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Speech or Debate Clause Constitutional Immunity: An Overview

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Summary

Members of Congress have immunity for their legislative acts under Article I, § 6, cl. 1, of the Constitution, which provides in part that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." Even if the actions of a Senator or Representative are within the scope of the speech or debate clause or some other legal immunity, he remains accountable to the House of Congress in which he serves and to the electorate.

The clause has its roots in English history, specifically in the conflict between Parliament and the Crown. In the American system of government, the clause protects the independence of the legislative branch and reinforces the separation of powers.

In cases in which the clause applies, the immunity is absolute and cannot be defeated by an allegation of an improper purpose or motivation. When applicable, the clause affords not only substantive immunity but also a complementary evidentiary privilege. In other words, the clause provides both immunity from liability (in civil and criminal proceedings) and a testimonial privilege.

The clause provides both an institutional and an individual privilege which may be asserted by a current Member, by a former Member in an action implicating his conduct while in Congress, and by a Member's aide if the conduct of the aide would be within the scope of the clause if performed by the Member himself.

Since its ruling in 1972 in *United States v. Brewster*, the Supreme Court has given a restricted reading to the clause, holding that it protects only from inquiry into "legislative acts." In a frequently quoted description of the scope of the clause, the Court in 1972 in *Gravel v. United States* explained that, in addition to actual speech or debate in either House, the clause applies only to acts which are "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."

The courts have held that the clause protects a Member when speaking on the House or Senate floor, introducing and voting on bills and resolutions, preparing and submitting committee reports, acting at committee meetings and hearings, and conducting investigations and issuing subpoenas. The clause does not protect criminal conduct, political activity, direct communications with the public, or even the distribution of official committee reports outside the legislative sphere. Some contacts by Members with the executive branch (*e.g.*, legislative oversight hearings) are protected and some (*e.g.*, assisting constituents in obtaining government contracts) are not protected. The application of the clause to various other contacts by Members with the executive (*e.g.*, informal communications between Members and executive officials) and to congressional personnel actions is uncertain. (*Note:* This report was originally written by Jay R. Shampansky, Legislative Attorney.)

Contents

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Introduction

Members of Congress have immunity for their legislative acts under Article I, § 6, cl. 1,[1] of the Constitution, which provides in part that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." This report provides an overview of speech or debate immunity.[2]

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[1] The clause which provides for speech or debate immunity also grants Members a privilege from arrest, except in cases of "treason, felony and breach of the peace," while in attendance at a legislative session or in going to or returning from such a session. The privilege from arrest is generally beyond the scope of this report, but it is noted that that privilege and the speech or debate clause are often referred to as a Congressman's "privileges" and "immunities." See Deschler's *Precedents of the U.S. House of Representatives*, ch. 7, § 15, at pp. 140-41 (1977). For a brief judicial treatment of the relationship of these two privileges, see *Gravel v. United States*, 408 U.S. 606, 614-15 (1972).

[2] As will be seen below, the speech or debate clause does not immunize all acts by a Member. In some cases, other defenses (constitutional, common law, and statutory) may be raised. See, *e.g.*,*United States v. Helstoski*, 442 U.S. 477, 481 (1979)(constitutional right of privacy); *United States v. Rostenkowski*, 59 F.3d 1291 (D.C.Cir. 1995) (separation of powers doctrine, rulemaking power of each House); *Chastain v. Sundquist*, 833 F.2d 311 (D.C.Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988)(common law official immunity); *Williams v. United States*, 71 F.3d 502 (5th Cir. 1995)(immunity under Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. §§ 1346(b), 2671-80).

Aides are within the scope of speech or debate immunity. See text accompanying note 18, *infra*. In some circumstances, acts of some aides that are not protected by the speech or debate clause or some other immunity may be covered by professional liability insurance. Appropriated funds may be used to reimburse such aides for part of the cost of this insurance. 5 U.S.C. note preceding § 5941.

Most of the judicial interpretations of a legislator's immunity cited in this report are interpretations of the immunity of Members of Congress. However, a few of the cases cited are interpretations of provisions of state constitutions which often grant to state legislators immunity comparable to that of Members of Congress. See, *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367 (1951).

Even if the actions of a Senator or Representative are within the scope of the speech or debate clause or some other legal immunity, he remains accountable to the House of Congress in which he serves[3] and to the electorate.[4]

Scope of Privilege

The speech or debate clause has its roots in English history, specifically in the conflict between Parliament and the Crown.[5] In the American system of government, the clause performs two related functions. First, it protects the "independence and integrity of the legislature," and, second, it "reinforce[s] the separation of powers ...."[6] Although the privilege is available in private civil suits against Members, the purpose of the clause was to prevent "intimidation by the executive and accountability before a possibly hostile judiciary."[7] The Supreme Court has recognized that the clause was not intended simply "for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."[8]

The clause protects Members "not only from the consequences of litigation's results, but also from the burden of defending themselves."[9] In cases in which the clause applies, the immunity is absolute[10] and cannot be defeated by an allegation of an improper purpose or motivation.[11] Where it is applicable, the clause affords not only substantive immunity but also a complementary evidentiary privilege.[12] In other words, the clause provides both immunity from liability (in civil and criminal proceedings) and a testimonial privilege.[13]

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[3] Article I, § 5, cl. 2, of the Constitution authorizes each House to "punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member."

[4] *Gregg v. Barrett*, 771 F.2d 539, 542 (D.C.Cir. 1985).

[5] *Powell v. McCormack*, 395 U.S. 486, 502 (1969).

[6] *United States v. Johnson*, 383 U.S. 169, 178 (1966).

[7] *Id.* at 181.

[8] *United States v. Brewster*, 408 U.S. 501, 507 (1972). See also *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1881).

[9] *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

[10] *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509-10 (1975).

[11] *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

[12] *Evidentiary Implications of the Speech or Debate Clause*, 88 Yale L.J. 1280 (1979). See also *United States v. Helstoski*, 442 U.S. 477 (1979).

[13] Rotunda and Nowak, *Treatise on Constitutional Law: Substance and Procedure*, vol. 1, § 8.8, at p. 113 (2d ed., 1999 Supp.).

The clause affords both an institutional and an individual privilege.[14] It is uncertain whether, at least in limited circumstances, the institution might be able to waive the privilege of individual Members.[15] The Court has assumed, without deciding, that an individual Member could waive the clause's protection against criminal prosecution, but has held that such a waiver could "be found only after explicit and unequivocal renunciation of the protection."[16]

It has been held that the clause may be asserted not only by a current Member but also by a former Member in an action implicating his conduct while in Congress[17] and by a Member's "aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."[18] The immunity applies regardless of whether the Member or aide is a party to the litigation or has merely been called to testify or give a deposition.[19]

Although the clause affords personal immunity for a Member and his aides, it does not preclude judicial review of "the merits of ... challenged congressional action"[20] or the use of acts (*e.g.*, speeches or votes) as evidence in the course of such review.[21]

The Supreme Court has construed the speech or debate clause in only a few cases. In its first decision interpreting the clause, *Kilbourn v. Thompson*,[22] the Court read it expansively, finding that a Member's privilege extended "to things generally done in a session of the House by one of its Members in relation to the business before it."[23] Notwithstanding broad language in earlier cases as to the scope of the

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[14] *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir.1978). See also *Helstoski*, 442 U.S. at 492-93.

[15] In several cases, the Court specifically has declined to rule on the issue of waiver. See, *e.g.*, *id*. at 490.

[16] *Id*. at 490-91.

[17] *United States v. Brewster*, 408 U.S. 501 (1972).

[18] *Gravel v. United States*, 408 U.S. 606, 618 (1972).

[19] *Miller v. Transamerican Press*, 709 F.2d 524, 529 (9th Cir. 1983); *Tavoulareas v. Piro*, 93 F.R.D. 11, 18-19 (D.D.C. 1981).

[20] *Powell v. McCormack*, 395 U.S. 486, 505-06 (1969). See also *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881).

[21] Tribe, *American Constitutional Law*, vol. 1, at p. 1019 (3d ed. 2000). For example, the Court in *Powell* reviewed the act of the House in excluding a Representative-elect but held that the clause barred naming Members as defendants. 395 U.S. at 506.

[22] 103 U.S. 168 (1881).

[23] *Id.* at 204. The quoted language has been understood as extending immunity to "*all* 'things generally done'" in a congressional session by a Member in regard to pending business. Tribe, *supra* note 21, at p. 1015 (emphasis added). (For a similar interpretation of the quoted language, see *Brewster*, 408 U.S. at 509.) The *Kilbourn* Court (103 U.S. at 203-04), in rejecting a "narrow view of the constitutional provision" that would have limited it "to words spoken in debate," relied on the interpretation of a comparable clause

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immunity, since its ruling in 1972 in *United States v. Brewster*,[24] the Court has taken a more limited view of the protection provided by the clause,[25] holding that it protects only from inquiry into "legislative acts."[26] In *Brewster*, the Court explained that "a legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the speech or debate clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."[27]

In another frequently quoted description of the scope of the privilege, the Court in *Gravel v. United States*,[28] decided on the same day as *Brewster*, explained that, in addition to actual speech or debate in either House, the clause applies only to acts which are "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."[29]

The clause does not protect "political" activity, a term which the Court has indicated would include, *inter alia*, for purposes of Article I, § 6, constituent service, press releases, and speeches delivered outside the legislative sphere. As the Court explained in *dicta* in *United States v. Brewster*:

> Members of Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "newsletters" to constituents, news releases, and speeches delivered outside the Congress ....Although these are entirely legitimate activities, they are political in nature rather than legislative. [I]t has never been seriously contended that these political matters, however appropriate, have the protection afforded by the speech or debate clause.[30]

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[23] (...continued)
in the Massachusetts Constitution in *Coffin v. Coffin*, 4 Mass. 1 (1808).

[24] 408 U.S. 501 (1972).

[25] For a detailed historical review of the restricted reading placed upon the clause by the courts, see Walker, *Constitutional Law: Narrowing the Scope of Speech or Debate Clause Immunity*, 68 Temple L. Rev. 377 (1995). See also Rotunda and Nowak, *Treatise on Constitutional Law: Substance and Procedure*, vol. 1, § 8.8 (2d ed. 1992).

[26] *Brewster*, 408 U.S. at 509.

[27] *Id.* at 512.

[28] 408 U.S. 606 (1972).

[29] *Id.* at 625.

[30] 408 U.S. at 512.

Judicial construction of the speech or debate clause since *Brewster* has been founded on the distinction developed in that case between legislative and political activity, and on a related distinction between legislative acts, on the one hand, and acts in preparation for or implementation of legislative acts, on the other. In *Gravel*, the Court held that a grand jury could probe the manner by which a Senate subcommittee chairman had obtained classified government documents (the Pentagon Papers) and could consider allegations that the Senator had arranged for private republication of those materials, but further held that the grand jury could not inquire into the conduct or motives of the Senator or his aides at a subcommittee meeting during which the Senator placed the Pentagon Papers in the public record.[31] In explaining its ruling in *Gravel*, the Court stated: "While the ... 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."[32]

The clause protects a Member when speaking on the House or Senate floor,[33] introducing and voting on bills and resolutions,[34] preparing and submitting committee reports,[35] acting at committee meetings and hearings,[36] and conducting investigations and issuing subpoenas.[37]

The clause does not protect criminal conduct, such as taking a bribe, which is not a part of the legislative process.[38] Additionally, the clause provides no protection

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[31] 408 U.S. at 609, 622-29.

[32] *Id.* at 626.

[33] *Id*. at 616; *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930).

[34] *Powell v. McCormack*, 395 U.S. 486 (1969); *Kilbourn v. Thompson*, 103 U.S. 168 (1881). See also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810)(Court declined to examine motives of state legislators who were allegedly bribed to vote for bill).

[35] *Doe v. McMillan*, 412 U.S. 306 (1973).

[36] *Id.*; *Gravel*, 408 U.S. at 628-29. It has also been held that the clause bars evidence of a Member's committee membership. See *United States v. Swindall*, 971 F.2d 1531 (11th Cir.), *rehearing denied*, 980 F.2d 1449 (11th Cir. 1992). *But see United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), *cert. denied*, 514 U.S. 1003 (1995).

[37] *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975). See also *Tenney v. Brandhove*, 341 U.S. 367 (1951)(refusing to examine motives of state legislator in summoning witness to hearing).

[38] *United States v. Brewster*, 408 U.S. 501, 526 (1972). The Court emphasized that the prosecution in that action could establish its case without "inquiry into legislative acts or motivations for legislative acts" (*id*. at 525) and on that basis distinguished its decision in *United States v. Johnson*, 383 U.S. 169 (1966), which had voided a Member's criminal conviction for conspiracy to defraud the United States. The prosecution in *Johnson* had introduced evidence bearing on the preparation and motivation of a speech on the floor that the Member had allegedly delivered as part of the conspiracy.

The Court has also ruled that in a criminal prosecution the government may offer evidence
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for direct communications with the public (including speeches outside of Congress,[39] newsletters,[40] press releases,[41] private book publishing,[42] or even the distribution of official committee reports outside the legislative sphere[43]) because such communications are not "an integral part of the deliberative and communicative processes" by which Members participate in legislative activities.[44]

Some contacts by Members with the executive branch (*e.g.*, investigations and hearings related to legislative oversight of the executive[45]) are protected, and some (*e.g.*, assisting constituents in "securing government contracts" and making "appointments with government agencies"[46]) are not protected. The application of the clause to various other contacts by Members with the executive (*e.g.*, letters and other informal means of communication from Members to officials of the executive branch), particularly in the course of the oversight process, is uncertain.[47] It is also uncertain whether the speech or debate clause immunizes a Member for personnel actions.[48]

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[38] (...continued)
of corrupt agreements because "promises by a Member to perform an act in the future are not legislative acts." *United States v. Helstoski*, 442 U.S. 477, 489 (1979).

[39] *Brewster*, 408 U.S. at 512 (*dictum*).

[40] *Id.*

[41] *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

[42] *Gravel v. United States*, 408 U.S. 606 (1972).

[43] In *Doe v. McMillan*, 412 U.S. 306 (1973), the Court held that the actions of the Members, their staffs and a consultant in preparing a committee report were protected. On remand, after a detailed factual inquiry which revealed that there had been quite limited public distribution of the report, the lower courts upheld the claim of immunity as to the Public Printer and Superintendent of Documents. 374 F. Supp. 1313 (D.D.C. 1974), *aff'd*, 566 F.2d 713 (D.C.Cir. 1977), *cert. denied*, 435 U.S. 969 (1978). The court of appeals expressly reserved the question of the availability of immunity "in a case where distribution was more extensive, was specially promoted, was made in response to specific requests rather than standing orders, or continued for a period after notice of objections was received." 566 F.2d at 718.

[44] *Gravel*, 408 U.S. at 625.

[45] *United States v. McDade*, 28 F.3d 283, 299-300 (3d Cir. 1994) (*citing Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504-06 (1975)), *cert. denied*, 514 U.S. 1003 (1995).

[46] *United States v. Brewster*, 408 U.S. 501, 512 (1972) (*dicta*).

[47] *McDade*, 28 F.3d at 300.

[48] Decisions of the U.S. Court of Appeals for the District of Columbia Circuit have held that the clause immunizes Members for personnel actions regarding at least some congressional employees. See, *e.g.*, *Browning v. Clerk*, 789 F.2d 923, 929 (D.C. Cir.), *cert. denied*, 479 U.S. 996 (1986)(personnel actions protected by the clause if the "employee's duties were *directly related to the due functioning of the legislative process*") (emphasis in the original). However, the subsequent ruling of the Supreme Court in *Forrester v. White*, 484 U.S. 219 (1988), involving judicial immunity for personnel actions, raises doubts as to whether the
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Conclusion

The speech or debate clause provides a Member with immunity for his legislative acts, including, *inter alia*, speaking and voting on the House or Senate floor and in committee. The clause does not protect "political" activity, including, *inter alia*, constituent service, press releases, and speeches delivered outside the legislative sphere.

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[48] (...continued)
Court would find speech or debate immunity applicable to employment actions. In *Forrester*, the Court held that a state court judge did not have judicial immunity for firing a probation officer, and advocated a "functional" approach to the immunity issue, evaluating the effect of possible liability on the performance of a particular function.

In 1995, with little debate focused on the immunity issue, the House and Senate passed the Congressional Accountability Act, P.L. 104-1, 109 Stat. 3 (1995). which provides for judicial review under various statutes of congressional personnel actions. However, § 413 of the act declares that the authorization to bring judicial proceedings under various provisions of the law does not constitute a waiver of, *inter alia*, the speech or debate privilege of any Member.