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Legislative Immunity: Congressional Investigators Immune from Charges of Invasion of Privacy

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CASE COMMENTS

LEGISLATIVE IMMUNITY: CONGRESSIONAL INVESTIGATORS IMMUNE FROM CHARGES OF INVASION OF PRIVACY*

McSurely v. McClellan, 521 F.2d 1024 (D.C. Cir. 1975)

Plaintiffs,[1] field organizers for the Southern Conference Educational Fund (SCEF),[2] brought a civil action for damages, alleging violations of their constitutional rights,[3] against the Chairman of the Senate Permanent Subcommittee on Investigations[4] and three of his aides.[5] Plaintiffs charged that defendants' acquisition[6] and use of allegedly seditious SCEF materials[7] illegally seized by state agents[8] and held in safekeeping by a federal court order,[9] as well as defendants' subsequent procurement of contempt of Congress citations for plaintiffs' refusal to produce certain materials,[10] violated plaintiffs'

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1. Alan and Margaret McSurely were the plaintiffs. McSurely v. McClellan, 521 F.2d 1024 (D.C. Cir. 1975).

2. The Southern Conference Educational Fund is an organization promoting black civil rights in the South. 521 F.2d at 1029.

3. Damages in the sum of $200,000 per defendant were sought for alleged violations of the plaintiffs' rights under 42 U.S.C. §§1981, 1983, and 1985 and the first, fourth, fifth, and fourteenth amendments of the United States Constitution. 521 F.2d at 1033.

4. Senator John L. McClellan was the chairman of this subcommittee. 521 F.2d at 1029.

5. Jerome Alderman, General Counsel, Donald O'Donnell, Chief Counsel, and John Brick, Investigator, were the three legislative aides. John Brick died during the pendency of the appeal. 521 F.2d at 1033.

6. Defendants acquired the materials from the Commonwealth Attorney for Pike County, Kentucky, Thomas Ratliff. Ratliff had made a public announcement that the materials would be made available to congressional committees. Shortly thereafter, Lavern Duffy, Subcommittee Counsel, contacted Ratliff by telephone about the seized materials. As a result, defendant John Brick was dispatched to Pikeville where he examined and received copies of the documents. 521 F.2d at 1029.

7. Materials consisted of books, posters, and pamphlets printed by the Southern Conference Educational Fund and other private and published documents. McSurely v. Ratliff, 282 F. Supp. 848, 850 (E.D. Ky. 1967).

8. On August 11, 1967, officials of Pike County, Kentucky, raided the McSurely home under the authority of a warrant charging seditious activity in violation of KY. REV. STAT. ANN. §432.040 (1953). A three judge district court found the statute facially unconstitutional and enjoined further prosecution of the McSurelys. 282 F. Supp. at 850-51.

9. The three judge district court ordered the Commonwealth Attorney for Pike County, Thomas Ratliff, to hold for safekeeping the materials taken from the McSurely home, pending the possible appeal of the court's decision. 282 F. Supp. at 850.

10. After the investigator returned to Washington with the copies, the subcommittee issued a subpoena for the documents in the possession of the Commonwealth Attorney. The Sixth Circuit Court of Appeals in McSurely v. Ratliff, 398 F.2d 817 (6th Cir. 1972), banned the release of the materials by the Commonwealth Attorney and ordered the documents and the copies returned to the McSurelys without prejudice to the subcommittee's right to enforce the subpoenas. The McSurelys were served by the subcommittee with a

rights to be secure from unwarranted search and seizure and invasions of privacy.[11] The District Court denied defendants' motion for summary judgment based on the legislative speech or debate clause immunity.[12] The United States Circuit Court of Appeals for the District of Columbia reversed, remanded[13] and HELD, that the speech or debate clause provided immunity for a congressional investigator's inspection, copying, and transportation to Washington, D.C., of materials seized in violation of the fourth amendment by a county prosecutor, so long as the congressional aides did not actively participate in the fourth amendment violation.[14]

Legislators' immunity from personal liability for opinions expressed and decisions made during the performance of official duties arose in England during the 1400's as Parliament began to establish its authority over the monarchy.[15] The fundamental purpose for this legislative immunity was to allow the legislator to discharge freely his responsibilities to his constituents without fear of Executive interference or accountability before a possibly hostile judiciary.[16] This concept gradually expanded into an absolute shield against any outside interference with the legislative process.[17] By the time of the American Revolution, the doctrine of legislative immunity was so firmly established that the Framers included the speech or debate clause[18] in the Constitution without discussion.[19] Moreover, the clause serves as an additional safeguard to assure separation of powers[20] and the coequal status of Congress.[21]

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subpoena *duces tecum*. Their refusal to produce the materials resulted in contempt of Congress convictions.

11. Reasoning that the exclusionary rule should be applied to congressional proceedings as well as criminal prosecutions, the D.C. Circuit reversed the contempt of Congress convictions and found the subpoenas invalid as the fruit of unlawful search and seizure. McSurely v. McClellan, 521 F.2d 1024, 1030 (D.C. Cir. 1975).

12. U.S. CONST. art. I, §6.

13. 521 F.2d at 1048. The district court was to determine on remand if there was sufficient evidence to merit a trial on the issue whether the defendants actively collaborated in the unlawful seizure or distribution of actionable material outside Congress.

14. 521 F.2d at 1046-47.

15. *See* 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 L. REV. 1 (1968). *See generally* C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1921).

16. *See, e.g.*, Gravel v. United States, 408 U.S. 606, 617 (1972); United States v. Brewster, 408 U.S. 501, 507 (1972); Tenney v. Brandhove, 341 U.S. 367, 372-73 (1951).

17. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1122-35 (1973).

18. U.S. CONST. art. I, §6 provides: "[F]or any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other place." This wording was taken almost without change from the English Bill of Rights of 1689. Cella, *supra* note 15, at 14.

19. Reinstein & Silverglate, *supra* note 17, at 1136.

20. Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 191-95 (1973).

21. United States v. Brewster, 408 U.S. 501, 508 (1972). *See also* Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK L. REV. 1019, 1020-22 (1973).

Because the need for legislative immunity has not been seriously questioned since the 1600's,[22] the scope of the privilege has rarely been litigated[23] and has never been authoritatively determined.[24] In the two cases reaching the Supreme Court prior to 1966,[25] the Court enunciated broad, indefinite guidelines that protected legislative activity within the "legislative sphere."[26] This indefinite standard combined with the relative flood of recent litigation on the speech or debate clause[27] has left the task of contouring the scope of legislative immunity to contemporary courts. Emphasizing a liberal interpretation of the fundamental purpose[28] behind the clause as the touchstone for its decision,[29] the Supreme Court interpreted the immunity to relieve Members of Congress from the burden of defending[30] both civil and criminal actions.[31]

Since the purpose of the speech or debate clause is not to foreclose judicial scrutiny of legislative action, but rather to free legislators from the burden of justifying their decision,[32] the Court adopted a functional analysis test of congressional activities that grants immunity from questioning only for those activities deemed to be essential to legislative activity.[33] This ap-

22. Cella, *supra* note 15, at 16.

23. Apparently, only nine cases involving legislative immunity have reached the Supreme Court: Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813 (1975); Doe v. McMillan. 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880).

24. Cella, *supra* note 21, at 1049.

25. Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880).

26. For example, legislative sphere was defined as "things generally done in a session of the House by one of its members in relation to the business before it," Kilbourn v. Thompson, 103 U.S. 168, 204 (1880), and as "acting in the sphere of legitimate legislative activity," Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

27. The Supreme Court has construed the speech or debate clause in seven cases since 1966. See note 23 *supra*.

28. Doe v. McMillan, 412 U.S. 306, 313 (1973).

29. This approach appears to be in accord with the intent of the Framers. "In the application of the privilege to emerging cases . . . the reason and necessity of the privilege must be the guide." 4 WRITINGS OF JAMES MADISON 221 (1865), *quoted in* Reinstein & Silverglate, *supra* note 17, at 1140, n.142.

30. "Furthermore, the clause not only provides a defense on the merits but also protects a legislator from the burden of defending himself." Powell v. McCormack, 395 U.S. 486, 502-03 (1969).

31. Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1821 (1975).

32. Powell v. McCormack, 395 U.S. 486, 505 (1969).

33. "Insofar as the Clause is construed to reach other matters [congressional activities other than speech or debate], they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972).

The Supreme Court relied on this definition in the two cases following *Gravel*, Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1821 (1975) and Doe v. McMillan, 412 U.S. 306, 315 (1973).

proach excludes from protection under the clause many activities normally performed by Congressmen.[31] Thus, while speeches or votes made on the floor or in committee[35] have been deemed to be protected activities, attempts to influence or oversee the executive branch in the administration of the law[36] have not been exempted. Since immunity flows from the nature and context of the legislative activity,[37] congressional aides are granted coextensive immunity for their participation in protected legislative activities.[38]

Significantly, this approach grants immunity for voting to authorize unlawful acts;[39] however, anyone, even a Member, who *executes* the act may be held liable. For example, the Supreme Court has determined that the dissemination of information beyond the legislative branch, whether to the Executive or the public, is not protected as essential to the legislative process.[40] Thus, the Public Printer who supervises the printing of congressional documents[41] has been denied immunity for printing a congressional report that contained defamatory material, although the Congressmen and their committee aides were protected from any inquiry with regard to the report's contents or publication.[42]

Relying on an earlier decision that authorized congressional investigations as inherent in the power to make laws,[43] the Court has extended a limited protection to Congress' investigative function.[44] In *Doe v. McMillan*,[45] the Court included within the immunity: authorizing an investigation, issuing subpoenas, holding hearings where materials are presented, preparing reports, and authorizing their publication and distribution.[46] This legislative in-

34. "But the Clause has not been extended beyond the legislative sphere . . . . 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." Gravel v. United States, 408 U.S. 606, 624-25 (1972).

35. United States v. Brewster, 408 U.S. 501, 526 (1972).

36. In *Johnson* a Congressman made a speech favorable to savings and loan associations and then attempted to influence the Justice Department regarding a case pending against a savings and loan association. Although he could not be questioned about the motivation for his speech, he was eventually convicted of a conflict of interest in attempting to influence the Justice Department. United States v. Johnson, 383 U.S. 169 (1966).

37. See note 33 *supra*.

38. Aides are protected under the "alter ego" theory. Immunity applies to the aide insofar as the conduct of the aide would be a protected legislative act if performed by the Member himself. Gravel v. United States, 408 U.S. 606, 617-18 (1972).

39. *See, e.g.*, Doe v. McMillan, 412 U.S. 306 (1973); Powell v. McCormack, 395 U.S. 486 (1969); Kilbourn v. Thompson, 103 U.S. 168 (1880).

40. *See* Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972).

41. The Public Printer manages and supervises the Government Printing Office, which is the authorized printer for the various branches of the federal government. Doe v. McMillan, 412 U.S. 306, 321 (1973).

42. Doe v. McMillan, 412 U.S. 306 (1973).

43. McGrain v. Daughterty 273 U.S. 135, 175, (1927).

44. Doe v. McMillan, 412 U.S. 306 (1973); Dombrowski v. Eastland, 387 U.S. 82 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).

45. 412 U.S. 306 (1973).

46. The protection for issuing subpoenas was not expressly included until *Service-*

vestigatory immunity is subject to two restrictions. First, congressional investigators cannot actively participate in illegal activity while gathering information.[47] This exception has been enlarged to allow grand jury questioning of a Member or his aide about sources of information relating to third party criminal activity.[48] Second, investigations must focus on subjects on which Congress could legislate.[49] To avoid questioning congressional motives, a court's authority to determine if the subject is within the jurisdiction of Congress is extremely limited.[50] Therefore, an investigation need be only facially legislative[51] to be upheld, even over allegations that the true purpose is to restrict an individual's first amendment rights.[52]

Significantly, the instant court held[53] that the investigator did not violate the first restriction placed on investigatory privilege[54] despite this same court's ruling in an earlier contempt proceeding[55] that the investigator's inspection and use of the materials held in safekeeping by court order violated plaintiffs' constitutional rights to be free from unwarranted search and seizure. The present majority disposed[56] of this apparent fourth amendment violation by finding sufficient similarities between grand jury and congressional investigations to rely on *United States v. Calandra*, which allowed a grand jury to base questions on evidence illegally seized by federal agents.[57] As the dissent[58] in the instant case noted, it strains credulity to read *Calandra* as an authorization to violate a court protective order. Furthermore, the tenuous analogy between congressional and grand jury investigations cannot withstand scrutiny in light of their respective functions. The confidential nature of grand jury

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men's Fund. However, the Court in that case noted that the extension of protection to issuing subpoenas was implicit in the holding of *Doe*. Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1822 (1975).

47. Dombrowski v. Eastland, 387 U.S. 82 (1967). Counsel to the Internal Security Subcommittee was charged with actively collaborating with local officials in violation of plaintiff's fourth amendment rights. Because there was no evidence to implicate the Chairman of the subcommittee, the Counsel could be questioned about his activities, but the Senator could not be questioned about issuing a subpoena for the illegally seized materials.

48. Gravel v. United States, 408 U.S. 606 (1972) (Senator's aide could be questioned about his acquisition of the Pentagon Papers).

49. Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1822-23 (1975).

50. Tenney v. Brandhove, 341 U.S. 367 (1951). There must be an obvious usurpation of exclusive judicial or executive functions.

51. Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1822 (1975).

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

53. 521 F.2d at 1047.

54. See text accompanying notes 47-52 *supra*.

55. United States v. McSurely, 473 F.2d 1178, 1182-83, 1191-92 (D.C. Cir. 1972).

56. 521 F.2d at 1045-47.

57. 414 U.S. 338 (1974). The Supreme Court held that the exclusionary rule did not bar a grand jury from subpoenaing Calandra in order to ask him questions based on evidence illegally seized during a search of his place of business. The Court said: "Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new fourth amendment wrong." *Id.* at 354.

The instant court quoted this passage in its decision and concluded that the investigator's subsequent seizure of illegally obtained evidence held in safekeeping under a court protective order constituted no new fourth amendment wrong. 521 F.2d at 1046-47.

58. *Id.* at 1053-55 (Leventhal, J., concurring in part and dissenting in part).

proceedings lends support to the argument that questions based on illegally seized materials do not constitute additional invasions of privacy. The general purpose of legislative investigations, however, is exposure of the information to the Congress and possibly the public to facilitate or justify legislative decisions.[59]

The present court followed the two step analysis used in *Eastland v. United States Servicemen's Fund*[60] to test the investigation in question against the second requirement placed on investigatory privilege.[61] This analysis questions not only the jurisdictional basis for the investigation but also the propriety of investigating these particular individuals or organizations under the grant of investigative authority.[62] The court concluded not only that this particular investigation was within the legitimate legislative sphere,[63] but also that it could not review the propriety of the investigator's intentional gathering of irrelevant, personal information,[64] without impermissibly inquiring into congressional motives.[65]

The Supreme Court, however, has repeatedly stated that the legitimacy of congressional authorization for an act does not insulate the execution of the act from judicial scrutiny.[66] The Court has used the distinction between

59. *Id.* at 1053.

60. 95 S. Ct. 1813, 1822 (1975). The Court first determined that the investigation at issue concerned a subject on which legislation could be forthcoming under the grant of investigative authority delegated to the Subcommittee by the Senate resolution. Then the Court determined the propriety of investigating the United States Servicemen's Fund under the subcommittee's grant of authority.

61. See text accompanying notes 47-52 *supra*.

62. Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1822 (1975).

63. The instant court found that S. Res. 150, 90th Cong., 1st Sess. (1967), empowered the subcommittee "to make a full and complete study and investigation of violent disturbances of the peace [and] . . . civil and criminal disorder . . . the commission of crimes in connection therewith, the immediate and longstanding causes, the extent and effects of such occurrences and crimes, and measures necessary for their immediate and long range prevention." The Court then concluded that this was an appropriate grant of investigatory power concerning a subject "on which legislation could be had." The fact that the McSurelys had attended a meeting of the Southern Conference Educational Fund in Nashville immediately before the April 1967 riots justified investigating their possible connection with the riots. 521 F.2d at 1040.

64. Among the materials seized by the Kentucky agents and subsequently copied and transported to Washington was a love letter addressed to Mrs. McSurely from Drew Pearson. The investigator testified in the McSurely contempt trial, United States v. McSurely, 473 F.2d 1178 (D.C. Cir. 1972), that he took the letter knowing that he did not need it for the performance of his duties. 521 F.2d at 1049 (Leventhal, J.).

65. 521 F.2d at 1039. The court concluded that a detailed assessment of each piece of information gathered would involve questioning congressional motive. The court relied on Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1824 (1975), in which the Supreme Court refused to justify the legitimacy of a congressional inquiry by what it produces. This statement in *Eastland*, however, was in the context of nonproductive research, not intentional invasions of privacy. In contrast, the dissent argued that the issue of investigatory jurisdiction is a limited and proper threshold question approved by the Court in *Servicemen's Fund* and that this issue does not involve an inquiry into congressional motive. 521 F.2d at 1051.

66. *See, e.g.*, Doe v. McMillan, 412 U.S. 306, 316 n.10 (1973); Powell v. McCormack, 395 U.S. 486, 504 (1969); Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

the authorization to investigate and thus extended investigatory immunity to prevent unwarranted violations of individual rights and as a means to afford relief to injured parties.[67] The present court denied this distinction by refusing to view the implementation of the investigation as separate from the authorization to investigate and thus extend investigatory immunity beyond the limits established in *Doe v. McMillan*.[68] The instant court attempted to reconcile this extension, noting that *Doe* did not distinguish between an investigator's procurement and a committee member's utilization of materials.[69] This ignores the fact that *Doe's* common reference to Members and aides protected only those activities occurring within a committee proceeding.[70] The instant court, by granting summary judgment based on the speech or debate clause, extended protection to the acquisition of the materials in Kentucky and their transport to Washington.[71] This extension broadens the potential impact of congressional violations of individual rights that the Supreme Court earlier sought to limit by restricting immunity to a legislative setting.[72]

The instant case serves as an example of the subordination of individual rights to privileged congressional inquiry. The Supreme Court has stated that neither a Member nor his aide should be immune from liability or questioning if he invaded the privacy of a citizen to secure information for a hearing.[73] Nevertheless, after finding the preliminary investigatory activities immune, the instant court dismissed the plaintiffs' claim of invasion of privacy for failing, as a matter of law, to state a viable cause of action.[74] Additionally, the present court violated procedural due process by sanctioning an investigator's acquisition of materials prior to the issuance of a subpoena.[75]

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67. In Doe v. McMillan, 412 U.S. 306 (1973), the Public Printer was liable to plaintiff for printing defamatory material under congressional authorization. In Kilbourn v. Thompson, 103 U.S. 168 (1880), the plaintiff was awarded a $20,000 judgment against the House Sergeant-at-Arms for false arrest resulting from his incarceration pursuant to a House resolution.

68. 412 U.S. 306, 310 (1973). See text accompanying notes 45-46 *supra*.

69. 521 F.2d at 1037.

70. "[T]he complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, *or from the investigator, for introducing material at Committee hearings* that identified particular individuals, for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report." Doe v. McMillan, 412 U.S. 306, 312 (1973) (emphasis added).

In *Servicemen's Fund*, the Supreme Court reiterated the position taken in *Doe*: "We have already held that the *'act of authorizing an investigation* pursuant to which . . . materials were gathered' is an integral part of the legislative process." Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1833 (1975) (emphasis added).

71. 521 F.2d at 1047.

72. In United States v. Gravel, 408 U.S. 606, 622-23 (1972), while discussing the extension of immunity to congressional aides, the Court reasoned that the potential abuses of civil and criminal law that might result from such an extension could be minimized by affording no protection for criminal conduct threatening the security of the person or property of others *in preparation of or in execution of a legislative act.*

73. United States v. Gravel, 408 U.S. 601, 622 (1972).

74. 521 F.2d at 1047.

75. *Id.* at 1030, 1037.