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CONGRESSIONAL PAPERS, JUDICIAL SUBPOENAS, AND THE CONSTITUTION

David Kaye*

INTRODUCTION

For at least a century, and with increasing frequency in recent years, grand juries, public prosecutors, criminal defendants, and private litigants have sought, subpoena in hand, to wrest papers from Congress.¹ By and large, Congress has honored these subpoenas.² Yet, even in the course of compliance, Congress often

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¹ Many of these incidents are recounted in Kaye, *Congressional Papers and Judicial Subpoenas*, 23 UCLA L. REV. 57 (1975) [hereinafter cited as *Congressional Papers*]. The word "Congress" will be used in this paper to refer to both houses of Congress.

² The *Congressional Record* is replete with resolutions authorizing compliance. See *Congressional Papers*, note 1 *supra*; Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1393-95 (1974). Congressional responses to subpoenas duces tecum arising since the publication of these articles include H.R. Res. 1429, 94th Cong., 2d Sess., 122 CONG. REC. H7822 (daily ed. July 27, 1976) (grand jury subpoena); H.R. Res. 1384-85, *id.* at H6991-92 (daily ed. June 29, 1976) (grand jury subpoenas); H.R. Res. 1273-74, *id.* at H5500-01 (daily ed. June 9, 1976) (grand jury subpoenas); H.R. Res. 1233, *id.* at H5169-70 (daily ed. June 2, 1976) (grand jury subpoena); H.R. Res. 1122, *id.* at H2617 (daily ed. Mar. 31, 1976) (order for production in civil case); H.R. Res. 1082, *id.* at H1701-02 (daily ed. Mar. 9, 1976) (subpoenas in civil case); H.R. Res. 1001, *id.* at H515 (daily ed. Jan. 19, 1976) (trial subpoena in criminal case); S. Res. 336, 94th Cong., 1st Sess., 121 *id.* at S23067 (daily ed. Dec. 19, 1975) (subpoenas in civil case); H.R. Res. 947, *id.* at H13161 (daily ed. Dec. 19, 1975) (order for production in civil case); H.R. Res. 946, *id.* at H13160-61 (daily ed. Dec. 19, 1975) (trial subpoena in criminal case); S. Res. 320, *id.* at S21555-56 (daily ed. Dec. 9, 1975) (subpoena in civil case); H.R. Res. 903, *id.* at H11877-78 (daily ed. Dec. 4, 1975) (subpoena in civil case); H.R. Res. 819, *id.* at H10278 (daily ed. Oct. 23, 1975) (grand jury subpoena); S. Res. 273, *id.* at S17528 (daily ed. Oct. 3, 1975) (grand jury subpoena); H.R. Res. 717, *id.* at H8769-70 (daily ed. Sept. 17, 1975) (grand jury subpoena); H.R. Res. 709, *id.* at H8621 (daily ed. Sept. 10, 1975) (trial subpoena in criminal case); H.R. Res. 663, *id.* at H7946-47 (daily ed. July 31, 1975) (grand jury subpoena); H.R. Res. 519, *id.* at H5178 (daily ed. June 10, 1975) (trial subpoena in criminal case); S. Res. 105-08 & 170, *id.* at S3561-63 (daily ed. Mar. 11, 1975) & S9094 (daily ed. May 22, 1975) (trial subpoenas in criminal case); H.R. Res. 156, *id.* at H671 (daily ed. Feb. 6, 1975) (grand jury

asserts that "by the privileges of [Congress] no evidence of a documentary character under the control and in the possession of [Congress] can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission"³

In a previous article, I attempted to demonstrate that language such as this can be traced back to earlier congressional claims of privilege which were limited to refusals to produce only original copies of congressional papers.⁴ I argued that the routine reiteration of these words in modern times does not necessarily represent a more expansive claim on the part of recent Congresses.⁵

Nevertheless, it is possible that contemporary Congresses have lost sight of the original scope of their predecessors' assertions of privilege and now claim an absolute privilege to withhold both the originals and copies of subpoenaed papers. A few judicial opinions suggest as much or more,⁶ and, in a field virtually devoid of judicial precedent, it is possible that even cursorily documented, ill-considered dicta can take root and flourish.⁷

This Article will chart the constitutional boundaries of Congress' privilege to withhold its internal papers⁸ from judicial sub-

subpoena). Cf. S. Res. 175, *id.* at S9712 (daily ed. June 5, 1975) (authorizing Comptroller General to comply with any subpoena for financial disclosure statements in connection with criminal trials or investigations).

In the relatively few instances in which Congress has withheld the information, the question of congressional privilege has not been conclusively litigated. See, e.g., *Congressional Papers*, *supra* note 1, at 72-75; S. Res. 409, 94th Cong., 2d Sess., 122 CONG. REC. S4089 (daily ed. Mar. 23, 1976); S. Res. 336, 94th Cong., 1st Sess., 121 *id.* at S23066 (daily ed. Dec. 19, 1975); H.R. Res. 940, *id.* at H13017-18 (daily ed. Dec. 18, 1975); notes 130 & 158 *infra*.

³ S. Res. 320, note 2 *supra*; H.R. Res. 947, note 2 *supra*.

⁴ *Congressional Papers*, *supra* note 1, at 59-66. The earlier claims of privilege also reflected Congress' concern that its members and agents refrain from releasing possibly privileged material without explicit authorization. *Id.* See note 16 *infra*.

⁵ *Congressional Papers*, *supra* note 1, at 76.

⁶ See, e.g., *Nixon v. Sirica*, 487 F.2d 700, 738-40, 772-73 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part; Wilkey, J., dissenting); *Soucie v. David*, 448 F.2d 1067, 1081-82 (D.C. Cir. 1971) (Wilkey, J., concurring); see also Brief for Respondent at 60-61, *United States v. Nixon*, 418 U.S. 683 (1974), reprinted in *UNITED STATES v. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT* 320, 357-58 (L. Friedman ed. 1974) [hereinafter cited as *UNITED STATES v. NIXON*]; Brief for Petitioner at 35-36, *Nixon v. Sirica*, *supra*; Brief for Appellee at 21-22, *Senate Select Comm. on Pres. Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

⁷ See O'Brien, *The Dissenting Opinions of Nixon v. Sirica: An Argument for Executive Privilege in the White House Tapes Controversy*, 28 Sw. L.J. 373 (1974).

⁸ References to the "internal papers" of Congress or "congressional papers" are meant to include all evidence of a documentary character which is under the control and in the possession of Congress.

poena.⁹ The privileges expressly given Congress in the text of the Constitution as well as the privileges that might be implied from our constitutional structure and history will be surveyed.¹⁰ This examination will reveal that while the Constitution does give Congress the privilege of refusing to comply¹¹ with subpoenas for documents in limited circumstances, it does not supply the absolute, unreviewable power that, in the view of some observers,¹² Congress has arrogated to itself.

I. EXPRESS CONSTITUTIONAL PRIVILEGES

The express constitutional provisions that bear on Congress' right to maintain the confidentiality of its papers are contained in article I. The publication clause,¹³ the immunity from arrest clause,¹⁴ and the speech or debate clause¹⁵ are the most pertinent.¹⁶ Each of these clauses has been adduced, at one time or

⁹ The phrase "judicial subpoenas" denotes those enforceable by the judiciary and issued by litigants or grand juries. Subpoenas issued by administrative agencies are not considered in this Article, for few if any administrative subpoenas have been served on legislators or legislative personnel. The constitutional questions that might arise from such subpoenas are the same as those generated by judicial subpoenas, although the interests in discovery are somewhat different. For a discussion of compulsory process and other techniques of information gathering available to administrative agencies, see G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 385-405 (1974).

¹⁰ Express constitutional privileges are discussed in text accompanying notes 13-204 *infra*. Possible implied privileges are discussed in text accompanying notes 205-43 *infra*.

¹¹ Privileges protecting congressional papers, like other evidentiary privileges, should be asserted in an appropriate judicial form if they are to be honored by the courts. See *United States v. Liddy*, 542 F.2d 76, 82-83 (D.C. Cir. 1976); 1 T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 275 n.2 (8th ed. 1927). Cf. *United States v. Nixon*, 418 U.S. 683 (1974) (executive privilege); *Powell v. McCormack*, 395 U.S. 486, 505 n.25 (1969) (speech or debate privilege). Usually Congress will be able to assert its privileges in enforcement proceedings, see, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 499 n.13 (1975); note 158 *infra*. However, it may choose to do so at an earlier stage. See, e.g., note 97 *infra*. Courts may occasionally be willing to find privileges even in the absence of a formal claim. See, e.g., text accompanying notes 29-36 *infra*.

¹² See authorities cited in notes 6 & 7 *supra*.

¹³ U.S. CONST. art. I, § 5, cl. 3.

¹⁴ *Id.* § 6, cl. 2.

¹⁵ *Id.* § 6, cl. 3.

¹⁶ Claims of congressional privilege over papers might also be based on Congress' disciplinary and rule-making power or Congress' general law-making power. Article I, section 5, provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." *Id.* § 5, cl. 2. Pursuant to this rule-making power, the Senate has declared that "[n]o memorial or other paper presented to the Senate, except original treaties finally acted upon, shall be withdrawn from its files except by order of the Senate." Senate Standing Rule 30, in *SENATE COMM. ON RULES AND ADMINISTRATION, STANDING RULES OF THE UNITED STATES SENATE* 51 [hereinafter cited as *STANDING RULES*]. Cf. H.R. Res. 9, 94th

another, in support of congressional claims of privilege over internal papers.

A. *The Publication Clause*

The publication clause provides that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy"¹⁷ This language has recently been cited as constitutional support for congressional claims of a privilege to resist judicial requests for a certain type of documentary evidence¹⁸—transcripts of testimony given to executive sessions¹⁹ of congressional investigating committees.²⁰ The courts have examined the relationship of the publication clause to refusals to give up such transcripts in two cases which for other reasons have had considerable notoriety.²¹ The first case is *United States v.*

Cong., 1st Sess., 121 CONG. REC. H20 (daily ed. Jan. 14, 1975). Rules made pursuant to the rule-making power are binding (unless unconstitutional on other grounds) in that a member, aide or employee who violated them would be subject to the disciplinary powers of the house, including the contempt power. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 85 HARV. L. REV. 1113, 1178-79 (1973). However, article I, § 5, cl. 2, goes no further than to allow Congress to prescribe disciplinary rules for its members in the interest of orderly proceedings. This power to impose internal sanctions does not imply the power to resist subpoenas or other court orders. It does not insulate members from the duty to obey court orders even if the members may be disciplined by their house for their compliance with the court orders. See Reinstein & Silverglate, *supra* at 1178-80. Cf. *Powell v. McCormack*, 395 U.S. 486, 505-06 (1969) (legislative employees acting pursuant to congressional directive); *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 472-73 (1951) (Frankfurter, J., concurring) (executive official acting in accordance with orders of superior); *Sawyer v. Dollar*, 190 F.2d 623, 639 (D.C. Cir. 1951), *vacated as moot sub nom. Land v. Dollar*, 344 U.S. 806 (1952) (same); Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 19 (1974) (legislative employees answerable for carrying out congressional directives and cabinet officers legally accountable for executing presidential directives).

Congress might also try to create a privilege by using its general law-making power to enact a statutory privilege. Because Congress has shown no inclination to enact any such statutory privilege for itself, however, this basis for a privilege will not be discussed here.

¹⁷ U.S. CONST. art. I, § 5, cl. 3.

¹⁸ See note 41 *infra*.

¹⁹ Executive sessions involve communications to a house of Congress from the executive department. See Senate Standing Rules 36-38, *STANDING RULES*, *supra* note 16, at 55-61. Unless these executive sessions are declared open during the proceeding, they are cloaked in secrecy. *Id.* Other proceedings may also be held behind closed doors. See Senate Standing Rule 35, *id.* at 55. The rules of both houses of Congress prohibit the release of certain executive session materials except by affirmative vote of the house or the affected committee. See H.R. Res. 12, 93d Cong., 1st Sess., 119 CONG. REC. 30-31 (1973); note 16 *supra*.

²⁰ Congress has not been consistent in its responses to judicial requests for such transcripts and has sporadically refused to comply with such requests. See *Congressional Papers*, *supra* note 1, at 71-75.

²¹ *United States v. Ehrlichman*, Crim. No. 74-116 (D.D.C. July 3, 1974), *aff'd in part*, 44 U.S.L.W. 2543 (D.C. Cir. May 17, 1976), *petition for cert. filed*, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1976); *Calley v. Callaway*, 382 F. Supp. 650

Ehrlichman,²² a criminal prosecution for a warrantless search of a psychiatrist's office instigated by White House officials.²³ In this case, defendant G. Gordon Liddy issued subpoenas for transcripts of testimony of government witnesses who had appeared before the House Armed Services Special Subcommittee on Intelligence.²⁴ When it seemed that the House would not honor the subpoenas,²⁵ the district court ruled that the transcripts were privileged under the publication clause²⁶ and that Liddy had no right to require their production.²⁷ The court of appeals, however,

(M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

²² Crim. No. 74-116 (D.D.C. July 3, 1974). The convictions of defendants Ehrlichman and Liddy were affirmed, *United States v. Ehrlichman*, 44 U.S.L.W. 2543 (D.C. Cir. May 17, 1976), *petition for cert. filed*, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1976); *United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976), while those of Barker and Martinez were reversed, *United States v. Barker*, 44 U.S.L.W. 2544 (D.C. Cir. May 17, 1976).

²³ See generally WATERGATE SPECIAL PROSECUTION FORCE, REPORT 60-61 (1975) [hereinafter cited as WATERGATE REPORT]; see also note 82 *infra*.

²⁴ *United States v. Liddy*, 542 F.2d 76, 82 (D.C. Cir. 1976); *Congressional Papers*, *supra* note 1, at 74-75.

²⁵ The House did release the testimony during the pendency of the appeal. *United States v. Liddy*, 542 F.2d 76, 83 (D.C. Cir. 1976).

²⁶ The court's initially unpublished memorandum and order of July 3, 1974, denying defendant's motion to enforce the subpoenas, does not dally in reaching this conclusion:

In the instant case, defendant Liddy seeks a transcript of secret, executive session proceedings before a House subcommittee. That transcript has been placed in the possession of the Speaker and can only be released upon a vote of the whole House. Congress' right to invoke such a privilege with regard to verbatim transcripts of its executive proceedings would appear to be established by the [secrecy exception of the Publication] Clause in Article I, Section 5, Clause 3 of the Constitution.

Memorandum & Order at 3, *United States v. Ehrlichman*, Crim. No. 74-116 (D.D.C. July 3, 1974) (citation omitted). The court offered the alternative holding that, in any event, the speech or debate clause prohibited judicial enforcement of the subpoena. See note 128 & accompanying text *infra*. The memorandum opinion has been reprinted in *Hearings on Representation of Congress and Congressional Interests in Court Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 229-30 (1976) [hereinafter cited as *Hearings*].

²⁷ Liddy argued that the committee's refusal to produce the transcripts violated his rights as a criminal defendant under the Jencks Act, 18 U.S.C. § 3500 (1970), the fifth amendment due process clause, and the sixth amendment compulsory process clause. The district court found that statements made to the legislature, rather than to executive investigatory agencies, are not within the scope of the Jencks Act and that the due process analysis of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the prosecution to produce exculpatory evidence in its possession, is not applicable to the suppression of evidence by the legislature. The court also held that the right to compulsory process does not extend to the production of privileged material. Memorandum & Order, *supra* note 26, at 2-4.

An appraisal of this aspect of the opinion concerning the rights of criminal defendants seeking congressional testimony is more properly the subject of a separate article analyzing the consequences to underlying litigation of a congressional refusal to comply with a subpoena duces tecum, but a few general observations will be made here. First, under the Jencks Act, a federal criminal

dismissed these issues as "academic," holding that even if the transcripts had been withheld under an invalid claim of con-

defendant is entitled at trial to a prosecution witness' prior "statements" "in the possession of the United States." 18 U.S.C. § 3500(b) (1970). A verbatim transcript is surely a "statement" for Jencks Act purposes. See *Harney v. United States*, 306 F.2d 523 (1st Cir.), cert. denied sub nom. *O'Connell v. United States*, 371 U.S. 911 (1962); *United States v. Lev*, 258 F.2d 9 (2d Cir. 1958), aff'd by an equally divided court, 360 U.S. 470 (1959). See generally *Palermo v. United States*, 360 U.S. 343 (1959); ABA ADVISORY COMMITTEE ON PRETRIAL PROCEEDINGS, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.1, Comment (1970). But whether it is a statement "in the possession of the United States" as that phrase is used in the Act is not so clear cut. As employed in 18 U.S.C. § 3500(a), (b), (c), (e) (1970), "United States" plainly means the United States as prosecutor. Presumably, the words have the same meaning in section 3500(d), the section that necessitates disclosure and specifies sanctions for nondisclosure. But see 103 CONG. REC. 15931 (1957) (observation by Senator Hruska that the Act "might even extend to an executive session of a Congressional Committee"); *id.* at 15927 (statement of Senator Javits that the bill applies "to all officials of the Federal Government"). Thus, the district court's observation in *Ehrlichman* that "there is no indication that Congress intended [the Jencks Act] to encompass its own legislative proceedings held in executive session . . ." Memorandum and Order, *supra* note 26, at 2, while arguably overstated, seems essentially correct.

This conclusion does not imply that the Jencks Act is rigidly confined to the discovery of material in the prosecutor's files at a particular time. See, e.g., *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971). It merely recognizes that the Jencks Act, like rule 16 of the Federal Rules of Criminal Procedure, is basically intended to give the defense access to the relevant evidence and information available to the prosecution. Thus, the simple fact that a statement of a government witness is unavailable to the defense as well as the prosecution should not trigger Jencks Act sanctions. See *United States v. Augenblick*, 393 U.S. 348, 355-56 (1969); *Killian v. United States*, 368 U.S. 231, 242 (1961); *Campbell v. United States*, 365 U.S. 85, 98 (1961); *United States v. Bryant*, *supra* at 651.

The due process argument made by Liddy is more troublesome. The suggestion that one branch of the government may prosecute an individual while a parallel branch holds secret information that might lead to his acquittal or to a decision not to prosecute is offensive to due process concepts. While the Court in *Brady v. Maryland*, *supra*, speaks of "suppression by the prosecution," and the prosecution is not normally obliged to obtain evidence from third parties, *Brady* does not hold that different agencies of the government are necessarily severable entities. See, e.g., *United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973); *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964); *Carlson, False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?*, 1969 DUKE L.J. 1171. The district court in *Ehrlichman* therefore seems to have disposed of the *Brady* due process problem too hastily when it stated:

Nor does *Brady* apply. The subpoenaed testimony is not in the possession of the Government within the meaning of that decision, since the Subcommittee is neither an investigative nor a prosecutorial arm of the Executive branch nor an agency of the Government in any way involved in the offense or related transactions.

Memorandum and Order, *supra* note 26, at 2. See also note 36 *infra*.

At the same time, not every "suppression" of evidence resulting from congressional invocation of privilege amounts to a denial of due process, since information Congress refuses to release is not inexorably favorable to the defense. It may be highly damaging, merely redundant, or simply irrelevant. See Brief for Plaintiff at 109-10, *United States v. Ehrlichman*, 44 U.S.L.W. 2543 (D.C. Cir. May 17, 1976). If Congress is unwilling to provide a transcript even for the limited purpose of in camera inspection by the trial court, the court may request

gressional privilege, the error was harmless beyond a reasonable doubt.²⁸

The second case arose out of the court martial of Lt. William Calley, Jr., for the mass murder of Vietnamese civilians at My Lai in 1968. The military judge requested that the House release evidence and testimony given in an executive session of the Armed Services Subcommittee.²⁹ The House did not accede to this request,³⁰ and the court martial in *United States v. Calley*³¹ held that the House's failure to release the papers was within

that a responsible legislative official or agent, such as the committee chairman or committee counsel, review the subpoenaed material with the aid of detailed guidelines from the prosecution and defense indicating what type of information would be exculpatory or useful for impeachment. If the committee official then informs the court that the subpoenaed material is neither exculpatory nor useful for impeachment, the problem may be resolved without the court's insisting on production or dismissal. A similar procedure was adopted in *Ehrlichman* when former President Nixon refused to allow Ehrlichman and his counsel to inspect notes Ehrlichman had made while on the White House staff. See Brief for Plaintiff, *supra* at 110; WATERGATE REPORT, *supra* note 23, at 61. Even if Congress refuses to review the testimony in this fashion, or if it reports that there are material inconsistencies between the congressional testimony and the expected trial testimony of the witness, sanctions less drastic than dismissal may be appropriate. Consideration should be given to precluding the prosecution from calling the witness, to instructing the jury that the witness' credibility is in doubt since he has testified differently on another occasion, or to giving a "missing witness instruction" to the effect that the jury may infer inconsistency from the government's inability to show that the witness' previous testimony is consistent. *But see Note, A Defendant's Right to Inspect Pretrial Congressional Testimony of Government Witnesses*, 80 YALE L.J. 1388 (1971).

The third argument made to overcome the privilege in *Ehrlichman* was based on the criminal defendant's sixth amendment right "to have compulsory process for obtaining witnesses in his favor." U.S. CONST., amend. VI, cl. 3. The court in *Ehrlichman* reasoned that this right of compulsory process did not entitle Liddy to an order compelling production because he had not made an adequate showing of need for the transcripts. Memorandum and Order, *supra* note 26, at 2-3. Moreover, the court held that because the material was privileged, dismissal was not necessary to preserve Liddy's sixth amendment right. *Id.* at 3. *But see* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 73, 126-31, 159-66 (1974); Westen, *Compulsory Process II*, 74 MICH. L. REV. 192, 247-48 (1975).

²⁸ Upon reviewing the subcommittee transcripts and the trial testimony of the subcommittee witnesses, the court found that the subpoenaed materials contained no exculpatory statements and no information which could have materially aided cross examination. Hence, the court eschewed what it called "a fruitless discussion" concerning the applicability of the Jencks Act, 18 U.S.C. § 3500 (1970), *Brady v. Maryland*, or the sixth amendment "as to materials in the possession of Congressional Committees." *United States v. Liddy*, 542 F.2d at 83.

²⁹ For a fuller discussion of this incident, see *Calley v. Callaway*, 382 F. Supp. 650, 699-702 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184, 219-20 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Congressional Papers*, *supra* note 1, at 71-73.

³⁰ The court martial's request was apparently never brought to the attention of the House as a whole. *Calley v. Callaway*, 382 F. Supp. 650, 702 n.47. See note 19 *supra*.

³¹ 46 C.M.R. 1131, *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973).

the scope of the privilege delineated by the publication clause.³² In granting habeas corpus relief in *Calley v. Callaway*,³³ the district court apparently agreed with this interpretation of the clause, but thought that, on balance, "the legislative branch was not entitled to invoke the privilege of confidentiality at the expense of the individual accused's right to evidence at his criminal trial."³⁴ On appeal, the Fifth Circuit found it unnecessary to decide "whether the . . . Subcommittee could properly invoke its congressional privilege and correctly refuse to furnish the subpoenaed testimony."³⁵ The court of appeals found that even if the publication clause privilege did not justify withholding the testimony, the unavailability of the subpoenaed material did not, in the circumstances of the case, amount to a denial of due process.³⁶

³² See *United States v. Calley*, 8 CRIM. L. REP. (BNA) 2054-55 (Army GCM, 5th Jud. Cir. 1970) (court order no. 19), reprinted in 116 CONG. REC. 37652-53 (1970). The military appellate courts did not dispute this conclusion.

³³ 382 F. Supp. 650 (M.D. Ga. 1974), rev'd, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

³⁴ 382 F. Supp. at 705. See also note 27 *supra*. The court relied primarily on *United States v. Nixon*, 418 U.S. 683 (1974), the Watergate Tapes case, for this conclusion. Chief Judge Elliot interpreted *Nixon* to mean that any evidentiary privilege based on the generalized need for confidentiality in government is not absolute, but subject to judicial balancing. *Id.* at 704. This holding vindicated, almost before it was written, Professor Henkin's prediction:

That a constitutional privilege of the President is not absolute will doubtless inspire attacks on traditionally absolute privileges: husband-wife, lawyer-client, doctor-patient, priest-penitent, and privileges-immunities of sovereigns and diplomats.

Henkin, *Executive Privilege: Mr. Nixon Loses but the Presidency Largely Prevails*, 22 UCLA L. REV. 40, 44 (1974). See also Kurland, *United States v. Nixon: Who Killed Cock Robin?*, 22 UCLA L. REV. 68, 73-74 (1974). The relevance of *Nixon* to legislative privilege is discussed in text accompanying notes 181-91 *infra*.

³⁵ 519 F.2d at 220 n.60.

³⁶ *Id.* at 220-26. The Fifth Circuit, being unable to review the subpoenaed testimony for itself, was content to rely on external circumstances to conclude the material was probably not exculpatory. Thus, the court emphasized that the witnesses whose congressional testimony was being sought had testified previously on the same subjects, and that the defense had access to these statements. *Id.* at 221. See also Brief for Appellant at 139-42, *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), reprinted in *Hearings, supra* note 26, at 225-27. However, the Fifth Circuit, in discussing the fifth amendment due process clause argument, read *Brady* even more narrowly than the *Ehrlichman* court, stressing the importance of "the suppression by the prosecution" of "crucial, critical, highly significant" evidence. *Id.* at 223 (emphasis in original) & 221. See note 27 *supra*.

The court of appeals did not decide whether the Jencks Act, 18 U.S.C. § 3500 (1970), had been violated by Congress, but held that even if there had been such a statutory violation, it was not of constitutional dimension and therefore did not justify habeas corpus relief. 519 F.2d at 224-26.

Although the court did not explicitly discuss the sixth amendment right to compulsory process and confrontation, its fifth amendment holding (resting in part on the premise that the subpoenaed transcripts were cumulative) should be dispositive on this point as well. See *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952). The alternative—to hold that the right of com-

The court therefore held that the lower court erred in granting the habeas corpus petition.

In treating the failure to produce subpoenaed transcripts of closed congressional hearings as within the ambit of the publication clause, the lower courts in *Calley* and *Ehrlichman* were plainly mistaken.³⁷ To begin with, reliance on this clause in these cases is difficult to reconcile with a literal reading of the publication clause in its entirety. The clause directs the houses of Congress to keep a complete "Journal," or record, of their "Proceedings" and to publish this record, except for "such Parts as may in their Judgment require secrecy."³⁸ Hearings conducted by congressional committees, whether open or closed to the public, are indisputably part of congressional proceedings.³⁹ Hence, had the issue in *Calley* and *Ehrlichman* been whether Congress was constitutionally obliged to insert verbatim transcripts of these proceedings in the *Congressional Record*, the publication clause would have been controlling.⁴⁰ However, the issue presented in *Calley* and *Ehrlichman* was whether Congress had the power to refuse to produce records of its proceedings subpoenaed for use in litigation. On its face, the publication clause gives Congress only the power to determine that certain records of congressional proceedings should be omitted from the published journal. Nothing in the wording of the clause gives Congress the power to block other modes of publication or disclosure of its proceedings.⁴¹

pulsory process does not entitle a defendant to material that is unavailable by reason of a valid exercise of privilege—would have required the court to pass on the validity of the congressional assertion of privilege. See generally note 27 *supra*.

³⁷ Their mistaken interpretation is not too surprising since none of the parties in these cases offered any other construction of the clause to the courts, see, e.g., Brief for Plaintiff at 108 n.88, *United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976), and this aspect of the clause has received virtually no other judicial attention. For cases concerned with other aspects of the clause, see *Gravel v. United States*, 408 U.S. 606, 626 n.16 (1972); *Wright v. United States*, 302 U.S. 583, 588-89 (1938); *The Pocket Veto Case*, 279 U.S. 655, 683 n.8 (1929); *United States v. Ballin*, 144 U.S. 1 (1892); *Field v. Clark*, 143 U.S. 649 (1891).

³⁸ See text accompanying note 17 *supra*.

³⁹ Cf. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (upholding investigatory powers of congressional committees); *Barenblatt v. United States*, 360 U.S. 109 (1959) (same); *Watkins v. United States*, 354 U.S. 178 (1957) (same); *McGrain v. Daugherty*, 273 U.S. 135 (1927) (same).

⁴⁰ See text accompanying notes 48-51 *infra*.

⁴¹ The questionable assumption that the publication clause deals with all forms of disclosure of congressional information also appears in Note, *The CIA's Secret Funding and the Constitution*, 84 YALE L.J. 608, 624-25 (1975).

It is true that the secrecy exception to the publication clause *could* be used to buttress the argument that Congress, like the executive, has an implied privilege over its papers based on a generalized interest in confidentiality or the more specific interest in preserving national security secrets. This possibility is considered in text accompanying notes 229-42 *infra*.

An examination of discussions of the clause during the drafting and adoption of the Constitution confirms this interpretation of the clause. The clause was drafted to insure the publicity—not the secrecy—of congressional proceedings.⁴² When Oliver Ellsworth, a highly respected delegate from Connecticut, suggested in frustration that the entire clause be stricken because the “legislature will not fail to publish its proceedings from time to time,”⁴³ James Wilson of Pennsylvania vigorously insisted: “The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings.”⁴⁴ After the clause was adopted in its present form by the Federal Convention, misgivings continued to be expressed over the proposed constitution’s failure to require the legislature to publish all of its proceedings at regularly specified intervals. Ratification by the states was achieved only after the antifederalists were assured by James Madison and other influential members of the Convention that frequent publication of the journal was required,⁴⁵ and that the secrecy

⁴² The authors of a recent article have commented:

The Framers also inserted a provision in the Constitution which specifically overruled an important and controversial privilege. Since 1641, the House of Commons had a standing rule which forbade the publication of its proceedings either by members or by the press, except by specific leave of the House. This rule was originally justified as insuring secrecy against monarchs who threatened retaliation against members who were discovered to have intruded into their prerogatives in parliamentary debates. But the rule was later invoked out of fear of misrepresentation in the press and a general intolerance of public criticism. The possibility that such a rule could be invoked by the new Congress was inconsistent with the authors’ theories of self-government, which presupposed the existence of an informed electorate. In addition, the Framers were appreciative of the effects on public opinion and on government caused by publicizing the debates of the colonial assemblies. They therefore placed in the Constitution a duty of Congress to inform the public about its deliberations.

Reinstein & Silverglate, *supra* note 16, at 1137-38 (footnotes omitted).

⁴³ 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 260 (1911).

⁴⁴ *Id.* Immediately following Wilson’s remarks, the framers approved the publication clause in its present form by a vote of six to four. *Id.*

⁴⁵ Consider, for example, the following exchange in the Virginia ratification debate. When Patrick Henry contended that the expression “from time to time” “admits of any extension” and “is too inexplicit and ambiguous to avail anything,” 3 J. ELLIOT, DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 170 (2d ed. 1836) [hereinafter cited as ELLIOT’S DEBATES], Edmund Randolph, a Virginia delegate to the Federal Convention, countered:

There is no clause in the Constitution of Virginia to oblige its legislature to publish its proceedings at any period. The clause in this Constitution which provides for a periodical publication . . . renders the federal Constitution superior to that of Virginia in this respect. The expression, *from time to time*, renders us sufficiently secure; it will compel them to publish their proceedings as often as it can con-

exception would be invoked only on extremely rare occasions.⁴⁶

Thus, the debate surrounding the publication clause focused entirely on the record that Congress is required to maintain and release to the general public. Nowhere in the history of the clause's enactment is there the slightest hint that the clause was designed to free Congress from the duty to produce subpoenaed documents needed in litigation. Given the aversion displayed by the authors of the Constitution to secrecy in government,⁴⁷ it is implausible that the discretion given Congress in the secrecy exception to the publication clause was meant to extend beyond the content of the published journal of congressional proceedings.

There is a second, independent basis for the conclusion that the lower courts in *Calley* and *Ehrlichman* erred in holding that the subpoenaed transcripts were privileged under the publication clause—the limited scope of the secrecy exception. Even if the publication clause gave Congress the right not only to delete certain material from its journal, but also to resist judicial subpoenas for certain documents, Congress could decline to comply with only those subpoenas that demanded the sort of information which the secrecy exception was adopted to protect.

Those who framed and adopted the Constitution intended that the secrecy exception would apply only to certain specific types of congressional proceedings—principally the negotiation of treaties and the planning of military operations in wartime.⁴⁸

veniently and safely be done: and it must satisfy every mind without an illiberal perversion of its meaning.

Id. at 202.

⁴⁶ See note 48 *infra*.

⁴⁷ See, e.g., Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1044, 1067-69 (1965).

⁴⁸ In the Virginia ratification debates, John Marshall discussed the secrecy exception in this way: "When debating on the propriety of declaring war, or on military arrangements, do they deliberate in the open fields? No sir. . . . In this plan, secrecy is used only when it would be fatal and pernicious to publish the schemes of government." 3 ELLIOT'S DEBATES, *supra* note 45, at 233. See also *id.* at 331 (Madison), 401 (Randolph), 404 (Mason), 409 (Madison), 459 (Mason), 460 (Madison and Mason).

Similarly, in the North Carolina Ratification Convention, Iredell explained: [I]n time of war it was absolutely necessary to conceal the operations of government; otherwise no attack on an enemy could be premeditated with success . . . [and] it was no less imprudent to divulge our negotiations with foreign powers.

4 *id.* at 73. See also 2 *id.* at 52 (Gorham and Perley); 2 M. FARRAND, *supra* note 43, at 613. But see 1 ELLIOT'S DEBATES, *supra* note 45, at 330 (amendment proposed by New York explicitly limiting secrecy to "parts relating to treaties or military operations," *id.*); *id.* at 336 (amendment proposed by Rhode Island explicitly limiting secrecy to "parts . . . relating to treaties, alliances or military operations"); 3 *id.* at 659-60 (similar amendment proposed by Virginia); 4 *id.* at 425 (similar amendment proposed by North Carolina); 2 M. FARRAND, *supra* note 43, at 260.

Thus the secrecy provision was not made more explicit⁴⁹ only because it was understood that it was limited in scope to "[s]uch transactions as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the community."⁵⁰ Ratification debates revealed the concern that the Federal Constitution should not allow the new legislature to "cover with the veil of secrecy the common routine of business."⁵¹

The documents requested in *Calley* and *Ehrlichman* did not fall within the scope of the secrecy exception thus defined. The proceedings represented by the transcripts sought in these cases were not of a sufficiently sensitive character. Congress was not discussing military or diplomatic secrets which might jeopardize national security if disclosed. It was attempting to uncover facts concerning past events which, although distressing, were hardly state secrets as the framers understood the concept.⁵²

Although the secrecy exception is of limited scope, Congress' decision as to when to invoke the exception is arguably not subject to challenge in court, for the clause entrusts the decision as to what merits secrecy to the houses of Congress "in their Judgment." This argument is based on the "political question" doctrine.⁵³ Among other things, this doctrine precludes judicial resolution of those matters which the text of the Constitution com-

⁴⁹ See 2 M. FARRAND, *supra* note 43, at 613; note 48 *supra*.

⁵⁰ 3 ELLIOT'S DEBATES, *supra* note 45, at 170 (Henry). See also note 48 *supra*.

⁵¹ 3 ELLIOT'S DEBATES, *supra* note 45, at 170 (Henry).

⁵² As the district court observed in *Ehrlichman*, Howard Hunt's testimony to the Intelligence Subcommittee "appears to have dealt, in part and long after the events, with the intelligence community's role in the Fielding break-in." Memorandum and Order, *supra* note 26, at 2. Perhaps, if the testimony had exposed such United States intelligence operations abroad that public disclosure might have caused interference in relations with foreign governments, it would have met the test for suppression under the publication clause.

The testimony in *Calley* concerned the past activities of American military forces abroad, but the mere fact that a matter touches on military operations or foreign relations should not make it a state secret any more than the President's power as Commander-in-Chief encompasses "anything . . . that can be done with an army or navy." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

⁵³ See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Note that Professor Henkin has recently called for a rethinking of the "political question" doctrine, suggesting that it is "an unnecessary, deceptive packaging of several established doctrines." Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976).

mits for decision to another branch of government.⁵⁴ The "in their Judgment" portion of the publication clause seems a paradigm of such a "textually demonstrable commitment."⁵⁵ If so,⁵⁶ the propriety of decisions as to which of Congress' proceedings require secrecy is a political question beyond the ken of the courts.⁵⁷

Even if a court is precluded from reviewing congressional judgments against publication,⁵⁸ however, such judgments are not apodictically correct when measured against constitutional standards. That a court will not tell Congress it has made a constitutional error in invoking secrecy in a particular case does not prevent other participants in the political and legal process from doing so. In particular, it does not, and should not, stop individ-

⁵⁴ According to one commentator, the "proper content" of the political question doctrine consists of the following propositions:

1. The courts are bound to accept decisions by the political branches within their constitutional authority.
2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
4. The courts may refuse some (or all) remedies for want of equity.
5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review.

Henkin, *supra* note 53, at 622-23.

⁵⁵ Baker v. Carr, 369 U.S. 186, 217 (1962). Indicative of its relative obscurity among constitutional provisions, *see* note 37 & accompanying text *supra*, the publication clause has not played even a supporting role in the debate on the nature of the political question doctrine. Professor Wechsler's examples of textual provisions creating political questions were the article I, section 5 provision that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members," and the article I, section 3 language that the "Senate shall have the sole Power to try all Impeachments." Wechsler, *supra* note 53, at 8-9.

⁵⁶ Whether *any* clause in the Constitution amounts to a textual commitment excluding judicial review is debatable. For an analysis of Wechsler's examples of textual commitments, Wechsler, note 55 *supra*, which is readily applicable to the publication clause, *see* Henkin, *supra* note 53, at 604-05. *See also* Roudebush v. Hartke, 405 U.S. 15 (1972); Powell v. McCormack, 395 U.S. 486 (1969). *But see* Gilligan v. Morgan, 413 U.S. 1 (1973).

⁵⁷ It might be argued that a court may nonetheless ascertain whether Congress has applied the correct standards in deciding that a particular matter should be kept secret. Such is the implication of Powell v. McCormack, 395 U.S. 486 (1969), *criticized in* Sandalow, *Comments on Powell v. McCormack*, 17 UCLA L. REV. 164, 172-74 (1969), *but adopted in* Note, *Blacklisting Through the Publication of Congressional Reports*, 81 YALE L.J. 188, 204 (1971). This argument would allow judicial review of the grounds (*e.g.*, is this information related to foreign affairs?) but not the need (what effect would disclosure have on foreign affairs?) for secrecy. *See* Henkin, *supra* note 53, at 605 n.26.

⁵⁸ The political nature of the question does not deprive the courts of jurisdiction, but it does render the case nonjusticiable. *See* Powell v. McCormack, 395 U.S. 486, 512 (1969); A. BICKEL, *supra* note 53, at 125-26; Scharpf, note 53 *supra*. *But see* Wechsler, note 53 *supra*.

ual legislators from making their decisions about the appropriateness of invoking secrecy in accordance with the proper constitutional conception of state secrets.⁵⁹

In sum, to the extent that congressional resistance to judicial discovery is predicated on the publication clause, it is without constitutional validity. Even in situations as yet unrealized, where a record of congressional proceedings is subpoenaed⁶⁰ and where the decision that this record not be published is consistent with the constitutional scope of the secrecy exception of the publication clause, the clause does not absolve Congress of the responsibility to supply the information for use in litigation.

B. *The Immunity from Arrest Clause*

Unlike the publication clause, the immunity from arrest clause is not directly concerned with the confidentiality of congressional proceedings or papers. The clause reads: "They [Senators and Representatives] 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 from and returning to the same."⁶¹ Thus on its face, the immunity from arrest clause protects people,⁶² not

⁵⁹ See Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). But see H.L.A. HART, *THE CONCEPT OF LAW* 68 (1961). And certainly the political question doctrine, or, more generally, any limitation on judicial review, need put no damper on professorial criticism, or "scholarly kibitzing," as Professor Michelman would put it. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13 (1969).

⁶⁰ Whatever privilege the publication clause supplies should be limited to materials such as recordation of votes and debates on the floor or transcripts of committee meetings, which qualify as records of "Proceedings" that might be included in a "Journal." The privilege should not apply to all internal papers of Congress, since not all papers in the possession of Congress record proceedings. See note 8 *supra*.

⁶¹ U.S. CONST. art. I, § 6, cl. 1.

⁶² It protects a very limited number of people—"Senators and Representatives." The clause is inapposite to other persons, such as congressional aides or employees. Significantly, the early British and colonial practice was otherwise. By the early 18th century, the freedom from arrest privilege embraced not only members but others as well: their servants and estates; officers of the whole house acting in their official capacities; and "evidences," that is, persons called to give testimony in an assembly hearing. A privilege from arrest, process, and a wide range of other "molestations" was claimed for all these persons. See generally *United States v. Brewster*, 408 U.S. 501, 529 (1972) (Brennan, J., dissenting); M. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 98-119 (1943); 10 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 544-46 (1938); 1 T. MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 358 (1912); C. WITTKÉ, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 41-43 (1921); Reinstein & Silverglate, *supra* note 16, at 1137 n.128. By the late 18th century,

papers. However, the availability of congressional papers to parties engaged in litigation may ultimately depend upon the amenability of legislative personnel to judicial orders. A subpoena duces tecum, for instance, commands a particular person to appear in court and to bring with him specifically identified materials.⁶³ A number of such subpoenas have been served on legislators and have met with resistance apparently based on Congress' understanding of the immunity from arrest clause.⁶⁴ Whether members of Congress can validly claim that this clause immunizes them from subpoenas or other judicial orders therefore warrants scrutiny.

In England and colonial America, members of Parliament and the legislative assemblies were exempt from attending court in any capacity,⁶⁵ and, for a time, the immunity from arrest clause

the very breadth of this immunity had bred popular dissatisfaction, leading the framers to provide for freedom from arrest for "Senators and Representatives" only. See note 93 *infra*.

In *Gravel v. United States*, 408 U.S. 606, 613-15 (1972), the Court analyzed a subpoena to a legislative aide as if it had been addressed to a legislator. However, in the context of the immunity from arrest clause, the Court made this assumption solely for the purpose of argument and did not accept "the claim . . . that a Member's aide shares the Member's constitutional privilege." *Id.* at 613. With respect to the speech or debate clause, on the other hand, the Court held that aides and assistants to a legislator "must be treated as the latter's alter egos." *Id.* at 617. See notes 192-203 & accompanying text *infra*.

⁶³ The subpoenaed material need not be a paper or document. See, e.g., *Ariz. Republic*, Oct. 26, 1976, § B, at 1, col. 3 (subpoena duces tecum calling for production of a dog).

⁶⁴ See, e.g., *Congressional Papers*, *supra* note 1, at 59-60, 68-69 & 74-75. Congress has taken the same position with respect to subpoenas commanding legislators to testify but not demanding the production of documents. See, e.g., *id.* at 59 n.14; H.R. Res. 956, 122 CONG. REC. H6 (daily ed. Jan. 19, 1976); H.R. Res. 892, 121 *id.* at H11550 (daily ed. Dec. 1, 1975); S. Res. 183, *id.* at S10640 (daily ed. June 13, 1975). The inaction of the House in the face of a subpoena to Fiorella La Guardia in 1926 is one of the more celebrated cases. When subpoenaed to testify before a grand jury, La Guardia informed the House that the subpoena invaded privileged territory and intimated that the House should not grant him permission to comply with the subpoena. 6 C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 586, at 825 (1936). In bringing the matter to the attention of the House, La Guardia was following established practice and adhering to the principle that where a privilege exists it may not be waived without the consent of the House. See *Congressional Papers*, *supra* note 1, at 60-61. The House acquiesced in La Guardia's suggestion, and La Guardia apparently did not testify. 6 C. CANNON, *supra* at 825. See *Nixon v. Sirica*, 487 F.2d 700, 739 (D.C. Cir. 1973) (MacKinnon, J., dissenting).

⁶⁵ The following is an account of the English and colonial practice: The House of Commons was especially resentful if its members were called to jury duty, or subpoenas were served upon them, or they were made defendants in civil suits. In the colonies, also, anything of this sort which distracted a member's attention from his duties or tended to divide his time was counted as a violation of privilege. If an assemblyman was called to court as a defendant, witness, or attorney without first gaining the consent of the house to which he belonged, the honor and dignity of the assembly was supposed to be impaired. This was

was thought to embody this broad privilege. Both Thomas Jefferson and Joseph Story, for example, had no doubt that "[t]his privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person, as a *subpoena ad respondendum* or *testificandum*, or a summons on a jury,"⁶⁶ and many early cases reflected their view.⁶⁷

The United States Supreme Court, however, did not begin to define the dimensions of the privilege until more than 120 years after the framing of the Constitution. The first step was taken in *Williamson v. United States*.⁶⁸ John Williamson, a member of the House of Representatives, had been convicted of conspiring to suborn perjury in connection with the purchase of land by the federal government. As the court was about to pro-

not merely a whim on the part of the house, but was also recognized outside that body.

M. CLARKE, *supra* note 62, at 109-10. See also T. JEFFERSON, *MANUAL OF PARLIAMENTARY PRACTICE* § III, in Senate Manual, S. DOC. NO. 1, 94th Cong., 1st Sess. 586-87 (1975); 1 T. COOLEY, *supra* note 11, at 273-75; L. LABAREE, *ROYAL GOVERNMENT IN AMERICA* 204 (1930); Reinstein & Silverglate, *supra* note 16, at 1122 n.46, 1137 n.128.

⁶⁶ T. JEFFERSON, *supra* note 65, at 588; 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 857, at 325 (Boston 1833). See also L. CUSHING, *LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES* § 598, at 241 (2d ed. 1866).

⁶⁷ The early cases are collected in 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2371, at 753 n.5 (McNaughton rev. 1961). Upon an examination of these cases, Wigmore concluded that although the immunity from arrest clause "still admits of some question," it has been interpreted as a complete exemption "from attending court in any capacity." *Id.* at 753. See, e.g., *Gyer's Lessee v. Irwin*, 4 Dall. 107 (Pa. 1790), where the Pennsylvania Supreme Court unanimously announced in dictum that "[a] member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him." *Id.* at 107. But see *United States v. Cooper*, 25 F. Cas. 626 (C.C.D. Pa. 1800) (No. 14,861). In *Cooper*, the defendant, who had been indicted for seditious libel on President Adams, sought to have various members of Congress testify in his behalf. State courts in Pennsylvania followed the practice of addressing letters, rather than subpoenas, to legislators. *Cooper* asked the federal court to write such a letter in his behalf to several members of Congress. Justice Chase agreed, seeing no reason to accord the federal legislators this perquisite:

The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations of a subpoena, in such cases. I will not sign any letter of the kind proposed. If, upon service of a subpoena, the members of congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue. It is not a necessary consequence of non-attendance, after the service of a subpoena, that an attachment shall issue. A satisfactory reason may appear to the court to justify or excuse it.

Id. at 626.

⁶⁸ 207 U.S. 425 (1908).

nounce sentence, Williamson protested that his term of office had not yet expired and that the immunity from arrest clause therefore precluded his imprisonment. Unpersuaded, the trial court sentenced the congressman to ten months in prison. On appeal, the Supreme Court affirmed, reasoning that the privilege from arrest applies to a sentence of imprisonment which would prevent a legislator from attending a session of Congress,⁶⁹ but that the qualifying phrase concerning "Treason, Felony, and Breach of the Peace" makes the grant of immunity inapplicable to all criminal cases, even those not involving an overt public disturbance or act of violence.⁷⁰ After *Williamson*, it was clear that the arrest privilege does not make congressmen immune from arrest, prosecution, or sentencing as defendants in criminal cases.⁷¹

Controversy over the scope of immunity from civil process continued after *Williamson*. In *Long v. Ansell*,⁷² the Supreme Court made the first major inroad on the early position that the clause confers on legislators a blanket exemption from civil process. Named as a defendant in a libel action filed in the District of Columbia, Senator Huey P. Long of Louisiana moved to quash the summons on the theory that "the summons and service thereof is invalid and of no legal effect whatsoever because in violation of Article I, Section 6, Clause 1, of the Constitution."⁷³ The Supreme Court was not impressed. Mr. Justice Brandeis, writing for a unanimous Court, disposed of the constitutional question in a terse, three-page opinion. Without adverting to the policies underlying the immunity from arrest clause,⁷⁴ the opinion asserted that the clause's "language is exact and leaves no room for [another] construction."⁷⁵ Numerous cases interpreting the clause along the lines suggested by Jefferson and Story were dismissed as resting "largely upon doubtful notions as to the historic privileges of members of Parliament before the enactment in

⁶⁹ *Id.* at 434.

⁷⁰ The Court found that the expression "treason, felony, and breach of the peace" was drawn from the English practice, and that "the words were used in England for the very purpose of excluding all crimes from the operation of the parliamentary privilege." *Id.* at 438.

⁷¹ Imprisonment of congressmen convicted of criminal offenses is quite rare, however. When Idaho representative George Hansen was ordered to serve two months in prison following his conviction for violations of federal campaign financing laws, he became the first sitting congressman to go to prison in 20 years. *Wall St. J.*, Apr. 21, 1975, at 1, col. 3.

⁷² 293 U.S. 76 (1934).

⁷³ *Id.* at 81.

⁷⁴ The plaintiff in the libel suit emphasized how "disturbingly, strange and foreign" it would be to read the clause as a "senatorial prerogative that places the personal wrongs done by a Senator to a private citizen beyond the effective reach of the law." *Id.* at 79.

⁷⁵ *Id.* at 82.

1770 of the statute of 10 George III, c. 50."⁷⁶ This statute, Justice Brandeis explained, declared that members of Parliament were subject to process as defendants in civil cases, provided that they were not "arrested or imprisoned."⁷⁷ Thus, according to Justice Brandeis' interpretation, the English privilege at the time of the framing of the Constitution protected legislators from civil arrest, the antiquated technique of initiating a civil case by physically restraining the defendant,⁷⁸ but did not afford any protection from service of a summons. The privilege as written into the Constitution, the Court concluded, supplies this same protection from civil arrest, but does not bar effective service of a summons on a senator or representative.⁷⁹

Neither *Williamson*, which established the amenability of a legislator to criminal charges and punishment, nor *Long*, which held that a congressman is susceptible to civil suit, dealt specifically with the claim of legislative immunity from serving as a witness in a civil or criminal case.⁸⁰ The possibility of legislative

⁷⁶ *Id.*

⁷⁷ *Id.* at 82-83. Blackstone mentions four other statutes enacted to curtail parliamentary privilege from arrest. Two of them, 12 & 13 Will. 3, c. 3 (1700) and 11 Geo. 2, c. 24 (1738), limited the immunity to the period in which parliament is in session plus a fortnight after adjournment. The other two were weaker versions of 10 Geo. 3, c. 50 (1769). One, 4 Geo. 3, c. 33 (1764), permitted service of process for debt on members who were also merchants, and the other, 2 & 3 Ann., c. 18 (1703), allowed suits for any misdemeanor or breach of trust in a public office. See 1 W. BLACKSTONE, COMMENTARIES *165.

⁷⁸ When the Constitution was adopted, arrests in civil suits were still common in America. 293 U.S. at 83. This provisional remedy of civil arrest, although no longer commonly pursued, is still allowed in certain circumstances in many states. See, e.g., 7B N.Y. CIV. PRAC. § 6101 (McKinney 1963); OR. REV. STAT. § 29.510 (1975). The grounds for such arrest vary widely. See N.Y. ADVISORY COMM. ON PRACTICE AND PROCEDURES, THIRD PRELIMINARY REPORT 797-805 (1959). In some jurisdictions, an equitable writ of *ne exeat* may also be used to prevent a defendant from fleeing the jurisdiction. See, e.g., *United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971); *National Auto. & Cas. Ins. Co. v. Queck*, 1 Ariz. App. 595, 405 P.2d 905 (1965). Another sort of arrest not part of the process of initiating a criminal accusation is the confinement of material witnesses in criminal proceedings. See, e.g., *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971); *Carlson, Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1 (1969).

⁷⁹ For a recent instance of a civil suit against a congressman, see, e.g., *United States ex rel. Hollander v. Clay*, 420 F. Supp. 853 (D.D.C. 1976) (no constitutional or statutory bar to suit under False Claims Act, 31 U.S.C. §§ 231 *et seq.* (1970), for allegedly false or inflated travel vouchers filed by representative).

⁸⁰ There is language in *Long* to the effect that immunity from arrest means no more than immunity from civil arrest as defined above. However, this description of the clause, which goes back to *Williamson*, see 293 U.S. at 83, occurs in the context of a suit in which Senator Long was named as a defendant. The statute of 10 Geo. 3, c. 50, which the Court cited in *Long* to delineate the limits of the immunity, was enacted to make members of the British parliament liable

witness immunity was first discussed—although somewhat superficially—in *Gravel v. United States*.⁸¹ *Gravel* arose from a grand jury investigation of the release and publication of the “Pentagon Papers.”⁸² When the grand jury subpoenaed an assistant to Senator Gravel to testify about allegations that Gravel or his staff had arranged for the papers to be published, the Senator intervened, seeking to quash the subpoena as violative of his privilege under the speech or debate clause.⁸³ Although no claim under the immunity from arrest clause was raised, the Court discussed that clause because it felt that the scope of the arrest privilege in some way helped mark the contours of the speech or debate privilege.⁸⁴ For analytical purposes, the Court treated the assistant as a member of the Senate.⁸⁵ The Court stated that “[h]istory reveals, and prior cases so hold, that [the immunity from arrest clause] exempts Members from arrest in civil cases only.”⁸⁶ Since the grand jury subpoena did not constitute an “arrest” in a “civil case,”⁸⁷ the Senator and, a fortiori, his aide, had no protection by virtue of the immunity from arrest clause. In general, the Court declared, the clause does not “confer immunity on a Member from service of process as . . . a witness in a criminal case.”⁸⁸

to suit, but not necessarily to subpoena. Nor did other curative legislation enacted in England before the adoption of the Constitution curtail this aspect of the parliamentary privilege from arrest. See 10 W. HOLDSWORTH, *supra* note 62, at 546-47; note 77 *supra*; note 91 *infra*.

⁸¹ 408 U.S. 606 (1972). Since Senator Gravel himself was not subpoenaed, the Court's comments on the immunity from arrest clause were, in one sense, mere dicta. See note 62 *supra*.

⁸² “Pentagon Papers” was the name given to a classified Defense Department study entitled “History of United States Decision-Making Process on Viet Nam Policy.” Anthony Russo and Daniel Ellsberg were ultimately indicted on charges relating to the dissemination of the study, but the indictment, *reprinted in* W. BISHIN & C. STONE, *LAW, LANGUAGE AND ETHICS* 1179-80 (1972), was dismissed as a result of a government-inspired search of Ellsberg's psychiatrist's office. See *United States v. Russo*, No. 9373-CD (C.D. Cal. 1973), May 11, 1973, Tr. at 22,690; G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1331 n.* (9th ed. 1975).

⁸³ The Court's treatment of the speech or debate issue is examined in notes 112-27, 146, 161-72 & accompanying text *infra*.

⁸⁴ The Court's reasoning as to the relationship between the arrest privilege and the privilege of speech or debate, which also appears in *United States v. Brewster*, 408 U.S. 501, 521 (1972), has been roundly criticized. Reinstein & Silverglate, *supra* note 16, at 1139 n.139.

⁸⁵ See note 62 *supra*.

⁸⁶ 408 U.S. at 614.

⁸⁷ It is not clear whether the Court was relying on the absence of an “arrest,” or the absence of a “civil case,” or both. A subpoena is a form of civil process. A grand jury inquiry is a criminal proceeding. The opinion seems to emphasize the latter fact, making it appear that the freedom from arrest privilege does not pertain to a grand jury subpoena because a criminal, rather than a civil, case is involved. See note 91 *infra*.

⁸⁸ 408 U.S. at 614-15.

This reasoning can easily be extended to dispose of any putative immunity from appearing as a witness in a civil case. If, as *Gravel* seems to say, the privilege of freedom from arrest is to be defined as narrowly as possible—to include no more than “civil arrest,”⁸⁹ the historical antecedent of a summons to a civil defendant—it follows that the privilege erects no obstacle to civil discovery orders.

Yet, to move from a legislator's lack of immunity as a defendant to his amenability to process as a witness in a criminal or civil case requires a major step.⁹⁰ Contrary to the assertion in *Gravel*, neither “history” nor “prior cases” dictate that it *must* be taken. The precedents are simply inconclusive.⁹¹ As for

⁸⁹ See note 80 *supra*; note 91 *infra*.

⁹⁰ Different interests are implicated in each case. A privilege against serving as a witness, while significant in its own right, is not of the same order of magnitude as a privilege absolving a public official of responsibility for criminal or civil wrongdoing. Moreover, there are salient differences between appearances in criminal and civil cases. Compare *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), with Senate Select Comm. on Pres. Campaign Acts v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974). See Karst & Horowitz, *Presidential Prerogative and Judicial Review*, 22 UCLA L. REV. 47, 65 (1974). For example, the possibility of abuse—of litigation being manufactured as a vehicle to obtain congressional papers—seems greater in civil suits by private parties.

⁹¹ See, e.g., 1 D. WATSON, *THE CONSTITUTION OF THE UNITED STATES* 314 (1910); note 67 *supra*. To support the pronouncement concerning history and prior cases, Justice White's majority opinion in *Gravel* reproduces snippets of the opinions in *Long v. Ansell*, 293 U.S. 76 (1934), and *Williamson v. United States*, 207 U.S. 425 (1908). But the language in these opinions relating to “arrests in civil cases” occurs in the context of suits naming congressmen as defendants. These cases contain no dicta, let alone any holdings, regarding legislative immunity from subpoena. See note 80 *supra*.

Having advanced the proposition that the immunity from arrest clause applies solely to “arrests in civil cases” without explaining what this phrase means in terms of the precedents cited, Justice White then states the corollary that “freedom from arrest [does not] confer immunity on a Member from service of process . . . as a witness in a criminal case.” 408 U.S. at 614-15. The opinion offers three justifications for this conclusion. First, it quotes the circuit court's disavowal in *United States v. Cooper* of the existence of “any privilege to exempt members of congress from the service, or the obligations, of a subpoena, in such cases.” 25 F. Cas. 626 (C.C.D. Pa. 1800) (No. 14,861) (Chase, J., sitting on Circuit), quoted in 408 U.S. at 615. However, the Court in *Gravel* shows no awareness of Justice Chase's intimation in *Cooper* that a congressman, although subject to service of a subpoena, might properly decline to appear as ordered. See note 67 *supra*. Second, the *Gravel* opinion states, relying on *Williamson* and *Burton v. United States*, 202 U.S. 344 (1906), a dubiously related case, “[i]t is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members.” 408 U.S. at 615. The holding in *Williamson*—that a legislator may be tried for a criminal offense—is explicitly provided for in the Constitution, and thus is “sufficiently plain.” But what this tells us about the obligation of a member of Congress to appear as a third-party witness rather than to stand trial for his own criminal act is not explained. Finally, the opinion disingenuously cites Jefferson for “the judgment that legislators ought not to stand above

history, the most that can be said is that the records of the drafting and inclusion of the immunity from arrest clause, from the Articles of Confederation through the ratification of the Constitution, do not reveal any firm intent to afford legislators a general immunity from process,⁹² and that the general attitude that prevailed toward legislative freedom from arrest in 1787 suggests that no sweeping immunity was intended.⁹³ To discern the limits of the privilege that was granted, it therefore becomes necessary to consider the policies that induced the authors of the Constitution to provide explicitly for an arrest privilege. Two competing concerns seem to have influenced the framers.⁹⁴ On the one hand, they did not wish to see legislators abandon their duties to their constituents as a result of being forced to attend possibly distant courts while their houses were in session. Jefferson, voicing this concern in the manual of parliamentary procedure he prepared for the first Congress, went so far as to state that "the enormous disparity of [this] evil admits of no comparison."⁹⁵ On the other hand, those

the law they create but ought generally to be bound by it as are ordinary persons." *Id.*, citing T. JEFFERSON, *supra* note 65, at 587. Justice White makes no mention of Jefferson's unqualified rejection of the conclusion that legislators are amenable to subpoena even though Jefferson's thoughts on this precise issue are stated only two paragraphs after Jefferson's more general judgment. *See id.* at 588-89; T. JEFFERSON, *supra* note 65, at 480; text accompanying note 66 *supra*.

⁹² *See* the Court's discussion of the history of the clause in *Williamson v. United States*, 207 U.S. 425, 436-38 (1908). It would have been easy enough for the framers to provide unequivocally for such an immunity. *Cf.*, e.g., CAL. CONST. art. 4, § 14 (1966) ("A member of the Legislature is not subject to civil process during a session of the Legislature or for five days before and after a session").

⁹³ By the late 18th century, parliamentary privileges, particularly freedom from arrest, had been so abused that a strong counterreaction had set in. *See*, e.g., *United States v. Brewster*, 408 U.S. 501, 546 (1972) (dissenting opinion); *Long v. Ansell*, 293 U.S. 76, 82-83 (1934); M. CLARKE, *supra* note 62, at 85; Reinstein & Silvergate, *supra* note 16, at 1137 n.128; Comment, Brewster, Gravel and Legislative Immunity, 73 COLUM. L. REV. 125, 127 (1973) [hereinafter cited as *Legislative Immunity*]; note 77 *supra*. Thus, despite the colonial belief that "the legislative assembly [is] the natural friend of liberty," E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 5-6 (4th ed. 1957); *see* Berger, *supra* note 47, at 1070 n.132, the framers took pains to withhold from the national legislature the broad, undefined privileges that had prevailed in the colonies. *See*, e.g., *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 F. Supp. 1, 4 (D.D.C.), *mandamus denied sub nom. Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

⁹⁴ The arrest clause, unlike the publication clause, provoked little controversy which would illuminate these concerns. In fact, in 1800, Charles Pinckney, a delegate to the federal convention of 1787, declared that "[t]he remainder of the clause respecting privilege is so express on the subjects of privilege from arrest, government of members, and expulsion, that every civil officer in the United States, and every man who has the least knowledge, cannot misunderstand them." 10 ANNALS OF CONGRESS 72 (Gales & Seaton eds. 1800), *reprinted in* 3 M. FARRAND, *supra* note 43, at 384.

⁹⁵ The context of this statement is as follows:

This privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person,

who drafted and ratified the Constitution were also sensitive to the importance to our system of justice, civil as well as criminal, of obtaining relevant evidence from all persons, regardless of their rank and station in life.⁹⁶

The arrest clause best accommodates these two interests if it is interpreted as preventing unnecessary detentions and distractions resulting from civil arrest, while permitting service of process on all defendants or witnesses in criminal or civil litigation. If this seems a narrow construction of the privilege, it should be remembered that the problem of interference with legislative pro-

as a *subpoena ad respondendum*, or *testificandum*, or a summons on a jury; and with reason, because a member has superior duties to perform in another place. When a Representative is withdrawn from his seat by summons, the 40,000 people whom he represents lose their voice in debate and vote, as they do on his voluntary absence; when a Senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does on his voluntary absence. The enormous disparity of evil admits of no comparison.

T. JEFFERSON, *supra* note 65, at 588-89. See also 4 CONG. REC. 1530 (1876) (debate on *Belknap* subpoena):

[A] Representative who represents a large body of people, or a Senator who represents a State, should not be called by the courts at their pleasure to leave their seats. He holds superior allegiance. If it were otherwise, might we not be left without a quorum here? . . . Public duty is paramount to all your police courts and with all their attachments and subpoenas *duces tecum*.

Id. The concern that the people of a state or district would be deprived of their voice and vote in Congress was properly more acute earlier in our history when travel was more time-consuming and legislative sessions were shorter.

⁹⁶ As Pinckney explained, "they never meant that the body who ought to be the purest, and the least in want of shelter from the operation of laws equally affecting all their fellow citizens, should be able to avoid them . . ." 10 ANNALS OF CONG. 72 (Gales & Seaton eds. 1800), *reprinted in* 3 M. FARRAND, *supra* note 43, at 385.

On the same day as the decision in *Gravel*, the Supreme Court held, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that the first amendment did not protect newspaper reporters from demands by a grand jury to reveal the sources of information given them in confidence. Relying on the "longstanding principle 'that the public . . . has a right to every man's evidence,'" *id.* at 688 (citations omitted), the Court quoted Jeremy Bentham's vivid illustration of the importance of the need for relevant evidence to the fair administration of the civil justice system:

Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance on every petty cause? Yes, as far as it is necessary, they and everybody . . . Were the Prince of Wales, the Archbishop of Canterbury, and the High Lord Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or barrow-woman were to think it proper to call upon them for their evidence, could they refuse it? No, most certainly.

Id. at 688 n.26, quoting 4 THE WORKS OF JEREMY BENTHAM 320-21 (J. Bowring ed. 1843). *But cf.* Cox, *supra* note 2, at 1417 (suggesting that the interest in production of evidence in civil cases in which a claim of executive privilege is raised is less weighty than that in criminal cases); Karst & Horowitz, *supra* note 90, at 65 (same).

ceedings can be ameliorated without throwing a blanket immunity from process around Congress.⁹⁷ Moreover, as Wigmore taught,

⁹⁷ The question of amenability to subpoena can be treated separately from the issue of what constitutes compliance. See J. WIGMORE, *supra* note 67, § 2370(c), at 748 (distinguishing between testimonial and viatorial immunity). The appearance can be delayed, if need be, until the House is in recess. See *United States v. Cooper*, 25 F. Cas. 626 (C.C.D. Pa. 1800) (No. 14,861). In some instances, the testimony might be secured by deposition or interrogatories. See 8 J. WIGMORE, *supra* note 67, § 2371(d), at 749. Cf. *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) (President may under certain circumstances be deposed).

Gravel v. United States, 408 U.S. 606 (1972), and *Long v. Ansell*, 293 U.S. 76 (1934), do not directly address the question whether special arrangements should or must be made to minimize interference with a congressman's attendance at his house, although *Gravel* does cite Justice Chase's opinion in *United States v. Cooper*, *supra*, with approval, 408 U.S. at 615. See note 67 *supra*.

Gravel and *Long* also do not consider whether a subpoena to a congressman may be enforced by a contempt citation. Cf. *United States v. Nixon*, 418 U.S. 683, 692 (1974) (ordering the President to comply with a subpoena notwithstanding the recognition that the "issue whether a President can be cited for contempt could itself engender protracted litigation"); *Powell v. McCormack*, 395 U.S. 486, 517 (1969) (declaratory judgment requested, rather than coercive relief). Thus, the majority opinion in *Gravel* states only that the freedom from arrest privilege does not "confer immunity on a Member from *service of process* as . . . a witness in a criminal case." 408 U.S. at 614-15 (emphasis added). Still, the opinion strongly suggests that legislators are no more immune from the "obligations" of a subpoena than they are from service of process. *Id.* at 615. Furthermore, the logic of *Gravel* in narrowing the protection of the immunity from arrest clause to freedom from arrest as a defendant in a civil suit implies that even imprisonment for civil contempt is not constitutionally offensive.

The argument against permitting legislators to be held in contempt while their house is in session rests on the same ground as the argument against requiring legislators to testify—to do so would deprive the voters of their elected representative. The argument carries more weight here, however, because a recalcitrant legislator could conceivably find himself imprisoned for contempt for an extended period of time. Related concerns about the traditional remedy of coercive contempt have led courts to be highly circumspect in granting effective relief against executive officials. See, e.g., *Gautreux v. Romney*, 457 F.2d 124 (7th Cir. 1972).

Even if the concern for the electorate is perceived as compelling in this context, it does not establish that members of Congress are outside the reach of the contempt power. First, imprisonment is not the only form of coercive, civil contempt. Salaries may be withheld, or daily fines imposed. See, e.g., *O. FISS, INJUNCTIONS* 739-59 (1972). Second, even if imprisonment is found to be necessary in a particular instance, a recalcitrant congressman's sentence could be suspended until his house is no longer in session. Cf. *Jencks v. Goforth*, 57 N.M. 627, 261 P.2d 655 (1953) (suspended sentence of imprisonment of union official for violation of injunction).

A legislator who desires to contest the validity of a subpoena directed to him as a third party need not risk a contempt citation to secure judicial review. He may move to quash the subpoena, and, if need be, he may obtain appellate review by mandamus. See, e.g., *Gravel v. United States*, 408 U.S. at 608 n.1; *McSurely v. McClellan*, 521 F.2d 1024, 1032 n.25 (D.C. Cir. 1975), *aff'd en banc* by an equally divided vote, 45 U.S.L.W. 2311 (D.C. Cir. Dec. 21, 1976). Cf. *United States v. Nixon*, *supra* at 691-92 (granting appellate review of claim of executive privilege prior to enforcement proceeding); *Nixon v. Sirica*, 487 F.2d 700, 706-07 (D.C. Cir. 1973) (same).

privileges against forced disclosures, whether "established in the Constitution, by statute, or at common law," are "exceptions to the demand for every man's evidence" and "are not lightly created nor expansively construed, for they are in derogation of the search for truth."⁹⁸ The conclusion and implications of *Gravel* are thus essentially correct.

In short, the immunity enjoyed by legislators should be confined to the immunity from civil arrest spoken of in *Long* and *Gravel*. Legislators are amenable to process, both as defendants and witnesses in criminal and civil cases. Consequently, the immunity from arrest clause is not a barrier to judicial discovery of congressional papers.

C. *The Speech or Debate Clause*

The speech or debate clause states that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."⁹⁹ Despite numerous cases¹⁰⁰ and copious commentary¹⁰¹ interpreting the clause, its relationship to subpoenas for congressional papers remains largely unexplored.¹⁰² As the wording of the clause suggests, in order to ascertain whether it protects any or all congressional papers¹⁰³

⁹⁸ *United States v. Nixon*, 418 U.S. 683, 709-10 (1974) (footnote omitted). See 8 J. WIGMORE, *supra* note 67, § 2192, at 70. See also *United States v. Dionisio*, 410 U.S. 1, 9 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972); *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Blair v. United States*, 250 U.S. 273, 281 (1919).

⁹⁹ U.S. CONST. art. I, § 6, cl. 3.

¹⁰⁰ The most recent Supreme Court decisions are *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Brewster*, 408 U.S. 501 (1972); *Gravel v. United States*, 408 U.S. 606 (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).

¹⁰¹ See, e.g., authorities cited in *Congressional Papers*, *supra* note 1, at 59 n.12; Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK U.L. REV. 1019 (1974); Suarez, *Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach*, 20 VILL. L. REV. 97 (1974); Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131 (1910); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960 (1951); 46 MISS. L.J. 1112 (1975); 41 MO. L. REV. 108 (1976).

¹⁰² The federal district court for the District of Columbia has considered the issue in two recent cases, *United States v. Ehrlichman*, Crim. No. 74-116 (D.D.C. July 3, 1974), *aff'd in part*, 44 U.S.L.W. 2543 (D.C. Cir. May 17, 1976), *petition for cert. filed*, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1976), and *Common Cause v. Bailer*, Civ. No. 1887-73 (D.D.C., filed Oct. 5, 1973). The memoranda and orders in these cases dealing with the speech or debate clause barrier to the discovery of congressional papers are discussed in notes 128 & 157 *infra*. See also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 499 n.13 (1975).

¹⁰³ See note 8 *supra*.

from judicial discovery, it is necessary to define the type of "questioning" to which the clause applies, the nature of the "speech or debate" that is protected from such questioning, and how the clause operates in the context of subpoenas to legislative aides and employees.¹⁰⁴

1. What Constitutes Questioning?

The historical background of the speech or debate clause suggests that, at the very least, the "questioning" prohibited by the clause includes attempts to impose criminal liability on legislators for their legislative acts.¹⁰⁵ It was this form of questioning which led to enactment of the provision in the English Bill of Rights of 1688 for freedom of speech, debate and proceedings in Parliament¹⁰⁶—the prefigurement of the article I privilege.¹⁰⁷ Cognizant of this history, the Supreme Court has repeatedly declared that the "central role" of the speech or debate clause is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."¹⁰⁸ Accordingly, the Court has invariably treated criminal accusations of legislators as the type of questioning that triggers the application of the speech or debate clause.¹⁰⁹

¹⁰⁴ Of course, this last factor is only relevant if a member of Congress is not the individual subpoenaed to produce the papers. In practice, most subpoenas duces tecum are directed to file clerks or other employees. See *Congressional Papers*, *supra* note 1, at 61-68, 70-71, 73-74.

¹⁰⁵ Only questioning "for any Speech or Debate" is prohibited by the clause. Thus the clause provides immunity from criminal charges for only certain types of activities by legislators, referred to in text as "legislative acts." For a more complete discussion of the types of activities protected, see text at notes 129-91 *infra*. For a discussion of the general lack of immunity from criminal penalties for nonlegislative acts, see text at notes 61-98 *supra*.

¹⁰⁶ The English privilege was the product of a century-long battle between Parliament and the Tudor and Stuart monarchs, who sought to punish Parliament members for "seditious" and "licentious" speech against the Crown. See, e.g., Reinstein & Silverglate, *supra* note 16, at 1120-40; 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, 3-16 (1968); Yankwich, *supra* note 101, at 961-66; Veeder, *supra* note 101, at 131-40. As formulated in the English Bill of Rights of 1688, the Act states that "the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 W. & M., sess. 2, c. 2, § 1 (1688).

¹⁰⁷ See authorities cited in note 106 *supra*.

¹⁰⁸ *United States v. Johnson*, 383 U.S. 169, 181 (1966), *quoted in* *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975); *Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel v. United States*, 408 U.S. 606, 617 (1972).

¹⁰⁹ E.g., *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966). See note 105 *supra*.

However, the Supreme Court has not confined the meaning of questioning to this indisputable core. Reasoning that the essential purpose of the clause is to foster "the uninhibited discharge of [the] legislative duty,"¹¹⁰ the Court has consistently held that the clause also relieves legislators from the burden of defending their legislative activities against civil complaints initiated by private parties.¹¹¹

Whether the protection against questioning provided in the speech or debate clause extends beyond attempts to impose civil or criminal penalties on legislators is not clear. One of the few cases to address this issue is *Gravel v. United States*.¹¹² *Gravel* arose not from a criminal or civil suit naming a legislator as a defendant, but from a subpoena for testimony. Senator Gravel had convened a night meeting of the Subcommittee on Buildings and Grounds, of which he was chairman, and had placed most of the forty-seven volumes of the Pentagon Papers¹¹³ in the public record. As noted earlier,¹¹⁴ a grand jury, investigating an allegation that Gravel had arranged for the classified study to be published by Beacon Press, subpoenaed an aide to the senator.¹¹⁵ Senator Gravel intervened, and the Supreme Court held on appeal that the inquiry could proceed, but only within certain limits.¹¹⁶ Although the Court was sharply divided over other matters,¹¹⁷ apparently none of the justices doubted that requiring a senator or his aide¹¹⁸ to respond to grand jury interrogation about the senator's legislative activity was a species of questioning under the speech or debate clause.

¹¹⁰ *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

¹¹¹ *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975). *But see* Reinstein & Silverglate, *supra* note 16, at 1172 (suggesting that the line of cases treating immunity from private actions as constitutionally based is "ripe for rethinking"). With respect to both executive-motivated actions and private civil suits, the clause has never been read so broadly that legislators are "absolved of the responsibility of filing a motion to dismiss." 421 U.S. at 511 n.17, *quoting* *Powell v. McCormack*, 395 U.S. 486, 505 n.25 (1969).

¹¹² 408 U.S. 606 (1972).

¹¹³ *See* note 82 *supra*.

¹¹⁴ *See* text accompanying notes 81-88 *supra*.

¹¹⁵ The grand jury's inquiry related to the possible crimes connected with the acquisition and dissemination of the Pentagon Papers. *See* note 82 *supra*.

¹¹⁶ *See* note 165 & accompanying text *infra*.

¹¹⁷ The Chief Justice and Justices Blackmun, Powell and Rehnquist joined in Justice White's opinion for the Court. Justice Brennan, joined by Justices Douglas and Marshall, filed a dissenting opinion; Justices Douglas and Stewart wrote individual dissenting opinions as well. Disagreement centered on which of Senator Gravel's alleged activities in connection with the Pentagon Papers should have been considered legislative acts immune from probing by the grand jury. *See, e.g.,* note 173 *infra*.

¹¹⁸ *See* text accompanying notes 192-203 *infra*.

The Court's assumption that the type of questioning prohibited in the speech or debate clause includes grand jury subpoenas for testimony seems justified. The policy behind the prohibition is not limited to the imposition of sanctions. Typically initiated, directed and dominated by the executive branch,¹¹⁹ grand jury interrogations may intimidate legislators and strike near the heart of the clause's protections.¹²⁰

Moreover, the implication of the Court's holding in *Gravel* is that demands for testimony in *civil* litigation should also fall within the sphere of the questioning prohibited by the speech or debate clause.¹²¹ Whether the questions are asked in front of a grand jury or posed, instead, before a petit jury¹²² in a civil case, questioning literally takes place. More importantly, the generalized concern for the uninhibited discharge of the legislative duty¹²³ applies to any judicial proceeding—criminal or civil—that seeks an explanation of legislative speech or debate.¹²⁴

¹¹⁹ See, e.g., Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L.C. & P.S. 174 (1973); Tigar & Levy, *The Grand Jury as the New Inquisition*, 50 MICH. ST. B.J. 693 (1971); Comment, *Federal Grand Jury Investigations of Political Dissidents*, 7 HARV. C.R.-C.L. REV. 432 (1972); 2 COLUM. J.L. & SOC. PROB. 88, 90 (1966). Of course, there have been "runaway" grand juries, e.g., *In re* Presentation of Special Grand Jury Impaneled Jan. 1969, 315 F. Supp. 662 (D. Md. 1970), and the federal grand jury has been described as "a constitutional fixture in its own right, legally independent of the Executive." *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973).

¹²⁰ See text accompanying notes 108 & 110 *supra*. Had the framers meant to forbid only the imposition of sanctions for legislative speech or debate, they could have followed the example of several state constitutions which provided that "deliberation, speech or debate . . . cannot be the foundation of any accusation or prosecution, action or complaint, in any court or place whatsoever." MASS. CONST. pt. I, art. 21 (1784). The choice of the broad term "questioned in any other place" in the clause suggests that the privilege was meant to reach questioning in front of a grand jury.

¹²¹ Lower courts have assumed that examination of witnesses in civil cases may constitute "questioning" within the meaning of the speech or debate clause. See *McSurely v. McClellan*, 521 F.2d 1024, 1032 (D.C. Cir. 1975), *aff'd en banc by an equally divided vote*, 45 U.S.L.W. 2311 (D.C. Cir. Dec. 21, 1976) (interrogatories, depositions and civil trial); *Dickey v. CBS, Inc.*, 387 F. Supp. 1332 (E.D. Pa. 1975) (dictum) (deposition). Cf. *Common Cause v. Bailar*, Civ. No. 1887-73 (D.D.C., filed Oct. 5, 1973) (Memoranda & Orders of July 30, 1975 and Mar. 1, 1976) (production of documentary evidence), *reprinted in part in* JOINT COMM. ON CONG. OPERATIONS, REPORT PURSUANT TO SECTION 402(a)(2) OF THE LEGISLATIVE REORGANIZATION ACT OF 1970 IDENTIFYING COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS 50-57 (1976).

¹²² Demands for testimony before a judge, at a deposition, or via interrogatories should also be included in the clause's protection.

¹²³ See text accompanying note 110 *supra*.

¹²⁴ The inhibition of the legislative duty resulting from the threat of criminal proceedings and damage suits is plain, but other forms of harassment can similarly jeopardize freedom of speech and debate. See *United States v. Brewster*, 408 U.S. 501, 555-56 (1972) (White, J., dissenting). The executive can cause members of Congress to explain their legislative activities to grand juries ostensibly or actually concerned with the crimes of nonlegislators. Cf. *Gravel v. United States*, 408 U.S. 606 (1972) (senatorial aide called before grand jury to testify about Senator's activities). Private parties seeking explanations of why certain legisla-

In short, *Gravel* highlights what has been termed the "evidentiary aspect"¹²⁵ of the speech or debate privilege. Not only does the clause mean that the content of a legislator's speech or debate may not be made the basis of either civil or criminal liability,¹²⁶ it has also been construed to mean that legislators may not be required to answer questions about their legislative activities.¹²⁷

tion was passed or the scope of its coverage can demand that legislators testify as to their votes or intent. *Cf. Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 516 (1975) (Marshall, J., concurring) ("freedom from vexatious and distracting litigation").

It should be noted, however, that the broad description of the purpose of the speech or debate clause and the corresponding extension of "questioning" to encompass subpoenas for testimony is debatable. The specific evil that led to the clause was the British crown's efforts to impose criminal liability for legislative speech and debate. *See* note 106 *supra*. Thus, the "questioning" denominated in the speech or debate clause, it might be argued, consists of holding legislators criminally responsible for speech or debate, or, at most, of imposing criminal or civil liability for legislative activity. *Cf. Reinstein & Silverglate, supra* note 16, at 1171-76 (arguing that speech or debate immunity is limited to criminal proceedings). While this construction of the clause would permit the type of "vexatious and distracting litigation" referred to above, it could be argued that civil and criminal immunity is ample protection for speech or debate. Moreover, one can hold this narrow view of "questioning," but maintain that protection from the more subtle forms of harassment and interference with the legislative process is more appropriately secured by judicial development of a common law privilege relating to subpoenas seeking testimony about legislative activities in cases where the subpoenaed persons are not parties to the litigation. *Cf. id.* at 1174 (advocating a common law rather than constitutional privilege against civil liability of legislators).

Although it is not too late to suggest that the assumption that "questioning" includes being subpoenaed be reconsidered, the analysis in this Article follows *Gravel* and therefore does not pursue the federal common law privilege that might follow if this assumption were relaxed. *See* notes 205-43 & accompanying text *infra*.

¹²⁵ *United States v. Craig*, 528 F.2d 773, 777 (7th Cir.), *reheard en banc and decided on other grounds*, 537 F.2d 957 (1976), U.S. *appeal pending*. Other constitutional protections have evidentiary dimensions as well. The freedom of expression clause, it has been suggested, establishes evidentiary as well as substantive protections. *See* Note, *Conspiracy and the First Amendment*, 79 *YALE L.J.* 872, 894-95 (1970). The evidentiary implications of the fourth, fifth and sixth amendments are well recognized, but, of late, are conceived as increasingly dispensable remedies fashioned to enforce substantive protections. *See, e.g., United States v. Calandra*, 414 U.S. 338 (1974); *Harris v. New York*, 401 U.S. 222 (1971).

¹²⁶ *United States v. Craig*, 528 F.2d 773 (7th Cir.), *reheard en banc*, 537 F.2d 957 (1976), U.S. *appeal pending*.

¹²⁷ *Id.*; *McSurely v. McClellan*, 521 F.2d 1024, 1032 (D.C. Cir. 1975), *aff'd en banc by an equally divided vote*, 45 U.S.L.W. 2311 (D.C. Cir. Dec. 21, 1976) (interrogatories, depositions and civil trial); *Dickey v. CBS, Inc.*, 387 F. Supp. 1332 (E.D. Pa. 1975) (dictum) (deposition); *United States v. Ehrlichman*, Crim. No. 74-116 (D.D.C. July 3, 1974) (Order & Memorandum of July 3, 1974), *aff'd in part on other grounds sub nom. United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976). *Cf. Common Cause v. Bailar*, Civ. No. 1887-73 (D.D.C., filed Oct. 5, 1973) (Memoranda & Orders of July 30, 1975 and Mar. 1, 1976) (documentary evidence), *reprinted in part in* JOINT COMM. ON CONG. OPERATIONS, *supra* note 121, at 50-57.

Except for *Gravel*, however, the Supreme Court cases apparently establishing evidentiary protections for speech or debate do so in the context of actions

Finally, in terms of the clause's wording and policy, there is no reason to distinguish between a subpoena for a personal testimony and one for documentary evidence. Both forms of discovery may threaten freedom of speech or debate in demanding out-of-chambers explanations of purely legislative activities. Consequently, subpoenas duces tecum, like subpoenas ad testificandum, have been held to constitute "questioning" within the meaning of the speech or debate clause.¹²⁸

2. What Constitutes Speech or Debate?

Of course, not all "questioning" is prohibited by the speech or debate clause. Only that "for . . . Speech or Debate" is pro-

against legislators. For example, the prohibition on using a congressman's vote as evidence of a bribe, *e.g.*, *United States v. Brewster*, 408 U.S. 501, 525 (1972), can be understood as resting on the fear that were such evidence admissible, the congressman might be convicted for the way he voted rather than for the bribe. Even *Gravel* can be fit into this interpretation of the evidentiary protections as being necessary only to prevent the punishment of a legislator for the content of his speech or debate. Since the grand jury could conceivably have indicted *Gravel* (given the Court's application of its definition of speech or debate) for his role in the acquisition and dissemination to the general public of classified information, questioning as to what transpired at the subcommittee meeting was forbidden merely to preclude an indictment resting even in part on the grand jurors' disapproval of the senator's convening and conducting the unusual meeting. *But see id.* at 615 (accepting as "incontrovertible" *Gravel's* claim that the clause "protects him from criminal or civil liability and from questioning") (emphasis added). If the "evidentiary" speech or debate clause cases are limited in this way, testimony about speech or debate could be compelled as long as there is no possibility of civil liability and all legislators colorably involved in the conduct under investigation are granted use immunity by the prosecutor. *But see* note 128 & accompanying text *infra*.

¹²⁸ This is the conclusion that the district court, relying on language from *Gravel*, seems to have reached in connection with the Liddy subpoena for congressional testimony, *see* text accompanying notes 22-27 *supra*, in *United States v. Ehrlichman*, Crim. No. 74-116 (D.D.C. July 3, 1974), *aff'd in part on other grounds sub nom.* *United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976). Immediately after invoking but not analyzing the publication clause, *see* note 26 *supra*, Judge Gesell devoted more careful attention to the speech or debate clause, reasoning:

Moreover, since the requested transcript would reveal "the deliberative and communicative processes by which Members [of Congress] participate in committee and House proceedings. . .", *judicial efforts to compel production of that document would, under the present circumstances, also violate the Speech and Debate Clause. . . .* That provision clearly prohibits the Court from forcing the Chairman of the Subcommittee or the Speaker to answer questions concerning the testimony at issue . . . and it would appear to follow that they cannot be required to produce at trial the official record of that testimony or to put the issue to a vote of the full House.

Memorandum and Order, *supra* note 26, at 3-4 (citations omitted; emphasis added).

The significance of the limiting words "under the present circumstances" is unclear. While they could relate to the defendant's failure to make a proper showing of need, *see* note 27 *supra*, it seems more likely that they are merely intended to indicate that Congress' investigation into the conduct of the intelligence community was within Congress' investigatory power and therefore within the definition of speech or debate.

scribed, and conduct outside this sphere may become the subject of inquiry or liability without offending the speech or debate clause. In determining what activities undertaken by members of the legislature constitute speech or debate, the Supreme Court has generated various formulae¹²⁹ but has provided little in the way of explicit criteria for applying these formulae. Although not a case concerning a subpoena for congressional papers,¹³⁰ *Eastland v. United States Servicemen's Fund*,¹³¹ the Court's most recent encounter with the speech or debate clause, provides perhaps the most comprehensive discussion of the definition of speech or debate. Senator Eastland, as chairman of the Senate Subcommittee on Internal Security, had issued a subpoena ordering a bank to produce "any and all records" involving the account of the United States Servicemen's Fund, an organization suspected of subversive activities. Arguing that the subpoena infringed its first amendment rights and those of its members, the Fund sought declaratory and injunctive relief against the subpoena's enforcement.¹³² The district court denied the relief, and the court of appeals reversed, holding that subcommittee members could be restrained from invading the constitutional rights of the organization that might result from enforcing the subpoena.¹³³ Over the lonely dissent of Justice Douglas, the Supreme Court in turn reversed the court of appeals and held that under the speech or debate clause, the senators were immune from civil suit for acts committed in the performance of their legislative duties.¹³⁴ The Court stated what has become the general rule for ascertaining whether an activity constitutes speech or debate:

¹²⁹ See, e.g., Note, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55 (1973), where the Court's various descriptions of speech or debate have been compiled:

(a) anything "generally done in a session of the House by one of its members in relation to the business before it," . . . ; (b) conduct within the "sphere of legitimate legislative activity," . . . ; and (c) actions which are "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to . . . matters which the Constitution places within the jurisdiction of either House."

Id. at 226-27 n.35 (citations omitted).

¹³⁰ The plaintiff in *Eastland* had attempted to take the deposition of a Senate employee and to require him to produce Senate documents. See *Congressional Papers*, *supra* note 1, at 73. The district court denied plaintiff's motion to compel discovery, stating that the information sought by the plaintiff had "been received by [the employee] pursuant to his official duties as a staff employee of the Senate" and that "[as] such, the information is within the privilege of the Senate." 421 U.S. at 499 n.13. The court of appeals and the Supreme Court permitted this statement to stand without discussion. *Id.*

¹³¹ 421 U.S. 491 (1975).

¹³² *Id.* at 496.

¹³³ *Id.* at 496-500.

¹³⁴ The chief counsel to the subcommittee shared the senators' immunity. *Id.* at 507.

The question to be resolved is whether the actions of the [senators] fall within the "sphere of legitimate legislative activity." . . . In determining whether particular activities other than literal speech or debate fall within the "legitimate legislative sphere," we look to see whether the activities took place "in a session of the House by one of its members in relation to the business before it." . . . More specifically, we must determine whether the activities 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."¹³⁵

Finding the subcommittee investigation to be within Congress' power to gather information in aid of possible legislation, and the issuance of compulsory process to be an essential part of this investigatory power, the Court in *Eastland* readily classified the subcommittee's subpoena to the bank as speech or debate.¹³⁶ Once this classification was made, it followed that the legislative act of issuing a subpoena could not be "questioned" by a civil suit.¹³⁷

Although the *Eastland* case involved questioning in the form of a civil suit rather than a subpoena for documents,¹³⁸ a subpoena for documents may also constitute forbidden questioning under the speech or debate clause if the documents evidence conduct which is part of legislative speech or debate. The *Eastland* definition of which activities are within the sphere of speech or debate is therefore useful in determining whether a particular document is protected from discovery by the clause. As an example of the application of the *Eastland* definition to congressional papers, it may be instructive to analyze the protection given papers generated by congressional investigations, for many subpoenas of legislative papers are directed towards the discovery of what congressional investigators have learned or how they have acquired their information.¹³⁹

¹³⁵ *Id.* at 501-04 (citations and footnotes omitted).

¹³⁶ *Id.* at 504-07.

¹³⁷ In reality, this conclusion is less obvious than the Court's opinion suggests. Prior Supreme Court cases had established only that the freedom of speech or debate includes an immunity from liability for damages caused by legislative conduct. See text accompanying note 111 *supra*. *Eastland* extends the immunity in civil cases to declaratory and injunctive relief as well. Whether so broad a construction of "questioning" is appropriate is debatable, since the specificity of these remedies makes them less an inhibition to vigorous legislation than the threat of damage judgments considered in the earlier cases. See note 111 *supra*; 55 NEB. L. REV. 299, 312 (1976).

¹³⁸ See text accompanying note 128 *supra*.

¹³⁹ See, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491,

Congressional investigations which produce papers later subpoenaed tend to fall within the "sphere of legitimate legislative activity" demarcated in *Eastland*. Congress' power to investigate is penetrating and far-reaching,¹⁴⁰ and the Court has yet to find a duly authorized¹⁴¹ investigation to be in excess of legislative power.¹⁴² Even the fact that the investigation may infringe the constitutional rights of those under investigation does not affect the determination that it constitutes "legitimate legislative activity"¹⁴³ in the context of the speech or debate clause. *Eastland*

499 n.13 (1975); *United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Christoffel v. United States*, 200 F.2d 734 (D.C. Cir. 1952), *vacated and remanded*, 345 U.S. 947 (1953); *United States v. Hoffa*, 205 F. Supp. 710 (S.D. Fla.), *cert. denied sub nom. Hoffa v. Lieb*, 371 U.S. 892 (1962); *Congressional Papers*, *supra* note 1, at 66-75.

¹⁴⁰ On the history and scope of the congressional power to investigate, see, e.g., R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 15-48 (1974); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 271-74 (1970); 1 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 351-54 (3d ed. 1967); J. HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS* (1976).

¹⁴¹ The Court may limit the scope of a committee's investigatory authority to something narrower than a commission to explore all questions with which Congress is competent to deal—as by holding that the committee is bound by the parent body's authorizing resolution, see, e.g., *Sacher v. United States*, 356 U.S. 576 (1958); *United States v. Rumely*, 345 U.S. 41 (1953), or by the chairman's statement of the scope of inquiry, see, e.g., *Gojack v. United States*, 384 U.S. 702 (1966); *Deutch v. United States*, 367 U.S. 456 (1961). Thus, in *Eastland*, the Court noted that the subcommittee "was acting under an unambiguous resolution from the Senate authorizing it to make a complete study of the 'administration, operation, and enforcement of the Internal Security Act of 1950 [50 U.S.C. §§ 781 *et seq.*]." 421 U.S. at 506.

However, when the Court has read committee authorizations narrowly, it has usually done so in the context of allowing a defense to witnesses charged with contempt of Congress. See, e.g., *Scull v. Virginia*, 359 U.S. 344, 349 (1959). The limitations on Congress' power to hold in contempt a person hailed before a committee may be more stringent than the constraints upon the committee's power to investigate. Thus, although a committee might not have a sufficiently clear mandate to warrant citing a witness for contempt, it may still be engaging in "speech or debate" in examining the witness. See generally *Reinstein & Silverglate*, *supra* note 16, at 1165-68; see also note 143 *infra*.

¹⁴² *But cf.* *DeGregory v. New Hampshire Att'y Gen.*, 383 U.S. 825 (1966) (treating investigation of state legislative committee as exceeding legislative power); *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968) (same); *Liveright v. Joint Comm.*, 279 F. Supp. 205 (M.D. Tenn. 1968) (same).

¹⁴³ 421 U.S. at 509-10. As a consequence, the investigation may not be enjoined and, presumably, it may not give rise to liability for damages on the part of the participating legislators. See *id.* But affected individuals may raise the unconstitutionality of the investigation as a basis for declining to cooperate with the investigators. In evaluating constitutionality for this purpose, the Court may consider the motivation for the investigation and demand a compelling state interest to justify a significant impact on constitutional rights. See *id.* at 509 n.16; *id.* at 515-16 (concurring opinion); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1310-12 (1970). *But see* T. EMERSON, *supra* note 140, at 274-79.

confirms that it is enough that the subject of the inquiry is one "on which legislation could be had."¹⁴⁴ Therefore, papers generated by a duly authorized investigation cannot be excluded from the protection of the speech or debate clause on the ground that the investigation generally exceeds legislative limits and is not part of "speech or debate."

The inquiry is not over at this point, however. The mere fact that a document is in some sense related to the work of a congressional investigating committee does not ensure that the document is privileged under the speech or debate clause. Whether congressional papers are privileged depends on whether the *specific* conduct giving rise to the papers is within the sphere of legitimate legislative activity. Despite the broad scope of Congress' power to gather information to aid potential legislation, not all conduct relating to investigations or legislation constitutes speech or debate. The test is a formal one: Where the conduct in question takes the form of an official act within the legislative domain, that conduct is conclusively established as speech or debate.¹⁴⁵ For instance, *Gravel* reveals that when a committee chairman convenes a committee meeting and addresses the committee, his conduct is speech or debate irrespective of his reasons

¹⁴⁴ 421 U.S. at 506. Since federal legislation, in the form of a proposed constitutional amendment if nothing else, "could be had" on almost any subject, this limitation on congressional investigations is more illusory than real.

The Supreme Court's observations that Congress does not have "general" power to inquire into private affairs," *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927), nor "the power to expose for the sake of exposure," *Watkins v. United States*, 354 U.S. 178, 200 (1957) (dictum), could be interpreted to mean that an improperly motivated investigation exceeds legislative power. See T. EMERSON, *supra* note 140, at 273 (describing rather than endorsing this approach); A. BICKEL, *supra* note 53, at 208 (same). However, as a practical matter, this purported limitation on the investigative power has not proved significant, see T. EMERSON, *supra* note 140, at 273-74, and, as a formal matter, the Court has abandoned it. *Eastland* indicates that any investigation that bears on potential legislation is not bent on "exposure for exposure's sake." 421 U.S. at 506. In *Eastland*, plaintiff alleged that the "sole purpose" of the investigation was to force "public disclosure of beliefs, opinions, expressions and associations of private citizens which may be unorthodox or unpopular." *Id.* at 508. In response, the Court insisted that "[t]he claim of an unworthy purpose does not destroy the privilege." *Id.*, quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). See also *Watkins v. United States*, 354 U.S. 178, 200 (1957) ("motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served," *id.*). But see Ely, *supra* note 143, at 1308-13; Shapiro, *Judicial Review: Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations*, 15 VAND. L. REV. 535 (1962).

¹⁴⁵ The courts will not probe further to decide whether the trappings of speech or debate are being adopted to advance some ulterior, nonlegislative purpose. See, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Gravel v. United States*, 408 U.S. 606 (1972).

for calling the meeting and regardless of the connection between his remarks and the committee's work.¹⁴⁶ Speaking before an officially convened group of legislators is, on its face, an activity constituting speech or debate, and documentation of this conduct should be privileged from discovery.

The opposite result is reached where conduct is, on its face, personal or political—even though legislators or legislative employees may participate in it. False imprisonment,¹⁴⁷ unreasonable search and seizure,¹⁴⁸ wrongful exclusion of a representative-elect,¹⁴⁹ receipt of a bribe,¹⁵⁰ arranging for commercial publication of classified information presented to a con-

¹⁴⁶ Surely it would not have been implausible to suggest that Senator Gravel's presentation of the Pentagon Papers to a hastily convened nighttime meeting of the Subcommittee on Buildings and Grounds was a none too subtle attempt to cloak the dissemination of classified information in the garb of speech or debate. Yet, the Court insisted that the senator's contention that the unusual meeting was speech or debate was "incontrovertible." 408 U.S. at 615. Cf. *United States v. Brewster*, 408 U.S. 501, 526 (1972) (by implication forbidding the prosecution in a bribery case to "inquire into how [the Senator] spoke, how he debated, how he voted, or anything he did in the chamber or in committee," *id.*).

¹⁴⁷ *Kilbourn v. Thompson*, 103 U.S. 168 (1881). *Kilbourn* was an action to recover damages for false imprisonment. The Court held that the speech or debate clause afforded the defendant members of Congress a good defense since they had taken no part in Kilbourn's arrest other than to vote that the sergeant at arms accomplish it. The sergeant at arms, however, was held to answer for carrying out their unconstitutional directive, and Kilbourn later recovered \$20,000 from him. See *Eastland v. United States Servicemen's Fund*, 421 U.S. at 517 (Marshall, J., concurring).

¹⁴⁸ *Dombrowski v. Eastland*, 387 U.S. 82 (1967). In *Dombrowski*, a complaint against Senator Eastland for allegedly subpoenaing documents in violation of the fourth amendment was dismissed on the basis of his speech or debate privilege, because voting and signing a subpoena was a legislative act. However, the Court held that the privilege did not protect the committee counsel who was charged with conspiring with state officials to carry out an illegal seizure of records that the subcommittee sought for its own proceedings. See also *Eastland v. United States Servicemen's Fund*, 421 U.S. at 514 n.1 (Marshall, J., concurring).

¹⁴⁹ *Powell v. McCormack*, 395 U.S. 486 (1969). *Powell* resulted from a House resolution excluding representative-elect Adam Clayton Powell, Jr., from the House and declaring his seat vacant as a result of Powell's alleged misuse of House funds and unwarranted assertions of immunity from process in New York courts. Powell (and 13 voters in his district) sought declaratory and injunctive relief against the majority speaker, the clerk, the sergeant at arms and the doorkeeper of the House. The Court held that the exclusion was inconsistent with the constitutional provisions stating the qualifications for membership in the House. It found that the speech or debate clause justified a dismissal of the action against members of Congress but did not bar proceedings against the congressional employees. Although the employees were "acting pursuant to express orders of the House," that did not "bar judicial review of the constitutionality of the underlying legislative decision." *Id.* at 504.

¹⁵⁰ *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966). Acceptance of the bribe is not speech or debate, but voting in accordance with the bribe is. See *United States v. Brewster*, 408 U.S. at 527.

gressional subcommittee,¹⁵¹ and public printing of a subcommittee report which invades privacy¹⁵² have all been held to comprise personal or political, as opposed to legislative, conduct; documentation of such conduct is therefore not privileged from discovery.

These holdings do not undermine the principle that speaking or debating¹⁵³ in favor of, or voting to authorize, tortious, unconstitutional conduct is protected under the speech or debate clause. Rather, the holdings reveal that legislators are stepping outside the realm of speech or debate when they engage in such conduct before the debating and voting are underway, or when, after the speaking or debating is concluded, they participate in the execution of the actionable conduct.¹⁵⁴ As a result, papers revealing nothing more than the participation of congressmen, congressional employees, or anyone else in such nonlegislative undertakings cannot claim the protection of the speech or debate clause. For

¹⁵¹ *Gravel v. United States*, 408 U.S. 606 (1972). Scholarly commentary has tended to be highly critical of this aspect of the *Gravel* opinion. Reinstein & Silverglate, note 16 *supra*; Cella, note 101 *supra*; *Legislative Immunity*, *supra* note 93, at 148-49.

¹⁵² *Doe v. McMillan*, 412 U.S. 306 (1973). *Doe* arose out of a House committee report on the District of Columbia schools which, "to 'give a realistic view,'" *id.* at 308, included derogatory information about the performance and disciplinary problems of certain students. On behalf of the students mentioned by name in the report, petitioners brought an action against the committee members and staff, the public printer and the superintendent of documents, seeking damages for invasion of privacy and an injunction against further dissemination of the report. The court of appeals affirmed the district court's dismissal of the complaint on the ground that committee members and staff were protected by the speech or debate clause and the others by general principles of governmental immunity. Justice White wrote for the Court, affirming the dismissal with respect to the committee members and staff: The complaint failed to allege that they did anything more than compile the report, refer it to the House, and vote for its publication—all official legislative acts protected by the clause. But, though the Court conceded the "importance of informing the public about the business of Congress," *id.* at 314, it held that public distribution of the report was not necessarily "an essential part of the legislative process," *id.* at 314-15, and that neither the speech or debate clause nor other principles "immunize those who publish and distribute [as distinguished from voting to publish and distribute] otherwise actionable materials beyond the reasonable requirements of the legislative function." *Id.* at 315-16. Thus, the Court reversed the dismissal as to the public printer and superintendent of documents to allow the lower courts to determine "whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded." *Id.* at 324-25. See P. BREST, *PROCESSES OF CONSTITUTIONAL DECISION-MAKING* 380-81 (1975).

¹⁵³ For additional examples of acts found to be "clearly" legislative, see *United States v. Brewster*, 408 U.S. 501, 516 n.10 (1972). For other examples of "political" rather than "legislative" acts, see *id.* at 512 (preparing speeches for delivery outside the legislature, making inquiries for constituents, and the like); *Schiaffo v. Helstoski*, 492 F.2d 413 (3d Cir. 1974) (abuse of franking privilege); *Dickey v. CBS, Inc.*, 387 F. Supp. 1332 (E.D. Pa. 1975) (televised speech outside of Congress).

¹⁵⁴ See notes 147-52 *supra*; see also *Doe v. McMillan*, 412 U.S. 306, 315 (1973); *Gravel v. United States*, 408 U.S. 606, 618-22 (1972).

example, an extant and unshredded memorandum from a congressional investigator to a committee chairman, describing (unlikely as this may be) the installation of a bugging device, the breaking and entering of a home or office, the warrantless seizure of personal possessions, or the detention and grilling of a citizen should not be treated as speech or debate.¹⁵⁵ Such materials stand in sharp contrast to records of votes, transcripts of committee hearings, drafts of speeches intended for delivery to the full House, papers acquired by Congress through the issuance of a legislative subpoena,¹⁵⁶ and other documentary evidence of what is clearly speech or debate.¹⁵⁷

Although the dichotomy between legislative and nonlegislative activities outlined in *Eastland* is easy to state in the abstract, there may well be instances in which the differentiation of speech or debate from mere political or personal conduct will be exceedingly difficult to perform.¹⁵⁸ But the boundary between

¹⁵⁵ Cf. *McSurely v. McClellan*, 521 F.2d 1024 (D.C. Cir. 1975), *aff'd en banc by an equally divided vote*, 45 U.S.L.W. 2311 (D.C. Cir. Dec. 21, 1976) (congressional perusal of items illegally obtained by state officials).

¹⁵⁶ The fact that the committee's decision to subpoena a specific witness or particular document may have been intended to, or might have the effect of, stifling freedom of expression or another constitutional right would not make the acquisition of the document or the transcript of the witness' testimony any the less speech or debate. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975) ("[t]he propriety of making USSF a subject of the investigation and subpoena is a subject on which the scope of our inquiry is narrow," *id.*). At most, it would provide a defense for a witness who refused to appear or to produce the document for the committee. See note 143 *supra*; Ely, *supra* note 143, at 1309-10.

On the other hand, the committee's seizure, inspection, or dissemination of materials known to be "plainly and unmistakably unrelated to the congressional inquiry" should not, under the reasoning in *Eastland* and its predecessors, be treated as legitimate legislative activity within the "finite limits" of the speech or debate clause. *McSurely v. McClellan*, 521 F.2d 1024, 1051-52 (D.C. Cir. 1975) (Leventhal, J., dissenting) (emphasis in original), *aff'd en banc by an equally divided vote*, 45 U.S.L.W. 2311 (D.C. Cir. Dec. 21, 1976) (Leventhal, J., for the majority).

¹⁵⁷ The apparent simplicity of this statement disguises the confusion sometimes engendered by the relation between the subpoenaed congressional materials and the underlying conduct. For instance, the written report of an unreasonable search and seizure prepared by a committee investigator and sitting in the files of the committee is not privileged, since its production would not cause a questioning of speech or debate—an unreasonable search not being a part of speech or debate. See note 148 & accompanying text *supra*. But if the report is placed in the record of an official session of the committee, it becomes documentary evidence of the committee proceedings—proceedings that do constitute speech or debate. See note 146 *supra*. In these circumstances, the report partakes of the speech or debate privilege. *Id.*

¹⁵⁸ In some respects, *Common Cause v. Bailar*, Civ. No. 1887-73 (D.D.C., filed Oct. 5, 1973), is a case arising out of this twilight zone. Originally filed on October 5, 1973, this action seeks declaratory and injunctive relief against Postmaster General B. F. Bailar, and Secretary of the Treasury William E. Simon. The complaint alleges that certain uses of the franking privilege, by which members of Congress may send materials through the mails free of charge, see Franking

legislative and nonlegislative conduct must be drawn; once

Act of 1973, 39 U.S.C. § 3210 (Supp. V 1975), abridge first and fifth amendment rights, violate statutory duties of the Postmaster General and of the Secretary of the Treasury, and constitute an unlawful appropriation of public funds for nonpublic purposes.

In an effort to establish that the franking statute unconstitutionally disadvantages candidates challenging incumbent congressmen, Common Cause subpoenaed not only the records showing which senators and representatives used the franking privilege and to what extent, but also papers relating to complaints of misuse made to the Senate Select Committee on Standards and Conduct, the House Committee on Standards, and a House commission established to oversee the use of the franked mails. The legislative employees on whom the subpoenas were served objected to production on a variety of grounds. The subpoenaed House employees contended, *inter alia*, that the testimony and documents sought with respect to the activities of the House Committee on Standards and the House Commission on Congressional Mailing Standards, which is empowered to refer "serious and willful" violations of the franking statute to the Committee on Standards, 39 U.S.C. § 3210(a) (Supp. V 1975), were within the scope of the speech or debate clause, since the activities of these organs of Congress are in furtherance of Congress' disciplinary powers, *see* note 16 *supra*, and intended to remedy franking abuses. Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery and Production of Documents by Five Employees of the House of Representatives at 24-28, *Common Cause v. Bailar*, *supra*. Plaintiff's rejoinder was that this argument, "taken to its logical conclusion, would mean that Congress could statutorily expand the scope of the Speech or Debate Clause to cover any activity merely by making that activity subject to congressional discipline and entrusting its oversight to a House Commission." Reply to Memorandum in Opposition to Plaintiffs' Motion to Compel Testimony and Production of Documents by Five Employees of the House of Representatives at 18, *Common Cause v. Bailar*, *supra*.

The court disposed of the speech or debate clause objection to discovery in a single, cryptic paragraph:

Likewise, the claims of constitutional immunity are without weight. The *Brewster* case and others clearly demonstrate that congressional immunity is limited to legislative activities and the claimed use of the franking privilege for political activities is not covered even by a most expansive definition of the Speech and Debate Clause. That the use of the franking privilege is not within the language of Article I, Section 5 [the grant of power to each House to govern the behavior of its members], requires no discussion.

Memorandum & Order of July 30, 1975, at 5, *Common Cause v. Bailar*, *supra*, reprinted in *JOINT COMM. ON CONG. OPERATIONS*, *supra* note 121, at 52. Although the court proceeded to grant plaintiffs' motion to compel production of various congressional documents concerning the use and effects of the franking privilege, it apparently had second thoughts. Some months later, in a turbid opinion relating to precisely the same type of documents compiled by the Senate Select Committee on Standards and Conduct, the same court found the Senate's virtually identical claim of privilege weighty enough to accept, at least provisionally. This time the three-judge court wrote:

We have given careful thought to the contentions [concerning the speech or debate privilege claimed for the Senate documents]. It is conceded that the documents themselves are relevant to the issues in this case. Whether the documents are privileged may be determined by whether they relate to the business of Senators or the business of candidates for the Senate. This approaches a capsule description of the ultimate issue in this case. We can agree that a privilege for Senatorial documents exists, without deciding that these documents are Senatorial and therefore privileged.

At this stage in the lawsuit we think it better to act as if the documents were Senatorial and privileged, with the ultimate decision reserved. Inspection by plaintiffs' counsel, even with all safeguards, would

drawn,¹⁵⁹ it is easy enough to conclude that papers pertaining

in some sense defeat the privilege, if in ultimate analysis these documents were found to be properly entitled to protection. Memorandum & Order, Mar. 1, 1976, at 4-5, *Common Cause v. Bailar*, *supra*. The court then proceeded to order the committee to produce summaries of the subpoenaed documents, but not the internal memoranda themselves. *Id.* The proceedings in *Bailar* are described in more detail in JOINT COMM. ON CONG. OPERATIONS, *supra* note 121, at 45-57.

Plainly, the *Bailar* court's analysis of congressional privilege as it relates to Common Cause's subpoenas is something less than a model of clarity. With respect to the subpoenas for papers reflecting the extent and timing of congressional use of the franking privilege, wholesale discovery should have been compelled only if mailed communications from a legislator to persons outside the Congress can never qualify as speech or debate. In that event, the information concerning particular mailings would be documentary evidence of purely non-legislative conduct, and therefore amenable to subpoena. If, however, some mailings count as speech or debate, then compelling production of documentary evidence about these mailings invades speech or debate. Thus, the relevant issue for speech or debate purposes is the status of mailings, not who pays for them. The question of financing is important only in connection with the allegations of statutory and constitutional violations. Whether all mailed communications from Congress to the public are outside the sphere of speech or debate is not entirely free from doubt. For a defense of the "informing function" of Congress and an argument suggesting that at least some newsletters should be treated as speech or debate, see, e.g., Reinstein & Silverglate, *supra* note 16, at 1142-44, 1148-53. But see *Doe v. McMillan*, 412 U.S. 306 (1973) (public printing of actionable material); *United States v. Brewster*, 408 U.S. 501, 512 (1972) (dictum declaring that "so-called 'newsletters' to constituents, news releases, and speeches delivered outside the Congress" are not entitled to speech or debate protection, *id.*).

The records concerning complaints to the House Commission and the Senate and House committees on standards are more clearly related to speech or debate, and, hence, immune from discovery. These records document official activity well within the jurisdiction of each house as enumerated in article I, section 5 of the Constitution to prescribe standards for the conduct of its members and to discipline them. The *Bailar* court's observation that "the use of the franking privilege is not within the language of Article I, Section 5," Memorandum & Order, July 30, 1975, reprinted in JOINT COMM. ON CONG. OPERATIONS, *supra* note 121, at 52, is no answer to the contention that exposure of the disciplinary process with respect to violations of the franking statute amounts to a questioning of speech or debate. The argument that any activity can be brought within Congress' disciplinary power, and therefore within the speech or debate privilege, is overstated. It is the exercise of the disciplinary power—not the activity subject to discipline—that is included in the definition of speech or debate. It is true, however, that the copies of papers evidencing misconduct contained in the files of the disciplinary committees are privileged, since they also amount to documentary evidence of legislative conduct—gathering information for disciplinary purposes—which meets the formal test for speech or debate. See text accompanying notes 145-46 *supra*. Consequently, Congress could, at least in theory, withhold certain evidence of wrongdoing by use of the disciplinary process.

¹⁵⁹ Because congressional papers, under the analysis presented here, partake of the speech or debate privilege through the underlying conduct they document, a proper classification of the actions taken by legislators and legislative personnel is vital if congressional papers are to be protected adequately by the speech or debate clause. It should therefore be emphasized that the discussion of *Eastland*, *Gravel*, and other speech or debate clause cases presented in the text has been

entirely to nonlegislative matters are not immune from discovery by virtue of the speech or debate clause.

A more difficult question is whether congressional papers that do reflect speech or debate may nonetheless be amenable to subpoena in certain circumstances if they also pertain to non-legislative behavior. The query, stated another way, is whether the privilege of speech or debate is absolute¹⁶⁰ as it pertains to

predominantly descriptive. For more critical treatment of the Court's recent performance in this area, see, e.g., Cella, note 101 *supra*; Suarez, note 101 *supra*; *Hearings Before the Joint Comm. on Gov't Operations*, 93d Cong., 1st Sess. (1973); 46 *MISS. L.J.* 1112 (1975); 41 *MO. L. REV.* 108 (1976); 55 *NEB. L. REV.* 299 (1976).

¹⁶⁰ A privilege is not absolute, as the term is used here, if (1) it may be defeated by a showing of overriding considerations in a particular case, (2) it is subject to categorical exceptions, or (3) it is conditioned on good motives and reasonable behavior. A privilege that exhibits the first characteristic may be called *prima facie* rather than absolute. See Wasserstrom, *The Obligation to Obey the Law*, 10 *UCLA L. REV.* 780 (1963). It is susceptible to *ad hoc* balancing. See J. RAWLS, *A THEORY OF JUSTICE* 34 (1971); Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 912 (1963). The freedom of a landowner to use his property as he wishes exemplifies a *prima facie* privilege, for it can be overcome by a determination that the injuries caused to adjoining property owners outweigh the social utility of the use in question. See, e.g., *Vowinckel v. N. Clark & Sons*, 216 Cal. 156, 13 P.2d 733 (1932). A privilege that possesses the second characteristic is the product of definitional balancing—although the privilege, on its face, is applicable, exceptions have been fashioned in order to accommodate competing interests. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *HARV. L. REV.* 1482 (1975); Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 *CALIF. L. REV.* 935 (1968). Privileges of this second type may also be called *prima facie*, and are exemplified by evidentiary privileges for various confidential communications which, like the attorney-client privilege, are subject to certain categorical exceptions. See, e.g., Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 *HARV. L. REV.* 730 (1964) [hereinafter cited as *Future Crime or Tort Exception*]. Finally, a privilege that has the third characteristic may be called a qualified, conditional or defeasible privilege. See W. PROSSER, *THE LAW OF TORTS* § 115, at 786 (4th ed. 1971). For example, the first amendment privilege to libel public officials is qualified, since the privilege is overcome by a showing of actual malice. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

These categories of *prima facie* and qualified privileges may overlap, and some writers may describe *prima facie* privileges of the second type as "absolute," see note 34 *supra*, while others refer to privileges that are *prima facie* in the first sense as "qualified," "defeasible," or "presumptive," see, e.g., Cox, note 2 *supra*. What is important is not so much which labels are used (although adoption of a more uniform terminology would promote a much needed clarity), but the realization that if a privilege from liability or discovery is absolute in the sense suggested here, demonstrating that it applies in a given instance establishes once and for all that the conduct is protected. In particular, if the privilege of speech or debate is absolute, papers which document conduct that is, on its face, speech or debate, are immune from discovery no matter how much a litigant may need the evidence or how heinous the motives are of those engaged in the legislative activity. Lest it be thought that the law recognizes no privileges that are absolute in this strong sense, one need only look to the civil immunity of the judiciary. See, e.g., W. PROSSER, *supra* § 114, at 777.

congressional papers. If the privilege is absolute, it is not subject to any categorical exceptions, and it may not be overcome in a particular case by a balancing of interests.

The possibility that the speech or debate privilege might be subject to specific exception is suggested in *Gravel v. United States*.¹⁶¹ The Court in *Gravel*, acting sua sponte,¹⁶² outlined a protective order that would have permitted questioning concerning the source of the copy of the Pentagon Papers placed in the subcommittee record.¹⁶³ Although such questioning would necessarily pertain to preparations for a legislative act,¹⁶⁴ the majority maintained that to trace the source of the senator's information would not violate the speech or debate clause.¹⁶⁵ As others have observed, this portion of the Court's opinion is "not at all clear."¹⁶⁶

Some have suggested that in permitting this questioning, the Court was articulating a criminality exception to the immunity provided in the speech or debate clause, under which questioning concerning legislative activities would be allowed insofar as it is pertinent to investigating and prosecuting crime.¹⁶⁷ This is an

¹⁶¹ 408 U.S. 606 (1972).

¹⁶² See Reinstein & Silverglate, *supra* note 16, at 1155 n.216.

¹⁶³ 408 U.S. at 628-29.

¹⁶⁴ See text accompanying notes 129-59 *supra*.

¹⁶⁵ The Court in *Gravel* explained that it could perceive no constitutional or other privilege that shields [the Senator's aide], any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.

408 U.S. at 628 (footnote omitted). While the proviso that no legislative act be "implicated" may seem consistent with a broad interpretation of the protection given by the speech or debate clause, the Court in *Gravel* also stated that a protective order would

afford ample protection for the [speech or debate] privilege if it forbade questioning any witness . . . (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee; (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) *except as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing.*

Id. at 628-29 (footnote omitted; emphasis added). Since the Court was willing to allow questioning about any act by the Senator or his aides in preparation for the subcommittee hearing if the act was itself criminal, or if the information sought was relevant to the investigation of third-party crime, the Court must have determined that such questioning would not "implicate" any legislative act.

¹⁶⁶ Reinstein & Silverglate, *supra* note 16, at 1155.

¹⁶⁷ See, e.g., Brief for United States at 93-94 & Reply Brief for United States at 19, *United States v. Nixon*, 418 U.S. 683 (1974), reprinted in *UNITED STATES v. NIXON*, *supra* note 6, at 367-68, 439; Cella, *supra* note 101, at 1032.

overly broad interpretation of *Gravel*. Whatever the treatment accorded preparations for the subcommittee meeting,¹⁶⁸ the Court specifically forbade questioning concerning what transpired at the meeting.¹⁶⁹ The meeting was legislative activity, and it was absolutely shielded from outside inquiry. Thus, *Gravel* casts no serious doubt on the conclusion that congressional papers that record legislative actions, such as transcripts of validly held committee hearings or tallies of votes, are fully protected by the speech or debate clause. Even though such papers might be vital to proving criminal activity on the part of a senator, his aide, or anyone else, production cannot be compelled.¹⁷⁰

Gravel could also be interpreted more narrowly as granting a criminality exception to the speech or debate privilege for questioning concerning acts done *in preparation* for legislative activity.¹⁷¹ However, this too appears to be an incorrect interpretation. Instead of creating a criminality exception, *Gravel* simply indicates that one aspect of preparation for legislative activity—the physical act of acquiring information informally from a private source—is not speech or debate and is therefore subject to questioning.¹⁷²

¹⁶⁸ See text accompanying notes 171-72 *infra*.

¹⁶⁹ See note 165 *supra*.

¹⁷⁰ Thus, even if a senator's speech and vote in favor of certain legislation is relevant to an investigation of whether a third party bribed the senator to influence him to support the legislation, *Gravel* does not disturb the clear implication of *United States v. Brewster*, 408 U.S. 501 (1972), decided the same day, that the prosecution may not "inquire into how [the senator] spoke, how he debated, how he voted, or anything he did in the chamber or in committee" *Id.* at 526.

¹⁷¹ In *United States v. Dowdy*, 479 F.2d 213 (4th Cir.), *cert. denied*, 414 U.S. 823, 866, *rehearing denied*, 414 U.S. 1117 (1973), the circuit court read the language of the *Gravel* Court's suggested protective order as allowing inquiry into speech or debate (1) "[if] it proves relevant to investigating possible third party crime," or (2) "if the Congressman's act is itself criminal." *Id.* at 224-25 n.20. Recognizing the possibility that "these exceptions [to the speech or debate privilege] would engulf the rule," *Dowdy* limited their application "to cases where the inquiry focuses on the manner and methods of *obtaining certain information*." *Id.* (emphasis added).

It is true that the requirement that the grand jury be investigating third-party crime is not a significant limitation. The independence of the legislative branch is seriously jeopardized by allowing questioning of congressmen about their speech or debate regardless of the immediate purpose and motives of the grand jurors. It is usually not overly difficult to characterize an investigation as involving third-party crime, and even an investigation initially focused entirely on third parties can easily evolve into a probe of the legislator's speech or debate with an eye toward the latter's prosecution and conviction. The other exception allowing inquiry into a congressman's act "in itself criminal" is also broad enough to swallow the privilege if an act in furtherance of a conspiracy is "in itself criminal." See also Reinstein & Silverglate, *supra* note 16, at 1155 n.218.

¹⁷² *Gravel* need not be read to sanction questioning about the purportedly nonlegislative preparatory act of unofficially acquiring information from a private

Even if no well defined categorical exceptions can be carved out of the speech or debate privilege, it might still be argued that the privilege should yield to a strong showing of need in a particular case. At least one Supreme Court Justice has advocated such an ad hoc balancing test for the speech or debate clause,¹⁷³ and a few lower courts have thought that *United States v. Nixon*,¹⁷⁴ the Watergate Tapes case, compels such a result.¹⁷⁵ However,

source when to do so would also entail questioning about an activity the Court would be willing to call speech or debate. Although the protective order envisioned by the *Gravel* Court arguably would have permitted such questioning of preparatory acts, the Court was not actually confronted with a subpoena for a draft of a speech or a memorandum discussing how a senator might persuade fellow committee members to vote a certain way. The Court would not have found it so easy to maintain that the drafting of speeches, communications about vote-getting strategy, or other such preparatory parts of the legislative process are outside "the deliberative and communicative processes" of legislation or that forcing congressmen to explain or defend these activities would not produce an "indirect impairment" of "pure" speech or debate. 408 U.S. at 625. Indeed, when the Court in *Gravel* did focus its attention on an activity it considered to be speech or debate, it forbade questioning of any kind. See text accompanying note 146 *supra*. More recently, in *Eastland*, when faced with a preparatory step that was intimately related to literal speech or debate—acquiring information for the subcommittee by compulsory process rather than through private channels—the Court found *Gravel* no obstacle to classifying this activity as speech or debate and according it "absolute" protection. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

In short, the protective order outlined by the Court on its own initiative in *Gravel* is best seen as an inartful effort to separate questioning implicating nonlegislative activity from that bearing on speech or debate. That the Court's phraseology was not up to this task in this unsolicited sketch of an order limiting future grand jury examination of a witness is not too surprising, since it is difficult to envision in advance the ways in which various lines of questioning about a nonlegislative matter could impinge on bona fide legislative activity.

¹⁷³ In a partially dissenting opinion in *Gravel*, Justice Stewart complained that "it is by no means clear to me that the Executive's interest in the administration of justice must *always* override the public interest in having an informed Congress." 408 U.S. at 632 (emphasis in original). Accordingly, the Justice asked, "[W]hy should we not, given the tension between the two competing interests, *each* of constitutional dimensions, balance the claims of the Speech or Debate Clause against the claims of the grand jury in the particularized contexts of specific cases?" *Id.* (emphasis in original). However, Justice Stewart may not have considered Senator Gravel's acquisition of the Pentagon Papers to have been speech or debate—his opinion remains ambiguous on this point. If so, his recommendation of an ad hoc balancing test may be limited to cases in which no questions are asked about speech or debate, but an incidental impact on speech or debate is present.

¹⁷⁴ 418 U.S. 683 (1974).

¹⁷⁵ The three-judge court in *Common Cause v. Bailer*, Civ. No. 1887-73 (D.D.C., filed Oct. 5, 1973), in passing on the Senate's claim of speech or debate privilege for subpoenaed committee documents, offered the following obiter dictum:

[T]here is no doubt that the privilege claimed . . . is not absolute but is defeasible upon a showing of proper need. As the recent Watergate experience has taught us, a President's claim of absolute privilege on the grounds of confidentiality must yield when a proper

neither principle nor precedent dictates diluting the freedom of speech or debate in this fashion. The information sought from Congress may be relevant—even decisive—to the outcome of a particular case. Furthermore, the information may not be available through any other channels, and the case may involve the vindication of fundamental human rights or interests of constitutional magnitude. But to say that in such circumstances the privilege must always yield, or must yield at least in those cases where the speech or debate is not very important in comparison to the interests asserted by the litigant seeking the information, is hardly consistent with the speech or debate clause's proscription of questioning for *any* speech or debate. Such an approach is inherently fraught with ambiguity and uncertainty in application,¹⁷⁶ and is quite at odds with the typical speech or debate clause cases concerned with alleged congressional misconduct.¹⁷⁷ In these cases, the same clashing of interests and values can be seen yet the privilege has not yielded. For instance, the lower courts in *Eastland v. United States Servicemen's Fund*¹⁷⁸ "balanced" the legislative interest in the subcommittee investigation against the danger to free expression and association posed by production of bank records; but the Supreme Court eschewed all talk of balancing, insisting instead that the only relevant inquiry for speech or debate clause purposes is whether the congressional activity is "within the legitimate legislative sphere."¹⁷⁹ *Eastland* involved questioning in the form of a civil suit, but unless the clause's directive against "questioning" has no fixed meaning, and instead varies with the form of the questioning, balancing is equally inappropriate in deciding whether documentation of legitimate legislative activity is protected from judicial discovery.¹⁸⁰

showing is made that the overriding considerations of the public interest require disclosure.

Order of Mar. 1, 1976, at 4-5, reprinted in JOINT COMM. ON CONG. OPERATIONS, *supra* note 121, at 54. Cf. note 34 *supra* (publication clause privilege treated as prima facie by district court).

¹⁷⁶ Cf. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 54 (1966) (critique of balancing test in first amendment cases).

¹⁷⁷ See, e.g., cases cited in notes 147-51 *supra*.

¹⁷⁸ 421 U.S. 491 (1975).

¹⁷⁹ *Id.* at 509 n.16. The opinion prefaced this remark with the introductory clause "[w]here we are presented with an attempt to interfere with an *ongoing* activity by Congress." *Id.* (emphasis added). However, the fact that the subcommittee investigation in *Eastland* had not been concluded should not limit the holding of that case to situations where the activity is "ongoing." Such a limitation on the absolute nature of the privilege would be difficult to reconcile with the Court's sweeping language of the sentence following the quotation in the text: "The speech or debate protection provides an absolute immunity from judicial interference." *Id.*

¹⁸⁰ Subpoenas for congressional papers may constitute questioning prohibited by the speech or debate clause. See text accompanying notes 105-28 *supra*.

*United States v. Nixon*¹⁸¹ is not to the contrary. In seeking to quash the Watergate Special Prosecutor's trial subpoena for sixty-four presidential conversations, the President raised a constitutional claim of absolute privilege.¹⁸² The Supreme Court, in a unanimous opinion, agreed that the conversations were within the scope of a constitutionally grounded executive privilege, but held that this privilege was *prima facie*¹⁸³ rather than absolute. On the facts before it, the Court concluded that the privilege "must yield to the demonstrated, specific need for evidence in a pending criminal trial."¹⁸⁴ However, the Court's treatment of executive privilege tells us very little about legislative privilege.¹⁸⁵ The Court in *Nixon* inferred the existence of a privilege for presidential communications in the face of textual¹⁸⁶ and histori-

¹⁸¹ 418 U.S. 683 (1974).

¹⁸² For an accessible description of the unprecedented event culminating in the special prosecutor's subpoena, and the other arguments advanced by the President in *United States v. Nixon* and related litigation, see WATERGATE REPORT, note 23 *supra*.

¹⁸³ See note 160 *supra*. In fact, the Court went out of its way in *Nixon* to create a constitutional basis for executive privilege. The government urged the Court to decide the case by holding that the common law privilege of confidentiality for the executive department did not cover the presidential tape recordings that had been subpoenaed and that no new privilege—constitutional or otherwise—should be held to encompass the subpoenaed materials. See Brief for Petitioner, *United States v. Nixon*, 418 U.S. 683 (1974), reprinted in UNITED STATES V. NIXON, *supra* note 6, at 171. Inasmuch as the Court accepted these contentions, there was no need for it to decide that the evidentiary privilege was anything more than a judicial construct, modifiable by the courts or Congress. See note 231 *infra* (common law evidentiary basis of executive privilege). The pointed and emphatic recognition in the Chief Justice's opinion for the Court of a constitutional basis for some form of executive privilege was apparently a price paid for a unanimous opinion. Unpublished address by Philip Lacovara, former Counsel to the Watergate Special Prosecutor, Arizona State University, Oct. 11, 1976. See also Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76, 83-89 (1974). The constitutional basis of executive privilege is considered more fully at note 186 *infra*.

¹⁸⁴ 418 U.S. at 713. The sense in which the privilege is *prima facie* is not made clear by the opinion. The Court may have been engaging in ad hoc balancing, see note 175 *supra*; cf. Ratner, *Executive Privilege, Self-Incrimination, and the Separation of Powers Illusion*, 22 UCLA L. REV. 92, 104 (1974), but the better reading of the case is that it establishes a categorical exception to the privilege in all criminal cases in which relevance and admissibility are shown. See Henkin, *supra* note 34, at 42; Mishkin, *supra* note 183, at 84; note 160 *supra*.

¹⁸⁵ Cf. Kurland, *supra* note 34, at 74 ("there can be little doubt that the Court's reasoning in this case is good for this case only," *id.*).

¹⁸⁶ Although the Constitution meticulously delineates certain legislative privileges in article I, it makes no mention of any executive privileges in article II. According to one delegate to the Federal Convention of 1787, this omission was deliberate:

Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. . . . No privilege of this kind was intended for your Executive, nor any except

cal¹⁸⁷ indications that no such privilege was intended.¹⁸⁸ That this particular implied privilege was said to be somewhat less than absolute should come as no great surprise. The speech or debate privilege, in contrast, is explicitly rooted in the Constitution and has traditionally been perceived as absolute. Thus, in *Eastland*, the Court, without so much as a nod to *Nixon*, announced no less than five times that the protection the speech or debate clause affords to legislative activity is "absolute," and held that the privilege could not be overcome in that case by a showing of bad faith or invasion of constitutional rights.¹⁸⁹

In brief, the rejection of absolute privilege in *Nixon* is confined to direct presidential communications;¹⁹⁰ the speech or debate privilege has been left intact and absolute. The privilege does not bend to accommodate competing interests in particular cases, and, despite *Gravel*, it is not subject to general, categorical exceptions. Once a legislative document is classified as speech or debate, it is immune from discovery.¹⁹¹

that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

10 ANNALS OF CONGRESS 72 (Gales & Seaton eds. 1800), reprinted in 3 M. FARRAND, *supra* note 43, at 385 (Pinckney). Certainly, the framers were aware of the problem of executive privilege. During the debate on legislative privilege, James Madison suggested that the convention consider "what privileges ought to be allowed to the Executive." The convention recessed at that point, however, and did not return to the topic in its later proceedings. 2 M. FARRAND, *supra* note 43, at 503. The Court's manner of filling this textual vacuum in *Nixon* has been the target of much criticism. See, e.g., Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 118 (1974).

¹⁸⁷ See generally R. BERGER, note 140 *supra*.

¹⁸⁸ As Professor Mishkin put it, "the generalized constitutionally-based privilege seems to emerge full blown from the head of the Court." Mishkin, *supra* note 183, at 84.

¹⁸⁹ 421 U.S. at 503, 509, 510 n.16.

¹⁹⁰ Unless the opinion is to have the effect of undermining *all* absolute evidentiary privileges—and it is hard to believe that the Court meant to precipitate such a revolution in the law of evidence—the opinion must be confined to these facts. See Kurland, *supra* note 34, at 73-74. Thus, other executive communications may be covered by stronger or weaker privileges, depending on the nature of these communications. For example, the Court intimated that communications in the nature of "state secrets," might be absolutely privileged from discovery.

¹⁹¹ Of course, part of a letter, memorandum, tape recording, or other document in the possession of Congress may constitute speech or debate, and part may not. For instance, the subpoenaed item may be a memorandum from a committee investigator describing unsuccessful efforts to subpoena an organization's membership list, and reporting as well on an unofficial nighttime raid on the organization's headquarters. *Dombrowski v. Eastland*, 387 U.S. 82 (1967), and *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), indicate that the first matter is absolutely privileged as speech or debate since subpoenaing

3. Subpoenas to Nonlegislators

Thus far, the protection afforded congressional papers by the speech or debate clause has been considered solely in the context of subpoenas to legislators. The argument has been that documentation of "legitimate legislative activity" is an aspect of "speech

information is almost always a legitimate legislative act, whereas the second is not within the investigatory power of Congress and has no pretense to protection. Therefore, the committee could not be compelled to produce the first portion of the memorandum even though this evidence might help demonstrate the motive for the subsequent illegal acquisition of the list sought by the committee. With this one part deleted, however, the memorandum should be discoverable.

More generally, if Congress claims the speech or debate privilege for the particular document, the court should receive evidence on the general nature of the document. If this evidence fails to prove that production of part or all of the document would result in exposure of speech or debate, the court should deny the claim of privilege. In doubtful cases, in camera inspection for the sole purpose of deciding whether part or all the subpoenaed material constitutes speech or debate should be permissible.

This level of judicial scrutiny of congressional claims of the speech or debate privilege for documents is warranted even though in camera inspection, and perhaps even the general description of items that are ultimately found to expose speech or debate, can be characterized as infringements of the privilege. See *Doe v. McMillan*, 412 U.S. 306, 339 (1973) (Rehnquist, J., concurring in part and dissenting in part); *EPA v. Mink*, 410 U.S. 73, 93 (1973); Westin, *Compulsory Process II*, 74 MICH. L. REV. 192, 248 n.198 (1975). Unless the entire question whether a particular item is within the speech or debate privilege is to be relegated to Congress, this minimal degree of extra-legislative questioning is unavoidable. General description of documents and occasional in camera inspection is essential to effective and meaningful judicial review of assertions of privilege, and it seems doubtful that this process would deter legislative zeal or subject legislators to executive or judicial control. Thus, in other areas where courts have recognized some rather potent privileges, similar inquiries have been held appropriate and necessary to insure that privileges are properly invoked and applied, at least in cases where an external perspective, in itself, is not sufficient to verify the claim of privilege. See, e.g., *United States v. Nixon*, 418 U.S. 683, 714-16 (1974); *EPA v. Mink*, *supra*; *United States v. Reynolds*, 345 U.S. 1 (1953); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *UNITED STATES v. NIXON*, *supra* note 6, at 589-90 (procedures for maintaining confidentiality of military and diplomatic secrets); *State ex rel. DeConcini v. Superior Ct.*, 20 Ariz. App. 33, 509 P.2d 1070 (1973), *noted in* 1 ARIZ. ST. L.J. 147 (1974); Westin, *supra* at 248 n.198. For a more detailed analysis of the factors which should induce a court to order in camera inspection, see Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 168-70 (1976) [hereinafter cited as *Discovery*]; Note, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557 (1974) [hereinafter cited as *In Camera Inspections*].

In fact, it can be maintained with considerable plausibility that inspection by the court alone is inadequate to assess claims of privilege in some situations. See, e.g., *Alderman v. United States*, 394 U.S. 165, 182 (1969); *Dennis v. United States*, 384 U.S. 855, 874-75 (1966). Thus, even with Judge Sirica's undoubtedly sedulous in camera inspection of the presidential tape recordings subpoenaed in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), certain conversations relevant to the grand jury's inquiry initially were not made available to the grand jury. See B. WOODWARD & C. BERNSTEIN, *THE FINAL DAYS* 89, 131 (1976). A court conducting an in camera inspection should consider utilizing

or debate” and that civil and criminal discovery is a form of “questioning,” at least when the subpoena is addressed to a senator or representative. In the usual case, however, a subpoena for papers is served on a legislative employee rather than, or as well as, a congressman.¹⁹² Since the clause states only that “they”—referring to the legislators themselves—“shall not be questioned,” it is arguable that no speech or debate clause protection is available to shield nonlegislators commanded by subpoena to produce papers in judicial proceedings.¹⁹³ Indeed, the government advanced just such a position in *Gravel v. United States*.¹⁹⁴ As previously discussed,¹⁹⁵ *Gravel* arose from a grand jury subpoena calling for the appearance of an aide to Senator Gravel. In defending the subpoena, the government strongly urged the Court to differentiate between a subpoena to a legislator and one to his aide, maintaining that the speech or debate clause confers a privilege only upon “Senators and Representatives.”¹⁹⁶

The Court in *Gravel* categorically rejected this construction of the clause on the theory that “it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants” Since “the day-to-day work of such aides is so critical to the Members’ performance,”¹⁹⁷ the Court concluded that “they must be treated as the latter’s alter egos.”¹⁹⁸

This sort of functional analysis could be extended to protect documents against subpoenas *duces tecum* directed at persons other than legislators or their immediate aides. One could say that the custodians of such papers, like congressional aides, are entitled to the rank of “alter ego,” or that the congressional memoranda, reports, transcripts and other papers are themselves

the assistance of counsel for the party seeking disclosure in evaluating the subpoenaed materials. See *United States v. Nixon*, 418 U.S. 683, 715 n.21 (1974). A protective order enjoining counsel to secrecy may be appropriate in such circumstances. See *In Camera Inspections*, *supra* at 559 n.19.

¹⁹² See note 104 *supra*.

¹⁹³ Under this view, the speech or debate clause parallels the homomorphic immunity from arrest clause, which protects congressmen but not their agents from arrest. See note 62 *supra*. The position is at least consistent with a recognition that, as a procedural matter, the congressman affected may move to quash such subpoenas. See, e.g., *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 501 n.14 (1975).

¹⁹⁴ 408 U.S. 606 (1972).

¹⁹⁵ See text accompanying notes 112-27, 146, 161-72 *supra*.

¹⁹⁶ 408 U.S. at 616.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 616-17.

indispensable to intelligent legislation, and hence, deserve protection in their own right.

Yet, this alter ego reasoning, whatever its intrinsic merit,¹⁹⁹ is not needed to resolve the issue of subpoenas to nonlegislators. Searching for alter egos or functional equivalents to the antecedents of the word "they" as used in the speech or debate clause is a cumbersome method of construing the clause. A simpler analysis is one which focuses on the meaning of "questioning." It may be that only "Senators and Representatives" are privileged, but one need not drive a legislator to the witness stand in order to "question" the legislator regarding his or her speech or debate. The "central role" of the speech or debate clause is to "prevent intimidation [of legislators] by the Executive and accountability before a possibly hostile judiciary."²⁰⁰ The legislative branch is subjected to "questioning" in this sense when aides are compelled to discuss legislative speech or debate or when file clerks are required to produce documentary evidence of speech or debate.²⁰¹ Thus, when a subpoena is served on a custodian of congressional papers, the inquiry should be whether the subpoenaed materials are of such a nature that their production—by anyone—would "bring the [legislature's] conduct into question,"²⁰² not whether the custodian is an aide or employee who earns his keep or whether preparing and storing papers is an essential legislative enterprise.²⁰³

¹⁹⁹ See note 203 *infra*.

²⁰⁰ *United States v. Johnson*, 383 U.S. 169, 181 (1966), *quoted in* *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975), *Doe v. McMillan*, 412 U.S. 306, 311 (1973), and *Gravel v. United States*, 408 U.S. 606, 617 (1972). See generally notes 106-28 & accompanying text *supra*.

²⁰¹ See 8 J. WIGMORE, *supra* note 67, § 2193, at 74-75.

²⁰² 408 U.S. at 612 n.9. At some point, it might seem that a legislator's unofficial and indiscreet communications might amount to a waiver of the speech or debate privilege and that this question of waiver should also be part of the inquiry. Suppose, for instance, a congressman brings notes of his remarks and those of his colleagues at a committee meeting to a dinner, reads aloud from these notes, and leaves them with the host. Grand jury interrogation of those attending the party about these communications or a subpoena duces tecum to the host demanding production of the notes would still constitute one form of "questioning" implicating speech or debate, even though dinner companions are not vital to the 20th century legislative process. Should the congressman's indiscretions be treated, then, as a waiver of the speech or debate privilege? Since the privilege belongs to the House as a whole and an individual member is not authorized to act for his House in this area, see, e.g., *Congressional Papers*, *supra* note 1, at 61 n.19, there can be no waiver without the consent of the House—just as an attorney cannot waive his client's attorney-client privilege without the client's consent or one spouse cannot waive his or her partner's marital privilege. See, e.g., 8 J. WIGMORE, *supra* note 67, § 2327, at 635; *id.* § 2340, at 671. But see *United States v. Craig*, 528 F.2d 773, 780-81 (7th Cir.), *reheard en banc and decided on other grounds*, 537 F.2d 957 (1976).

²⁰³ In contrast, the complexity of 20th century life and legislation is undoubtedly important to an analysis of the judicially crafted official immunity

If legislators, individually and as a group, are not to be "questioned" for their speech or debate, no explanation—documentary or verbal—of speech or debate can be compelled outside the halls of Congress.

doctrine as it applies to damage suits against legislative personnel. This doctrine, as explained in *Doe v. McMillan*, 412 U.S. 306 (1973), "has in large part been of judicial making," and

confers immunity on Government officials of suitable rank for the reason that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Id. at 318-19 (citations omitted). The scope of this immunity is tied to the scope of the official's authority. *Id.* at 320. Some officers are absolutely protected in the exercise of their discretionary functions, but others have been given only a qualified privilege—one that yields on a showing of malice. *Id.* at 319. See generally W. PROSSER, *supra* note 160, § 132, at 987-92; Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

Unfortunately, the Court has usually treated the civil immunity of legislative employees as an aspect of the speech or debate clause immunity rather than as a special case of the general immunity doctrine fashioned to protect public officials. In *Dombrowski v. Eastland*, 387 U.S. 82 (1967), for instance, the Court wrote that for the purpose of imposing civil liability, the counsel to the Senate subcommittee need not be treated as if he were a private citizen, for the speech or debate clause immunity "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." *Id.* at 85. In *Doe v. McMillan*, 412 U.S. 306 (1973), the Court did discuss the official immunity doctrine in its own right, but only after asking whether the speech or debate clause immunized a legislator engaging in the alleged tort. In so doing, the Court was willing to assume that all legislative functionaries partake equally and fully in the absolute immunity the speech or debate clause gives congressmen. See Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 189-90 (1971).

It is far from clear that the speech or debate clause should be construed in this manner. It is one thing to hold that a congressman may with impunity take official action out of spite and with reckless disregard of constitutional rights, and quite another to say that the speech or debate clause gives this same immunity to all legislative functionaries, from the highest to the lowest. Why, after all, should a subcommittee counsel be permitted to recommend subpoenaing a particular witness when he is motivated solely by racial prejudice, personal pique, or dislike of the witness' politics or ideas? The speech or debate clause tells us we must tolerate such actions on the part of committee members, but why must we accept them also from every person on the committee's payroll? Because congressmen need assistants? Because the legislative process is more complex than it was a century ago? Because the enactment of legislation will be hampered if employees are not given an absolute privilege? Concededly, the speech or debate clause is concerned with such matters, but neither its wording, its history, nor its policies dictate an absolute privilege for absolutely everybody connected with speech or debate. In short, it would be preferable to recognize the problem of civil liability of legislative employees for official conduct for what it is—a special case of the general, judicially manufactured, and far more flexible doctrine of official immunity. Cf. *Gravel v. United States*, 408 U.S. at 617 (relying on *Barr v. Matteo*, 360 U.S. 564 (1959), the leading official immunity case); Reinstein & Silverglate, *supra* note 16, at 1171-77.

D. Summary

Of the three article I clauses that comprise the explicit privileges of the legislative branch, only one protects against subpoenas for congressional papers. The immunity from arrest clause privileges the person of a legislator from civil arrest, but does not absolve a congressman or anyone else from the obligations of a subpoena. The publication clause enables Congress to withhold military and diplomatic secrets from the public journal of its proceedings—but not from trial or pretrial discovery. Only the speech or debate clause privileges Congress from judicial discovery of those papers that document or describe “legitimate legislative activity.” This speech or debate privilege is absolute in that it does not give way to a showing of malice, criminality, or overriding interests. The fact that the privilege is not thus qualified, however, does not free a court from its obligation to determine in a proper case and in accord with the usual rules of evidence whether production of part or all of a paper in Congress’ custody would expose “speech or debate.”²⁰⁴

II. IMPLIED PRIVILEGES

Had no privileges been explicitly given the legislative branch in the Constitution, some probably would have been invented. The existence of such privileges, called implied privileges, would have been inferred from general notions of necessity and separation of powers.²⁰⁵ Indeed, that is precisely what the Supreme Court did for the executive branch in *United States v. Nixon*.²⁰⁶ This section considers the relevance of the principles of separation of powers and necessity, and of the *Nixon* case in particular,²⁰⁷ to Congress’ privilege to maintain the confidentiality of its papers against judicial subpoena.

A. Separation of Powers

Legislators have on occasion claimed privilege on separation of powers grounds. Proposing a resolution in response to defense subpoenas in *United States v. Hoffa*,²⁰⁸ for instance, Senator

²⁰⁴ See note 191 *supra*.

²⁰⁵ See Freund, *supra* note 16, at 20-21.

²⁰⁶ 418 U.S. 683 (1974).

²⁰⁷ The significance of *United States v. Nixon* for express constitutional privileges, primarily the speech or debate clause, has already been discussed, and it has been argued that the case does not mark the coming of the end of absolute privileges. See notes 34 & 181-91 & accompanying text *supra*.

²⁰⁸ 205 F. Supp. 710 (S.D. Fla.), *cert. denied sub nom. Hoffa v. Lieb*, 371 U.S. 892 (1962). See *Congressional Papers*, *supra* note 1, at 69-71. Hoffa addressed subpoenas to the chairman and various employees of certain Senate

McClellan alluded to "certain privileges" which the Senate enjoys "as a separate and distinct branch of government."²⁰⁹ Although such declarations often smack of the *ignotum per ignotius*,²¹⁰ three distinct arguments are implicit in a general reliance on separation of powers.²¹¹ First, reference to separation of powers may be tantamount to an assertion of legislative immunity from all judicial process or compulsion.²¹² If so, the argument is unconvincing. As the Court held in *United States v. Nixon*, the separation of powers doctrine does not insulate any one branch of government or place it beyond the effective reach of the other two.²¹³ Article I specifically immunizes members of Congress from civil arrest, but leaves them susceptible to service of process and judicial command.²¹⁴ The mere fact of a tripartite system of government does not supply what seems to have been deliberately omitted from this article of the Constitution.²¹⁵ Thus, the judiciary has repeatedly issued mandatory orders to executive²¹⁶

committees seeking information derived from electronic and mail surveillance of Hoffa and his associates.

²⁰⁹ 108 CONG. REC. 3627 (1962).

²¹⁰ See R. BERGER, *supra* note 140, at 45-47.

²¹¹ See Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 33-34 (1974).

²¹² Consider the statement of Senator Stennis relied on by Judge Wilkey, dissenting in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973):

"We now come face to face and are in direct conflict with the established doctrine of separation of powers. . . . I know of no case where the court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either one of them could."

Id. at 773, quoting Senator Stennis' statement in SENATE COMMITTEE ON ARMED SERVICES, MILITARY COLD WAR ESCALATION AND SPEECH REVIEW POLICIES, 87th Cong., 2d Sess. 512 (1962) (footnote omitted). See also *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), quoting Subcommittee Chairman Herbert's letter to the *Calley* court-martial: "As you know, the Constitution created the Congress as an independent branch of the government, separate from and equal to the executive and judicial branches. As a separate branch, it is our belief that only the Congress can direct the disclosure of legislative records." 382 F. Supp. at 702.

²¹³ 418 U.S. at 707. See generally J. PELTASON, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 24 (5th ed. 1970); Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 ORE. L. REV. 211, 217-19 (1973); Ratner, *supra* note 184, at 92-93; Note, *Developments in the Law—National Security*, 85 HARV. L. REV. 1130, 1217 (1972) [hereinafter cited as *National Security*]; Brief for United States at 51 (footnotes omitted), *United States v. Nixon*, 418 U.S. 683 (1974), *reprinted in UNITED STATES v. NIXON*, *supra* note 6, at 210.

²¹⁴ See text accompanying notes 61-98 *supra*.

²¹⁵ See *Nixon v. Sirica*, 487 F.2d 700, 710-11 (D.C. Cir. 1973); notes 83 *supra* & 216 *infra*.

²¹⁶ See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974) (affirming an order compelling the President to produce documentary evidence for use at trial); *United States v. United States Dist. Ct.*, 407 U.S. 297 (1972) (affirming an order requiring the government to make full disclosure of illegally wiretapped conversations); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

and legislative²¹⁷ officials.

A more modest, but no more tenable, inference from the separation of powers is that it is for Congress, not the courts, to decide what documents are shielded from judicial discovery. The Court unanimously rejected this interpretation of the separation of powers doctrine as applied to the executive branch in *United States v. Nixon*.²¹⁸ The case for allowing Congress to be the judge of which of its papers are privileged is no stronger. The framers chose to have legislative privileges defined "by law" instead of legislative fiat,²¹⁹ and the courts have implemented this

(affirming an injunction compelling the Secretary of Commerce to restore steel mills to private operators); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) (issuing mandamus to Postmaster General, commanding him to comply fully with an act of Congress).

²¹⁷ See, e.g., *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969); *Glidden Co. v. Zdanok*, 370 U.S. 530, 568-71 (1962); *United States v. Lee*, 106 U.S. 196 (1882); *Davis v. Ichord*, No. 23,426 (D.C. Cir. Aug. 20, 1970); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970). Thus, in *Doe v. McMillan*, 412 U.S. 306 (1973), the Court did not suggest that the separation of powers doctrine bars injunctive relief against Congress, notwithstanding Justice Rehnquist's reliance on this point in his dissent, *id.* at 343, and previous precedent, *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729, 731 (D.D.C. 1956), and dictum, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500 (1867), to this effect.

²¹⁸ The Court, however, may not have recognized this "commitment to another branch" argument as an aspect of the President's invocation of separation of powers. See 418 U.S. at 693, 703-06. The Court's opinion does not provide the clearest exposition of the reasons for its holding. See *Gunther*, note 211 *supra*. For a more elaborate and lucid justification of the result in *Nixon*, see *Karst & Horowitz*, note 90 *supra*. For an impassioned defense of judicial review of invocations of government secrecy, emphasizing the excesses inherent in allowing an involved party to make secrecy decisions, see R. BERGER, note 140 *supra*. Additional literature on executive privilege includes Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975); Berger, *Executive Privilege, Professor Rosenblum, and the Higher Criticism*, 1975 DUKE L.J. 921; Danielson, *Presidential Immunity from Criminal Prosecution*, 63 GEO. L.J. 1065 (1975); Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 387-91 (1976); authorities cited in *Congressional Papers*, *supra* note 1, at 58 n.11.

²¹⁹ From tentative protestations offered as palladiums against the displeasure of the King in medieval times, parliamentary privilege in England had become, by the end of the 18th century, an amorphous and expansive set of rights exercised by the legislature. See, e.g., M. CLARKE, *supra* note 62, at 2; Cella, *supra* note 106, at 3-13. As explained in *Watkins v. United States*, 354 U.S. 178 (1957),

[T]he House of Commons and the House of Lords claimed absolute and plenary authority over their privileges. This was an independent body of law, described by Coke as *lex parliamenti*. Only Parliament could declare what those privileges were or what new privileges were occasioned, and only Parliament could judge what conduct constituted a breach of privilege.

Id. at 188 (footnote omitted). The framers did their best to withhold from the national Congress this power of the British Parliament. When Pinckney moved "that each House should be the judge of the privilege of its own members," the delegates favored Madison's advice that "it would be better to make provision for ascertaining, by law, the privileges of each House, than to allow each House to decide for itself." 2 M. FARRAND, *supra* note 43, at 502-03 (emphasis in original).

feature of the Constitution.²²⁰ When the framers felt that Congress should be the body to decide whether particular activity was privileged, an explicit commitment was made.²²¹ As to a claim of a general privilege over congressional papers, there is no textually demonstrable commitment of the question to Congress and no lack of judicially manageable standards for adjudicating claims of legislative privilege, even as to papers involving diplomacy and defense.²²² Therefore, the division of government into three coordinate branches does not, in itself, place within the exclusive domain of the legislature the power to determine which papers are privileged.²²³

²²⁰ See, e.g., *United States v. Nixon*, 418 U.S. at 713-16; *Doe v. McMillan*, 412 U.S. 306, 316 (1973). Although the pragmatic aphorism that Congress' privileges are what a majority of Congress says they are recurs from time to time, see, e.g., H.R. Res. 1306, 91st Cong., 2d Sess., 116 CONG. REC. 41357 (1970) ("[i]t has been settled law in both England and America that a single house does not have the power to define its own privileges," *id.*); Reinstein & Silverglate, *supra* note 16, at 1178. See generally *Tenney v. Brandhove*, 341 U.S. 367, 376-77 (1951); L. CUSHING, *supra* note 66, § 537, at 219; T. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 583 (11th ed. 1960).

²²¹ See, e.g., text accompanying note 17 *supra*.

²²² Cf. Karst & Horowitz, *supra* note 90, at 63-64 (comparable analysis of executive privilege). The need for secrecy in such areas is considered at text accompanying notes 224-43 *infra*. The "committed to another branch of government" test is an aspect of the political question doctrine discussed at notes 53-58 & accompanying text *supra*. It is an appropriate test here, for the contention that the separation of powers implies that congressional assertions of documentary privilege are cognizable in court is, in essence, a claim that the matter is a "political question" and not subject to judicial resolution.

²²³ The history of legislative responses to judicial subpoenas does not advance the claim of absolute privilege based on separation of powers. First, early legislative assertions of privilege were actually far more narrow and defensible. See *Congressional Papers*, note 1 *supra*. In fact, the congressional practice of deciding whether members or employees should supply evidence to other tribunals appears to have originated in circumstances where separation of powers arguments were quite inapposite. In 1819, the Senate was asked to grant permission to two of its members to testify at hearings before a committee of the House, and in 1832, the Senate allowed its doorkeeper to testify in response to a summons from another House committee. See H.R. Jour., 15th Cong., 2d Sess. 787, 870-71 (1819); S. Jour., 22d Cong., 1st Sess. 370 (1832). Second, legislative assertions, even if they had been more absolute, would not establish an absolute privilege grounded in the separation of powers. As Professor Cox points out, "[n]either the House nor the Senate has ever persisted, upon the basis of the separation of powers, in a refusal of evidence needed in a judicial proceeding." Cox, *supra* note 2, at 1395. Third, the presence of explicit constitutional provisions delineating legislative privileges minimizes the need to resort to generalized separation of powers arguments and the associated "gloss" of history. See R. BERGER, *supra* note 140, at 98. Finally, even if the congressional claims could bear the characterizations given them by the dissenters in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), their "precedential value would still be quite limited." Powell v. McCormack, 395 U.S. 486, 546-47 (1969). See Note, *The Power of a House of Congress to Judge the Qualifications of Its Members*, 81 HARV. L. REV. 673, 679 (1968). For a general study of the relationship between historical practices and constitutional adjudication, see C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969).

The third argument implicit in the invocation of separation of powers is the strongest. Not all powers are shared by all branches of government.²²⁴ If separation of powers means anything, it means that one branch of government may not exercise a power exclusively committed to another branch.²²⁵ The question is therefore whether judicial subpoenas for congressional papers constitute a form of judicial usurpation²²⁶ of legislative power. If Congress is unable to exercise its exclusive enumerated powers wisely and effectively because of judicial subpoenas, arguably such usurpation has taken place.²²⁷ Therefore, the argument continues, some degree of legislative privilege may be necessary to assure that Congress can effectively exercise its enumerated powers. At this point, the separation of powers analysis becomes an argument about the inherent need for confidentiality—a matter considered in its own right in the next section.²²⁸

B. *The Need for Confidentiality*

The business of the legislature is to legislate,²²⁹ and to legislate wisely and well, Congress must acquire and process information. It must engage in internal discussion and deliberation and seek external feedback. The legislative branch therefore may assert that efficient operation of legislative business requires

²²⁴ The power to pardon, for example, is lodged entirely with the executive department. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872). Deciding cases, on the other hand, is a purely judicial function. *Id.*

²²⁵ Examples of usurpation by one branch of the enumerated powers of another branch are easily constructed. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

²²⁶ Where the executive department demands information from Congress through the use of grand jury or other judicial subpoenas, the question of executive usurpation of legislative power is also raised.

²²⁷ In cases where the issue is the exercise of a power exclusively committed to one branch, see notes 224-25 *supra*, recognition that powers are separate is important. The doctrine of separation of powers is less useful, however, in cases where the alleged interference by one branch lies only in a general weakening or diminution in the ability of another branch to conduct its business. See Cox, *supra* note 2, at 1387-91.

²²⁸ The practical argument can be advanced independently of the notion of separation of powers, in which case it is cast as a claim of inherent power. Claims of "inherent power," Professors Karst and Horowitz have observed, "always come down to arguments based on necessity." Karst & Horowitz, *supra* note 90, at 62. Thus, in *United States v. Nixon*, the Supreme Court perceived the executive's interest in confidentiality as "common to all governments" with its "constitutional underpinnings" in "the nature of enumerated powers" rather than as an aspect of the President's separation of powers arguments. 418 U.S. at 705-06.

²²⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953).

that its papers be protected to assure vigorous investigation, candid interchange, frank discussion, and confidentiality of military and diplomatic secrets. These concerns are not unknown to the courts. The executive branch, in the absence of any explicit constitutional provision for such protection, has made similar claims,²³⁰ and the courts have granted²³¹ the executive branch a series of prima facie or qualified²³² evidentiary privileges²³³ concerning official papers containing advice,²³⁴ investigatory files and litigation materials,²³⁵ the identities of confidential informants,²³⁶

²³⁰ On the history of executive assertions of privilege predicated on these interests, see, e.g., Berger, note 47 *supra*; Cox, *supra* note 2, at 1395-1405; Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 11-13 (1974); *National Security*, *supra* note 213, at 1212-14.

²³¹ On the judicial derivation of evidentiary privileges for executive branch materials, see, e.g., Veeder, *supra* note 101, at 144-46; *Discovery*, *supra* note 191, at 156-65.

Some privileges are given the executive by specific statutes, e.g., 13 U.S.C. § 9 (1970), generally prohibiting official disclosure of census information, and others are recognized in the form of exceptions to the disclosure mandated by the Freedom of Information Act, 5 U.S.C. § 552(b) (Supp. V 1975). See *Discovery*, *supra* note 191, at 145-56. As originally approved by the Supreme Court in 1972, the proposed federal rules of evidence would have codified the judicially established "state secrets," "official information," and "informer" privileges. See FED. R. EVID. 509-510. As enacted by Congress, however, the rules make no attempt to specify the content and types of such privileges, relying instead on continued common law development. See *id.* 501 ("the privilege of a witness, person [or] government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience").

²³² See note 160 *supra*.

²³³ See generally Berger & Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451 (1950); Cox, *supra* note 2, at 1393, 1401, 1407-19. As to the exceptions or qualifications to these privileges, see, e.g., *Discovery*, *supra* note 191, at 160-65; *Future Crime or Tort Exception*, note 160 *supra*.

²³⁴ See, e.g., *Ash Grove Cement Co. v. F.T.C.*, 519 F.2d 934 (D.C. Cir. 1975); *Washington Research Project, Inc. v. H.E.W.*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1976); *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969); *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600 (5th Cir. 1966); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 660 (D.C. Cir. 1960); *Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958); *Chatterton v. Secretary of State for India*, [1895] 2 Q.B. 189; *Hennessy v. Wright*, [1888] 21 Q.B. 509; *M'Elveney v. Connellan*, [1864] 17 Ir. R.C.L. 55 (report of Inspector-General of Prisons to Lord Lieutenant of Ireland); C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 107 (2d ed. 1972); *UNIFORM RULES OF EVIDENCE* 508 (1974).

²³⁵ See, e.g., *Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Brown v. Thompson*, 430 F.2d 1214 (5th Cir. 1970); *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973); *Pilar v. SS Hess Petrol*, 55 F.R.D. 159 (D. Md. 1972); *Reliable Transfer Co. v. United States*, 53 F.R.D. 24 (E.D.N.Y. 1971); *Farrell v. Piedmont Aviation, Inc.*, 50 F.R.D. 385 (W.D.N.C. 1969); Dorsen & Shattuck, *supra* note 230, at 26-29.

²³⁶ See, e.g., *Roviaro v. United States*, 353 U.S. 53 (1957); *Vogel v. Gruaz*,

presidential communications,²³⁷ or state secrets.²³⁸ Although not all of these categories can be mechanically transferred to the legislative domain,²³⁹ a generally comparable framework of government privileges for legislative papers could be claimed by Congress to accommodate its need for confidentiality.²⁴⁰ However, Congress cannot plausibly claim that an absolute privilege for all papers is necessary. Congress would undoubtedly be able to maintain its integrity as an independent and coordinate branch of government without so extravagant a privilege. Certainly, the executive department has survived and thrived²⁴¹ without an absolute privilege in any of these areas.²⁴²

110 U.S. 311, 316 (1884); *United States v. Day*, 384 F.2d 464 (3d Cir. 1967); *Schultz v. Strauss*, 127 Wis. 325 (1906); *Worthington v. Scribner*, 109 Mass. 487 (1872); C. McCORMICK, *supra* note 234, § 111; 8 J. WIGMORE, *supra* note 67, at § 2374.

²³⁷ See text accompanying notes 181-91 *supra*.

²³⁸ See, e.g., *EPA v. Mink*, 410 U.S. 73 (1973); *United States v. Reynolds*, 345 U.S. 1 (1953); *Schaffer v. Kissinger*, 505 F.2d 389 (D.C. Cir. 1974); 8 J. WIGMORE, *supra* note 67, § 2378, at 794-96; C. McCORMICK, *supra* note 234, at §§ 107-08; Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966).

²³⁹ The privilege recognized in *United States v. Nixon* for direct communications to and from the President, for example, see text accompanying notes 181-91 *supra*, has no simple legislative analog. The informant's privilege also suffers in the translation. See note 236 & accompanying text *supra*.

²⁴⁰ Looking to the law of evidence to solve the necessity problem would not be inconsistent with the constitutional underpinnings of the legislature's privilege. See Freund, *supra* note 16, at 20-21. But see Mishkin, *supra* note 183, at 84-85.

In *United States v. Nixon*, it is true, the Supreme Court took a somewhat different approach to the argument based on necessity. Following the path marked by the court of appeals in the related case of *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), the Court held that the inherent need for confidentiality of communications between a President and his advisors would be satisfied by a defeasible or presumptive privilege—one that would yield to other interests of constitutional magnitude in appropriate cases. 418 U.S. at 715. See generally Cox, note 2 *supra*. This ad hoc balancing test, if that is what it is, see note 184 *supra*, has little to recommend itself for application outside the zone of direct presidential communications. The uncertainty and ambiguity of ad hoc balancing are troublesome enough, see T. EMERSON, *supra* note 140, at 253-56, and there is no good reason to demand as powerful a showing as the Watergate Special Prosecutor was able to make when disclosure of executive communications not involving presidential policy discussions is sought.

²⁴¹ See, e.g., A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); E. CORWIN, note 93 *supra*. Confrontations between Congress and the executive resulting from congressional demands for information have been resolved by political accommodation rather than judicial decision. See, e.g., Cox, *supra* note 2, at 1425-32. It is conceivable that the growth of executive power might have been impeded somewhat by judicial enforcement of legislative subpoenas in accordance with the evidentiary principles developed in the context of litigation with private parties. See, e.g., R. BERGER, *supra* note 140, at 342-47.

²⁴² Even with respect to military and diplomatic secrets, the courts will review a claim of privilege and decide for themselves whether a document contains such secrets, and hence should not be disclosed in open court. See, e.g., *Committee for Nuclear Resp., Inc. v. Seaborg*, 463 F.2d 788 (D.C. Cir.), *injunc-*

In sum, inferences predicated on nothing more than general principles of government structure and necessity hardly dictate an implied privilege that would make Congress the judge of whether papers in its possession are exempt from discovery. The a priori reasoning characteristic of the separation of powers arguments and the argument from practical necessity point in the direction of limited evidentiary privileges applicable to legislative papers. Such limited privileges add little of substance to the more powerful, explicit privilege encapsulated in the speech or debate clause.²⁴³

CONCLUSION

"Papers," one novelist wrote, are "the sinews of litigation."²⁴⁴ When papers needed in litigation are held by Congress, and Congress objects to disclosure, the Constitution entrusts the judiciary with the delicate task of determining whether production of congressional papers would infringe the freedom of speech or debate.²⁴⁵ No constitutionally based privilege gives congressional papers more protection than this, but this protection is neither trivial nor negligible. If Congress can establish to judicial satisfaction that "legitimate legislative activity" would be implicated by compliance with a subpoena,²⁴⁶ the role of the court is at an end. Judicial balancing of the legislature's need for confidentiality against the litigants' need for discovery is impermissible.²⁴⁷ The balance has already been struck by the Constitution in favor of speech or debate.

Where speech or debate would be brought into question by compliance with a subpoena, the Constitution leaves it to Congress to decide whether secrecy is in the public interest. In making this determination, however, Congress should be guided by the

tion denied, 404 U.S. 917 (1971); Karst & Horowitz, *supra* note 90, at 64; *National Security*, *supra* note 213, at 1219-20; note 191 *supra*. The negative pregnant concerning national security in *United States v. Nixon* should not be read to state a different rule. See Freund, *supra* note 16, at 33. The potential for abuse that inheres in allowing an official, legislative or executive, to block all inquiry into a matter in which he might be involved on the basis of unexamined assertions of national security is too great. See, e.g., Berger, *The Incarnation of Executive Privilege*, 22 UCLA L. REV. 4, 28 (1974); Ratner, *supra* note 184, at 103-04; 8 J. WIGMORE, *supra* note 67, § 2379, at 809-10. The tendency to maintain the secrecy of classified materials long after the need for secrecy has vanished is all too often irresistible. See, e.g., Book Review, 193 SCI. 668 (1976). In fact, McCormick goes so far as to contend that the judge's duty is "to strike a wise balance" between private interests and conflicting public policies in each case. C. McCORMICK, *supra* note 234, § 110, at 235.

²⁴³ See text accompanying notes 99-204 *supra*.

²⁴⁴ S. BEDFORD, *THE FACES OF JUSTICE* 299 (1966).

²⁴⁵ See text accompanying note 204 *supra*.

²⁴⁶ See text accompanying notes 135-39 *supra*.

²⁴⁷ See text accompanying notes 160-91 *supra*.

same considerations that prompted the founders of the Constitution to adopt specific congressional privileges.²⁴⁸ These privileges were included in the Constitution to give Congress a shield against a hostile executive or judiciary.²⁴⁹ The Constitution does not require Congress to raise that shield at every available opportunity and Congress has not done so. Where there is no attack, as, for example, when a defendant seeks pretrial discovery of testimony given by his accusers to a congressional committee, there need be no defense and the papers should be released.²⁵⁰ It should not be necessary to belabor the dangers that lurk in cloaking the business of government—legislative or executive—in secrecy.²⁵¹ There will be occasions when Congress rightly desires to conduct its official business in private, as when publicity would cause immediate and irreparable injury,²⁵² but these will be infrequent and unusual. Cloakroom conversations may not be meant for public broadcast, but, in general, compliance instead of defiance should be the rule when subpoenas are issued.²⁵³ Unless Congress has good reason to think a subpoena is part of an attack by a hostile executive or judiciary, or that disclosure would cause immediate and irreparable damage to military or diplomatic affairs,²⁵⁴ it should heed the principle that “the public . . . has a right to every man’s evidence.”²⁵⁵

²⁴⁸ See, e.g., notes 108-11 & accompanying text *supra*.

²⁴⁹ See U.S. CONST. art. I, § 6, cl. 3 (speech or debate clause), discussed at notes 99-204 & accompanying text *supra*.

²⁵⁰ But see *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *United States v. Ehrlichman*, Crim. No. 74-116 (D.D.C. July 3, 1974), *aff'd in part*, 44 U.S.L.W. 2543 (D.C. Cir. May 17, 1976), *petition for cert. filed*, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1976). Both cases are discussed at text accompanying notes 22-41 *supra*.

²⁵¹ See, e.g., R. BERGER, *supra* note 140, at 234-303; *Congressional Papers*, note 1 *supra*.

²⁵² See U.S. CONST. art. I, § 6, cl. 3 (publication clause), discussed at notes 17-60 & accompanying text *supra*. Cf. T. EMERSON, note 176 *supra* (advocating similar test to differentiate protected first amendment expression from unprotected conduct).

²⁵³ The fact that the speech or debate clause creates an “absolute” immunity in that an unworthy purpose does not destroy the privilege, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), hardly makes every invocation of the privilege a worthy one.

²⁵⁴ Cf. *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (proposed standard for enjoining publication of newspaper article).

²⁵⁵ 8 J. WIGMORE, *supra* note 67, § 2192, at 70. See also, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).