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HARVARD LAW REVIEW

LEGISLATIVE PRIVILEGE AND THE SEPARATION OF POWERS

Robert J. Reinstein * and Harvey A. Silverglate **

Professor Reinstein and Mr. Silverglate argue that the scope of the Constitution's speech or debate privilege, article I, section 6, must be defined historically, but not by static criteria derived from the clause's ancient judicial origins. After tracing the dynamic evolution of the privilege as a means of preserving legislative independence, they conclude that the clause's current scope must encompass all legitimate contemporary functions of a legislature in a system embracing a separation of powers. The authors argue that such a functional perspective requires that the privilege be interpreted broadly to prevent intrusions by the executive branch into such legislative activities as the publication of information for congressional colleagues and the public, the acquisition of information for such purposes, and the decisionmaking processes preparatory to such legislative functions, although not into legislative intervention before executive agencies. The functional independence of the legislative branch and the political neutrality of the judicial branch depend upon such a broad definition in executive-motivated suits. But the authors contend that such functional considerations indicate that the clause should be given a narrow scope in private civil suits brought against congressmen or congressional committees, especially those involving constitutional rights. Finally, because recent Supreme Court decisions have not afforded legislators adequate protection, the authors outline several legislative options by which Congress could preserve its independence in the system of separate powers.

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The authors were counsel for Senator Gravel in his legislative privilege case, which is discussed extensively in this Article. We cannot overstate the contribution made to this Article by Charles L. Fishman, who was Senator Gravel's chief counsel. Mr. Fishman's ideas pervade this piece and by rights he should be listed as a co-author, but he declined because he did not participate in the actual writing. We of course absolve Mr. Fishman of all responsibility for the final product. The research assistance of Ralph Kates and Gerald McFadden is also gratefully acknowledged.

I. INTRODUCTION

ONLY 7 years ago, writing in *United States v. Johnson*,¹ the fourth case concerning the speech or debate clause² ever to reach the Supreme Court's docket,³ Mr. Justice Harlan observed that "[i]n part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause."⁴ Yet since then, the Court has taken review of such cases five more times.⁵ Three of these cases were argued last term alone; two — *Gravel v. United States*⁶ and *United States v. Brewster*⁷ resulted in landmark opinions, and one — *Doe v. McMillan*⁸ — is still pending.

Last term's cases present a diverse array of factual situations, in which members of Congress invoked the clause as protection against alleged intrusions into the official actions of congressmen by the executive branch, private citizens, grand juries and the courts. The *Gravel* case is particularly important, since it involved a classic confrontation, nearly unprecedented in 200 years of American constitutional history, between avowedly separate and coequal branches of government. It arose out of the Justice Department's use of a Boston-based grand jury to interrogate Dr.

This Article is dedicated to the memory of our late teacher, Henry M. Hart, Jr.

¹ 383 U.S. 169 (1966).

² The speech or debate clause provides that

for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place.

U.S. CONST. art. I, § 6.

³ Prior to 1966, the Court had rendered decisions on the merits in only two cases involving the clause, *Kilbourn v. Thompson*, 103 U.S. 168 (1881) and *Tenney v. Brandhove*, 341 U.S. 367 (1951). The discussion in *Tenney*, although extensive, was technically dictum since the suit was brought against state legislators under the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 (1970), and the Court fashioned a common law privilege similar to the constitutional privilege for congressmen. In a third case, the court of appeals upheld a Senator's assertion of the privilege, and the Supreme Court declined to take review. *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.), cert. denied, 282 U.S. 874 (1930). We exclude from this list another case which commentators occasionally refer to as involving the speech or debate clause, *Long v. Ansell*, 293 U.S. 76 (1934), because Senator Long's defense was premised entirely upon the distinct privilege from arrest. See p. 1123 & note 48, p. 1137 & note 128, p. 1139 & note 139 *infra*. In rejecting that defense as a bar against civil service of process, Justice Brandeis' opinion properly avoided mention of the speech or debate privilege.

⁴ *United States v. Johnson*, 383 U.S. 169, 179 (1966).

⁵ *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Brewster*, 408 U.S. 501 (1972); *Gravel v. United States*, 408 U.S. 606 (1972), noted in *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 189 (1972); *Doe v. McMillan*, 459 F.2d 1304 (D.C. Cir.), cert. granted, 408 U.S. 922 (1972).

⁶ 408 U.S. 606 (1972).

⁷ 408 U.S. 501 (1972).

⁸ 459 F.2d 1304 (D.C. Cir.), cert. granted, 408 U.S. 922 (1972).

Leonard Rodberg, an aide to Senator Mike Gravel (D., Alaska), concerning the Senator's conduct at an extraordinary meeting⁹ of the Senate Subcommittee on Public Buildings and Grounds, which Senator Gravel headed. At that meeting, held on June 29, 1971, the Senator read aloud segments of a classified Defense Department study of the history of United States decisionmaking in Vietnam, popularly known as the "Pentagon Papers," and then placed into the record of the subcommittee hearing a large portion of that gargantuan study.¹⁰ Aided by Dr. Rodberg, he then prepared the record for publication and engaged the Beacon Press of Boston to publish the entire manuscript, which Beacon did some months later.¹¹

The Justice Department, utilizing the grand jury to investigate the subcommittee hearing, the preparation for it, and the subsequent release of the Senator Gravel edition of the Pentagon Papers, subpoenaed Dr. Rodberg.¹² Dr. Rodberg resisted, and Senator Gravel intervened with a motion to quash the subpoena. The district court preliminarily restrained enforcement

⁹ The meeting was held at midnight, but notice had been given to the members, and the meeting was apparently conducted according to the letter, although possibly not the spirit, of the Senate rules. See 118 CONG. REC. 4620 (daily ed. March 22, 1972).

¹⁰ Another extraordinary feature of the meeting was that the Supreme Court had *sub judice* the case in which the executive had asked for an injunction against two newspapers to prevent the publication of portions of the "Pentagon Papers." See *New York Times Co. v. United States*, 403 U.S. 713 (1971). The Court's opinion in that case was delivered the next day, June 30.

Senator Gravel did not read, nor place into the record, four volumes of the Pentagon Papers dealing with unsuccessful negotiations to end the war in Vietnam. Reply Brief of Senator Gravel at 13-14 n.7, *Gravel v. United States*, 408 U.S. 606 (1972).

¹¹ THE SENATOR GRAVEL EDITION: THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM (1971). At about the same time, the Defense Department had the Government Printing Office publish a limited number of a censored edition at a price of \$50. HOUSE COMM. ON ARMED SERVICES, 92D CONG., 1ST SESS., UNITED STATES-VIETNAM RELATIONS 1945-1967 (Comm. Print 1971). The more comprehensive Beacon edition was made available to the public in sufficient quantity at a price of \$20.

¹² Both Dr. Rodberg and Senator Gravel alleged that the purpose of the subpoena of Rodberg was to investigate the Senator's actions with respect to the Pentagon Papers, rather than the actions of Dr. Daniel Ellsberg and Anthony Russo, who had already been indicted for their alleged conversion and distribution of the Papers. Record at 54, 70, *Gravel v. United States*, 408 U.S. 606 (1972). See *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972); *United States v. Russo*, Crim. No. 9373 (C.D. Cal., filed Dec. 29, 1972); *United States v. Ellsberg*, Crim. No. 8354 (C.D. Cal., filed June 28, 1972). The Justice Department did not deny this allegation, with which its legal arguments were consistent. The district court therefore accepted the allegation even though it had not required the Justice Department to specify the scope of the proposed inquiry. *United States v. Doe*, 332 F. Supp. 930, 932-34 & 933 n.3 (D. Mass. 1971).

of the subpoena, and ultimately rendered an opinion granting partial relief to the Senator.¹³ Both sides appealed, and relief was altered by the Court of Appeals for the First Circuit in a somewhat abstruse opinion¹⁴ that was clarified shortly thereafter.¹⁵ The Supreme Court granted cross petitions for certiorari¹⁶ and ultimately decided the issues essentially adversely to the Senator.¹⁷

Senator Gravel contended throughout the lengthy and complex proceedings that the speech or debate clause does not permit the executive or the judiciary to question members of Congress and their aides "in any other place" concerning their customary legislative activities, which had been defined by prior precedent to include all things "generally done in a session of the House by one of its members in relation to the business before it."¹⁸ In

¹³ The court held that no witness before the grand jury could be questioned about the actions taken by Senator Gravel and his aides in preparing for and holding the subcommittee meeting, and a protective order was entered to that effect. *United States v. Doe*, 332 F. Supp. 930, 937-38 (D. Mass. 1971). The district court also held that the "republishing" of the subcommittee record was not privileged and thus could be investigated by the grand jury and made the subject of a criminal indictment. *Id.* at 936-37.

Each court in this case used the technical term "republishing" to describe the Beacon edition. Since this was the first and only publication of the subcommittee record—it was published neither in the official Senate Journal nor in the unofficial *Congressional Record*—we use the term "publication" in this Article.

¹⁴ *United States v. Doe*, 455 F.2d 753 (1st Cir. 1972).

¹⁵ Clarification came after a motion for rehearing and clarification. *Id.* at 762. The circuit court issued two protective orders. *United States v. Doe*, No. 71-1331 (1st Cir., Jan. 7, 1972); No. 71-1332 (1st Cir., Jan. 18, 1972). The latter reads as follows:

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

Gravel v. United States, 408 U.S. 606, 612-13 (1972), quoting Protective Order, *United States v. Doe*, No. 71-1332 (1st Cir., Jan. 18, 1972).

¹⁶ *Gravel v. United States* and *United States v. Gravel*, 405 U.S. 916 (1972). On January 24, 1972, Mr. Justice Brennan had granted a stay of the court of appeals order pending the filing of a petition for certiorari. Brief of Senator Mike Gravel at 2, *Gravel v. United States*, 408 U.S. 606 (1972).

¹⁷ See *Gravel v. United States*, 408 U.S. 606 (1972).

¹⁸ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). Senator Gravel's assertion of privilege was supported by the United States Senate, which entered the case as *amicus curiae*. Senators Ervin (D., N.C.) and Saxbe (R., Ohio) argued orally for the Senate before the Supreme Court. This was the first time in recent memory

order to adequately protect legislators, Senator Gravel argued, the speech or debate privilege should not be defined literally: though the clause speaks only of legislators themselves, protection of their functions requires that the privilege extend to staff members who assist them.¹⁹ When a subpoena to two printers followed the Rodberg subpoena,²⁰ Senator Gravel broadened his argument to seek protection for "third parties," that is, parties other than Senators and their immediate staff members and aides who assist a Senator in performing his functions. The Senator contended that to be effective in the case at hand, such protection had to encompass his acquisition of the papers, the preparation for and conduct of the subcommittee meeting, and the subsequent publication of the subcommittee record by Beacon Press.

The *Gravel* case, in short, presented the question of how wide a scope should be given to the definition of "legislative acts" — those activities performed by congressmen which are considered proper legislative functions, and thus entitled to the protection of the speech or debate clause. The answer to that question determines the extent to which the courts have jurisdiction to look into crimes allegedly committed by Senators, their aides, or "third parties" in the course of their activities. Put more in terms of separation of powers, the question is to what extent the speech or debate clause requires Congress alone to discipline its members accused of wayward conduct.²¹

The Supreme Court unanimously agreed that aides of congressmen must be treated as their alter egos for the purpose of the

that the Senate had appeared before the Supreme Court as *amicus curiae*. The Senate Resolution authorizing that participation stated that "a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole . . ." S. Res. 280, 92d Cong., 2d Sess., 118 CONG. REC. 4735 (daily ed. March 23, 1972). As it turned out, the Senate's fears were well founded.

¹⁹ Brief for Senator Gravel at 90-100, 109-126, *Gravel v. United States*, 408 U.S. 606 (1972).

²⁰ The first subpoena was addressed to Howard Webber, Director of M.I.T. Press. As with the Rodberg subpoena, Senator Gravel moved to intervene and quash the subpoena, alleging that the intended questioning would focus on the Senator's unsuccessful negotiations with Webber to publish the subcommittee record. Record at 17, *Gravel v. United States*, 408 U.S. 606 (1972). The Justice Department did not deny the allegation, and the district court allowed intervention and stayed operation of the subpoena pending appeal. *Id.* at 136-38. Four days after the court of appeals' decision, a subpoena was served upon Gobin Stair, Director of Beacon Press, which published the subcommittee record. The district court's stay order covered this subpoena and was continued by the court of appeals pending Supreme Court review. *Amicus Brief of Unitarian Universalist Association* at 2, *Gravel v. United States*, 408 U.S. 606 (1972).

²¹ Congress is granted power to discipline its own members under U.S. CONST. art. I, § 5, cl. 2.

speech or debate clause, and agreed also that the clause should be applied in a subject-matter form: if a legislative activity were privileged, there could be no inquiry about it through the testimony of any witness.²² However, a split Court held that the scope of activities protected by the clause is very narrow and does not include publication of the record or receipt of the material for use in committee.²³

*United States v. Brewster*²⁴ involved the same central question as did *Gravel*, but in a far different factual setting. Former Senator Daniel B. Brewster (D., Md.) was indicted for accepting a bribe in exchange for his "being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation" and for soliciting funds "for and because of official acts performed by him."²⁵ The district court dismissed the indictment because it felt that the speech or debate clause "shields [Brewster] from any prosecution for alleged bribery to perform a legislative act,"²⁶ and the Justice Department had conceded that in order to secure a conviction it would have to introduce evidence concerning Senator Brewster's legislative activities.²⁷ The dismissal, in the district judge's view, was required by the Supreme Court's decision in *United States v. Johnson*²⁸ that the speech or debate clause prohibits extra-legislative inquiry into the motivations behind a congressman's speeches or votes. The Justice Department appealed directly to the Supreme Court,²⁹ which reversed, distinguishing *Johnson* and denying Brewster's plea of privilege.

²² *Gravel v. United States*, 408 U.S. 606, 616-22, 627-29 (1972); *id.* at 647 (Douglas, J., dissenting). *But cf. id.* at 628 n.17.

²³ See pp. 1153-57 *infra* for a discussion of this issue.

²⁴ 408 U.S. 501 (1972).

²⁵ *Id.* at 502-03. The facts of the *Brewster* case are detailed at pp. 1157-63 *infra*.

²⁶ *Id.* at 504. The district court's opinion was delivered orally on a motion to dismiss the indictment and is unreported. Record at 33, *United States v. Brewster*, 408 U.S. 501 (1972). In a colloquy with counsel the district court stated:

[T]his Speech and Debate Clause wasn't just something that somebody stuck in this Constitution as an afterthought This matter of protecting legislators in what they did as legislators was a very important matter to the people who drafted our Constitution. It is a right you don't very often hear about, but for the functioning of a true Republic it is probably as important as the first ten Amendments put together.

Id. at 30. For a prior decision by the same judge (Hart) involving the speech or debate clause, see *Powell v. McCormack*, 266 F. Supp. 354 (D.D.C. 1967), *aff'd*, 395 F.2d 577 (D.C. Cir. 1968), *rev'd in part*, 395 U.S. 486 (1969).

²⁷ Record at 28, *United States v. Brewster*, 408 U.S. 501 (1972).

²⁸ 383 U.S. 169 (1966).

²⁹ The appeal was based on 18 U.S.C. § 3731 (Supp. V, 1970). See *United States v. Brewster*, 408 U.S. 501, 504-07 (1972). A 1971 amendment, which does not apply retroactively, no longer permits bypassing the court of appeals. Act of

*Doe v. McMillan*³⁰ reached the Supreme Court too late to be argued along with *Gravel* and *Brewster*, but certiorari was granted before the opinions in those two cases were rendered. *McMillan* arose out of an investigation by the House Committee on the District of Columbia into the problems of the District of Columbia school system. The committee's report discussed, in negative terms, the opinions and alleged activities of certain named students. When the committee was about to "republish" the report and distribute it publicly, these students sued the committee members, their aides and "third parties," including the Public Printer, to enjoin publication.³¹ The plaintiffs asserted that the threatened publication would be an invasion of their constitutional right to privacy and an ill-disguised bill of attainder.³² Congressman McMillan, represented by the Justice Department, asserted the speech or debate clause as a bar to the court's jurisdiction. The district court dismissed the complaint³³ and the court of appeals affirmed³⁴ without expressing any view on the merits, holding that the speech or debate clause and related common law privileges precluded it from considering the suit against any of the defendants.³⁵

The positions taken by Senators Gravel and Brewster are arguably consistent with the recognition that the plaintiffs in *McMillan* should not be totally denied an opportunity to seek relief. The history of the speech or debate clause reveals that the privilege was not meant to apply broadly to suits brought by citizens to protect their civil rights from invasion by congressmen or congressional committees.³⁶ Rather, it was designed primarily to be invoked by congressmen in order to prevent executive intimidation and harassment.³⁷ However, the Justice Department

Jan. 2, 1971, Pub. L. 91-644, Title III, § 14(a)(1), 84 Stat. 1890, *codified at* 18 U.S.C. § 3731 (Supp. 1972).

³⁰ 459 F.2d 1304 (D.C. Cir.), *cert. granted*, 408 U.S. 922 (1972).

³¹ For obvious reasons, the plaintiffs sued anonymously.

³² 459 F.2d 1304, 1308 (D.C. Cir.), *cert. granted*, 408 U.S. 922 (1972).

³³ *See id.* at 1308.

³⁴ *Id.* at 1309.

³⁵ *Id.* at 1314, 1316. Judge J. Skelly Wright dissented. *Id.* at 1319-29. In an earlier case, the district court had enjoined the Public Printer from publishing a House Internal Security Committee Report, which if published would have resulted in an abridgement of freedom of speech and association. *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970). However, that action had been dismissed against the congressmen-defendants and the committee's chief counsel, and normal publication in the *Congressional Record* was permitted. *Id.* at 1183.

³⁶ *See pp.* 1171-77 *infra*.

³⁷ *See pp.* 1122-33 *infra*. A less expansive position was taken in the amicus briefs submitted in *Gravel v. United States*, 408 U.S. 606 (1972), by the United States Senate, the American Civil Liberties Union and the Unitarian Universalist Association. These groups argued that a balance of competing social interests

took a rather different position, urging the Court to deny Senators Gravel and Brewster immunity from executive and judicial action while seeking to protect Representative McMillan from a charge of violating the rights of citizens.

With the *Gravel*, *Brewster* and *McMillan* cases before it, the Supreme Court had an opportunity to spell out the limits and uses of a clause which had not emerged in so many diverse contexts in 200 years of constitutional history. Involved were basic issues of separation of powers, executive dominance and congressional decline, the people's right to know, the ability of Congress to discipline itself free from hostile executive or judicial action, and the ability of citizens to protect their rights from invasion by congressional committees. An important provision of the Constitution, adopted at the Convention with almost no debate³⁸ and viewed as axiomatic for most of our history, has thus become the source of controversy and doubt. The purpose of this Article is to propose a general theory for the construction of the speech or debate clause. We begin this analysis with a detailed and admittedly revisionist examination of the development and historical purpose of the speech or debate privilege in both England and this country. We then examine the continuing viability of that purpose in our present form of government, and suggest how the general theory which we advocate should be applied to specific contemporary situations. Finally, because our conclusions differ from those of a majority of the Supreme Court in *Gravel* and *Brewster*, and because considerable and justifiable alarm has been expressed by constitutional scholars in Congress,³⁹ we end this Article with a discussion of several legislative remedies which may restore this essential constitutional provision to its proper role in our governmental system.

II. THE HISTORICAL DEVELOPMENT OF THE PRIVILEGE

The roots of the speech or debate clause, perhaps more than those of any other constitutional prohibition, can be traced directly to historical antecedents, to the bitter and prolonged dispute between Crown and Parliament which disrupted England

requires that those who assist congressmen in the performance of their legislative tasks should be immune from judicial inquiry in executive-motivated suits though not in private civil suits, but that congressmen themselves should be immune from all forms of judicial review. Our resolution is somewhat different. See pp. 1171-77 *infra*.

³⁸ See pp. 1135-40 *infra*.

³⁹ See, e.g., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 118 CONG. REC. 13,610 (daily ed. Aug. 16, 1972) (speech of Senator Ervin).

for centuries. Even the language of our clause is taken almost verbatim from the English Bill of Rights of 1689.⁴⁰ Although the historical definition of the privilege is neither obvious nor uncontroversial, the particular historical view which one adopts is crucial to one's contemporary construction of the scope of the speech or debate clause. The traditional historical view perceives the privilege as static from an ancient inception, as unchanging over the several hundred years during which it has been recognized.⁴¹ This approach defines the privilege according to its literal terms, insulating legislative debate from any form of outside interference and fostering a contemporary construction of the privilege which is in one sense narrow, and in another, expansive. In cases involving conflicts with the executive, the literal approach does not extend the reach of the privilege beyond legislative functions which are necessarily intertwined with speech or debate on the floor of Congress; the literal language of the speech or debate clause is thus construed to include voting, committee hearings, and legislative debate, but nothing more.⁴² On the other hand, the traditional view does not distinguish the kinds of cases in which successful assertion of the privilege would frustrate its own historic objectives and would maintain the privilege with respect to civil suits.⁴³ A major thesis of this Article is that the literal theory of the privilege represents a fundamentally incorrect view of its history and leads to undesirable consequences for our system of government. The functional approach which we advocate views the privilege as evolving dynamically in response to changing governmental functions in order to fulfill the historic purpose of the privilege—the preservation of legislative independence in a system of separation of powers.⁴⁴ This approach

⁴⁰ See pp. 1129–30 *infra*.

⁴¹ This view is expressed in the leading American treatise dealing with the subject, C. WITTKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 23–32 (1970). See also I W. ANSON, *LAW AND CUSTOM OF THE CONSTITUTION* 159–60 (4th ed. 1909); F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 241–43 (1926).

⁴² See *Gravel v. United States*, 408 U.S. 606, 624–27 (1972); *United States v. Brewster*, 408 U.S. 501, 512–16 (1972).

⁴³ See, e.g., *United States v. Brewster*, 408 U.S. 501, 516 (1972); *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930).

⁴⁴ Our analysis builds upon the ground-breaking research of J.E. Neale, who has studied the development of the privilege during the Elizabethan era, which was a formative period in its history. See Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 *HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT* 147–76 (E. Fryde & E. Miller ed. 1970). Neale's work was first published in 1924. Neale, *The Commons' Privilege of Free Speech in Parliament*, in *TUDOR STUDIES* 257–86 (R. Seton-Watson ed. 1924). It has had some impact upon the thinking of constitutional scholars in England. For example, the fourth edition of Taswell-Langmead's classic work, which is the last edition to retain his original text, sets

broadly defines the sphere of contemporary legislative functions protected by the speech or debate clause in executive-legislative conflicts, and it circumscribes the degree to which the privilege may preclude judicial review in certain private civil cases.

A. *The Evolution of the Privilege in England*

As first conceived in England, the free speech privilege afforded no protection to legislators against the actions of a hostile monarch. Parliament's privileges originated in the fourteenth and fifteenth centuries out of a conception of Parliament as a *judicial* body, the highest court of the land, and a concomitant assertion that lower courts could not entertain actions challenging the propriety of deliberations in a higher court.⁴⁵ In addition to freedom of speech, a number of other privileges were claimed, including freedom from civil arrest and the right to punish members and outsiders for contempt, rights which also derived from judicial antecedents.⁴⁶ Given this judicial origin, the initial scope of the free speech privilege was necessarily limited to protecting the speeches and debates of members of Parliament from the interference of private persons through the courts.⁴⁷ The judicial

forth the traditional historical view, T.P. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL LAW* 284-85, 300-05 (4th ed. 1898) [hereinafter cited as TASWELL-LANGMEAD (4th ed.)], while the most recent edition, edited by Plucknett, adopts Neale's approach. T. PLUCKNETT, *TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME* 245-51 (11th ed. 1960) [hereinafter cited as TASWELL-LANGMEAD (11th ed.)].

⁴⁵ See generally C. MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND* 229-46 (1910); Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 *HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT* 147-76 (E. Fryde & E. Miller ed. 1970); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 *SUFFOLK L. REV.* 1, 3-5 (1968). For the early origins of one privilege, see note 48 *infra*.

⁴⁶ See generally C. WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* (1921). The privilege against arrest was first codified in a statute of Henry IV, which provided that members of Parliament and their servants were immune from arrest during session and shortly before and after. See D. BARRINGTON, *OBSERVATIONS ON THE MORE ANCIENT STATUTES* 372 (4th ed. 1775). But this privilege never applied to actions instituted by the Crown: "treason, felony and surety of the peace" cases. T. MAY, *TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT* 90, 100-01 (B. Cocks ed. 1971).

⁴⁷ *Strode's Case*, discussed in TASWELL-LANGMEAD (11th ed.) at 247-49, is an excellent illustration of the original meaning of the privilege. In 1512, a private complaint was filed against Richard Strode, a Burgess of Parliament, because he had voted in favor of a bill controlling abuses against tin miners. He was convicted and imprisoned by a local court, and when he petitioned Parliament for a remedy, a special bill was passed setting him free. 4 Henry VIII, c. 8 (1512). As Neale points out, this case

has no concern with the relations of the crown and the commons. The act

privilege was a corollary of sovereign immunity: the personal delegates of the King were answerable only to him for their official conduct.⁴⁸ Although this somewhat narrow scope of the privilege was to plague Parliament during subsequent confrontations with the Crown, no claim was made by Parliament, even through the early 1500's, that the King was obliged by law, custom, or history to refrain from interfering with its deliberations. It was not until 1542, a century and a half after the privilege was first conceived, that freedom of speech or debate was first recorded as an asserted right in the Speaker's Petition, which defined, albeit vaguely, the relations of Parliament and the Crown.⁴⁹

The free speech privilege evolved gradually and painfully into a practical instrument for security against the executive, an evolution triggered by basic changes in the functions of the legislature.⁵⁰ As the powers of the king's council decayed in the

concerning him asserts the obvious principle that an inferior court cannot punish members of a superior court for their actions in that court.

Neale, *supra* note 44, at 160 n.45. See also McILWAIN, *supra* note 45, at 219-22. More than 150 years later, when the Commons' functions had conflicted with the Crown's prerogatives and Parliamentary independence was established, this Act was declared to be a general act, applicable to the Crown as well as private parties. See note 70 *infra*.

⁴⁸ See, e.g., Floyd & Barker, 77 Eng. Rep. 1305, 1307 (Star Chamber 1608); cf. Randall v. Brigham 74 U.S. (7 Wall.) 523, 539 (1868). See also 5 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 159-60 (2d ed. 1937). The privilege of freedom from arrest, which appears to be the earliest recorded privilege, originated in royal proclamations stating that all members going to or from Parliament were under the prescriptive protection of the King, who summoned them. In 1290, Edward I decreed that distraints against members of the King's council in time of Parliament were forbidden; and in 1314 Edward II issued writs to stay all actions by assize against members of either house during a session. The first instance in which a breach of this privilege was remedied occurred in 1315, when the Prior of Malton was placed under civil arrest while returning from Parliament. The King declared the arrest to be an act done in contempt of the Crown and gave the prior a right to damages. See J. JOLLIFFE, CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 452-53 (4th ed. 1961); 3 W. STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND 512-14 (4th ed. 1946).

⁴⁹ Neale, *supra* note 44, at 157.

⁵⁰ This expansion of the scope of Parliament's speech or debate privilege must be attributed to the assumption of legislative prerogatives by the House of Commons. The House of Lords was created as a judicial body and remains the highest appellate court in England. The House of Commons originally assumed the quasi-judicial function of acting upon private petitions and thus shared with Lords the judicially defined speech or debate privilege. See McILWAIN, *supra* note 45, at 202-05; Neale, *supra* note 44, at 151-52. But Commons gradually expanded its prerogatives, and with them the scope of Parliament's speech or debate privilege. See pp. 1124-35 *infra*. Although most of the controversies surrounding the privilege concerned the prerogatives of Commons, sympathetic dissidents in the House of Lords also bore the brunt of Royal displeasure. On one occasion, Charles I (1625-1649) forbade the Earl of Arundel to attend Parliament. See 6 S. GARDINER,

late fifteenth and early sixteenth centuries, the House of Commons asserted growing authority over bills submitted by the Crown and sought to construct a shield against the King's oft-expressed displeasure.⁵¹ It was "out of this need for unrestrained criticism of government measures" that the House attempted to transform the free speech privilege into a guarantor enforcing a nascent system of separation of powers.⁵² The privilege was therefore formalized into the Speaker's Petition in 1542,⁵³ and the first comprehensive definition of the expanded version of the privilege was articulated by a courageous and harassed member, Peter Wentworth, in 1575.⁵⁴ But the Crown, emphasizing

HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 91-94 (1965); TASWELL-LANGMEAD (11th ed.) at 364-65. But despite such opportunities for members of Lords to assert their privileges against the King, we could find no occasion upon which they did so. Nevertheless, when Commons asserted the speech or debate privilege, it did so on behalf of all of Parliament, and the expanded privilege must apply to Lords as well as Commons.

⁵¹ Neale, *supra* note 44, at 163-64. When Parliament's initiative was by petition, there was no real threat to the wide powers of the Crown, since the petition was only a request for a remedy and the King's response became the statute. Of course, the King could and often did qualify the sense of the petition in his reply and thereby mold the statute. However, when the bill procedure was introduced, the King's power of modification was eliminated, and he could only assent to or veto the bill. *Id.* at 170-72. The bill was thus the actual text of law, enforceable in the courts, and the veto was an unreliable weapon. Elizabeth tried, therefore, to reinstitute the old petition procedure, but did not succeed. However, the House needed protection against more direct interference with their debates. *Id.* at 170-72. Thus, the speech or debate privilege did not arise independently of the change in Parliament's functions, but as a result of it.

⁵² *Id.* at 163-64.

⁵³ *Id.* at 157; see note 58 *infra*.

⁵⁴ Wentworth began his remarkable speech by complaining that in the last session of Parliament, "I saw the Liberty of free Speech, the which is the only Salve to heal all the Sores of this Common-wealth, so much and so many ways infringed." S. D'EWES, JOURNAL OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELIZABETH 236 (1682). Free speech was insecure, he said, as long as the House heeded the Crown's commands to cease discussion into matters involving its prerogatives. *Id.* at 236-37. He then asserted the absolute and exclusive right of the House to control the parameters of debate:

. . . The King ought not to be under man, but under God and under the Law, because the Law maketh him a King . . . [and] free Speech and Conscience in this place are granted by a special Law, as that without which the Prince or State cannot be preserved or maintained . . .

. . . it is a dangerous thing in a Prince to oppose or bend herself against her Nobility and People . . . And how could any Prince more unkindly intreat, abuse, oppose herself against her Nobility and People, than her Majesty did the last Parliament? . . . is it not all one thing to say, Sirs, you shall deal in such matters only, as to say, you shall not deal in such matters? and so as good to have Fools and Flatterers in the House, as men of Wisdom . . . It is a great and special part of our duty and office, Mr. Speaker, to maintain the freedom of Consultation and Speech, for by this, good Laws . . . are made . . . for we are incorporated into this place, to serve God and all England, and not to be Time-Servers . . . or as Flatterers that would fain beguile all the World . . . [b]ut let us show our-

the "judicial" theory of the privilege, vehemently denied that it was bound by such a transformation,⁵⁵ and through the reigns of Henry VIII⁵⁶ and Elizabeth I⁵⁷ the privilege afforded no real protection for "licentious" discussions of matters involving the prerogatives of the Crown.⁵⁸

selves a People endured with Faith . . . that bringeth forth good Works . . . Therefore I would have none spared or forborn that shall from henceforth offend herein, of what calling soever he be, for the higher place he hath the more harm he may do . . .

Id. at 238-40. Immediately following this audacious speech Wentworth was placed under arrest, interrogated, and imprisoned for 1 month. *Id.* at 241-46. The persecution of Wentworth, and his elaborate defense on the grounds of privilege, are described by Cella, *supra* note 45, at 8-9.

⁵⁵ See S. D'EWES, JOURNAL OF ALL THE PARLIAMENT DURING THE REIGN OF QUEEN ELIZABETH 175-76, 259, 269, 284, 410-11, 478-79 (1682).

⁵⁶ 1509-47.

⁵⁷ 1558-1603.

⁵⁸ See 4 HOWSWORTH, *supra* note 48, at 89-93; Neale, *supra* note 44, at 159-60, 164-65. Analysis of the development of freedom of speech and debate is made difficult by the fact that during subsequent confrontations with the Crown, Parliament was to argue that the privilege had been understood from ancient times to bar intrusions by the Crown. See, e.g., *Protestation of December 18, 1621*, in TASWELL-LANGMEAD (11th ed.) 357-58; argument of counsel in Proceedings against Sir John Eliot, Denzil Hollis and Benjamin Valentine, 3 HOW. ST. TR. 294, 295-97, 302-04 (1629). But the only two pieces of evidence ordinarily advanced in support of this proposition do not withstand analysis:

(a) Some historians and judges have cited *Haxey's Case* in 1399 (unreported) as an early assertion of the privilege against the Crown. See, e.g., MATTLAND, *supra* note 41, at 241-42; WITKE, *supra* note 46, at 23-24; Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 132 (1910); cf. *Barr v. Matteo*, 360 U.S. 564, 578, 579 n.2 (1959) (Warren, C.J., dissenting). Haxey was a clerical proctor serving as keeper of the rolls in the Court of Common Pleas. He introduced a private bill to reduce the expenditures of the royal household, for which he was tried and convicted of treason. In the first year of Henry IV, he successfully petitioned the King in Parliament for a reversal of this judgment as being "encontre droit et la course quel avoit use devant en Parliament en anientissement des custumes de lez communes." See TASWELL-LANGMEAD (11th ed.) 174-75, citing 3 Rot. Parl. 434 n.104. But Neale has shown that the petition did not represent a claim of parliamentary privilege, but was grounded either upon procedural irregularities in the trial or upon the contention that Haxey's offense did not amount to treason. Neale, *supra* note 44, at 149; see also TASWELL-LANGMEAD (11th ed.) 174-75. If *Haxey's Case* did deal with the speech or debate privilege, it would be very difficult to explain why this privilege was not asserted in the Speaker's Petition until a century and a half later.

(b) In its battles with Charles I (1625-1649), Parliament was to argue that the act in *Strode's Case*, *supra* note 47, was originally intended to be an absolute prohibition against any prosecution of members for speeches in Parliament. See Proceedings against Sir John Eliot, Denzil Hollis, and Benjamin Valentine, 3 HOW. ST. TR. 294, 297 (1629). Some historians seem to agree, see, e.g., WITKE, *supra* note 46, at 25-30; cf. *United States v. Johnson*, 383 U.S. 169, 182 n.13 (1966). But there is evidence which points the other way. In 1523, only 11 years after *Strode's Case*, and in the midst of one of the first of a series of major conflicts between Parliament and the Crown, Sir Thomas More, Speaker of the House

The increasing independence and legislative authority of the House of Commons was a powerful force, and increasing legislative cognizance was taken of matters once thought to be within the Crown's exclusive domain, such as the conduct of foreign policy and the succession. The House began to conceive of itself seriously as Grand Inquest of the Nation, demanding "a voice in the general policy of the country, and [the right] to criticize the action of the executive in modern fashion."⁵⁹ The consequent intrusions into the Crown's prerogatives led to a century-long battle⁶⁰ over Parliament's freedom of speech or debate, with the Tudor and Stuart monarchs claiming the inherent sovereign right to defend their prerogatives by interfering in Commons' debates and punishing members for "seditious" and "licentious" speech. If the privilege was to serve as an effective instrument of security for Parliament, a broader and more absolute definition, which would protect those speeches concerning matters within the House's expanded jurisdiction, was essential.⁶¹

This dispute over the scope of the privilege was characterized

of Commons, begged Henry VIII to show tolerance towards displeasing opinions expressed during the course of debate:

[T]he wisest man and best spoken in a country happens on occasion while his mind is fervent on a matter, to speak in such wise as he would afterward wish not to have done, and would so gladly change: therefore, most gracious Sovereign, considering that in all your high Courts of Parliament there is nothing treated but matters of weight and importance concerning your realm, and your own royal estate, it could not fail to hinder and put to silence from giving their advice many of your discreet Commons, unless they were utterly relieved of all doubt and fear how anything they should happen to speak should by your Highness be taken: and on this point your well-known benignity puts every man in right good hope.

. . . . It may therefore please your most abundant Grace, our most gracious King, to give to all your Commons here assembled, your most gracious licence and pardon freely, without doubt of your dreadful displeasure, for every man to discharge his conscience, and boldly in everything incident among them to declare his advice; and whatsoever any man happens to say, it may please your noble Majesty

ROPER'S LIFE OF MORE, IN THE UTOPIA OF SIR THOMAS MORE 218-19 (Campbell ed. 1947). There is nothing in this language which suggests that More, or the burgesses for whom he was speaking, regarded freedom of speech and debate as a claim of natural inheritance which must be honored by the Crown. See also note 71 *infra*.

⁵⁹ 1 W. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 35 (5th ed. 1922). See also MCLLWAIN, *supra* note 45, at 173-89.

⁶⁰ Roughly, 1575-1688.

⁶¹ See ANSON, *supra* note 59, at 160-161:

The line taken by the Tudor and Stuart sovereigns on this question of freedom of speech shows that the House had to struggle not merely for latitude of discussion, but for the existence of its initiative in legislation and in deliberation. The Crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one.

See also 4 HOLDSWORTH, *supra* note 48, at 178.

by systematic harassment of members who dared criticize the Crown — the King claiming that the privilege ended where his prerogatives began and the House declaring that the privilege was absolute for any matter touching parliamentary business.⁶² The methods of intimidation employed by the Crown and objected to by Parliament as a breach of privilege took a wide variety of forms. The Crown's arsenal included the practices of issuing direct orders to the Speaker to cease debate on sensitive topics, spreading rumors of royal displeasure and threats of retaliation, bribing corruptible members of Parliament, summarily arresting others and arraigning them before the Star Chamber and other secret, inquisitorial bodies, or committing them directly to the Tower of London.⁶³ Apparently out of a need to legitimize its position in the face of increasing popular displeasure, the Crown turned to the courts for both assistance and vindication. The battle culminated when Sir John Eliot and other members of Commons, who opposed funding what they considered to be a needless and bloody war against France, were prosecuted in 1629 for making "seditious" speeches in the House.⁶⁴ The judges of the King's Bench agreed with the Crown that the judicial foundation of freedom of speech or debate precluded "seditious" speeches from its scope, and therefore rejected Eliot's plea of privilege.⁶⁵ He was convicted for seditious libel and ordered

⁶² See 4 HOLDSWORTH, *supra* note 48, at 89-93; Neale, *supra* note 44, at 159-60, 164-65.

⁶³ See generally TASWELL-LANGMEAD (11th ed.) 174-76, 194-96, 312-16, 353-79.

⁶⁴ *Id.* at 362-65, 375-78.

⁶⁵ Proceedings Against Sir John Elliot, Denzil Hollis and Benjamin Valentine, 3 HOW. ST. TR. 294 (1809) (*Eliot's Case* was decided in 1629). It is noteworthy that Eliot's counsel based his plea against the court's taking jurisdiction on a functional perspective, arguing that the privilege applied even to speeches characterized as "seditious" because of the accusatory and inquiring function of Parliament:

The words [of the speech] themselves contain several accusations of great men; and the liberty and accusation hath always been parliamentary So it is the duty of the commons to enquire of the Grievances of the Subjects, and the causes thereof, and doing it in a legal manner . . . [and] parliamentary accusation, which is our matter, is not forbidden by any law.

Id. at 295-96. He also relied on the judicial origins of the privilege:

Words spoken in parliament, which is a superior court, cannot be questioned in this court, which is inferior.

Id. at 296. In rejecting the plea, the judges addressed themselves *only* to the latter proposition. Justice Whitlocke said:

[W]hen a burges of parliament becomes mutinous, he shall not have the privilege of parliament. In my opinion, the realm cannot consist without parliaments, but the behaviour of parliament-men ought to parliamentary. No outrageous speeches were ever used against a great minister of state in parliament which have not been punished. If a judge of this court utter scandalous speeches to the state, he may be questioned for them before commissioners of Oyer and Terminer, because this is no judicial act of the court.

Id. at 308. And Chief Justice Hyde added:

As to what was said, That an inferior court cannot meddle with matters

imprisoned "during the king's pleasure."⁶⁶

The conviction and imprisonment of Eliot and others crystallized opposition to the dictatorial rule of Charles I and was a significant factor leading to the Civil War and the execution of the King.⁶⁷ In 1641, with the beginning of the Long Parliament and a full century after Commons had taken the first tentative step of incorporating the privilege into the Speaker's Petition, the House declared Eliot's trial to be an illegal infringement of speech and debate.⁶⁸ There followed a series of resolutions and acts by both Houses, before and following the Restoration,⁶⁹ guaranteeing the privilege in absolute terms.⁷⁰

During this entire developmental period the speech or debate privilege was not an end in itself, but an essential mechanism for the protection of the legislature's changing functions. Even prosecutions such as Eliot's would not have been condemned in earlier years;⁷¹ it was only when Commons seriously asserted its

done in a superior [court]; true it is . . . but if particular members of a superior court offend, they are oft-times punishable in an inferior court

Id. at 307.

⁶⁶ *Id.* at 310. Eliot died in prison three years later.

⁶⁷ See 2 R. GNEIST, HISTORY OF THE ENGLISH CONSTITUTION 243-44 (1886); cf. Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (Frankfurter, J.); WITKE, *supra* note 46, at 103-06. See also 7 S. GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 77-122 (1965).

⁶⁸ This resolution is reprinted in 3 HOW. ST. TR. 310-311 (1809). Except for the Short Parliament of 1640, the first opportunity for the House to invalidate Eliot's conviction and establish the absolute scope of the privilege was the year 1641, since Charles I governed dictatorially without Parliament from 1630 until the Civil War. TASWELL-LANGMEAD (11th ed.) 378-93.

⁶⁹ Following the interregnum, Charles II was restored to the Crown in 1660.

⁷⁰ For example, in 1667 both Houses resolved that the special act in *Strode's Case* was a general law. See 3 HOW. ST. TR. 314-15 (1809). In 1668, the House of Lords reversed the convictions of Eliot, Hollis and Valentine. 12 H.L. JOUR. 223 (1668); TASWELL-LANGMEAD (11th ed.) 378 n.55. In order to emphasize the permanence of its expanded jurisdiction, the House of Commons developed an interesting symbolic practice, which still persists, reminding the King of its initiative in legislation: at the beginning of each session, a bill is read pro forma before the King's speech is considered. See ANSON, *supra* note 59, at 67.

⁷¹ The Commons' protestations in *Eliot's Case* may be compared with earlier instances of passive acquiescence to the imprisonment of its members by the Crown. For example, in 1450, Sir Thomas Yonge, a member from Bristol, moved in Commons that, the King having no issue, the Duke of York should be declared heir-apparent. Henry VI, who resented this apparent meddling with his prerogative to determine the succession, ordered Yonge arrested and summarily imprisoned in the Tower of London. Yonge remained in the Tower for the next five years, and there is no record of *any* protest from Commons during this period. In 1455, the Duke of York was appointed protector, and Yonge petitioned Commons to plead his cause with the Crown. The Commons forwarded Yonge's petition to the House of Lords, and Henry VI directed the Lords to grant whatever relief they believed was "convenient and reasonable." TASWELL-LANGMEAD (4th ed.) 303. A comparison of these two cases provides additional evidence that the scope of the

right to function as the Grand Inquest that "restrictions hardly noticed before were bitterly resented; and the illusion of freedom gradually vanished from men's minds."⁷² In short, as the circumstances and need for the privilege were fluid, so too was its operative scope. It is incorrect simply to view this prolonged dispute over the scope of the privilege as involving blatant and intentional violations by hostile monarchs, with the assistance of dishonest "lackey" judges, of the ancient, absolute, and well-defined rights of Parliament.⁷³ A more complex picture emerges from this history. To be sure, although the Tudor and Stuart monarchs were extremely hostile to developments in Parliament which threatened their prerogatives, and although they obtained assistance from judges who were no doubt devoted to maintaining the status quo, it is nonetheless true that their arguments for restricting the privilege were hardly insubstantial. To those with legalistic minds and an inclination to power in the executive, the assertions for an expanded concept of the privilege arguably represented an unwarranted attempt by irresponsible members of Parliament to abuse their position of trust and to put themselves above the law. This issue, of course, was not settled by an abstract consideration of opposing legal theories; it was settled by the historical development and popular acceptance of an independent legislative branch.

1. *The Case of Sir William Williams* — The evolution of the free speech privilege did not end with the Restoration; there followed another cataclysmic confrontation between the Crown and Parliament which was an immediate cause of the Revolution of 1689, the exile of James II, and the enactment of the English Bill of Rights. This confrontation is of considerable importance inasmuch as the speech or debate clause in our own Constitution was taken almost verbatim from the like provision of the English Bill of Rights.

The grievance which gave rise to the legislative free speech provision is set forth clearly in the preamble to the Bill of Rights, charging King James with subverting the Protestant religion and the laws and liberties of the Kingdom by initiating prosecutions for matters "cognizable only in Parliament."⁷⁴ Corresponding to this article of grievance was the declaration:⁷⁵

that the freedom of speech and debates or proceedings in Parliament was not static, but evolved dynamically. *But see* WITTKÉ, *supra* note 46, at 24-25.

⁷² Neale, *supra* note 44, at 175.

⁷³ Such a view was expressed forcefully by Mr. Justice Harlan in *United States v. Johnson*, 383 U.S. 169, 178 (1966).

⁷⁴ 1 W. & M. Sess. 2, c. 2 (1689).

⁷⁵ *Id.*

liament ought not to be impeached or questioned in any court or place out of Parliament.

This provision was not by its terms confined to spoken words and could not have been so intended, consistent with the circumstances which led to its creation. The last prosecution for words spoken in Parliament is found in *Eliot's Case* in 1629, during the reign of Charles I, and that conviction had been reversed by writ of error by the House of Lords in 1668.⁷⁶ The only reported prosecution of a member by James II was against Sir William Williams in 1686–88 for having ordered the republication of a House committee report which alleged misconduct by the King, his family and his advisors.⁷⁷ The King based this prosecution on the legal argument that prior history and cases had carefully and narrowly defined the free speech privilege to provide absolute immunity only for speeches, debates and votes within the walls of Parliament.⁷⁸ In response, Parliament asserted that the privilege encompassed all of the ordinary and necessary functions of the legislature and that the publication of proceedings was such a function.⁷⁹ The immediate purpose of the speech or debate clause of the English Bill of Rights, adopted in specific response to the Williams trial, was to confirm this broader construction for posterity.⁸⁰

The great case of Sir William Williams arose out of circumstances beginning in the reign of Charles II, when the House of Commons, of which Williams was Speaker, received a number of narrative reports about an alleged "popish plot" between the King, his relatives and advisors, and the King of France to restore Catholicism as the established religion of England and to prevent the free exercise of religion by Protestants.⁸¹ The most famous of these was Dangerfield's Narrative, which in lurid detail set forth

⁷⁶ See note 70 *supra*; WITKE, *supra* note 46, at 106.

⁷⁷ *Rex v. Williams*, 89 Eng. Rep. 1048 (K.B. 1688). See Report of the House Committee on the Privileges of Parliament (1771), reprinted in 8 How. ST. TR. 16–17 (1809).

This proceeding the Convention Parliament deemed so great a grievance, and so high an infringement of the rights of Parliament, that it appears to your Committee to be the principal, if not the sole object of the first part of the eighth head [paragraph] of the means used by king James to subvert the laws and liberties of this kingdom, as set forth in the Declaration of the two Houses.

See also McILWAIN, *supra* note 45, at 242–44; W. TOWNSEND, HISTORY OF THE HOUSE OF COMMONS 412–16 (1843).

⁷⁸ See Proceedings Against Sir William Williams, 13 How. ST. TR. 1370, 1377–79 (1684–1695).

⁷⁹ *Id.* at 1410–15.

⁸⁰ See p. 1133 *infra*.

⁸¹ See generally J. POLLOCK, THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II (1903).

such allegations against some of the most prominent members of the royal court. A committee of the House received these narratives, the report containing them was entered in the Commons Journal, and the House then gave permission to several of its members and outside printers to publish the narratives and other papers relating to the popish plot.⁸² Williams, the Speaker, requested and received permission to publish Dangerfield's Narrative.⁸³ Sir William Courtney, among others, went on record to support the reason for the printing:⁸⁴

Let men know what they please, the weight of England is the people; and the more they know, the heavier will it be; and I wish some would be so wise as to consider, that this weight hath sunk ill ministers of state, almost in all ages; and I do not in the least doubt but it will do so to those who are the enemies of our religion and liberties.

A number of prosecutions were instituted by Charles II against virulently anti-Catholic spokesmen.⁸⁵ All were found guilty of seditious libel or high treason by the judges of the King's Bench.⁸⁶ Yet even Charles II dared not attack members of Parliament. It was not until 1686, a year after James II succeeded to a turbulent throne, that the King ordered the filing of an information in the King's Bench against Sir William Williams for the publication of Dangerfield's Narrative.⁸⁷

Williams was represented by Sir Robert Atkyns, a former judge of the Court of Common Pleas, who came out of retirement to argue on behalf of the speech or debate privilege of the House.⁸⁸ Atkyns' argument contained a remarkable exposition of

⁸² See 9 H.C. JOUR. 630-95 (1680). The printing began in 1680 and continued through 1681 as new information was received. See *id.* at 709, 711.

⁸³ *Id.* at 649.

⁸⁴ 2 J. TORBUCK, A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND 96 (1741). (Courtney's statement was made on March 24, 1681.) Another member said, less ominously:

The Privy Council is constituted by the King, but the House of Commons is by the choice of the people. I think it not natural nor rational, that the people who sent us hither should not be informed of our actions.

Id. at 92.

⁸⁵ The earlier cases includes the Trial of William Stayley, 6 How. ST. TR. 1501 (K.B. 1678); Trial of Edward Coleman, 7 How. ST. TR. 1 (K.B. 1678); Trial of Ireland, Pickering and Grove, 7 How. ST. TR. 79 (K.B. 1678); Trial of Whitehead, Harcourt, Fenwick, Gawen and Turner, 7 How. ST. TR. 311 (K.B. 1679); Trial of Langhorn, 7 How. ST. TR. 417 (1679).

⁸⁶ See POLLOCK, *supra* note 81, at 265-87.

⁸⁷ Proceedings Against Sir William Williams, 13 How. ST. TR. 1370 (1684-1695).

⁸⁸ Atkyns had been dismissed from the bench for contradicting a dictum of Chief Justice Scroggs that "the presentation of a petition for the summoning of Parliament was high treason." POLLACK, *supra* note 81, at 286.

the origin, development and purposes of the privilege. He traced the history of the privilege from its early judicial antecedents, which he claimed settled the principle that anything said or done in Parliament could not be questioned in any inferior court.⁸⁹ He then argued on a functional basis that the privilege encompassed actions of members in effectuating the powers of Parliament. He saw those powers as three-fold: a legislative power, in the enactment of statutes; a judicial power, when acting as the High Court; and a counselling, or enquiring, power, which serves both the legislative and judicial powers.⁹⁰ As evidence of this third function he cited the obligation of the House to investigate matters of state, expose corruption and maladministration, punish offending ministers and offer guidance to the king.⁹¹

Atkyns tied Williams' printing of the report to the enquiring function.⁹² He asserted, in fact, that this function was necessary for the accomplishment of all of the House's powers.⁹³ Atkyns then responded to the Attorney General's contention that Williams' act of publication was outside the scope of the privilege. As a matter of common sense, he said, this was absurd.⁹⁴ The narrative had already been made public when read before the bars of both houses and entered in their Journals; the publishing in print changed nothing.⁹⁵ Finally, Atkyns asked rhetorically, "what need was there of printing it?"⁹⁶ and responded that the members of the House, "out of a sense of their duty,"⁹⁷ might decide that it was necessary to inform and alert the public of Dangerfield's charges against high ministers. An enlightened public might then be encouraged to come forward and offer more information, "a fuller proof" that could lead to the prosecution,

⁸⁹ 13 How. ST. TR. 1370, 1383-1407 (1684-1695).

⁹⁰ *Id.* at 1410-13.

⁹¹ *Id.* at 1413.

⁹² *Id.* at 1414.

⁹³

[T]he enquiry is the most proper business of the House of Commons.

For this reason they are commonly styled The Grand Inquest of the nation. . . .

This enquiry of theirs is necessary in a subserviency to *all* the several high powers of that high court. Namely, in order to their legislature, or to the exercise of their power of judicature.

Or it may be in order to their counselling power, for removal of great officers or favorites. . . .

But still they first make enquiry . . . [and] the most effectual enquiry is most probably from without doors; and without such enquiry, things of great importance may lie concealed.

Id. at 1414-15 (emphasis added).

⁹⁴ *Id.* at 1415-17.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1416.

⁹⁷ *Id.* at 1418.

removal, or clearing of the ministers.⁹⁸ Publication of the report was a good way of conducting this further enquiry and had become "a most frequent practice . . . the most ordinary way of making enquiries, which run into all parts of the nation."⁹⁹

Atkyns' argument was thus a forerunner of a standard applied two hundred years later by our Supreme Court — that the privilege protects "things generally done . . . by . . . members in relation to the business" before the legislature.¹⁰⁰ In other times, this argument might have succeeded, but James II dismissed the judges of the King's Bench and caused Williams to be tried by judges who were staunch believers in absolute monarchy.¹⁰¹ The plea of privilege was rejected, and Williams was fined ten thousand pounds.¹⁰²

Shortly after James II was sent into exile, a committee was appointed by the House of Commons to draft what was to become the English Bill of Rights, a proclamation for "better securing our Religion, Laws, and Liberties."¹⁰³ The committee was chaired by Sir George Treby and included Sir William Williams.¹⁰⁴ The committee reported back, and Treby said of the free speech guarantee:¹⁰⁵

This Article was put in for the sake of one, once in your place [*i.e.*, the Speaker], Sir William Williams, who was punished out of Parliament for what he had done in Parliament.

A delegation with Williams at its head was then sent to the House of Lords, and in February of 1689 the two Houses agreed upon the broad language of the Bill of Rights.¹⁰⁶ In July, the House of Commons passed a specific resolution that the judgment of the King's Bench against Williams "was an illegal Judgment, and against the Freedom of Parliament."¹⁰⁷

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

¹⁰¹ See TOWNSEND, *supra* note 77, at 413; *cf.* 6 HOLDSWORTH, *supra* note 48, at 502-05.

¹⁰² See *Rex v. Williams*, 89 Eng. Rep. 1048 (1688). Williams paid 8,000 pounds, and the King acknowledged satisfaction. *Id.* For Williams' subsequent role as legal spokesman for James II, see note 175 *infra*.

¹⁰³ 10 H.C. JOUR. 15 (January 29, 1689).

¹⁰⁴ *Id.*

¹⁰⁵ 9 A. GREY, DEBATES OF THE HOUSE OF COMMONS 81 (1763), *reprinted in* REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACT 24 (H.C. 1939).

¹⁰⁶ 10 H.C. JOUR. 21.

¹⁰⁷ *Id.* at 215. A bill to reverse the conviction and compensate Williams for the fine was sent to the House of Lords. The Lords did not act favorably upon it because that would have required payment to Williams of the not insubstantial amount of 8000 pounds from a greatly depleted treasury. TOWNSEND, *supra* note

2. *A Note on the Seven Bishops Case.* — The great historical battles in England over freedom of speech or debate occurred as a result of legislative resistance to the Crown's vigorous assertions of executive prerogatives. This conflict over the respective powers of the executive and legislative branches is at the core of the development of the privilege. During the Tudor and early Stuart era, at stake was not only the ability of Parliament to deliberate freely, but also the maintenance of its power to function in areas such as foreign policy and the succession, which the executive claimed as solely within its province.

The seminal case of Sir William Williams should be viewed in this perspective. The Crown's motivations for attempting to stifle the Speaker of the House reflected more than chagrin over the revelations of an alleged "popish plot," or even a desire to cut off Parliament's informing function. The prosecution was an integral part of the executive's plan to extend its prerogatives and establish effective dominance over the divisive issue of religion. It was hoped that a Parliament rendered passive by successful violations of its privileges would not effectively oppose the ultimate objective of the executive, to suspend some of the fundamental laws of the nation and to place Parliament in a position subservient to the Crown.¹⁰⁸

In April of 1687, shortly after the indictment of Sir William Williams, James II published a Declaration of Indulgence declaring it to be his "royal will and pleasure that . . . the execution of all and all manners of penal laws in matters ecclesiastical . . . be immediately suspended."¹⁰⁹ Although this assertion of executive power to nullify statutes passed by Parliament was not completely unprecedented, prior attempts to exercise this prerogative had been infrequent and had not precipitated a constitutional crisis.¹¹⁰ When Charles II had declared the ecclesiastical laws suspended in 1672, the response in the House of Commons was so vehement that the King retracted his declaration and acknowl-

77, at 415. See also 13 HOW. ST. TR. at 1438-39. Consideration was given to confiscating the estates of Jeffries and Sir Robert Sawyer, who had filed the information against Williams, but the Lords declined to do so in 1695. *Id.*

¹⁰⁸ See TASWELL-LANGMEAD (4th ed.) at 612-13. James was, in fact, largely successful in stifling parliamentary opposition. The Parliament which was assembled after Williams' indictment was exceedingly servile, granting the King, among other things, munificent supplies for the support of a standing army in time of peace. But when opposition to his religious policies began to grow in the House, James dissolved Parliament and, like Charles I before him, governed dictatorially. See *id.*

¹⁰⁹ SELECTED STATUTES, CASES AND DOCUMENTS 389-90 (C.G. Robertson ed. (9th ed. 1949)).

¹¹⁰ See A. POLLARD, THE EVOLUTION OF PARLIAMENT 275-76 (1964); TASWELL-LANGMEAD (4th ed.) 290-93.

edged that the assertion of this prerogative was illegal.¹¹¹

In 1688, James published his Declaration a second time and ordered it to be read in all the churches. When seven bishops, including the Archbishop of Canterbury, petitioned the King to rescind the order, they were charged with seditious libel.¹¹² Despite James' attempt to pack the King's Bench with judges who would obey his will, the court was evenly divided over the legality of the King's actions.¹¹³ The constitutionality of the suspending power was thus left for decision by the jury.¹¹⁴ This prerogative, Mr. Justice Powell told the jurors, amounted, "to an abrogation and utter repeal of all the laws If this be once allowed of, there will need no parliament. All the legislature will be in the King."¹¹⁵ On June 30, 1688, the jury returned a verdict of not guilty.¹¹⁶

The Bill of Rights of 1689 abolished the suspending power, a prerogative which "was in its nature incompatible with the existence of constitutional government."¹¹⁷ The first grievance enumerated in the Bill of Rights was that James II had endeavored to subvert the laws and liberties of the kingdom "[b]y Assuming and Exercising a Power of Dispensing with, and Suspending of Laws, and the Execution of Laws, without Consent of Parliament."¹¹⁸ Corresponding to this grievance was the first article of the Bill of Rights: "That the pretended Power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal."¹¹⁹ Thus the Bill of Rights both abolished the suspending power and guaranteed the speech or debate privilege.¹²⁰ Together, the two provisions preserved the freedom of legislative debate and the force of legislative enactment, thus assuring the functional independence of Parliament in a system of separate powers.

B. Historical Developments in the United States

1. The Constitutional Convention. — The speech or debate

¹¹¹ 5 HOLDSWORTH, *supra* note 86, at 222; see SELECTED STATUTES, CASES AND DOCUMENTS, *supra* note 109, at 75-80.

¹¹² See TASWELL-LANGMEAD (11th ed.) 443; Case of the Seven Bishops, 12 HOW. ST. TR. 183, 377 (1688).

¹¹³ 12 HOW. ST. TR. at 421-30.

¹¹⁴ The judges could not agree upon the legal issue about which the jury should be charged, and thus left the entire decision of charge and guilt to the jury. *Id.*

¹¹⁵ *Id.* at 427.

¹¹⁶ *Id.* at 430-31; TASWELL-LANGMEAD (11th ed.) 443.

¹¹⁷ TASWELL-LANGMEAD (4th ed.) 294.

¹¹⁸ W. & M., Sess. 2, c. 2 (1689).

¹¹⁹ *Id.*

¹²⁰ See pp. 1129-33 *supra*.

clause in article I, section 6, is the product of a lineage of free speech or debate guarantees from the English Bill of Rights of 1689 to the first state constitutions¹²¹ and the Articles of Confederation.¹²² Presumably because the principle was so firmly rooted, there was little discussion of the clause during the debates of the Constitutional Convention¹²³ and virtually none at all in the ratification debates.¹²⁴ Nevertheless, two aspects of these debates shed considerable light upon the delegates' intentions.

First, the Framers approached the general problem of legislative privilege with extreme meticulousness. At the time of the Convention Parliament claimed a number of privileges, most of

¹²¹ See *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). Both the Massachusetts constitution of 1780 and the New Hampshire constitution of 1784 explicitly declared as the basis of their clauses the principle that free speech or debate in the legislature is "essential to the rights of the people." MASS. CONST., part I, art. XXI; N.H. CONST., part I, art. XXX. See also M. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 69-70, 93-131 (1943). Clarke's comprehensive work does not reveal any overt challenge to freedom of speech or debate in the colonial assemblies, nor did we uncover any in our research. As an a priori matter, when one considers the political climate in states such as Massachusetts between 1760 and 1776, this appears quite incredible; the matter surely warrants further study.

¹²² See *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). Article 5 of the Articles of Confederation provided as follows:

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress

We could find no debate on the language, scope, or purpose of this provision in the Articles Convention. At least two proposals utilizing language similar to that in the Articles were presented to the Constitutional Convention. The Pinckney plan provided:

In each House a Majority shall constitute a Quorum to do business — Freedom of Speech & Debate in the legislature shall not be impeached or Questioned in any place out of it

3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 597 (M. Farrand ed. 1911). And the Convention's Committee on Detail recommended the following language:

Freedom of speech and debate in the Legislature shall not be impeached or questioned in any Court or place out of the Legislature

3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 447 (1900). Toward the end of the convention both proposals were referred to the Committee of Style and Arrangement, which without explanation adopted the language of the current speech or debate clause which bars questioning "in any other place." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 567, 593 (M. Farrand ed. 1911). The earlier versions of the privilege invoke the language of the English Bill of Rights, which had singled out the judiciary for special mention due to the seditious libel conviction of Sir William Williams by the King's Bench. See pp. 1129-33 *supra*.

¹²³ See pp. 1138-40 *infra*.

¹²⁴ See 2 ELLIOTS DEBATES 52-54 (Massachusetts), 325, 329 (New York) (2d ed. 1937); 3 ELLIOTS DEBATES 368-75 (Virginia) (2d ed. 1937); 4 ELLIOTS DEBATES 73 (North Carolina) (1st ed. 1863). In the above debates, the speech or debate clause received only cursory mention and was approved without dissent. In each of the other state debates, there is no recorded mention of the clause.

which derived historically from its original judicial character.¹²⁵ Many of these privileges should have fallen into desuetude, given the changing functions of Parliament. Instead, however, they had become instruments of oppression.¹²⁶ Aware of these developments and fearful of legislative excess,¹²⁷ the Framers limited certain privileges and excluded others altogether. For example, the unlimited privilege from arrest and civil process was carefully defined and severely curtailed in article I, section 6.¹²⁸ The general privilege of contempt power, which had been used during the period before the Convention to imprison offending newspapermen,¹²⁹ was withheld entirely from Congress;¹³⁰ and the privilege to determine members' qualifications, as well as the related privileges of exclusion and expulsion of members, were narrowed significantly in light of Wilkes' ordeal.¹³¹

The Framers also inserted a provision in the Constitution which specifically overruled an important and controversial privilege. Since 1641, the House of Commons had a standing rule which forbade the publication of its proceedings either by mem-

¹²⁵ See p. 1122 & notes 45-46 *supra*.

¹²⁶ See notes 128-32 *infra*.

¹²⁷ See, e.g., J. MADISON, THE FEDERALIST NO. 43 (1788): "The legislative department is everywhere . . . drawing all power into his impetuous vortex."

¹²⁸ See generally T. JEFFERSON, MANUAL OF PARLIAMENTARY PRACTICE § 3 (1797-98). See also Long v. Ansell, 293 U.S. 76 (1934); Williamson v. United States, 207 U.S. 425 (1908). The privilege from arrest had been extended beyond its original scope, see note 46 *supra*, to include not only the persons of members and their servants, but their families and estates as well. Members of Parliament even took to selling "protections" to complete outsiders, who were thus placed beyond the reach of the common law. See WITKE, *supra* note 46, at 41-43. See also I T. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 358 (1912). Following the enactment of the English Bill of Rights, statutes were passed eliminating these abuses. The last of these statutes was 10 Geo. 3, c. 50 (1769), which limits the privilege from arrest in terms similar to those of article I, section 6 of our Constitution.

¹²⁹ See I ANSON, *supra* note 59, at 161-64; p. 1138 *infra*.

¹³⁰ Mr. Justice Miller's excellent historical analysis in *Kilbourn v. Thompson*, 103 U.S. 168, 183-89 (1880), demonstrates how this privilege obtained only in bodies of a judicial character.

¹³¹ Wilkes was one of the few honest members of a House of Commons, which had yielded its independence as a result of bribery and cajolery by the Crown. Wilkes' public exposure of this corruption left the House in a virtual frenzy; it passed a resolution, joined by the House of Lords, withdrawing the privilege from him so that he could be tried in the courts for seditious libel. Wilkes went into self-imposed exile until 1768, when he returned to England and was reelected to Parliament. The House thereupon expelled him and he was convicted of seditious libel and sentenced to 22 months of imprisonment. Wilkes was finally vindicated in 1782 when these actions were expunged from the records of the House. Wilkes' experiences and their effects upon the Framers' interpretation of legislative privilege are discussed in *Powell v. McCormack*, 395 U.S. 486, 527-31, 536-42 (1969).

bers or by the press, except by specific leave of the House. This rule was originally justified as insuring secrecy against monarchs who threatened retaliation against members who were discovered to have intruded into their prerogatives in parliamentary debates. But the rule was later invoked out of fear of misrepresentation in the press and a general intolerance of public criticism.¹³² The possibility that such a rule could be invoked by the new Congress was inconsistent with the authors' theories of self-government, which presupposed the existence of an informed electorate.¹³³ In addition, the Framers were appreciative of the effects on public opinion and on government caused by publicizing the debates of the colonial assemblies.¹³⁴ They therefore placed in the Constitution a duty of Congress to inform the public about its deliberations.¹³⁵ This provision generated heated argumentation in the ratification debates,¹³⁶ with anti-federalists protesting that it did not go far enough since it allowed the people's representatives to conduct secret proceedings "in their judgment." They were assuaged only after Madison and other influential members of the Convention assured them that the secrecy exception would be invoked only on extremely rare occasions and that the people's representatives could be trusted to exercise considerable restraint in withholding proceedings from the electorate.¹³⁷

Alone among the privileges claimed by Parliament, freedom of speech or debate was placed in the Constitution virtually unchanged. In light of the care with which they approached legisla-

¹³² See 1 ANSON, *supra* note 59, at 161-64.

¹³³ See, e.g., J. MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 434 (1966); 1 THE WORKS OF JAMES WILSON 422 (McCloskey ed. 1967); *cf.* 4 PAPERS OF JAMES MADISON 236-37 (Hutchenson ed. 1965); 6 WRITINGS OF JAMES MADISON 396-98 (Hunt ed. 1906).

¹³⁴ Following the practice of the House of Commons, the colonial assemblies had enjoined their members from reporting proceedings in order to preserve secrecy of operation from the Crown, or, in their situation, from Crown-appointed governors. CLARKE, *supra* note 121, at 227-34. However, beginning around 1760, several of the assemblies repealed the secrecy rule and opened their proceedings to the public. The immediate effect in one important state, Massachusetts, was that the debates over policies of resistance accentuated the sense of crisis and stirred the people of Boston to "mutiny and rage." J. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 70-71 (1966).

¹³⁵ Art. I, § 5 requires that:

Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the Journal.

¹³⁶ See, e.g., Patrick Henry's plea in the Virginia Ratification Convention, 3 ELLIOTT'S DEBATES, *supra* note 124, at 170, 315-16, 375-78 (1788).

¹³⁷ See, e.g., *The Virginia Ratification Debates*, 3 ELLIOTT'S DEBATES, *supra* note 124, at 331 (Madison), 401 (Randolph), 409 (Madison), 459 (Mason), 460 (Madison and Mason).

tive privilege generally and the fact that the Framers were competent historians and political theorists, the conclusion seems almost inevitable that they recognized the unique and vital role of this privilege in the system of separate powers.¹³⁸ Thus, the fact that other legislative privileges were curtailed gives no warrant to dilute the speech or debate privilege, which had been molded by history as vital to the independence and integrity of the legislature. The argument to the contrary, that the abuses of other privileges can be imputed to the speech or debate privilege, an argument expressed by Chief Justice Burger in *Brewster*, depends upon an historical construction that is more creative than descriptive.¹³⁹

The second event of importance in gauging the delegates' intent occurred during the brief debate in the Convention over the speech or debate clause. Madison proposed that the scope of the privilege be defined specifically, but this was rejected by the

¹³⁸ James Wilson, an important member of the committee that drafted the speech or debate clause, stated the purpose of this privilege in these terms:

In order to enable and encourage a representative of the publick to discharge his publick 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.

2 WORKS OF JAMES WILSON 421 (McCloskey ed. 1967).

There is little doubt that in speaking of the "powerful," Wilson is referring primarily to the executive branch. *Cf.* *United States v. Johnson*, 383 U.S. 169, 181-82 (1966).

¹³⁹ *United States v. Brewster*, 408 U.S. 501, 516-21 (1972). In arguing for a limited construction of freedom of speech or debate, the Chief Justice stated:

The history of *the privilege* is by no means free from grave abuses by legislators. In one instance, abuses reached such a level in England that Parliament was compelled to enact curative legislation.

Id. at 517 (emphasis added). He then cited WITTKÉ, *supra* note 46, at 39, for examples of abuse. Yet all of these abuses, as well as the "curative legislation," dealt with the privilege from arrest, not the privilege of speech or debate. *See* WITTKÉ, *supra* note 46, at 39-42. *See also* note 128 *supra*.

The Chief Justice then compounds the error by specifically referring to the privilege from arrest and emphasizing its limited scope. 408 U.S. at 520-21. He then states: "We recognize that the privilege against arrest is not identical with the Speech or Debate privilege, but it is closely related in purpose and origin." *Id.* at 521. No citation or authority is given for this remarkable proposition. The statement would have been substantially true in the 1400's, but totally ignores the completely separate development of the two privileges over the 500 years that followed. While the original formulation of both privileges protected burgesses only from interference by private persons with their parliamentary functions, *see* pp. 1122-23 & notes 46-48 *supra*, the speech or debate privilege developed into a shield against interference by the King. The freedom from arrest privilege, however, never applied to executive-motivated actions. *See* note 46 *supra*.

Earlier in his analysis, the Chief Justice combined both of these errors when he attempted to invoke the memory of the Framers: "The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards." *Id.* at 517. If the case under decision had involved a legislator invoking the privilege against arrest to

Convention.¹⁴⁰ Although there is no direct evidence of the reason behind the Convention's action, it may be inferred that the Framers were heeding Blackstone's warning that such definitions could be counterproductive, for if¹⁴¹

no privilege [were] to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament.

Madison himself was later to agree, advocating a functional approach to the privilege.¹⁴²

2. *Post-Convention Developments.* — The great ideals of the Constitution were not long in print before they were tested by intense factional disputes which threatened the Republic's future. Internecine conflict was mitigated by the unifying role of President Washington, but even limited tolerance gave way to undisguised suppression under the administration of John Adams.¹⁴³ The most forceful and persistent of the executive's critics were in the press and in Congress. And the Federalist administration enlisted the judiciary to intimidate both groups.¹⁴⁴

(a) *The Cabell Grand Jury Investigation and Jefferson's Protest.* — In 1797, a federal grand jury was impanelled in Virginia to investigate the conduct of several anti-Federalist members of Congress, including Congressman Cabell of Virginia, who had sent newsletters to their constituents attacking the administration's policy in the war with our former ally, France. The administration declared the newsletters to be "seditious," to contain information valuable to the enemy, and to threaten the security of

bar a civil suit for nonpayment of debt, this statement would be persuasive; all of the "history," "abuses" and "the privilege" discussed involve that privilege. If the delegates were aware of a long "history" of "abuses" from "too sweeping safeguards" of freedom of speech and debate, they certainly kept this to themselves. All of the available evidence, including Jefferson's great protest in *Cabell's Case*, note 150 *infra*, supports the conclusion opposite to that asserted by the Chief Justice. Compare his opinion in *Powell v. McCormack*, 395 F.2d 577, 599-602 (D.C. Cir. 1968), *aff'd in part, rev'd in part*, 395 U.S. 486 (1969), where the clause's history and purpose were set forth more accurately.

¹⁴⁰ See Cella, *supra* note 46, at 14-15.

¹⁴¹ 1 BLACKSTONE'S COMMENTARIES 164 (1765).

¹⁴²

In the application of the privilege to emerging cases, difficulties and differences of opinion may arise. In deciding on these the reason and necessity of the privilege must be the guide.

4 WRITINGS OF JAMES MADISON 221 (1865).

¹⁴³ See J.M. SMITH, *FREEDOM'S FETTERS* (1956); Carroll, *Freedom of Speech and the Press in the Federalist Period: The Sedition Act*, 18 U. MICH. L. REV. 615 (1920).

¹⁴⁴ See SMITH, *supra* note 143; Carroll, *supra* note 143.

the nation.¹⁴⁵ The grand jury was placed under the supervision of Mr. Justice Iredell. Spurred by his inflammatory charge,¹⁴⁶ the grand jury levied indictments against Cabell and others for disseminating "unfounded calumnies" against the government.¹⁴⁷

Thomas Jefferson, who was then Vice-President of the United States and a leading contemporary expert on congressional procedure,¹⁴⁸ immediately drafted a long essay in the form of a protest to the Virginia House of Delegates, signed by himself and other leading citizens of the district represented by Cabell. Jefferson's treatise condemned the grand jury's investigation as an overt violation of the congressional privilege and of the doctrine of separation of powers. The draft was forwarded to Madison, who joined in supporting it and suggested minor changes.¹⁴⁹ These changes were then adopted by Jefferson and the protest was sent to the House of Delegates. The significance of this eloquent protest goes beyond even the stature of its authors; it is a cogent analysis of the purposes and scope of the speech or debate clause, as well as the limitations the clause places on grand jury investigations.¹⁵⁰ Jefferson's protest ended with a petition that the

¹⁴⁵ See 8 WORKS OF THOMAS JEFFERSON 325 (Ford ed. 1904).

¹⁴⁶ See I. BRANDT, JAMES MADISON: FATHER OF THE CONSTITUTION 460 (1950); M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 605 (1970).

¹⁴⁷ 8 WORKS OF THOMAS JEFFERSON 325 (Ford ed. 1904).

¹⁴⁸ While Vice-President, Jefferson compiled the authoritative Manual of Parliamentary Practice. This manual is controlling in the House of Representatives except when in conflict with a standing rule. See Rule XLII in L. DESCHLER, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 439, 91st Cong., 2d Sess., § 938, at 540 (1971).

¹⁴⁹ Letter from Madison to Jefferson, August 5, 1797, in PRESIDENTIAL PAPERS MICROFILM, JAMES MADISON PAPERS, SERIES I: 1796 JAN. 5 — 1801 JUNE 14 (Library of Congress).

¹⁵⁰ 8 WORKS OF THOMAS JEFFERSON 322-31 (Ford ed. 1904):

[I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

Id. at 322-23.

[F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with

House of Delegates order the arrest and imprisonment of the grand jurors¹⁵¹ for this "great crime, wicked in its purpose, and mortal in its consequences," which not only jeopardized Cabell personally, but infringed the rights of the people.¹⁵² The petition apparently mobilized public opinion, because the grand jury quickly withdrew its presentment.¹⁵³

(b) *Matthew Lyon's Case*. — Intimidation of critical members of Congress did not end with the aborted grand jury investigation of Congressman Cabell. In 1798, the administration obtained an even more potent weapon for use against its opponents — the Sedition Act.¹⁵⁴ As he had predicted,¹⁵⁵ Matthew Lyon, a vociferous anti-Federalist congressman from Vermont, was the first person prosecuted under the Act.¹⁵⁶ His trial, its effects on representative government, and the public reaction it generated, bore witness to the effects on the doctrine of separation of powers which result when the executive and judicial branches take action against a legislator who speaks out against policies thought by the executive to be "essential" to the national security.

their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation . . . is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive . . . and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods.

Id. at 325-27.

¹⁵¹ *Id.* at 329-30.

¹⁵² *Id.* at 331.

¹⁵³ See J.M. SMITH, FREEDOM'S FETTERS 95 (1956); Koch & Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WILLIAM AND MARY QUARTERLY 152-53 (third series 1948). That the protest was aimed principally at alluring public opinion seems evident from Madison's letter, in which he stated:

It is certainly of great importance to set the public opinion right with regard to the functions of grand juries, and the dangerous abuses of them in the federal courts; nor could a better occasion occur.

Letter from Madison to Jefferson, August 5, 1795, in PRESIDENTIAL PAPERS MICROFILM, JAMES MADISON PAPERS, SERIES I: 1796 JAN. 5-1801 JUNE 14 (Library of Congress).

¹⁵⁴ 1 Stat. 543 (July 14, 1798).

¹⁵⁵ Lyon's Case, 15 F. Cas. 1183, 1185 (No. 8646) (C.C.D. Vt. 1895) (the case was decided in 1798).

¹⁵⁶ *Id.* This case is also discussed in detail in SMITH, *supra* note 153, at 221-41, in a chapter aptly entitled *The Ordeal of a Critical Congressman*. Mr. Justice Patterson's role in the case is also discussed in Kraus, *William Patterson*, 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 163, 170-71 (L. Friedman & F. Israel eds. 1969).

Lyon was indicted and tried under the Sedition Act for publishing two letters: the first accused the President of an "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice" and the second reprinted a communication from France containing a charge of "stupidity" in the nation's policy toward France.¹⁵⁷ Supervising the grand jury was Mr. Justice Patterson, who instructed the jurors to look carefully at "the seditious attempts of disaffected persons to disturb the government."¹⁵⁸ The grand jury issued the indictment against Lyon on October 5, 1798,¹⁵⁹ 2 days after it was impanelled and at a time when Lyon was a candidate for reelection to a House equally divided between Federalists and anti-Federalists.¹⁶⁰

Lyon's trial began 4 days later. He was represented by the Chief Justice of Vermont, but the latter withdrew when Justice Patterson refused to allow the defense adequate time for preparation.¹⁶¹ Lyon was ignorant of the law and offered no real defense.¹⁶² Following one-sided instructions by Justice Patterson, the jury found Lyon guilty as charged.¹⁶³ He was sentenced to 4 months' imprisonment and fined \$1,000.

The lesson which the Administration sought to achieve in jailing Lyon was not unheeded; Jefferson wrote that "Lyon's judge, and jury . . . are objects of national fear."¹⁶⁴ But the Adams Administration's careful planning was upset when Lyon's constituents, enraged at the imprisonment of their representative for criticizing Adams, formed a mob and threatened to free him forcibly. Lyon apparently perceived the political leverage he now possessed, and quieted the mob. His continued imprisonment was so embarrassing "that the cabinet panted for an excuse to liberate him."¹⁶⁵ He was offered a pardon and money in return for an apology (the President said that "repentance must precede mercy"), but Lyon refused.¹⁶⁶ He was reelected while in jail by a comfortable majority and released from prison at the conclusion

¹⁵⁷ Lyon's Case, 15 F. Cas. 1183, 1184 (No. 8646) (C.C.D. Vt. 1895) (case decided in 1798).

¹⁵⁸ Kraus, *supra* note 156, at 170.

¹⁵⁹ *Id.*

¹⁶⁰ Lyon's Case, 15 F. Cas. 1183, 1187 (No. 8646) (C.C.D. Vt. 1895).

¹⁶¹ *Id.* at 1185.

¹⁶² *Id.* at 1187.

¹⁶³ Patterson charged the jury to decide two points: 1) whether Lyon authored the writings in question, and 2) whether he wrote them seditiously, with "bad intent." The first issue was not contested. Kraus, *supra* note 156, at 170-71. But Justice Patterson never mentioned the propriety of legitimate political opposition, the defense of truth, or even the possibility of acquittal. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Lyon's Case, 15 F. Cas. 1183, 1189 (No. 8646) (C.C.D. Vt. 1895).

¹⁶⁶ *Id.* at 1190.

of the sentence.¹⁶⁷ On his return trip to Congress, he was hailed by crowds rivaling those at Washington's inauguration.¹⁶⁸ A move by Federalist forces in the House to expel him failed to muster the necessary two-thirds vote, and Lyon served another 10 years.¹⁶⁹ Final vindication came in 1840, when a bill was passed by both houses and signed by the President voiding the judgment.¹⁷⁰

Acting in his own defense, Lyon had not raised article I, section 6 as a defense to his prosecution, and the issue of the speech or debate privilege was not litigated at his trial. But *Lyon's Case* is nonetheless vitally important to the doctrine of legislative privilege. Lyon is the only member of Congress in American history to be tried and convicted in the courts for openly criticizing national policy. His trial and its aftermath illustrate vividly the harm to separation of powers which the Framers sought to prevent by including the speech or debate clause in the Constitution.¹⁷¹

III. THE SCOPE OF THE PRIVILEGE

In defining the scope of the speech or debate privilege in "emerging cases," Madison wrote, "the reason and necessity of the privilege must be the guide."¹⁷² The historical development of the privilege in both England and America reveals a fundamental principle — that the speech or debate privilege arose dynamically to preserve the functional independence of the legislature. If it is to serve this purpose effectively, its content can-

¹⁶⁷ *Id.*

¹⁶⁸ SMITH, *supra* note 153, at 241.

¹⁶⁹ Lyon's Case, 15 F. Cas. 1183, 1190 (No. 8646) (C.C.D. Vt. 1895).

¹⁷⁰ *Id.* at 1191.

¹⁷¹ Other constitutional privileges have been implicated in cases in which they were not specifically litigated. The Supreme Court has observed that the trials of newsmen under the Sedition Act, 1 Stat. 596 (1798), "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). Many of the newsmen in these cases served as their own counsel, as did Lyon, either by their own choice or because Federalist judges were generally hostile to defense counsel. Thus the constitutional provision was often not raised as a defense. *See, e.g.*, the trials of Thomas Cooper in F. WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 659-79* (1849). *See also* the trial of John Freis for treason, *id.* at 610-41. When newsmen represented by counsel did attempt to raise the constitutional issue, they were often ordered to abandon the effort. *See, e.g.*, the trial of James T. Callender, *id.* at 710-13. Considering the attitude of Mr. Justice Patterson in the *Lyon* case, p. 1143 & notes 158-63 *supra*, there can be little doubt that the claim of privilege would have been summarily dismissed had Lyon raised it.

¹⁷² 4 WRITINGS OF JAMES MADISON 221 (Hunt ed. 1910); *see* note 142 *supra*.

not be frozen by the role of the burgesses of five hundred years ago, or by the events leading to the execution of Charles I, or even by the conditions prevalent in 1787. Instead the clause must be shaped, as it has always been, by the contemporary functions of the legislature in a system of separation of powers.¹⁷³

The historical development of the privilege should also demonstrate that it is an over-simplification to assert that the only argument supporting a broad construction is based upon exaggerated fears of a runaway and tyrannical executive.¹⁷⁴ Any system of government based on separation of powers contains inherent friction, and clashes between the legislative and executive branches over their respective prerogatives are inevitable. It should be remembered that past threats to legislative independence have come, in the main, from executives who were unquestionably sincere in their beliefs but unable or unwilling to settle their differences with critical legislators in the political arena.¹⁷⁵ But even well-meaning

¹⁷³ See Cella, *supra* note 45, at 34. Chief Justice Burger diluted the importance of the English experience by pointing out 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.

United States v. Brewster, 408 U.S. 501, 508 (1972). He drew on a statement from United States v. Johnson, 383 U.S. 169 (1966), that the privilege "was the culmination of a long struggle for parliamentary supremacy." *Id.* at 178. But this view of the development of the privilege in England is mistaken. In its formative period—from 1540 through 1688—the privilege was asserted by Parliament as a necessary defense of its growing independence. During that period, Parliament was attempting to preserve and extend its functions in a system of balance of powers. Neither the claim nor the reality of Parliamentary supremacy was to come until much later.

¹⁷⁴ But see Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335 (1965).

¹⁷⁵ See pp. 1123–28, 1140–44 *supra*. The only clear exception was the prosecution of Sir William Williams by James II, whose despotic ambitions were nurtured by a zealous belief in the divine right of kings. 13 HOW. ST. TR. 1370 (1686–1688). Yet even in this instance, one should hesitate before regarding the King's opponents as unyielding defenders of liberty. After Sir William Williams was convicted, he turned full circle and swore loyalty to the King. Williams, who had already been driven close to bankruptcy by the judgment in his criminal action, was sued by the Earl of Peterborough, who had been unfavorably mentioned in Dangerfield's Narrative and who demanded large damages from Williams. The King and Williams then struck a bargain whereby the civil action would be dropped if Williams became Solicitor General. To writers who lacked charity for former Whigs who aided the opposition, such a deal "to a man of strong principles . . . would have been more dreadful than beggary, imprisonment, or death." 2 T. MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 988–89 (C. Firth ed. 1968).

As Solicitor General, Williams, a prior enemy and victim of James' oppressive policies, represented the King in the prosecution of the seven bishops. See pp. 1134–35 & notes 108–119 *supra*; Case of the Seven Bishops, 12 HOW. ST. TR. 183, 202 (1688). Not only did Williams argue that the King had the inherent power to

executive challenges to legislative activities can have a serious impact upon traditional legislative functions. When one considers that the cases involving the privilege have often subsumed such legitimate disputes between the executive and the legislature over their respective prerogatives, the prophylactic purposes of the doctrine of legislative privilege are magnified.

These considerations indicate that in executive-motivated suits, any contemporary legislative practice which is necessary to fulfill one of the goals of representative government should fall within the ambit of the speech or debate clause. In considering whether a given practice is protected by the clause, guidance is available in the actual workings of Congress to determine whether it is widely utilized by members in the performance of their duties. But the ultimate focus must be the functioning of the legislature according to the doctrine of separation of powers, so that the privilege, which is an historical derivative of that doctrine, will continue to be defined by it. Of course this does not mean that the privilege should extend to all of a congressman's actions simply because of his status. For example, crimes such as assault and battery or armed robbery should be beyond the scope of the privilege, even if fortuitously committed within the walls of the Capitol.¹⁷⁶ Such crimes are not legislative functions, and their commission in no way supports the system of separate powers.

A broad construction of the privilege in cases involving conflicts between the executive and legislators is also necessitated by considerations of judicial independence. Courts do violence to a democratic separation of powers when they legitimize executive

suspend ecclesiastical laws without the consent of Parliament, *id.* at 402-17, but he also cited his own conviction as precedent against some of the bishops' legal arguments. *Id.* at 226-29. To complete this surprising role reversal, the bishops were represented by Sir Robert Sawyer, who was the Attorney General who had prosecuted Williams. *Id.* at 202-03.

Following the Restoration, Williams disavowed the positions he had taken as Solicitor General in the *Seven Bishops* case. He opposed publication of the trial transcript, *id.* at 201, and in a later case, when discussing the *Seven Bishops* case, said to the King's Bench: "I will not undertake to justify the proceedings of the late Government: we have all done amiss, and must wink at one another." Prynne's Case, 87 Eng. Rep. 764, 766 (1691).

¹⁷⁶ Special problems are presented in prosecutions of crimes such as bribery, in which the charge is often intertwined with a privileged act. Since the speech or debate clause precludes inquiry into a congressman's "legislative acts . . . [and] his motives for performing them," the privilege might operate to bar the admissibility of evidence. *United States v. Johnson*, 383 U.S. 169, 185 (1966). See also *Ex parte Wason*, L.R. 4 Q.B. 573 (1869). In this sense, the speech and debate privilege operates testimonially—to prevent questioning of legislators concerning their activities—in a manner akin to the privilege against self-incrimination or the attorney-client privilege. See REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACTS 9 (House of Commons 1939). This is discussed more fully at pp. 1157-63 *infra*.

assaults upon legislative prerogatives. If the courts define the privilege narrowly, so as to entertain on the merits executive-motivated challenges to legislative activities, they will subject themselves to weighty pressures which threaten to politicize their processes. Such pressures have too often proved irresistible in the past. Whether couched in terms of "sedition," "treason," or "espionage," the essential position of the executive in these cases has been that legislators have jeopardized policies which the executive believes are essential to the furtherance of important national interests. Understandably, the traditional inclination of the courts has been to entertain the executive's claims of impending disaster with a sympathetic ear, and to view the actions (and sometimes motives) of the offending legislators as irresponsible or unpatriotic, or both.¹⁷⁷ But neither Congress nor the English Parliament has been full "of spies and traitors,"¹⁷⁸ and judicial decisions restricting the privilege at the behest of the executive have later been regretted as unfortunate instances of judicial overreaction.¹⁷⁹ Judi-

¹⁷⁷ See notes 65 & 102 *supra* for the perspectives of Justices of the King's Bench in Eliot's and Williams' cases, and pp. 1140-43 *supra* for those of two American Justices in Cabell's and Lyon's cases. See also *Gravel v. United States*, 408 U.S. 606 (1972), in which Justice Douglas, in dissent, pointedly stated that judicial hostility "emanates from every phase of the present proceeding." *Id.* at 633.

¹⁷⁸ In 1938, an opposition member of the House of Commons, Duncan Sandys, obtained and disclosed secret military documents, allegedly in violation of the Official Secrets Act, 10 & 11 Geo. 5, c. 75 (1920). The documents revealed the inadequacy of anti-aircraft defenses around London, and Sandys hoped to mobilize public opinion to remedy the situation. A military court of inquiry subpoenaed Sandys for interrogation about the source of the documents. The House appointed a special committee to consider the applicability of the Official Secrets Act to members of Parliament. During the course of debate, Clement Atlee stated:

Unless Members of Parliament can have reasonable access to knowledge they cannot criticise Ministers effectively. It is our duty to criticise Ministers who are in charge of the administration

In practice Members of Parliament do not abuse their privileges; we are not a House of spies and traitors, and the House has its own method of dealing with hon. Members and of keeping them within bounds. I think it is essential for the life of this House that this House itself should make itself responsible for hon. Members. There is a danger in any suggestion that there should be some outside court or sanction brought in.

337 PARL. DEB. H.C. (5th Ser.) 2167 (1938). The Committee agreed with Atlee on this point. See REPORT FROM THE SELECT COMMITTEE ON THE JUDICIAL SECRETS ACTS 15 (House of Commons 1939). But see note 212 *supra*.

¹⁷⁹ In *Rex v. Wright*, 101 Eng. Rep. 1396, 1398 (1799), one Justice of the King's Bench said of the *Williams* case that it "happened in the worst of times" and another said that it was "a disgrace to the country." The same may properly be said of the actions of Justices Iredell and Patterson in the *Cabell* and *Lyon* cases. See pp. 1140-43 *supra*.

The phenomenon of judicial over-deference to executive claims of protecting national interests is not, of course, limited to legislative immunity cases. It has occurred with some frequency in first amendment cases as well. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

cial neutrality can be assured only by a broad definition of the privilege, which leaves judgments about the propriety of specific exercises of legislative functions in the political arena. Which legislators are heroes in their conflicts with the executive, and which are villains, is a matter best left to the collective deliberation of their colleagues and of their constituents.

These considerations have little applicability in private civil cases. None of the cases which led to the incorporation of the privilege in our Constitution involved a suit by a private individual claiming that his rights were violated.¹⁸⁰ Although the early judicial origins of the privilege certainly would have barred such suits,¹⁸¹ only under the static historical view would that result necessarily persist. But the functional approach which derives from our historical analysis suggests that the operation of the clause should be different in cases where it is asserted against individual rights than in those where it is asserted against executive intrusions.¹⁸² For reasons which will be developed more fully,¹⁸³ the proper functioning of our system of separation of powers requires that in at least one instance involving a clash of individual rights and the privilege — where rights guaranteed by the Constitution are infringed — judicial review should not be foreclosed by the speech or debate clause.

In this section of the Article, we analyze the contemporary role of Congress to determine which congressional activities should be defined as “legislative functions” for the purpose of the speech or debate clause. We examine the question whether collective congressional action can divest individual congressmen of the privilege, and we attempt to distinguish between executive-motivated and civil suits against legislators.

A. *The Informing Function*

A major issue in the *Gravel* case was whether the acquisition of the Pentagon Papers and the Senator’s private publication of the committee record were beyond judicial inquiry. Adopting a

¹⁸⁰ There were, in fact, no civil suits against members of Parliament involving the speech or debate privilege before our Constitution was written. *But cf. Strode’s Case*, *supra* note 47 (private criminal case in 1512 involving privilege when still tied to judicial origins). This is probably the result of two factors: (a) private litigants may have felt that bringing such actions was useless; and (b) they may have been deterred by the existence of another privilege, by which the House of Commons committed for contempt those individuals who had insulted members. See WITTKE, *supra* note 46, at 49–51.

¹⁸¹ See the discussion of *Strode’s Case*, *supra* note 47. See also *Ex parte Wason*, L.R. 4 Q.B. 573 (1869).

¹⁸² See pp. 1172–74 *infra*.

¹⁸³ See pp. 1174–77 *infra*.

narrow definition of the scope of the privilege and asserting that these matters were not part of "legislative activity," the Supreme Court held that they were not privileged.¹⁸⁴ Specifically, the Court held that while a Senator cannot be questioned about his conduct in committee, he can be interrogated about how he obtained materials for the hearing and how he secured publication of the committee record. In so holding, the Court adopted an inadequate definition of "legislative activity," which allowed executive and judicial inquiry in precisely that kind of situation which the speech or debate clause was designed to forbid.

1. *Publication of Legislative Proceedings.* — The scheme of representative government envisaged by the Constitution presupposes an obligation on the part of a legislator to inform his constituents and colleagues about vital matters concerning the administration of government and national affairs.¹⁸⁵ The informing function plays a key role in our system of separation of powers, insuring that the administration of public policy by the innumerable nonelected officials of the executive department is fully understood by the legislature and the people.¹⁸⁶ In contemporary times, as much as when the Constitution was written, the informing function acts to preserve the basic character of our constitutional government.¹⁸⁷ For a system of self-government to be viable, the people must be fully informed of the workings of their government so that they may meaningfully exercise their rights to vote and to "free public discussion of the stewardship of public officials."¹⁸⁸ Congressmen should thus be unhindered in performing their duty of informing the electorate.¹⁸⁹

The publication of congressional committee proceedings and their dissemination to the electorate play other important roles in

¹⁸⁴ *Gravel v. United States*, 408 U.S. 606 (1972). The Court had held, in *United States v. Brewster*, 408 U.S. 501 (1972), that the Senator's activities were not "legislative," but were merely "political." *Id.* at 512. *But see* pp. 1150-53 *infra*.

¹⁸⁵ This was recognized by the Supreme Court in *Watkins v. United States*, 354 U.S. 178 (1957). In speaking of the "power of Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.* at 200 n.33.

¹⁸⁶ *See, e.g.*, W. WILSON, *CONGRESSIONAL GOVERNMENT* 303 (1885).

¹⁸⁷ The centrality of the informing function to democratic institutions has been emphasized even by those political theorists who, while doubting the capacity of legislative bodies to legislate, nonetheless believed that by overseeing the administration of government they would make an essential contribution to the protection of liberty. *See, e.g.*, J.S. MILL, *CONSIDERATIONS OF REPRESENTATIVE GOVERNMENT* 42 (People's ed. 1873).

¹⁸⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

¹⁸⁹ WILSON, *supra* note 186, at 303.

representative government. The heart of representative democracy is the communicative process between the people and their agents in government.¹⁹⁰ By making accurate reports of these proceedings widely available, congressmen enlighten the electorate and at the same time insure that the people will inform them and their colleagues of their well-considered views on pending or potential legislation. Practically every careful student of Congress has observed this process and has also noted that committee hearings and the publication and distribution of speeches and committee reports form the principal avenue for achieving it.¹⁹¹

In examining whether informing constituents through publication is a "legislative act," it is also pertinent to note that congressmen understand both the utility and necessity of holding committee hearings and publishing their proceedings in order both to enlighten the electorate and affect future legislation.¹⁹² Accordingly, Congress has provided a variety of financial and other supports for communications between a legislator and the public.¹⁹³ One study revealed that a majority of congressmen send newsletters to the public on a periodic basis,¹⁹⁴ and it has also been

¹⁹⁰ See, e.g., *SELECTED POLITICAL ESSAYS OF JAMES WILSON 169-70* (Adams ed. 1930).

¹⁹¹ See, e.g., J. BIBBY & R. DAVIDSON, *ON CAPITOL HILL 13* (1967); E.S. GRIF-FITH, *CONGRESS: ITS CONTEMPORARY ROLE 249-53* (4th ed. 1967); J.P. HARRIS, *CONGRESS AND THE LEGISLATIVE PROCESS 41* (1967); *THE REORGANIZATION OF CONGRESS, A REPORT OF THE COMMITTEE ON CONGRESS OF THE AMERICAN POLITICAL SCIENCE ASS'N 13-14* (1945). See also H. LASKI, *THE AMERICAN PRESIDENCY: AN INTERPRETATION 158* (1940). Cf. C.L. CLAPP, *THE CONGRESSMAN: HIS WORK AS HE SEES IT 100-01* (1963).

¹⁹² See, e.g., CLAPP, *supra* note 191, at 265-66; W. MORROW, *CONGRESSIONAL COMMITTEES 91-97* (1969); O. TACHERON & M. UDALL, *THE JOB OF A CONGRESSMAN 117, 280-88* (1966).

¹⁹³

Such provisions include the franking privilege for sending letters, the telephone and telegraph allowance, the stationery allotments, use of the Joint Senate-House Radio-Television facilities, free distribution of the *Congressional Record*, favorable prices on personal reprints from the *Record*, and free use of the folding rooms which collate, fold, stuff, package and mail Congressional newsletters, polls and other communications directed to constituents.

C. HAWVER, *THE CONGRESSMAN'S CONCEPTION OF HIS ROLE, 54-55* (1963). See also *Gravel v. United States, 408 U.S. 606, 650* (1972) (Brennan, J., dissenting); CLAPP, *supra* note 191, at 58-60, 89.

¹⁹⁴

In 1962 a confidential House survey showed that 231 of 437 members of the House used franked-mail newsletters, mailed weekly or on another periodic basis. Of the 231, some 15 Congressmen sent out 400,000 or more pieces of free mail each during the first seven months of the year while 19 sent out 300,000 to 400,000 pieces. . . . In the middle range, well scattered between 5,000 and 300,000 pieces, were 168 (about 73%), while only 29 sent out 5,000 pieces or less.

HAWVER, *supra* note 193, at 56. The Post Office has reported that the amount of franked mail increased from 44.9 million pieces in 1955 to 63.4 million in 1958 and 111 million in 1962. CLAPP, *supra* note 191, at 59.

found that congressmen spend a substantial portion of their time informing the electorate.¹⁹⁵

The informing function is a fact of life in the modern Congress, and it surely cannot be dismissed cynically as a mere device for congressmen to woo votes.¹⁹⁶ Many congressional hearings have been held and extensively publicized in order to enlighten the electorate about activities which were inimical to the general welfare, and have resulted in public pressure for the consequent passage of important legislation. A small sample might include the famous inquiries conducted by the Kefauver committees on organized crime and on dangerous drug practices,¹⁹⁷ by the Senate rackets subcommittee on the regulation of internal operation of labor unions,¹⁹⁸ by the LaFollette civil liberties committee,¹⁹⁹ by the 1965 Senate committee hearings on automobile safety,²⁰⁰ and by the Fulbright committee on the Reconstruction Finance Corporation.²⁰¹ With respect to investigations of executive conduct, one

¹⁹⁵ See, e.g., the results of congressional surveys in TACHERON & UDALL, *supra* note 192, at 280-88.

¹⁹⁶ *But see* United States v. Brewster, 408 U.S. 501 (1972), where the Court did just that. Chief Justice Burger distinguished "legislative" from "political" activities of congressmen. The latter, termed "legitimate 'errands' performed for constituents," were said to include

making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside Congress. . . . 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.

Id. at 512. Senator Ervin has stated that these comments show a basic lack of respect for a coordinate branch of government and amount to a "serious affront." Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 118 CONG. REC. S 13,610, 13,612 (daily ed. Aug. 16, 1972).

¹⁹⁷ *Hearings on Investigation of Organized Crime in Interstate Commerce Before the Senate Special Comm. to Investigate Organized Crime in Interstate Commerce*, 81st Cong., 2d Sess. (1950) & 82d Cong., 1st Sess. (1951).

¹⁹⁸ *Hearings on Violation or Nonenforcement of Government Laws and Regulations in the Labor Union Field Before the Permanent Subcomm. on Investigations of the Senate Government Operations Comm.*, 85th Cong., 1st Sess. (1957); *Hearings on the Investigation of Improper Activities in the Labor or Management Field Before the Senate Select Comm. on Improper Activities in the Labor or Management Field*, 85th Cong., 1st Sess. (1957) through 86th Cong., 1st Sess. (1959).

¹⁹⁹ *Hearings on Violations of Free Speech and Assembly and Interference with Rights of Labor Before a Subcomm. of the Senate Comm. on Education and Labor*, 74th Cong., 2d Sess. (1936) through 76th Cong., 1st Sess. (1939).

²⁰⁰ *Hearing on Federal Role in Traffic Safety: Examination and Review of Efficiency, Economy, and Co-ordination of Public and Private Agencies, Activities and the Role of the Federal Government Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 89th Cong., 1st Sess. (1965).

²⁰¹ *Hearings on a Study of the Operations of the Reconstruction Finance Corporation Pursuant to S. Res 219 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 81st Cong., 2d Sess. (1950) & 82d Cong. 1st Sess. (1951).

might add the Wheeler-Walsh exposure of scandal in the Harding administration,²⁰² the Truman-Mead hearings on national defense²⁰³ and of course, many more recent hearings on the origins and conduct of the Vietnam War.²⁰⁴

The constitutional evil which would result from denying the privilege's applicability to the informing function of Congress should be apparent, particularly when this is done at the behest of the executive and with respect to material which is critical of executive behavior. If the executive branch may institute grand jury proceedings and interrogate witnesses about the publication of their speeches and committee reports which congressmen send to the electorate, legislators will inescapably be inhibited from communicating to constituents — in press releases, newsletters, and anything spoken outside of Congress. Fear of harassment, grand jury investigations, and even prosecutions will isolate congressmen from their constituents,²⁰⁵ thus undermining an important legislative function.

²⁰² See Frankfurter, *Hands off the Investigations*, 38 THE NEW REPUBLIC 329-31 (1924).

²⁰³ *Hearings on Investigation of the Nation's Defense Program Before a Senate Special Comm. Investigating the National Defense Program*, 77th Cong., 1st Sess. (1941) through 80th Cong., 1st Sess. (1947).

²⁰⁴ See THE VIETNAM HEARINGS (1966) (copyright and intro. by J.W. Fulbright); THE TRUTH ABOUT VIETNAM: REPORT ON THE UNITED STATES SENATE HEARINGS (F. Robinson & E. Kemp eds. 1966) (analysis by W. Morse; foreword by J. W. Fulbright). On the general importance of congressional hearings, see Black, *Inside a Senate Investigation*, 172 HARPER'S MONTHLY 275, 285-86 (1936).

²⁰⁵ The holding in *Gravel* arguably does not undermine a congressman's obligation to inform his colleagues, since the specific holding is limited to "private" publication and not to congressionally authorized publications, which would include the *Congressional Record*. See *Gravel v. United States*, 408 U.S. 606, 626 & n.16 (1972). But the logic of the Court's holding may lead to the conclusion that even statements inserted in the *Record* are not privileged, since publication of proceedings in the *Record* may serve to inform constituents no less than Senator Gravel's publication of the subcommittee record, and the Senator's action arguably also served to inform congressional colleagues no less than the *Record*. And logically, official authorization to "republish" should not affect the scope of the privilege. See pp. 1166-69 *infra*. But even if the privilege is held to apply to the *Record*, its publication does not obviate the effect of the decision in cutting off congressmen from their constituents. The *Record* has a very limited circulation, and most congressmen necessarily rely upon "private" publications and speeches outside the Capitol to inform their constituents. See pp. 1150-51 & notes 192-95 *supra*; p. 1168 & note 274 *infra*. Furthermore, congressmen do not enjoy an unlimited right to insert matters into the *Record*; a congressman must obtain the unanimous consent of his house in order to place a statement in the *Record*. Conversation with Murray Zweeben, Assistant Parliamentarian, United States Senate, April 19, 1973. On April 25, 1972, Senator Gravel asked for unanimous consent to insert into the *Record* a copy of National Security Study Memorandum No. 1, which contained analyses by the Defense Department, the State Department and the Central Intelligence Agency concerning the feasibility and likely consequences of an executive decision

The conflict over the informing function which was raised in the *Gravel* case is certainly not novel. Past disputes over the scope of legislative privilege have also centered on this very issue; the factual similarity of the *Gravel* case with the precedents of congressmen Cabell²⁰⁶ and Lyon²⁰⁷ in this country and Sir William Williams²⁰⁸ in England is readily apparent. All involved attempts by legislators to inform their constituents of corruption or maladministration in the executive branch. The central purpose of the speech or debate privilege — to protect legislative functions in the system of separate powers — requires that attempts by the executive to stifle such communication between the people and their representatives in Congress should not be entertained in the courts; the contrary result, to quote Jefferson, would be “to leave us, indeed, the shadow, but to take away the substance of representation.”²⁰⁹

2. *Acquisition of Information.* — The same considerations which dictate that publications of legislative proceedings should be privileged, should apply in equal or even greater force to the acquisition of information for use in legislative proceedings. In order to propose legislation, debate and vote intelligently, and inform the people about the workings of government, congressmen must first be able to inform themselves.²¹⁰ There are two primary

to bomb Hanoi and Haiphong and to mine the North Vietnamese harbors. Senator Griffin (R. Mich.) objected, 118 CONG. REC. S 6579-81 (daily ed. April 25, 1972), and it was decided to resolve the matter in an executive session of the Senate. The session, held on May 2, 1972, lasted for 6½ hours, and it was ultimately decided, informally, that Senator Gravel would not place the memorandum in the *Record* and that a specially appointed committee would give the matter further study. The proceedings of the executive session were subsequently published in 118 CONG. REC. 7393-7427 (daily ed. May 5, 1972).

²⁰⁶ See pp. 1140-42 & notes 145-53 *supra*.

²⁰⁷ See pp. 1142-44 & notes 154-70 *supra*.

²⁰⁸ See pp. 1129-33 & notes 74-107 *supra*.

²⁰⁹ 8 WORKS OF THOMAS JEFFERSON 326 (Ford ed. 1904). See note 150 *supra*.

²¹⁰ As Dean Landis has emphasized:

It needed no argument for Montesquieu to conclude that a knowledge of the practical difficulties of administration was a *sine qua non* of wise legislative activity. But such knowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case; it requires, even though its comprehension be limited by its capacity, the chaos from which its representative has claimed to have evolved the order that betokens progress. The very fact of representative government thus burdens the legislature with this informing function. Nevertheless its first informing function lies to itself, a necessary corollary of any legislative purpose. Knowledge of the detailed administration of existing laws is not merely permissive to Congress; it is obligatory.

Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40

methods for doing so. Legislators can subpoena witnesses, a method held to be a privileged "legislative act" in *Dombrowski v. Eastland*.²¹¹ And legislators can also receive information from informal, voluntary sources. These sources not only provide direct information to congressmen, but often make possible the receipt of information through subpoenas. A congressman cannot subpoena material unless he has enough threshold information to know where, to whom, or for what documents he should direct a subpoena. The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.²¹²

It is especially important that acquisition of information be privileged when the subject of congressional inquiry is executive decisionmaking and when executive errors and misjudgments are more apt to be hidden. As Mr. Justice Brennan observed: "Corrupt and deceitful officers of government do not often post for public examination the evidence of their own misdeeds."²¹³ The informal sources of information from leaks and volunteers are particularly vital in view of the security classification system and the growing assertion of "executive privilege," by which the executive may refuse to supply Congress information which is crucial to its decisionmaking.²¹⁴ The necessity for obtaining information from the executive also influences the allocation of power among the branches of government. If the executive can cut Congress off from relevant sources of information, it can expand its powers into areas vested by the Constitution in the

HARV. L. REV. 153, 205-06 (1926). See also *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927).

The primary reason for the development and reliance upon committees in each house was to further congressional self-education. See generally W.L. MORROW, CONGRESSIONAL COMMITTEES (1969); Landis, *supra*. See also note 178 *supra*. Furthermore, when the Court held in *Tenney v. Brandhove*, 341 U.S. 367, 377 & n.6 (1951), that committee deliberations are privileged, it appeared to rely on the necessity of Congress' ability to inform itself.

²¹¹ 387 U.S. 82 (1967). A complaint against Senator Eastland for allegedly subpoenaing documents in violation of the fourth amendment was dismissed on the basis of his speech or debate privilege.

²¹² This was the conclusion reached by Sir Gilbert Campion, the legal expert for the House of Commons select committee which was appointed in response to the Duncan Sandys incident, see note 178 *supra*. REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACTS (1939). However, the committee itself stated, without explanation, that the receipt of information by a Member of Parliament was not privileged. *Id.* at 11. One can speculate about the extent to which the committee was influenced by the outbreak of World War II shortly before its report was issued.

²¹³ *Gravel v. United States*, 408 U.S. 606, 663 (1972) (Brennan, J., dissenting).

²¹⁴ See, e.g., *id.* at 637-46 (Douglas, J., dissenting).

legislative branch. There can perhaps be no better example of such potential usurpation of functions, and of the attendant disastrous results, than the history of the American involvement in the Indochina War. It is ironic that perhaps the most important revelation of the Pentagon Papers was the ease with which the executive was consistently able to manipulate a Congress kept ignorant of pertinent but distasteful information.²¹⁵

Yet in *Gravel* the Supreme Court held *sua sponte*²¹⁶ that Senator Gravel's receipt of the Pentagon Papers was not immune from extra-legislative inquiry. In discussing the scope of the protective order issued by the court of appeals, the majority said, almost in passing:²¹⁷

Neither do we perceive any constitutional . . . privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.

This statement is not at all clear. On its face, the Court did not specifically hold that acquisition was not a "legislative act," but that inference is inevitable.²¹⁸ For if acquisition is a legislative act, then any questioning about it perforce will "implicate" privileged conduct.

²¹⁵ See also NO MORE VIETNAMS? THE WAR AND THE FUTURE OF AMERICAN FOREIGN POLICY (Pfeffer ed. 1968).

²¹⁶ Since the court of appeals had held that Senator Gravel's acquisition of the Pentagon Papers was privileged; see *United States v. Doe*, 455 F.2d 753, 758-59 (1st Cir. 1972), and since the Solicitor General did not seek review of this ruling in his petition for certiorari, the issue was not discussed in the briefs. *United States' Petition for Certiorari* at 2, *Gravel v. United States*, 408 U.S. 606 (1972). During oral argument, in response to questions from Mr. Justice Marshall, the Solicitor General conceded the correctness of the lower court's ruling. See *Gravel v. United States*, 408 U.S. 606, 632 n.4 (1972) (Stewart, J., dissenting).

²¹⁷ 408 U.S. at 628-29.

²¹⁸ *But see Dowdy v. United States*, No. 72-1614 (4th Cir., March 12, 1973), where the court read *Gravel* as immunizing the "gathering [of] information in preparation for a possible subcommittee investigatory hearing." *Id.* at 27. According to the *Dowdy* court, the *Gravel* decision merely articulated two exceptions to the immunity: (a) "if [inquiry] proves relevant to investigating possible third party crime," and (b) if the congressman's act is itself criminal. *Id.* at 28 n.20, citing *Gravel v. United States*, 408 U.S. 606, 629 (1972). But the purpose of the privilege is inconsistent with the existence of such "exceptions." As the *Dowdy* court itself said, once it is determined that a legislative function is "apparently being performed, the propriety and motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry." *Dowdy v. United States*, *supra* at 33. Ad hoc inquiry into whether a specific exception is factually present negates the concept of privilege, particularly when, as here, the exceptions are so broad as to swallow the privilege.

The principle articulated in the *Gravel* opinion was that the privilege extends to matters beyond pure speech or debate "only when necessary to prevent indirect impairment of [congressional] deliberations."²¹⁹ We believe this standard is far too narrow if it excludes from the ambit of the privilege practices such as the publication of legislative activities which serve to enlighten the electorate. Arguably, the standard does protect the informing function, since an informed public is vital to effective congressional deliberations,²²⁰ and curtailment of the informing function would at least indirectly impair such deliberations. But acquisition certainly should be privileged under the Court's standard. Acquisition of information by congressmen and committees is essential to intelligent deliberation on important issues by Congress. "To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness."²²¹ Indeed the court of appeals, from which the Supreme Court adopted its purported standard as to the scope of the clause, had little difficulty in concluding that Senator Gravel could not be questioned about his acquisition of the Pentagon Papers.²²² It is thus apparent either that the actual standard applied by the Court is narrower than the one stated in the opinion or that the articulated standard was applied in little more than a result-minded manner.

It is possible, however, that the Court's summary disposition of the acquisition issue in *Gravel* was seen by the majority as being dictated, a fortiori, by that same majority's rejection — in *Branzburg v. Hayes*²²³ — of the claim of newspapermen of the right to preserve the confidentiality of sources. But for several reasons, that decision is not dispositive of a congressman's claim that the speech or debate clause encompasses acquisition of information. First, the claim of congressional privilege rests upon a different basis than the claim of privilege for the press — the latter is premised entirely upon the assertion that permitting the interrogation of newspapermen about information given to them by confidential sources will dry up those sources and thereby diminish the amount of information available to the public. The reporter's claim of privilege is thus entirely derived from the rights of the people to be informed. While congressmen do serve the function of enlightening the public by disseminating information,

²¹⁹ 408 U.S. at 625, quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972).

²²⁰ See pp. 1149-50 & notes 190-91 *supra*.

²²¹ Landis, *supra* note 210, at 209.

²²² *United States v. Doe*, 455 F.2d 753, 758-59 (1st Cir. 1972).

²²³ 408 U.S. 665 (1972). This decision was handed down the same day as *Gravel*; Mr. Justice White wrote both majority opinions.

they must also obtain information for use in formulating laws. Thus, if key sources of confidential information are chilled, the very functioning of Congress itself is jeopardized. Second, the Supreme Court majority in *Branzburg* expressed fear that the privilege being asserted was incapable of limitation — that is, it would be impossible to determine who was or was not a bona fide newsman; and lurking in the background were other groups, including scholars and authors, seeking similar protection.²²⁴ In contrast, congressmen comprise a relatively small, well-defined group, which is singled out for unique protection by the speech or debate clause. Third, as we have emphasized, the claim of confidentiality by congressmen is especially compelling in their acquisition of information concerning the executive branch, and this raises important considerations of separation of powers not so directly encountered in the newsman's situation.²²⁵

B. The Bribed Congressman — Inquiry into Motives for Speeches and Votes

Former Senator Brewster was indicted under federal bribery and conflict-of-interest statutes which are specifically applicable to members of Congress.²²⁶ The five counts of the indictment charged Brewster with soliciting and receiving sums of money in return for "official acts performed by him in respect to his action, vote and decision" on proposed postal rate legislation.²²⁷

²²⁴ *Id.* at 703-05. For a lower court decision rejecting a scholar's claim that he had a right under the first amendment to protect the confidentiality of his sources, see *United States v. Doe*, 332 F. Supp. 938 (D. Mass. 1971).

²²⁵ A fourth distinction derives from the different tests applied in first amendment and privilege cases. The absolutist approach of Justices Black and Douglas in first amendment cases — that privileged speech will not yield to subordinate governmental interests — has never commanded a majority of the court. The majority in *Branzburg* recognized that news gathering was entitled to some first amendment protection but held that this was outweighed by the government's interest in securing information relevant to alleged crimes. *Branzburg v. Hayes*, 408 U.S. 665, 681-82, 686-88 (1972). The speech or debate privilege, on the other hand, has always been considered to afford "an absolute privilege . . . in respect to any speech, debate, vote, report or action done in session." *Barr v. Matteo*, 360 U.S. 564, 569 (1959). See also *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967); *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.), cert. denied, 282 U.S. 874 (1930). Thus, a determination that acquisition was protected by the speech or debate clause would mean that executive appeals for more effective criminal law enforcement could not be entertained.

²²⁶ 18 U.S.C. § 201(a), (c)(1)-(2), (g) (1970).

²²⁷ *United States v. Brewster*, 408 U.S. 501, 502-04 (1972). Senator Brewster was charged in five counts of a ten count indictment. Four of the counts charged him with violation of 18 U.S.C. § 201(c)(1)-(2) (1970); which provides:

Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts,

It is apparent that accepting a bribe is not a legislative act; it could not seriously be contended that such an activity is necessary to further any legitimate goal of representative government. On the contrary, bribe taking seriously subverts the legislative process. It might therefore appear that the "bribed congressman" situation in the *Brewster* case presents completely different considerations than the "informing congressman" situation in the *Gravel* case.

However, speech or debate clause problems arise when the alleged bribery is intertwined, as in *Brewster*, with the performance of a privileged act.²²⁸ In *United States v. Johnson*,²²⁹ Mr. Justice Harlan stated that the essence of such a charge is simply that privileged activity was corruptly motivated; and the Court held that such motivation could not be made "the basis of a criminal charge against a member of Congress."²³⁰ In reaching this conclusion, Justice Harlan laid great stress upon the prophylactic purposes of the clause, emphasizing that it should be construed broadly in order "to prevent intimidation by the executive and accountability before a possibly hostile judiciary."²³¹ The thrust of this argument seems to be that executive and judicial inquiry into a congressman's motivation puts him at the mercy of the other branches, and there is no guarantee that their definition of evil will not encompass the vociferous opponent as well as the bribed congressman.²³²

At least on its face, this argument is not fully satisfactory. A

receives, or agrees to receive anything of value for himself or for any other person or entity, in return for: (1) being influenced in his performance of any official act; or (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States . . .

Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 201(d)-(e) (1970). A fifth count of the indictment charged Senator Brewster with violating 18 U.S.C. § 201(g), which prohibits public officials from accepting payment in return for performance of an official act. 18 U.S.C. § 201(a) specifically defines "public official" to include a member of Congress.

²²⁸ If a congressman is indicted for accepting a bribe to commit a nonlegislative act (e.g., intervening before an executive agency, see pp. 1163-64 *infra*), no problem of privilege exists.

²²⁹ 383 U.S. 169 (1966).

²³⁰ *Id.* at 180.

²³¹ *Id.* at 181-82.

²³²

In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.

Tenny v. Brandhove, 341 U.S. 367, 378 (1951) (footnote omitted).

major objective of the privilege is to give practical security to legislators who criticize executive administration of domestic and foreign policy. Unlike investigations concerning the publication and acquisition of information,²³³ a bribery prosecution does not normally involve disputes between the branches over the effective scope of their respective functions. Nor may it be sufficient to speculate that an ill-willed executive will selectively employ bribery prosecutions against outspoken legislative critics who are constitutionally immune from more direct threats. If the executive wishes to harass a congressman, it has many other means available, including use of the grand jury and an arsenal of law enforcement and investigatory agencies.²³⁴ Since the ability of the executive to harass and prosecute congressmen for activities unrelated to the legislative process has not evoked fears of widespread executive intimidation, the independence or integrity of Congress would hardly appear to be jeopardized if the "bribed congressman" does not enjoy immunity from prosecution.²³⁵

However, the threat to legislative independence becomes clearer when the focus is shifted to an examination of the problems inherent in the administration of bribery statutes. When

²³³ See pp. 1150-55 *supra*.

²³⁴ The grand jury's attempted investigation of Senator Gravel's activities illustrates such potential harassment of a critical legislator. Counsel for the Internal Security Division suggested before the district court that Senator Gravel himself could be subpoenaed, at which time he could invoke his fifth amendment privilege against self-incrimination. Record at 8, *Gravel v. United States*, 408 U.S. 606 (1972). Only after the district court issued its protective order did the Justice Department for the first time state that an indictment against Senator Gravel was "not probable." *Id.* at 127-28. Throughout the proceedings, the Justice Department offered no reason for the grand jury investigation. One instance in the Supreme Court proceedings is suggestive of the use of the investigation for harassment. Certiorari was granted on February 22, 1972, *Gravel v. United States*, 405 U.S. 916 (1972), which was too late, under the usual time limits for filing briefs, for oral argument during that term. The Solicitor General filed a motion to expedite consideration, claiming that the grand jury was being paralyzed by the stay and that "important evidence" relating to the Ellsberg trial, see note 12 *supra*, might somehow be withheld if Rodberg's testimony could not be obtained. The latter assertion was directly contrary to the Justice Department's assertion before the First Circuit that it was not using the Boston grand jury to gather more evidence against Ellsberg, who had already been indicted in Los Angeles. See *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972).

In any event, the Supreme Court granted the motion to expedite, *Gravel v. United States*, 405 U.S. 972 (1972), and a decision favoring the Justice Department was rendered on June 29, 1972. *Gravel v. United States*, 408 U.S. 606 (1972). Having thus proved its point, the Justice Department declined to send new grand jury subpoenas to Rodberg, Webber, Stair or anyone else connected with Gravel. See note 20 *supra*.

²³⁵ See Note, *The Bribed Congressman's Immunity from Prosecution*, 75 *YALE L.J.* 335, 348 (1965).

members of the executive and judicial branches accept money from private interests and then support those interests, a strong inference of unethical and illegal conduct arises. But because of their unique representative status, the same cannot be said of congressmen. Members of Congress owe a certain amount of loyalty to their constituents; at the same time, they rely upon gifts in the form of campaign contributions to finance the constantly escalating costs of travel expenses and political campaigns. Forced to satisfy their own needs as well as to serve the interests of their constituents, congressmen often incur the favor of special-interest groups by proposing and voting for certain legislation; in return for this support, congressmen often receive generous campaign contributions. This may reflect a community of interest, or expectations on both sides, or it may be an outright bribe.²³⁶ The interplay of congressmen and their constituents is rarely publicized by either; the circumstances would often permit a grand jury, led perhaps by an unfriendly United States Attorney, to issue an indictment on the basis of ambiguous evidence.²³⁷

The absence of ascertainable standards for distinguishing legitimate from illegitimate congressional motives reduces the en-

²³⁶ This argument was well expressed by the Association of the Bar of the City of New York:

In fundamental respects, however, the congressional problem differs from that of the executive. It is too easy to say glibly that rules governing the administrator should govern the legislator. The congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry — though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government.

Furthermore, no member of Congress can subsist on his government salary. Forced to keep his base and to spend time in his home district, he unavoidably incurs heavy and regular travel expenses. Campaign costs soar as campaign techniques turn to mass communication media. And the congressman must always be prepared to sail on the next ebb of the political tide. These facts, taken together with the myth that membership in Congress is still a part-time job, ensure that congressmen will keep up their outside economic connections, and that they will insist upon the necessity and justice of their doing so.

SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT ON INTEREST AND FEDERAL SERVICE 14-15 (1960).

²³⁷ See *Regina v. Bunting*, 7 Ont. 524, 564-65, 568-69 (1885) (O'Connor, J., dissenting); Brief for Senator Brewster at 68-72, *United States v. Brewster*, 408 U.S. 501 (1972); 78 HARV. L. REV. 1473, 1475-76 (1965).

forcement of bribery statutes to subjective judicial perceptions on an ad hoc basis. The use of these statutes in cases where the charge of bribery is intertwined with privileged activity may have a detrimental impact upon the untrammelled functioning of the legislative process, because the inability of congressmen to know for certain the range of disallowed activities will tend to diminish their willingness to perform their legislative functions without inhibition.²³⁸ And this danger is magnified by the possibility that bribery statutes will be applied selectively against congressmen whose rapport with the White House may be less than ideal.²³⁹

In denying Senator Brewster's claim of immunity, the Supreme Court did not suggest the existence of ascertainable standards for judging the propriety of his motives nor, assuming the absence of such criteria, did it examine the effect such trials might have upon the legislative process. Instead, accepting a belated suggestion of the Solicitor General,²⁴⁰ the majority held that the

²³⁸ This ambiguity may well support an independent constitutional challenge on grounds of vagueness, either as a matter of due process or by analogy to the application of the vagueness doctrine in first amendment cases. Since a definition of impermissible activity appears impossible to construct, the bribery statutes put too much discretion in the hands of prosecutors and courts, thus "chilling" the legislator's exercise of his freedom of speech and debate. See generally Note, *The Void-for-Vagueness Doctrine in The Supreme Court*, 109 U. PA. L. REV. 67 (1960). On the invalidity of broad delegations of discretion in the free speech area, see, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

²³⁹ Much of our present law on the speech or debate clause may be traced to the efforts of a former United States Attorney, Stephen A. Sachs, who prosecuted both Representative Johnson and Senator Brewster. Sachs also obtained a bribery indictment and was appointed special prosecutor against Representative Dowdy (D., Tex.), who was subsequently convicted. *United States v. Dowdy*, No. 72-1614 (4th Cir., March 12, 1973). We certainly do not imply that any of these prosecutions were politically motivated. Sachs enjoys a well-deserved reputation for honesty and nonpartisanship; moreover, he is a Democrat, as are all three of the congressmen. Yet even this example does not mitigate the dangers of selective prosecution by more partisan prosecutors; when Sachs secured bribery indictments against congressmen who enjoyed political favor in the White House, Attorney General Mitchell ordered Sachs not to sign the indictments and the cases were dismissed. See N.Y. Times, May 29, 1970, at 1, col. 1.

²⁴⁰ The Solicitor General's petition for certiorari and original brief focused entirely upon an issue which had been left open in *Johnson*: whether Congress might enact a narrowly drawn statute which would criminalize bribetaking by legislators and authorize the executive to prosecute and the court to try the offending congressman. *United States v. Johnson*, 383 U.S. 169, 185 (1966). This raises the key issue of whether a member's individual privilege may be divested by decision of his house or by Congress as a whole, which is discussed *infra*, pp. 1164-71. The *Brewster* Court did not decide the divestment issue and relied instead upon a new argument — that bribetaking is not a legislative activity — raised by the Solicitor General for the first time in the Supplemental Memorandum for the United States on Reargument at 3-8, *United States v. Brewster*, 408 U.S. 501 (1972).

bribery indictment could be prosecuted successfully without inquiry into either legislative acts or their motivation. The majority reasoned:²⁴¹

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.

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment.

As with the *Gravel* holding on acquisition,²⁴² this statement is not very clear, because the Court did not explain how inquiry into a legislative act or its motivation is possibly avoidable. If a congressman decides to give a speech or cast a vote a certain way and he is indicted for having done so corruptly — as a result of a bribe — his motivation for the legislative activity is being called into question by the charge.²⁴³ Nor would it matter that he did not even speak or vote. The decisionmaking process by which a congressman decides to speak or vote, or to remain silent or abstain, would seem to be as much a legislative act as a speech or vote itself. An indictment for exercising that decision improperly directly challenges this decisionmaking process.²⁴⁴ The holding in *Brewster* thus must be that this basic decisionmaking process is not privileged and is thus subject to executive and judicial inquiry. Such a holding is, of course, consistent with the holding in *Gravel* that receipt of documents for use in congressional deliberations is likewise subject to extra-legislative restraint and sanctions.²⁴⁵

²⁴¹ United States v. Brewster, 408 U.S. 501, 526 (1972).

²⁴² See pp. 1155-57 *supra*.

²⁴³ Nor did the Court explain how this holding is consistent with the language of the statute, since 18 U.S.C. § 201 (c)(1)-(2) (1970) at no place mentions the word "promise." It says that no public official may accept anything of value in return for "being influenced in his performance" of an official act. See note 227 *supra*. The Court may have misconstrued the statute in order to save the indictment. See United States v. Brewster, 408 U.S. 501, 535-36 (1972) (Brennan, J., dissenting).

²⁴⁴ See *Ex parte Wason*, L.R. 4 Q.B. 573, 576 (1869).

²⁴⁵ It is difficult to reconcile Mr. Justice White's dissenting opinion in *Brewster* with his holding in *Gravel* that preparatory activity such as acquisition is not privileged. Justice White distinguished the preparatory acts in *Gravel* as being "criminal in themselves." United States v. Brewster, 408 U.S. 501, 555 n.* (1972) (dissenting opinion) (the footnote is marked only by an asterisk). There are

Taken together, the decisions establish that a congressman is immune from questioning about his speeches, debates and votes, but that he is accountable to the executive and judicial branches for his conduct in preparing his speeches, deciding how to vote, and telling the people why he spoke and voted as he did. One might conclude, with Mr. Justice Brennan's dissent in *Gravel*, that this result "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."²⁴⁶

C. Intervention Before Executive Agencies

In *United States v. Johnson*,²⁴⁷ Justice Harlan stated in dictum that congressmen who intervene before executive agencies on behalf of their constituents do so at their own risk:²⁴⁸

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.

Yet the issue is more difficult than this casual disposition would indicate.²⁴⁹ It may be argued that there is a congressional role akin to that of an ombudsman with respect to executive agencies. With the tremendous growth of these federal agencies and the mushrooming number of bureaucrats, there is much to be said for members of Congress using their influence to protect constituents from injustice.²⁵⁰ And the positive effects of such intervention on the workings of government go beyond relief for individual constituents who feel helpless when confronted with a gigantic bureaucracy; the intervening legislator is also in a position to help administrators keep in touch with popular opinion con-

three problems with this distinction: (1) accepting a bribe is also a criminal act in itself; (2) the privilege, by definition, protects both legal and illegal activity; and (3) it is hardly clear that merely receiving classified documents violates any criminal statute. See note 218 *supra*. The last point is now being litigated in the trial of Daniel Ellsberg and Anthony Russo. See note 12 *supra*.

²⁴⁶ *Gravel v. United States*, 408 U.S. 606, 648 (1972) (Brennan, J., dissenting).

²⁴⁷ 383 U.S. 169 (1966).

²⁴⁸ *Id.* at 172.

²⁴⁹ See Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L.J. 366, 372, 384 (1967); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 336, 346 (1965).

²⁵⁰ See, e.g., E. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 79 (4th ed. 1967); B. GROSS, THE LEGISLATIVE STRUGGLE: A STORY IN COMBAT 140-41 (1953); SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 16 (1960).

cerning the activities of their agency.²⁵¹ In addition, studies of Congress attest generally to the fairly widespread nature of legislative intervention before executive agencies.²⁵²

While these arguments in support of the usefulness of intervention seem to us persuasive, there are countervailing considerations. Many congressmen believe that the practice is at least ethically questionable, since the line between legitimate assistance of constituents and illegitimate influence peddling is exceedingly narrow.²⁵³ Legislative proposals have been introduced to curb the practice, and a substantial number of congressmen do not go beyond sending a letter of inquiry to the agency.²⁵⁴

While some controversy thus surrounds the question of the propriety of intervention, that question need not be resolved when one analyzes the scope of the speech or debate clause in terms of its purpose — preservation of the system of separation of powers. The usefulness or even commonness of such intervention is not alone a sufficient index of the scope of the privilege. Historical redefinition of the privilege has consistently described its parameters not according to general notions of public policy, but according to the function of legislative prerogatives in the scheme of separate powers. Even if intervention by individual congressmen is useful and ethical, whether it is a proper “legislative function” is open to serious question. It is arguable that such intervention breaches separation of powers because it involves direct interference with matters committed by law for resolution by a coordinate branch of government. It would hardly be thought consonant with separation of powers for a congressman to intercede before a judge who was deciding the case of a constituent; on principle, the same may be true with regard to intervention before the executive branch. If a congressman does believe that an injustice has been committed by an executive agency (or, for that matter, by a court), he has adequate legislative tools at his disposal: he may hold hearings, expose the injustice and introduce remedial legislation. On balance, therefore, it would appear that Justice Harlan was correct in indicating that personal intervention before executive agencies would not fall within the ambit of the protection of the speech or debate clause.

D. *Divestment of the Privilege*

Although neither case was explicitly decided on this issue, in both *Gravel* and *Brewster* the Justice Department argued that

²⁵¹ See E. HERRING, *THE POLITICS OF DEMOCRACY: AMERICAN PARTIES IN ACTION* 383 (1940).

²⁵² *E.g.*, J. BIBBY & R. DAVIDSON, *ON CAPITOL HILL* 15-16 (1967).

²⁵³ Cf. SUBCOMM., SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, *ETHICAL STANDARDS IN GOVERNMENT*, 82d Cong., 1st Sess. 19-30 (Comm. Print 1951).

²⁵⁴ See G. GALLOWAY, *THE LEGISLATIVE PROCESS IN CONGRESS* 202-05 (1953).

each Senator's privilege was divested because of an asserted conflict with congressional practice, rules or statutes. In *Gravel*, the Justice Department originally claimed that the speech or debate clause did not protect any of the Senator's actions because the subcommittee meeting was allegedly "unauthorized" by the Senate rules, since the subject matter of the inquiry was said to be beyond the jurisdiction of the subcommittee.²⁵⁵ This claim — that the hearing was an "irregular" or "nongermane" activity and thus not a "legislative function" — was rejected by the district court and was not pursued in the higher courts.²⁵⁶ However, the divestment theory enjoyed more success when applied not to the lack of authorization for the committee meeting, but to the lack of authorization for the publication of its record. In both the court of appeals and the Supreme Court, the Justice Department stressed that such publication was not privileged because a private printer had been used and the full committee had not authorized the publication.²⁵⁷ Combining the "irregularity" and "nongermaneness" themes, the court of appeals²⁵⁸

dr[ew] a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of . . . lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern.

The Supreme Court did not explicitly embrace such a distinction, but it did suggest that Senate or committee authorization for the publication might make a difference in determining whether the privilege applied.²⁵⁹ Similarly, in the *Brewster* case the Justice Department claimed that the Senator's privilege had been divested by a narrowly drawn criminal statute by which Congress gave the courts jurisdiction to try congressmen accused of accepting a

²⁵⁵ The Justice Department's argument was that judicial review had often been exercised to control legislative committees which went outside their jurisdiction. Reliance was placed on cases in which the courts refused to hold in contempt of Congress witnesses who had been recalcitrant before legislative committees. See *United States v. Doe*, 332 F. Supp. 930, 935-36 (D. Mass. 1971).

²⁵⁶ *Id.* at 935. See also *Gravel v. United States*, 408 U.S. 606, 610 n.6 (1972).

²⁵⁷ This argument was pursued by the Solicitor General, who asserted that the chairman of the parent committee "apparently recognized that the republication was not necessary or appropriate to the proper performance of any legislative function, since he refused to authorize it." Brief for the United States at 42, *Gravel v. United States*, 408 U.S. 606 (1972). Actually, as Senator Dole stated on the floor of the Senate, the committee chairman, Senator Randolph, had not refused to authorize the republication, 118 CONG. REC. S 4620 (daily ed. March 22, 1972), and the district court refused to so find. Record at 88-89, *Gravel v. United States*, 408 U.S. 606 (1972).

²⁵⁸ *United States v. Doe*, 455 F.2d 753, 759-60, 762 (1st Cir. 1972).

²⁵⁹ *Gravel v. United States*, 408 U.S. 606, 626 (1972).

bribe in return for a favorable speech or vote.²⁶⁰ This issue was left open by the Supreme Court majority,²⁶¹ although the three dissenters rejected the claim.²⁶²

While each of these positions advanced by the Justice Department is somewhat different, they basically involve the same question: whether the validity of a congressman's assertion of legislative privilege depends upon the approval or disapproval of his house.²⁶³ For two reasons, it should not. First, Congress should not be able to collectively circumscribe the constitutional rights of its individual members. The earliest American case to address the question — concerning a state constitutional provision analogous to the speech or debate privilege — held that because the privilege was personal to each legislator, the prohibition against executive and judicial inquiry into the exercise of legislative acts does not depend upon “whether the exercise was regular according to the rules of the house, or irregular and against their rules.”²⁶⁴ At most, legislative actions without house approval should subject a congressman to disciplinary actions by his colleagues; but such actions should not remove a congressman's personal constitutional rights.

Second, the rules of each house or “germaneness” and “regularity” do not define or set bounds upon the limits of the legislature's functions. These rules are established for the convenience and efficiency of each house, to allocate the exercise of these functions among its members and its committees. But whether a function is performed by the member to whom it has been delegated or by another member should not alter its character as a legislative function.²⁶⁵ And it is the characterization of an activity as a legislative function which brings it within the scope of the speech or debate privilege. Similarly, whether rules of procedure

²⁶⁰ This was the only argument made by the Justice Department in its brief. After the case was set down for rehearing, the Justice Department argued that the indictment could be proven without inquiry into any legislative act. The Supreme Court accepted the latter proposition, and the divestment issue was avoided. See pp. 1160–61 & note 240 *supra*.

²⁶¹ *United States v. Brewster*, 408 U.S. 501, 529 n.18 (1972).

²⁶² *Id.* at 540–49 (Brennan, J., joined by Douglas, J.), 562–63 (White, J., joined by Douglas and Brennan, J.J.).

²⁶³ This discussion assumes *arguendo* that approval or disapproval of the house may be inferred by comparing a congressman's actions with statutes or rules. *But cf.* note 272 *infra*.

²⁶⁴ *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). This passage was quoted with approval in *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880). See also note 277 *infra*.

²⁶⁵ The district court in *Gravel* implicitly recognized this point in rejecting the Justice Department's argument of nongermaneness: “It has not been suggested . . . that the war in Vietnam is an issue beyond the purview of congressional debate and action.” *United States v. Doe*, 332 F. Supp. 930, 936 (D. Mass. 1971). See also *Dowdy v. United States*, No. 72–1614 (4th Cir. March 12, 1973), at 33.

are adhered to or violated has no bearing upon the character of the function being performed.²⁶⁶

Conversely, the mere imprimatur of a committee or the full house should not give constitutional protection to an otherwise unprivileged act. As with all other constitutional provisions, the contours of the speech or debate clause are ultimately established by judicial decision and not by legislative fiat. If an act of a congressman is *ab initio* unrelated to the proper functioning of the legislative process, a simple approval by the house should not magically transform it into a legislative act.²⁶⁷ Furthermore, the logic of a contrary conclusion would hold that the privilege protects only those congressmen who are in accord with the majority sentiment. In terms of separation of powers, it may be more important to protect dissenters, especially when a majority of the Congress supports the executive.

The use of germaneness and regularity standards by the courts in determining the applicability of the privilege in individual cases is thus inconsistent with both the individual nature and the functional definition of the privilege. Of course such use may also be barred by an argument extrinsic to the speech or debate clause, that the judiciary does not have the authority to enforce house rules.²⁶⁸ The assertion that a congressman may be disciplined by the executive and judiciary for otherwise privileged conduct because he violated the practices of his house necessarily presupposes that these branches have some general power to oversee the internal rules of the legislative branch.²⁶⁹ But Congress' power in article I, section 5 to make and enforce rules for its proceedings is a "textually demonstrable constitutional commit-

²⁶⁶ For example, Rule XIV (2) of the Rules of the House of Representatives imposes a general 1 hour time limit on individual floor speeches. Rule XIV (2), in L. DESCHLER, *CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES*, H.R. DOC. NO. 439, 91st Cong., 2d Sess., § 759, at 416 (1971). In practice, the Senate and House generally limit floor speeches much more severely — to 5 minutes in the House and 15 minutes in the Senate. Conversation with Murray Zweeben, Assistant Parliamentarian, United States Senate, April 19, 1973. If a congressman spoke longer than the time limit, it could not seriously be suggested that his speech was not a legislative function, even if he were disciplined by his house for violation of its rules.

²⁶⁷ This has been the rule in England at least since *Ashby v. White*, 92 Eng. Rep. 126 (Q.B. 1702), *rev'd on other grounds*, 1 Eng. Rep. 417 (H.L. 1703). See also *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1156 (Q.B. 1839).

²⁶⁸ Such an argument is one aspect of what is known as the "political question doctrine." See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²⁶⁹ This argument was in fact made in *Gravel* by counsel for the Justice Department in the district court proceedings. When asked by the court how he proposed to prove that Senator Gravel's actions had violated senatorial rules and practice, counsel replied that he might subpoena Senator Randolph, chairman of the parent committee. Record at 89, *Gravel v. United States*, 408 U.S. 606 (1972).

ment”²⁷⁰ and thus precludes general superintendence by the judicial branch.²⁷¹ How a house of Congress internally allocates its legitimate legislative functions, in committee and on the floor, is a question which is beyond the general cognizance of the other branches.²⁷²

With these principles concerning the internal rules of Congress in mind, we can evaluate one possible distinction between *Doe v. McMillan*²⁷³ and *Gravel*. The “republication” sought to be enjoined in *McMillan* was pursuant to committee authorization and with the assistance of the Public Printer; Senator Gravel, on the other hand, did not seek or obtain parent committee approval for “republishing” the subcommittee record and used Beacon Press, a private printer. But such a distinction should have no legal significance. If the informing function is protected by the speech or debate clause, then an exercise of that function should be privileged regardless of the formal technique which an individual congressman uses in discharging it.²⁷⁴ If, on the other hand, the

²⁷⁰ *Baker v. Carr*, 369 U.S. 186, 217 (1962) (Brennan, J., speaking generally of the political question doctrine).

²⁷¹ This is not to say that Congress has exclusive authority under § 5 to discipline its own members in all situations. Activity which is not within the scope of the speech or debate clause (§ 6) may be prohibited by both house rules and criminal statutes, and offending congressmen would then be subject to sanctions by both the house and the judiciary. See *Burton v. United States*, 202 U.S. 344, 367 (1906); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 348 & n.83 (1965).

²⁷² Of course, when the enforcement of a statute depends upon a legislator's adherence to internal rules, judicial inquiry may be proper. For example, when a witness is prosecuted in the federal courts under the contempt of Congress statute, 2 U.S.C. § 192 (1970), for refusal to answer the questions of a committee, the courts may be obliged to examine internal house rules in order to determine whether the committee had jurisdiction of the matter; if it did not there could be no contempt. See, e.g., *Watkins v. United States*, 354 U.S. 178, 205-06 (1957). Except in a situation of this kind, the issue of jurisdiction is “peculiarly within the realm of the legislature.” *Id.* Thus, in *Yellin v. United States*, 374 U.S. 109 (1963), a recalcitrant witness was found not guilty of contempt because the committee had failed to follow its own rules, but the Court noted that the committee members nevertheless were immune from suit under article I, § 6. *Id.* at 121-22.

²⁷³ 459 F.2d 1304 (D.C. Cir. 1972), cert. granted, 408 U.S. 922 (1972). The facts of this case are discussed *supra*, p. 1119.

²⁷⁴ This point was made forcefully by the Senate in its amicus brief:

One of these duties, important as any other, is the duty of informing other Members, constituents and the general public, on the issues of the day. This is done in many ways, most of which were not technically possible in 1789. Floor debate and belated newspaper reports were practically the only means available at the time of the founding. Now, there are many means of disseminating information: wire services, radio and television, telephone and telegraph, as well as floor debate, newspapers, books, magazines, newsletters, press releases, committee reports, the *Congressional Record*, and legislative services. In today's hectic and complicated world, the various methods of informing vary in effectiveness. Each Member must decide for himself from time to time which issues require ventilation and what methods to use.

obligation of congressmen to enlighten their constituents is not part of the philosophy of the speech or debate clause, then the clause does not bar judicial inquiry even if the congressman acted pursuant to an order of the house.²⁷⁵ It may be noted that this conclusion — that the legislature cannot confer a privilege upon an otherwise unprivileged act — was enunciated in *Stockdale v. Hansard*,²⁷⁶ a decision which was relied upon by the majority in *Gravel*.

For similar reasons, Congress should not be able to divest any of its members of the privilege by a statute authorizing prosecution in the courts. As we have indicated, the privilege is guaranteed to each member personally, and its constitutional protection is not

It is not for the Executive to challenge nor for the Judiciary to judge a member's choice of issues to publicize or methods of publication regardless of whether they may be considered ill-advised.

Brief of Senate as Amicus Curiae at 6, *Gravel v. United States*, 408 U.S. 606 (1972).

Furthermore, technological developments in printing have persuaded many congressmen and other public officials to utilize private facilities to disseminate reports and records in order to obtain the cheapest and most widespread distribution. For example, we have been advised by the Library of Congress that the Bantam edition of the Kerner Commission Report had sales of 1,895,000 compared to 65,000 for the Government Printing Office edition (the latter costing three times as much); the sales of private editions of the 1966 Foreign Relations Committee hearings on the Vietnam War totalled 42,000, compared to 6023 for the G.P.O. edition. Senator Gravel's brief lists about 50 recent examples of private publications of House and Senate committee hearings. Brief for Senator Gravel at 86-88, nn.111-119, *Gravel v. United States*, 408 U.S. 606 (1972). Finally, it should be observed that the Public Printer has not had a status that is different, under either English or American law, from private printers who publish legislative proceedings. See *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180 (D.D.C. 1970); compare The Parliamentary Papers Act, 3 and 4 Vict. c. 9 (1840), with *Wason v. Walter*, L.R. 4 Q.B. 73 (1868).

²⁷⁵ There was a hint in the majority opinion in *Gravel* that the requirement in article I, § 5 that each house keep and publish a "Journal of its Proceedings" might lead to a different result "when Congress or either House, as distinguished from a single member, orders the publication and/or public distribution of committee hearings, reports or other materials." *Gravel v. United States*, 408 U.S. 606, 626 n.16 (1972). However, the history of this provision shows that it was designed to negate a privilege of secrecy claimed by the House of Commons rather than to create a privilege in either house. See p. 1138 *supra*. Moreover, protecting publications in the *Journal* would accomplish little, since the *Journal* generally records only the daily legislative schedule, and the results of votes, speeches and documents are recorded in the *Congressional Record*, which is an unofficial publication not required under § 5.

²⁷⁶ 112 Eng. Rep. 1112, 1156 (Q.B. 1839). This was a libel suit against the Public Printer who, pursuant to house order, had published and distributed a committee report critical of the management of Newgate Prison. The Queen's Bench held that the mere order of the house could not confer a privilege upon the Public Printer. But a statutory privilege was conferred upon the Public Printer by the Parliamentary Papers Act, 3 & 4 Vict., c. 9 (1840). See also pp. 1180-81 & notes 324-34 *infra*.

subject to collective discretion.²⁷⁷ We have also argued that the scope of the privilege is defined by contemporary legislative functions, and that the definition of a constitutional privilege is the province of the courts, not the Congress. While a congressional decision that specific legislative conduct is a crime does indicate that the majority of Congress does not consider such conduct to be a proper legislative function, and while that decision should no doubt influence the court, it cannot be dispositive of the constitutional question. Congressional judgments on the propriety of legislative activities may well be suspect in some cases. If the Congress passed a law proscribing all floor speeches which in any way criticize the government, there could be little doubt that the proscribed activities would fall within the ambit of the speech or debate privilege.²⁷⁸ Moreover, Congress may make criminal activity which itself is not a "legislative function," but whose prosecution would necessarily require questioning about legitimate legislative functions.²⁷⁹ In these situations, the courts should be wary of subjecting individual legislators to sanctions that may be politically motivated and which infringe upon the freedom of legislative deliberation.

Finally, it must be admitted that in some cases wrongdoing may go unquestioned, uninvestigated, or unpunished because the courts will be found to be without jurisdiction over the offense and because the legislature will fail to discipline its members,²⁸⁰ perhaps for political reasons or out of solicitude for a member. Yet this consequence is inevitable if the speech or debate privilege is to serve its purpose of preserving legislative independence against executive and judicial infringement. It is not very probable that widespread legislative abuses are any more likely to follow contemporary vindication of the privilege than has been true in hundreds of years of English and American history. The occasional instances in which law enforcement is hindered are

²⁷⁷ See p. 1156 & note 222, *supra*. See also *Coffin v. Coffin*, 4 Mass. 1 (1808). [T]he privilege secured by it is not so much the privilege of the House as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. . . . Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature.

Id. at 27.

²⁷⁸ See *Mathew Lyon's case*, pp. 1142-44 *supra*, and *Duncan Sandys' case*, note 178 *supra*, for instances in which statutes of general applicability proscribed legislative functions when applied to representatives.

²⁷⁹ *E.g.*, bribery statutes. See pp. 1157-63 *supra*.

²⁸⁰ See *United States v. Brewster*, 408 U.S. 501, 521 (1972); Note, *The Bribed Congressman's Immunity From Prosecution*, 75 *YALE L.J.* 335, 349 (1965).

more than counterbalanced by the preservation, intact, of our system of separation of powers.²⁸¹

E. Private Civil Actions

We have thus far examined the scope of the privilege in the context of disputes between the executive and the legislative branch. In these cases the privilege is asserted as a defense against the jurisdiction of the courts and serves its historic function of preserving a separation of powers. Congressmen who violate standards of law and decency in the course of their legislative activity are responsible to their peers in Congress and to the electorate; the theory of the privilege is that the risk of its abuse is far less than the risk created by permitting executive and judicial initiation of essentially political interrogation and discipline.

The literal language of the speech or debate clause does not distinguish between these classic separation of powers cases and disputes in which private citizens invoke the jurisdiction of the courts to enforce their rights against congressmen acting under color of law; and the public generally has come to believe that no such distinction exists.²⁸² Furthermore, in *Kilbourn v. Thompson*,²⁸³ *Tenney v. Brandhove*,²⁸⁴ and *Dombrowski v. Eastland*,²⁸⁵ the Supreme Court held that the privilege immunizes congressmen from suits seeking redress for the violation of individual rights.²⁸⁶

²⁸¹ As Pitt stated in his famous protest against Parliament's notorious action in stripping Wilkes of his privileges upon the claim of the Crown that law enforcement was being paralyzed:

Let the objection, nevertheless, be allowed in its utmost extent, and then compare the inexpediency of not immediately prosecuting on one side, with the inexpediency of stripping the Parliament of all protection from privilege on the other. Unhappy as the option is, the public would rather wish to see the prosecution for crimes suspended, than the Parliament totally unprivileged, although notwithstanding this pretended inconvenience is so warmly magnified on the present occasion, we are not apprised that any such inconvenience has been felt, though the privilege has been enjoyed time immemorial.

342 PROTESTS 68, 73-74 (1763); see note 131 *supra*.

²⁸² This probably explains the insignificant number of slander suits against congressmen for their speeches on the floor. For a lower court decision upholding the privilege in such a case, see *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir. 1930), *cert denied*, 282 U.S. 874 (1930). See also *McGovern v. Martz*, 182 F. Supp. 343 (D.D.C. 1960).

²⁸³ 103 U.S. 168, 201-05 (1881).

²⁸⁴ 341 U.S. 367 (1951). This action was brought against state legislators under the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985 (3) (1970). The Court held that the legislators enjoyed a common law privilege by analogy to the speech or debate clause.

²⁸⁵ 387 U.S. 82 (1967).

²⁸⁶ In *Kilbourn*, members of the House of Representatives ordered the unconstitutional arrest of the plaintiff for contempt. *Tenney* involved a state legislative committee that interfered with freedoms of speech and association. In *East-*

These decisions also indicate that the scope of the clause is effectively coextensive in executive-motivated and private-action cases.²⁸⁷

Although the early formulation of the speech or debate privilege only covered private civil suits, it developed toward protection against executive-motivated actions.²⁸⁸ If the historical development of the privilege did not transcend its judicial origins, it is unlikely that the legislative privilege would have been given constitutional stature. The cognate common law doctrine of judicial immunity to private suits did not find a place in article III; nor was the doctrine of executive immunity from such suits included in article II. And there is very little evidence that the Framers anticipated that the speech or debate clause would prohibit private actions.²⁸⁹ Only the traditional historical view would rigidly encompass this more ancient aspect of the privilege. Since the Supreme Court has not hesitated in the past to go beyond the literal language of constitutional provisions and construe them in light of their history and purposes,²⁹⁰ this line of private civil cases seems ripe for rethinking.²⁹¹

From a functional perspective, the values at stake in executive-motivated and private actions are very different. The private actions do not usually present the conflict of prerogatives between the executive and legislative branches from which the privilege evolved as a guarantor of legislative independence.²⁹² Nor do they

land, a Senate committee chairman ordered the issuance of an unconstitutional subpoena.

²⁸⁷ See *United States v. Johnson*, 383 U.S. 169, 180-82 (1966). The Court has suggested, however, that there may be legislative acts "of an extraordinary character, for which the members who take part may be held legally responsible." *Kilbourn v. Thompson*, 103 U.S. 168, 205 (1881). As an example, the Court opined that should congressmen order the execution of the Chief Justice, "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." *Id.*

²⁸⁸ See pp. 1122-29 *supra*.

²⁸⁹ See p. 1172 *supra*. But see *Coffin v. Coffin*, 4 Mass. 1 (1808); note 138 *supra*. *Coffin* is the first recorded civil action involving the privilege in either England or America, but was litigated under Article 21 of the Massachusetts Constitution, which by its terms extended the privilege to civil suits.

²⁹⁰ A familiar example is the clause in art I, § 10 prohibiting the states from passing laws "impairing the obligation of contracts." For a narrow construction of this clause based upon its history and purpose, see *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934).

²⁹¹ In fact, despite the holdings in these cases, there are indications that the Court is willing to undertake such a rethinking. See pp. 1175-76 *infra*.

²⁹² Such a conflict could be present if, for example, executive officials who are under investigation by a congressional committee file a civil action in an attempt to thwart the investigation. Cf. Frankfurter, *Hands Off the Investigations*, 38 THE NEW REPUBLIC 329 (1924). A simple civil-criminal distinction would therefore be imprecise.

generally represent so great an intrusion upon legislative functions. In executive-motivated cases, the mere allegation that a crime has been committed is enough to trigger a grand jury investigation with powers of subpoena and interrogation so broad as to permit massive infringements upon the legislative sphere.²⁹³ If a prosecution is instituted, the congressman faces severe criminal penalties²⁹⁴ that depend upon how the trier of fact, influenced to an indeterminate degree by the political pressures of the time, subjectively evaluates the propriety of the legislative conduct; and even if the congressman is acquitted the course of a trial may ruin his political career.²⁹⁵ The potential inhibiting effect of such actions upon the willingness of congressmen to oversee corruption and maladministration by the executive is readily apparent. A broad construction of the privilege in these separation of powers cases is necessary to redress this imbalance of power.

In private civil actions, however, the pattern is usually reversed: a vulnerable individual seeks judicial protection against congressmen who allegedly have used the authority of their office to violate protected rights. It is true that if congressmen are

²⁹³ See *Gravel v. United States*, 408 U.S. 606, 631-32 (1972) (Stewart, J., dissenting); note 234 *supra*. Theoretically, the grand jury is an independent investigating agency, but its use as a tool of the executive is well known. See, e.g., *United States v. Dionisio*, 93 S. Ct. 764, 777 (1973) (Douglas, J., dissenting). Cf. *id.* at 773 (majority opinion). In the *Gravel* case, counsel for the Justice Department who was "supervising" the grand jury investigation characterized it as an "executive proceeding." Record at 8, *Gravel v. United States*, 408 U.S. 606 (1972).

²⁹⁴ Representative Johnson was first convicted in June of 1963, see *N.Y. Times*, June 14, 1963, at 64, col. 2, and was sentenced to 6 months in prison and fined \$5000. *N.Y. Times*, Oct. 8, 1963, at 22, col. 1; *N.Y. Times*, Oct. 11, 1963, at 36, col. 1. After his conviction was reversed by the Supreme Court, *United States v. Johnson*, 383 U.S. 169 (1966), he was retried and convicted, see *N.Y. Times*, Jan. 27, 1968, at 33, col. 3, and was sentenced to 6 months in prison. *N.Y. Times*, Jan. 31, 1968, at 27, col. 4. His second appeal failed. *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).

Following the Supreme Court decision denying his plea of privilege, *United States v. Brewster*, 408 U.S. 501 (1972), Senator Brewster was convicted of three counts under the bribery statute, 18 U.S.C. § 201(g), which carries a maximum penalty of 2 years imprisonment and \$10,000 fine on each count. See *N.Y. Times*, Nov. 17, 1972, at 7, col. 1; *N.Y. Times*, Nov. 19, 1972, § 4, at 12, col. 1. On February 2, 1973, he was sentenced by Judge Hart to the maximum on each count, the sentences to run consecutively.

Congressman Dowdy was convicted on eight counts of bribery, conflict of interest, and perjury. On February 23, 1972, he was sentenced to a total of 18 months imprisonment and a \$25,000 fine. On appeal, the judgment was reversed on the bribery and conflict of interest counts because evidence had been introduced at trial in violation of his speech or debate privilege, but the judgment on the perjury count was affirmed. *United States v. Dowdy*, No. 72-1614 (4th Cir., March 12, 1973).

²⁹⁵ See *United States v. Johnson*, 337 F.2d 180, 191 (4th Cir. 1964) (Sobeloff, J.), *aff'd*, 383 U.S. 169 (1966).

obliged to defend these actions on the merits, there is some possibility that they will be inhibited²⁹⁶ or distracted²⁹⁷ from the performance of their duties. And the institution of repeated lawsuits can be a successful form of harassment, even if the actions are meritless. But despite this possibility, the potential adverse effects upon the legislative process and the separation of powers cannot compare to cases in which the executive challenges the right of a congressman to inform the electorate about matters of great public importance.²⁹⁸

We do not suggest that courts should be oblivious to the possible effects of private actions upon legislative behavior. But these functional considerations imply that the position of congressmen sued in ordinary civil cases is little different from that of judges or high executive officials. The Supreme Court has concluded that the threat of such actions against judges and executive officials might chill the discharge of the obligations of their office and has therefore maintained a federal common law privilege.²⁹⁹ For two reasons, such an approach in the case of legislators would be preferable to reading the speech or debate clause as affording a constitutional immunity: (a) judicially-developed common law rules on immunity can be superseded by congressional legislation to protect individual rights; and (b) if experience convinces the Court that abuses of the immunity rules outweigh the benefits which result from them, those rules may be liberalized or even eliminated.³⁰⁰

Even assuming, however, that tort suits in general should or will continue to be precluded by the speech or debate clause, functional considerations indicate that the courts should exercise their jurisdiction and consider redress for legislative violations of in-

²⁹⁶ See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

²⁹⁷ See *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

²⁹⁸ Civil actions certainly embrace the possibility of significant sanctions. Money damages may be extensive, unlike criminal fines; harm to reputation may be great; discovery rules allow extensive investigation; and such litigation may drain a congressman's time and resources for years. But criminal prosecutions raise far more intrusive possibilities: jail terms, fines, extensive publicity, expenditure of time and resources, contempt citation, and irreparable political costs, all preceded by widespread probing at the hands of massive executive investigatory machinery. Moreover, the legitimacy of executive-motivated actions is more suspect than that of civil suits.

²⁹⁹ See *Pierson v. Ray*, 386 U.S. 547 (1967); *Spalding v. Vilas*, 161 U.S. 483 (1896). See also *Barr v. Matteo*, 360 U.S. 564 (1959).

³⁰⁰ Several justices have argued that the related doctrines of judicial and executive immunity should be limited by a malice exception. See *Pierson v. Ray*, 386 U.S. 547, 566-67 (1967) (Douglas, J., dissenting); *Barr v. Matteo*, 360 U.S. 546, 579-84 (1959) (Warren, C.J., dissenting). But see *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

dividuals' *constitutional* rights. That kind of situation presents two competing constitutional principles — the constitutional rights of individuals pitted against the assertion of legislative privilege.³⁰¹ Our system of separation of powers suggests that the balance be drawn on the side of judicial review. The judiciary in our country has always borne the institutional responsibility for protecting individuals against unconstitutional violations of their rights by all branches of the government.³⁰² Judicial review of unconstitutional legislative action should not be foreclosed whether that action takes the form of a statute or the conduct of an individual congressman. The speech or debate clause cannot be read in isolation from the entire constitutional scheme; judicial respect for and enforcement of the Bill of Rights is no less important than respect for the prerogatives of individual congressmen.

Despite the fact that no civil action has yet been permitted against congressmen for unconstitutional legislative action, the Supreme Court has adopted a compromise which has allowed aggrieved individuals to obtain judicial redress. In *Kilbourn, Eastland* and *Powell v. McCormack*,³⁰³ the Court dismissed the actions against the congressmen but allowed the actions to proceed against legislative employees who enforced the unconstitutional legislative order.³⁰⁴ These decisions present no conceptual difficulty. The employees involved were acting as ordinary law enforcement officials in executing an unconstitutional act and infringing protected rights. The presence of these employees as enforcement agents enabled the Court to adjudicate the legality of the congressional act and to vindicate the constitutional rights of the plaintiffs without inhibiting congressmen in their duties.³⁰⁵

In some situations, however, this compromise may not afford enough protection, since congressmen possess the power to in-

³⁰¹ This is not the case when the privilege is asserted as a defense to executive-motivated actions. The executive may contend, of course, that the action was instituted because a congressman intruded into its prerogatives. But article II does not purport to give the executive personal rights which it may vindicate by imposing coercive sanctions upon inquisitive congressmen.

³⁰² But a proper judicial role in executive-motivated suits requires a broad definition of the privilege, *see pp. 1146-48 supra*.

³⁰³ 395 U.S. 486 (1969).

³⁰⁴ In *Kilbourn*, the Court held the Sergeant-at-Arms liable for executing an illegal arrest. *Kilbourn v. Thompson*, 103 U.S. 168, 202 (1880). In *Eastland*, counsel for the Congressional committee was alleged to have conspired with state officials to conduct an illegal search and seizure; and the Court reversed a lower court judgment dismissing an action against him. *Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967). In *Powell*, the Court asserted judicial review over the House Clerk and Doorkeeper who had executed an unconstitutional order excluding Congressman Powell. *Powell v. McCormack*, 395 U.S. 486, 503-05 (1969).

³⁰⁵ *See Gravel v. United States*, 408 U.S. 606, 617-20 (1972).

fringe rights of free speech, association and privacy without having to call upon the assistance of enforcement agents. *Tenney v. Brandhove*³⁰⁶ presented just that situation, yet the Court dismissed the action on the basis of a common law legislative privilege.³⁰⁷ *Tenney* may have been overruled sub silentio in *Bond v. Floyd*,³⁰⁸ but in *Powell* the Court specifically left open the question³⁰⁹

[w]hether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against the members of Congress where no agents participated in the challenged action and no other remedy was available.

This question may now be before the Court in *Doe v. McMillan*.³¹⁰ The plaintiffs in that case seek declaratory relief and an injunction to prevent the members of a house committee, their assistants and the Public Printer from republishing and distributing a document which allegedly would be an unconstitutional bill of attainder and invasion of privacy. Presumably, the holding in *Gravel* that "republication" is not within the scope of the privilege will dispose of the speech or debate defense. However, if the Court distinguishes *Gravel*³¹¹ it will then be confronted with a

³⁰⁶ 341 U.S. 367 (1951).

³⁰⁷ See notes 284, 286 *supra*.

³⁰⁸ 385 U.S. 116 (1966). Legislator-elect Julian Bond had been excluded from the Georgia House of Representatives because of certain anti-war speeches. As in *Tenney*, a suit was instituted under 42 U.S.C. § 1983 (1970) claiming that this legislative action violated the first amendment. The Supreme Court held for Bond without even a passing reference to *Tenney*. Arguably, the cases are distinguishable because Bond sought injunctive relief only, while Brandhove sought damages. But the doctrine of legislative privilege has always been structured in jurisdictional terms, independent of the kind of relief being sought by the plaintiff. Furthermore, while a grant of damages may perhaps have a greater deterrent effect on individual legislators (who may, however, be reimbursed by their house) an injunction is a much more direct intrusion by the judiciary into the legislative process and is enforceable by the threat of contempt proceedings.

³⁰⁹ 395 U.S. 486, 506 n.26 (1969). See also *Gravel v. United States*, 408 U.S. 606, 620 (1972).

³¹⁰ 459 F.2d 1304 (D.C. Cir. 1972), *cert. granted*, 408 U.S. 922 (1972), *argued* Dec. 13, 1972, 41 U.S.L.W. 3343.

³¹¹ One possible distinction is between activities approved and those disapproved by the house, but this distinction does not appear to be tenable. See pp. 1166-68 *supra*. A second possible distinction may have been suggested by certain language in *Brewster*:

Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch, but . . . its purpose [was not] 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.

United States v. Brewster, 408 U.S. 501, 516 (1972) (footnote omitted). Hope-

direct clash of privilege versus individual constitutional rights. It is theoretically possible that an injunction addressed solely to the legislative employees and the Public Printer would not afford sufficient relief; if the congressmen wish to reproduce and circulate this document, they need only xerox and mail it themselves. Legislative privilege should not foreclose effective judicial review in such an eventuality. It would be a supreme irony if the speech or debate privilege, which was designed to protect against executive intimidation and was placed in a constitution under which courts protect individual rights, were construed so that courts lend their assistance to the executive in breaching the wall of separation of powers but deny relief for the violation of individual rights.

IV. LEGISLATIVE REMEDIES

Since the Supreme Court has now held, in effect, that the speech or debate clause does not bar grand jury investigations of and criminal prosecutions against congressmen for deciding how to speak or vote and for informing themselves and the electorate about maladministration and corruption in the executive branch, it remains for Congress to remedy, if possible, the inferior position in which it has been placed. The importance of the Court's decisions goes well beyond the fate of individual Senators such as Gravel and Brewster; the scope of executive and judicial superintendence of the legislative process which is permissible as a result of these decisions jeopardizes the ability of the elected representatives in Congress to carry out independently and meaningfully the powers vested in them by the Constitution.

Congress should begin by considering whether it agrees with the Supreme Court that protection against executive intimidation is not constitutionally required with respect to functions other than those that are "purely legislative," such as "political" activities and "'errands' for constituents." These include "making . . . appointments with government agencies, assist[ing] in securing government contracts, [and] preparing so-called 'newsletters' to constituents, news releases, and speeches delivered outside the Congress."³¹² Should congressmen decide that some or all of

fully, the Court is not suggesting that the Framers intended to leave congressmen vulnerable to executive intimidation but free to violate the rights of individuals.

If the plaintiffs in *McMillan* are able to overcome the jurisdictional defense of legislative privilege, it is by no means certain that they should obtain the relief they seek on the merits. Even assuming their factual allegations to be true, the plaintiffs nevertheless are asking for a judicially-imposed prior restraint upon publication, and thus upon the first amendment rights of the publishers.

³¹² *United States v. Brewster*, 408 U.S. 501, 512 (1972). See also note 196 *supra*.

these "errands" are vital elements of the legislative function in a democratic society and resolve to strengthen the bulwark of separation of powers, there are two possible legislative remedies available, one more effective than the other.

A. House Resolution

Each house has the constitutional power to make rules for its own functioning.³¹³ Such rules could include a provision forbidding any member, aide, or employee from appearing outside the house to give testimony or produce house or committee documents relating to a wide range of "legislative" and "political" activities.³¹⁴ Such a rule could of course be waived by a vote of the house.³¹⁵ If such a rule were respected, this would effectively halt grand jury investigations and court hearings into the defined activities by preventing the receipt of important evidence.

However, lacking the formal dignity of a statute, a mere rule of the house would probably be insufficient to remedy the effects of the *Gravel* and *Brewster* opinions.³¹⁶ Such a rule would be binding in the sense that any member, aide, or employee who violates it would be subject to the disciplinary powers of the house, including the contempt power.³¹⁷ The rule would not, however, be binding upon the court which seeks to enforce a subpoena against a recalcitrant witness, because the order of one house of Congress cannot amend or supersede power vested by statute in a court or grand jury. Furthermore, it has been settled law in both England and America that a single house does not have the power to define its own privileges.³¹⁸ It would therefore seem that a house rule would have no more legal effect on the

³¹³ U.S. CONST. art. I, § 5.

³¹⁴ Senate Rule XXX, for example, already restricts the giving of outside testimony by Senate employees without the permission of the Senate. Senate Standing Rule XXX, in SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. No. 92-1, 92d Cong., 1st Sess. 49 (1971). In the *Brewster* case the "privilege of the Senate" and Rule XXX were invoked as the basis for a resolution authorizing David Minton, a staff director and counsel of the Committee on Post Office and Civil Service, to respond to a subpoena issued by the trial court in *Brewster*, but restricting his production of committee documents. S. Res. 373, 92d Cong., 2d Sess., 118 CONG. REC. 16,766 (daily ed. 1972).

³¹⁵ See S. Res. 373, 92d Cong., 2d Sess., 118 CONG. REC. 16,766 (daily ed. 1972).

³¹⁶ It should be remembered that any proposed legislative remedy would seek only to ameliorate the effects of the Supreme Court's construction of the privilege. Congress cannot change the scope of the speech or debate clause as interpreted by the Supreme Court without a basic judicial rethinking of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³¹⁷ Cf. *Groppi v. Leslie*, 404 U.S. 496 (1972); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

³¹⁸ See pp. 1167-70 *supra*.

courts than the amicus brief of the Senate which was filed with the Supreme Court in *Gravel* to express the collective judgment of that body.³¹⁹

Moreover, the passage of a house rule may have practical consequences which are not pleasant to contemplate. A member, aide, or employee subject to such a rule and also subject to a conflicting judicial subpoena would potentially be in the position of facing a contempt citation regardless of what he does: if he obeys the subpoena he will be in contempt of the house, if he obeys the house rule he will be in contempt of the court. This presents the possibility of a direct constitutional confrontation, and one side may back down. Faced with this confrontation the court may decline to enforce the subpoena, holding that the witness was justified in refusing to testify; or the house may waive the rule and allow the subpoena to be enforced. However, both the court and the house may see their essential prerogatives at stake and refuse to compromise, a result which occurred in England during the 1800's with unfortunate results.³²⁰

B. Congressional Statute

The more practical means for effectuating that degree of privilege which is necessary for Congress to function without unwarranted executive and judicial interference would appear to be the passage of an appropriate statute. Since Congress has the undoubted power to define the scope of the criminal law and to regulate the jurisdiction and procedure of the federal courts, it possesses ample power to protect its members from decisions such as *Brewster* and *Gravel*.

Congress should prohibit grand jury investigations and criminal proceedings which "question in any other place" the legislative activities of a member of Congress and his staff by stripping the grand jury and courts of jurisdiction to entertain such proceedings.³²¹ For the purpose of this statute, "legislative activities" should be defined as any activity relating to the due functioning of the legislative process and the carrying out of a member's obligations to his house and his constituents. The following should be included specifically: speeches, debates, and votes; conduct in committee; receipt of information for use in legislative proceed-

³¹⁹ Amicus Brief of United States Senate, *Gravel v. United States*, 408 U.S. 606 (1972).

³²⁰ See the discussion of *Stockdale v. Hansard*, 112 Eng. Rep. 1112 (QB. 1839), *infra* at 1180-81. This confrontation was settled only by passage of the Parliamentary Papers Act, discussed *infra* at 1181.

³²¹ The same result would occur if Congress were to enact a statute exempting the legislative activities of members of Congress from the criminal prohibitions of the United States Code.

ings; publications and speeches made outside of Congress to inform the public on matters of national or local importance; and the decisionmaking processes behind each of the above.

Enforcement of such a statute would require a delicate procedural mechanism which would ensure not only that the legislatively defined area of privilege is not being infringed, but also that permissible inquiries are not thwarted. Such a mechanism is available via control of the subpoena power. Congress could provide by statute that a member may move to quash any subpoena which he alleges seeks testimony about legislative activity³²² and that such a motion would automatically stay the subpoena. For the subpoena to be enforced, the prosecutor would be required to specify the nature and scope of the proposed inquiry.³²³ If it appears to the court that this inquiry infringes upon the forbidden area, the court would quash the subpoena. If the proposed inquiry is permissible under the statutory guidelines, the court would enforce the subpoena with an appropriate protective order against "fishing expeditions" into the Capitol.

This legislative solution is similar to that adopted by the English Parliament to counteract the effects of *Stockdale v. Hansard*,³²⁴ in which successive suits were lodged against the Printer of the House of Commons for "republishing" allegedly defamatory legislative proceedings. When the court held, contrary to prior precedent,³²⁵ that the privilege did not protect publications by the Public Printer, the House of Commons passed a resolution stating that the publications were privileged.³²⁶ Unimpressed, the Queen's Bench held that the resolution was not binding:³²⁷

[T]he mere order of the House will not justify an act otherwise illegal, and . . . the simple declaration that that order is made in exercise of a privilege does not prove the privilege

When *Stockdale's* lawyer sought to execute the judgment, the House ordered the sheriff not to enforce the court order and as a precautionary measure ordered the Sergeant-at-Arms to arrest the

³²² In *Gravel*, the Court noted that the privilege is "invocable only by the Senator or by the aide on the Senator's behalf," from which "[i]t follows that an aide's claim of privilege can be repudiated and thus waived by the Senator." *Gravel v. United States*, 408 U.S. 606, 622 & n.13 (1972).

³²³ If a claim of confidentiality were made by the prosecutor, the specification could be made *in camera*.

³²⁴ 112 Eng. Rep. 1112 (Q.B. 1839); 174 Eng. Rep. 196 (Nisi prius 1837).

³²⁵ See *Rex v. Wright*, 101 Eng. Rep. 1396 (1799).

³²⁶ See WITTKÉ, *supra* note 46, at 142-51.

³²⁷ *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1169 (Q.B. 1839) (Denman, C.J.).

sheriff.³²⁸ The impasse was deepened by further procedural battles in which the plaintiff unsuccessfully sought an attachment against the sheriff and the sheriff unsuccessfully petitioned the Queen's Bench for a writ of habeas corpus.³²⁹

The deadlock was finally broken with the passage of a remedial statute. After a monumental debate in which leading members of the House excoriated the *Stockdale* court for placing restraints on the ability of Parliament to inform the people,³³⁰ both houses passed the Parliamentary Papers Act.³³¹ The Act was prefaced by the claim that "it is essential to the due and effective . . . [functioning] of Parliament . . . that no Obstructions or Impediments should exist to the Publication of . . . Reports, Papers, Votes, or Proceedings" and that there had been too many vexatious lawsuits against printers which threatened to hinder such publication. The Act provided that all subpoenas in criminal or civil proceedings against any person for the publication of papers printed with the approval of the house were to be stayed³³² and that upon production of a certificate of such approval, the proceedings were to be dismissed. Through this procedural mechanism Parliament was able to stop at the outset suits which jeopardized its informing function.³³³ By this statute Parliament was able to ensure that the *Stockdale* opinion was an aberrant breach of legislative independence which would never occur again.³³⁴ Congress should ensure the same fate for the *Gravel* and

³²⁸ See WITTKE, *supra* note 46, at 151-54.

³²⁹ See *id.* at 152-55.

³³⁰ See, e.g., 52 PARL. DEB., H. C. (3rd ser.) 330-33 (Lord John Russell), 334-35 (Attorney General Campbell), 361-69 (Sir Robert Peel) (1840).

³³¹ 3 & 4 Vict., c. 9 (1840).

³³² Our proposal would protect activities generally defined by statute, not activities approved in specific instances by the house.

³³³ This concern for terminating proceedings in violation of the privilege at the earliest stage possible is not unlike the concern of American courts that the mere threat of litigation might be sufficient to deter a legislator and that the defense of privilege should therefore be asserted on a motion to dismiss or motion for summary judgment. See *Powell v. McCormack*, 395 U.S. 486, 505-06 & n.25 (1969).

³³⁴ The courts themselves were later to repudiate *Stockdale*. In *Wason v. Walter*, 4 Q.B. 73 (1868), a newspaper was sued for publishing allegedly defamatory legislative speeches. Since the publication was not pursuant to formal house approval, the Parliamentary Papers Act was inapposite. Nevertheless, the plea of privilege was upheld. While giving "unhesitating and unqualified adhesion" to the "masterly" judgment of the *Stockdale* court that a mere resolution of the house could not confer privilege, the *Wason* court held that the publication "is, independently of such order or assertion of privilege, in itself privileged and lawful." *Id.* at 86-87. On this latter point, the *Wason* court severely criticized the reasoning of *Stockdale*, saying it had expressed "a very shortsighted view of the subject." *Id.* at 91. Stressing the centrality of the informing function to representative government, the *Wason* court forcefully upheld the privilege for publication

Brewster decisions, which represent a much greater threat to legislative independence.

We have discussed proposed legislative remedies only with respect to executive-motivated actions. Congress would be ill-advised to extend any limitation upon court jurisdiction to include civil suits by citizens claiming the deprivation of constitutional rights. Legislative remedies should be designed to protect our system of separate powers; congressmen who would abuse their position and impinge upon rights secured by the Constitution transgress the great principle of separation of powers and give ammunition to those who believe that the concept of legislative privilege has no place in our contemporary society.

in terms almost identical to Jefferson's protest in *Cabell's* case, *supra* note 150. *Wason v. Walter*, *supra* at 89.

The above analysis was accepted by the dissenters in *Gravel v. United States*, 408 U.S. 606, 658-60 & n.1 (1972) (Brennan, J.). But the majority relied heavily upon *Stockdale* and distinguished *Wason* as creating a privilege analogous to the judicial privilege. *Id.* at 622-23 & n.14. It must be remembered, however, that legislative privilege derived historically from judicial privilege, and to the English courts, the two are corolaries insofar as civil suits are concerned. *See* pp. 1122-23 *supra*.