

Speech or Debate Clause Protections for Informal Member Oversight and Investigations

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The Supreme Court [recently](#) cleared the way for a state grand jury to question Senator Lindsey Graham about his role in the 2020 presidential election in Georgia, including with respect to aspects of alleged phone calls the Senator placed to Georgia election officials. The dispute over Senator Graham’s testimony—which in large part focuses on the protections the [Constitution’s Speech or Debate Clause](#) (the Clause) affords to investigative or oversight communications between Members of Congress and other government officials—is unlikely to be over soon. While Senator Graham may now need to appear before the grand jury, the [Supreme Court](#) made clear that he “may return to the District Court should disputes arise regarding the application of the Speech or Debate Clause immunity to specific questions.” Senator Graham, therefore, may be able to raise Speech or Debate objections in response to questions that the Senator feels relate to protected legislative acts.

The [pair](#) of district court [opinions](#) in *In re subpoena to Non-party Lindsey O. Graham* reflect the difficulty of determining what types of Member communications are protected by the Speech or Debate Clause and the constitutional sensitivities of courts investigating the content of Member communications to determine their protected status. The case is not the first of its kind. It takes place within a legal context in which courts have [disagreed](#) about how to treat an individual Member’s own informal investigative or oversight activities. How this uncertainty is ultimately resolved—in this case or future cases—could either inhibit informal, Member-driven investigations and oversight by subjecting them to examination from outside of Congress, or facilitate such activities by shielding them from outside inquiry as part of the legislative function performed by all Members.

Background

In January 2022, a special purpose grand jury was [empaneled](#) in Fulton County, Georgia, to investigate “possible attempts to disrupt the lawful administration of the 2020 elections in the state of Georgia.” As part of the ensuing investigation, the District Attorney caused the grand jury to issue a subpoena to Senator Graham seeking his testimony as a witness. Senator Graham moved to [quash](#) the subpoena, arguing, among other things, that he could not be compelled to testify before the grand jury because his

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alleged communications with Georgia election officials were investigatory, made to inform himself for his legislative duties, and therefore absolutely protected by the Clause.

The U.S. District Court for the Northern District of Georgia, in a pair of opinions entitled *In re subpoena to Non-party Lindsey O. Graham*, rejected Senator Graham's argument that the subpoena should be quashed in its entirety. The court instead held that while the Clause prevented the District Attorney from questioning Senator Graham about the "legislative fact finding" aspects of any calls to Georgia election officials, the District Attorney could ask him targeted questions about any non-investigatory aspects of those calls. Senator Graham could, the court reasoned, also be asked about other non-legislative conduct, including communications with the Trump Campaign, public statements on the 2020 election, and other efforts to influence the actions of Georgia election officials. The U.S. Court of Appeals for the Eleventh Circuit agreed with the district court's reasoning, holding in response to an emergency motion that "there is significant dispute about whether [the Senator's] phone calls with Georgia election officials were legislative investigations at all" and concluding that the district court approach would "enable[] a process through which that dispute can be resolved."

Senator Graham eventually asked the Supreme Court for a stay, which was temporarily granted by Justice Thomas and referred to the full Court. On November 1 the Court rejected the Senator's request, reasoning that a stay was not necessary because the district court had "assumed that the informal investigative fact-finding that Senator Graham assertedly engaged in constitutes legislative activity protected by the Speech or Debate Clause" and that "Senator Graham may not be questioned about such activities." That ruling, the Court reasoned in its brief order, adequately protected the Senator's constitutional prerogatives because, as previously noted, Senator Graham may return to court "should disputes arise regarding the application of the Speech or Debate Clause immunity to specific questions."

The Speech or Debate Clause and Member Interactions with Government Officials for Purposes of Investigation or Oversight

The Speech or Debate Clause provides that for any "Speech or Debate in either House," Members of Congress "shall not be questioned in any other Place." As interpreted by the Supreme Court, the Clause largely immunizes Members from criminal and civil liability or any form of compelled testimony that is predicated on their "legislative" activities. The purpose of the Clause is not simply to protect Members by giving them special treatment under the law. The Clause instead acts as a key component of the Constitution's separation of powers; safeguarding legislative independence by ensuring that neither executive, judicial, nor state legal processes are used to improperly influence, intimidate, or harass Members.

The types of actions that are given protection by the Clause go beyond formal "Speech or Debate" in the halls of Congress. The Clause's protective umbrella extends to cover any action that is an "integral part of the deliberative and communicative processes" through which Members engage either in "the consideration and passage or rejection of proposed legislation" or "other matters which the Constitution places within the jurisdiction of either House." If the act in question is deemed to be sufficiently "legislative," there is no "balancing" of the various interests at play. The Clause is an "absolute bar to interference."

The Supreme Court has previously found that investigative and oversight actions sanctioned by either the House, Senate, or a congressional committee are the type of legislative acts that receive Speech or Debate Clause protections. "The power to investigate," the Supreme Court has held, "plainly falls" within the definition of "legislative." This conclusion is perhaps unsurprising given that investigative oversight has generally been viewed not only as a "legitimate task of Congress," but one "essential" to the legislative function. As such, actions taken as part of an authorized congressional investigation, including those

actions taken by individual Members at hearings, in issuing subpoenas, or pursuing contempt, have all been interpreted to be protected legislative acts.

Courts have been less receptive to protecting informal investigative and oversight actions undertaken by individual Members outside of formal committee investigations, including Member communications with other government officials. While these interactions are [generally viewed](#) as “official” and “legitimate,” they are not always “legislative.” Notably, the Supreme Court has [suggested](#) that efforts to influence how the executive branch implements or administers the laws enacted by Congress (a common and legitimate oversight activity) are insufficiently connected to the legislative function and, therefore, *not* protected by the Clause, at least when conducted “informally” by an individual Member. As stated by the [Supreme Court](#):

Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

On the other hand, informally speaking with a government official in an effort to gather facts to assist the Member in their legislative duties (rather than seeking to “cajole” or “exhort” the official) has [sometimes](#) been given the protections of the Clause. This recognition of the importance of legislative fact-finding by individual Members is consistent with the [position](#) generally taken by Members that as constitutionally elected officers of the legislative branch, they are authorized to engage in oversight and investigations and entitled to access necessary information. The Department of Justice has taken a [different view](#), concluding that individual Members “do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee.” The D.C. Circuit, however, has previously suggested support for the congressional position. Reasoning in the context of the Freedom of Information Act, rather than in relation to the Clause, that court [stated](#):

All Members have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information. ... Each of them participates in the law-making process; each has a voice and a vote in that process; and each is entitled to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator.

Still, there are [courts](#) that do not view informal actions by individual Members as “integral to the legislative process” for purposes of the Clause. In those jurisdictions, such activity would receive no protections, and a Member may be subject to criminal or civil liability for that activity or questioned against her will by executive branch or state investigative authorities. Still other courts have adopted a middle ground, [holding](#) that “oversight activities” do “not automatically result in Speech or Debate protections,” but “exist along a spectrum” in which some informal actions are unprotected but other “informal attempts to influence the Executive Branch on policy, for actual legislative purposes, may qualify as ‘true legislative oversight’ and merit Speech or Debate immunity.”

The *Graham* Litigation and Its Potential Impact

After noting the existing uncertainty over the scope of the Clause’s protections, the district court in *Graham* ultimately [reached the conclusion](#) that informal investigative activities by an individual Member of Congress *can* constitute legislative activity protected by the Clause. Specifically, the court [held](#) that

while actions taken pursuant to a formally authorized congressional investigation would presumably always fall within the sphere of legitimate legislative activity, the fact that a member’s individual investigative efforts may not be tied to an official congressional inquiry does not necessarily mean that such an investigation is per se non-legislative. The Court is therefore persuaded that, in some instances, fact-finding inquiries carried out by individual members of Congress can fall within the sphere of legislative activity protected by the Speech or Debate Clause.

As applied to Senator Graham, the court [reasoned](#) that because Members have the legislative responsibility of certifying presidential elections under the Electoral Count Act, “to the extent Senator Graham was merely asking questions about Georgia’s then-existing election procedures and allegations of voter fraud in the leadup to his certification vote, such questions are shielded from inquiry under the Speech or Debate Clause. In other words, Senator Graham cannot be asked about the portions of the calls that were legislative fact-finding.”

The court [could not](#), however, “simply accept Senator Graham’s sweeping and conclusory characterizations of the calls” as “comprise[d] entirely of legislative fact-finding.” Instead, the court [concluded](#) that because a call from a South Carolina Senator to a Georgia state election official is not “manifestly legislative,” and because the nature of the calls has been a matter of public dispute, the record must be “more developed” before the court could determine whether the “entirety” of the call constituted legislative activity. Accordingly, Senator Graham [may face](#) “targeted and specific questioning” about the non-investigatory aspects of the calls—for example, whether he asked Georgia election officials to take any specific actions, including throwing out ballots. This conclusion, the court reasoned, was consistent with the Supreme Court’s prior holdings that efforts to “cajole” government officials—i.e., efforts to influence official action—though “expected” and routine, are non-legislative and unprotected by the Clause.

Though the judicial decisions in the *Graham* litigation have recognized the importance of legislative fact-finding by individual Members and concluded that in some circumstances that activity receives Speech or Debate protections, the holding that Member fact-finding is not facially or “manifestly” legislative is a significant one for Congress. It confirms the principle that “informal” investigative activities by individual Members will sometimes be treated differently from more formal investigative activities connected to a committee investigation. If an individual Member communicates with a government official outside of a committee investigation, a federal or state prosecutor may be free to compel the Member’s testimony on the non-investigatory aspects of the communication (and in some courts, perhaps the investigatory aspects). On the other hand, if a Member makes the same statements to the same official as part of a committee investigation—for example, in a hearing or deposition—those statements are likely to be [absolutely protected by a court](#). The Clause generally would not permit that same prosecutor to [examine further](#) the content of the Member’s communications in that context.

Given the parties’ divergent views on the Clause, it seems likely that if Senator Graham appears before the special grand jury, disputes will arise as to whether specific questions relate to constitutionally protected communications or conduct. If that happens, either party may return the dispute to the federal courts, and the case may again make its way to the Supreme Court where, if appropriate, the Court could shed greater light on the extent to which the Justices view the Clause as protecting informal investigative and oversight activities by individual Members. That potential decision could have a significant impact on informal Member fact-finding.

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