THE CONSTITUTIONAL PRIVILEGES FROM ARREST AND OF SPEECH OR DEBATE OF MEMBERS OF CONGRESS, U.S. CONSTITUTION ARTICLE I, SECTION 6

Historical Aspects and Legal Precedents

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PREFACE

The purpose of this Report is to provide Members of Congress with a brief guide to the historical background and judicial construction of the meaning and scope of two Constitutional Privileges which are personal to each Member: The Privilege from Arrest and the Privilege of Speech or Debate. It is intended to supersede a prior limited report compiled by the author - Congressional Privilege: Immunity from Liability for Slander and Libel, dated Feb. 24, 1961, and revised June 12, 1963. All the matter in the prior report has been included here. This latest effort has been expanded to include both Privileges.

Beginning on August 6, 1968 and revised again on January 4, 1971, this third edition has been necessitated by the importance of subsequent judicial activity. Based upon the Johnson case and continued in the Brewster and Gravel cases (III, B.), for example, the Supreme Court has attempted to define with some particularity the use and limits of the Speech or Debate Clause as a defensive measure in the criminal area. The significance of defining a Member's activities as either "legislative" or "political" in relation to the privilege will affect other areas as well.

The Constitutional Privileges from Arrest and
of Speech or Debate of Members of Congress
U.S. Constitution, Article I, Section 6

Historical Aspects and Legal Precedents

I. Origin in the History of the English Parliamentary Privilege.

The Constitution of the United States grants two important privileges to Members of Congress, i.e., the privilege from arrest and the privilege of speech or debate. It provides in Article I, Section 6, Clause 1, in part, that:

> They [the Senators and Representatives] shall in all cases, except treason, felony, and breach of peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

Although language of the clause seems clear and explicit, nevertheless disputes and litigation have arisen from time to time concerning the extent and scope of the privileges. In dealing with constitutional questions, the Supreme Court frequently resorts to historical origin in order to ascertain meaning. It has done so, on occasion, respecting these privileges.[1/] It would therefore seem appropriate at this point to note briefly their respective origins before considering the privileges in more detail.

The Constitutional Convention of 1787, whose labors ultimately resulted in the adoption of the United States Constitution, included the two privileges in that document without debate.[2/] These privileges had existed during the

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1/U.S. v. Johnson, 383 U.S. 169, 177-8 (1966); Williamson v. U.S., 207 U.S. 425, 435-446 (1908).

2/For details of their inclusion in the Constitution, see Max Farrand, The Records of the Federal Convention of 1787, Revised Edition in four volumes, Yale University Press, New London, Conn., 1966, Vol. 2, pp. 140-1, 156, 166, 180, 246, 254, 256, 267, 567, 593, 645; Vol. 3, pp. 148, 312, 384; Vol. 4, pp. 40-43.

Confederation. Obviously their immediate source would then be The Articles of Confederation of 1777,[3] which, in the last paragraph of Article V, provided:

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the Members of Congress shall be protected in their persons from arrest and imprisonment, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

The privileges, however, were actually of ancient lineage in English parliamentary history. Freedom of speech or debate appears to have been recognized as early as 1399 in Haxey's Case (see May, p. 48, in footnote 5), below, when judgment against him was twice reversed and finally annulled in the statute of 1 Henry IV of that year.[4] Haxey had been convicted of treason for introducing a bill in the Commons, two years before, complaining of maladministration and the excessive cost of the King's household. The privilege was eventually established by its frequent and effective exercise in subsequent cases and was finally confirmed during the "Glorious Revolution" in the 9th Article of the Bill of Rights of 1689.[5]

The privilege from arrest appears to be even older, possibly as early as the reign of Aethelberht of Kent in the 6th Century or possibly that of Cnut in the 11th Century. It was involved in Bishop of St. David's Case, where the King ruled that it was not fit that members of his council should be distrained in time of Parliament, (19 Edward 1st, 1290, 1 Rotuli Parliamentorium, etc., 61;

3/U.S. Code, 1964 Ed., Vol. 1, pp. xxxi-xxxv.

4/For origin of Judicial privilege (1608) and Executive privilege (1786) see Mr. Chief Justice Warren's dissenting opinion in Barr v. Matteo, 360 U.S. 564 at 579-80 (1959) and footnotes 5 and 6 thereto.

5/Thomas Pitt Taswell-Longmead: English Constitutional History, 2d Ed., 1881, pp. 302-4, 320-24; For text of Bill of Rights, pp. 654-661; Thomas Erskine May: Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 15th (1950) Ed., pp. 46-50.

1 Hatsell: Precedents of Proceedings in the House of Commons, p. 3). The first definite legislative recognition appears to have been in 1603 in the statute of 1 James I. C. 13.[6/] Even in the early precedents, however, the privilege did not include criminal matters. "In their petition of 1404 the Commons claimed that according to the custom of the realm they were privileged from arrest for debt, trespass or contract of any kind (3 Rot. Parl. 541)." "Here may be seen both the limitation of their privilege, since they did not claim that it extended to criminal charges, and its dependence on the King's assistance for realization." (Pickthorn, Henry VII, p. 110). The privilege has been defined negatively in the claim of the Commons in 1429, which specifically excepted treason, felony and surity of the peace (4 Rot. Parl. 357)." see May, pp. 66-7, in note 5, below.

II. Privilege from Arrest.

Although the roots of this privilege lie far back in the history of the struggle for power between the English King and the Parliament, the privilege had become so firmly established in law that it was inserted in the United States Constitution without explanation or debate. Story, writing his Commentaries on the Constitution in 1833, commented on the privilege (Secs. 856-862), and summarized its purpose as follows (footnotes in parentheses):

> Sec. 856. The next part of the clause regards the privilege of the members from arrest, except for crimes, during their attendance at the sessions of congress, and their going to, and returning from them. This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange, indeed, if it were denied to the highest functionaries of the state in the discharge of their public duties. It belongs to congress in common with all other legislative bodies,

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6/See Note 5 - Taswell - Longmead, pp. 324-332, and May, pp. 67-85; For text of 1 James I, C. 13, see Halsbury's Statutes of England, 2d Ed., Vol. 17, p. 468.

which exist, or have existed in America, since its first settlement, under every variety of government; and it has immemorially constituted a privilege of both houses of the British parliament.1/ (1/ 1 Black. Comm. 164, 165; Com. Dig. Parliament, D. 17; Jefferson's Manual, Sec. 3, Privilege; Benyon v. Evelyn, Sir O. Bridg. R. 334.) It seems absolutely indispensable for the just exercise of the legislative power in every nation, purporting to possess a free constitution of government; and it cannot be surrendered without endangering the public liberties, as well as the private independence of the members.2/ (2/ 1 Kent. Comm. Lect. 11, p. 221; Bolton v. Martin, 1 Dall. R. 296; Coffin v. Coffin, 4 Mass. R.I.).

Sec. 857. This privilege from arrest, privileges them of course against all process, the disobedience to which is punishable by attachment of the person, such as a subpoena ad respondendum, aut testificandum, or a summons to serve on a jury; and (as has been justly observed) with reason, because a member has superior duties to perform in another place. When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his state loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of no comparison.1/ (1/ Jefferson's Manual, Sec. 3). The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice, who are the members of the house returned of record.2/ (2/ Id. Sec. 3).

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Sec. 860. The effect of this privilege is, that the arrest of the member is unlawful, and a trespass ab initio, for which he may maintain an action, or proceed against the aggressor by way of indictment. He may also be discharged by motion to a court of justice, or upon a writ of habeas corpus;2/ (2/ Id. Sec. 3; 2 Str. 990; 2 Wilson's R. 151; Cas. Temp. Hard. 28.) and the arrest may also be punished, as a contempt of the house.3/ (3/ 1 Black Comm. 164, 165, 166; Com. Dig. Parliament, D. 17; Jefferson's Manual, Sec. 3.)

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Sec. 862. The exception to the privilege is, that it shall not extend to "treason, felony, or breach of the peace." These words are the same as those, in which the exception to the privilege of parliament is usually expressed at the common law and was doubtless borrowed from that source.1/ (1/ 4 Inst. 25; 1 Black Comm. 165; Com. Dig. Parliament, D. 17.) Now, as all crimes are

> offences against the peace; the phrase "breach of the peace" would seem to extend to all indictable offences, as well those, which are, in fact, attended with force and violence, as those, which are only constructive breaches of the peace of the government, inasmuch as they violate its good order.2/ (2/ 1 Black, Comm. 166.) And so in truth it was decided in parliament, in the case of a seditious libel, published by a member, (Mr. Wilkes,) against the opinion of Lord Camden and other judges of the Court of Common Pleas;3/ (3/ Rex v. Wilkes, 2 Wilson's R. 151.) and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense, and in furtherance of public justice.4/ (4/ See 1 Black.CComm. 166, 167.) It would be monstrous, that any member should protect himself from arrest, or of punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest, for the pettiest assault, or the most insignificant breach of the peace.

The privilege from arrest was litigated in the American courts from the beginning. In fact the only American case cited by Story, Bolton v. Martin, 1 Dall. 296 (1788), occurred before the adoption of the Constitution the following year and involved, not the United States, but the Pennsylvania State privilege. Martin, the defendant, was a member of the State Convention assembled in Philadelphia to consider the adoption or rejection of the Federal Constitution. While in attendance he was served with a summons. President Shippen, of the Court of Common Pleas of Philadelphia County considered the question whether Martin could, while so serving, be arrested, or served with summons or other process to compel his appearance in a civil action, consistent with the privilege. After reviewing the background of the privilege, he concluded that he could not.

An extensive search for instances of judicial construction of the federal constitutional privilege has revealed approximately 21 cases beginning in 1798 in which it has been involved.[7/] In considering this group it should be noted that only three of them were decided by the Supreme Court of the United States while the rest were in either the lower Federal or in the State Courts. In this sense only the three in the United States Supreme Court might be said to be leading cases. They, however, do not answer all questions which have been, or might in the future, be raised concerning the privilege. As a consequence the cases have been classified below according to what appears to be the subject of the Court's comments concerning the privilege whether or not they are controlling. In some cases the Court's comments were mere dicta.

A. Arrest - Exceptions from the Privilege.

Article I, section 6, clause 1, states: "They [Senators and Representatives] 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..." [underlining added]. The general rule, with respect to this provision, could

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7/See: Coxe v. M'Clenachan, 3 Dall. 478 (1798): U.S. v. Cooper, 4 Dall. 341 (1800); Lewis v. Elmendorf, 2 Johnson's Cases (N.Y.) 222 (1801); Respublica v. Duane, 4 Yeates 347 (1807) - also appears in 2 Alden's Abridgement of Penn. Supreme Court Reports, 1851; Dunton & Co. v. Halstead, 2 Clark (Pa. Law Journal Reports) 236 (1840); Doty v. Strong, 1 Pinney's Wisc. Reports 84 (1840); U.S. v. Wise, 28 Fed. Cases No. 16, 746a (1842), also in 1 Hayward & Hazleton (D.C.) 182; Nones v. Edsall, 1 Wall 189 (1848), also in 18 Fed. Cases No. 10,290; Kimberly v. Butler, 14 Fed. Cases, No. 7,777 (1869); Hoppin v. Jenckes, 8 R.I. 453 (1867); State v. Smalls, 11 SC 262 (1878); Merrick v. Giddings, 1 MacArthur and Mackeys (D.C. Sup. Ct.) Reports 55 (1879); Miner v. Markham, 28 Fed. 387 (1886); Bartlett v. Blair, 68 N.H. 232 (1894); Howard v. Citizens Bank & T. Co., 12 App. D.C. 222 (1898); Worth v. Norton, 56 S.C. 56 (1899); Burton v. U.S., 196 U.S. 283 (1905); Williamson v. U.S., 207 U.S. 425 (1908); Long v. Ansell, 293 U.S. 76 (1934); James v. Powell, 274 N.Y.S. 2d 192 (1966), 277 N.Y.S. 2d 135, and 279 N.Y.S. 2d 972 (1967); Yuma Greyhound Park, Inc. v. Hardy, 472 Pac. 2d 47 (1970).

be said to be that it excepts all criminal offenses from the privilege. In effect, therefore, the privilege applies only to arrests in civil suits.

The leading case on this subject is Williamson v. U.S., 207 U.S. 425 (1908). From the statement of facts in that case, it appears that Williamson, while a Member of the House of Representatives of the United States, was indicted on February 11, 1905, with two other persons for alleged violations of Revised Statute 5440 in conspiring to commit the crime of subornation of perjury in proceedings for the purchase of public land under the authority of the Timber and Stone Act (20 Stat. 89). They were found guilty in September 1905 and on October 14 of that year, when the court was about to pronounce sentence,Williamson, whose term of office as a Member of the House did not expire until March 4, 1907, protested against the court passing sentence upon him, especially to any sentence of imprisonment, on the ground that thereby he would be deprived of his constitutional right to go to, attend, and return from the ensuing session of Congress. The objection was overruled and Williamson was sentenced to pay a fine and to imprisonment for ten months. Exceptions were taken, including one on the basis of the foregoing article of the Constitution.

With respect to the privilege, it was argued in behalf of Williamson that the phrase "breach of the peace" meant only actual breaches of the peace or offenses involving violence or public disturbance. As to other misdemeanors, it was argued that the parliamentary privilege applied, as in libel, citing Rex v. Wilkes, 2 Wilson 151; Ware v. Circuit Judge, 75 Michigan 488; Estes v. State, 2 Humphrey 496 (p. 427).

The Attorney General, on the other hand, argued that the privilege of immunity extended to civil arrests only and did not apply to an indictable offense (p. 430), citing 1 Hatsell's Precedents of Proceedings in House of Commons, 2, 40, 65, 66; Wilkinson v. Boulton, 1 Levinz 163; Mr. Long Wellesley's Case,

2 Rus. and Myl. 639, 664, 665; Rawlins v. Ellis, 10 Jurist, pt. 1, p. 1039; Bowyer's Com. on Const. Law of Eng., 2d ed., p. 84; May's Law of Parliament, 145.

The precise question, as framed in the opinion of the court, was "What is the scope of the qualifying clause--that is, the exception from the privilege of treason, felony and breach of the peace." To reach a conclusion on this question the court proceeded to trace the origin of that phrase and the meaning of the words as understood in this country prior to the adoption of the Constitution. It noted that the words appear in the Articles of Confederation (last clause of Article V) which probably accounts for the fact that the clause did not receive much attention during the debates in the Convention (pp. 436-446). It would not seem necessary, for the purpose of this memorandum, to review the lengthy discussion of the precedent law found in this decision. The conclusion reached by the Supreme Court, on the basis of the historical precedents, was that the terms treason, felony and breach of the peace as used in the constitutional provision "excepts from the operation of the privilege all criminal offenses." It concluded that Williamson's claim of privilege of exemption from arrest and sentence was without merit. It said specifically, after its review of historical precedent - "these reasons above, though others might be added, are sufficient to establish the point that the terms 'treason, felony, and breach of the peace' as used in our constitutions, embrace all criminal cases and proceedings whatsoever" (445-6).

On other grounds, the conviction in the Court below was finally reversed and remanded by the Supreme Court. A possible area of confusion as to the inclusiveness of the term "all criminal cases and proceedings whatsoever", would seem to exist. In 21 Am. Jur. 2nd "Criminal Law" 1, it is indicated that criminal cases and statutes are those in which fine and/or imprisonment is imposed as punishment. Further in 21 Am. Jur. (original ed.) "Municipal

Corporation" 202, some Municipal ordinances are criminal, while in some states Municipalities have no authority to adopt criminal ordinances. In the Federal area note should be taken that criminal statutes appear, not only in Title 18 and under the heading "Crimes and Offenses" in the Index, but also elsewhere in the Code. The latter appear under the heading "Fines, Penalties and Forfeitures" in the index which also includes civil fines, penalties and forfeitures. It is therefore necessary in each individual case to carefully examine the statute involved, State or Federal, to determine its criminal aspects before asserting the Constitutional privilege.

The United States Supreme Court in Long v. Ansell, 293 U.S. 76 (1934) at page 82, reaffirmed its conclusion in the Williamson Case in noting that "when the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies, Williamson v. U.S., 207 U.S. 425". For a discussion of Long v. Ansell, see G. Subpoenas and and Service of Civil Process, below.

As an historical note to the cases above, it perhaps should be noted that the earliest case found in our survey was that of Coxe v. M'Clenachen, 3 Dall. 478 (1798). There a member of Congress during the Fifth Congress (March 4, 1797 - March 3, 1799, in Philadelphia) was out on bail in what appears to have been a civil suit and had been surrendered by his bail. He pleaded his privilege and a compromise was reached by the bail agreeing to surrender him 4 days after the session, without the Supreme Court of Pennsylvania ruling on the privilege.[8/] The case is important only in that both Counsel and the Court appear to have recognized the existence of the privilege.

8/All Volumes of Dallas (Vols. 1-4) contain decisions of Appellate Courts of Pennsylvania - in fact, 1 Dallas contained no U.S. Supreme Court decisions. The first two reporters (Dallas and Cranch) were commercial reporters. It was not until the Act of March 3, 1817 [3 Stat. 376] that an official reporter was named.

B. Breach of the Peace.

The only case found, dealing with breach of the peace, was that of U.S. v. Wise, 28 Fed. Cases No. 16,746a; 1 Hayward and Hazleton 82 (1848), in the Criminal Court of the District of Columbia. The Member of Congress had been arrested on a warrant charging probable cause to believe that he was about to commit a breach of the peace by fighting a duel. The Court ruled the privilege of no avail since breach of the peace is one of the exceptions to the privilege. The Congressman was required to give $3,000 as security to keep the peace.

C. Contested Elections - Continuance After Adverse Ruling.

In Dunton and Co. v. Halstead, 2 Clark (Penn. Law Journal Reports) 236 (1840), defendant member-elect had gone from his home in Trenton, N.J., to Congress with the Governor's Commission to represent his State. A contest for his seat was decided against him. Being without funds, he delayed his departure for 5 days until a House Resolution was adopted granting him the usual per diem allowance. During his return to Trenton he was arrested on a capias ad respondendum in Philadelphia. The District Court for the City and County set the writ aside. It ruled that:

> One who goes to Washington duly commissioned to represent a State in Congress is privileged from arrest, eundo, morando et redeundo, and though he is not entitled to a seat there, he is protected until he reaches home, if he returns as soon as possible after such decision.
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> Sickness or want of funds, are valid excuses for a failure to return immediately after such decision.
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> Wherever the privilege of a party exists eundo, it continutes redeundo.

D. Delegate in Congress - Entitlement.

In Doty v. Strong, 1 Pinney's Wise Reports 84 (1840), the Territorial Supreme Court of Wisconsin held that the privilege extended to Delegates in Congress from territories as well as to Members of Congress. They, however, erroneously applied the privilege to the service of civil process not involving arrest, following the Pennsylvania case of Geyer's Lessee v. Irwin, 4 Dall. 96 [actually 4 Dall. 107 (1790)] where the Pennsylvania Court in dealing with the case of a State legislator had interpreted language in the Pennsylvania Constitution similar to that of the United States Constitution, so as to extend it to service of civil process.

E. Leave of Absence During Session.

The case of Worth v. Norton, 56 S.C. 56 (1899), involved the question of whether the constitutional privilege extends to service of civil process not involving arrest in Florence, South Carolina, on a Member of Congress during the session of the House while he was on leave of absence on private business. While the main thrust of this decision is that the privilege extends only to arrest and not to the service of civil process, it is noted here, because it is the only case found in which leave of absence was involved. On this, the Court ruled that a Member, not in attendance or going to or returning from a session on private business, is not within the constitutional privilege. For dicta con-concerning neglect to attend session or desertion of session, without leave, see Respublica v. Duane, (1807) in G. below.

F. Misdemeanors.

In Burton v. U.S., 196 U.S. 283 (1905), the United States Supreme Court reviewed the conviction in the United States District Court (E.D., Mo.) of a violation of U.S. Rev. Stat. 1782, making it a misdemeanor for a Member of Congress to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested. The defendant Senator based his right to review by the Supreme Court on several sections of the Constitution, including that of the privilege from arrest in Article I, sec. 6.

The only comment the Court made on the privilege was to note counsel's contention that the case involved construction of it. It then stated "These questions were raised in the court below." [The only printed report below seems to have been in the District Court, on demurrer to indictment, 131 Fed. 552, which did not mention the privilege.] "Whether the defendant waived his alleged privilege of freedom from arrest as Senator would probably depend upon the question whether the offense charged was in substance a felony, and if so, was that privilege a personal one only, and not given for the purpose of always securing the representation of a State in the Senate of the United States." [Note the statute provided that conviction is a misdemeanor with maximum imprisonment of 2 years and maximum fine of $10,000 and incapability forever of holding any office of honor, trust, or profit under the government of the United States.] "However that may be, the question is not frivolous, and in such case the statute grants to this court jurisdiction to issue the writ of error directly to the district court and then to decide the case without being restricted to the Constitutional question, Horner v. U.S., 143 U.S. 570.... It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." The Court, without further comment on the privilege, decided the questions otherwise involved in the case record, and, reversed the conviction, remanding the case for a new trial.

Three years after the Burton case the United States Supreme Court decided Williamson v. U.S., see A. Arrest - Exceptions from the Privilege, supra, in which it stated, after reviewing historical precedent: "these reasons, alone, though others might be added, are sufficient to establish the point that the terms 'treason, felony, and breach of peace' as used in our constitution, embrace all criminal cases and proceedings whatsoever" (p. 445-6).

G. Subpoenas and Service of Civil Process.

The leading case in this area is that of Long v. Ansell, 293 U.S. 76 (1934). Senator Huey P. Long, while Congress was in Session, had been served with a summons in a civil suit for libel brought by Ansell in the Supreme Court of the District of Columbia. Both that Court and the Court of Appeals, D.C. had denied the Senator's motion to quash service of the summons, although he had contended that the constitutional privilege invalidated such service. The Supreme Court of the United States, affirming the decision below in a brief opinion, stated:

> Senator Long contends that Article I, Section 6, Clause 1 of the Constitution, confers upon every member of Congress, while in attendance within the District, immunity in civil cases not only from arrest, but also from service of process. Neither the Senate, nor the House of Representatives, has ever asserted such a claim in behalf of its members. Clause 1 defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant. In Kimberly v. Butler, Fed. Cases No. 7,777, Mr. Chief Justice Chase, sitting in the Circuit Court for the District of Maryland, held that the privilege was limited to exemption from arrest. Compare Mr. Justice Grier, sitting in the Circuit Court of the District of New Jersey in Nones v. Edsall, Fed. Cases No. 10,290. The courts of the District of Columbia, where the question has been raised from time to time since 1868, have consistently denied the immunity asserted, Merrick v. Giddings, McArthur & Mackey 55, 67; Howard v. Citizens' Bank & Trust Co., 12 App. D.C. 222. State cases passing on similar provisions so hold.
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> History confirms the conclusion that the immunity is limited to arrest. See opinion of Mr. Justice Wylie in Merrick v. Giddings. The cases cited in support of the contrary view rest largely upon doubtful notions as

> to the historic privileges of members of Parliament before the enactment in 1770 of the statute of 10 George III, c. 50. That act declared that members of Parliament should be subject to civil process, provided that they were not "arrested or imprisoned." When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies. Williamson v. United States, 207 U.S. 425.
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> The constitutional privilege here asserted must not be confused with the common law rule that witnesses, suitors and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another. That rule of practice is founded upon the needs of the court, not upon the convenience or preference of the individuals concerned. And the immunity conferred by the court is extended or withheld as judicial necessities require. See Lamb v. Schmitt, 285 U.S. 222, 225, 226.

Although the Williamson (see A. supra) and Long (above) cases make it eminently clear that the privilege does not apply to any criminal cases or proceedings or to any civil suits except those involving arrests, it may be of some interest to briefly review the varied handling of civil suits aginst Members of Congress prior to the Long case including a change in the later editions of Blackstone concerning 10 George II, c. 50 which caused some courts to adopt a contrary position (see Mr. Justice Blackstone's correction, as noted in Merrick v. Giddings, below).

The first case found was that of U.S. v. Cooper, 4 Dall. 341 (1800), in the U.S. Circuit Court, Penn. District. The defendant, who was under indictment for a libel on the President, moved for a letter addressed to several Members of Congress requesting their attendance as witnesses, Congress then being in session. Mr. Justice Chase, on circuit, refused to sign the letter pointing out that every man charged with offense, was constitutionally entitled to compulsory process to secure attendance of his witnesses. He stated that he knew of no privilege exempting Members of Congress from the service or obligations of a subpoena in such cases. If after service of subpoena, the Members of Congress did not attend, it would then be time enought to decide

whether attachment (arrest) should issue. Further, he stated that it is not a necessary consequence of non-attendance after service, that attachment shall issue. A satisfactory reason may appear to the Court, to justify or excuse it.

The case of Respublica v. Duane, 4 Yeates 347, (1807) (for a report of the case see, 2 Alden's Abridgement of the Reports of the Supreme Court of Pennsylvania, 1851, which contains the last 3 volumes of Yeates and the first two volumes of Binney, L. 320), involved a "motion for attachment against a Members of Congress for a contempt in not obeying a subpoena regularly served, he not attending Congress, or going to or returning from Congress." The Court refused the attachment stating:

> A witness should be allowed a reasonable time before his attendance can be required under a subpoena. The present claim of privilege rests on the 6th section of the Constitution of the United States; the words thereof are, "the senators and representatives 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 or returning from the same." The privilege secured to members of Congress is freedom from arrest. The service of a subpoena is not an arrest, it is a mere notice for the party to attend and give testimony. If the Court cannot compel the attendance of a reluctant witness, it would be of no avail to issue process. Can such process be issued against a member of Congress, for refusing to attend in obedience to a subpoena? The service of an attachment includes an arrest; and such contempt is neither treason, felony, nor breach of the peace. The privilege is confined to members going to, coming from, or attending the session of their respective houses. If a member should neglect his duty by not attending the session of Congress, or should desert it without leave, he is no more entitled to privilege in such instances from arrest than a private citizen. The Court will not presume a dereliction of duty, it must be established by proof; and they will construe the privilege liberally, and by no means weigh the absence of a member with too nice a balance. Should it appear that he was on his return to Congress, they would at once withhold the attachment. Vide 4 Dall. 341. [U.S. v. Cooper, supra].

The United States Circuit Court, District of New Jersey in Nones v. Edsall, 1 Wall 189; 18 Fed. Cases No. 10,290 (1848), held that defendant Member of Congress attending Congress was not entitled as a matter of right to have the pending civil suit postponed, noting that suits could be carried on by attorney without the party's personal attendance. The Court, however, did grant the continuance as a matter of the Court's discretion.

The case of Kimberly v. Butler, 14 Fed. Cases, No. 7,777 (U.S. Circuit Court, Md. D., 1869) was in assumpsit for money illegally exacted for rent by the defendant. On a plea of constitutional privilege from arrest as a Member of Congress, the Court held that the constitutional privilege does not extend to service of summons in a civil suit, but was limited only from arrest with a view to imprisonment.

Merrick v. Giddings, 1 MacArthur and Mackey's Reports 55 (1879), involved a suit in the District of Columbia for alleged violation of a personal contract where Member of Congress was served with civil summons while in attendance on Congress. The D.C. Supreme Court in reviewing the background of the constitutional privilege noted that the Parliamentary privilege in England had been limited to arrest only, by 10 George II, ch. 50, 1770, whereas our Constitution "was signed in 1787, and was framed by men who could not have been ignorant of that act of Parliament." The Court ruled that the constitutional privilege is limited to arrest only, not to service of process.

Mr. Justice Wylie's opinion in this case corrected a tendency to error which had gained some acceptance through reliance by some courts on the early editions of Blackstone, to the effect that legislators could not be served with any process in civil cases because of the parliamentary privilege--

> The leading authority on that side of the question, and the source which has supplied the authority in this country for all the dicta of that kind we find in the books, is the case of Bolton v. Martin, 1 Dall., 296. The defendant in that case was a member of the convention

which had been called by the State of Pennsylvania, was was sitting in 1788 to consider the subject of adopting or rejecting the Constitution of the United States, and was served with a summons in a civil action. At that time the people of that State were living under their constitution of 1776, which was silent on the subject of privilege. The Constitution of the United States had not yet been adopted, and if it had been adopted, would not have been law for such a case, arising under and to be determined according to the law of the State.

Judge Shippen set aside the service of the summons on the ground that, according to the general parliamentary law, the defendant was not subject to process of any kind whilst in attendance upon the convention, and as authority for such being the parliamentary law, cited the following passage from Blackstone's Commentaries: "Neither can any member of either house be arrested or taken into custody, or served with any process, without a breach of the privilege of parliament."

As has been said before, this decision was made in the year 1788. At that time seven, perhaps eight, editions of Blackstone's Commentaries had been issued. The two first editions were issued prior to the year 1770; the first was issued in 1765 from the Clarendon Press, Oxford. So, also, was the second. Both of these contain the passage as cited by Judge Shippen and quoted above; but after the passage by Parliament of the act of 10th of George III, ch. 50, in the year 1770, Mr. Justice Blackstone with his own hand struck out that passage, and changed its reading to the present form, which is as follows: "Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of Parliament," omitting the words, "or served with any process," on which Chief Justice Shippen relied for his decision in Bolton v. Martin, eighteen years after the change had been made, and after numerous large editions of the work with the passage corrected, had been given to the world. Nor was this the whole of the change made by the eminent commentator at that time, for immediately succeeding the sentence on which we have been remarking, he inserted an additional paragraph which is too long to quote, but which contains these two sentences: "But all other privileges which derogate from the common law in matters of the freedom of the member's person;" and, "as to all other privileges which obstruct the ordinary course of justice, they were restrained by the statute, 12th William III, ch. 3; 2 and 3 of Ann., ch. 18, and 11th George II, ch. 24, and are not totally abolished by statute 10th George III, ch. 50, which enacts that any suit may at any time be brought against any peer or member of Parliament, their servants or any other person entitled to privilege

> of Parliament, which shall not be impeached or delayed by pretense or any such privilege, except that a member of the House of Commons shall not, thereby, be subjected to any arrest or imprisonment."
>
> Of course it requires no argument to prove that no privilege of Parliament could exist contrary to an express act of Parliament. It is but a reasonable exercise of charity, however, to presume that Ch. J. Shippen, in making up his decision in that case, relied upon a copy from one of the early editions of the Commentaries which he had probably studied in his youth and believed to be as unchanged and unchangeable as the Koran.

The New Hampshire Supreme Court, in Bartlett v. Blair, 68 N.H. 232 (1894), denied a motion based on the constitutional privilege, to quash service of civil process left at home of defendant under State law, while he was away attending a session of the Congress because of the absence of a United States Supreme Court adjudication extending the privilege to service of summons or like civil process.

In Howard v. Citizen Bank and Trust Co., 12 App. D. C. 222 (1898), the Bank had obtained a money judgment against Howard in Alabama and sued on it in the District of Columbia. Service of civil process and attachment of a bank account in a District of Columbia bank was obtained, while Howard attended Congress as a member from Alabama. The D.C. Court of Appeals, citing Merrick v. Giddings, supra, ruled, with respect to the privilege, that Senators and Representatives are exempt from arrest and nothing more.

In the case of Worth v. Norton, 56 S.C. 56 (1899), in E. Leave of Absence During Session, supra, the Supreme Court of South Carolina ruled that the privilege extends only to arrest and not to the service of civil process not involving arrest. It also pointed out that State constitutional privileges differed somewhat among themselves on the service of civil process on state legislators, see Cooley: Constitutional Limitations, 2d edition, p. 133.

Since Long v. Ansell, supra, the following cases have dealt with the problem. The case of James v. Powell, 274 N.Y.S. 2d 192 (1966) was a long and

involved attempt by the plaintiff to collect a damage judgment from the Congressman who had become a judgment debtor in a prior libel suit in New York, which had no connection with Congress. It grew out of a motion to punish the Congressman for contempt for wilful failure to obey a subpoena in a supplementary proceeding. The Special Term of the Supreme Court of New York County had denied the motion. Plaintiff appealed to the Supreme Court, Appellate Division. The Appellate Division ruled that a civil contempt was involved in a failure to obey a subpoena in a civil proceeding, whereupon Powell pleaded his constitutional privilege, as a Member of Congress. With respect to the privilege, Justice Steuer stated:

> Article 1, section 6 of the United States Constitution gives to Senators and Representatives immunity from arrest (except in certain cases not material here) during attendance at sessions and in going to and returning therefrom. The immunity is from civil arrest (see Williamson v. United States, 207 U.S. 425, 436, 28 S. Ct. 163, 52 L. Ed. 278), but there is no exemption from civil process short of arrest (Long v. Ansell, 293 U.S. 76, 55 S. Ct. 21 79 L. Ed. 208).
>
> To elaborate on the above, a member of Congress must respond to civil process and is liable for all consequences of disregarding the same except that he cannot be subjected to arrest during a session of Congress. Consequently, there is no immunity from the service of a subpoena. "A subpoena is not an arrest, though there are circumstances in which disobedience to its command may give rise to an arrest" (People ex rel, Hastings v. Hofstadter, 258 N.Y. 425, 429, 180 N.E. 196, 107, 79 A.L.R. 1208). Whether or not the fact that a subpoena may, if disobeyed, give rise to an arrest brings it within the spirit of the constitutional exemption has not been authoritatively passed upon, and differing views have been expressed. As regards the exemption to members of the Congress, the only judicial expression discovered is that the possibility of imprisonment creates no exemption. It was observed that a body attachment would not be involved if the subpoena was obeyed and if disobeyed some other form of sanction could well be employed (United States v. Cooper, 4 Dall. 341, 1 L. Ed. 859). We believe that the foregoing is the proper approach, and the conclusion that there is no exemption from the process necessarily follows. The purpose of the exemption is not for the benefit or even the convenience of the individual legislators.

> It is to prevent interference with the legislative process. And it prevents the judicial branch of the government from effecting such an interference by restricting the power of the courts. However, it is the broad principle that any such restriction of the judicial branch is limited to the instances where the exercise of judicial power would constitute an actual interference with the legislative or executive branches as distinct from one that is theoretical or conditional (People ex rel. Broderick v. Morton, 156 N.Y. 136, 50 N.E. 691, 41 L.R.A. 231). It may be argued, however, that attendance as a witness in itself may interfere with attendance at the sessions of Congress and hence come within the spirit of the exemption, if not its letter. This argument depends on the assumption that the court in the face of a showing of such actual interference will fail to make suitable provision by way of adjournment or fixing of a time and place of examination which will obviate any real conflict. Congress does not sit around the clock and legislators are frequently absent from its halls, entirely legitimately, during more or less extensive periods of the legislative session. Here, no attempt was made to seek any accommodation. Had such been made and refused, a different question would be presented, namely, whether the refusal showed the abuse of a proper discretion. The filed record in this and in the companion case leave no room for speculation that the debtor was not amenable to examination at any time or place. And the question of whether attendance on the subpoena would, in fact, work an interference, was never presented. Actually, at this writing, the Congressional session has been completed and Congress has adjourned.
>
> It might be conceivable that although the debtor did not enjoy an exemption, he believed he did, and that consequently his disregard of the process was not wilful. It would be a sufficient answer that he has submitted no affidavit to that effect. Nor could he very well do so in light of the prior decisions in his own case, which must have received his attention (see, for example, James v. Powell, 43 Misc. 2d 314, 250 N.Y.S. 2d 635).

Thereafter the Court issued an order holding the Congressman in civil contempt subject to a $250 fine and 30 days' imprisonment. It fixed a date for his appearance and provided for remitting the imprisonment if he appeared. On appeal to the Court of Appeals of New York (the highest court of the State), that Court affirmed the order below but on stipulation of the parties set a later date for appearance, see 277 N.Y.S. 2d 135 (1966). On April 11, 1967, the Court of

Appeals deleted its order for appearance but affirmed the fine stating - "It is undisputed that the judgment which formed the basis for the proceeding has now been paid and that the direction to appear has become moot, see 279 N.Y.S. 2d 972.

On July 2, 1970 the Supreme Court of Arizona, in Yuma Greyhound Park, Inc. v. Hardy, 472 P. 2d 47 ruled that Members of Congress are not immune from an order compelling deponent to answer questions propounded. Congressman Steiger, upon whom a subpoena duces tecum had been served, appeared but refused to answer questions claiming immunity under his constitutional privilege from arrest. The Court, however, ruled:

> We find no cases which bear directly on the issue in this matter but we are persuaded by the following language of Long v. Ansell, 293 U.S. 76, 55 S. Ct. 21, 79 L. Ed. 208 (1934), that a Rule 37(a) order is not barred by the alleged congressional immunity:
>
> > "History confirms the conclusion that the immunity is limited to arrest. See opinion of Mr. Justice Wylie in Merrick v. Giddings [11 D.C. 55]. The cases cited in support of the contrary view rest largely upon doubtful notions as to the historic privileges of members of Parliament before the enactment in 1770 of the statute of 10 George III, c. 50. That act declared that members of Parliament should be subject to civil process, provided that they were not 'arrested or imprisoned.' When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies. Williamson v. United States, 297 U.S. 425, 28 S. Ct. 163, 52 L. Ed. 278." 55 S. Ct. at p. 22.
>
> Writ of Mandamus is made peremptory.

H. Travel

The Supreme Court of New York, in Lewis v. Elmendorf, 2 Johnson's Cases 222 (1801), in a per curiam opinion, denied a motion for discharge of a Member of

Congress who "was arrested, while traveling about ten days after he had left home." It noted that the federal constitutional privilege "is to be taken strictly, and is to be allowed only while the party is attending Congress, or is actually on his journey going to or returning from the seat of government." The Court said that the case of Calvin v. Morgan, 1 Johnson's Cases 415, was in point. It is not specifically stated in the per curiam opinion of the Court that the travel involved was or was not in going or returning from the Congress. In the cited case of Calvin v. Morgan the state legislator had actually finished the trip to and from the State Legislature and the upholding of the arrest was based on this fact. The travel concerned was, therefore, not involved in the State constitutional privilege.

The Supreme Court of Rhode Island in Hoppin v. Jenckes (8 R.I. 453; 5 American Reports 597, 1867) considered an action against a Member of Congress as indorser of a promissory note. He filed a plea in abatement on the basis of privilege, i.e., that the privilege extended to 40 days before and after a session of Congress. The Court after an extended review concluded that it was limited to a reasonable time only for going and coming.

The United States Circuit Court, Eastern District of Wisconsin, in Miner v. Markham, 28 Fed. 387 (1886), construing the word "arrest" according to Wisconsin law, held that a Member of Congress in going to and from a session of Congress was entitled to a reasonable time for the journey from California to Washington and that a deviation to his brother's home in Milwaukee, after his children were taken sick, was not an abandonment of the journey. It held further, that the privilege under Wisconsin law extends to exemption from civil process, with or without actual arrest. With respect to this holding, see G., supra, particularly the case of Merrick v. Gidding.

III. The Privilege of Speech or Debate

The fact that in England the privilege of speech or debate had become firmly established by the time of the adoption of our own Constitution, led to its inclusion in that document without either explanation or discussion. Unlike the Privilege from Arrest, where adoption was followed by a series of court cases construing various aspects of its meaning, an interregnum of 91 years occurred before the courts had the occasion to construe this privilege in relation to Members of Congress, Kilbourn v. Thompson, 102 U.S. 168 (1880).[9/] During this gap three events of note occurred which provided clues to its probable meaning and scope. First, Thomas Jefferson, serving as Vice President of the United States and President of the Senate, 1797-1801, prepared his Manual of Parliamentary Practice, now known as Jefferson's Manual, for his own guidance as presiding office. The Manual was privately published and printed by Samuel Harrison Smith at Washington City in 1801. It was not until 1837, however, that the House of Representatives, by rule, provided that the provisions of the Manual should "govern the House in all cases to which they are applicable and in which they are not inconsistent with the standing rules and orders of the House."[10/] The second event occurred in 1808 when the Supreme Court of Massachusetts construed a similar privilege in the Constitution of Massachusetts, as it applied to legislators of that State, in Coffin v. Coffin, 4 Mass. 1.[11/] Finally, in 1833, Mr. Justice Story, then Dane Professor of Law at Harvard University, published his

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9/In the Kilbourn Case, Mr. Justice Miller, at page 204, stated that "we have been unable to find any decision of a Federal court on this clause of section 6 of Article I, though the previous clauses concerning exemption from arrest has been often construed." For a discussion of the Kilbourn Case, see C. False Imprisonand Recovery of Damages for Legislative Acts, below.

10/See note (p. 115) and Rule XLII in Constitution, Jefferson's Manual and Rules of of the House of Representatives, 90th Congress, House Doc. No. 529, 89th Congress, 2d Sess. Contact with the Senate Parliamentarian indicates that the Senate appears never to have formally adopted the Manual.

11/The significance of Coffin v. Coffin is treated herein under Kilbourn v. Thompson, in C, below.

famous Commentaries on the Constitution of the United States. He commented on the privilege in Vol. 11, sec. 863, citing among other things, Coffin v. Coffin.[12/]

> Sec. 863. The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant, or ineffectual. (See 2 Wilson's Law Lect. 156.) This privilege also is derived from the practice of the British parliament, and was in full exercise in our colonial legislatures, and now belongs to the legislature of every state in the Union, as matter of constitutional right. In the British parliament it is a claim of immemorial right, and is now farther fortified by an act of parliament; and it is always particularly demanded of the king in person by the speaker of the house of commons, at the opening of every new parliament. (1 Black, Comm. 164, 165.) But this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty. (Jefferson's Manual, Sec. 3.) Therefore, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere; yet, if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel. (The King v. Creevy, 1 Maule & Selw. 273.) And the same principles seem applicable to the privilege of debate and speech in congress. No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in congress, that furnishes no reason why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens. It is neither within the scope of his duty, nor in furtherance of public rights, or public policy. Every citizen has as good a right to be protected by the laws from malignant scandal, and false charges, and defamatory imputations, as a member of congress has to utter them in his seat. If it were otherwise, a man's character might be taken away without the possibility of redress, either by the malice, or indiscretion, or overweaning self-conceit of a member of congress. (See the reasoning in Coffin v. Coffin, 4 Mass. R.I.) It is proper

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12/Story's footnotes are included in parentheses in the text of the quoted section.

> however, to apprise the learned reader, that it has been recently denied in congress by very distinguished lawyers, that the privilege of speech and debate in congress does not extend to publication of his speech. And they ground themselves upon an important distinction arising from the actual differences between English and American legislation. In the former, the publication of the debates is not strictly lawful, except by license of the house. In the latter, it is a common right, exercised and supported by the direct encouragement of the body. This reasoning deserves a very attentive examination. (Mr. Doddridge's Speech in the case of Houston, in May, 1832; Mr. Burges's Speech, Ibid.)

Thus the main outlines of the significance of the privilege, as it related to Members of Congress, were discernible unofficially during the period of nine decades before an official authoritative construction of the constitutional language occurred. Jefferson's attempt, in 1801, to produce an operating document for the use of Congress met with delayed and only partial acceptance. The ruling of the Massachusetts court in 1808 in Coffin v. Coffin, an action for slander against a state legislator, indicated only by analogy, the reason for and probable scope of the congressional privilege. Story's treatment of the privilege in 1833 seemed mainly concerned with indicating the line on one side of which a Member would be protected from liability for libel or slander, while emphasizing the amenability of the Member to liability on the other. Strangely enough, the first official and authoritative construction of the constitutional privilege occurred in the Kilbourn Case which had nothing to do with libel or slander. This underscores the fact that the protections of the privilege extend beyond libel or slander to other areas as well. The Kilbourn Case was an action for false imprisonment.

Before turning to a consideration of the litigation which occurred concerning the privilege of speech or debate, it would perhaps be appropriate to pause a moment to ascertain exactly the meaning of the term "libel" and its spoken equivalent "slander" in today's usage because of their importance in the question of a Member's liability. Historically, a writ of libel was the

instrument used by the King to attempt the control of Parliament. Although no longer effective for that purpose, the decided cases below reveal that the constitutional privilege continues to protect Members of Congress from suits for damages based on libel and slander. Black's Law Dictionary, 4th Ed., 1951, defines libel as follows:

> In Torts. A method of defamation expressed by print, writing, pictures, or signs. Spence v. Johnson, 142 Ga. 267; 82 S.E. 646, 647; Ann. Cas. 1916A, 1195. In its most general sense any publication that is injurious to the reputation of another. Ajouelo v. Auto-Soler Co., 61 Ga. App. 216; 6 S.E. 2d 415, 418; Flake v. Greensboro News Co., 212 N.C. 780; 195 S.E. 55, 60. Libel is written defamation. Locke, v. Gibbons, 299 N.Y.S. 188, 192, 193; 164 Misc. 877. Defamatory words read aloud by speaker from written article and broadcast by radio constitute libel. Sorensen v. Wood, 123 Neb. 348; 243 N.W. 82; Hartman v. Winchell, 73 N.E. 2d 30; 296 N.Y. 296.
>
> Accusation in writing or printing against the character of a person which affects his reputation, in that it tends to hold him up to ridicule, contempt, shame, disgrace, or obloquy, to degrade him in the estimation of the community, to induce an evil opinion of him in the minds of right-thinking persons, to make an object of reproach, to diminish his respectability or abridge his comforts, to change his position in society for the worse, to dishonor or discredit him in the estimation of the public, or his friends and acquaintances, or to deprive him of friendly intercourse in society, or cause him to be shunned or avoided, or where it is charged that one has violated his public duty as a public officer. Stevens v. Wright, 107 Vt. 337; 179 A. 213, 217. [Each republication is a separate cause of action.]

Slander is defined by the Dictionary as follows:

> Slander. The speaking of base and defamatory words tending to prejudice another in his reputation, office, trade, business, or means of livelihood, Little Stores v. Isenberg, 26 Tenn. App. 357; 172 S.W. 2d 13, 16; Harbison v. Chicago R.I. & P. Ry., 327 Mo. 440; 37 S.W. 2d 609, 616. Oral defamation; the speaking of false and malicious words concerning another, whereby injury results to his reputation. Pollard v. Lyon, 91 U.S. 227; 23 L. Ed. 308 Fredrickson v. Johnson, 60 Minn. 337; 62 N.W. 388; Johnston v. Savings Trust Co. of St. Louis, Mo., 66 S.W. 2d 113, 114; Lloyd v. Commissioner of Internal Revenue, C.C.A. 7, 55 F. 2d 842, 844. An essential element of "slander" is that slanderous words

> be spoken in presence of another than person slandered, and publication is always material and issuable fact in action for slander. Tucker v. Pure Oil Co. of Carolinas, 191 S.C. 60; 3 S.E. 2d 547, 549. Hence an oral defamation, heard only by one who does not understand the language in which it is spoken, is not "slander". Allen v. American Indemnity Co., 63 Ga. App. 894; 12 S.E. 2d 127, 128.
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> "Libel" and "slander" are both methods of defamation; the former being expressed by print, writing, pictures, or signs; the latter by oral expressions. Ajouelo v. Auto-Soler Co., 61 Ga. App. 216; 6 S.E. 2d 415, 418. [As in libel, each repetition is basis for a separate cause of action.]

An extended search has revealed 14 cases of importance in considering the constitutional privilege of speech or debate: Kilbourn v. Thompson, 103 U.S. 165 (1880); Cochran v. Couzens, 42 F. 2d 783 (1930). cert. denied 282 U.S. 874; Barsky v. U.S., 167 F. 2d 241 (1948), cert. denied 334 U.S. 843; Tenney v. Brandhove, 341 U.S. 367 (1951); Smith v. Crown Publishers, 14 F.R.D. 514 (1953); Methodist Federation For Social Action v. Eastland, 141 F. Supp. 729 (1956); McGovern v. Martz, 182 F. Supp. 343 (1960); U.S. v. Johnson, 383 U.S. 169 (1966); Dombrowski v. Eastland, 387 U.S. 82 (1967); U.S. v. Brewster, 408 U.S. 501 (1972); Gravel v. U.S., 408 U.S. 606 (1972); and, Doe v. McMillan, 459 F. 2d 1304; Hentoff v. Ichord (D.C. D.C.) 318 F. Supp. 1175 (1970); and U.S. v. Dowdy, criminal, no. 70-0125 (District of Maryland), 1970. Six of the cases were decided by the Supreme Court; in two it denied certiorari, one has been granted certiorari, and the remaining three were decided by the lower courts. With respect to these cases, a mere chronological arrangement has been avoided in favor of a subject-matter approach.

A. Congressional Record and Reprints-- Unofficial Circulation and Liability for Libel.

The case of McGovern v. Martz, 182 F. Supp. 343 (1960) involved an action brought by the Congressman against Martz, publisher of a weekly newsletter, for falsely reporting that the Congressman had sponsored a "Communist Front." The Defendant filed 2 counterclaims for libel. Both parties filed motions for judgment on the pleadings or for summary judgment. With respect to the

Congressman's motions, the Court overruled them, since the question of whether the defendant had acted with malice was a question of fact to be proved. Presumably the case was then noted down for trial; however, I have been informed that the clerk's record indicates that the case was dismissed with prejudice about 9 months later, apparently without trial. The report of the Court deals mainly with the two counterclaims against the Congressman for libel. The second claim concerned a letter which the Congressman had allegedly caused to be published and republished, which claim the Court ruled to have been barred by the Statute of Limitations. The Court's opinion respecting the first counterclaim, however, is of significance concerning the scope of the privilege.

The first counterclaim alleged that the Congressman had inserted in the appendix of the Congressional Record certain defamatory remarks, not as a part of any official business of Congress or any committee, but solely as a personal attack. The Congressman's reply admitted that the statement had been inserted by him in the Record as an Extension of Remarks with the consent of the House and was protected by an absolute privilege. The Court in its opinion stated (footnotes omitted):

> The privilege of legislators to be immune from civil process for their actions or statements in legislative proceedings has its beginnings at least as early as 1399. Initially acting as a shield against executive interference with the individual legislator, it has since come to protect against actions for defamation as well. The immunity was believed to be so fundamental that express provision is found in the Constitution, although scholars have proposed that the privilege exists independently of the Constitutional declaration "as a necessary principle in free government."
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> Its purpose is clear: insure legislative peace of mind. The theory is that in a democracy a legislature must not be deterred from frank, uninhibited and complete discussion; since "[o]ne must not expect uncommon courage even in legislators; reprisal by the executive or judicial branches for what legislators say or do within the legislature must be impossible in order to obtain free discussion and the consequent benefits to the public. Thus the privilege is absolute; purpose, motive or the reasonableness of the conduct is irrelevant.

The Court then briefly contrasted common law immunity with the constitutional privilege on the basis of Cockran v. Couzens (see F. Slander in a Congressional Speech, below) and concluded with respect to insertions in the Congressional Record:

> Thus if the counterclaim here were confined to an allegation that the defamatory words were spoken on the floor of the House, plaintiff's motion would have to be granted. Moreover, it would be of no avail to the defendant to show that the libel appeared in the Congressional Record since everything said on the floor of the House, as a matter of course, is published in the Congressional Record; thus, to hold the privilege inapplicable to material appearing therein would constitute a complete subversion of the privilege. The Court further concludes that the privilege also embraces material unspoken on the floor of the House but inserted in the Congressional Record by a Congressman with the consent of the House. It cannot be assumed that the complete interchange of ideas and information can be achieved solely from debate on the floor of the House; in point of fact, Congressmen often utilize the Congressional Record as their vehicle to impart, and their source of acquiring, necessary information. Keeping in mind the social policy underlying the privilege, it should-- and so does protect Congressmen for publication in the Congressional Record.

The Court then addressed itself to the effect of the circulation of reprints from the Congressional Record and the unofficial dissemination of the Record itself. Its remarks with respect to these, however, are obiter dictum, since neither reprints nor unofficial dissemination was involved. The Court's remarks in this respect are included here as an indication of the background and likely course of decision should a case arise.

> But what of republication? Should an absolute privilege exist to bar suits for defamation resulting from a Congressman's circulation of reprints of copies of the Congressional Record to non-Congressmen? The reason for the rule--complete and uninhibited discussion among legislators--is not here served. Accordingly, the absolute privilege to inform a fellow legislator (either by way of speech on the floor or writings inserted in the Record) becomes a qualified privilege for the republication of the information. "Though a member of Congress is not responsible out of Congress for

words spoken there, though libelous upon individuals; yet if he causes his speech to be published he may be punished for a libel action or indictment. This is the English and the just law [citing Rex v. Abingdon, 1 Exp. 226, Peake 310 (1795); Rex v. Greevy, 3 eq. N.P. Cases, 228, 1 M. & S. 273 (1813)]." 1 Kent's Commentaries 249, note c (8th Ed. 1854).

The American Law Institute's Restatement of Torts Sec. 590, comment b reads, in part:

"...Defamatory matter spoken or otherwise uttered in a legislative proceeding is a publication thereof and a report of the legislative proceeding is a republication of the defamatory matter. Such republication is not absolutely privileged under the rule stated in this Section but is conditionally privileged under the rule stated in Sec. 611. Thus there is no absolute privilege to disseminate the Congressional Record or reprints thereform, either by a Senator or a Congressman or by a third person...."

In Long v. Ansell [63 App. D.C. 68, 69 F. 2d 386 (1934), affd. 293 U.S. (1934)], the defendant Senator appealed from an order denying his motion to quash service in a suit which charged that the Senator had defamed the plaintiff by circulating in the District of Columbia and elsewhere, reprints of the Congressional Record containing a speech made by the defendant on the floor of the Senate. In affirming, the Court of Appeals said:

"The charge here is not for slander resulting from a speech made on the floor of the Senate, but for libel in publishing and distributing a copy of that speech, together with a letter calling special attention to the article."

Defendant pitches his defense upon the exemption from arrest, and not upon his exemption from the responsibility for statements made in his speech on the floor of the Senate. But were that claim advanced, it would be without force, since the acts charged have only remote connection with the speech. While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circularizing of the libelous documents. (emp. supp.) (63 App. E.C. at 71; 69 F. 2d at 389) And see Cole v. Richards, 108 N.J.S. 356, 158 A. 466 (1932); Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729 (D.C. D.C.)1956) dissenting opinion).

Congressmen undoubtedly have a responsibility to inform their constituents, and undoubtedly circulation of the Congressional Record is a convenient method. It does not follow from this, however, that an absolute privilege is necessary; a qualified privilege is enough. Congressmen are thereby protected and thereby free to inform their constituents--even if the information is defamatory--so long as the act is not done maliciously.

"...[T] existence of a privilege itself for the circulation of a speech by the person who made it, is in ordinary cases warranted and required by the general rule already referred to, by which fair reports of the proceedings may be privileged.... The true rule, it is apprehended, should be to put the circulation of speeches altogether upon the footing of fair reports, justifying the speaker only as he would be justified as the publisher of a newspaper reporting to the world the proceedings of the legislatures.... The privilege in question is of course of the kind called prima facie; that, it exists on the footing that the act of the sender was not malicious--not done, e.g., with an indirect motive of wrong....' 1 Story, 'Commentaries on the Constitution of the United States' (5th Ed. 1905) §866, n. (a)" [Note (a) was added by Editor of 5th Ed. See Story's statement quoted in the introductory paragraphs to Sec. 3 of this paper, and §863 in the original 1833 Ed.].

When analogy to the judicial privilege is made, it further appears reasonable to hold that Congressmen have only a qualified privilege, and thus are liable for malicious defamation, for the unofficial dissemination of the Congressional Record. While a judge has an absolute privilege for the official publication of a judicial statement (as by reading an opinion in open court or filing it in the clerk's office), there is only a qualified privilege for the unofficial circulation of copies of a defamatory opinion. Murray v. Brancato, 290 N.Y. 52, 48 N.E. 2d 257 (1943); Annot. 146 A.L.R. 913 (1943); Francis v. Branson, 168 Okla. 24, 31 P. 2d 870 (1933). Note, 12 Ford. L. Rev. 193 (1943).

Since, according to the Court, the existence of "malice" would seem to be the key to the existence of a qualified or conditional privilege in the unofficial dissemination of the Record and reprints, it would seem appropriate to take a fair sampling of what the Courts have said in regard to "malice" in connection with qualified or conditional privileges generally. The following is a sampling of case law on the subject:

> Snider v. Leatherwood, Tex., 49 S.W. 2d 1107, 111.
> "Malice" which deprives one of benefits of privileged communication is a statement not believed to be true or one actuated by sinister or corrupt motive or ill will, or made willfully or wantonly.
>
> Peterson v. Cleaver, 181 N.W. 187, 189, 105 Neb. 438, 15 A.L.R. 447.
> The additional fact which is required to be shown to destroy the conditional privilege of a defamatory publication is "malice", meaning bad intent; i.e., an intent to injure the person whom or whose affairs the language concerns.
>
> National Standard Life Ins. Co. v. Billington, Tex., Civ. App., 89, S.W. 2d 491, 493.
> "Malice" which destroys privilege is different from that which law imputes with respect to every defamatory charge irrespective of motive, but is indirect and wicked motive inducing defendant to defame plaintiff.
>
> Doane v. Grew, 107 N.E. 620, 622, 220 Mass. 171, L.R.A. 1915C, 774, Ann. Cas. 1917A, 338.
> Malice in fact may be proved, not only by evidence that defendant made the alleged untrue defamatory statements out of hatred for plaintiff, but by evidence that defendant under circumstances of privilege went outside the privilege.
>
> Civ. Code, §47, subd. 3: §48, Harris v. Curtis Pub. Co., 121 P. 2d 761, 766, 767, 768, 49 Cal. App. 2d 340.
> "Malice", within statute defining "privileged publication" as one made in communication without

malice to person interested herein by one who is also interested, may not be inferred from the communication or publication, but may be inferred where charge is false and is libelous per se and where defendant publishes it without having probable cause for believing it to be true.

Civ. Code, §47, subd. 3: §48. Harris v. Curtis Pub. Co., 121 P. 2d 761, 766, 767, 768, 49 Cal. App. 2d 340.

The "malice" referred to by statute defining "privileged publication" as one made in communication without malice to person interested therein by one who is also interested, is malice in popular conception of the term as a desire or disposition to injure another founded upon spite or ill will.

Houston Chronicle Pub. Co. v. Quinn, Tex., 184 S.W. 669, 675.

If the publication and circulation of an article was done in such manner and under such circumstances as to show a reckless disregard of the rights of plaintiff and of the consequences to plaintiff, the jury were authorized to infer "malice", since reckless disregard and want of care would amount to "gross negligence", which is equivalent to "actual malice", and exemplary damages might be allowed.

International & C.N. Ry. Co. v. Edmundson, Tex., 222 S.W. 181, 183.

In libel, the "malice" which avoids a privilege is actual or express, existing as a fact at the time of the communication, and which has inspired or colored it, and such malice exists where one casts an imputation which he does not believe to be true, and where the communication is actuated by some sinister or corrupt motive, or motives of personal spite or ill will, or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act.

Morse v. Times-Republican Printing Co., 100 N.W. 867, 871, 124, Iowa, 707.

"The term 'malice', as employed in the definition of libel per se, is often misunderstood by the general reader, and is sometimes misapprehended by lawyers.

> It does not necessarily mean personal hatred or ill will toward the person at whom the libel is directed. Legal malice in the publishing of a libel is not inconsistent with honesty of purpose and good motive.... In other words, malice is the want of legal excuse for an act done to the injury of another. Whoever gives currency to libelous matter (not protected as being privileged) must be prepared to prove its truth, if he would avoid liability to the party injured."
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> Denver Public Warehouse Co. v. Holloway, 83 P. 131, 133, 34 Colo, 432, 3 L.R.A.N.S., 696, 114 Am. St. Rep. 171, 7 Ann. Cas. 840, quoting and adopting Hemmens v. Nelson, 34 N.E. 342, 138 N.Y. 524, 20 L.R.A. 440; Odgers, L & S. 267.
>
> The kind of "malice" which "overcomes and destroys the privilege is, of course, quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an 'indirect and wicked motive which induces the defendant to defame the plaintiff.'"

In general, then, malice which will destroy a conditional privilege, embraces any one of the following; ill will, a sinister or corrupt motive; an evil intent; gross negligence of the rights of others; publication of a statement, libelous per se, without probable cause for believing it to be true.

The McGovern Case indicates that unofficial circulation by Members of Congress of copies of the Congressional Record and of reprints therefrom containing libels, constitutes publication of the libel without protection of their constitutional privileges. If such publication was malicious, as defined in the cases supra, proof of malice would destroy the Congressman's prima facie, or qualified

privilege and subject him to liability in damages. It is possible, however, that more protection from liability, may be afforded by the difficulties of proving "actual malice", in a limited number of instances depending upon the status of persons bringing suit, i.e., in libel suits brought against Members of Congress by persons who are public officials (appointed as well as elected officials); candidates for office as well as incumbents, including ones no longer holding public office; and persons who, while not public officials, are nevertheless newsworthy persons or public figures. In a recent line of cases the U.S. Supreme Court has required the proof of actual malice: it has created a "reckless-disregard-of-truth" standard for recovery of damages in suits by such persons. The rationale of these cases is the attempted balance of interests between the individual's right to be free from socially and politically damaging statements and the public's right to knowledge in areas of legitimate public concern.

The following cases were attempts by persons in the limited categories enumerated, supra, to recover against others in suits for defamation. One could speculate that should a Congressman, because of unofficial circulation of the Congressional Record or reprints, become a defendant in a suit by such persons, the plaintiff would necessarily have the burden of proving actual malice as laid down by the Supreme Court in the landmark case of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and the succeeding cases.

In the New York Times Case the Court, in holding that in certain instances libelous misstatements of fact were qualifiedly protected by the First and Fourteenth Amendments to the Constitution, held the plaintiff, a city commissioner of public affairs, to proof of "actual malice", i.e., that the defamatory statement was made either with a knowledge that it was false or was made with a reckless disregard of whether it was false or not. The Court justified its holding on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, sometimes unpleasantly sharp attacks on government and public officials" (p. 270). It did not define either "public official" or "official conduct":

> We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included... Nor need we here determine the boundaries of the "official conduct" concept... (p. 283, fn. 23).

The Court in this case specifically left open the question of what is "official conduct". This uncertainty, which still persists to date, will perhaps be cleared up in future cases. While it would seem logical to include in the official conduct concept anything which directly impinges upon official duties or fitness to perform such duties, such as an incumbent's or candidate's private

reputation for honesty etc., Garrison v. Louisiana, below at pp. 76-77, does it also include private personal conduct or behavior, in fact, not necessarily related to capacity to perform his official duties but which the public might regard as reflecting on his general suitability for public office?

In Rosenblatt v. Baer, 383 U.S. 75, (1966), a former county supervisor, in a libel action against a newspaper for an item written after his discharge from that position, was held to be a public official. The Court made it clear that the New York Times Case standard applied as long as public interest continued in the matter upon which the suit was based.

Garrison v. Louisiana, 379 U.S. 64 (1964), involved an appeal by a District Attorney of his conviction under the Louisiana Criminal Defamation Statute, La. Rev. Stat., 1950, Tit. 14, for having accused Judges, at a press conference, of laxness in enforcing the vice laws. Here also, the Supreme Court imposed the New York Times Case standard on the efforts of the State to impose criminal sanctions for such criticism. It stated in part, that "the New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation is harmed." (p. 77).

The New York Times rule has been applied to appointed as well as elected officials, to candidates for office as well as incumbents, and to individuals in their private capacities, i.e., to news-

worthy persons, Pauling v. Globe-Democratic Pub. Co. 362 F. 2d 188, 196-7 (1966); Time, Inc. v. Hill, 385 U.S. 374 (1967). In the case of newsworthy persons, i.e., "public figures", there appears to have been, however, a slight modification of the rule. In Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) at p. 155 the Supreme Court stated:

> ...that libel actions of the present kind cannot be left entirely to State libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of New York Times are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

The Court thus expanded its holdings in the New York Times line of cases including Time, Inc., (p. 155 at fn. 19), to include public figures who were not necessarily public officials.

Another case is St. Amant v. Thompson, 390, U.S. 7, 27 (1968), involving a defamation suit by a deputy sheriff against a candidate for public office. The Supreme Court, here, elaborated further on the New York Times rule. Referring to the New York Times, Garrison and Curtis Pub. Co. Cases it stated:

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrate actual malice. See also, Ocala Star-Banner Co. v. Damson, 91 S. Ct. 628 (1971).

In conclusion then, should a Congressman be sued by persons in the "public official" or "public figure" categories for defamation in unofficially circulating the Congressional Record or reprints, it would seem logical to speculate that the New York Times rule would apply. No cases against Congressmen involving this precise situation have been found since the New York Times rule was handed down. How far the Court will go in expanding or modifying the rule or its application, can not yet be determined. As one commentator states (Bertelsman: Libel and Public Men, 52 American Bar Assoc. Journal, 657, 662 (1966):

> But the particular applications of the Times rule and the precise synthesis between the competing legal interests its development necessarily involves remains to be forged by the Supreme Court amid the flames of actual controversy on the traditional anvil of the common law's case-by-case method. Whatever exegesis the Court ultimately places on the text of New York Times, it is certain to be fraught with significance for the constitutional history of our nation.

For a case in which a public official (a U. S. Senator and candidate for President) established the "actual malice" prerequisite of the Times case, see Goldwater v. Ginzburg, 414 F. 2d 324 (1969), cert. denied 396 U.S. 1049 (1970), rehearing denied, 397 U.S. 978 (1970).

B. Criminal Action and the Speech or Debate Clause

The case of U.S. v. Johnson, 383 U.S. 169 (1966) in the Supreme Court involved a former Congressman who had been convicted in the District Court on a number of counts for violating the conflict of interest statute, 18 U.S.C. 281, and one count of conspiring to defraud the U.S. under 18 U.S.C. 371. The conspiracy charged alleged agreement to attempt to influence the Justice Department to drop charges of mail fraud pending against certain Savings and Loan Companies and that the Congressman would deliver a speech for pay in the House favorable to the companies. The Court of Appeals below ordered retrial on the substantive counts as being tainted by the evidence adduced on the conspiracy count which it held to be barred by the constitutional privilege of speech or debate. In the Supreme Court the only question involved the taking of money to give a speech on the floor of Congress--"It is the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem with which we deal." The Court, at the conclusion of its opinion, stated that it did not pass upon the Court of Appeals order for a new trial for the conflict of interest counts since they were not argued. It noted the Government Counsel's oral argument that only the privilege and the question of taking money to make a congressional speech was brought up in the Supreme Court (p. 186, fn. 16). The Supreme Court affirmed the Court of Appeals ruling and remanded to the District Court for further proceedings consistent with its opinion.

Mr. Justice Harlan, in the opinion of the Court, pointed out how the attention given to the substance of the speech and its motivation had affected the trial and concluded on this aspect of the case, that:

> The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence. The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence. The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech. Johnson's defense quite naturally was that his remarks were no different from the usual congressional speech, and to rebut the prosecution's case he introduced speeches of several other Congressmen speaking to the same general subject, argued that his talk was occasioned by an unfair attack upon savings and loan associations in a Washington, D. C., newspaper,and asserted that the subject matter of the speech dealt with a topic of concern to his State and to his constituents. We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it.

He then turned to the constitutional privilege itself, noting its background and how it reinforced "the separation of powers so deliberately established by the Founders...ensuring the independence of the legislature." Further, he noted the lack of "judicial illumination of the clause" and pointed out that "clearly no precedent controls the decision in the case before us." He briefly reviewed Kilbourn v. Thompson, 103 U.S. 168 (1880), and Tenney v. Brandhove, 341 U.S. 367 (1951), concluding that the constitutional clause must be read broadly to cover not only words spoken "but anything generally done in a session of the House by one of its members in relation to the business before it and that an unworthy purpose or motive does not destroy the privilege." He noted and reasoned that, (original footnotes included):

The Speech or Debate Clause of the Constitution was approved at the Constitutional Convention without discussion and without opposition. See V Elliot's Debates 406 (1836 ed.); II Records of the Federal Convention 246 (Farrand ed. 1911). The present version of the clause was formulated by the Convention's Committee on Style, but the original vote of approval was of a slightly different formulation which repeated almost verbatim the language of Article V of the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress...." The language of that Article, of which the present clause is only a slight modification, is in turn almost identical to the English Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c.2.

This formulation of 1689 was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart Monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.[13/] Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. See, e.g., Story, Commentaries on the Constitution §866; II The Works of James Wilson 27-38 (Andrews ed. 1896). In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. As Madison noted in Federalist No. 48:

13/See generally C. Wittke, The History of English Parliamentary Privilege (Ohio State Univ. 1921); Neale, The Commons' Privilege of Free Speech in Parliament, in Tudor Studies (Seton-Watson ed.1924).

> "It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved."(Cooke ed.)

The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the "practical security" for ensuring the independence of the legislature.

In part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause. Clearly no precedent controls the decision in the case before us. This Court first dealt with the clause in Kilbourn v. Thompson, 103 U.S. 168, a suit for false imprisonment alleging that the Speaker and several members of the House of Representatives ordered the petitioner to be arrested for contempt of Congress. The Court held first that Congress did not have power to order the arrest, and second that were it not for the privilege, the defendants would be liable. The difficult question was whether the participation of the defendants in passing the resolution ordering the arrest was "speech or debate." The Court held that the privilege should be read broadly, to include not only "words spoken in debate," but anything "generally done in a session of the House by one of its members in relation to the business before it." 103 U.S., at 204.

> In Tenney v. Brandhove, 341 U.S. 367, at issue was whether legislative privilege protected a member of the California Legislature against a suit brought under the Civil Rights statute, 8 U.S.C. §§43, 47 (3) (1946 ed.), alleging that the legislator had used his official forum to "intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances...." 341 U.S., at 371. The Court held a dismissal of the suit proper; it viewed the state legislative privilege as being on a parity with the similar federal privilege, and concluded that--
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> > "The claim of an unworthy purpose does not destroy the privilege.... The holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S., at 377.

The opinion then noted that neither Kilbourn nor Tenney were criminal prosecutions of a member based upon a congressional speech. Mr. Justice Harlan stated his conclusion that the privilege does apply to criminal prosecutions, so based, stating his reasons therefor and the limitations of his ruling thereon as follows(original footnotes included):

> However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.

> Even though no English or American case casts bright light on the one before us14/it is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in Kilbourn and Tenney, but rather to prevent intimidation by the executive and accountability before a possible hostile judiciary. In the notorious proceedings of King Charles I against Eliot, Hollis, and Valentine, 3 How. St. Tr. 294 (1629), the Crown was able to imprison members of Commons on charges of seditious libel and conspiracy to detain the Speaker in the chair to prevent adjournment.15/ Even after the Restoration, as Holdsworth noted, "[t]he law of seditious libel was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government." VI Holdsworth, A History of English Law, 214 (1927). It was not only fear of the executive that caused concern in Parliament but of the judiciary as well, for the judges were often lackeys of

14/Compare the King v. Boston, 33 Commw. L.R. 386 (Austl. 1923); The Queen v. White, 13 Sup. Ct. R. 322 (N.S.W. 1875; Regina v. Bunting, 7 Ont. 524 (1885), for Commonwealth cases dealing with the general question of liability of legislators for bribery in distinguishable contexts. See 78 Harv. L. Rev. 1473, 1474.

15/The Court in that case attempted to distinguish between the true privilege and unlawful conspiracies:

> "And we hereby will not draw the true Liberties of Parliamentmen into question; to wit, for such matters which they do or speak in a parliamentary manner. But in this case there was a conspiracy between the Defendants to slander the State, and to raise sedition and discord between the king, his peers, and people; and this was not a parliamentary course.
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> . . . . . .
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> "That every of the Defendants shall be imprisoned during the king's pleasure: Sir John Elliot to be imprisoned in the Tower of London, and the other Defendants in other prisons." 3 How. St. Tr., at 310.

See the account in Taswell-Langmead's English C nstitutional History (Plucknett ed. 1960), at 376-378. After the Restoration, some 38 years after the trial, Parliament resolved that the judgment "was an illegal judgment, and against the freedom and privilege of Parliament." The House of Lords reversed the convictions in 1668. See Taswell-Langmead, supra, at 378, note 55.

the Stuart monarchs,16/levying punishment more "to the wishes of the crown than to the gravity of the offence." Id.,at 214-215. There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause, In scrutinizing this criminal prosecution, then, we look particularly to the prophylactic purposes of the clause.17/

The Government argues that the clause was meant to prevent only prosecutions based upon the "content" of speech, such as libel actions, but not those founded on" the antecedent unlawful conduct of accepting or agreeing to accept a bribe." Brief of the United States, at 11. Although historically seditious libel was the most frequent instrument for intimidating legislators, this has never been the sole form of legal proceedings so employed,18/in the

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16/See Holdsworth, supra, at 503-511.

17/Compare Thornhill v. Alabama, 310 U.S. 88, and New York Times Co. v. Sullivan, 376 U.S. 254, for expressions of the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments.

18/See, e.g., Strode's Case, one of the earliest and most important English cases dealing with the privilege. In 1512, Richard Strode, a member of Commons from Devonshire, introduced a bill regulating tin miners which appears to have been motivated by a personal interest. He was prosecuted in a local Stannary Court, a court of special jurisdiction to deal with tin miners, for violating a local law making it an offense to obstruct tin mining. He was sentenced and imprisoned. Parliament released him in a special bill, declaring "That suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, grievances, charges, and impositions, put or had, or hereafter to be put or had, unto or upon the said Richard, and to every other of the person or persons afore specified that now be of this present Parliament, or that of any Parliament hereafter shall be, for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament to be communed and treated of, be utterly void and of none effect." 4 Hen. 8, c. 8, as reproduced in Tanner, Tudor Constitutional Documents 558, 559 (2d ed. 1930); see Taswell-Langmead, supra, at 248-249. During the prosecution of Sir John Eliot in 1629 it was argued that Strode's Act applied to all legislators, but the court held that it was a private act. 3 How. St. Tr. 294, 309. In 1667 both Houses of Parliament declared by formal resolutions that Strode's Act was a general law, "And that it extends to indemnify all and

broadest terms. The broader thrust of the privilege is indicated by a nineteenth century British case, Ex parte Wason, L.R. 4 Q.B. 573 (1869), which dealt specifically with an alleged criminal conspiracy. There a private citizen moved that a magistrate be required to prosecute several members of the House of Lords for conspiring wrongfully to prevent his petition from being heard on the floor. The court denied the motion, stating that statements made in the House "could not be made the foundation of civil or criminal proceedings.... And a conspiracy to make such statements would not make the person guilty of it amenable to the criminal law." Id., at 576. (Cockburn, C.J.) Mr. Justice Lush added, "I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." Id., at 577.

In the same vein the Government contends that the Speech or Debate Clause was not violated because the gravamen of the count was the alleged conspiracy, not the speech, and because the defendant, not the prosecution, introduced the speech itself.19/ Whatever room the Constitution may allow for such factors

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every the Members of both Houses of Parliament, in all Parliaments, for and touching all Bills, speaking, reasoning, or declaring of any Matter or Matters in and concerning the Parliament, to be communed and treated of and is only a declaratory law of the antient and necessary Rights and Privileges of Parliament." 1 Hatsell, Precedents of Proceedings in the House of Commons 86-87 (1786); see Taswell-Langmead, supra, at 378, note 55. The central importance of Strode's case in English constitutional history is persuasive evidence that the parliamentary privilege meant more than merely preventing libel and treason prosecutions.

19/The Government, however, did introduce a reprint of the speech in its case-in-chief, in order to show how the co-conspirators made use of it. Certain portions were shown to be outlined in red because, as the prosecution's witness testified,"these were the points most pertinent to what we were trying to put across and for ease in the person's reading it." App. 259. The use of a copy of the speech in this context necessarily required the jury to read those portions and to reflect upon its substance.

in the context of a different kind of prosecution, we conclude that they cannot serve to save the Government's case under this conspiracy count. It was undisputed that Johnson received the funds; controversy centered upon questions of who first decided that a speech was desirable, who prepared it and what Johnson's motives were for making it. The indictment itself focused with particularity upon motives underlying the making of the speech and upon its contents:

> "(15) It was a part of said conspiracy that the said THOMAS F. JOHNSON should... render services, for compensation....to wit, the making of a speech, defending the operations of Maryland's 'independent' savings and loan associations, the financial stability and solvency thereof, and the reliability and integrity of the 'commercial insurance' on investments made by said 'independent' savings and loan associations, on the floor of the House of Representatives." App. 5-6.

We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.20/

20/Cf. Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L.J. 335, 347-348 (1965).

> The Court of Appeals' opinion can be read as dismissing the conspiracy count in its entirety. The making of the speech, however, was only a part of the conspiracy charge. With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.

The Supreme Court affirmed the judgment of the Court of Appeals, which had set aside the conviction on the conspiracy count for violation of 18 U.S.C. 371 (1964 ed.) and ordered a new trial on the conviction on seven counts of violating the conflict of interest statute, 18 U.S.C. 281. It remanded the case to the District Court for further proceedings consistent with the opinion. Subsequently, Johnson was retried and convicted on the substantive conflict of interest charges involving attempts to influence the Department of Justice and his conviction was affirmed, U.S. v. Johnson, 419 F. 2d. 56 (C.A. 4), cert. denied, 397 U.S. 1010.

In U.S. v. Brewster, 408 U.S. 501 (1972) the Court examined the perimeter, the outer boundary, of the Privilege and concluded that while the speech or debate clause of the Constitution protects Members of Congress from inquiry into their legislative act or their motivations for actual legislative performance, it does not protect them from other activities involving action by Members which are political rather than legislative in nature nor does it protect them from prosecution for criminal activities which do not require investigation of motivation for legislative activities. Appellee-defendant, a former Senator, had been charged with soliciting and accepting bribes in exchange for promises related to official acts while a Member of Congress and a Member of the Senate Post Office and Civil Service Committee under 18 U.S.C. 201(c)(1) and 201(g). Section 201(a) defined "public official" to include "Member of Congress." The case had been dismissed in the District Court on appellee-defendant's pre-trial motion pleading the Privilege and the Government took a direct appeal to the Supreme Court under 15 U.S.C. 373. In a six to three opinion the Supreme Court reversed and remanded, holding that the speech or debate clause did not prohibit the prosecution under the statute, that although the privilege does prohibit inquiry into legislative acts and motivations though, citing U.S. v. Johnson, it does not protect all conduct relating to the legislative process, and that prosecution of bribery charges does not necessitate inquiry into legislative acts or motivations.

The Court noted the historical roots of the Privilege and its place in the American constitutional scheme as contrasted wtih the English parliamentary system [footnotes omitted except as indicated]:

The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in United States v Johnson, 383 US 169, 15 L Ed 2d 681, 86 S Ct 749 (1966), Mr. Justice Harlan canvassed the history of the Clause and concluded that it "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." Id., at 178, 15 L Ed 2d at 687 (footnote omitted).

Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

It does not undermine the validity of the Framers' concern for the independence of the legislative branch to acknowledge that our history does not reflect a catalog of abuses at the hands of the Executive that gave rise to the privilege in England. There is nothing in our history, for example, comparable to the imprisonment of a Member of Parliament in the Tower without a hearing and, owing to the subservience of some royal judges to the Seventeenth and Eighteenth Century English Kings, without meaningful recourse to a writ of habeas corpus. In fact, on only one previous occasion has this Court ever interpreted the Speech or Debate Clause in the context of a criminal charge against a Member of Congress.

The Court pointed out that in Johnson the conviction rested on the conflict of interests counts and not on the conspiracy count which would have necessitated inquiry into the making of a speech on the House floor and the motives therefore. It left open the question of a prosecution which though possibly entailing some reference to legislative acts, is founded on a narrowly drawn statute passed by Congress in exercise of its power to regulate its Members conduct. It noted the holding in Johnson and stated, "In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in Congress in the performance of official duties and the motivation for those acts." The Court then considered the many activities of Members of Congress other than the purely legislative activities which are not protected by the Privilege:

> 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 and 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, 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. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court

has regarded the protection as reaching only those things "generally done in a session of the House by one of its members in relation to the business before it," Kilbourn v Thompson, supra, at 204, 26 L Ed at 392, or things "said or done by him as a representative, in the exercise of the functions of that office," Coffin v Coffin, 4 Mass 1, 27 (1808).

Appellee argues, however, that in Johnson we expressed a broader test for the coverage of the Speech or Debate Clause. It is urged that we held that the Clause protected from Executive or Judicial inquiry all conduct "related to the due functioning of the legislative proccess." It is true that the quoted words appear in the Johnson opinion, but appellee takes them out of context; in context they reflect a quite different meaning from that now urged. Although the indictment against Johnson contained eight counts, only one count was challenged before this Court as in violation of the Speech or Debate Clause. The other seven counts concerned Johnson's attempts to influence members of the Justice Department to dismiss pending prosecutions. In explaining why those counts were not before the Court, Mr. Justice Harlan wrote:

"No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise *related to the due functioning of the legislative process*. It is the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem with which we deal." 383 US, at 172, 15 L Ed 2d at 684. (Emphasis added; footnotes omitted.)

In stating that those things "in no wise related to the due functioning of the legislative process" were *not* covered by the privilege, the Court did not in any sense imply as a corollary that everything that "related" to the office of a member was shielded by the Clause. Quite the contrary, in Johnson we held, citing Kilbourn v Thompson, that only acts generally done in the course of the process of enacting legislation were protected.

Nor can we give Kilbourn a more expansive interpretation. In citing with approval, 103 US, at 203, 26 L Ed at 391, the language of Chief Justice Parsons of the Supreme Judicial Court of Massachusetts in Coffin v Coffin, 4 Mass 1 (1808), the Kilbourn Court gave no thought to enlarging "legislative acts" to include illicit conduct outside the House. The Coffin language is:

"[The Massachusetts legislative privilege] ought not to be construed strictly, but liberally that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution, *for every thing said or done by him, as a representative, in the exercise of the functions of that office*, without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber." Id., at 27 (emphasis added).

It is suggested that in citing these words, which were also quoted with approval in Tenney v Brandhove, 341 US 367, 373–374, 95 L Ed 1019, 1025, 71 S Ct 783 (1951), the Court was interpreting the sweep of the Speech or Debate Clause to be broader than Johnson seemed to indicate or than we today hold. Emphasis is placed on the statement that "there are cases in which [a Member] is entitled to this privilege when not within the walls of the representatives' chamber." But the context of Coffin v Coffin indicates that in this passage Chief Justice

Parsons was referring only to legislative acts, such as committee meetings, which take place outside the physical confines of the legislative chamber. In another passage, the meaning is clarified:

"If a member . . . be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article and ought to be considered within the privilege. The body of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for every thing said or done by him in the exercise of his functions as a representative, in committee, either in debating, in assenting to, or in draughting a report." 21/4 Mass, at 28.

[13] In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process. 22/Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.

We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence

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21/It is especially important to note that in Coffin v. Coffin, the court concluded that the defendant was not executing the duties of his office when he allegedly defamed the plaintiff and was hence not entitled to the claim of privilege.

22/See Kilbourn v. Thompson, 103 U.S. 168, 26 L. Ed. 377 (1881) (voting for a resolution); Tenney v. Brandhove, 341 U.S. 367, 95 L. Ed. 1010, 71 S. Ct. 783 (1951) (Harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); United States v. Johnson, 383 U.S. 169, 15 L. Ed. 2d 681, 86 S. Ct. 749 (1966) (making a speech on House floor); Dombrowski v. Eastland, 387 U.S. 82, 18 L. Ed. 2d 577, 87 S. Ct. 1425 (1967) (subpoenaing records for committee hearing); Powell v. McCormack, 395 U.S. 486, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969) (voting for a resolution).

In Coffin v. Coffin, 4 Mass 1 (1808), the state equivalent of the Speech or Debate Clause was not held to be inapplicable to a legislator who was acting outside of his official duties.

> of the Legislative branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.

Distinguishing between taking or agreeing to take money for a promise to commit an illegal act, and the actual performance of the act, i.e., the legislative act of voting, the Court held that the immunity clause did not extend to the first premise

> The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
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> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an "act resulting from the nature and execution of the office." Nor is it "a thing said or done by him as a representative in the exercise of the functions of the office," 4 Mass., at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." 383 U. S., at 185.
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> Nor does it matter if the Member defaults on his illegal bargain. To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act. If, for example, there were undisputed evidence that a Member took a bribe in exchange

> [illegible] agreement to vote for a given bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime?
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> Another count of the indictment against appellee alleges that he "asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive" money "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . ." This count is founded on 18 U. S. C. § 201 (g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

The Court noted that our Founding Fathers were aware of both the history of abuse of privilege in England and of the need for a privilege, and therefore provided a shield which does not extend beyond what is necessary to preserve the integrity of the legislative process. It considered the power of each House of Congress to punish their Members, under Article 1, section 5 of the Constitution, in relation to a broad interpretation of the privilege to exempt all matters having any relationship to the legislative process and concluded it to be unworkable. It also considered the danger of permitting the Executive to initiate prosecution of a Member of Congress for the specific crime of bribery as subject to serious potential abuse that might endanger the independence of the legislature but concluded that the danger is balanced by the system of checks and balances in our governmental scheme. Finally the Court examined the specific charges in relation to the Privilege and ruled:

> The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities which are casually or incidentally related to legislative affairs but not a part of the legislative process itself. Under this indictment and these statutes no such proof is needed.
>
> We hold that under this statute and this indictment, prosecution of appellee is not prohibited by the Speech or Debate Clause. Accordingly the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

In a dissenting opinion with which Justice Douglas concurred, Justice Brennan expressed his concern about the distinction by the Court between the legislative act of voting - which was admittedly protected - and the promise to be influenced in voting, which it considered not to be protected, feeling that the point had been decided in U.S. v. Johnson, supra just six years before. Motivation, which was protected, was a part of the crime, he held, and he deplored the fact that the thesis accepted by the majority, and which had been argued by the Government in the Johnson case and had been turned down, should have been adopted so readily so soon thereafter.

In a dissent with which Justices Douglas and Brennan concurred, Justice White held that the crime charged necessarily implicated the Member's legislative duties, and that to differentiate between a promise to vote and the vote itself opened the door to possible control over legislative conduct by the Executive in contradiction of the purpose of the Speech or Debate Clause. Holding that Congress could not waive the immunity of its Members in situations involving legislative acts, he deemed each House of Congress to be the proper body for disciplining its Members in such situations.

Trial of the case on the merits has been held and the former Senator was deemed guilty of "receiving an unlawful gratuity."

Another outer limit of the Privilege of Speech or Debate was examined by the Supreme Court in Gravel v. U.S., 408 U.S. 60 (1972) handed down on the same day as the Brewster Case. The question considered here was, how far does the Privilege extend to protect the Member and his employee in a Grand Jury investigation of possible violations of criminal statutes? The Senator, Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, read to a meeting of the Subcommittee from highly classified ("Top Secret-Sensitive") Defense Department documents, subsequently known in popular parlance as the "Pentagon Papers", and then placed all 47 volumes in the public record; subsequently, he attempted private publication thereof.

Thereafter a federal grand jury, convened to investigate possible criminal conduct under 18 U.S.C. 641 (retention of public property or records with intent to convert), 18 U.S.C. 793 (gathering and transmitting defense information), 18 U.S.C. 2071 (concealment and removal of public records or documents) and 18 U.S.C. 371 (conspiracy to commit such offenses and to defraud the United States), subpoenaed as witnesses and aid to the Senator, who had been added to the Senator's staff the same day the Senator introduced the documents in the public record, and the editor of a private book-publishing firm with which the Senator had arranged for republication of the "Pentagon Papers."

The Senator, claiming his privilege of speech or debate (Art. 1, sec. 6) intervened in the District Court, with motions to quash the subpoenas and to require the Government to specify the particular questions to be addressed to his aid, Rodberg. The District Court overruled the motions but entered an order proscribing certain catagories of questions, U.S. v. Doe, 332 F. Supp. 930 (1971).

It shielded from inquiry (1) anything the Senator did at the subcommittee meeting and certain acts done in preparation therefor and (2) things done by Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator. It held the private republication of the documents not privileged.

The Court of Appeals, (U.S. v. John Doe (C.A.), 455 F. 2d 753, (1972)), affirmed the denial of the motions but modified the protective order. The Court agreed that the Senator and aide were one for the purposes of the privilege respecting legislative acts; it also barred direct inquiry of the Senator and aide but not of third parties respecting the sources of the Senator's information used in performing legislative duties. Although private publication by the Senator on a private press was not protected and third parties could be inquired of, both the Senator and aide could not be questioned about it because of a common law privilege akin to the judicially created privilege of executive officers from liability for libel, Barr v. Matteo, 360 U.S. 564 (1959).

On appeal from both parties, the Supreme Court ruled that the privilege applied to protect the Senator and also the aide insofar as the aide's conduct would be a protected legislative act if performed by the Senator himself; the privilege, it held, does not extend immunity from testifying about arrangements for private publication as such publication had no connection with the legislative process; the aide, it stated further, had no non-constitutional privilege with respect to questions concerning private publication, or with respect to third party conduct under valid investigation by the grand jury or questions relevant to tracing the source of highly classified documents that came into the Senator's possession so long as the questions do not implicate legisltive action of the Senator; and, thus, that the Appeals Court order was overly broad in enjoining interrogation of the aide with respect to any act, "in the broadest sense," that he performed within the scope of his employment since the aide's immunity

extended only to legislative acts as to which the Senator would be immune.

In its opinion the Supreme Court noted that the privilege from arrest, in the same sentence as the speech or debate privilege, exempts Members from civil arrest only, not from service of civil process or as a witness in a criminal case, nor does it exempt from arrest and sentence in criminal cases. The Court said:

> "Since . . . the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit . . . ." Williamson v United States, 207 US 425, 446, 52 L Ed 278, 290, 28 S Ct 163 (1908). Nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters. Long v Ansell, supra, at 82-83, 79 L Ed at 209, 210, or as a witness in a criminal case. "The constitution gives to every man, charged with an offense, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a *subpoena*, in such cases." United States v Cooper, 4 Dall 341, 1 L Ed 859 (1800) (per Chase, J., sitting on Circuit). It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. Williamson v United States, supra; cf. Burton v United States, 202 US 344, 50 L Ed 1057, 26 S Ct 688 (1906). Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons. Jefferson, Manual of Parliamentary Practice, S Doc No 91-2 437 (1971).

The Court recognized that the Speech or Debate Clause, however, protects the Senator from civil or criminal liability and from questioning elsewhere with respect to events occurring at the subcommittee hearing:

> In recognition, no doubt, of the force of this part of Clause 6, Senator Gravel disavows any assertion of general immunity from the criminal law. But he points out that the last portion of Clause 6 affords Members of Congress another vital privilege—they may not be questioned in any other place for any speech or debate in either House. The claim is not that while one part of Clause 6 generally permits prosecutions for treason, felony and breach of the peace, another part nevertheless broadly forbids them. Rather, his insistence is that the Speech or Debate Clause at the very least protects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible. The Speech or Debate Clause was designed to assure a coequal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch.

The Privilege, it held, also extends to Rodberg, the aide, for matters which would have been protected legislative acts if performed by the Senator himself:

> We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be "treated as one," *United States* v. *Doe*, 455 F. 2d, at 761; or, as the District Court put it: the "Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *United States* v. *Doe*, 332 F. Supp., at 937–938. Both courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States* v. *Johnson*, 383 U. S. 169, 181 (1966)—will inevitably be diminished and frustrated.

The Court distinguished the cases of 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) where the privilege was unavailable to House or Senate committee employees:

None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. The three cases reflect a decidedly jaundiced view towards extending the clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings. In Kilbourn, the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the Speech or Debate Clause; in Eastland, the committee counsel was gathering information for a hearing; and in Powell, the Clerk and Doorkeeper were merely carrying out directions that were protected by the Speech or Debate Clause. In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.

None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In Kilbourn-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So too in Eastland, as in this case, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v Johnson, 383 US 169, 15 L Ed 2d 681, 86 S Ct 749 (1966).

The United States fears the abuses that history reveals have occurred when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws. But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf,23/ and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it

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

> immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

The Court was convinced that private republication of the Pentagon Papers is not protected by the Privilege. It noted that the English Privilege did not protect the private republisher from responsibility, citing Stockdale v. Hansard, 112 K.B. 1112, 1156 (1839) and that this had been aceepted in Kilbourn v. Thompson, 103 U.S. at 202 as a "sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England" and as a reasonable basis for inferring "that the framers of the Constitution meant the same thing by the use of language borrowed from that source." 103 U.S. at 202. It stated further:

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

a civil or criminal judgment against a Member because that conduct is within the "sphere of legitimate legislative activity." Id., at 376, 95 L Ed at 1026. 24/

But the clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. United States v Johnson decided at least this much. "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 US, at 172, 15 L Ed 2d at 683. Cf. Burton v United States, 202 US 344, 367-368, 50 L Ed 1057, 1065, 26 S Ct 688 (1906).

Legislative acts are not all-encompassing. The heart of the clause 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 consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." United States v Doe, 455 F2d 753, 760 (CA1 1972).

Here private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the House; nor does questioning as to private publication threaten the integrity or independence of the House by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings; the record and any report that was forthcoming were available both to his committee and the House. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the

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24/The Court in Tenney, 341 U.S., at 376-377, 95 L. Ed. at 1026-1027, was equally clear that "legislative activity" is not all-encompassing, nor may its limits be established by the Legislative Branch: "Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since Ashby v. White, 2 Ld.Raym.938, 3 id, 20. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting out side its legislative role. Kilbourn v. Thompson, 103 U.S. 168 [26 L. Ed. 377]; Marshall v. Gordon, 243 U.S. 521 [61 L. Ed. 881, 37 S. Ct. 448]; compare McGrain v. Daugherty, 273 U.S. 135, 176 [71 L. Ed. 580, 593, 47 S. Ct. 319, 50 ALR 1]."

publication.25/We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

There are additional considerations. Article I, § 6, cl 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers was a crime under an Act of Congress, it was not entitled to immunity under the Speech or Debate Clause. It also appears that the grand jury was pursuing this very subject in the normal course of a valid investigation. The Speech or Debate Clause does not in our view extend immunity to Rodberg, as a Senator's aide, from testifying before the grand jury about the arrangement between Senator Gravel and Beacon Press or about his own participation, if any, in the alleged transaction, so long as legislative acts of the Senator are not impugned.

25/The sole constitutional claim asserted here is based on the Speech or Debate Clause. We need not address 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. Of course, Art. I, Sec. 5, cl. 3, requires that each House "keep a Journal of it its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy...." This Clause has not been the subject of extensive judicial examination. See Field v. Clark, 143 U.S. 649 670-671, 36 L. Ed. 294, 302-303, 12 S. Ct. 495 (1892); United States v. Ballin, 144 U.S. 1, 4, 36 L. Ed. 321, 324, 12 S. Ct. 507 (1892).

With respect to the nonconstitutional testimonial privilege, judicially constructed by the Court of Appeals, it said:

> Similar considerations lead us to disagree with the Court of Appeals insofar as it fashioned, tentatively at least, a nonconstitutional testimonial privilege protecting Rodberg from any questioning by the grand jury concerning the matter of republication of the Pentagon Papers. This privilege, thought to be similar to that protecting executive officials from liability for libel, cf. Barr v Matteo, 360 US 564, 3 L Ed 2d 1434, 79 S Ct 1335 (1959), was considered advisable "to the extent that a congressman has responsibility to inform his constituents . . . ." 455 F2d, at 760. But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute. The so-called executive privilege has never been applied to shield executive officers from prosecution for crime, the Court of Appeals was quite sure that third parties were neither immune from liability nor from testifying about the republication matter and we perceive no basis for conferring a testimonial privilege on Rodberg as the Court of Appeals seemed to do.

Finally, the Court reviewed the protective order of the Court of Appeals and on concluding that it was too broad, proceeded to vacate that judgment and remand for further proceedings consistent with its own opinion, supra.

In a dissent with which Justices Douglas and Marshall joined, Justice Brennan held that the publication arrangements should come within the Speech or Debate Clause on the theory that the activities of Congressmen in communicating with the public, the so-called "information function," are legislative acts protected by the Clause.

The Government, in a footnote to its Brewster Appeal, supra, cited U.S. v. Dowdy, Criminal No. 70-0123 (District of Maryland), denying a motion to dismiss, on the grounds of immunity, a bribery charge, as reaching a result consistent with the Government's Brewster argument. The footnote states (Brewster, p. 6, note 4):

> We note that a result consistent with the view we advocate was recently reached by Chief Justice Thomsen, in an opinion denying the motion of former Congressman Dowdy to dismiss criminal charges against him based upon bribery. United States v. Dowdy, et al. Cr. No. 70-0123, (D. of Md.) decided on July 16, 1970.

The opinion mentioned has not been published in the Reporter System as yet. According to accounts (Washington Post, July 17, 1970, p. c-1, c-3) the basis of the motion was the Speech and Debate Clause.

The account stated in part:

> A federal judge in Baltimore yesterday rejected the claim of Rep. John Dowdy (D-Tex.) that he is immune from prosecution on federal bribery and conspiracy charges because they arose out of his activities as a congressman.
>
> Judge Roszel C. Thomsen denied a motion by Dowdy that sought dismissal of charges that he took $25,000 to intervene in a federal investigation of a Washington area home improvement firm.
>
> Thomsen's decision clears the way for Dowdy's trial.
>
> . . .
>
> Representative Dowdy was charged with seeking to intervene in an investigation by the U.S. attorney's office into the activities of the now-defunct Monarch Construction Co. of Silver Spring.
>
> . . .

For much of his opinion, Judge Thomsen relied on Johnson v. United States, 383 U.S. 169 (1966).

Excerpts from the Dowdy opinion are as follows:

"In United States v. Johnson, supra, the Supreme Court reviewed the history of the constitutional prohibition, the policies which underlay it and the Court's prior interpretations of the provision in Kilbourn v. Thompson, 103 U.S. 168 (1880), and Tenney v. Brandhove, 341 U.S. 367 (1951). The Court then held that Congressman Johnson's conviction on a charge of conspiracy to defraud the United States offended the language and purposes of that clause because a substantial part of the government's case, both its proof and its conspiracy theory, drew into question a speech which Johnson had made on the floor of the House, its contents, and his allegedly corrupt motivation in making it.

"The Court said that even the broadest application of the Speech or Debate Clause will not afford protection from prosecution to a Congressman whose alleged criminality 'is in no wise related to the due functioning of the legislative process.' 383 U.S. at 172. It stated that its decision 'does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' 383 U.S. at 185. The Court made explicit one type of conduct it regarded as not protected by the privilege. A part of the conspiracy to defraud charge, and all seven additional counts charging Johnson with conflicts of interest in violation of 18 U.S.C. 281 (now 18 U.S.C. 203), grew out of this attempts -- for pay -- to stop a prosecution of his client by the Department of Justice. The Court said: 'No argument is made, nor do we think it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 U.S. at 172.

"The conspiracy count in the Johnson case was brought under that part of 18 U.S.C. 371 which deals with conspiracies to defraud the United States. The Court characterized the constitutional problem before it as 'the application of this broad conspiracy statute to an improperly motivated speech.' 383 U.S. at 172. It further state, 'We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and policies which underlie it.' 383 U.S. at 177. Again: 'However reprehensible such conduct [giving a floor speech for pay from private interests] may be, we believe that the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions.' 383 U.S. at 180. The Court made its holding clear in the following passage:

> "We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute or general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S. at 184, 185.

* * * * * *

"It appears, therefore, that the privilege protects only 'legislative acts' or acts which relate 'to the due functioning of the legislative process,' United States v. Johnson, 383 U.S. at 172, and it is still an open question whether such 'legislative acts' and the motives therefor may be inquired into in a prosecution which is 'founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.' Ibid, 383 U.S. at 185.

"We must consider whether Counts 1, 2, and 3, (A) relate to the 'due functioning of the legislative process,' and (B) whether they are 'founded upon narrowly drawn statutes passed by Congress in the exercise of its legislative power to regulate the conduct of its members.'

"(A) With the exception of certain overt acts which charge (1) that Dowdy used his official position to obtain records, which were later turned over to Cohen, and (2) that he discussed with the co-conspirators a plan to have Cohen testify before a committee in order to obtain immunity (which was never done), the acts charged to Dowdy cannot reasonably be considered 'Legislative Acts' within the meaning of the Johnson opinion. The object of the conspiracies charged in the first two counts was to prevent the prosecution of Cohen and Monarch by the Department of Justice. Count 3 simply charges interstate travel and use of the facilities of interstate commerce with the intent to facilitate bribery. Aside from the two items mentioned above, Dowdy's conduct which is the subject of the charges in Counts 1, 2, and 3 did not relate to the 'due functioning of the legislative process,' within the meaning of that phrase, as used in United States v. Johnson, at 172, 185.

"The essential elements of the charges in those counts do not relate to legislative acts, and therefore the prosecution of those counts is not barred for that reason, unless the inquiry at the trial includes privileged areas. The Court need not decide at this time what evidence may be offered and what evidence must be excluded. Those matters may be discussed at a pretrial conference. Some of the rulings may have to await the development of the case at the trial.

"(B) An inquiry into the area of 'legislative acts' is not necessarily barred, if the prosecution is 'founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.' United States v. Johnson, 383 U.S. at 169. Counts 1 and 3 charge offenses which are based on 'narrowly drawn statutes passed by Congress in the exercise of its legislative power to regulate the conduct of its members' and do not offend the Speech or Debate Clause.

"Congress has the undoubted constitutional power to regulate the conduct of its members, including the power to inquire into the unlawful motivations of speech, debate or other legislative activities. Article I, sections 5 and 6, Powell v. McCormack, 395 U.S. 486, 548 (1959). Congress has seen fit to delegate its responsibility for policing such conduct to the Executive and Judiciary Branches by the enactment of narrowly drawn statutes.

"For more than a century Congress has delegated to the courts the responsibility for trying legislators accused of accepting bribes. In the 1962 revision of the conflict of interest statutes, Congress responded to increased national concern over the ethical standards of political officials by reaffirming and broadening this delegation of authority to the courts. The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 341 (1965).

"Where Congress clearly intended to delegate such responsibilities, the Speech or Debate Clause should not be permitted to frustrate its intent. Congress itself still retains the ultimate control over the exercise of this authority; and so, the policy of the Clause is served. If the purpose of the Clause is the preservation of the independence of the legislative branch, a specific, revocable delegation of its power to regulate the conduct of its own members, pursuant to which the legislative acts of its members may be drawn into question, does not impinge upon this independence.

"Sections 203 (conflict of interest) and 201 (bribery) are the sort of narrowly drawn statutes evidently contemplated by Johnson as an exercise of Congress' power to police its members. Each represents the present expression of an uninterrupted course of legislative intent to permit the executive to bring, and federal courts to hear, prosecutions of Members of Congress. The legislative history of 18 U.S.C. 201 and its predecessors, discussed by the government in its brief, supports the conclusion that Congress has consistently intended the bribery statutes to cover the actions, votes and decisions of its Members. Although the Supreme Court has never interpreted the Clause to apply only to speech and debate on the floor of Congress, but rather to include all legislative activities of Members of Congress. Congress has seen fit to enact and reenact bribery statutes applicable to these same legislative activities without every questioning its power to do so. In view of this legislative and judiciary history, an interpretation of the Speech or Debate Clause which would render b bery prosecutions of Members of Congress under section 201 constitutionally void where the legislative acts and motivations of the Members are drawn in question, would frustrate the wishes of Congress and impair its ability to regulate the conduct of its Members."

At the trial of the case in the U.S. District Court for the District of Maryland, the Congressman was convicted and on February 23, 1972 sentenced to fine and imprisonment. The case has now been appealed to the Fourth Circuit but as yet no date for hearing has been set. The opinion on appeal will be the first published in the reporter system and may well include a discussion of the refusal of the trial court to dismiss on the basis of privilege.

C. Elections - Political Campaigns and Election Practices.

The use of the frank by defendant Member for mass mailings (i.e., questionnaires) to residents of a new District, whose Member was not the incumbent but

merely a candidate, was enjoined until such time as Member became a duly elected Member-Elect or Member of Congress representing that District, Hoellen v. Annunzio, U.S. D.C., (Ill, N.D., E. Dis.) Civil Action, No. 72C 1302. (Sept. 15, 1972). [Not yet reported in F. Supp., for opinion see Committee Print, 92d Congress, 2d Session, Report of the Joint Committee on Congressional Operations....Identifying Court Proceedings and Actions of Vital Interest to the Congress. Cumulative to September 25, 1972, pp. 138-151.] The Court held the mass mailings not to be "upon official business" as required by 39 U.S.C. 3210.

The Court considered the Constitutional Privilege in determining the question of its jurisdiction to decide the issue (pp. 146-149):

> It remains for us to inquire whether there is any basis for our refusing to accept jurisdiction other than the political question doctrine. The fountainhead of the principle of Congressional immunity from suit is the Speech or Debate Clause of the Constitution, Article I, § 6, which is not raised specifically by the defendant or the House of Representatives Committee on House Administration in its *amicus curiae* brief. We must nevertheless inquire whether that clause bars this action against a Member of Congress or precludes us from granting injunctive relief.
>
> The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other place." The Supreme Court had held in cases preceding *Powell* and *Brewster* that the protection of the Clause was confined to Members acting in the sphere of "legitimate legislative activity. . . . The Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove*, 341 U.S. 367, 376–77 (1951).

The issue is whether the alleged conduct complained of here, the use or misuse of the frank, is within the penumbra of the Clause's protection. Stated another way, the question is whether the use of the franking privilege to communicate with the public is within that sphere of direct legislative activity for which a Congressman's motivation is immunized from judicial inquiry.[6] For the gravamen of the plaintiff's complaint here is that Congressman Annunzio sent out the mailings in question for political purposes, *i.e.*, to aid in his campaign for reelection, rather than for legislative purposes, *i.e.*, to inform the public about legislative matters or to inform himself of the public's views on legislative matters. Plaintiff plainly asks us to inquire into the motive with which the defendant Congressman acted. If the activity—the mailings under the frank—is within the sphere protected by the Speech or Debate Clause, a motivational inquiry would be foreclosed by that clause; and this Court would be unable to entertain the complaint.

The *Brewster* decision is decisive of this issue. In holding that the Speech or Debate Clause did not immunize Senator Brewster from prosecution on federal bribery charges, the Supreme Court distinguished between Congressional conduct which is clearly part of the legislative process—such as voting, speaking on the floor or conducting a legislative hearing—and conduct which is incidentally related to the legislative process. The Court, 92 S. Ct. at 2537, confined the protections of the Clause to the former and specifically included the conduct with which we are concerned in the instant case in the latter:

> "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 and 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, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have

[6] That the Speech or Debate Clause forbids both the Executive and Judicial Branches of the Government from questioning the motivation of legislators for "legitimate legislative activity" is no longer in doubt. The foreclosure of a motivational inquiry was one of the most important objectives of the framers in devising the Speech or Debate Clause. *See Tenney* v. *Brandhove*, *supra*, at 377. But what is at issue is the nature of the Congressional activity to which the protections of the clause attach and thus for which a Member's motivation will not be questioned.

> 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. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause."

In light of this language, there can be no doubt that the activities at issue in this case, sending out documents and questionnaires to constituents and others, while "entirely legitimate activities" related to the legislative process, are not "purely legislative activities" protected by the Speech or Debate Clause. Therefore no doctrine of legislative immunity precludes judicial inquiry into the legality of Congressman Annunzio's use of the frank in this case, even if that inquiry necessitates a consideration of his motives in making the mailings.

Finally, with regard to injunctive relief, it follows *a fortiori* from the holding in *Brewster* that if conduct by a Member of Congress which is outside the sphere of purely legislative activity is not immunized from criminal prosecution, then conduct in that category is not immunized from injunctive relief. The issuance of an injunction should be governed in this case by the same equitable principles that govern the issuance of an injunction in the usual case.

The Seventh Circuit U.S. Court of Appeals affirmed the judgment of the lower court on October 20, 1972 (John J. Hoellen, Plaintiff-Appellee v. Frank Annunzio, Defendant Appellant, No. 72-1794). In regard to the immunity clause argument it stated:

> Defendant's reliance on the Speech or Debate Clause as foreclosing inquiry into his motivation assumes that the mailing was a legislative act. But, as the district court clearly recognized, the Supreme Court's recent decision in United States v. Brewster, 408 U.S. 501, requires rejection of that assumption. Although a Congressman's motivation for a legislative act may not be questioned, the clause does not preclude consideration of his motive in the determination of whether a particular mailing was "upon official business...."

In a second decision respecting misuse of the franking privilege a similar conclusion was reached as regards to the Speech or Debate Clause (Alfred D. Schiaffo v. Henry Helstoski, U.S. D.C., District of Newy Jersey, Civil Action 1571-72, October 18, 1972).

D. Exclusion of Member-Judicial Review: Privilege a Good Defense for Members Personally But No Bar to Review on Merits or Against Congressional Agents or Employees Charged with Unconstitutional Activity.

In the case of Powell v. McCormack, 395 U.S. 486 (1969) the U.S. Supreme Court ruled in part, where an excluded Member sued the House Speaker and certain other Members, the Clerk, Sergeant at Arms and the Doorkeeper for injunctive, mandatory, and declaratory relief, alleging as unconstitutional exclusion by majority vote based on matters other than the qualifications of age, citizenship and residence in violation of Art. I, §2, cl. 1 of the Constitution, that although the Speech or Debate Clause bars action against all the Members of Congress, it does not bar action against the other respondents, who are legislative employees charged with unconstitutional activity, citing Kilbourn v. Thompson, 103 U.S. 165 and Dombrowski v. Eastland, 387 U.S. 82. It also stated that the fact that House employees are acting pursuant to express orders of the House does not preclude judicial review of the constitutionality of the underlying legislative decision. With respect to the Privilege, the Court reasoned (original footnotes included):

III

Speech or Debate Clause

Respondents assert that the Speech or Debate Clause of the Constitution, Art. I, §6,[26] is an absolute bar to petitioners' action. This Court has on four prior occasions - Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); and Kilbourn v. Thompson, 103 U.S. (1881) - been called upon to determine if allegedly unconstitutional action taken by legislators or legislative employees is insulated from judicialreview by the Speech or Debate Clause. Both parties insist that their respective positions find support in these cases and tender for decision three distinct issues: (1) whether respondents in participating in the exclusion of petitioner Powell were "acting in the sphere of legitimate legislative activity," Tenney v. Brandhove, supra, at 376; (2) assuming that respondents were so acting, whether the fact that petitioners seek neither damages from any of the respondents nor a criminal prosecution lifts the bar of the clause; [27] and (3) even if this action may not be maintained against a Congressman, whether those respondents who are merely employees of the House may plead the bar of the clause. We find it necessary to treat only the last of these issues.

26/ Article I, §6, provides: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

27/ Petitioners ask the Court to draw a distinction between declaratory relief sought against members of Congress and either an action for damages or a criminal prosecution, emphasizing that our four previous cases concerned "criminal or civil sanctions of a deterrent nature." Brief for Petitioners 171.

The Speech or Debate Clause, adopted by the Constitutional convention without debate or opposition, 28/ finds its roots in the conflict between Parliament and the Crown culminating in the Glorious Revolution of 1688 and the English Bill of Rights of 1689.29/ Drawing upon this history, we concluded in United States v. Johnson, supra, at 181, that the purpose of this clause was "to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary." Although the clause sprang from a fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament, 30/ we have held that it would be a "narrow view" to confine the protection of the Speech or Debate Clause to words spoken in debate. Committee reports, resolutions, and the act of voting are equally covered, as are "things generally done in a session of the House by one of its members in relation to the business before it." Kilbourn v. Thompson, supra, at 204. Furthermore, the clause not only provides a defense on the merits but also protects a legislator from the burden of definding himself. Dombrowski v. Eastland, supra, at 85; see Tenney v. Brandhove, supra, at 377.

28/ See 5 Debates on the Federal Constitution 406 (J. Elliot ed. 1876); 2 Records of the Federal Convention of 1787, p. 246 (M. Farrand rev. ed. 1966) (hereinafter cited as Farrand).

29/ The English Bill of Rights contained a provision substantially identical to Art. I, §6: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2. The English and American colonial history is traced in some detail in Cella, The Doctrine of Legislative Provilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk, U.L. Rev. 1, 3-16 (1968), and Yankwich, The Immunity of Congressional Speech - Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 960, 961-966 (1951).

30/ United States v. Johnson, 383 U.S. 169, 182-183 (1966).

Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation. Thus, in Tenney v. Brandhove, supra, at 373, the Court quoted the writings of James Wilson as illuminating the reason for legislative immunity: "In order to enable and encourage a representative of the publick to discharge his publik trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence."31/

Legislative immunity does not, of course, bar all judicial review of legislative acts. That issue was settled by implication as early as 1803, see Marbury v. Madison, 1 Cranch 137, and expressly in Kilbourn v. Thompson, the first of this Court's cases interpreting the reach of the Speech or Debate Clause. Challenged in Kilbourn was the constitutionality of a House Resolution ordering the arrest and imprisonment of a recalcitrant witness who had refused to respond to a subpoena issued by a House investigating committee. While holding that the Speech or Debate Clause barred Kilbourn's action for false imprisonment brought against several members of the House, the Court nevertheless reached the merits of Kilbourn's attack and decided that, since the House had no power to punish for contempt, Kilbourn's imprisonment pursuant to the resolution was unconstitutional. It therefore allowed Kilbourn to bring his false imprisonment action against Thompson, the House's Sergeant at Arms, who had executed the warrant for Kilbourn's arrest.

31/ 1 The Works of James Wilson 421 (R. McCloskey ed. 1967).

The Court first articulated in Kilbourn and followed in Dombrowski v. Eastland 32/ 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. Despite the fact that petitioners brought this suit against several House employees -- the Sergeant at Arms, the Doorkeeper and the Clerk -- as well as several Congressmen, respondents argue that Kilbourn and Dombrowski are distinguishable. Conceding that in Kilbourn the presence of the Sergeant at Arms and in Dombrowski the presence of a congressional subcommittee counsel as defendants in the litigation allowed judicial review of the challenged congressional action, respondents urge that both cases concerned an affirmative act performed by the employee outside the House having a direct effect upon a private citizen. Here, they continue, the relief sought relates to actions taken by House agents solely within the House. Alternatively, respondents insist that Kilbourn and Dombrowski prayed for damages while petitioner Powell asks that the Sergeant at Arms disburse funds, an assertedly greater interference with the legislative process. We reject the proffered distinctions.

That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision. Kilbourn decisively settles this question, since the Sergeant at Arms was held liable for false imprisonment even though he did nothing more than execute the House Reolution that Kilbourn be arrested and

32/ In Dombrowski $500,000 in damages was sought against a Senator and the chief counsel of a Senate Subcommittee chaired by that Senator. Record in No. 118, O.T. 1966, pp. 10-11. We affirmed the grant of summary judgment as to the Senator but reversed as to subcommittee counsel.

imprisoned. 33/ Respondents' suggestions thus ask us to distinguish between affirmative acts of House employees and situations in which the House orders its employees not to act or between actions for damages and claims for salary. We can find no basis in either the history of the Speech or Debate Clause or our cases for either distinction. The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but 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. 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 a lawsuit questioning the employee's failure to act. Nor is the distraction or hindrance increased because the claim is for salary rather than damages, or 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.34/ In Kilbourn and Dombrowski we thus dismissed the action against members of Congress but did not

33/ The Court in Kilbourn quoted extensively from Stockdale v. Hansard, 9 Ad. & E. 1, 114, 112 Eng. Rep. 1112, 1156 (Q.B. 1839), to refute the assertion that House agents were immune because they were executing orders of the House: "[I]f the Speaker, by authority of the House, order an illegal Act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer." Kilbourn eventually recovered $20,000 against Thompson. See Kilbourn v. Thompson, MacArth. & M. 401, 432 (Sup. Ct. D.C. 1883).

34/ A Congressman is not by virtue of theSpeech or Debate Clause absolved of the responsibility of filing a motion to dismiss and the trial court must still determine the applicability of the clause to plaintiff's action. See Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. Similarly, though this action may be dismissed against the Congressmen petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell.[35] As was said in Kilbourn, in language which time has not dimmed:

> "Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." 103 U.S., at 199.

35/ Given our disposition of this issue, we need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available. Cf. Kilbourn v. Thompson, 103 U.S. 168, 204-2-5 (1881).

E. False Imprisonment and Recovery of Damages.

Kilbourn v. Thompson, 103 U.S. 168 (1880), is a leading case on the contempt powers of Congress, as well as on the constitutional privilege of speech or debate. Only such of the facts are stated here as seem necessary for an understanding of the latter. Kilbourn, a partner in the firm of Jay Cook and Co., the affairs of which were involved in a pending bankruptcy case in court, had been subpoenaed to testify and produce books and papers before a Committee of the House of Representatives. The Committee had been appointed under a House Resolution to investigate the bankruptcy of the firm, of which the Government was a creditor, due to the improvident deposit of public moneys therein by the Secretary of the Navy. Kilbourn refused to testify before the Committee. On his further refusal at the Bar of the House, that body held him in contempt and ordered Thompson, the Sergeant-at-Arms, to keep him in custody in the D.C. Jail until he purged himself. Kilbourn appears to have eventually regained his freedom on Habeas Corpus from the D.C. Supreme Court. He then brought this action for damages for false imprisonment against Thompson, the Speaker and the Members of the Committee. The case eventually reached the Supreme Court of the United States.

Mr. Justice Miller, after extensive review, ruled that the House of Representatives had exceeded its powers in adopting the original investigative resolution, since the matter therein was judicial and not legislative, and further, that the House did not possess the power to punish citizens generally for contempt. With respect to contempt, he quoted Burnham v. Morrissey, 14 Gray (Mass.) 226, the last sentence of which summarized the matter: "The House of Representatives [Massachusetts]

has the power under the Constitution to imprison for contempt; but the power is limited to cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from those constitutional functions and duties to the proper performance of which it is essential." Mr. Justice Miller held that the committal of Kilbourn to prison was unjustified since "the House was without authority in the matter."

The Court then ruled on the special pleas of privilege of debate entered by the defendants. With respect to the background and meaning of the privilege, the Court stated:

> We may, perhaps, find some aid in ascertaining the meaning of this provision, if we can find out its source, and fortunately in this there is no difficulty. For while the framers of the Constitution did not adopt the lex et consuetudo of the English Parliament as a whole, they did incorporate such parts of it, and with it such privileges of Parliament, as they thought proper to be applied to the two Houses of Congress. Some of these we have already referred to, as the right to make rules of procedure, to determine the election and qualification of its members, to preserve order, etc. In the sentence we have just cited another of the privileges of Parliament are made privileges of Congress. The freedom from arrest and freedom of speech in the two Houses of Parliament were long subjects of contest between the Tudor and Stuart kings and the House of Commons. When, however, the revolution of 1688 expelled the last of the Stuarts and introduced a new dynasty, many of these questions were settled by a bill of rights formally declared by the Parliament and assented to by the crown. 1 W. & M., st. 2, c. 2. One of these declarations is "that the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

> In Stockdale v. Hansard, [9 AD&E 1 (1839); see 112 Eng. Reports 1112, the quotation appears at p. 1156], Lord Denman, speaking on this subject, says: "The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches, made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So if the speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer."
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> Taking this to be a sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England, it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source.

Mr. Justice Miller further clarified the meaning and scope of the privilege by turning to the construction of analogous language in the Massachusetts Constitution of 1780, by the Supreme Court of that State. This occurred in the case of Coffin v. Coffin, 4 Mass. 1, which he referred to as "perhaps, the most authoritative case in this country on the construction of the privilege in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight," (p. 204). He stated:

This article received a construction as early as 1808, in the Supreme Court of that State, in the case of Coffin v. Coffin (4 Mass. 1), in which Mr. Chief Justice Parsons delivered the opinion. The case was an action for slander, the offensive language being used in a conversation in the House of Representatives of the Massachusetts legislature. The words were not delivered in the course of a regular address or speech, though on the floor of the House while in session, but were used in a conversation between three of the members, when neither of them was addressing the chair. It had relation, however, to a matter which had a few moments before been under discussion. In speaking of this article of the Bill of Rights, the protection of which had been invoked in the plea, the Chief Justice said: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

The report states that the other judges, namely, Sedgwick, Sewall, Thatcher, and Parker, concurred in the opinion.

> This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight. We have been unable to find any decision of a Federal court on this clause of section 6 of article 1, though the previous clause concerning exemption from arrest has been often construed.

The Court then briefly alluded to Story, §863, 1833 ed., quoted supra, and continued:

> It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.
>
> It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matter which have been pressed on our attention, we prefer to decide only what is necessary in the case in hand, and we think the plea set up by those of the defendants who were members of the House is a good defence, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed. As to Thompson, the judgment will be reversed and the case remanded for further proceedings.

F. Investigating Committee, Conduct of

In Barsky v. U.S., 167 F. 2d 241 (1948); cert. denied 334 U.S. 843, the U.S. Court of Appeals (D.C.), affirmed the conviction of the defendant and others, of willful failure to produce records before the House UnAmerican Activities Committee, pursuant to subpoenas in violation of 2 U.S.C. 192. The Committee was investigating whether money collected in this country by the Joint Anti-Fascist Refugee Committee for relief purposes abroad, had in fact been so disbursed. Some evidence had been elicited by the Committee that the funds had been disbursed for political propaganda and not for relief. Among the grounds urged by defendants on appeal was one concerning the conduct and behavior of the Committee in various respects. Associate Justice Prettyman, for the Court, in ruling on this ground commented upon the Privilege:

> Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Eminent persons have stated similar views. But such matters are not for the courts. We so held in Townsend v. United States, citing Hearst v. Black. The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the court in quite as great a degree as the courts." The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused "affords no ground for denying the power." The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and administrative, from liability for damage done by their acts or speech, even though knowing-

> ly false or wrong. [39 U.S. Const. Art. 1, §6; Kilbourn v. Thompson, supra note 15; Cochran v. Couzens, 1930, 59 App. D.C. 374, 42 F. 2d 783 certiorari denied, 1930, 282 U.S. 874, 51 S.Ct. 79, 75 L. Ed. 772; Spalding v. Vilas, 1896, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780; Glass v. Ickes, 1940, 73 App. D.C. 3, 117 F. 2d 273, 132 A.L.R.,1328; Jones v. Kennedy, 1941, 73 App. D.C. 292, 121 F. 2d 40] The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity, within the respective powers of the legislature and the executive.
>
> We hold that in view of the representations to the Congress as to the nature, purposes and program of Communism and the Communist Party, and in view of the legislation proposed, pending and possible in respect to or premised upon that subject, and in view of the involvement of that subject in the foreign policy of the Government, Congress has power to make an inquiry of an individual which may eleicit the answer that the witness is a believer in Communism or a member of the Communist Party. And we further hold that the provision we have quoted from House Resolution No. 5 is sufficiently clear, definite and authoritative to permit this particular Committee to make that particular inquiry. We hold no more than that.

In Dombrowski v. Eastland, 387 U.S. 82 (1967), the U.S. Supreme Court, by per curiam opinion, ruled on this principle directly. Here the Chairman and Counsel of a Senate Subcommittee were sued in damages for having conspired with state officials to seize the property and records of the plaintiffs by unlawful means, in violation of the Fourth Amendment. The District Court had granted both defendants a summary judgment and dismissed the case on the basis of immunity. This was affirmed by the Court of Appeals. The Supreme Court affirmed the ruling below with respect to the Subcommittee Chairman. It reversed and remanded the case to the District Court for further proceedings, however, with respect to the counsel. [See, Court ruling in Anderson v. Dunn, 6 Wheat. 204 (1821) and Kilbourn v. Thompson, 103 U.S. 168 (1881)

respecting the Sergeant-at-Arms' liability and statement in Tenney v. Brandhove, 341 U.S. at 378 on the extension of a lesser privilege to non-member officers and employees.] With respect to the Chairman the Court said:

> In the present case, the court below recognized "considerable difficulty" in reaching the conclusion that, on the basis of the affidavits of the parties, there were no disputed issues of fact with respect to the petitioners' claim. It nevertheless upheld summary dismissal of the action on the ground that "the record before the District Court contained unchallenged facts of a nature and scope sufficient to give [respondents] an immunity against answerability in damages...." In support of this conclusion the court addressed itself to only that part of petitioners' claims which related to the takeover of the records by respondents after the "raids." As to this, it held that the subject matter of the seized records was within the jurisdiction of the Senate Subcommittee and that the issuance of subpoenas to the Louisiana committee to obtain the records held by it was validated by subsequent Subcommittee ratification. On this basis, the court held that the acts for which petitioners seek relief were privileged, citing Tenney v. Brandhove, 341 U.S. 367 (1951).
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> ...It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, Kilbourn v. Thompson, 103 U.S. 168, 204 (1881), that legislators engaged "in the sphere of legitimate legislative activity," Tenney v. Brandhove, supra, 341 U.S., at 376, should be protected not only from the consequences of litigations but also from the burden of defending themselves....

In Stamler v. Willis, 415 F. 2d. 1365 (1969), cert. denied 399 U.S. 929, No. 683 (1970), involving Chairman Willis and Members of the House Unamerican Activities Committee, the Attorney General and the U.S. Attorney (N.D., Ill.), the Court dismissed the action against the Congressmen on the basis of the Privilege. It, however, continued the action against the non-congressional defendants,"since plaintiffs have conceded that 'a judgment against the prosecutors will afford appellants [plaintiffs] all the relief they request, including a declaratory judgment that Rule XI is unconstitutional and an injunction restraining prosecution of the criminal cases'. Therefore, as in the Powell case [see D Exclusion of Member-Judicial Review ..., supra], we need not decide whether under the Speech or Debate Clause the plaintiffs would be entitled to maintain this action solely against Members of Congress where no other remedy was available (see 395 U.S. at p. 506, note 26, 89 S. Ct. at p. 1956)". The present posture of the case is that it has been dismissed as to the congressional defendants on the bases of the Privilege; it remains as to defendant committee staff employees. Parties are presently undergoing discovery motions.

Meanwhile, the related criminal cases against the plaintiff must be deferred.

The Privilege was again involved in Hentoff v. Ichord, U.S. District Court, D.C., 318 F. Supp. 1175 (1970). seeking to enjoin the official publication and distribution of a Report of the House Committee on Internal Security. The defendants were the Members of the Committee, its Chief Counsel, the U.S. Public

Printer and the Superintendent of Documents. The Report, entitled, Limited Survey of Honoraria Given Guest Speakers for Engagements at Colleges and Universities, filed with the House after commencement of the suit, and released to the press, stated its origin in the Committee as:

> Early this year, I became concerned -- as did many of my colleagues -- with frequent news accounts of inflammatory speeches which were being made to large audiences on college and university campuses by the radical rhetoricians of the New Left promoting violence and encouraging the destruction of our system of government. At times, reference was made in these reports to the fact that the speakers who preached such a message of hate for America and its institutions often received substantial appearance fees.
>
> A question which persistently confronts our committee is the one of how and where revolutionary movements in the United States obtain the financing for their activities.

The Report listed the names of 65 individuals implying them to be associated with 12 organization also listed. Without mentioning or recommending legislation, the Report concluded:

> The committee believes that further, more costly, probing of this matter would only add greater detail to the findings -- not greater enlightenment. This report, therefore, concludes the committee's inquiry into the question of honoraria paid campus speakers.

"The Public Printer has been directed initially to print 6,000 copies.

The Plaintiffs contended that the contemplated publication and distribution infringed the First Amendment Freedom of Speech Rights of the listed individuals and was being undertaken by the Committee without any proper legislative purpose. They prayed to enjoin the defendants from any publication and distribution, limiting the Report's disclosure to insertion

in the Congressional Record and such discussion as follows in the normal process of any debate on the floor of the House.

The Defendants moved to dismiss, based in part on the Speech and Debate Clause of the Constitution. With respect to this defense the Court stated:

> First it is suggested that the publication of this Report is protected by the Speech or Debate Clause of the Constitution. Article I, Section 6, Clause 1, of the Constitution reads in pertinent party:
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> > The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place.
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> In considering the application of this Clause to the issues here presented, it should be noted that no injunction is sought to prevent any members of the Committee or other members of the House or Senate from discussing the Report, its contents or its import on the floor of Congress. Nor is any injunction sought which will prohibit placing the Report in the Congressional Record for the information of all members of Congress. Plaintiffs concede and the Court so holds that under the Speech or Debate Clause there is no power in the Court to enter prohibitions of this type. The question presented is a narrower one, namely, whether the Speech or Debate Clause has been or should be interpreted to have a broader application than these privileges which it clearly grants.
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> The scope of the protection afforded by the Speech or Debate Clause has been considered by the Supreme Court on five occasions: Kilbourn v. Thompson, 103 U.S. 168 (1881); Tenney v. Brandhove, 341 U.S. 367 (1951); United States v. Johnson, 383 U.S. 169 (1966); Dombrowski v. Eastland, 387 U.S. 82 (1967); and Powell v. McCormack, 395 U.S. 486 (1969). These cases establish that the courts lack jurisdiction to entertain an action seeking any remedy against a member of Congress for any statement made or action taken in the sphere of legitimate legislative activity. As stated in Powell:

> The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but 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. . . . 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. 395 U.S. at 505.

The Supreme Court in Powell left open the question whether an action could be maintained against Congressmen to compel the seating of a member of the House, the restoration of seniority privileges, and the award of back pay. 395 U.S. at 506, f. 26. Plaintiffs contend that the discussion in Powell, together with such decisions as McGovern v. Martz, 182 F. Supp. 343 (D.D.C. 1960), and Long v. Ansell, 63 U.S. App. D.C. 68, 69 F. 2d 386 (1934), indicates that this Court may restrain Congressmen from publishing, filing, or distributing, except by insertion in the Congressional Record, a report that impinges upon First Amendment rights.

The Court is of a contrary view. Members of Congress have the same right to speak as anyone else. Their legislative activities are not limited to speech or debate on the floor of Congress. Information in this Report involves matters of public concern, and the Court will take no action which limits the use that individual Congressmen choose to make of the Report or its contents on or off the floor of Congress. No injunction is appropriate against any Congressman named defendant. This leaves for disposition the question of what relief, if any, should be granted as to the Public Printer, the Superintendent of Documents */ and employees or representatives of the Committee.

*/ The Superintendent of Documents is a subordinate of the Public Printer. While the Public Printer is appointed by the President, 44 U.S.C. §301, he is a legislative employee. Duncan v. Blattenberger, 141 F. Supp. 513, 515 (D.D.C. 1956).

It is claimed that the protection afforded individual Congressmen by the Speech or Debate Clause is equally applicable to the Public Printer, and any members of the Committee staff when acting at the express direction of the Committee or of Congress. Reliance is placed primarily on Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956), where both the Public Printer and the Superintendent of Documents were among the defendants in an action seeking to enjoin publication and distribution by a Senate Subcommittee on Internal Security of a document which named the plaintiff as a communist-front organization. A three-judge court dismissed the complaint against all defendants, apparently relying, among other things, on the Speech or Debate Clause. While the plaintiff's claim was founded on an alleged libel in the report and not, as here, on an abridgment of First Amendment freedoms, the language of the court was broad:

> Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement. 141 F. Supp. at 731.

In its application to members of Congress, this language is consistent with this Court's decision that no injunction should issue against the members of the Committee. Insofar as the court in Methodist Federation read the Speech or Debate Clause or the separation of powers doctrine to afford complete protection to anyone other than Congressmen, however, the decision has been in effect overruled by Powell, where the Supreme Court stated: "That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision." 395 U.S. at 504. See also, Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Stamler v. Willis, 415 F. 2d 1365, 1368 (7th Cir. 1969).

This case is, of course, somewhat distinguishable from Powell on the grounds that the report of a Committee of Congress is involved rather than congressional action affecting qualification for office. Defendants argue that the printing of a committee report by the Public Printer is a ministerial function necessary to allow Congressmen to bring their views before the Congress and

> the public, and hence a function insulated from judicial power. Nothing in the Constitution or the cases suggests, however, that a committee report is a necessary adjunct to speech or debate in Congress. Article I, Section 5, of the Constitution provides that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same . . .," a mandate fulfilled by the printing of the Congressional Record. As previously indicated, publication of the Report in the Congressional Record cannot be enjoined. Additional printing of a committee report for wide public distribution and sale, however, stands on a wholly different footing. While it is printed and distributed to members of Congress pursuant to statute, 44 U.S.C. §§701 et seq., nothing in the Constitution compels its publication, and its further printing and public distribution is not necessary to give effect to the freedom of Congressmen to speak and debate on or off the floor. The Speech of Debate Clause does not necessarily bar an action to enjoin the Public Printer from printing a committee report for public distribution.

Finally, the Court dismissed the case as to all Congressmen and the Committee's Chief Counsel but enjoined the Public Printer and the Superintendent of Documents from printing and distributing the Report except for its insertion in the Congressional Record. The decision was appealed, but the appeal was withdrawn subsequent to the adoption by the House of H.Res. 1306, 91st Congress, 2nd Sess.,

on December 14, 1970, under which a second report on substantially the same subject matter was filed. The resolution restrained any and all persons, whether or not acting under color of office, from interfering with the printing and dissemination of the report. No order from any court having been issued respecting the second report, the Department of Justice was instructed by the appellant to withdraw the appeal (Daily Congressional Record, April 6, 1971, pp. E 2809-10, remarks of Ch. Ichord).

Doe v. McMillan, 459 F.2d 1304 (1972) was an action for a declaratory judgment, injunction and damages against Members of the House Committee on the District of Columbia, "federal legislative employees, (i.e., clerk, staff director, counsel and consultant to the House Committee on the District of Columbia, its investigators, superintendent of public documents, and the public printer), and District school officials and employees to enjoin further publication and distribution of a Committee Report on the District's school system which contained certain school documents that included the true names and addresses of the students involved

and which identified them in contexts, at least, partially, derogatory." The Court, in upholding the dismissal of the case below, noted the exclusive congressional legislative authority over the District (Const. Art. 1, Sec. 8) and the inherently broad investigatory authority therein. It concluded that the investigation and Report were within that authority and constituted a legitimate legislative activity, distinguishing Kilbourn v. Thompson, 103 U.S. 168 (1881) and Powell v. McCormack, 395 U.S. 486 (1969) where the underlying authorizations were invalid. Ruling that all of the defendant-appellees were immune from the suit brought against them, it said with respect to the Speech or Debate Clause:

> Article I, Section 6 of the Constitution provides that 'for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place.' This provision, which was adopted by the Constitutional Convention without debate or opposition, found its roots in the conflict between Parliament and the Crown culminating in the Glorious Revolution of 1688 and the English Bill of Rights of 1689. In light of this history, the Supreme Court concluded in United States v. Johnson, 383 U.S. 169, 181, 86 S.Ct. 749, 755, 15 L.Ed.2d 681, (1966), that the purpose of the Speech or Debate Clause was 'to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary.'
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> 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.' To accomplish this important objective, the Supreme Court has recognized the necessity for construing the Speech or Debate Clause protection in a broad fashion Kilbourn v. Thompson, 103 U.S. 168, 204, 26 L.Ed. 377 (1881); United States v. Johnson, 383 U.S. 169, 179-180, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966). '[I]t would be a 'narrow view' to confine [its] protection...to words spoken in debate. Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.' Kilbourn v. Thompson, supra, at 204.' Powell v. McCormack, 395 U.S. 486, 502, 89 S.Ct. 1944, 1954, 23 L.Ed.2d 491 (1969)(emphasis supplied).
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> The Speech or Debate Clause not only provides a defense on the merits, but it generally protects a legislator from the annoyance of having to devote his time and efforts to defending himself in court. Powell v. McCormack, supra, 395 U.S. at 502-503, 89 S.Ct. 1944. See Dombrowski v. Eastland, 387 U.S. 82, 85, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967). The only question which a trial court should consider is 'whether from the pleadings it appears that the [legislators] were acting in the sphere of legitimate legislative activity.' Tenney v. Brandhove, 341 U.S. 367, 376 S.Ct. 783, 788, 95 L.Ed. 1019

(1951). Since we believe that the activities of the defendant-members of the Committee on the District of Columbia of the House of Representatives 'may fairly be deemed within [the Committee's] province, it is clear that the District Court properly dismissed the suit as to them. Id., at 378, 71 S.Ct. at 789. See United States v. Doe, 455 F.2d 753, 757 (1st Cir. 1972).

As has been noted, appellants concede the authority of the House District Committee to investigate and report to Congress on the District of Columbia Public School System. They have only questioned the propriety of that small portion of the Committee Report which uses their names in somewhat derogatory contexts. 'That the protection of private rights upon occasion involves an invasion of those rights is in theory a paradox but, in the world as it happens to be, is a realistic problem requiring a practical answer.' Barsky v. United States, supra, 83 U.S.App.D.C. at 135, 167 F.2d at 249. It is apparent that the House District Committee was faced with a great dilemma. It its effort to expose the vexing problems which adversely affect the District of Columbia School System, with a view toward the alleviation of such problems to the benefit of all school children, the Committee obviously believed that some disclosure which might possibly injure a few pupils was necessary. While there may or may not be any substantial public interest in the test papers, discipline memoranda, or absentee lists themselves, the inclusion of such material in the Committee Report clearly increased its credibility. While some might consider that it was unnecessary to include the names, at a time such as this when 'credibility gaps' are frequently mentioned, it was entirely reasonable for the House District Committee to include what it considered to be sufficient factual data to support its findings concerning a controversial and complex area. Delinquency in the District of Columbia Schools is such a problem and in connection with its investigation of the Student Suspension Policy, which it was investigating, Congress had a right to know the precise details of a few particular disciplinary problems involving the discipline of particular students for particular acts committed in the class rooms of the public schools of the District. All the details of such circumstances, including the names of the students involved and their acts were relevant and necessary for a full and proper consideration of the matter. Many of the instances of student delinquency which one hears daily are considered by many to be unbelievable. Others assert they are untrue. Under such circumstances the desire of the Committee to present specific evidence to support its findings is understandable. And the discretion is vested in Congress, not the courts. We must be careful to remeber that under such circumstances, 'every reasonable indulgence of legality must be accorded to the actions of [the] coordinate branch of our Government' by the judiciary. Watkins v. United States, supra, 354 U.S. at 204, 77 S.Ct. at 1188.

What is really involved here is Congress functioning as it must with respect to the District of Columbia, as a combination state legislature and education committee that is concerned with a grass roots problem. As with any local school board problem, this involves individuals, administrators, teachers, employees, parents, students and taxpayers. The Report recognizes this and to make its study complete and to give it the maximum credibility, the Report throughout,

in hundreds of situations in addition to the students involved in disciplinary problems, has named the persons involved. The Report is replete with names of individuals, groups and organizations, many of which are discussed in connection with highly derogatory conduct. For instance, in reporting on the narcotics situation, names and incidents are recited of employees who were furnishing narcotics to drivers employed by the schools. H.R. Rep. No. 91-1681, 91st Congress, 2d Sess. 109-110 (1970). Appellants are not singled out. They are a minor part of the Report. However, it must be noted that the use of specific names throughout the Report does add considerably to its credibility in an area where reliability is necessary.

'Our function, at this point, is...not to pass judgment upon the general wisdom or efficacy of the activities of this Committee in a vexing and complicated field.' Barenblatt v. United States, supra, 360 U.S. at 125, 79 S.Ct. at 1092. It is merely to determine whether the defendant-legislators were acting within the sphere of their legitimate activity when they collected the information in question and issued the House Committee Report in its present form. Since it is readily apparent that their actions were within the discretionary area of their constitutional authority, the defendant-Representatives are absolutely protected by the Speech or Debate Clause.

The legislative immunity provided by the Speech or Debate Clause is not limited to Congressmen, although the doctrine's protection 'is less absolute...when applied to officers or employees of a legislative body, rather than to legislators themselves.' Dombrowski v. Eastland, supra, 387 U.S. at 85, 87 S.Ct. at 1427. See Tenney v. Brandhove, supra, 341 U.S. at 378, 71 S.Ct. 783. Therefore, when congressional employees or officers are acting pursuant to valid legislative authorization, in furtherance of a proper legislative purpose, they also come within the scope of the Speech or Debate Clause protection. See United States v. Doe, 455 F.2d 753, 761 (1st Cir. 1972).

There is no contention by appellants that any of the Federal legislative employees named as defendants were acting outside the sphere of their official duties. They merely performed the incidental functions which were necessary to insure the full accomplishment of the House District Committee's appropriate legislative objective. In this day of complex public problems, where assignment of authority by legislators to legislative assistants is an absolute necessity if Congress is to be able to perform its constitutional functions, it would indeed be hollow to afford immunity to the Congressmen, but not to their assistants, for these aides might be hesitant to undertake the full performance of their lawful duties if they had to face the threat of possible lawsuits. Such an inconsistent result would impossibly hinder congressional activities, and effectively prevent the attainment of the objectives underlying the Speech or Debate Clause. We therefore must conclude that the suit against the Federal legislative employees was properly dismissed due to their legislative immunity.

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Although we could base our decision regarding the Federal legislative employees wholly on the protection afforded them by the Speech or Debate Clause, an additional consideration further demonstrates why the District Court properly refused to enjoin the publication and distribution of the House Committee Report by them. 'If a court could say to the Congress, [and we might add to its authorized agents,] that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others.' Hearst v. Black, 66 App.D.C. 313, 316-317, 87 F.2d 68, 71-72 (1936). In Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956), a decision of a three-judge court, Judge Edgerton speaking for himself and Judge Prettyman said:

> Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.
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> [Courts] have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.

141 F. Supp. at 731-732. See Hobson v. Tobriner, 255 F. Supp. 295 (D.D.C. 1966).

The Court noted that the federal legislative employees and the District of Columbia employees, defendants in the suit, were also protected from liability by the doctrine of official immunity, see pp. 1316-19 of the opinion and specifically footnote 22, p. 1316.

A petition for a writ of certiorari was granted by the Supreme Court on June 26, 1972.

G. Separation of Powers Doctrine--Relation to Privilege.

The case of Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729 (1956) points up a supporting relationship between the doctrine of separation of powers and the privilege in certain fact situations. For example, where as in this case, a libel occurs in legislative action which is well within the legitimate sphere of legislative activity, the courts will not only protect the members from liability under the privilege but will refuse to interfere with the case for whatever precedential value it may have.

The report of the case reveals that the Senate Internal Security Subcommittee issued a pamphlet entitled, The Communist Party of the United States - What It Is - How It Works - A Handbook For Americans, which was printed in December 1955 in limited numbers for the use of the Committee. Subsequently, the pamphlet was ordered printed (75,000 additional copies) as a Senate document for the use of the Committee. The pamphlet stated that the Communists formed religious fronts, such as the Methodist Federation, using names similar to well-known and respectable organizations with thich the Federation has no official connection. The Federation filed a complaint against the members of the Subcommittee, the Public Printer, and the Superintendent of Documents on the grounds, among others, that the statement concerning the front was false and defamatory and caused irreparable injury, requesting a restraining order against printing and distribution of the pamphlet. No appearance was entered for the members of the Committee. A temporary restraining order was issued against the Public Printer and the Superintendent of Documents, who moved to dismiss or for summary judgment. For the purposes of a hearing by a 3-judge court the falsity of the statement was assumed.

The Court, in its opinion, dismissed the complaint and stated with respect to the doctrine and the privilege that:

> By express provision of the Constitution, members of Congress, "for any Speech or Debate in either House.....shall not be questioned in any other Place." Art. I, §6. It would be paradoxical if members could be questioned in any other place for statements in a document which both houses have ordered published.
>
> Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.
>
> No previous case has been called to our attention in which it has even been attempted to prevent publication of anything Congress has ordered published. In Hearst v. Black, 66 App. D.C. 313, 87 F. 2d 68, the plaintiff sought among other things to enjoin the members of a Senate Committee from publishing telegrams alleged to have been obtained in violation of his constitutional rights. The United States Court of Appeals for the District of Columbia said in denying relief: "If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded." 66 App. D. C. at pages 316-317, 87 F. 2d at pages 71-72. Since Congress has ordered publication of the telegrams involved in the Hearst case, it is even plainer here than there that a judgment for the plaintiff would invade the constitutional separation of powers.
>
> The premise that courts may refuse to enforce legislation they think unconstitutional does not support the conclusion that they may censor congressional language they think libelous. We have no more authoirity to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Con-

> gressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.
>
> The constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament, or an American court to restrain Congress, from publishing any statement. This history therefore tends to confirm our view.
>
> . . . . . .
>
> As to the members of the Senate Subcommittee, the complaint is dismissed for lack of jurisdiction. Cf. Hearst v. Black, supra. As to the Public Printer and the Superintendent of Documents, the complaint is dismissed for failure to state a claim on which relief can be granted.

Although the constitutional privilege of Members was noted in the majority opinion written by the two circuit judges, the main thrust of the opinion appears to be lack of power of the judiciary to interfere with the legislative process under the doctrine of separation of powers. It will be recalled that in Kilbourn v. Thompson, supra, the Supreme Court held that the House of Representatives, acting by itself, lacked constitutional power to punish citizens generally for contempt, particularly in investigating a matter not a part of the legislative process which was then pending before a court. It further held that the members themselves, because of the Constitutional privilege, were not liable in damages for false imprisonment of the citizen. In the Methodist Federation Case, the legitimacy of the legislative process was clear, the Committee undoubtedly had power to have a limited number of copies of its pamphlet printed for its own use and the Con-

gress, by concurrent resolution, clearly possesses power to order the pamphlet published as a congressional document (House or Senate Doc.). Further, the Public Printer and the Superintendent of Documents had authority from the Congress under a previously enacted Statute--44 U.S.C. 71, 72, to print and sell such documents. Thus it would seem that, even if the document was false and defamatory, both the members and the congressional employees were protected under the Doctrine of Separation of Powers since the courts lacked the power to restrain. Of course the members were also protected by the Privilege. Cf. Anderson v. Dunn, 6 Wheat. 204 (1821); Kilbourn v. Thompson, 103 U.S. 168 (1881) and statement in Tenney v. Brandhove, 341 U.S. at 378 on lack of privilege of non-member congressional officers and employees. In the Tenney Case the Court pointed out that:

> It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In Kilbourn v. Thompson, supra, this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant Members of the House.

H. Slander.

Cochran v. Couzens, 42 F. 2d 783 (1930), cert. denied, 282 U.S. 874, was an action for damages for an alleged slander uttered on the floor of the Senate concerning the actions of the Plaintiff, a tax consultant. Plaintiff's declaration stated that the slander occurred in the Senate in the course of a speech but not in the course of a debate on the floor, unofficially and not in the discharge of official duties as a Senator, on a subject not then and there pertinent or relevant to any matter under inquiry by the Senate. The District Court had rendered judgment for the defendant. The Court of Appeals affirmed.

In affirming the judgment below, the Court of Appeals in the course of its opinion, stated:

> Article 1, §6, of the Constitution, provides that in all cases, except treason, felony, and breach of the peace, Senators and Representatives shall be "privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."
>
> It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted unlimited freedom in speeches or debates. The provision to that end is, therefore, grounded on public policy, and should be liberally construed. Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues. Article 1, §5.
>
> In Kilbourn v. Thompson, 103 U.S. 168, 26 L. Ed. 377, the court considered whether a resolution offered by a member is a speech or debate within the meaning of Article 1, §6, and whether the report made to the House and the vote in favor of a resolution are within its protection. The court said (page 201 of 103 U.S.): "If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place. And yet if a report, or a resolution, or a vote is not a speech or debate, of what value is the constitutional protection?"
>
> The court then observed that, while the framers of our Constitution did not adopt the lex et consuetudo of the English Parliament as a whole, "they did incorporate such parts of it, and with it such privileges of Parliament, as they thought proper to be applied to the two Houses of Congress."
>
> The court then quoted from the opinion of Lord Denman in Stockdale v. Hansard, 9 Ad. & E. 1, as follows: "The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place...."

> The court then observed: "Taking this to be a sound statement of the legal effect of the Bill of Rights and of the Parliamentary law of England, it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source."
>
> The court then reviewed American decisions, including Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189, relied upon by appellant, and concluded: "It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it."
>
> We regard the decision in Kilbourn v. Thompson as controlling here. Under the declaration the words forming the basis of plaintiff's action were uttered in the course of a speech in the chamber of the Senate of the United States, and were absolutely privileged and not subject to "be questioned in any other place." The averment that these words were spoken unofficially and not in the discharge of his official duties as a Senator is a mere conclusion and entirely qualified by the averment that they were uttered in the course of a speech.

I. State Legislative Privilege, Analogy with the Congressional Privilege.

An historical analogy between the State and Congressional privileges of debate appears in the Court's opinion in Tenney v. Brandhove, 341 U.S. 367 (1951). Brandhove brought an action in the U.S. District Court, for damages for deprivation of rights guaranteed by the Federal Constitution, against the Chairman (Tenney) and Members of the California legislative committee, named the Senate Fact-Finding Committee on Un-American Activities, under the Federal Civil

Rights Act of 1871, 42 U.S.C. 1983, 1985 (3). The District Court's dismissal of the complaint was reversed by the U.S. Court of Appeals. In doing so the Supreme Court carefully reviewed the history of and the analogy between the two privileges:

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. Roper, Life of Sir Thomas More, in More's Utopia (Adams ed.) 10. In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for 'seditious' speeches in Parliament. Proceedings, against Sir John Elliot, 3 How. St. Tr. 294, 332. In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary, Sess. 2, c. II. See Stockdale v. Hansard, 9 Ad. & El, 113-114 (1839).
>
> Freedom of speech and action in the legislature was taken as a matter of course by those who severed the colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress...."
>
> . . . . . .
>
> Article I, §6, of the Constitution provides: "...for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv.

The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege. The Maryland Declaration of Rights, Nov. 3, 1776, provided: "That freedom of speech, and debates or proceedings, in the legislature, ought not to be impeached in any other court or judicature." Art. VIII. The Massachusetts Constitution of 1780 provided: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever." Part The First, Art. XXI.

. . . . . .

The New Hampshire Constitution of 1784 provided: "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential

to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever." Part I, Art. XXX.[36]

It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess.[37] For the loyalist executive and Judiciary had been deposed, and the legislature was supreme in most States during and after the Revolution. "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetous vortex." Madison, The Federalist. No. XLVIII.

36/ In two State Constitutions of 1776, the privilege was protected by general provisions preserving English law. See, S.C. Const., 1776, Art. VII; N.J. Const., 1776, Art. XXII. Cf. N.C. Const., 1776, §XLV.
Three other of the original States made specific provision to protect legislative freedom immediately after the Federal Constitution was adopted. See, Pa. Const. 1790, Art. I, §17; Ga. Const., 1789, Art. I, §14, Del. Const., 1792, Art. II, §11. Connecticut and Rhode Island so provided in the first constitutions enacted to replace their uncodified organic law. Conn. Const., 1818, Art. Third, §10; R.I. Const., 1842, IV, §5.
In New York, the Bill of Rights passed by the legislature on January 26, 1787, provided: "That the freedom of speech and debates, and proceedings in the senate and assembly, shall not be impeached or questioned in any court or place out of the senate or assembly."
In Virginia, as well as in the other colonies, the assemblies had built up a strong tradition of legislative privilege long before the Revolution. See, Clarke, Parliamentary Privilege in the American Colonies (1943), passim, especially 70 and 93 et seq.

37/ See, Jefferson, Notes on the State of Virginia (3d A. ed 1801), 174-175. The Notes were written in 1781. See also, a letter from Jefferson to Madison, March 15, 1789, to be published in a forthcoming volume of The Papers of Thomas Jefferson (Boyd ed.): "The tyranny of the legislatures is the most formidable dread at present, and will be for long years." As to the political currents at the time the United States Constitution and the State Constitutions were formulated, see, Corwin, The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 Am. Hist. Rev. 511 (1925).

As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege.38/

Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power.

38/Ala. Const., Art. IV, §56; Ariz. Const., Art. IV, 2, §7; Ark. Const. Art. V. §15; Colo. Const., Art. V, §16; Conn. Const., Art. Third, §10, Del. Const., Art. II, §13; Ga. Const., Art. III, §VII, par. III. Const., Art. IV, §14; Ind. Const., Art. 4, §8; Kan. Const., Art. 2, §22; Ky. Const., §43; La. Const., Art. III, §13; Me. Const., Art. IV, Pt. Third, §8; Md. D.R. 10, Const., Art. III, §18; Mass. Const., Pt. First, Art. 21; Mich. Const., Art. V, §8; Minn. Const., Art. IV, §8; Mo. Const., Art. III, §19; Mont. Const., Art. V, §15; Neb. Const., Art. III, §26; N.H. Const., Pt. First, Art. 30th; N.J. Const., Art. IV, §4, par. 8; N.M. Const., Art. IV, §13; N.Y. Const., Art. III, §11, N.D. Const., Art. II, §42; Ohio Const., Art. II, §12; Okla. Const., Art. V, §22; Ore. Const., Art. IV, §9; Pa. Const., Art. II, §15; R.I. Const., Art. IV, §5; S.D. Const., Art. III, §11; Tenn. Const., Art. II, §13; Tex. Const., Art. III, §21; Utah Const., Art. VI, §8; Vt. Const., c. I, Art. 14th; Va. Const., Art. IV, §48; Wash. Const., Art. II, §17; W. Va. Const., Art. VI, §17; Wis. Const., Art. IV, §16; Wyo. Const., Art. 3, §16. Cf., Iowa Const., Art. III, §10; N.C. Const., Art. II, §17 (right of legislator to protest action of legislature). See also, Cal. Const., Art. IV, §11; Iowa Const., Art. III, §11; Miss. Const., Art. 4, §48; Nev. Const., Art. IV, §11; S.C. Const., Art. III, §14 (freedom from arrest). Only the Florida Constitution has no provision concerning legislative privilege.

There are difficulties we cannot hurdle. The limits of §§1 and 2 of the 1871 statute--now §§43 and 47 (3) of Title 8--were not spelled out in debate. We cannot believe that Congress--itself a staunch advocate of legislative freedom--would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.

We come then to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity. Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since Ashby v. White, 2 Ld. Raym. 938, 3 ed. 320. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. Kilbourn v. Thompson, 103 U.S. 168; Marshall v. Gordon, 243 U.S. 521; cf., McGrain v. Daugherty, 273 U.S. 135, 176.

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in Fletcher v. Peck, 6 Branch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See, cases cited in Arizona v. California, 283 U.S. 423, 455.

Investigations, whether by standing or special committees, are an established part of

representative government.[39] Legislative committees have been charged with losing sight of their duty of disinterestedness. In time of political passion dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.[40] Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Executive. The present case does not present such a situation. Brandhove indicated that evidence previously given by him to the committee was false, and he raised serious charges concerning the work of a committee investigating a problem within legislative concern. The Committee was entitled to assert a right to call the plaintiff before it and examine him.

It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves a greater respect than where an official action on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In Kilbourn v. Thompson, supra, this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House.

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

40/ See Dilliard, Congressional Investigations: The Role of the Press, 18 U. of Chi. L. Rev. 585.

> We have only considered the scope of the privilege as applied to the facts of the present case. As Mr. Justice Miller said in the Kilbourn case: "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." 103 U.S. at 204. We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create a civil liability for such conduct.

J. Voting and Member's Reasons Therefor, as Privileged

In Smith v. Crown Publishers, 14 F.R. D. 514 (1953), Plaintiff, a Senator, brought an action for libel against the Publishers, during the course of which the Plaintiff moved for an order under Rule 30 (b), (d), Federal Rules of Civil Procedure, 28 U.S. Code, to limit the scope of the deposition which the Defendant was taking on oral examination of the Senator. She alleged that many of the questions asked infringed upon her constitutional immunity, and that much of the information sought would be inadmissible in Court. The Court noted the difficulties it faced in ruling on the Privilege as aid to the prosecution of an action rather than, as is usual, as a defense to one. It did, however, rule specifically that the Members' voting record and the reasons therefor are protected by the Legislative Privilege. It said, in part:

> The question of privilege with regard to the immunity of a Senator as provided for in Article I, Section 6, of the Constitution of the United States, is most difficult of application in this case because of the position of the parties. The vast majority of the authorities, American and English, as well as the recent discussion in the House of Representatives (Congressional Record 3/26/53, pages 2444-2446) [99 C.R. Pt. 2, pages 2356-2358], discuss the matter in terms of using the privilege as a defense to an action rather than as an aid to the prosecution of one.

> As a matter of general principle, it is most difficult for the court to rule on the question of privilege in the abstract. The normal procedure, and, the court feels, the proper one to be followed in this case, is for the examination to proceed, the plaintiff to refuse to answer those questions for which refusals she asserts privilege, and then for the matter to be submitted to a court for ruling on the specific questions disputed.
>
> The court will rule at this time only that the plaintiff's voting record in the House and Senate, and the reasons therefor, are clearly matters of privilege (discussion of legislative privilege in Tenney v. Brandhove, 1951, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019).
>
> Motion denied, without prejudice to the plaintiff. Settle order.

The value of this decision as a precedent, particularly the last paragraph of the Court's opinion, is obscure, since neither the actual matter in controversy nor the questions actually put at the oral examination, are apparent from the case report. This is included here only for the sake of completeness.

IV. Table of Cases

1. The Privilege From Arrest.

Bartlett v. Blair, 68 N.H. 232 (1894)
Burton v. U.S., 196 U.S. L. 83 (1905)
Coxe v. M'Clenachan, 3 Dall. 478 (1798
Doty v. Strong, 1 Pinney's Wisconsin Reports 84 (1840)
Dunton & Co. v. Halstead, 2 Clark (Pa. Law Journal Reports) 236 (1840)
Hoppin v. Jencks, 8 Rhode Island 453 (1867)
Howard v. Citizens Bank & T. Co., 12 App. D.C. 222 (1898)
James v. Powell, 274 N.Y.S. 2d. 192 (1966), 277 N.Y.S.2d 135, 279 N.Y.S.2d 972 (1967)
Kimberly v. Butler, 14 Fed. Cases. No. 7,777 (1869)
Lewis v. Elmendorf, 2 Johnson's Cases (N.Y.) 222 (1801)
Long v. Ansell, 293 U.S. 76 (1934)
Merrick v. Giddings, 1 MacArthur 7 Mackeys (D.C.) 55 (1879)
Miner v. Markham, 28 Fed. 387 (1886)
Nones v. Edsall, 1 Wall. 189 (1848)
Respublica v. Duane, 4 Yeates 347 (1807), see 2 Alden's Abridgement of Penn. Sup. Ct. Reports, 1851 Ed.
State v. Smalls, 11 S.C. 262 (1878)
U.S. v. Cooper, 14 Dall. 341 (1800)
U.S. v. Wise, 28 Fed. Cases, No. 16, 746a (1842)
Williamson v. U.S., 207 U.S. 425 (1908)
Worth v. Norton, 56 S.C. 56 (1899)
Yuma Greyhound Park, Inc. v. Hardy, 472 Pac. 2d 47 (1970)

2. The Privilege of Speech or Debate

Barsky v. U.S., 167 F 2d. 241 (1948); cert. denied, 334 U.S. 843
Cochran v. Couzens, 42 F 2d. 783 (1930); cert. denied, 282 U.S. 874
Dombrowski v. Eastland, 387, 387 U.S. 82 (1967)
Doe v. McMillan, 459 F.2d, 1304 (1972)
Gravel v. United States, 408 U.S. 606 (1972)
Hoellen v. Annunzio, U.S.D.C. (Ill.), Civil Action No. 72C 1302 (Sept. 15, 1972), affirmed, Hoellen v. Annunzio, (C.A. 7), No. 72-1794 (Oct. 20, 1972).
Kilbourn v. Thompson, 103 U.S. 168 (1880)
McGovern v. Martz, 182 F. Supp. 343 (1960)
Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729 (1956)
Hentoff v. Ichord (D.C., D.C.) 318 F. Supp. 1175 (1970).

Schiaffo v. Helstocki, U.S.D.C. (N.J.) Civil Action No. 1571-72, (Oct. 18, 1972).

Powell v. McCormack, 395 U.S. 486 (1969)
Smith v. Crown Publishers, 14 F.R.D. 514 (1953)
Stanley v. Willis, 415 F. 2d. 1365 (1969); cert. denied, 389 U.S. 925 (1970)
Tenney, v. Brandhove, 341 U.S. 367 (1951)
U.S. v. Brewster, 408 U.S. 501 (1972).

U.S. v. Dowdy, U.S. District Court, Md., Criminal No. 70-0123 (1970)
U.S. v. Johnson, 383 U.S. 169 (1966)

V. Law Review Articles and Case Notes.

1. Law Review Articles

Absolute Immunity in Defamation: Legislative and Executive Proceedings.
Columbia Law Review, 10:131-137 (1910)

Absolute Tort Immunity for Legislative Correspondence?
Stanford Law Review, 11:194 (Dec. 1958)

Bribed Congressman's Immunity from Prosecution.
Yale Law Journal, 75:335 (Dec., 1965)

Congressional Free Speech.
Loyola Law Review, 8:1 (1955-6)

Congressional Immunity and Conflict of Interest.
Wisconsin Law Review, 1965:702 (Summer, 1965)

Congressional Immunity from Arrest.
United States Law Review, 70:306-10 (June, 1936)

Congressional Immunity from Libel and Slander.
Nebraska Law Review, 30:107-11 (Nov., 1950)

Constitutional Law - Congressional Immunity - Speech or Debate Clause Held Bar to Injunction Against Contempt of Congress Proceeding.
New York University Law Review; 43: 1227 (Dec. 1968)

Constitutional Law - Congressional Immunity - Speech or Debate Clause Held No Bar to Declaratory Judgment and Injunction Against Publication of Congressional Committee Report by Public Printer. New York Law Forum, 16;934 (1970)

Constitutional Law - Speech or Debate Clause - Declaratory and Injunctive Relief Against a Congressional Committee.
Wisconsin Law Review, 1970; 1216 (1970)

Constitutional Privilege of Legislators: Exemption from Arrest and Action for Defamation.
Minnesota Law Review, 9:442 (1925)

Defamation - Publication of Defamatory Statements Made by U.S. Senator at Press Conference is Qualifiedly Privileged.
Fordham Law Review, 28:363 (Summer, 1959)

Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its P st, Present and Future as a Bar to Criminal Prosecution in the Courts. Suffolk University Law Review, 2:1 (Winter, 1968)

Dombrowski v. Eastland - A Political Compromise and Its Impact. Rutgers Law Review, 22:137 (Fall, 1967)

First Amendment - Congressional Investigations and the Speech or Debate Clause. University of Missouri at Kansas City Law Review, 40;108 (Autum, 1971)

Immunities of Congress from Process.
George Washington Law Review, 10:513-27 (March, 1942)

Immunity of Congressional Speech - Its Origin, Meaning and Scope.
University of Pennsylvania Law Review, 99:960-77 (May, 1951)

Legislative Immunity, Arrest Under Motor Vehicle Code, Limits of the Legislative Immunity.
University of Pittsburgh Law Review, 7:150-4 (Jan., 1941)

Scope of Immunity for Legislators and Their Employees.
Yale Law Journal, 77: 366 (Dec., 1967)

"They shall not be questioned..." - Congressional Privilege to Inflict Verbal Injury.
Stanford Law Review, 3:486-96 (April, 1951)

"They shall not be questioned in any other place." - A New Look at Legislative Immunity.
Law in Transition Quarterly, 3:45 (Winter, 1966)

2. Case Notes

Barsky v. U.S.
Cornell Law Quarterly, 33:565 (June, 1948)
Georgetown Law Journal, 37:104 (Nov., 1948)
Illinois Law Review, 43:253 (May - June, 1948)
Nebraska Law Review, 28:516 (May, 1949)
Southern California Law Review, 22:467 (July, 1949)
Temple Law Quarterly, 22:227 (October, 1948)
University of Cincinnati Law Review, 17:264 (May, 1948)
Virginia Law Review, 34:460 (May, 1948)
Washington & Lee Law Review, 6:66 (1949)

Cochran v. Couzens
Illinois Law Review, 26:707 (Feb., 1932)
Law Notes, 34:162 (Dec., 1930)
Notre Dame Lawyer, 7:414 (March, 1932)

Dombrowski v. Eastland
American Bar Association Journal, 53:758 (August, 1967)
Rutgers Law Review, 22:137 (Fall, 1967)
Syracuse Law Review, 19:115 (Fall, 1967)

James v. Powell
Maryland Law Review, 26:293 (Summer, 1966)
Texas Law Review, 45:1205 (July, 1967)
West Virginia Law Review, 68:416 (June, 1966)

Long v. Ansell
Columbia Law Review, 34:1131 (June, 1934)
Georgetown Law Journal, 23:316 (January, 1935)
George Washington Law Review, 3:231 (January, 1935)
Virginia Law Review, 21:701 (April, 1935)
West Virginia Law Review, 41:159 (Feb., 1935)

Methodist Federation for Social Action v. Eastland
Cornell Law Quarterly, 43:103 (Fall, 1957)
Fordham Law Review, 25:741 (Winter 1956-7)
Georgia Bar Journal, 19:366 (Feb., 1957)
Harvard Law Review, 70:723 (Feb., 1957)
Iowa Law Review, 43:132 (Feb., 1957)
U.C.L.A. Law Review, 4:466 (April, 1957)

Powell v. McCormack

American Bar Association Journal, 55:1076 (Nov., 1969)
Buffalo Law Review, 19:105 (Fall, 1969)
DePaul Law Review, 19:171 (Autumn, 1969)
Duquesne Law Review, 8:190 (Winter, 1969-70)
Georgia Law Review, 5:203 (Winter, 1971)
Harvard Law Review, 83:62 (Nov., 1969)
Layola Law Review, 16:483 (1969-1970)
New York Law Forum, 15:921 (Winter, 1969)
Rutgers Law Review, 24:193 (Winter, 1970)
Southwest Law Journal, 23:733 (Oct., 1969)
Tulane Law Review, 44:377 (Feb., 1970)
U.C.L.A. Law Review, 17:1 (Nov., 1969)
U. Miami Law Review, 24:389 (Winter, 1970)
Utah Law Review, 1969:182 (Jan., 1969)
West Virginia Law Review, 72:413 (Sept., 1970)

Tenney v. Brandhove

American Bar Association Journal, 37:768 (Oct., 1951)
Mercer Law Review, 3:221 (Fall, 1951)
Texas Law Review, 30:516 (April, 1971)
University of Cincinnati Law Review, 20:511 (Nov., 1951)

U.S. v. Johnson

American Bar Association Journal, 52:374 (April, 1966)
American Bar Association Journal, 54:600 (June, 1968)
Syracuse Law Review, 22:1167 (1971)