests are presented as questions of House privilege and not personal privilege, since they affect the rights of the House collectively, its safety, dignity, and integrity of proceedings. See Rule IX, *House Rules and Manual* §661 (1973). And resolutions proposing action by the House are called up under a question of the privileges of the House.

The personal privilege of the Member may also be involved, however, since that privilege rests primarily on the constitutional immunities. See *House Rules and Manual* §663 (1973). For an instance where a grand jury summons was raised as a question of personal privilege, see 6 Cannon’s Precedents § 586.