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Constitutional Law - Speech or Debate Clause

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CONSTITUTIONAL LAW—SPEECH OR DEBATE CLAUSE

On June 29, 1971, Senator Gravel, chairman of the Subcommittee on Buildings and Grounds, convened a meeting of that subcommittee. He stated at the outset that the conduct of the United States in Indochina was relevant to the purposes of his subcommittee because of its effects on the domestic economy, specifically the lack of sufficient federal funds to provide for adequate public facilities. He then read portions of the "Pentagon Papers"[1] and included the documents in their entirety in the record of the meeting. Subsequently, he entered into unsuccessful arrangements for the publication of the record (for no personal, financial gain) by Beacon Press, a private, nonprofit publishing house.

A federal grand jury, convened in Boston to investigate matters relating to the public disclosure of the Pentagon Papers, subpoenaed Dr. Rodberg, an aide to the Senator. Senator Gravel then moved to intervene in an action brought by the aide to quash the subpoena. He contended that the questioning of the aide would contravene the speech or debate clause of the Constitution.[2] The motion to quash the subpoena of the aide was denied, but a protective order was entered and affirmed precluding questioning of the Senator or any member of his staff about the subcommittee meeting, including the acquisition and subsequent publication of the Pentagon Papers.[3] The order was based on the privilege of the legislator and his aide under the speech or debate clause, and on a common law privilege akin to that accorded executive and judicial officials to protect them from liability for official conduct.

The United States petitioned for certiorari challenging: (1) the ruling that aides and other persons may not be questioned with respect to legis-

1. UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES-VIETNAM RELATIONS *1945-1967* (1971) (twelve volume edition condensing the original forty-seven volumes for use of the House Committee on Armed Services', U.S. Government Printing Office) (hereinafter referred to as the Pentagon Papers).

2. U.S. Const. art. I, § 6: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other place.*" (Emphasis added).

3. United States v. Doe, 332 F. Supp. 930 (D. Mass. 1971); *aff'd*, 455 F.2d 753 (1st Cir. 1972).

lative acts; and (2) the ruling that an aide has a common law privilege against testifying with respect to private republication of materials introduced into a subcommittee meeting.[4] Senator Gravel petitioned for certiorari seeking reversal of the lower court decision insofar as: (1) it held private republication to be unprotected by the speech or debate clause; and (2) it too narrowly protected against inquiries that a grand jury could direct to third parties.[5] Both petitions were granted.

The Supreme Court held: (1) the speech or debate clause applies to a member of Congress as well as to his aide, when the conduct of the aide would be a protected legislative act if performed by the member himself; (2) the speech or debate clause does not privilege the aide from testifying before the grand jury concerning the alleged arrangement for private publication of the Pentagon Papers because this publication was not part of the legislative process; (3) the aide has no common law privilege from being questioned by the grand jury about possible violations of federal laws resulting from the alleged arrangement for private publication of the Pentagon Papers; and (4) the aide could be questioned about the source of classified documents in the Senator's possession as long as the questioning implicated no legislative act.[6] The lower court decision was vacated and the case remanded with instructions to modify the protective order in accordance with the decision.

The decision in this case is significant because of the Court's determination of the activities which are entitled to the protection of the speech or debate clause. The Court recognized the privileged nature of the legislative committee meeting when it held that Senator Gravel and his aide were privileged from inquiry with regard to activities performed therein,[7] while it excluded from protection the publication of legislative proceedings by a legislator when it held that a grand jury could question the Senator's aide concerning the alleged arrangements for publication.[8] Finally, the Court denied the protection of the clause to the gathering of information in preparation for legislative action, by holding that the aide could be questioned about the source of classified documents in the Senator's possession.[9] This casenote will explore the nature of the legislative proc-

4. Petitioner's Brief for Certiorari, United States v. Gravel, 408 U.S. 606 (1972) (No. 71-1026).

5. Petitioner's Brief for Certiorari, Gravel v. United States, 408 U.S. 606 (1972) (No. 71-1017).

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

7. *Id.* at 621.

8. *Id.* at 626-27.

9. *Id.* at 628.

ess and the aspects of this process which are entitled to the protection of the speech or debate clause. This exploration will reveal that the decision of the Court in the instant case represents a very restrictive view of the legislative process, which the clause was intended to protect.

An early American case, *Coffin v. Coffin*,[10] involved a defamation suit by one state legislator against another for remarks made on the floor of the Massachusetts House of Representatives. The Massachusetts constitution contains a provision analogous to the speech or debate clause, which the defendant pleaded as a defense.[11] While holding that it was no defense, the chief judge defined the privilege as follows:

I would define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house: and I am satisfied that there are cases in which he is entitled to the privilege, when not within the walls of the representatives' chamber.[12]

This early interpretation of the legislative privilege clearly recognized a broad privilege for legislators in the performance of their functions.

The *Coffin* decision was quoted with approval in *Kilbourn v. Thompson*,[13] an action for false imprisonment brought against the Speaker, members and the Sergeant-at-Arms of the House of Representatives. The House had adjudged Kilbourn in contempt of Congress and ordered the Sergeant-at-Arms to arrest him. The Court found that the House had no authority to order the arrest of Kilbourn but that the members were privileged by the clause.

In arriving at its decision, the Court considered the origins of the clause in the English Bill of Rights and determined that the framers of the Constitution had indicated their intent for the clause to have the same meaning by using the same language. The Court defined the scope of the clause stating:

It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.[14]

10. 4 Mass. 1 (1808).

11. *See* Oppenheim, *Congressional Free Speech*, 8 LOYOLA L. REV. 1, 6 (1955), for a listing of state constitutional provisions establishing the doctrine of legislative privilege.

12. 4 Mass. 1, 27 (1808).

13. 103 U.S. 168 (1880).

14. *Id.* at 204.

Thus, the clause was viewed as flexible and applicable when a member is engaged in legislative matters and not merely upon a static set of duties.

A legislator is not, however, protected by the clause when he commits a crime. For example, the clause was not a defense for accepting bribes in *Burton v. United States*,[15] and for conspiracy to commit subornation of perjury in *Williamson v. United States*,[16] because these acts were held to be outside the scope of the legislative process.

The clause protected a Senator against a defamation suit for words spoken in the Senate during a speech, but totally unrelated to Senate business, in *Cochran v. Couzens*.[17] The court recognized the importance of free speech in Congress when it stated:

> It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted unlimited freedom in speeches or debates. The provision to that end is, therefore, grounded on public policy, and should be liberally construed. Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues.[18]

The clause was interpreted as a guarantor of free discussion in the legislature and, should any abuses result, the member is to be disciplined by his peers.[19]

The protection of the clause was determined to be a valid defense for members of a California Senate investigating committee sued for violations of the Civil Rights Act by a witness.[20] The Court decided that the claim of an unworthy purpose does not destroy the privilege because

> [i]nvestigations, whether by standing committees or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. 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. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.[21]

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15. 202 U.S. 344 (1906).

16. 207 U.S. 425 (1908).

17. 42 F.2d 783 (D.C. Cir. 1930).

18. *Id.* at 784.

19. *See generally* Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131 (1910); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960 (1951).

20. Tenney v. Brandhove, 341 U.S. 367 (1951).

21. *Id.* at 377-78.

The Court recognized the importance of an investigating committee in relation to the legislative process and decided that the judiciary should only question the acts of such legislative committees in extreme cases.

In *McGovern v. Martz*[22] the clause was interpreted as an absolute privilege against defamation when a Senator placed material containing defamatory subject matter in the Congressional Record. The court recognized that the interchange of ideas and information could not be achieved solely from debate on the floor of Congress but that congressmen must be able to utilize the Congressional Record as a means of imparting and acquiring necessary information.

Also, in *United States v. Johnson*,[23] the clause's protection was broadened to include the motives, purposes and ingredients of a congressman's speech delivered in the House of Representatives. In this case an ex-congressman was indicted for violating a federal conflict of interest statute and for conspiring to defraud the United States. The conspiracy charge was based upon the government's theory that his speech in the House of Representatives was delivered for the purpose of showing favoritism to disreputable financial institutions and not for a valid legislative purpose. The prosecution conducted extensive investigations of the congressman and his aides concerning the manner in which the speech was prepared, its contents and his motives for delivering it. The Court said that such an extensive judicial inquiry, made in the course of a prosecution by the executive branch, violated the express language of the Constitution and the policies underlying it.[24] Furthermore, the Court determined that the clause serves another important function, namely that of reinforcing the separation of powers:

> The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature.[25]

The chairman and counsel of a Senate investigating committee relied upon the free speech or debate clause as a defense against a suit brought by a citizen charging them with conspiring to seize his property in violation of the fourth amendment.[26] The Court considered the purpose of legislative immunity, stating:

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22. 182 F. Supp. 343 (D.D.C. 1960).

23. 383 U.S. 169 (1966).

24. *Id.* at 177.

25. *Id.* at 179. *See generally* 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 SUFF. L. REV. 1 (1968).

26. Dombrowski v. Eastland, 387 U.S. 82 (1967).

[l]egislators engaged 'in the sphere of legitimate legislative activity' (citation omitted) should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.[27]

In holding that the legislative privilege was applicable, the Court pointed out that the right to immunity would not be applied as strictly when officers or employees of Congress rather than actual legislators are involved. Although the privilege was not extended to the counsel in this case, it was, significantly, seen to extend to aides.

The most recent case involving the clause was *Powell v. McCormack* wherein an elected representative brought suit against the Speaker, members and employees of the House of Representatives.[28] The members had voted to exclude Adam Clayton Powell from his seat in the House and the employees had denied him physical admission to the House and other services. The Court dismissed the suit as to the members of the House and stated:

Our cases make it clear that legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.[29]

Although the petitioner was allowed to maintain the suit against the employees and to obtain judicial review of the resolution to exclude him,[30] the Court determined that it was necessary for legislators to be shielded from possible liability for their actions if they are to effectively function as representatives of their constituents.

The interpretation of the speech or debate clause rendered by the Court in *Gravel v. United States* that the protection of the clause now extends to a legislator's aide when he is performing an act which would be a protected legislative act if performed by the legislator, should have a beneficial effect upon the manner in which the legislature conducts its operations. The Court has recognized the necessity of a legislator having competent assistants if he is to accomplish the numerous, complex tasks with which he is charged.

The determination that the clause does not protect from grand jury inquiry either Senator Gravel's alleged arrangements for private publication of the record of his subcommittee meeting containing the Pentagon

27. *Id.* at 85.

28. 395 U.S. 486 (1969).

29. *Id.* at 503.

30. *See generally* Note, *Legislative Power to Judge the Qualifications of its Members*, 19 VAND. L. REV. 1410 (1966); Rogers, *The power of the Legislature to Disqualify Members-Elect*, 45 N.C.L. REV. 524 (1967).

Papers, or the source of classified documents in the Senator's possession represents a very restrictive interpretation of the legislative privilege. The Court has removed the protection of the clause from two vital functions of a legislator: (1) The publication of a legislator's work to inform his constituents; and (2) the gathering of information to prepare for legislative acts.

The Court relied largely upon English cases for authority that there is no privilege for publication by a legislator. The decision in *Stockdale v. Hansard*[31] was cited erroneously as supporting the contention that the English legislative privilege did not permit publication and that this interpretation was embodied in the speech or debate clause of the Constitution, while the facts reveal that publication of parliamentary proceedings was recognized as an important part of legislative activity. The attempt by the Crown, for example, in *Rex v. Williams* to thwart the publication of Dangerfield's Narrative by order of the Commons led to the inclusion of article 9 in the English Bill of Rights to protect this activity.[32] In addition, the decision in *Stockdale* does not represent authority that a mem-

31. 112 Eng. Rep. 1112 (Q.B. 1839). This case involved a libel suit against a printer of the House of Commons. The House had ordered the publication of one of its reports containing the libelous matter, and the printer contended that he was protected by Parliamentary privilege. The court considered the privilege of members of Parliament and stated: "By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to public peace, that member enjoys complete immunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a Court of Justice." *Id.* at 1156. The court held that the printer was not covered by the privilege which resulted in the enactment of the Parliamentary Papers Act, 1840, 3 & 4 Vict., c. 9, §§ I, II, to protect publishers of Parliamentary proceedings. It is important to note that the *Stockdale* case does not represent authority that a member cannot publish his legislative work under the legislative privilege because the court did not consider this issue. *See also* Kilbourn v. Thompson, 103 U.S. 168 (1880).

32. 13 How. St. Tr. 1370 (1816). This case involved the proceeding by James II against Sir William Williams, the Speaker of the Commons in 1686, who was charged with seditious libel for publishing Dangerfield's Narrative by order of the Commons. Dangerfield's Narrative was a report of an alleged plot between the King and his relatives to restore Catholicism to England and to suppress Protestantism. Sir Williams contended that his actions were protected by Parliamentary privilege but he was found guilty and fined. In 1688, after James II went into exile, the Commons appointed a committee to consider what action should be taken to protect the liberties of the people and the independence of Parliament. The result of their work was the Bill of Rights of 1689 containing article 9 which protected speech and debate stating "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." I W. & M., Sess. 2, c. 2, art. 9 (1689). This provision was the basis for the Speech or Debate Clause in the United States Constitution.

ber is not privileged to publish his legislative work, but rather that a printer is not protected if he publishes a report containing libelous matter.[33] Finally, *Wason v. Walter*[34] held that a printer is privileged to print accurate and good faith reports of parliamentary proceedings and that a member may publish his speech for the information of his constitutents.

The Court in *Gravel* analyzed the activities performed by legislators and defined those entitled to the protection of the clause when it stated:

> [T]hey must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[35]

The Court then decided that private publication by Senator Gravel was in no way essential to the deliberations of either House and concluded that the arrangements for publication were, "not part and parcel of the legislative process."[36] Since publication was not part of the legislative process there was no immunity for the aide under the clause.

The majority decision that publication by Senator Gravel was not a legislative function privileged by the clause was strongly disputed in the dissenting opinion of Justice Brennan, with whom Justices Douglas and Marshall joined. Justice Brennan was concerned by the majority's narrow scope of the legislative function when he stated:

> Thus the Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator's duty to inform the public about matters affecting the administration of government.[37]

Justice Brennan reasoned that this "informing function" of a legislator is entitled to the protection of the clause and that, since Senator Gravel was attempting to inform the public in arranging for publication of his committee report, his conduct was privileged from inquiry by the grand jury.

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33. 112 Eng. Rep. 1112 (Q.B. 1839).

34. L.R. 4 Q.B. 73, 95 (1868). This case involved a defamation suit against the proprietor of the London Times who published a debate in which the plaintiff was severely criticized. The court considered the *Stockdale* decision and criticized it has having been very shortsighted because the judges involved had denied the necessity and public advantage of having proceedings made public. The court reasoned that the same principles upon which reports of judicial proceedings were held privileged applied to reports of Parliamentary proceedings. If the publication was accurate, and in good faith, it could not be the basis of a libel action. A member of Parliament was also privileged to publish his speech for the information of his constituents. *Id.* at 89.

35. 408 U.S. 606, 625 (1972).

36. *Id.* at 625-26.

37. *Id.* at 648, 649 (Brennan J., dissenting).

There is considerable authority to support this view of the informing function of a legislator as an important part of the legislative process and thus entitled to the protection of the clause. This function was recognized by the framers of the Constitution. An early statement of their views appears in the reaction of Thomas Jefferson and James Madison to a 1797 case involving Samuel Cabell, a congressman from Virginia. Cabell had sent newsletters to his constituents which were critical of the administration's policy in the war with France. When Cabell was subpoenaed before a federal grand jury, Jefferson drafted an essay condemning the invasion of a legislator's privilege to communicate with his constituents. The protest was joined by Madison and was sent to the Virginia House of Delegates:

[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 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. . . .[38]

The importance of the informing function as an insurance that legislators represent their constituents was emphasized by James Wilson, one of the drafters of the Constitution, when he stated that:

Representation is the chain of communication between the people and those to whom they have committed this exercise of the powers of government. This chain may consist of one or more links, but in all cases it should be sufficiently strong and discernable.[39]

In a speech before the Virginia Committee to ratify the Constitution, Patrick Henry discussed the importance of the informing function as a safeguard against arbitrary government when he stated:

Give us at least a plausible apology why Congress should keep their proceedings in secret. . . . They may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them.[40]

The duty of a legislator to inform his constituents has been noted by numerous constitutional scholars but perhaps Woodrow Wilson best described it when he stated:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress has and uses every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how

38. 8 Works of Thomas Jefferson 322 (Ford ed. 1904).

39. II Elliot's Debates 424 (1937).

40. III Elliot's Debates 169-70 (1937).

it is being served. . . . The informing function of Congress should be preferred even to its legislative function.[41]

Wilson clearly recognized that Congress could not represent its constituents unless it communicated, through its members, with the public.

The informing function of a legislator also has been recognized in numerous decisions which have referred to it as a vital part of the legislative process. In *Tenney v. Brandhove*, the Court held that members of a legislative investigating committee were protected by the clause because this activity was a necessary part of the informing function.

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may give offence.[42]

The duty of Congress to conduct investigations into all areas of government was seen as a vital part of the legislative process in *Watkins v. United States* where the Court held:

[t]he power of Congress to conduct investigations is inherent in the legislative process. That power is broad. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[43]

The Court clearly recognized that publication of the findings of legislative investigations is a necessary concomitant to the effective performance of the informing function.[44]

The right of legislators to publish the reports of investigating committees was the basis of the court's refusal to grant an injunction against members of the House of Representatives in *Hentoff v. Ichord*.[45] The decision held that legislative activities were not limited to speech or debate on the floor of Congress and, because the report involved matters of public concern, the court would take no action to limit the use that the members chose to make of it on or off the floor of Congress. These reports are prepared and published in order to inform the public on topics of vital importance so that they may express their opinions to their elected representatives and participate in the actual legislative process.[46]

There is further support for the informing function of a legislator when

41. WILSON, CONGRESSIONAL GOVERNMENT 303 (1885).

42. 341 U.S. 367, 373 (1951); *see also*, Bond v. Floyd, 385 U.S. 116 (1966).

43. 354 U.S. 178, 187 (1957).

44. *Id.* at 200, n.33 (emphasis added).

45. 318 F. Supp. 1175, 1179 (D.D.C. 1970).

46. *See, e.g.*, REPORT BY THE U.S. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968); REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

the numerous privileges accorded to congressmen for the purpose of communicating with their constituents are considered. Congressmen are entitled to a free franking privilege on their letters; monetary allowances for the use of the telephone or telegraph; monetary allotments for stationery; and reduced rates on reprints of the Congressional Record. A careful evaluation of the above data clearly reveals that the informing function of a legislator is an integral part of the legislative process which the clause is intended to protect. Senator Gravel's arrangement for private publication of his committee report containing the Pentagon Papers was a manifestation of that informing function and should have been protected by the Court.

The majority in *Gravel* also decided that there was no constitutional privilege or common law privilege that shielded the aide or any other witness from grand jury questions relevant to tracing the source of classified documents that came into the Senator's possession as long as no legislative act was implicated by the questions. This decision, in effect, determined that information gathering by a legislator is not a part of the legislative process and therefore is not entitled to the protection of the clause.

Justice Stewart was concerned with this issue when he dissented in part:

> [I]n preparing for legislative hearings, debates and roll calls, a member of Congress obviously needs the broadest possible range of information. . . . Thus, the acquisition of knowledge through a promise of nondisclosure of its source will often be a necessary concomitant of effective legislative conduct, if members of Congress are properly to perform their constitutional duty.[47]

Justice Stewart reasoned that the information gathering process was essential to the proper performance of a legislator's duties and was entitled to the privilege of the clause.

Justice Brennan, with whom Justices Marshall and Douglas joined dissenting, said of the information gathering process:

> The receipt of materials for use in a congressional hearing is an integral part of the preparation for that legislative act. . . . It would accomplish little toward the goal of legislative freedom to exempt an official act from intimidating scrutiny, if other conduct leading up to the act and intimately related to it could be deterred by a similar threat.[48]

Justice Brennan reasoned that the Senator and his aides should be privileged from inquiry as to the source of the classified documents. He would extend this privilege to any information which the Senator and his aide might have as to the ultimate source of their information.

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47. 408 U.S. 606, 630 (1972).

48. *Id.* at 648, 662-63 (Brennan, J., dissenting).

The gathering of information has been recognized and upheld in the numerous decisions extending the protection of the clause to legislative investigating committees. These committees have served as a prime source of gathering of information by legislators in preparation for future legislative action. The members of a committee in *Kilbourn v. Thompson* were protected from suit because the clause extends protection "to things generally done in the session of the House by one of its members in relation to the business before it."[49] The legislators in *Tenney v. Brandhove* were similarly privileged because "[i]nvestigations, whether by standing committees or special committees, are an established part of representative government."[50]

It is apparent from this precedent that information gathering is an integral part of the legislative process and that the action of Senator Gravel in acquiring the classified documents for use in his subcommittee meeting should have been protected from inquiry by the clause.

The speech or debate clause was included in the Constitution to insure independence of the legislative branch of the government from interference by the two coordinate branches. The clause was intended to prevent inquiry into how the legislature exercises the functions delegated to it by the Constitution. The decision in *Gravel* has threatened this safeguard by limiting its protection in accordance with the Court's view of what the legislative process entails. The decision may have raised more serious difficulties: Will a constitutional amendment be necessary to insure the freedom of the legislature? Will the prospect of increased liability for their actions cause legislators to hesitate in seeking out and exposing corruption in government? Finally, will the relative ease, with which the judicial branch has stripped away the constitutional protection of the legislative branch, encourage it to attempt further incursions?

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49. 103 U.S. 168, 204 (1880).
50. 341 U.S. 367, 377 (1951).