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## CONSTITUTIONAL LAW — LEGISLATIVE IMMUNITY OUTWEIGHS FIRST AMENDMENT RIGHTS

In *Eastland v. United States Servicemen's Fund*<sup>1</sup> the United States Supreme Court held that even in the face of an alleged infringement of first amendment rights, when a Senate subcommittee's activity falls within the "legitimate legislative sphere,"<sup>2</sup> the speech or debate clause of the United States Constitution<sup>3</sup> protects the activities of the subcommittee, the individual senators and the chief counsel, thereby prohibiting judicial interference to enjoin a subpoena issued by the subcommittee.

Respondent, United States Servicemen's Fund, Inc. (USSF), was a non-profit membership corporation which purported "to further the welfare of persons who have served or are presently in the military."<sup>4</sup> In attempting to accomplish this goal the respondent, USSF, had established "coffee-houses" near United States military bases and had aided "underground newspapers" with the purpose of furthering dissent and expressions of opposition within the military towards United States involvement in southeast Asia.<sup>5</sup> Pursuant to the broad authority granted the Subcommittee on Internal Security by the Senate for enforcing the Internal Security Act of 1950,<sup>6</sup> the subcommittee, chaired by Senator James O. Eastland, began an investigation into USSF's activities in the early part of 1970 to determine if there had been any foreign infiltration into the organization. During the course of the investigation the subcommittee sought to examine certain financial records of the respondent corporation and therefore issued a subpoena duces tecum to the bank where USSF maintained its account, ordering the bank to produce "'any and all records appertaining to or involving the account or accounts of [USSF] . . .'" Before the return date of the subpoena, USSF and two of its members filed suit in the United States District Court for the District of Columbia to enjoin its implementa-

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1. 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975).

2. *Id.* at 503, 506-07, 95 S.Ct. at 1820, 1823, 44 L.Ed.2d at 335, 338-39.

3. U.S. CONST. art. I, §6, cl. 1, reads in part:

The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. (emphasis added)

4. 421 U.S. at 493, 95 S.Ct. at 1816, 44 L.Ed.2d at 331.

5. *Id.* at 494, 95 S.Ct. at 1817, 44 L.Ed.2d at 331.

6. S. Res. 341, 91st Cong., 2d Sess., 116 CONG. REC. 3418 (1970). As part of the broad authority given the Subcommittee on Internal Security, the Senate authorized a continuing study and investigation into the extent, nature and effect of subversive activities, including infiltration of organizations by persons under the domination of foreign governments.

7. 421 U.S. at 494, 95 S.Ct. at 1817, 44 L.Ed.2d at 331.

tion,<sup>8</sup> but the court refused to issue a temporary restraining order.<sup>9</sup> After hearing testimony, the court also denied USSF's motions for preliminary and permanent injunctions and dismissed the senators as parties. On appeal,<sup>10</sup> the United States Court of Appeals for the District of Columbia reversed and remanded the case to the district court for further consideration, holding that the senators could be parties<sup>11</sup> and that if necessary, coercive relief could also be ordered.<sup>12</sup> After granting certiorari,<sup>13</sup> the Supreme Court reversed and remanded.

Legislative immunity, as embodied in the speech or debate clause of the Constitution, had its origin in England as the result of Parliament's struggle to gain independence from the English Crown.<sup>14</sup> The English Bill of Rights, enacted in 1689, formally recognized the immunity sought by members of Parliament to shield them from the King and his courts, and was quite similar in form and context to that privilege adopted by the drafters of the United States Constitution.<sup>15</sup> By the time of the American Revolution, the privilege was so engrained in the democratic idea of gov-

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8. USSF's complaint charged that

the authorizing resolutions and the Subcommittee's actions implementing them were an unconstitutional abuse of the legislative power of inquiry, that the "sole purpose" of the Subcommittee investigation was to force "public disclosure of beliefs, opinions, expressions and associations of private citizens which may be unorthodox or unpopular," and that the "sole purpose" of the subpoena was to "harass, chill, punish and deter [USSF and its members] in their exercise of their rights and duties under the First Amendment and particularly to stifle the freedom of the press and association guaranteed by that amendment." The subpoena was issued to the bank rather than to USSF . . . "in order to deprive [them] of their rights to protect their private records, such as the sources of their contributions, as they would be entitled to do if the subpoena had been issued against them directly. . . ." [F]inancial support to USSF is obtained exclusively through contributions from private individuals, and if bank records are disclosed "much of that financial support will be withdrawn and USSF will be unable to continue its constitutionally protected activities."

421 U.S. at 495-96, 95 S.Ct. at 1817, 44 L.Ed. 2d at 331-32 (emphasis added).

9. The Court of Appeals for the District of Columbia Circuit stayed enforcement of the subpoena awaiting a consideration of the issues by the district court.

10. *United States Servicemen's Fund v. Eastland*, 488 F.2d 1252 (D.C. Cir. 1973).

11. The court of appeals held that members of Congress could be added as parties if their presence is "unavoidable if a valid order is to be entered by the court to vindicate rights which would otherwise go unredressed." 488 F.2d at 1270.

12. The court of appeals noted that while declaratory relief is preferable, coercive relief is authorized by implication. 488 F.2d at 1270.

13. *Eastland v. United States Servicemen's Fund*, 419 U.S. 823, 95 S.Ct. 288, 42 L.Ed.2d 46 (1974).

14. See generally Reinstein and Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973), and Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 UNIV. PA. L. REV. 960 (1950).

15. The English version is as follows: "That the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." Yankwich, *supra* note 14, at 964.

ernment that it was quickly incorporated in the federal constitution as well as into all the state constitutions.<sup>16</sup> In 1808 the Supreme Judicial Court of Massachusetts, in *Coffin v. Coffin*,<sup>17</sup> became the first American court to judicially interpret the privilege of legislative immunity and its broad interpretation has been continuously followed in subsequent cases.<sup>18</sup> Justice Story in writing his 1833 treatise, *Commentaries on the Constitution of the United States*, likewise summarized the importance of the speech or debate clause as "great and vital . . . without which all other privileges would be comparatively unimportant or ineffectual."<sup>19</sup> In *Kilbourn v. Thompson*<sup>20</sup> in 1880 the United States Supreme Court had its first opportunity to interpret the clause. After petitioner Kilbourn had been found in contempt of Congress for refusing to answer certain questions before a congressional committee, he brought a civil action against the sergeant-at-arms and members of the House of Representatives for his imprisonment arising out of the contempt charge. In broadly applying the privilege of legislative immunity, the Court dismissed the members of Congress from the action. The Court clearly rejected a narrow interpretation that the privilege only covered those words spoken in debate, and held that the privilege included "things generally done in a session of the House by one of its members in relation to the business before it."<sup>21</sup>

After *Kilbourn* there was a marked absence of cases before the Court involving the speech or debate clause. It was not until 1951 in *Tenney v. Brandhove*<sup>22</sup> that the Court was called upon to delineate the scope of its authority to consider questions involving the legislative privilege. Even

16. See J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 630 (5th ed. 1891).

17. 4 Mass. 1 (1808).

18. The Massachusetts court interpreted the clause as follows:

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

Yankwich, *supra* note 14, at 968, quoting from *Coffin v. Coffin*, 4 Mass. 1, 27 (1808).

19. Story, *supra* note 16, at 630.

20. 103 U.S. 168, 26 L.Ed. 377 (1880).

21. *Id.* at 204, 26 L.Ed. at 391.

22. 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

though *Tenney* dealt with a suit involving state legislators, the case is important because the Court in considering the rationale behind legislative immunity held that once the legislators were found to be "acting in the sphere of legitimate legislative activity" a civil action could not be maintained against them.<sup>23</sup> The Court in *Tenney* interpreted the extent of the privilege in the following manner:

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. . . .

The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive.<sup>24</sup>

The next case to be heard by the Court involving the clause was *United States v. Johnson*,<sup>25</sup> where the Court held that the clause precluded judicial inquiry into the motivation for a congressman's speech even though his speech was the basis for a criminal charge of conspiracy to defraud the government. Of even more importance however, was the Court's explanation of the immunity privilege as a means "to prevent intimidation by the executive and accountability before a possibly hostile judiciary."<sup>26</sup>

In applying the privilege of immunity later cases have continued to expand its coverage. In *Dombrowski v. Eastland*<sup>27</sup> another case involving the Internal Security Subcommittee, there was an alleged infringement of fourth amendment rights. In dismissing the members of Congress from the suit, the Court held that the members were protected "not only from the consequences of litigation's results but also from the burden of defending themselves [in court]."<sup>28</sup> Three years later in *Powell v. McCormack*<sup>29</sup> the Court expanded upon a legislator's immunity from the burden of defending an action against him<sup>30</sup> by explaining that "[t]he purpose of the protection afforded legislators is . . . to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being

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23. *Id.* at 376-79, 71 S.Ct. at 788-89, 95 L.Ed. at 1026-28.

24. *Id.* at 377-78, 71 S.Ct. at 788-89, 95 L.Ed. at 1027-28.

25. 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966).

26. *Id.* at 181, 86 S.Ct. at 755, 15 L.Ed.2d at 688.

27. 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967).

28. *Id.* at 85, 87 S.Ct. at 1427, 18 L.Ed.2d at 580.

29. 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

30. *Id.* at 503, 89 S.Ct. at 1954, 23 L.Ed.2d at 506.

called into court to defend their actions.”<sup>31</sup>

A dichotomy in the application of the privilege in regard to congressional aides and members of Congress had existed in *Kilbourn*, *Dombrowski* and *Powell*, where although the actions were dismissed as to the members of Congress, the aides and employees of the Congressmen were held accountable. In *Gravel v. United States*<sup>32</sup> this distinction was discarded on the theory that a Senator’s aide is his alter ego. The Court in *Gravel* held that “the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself,”<sup>33</sup> and therefore extended the application of immunity to protect congressional aides. The extent of the application of legislative immunity was dealt with again in *Doe v. McMillan*;<sup>34</sup> however, the Court declined to extend absolute immunity to private persons who, with authorization from Congress, distributed reports which infringed upon the rights of others. In finding the actions “beyond the reasonable bounds of the legislative task,”<sup>35</sup> the suit was allowed to be maintained against the Government Printing Office but not against the members of Congress, as their acts were within the legislative function.

In contrast to the judicial expansion of the privilege of legislative immunity, certain critics have asserted that the immunity enjoyed under the speech or debate clause should be less than absolute.<sup>36</sup> They contend that where violations of an individual’s constitutional rights are in conflict with the clause, there should be a balancing of interests and the legislative privilege should yield to individual constitutional rights. The Court in *Eastland v. United States Servicemen’s Fund (USSF)* considered this contention, but declined to accept it by holding that judicial interference was not warranted in such a case. In the majority opinion Chief Justice Burger specifically stated that “the actions of the Senate Subcommittee, the individual Senators, and the Chief Counsel are protected by the Speech or Debate Clause of the Constitution, Art. I, §6, cl. 1, and are therefore immune from judicial interference.”<sup>37</sup> The first problem the Court addressed in *USSF* was whether the subcommittee’s action was “within the sphere of legislative activity.” In solving this problem the Court adopted the basic test in *Kilbourn* by looking “to see whether the activities took place ‘in a session of the House by one of its members in relation to the business before it.’”<sup>38</sup> After applying this test, the Court concluded that the power of investigation, as conducted by the Senate

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31. *Id.* at 505, 89 S.Ct. at 1955, 23 L.Ed.2d at 507.

32. 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

33. *Id.* at 618, 92 S.Ct. at 2623, 33 L.Ed.2d at 598.

34. 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973).

35. *Id.* at 315, 93 S.Ct. at 2026, 36 L.Ed.2d at 922.

36. Reinstein, *supra* note 14, at 1171-77.

37. 421 U.S. at 501, 95 S.Ct. at 1820, 44 L.Ed.2d at 335.

38. *Id.* at 503, 95 S.Ct. at 1821, 44 L.Ed.2d at 336.

Subcommittee on Internal Security, met this requirement,<sup>39</sup> and therefore, the issuance of a subpoena was a legitimate tool of congressional investigations. In addition the Court stated that once immunity attaches to the actions of Congressmen in the issuance of the subpoena, it likewise attaches to the chief counsel as well.<sup>40</sup>

The second issue addressed by the Court was USSF's claim that the subpoena invaded its privacy and therefore could not be immune from judicial questioning. In answering this contention the Court held that the respondents improperly relied on language in *Gravel* in making their claim,<sup>41</sup> since *Gravel* was referring to actions "not essential to legislating." The Court held the claim was inapplicable to the situation in *USSF* where the subcommittee's action was considered "essential."<sup>42</sup> USSF's next contention as to improper motives behind the subcommittee's investigation was similarly rejected, as the Court reaffirmed the position enunciated in *Tenney* by stating "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."<sup>43</sup>

Finally, the Court considered USSF's contention that the subpoena's purpose was to harass, chill, punish and deter USSF in the exercise of its first amendment rights and therefore the judiciary should intervene to protect those rights. By relying on the absolute nature of legislative immunity and a necessarily broad construction of the privilege, so as to maintain the independence of the legislature, the Supreme Court denied this claim and stated: "[t]he Clause was written to prevent the need to be confronted by such 'questioning' and to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority."<sup>44</sup> Therefore, in refusing to allow a first amendment exception to the privilege, the majority declined to hold that the legislative privilege must yield when individual constitutional rights are involved.

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39. The committee was charged with the duty to inquire into possible foreign infiltration and the need to know the funding of USSF was established in the following excerpt from the suit:

USSF asserted it does not know the source of its funds; in light of the Senate authorization to the subcommittee to investigate "infiltration by persons who are or may be under the domination of . . . foreign governments" . . . it is clear that the subpoena to discover USSF's bank records "may fairly be deemed within [the Subcommittee's] province."

*Id.* at 507, 95 S.Ct. at 1823, 44 L.Ed.2d at 338-39.

40. *Id.* at 506-07, 95 S.Ct. at 1823, 44 L.Ed.2d at 339.

41. In support of their claim respondents quoted the following language from *Gravel*: [N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances.

408 U.S. at 621, 92 S.Ct. at 2625, 33 L.Ed.2d at 600 (1972).

42. 421 U.S. at 508, 95 S.Ct. at 1824, 44 L.Ed.2d at 339.

43. *Id.* at 508, 95 S.Ct. at 1824, 44 L.Ed.2d at 339.

44. *Id.* at 511, 95 S.Ct. at 1825, 44 L.Ed.2d at 341.

Joined by Justices Stewart and Brennan, Justice Marshall wrote a concurring opinion,<sup>45</sup> in which he supported the majority position on the granting of immunity. He was clear, however, in stating that he believed congressional actions should be judicially reviewable where there is a subpoena issued to a third party, and the case is otherwise appropriate for the introduction of constitutional objections.<sup>46</sup> In dissent, Justice Douglas restated his opinion in *Tenney*, that legislative immunity should never be applied to deprive people of their constitutional rights under the first amendment.<sup>47</sup>

The majority's reasoning in *USSF* is well grounded in prior Supreme Court decisions authorizing a broad and somewhat absolute interpretation of the speech or debate clause's protection as applied to members of Congress. The need for maintaining an independent legislative branch is clear and in order to achieve this only a minimum amount of judicial interference is reasonable. The Court correctly applied the limitations of the prior cases and the rationale behind the privilege of legislative immunity in denying an injunction against the senators. The clause says that Congress shall not be questioned in any other place for any speech or debate in either House. By upholding the absoluteness of the privilege, the Supreme Court in *USSF* rejected the idea that one can override the privilege by asserting violations of first amendment rights. Consequently, there is no balancing of legislative immunity with other constitutional rights when an infringement is alleged. Once it is determined that the activity in question is within the legislative sphere and essential to the business of legislating, legislative immunity will prevail. Judicial interference and intimidation pose the same threat to an independent legislative branch, be it from private civil actions or from executive initiated actions. If the privilege is to be effective it must be absolute in its application.

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45. Five Justices formed the majority, three concurred and one dissented.

46. 421 U.S. at 513-17, 95 S.Ct. at 1827-28, 44 L.Ed.2d at 343-44.

47. *Id.* at 518, 95 S.Ct. at 1829, 44 L.Ed.2d at 345.



