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Office of the  
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Washington, D.C. 20530

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MEMORANDUM TO THE ATTORNEY GENERAL

Re: The Scope of the Speech or Debate Clause

This memorandum is in response to your request for a general discussion of the scope of the Speech or Debate Clause of the Constitution. The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const., Art. I, § 6, cl. 1. This Clause, rooted in ancient conflicts between the British Crown and Parliament, establishes broad substantive and evidentiary immunity for Members of Congress and their aides for activities carried out in furtherance of the legislative function. However, "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." United States v. Brewster, 408 U.S. 501, 512 (1972).

In its first decision construing the Clause, the Supreme Court read it broadly to apply not only to "words spoken in debate," Kilbourn v. Thompson, 103 U.S. 168, 204 (1881), but also 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.

Id. (emphasis added). Since then, the Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975). The principal purpose is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," United States v. Johnson, 383 U.S. 169, 181 (1966), although "the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." Eastland, 421 U.S. at 502-03. The Clause forbids executive or judicial inquiry into the motives for

legislative acts as well as the acts themselves. See Johnson, 383 U.S. at 184-85 (1966); Tenney v. Brandhove, 341 U.S. 367, 377 (1951). And because aides and assistants perform much of the necessary day-to-day work of Congress, the purposes of the Clause require that they too be protected, Gravel v. United States, 408 U.S. 606, 616-17 (1972), at least when there is no reason to distinguish their activities from those of Members. See Eastland, 421 U.S. at 507; Dombrowski v. Eastland, 387 U.S. 82, 84 (1967). But cf. Doe v. McMillan, 412 U.S. 306, 312-17 (Members of Congress, their staffs, and investigators are immune from suit for holding hearings and voting to issue a defamatory report "going beyond the reasonable requirements of the legislative function . . . , but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the Sergeant at Arms in Kilbourn v. Thompson [103 U.S. 168], when, at the direction of the House, he made an arrest . . . 'without authority' " (citation omitted)).

When it applies, the Clause shields Members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski, 387 U.S. at 85. Evidence of past legislative acts is inadmissible in any proceeding, United States v. Helstoski, 442 U.S. 477, 487-90 (1979), and references to such acts must be excised from otherwise admissible evidence. Id. at 488 n.7. In short, "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." Eastland, 421 U.S. at 503. See also Hutchinson v. Proxmire, 443 U.S. 111, 123 (1979) ("[i]f the respondents have immunity under the Clause, no other questions need be considered").

Application of the Speech or Debate Clause thus turns on whether the challenged conduct falls within the "sphere of legitimate legislative activity." Tenney, 341 U.S. at 376. The Court has made clear that not all acts performed in an official legislative capacity are "legislative" for purposes of the Clause:

Insofar as the Clause is construed to reach other matters [than speech or debate in either House], they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

<sup>1</sup> Of course, the Clause does not prevent Congress itself from taking action against one of its Members. See United States v. Helstoski, 442 U.S. 477, 488 n.7 (1979).

Gravel, 408 U.S. at 625 (emphasis added). In Gravel, for instance, it was held that Senator Gravel and his aides could not be prosecuted for holding committee hearings at which the Senator read from the Pentagon Papers and introduced them into the public record. Id. at 615-21. On the other hand, the Court also held that prosecution could be undertaken regarding an arrangement made by the Senator for the private publication of the papers because such an arrangement "was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence." Id. at 625. The Court continued:

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

Id. at 626-27. See also Brewster, 408 U.S. at 517 ("the shield does not extend beyond what is necessary to preserve the integrity of the legislative process"); Johnson, 383 U.S. at 172 ("[n]o argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as . . . [an] attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process").

These limitations on the Clause's scope were reaffirmed in Hutchinson v. Proxmire, 443 U.S. 111 (1979). Hutchinson received one of Senator Proxmire's Golden Fleece awards for his government-funded research into the emotional behavior of apes. A speech by Senator Proxmire announcing the award was inserted.

into the Congressional Record,<sup>2</sup> incorporated into a press release, and included in two newsletters sent by the Senator to 100,000 people. The Court reversed a grant of summary judgment against Hutchinson in his libel suit against Proxmire, holding that

A speech by Proxmire in the Senate would be wholly immune and would be available to other Members of Congress and the public in the Congressional Record. But neither the newsletters nor the press release was "essential to the deliberations of the Senate" and neither was part of the deliberative process.

Id. at 130 (quoting Gravel, 408 U.S. at 625). In response to the defendants' claim that newsletters and press releases are necessary for the functioning of the congressional process, the Court conceded that such statements may "exert some influence on other votes in the Congress and therefore have a relationship to the legislative and deliberative process," 443 U.S. at 131, but noted that it had " '[n]ever treated the Clause as protecting all conduct relating to the legislative process.' " Id. (quoting Brewster, 408 U.S. at 515). Defendants also claimed that "newsletters and press releases are privileged as part of the 'informing function' of Congress," 443 U.S. at 132, i.e., the alleged "duty of Members to tell the public about their activities," id. at 133, which defense the Court also rejected:

Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members is not a part of the legislative function or the deliberations that make up the legislative process. As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.

Id. (footnote omitted).

The law was usefully summarized by then-Assistant Attorney General Antonin Scalia in March 1976, in commenting on whether a bill to punish disclosure of certain classified information could be applied to Members of Congress: "[d]isclosures not legislative in origin, for example, statements or leaks to the press, newsletters, or any disclosure when no longer in office, would not be protected by the Speech and Debate Clause . . . ."

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<sup>2</sup> The Court assumed without deciding that material inserted into the Congressional Record but not actually delivered on the floor of the Congress was protected by the Clause. See Hutchinson v. Proxmire, 443 U.S. 111, 116 n.3. A recent District Court opinion holds the Clause applicable in these circumstances. See Gregg v. Barrett, 594 F. Supp. 108, 111 (D.D.C. 1984).

We trust the foregoing has been helpful to you. Should you desire further discussion of the Speech or Debate Clause or its application to a particular set of circumstances, we would be happy to provide it.

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