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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

Gravel v. United States, 408 U.S. 606 (1972)

The Pentagon Papers, classified military documents examining the history of the Vietnam War, were leaked to the New York Times *in 1971 by Daniel Ellsberg, a former Defense Department analyst. Days after the newspaper began to publish excerpts from those documents, Senator Mike Gravel (Democrat, Alaska) called a meeting of the Subcommittee on Buildings and Grounds, read extended sections of the Pentagon Papers, entered the entire document into the public record, and began to arrange for publication by a press. During its investigation of the leaking of the Pentagon Papers, a federal grand jury subpoenaed Leonard Rodberg, the legislative assistant to Gravel who was in charge of the Papers.*

Gravel intervened, filing a motion in federal district court to quash the subpoena on the grounds that Rodberg possessed a constitutional privilege against judicial inquiry into his actions as a congressional aide. The district court recognized a privilege and restricted the scope of the subpoena. On appeal, the circuit court largely agreed but modified the order. Both sides appealed to the U.S. Supreme Court, which ruled in favor of Gravel in a 5–4 decision and remanded the case for further modification of the scope of the subpoena. The case revolved around the extent of the congressional privilege from judicial scrutiny that derives from the constitutional provision that members of Congress are "privileged from arrest . . . for any Speech or Debate in either House, they shall not be questioned in any other Place." (In dissent, Justice Douglas also emphasized the First Amendment.)

Why did the Court think that the speech and debate clause extends to legislative aides? Why did the privilege extend beyond "speech and debate" to include a broader range of legislative activity? What is the core function of the legislature, according to the majority? How did the dissenters disagree?

JUSTICE WHITE delivered the opinion of the Court.

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

The last sentence of the Clause provides Members of Congress with two distinct privileges. Except in cases of "Treason, Felony and Breach of the Peace," the Clause shields Members from arrest while attending or traveling to and from a session of their House. History reveals, and prior cases so hold, that this part of the Clause exempts Members from arrest in civil cases only. . . . Nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters, or as a witness in a criminal case. . . . 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. . . . Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as [Thomas] Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to the bound by it as are ordinary persons. . . .

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. . . . [Gravel's] 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 co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. . . . Our decision is made easier by the fact that the United States appears to have abandoned whatever position it took to the contrary in the lower courts.

. . . . 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," 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." . . . 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 . . . 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 egos; and that if they are not so recognized, the central role of the Speech or Debate Clause-to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, . . . will inevitably be diminished and frustrated.

. . . .

It is true that the Clause itself mentions only "Senators and Representatives," but prior cases have plainly not taken a literalistic approach in applying the privilege. The Clause also speaks only of "Speech or Debate," but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. . . . Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator. . . .

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. . . . In *Kilbourn*-type situations [see *Kilbourn v. Thompson* (1881)], both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. . . . . On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are [not] essential to legislating . . . .

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 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. . . . .

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

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. . . . [T]he 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. . . .

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Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. . . .

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

JUSTICE DOUGLAS, dissenting.

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

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One of the things normally done by a Member "in relation to the business before it" is the introduction of documents or other exhibits in the record the committee or subcommittee is making. The introduction of a document into a record of the Committee or subcommittee by its Chairman certainly puts it in the public domain. . . .

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As to Senator Gravel's efforts to publish the Subcommittee record's contents, wide dissemination of this material as an educational service is as much a part of the Speech or Debate Clause philosophy as mailing under a frank a Senator's or a Congressman's speech across the Nation. . . .

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

. . . . In my view, today's decision so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system.

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. . . [T]he Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator's duty to inform the public about matters affecting the administration of government. . . .

. . . . Congress has provided financial support for communications between its Members and the public, including the franking privilege for letters, telephone and telegraph allowances, stationery allotments, and favorable prices on reprints from the Congressional Record. Congressional hearings, moreover, are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern. . . .

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

Though I fully share these and related views on the educational values served by the informing function, there is yet another, and perhaps more fundamental, interest at stake. It requires no citation of authority to state that public concern over current issues – the war, race relations, governmental

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invasions of privacy has transformed itself in recent years into what many believe is a crisis of confidence, in our system of government and its capacity to meet the needs and reflect the wants of the American people. Communication between Congress and the electorate tends to alleviate that doubt by exposing and clarifying the workings of the political system, the policies underlying new laws and the role of the Executive in their administration. To the extent that the informing function succeeds in fostering public faith in the responsiveness of Government, it is not only an "ordinary" task of the legislator but one that is essential to the continued vitality of our democratic institutions.

Unlike the Court, therefore, I think that the activities of Congressmen in communicating with the public are legislative acts protected by the Speech or Debate Clause. I agree with the Court that not every task performed by a legislator is privileged . . . . But the informing function carries a far more persuasive claim to the protections of the Clause. . . . Unlike the Court, therefore, I think that the activities of Congressmen in communicating with the public are legislative acts protected by the Speech or Debate Clause. I agree with the Court that not every task performed by a legislator is privileged; intervention before Executive departments is one that is not. But the informing function carries a far more persuasive claim to the protections of the Clause.

Nor can it be supported by history. There is substantial evidence that the Framers intended the Speech or Debate Clause to cover all communications from a Congressman to his constituents. . . .

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. . . . A Member of Congress who exceeds the bounds of propriety in performing this official task may be called to answer by the other Members of his chamber. We do violence to the fundamental concepts of privilege, however, when we subject that same conduct to judicial scrutiny at the instance of the Executive. . . .

. . . . I would hold that Senator Gravel's receipt of the Pentagon Papers, including the name of the person from whom he received them, may not be the subject of inquiry by the grand jury.

I would go further, however, and also exclude from grand jury inquiry any knowledge that the Senator or his aides might have concerning how the source himself first came to possess the Papers. This immunity, it seems to me, is essential to the performance of the informing function. Corrupt and deceitful officers of government do not often post for public examination the evidence of their own misdeeds. That evidence must be ferreted out, and often is, by fellow employees and subordinates. Their willingness to reveal that information and spark congressional inquiry may well depend on assurances from their contact in Congress that their identities and means of obtaining the evidence will be held in strictest confidence. . . .

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JUSTICE STEWART, dissenting.

. . . . [T]he acquisition of knowledge through a promise of nondisclosure of its source will often be a necessary concomitant of effective legislative conduct, if the members of Congress are properly to perform their constitutional duty.

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