CONSTITUTIONAL LAW—SPEECH OR DEBATE CLAUSE—SCOPE OF LEGISLATIVE IMMUNITY RESTRICTIVELY EXTENDED TO AIDES—*Gravel v. United States*, 408 U.S. 606 (1972).

On the evening of June 29, 1971, Senator Mike Gravel of Alaska, a member of the Senate Committee on Public Works and Chairman of its Subcommittee on Public Buildings and Grounds, called a meeting of the subcommittee, whereupon he proceeded to read extensively from a copy of a classified study entitled "History of the United States Decision-Making Process on Viet Nam Policy", more popularly known as the *Pentagon Papers*. At the conclusion of this hearing, which had been arranged and conducted with the assistance of a newly appointed aide, Dr. Leonard S. Rodberg, Senator Gravel placed the entire study of 47 volumes representing 7,000 pages in the public record, thereby exposing it to scrutiny by the press. Some seven weeks later, on August 18th, the press reported that Gravel and Dr. Rodberg had been instrumental in securing the private republication of the *Pentagon Papers* by a Boston publisher, Beacon Press. These events delineate a scope of legislative activity in which immunity, as provided by the speech or debate clause,[1] was austerely redefined in the principal case of *Gravel v. United States*.[2]

On August 24th, Dr. Rodberg, who was also a resident fellow at the Institute for Policy Studies in Washington, D.C., and Howard Webber, director of M.I.T. Press, were subpoenaed to appear and testify before a grand jury[3] investigating crimes which included the retention of public property or records with intent to convert, the gathering and transmitting of national defense information, the concealment or removal of public records or documents, and conspiracy to commit such offenses and to defraud the United States.[4] Both Dr. Rodberg and Senator Gravel, as intervenor,[5] subsequently petitioned the district court to quash the subpoena,[6] claiming it infringed upon

[1] U.S. CONST. art. I, § 6 provides in relevant part:

> 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.

[2] 408 U.S. 606 (1972).

[3] *Id.* at 608.

[4] *Id.* Such criminal conduct is violative of 18 U.S.C. §§ 641, 793, 2071, 371 (1970), respectively.

[5] 408 U.S. at 608.

[6] United States v. Doe, 332 F. Supp. 930, 931-32 (D. Mass. 1971).

the legislator's immunity guaranteed by the speech or debate clause of the Constitution of the United States.[7] The Senator also moved to require specification of the precise nature of the questions to be propounded by the Government.[8] The district court denied the motions to quash, and for specification,[9] but entered a protective order restricting the types of questions that could be posed.[10] The court's decision was founded upon the rationale that the speech or debate clause prohibited inquiry into acts performed by Dr. Rodberg as Senator Gravel's agent or assistant that would have been privileged legislative acts if executed by the Senator himself.[11]

The court of appeals affirmed the denial of the motions to quash,[12] but modified the lower court's protective order to include a prohibition barring direct inquiry of the Senator or his aides during their term of employment (but not third parties) with regard to sources of information employed in fulfilling legislative responsibilities.[13] Although the court did not consider private republication by Senator Gravel or Beacon Press to be within the purview of protection afforded by the speech or debate clause, the court of appeals ostensibly held

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7 *Id.* at 932.

8 *Id.*

9 *Id.* at 938.

10 *Id.*

11 *Id.* at 937-38. The protective order established the following restrictions:

> (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 about things done by the Senator in preparation for and intimately related to said meeting.
>
> (2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

Id. at 938.

12 455 F.2d 753, 762 (1st Cir. 1972). The Government challenged the Senator's standing to appeal the denial of his motions by the district court, contending that had the Senator been served with the subpoena directly, no appeal could follow unless he refused to comply and was adjudicated in contempt. *Id.* at 756-57. *See* United States v. Ryan, 402 U.S. 530 (1971); Cobbledick v. United States, 309 U.S. 323 (1940). However, the court of appeals noted that the subpoena had not been addressed to the intervenor but to third parties who could not be relied upon to risk contempt to protect the intervenor's rights. Hence, if Gravel had not been permitted to appeal the trial court's decision, he would have remained "powerless to avert the mischief of the order." Perlman v. United States, 247 U.S. 7, 13 (1918).

13 455 F.2d at 762-63. The court observed that

> allowing a grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them.

Id. at 758-59.

that both the Senator and his aide were shielded from liability—to the extent of a Congressman's duty to inform his constituents—by a common-law privilege reminiscent of the one extended to executive officers.[14] Finally, the court of appeals expanded upon the provisions of the protective order to prohibit inquiry concerning the actions of Dr. Rodberg "in the broadest sense, including observations and communications, oral or written, by or to him, or coming to his attention"[15] to the extent that they were within the scope of his employment.

Both parties' petitions for certiorari were granted.[16] The United States challenged the ruling that aides and other individuals could not be questioned with regard to legislative acts and that aides have a common-law privilege not to testify before a grand jury on the subject of private republication of materials introduced into the public record.[17] Senator Gravel sought reversal of the court of appeals' decision to limit the immunity of third parties against grand jury questioning, and not to extend the protection of the speech or debate clause to private republication.[18] In vacating and remanding the case, the United States Supreme Court ruled on four distinct issues. First, the speech or debate clause applies not only to the legislator but also to his aide to the extent that the aide's activities would constitute a protected legislative act if performed by the legislator personally.[19] Second, the speech

14 *Id.* at 760. The court was extremely vague in describing how this executive privilege could be applied to a legislative situation. It simply stated that the extent of this immunity "will depend upon the facts of the particular case." *Id.* at 761.

The case cited therein, Barr v. Matteo, 360 U.S. 564 (1959), addressed itself only to absolute immunity afforded an executive officer for a libelous news release. The Court recognized that fear of civil damage suits would be an impediment to the free and effective functioning of governmental machinery. *Id.* at 571. It was further noted that an ever-increasing complexity in governmental activity dictated a redelegation of authority to lower ranking officials but did not simultaneously diminish the importance of such functions. *Id.* at 573.

15 455 F.2d at 763.

16 405 U.S. 916 (1972).

17 408 U.S. at 613.

18 *Id.*

19 *Id.* at 618. This decision modified prior existing law as promulgated in Powell v. McCormack, 395 U.S. 486, 506 (1969); Dombrowski v. Eastland, 387 U.S. 82, 84 (1967); Kilbourn v. Thompson, 103 U.S. 168, 200, 205 (1881).

Traditionally, immunity under the speech or debate clause was afforded only to elected public officials, irrespective of the legislator's role in instigating or directing a resultant tort by one of lower rank. However, the district court in *Gravel* recognized a growing complexity in governmental activity which necessitated a delegation and redelegation of authority. 332 F. Supp. at 937. (The district court was thereby establishing the same pragmatic justification for its rationale as employed in Barr v. Matteo, 360 U.S. 564, 573 (1959), which addressed itself to the extension of the executive privilege. See discussion note 14 *supra*.) Hence, legislative protection could no longer be determined by one's status as a representative or aide, but should be founded upon the aide's role at the

or debate clause does not extend immunity to a legislator's aide testifying before a grand jury about an alleged arrangement for private republication of previously classified documents, provided such inquiry bears no connection with legislative acts.[20] Third, an aide has no common-law (executive) privilege which can prohibit questioning by a grand jury in connection with its investigation into whether private republication of once classified materials violated a federal criminal statute.[21] Lastly, the court of appeals' protective order was too encompassing and should be confined to acts legislative in character under which a Congressman would be immune, and not to all acts within the scope of the aide's employment.[22] An aide can also be questioned by a grand jury about the source of classified documents that have come into a legislator's possession provided no legislative act is thereby implicated.[23] The protective order would have afforded sufficient security had it prohibited the questioning of any witness about (a) the conduct, motives, and purposes of the Senator or his aides at the subcommittee meeting; (b) communications between the Senator and his aides during the period of their employment that related to the meeting in question or any legislative act of the Senator; (c) any legal act performed by the Senator or his aides within the scope of their employment in preparation for the subcommittee hearing if not germane to possible third party crimes.[24]

moment the alleged tort is perpetrated. If the aide performed mere non-discretionary duties which could not be associated with a specific furtherance of a legislative task, immunity would not attach. But should the aide be vested with critical and confidential duties which are vital to the proper functioning of the legislative office, his activities within that capacity should be equally protected. *See* 332 F. Supp. at 937-38. *See also* Heine v. Raus, 399 F.2d 785 (4th Cir. 1968), wherein the court ruled that a slander action could not be maintained against subordinate officials who merely executed directives made within the legitimate scope of legislative activity. The court failed to perceive any logic or purpose to a constitutional provision which would shield the legislator while exposing all his employees to actions for defamation. *Id.* at 790-91.

20 408 U.S. at 626-27. In their dissenting opinions, Justice Douglas and Justice Brennan assert that the legislator's duty to inform the public constitutes sufficient justification for permitting private republication to be embraced within the protective confines of the speech or debate clause. *Id.* at 633, 635-36; *Id.* at 648, 649-64.

21 Id. at 627. The Court observed that "[t]he so-called executive privilege has never been applied to shield executive officers from prosecution for crime." *Id.*

22 *Id.* at 627-28.

23 *Id.* at 628. Justice Stewart dissented solely concerning this point on procedural and pragmatic grounds, respectively. He first noted that this critical issue was not presented in either party's petition for certiorari. *Id.* at 629-30. He then argued that the acquisition of knowledge necessary for effective legislative conduct is frequently offered by informants only in the strictest confidence, for fear of retribution by those who might consequently be adversely affected. Thus, the Court's ruling in this matter could stifle legislative activity, thereby compromising the public's interest in having an informed Congress. *Id.* at 630.

24 *Id.* at 628-29.

The Court's majority and dissenting opinions in this controversial case reflect an apparent struggle in American jurisprudence between jurists who follow the banner of tradition and those who are more highly sensitive to contemporary public pressures. A traditionalist approach may be characterized by an analysis and digestion of legal controversies through a narrow or temperate application of presently recognized legal tenets.[25] However, other jurists view the legal system not as a self-generating body which can become disassociated from changing social trends, but as a forerunner in promoting subtle modification of lawful conduct whenever warranted by exigencies occasioned by a dominative polity.[26] Judicial near-sightedness in failing to recog-

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25 Indeed, Justice Cardozo has noted that an adamant faction could obfuscate the very purpose of the judiciary, namely, the dispensation of justice:

> There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. In such circumstances, the words of Wheeler, J., in Dwy v. Connecticut Co., 89 Conn. 74, 99 [92 A. 883, 891 (1915)], express the tone and temper in which problems should be met: "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society . . . ."

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151 (1921).

However, Justice Stewart, speaking for the Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971), observed that legal controversies which raise unique judicial problems are not always amenable to such formalistic resolution:

> The time is long past when men believed that development of the law must always proceed by the smooth incorporation of new situations into a single coherent analytical framework.

Id. at 483.

26 The necessity of a legal system to adapt its framework to the changing roles of governmental institutions is basic to the perpetuation of a representative form of government. In his dissent, Justice Brennan viewed the informing function as a means by which Congress could reclaim some control over the operation of governmental machinery.

> "With the decline of Congress as an original source of legislation, this function of keeping the government in touch with public opinion and of keeping public opinion in touch with the conduct of the government becomes increasingly important. Congress no longer governs the country; the Administration in all its ramifications actually governs. But Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized."

408 U.S. at 651 (quoting from A REPORT OF THE COMMITTEE ON CONGRESS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION, THE REORGANIZATION OF CONGRESS 14 (1945)).

Furthermore, Justice Brennan intimated that a legislative branch which fails to meet its communicative responsibilities to its constituents is little more than a vestigial organ of government:

> "Unless Congress have and use 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 it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain

nize the thrust of more recent decisions may still retain the support of legal precedent but it often focuses upon manifestations of the problem rather than its fundamental source. These latter observations are deftly crystallized within a passage in Justice Brennan's dissenting opinion in the principal case:

> It requires no citation of authority to state that public concern over current issues—the war, race relations, governmental invasions of privacy—has transformed itself in recent years into what many believe is a crisis of confidence, in our system of government and its capacity to meet the needs and reflect the wants of the American people. Communication between Congress and the electorate tends to alleviate that doubt by exposing and clarifying the workings of the political system, the policies underlying new laws and the role of the Executive in their administration. To the extent that the informing function succeeds in fostering public faith in the responsiveness of Government, it is not only an "ordinary" task of the legislator but one that is essential to the continued vitality of our democratic institutions.[27]

However, it must be observed that those who are guided by the dictates of tradition are confronted with an equally devious path in their quest to find insights into this area of constitutional law because of the paucity of cases from which to draw sustenance. Hence, a solution to this problem of interpreting the provisions of the speech or debate clause can best be found through extensive historical investigation, as proposed by the court of appeals:

> The difficulty is that the term "legislative process" is no more self-defining than "Speech or Debate." The language and history of the Speech or Debate clause is a surer guide to the scope of the privilege than catch phrases . . . .[28]

Indeed, many American cases which address themselves to the problem of interpreting the speech or debate clause refer to its origin in English parliamentary history.[29] The clause reputedly evolved from the continuing conflict between a Parliament growing in stature and inde-

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in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct."

408 U.S. at 651 (quoting from W. WILSON, CONGRESSIONAL GOVERNMENT 303 (3d ed. 1885)).

27 408 U.S. at 651-52. The majority opinion narrowly interpreted the purpose and scope of the speech or debate clause, whereas the dissenting opinions delved into the basic spirit and design of the clause to serve (as defined by prior cases) as a mechanism to guarantee the independence of the separate branches of government.

28 455 F.2d at 759.

29 *See* Powell v. McCormack, 395 U.S. 486, 502 (1969); United States v. Johnson, 383 U.S. 169, 182 (1966); Tenney v. Brandhove, 341 U.S. 367, 372 (1951); Williamson v. United States, 207 U.S. 425, 438 (1908); Kilbourn v. Thompson, 103 U.S. 168, 183 (1881).

pendence and a repressive Crown.[30] The "Glorious Revolution" of 1688 presented the somewhat subjugated Parliament with an ideal opportunity to clearly establish its right of freedom of speech and debate. The ninth article of the Bill of Rights reflects Parliament's success in this endeavor by providing "[t]hat the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."[31]

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30 Powell v. McCormack, 395 U.S. 486, 502 (1969). *See also* 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 U.L. REV. 1, 5 (1968); Oppenheim, *Congressional Free Speech*, 8 LOYOLA L. REV. 1, 7 (1955-56); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 962 (1951); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 337 (1965).

Since the Middle Ages, an assertion of certain rights and privileges (including freedom from arrest, external interference, and speech in debate) had been made by the Speaker of the House of Commons to the King as a formal pronouncement. These Speakers' Petitions have been entered in the Rolls of Parliament since 1377. C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 21 (1970). *See also* Cella, *supra*, at 5.

Some authorities cite 1399 as the parliamentary privilege's point of origin—the year in which the case involving a clergyman, one Thomas Haxey, was finally concluded. C. WITTKE, *supra*, at 23-24. Condemned in Parliament as a traitor, and sentenced to death for having presented a bill critical of royal household expenditures, Haxey was completely exonerated when Henry IV granted his petition to reverse the decision as contrary to the law and system of Parliament. 3 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND § 774, at 489-94 (Oxford ed. 1878). *See also* Oppenheim, *supra*, at 7-8.

Of more significance was the case of Richard Strode, a member of Parliament who, in 1512, had been prosecuted and imprisoned for having introduced bills regulating the Cornwall tin industry. 1 W. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 152 (3d ed. 1897); T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 278-79 (10th ed. 1946). Parliament became so incensed by the action taken that it passed a special bill annulling the judgment against Strode while announcing:

> [T]hat suits . . . fines . . . punishments . . . charges . . . put or had or hereafter to be put or had unto or upon the said Richard and to every other of the person or persons afore specified, that now be of this present Parliament or that of any Parliament hereafter shall be for any bill speaking . . . or declaring of any matter or matters concerning the Parliament to be communed and treated of, be utterly void and of none effect.

Privilege of Parliament Act of 1512, 4 Hen. 8, c. 8 (footnote omitted) (converted into modern English). *See also* Proceedings against Elliot, 3 Cobb. 294 (1629), *decision set aside*, Rex v. Elliot, 79 Eng. Rep. 1121 (K.B. 1668). For a discussion of the case see United States v. Johnson, 383 U.S. 169, 181-82 (1966); Cella, *supra*, at 11; Oppenheim, *supra*, at 9-10.

31 1 W. & M., sess. 2, c. 2 (1688). The scope of this privilege was later defined in the historic case of Stockdale v. Hansard, 112 Eng. Rep. 1112 (K.B. 1839). Stockdale, a publisher and merchandiser, brought a libel action against the named defendant, the printer of Parliament's official record, for publishing a prison report authorized under an act of parliament, which deprecated a certain scientific treatise on anatomy. Hansard defended his conduct by characterizing it as nothing more than standard publishing procedure as directed and required by Parliament. In attempting to apply the law to the factual situation presented, Judge Littledale stated:

Imbued with the heritage and practices of the English Parliament

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> I think this is not such a proceeding in Parliament as the Bill of Rights refers to; it is something out of Parliament. The privileges of Parliament appear to me to be confined to the walls of Parliament, for what is necessary for the transaction of the business there, to protect individual members so as that they may always be able to attend their duties . . . and to such other matters and things as are necessary to carry on their Parliamentary functions; and to print documents for the use of the members. But a publication sent out to the world, though founded on and in pursuance of an order of the House, in my opinion, becomes separated from the House; it is no longer any matter of the House, but of the agents they employ to distribute the papers; those agents are . . . individuals acting on their own responsibility as other publishers of papers.

Id. at 1182. Earlier in this decision, Chief Judge Denman had elaborated upon this concept:

> But, if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the Speaker, by authority of the House, order an illegal Act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's [sic] warrant for levying ship-money could justify his revenue officer.

Id. at 1156. In response to this decision, Parliament passed the Parliamentary Papers Act of 1840, 3 & 4 Vict., c. 9, which provided protection for those individuals employed by Parliament to publish its documents and reports.

A later holding, Wason v. Walter, L.R. 4 Q.B. 73 (1868), protected the proprietor of a newspaper from a libel action for printing a defamatory debate in the House of Lords, and might be thought to have overruled *Stockdale*. However, the factual differences between *Stockdale* and *Wason* were sufficient to distinguish the respective cases. In the latter situation, Wason had instigated the debate in question by accusing the Lord Chief Baron of a falsehood allegedly committed thirty-two years past (*Id.*), and during the course of the debate, Wason's own reputation was also maligned. *Id.* at 74.

The court cited the main issue for decision, whether a candid newspaper report of a debate in Parliament can give rise to a cause of action by one therein defamed, as one of first impression. *Id.* at 82-83. Hence, all attempts to apply the *Stockdale* rationale to the present subject matter were immediately frustrated. In reference to *Stockdale*, the *Wason* court stated that an arbitrary and unwarranted extension of parliamentary privilege by its members to protect a report libelous on its face and bearing no connection to House proceedings, constituted a factual situation totally dissimilar to the present one. *Id.* at 84, 87. Concerning the validity of the *Stockdale* decision, the court noted that it merited "unhesitating and unqualified adhesion." *Id.* at 86.

The *Wason* court did not consider the controversy as one involving parliamentary privilege (*Id.* at 84), but rather as a question of publication to which the same immunity would attach as had been traditionally extended to the accurate recounting of judicial proceedings. *Id.* at 88. Thus, the court argued that legitimate public concern dictated that communications exist between those who make the laws and those whose welfare is thereby affected. *Id.* at 89.

Both Justice White, speaking for the Court in *Gravel*, and Justice Brennan, in his dissenting opinion, referred to the *Wason* decision in support of their respective arguments. 408 U.S. 623 n.14; *Id.* at 658-59 n.1. Their divergent interpretations of this case offer great insight into their corresponding differences in approach to the *Gravel* situation. Justice White noted that *Wason* affirmed the *Stockdale* decision and had not addressed itself to the question of parliamentary privilege (*Id.* at 623 n.14), while Justice Brennan maintained that the basis of the decision in *Wason* (parliamentary privilege, or by analogy to judicial proceedings) was not significant when compared to the importance recognized by *Wason* of the representative's informing function. *Id.* at 658-59 n.1.

of that era, it is understandable that American colonists were deeply concerned with legislative free speech.[32] Moreover, a virgin wilderness provided an ideal opportunity for the germination of a unique legal construction. As observed by Justice Harlan, the thrust of this privilege has never varied since it was first given vitality in article V of the Articles of Confederation.[33] Ironically, however, judicial interpretation has, on occasion, both distended and retarded the development of legislative immunity. The epitome of this struggle between theoretical principle and pragmatic execution was the historic case of *Coffin v. Coffin*.[34] Micajah Coffin, a member of the Massachusetts House of Representatives from Nantucket, was sued by one William Coffin (no relation) for alleged slanderous statements the former had made to another colleague in a corridor just outside a convened session of the House. The comments in question were the defendant's response upon learning the identity of his colleague's informant who had previously encouraged the introduction of a resolution requesting the appointment of another notary public for the county of Nantucket.[35] The defendant's position appeared to be supported by the manifest direction assumed by the Massachusetts Constitution.[36] Indeed, in the court's opinion, Chief Justice Parsons reasoned that legislative privilege must be liberally construed, not to enable elected officials to eschew civil or criminal suits, but as a matter of public policy to permit the free exercise of delegated responsibilities without having to bear the ubiquitous burden of potential legal prosecution.[37] Hence, immunity was to attach to every (proper or conceivably improper) act or spoken word that still remained consistent with the functions of that office.[38]

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32 *See* M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 94-98 (1943).

33 United States v. Johnson, 383 U.S. 169 (1966). Article V provided in relevant part: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress . . . ."

34 4 Mass. 9, 4 Tyng 1, 3 Am. Dec. 189 (1808).

35 Chief Justice Parsons described the dialogue between the defendant and his colleague, Benjamin Russell, thusly:

> The defendant looked towards him, and said, "What, that convict?" *Russell*, surprised at the question, asked the defendant what he meant; he replied, "Don't thee know the business of *Nantucket* Bank?" [Russell] said, "Yes, but he was honorably acquitted." The defendant then said, "That did not make him less guilty, thee knows."

Id. at 29, 4 Tyng at 24-25, 3 Am. Dec. at 191.

36 MASS. CONST. part I, art. XXI provides:

> The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

37 4 Mass. at 31, 4 Tyng at 27, 3 Am. Dec. at 193-94.

38 *Id.*

Furthermore, the privilege was to know no strict physical demarcation.[39]

Although future courts were to embrace the exposition promulgated herein, the *Coffin* court retreated from the broad implications of this interpretation in rendering its decision. Notwithstanding the fact that any representative could have subsequently moved to have the resolution reconsidered, and no final appointment had been made to fill this position,[40] the court arbitrarily held that the defamatory words in question were neither spoken while the defendant was exercising a legislative role, nor had they reasonable relation to subject matters then before the legislature.[41] By basing its decision in part on the parliamentary technicality that the controversy in question was not then before the House, the court divested its earlier promulgation of all reasonable efficacy.[42] Moreover, as a representative of the constituency which would be directly affected by this resolution, it might be said that the defendant had a duty to initiate an investigation into the circumstances surrounding the resolution's origin.[43]

Whatever fears that might have been harbored by the outcome of

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39 *Id.* The court's views were expressed 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 . . . extend it 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 . . . .

Id. See also Field, *The Constitutional Privileges of Legislators: Exemptions from Arrest and Action for Defamation*, 9 MINN. L. REV. 422 (1925), wherein Chief Justice Parsons' rationale was reduced to a question of whether the defamatory statement was uttered in the course of legislative business. If so, immunity would be provided though the member was not within the walls of the House. But if a legislator was not so engaged, physical location alone could not furnish protection. *Id.* at 444.

40 Cella, *supra* note 30, at 29.

41 The legislative acts do not have to be motivated by subject matters then under official consideration to come within the protection afforded by the speech or debate clause. *See* Cochran v. Couzens, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930), wherein defamatory words spoken in the course of a speech to the Senate were deemed privileged though the appellant claimed the words had been said unofficially and not within the respondent's legislative capacity. The court ruled that such a claim was "a mere conclusion," and totally qualified by the circumstances under which the alleged defamatory statements were made, specifically, in the course of a speech. *Id.* at 784. This decision ostensibly extended legislative immunity by eliminating challenges founded upon motive or relevancy. Oppenheim, *supra* note 30, at 20.

42 Cella, *supra* note 30, at 29-30.

43 *Id.* at 30.

the aforementioned case that an authoritative legal foundation was being built on sand were subsequently quelled when this issue of legislative privilege arose before the Supreme Court in the landmark case of *Kilbourn v. Thompson*.[44] An action for false imprisonment was brought by Kilbourn against the Speaker of the United States House of Representatives, members of a House committee, and Thompson, the Sergeant-at-Arms, for their involvement in his arrest and imprisonment for a period of forty-five days. Kilbourn had been cited for contempt for refusing to answer certain questions posed to him by the committee.[45] The defendants had previously been instrumental in the passage of a House resolution which authorized incarceration for Kilbourn's continuing obstinacy.[46]

The Court first ruled that Congress lacked the authority to order the arrest and imprisonment of a private citizen and had exceeded its powers in attempting to punish for contempt.[47] Although Thompson remained vulnerable to prosecution,[48] the Court subsequently held that legislators who had introduced, supported, or otherwise participated in the unlawful extension of their authority were, nevertheless, shielded by the speech or debate clause from accountability in any judicial forum for their conduct.[49] Speaking for the Court, Justice Miller crystallized the fundamental issue thusly: "And yet if a report, or a resolution, or a vote is not a speech or debate, of what value is the constitutional protection?"[50] Embracing the arguments asserted in *Stockdale v. Hansard*[51] and *Coffin v. Coffin*,[52] the Court noted that limiting immunity to words uttered in debate would constitute too restrictive a view of the constitutional provision. Rather, such protec-

44 103 U.S. 168 (1881).

45 *Id.* at 170, 174-75.

46 *Id.* at 173-75.

47 *Id.* at 196.

48 *Id.* at 205.

49 *Id.* at 204-05.

50 *Id.* at 201.

51 112 Eng. Rep. 1112 (K.B. 1839). See note 31 *supra*, for a discussion of the court's decision.

52 4 Mass. 9, 4 Tyng 1, 3 Am. Dec. 189 (1808). In reference to *Coffin* the Court in *Kilbourn* commented:

> This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight.

103 U.S. at 204. It should be observed that in making these remarks, the Court referred only to Chief Justice Parsons' effort in interpretation, not to his application of the rationale to the facts before him.

tion should attach "to things generally done in a session of the House by one of its members in relation to the business before it."[53]

These sentiments were echoed by Justice Frankfurter in *Tenney v. Brandhove*,[54] where members of the un-American activities committee of the California Senate were sued for damages arising from certain questionable legislative conduct. Pursuant to the Civil Rights Statute,[55] a civil remedy is provided against those who, under the guise of state law, conspire to deprive an individual of any rights, privileges, or immunities guaranteed by the Constitution. Brandhove had distributed a petition among representatives of the state legislature alleging the existence of a conspiracy involving the Tenney Committee and a candidate in the 1947 mayoralty election in San Francisco.[56] He was subsequently summoned to appear before the Committee on the following day.[57] Brandhove refused to testify before the Tenney Committee, and, concurrent with an abortive prosecution for contempt in state courts, the committee introduced allegations concerning Brandhove's supposed criminal history into the official legislative record.[58] Declaring that legislative privilege deserves great respect, the Court held that the defendants' acts were within the sphere of legislative activity and therefore immune from liability.[59] By its language, the Court intimated that it recognized ulterior motives, possibly malicious in character, which might have occasioned this controversy, but could not alter its outcome.

> 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. One must not expect uncommon courage even in legislators. 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.[60]

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53 103 U.S. at 204. The Court cited only extreme examples whereby Congressmen could exceed their privilege (*e.g.*, executing a Chief Magistrate or assuming the role of a court for capital punishment). *Id.* at 204-05. It is therefore of import that the Court refused to recognize Senator Gravel's acts as privileged when motivated, as the minority opinion maintained, by a legitimate responsibility to inform the public.

54 341 U.S. 367 (1951).

55 42 U.S.C. §§ 1983, 1985(3) (1970).

56 341 U.S. at 370.

57 *Id.*

58 Brandhove claimed the Tenney Committee had not convened for a legislative purpose, but only to intimidate him into silence and to deprive him of his constitutional rights of free speech, equal protection of the laws, and due process of law. *Id.* at 371.

59 *Id.* at 378.

60 *Id.* at 377. The Court also ruled that it was not the intention of Congress to

In *United States v. Johnson*,[61] the Court was asked to extend legislative immunity from civil suits to criminal prosecutions. Johnson, a former Congressman, had been convicted on seven counts of violating the federal conflict of interest statute[62] and on one count of conspiring to defraud the United States[63] for his participation in a scheme designed to promote the trustworthiness of independent savings and loan associations. In furtherance of the alleged plan, Johnson delivered a favorable speech in the House and exerted his influence upon the Department of Justice to have indictments on mail fraud charges dismissed against a certain loan company and its officers in return for substantial compensation.[64] After reviewing the history of legislative immunity, the Court noted that the speech or debate clause did not extend to attempts to influence the Department of Justice.[65] To reach its decision, the Court relied upon the central purpose of the doctrine, which is "to prevent intimidation by the executive and accountability before a pos-

abolish legislative immunity through the enactment of the Civil Rights Statutes. *Id.* at 376. *See also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (inquiry into the motives of legislators was held incongruous with the established system of government).

61 383 U.S. 169 (1966).

62 Acts of June 25, 1948, ch. 645, § 281, 62 Stat. 697; May 24, 1949, ch. 139, § 6, 63 Stat. 90, *as amended*, 18 U.S.C. 203 (1970).

63 18 U.S.C. § 371 (1970).

64 383 U.S. at 171-72. The district court rejected Johnson's claim of immunity because a bribery situation conflicted with the fundamental purpose of the privilege, specifically, to insure the independence of legislators. 215 F. Supp. 300, 307 (D. Md. 1963). However, the court of appeals reasoned that such a prosecution dictated extensive inquiry into the preparation and content of the speech itself which encroached upon the boundaries of the privilege as defined in *Coffin*, *Kilbourn*, and *Tenney*. 337 F.2d 180, 190-91 (4th Cir. 1964).

65 383 U.S. at 172. Such conduct was obviously beyond the scope of legislative duties. *Id.*

On remand Johnson was convicted of interference with the proper functioning of the Justice Department in violation of the conflict of interests statute, 18 U.S.C. § 203(a) (1970). *See* United States v. Johnson, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). Hence, legislative immunity is by no means absolute. The Court in *Gravel* made mention of this salient point because it chose to discuss to what extent the Senator himself was immune from service of process or inquiry by a grand jury investigating criminal conduct. 408 U.S. at 614-15. *See* Long v. Ansell, 293 U.S. 76 (1934) (speech or debate provision applies only to arrests in civil suits which had been customary at the time the Constitution was adopted; clause's language is precise and therefore cannot be construed beyond its stated terms); Williamson v. United States, 207 U.S. 425 (1908) (inclusion of the terms "treason," "felony," and "breach of the peace" into the clause as exceptions removed the shield of immunity from all criminal offenses); United States v. Cooper, 4 U.S. (4 Dall.) 341 (C.C.D. Pa. 1880) (member of Congress is not exempt from the service of a subpoena in a criminal case because every man charged with an offense has a constitutional guarantee of compulsory process to insure the attendance of witnesses).

The Court did accept Senator Gravel's contention, however, that the clause shielded him from criminal or civil liability, or inquiry outside the walls of the Senate, with respect to incidents which transpired during the subcommittee meeting. 408 U.S. at 615.

sibly hostile judiciary."[66] Although the Court termed such conduct reprehensible, it perceived that the very nature of a conspiracy charge required an investigation into the substance of the speech, its preparation, authorship, and the motives of its deliverer, all of which contravened the speech or debate clause.[67] The Court crystallized its viewpoint in cogent terms:

> There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.[68]

Hence, though there was no tradition of legislative privilege in the area of criminal prosecutions, *Johnson* became the first case in which such protection was afforded to prevent a criminal prosecution for bribery.[69]

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66 383 U.S. at 181.

67 *Id.* at 184-85.

68 *Id.* at 182.

69 Note, *supra* note 30, at 344, 348. The validity of *Johnson* has recently been diminished in the case of United States v. Brewster, 408 U.S. 501 (1972). Brewster, a former United States Senator, had been indicted for soliciting and accepting a bribe in exchange for promises to be influenced in the performance of his official duties as a member of the Senate Committee on Post Office and Civil Service. *Id.* at 502. The ninth of ten counts also charged him with having exacted funds in return for " 'his action, vote and decision on postage rate legislation which had been pending before him in his official capacity.' " *Id.* at 503.

The Court, reluctant to overrule *Johnson*, yet equally determined to secure the prosecution of Brewster for his alleged criminal conduct, escaped from this irreconcilable confrontation by ignoring the language used in the indictment and by distinguishing acceptance of the bribe and execution of the illicit promise. *Id.* at 526. Because the solicitation and receiving of a bribe was as indefensible as an attempt to influence the Department of Justice (see note 65 *supra*), the Court succeeded in circumventing *Johnson* by holding that the aforementioned activity in itself constituted a criminal act. 408 U.S. at 526. Indeed, the Court asserted that the purview of immunity established in *Kilbourn* could not be extended to every act which is remotely related to the legislative process. *Id.* at 512-16. Rather, the speech or debate clause would be restricted to acts which were clearly a proper exercise of the legislative function. *Id.* at 515-16. Thus, through a dissection of the illegal conduct described in the indictment, the Court removed the legislative act from the prior unlawful agreement to prevent scrutiny of the former which was prohibited by the *Johnson* decision.

It is ironic that amidst this limited interpretation of prior case law, the majority opinion alluded to the liberal manner with which the clause has traditionally been construed, and the abuses that have accrued therefrom:

> 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.

Id. at 516. The Court also made the statement (which possibly offers an insight into the majority's basic viewpoint) that one cannot construct an argument founded upon the spirit or thrust of prior decisions, or "the sweep of the language used by courts," but must focus upon "the precise words used in any prior case" and their respective meaning, "fairly read." *Id.*

Although the cases previously enumerated addressed themselves to the issue of legislative immunity, none are as prominent in a politico-social perspective as the principal case. The presence of a legislative aide, Dr. Rodberg, and the subject matter involved, the *Pentagon Papers*, together created a novel legal controversy. The ensuing conflict involved such emotionally charged, interrelated issues as the Viet Nam War, first amendment guarantees, and the duty of an elected representative to inform a constituent body which becomes ever more cynical and suspicious of an ostensibly independent and unrestrained executive branch.[70] In reference to Dr. Rodberg, the Court announced that legislative aides possess a qualified privilege which shields them from grand jury questioning only with regard to legislative acts in which a legislator and his aide become inseparable.[71] Moreover, the Court cautioned, aides and legislators could find themselves beyond the purview of immunity for certain acts not essential to the legislative process,[72] and both could be asked to testify at trials or grand jury proceedings related to third-party crimes but unrelated to legislative acts.[73]

From an historical viewpoint, it would appear rather difficult to

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In his dissenting opinion, Justice Brennan immediately assailed the majority's failure to address itself to the entire indictment and its indispensable ramification. *Id.* at 530, 532. He could not accept the majority's convenient dichotomy of acceptance and performance, reasoning that the charge on its face required scrutiny of the former Senator's voting record as well as his underlying motivation in the performance of such legislative acts. *Id.* at 534-36. Reiterating Justice Frankfurter's holding in *Tenney*, Justice Brennan asserted that an unscrupulous motive could not eradicate the privilege. *Id.*

Justice White, whose dissenting opinion primarily rested upon the same grounds, maintained that the indictment forced the Government to identify specific legislative acts to prove its case. *Id.* at 553. Indeed, the Senator was not being prosecuted solely for accepting money but also for performing particular legislative acts in a certain manner. *Id.* at 553-54. The illicit agreement and the Senator's motives in executing his legislative function were equally inseparable. *Id.* at 554. Justice White expressed his rationale thusly:

> Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its context and made the basis of criminal charges, the Speech or Debate Clause loses its force. It will be small comfort for a Congressman to know that he cannot be prosecuted for his vote, whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain.

Id. at 556.

Both dissenting opinions also questioned the power of Congress to enact such legislation which would delegate to the judiciary authority to try one of its members for conduct otherwise shielded by the clause. *Id.* at 531, 552. Justice Brennan and Justice White asserted that Congress could not so relinquish duties imposed upon that branch by the Constitution. *Id.* at 550, 563. Furthermore, such a delegation would be totally inconsistent with the history of legislative immunity in the English and American governmental systems. *Id.* at 547-49, 561-62.

70 See notes 25, 26 and 27 *supra*.

71 408 U.S. at 618.

72 *Id.* at 621. See discussion note 19 *supra*.

73 408 U.S. at 622.

include private republication of the *Pentagon Papers* within the protection of the speech or debate clause. The *Stockdale* rationale seems transfixed as legal precedent.[74] It is presumed that neither Congress nor the full committee authorized Senator Gravel's action. Certain acts performed by Congressmen may not be legislative in nature although performed in an official capacity. Furthermore, immunity could not be extended to the private republication of classified material if such an activity had been deemed a crime under an Act of Congress.[75]

But if the clause is to be construed liberally (as traditionally recommended), it is easy to envision the informing function of Congress as an activity "generally done in a session of the House by one of its members in relation to the business before it."[76] Indeed, it must be

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74 In his dissenting opinion, Justice Brennan dismissed *Stockdale* as irrelevant because the defendant was a publisher rather than a legislator. *Id.* at 658. Yet the court in *Stockdale* addressed itself not specifically to the identity of the litigants but to the act of delivering documents for private dissemination which the court ruled was not a parliamentary function. See discussion note 31 *supra*.

Justice Douglas argued that Beacon Press was protected by first amendment guarantees and could not therefore be coerced or intimidated into maintaining government secrets. 408 U.S. at 640. He then compared this ruling to a prior case, New York Times Co. v. United States, 403 U.S. 713 (1971), in which the Court defended the press against attempts to censor its operations. 408 U.S. at 647. He expressed his position thusly:

> The story of the Pentagon Papers is a chronicle of suppression of vital decisions to protect the reputations and political hides of men who worked an amazingly successful scheme of deception on the American people. They were successful not because they were astute but because the press had become a frightened, regimented, submissive instrument, fattening on favors from those in power and forgetting the great tradition of reporting. To allow the press further to be cowed by grand jury inquiries and prosecution is to carry the concept of "abridging" the press to frightening proportions.

Id. at 647-48.

75 408 U.S. at 625-26. To propose that the law had not been violated because these documents have lost their classified status by virtue of their disclosure to the public is a tenuous proposition. However, Justice Douglas in his dissent suggested the validity of just such an argument. *Id.* at 646-47.

76 Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). Furthermore, Congress has traditionally possessed vast investigative powers. In response to objections raised concerning the power of Congress to inquire into the activities of individuals directly within executive control, the concept was established quite early in our history "that an inquiry into the expenditure of all public money was the indispensable duty of this House." 1 ANNALS OF CONG. 491 (1792) [1791-1793]. *See generally* Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 168-94 (1926), wherein it is asserted that almost from the moment of its inception, Congress has performed an informing function designed to expose corruption and ineptitude in governmental agencies. However, committees organized for this purpose were usually formal, officially-instituted bodies created to investigate a specific irregularity or event. *Id.* The Court, adhering to the general rule prohibiting inquiry into legislative purpose, conduct, or motives, refused to discuss Senator Gravel's contention that his activity was appropriate and justified (though not explicitly or formally sanctioned by Congress) because the subject matter involved, the Viet Nam War, had caused economic repercussions which had adversely affected the proper functioning of his subcommittee. 408 U.S. at 610 n.6. Hence, the Court

further noted that the Court has only cited examples of totally outrageous behavior as falling beyond the purview of legitimate legislative powers.[77] Ordinarily, therefore, the Court has advised that such abuses of authority should not be restrained by the courts but by Congress and the legislator's respective constituency.[78] Both dissenting opinions in *Gravel* view the informing function as vital in a governmental configuration which threatens to become an imbalanced separation of powers. Lacking substantial judicial authority, Justices Brennan and Douglas turned to the works of the Founding Fathers for support:

> "[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 co-ordinate 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 . . . ."[79]

In addition, one must not lose sight of the fact that the very purpose of legislative immunity is to protect the interests of the public.[80] It cannot be disputed that the informing function should play an indispensable role in such an endeavor, for a political system which places a determination of the public good in the hands of the few smacks of something other than a democratic institution. It also appears both inconsistent and inequitable to hold, as the Court did in *Tenney*, that an individual's constitutional rights must succumb to the ascendancy of legislative immunity,[81] when the power vested in this privilege cannot successfully compete, for the sake of the public good, against a seemingly omnipotent executive.

The most perplexing ruling of the Court in *Gravel* concerned its

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employed the rule to circumvent an attempt to force it to discuss the legitimacy of the Senator's acts as a valid interrelated application of the informing function. Instead, the Court viewed the private publication arrangements as possibly criminal in nature and not otherwise associated with the legislative process. *Id.* at 626.

77 103 U.S. 204-05. See examples cited note 53 *supra*.

78 Tenney v. Brandhove, 341 U.S. 367, 378 (1951). *See also* 408 U.S. 660-61 (Brennan, J., dissenting).

79 408 U.S. at 653 (quoting from 8 WORKS OF THOMAS JEFFERSON 322 (Ford ed. 1904)). In addition, Justice Douglas in his dissent demonstrated a profound irritation with the capricious manner in which documents are classified. *Id.* at 641-42.

80 341 U.S. at 377.

81 *Id.* at 377-78. See the dissenting opinion of Justice Douglas in *Tenney*, where he commented:

> If a committee departs so far from its domain to deprive a citizen of a right protected by the Constitution, I can think of no reason why it should be immune.

Id. at 382.

approval of questioning aides about sources of information provided such inquiries do not implicate a legislative act. As observed by Justice Stewart, this issue was not included in the petitions for certiorari.[82] Moreover, it contravenes the clause's objective "to prevent intimidation by the executive and accountability before a possibly hostile judiciary."[83] Since preparation has been deemed a segment of the legislating process,[84] this ruling seems to infringe upon the legislator's need to accumulate accurate but oftentimes confidential information to successfully perform his function. Although this holding therefore appears self-contradictory, the danger it presents is all too clear. If one governmental branch can enlist the inadvertent aid of another in subduing and intimidating the proper operation of the third branch, the entire system may ultimately consume itself. The judiciary must view the ramifications of its decisions in a contemporary perspective, and not base its logic upon rationales that were dictated by the pressures of yesterday.

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82 408 U.S. at 629-30.

83 United States v. Johnson, 383 U.S. 169, 181 (1966).

84 *Id.* at 184-85.