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# Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs Of Congressional Immunity

The speech or debate clause of the United States Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[1] The underlying purpose of this immunity is to protect the constitutional doctrine of separation of powers.[2] By protecting speech or debate within Congress, the Constitution prevents the legislative branch from being harassed by the executive or judicial branch. This allows the legislature to effectively perform its function in the federal government system.

As interpreted by the courts, the clause protects not only speech or debate on the floor of Congress, but also conduct related to legislative business.[3] In *Kilbourn v. Thompson*,[4] the first case to interpret the meaning of "speech or debate," the Supreme Court held that the clause covered "things generally done in a session of the House by one of its members in relation to the business before it."[5] Thus, under the *Kilbourn* analysis, the clause protects the speech or conduct of the legislator that relates to congressional business.

Today, courts continue to follow the *Kilbourn* approach, analyzing whether the act involved relates to legislative business.[6] This "legislative act" test promotes the underlying purpose of the clause, allowing congressmen to perform their legislative duties free from the threat of civil or criminal liability. Congressional immunity, however, imposes a cost on society in terms of unredressed injuries. Courts must carefully balance these competing concerns. In most cases, the legislative act test effectively balances these concerns. In certain "administrative function" cases,[7] however, the legislative act test is inappropriate because it unnecessarily protects a congressman's legislative activities which do not directly affect the lawmaking process.

Part I of this note analyzes the underlying purpose of the speech or debate clause. Part II discusses the legislative act analy-

1 U.S. CONST. art. I, § 6.
2 *See* notes 9-17 *infra* and accompanying text.
3 *See* notes 18-57 *infra* and accompanying text.
4 103 U.S. 168 (1880).
5 *Id.* at 204.
6 *See* notes 18-57 *infra* and accompanying text.
7 *See* notes 58-76 *infra* and accompanying text.

sis. Parts III and IV discuss how the administrative function cases arise and how courts have applied the legislative act doctrine to them. Finally, Part V proposes an alternative analysis for administrative function cases which more effectively balances legislative independence and accountability.[8]

## I. The Underlying Purpose of the Speech or Debate Clause

The delegates at the constitutional convention adopted the speech or debate clause with little debate,[9] the only privilege of the English Parliament to be included virtually unchanged.[10] In the American system, the immunity evolved from separation of powers concerns.[11] The Framers recognized that safeguards were necessary to protect the independence of each of the three branches of government.[12] The speech or debate clause is one of the safeguards which protects the independence of the legislative branch.

8 This note does not address two other issues related to the speech or debate question. The first is the extension of a congressman's immunity to his aides. In general, courts have extended the same protection to aides that the congressmen themselves enjoy. In Gravel v. United States, 408 U.S. 606 (1972), the Court recognized the importance of aides in light of the complexity and volume of the congressional workload. Without such protection, the Court noted, the purpose of the clause would "inevitably be diminished and frustrated." 408 U.S. at 617.

Another issue which this note does not address is the distinction that courts have drawn between a legislative act and subsequent actions pursuant to that act. The former, performed by congressmen, are protected; the latter, if performed by congressional employees, are not. In Kilbourn v. Thompson, 103 U.S. 168 (1880), Hallett Kilbourn refused to obey a subpoena duces tecum and also refused to answer questions before a House committee in the process of an investigation. The committee ordered him held, and the House sergeant-at-arms confined him for 45 days. The Court found that although the committee had no power to confine Kilbourn, the congressmen were immune from suit under the speech or debate clause. It found, however, that Kilbourn's action against the sergeant-at-arms was not barred by the immunity. For a more recent interpretation of this principle, see Powell v. McCormack, 395 U.S. 486 (1969), which held that legislative employees may still be liable for conduct and that the actions are subject to judicial review even if authorized by Congress.

9 *See* Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1136 (1973).

10 *Id.* at 1138.

11 *See, e.g.*, Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); United States v. Johnson, 383 U.S. 169 (1966). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 257 (2d ed. 1983).

12 In *The Federalist* Nos. 48 and 51, Madison argued for constitutional protection of the separation of powers. In No. 48, after discussing the possible ways that the branches could overrun each other, Madison concluded that "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." THE FEDERALIST No. 48, at 313 (J. Madison) (C. Rossiter ed. 1961).

In No. 51, Madison again turned to the safeguards necessary to protect the separation of powers. He spoke of various ways to ensure separation of the branches and then stated that "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary con-

By protecting the legislative branch, the speech or debate clause allows the most direct representatives of the people to perform their lawmaking duties without fear of reprisal.[13] Modern cases recognize that the clause serves two related purposes, stemming from two different types of cases.[14] First, the clause protects the legislative branch from interference by the executive and judicial branches.[15] This purpose is derived directly from the separation of powers doctrine. Secondly, the clause relieves congressmen from the burden of defending themselves in court, allowing them to concentrate on their legislative activities.[16] Recent cases have summarized the protection afforded by the clause as "prevent[ing] intimidation by the executive and accountability before a possibly hostile judiciary."[17]

## II. The Law: Mainstream "Legislative Act" Analysis

The predominant test for congressional speech or debate immunity today, derived from *Kilbourn* and its progeny, is whether the conduct qualifies as a "legislative act."[18] Under this test, the court analyzes the relationship between the act itself and legislative business. The test emphasizes the process involved, rather than the subject matter of the act. Courts generally "pigeonhole" the questioned conduct into one of two categories. The legislative acts category includes those acts which are generally protected as being within congressional business.[19] The other category, political acts, refers to those acts, outside of Congress, which remain unpro-

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stitutional means and personal motives to resist encroachments of the others." THE FEDERALIST No. 51, at 321-22 (J. Madison) (C. Rossiter ed. 1961).

13 James Wilson, a member of the committee that drafted the clause, stated the purpose in this way:

> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

Reinstein & Silvergate, *supra* note 9, at 1139 (citing WORKS OF JAMES WILSON 421 (McCloskey ed. 1967)).

14 *See* Note, *Speech or Debate Clause Immunity for Congressional Hiring Practices: Its Necessity and Its Implications*, 28 UCLA L. REV. 217, 229-43 (1980).

15 *See* Powell v. McCormack, 395 U.S. 486 (1969) (determining what actions courts can and cannot review); United States v. Johnson, 383 U.S. 169 (1966) (prohibiting judicial inquiry into motivation for acts in Congress).

16 *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Dombrowski v. Eastland, 387 U.S. 82 (1967).

17 *See, e.g., Johnson*, 383 U.S. at 181.

18 *See, e.g.*, United States v. Helstoski, 442 U.S. 477 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Kilbourn v. Thompson, 103 U.S. 168 (1880). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 257 (2d ed. 1983).

19 *See* notes 24-45 *infra* and accompanying text.

tected. In *United States v. Brewster*,[20] the Supreme Court set out clearly this distinction. The Court first noted that congressmen perform many legitimate errands for constituents, including making appointments with government agencies, assisting in securing government contracts, preparing news letters and news releases, and delivering speeches outside of Congress.[21] The Court held that, although legitimate, these activities have never been protected by the speech or debate clause.[22] The opinion also stated what was protected: "In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of that process."[23]

### A. *Protected Activities*

Courts have usually extended immunity to congressional investigative activities.[24] In *Eastland v. United States Servicemen's Fund* ("USSF"),[25] the Senate Subcommittee on Internal Security issued a subpoena duces tecum to a bank requesting records of the USSF.[26] USSF filed a complaint against ten senators, the subcommittee's chief counsel, and the bank.[27] The plaintiff asserted that the subpoena was an abuse of legislative power and requested an injunction against its implementation.[28] The Court determined that the issuance of the subpoena was "an integral part of the deliberative and communicative processes" of congressional business,[29] and therefore entitled to speech or debate clause protection.[30]

The courts have held, however, that the investigative act must be related to congressional business. In *Steiger v. Superior Court for Maricopa County*,[31] United States Representative Steiger sought to assert the speech or debate privilege to stop his former aide from

20 408 U.S. 501 (1972).

21 *Id.* at 512.

22 *Id.*

23 *Id.* at 515-16 (emphasis in original). Such acts would include voting for resolutions, legislative hearings, speeches on the floor, and comittee hearings. *Id.* at 516 n.10 (citing *Kilbourn*, 103 U.S. 168 (1880) (voting for a resolution); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislative hearing); *Johnson*, 383 U.S. 169 (1966) (speech on House floor); Dombrowski v. Eastland, 387 U.S. 82 (1967) (committee hearing); and *Powell*, 395 U.S. 486 (1969) (voting for a resolution)).

24 *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Ray v. Proxmire, 581 F.2d 998 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 933 (1978); Rusack v. Harsha, 470 F. Supp. 285 (M.D. Pa. 1978); United States v. A T & T, 567 F.2d. 121 (D.C. Cir. 1977).

25 421 U.S. 491 (1975).

26 *Id.* at 494.

27 *Id.* at 495.

28 *Id.* at 495-96.

29 *Id.* at 504 (citing *Gravel*, 408 U.S. 606, 625 (1972)).

30 *Id.*

31 112 Ariz. 1, 536 P.2d 689 (1975).

testifying in a discovery deposition.[32] The deposition concerned an investigation by Steiger of a sportswear company which Steiger claimed was "related to legislative activities" and therefore protected.[33] The court disagreed, holding that the investigation was not protected because it was a personal, not a congressional investigation.[34] The legislative act analysis protects investigations which are legislative in character, but not personal investigations. The link to congressional business is essential.

Courts have also applied speech or debate immunity in criminal bribery actions against congressmen. In *United States v. Johnson*,[35] a congressman was convicted of, among other things, making a speech on the floor of the House of Representatives for compensation.[36] At trial, the prosecution introduced a great deal of evidence about the speech itself, motives for the speech, and preparation of the speech.[37] The Supreme Court held that the speech or debate clause prohibited the admission of such evidence at trial.[38] According to the Court, the act was protected even though the allegation went to the very legitimacy of the speech.[39]

Although the protection of congressmen as individuals is absolute, the legislative action resulting from their conduct is reviewable. In *Powell v. McCormack*,[40] the Supreme Court allowed judicial review of a congressional decision while upholding the immunity of the congressmen involved. In 1966, Adam Clayton Powell was elected to the House of Representatives.[41] He met the constitutional requirements for age, citizenship and residency, but was nonetheless denied his seat pursuant to a House resolution.[42] Powell, along with thirteen voters from his district, sought an injunction

32 *Id.* at 690.
33 *Id.* at 691.
34 *Id.* at 692.
35 383 U.S. 169 (1966).
36 *Id.* at 170.
37 *Id.* at 173-74.
38 *Id.* at 176-77.
39 *Id. Johnson* was affirmed in United States v. Helstoski, 442 U.S. 477 (1979). *Johnson* and *Eastland* both held that evidence of legislative acts could not be introduced for the limited purpose of showing motive. *Helstoski* went one step further, finding that evidence cannot be offered for any purpose. 442 U.S. at 489-90.

Although it may seem that the Court is precluding prosecutions for bribery, it is not. Proof that the congressman carried out the act in Congress is not permitted, but it is not required. Prosecution must focus not on the act itself, but upon the agreement to act. The agreement to act has been found not to be a legislative act. *See* United States v. Brewster, 408 U.S. 501 (1972); United States v. Williams, 644 F.2d 950 (2d Cir. 1981); United States v. Garmatz, 445 F. Supp. 54 (D. Md. 1977).
40 395 U.S. 486 (1969).
41 *Id.* at 489.
42 *Id.* at 492. The resolution was based upon a committee report which stated that Powell had wrongfully diverted House funds, made false reports of expenditures, and had illegitimately asserted a privileges and immunities claim in the courts of New York. *Id.*

to compel House members and employees to seat him and a declaratory judgment to find the exclusion unconstitutional.[43] The Court held that although the Representatives were immune under the speech or debate clause, the clause did not preclude judicial review of the congressional action:[44] "[T]hough this action may be dismissed against the Congressmen petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell."[45]

### B. *Unprotected Activities*

Consistent with the legislative act analysis which protects only those actions directly related to legislative business, the courts generally have not protected conduct of congressmen outside the walls of Congress. The bribery cases illustrate this tendency. While the object of the bribe, the congressman's action in a session of Congress, falls within the definition of speech or debate, the deal-making performed outside of Congress is not protected.[46] In other cases, however, congressmen have argued that activities performed outside of Congress are part of their legislative duties and therefore should be protected by the clause.

In one line of cases, for example, congressmen have asserted a legislative duty to inform the public. Although the federal courts have recognized, in some circumstances, a congressional duty to inform,[47] the courts have not extended speech or debate clause protection to such activities. The Supreme Court addressed this issue in *Hutchinson v. Proxmire*.[48] On April 18, 1975, Senator Proxmire gave his "Golden Fleece of the Month Award" to several government agencies which funded the research of plaintiff, Ronald Hutchinson.[49] When he announced the award on the floor of the Senate, Proxmire made certain statements about Hutchinson's research which Hutchinson alleged were defamatory.[50] The speech or debate clause unquestionably protected Proxmire's speech in the Senate,[51] but Hutchinson's suit was based on Proxmire's subsequent press releases and newsletters.[52] Proxmire argued that these communications were protected as part of his congressional duty to

43 *Id.* at 493.
44 *Id.* at 505-06.
45 *Id.* at 506.
46 *See* notes 35-39 *supra* and accompanying text.
47 *See, e.g.*, Rusack v. Harsha, 470 F. Supp. 285 (M.D. Pa. 1978); Bowie v. Williams, 351 F. Supp. 628 (E.D. Pa. 1972).
48 443 U.S. 111 (1979).
49 *Id.* at 114.
50 *Id.* at 116.
51 *Id.* at 130.
52 *Id.* at 117.

inform his constituents of matters within Congress.[53] The Court disagreed: "Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process."[54] Because the informing function is not directly related to the legislative process, the Court refused to protect Proxmire's statements. Courts generally reach the same result in republication cases. In several cases, courts have protected material published in the *Congressional Record* but not the republication outside of Congress.[55]

Courts have also held that the communications between congressmen and members of other government branches are not protected by the clause. These actions have been protected only when connected with some other legislative act.[56] In general, however, such acts are not sufficiently related to lawmaking to be considered legislative acts for speech or debate clause purposes.[57]

## III. Administrative Cases

Some cases do not fit easily into the legislative act framework. These cases involve the administrative functions of Congress,[58] such as employment decisions for congressional employees,[59] granting of privileges to members of the media,[60] and administra-

53 *Id.* at 124.

54 *Id.* at 133.

55 *See, e.g.*, United States v. Gravel, 408 U.S. 606 (1972) (enjoining private publication for the Congressman); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (defense based on republication of *Congressional Record* denied); Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970) (enjoining printing and distribution of a "blacklist" of public speakers).

56 For example, in United States v. Dowdy, 479 F.2d 213 (4th Cir. 1973), the court protected attempts to influence the legislative branch because they were linked to preparation for committee hearings. In Rusack v. Harsha, 470 F. Supp. 285 (M.D. Pa. 1978), congressional contact with United States Navy officials was protected as within the investigative function.

57 In United States v. Eilberg, 465 F. Supp. 1080 (E.D. Pa. 1979), the claim of privilege for "member to member communication" stood alone. The court found the conduct to be "the type of legislator-to-executive contact which the Supreme Court has found not to be protected by the Speech or Debate Clause." *Id.* at 1084.

58 No court has used the term "administrative function" to establish a separate level of analysis. In Walker v. Jones, 733 F.2d 923, 938 (D.C. Cir. 1984) (MacKinnon, J., dissenting), the term was used to argue against the distinction made by the majority, although the majority did not expressly use the term. The majority opinion had construed the employment decision, even though made through congressional procedure, as not worthy of speech or debate protection. In his dissent, Judge MacKinnon characterized the majority decision as drawing distinctions between groups of congressional functions, protecting some and leaving others unprotected. The categories to which he refers are "administrative and legislative." *Id.* at 938.

59 *See* notes 62-67 *infra* and accompanying text.

60 *See* notes 68-72 *infra* and accompanying text.

tion of congressional finances.[61] While these functions are performed within congressional procedures and directly affect the legislature, they do not directly affect the passage of legislation.

A typical administrative function case involves employment discrimination in Congress. In *Davis v. Passman*,[62] the Supreme Court recognized the applicability of speech or debate clause analysis. Shirley Davis, a deputy administrative assistant to Congressman Otto E. Passman, was dismissed six months after she was hired because, as Passman's letter to her stated, "it was essential that the understudy to my Administrative Assistant be a man."[63] Although the case was decided on due process grounds, the Court recognized that speech or debate immunity would preclude prosecution if this were a legislative act.[64] In a footnote, Justice Brennan stated that "we hold that judicial review of employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause of the Constitution . . . ."[65] Because the court of appeals had not reached the speech or debate clause issue, the case was remanded for consideration of that and other issues.[66] Thus, while the Court could not and did not decide the merits of the speech or debate clause question, it recognized the clause's applicability in a congressional employment discrimination case.[67]

Another type of administrative function case involves news media privileges within Congress. In *Consumers Union of United States,*

61 *See* notes 73-76 *infra* and accompanying text.

62 442 U.S. 228 (1979).

63 *Id.* at 231.

64 *Id.* at 232-33. *Gravel* supports the idea of limiting the speech or debate clause to its purpose, but the Court goes a bit further. The opinion protects, in addition to matters dealing directly with legislation, "other matters which the Constitution places within the jurisdiction of either House." 408 U.S. at 625. Thus, *Gravel* would protect more than those functions directly impinging on legislation. In fact, since the Constitution expressly gives the Congress the power to "determine the Rules of its Proceedings" (U.S. CONST. art. I, § 5, cl. 2), a strict application of *Gravel* would protect the congressman in *Walker*. This argument is made by the dissent. 733 F.2d at 938-39 (MacKinnon, J., dissenting).

65 442 U.S. at 235 n.11.

66 *Id.* at 249.

67 *Id.* In Agromayor v. Colberg, 738 F.2d 55 (1st Cir. 1984), a journalist sued a member of the Puerto Rico House of Representatives, alleging employment discrimination. The representative argued that he was protected by legislative immunity. Because he was not a federal legislator, the speech or debate clause did not apply. In an analysis similar to speech or debate analysis, however, the court found the decision not a legislative act. In another case, Torres v. Grunkmeyer, 586 F. Supp. 796 (D. Wyo. 1984), plaintiff was denied a position as a janitor for the Wyoming State Legislature. He alleged that his application was rejected for "purely political" reasons. As in *Agromayor*, the claim was for legislative immunity, and, again, the court's analysis was similar to speech or debate analysis. *See also* Witty v. Jones, 563 F. Supp. 415 (D.D.C. 1983). In *Witty*, the manager of the United States House of Representatives beauty salon was dismissed. She brought suit against the congressmen responsible, alleging that age and sex discrimination were involved in the decision. The Congressmen raised the speech or debate defense, but the court dismissed the suit on other grounds, never reaching the speech or debate issue.

*Inc. v. Periodical Correspondents' Association*,[68] the Association denied admittance to the press galleries of Congress to Consumers Union's periodical, *Consumer Reports*.[69] Consumers Union sued the Association, which asserted the speech or debate clause privilege on the basis that it was acting as an aide of Congress.[70] The United States Court of Appeals for the District of Columbia Circuit found the question of admittance a legislative one, and dismissed the suit.[71] The court emphasized that the actions in question were performed within the congressional system.[72]

A third type of administrative function case concerns congressmen's financial reporting. In *United States ex rel. Hollander v. Clay*,[73] the Justice Department took over a private citizen's False Claims Act suit against Congressman Clay for submitting false travel vouchers and obtaining reimbursement for them.[74] Clay invoked the speech or debate clause, arguing that the statement involved was tied to "representation of and communication with a constituency" and thus should be protected as a legislative act.[75] The district court disagreed, holding that "the constituent communication aspect of the travel vouchers does not constitute the type of legislative activity defined by the cases to be within the clause."[76]

The legislative act analysis works well in most speech or debate clause cases. It protects the activities of congressmen performed within the legislative sphere. In most cases, those activities will be the ones which must be protected in order to preserve the independence of the legislative branch. Thus, the test generally serves the purpose of the clause. The test does not, however, adequately resolve the administrative function cases. While the actions involved in those cases directly relate to matters internal to Congress, they do not always affect the business of making laws. The legislative act test does not reflect this distinction. Thus, when the test is applied to the administrative function cases, there is the potential to protect activities which need not be protected to promote the underlying purpose of the speech or debate clause, the independence of the legislative branch.

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68 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

69 *Id.* at 1342.

70 *Id.*

71 *Id.* at 1350.

72 *Id.* The court of appeals relied on Doe v. McMillan, 412 U.S. 306 (1973), in which the Court held that publication within Congress would be protected, while "general, public distribution beyond the halls of Congress" was not protected. *Id.* at 317.

73 420 F. Supp. 853 (D.D.C. 1976).

74 *Id.* at 854-55.

75 *Id.* at 855.

76 *Id.* at 856.

## IV. *Walker v. Jones*: The Controversy

A recent administrative function case, *Walker v. Jones*,[77] highlights two alternate speech or debate analyses. Anne Walker, general manager of the House of Representatives Restaurant Service, was dismissed on June 22, 1982.[78] She sued Ed Jones, Chairman of the House Subcommittee on Services of the House of Representatives and Thomas Marshall, the Subcommittee's Staff Director, alleging that she had been dismissed because of her sex.[79] The defendants argued that the speech or debate clause applied because (1) Walker was a "ranking aide" of the subcommittee, and therefore employed within the legislature, and (2) the decision to discharge Walker was decided "in committee," and thus a legislative act.[80] The majority opinion rejected their argument.[81] The court, holding that Walker's dismissal was not a legislative act within the purpose of the speech or debate clause, stated:

> The "fundamental purpose" of the Speech or Debate Clause is to "free[] the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator*." . . . Selecting, supervising and discharging a food facilities manager, we believe, is not reasonably described as work that significantly informs or influences the shaping of our nation's laws.[82]

The majority also rejected the "in committee" argument: "Nor do we grasp why consideration or a vote 'in committee' should place all personnel superintendence of auxiliary services of a nonlegislative character inside a 'legislative sphere.' "[83]

In dissent, Judge MacKinnon stated that he would uphold the speech or debate clause defense.[84] He believed that "Speech or Debate immunity must be determined in accordance with the constitutional functions of Congress, which are varied and far ranging."[85] For MacKinnon, the test for speech or debate clause applicability is "whether the [Congress] has in practical fact treated the subject as a legislative matter in the constitutional sense."[86] MacKinnon characterized the majority opinion as creating a category of administrative cases to be left unprotected, an interpreta-

77 733 F.2d 923 (D.C. Cir.), *cert. denied*, 105 S. Ct. 512 (1984).
78 *Id.* at 926.
79 *Id.* at 925.
80 *Id.* at 927.
81 *Id.* at 928.
82 *Id.* at 931 (quoting Gravel v. United States, 408 U.S. 606, 618 (1972)).
83 *Id.*
84 *Id.* at 934 (MacKinnon, J., dissenting).
85 *Id.* at 937.
86 *Id.* at 938.

tion without Supreme Court precedent.[87] Judge MacKinnon advocates an analysis based on the form of the decision, asking whether or not it is within congressional procedure—the traditional legislative act test.

The difference between the two analyses of speech or debate applicability are subtle but important. The *Walker* majority espouses a narrower interpretation which focuses on the underlying purpose of the clause.[88] Thus, according to the *Walker* majority, the ultimate question is whether the independence of the legislature is threatened. Under this test, "legislative act" means an act which bears directly on the making of laws.[89] This test is consistent with the underlying purpose of the speech or debate clause. The primary function of the legislature is making laws, a function that the Constitution must protect from interference by the other branches. The traditional legislative act test, on the other hand, focuses not so much on the purpose of the clause as on the process through which the act is performed.[90] Under this analysis, the form of the act is the tripwire which determines what should be entrapped and what should be protected.

## V. Analysis: Comparison of the Two Alternatives

Although these analyses are very similar, and will often produce the same result, the subtle difference between them can be important. In the administrative cases, it is the crucial factor. The traditional analysis protects all acts, including legislative acts, performed within the congressional system. All such acts, however, do not directly affect the lawmaking process itself. Thus, the traditional legislative act test tends to encompass more conduct than the speech or debate clause need protect.

The danger of this over-protection is tied to the costs of applying speech or debate immunity—injury without compensation. The problem is similar to the potential problem of the overbreadth doctrine. In *Broadrick v. Oklahoma*,[91] the Supreme Court addressed the

87 *Id.*

88 *See* notes 9-17 *supra* and accompanying text.

89 The *Walker* opinion stresses that the clause only protects those activities of a member as a legislator. In finding the auxiliary services not legislative in character, the opinion contrasts them to actions which bear directly on the lawmaking process, such as preparing for hearings and assisting in composing legislative matters. The court summarized: "Selecting, supervising, and discharging a food facilities manager, we believe, is not reasonably described as work that significantly informs or influences *the shaping of our nation's laws*." 733 F.2d at 931 (emphasis added).

90 *See* notes 18-57 *supra* and accompanying text.

91 413 U.S. 601 (1973). The overbreadth doctrine allows a defendant to challenge a statute on the grounds that the statute could be construed to allow prosecution of conduct protected under the first amendment. In applying the doctrine, the Supreme Court has

classic overbreadth situation. The defendants who had clearly violated a statute contended that the statute should be overturned because it *could be* construed to cover activities protected by the first amendment.[92] In *Broadrick*, the Court refused to apply the overbreadth doctrine.[93] It recognized that, while the first amendment needs broad protection, there are consequences of allowing overbreadth challenges: "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."[94]

The Court recognized the social cost of applying the overbreadth doctrine and refused to apply it when other, less costly means could protect the rights involved. The speech or debate issue in *Walker* raises the same type of problem. The danger of executive or jucicial interference with the legislature justifies use of the immunity. But if an alternate analysis can adequately protect the legislature without overextending the immunity, that alternative should be applied.

The *Walker* court is not the only court to focus on the underlying purpose of the clause in determining whether a particular act is protected. In *Gravel v. United States*,[95] the Supreme Court applied this analysis, stating:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."[96]

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allowed a defendant to raise the defense, even if his own conduct was clearly unprotected. *See* NAACP v. Button, 371 U.S. 415, 432 (1963).

92 413 U.S. at 606-09.

93 *Id.* at 618.

94 *Id.* at 613 (citations omitted).

95 408 U.S. 606 (1972).

96 *Id.* at 625 (quoting United States v. Doe, 455 F.2d 753, 760 (1972)). In *Gravel*, Senator Gravel had obtained a copy of the Pentagon Papers and read from it in a committee hearing. He also arranged for both publication in the *Congressional Record* and a private publication. When the government sought to have the publications restrained, the Senator invoked the speech or debate privilege. The Court held that although the publication in the *Congressional Record* was clearly protected, the private publication was unprotected. *Id.* at 625-26.

Like the *Walker* court, the *Gravel* court looked to how interference with the action would interfere with Congress' work. For conduct other than "pure speech," the opinion establishes two requirements for protection: First, it must be an intergral part of the "communicative and deliberative process"[97] and, second, it must address legislation or some other congressional duty.[98] Through these two requirements, this test assures that speech or debate protection does not extend further than necessary.[99]

The Court again relied on the underlying rationale of the clause in *Doe v. McMillan*.[100] In this case, the parents of some Washington, D.C. schoolchildren sued a House committee and several other defendants to stop dissemination of a report on District of Columbia schools which mentioned the children in a derogatory manner.[101] The Court held that the use of the report within Congress was protected,[102] but its republication was not.[103] The Court looked directly to whether the action in question implicated the underlying purpose of the speech or debate clause:

> We cannot believe that the purpose of the Clause—"to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," . . . —will suffer in the slightest if it is held that those who, at the direction of Congress or otherwise, distribute actionable material to the public at large . . . must respond to private suits . . . . "[104]

The Court examined how the extension of speech or debate protection in this case would affect the values the speech or debate clause was meant to protect, rather than what particular process the action took.[105]

## VI. Conclusion

The primary objective of the speech or debate clause is to protect the separation of powers. Specifically, the clause protects the independence of the legislative branch. In addition, it allows legislators to concentrate on their legislative activities, freeing them

97 *Id.* at 625.

98 *Id.*

99 For two recent applications of *Gravel*, see Miller v. Transamerica Press, 709 F.2d 524 (9th Cir. 1983) (congressman required to disclose identities of former aides, the court holding that those identities did not meet the legislative act test); Benford v. American Broadcasting Co., 502 F. Supp. 1148 (D. Md. 1980) (taping of meeting and replay on news program not within speech or debate protection).

100 412 U.S. 306 (1973).

101 *Id.* at 309.

102 *Id.* at 312.

103 *Id.* at 318.

104 *Id.* at 316 (citations omitted).

105 Another Supreme Court case, United States v. Gillock, 445 U.S. 360 (1980), applied a similar analysis in a case involving a state legislator.

from the burden of defending themselves. Since *Kilbourn v. Thompson* in 1880, the courts have done that. Another concern, however, is the cost imposed on the justice system. The cost is necessarily high. In order to prevent harassment, the legislators are shielded not only from intimidation, but also from individual accountability. The purposes are worth the price, but the cure is expensive; the courts should be attentive to ways to reduce the cost where possible.

Limiting protection to functions that directly implicate separation of powers does just that. This analysis will, of course, permit more suits against congressmen. However, when the subject matter of the suit does not implicate separation of powers concerns, the suits do not merit such immunity. The proposed analysis promotes that primary purpose of the speech or debate clause, because that purpose is its keystone. And by tailoring protection tightly around the edges of the privilege, it reduces the excess cost needed to accomplish the task.

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