Y 4 C76/7 C83/ 976-2

94th Congress
2d Session } COMMITTEE PRINT

DOCUMENTS
NOV 29 1976
THE LIBRARY
KANSAS STATE UNIVERSITY
GOVERNMENT
Storage

REPORT

OF THE

JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

PURSUANT TO

SECTION 402(a)(2) OF THE LEGISLATIVE REORGANIZATION ACT OF 1970

IDENTIFYING

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

Cumulative to August 15, 1976

KSU LIBRARIES A11900 970457

Printed for the use of the Joint Committee on Congressional Operations

U.S. GOVERNMENT PRINTING OFFICE
75-565 WASHINGTON : 1976

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

DOCUMENTS
NOV 29 1971
THE LIBRARY
KANSAS STATE UNIVERSITY

JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

CONGRESS OF THE UNITED STATES

Representative JACK BROOKS, Texas, *Chairman*
Senator LEE METCALF, Montana, *Vice Chairman*

HOUSE OF REPRESENTATIVES	SENATE
ROBERT N. GIAIMO, Connecticut	MIKE GRAVEL, Alaska
JAMES G. O'HARA, Michigan	LAWTON CHILES, Florida
JAMES C. CLEVELAND, New Hampshire	JESSE A. HELMS, North Carolina
JOHN M. ASHBROOK, Ohio	PETE V. DOMENICI, New Mexico

CONTENTS

Court Proceedings and Actions of Vital Interest to the Congress

	Page
Introduction	VII
I. Constitutional Immunity of Members of Congress:	
Davis v. *Passman*	1
McSurely v. *McClellan*	1
Jordan v. *Latta*	6
II. Powers of Congressional Committees:	
Ashland Oil, Inc. v. *Federal Trade Commission*	11
United States v. *American Telephone and Telegraph Co*	15
III. Constitutional Powers of the Congress:	
Nixon v. *Sampson*	19
Nixon v. *Administrator of General Services*	19
Public Citizen, Inc. v. *Simon* (formerly Shultz)	31
Clark v. *Valeo*	33
IV. Officers, Employees, and Agents of the Congress:	
Socialist Workers v. *Henshaw* (formerly Jennings)	39
United States v. *McPherson*	40
Peroff v. *Manuel*	41
V. Other Actions Involving Members in Representative Capacity:	
Dellums v. *Powell*	43
Kennedy v. *Jones*	44
Common Cause v. *Bailar* (formerly Klassen)	45
Harrington v. *Colby*	57
United States v. *Gurney*	59
Metcalf v. *National Petroleum Council*	59
National Tribal Chairmen's Association v. *Abourezk*	62
Sportservice Corp. v. Steiger	64
Drinan v. *Richardson* (formerly Morton)	65
Simon v. *United States Postal Service*	67
Hutchinson v. *Proxmire*	68
Maremont Corporation v. *Rumsfeld*	69
Pressler v. *Simon*	70
Reuss v. *Balles*	71
United States ex rel. Hollander v. *Clay*	72
United States ex rel. Martin-Trigona v. *Hays*	74
United States ex rel. Thompson v. *Hays*	76
United States ex rel. Cennamo v. *Ray*	77

V. Other Actions Involving Members in Representative Capacity—Continued

Page

United States v. *Helstoski*---- 79
United States v. *Podell*---- 79
Genesis Publications, Inc. v. *Mondale*---- 80

Decisions

Jordan v. *Latta*---- 83
Public Citizen, Inc. v. *Simon*---- 89
United States v. *American Telephone & Telegraph Co*---- 103
Maremont Corporation v. *Rumsfeld*---- 117

Appendix

Members of the 94th Congress Parties to or Directly Concerned With Litigation Affecting Congress---- 127

Index

Table of Cases Reported---- 133

LEGISLATIVE REORGANIZATION ACT OF 1970

[Public Law 91-510]

TITLE IV—CONGRESS AS AN INSTITUTION

PART 1—JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

* * * * * * *

DUTIES OF JOINT COMMITTEE

SEC. 402. (a) The Joint Committee shall—

* * * * * * *

(2) identify any court proceeding or action which, in the opinion of the Joint Committee, is of vital interest to the Congress, or to either House of the Congress, as a constitutionally established institution of the Federal Government and call such proceeding or action to the attention of that House of the Congress which is specifically concerned or to both Houses of the Congress if both Houses are concerned.

* * * * * * *

INTRODUCTION

In accord with the statutory duty placed upon the Joint Committee on Congressional Operations by Section 402(a)(2) of the Legislative Reorganization Act of 1970, the committee initiated a cumulative reporting practice in the 92d Congress to "identify any court proceeding or action which, in the opinion of the Joint Committee, is of vital interest to the Congress, or to either House of the Congress, as a constitutionally established institution of the Federal Government."

The report, designated as *Court Proceedings and Actions of Vital Interest to the Congress*, is intended to meet the further statutory requirement that the Joint Committee shall "call such proceeding or action to the attention of that House of the Congress which is specifically concerned or to both Houses of the Congress if both Houses are concerned."

The report, designated as *Court Proceedings and Actions of Vital Interest to the Congress*, is intended to meet the further statutory re- of decisions in active cases the Joint Committee identified as of vital interest to the Congress since its last report in April 1976.

A final report of court proceedings and actions will be published by the Joint Committee at the end of the 94th Congress. We welcome comments from all Members of Congress and others using these reports as an information source and research document, as well as your suggestions of relevant pending court proceedings and actions—which do not appear in this report—for inclusion in the future reports of the Joint Committee.

JACK BROOKS, *Chairman.*
LEE METCALF, *Vice Chairman.*

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

I. Constitutional Immunity of Members of Congress

Davis v. *Passman*

Civil Action No. 75–1691 (Fifth Cir.)

Brief.—Plaintiff, Shirley Davis, served as deputy administrative assistant on the staff of Representative Otto E. Passman from February 1, 1974 through July 31, 1974, on which date her employment was terminated. Plaintiff then filed this complaint, naming Representative Passman as defendant, in the U.S. District Court for the Western District of Louisiana on August 7, 1974, alleging that she had been discriminatorily dismissed from defendant's congressional staff because of her sex in violation of her constitutional rights under the Fifth Amendment.

Plaintiff supplemented her complaint with a letter from the defendant, in which Mr. Passman indicated, in dismissing her, that he had concluded "it was essential that the understudy to my Administrative Assistant be a man."

Representative Passman filed a motion to dismiss the complaint, stating: (1) The alleged conduct of the defendant is not violative of the Fifth Amendment; (2) the law affords no private right of action to plaintiff; and (3) the doctrines of legislative and sovereign immunity bar any action against the defendant.

In a hearing on February 24, 1975, U.S. District Judge Tom Stagg, of the U.S. District Court for the Western District of Louisiana, dismissed plaintiff's complaint on the grounds that it failed to state a claim against Mr. Passman, upon which relief could be granted. The court held that the alleged sex discrimination by Mr. Passman is not violative of the Fifth Amendment to the Constitution and that the law affords no private right of action to plaintiff. The court further held, however, that Mr. Passman's defense of sovereign and official immunity was not well founded.

Mrs. Davis filed an appeal with the U.S. Court of Appeals for the Fifth Circuit on March 20, 1975. On April 12, oral argument was heard.

Status.—The case is now pending before the U.S. Court of Appeals for the Fifth Circuit.

McSurely v. *McClellan*

Civil Action No. 73–1991 (D.C. Cir.)

Brief.—Plaintiffs Alan and Margaret McSurely refused in March 1969 to comply with a subpoena *duces tecum* issued by the Senate Permanent Subcommittee on Investigations of the Government Oper-

ations Committee, chaired by Senator John L. McClellan, demanding the production of documents relating to membership in and activities of several organizations, including the Southern Conference Educational Fund, the Southern Student Organization Committee, the Student Nonviolent Coordinating Committee and Students for a Democratic Society, all also plaintiffs in this action.

Plaintiffs filed an action in the U.S. District Court for the District of Columbia on the date named in the subpoena for their appearance before the subcommittee seeking a declaration that compliance with the subpoena was not required, a preliminary and permanent injunction against institution of criminal proceedings against them for their failure to comply with the subpoena, and damages. No action had been taken in the civil action at the time the McSurelys were indicted for contempt of Congress for their failure to comply with the subpoenas. Subsequently, the plaintiffs filed an amended and supplemental complaint seeking only compensatory and punitive damages. The plaintiffs alleged that the defendants, Senator McClellan, three members of the subcommittee staff, and the Kentucky Commonwealth Attorney who initially seized from the plaintiffs' home the documents which included those later subpoenaed by the subcommittee, entered into a conspiracy to deprive them of their constitutional rights. They sought damages "for the unlawful seizure, inspection and appropriation of their personal and business papers and documents and other objects and articles, for the issuance of subpoenas based on illegally obtained information and invalid on their face, for their humiliation and embarrassment, mental and emotional pain, loss of employment, disruption of personal privacy and safety caused thereby, all in violation and derogation of their rights under the first, fourth, fifth and fourteenth amendments to the U.S. Constitution and the laws of the United States." [Plaintiffs' Amended and Supplemental Complaint, at 13–14.]

The McSurelys were convicted of contempt of Congress and sentenced in June 1970 in the criminal action. The convictions were appealed to the court of appeals, where oral arguments were heard on January 21, 1972.

The decision of the court of appeals, reversing the contempt of Congress convictions of the McSurelys, was filed on December 20, 1972. The majority of the court took the position that the exclusionary rule applied to proceedings before congressional committees as well as to criminal prosecutions, and, therefore, the court held that the subcommittee's subpoenas were invalid as the fruit of an unlawful search and seizure. [*United States* v. *McSurely*, 473 F. 2d 1178 (D.C. Cir. 1972); the text of the decision was printed in the Report of the Joint Committee on Congressional Operations Identifying *Court Proceedings and Actions of Vital Interest to the Congress*. Final Report for the 92d Congress, December 1972, at 645.]

The case was remanded to the U.S. District Court for the District of Columbia with instructions to enter judgments of acquittal in the matter of the contempt convictions.

The decision of the Solicitor General was not to petition the Supreme Court for a writ of certiorari.

In the civil proceedings, Chairman McClellan and three subcommittee staff members filed a motion to dismiss, or, in the alternative, for summary judgment in the district court on October 26, 1971.

The grounds claimed in support of the motion were:

> (1) Defendants are immune from actions for damages where as here it is clear that their conduct was within the sphere of legislative activity. (2) The claimant fails to state a claim upon which relief can be granted against defendants who were a United States Senator or employees of the Senate of the United States at all times material to this cause. (3) Plaintiffs are barred by collateral estoppel from relitigating issues previously settled by the judgment of this court in *United States* v. *Alan McSurely and Margaret McSurely*, Criminal Nos. 1376–69, 1377–69. * * * [Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, at 1.]

The motion to dismiss was denied on June 12, 1973, and after the motion for reconsideration was rejected, the Federal defendants filed notice of appeal.

In a 2-to-1 decision on October 28, 1975, the U.S. Court of Appeals for the District of Columbia reversed the district court's holding and remanded the case for further action consistent with its holding.

The appeals court held, that as a matter of law, the defendants were entitled to summary judgment on all counts of the complaint relating to the inspection by the committee investigator of the seized material, the transportation of such material to Washington by the investigator, the utilization of the information by the investigator as the basis for congressional subpoenas, and the issuance of Contempt of Congress citations against the plaintiffs.

The appeals court left for the district court on remand the determination whether the defendants actively collaborated in the original raid on the McSurelys' home and, if so, whether there was sufficient evidence of such collaboration to merit a trial on that issue.

In addition, the appeals court remanded to the lower court the question whether the defendants distributed copies of documents to individuals or agencies outside Congress—and if made, whether such distribution was actionable.

The court emphasized that at no point in the proceedings on remand may inquiry be made into those activities of the defendants which it had indicated are protected by the Speech or Debate Clause:

> [A]s a general rule, the process of gathering and utilizing information within Congress is protected activity within the "legislative sphere." Constitutional immunity may be withdrawn, however, if no rational legislative purpose can be found for a committee's action in directing its investigation toward a particular individual, organization, or institution. Also, the Speech or Debate Clause will not shield an employee or Member of Congress from prosecution or suit for a crime or fourth amendment violation arising from his efforts to obtain information. Finally, the dissemination of informa-

tion outside of Congress is not a protected legislative act and enjoys no special constitutional immunity.

The question whether the Subcommittee on Investigations in the instant case was engaged in investigative activity concerning matters "on which legislation could be had" is readily answered. At all times pertinent to the case, the Subcommittee was authorized by Senate Resolution to make a full and complete study and investigation of violent disturbances of the peace [and] * * * civil and criminal disorder * * *, the commission of crimes in connection therewith, the[ir] immediate and longstanding causes, the extent and effects of such occurrences and crimes[,] and measures necessary for their immediate and long range prevention.

* * * * *

Certainly, there is no question, in view of the breadth of Congress' investigatory power and of its mandate to the subcommittee, that the subcommittee had jurisdiction to send Brick to Pikeville to examine the materials in Ratliff's possession.

Moreover, Brick clearly enjoyed the prerogative—so long as he did not obtain the documents by unlawful means—to bring to Washington copies of all materials which might prove useful to the subcommittee's investigation. The primary dispute in this case, focused upon by our colleague's partial dissent, arises from Brick's testimony at the McSurely contempt trial that not all of the batch of 234 documents he received from Ratliff—in the selection of which Brick had played no part—were necessary to the investigation. Nevertheless, rather than attempt a document-by-document determination of which items might or might not be relevant, he carried all the papers to Washington for the subcommittee's inspection. *The question posed here is whether it was incumbent on Brick either to separate out those papers which were clearly not required for the investigation or forfeit his protection (and, possibly, the protection of the other defendants) under the Speech or Debate Clause.*

We do not believe a congressional committee's investigatory jurisdiction can turn on this kind of detailed assessment of the relevancy of particular items garnered by employees or Members of Congress pursuant to a facially valid inquiry. The Supreme Court in a similar situation in *Doe* v. *McMillan* found "no authority to oversee the judgment of the Committee * * * or to impose liability on its members if we disagree with their legislative judgment." It would appear that the jurisdictional requirements of the Speech or Debate Clause are met here, as in *Doe*, if a rational legislative purpose is present for investigating a particular person, organization, or institution. There is no requirement that every piece of information gathered in such an investigation be justified before the judiciary. Certainly, *Tenney* v. *Brandhove* and the *Servicemen's Fund* case do not go so far. Indeed, we submit that it is precisely this kind of entanglement in legisla-

> tive judgments that the Supreme Court in *Doe* properly sought to avoid. In view of the intrinsically functional nature of the immunity afforded the investigative process by the Speech or Debate Clause, and the Clause's basic purpose of preventing the probing of legislative motive, we are convinced that the line must be drawn here. [*McSurely* v. *McClellan*, Civil action No. 73–1991 (D.C. Cir. 1975); Slip Opinion at 248–250.]

In response to plaintiff's allegation that the examination by the subcommittee's investigator of the illegally seized materials in the Commonwealth Attorney's possession, was itself an independent violation of the McSurelys' Fourth Amendment rights and, therefore, not protected by Speech or Debate immunity—the court held that *United States* v. *Calandra*, 414 U.S. 338 (1974) was controlling in the instant case. The appeals court said:

> In sum, it would appear under *Calandra* that a Congressional committee should enjoy at least the same prerogative as a grand jury to use material which has been unlawfully seized. As with the grand jury, the congressional committee may not be privileged to utilize such information if its agents have actively participated in the original unlawful seizure. Outside of that circumstance, however, a committee commits no new fourth amendment wrong by examining and copying documents originally unlawfully secured.
>
> Judge Leventhal, in his partial dissent, however, argues that Brick's examination of the McSurely materials after the original unlawful seizure was itself violative of the fourth amendment because he knew the materials had been unlawfully seized and because a three-judge federal court had ordered Ratliff to hold the materials in safekeeping. Certainly, after *Calandra*, the fact that Brick knew the documents had come wrongfully into Ratliff's possession could not render his own examination unlawful. That a grand jury knows its information springs from an illegal search does not prevent it from examining the fruits of that search, and basing questions thereon, in the pursuit of a lawful investigation. A congressional committee, as we detailed above, is entitled to the same prerogative.
>
> That Ratliff had been ordered to hold the materials in safekeeping also does not render Brick's examination violative of the fourth amendment. The three-judge court's order was simply a function of its finding that the materials had been unlawfully seized. There was no implication in the order that investigatory bodies which would otherwise be entitled to utilize unlawfully seized materials were barred from such utilization by the court's formal ruling. This does not mean Brick could have broken into Ratliff's office to obtain access to the materials. Such an entry would have been in violation of *Ratliff's* fourth amendment rights. Ratliff himself, however, invited the subcommittee to come to Pikeville to examine the materials. He alerted the subcommittee to the

fact that the product of his search of the McSurely's home might be relevant to its investigation.

Calandra makes clear that a grand jury or, we submit, a Congressional committee has the right in its investigatory capacity to use the product of a past unlawful search and seizure. The Supreme Court emphasized that such use works no new fourth amendment wrong on the owners of the seized property. Since effective utilization of materials requires their examination, it is difficult to conceive, after *Calandra*, how the inspection by one authorized government agent of documents in the custody of another can be characterized as an unconstitutional search. The constitutional violation is completed with the original taking. [Slip Opinion at 255–256.]

On December 10, 1975, the decision of the court of appeals was vacated and a petition for a rehearing *en banc* was granted.

Oral argument was heard by the court of appeals *en banc* on April 19, 1976.

Status.—The case is pending before the U.S. Court of Appeals for the District of Columbia.

The full text of the court of appeals' decision in the civil case was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 31, 1975.

Jordan* v. *Latta

Civil Action No. C75–166 (N. D. Ohio)

Brief.—Plaintiff is a member of the International Brotherhood of Teamsters who lives in Cecil, Ohio, within the Fifth Congressional District. Defendant Delbert L. Latta is the U.S. Representative for the Fifth Congressional District, and defendants Larry Paul and George Blue work for the Federal Bureau of Investigation (FBI) in the Bureau's Toledo, Ohio office.

The complaint, filed April 22, 1975, alleged the following: that on or about April 4, 1975, plaintiff called Congressman Latta at his home in Bowling Green, Ohio, requesting his assistance in a labor dispute in which plaintiff was engaged with his trucking firm employer, and that two days later, at Representative Latta's request, he took some documents to the Representative's home. Two days later he again called and asked Representative Latta for his assistance in his capacity as a U.S. Congressman, and the Congressman indicated that he had prepared a letter indicating what plaintiff could do. Three days later, on April 11, 1975, the plaintiff called again asking about the letter and once more requesting assistance. Congressman Latta indicated that he could not help, but that he had prepared a letter regarding the problem. Plaintiff then stated that he would remember how to vote, and Congressman Latta said that was fine, he could vote any way he wanted.

The complaint then alleges that on April 14, 1975, defendants Paul and Blue called plaintiff and indicated they wanted to talk with him. They met him that day at his home and said Congressman Latta had filed a complaint with the FBI alleging that plaintiff had put undue pressure on him, though indicating that no threat was made on his life

by plaintiff. After discussing the situation with plaintiff for an hour, defendants Paul and Blue indicated to plaintiff that the whole incident should be kept quiet and not revealed to the press.

Plaintiff contended that he contacted his Congressman in order to petition his government for a redress of grievances, and that his appeal to Congressman Latta for assistance and intervention was protected by the First and Fourteenth Amendments; that the utilization of the FBI was meant to curtail his rights to petition the government; that he at no time put undue pressure on the Congressman, and the use of the FBI was meant to harass him in exercise of his right to petition his government; and that defendants' actions left him without an adequate remedy at law, since he was denied his right to contact his Congressman without suffering from the harassment of FBI investigations. He asked for the following relief:

> That a declaratory judgment issue declaring the following:
> (a) that Plaintiff as a citizen of the United States has a right as guaranteed by the Constitution to petition his Congressman;
> (b) that Defendant Latta's action in reporting Plaintiff to the FBI was violative of Plaintiff's rights as guaranteed by the Constitution;
> (c) that the Defendants Larry Paul and George Blue's investigation of the Plaintiff because of his contact with Defendant Latta was violative of Plaintiff's unencumbered right to petition government.
>
> That a preliminary and permanent injunction issue:
> (a) requiring the Defendants Larry Paul and George Blue to expunge any and all FBI records pertaining to Plaintiff as a result of Defendant Latta's charges;
> (b) enjoining the Defendants Larry Paul and George Blue from harassing the Plaintiff by visitation to home, place of work or anywhere else because of Plaintiff's exercise of his right to petition government or as a result of this lawsuit.
>
> That a writ and *mandamus* issue against Defendant Latta compelling Defendant Latta to do the following:
> (a) carry out and perform his functions as a United States Congressman in a manner so as not to deny Plaintiff his right to petition government:
> (b) to refrain from filing charges with the FBI regarding Plaintiff because Plaintiff seeks to petition government through Defendant Latta;
> (c) to fulfill those duties owed Plaintiff by Defendant Latta in his capacity as a United States Congressman; particularly to permit Plaintiff to seek a redress of his grievance and the right to petition government through Defendant Latta without becoming subject to FBI or any other governmental investigation.
>
> That compensatory damages in the amount of $15,000.00 be awarded Plaintiff.
>
> That punitive damages in the amount of $100,000.00 be awarded Plaintiff.

That reasonable attorney fees be awarded.
For any and all other relief the court deems appropriate.
[Complaint at 5–6]

In their "Motion to Dismiss or, in the Alternative for Summary Judgment," defendants stated that Congressman Latta had advised the plaintiff that the matter of plaintiff's request to him was within the jurisdiction of the National Labor Relations Board, and that plaintiff had become so hostile that it caused Congressman Latta to believe he may have been threatened. The Congressman reported the incident to the FBI and left the matter to their discretion. The FBI, after consultation with an Assistant United States Attorney, decided to conduct an informal interview to clarify the possible threat. This was done with plaintiff's consent, and it was determined that no crime had been committed. Plaintiff was not detained against his will nor subject to any form of duress, and therefore he had failed to state a claim against any of the defendants. "Moreover, the named individual defendants in this action were engaged in official duties with regard to the allegations herein and are therefore immune from suit." The response said that Congressman Latta was protected in his actions by the Speech or Debate Clause, or even if he wasn't, he was protected by the fact that he was carrying out his official duties as a Congressman.

The response also stated that Congressman Latta's exercise of his official duties is not reviewable by *mandamus*, since a Congressman is necessarily besieged with requests from individual constituents to take actions on their behalf, each of whom may earnestly believe that his case deserves immediate action as requested. It also said that because the United States had not consented to being sued in this case, it was protected by the doctrine of sovereign immunity.

Plaintiff countered that the doctrine of official immunity would not hold in this case because Congressman Latta had not called the FBI to investigate a possible crime but had sent the agents to deny plantiff his constitutional rights of freedom of speech and the right to petition his government for the purpose of protecting Congressman Latta by warning plaintiff not to put anything in the paper that would harm Congressman Latta's political career. By the same reasoning, plaintiff argued that Congressman Latta was not engaged in a legislative function when he called the FBI, and is therefore not protected by the Speech or Debate Clause. Also, plaintiff claims that *mandamus* is sought not to force Congressman Latta to grant him an audience, but to prevent the Congressman from filing charges with the FBI for plaintiff's attempts to petition him for assistance. Plaintiff also states that the United States is a proper party, not as to payment of damages, but as to having an order issued by the court which will prevent retaliatory action against plaintiff by other government agencies.

Defendants reasserted their claim of official immunity as to all defendants and legislative immunity as to Congressman Latta, and stated further that even were these defenses to be denied, Congressman Latta could not be liable since all he had done was report suspicious circumstances to a law enforcement agency. They stated further that plaintiff's claim that Congressman Latta had used the FBI to harass plaintiff and keep him from going to the press so that Congressman Latta could save his political career was without merit. "It

is from just such frivolous allegations that the doctrines of official immunity and congressional immunity are intended to guard government officers and legislators, leaving them free to pursue their important official functions."

Defendants again stated that by interviewing the plaintiff, the agents for the FBI had not given plaintiff grounds for an action, even if done for an improper motive. Finally, they stated that the United States is not subject to an action seeking an injunction without its consent by statute.

In an Opinion and Order issued March 26, 1976, U.S. District Court Judge Don J. Young decided that the lawsuit could not be entertained at all because he found that the activities involved fell within the legitimate legislative sphere of Representative Latta's duties as a Congressman. Therefore he was cloaked with congressional immunity and could not be questioned in court concerning those activities. "Mr. Latta was performing the legitimate legislative function of listening to and attempting to solve the problems of his constituency. He appears to have performed said function in an honest and sincere manner. In order to insure that he continues to perform said function independently, he must be protected from lawsuits of this nature." [Opinion and Order at 3; this report at 87.] The court also found that the FBI agents were merely serving Congressman Latta in his legislative function and were thus also entitled to constitutional protection under the Speech or Debate Clause as read in *Doe* v. *McMillan*, 412 U.S. 306 (1972). Also, since the United States had not consented to being sued in this case, it had to be dismissed as a party. The complaint was therefore ordered dismissed as to all defendants.

Status.—No appeal had been filed at the time of this report. The full text of the court's "Opinion and Order" is printed in the "Decisions" section of the report beginning at 83, *infra.*

II. Powers of Congressional Committees

Ashland Oil Inc. v. *Federal Trade Commission*

Civil Action Nos. 76–1174 and 76–1304 (D.C. Cir.)

Brief.—This suit, filed on November 24, 1975, by Ashland Oil, seeks declaratory and injunctive relief pursuant to Chapter 7 of the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*).

On, or about April 15, 1975, the Federal Trade Commission served upon Ashland Oil an order ("Special Report") which required Ashland Oil to submit information, some of which "was highly sensitive competitive data detailing the company's reserve estimates for all of its natural gas leases and contracts nationwide." [*Ashland Oil, Inc.* v. *Federal Trade Commission*, Civil Action No. 75–1956 (D.D.C.); Slip Opinion at 3]. Ashland's submission was accompanied by a letter from one of its vice presidents stating that the company's information on gas reserves was confidential and of a proprietary nature, the disclosure of which would result in competitive injury. The letter further stated that such information was submitted to the Commission with the express reservation that Ashland could claim its right to have the materials therein provided "accorded confidential treatment and be protected from disclosure."

Following a rejection by the Federal Trade Commission of his request, as a Member of Congress, to make available to him data gathered by the Commission pertaining to lease extensions on Federal lands, Congressman John E. Moss sent a second request as Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. Unlike its first response, in which it denied the Congressman's request for information which it considered to be exempt from mandatory disclosure under the Freedom of Information Act (5 U.S.C. §§ 552 (b)(4) and (b)(9), the Commission treated the second request as a "formal Congressional request" and advised Chairman Moss that the requested information would be furnished. Subsequently, Ashland was advised of the Commission's decision to turn over the requested data to Congressman Moss.

On the same day that this suit was filed—November 24, 1975—Ashland moved for and was granted a temporary restraining order enjoining the Commission from releasing the information in issue, thus preserving the *status quo* until the court considered the merits of Ashland's claims.

On December 2, 1975, a subpoena *duces tecum* was served on the Chairman of the Federal Trade Commission which ordered him to appear before the subcommittee and to bring with him

> any and all records within the Federal Trade Commission's control or custody or within the Federal Trade Commission's means to produce appertaining to or involving oil and/or gas

lease extensions on Federal lands, including Ashland Oil, Inc. and including all correspondence between the Federal Trade Commission and Ashland Oil, Inc. relating in any manner to agreements or proposed agreements to hold such records confidential or to give advance notice of the release thereof. [*See* H.R. Rep. No. 94–756, 94th Cong., 1st Sess., at 3–4 (1975).]

By letter of December 3, 1975, Chairman Moss informed Mr. Lewis Engman (Chairman of the FTC) that the subcommittee would take no action to enforce compliance with the subpoena until the court had considered the issues arising in the instant case.

Following a hearing in open court, Congressman Moss' motion to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, was granted on January 16, 1976.

This case came before Judge Howard F. Corcoran, of the United States District Court for the District of Columbia on Ashland's motion for preliminary and permanent injunction and Defendants Moss' and the Federal Trade Commission's motions for summary judgment or, alternatively, to dismiss.

In a memorandum and order filed February 2, 1976, the district court denied the plaintiff's motion, granted defendants' motion to dismiss, and dissolved the temporary restraining order issued November 24, 1975.

After addressing itself to the plaintiff's contention that Section 6(b) of the Federal Trade Commission Act prohibits the disclosure of trade secrets by the Commission to any third party—including the Congress—and having determined that some of the data in issue do indeed constitute a "trade secret" within the purview of Section 6(f) of the FTC Act, and further, declaring that congressional investigatory power is not unlimited and the parameters of the inquiry may be no broader than the "legitimate sphere of legislative activity," the court concluded:

> In summary, we find that the particular investigation here in issue is directly related to and in furtherance of "a legitimate task of Congress." *Watkins* v. *United States*, *supra*, 354 U.S., at 187. The Subcommittee, in issuing the subpoena, was acting under the clear mandate of the full committee and the House of Representatives to investigate within the "sphere of legitimate legislative activity" and that grant of authority is itself sufficient to show that the investigation upon which the Subcommittee has embarked "concerned a subject on which 'legislation could be had'." *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S., at 506; *McGrain* v. *Daugherty*, 273 U.S., at 177; *see also Communist Party* v. *Control Board*, 367 U.S. 1 (1961). [Slip Opinion at 18; footnote omitted.]

With respect to plaintiff's specific motion for preliminary and permanent injunction, the court said:

> Injunctive relief is appropriate only "to prevent existing or presently threatened injuries" and "will not be granted against something merely feared as liable to occur at some

indefinite time in the future." *Connecticut* v. *Massachusetts*, 282 U.S. 660, 674 (1930), *See also*, *General Fireproofing Company* v. *Wyman*, 444 F.2d 391, 393 (2nd Cir. 1971). Injunctions will not be granted where the injuries complained of are prospective and "which may, indeed, never occur." *Crimmins* v. *American Stock Exchange, Inc.*, 346 F. Supp. 1256, 1262 (S.D.N.Y. 1972). The injury complained of must be of such *imminence* that there is a "clear and present" need for equitable relief to prevent irreparable harm. *Hershey Creamery Co.* v. *Hershey Chocolate Corp.*, 269 F. Supp. 45 (S.D. N.Y. 1967); *see also Assn. of Professional Engineering Personnel* v. *Radio Corp. of America*, 183 F. Supp. 834 (D.C. N.J. 1960). And the required showing of irreparable injury is not eliminated simply by virtue of a claim alleging violation of statutory or constitutional rights, (unless the requirement has been specifically eliminated by statute). Thus, in *United Fuel Gas Co.* v. *Railroad Commission*, 278 U.S. 300 (1928), the Supreme Court noted:

> Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers but the act complained must inflict upon them some irreparable injury." 278 U.S., at 310 (Stone, J.)

See also Newtex S.S. Corp. v. *United States*, 107 F. Supp. 388 (S.D.N.Y.), *aff'd.* 344, U.S. 901; *Ellis Raw Bar* v. *District of Columbia Redevelopment Land Agency*, 433 F.2d 543 (D.C. Cir. 1970).

While Ashland couches its concerns in terms of "public disclosure," any irreparable injury to it would result, more precisely, in disclosure to its competitors. Certainly, such injury might logically result as well from general dissemination. But the transfer of such data from the FTC to the Subcommittee and the Subcommittee's review of that information, does not lead inexorably to either public dissemination or disclosure to Ashland's competitors. Moreover, the courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties. *See*, *Ansara* v. *Eastland*, 442 F.2d 751, 754 (1971); *United States* v. *Tobin*, 195 F. Supp. 588, 613 (D.D.C. 1961). [Slip Opinion at 19–20; footnotes omitted.]

In response to Ashland's allegations about the subcommittee's handling of trade secrets in the past which, according to the plaintiff, "has shown either a total incapacity to protect such trade secrets or a callous indifference to the proprietary nature of those secrets" (Plaintiff's Reply Memorandum, p. 59), the court stated:

> While the Court can appreciate Ashland's concern under these circumstances, it does not appear to the Court that isolated instances of breached confidentiality in the past are sufficient to overcome the continuing presumption of Congressional propriety.

Through its staff counsel, the Subcommittee has indicated that there is "no indication" that the Subcommittee "would release information originating from Ashland." (Affidavit of Michael R. Lemov, Intervenor's Motion to Dismiss). And Chairman Moss, through counsel, has represented:

> Of course, the Subcommittee does not seek publication of Ashland's trade secrets; it seeks merely production of documents in compliance with a Congressional subpoena. (Response of Chairman Moss to Ashland's Opposition to Motion to Dismiss, p. 6).

> Weighing all of these considerations, it appears to the Court, on balance, that the irreparable injury which Ashland seeks this Court to prevent by the issuance of permanent injunctive relief is neither "presently threatened" nor "imminent." The injuries complained of are, rather, "prospective" in nature and "may, indeed, never occur." *See Crimmins v. American Stock Exchange*, *supra*. [346 F. Supp. 1256, 1262 (S.D.N.Y. 1972)] [Slip Opinion at 22.]

In conclusion the court held that irreparable injury could not be established, that injunctive relief was not warranted, and that it need not reach the merits of Ashland's complaint.

However, on February 9, 1976, the court granted plaintiff's motion for an injunction pending appeal on terms identical to the temporary restraining order previously entered. The court said:

> [I]t appears to the Court that (1) this action will be rendered moot in the absence of an injunction pending appeal; and that (2) the issues to be raised on appeal have not heretofore been definitively settled in prior case law and are of substantial import to the parties and the general public; but that (3) the countervailing legitimate interests of the legislative branch militate against indefinite protraction of interlocutory relief by this Court. [See Order and Statement of Reasons Pursuant to Federal Rules of Appellate Procedure 8(a), February 9, 1976, at 1.]

Representative Moss filed a motion with the District Court on February 4 asking that Court to amend its findings in its order of February 2 by removing any implication that either he or the Subcommittee he chairs had at any time breached promises they had given to keep trade secret data confidential. Ashland filed a motion for a rehearing on February 5. Both motions were denied by the Court on February 9.

On February 18, 1976, Ashland filed an appeal with the U.S. Court of Appeals for the District of Columbia, and also filed a motion for an injunction to preserve the *status quo* pending appeal. The motion for the injunction was argued before the Court of Appeals on March 11, and was granted on March 26 in an order which also denied defendants' motion for summary affirmance.

Representative Moss then filed an appeal from the denial of his motion to amend the findings of the District Court. The appeal, filed on April 2, asked that this appeal and that of Ashland's be consolidated, which was done on April 23.

The consolidated cases were argued before the court of appeals on May 10, 1976.

Status.—The case is now pending before the U.S. Court of Appeals for the District of Columbia.

The district court's memorandum and order of February 2, 1976, was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1976.

United States* v. *American Telephone & Telegraph Co.

Civil Action No. 76–1712 (D.C. Cir.)

Brief.—On July 22, 1976 the Justice Department filed this action in the District Court for the District of Columbia seeking a temporary restraining order enjoining American Telephone and Telegraph (A.T. & T.) from complying with a subpoena issued by the Chairman of the House Committee on Interstate and Foreign Commerce pursuant to a vote by the Subcommittee on Oversight and Investigations. The Chairman of the Subcommittee, Representative Moss, filed a motion to intervene as a party-defendant which was granted. (Civil Action No. 76–1372 (D.D.C.).)

The information sought pursuant to the subpoena included letters from the Federal Bureau of Investigation (FBI) to subsidiaries of A.T. & T. requesting (1) that a leased telephone line be provided at the usual commercial rate, (2) a statement that the request was made upon a specific authorization of the Attorney General for purposes of national security, (3) the phone number, location or other information relating to the lines to be intercepted, and (4) the statement that A.T. & T. was not to disclose the existence of the request because such disclosure could obstruct and impede the investigation.

The letter includes the phone number, the address, or some other indication identifying the object of the electronic surveillance. Such a request is necessary because the information intercepted is moved from the point of interception (i.e., the telephone line leading to the object structure) to the point of monitoring (which may be the local FBI office) by way of a leased telephone line, which can be installed only by A.T. & T. and its subsidiaries.

Paragraph one of the subpoena seeks such "national security request letters."

The return date on the subpoena was orginally set for June 28, 1976, but because of continuing negotiations the compliance date was extended to July 23rd.

The executive branch presented the committee with an alternative proposal. Under this proposal, following A.T. & T's preparation of an "inventory" of the request letters held by A.T. & T., the FBI would identify by date those which were "foreign intelligence surveillances" and those which were "domestic surveillances." In regard to the past domestic surveillances, the FBI would furnish to the Subcommittee the memoranda on which the Attorney General based his authorization for such surveillances, with only minor deletions necessary to protect ongoing investigations. From the "foreign intelligence surveillances," the Subcommittee could select sample items for any 2 years, and representatives of the Subcommittee would be given access to the memoranda on which the Attorney General based his authorization of those

surveillances with names, addresses or other information identifying targets and sources deleted. President Ford also proposed a procedure whereby verification, and resolution of any questions, would be accomplished by the direct participation of the Attorney General and if necessary by the President himself. This proposal was rejected by Subcommittee Chairman Moss. On July 22, 1976, the President wrote to Representative Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, stating:

> I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States and damaging to the national security. Compliance with the Committee's subpoena would, therefore, be contrary to the public interest. Accordingly, I have instructed the American Telephone and Telegraph Company, as an agent of the United States, to respectfully decline to comply with the Committee's subpoena.

The suit was filed when it became clear that not withstanding the President's order, A.T. & T. was prepared to turn over the subpoenaed documents to the Committee.

Chairman Moss, "ostensibly participating in this action on behalf of the Subcommittee," [Slip Opinion at 8; this report at 109], asserted that the Speech or Debate Clause of the Constitution was an absolute bar to judicial interference with a congressional subpoena issued in the conduct of a legitimate legislative investigation.

The Justice Department countered that the suit should only be considered one seeking to restrain a private party from releasing documents in its possession.

By doing that, the Department argued, the court need not consider the applicability of the Speech or Debate Clause, since the immunity of that constitutional provision runs only to Members of Congress and their close aides when defending against a lawsuit, and does not afford any protection to a private entity such as A.T. & T. This argument was advanced so that the court could avoid dealing with a constitutional confrontation between two of the three branches of our Government.

On July 30th the court issued its decision. Rejecting the Department's approach, the court said:

> [T]o take this avenue would be to place form over substance. The effect of any injunction entered by this court enjoining the release of materials by A.T. & T. to the Subcommittee would have the same effect as if this court were to quash the Subcommittee's subpoena. In this sense the action is one against the power of the Subcommittee and should be treated as such, assuming that Representative Moss has authority to speak for the Subcommittee.

The court determined that it was confronted with a direct contest between the investigatory power of the Congress and the invocation of executive privilege. Rejecting the contentions of absolute rights as-

serted by both Chairman Moss and the Justice Department, the court determined that:

> Here, by nature, the extent and the relative importance of the power of one coordinate branch of government must be balanced against that of the other. Neither can be considered in a vacuum.

In balancing the competing interests the court noted several factors which, it concluded, must be considered. These included:

(1) whether the information requested is essential to "the responsible fulfillment of the Committee's functions." *Senate Select Committee* v. *Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (concerning a congressional subpoena of Executive documents *not* related to national security).

(2) whether there is "an available alternative" which might provide the required information "without forcing a showdown on the claim of privilege." *United States* v. *Reynolds*, 345 U.S. 1, 11 (1952).

(3) the circumstances surrounding and the basis for the Presidential assertion of privilege. *Id.*; *United States* v. *Nixon*, 418 U.S. 683, 710–711 (1974).

The court concluded:

> In the context of this case, and the court emphasizes that this decision is limited to the circumstances of this case, the court determines that there are alternative means available for obtaining the information required by the Subcommittee, that the particular form in which that information is sought is not absolutely essential to the legislative function, and that the President's determination that release of this material would present an unacceptable risk of disclosure of matters concerning the national defense, foreign policy and national security outweighs the Subcommittee's showing of necessity.

In deciding to grant the permanent injunction against compliance with the subpoena, the court considered the likelihood that the subpoenaed material if turned over to the Subcommittee might be made public. The court noted the President's determination that release of the material would present an unacceptable risk of disclosure to national security and foreign policy and that:

> if the materials were turned over to the Subcommittee, the information could legally be released upon the majority vote of a quorum (8 Members) of the Subcommittee unless such a determination were reversed by the affirmative action of the House. In addition, each of the 435 Members of the House of Representatives would have access to such material pursuant to Rule XI(2)(e)(2) of that Chamber's Rules. The potential for disclosure of this highly sensitive information, if put into the hands of so many individuals, has been determined by the President to be an unacceptable risk. Such a determination is entitled to great weight.

The court is not implying that the Members of the Subcommittee, or of the House of Representatives, will act negligently or in bad faith if they have access to these documents. But it does appear to the court that if a final determination as to the need to maintain the secrecy of this material, or as to what constitutes an acceptable risk of disclosure, must be made, it should be made by the constituent branch of government to which the primary role in these areas is entrusted.

Status.—Defendant-intervenors filed an immediate appeal with the court of appeals and asked for an expedited briefing period. On August 6, 1976, the U.S. Court of Appeals for the District of Columbia set an expedited schedule and designated the case for hearing in the October 14 to November 3 session of that court.

The full text of Judge Gasch's memorandum and order is printed in the "Decisions" section of this report at 103.

Nixon* v. *Sampson

Civil Action No. 74–1518 (D.D.C.)

and,

Nixon* v. *Administrator of Gen. Servs.

No. 75–1605 (U.S. Supreme Court)

Brief.—Following the resignation of former President Richard M. Nixon, the special prosecutor's office advised counsel to President Ford and counsel to the former President of its continuing interest in presidential materials and tape-recorded conversations housed in the White House, the Executive Office Building, and elsewhere which were relevant to investigations and prosecutions within the jurisdiction of the special prosecutor. Thereafter counsel for President Ford requested an opinion from then Attorney General William B. Saxbe on the issues of ownership of the presidential materials and tapes and the responsibilities of the Ford Administration with respect to them. A response to that request indicated that in the opinion of the Attorney General the presidential materials and tapes belonged to the former President, but the government had a right to use said materials. Following that advisory opinion a "depository agreement" [Nixon/Sampson agreement] was signed by the former President and Arthur F. Sampson, Administrator of the General Services Administration, on September 7, 1974.

Thereafter, Jack Anderson, a well-known columnist, and others filed a petition with the General Services Administration seeking access to these materials pursuant to appropriate provisions of the Freedom of Information Act. The petitions were denied by GSA.

On October 17, 1974, the former President filed a suit against Sampson and others in the United States District Court for the District of Columbia seeking a temporary restraining order and preliminary injunction to compel compliance with the "Nixon/Sampson agreement" and to prevent unauthorized access to the materials and tapes. Mr. Anderson, and the special prosecutor, and others moved to intervene, seeking a temporary restraining order and preliminary injunction to prevent the implementation of the "Nixon/Sampson agreement." U.S. District Court Judge Charles R. Richey issued a temporary restraining order prohibiting the implementation of the agreement until a full hearing could be held on the former President's motion for a preliminary injunction. [*Nixon* v. *Sampson*, Civil Action No. 74–1518 (D.D.C.).]

A petition for leave to participate as *amici curiae* in this case was filed and granted on behalf of then Senator Sam J. Ervin, Jr., and Senators Gaylord Nelson and Jacob Javits and Representatives Wayne L. Hays and John Brademas on November 11, 1974. A separate motion

of Representative Elizabeth Holtzman for leave to file an *amicus* brief was also granted on the same day.

The congressional petitioners sought leave to participate in the proceedings in order to bring to the attention of the court "their intense interest—as Members of Congress having 'special responsibility with pending legislation dealing with the subject matter' before the court—in the maintenance of the *status quo* pending consideration by the Congress of matters falling within its primary and fundamental authority." [Memorandum of Ervin et al. as *amici curiae*, *Nixon* v. *Sampson*, Civil Action No. 74–1518 (D.D.C. Nov. 11, 1974).]

At the time of the filing of the Ervin and Holtzman petitions, the Senate had passed a bill, S. 4016, which, while making no determination as to the title of the presidential materials, provided for the preservation of access to materials by placing them under the control of the Administrator of the General Services Administration, with all the materials to remain in Washington. The bill had been transmitted by the Senate to the House and referred to the appropriate House committee which had not then had an opportunity to act on it.

Each of the congressional participants—the *amici*—bore a special responsibility with regard to this legislation. As noted in a memorandum prepared on their behalf:

> Amicus Ervin, Senator from North Carolina, is Chairman of the Senate Committee on Government Operations, which has jurisdiction over such legislation in the Senate. Amicus Nelson, Senator from Wisconsin, is the sponsor of the pending bill. Amicus Javits, Senator from New York, is an original co-sponsor thereof. Amicus Hays, Representative from Ohio, is Chairman of the Committee on House Administration, which has jurisdiction over such legislation in the House. Amicus Brademas, Representative from Indiana, is Chairman of the relevant Subcommittee of the House Administration Committee. [*Id.*]

The action sought by the *amici* was set out in this language:

> Amici respectfully urge that the safeguarding of these materials pending Congressional action is a matter of the most compelling public interest. Accordingly, in light of these considerations of fundamental significance to amici and their colleagues in the legislative branch, amici urged that the Court grant a preliminary injunction to maintain the *status quo*. Such an injunction will insure an opportunity for orderly consideration of the issues by the representatives of the public in the exercise of their special Constitutional responsibilities as trustees of the people. It will insure that nothing untoward can happen to these materials while the people's representatives decide how best to exercise their responsibilities. [*Id.*]

Although the Holtzman petition supported the *status quo* position of the Ervin petition fully, Ms. Holtzman's memorandum was submitted for another purpose—to call to the court's attention the fact that the principal issue in this action was the ownership of the tapes

and papers. Accordingly, Ms. Holtzman contended that since the Attorney General had already expressed his opinion in writing that all of the disputed papers and tapes belonged to the former President, the "level of vigor" with which the Department of Justice would pursue the defense of any action brought by Mr. Nixon—to obtain either the return of, or compensation for, the property which both he and the Attorney General already agreed were his—would be less than adequate. Moreover, she maintained that the matter was further complicated because the Department was currently representing Mr. Nixon in several suits brought against him while he was President, thus raising an ethical question as to whether it could represent his adversary (the United States) in litigation over the ownership of the papers and tapes in question.

To remedy the situation, Ms. Holtzman informed the court that she intended to introduce legislation to provide for a Special Counsel, in lieu of the Department of Justice, to represent the United States in all litigation relating to the ownership of the papers and tapes at issue in this case. [Memorandum of Congresswoman Elizabeth Holtzman as *amicus curiae*, *Nixon* v. *Sampson*, Civil Action No. 74–1518 (D.D.C. Nov. 11, 1974).]

Judge Richey held a hearing on the petitions on November 15 and 18, 1974, but withheld any decision and asked counsel for *amici* to provide him with additional information regarding the effect of the pending lawsuit on the bill then before the Congress.

Subsequently, after a series of amendments, the Congress passed S. 4016, on December 9, 1974. The bill, the Presidential Recordings and Materials Preservation Act, was signed into law on December 19, 1974 [Pub. L. 93–526].

On the day after the Act went into effect, the former President brought an action in the U.S. District Court for the District of Columbia to enjoin its enforcement on the grounds that it transgressed the Constitution. [See *Nixon* v. *Administrator of Gen. Servs.*, Civil Action No. 74–1852 (D.D.C.), filed Dec. 20, 1974.] At the same time, Mr. Nixon asked that a three-judge court be convened pursuant to 28 U.S.C. §§ 2282, 2284 to hear and determine the constitutional claims asserted. The case was assigned to Judge Richey, before whom the consolidated cases aforementioned were then pending. The same issues, namely, the ownership of the materials and tapes and privilege against their disclosure, which were raised in the consolidated cases were now extended to Mr. Nixon's most recent challenge. On January 3, 1975, Mr. Nixon moved for a preliminary injunction against operation of the Act.

It was alleged that on five separate occasions, during the 5 weeks following institution of Mr. Nixon's action of December 20, 1974—he (Mr. Nixon through counsel) requested Judge Richey to initiate the statutory procedure leading to the formation of a district court of three judges. During that period, Judge Richey was preoccupied with the consolidated cases and planned to complete work on them before turning his attention to the challenge case. (*Nixon* v. *Administrator of Gen. Servs.*, *supra.*)

Having failed to convince Judge Richey that the appointment of a three-judge court took priority in this matter, Mr. Nixon filed a peti-

tion for a writ of *mandamus* in the U.S. Court of Appeals for the District of Columbia Circuit, directing Judge Richey to grant the application for a three-judge court immediately and give the challenge case priority over the consolidated cases as assertedly required by section 105(a) of the Presidential Recordings and Materials Preservation Act. [*Nixon* v. *Richey*, Civil Action No. 95–1063 (D.D.C.).]

The appeals court, in a *per curiam* order and opinion filed January 31, 1975, denied the former President's petition stating that the issuance of a writ of *mandamus* was unnecessary. It did, however, hold that Judge Richey erred in delaying action on the application for a three-judge panel. Although the court stated that an application for the convening of such a court is statutorily entitled to expeditious treatment under 28 U.S.C. § 2284, it held that beyond these considerations, the Presidential Recordings and Materials Preservation Act requires the trial judge to give priority to such an application:

> Beyond these considerations, the Recordings and Materials Act independently supports petitioner's claim that the District Judge should have acted weeks ago on the three-judge application. Section 105(a) of the Act confers upon the District Court for the District of Columbia "exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title," and specifically provides that "[a]ny such challenge shall be treated by the court as a matter requiring immediate consideration and resolution. * * *" (emphasis supplied) It is clear that the case for which petitioner sought the three-judge court was a "challenge to the legal or constitutional validity of" the Act. It is equally clear that, as an integral part of his "challenge," petitioner's application for such a court was "a matter requiring immediate consideration and resolution. * * *" In these views, we need not consider contentions by one of the amici curiae that Sections 2282 and 2284 are inoperable in the situation at bar. [*Nixon* v. *Richey*, 513 F. 2d 427, 429 (1975).]

Although the court acknowledged the propriety of the *mandamus* remedy under the circumstances, it saw no occasion for issuance of a writ, since having advised the District Judge of the relevant law, it assumed the lower court would proceed in accordance with the appellate opinion.

On the same day (January 31) in which the appeals court had issued its order and opinion, Judge Richey released a 98-page opinion in the consolidated cases. At the same time, Judge Richey issued a summary and synopsis of his opinion which appears in its entirety as follows:

Summary and Synposis of Opinion of Charles R. Richey, United States District Judge

A. Introduction

These consolidated cases present a unique controversy, the heart of which concerns the ownership of and the right to assert or waive a privilege with respect to the "Presidential

materials and tape-recorded conversations" of the Nixon Administration.

These actions are before the Court on the following motions: plaintiff Nixon's motions to dismiss the Hellman, et al., and Anderson suits for lack of standing; the government defendant's motion to dismiss all the actions, except that by the Special Prosecutor, on the ground that they are moot; and on motions for summary judgment or partial summary judgment by plaintiffs Anderson, The Reporters Committee for Freedom of the Press, et al., Lillian Hellman, et al., and the Special Prosecutor, on his counterclaim for declaratory relief, and as the intervenor-defendant in *Nixon* v. *Sampson, et al.*, (C.A. No. 74–1518).

B. Standing

The Court finds that plaintiffs Anderson, Hellman, et al., and The Reporters Committee for Freedom of the Press, et al., have standing to sue under the Freedom of Information Act and to challenge the Nixon-Sampson Agreement of September 7, 1974.

C. Justiciability

The Court finds that although the Presidential Recordings and Materials Preservation Act of December 19, 1974, nullifies the Nixon-Sampson Agreement of September 7, 1974, the said Act does not resolve the basic questions of ownership of the Presidential materials and tape recordings, nor whether the former President may assert any privilege in regard thereto. Therefore, the questions of ownership and privilege must be decided by this Court. Furthermore, the Court has decided the additional issue raised by the pleadings with regard to Mr. Nixon's asserted Fourth Amendment claims.

D. Summary Judgment

Because the Court finds that there are no genuine issues of material fact in dispute in these proceedings, the parties are clearly entitled to summary judgment on the issues as a matter of law.

E. Ownership

1. The claim of ownership of former President Nixon to the "Presidential materials and tape-recorded conversations" of the Nixon Administration is contrary to the general principle of law that that which is generated or kept in the administration and performance of the powers and duties of a public office belongs to the government.

2. Former President Nixon's assertion of ownership of the documents, papers, tapes and other materials generated or retained by himself or others on his behalf in the performance of his duties as the President of the United States is

contrary to the nature of the Office of the President and the Constitution.

3. The inherent continuity of the Office of the President negates a claim by former President Nixon that the independence of the Office requires that his assertion of ownership be sustained.

4. There is no precedent which compels a finding that the "Presidential materials and tapes" are the personal property of former President Nixon.

5. The historical practice of past presidents does not evidence a clear and constant recognition of ownership of the materials generated and retained in the conduct of the Office of the President.

6. Congress has not sanctioned the personal ownership of "Presidential materials and tapes" generated and retained in the conduct of the Office of the President.

7. Materials and tape-recorded conversations generated by Executive departments and agencies, although subsequently transferred to and currently located in the White House, are "records" within the meaning of the Freedom of Information Act, and the public has a right of access thereto; however, materials and tape-recorded conversations generated by the President and his personal aides are not "records" within the meaning of the Freedom of Information Act and, thus, are not available to the public under the Freedom of Information Act.

F. Privilege

A former President may not assert or waive the privilege which attaches to the confidential communications relating to the conduct of the Office of the President contained in Presidential materials and tape recordings as the privilege belongs to the government and may only be asserted or waived by the incumbent President.

G. Fourth Amendment

1. Mr. Nixon's Fourth Amendment rights have not been violated because the November 9th Agreement is not a general warrant; nor does it subject him to an unreasonable search and seizure. However, under the circumstances, Mr. Nixon's right of privacy must be afforded protection.

2. Mr. Nixon's right to privacy does not entitle him to an injunction, but the Court has the power to protect his rights and those of the government by fashioning a remedy.

H. Remedy

The Court will require the following procedure with regard to effectuation of the November 9th Agreement, with regard to any requests for Presidential materials and tape recordings made pursuant to court order or subpoena, or with

regard to any requests made under the Freedom of Information Act:

1. *Documents:* The government defendants, or their agents, prior to any governmental examination of the materials, shall permit Mr. Nixon or his counsel, (a) to segregate from any box or file, any document which is deemed personal, as defined by this Court; (b) to mark those portions of any document which are deemed private, as defined by this Court, without destroying or impairing the integrity of that portion or any other portion of the document;

2. *Tapes:* The government defendants or their agents, prior to any governmental examination of the tape-recorded conversations, shall permit Mr. Nixon or his counsel to listen to those tape-recorded conversations and, if any such tape-recorded conversation contains matters which are deemed private, as defined by this Court, then Mr. Nixon or his counsel shall so designate.

This procedure is to be effectuated as follows:

(a) The defendants shall specify one individual official of the government having expertise in the use of tape recording mechanisms (hereinafter, "operator") who at all times shall operate the mechanisms chosen by the operator for use in the procedure; and

(b) The operator shall employ two tape recorders, one (hereinafter, "recorder A") of which shall include the following features: (1) a single-listening device, commonly known as head-phones, and (2) a digital "counter"; the other (hereinafter, "recorder B") shall include the capacity to duplicate the recording from recorder A; and

(c) When Mr. Nixon, or his counsel, are in the process of listening to the tapes, he shall utilize the single-listener device; and

(d) The operator shall play the tape on Recorder A and duplicate the tape onto Recorder B, and when Mr. Nixon or his counsel deem any conversation or portion thereof as private, as defined by this Court, the operator shall stop recorder B at the commencement of that conversation or portion thereof so as not to record that conversation or portion thereof on the tape on recorder B at the termination of the conversation [or] portion thereof designated as private, and the operator shall also, utilizing the "counter," mark in a log the digital number of the commencement and termination of the conversation or portion thereof designated as private. When a dispute arises with respect to the validity of a claim that a particular item, or portion thereof, is private,

upon notice of counsel, the Court shall examine the material or tape-recorded conversation, or portion thereof, *in camera*. This shall be followed by a hearing under the procedure set forth in the Opinion.

The burden of proof as to whether a particular paper or tape-recorded conversation, or portion thereof, is personal, shall be borne by Mr. Nixon.

Following the release of Judge Richey's opinion, the former President sought reconsideration of the appeals court's earlier refusal of a writ of *mandamus* in *Nixon* v. *Richey*.

The appeals court, in an opinion and order of February 14, 1975, continued its stay of January 31 of any order implementing Judge Richey's opinion. The court noted that since a three-judge panel was convened on February 5 to consider whether it properly should pass on the constitutional issue, no further action by the appeals court was needed in that regard.

The appeals court noted that in its earlier opinion [January 31] it took pains to alert Judge Richey to the peril of disposing of the consolidated cases before acting on the former President's application for a three-judge panel. The court said it was obviously referring to the doctrine of collateral estoppel. [Under the doctrine, a final judgment in a prior suit precludes relitigation of material issues decided in that suit.] The court continued that the former President might be barred "from urging in the challenge case [*Nixon* v. *Administrator of Gen. Servs.*, Civil Action No. 74–1852 (D.D.C)] positions contrary to determinations which any decision of the consolidated cases [*Nixon* v. *Sampson*, Civil Action No. 74–1518 (D.D.C)] might yield." [*Nixon* v. *Richey*, 513 F. 2d 430, 438.]

The appeals court proceeded to undertake a review of the history of the Presidential Recordings and Materials Preservation Act.

The court stated that there were two goals Congress intended to and did accomplish by the passage of the Act: (1) insuring the Federal Government's interest in acquiring control over and power to protect the Presidential materials, and (2) speedy determination of possible constitutional challenges to the validity of the Act.

The court noted that the three-judge requirement under procedures delineated in Section 2284 of Title 28 of the United States Code was eliminated in Conference and the measure, with Section 105(a) of the Act, in its present form, which enables a single judge of the U.S. District Court for the District of Columbia to hear any constitutional challenge to this Act, was approved by the Conference Committee, and subsequently enacted into law [513 F. 2d at 439–442].

The Act did not, however, prohibit the petitioner from making an independent application under Section 2284, *supra*. The court said:

> The remarks of Representative Brademas demonstrate that Congress intended to preserve single-judge jurisdiction over the consolidated cases, even for consideration and decision of challenges to the constitutional validity of the new Act in the event that such challenges were asserted in those cases. The remarks plainly contemplated, too, that any such challenge would utilize that opportunity. But Representative Brademas

was completely silent on the question whether such a challenge could only take that route, and so is the rest of the legislative history.

We need not ponder whether Congress could validly have imposed the requirement that such a challenge could only be entertained in the consolidated cases. Nowhere in the legislative history is there any suggestion that Sections 2282 and 2284 would not enable a separate suit presenting a constitutional challenge to the Act in the context of a demand for injunctive relief. It would have been simple for Representative Brademas to state, and indeed for Congress to require, that those sections would not apply to challenges to the Act, had that been what Congress had in mind. Neither, however, was done, and the courts are left with the problem of determining whether petitioner's separate-suit challenge requires the usual three-judge court, particularly in light of the general canon of construction that repeal of a statute by implication is disfavored.

It is much the clearer, however, that Congress deemed indispensible to its objectives the immediate consideration and resolution of any challenge to the constitutional or legal validity of any provision of the new Act. It was to mandate that degree of expedition that each of the bills initially passing the Senate and the House contained the requirement that such challenges be heard and determined by a three-judge court with direct appeal to the Supreme Court, and contained also the requirement that both courts proceed immediately to consider and resolve the challenges.

* * * * *

> But what Congress expected, and what Section 105(a) as enacted would permit, was that any and all challenges to the validity of the Act would be made in the consolidated cases before Judge Richey as a single judge, after appropriate amendments and additions of parties for that purpose were accomplished. What Congress apparently did not anticipate was that petitioner, instead of pursuing that route, would institute a new, separate suit grounded on Sections 2282 and 2284 to test in orthodox fashion the constitutionality of the Act before a three judge rather than a single-judge tribunal. [513 F. 2d at 442–443.]

The court added that what Congress wanted "was speed in judicial handling of such [constitutional] 'challenges' whether properly to be considered and determined by three judges or one. Just as plainly, the text and history Section 105(a) indicate that Congress did not share the same concern for speed in the resolution of litigation not amounting to a [constitutional] 'challenge'. That litigation is relegated to a position below the priority specified for 'challenge' actions." [513 F. 2d at 444–445.]

The court concluded by granting the former President's petition for *mandamus* and ordering a stay of the issuance of Judge Richey's order and of any further proceedings in the consolidated cases.

On April 2, 1975, Judge Richey removed himself from the consolidated cases in which he was trial judge and from the challenge case before the three-judge panel of which he was a member. He was replaced in both proceedings by Judge Aubrey E. Robinson.

In August, Rose Mary Woods, who was Mr. Nixon's personal secretary when he was President, moved to intervene in the action before the court of appeals for the purpose of having the stay over the proceedings in the consolidated cases amended to allow her to intervene in those proceedings. On September 2, 1975, the court of appeals allowed her intervention and granted her motion to amend its order of January 31, 1975. Miss Woods then was admitted in the consolidated cases as an intervenor plaintiff seeking to obtain certain personal papers of her own from the Administrator of GSA. On December 2, 1975, her motion for judgment on her pleadings was granted. The decision was immediately appealed to the court of appeals. [*Nixon* v. *Sampson*, Civil Action No. 75–2194 (D.C. Cir.).]

In the meantime, the three-judge panel in the challenge case heard oral argument on September 22, 1975. In a unanimous opinion released on January 7, 1976, the three-judge court upheld the constitutionality of the act on its face. A summary of the court's opinion appears as follows:

Scope of Inquiry

> The court, responding to its duty to avoid constitutional questions whenever possible, considers only those questions of the Act's constitutional validity that are immediately ripe for resolution. As no regulations have yet taken effect, and as such regulations once effective are explicitly made subject to judicial review, the court considers only the injury to constitutionally protected interests of Mr. Nixon that is allegedly worked by the taking of his presidential materials into custody and their screening by government archivists. Slip op. at 18–31 *infra*.

Claims Relating to the Separation of Powers

> The court finds nothing in the separation of powers doctrine to support the contention that the legislature may not pass a statute in any way touching upon the prerogatives of the Executive. The only genuine separation of powers claim is that the Act might invade the presidential privilege that attaches to the small fraction of the materials that genuinely implicate presidential confidentiality. Although the court thinks it doubtful that a former President, rather than the incumbent, may assert such privilege, at the very least such a claim is entitled to relatively less weight in the balance of competing considerations. And the infringement upon presidential confidentiality caused by screening by trained and discreet government archivists, who have been employed to perform identical tasks for the materials of every President since Herbert Hoover, is very slight. The court finds, on the other hand, that Congress had ample reason to mandate

screening by government archivists rather than control by Mr. Nixon, who lacks their expertise and disinterestedness. The two most important of the interests served by preservation and responsible treatment of presidential materials are (1) maintaining a complete and accurate historical record and (2) assuring the availability of the materials potentially needed for continuity in executive policymaking. Other interests served by the Act include informing the public about the Watergate matters and ensuring the availability of materials that may be relevant to legislative investigations or judicial proceedings. Because of the manner in which personal materials are intermingled with official ones, comprehensive screening represents the only feasible manner of protecting these important interests. The court finds that the slight inroad on presidential confidentiality caused by such screening is outweighed by the need to further these important legislative objectives. Slip op. at 31–66 *infra*.

Claims Relating to Privacy

It appears from the record that plaintiff can validly claim a privacy interest in only a small fraction of the materials. Yet due to the historical practice of *de facto* control by Presidents of presidential materials, the court finds that regardless of where ownership of the materials lies—a question that need not be reached—plaintiff has a reasonable expectation of privacy in these materials, an interest that is infringed even by mere screening by government archivists conducted under legislation with retroactive application. In light of the intermingled nature of the materials, the court finds such infringement of privacy interests to be an inescapable concomitant of any attempt to serve the important legislative objectives underlying the Act. The private materials are far outnumbered by those that are non-private and related to those objectives. The court further finds that any invasion of privacy caused merely by archival processing—rather than by public access, which need not yet be considered—is not wide-ranging. In addition, less justification is needed when, as may be the case here, any invasion of privacy constituting a search and seizure does not serve law enforcement objectives. In light of these factors and the unavailability of less intrusive means of furthering the important legislative ends, the court concludes that any intrusion upon plaintiff's privacy interests has adequate justification. Slip op. at 67–89 *infra*.

Freedom of Speech and Association

Plaintiff's First Amendment claim is predicated upon the assumption that all materials—including those implicating privacy in political association—will be open to public access. The court finds no basis for that assumption. Rather, reaching only that infringement of First Amendment interests

caused by screening by government archivists, the court finds any injury to protected interests arising from a confidential review process to be insubstantial. Slip op. at 89–93 *infra.*

Equal Protection

The court finds that any difference in treatment between plaintiff and other Presidents is adequately justified. As respects immediate past Presidents, their papers had already been deposited in presidential libraries where, on the whole, their availability to promote important governmental interests was assured. As respects current and future Presidents, legislating with respect to them risked disrupting current executive policymaking, and would be unwise before the Commission study of the sensitive and complex problems involved in regulating the records of federal officials had been completed. Only plaintiff has finished his service as President but has not yet established a presidential library. Prompt congressional action was reasonably deemed necessary to assure that the materials would remain preserved, and to begin the lengthy process of reviewing and classifying them. Finally, Congress could legitimately consider plaintiff to be less likely than his immediate predecessors or successors to dispose of the materials responsibly. Slip op. at 93–97 *infra.*

Bill of Pains and Penalties

There is, in the court's view, no evidence in the legislative record to support the claim that the Act was designed to impose, or constitutes, punishment within the meaning of the Bill of Attainder Clause. The court finds there are other legislative objectives served by the Act which Congress could legitimately—and did—consider. Rather than possessing traditional indicia of a punitive enactment, the Act includes provisions that indicate a concern for plaintiff's interests, provisions that are wholly inconsistent with the hypothesis of punitive intent. Slip op. at 97–103 *infra.*

The court ordered that the preliminary and permanent injunctive relief sought by Mr. Nixon be denied, and his complaint be dismissed as without merit. Pending the final disposition of any appeal of the decision, the defendants were enjoined from "processing, disclosing, inspecting, transferring, or otherwise disposing of any materials, be they documents, papers, tape recordings or other items" which might fall under the provisions of the act, except for legal proceedings, inspection by Mr. Nixon or his designated agent, or use for current business by the executive branch.

The court also noted that the court of appeals had stated in *Nixon* v. *Richey*, 513 F. 2d at 448 that it would dissolve its stay of January 31, 1975, on the consolidated case proceedings, whenever the three-judge court indicated it believed the need for the stay no longer existed. "Having now entered judgment in this action, we are simultaneously requesting the court of appeals to dissolve the stay, thus permitting

the consolidated cases to proceed in whatever manner seems fit in light of the possibility of appeals in this action * * *" [Slip Opinion at 16. n. 10].

The court of appeals removed the stay on the consolidated cases on February 5, 1976.

On March 25, 1976, the court of appeals refused to grant a summary affirmance of Judge Robinson's order on December 2, 1975, which granted Rose Mary Woods summary judgment on her motion. Pending a decision on the merits of the appeal, the court ordered the parties to stipulate those materials as to which no controversy exists, and to make intermittent reports to the court. The parties have made several such reports to the court.

On March 5, 1976, Mr. Nixon filed a notice of appeal to the Supreme Court of the decision of the three-judge court on January 7, 1976. The case was docketed by the Supreme Court on May 3, 1976 (No. 75–1605).

Status.—The consolidated cases are before Judge Robinson in the U.S. District Court for the District of Columbia. The appeal of the order granting Miss Woods summary judgment is pending before the court of appeals. Mr. Nixon's appeal of the decision by the three-judge court was distributed by the Supreme Court on July 23, 1976, but no decision to grant or deny the appeal was made by the court before it recessed for the summer.

The full text of the U.S. Court of Appeals' decisions and of U.S. District Judge Richey's opinion were printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1975, and the full text of the three-judge court's opinion and order was printed in the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1976.

***Public Citizen, Inc.* v. *Simon* (formerly Shultz)**

Civil Action No. 74–2025 (D.C. Cir.)

Brief.—This action, filed in the U.S. District Court for the District of Columbia on November 16, 1972, sought to recover the salaries paid certain members of the White House staff for periods during which they were allegedly devoting substantially full-time to the 1972 Nixon presidential re-election campaign, rather than to their official duties.

Filed by Public Citizen, Inc., a nonprofit citizens' organization of some 65,000 members, an objective of which is to ensure that government officials carry out their duties in accordance with the law and that such laws are enforced, and its founder, Ralph Nader, the action named as defendant then Secretary of the Treasury George P. Shultz. The former members of the White House staff named in the complaint were Charles Colson, Special Counsel to the President, Robert H. Finch, Counselor to the President, Herbert G. Klein, Director of Communications for the Executive Branch, and various members of their staffs, of the White House staff and the staff of the Vice President.

The complaint was based upon Article I, Section 9 of the Constitution, which provides, in part, that "[n]o money shall be drawn from

the Treasury, but in Consequence of Appropriations made by Law; * * *" It was alleged that payments to staff persons, "devoting substantially all of their working time to the re-election campaign of President Nixon," from public moneys violates this constitutional provision and the provision of Section 628 of Title 31, United States Code, since such payments were not authorized by an appropriation of Congress. The code provision states: "Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

On March 8, 1973, U.S. District Judge June L. Green denied a motion by defendant to dismiss the suit for lack of standing on the part of plaintiffs. Subsequent to that denial, the Supreme Court decided two cases involving the issue of standing and defendant renewed his motion to dismiss, asking the court to review its previous holding in light of these two recent decisions. Judge Green agreed to do so.

In a memorandum opinion handed down September 30, 1974, Judge Green granted defendant's motion to dismiss, concluding that "[i]n view of these recent narrow interpretations of taxpayer standing [*United States* v. *Richardson*, 418 U.S. 166 (1974) and *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974)] this Court is constrained to conclude that the plaintiffs at bar fail to establish standing to proceed with this case." [*Public Citizen* v. *Simon*, Civil Action No. 2280–72 (D.D.C. Sept. 30, 1974), Slip Opinion at 4.]

Judge Green elaborated in her opinion:

> In the *Richardson* and *Reservists* cases * * *, the Supreme Court reviewed and reaffirmed its conclusion that in order to establish standing as a taxpayer, one must meet the narrowly defined tests enunciated in *Flast* v. *Cohen*, 392 U.S. 83 (1968), which are:
>
> > "(a) Challenging an enactment under the taxing and spending clause of Art. I, § 8 of the Constitution and (b) claiming that the challenged enactment exceeds specific constitutional limitations imposed on the taxing and spending power." * * *
>
> * * * The Supreme Court made it abundantly clear [in *Richardson* and *Reservists*] that taxpayer standing can be shown only when one challenges Congressional enactments under the taxing and spending clause of Article I, § 8.
>
> Plaintiffs herein fail in both respects. They are concerned with Executive action, and they base their claims not on Article I, § 8, but on Article I, § 9, clause 7 of the Constitution. [Slip Opinion 2–3.]

On June 25, 1976, the Court of Appeals affirmed the District Court's granting of the motion to dismiss, rejecting Public Citizen's assertion of standing. The Court held: "[T]he fair implication of appellants' position is to recognize taxpayer standing to attack any executive action that draws on an outstanding appropriation on the ground that the purchases or services are not in accord with the congressional intent in passing the appropriation. This would place the judiciary in the role of management overseer of the Executive Branch. Such oversight

is a function of Congress. Taxpayer standing here would bring into play the separation of powers concern pervading *Frothingham*, *Richardson* and *Schlesinger*.

"Appellants' final argument is that if they are not granted standing, the constitutional violation alleged will go unremedied and the funds diverted to the Nixon re-election campaign will never be recouped. We need not consider whether there is a 'better plaintiff' than a taxpayer to maintain the instant challenge. If not, the taxpayer's claim is still barred. In *Richardson* the Court rejected this factor as a basis for finding taxpayer standing, and viewed 'the absence of any particular individual or class' litigant as lending 'support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.' " [Slip Opinion at 13–14.]

Status.—No appeal had been filed as of the date of this report.

A copy of the appeals court's opinion is found in the "Decisions" section of this report at 89.

The full text of the district court's memorandum opinion was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Final Report, December 1974.

Clark* v. *Valeo

Civil Action No. 76–1227 (D.D.C.)

Brief.—This suit was filed on July 1, 1976, by former Attorney General Ramsey Clark, now a candidate for the Democratic nomination for U.S. Senator from New York, against: Francis R. Valeo, the Secretary of the Senate; Edmund L. Henshaw, Jr., the Clerk of the House of Representatives; and the Federal Election Commission (FEC). The action seeks declaratory and injunctive relief from certain provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, *et seq.*, as amended (hereinafter the "FECA") and Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 9001 *et seq.*, as amended, (hereinafter "Subtitle H") and against their administration and enforcement by defendants, on the grounds that these provisions, which allow a single House of Congress to disapprove regulations of the defendant Federal Election Commission (hereinafter "FEC"), violate the constitutional doctrine of separation of powers and destroy the constitutional system of checks and balances established by Articles I, II and III of the United States Constitution and deprive plaintiff of due process of law under the Fifth Amendment of the United States Constitution. [Plaintiff's "Complaint for Declaratory and Injunctive Relief," at pages 2–3.]

Plaintiff alleges that in the primary for the Democratic nomination he will be opposed by Representative Bella Abzug, among others, and that as a Member of the House of Representatives, she is authorized to, has and will continue to vote on whether to disapprove certain regulations of the FEC affecting elections for the U.S. Senate; and that in the general election he will be opposed by, among others, Senator James Buckley, who, as a Member of the Senate, is authorized to, has and will continue to vote on whether to disapprove the regulations of the FEC when they affect elections to the Senate. Mr. Valeo and Mr. Henshaw are sued (1) in their official positions whose duties include

furnishing certain services and facilities and cooperating with the FEC in carrying out its duties, (2) as custodians of the FEC of certain reports and statements submitted pursuant to the FEC's regulations, and (3) as *ex officio* members of the FEC.

The complaint states that the FEC is empowered to prescribe rules and regulations to carry out the provisions of the FECA and Subtitle H, but before any such rule or regulations may be put into effect, a statement containing the proposed regulation or rule and a detailed explanation of it must be transmitted to the appropriate House. Statements concerning candidates for the Senate go to the Senate and statements concerning candidates for the House go to the House. All other statements must be transmitted to both Houses. If within 30 legislative days after receipt either House disapproves a rule or regulation or part thereof, the FEC may not put the rule or regulation or part disapproved into effect.

Plaintiff states that on July 30, 1975, the FEC sent to both Houses a regulation pertaining to office accounts, which usually consist of excess campaign funds, used by Members of Congress to support various activities, and that a modified version of the regulation, intended to comply with certain suggestions by Members of both Houses, was sent to both Houses on September 30, 1975; that on October 8, 1975, the Senate rejected a modified version of the regulation by a single vote; that Senator Buckley, who himself has an office account, voted against the modified regulation; and that the Senate then rejected both regulations by a voice vote. Plaintiff further states that on August 1, 1975, the FEC sent to both Houses a regulation which would have required Members to file all reports and statements in the first instance with the FEC, instead of allowing them the special privilege of filing them with the Clerk of the House or the Secretary of the Senate (as appropriate) in the first instance, which plaintiff alleges delays the reporting to and investigation by the FEC for at least a week; that on October 22, 1975, the House of Representatives disapproved the regulation; and that Representative Abzug voted to disapprove the regulation.

He also states that several other regulations were referred to the appropriate Houses prior to the Supreme Court's decision in *Buckley* v. *Valeo* on January 30, 1976, which had not been disapproved, and on which the 30 legislative days had not yet run on that date, and that Congress subsequently provided that even rules and regulations adopted by the FEC before the date of enactment of the 1976 amendments to the FECA would not be effective unless they were resubmitted and subjected to the congressional veto system. He states that no such resubmissions have been made. Finally, plaintiff argues that since the FEC is currently considering rules and regulations which have not yet been, but which must eventually be, sent to the appropriate House to see if it disapproves, the FEC has and will continue to modify proposed rules and regulations in ways it perceives will meet the desires and wishes of Members. at times modifying them in such a way as to give incumbents advantages over non-incumbents.

The complaint states that the FECA and Subtitle H: (1) deprive plaintiff of his constitutional rights by allowing a single House to disapprove rules and regulations adopted by the FEC, and by denying

the President the opportunity to veto such congressional actions in violation of Articles I, II, and III of the Constitution; (2) deprive him of his constitutional right to have laws affecting him enacted by the full legislative process, including passage by both Houses with an opportunity for a Presidential veto, and invidiously discriminate against him by allowing incumbent Members of both Houses to veto rules and regulations of the FEC in violation of plaintiff's right to due process under the Fifth Amendment; and (3) deprive him of his constitutional rights by delegating the discretion to disapprove the FEC's regulations and rules to a single House of Congress and by delegating such authority without giving any standards or criteria to govern the exercise of such discretion or requiring any reason to be given for the use of such discretion.

Plaintiff alleges that unless the court enjoins the enforcement of the provisions of the FECA and Subtitle H which allow a single House of Congress to disapprove the rules and regulations of the FEC that he will suffer irreparable injury and will suffer constitutional impairment of his rights to vote, to participate effectively in the political process, and to compete without discrimination in the electoral process. He asks the court to (1) immediately appoint a three-judge court to hear the issues raised by the complaint as to Subtitle H, and (2) certify to the U.S. Court of Appeals for the District of Columbia all issues of constitutionality raised concerning the FECA. Further he asks: that the docket be expedited pursuant to 2 U.S.C. § 437h and 26 U.S.C. § 9011(b)(2); that the court order, adjudge, decree and declare that the FECA and Subtitle H provisions which allow the FEC's rules and regulations to be disapproved are repugnant to the Constitution and violate plaintiff's constitutional rights; and that the court permanently enjoin and restrain defendants from transmitting any rules or regulations to any body of Congress pursuant to the foregoing provisions of the FECA and Subtitle H and require the FEC to prescribe rules and regulations upon adoption by their own body.

That same day plaintiff filed a motion to convene a three-judge court as required by 26 U.S.C. § 9011 and 28 U.S.C. § 2282 with regard to those issues raised concerning the constitutionality of Subtitle H of the Internal Revenue Code, a motion to reduce defendants time to answer from the usual 60 days to 30 days, and a motion to certify questions about the constitutionality of the FECA to the U.S. Court of Appeals for the District of Columbia. The motion for an expedited answer should be granted, plaintiff claimed, because the FEC was about to adopt new rules and send them to each House of Congress (where they could then be disapproved), Congress had directed that the docket in these cases be expedited (thus recognizing the need for prompt rulings in these cases), plaintiff had hand-delivered copies of the complaint to the U.S. Attorney and the Attorney General on the same date the action was filed (thus avoiding the usual delays in their receiving the complaint due to the size of the Justice Department), and the defendants had just briefed and argued the very issue raised—the constitutionality of the congressional veto system—in the U.S. Supreme Court in *Buckley* v. *Valeo*, although the Court in that case found it unnecessary to decide the issue at that time.

Plaintiff claims that this question is now in the proper posture for resolution and asks the court to certify the following questions to the court of appeals:

> 1. Does the FECA deprive plaintiff of his constitutional rights by allowing a single House of Congress to disapprove rules and regulations, or selected portions of such rules and regulations, adopted by the Federal Election Commission, and by denying the President of the United States the opportunity to veto such Congressional actions, in violation of the constitutional systems of separation of powers and checks and balances established by Articles I, II and III of the United States Constitution?
>
> 2. Does the FECA deprive plaintiff of his constitutional right to have laws affecting him enacted by the full legislative process, including passage by both Houses of Congress with the opportunity for a Presidential veto, and invidiously discriminate against plaintiff by allowing incumbent officeholders, but not challengers, to veto rules and regulations of the Commission, in violation of plaintiff's right to Due Process of Law under the Fifth Amendment of the United States Constitution?
>
> 3. Does the FECA deprive plaintiff of his constitutional rights by delegating the discretion to disapprove regulations of the Federal Election Commission to a single House of Congress and by delegating such discretion without fixing any standards or criteria to govern the exercise of such discretion and without requiring any statement of reasons for the exercise of such discretion?

On August 6, 1976, the Justice Department moved to intervene as a party plaintiff in the action, stating that no party would adequately represent the interest and the position of the Executive Branch that 2 U.S.C. §§ 438(c)(2) and (c)(4), 26 U.S.C. §§ 9009(c)(2) and (c)(4), and 26 U.S.C. §§ 9039 (c)(2) and (c)(4) are unconstitutional. The motion alleges that these sections impermissibly intrude upon those areas reserved by the Constitution to the Executive Branch. It alleges the following constitutional infirmities: the one-house veto provisions of the Federal Election Campaign Act of 1971, as amended, violate the constitutional principle of separation of powers as embodied in Articles I, II, and III of the Constitution; the one-House veto provisions illegally and unconstitutionally permit the evasion of the Presidential veto requirements of Article I, § 7, clauses 1, 2, and 3 of the Constitution; the one-House veto provisions constitute an unlawful and unconstitutional delegation of legislative power to one House of Congress; the one-House veto provisions are in derogation of Article I of the Constitution in purporting to endow a House of Congress with powers outside of those specifically enumerated in the Constitution; and that, if permitted to operate, the challenged provisions will deprive the President of powers committed to his office and the Executive Branch of Government by the Constitution and will allow each House of Congress to separately perform legislative acts in derogation of Articles I and II.

A hearing was held on August 10 before U.S. District Judge Charles R. Richey. Plaintiff's motion to convene a three-judge court was argued in part and then respited until August 30. The court directed the legislative defendants to respond by August 18 to the motion of the Justice Department to intervene. The court also granted defendants' motion to file a motion to dismiss by August 18, and set a hearing on the motion to dismiss for August 30, 1976.

Status.—The case is pending before the U.S. Court of Appeals for the District of Columbia.

IV. Officers, Employees, and Agents of the Congress

Socialist Workers 1974 National Campaign Committee v. *Henshaw* (formerly Jennings)

Civil Action No. 74–1338 (D.D.C.)

Brief.—On September 10, 1974, the Socialist Workers 1974 National Campaign Committee, other State and local Socialist Workers Party Organizations and individual members of the Socialist Workers Party filed suit in the U.S. District Court for the District of Columbia to declare unconstitutional the Federal Elections Campaign Act of 1971.

The defendants in the case are the Clerk of the House, the Secretary of the Senate and the Comptroller General of the United States, each of whom is designated as a "supervisory officer" with whom statements and reports required under the Act are to be filed.

The plaintiffs allege, *inter alia*, that the provisions of the Act requiring the disclosure of the identities of party members, contributors, and others who support "lawful, though controversial political activities," deprive them of their freedom of association rights under the First Amendment. Plaintiffs also assert that the reporting and disclosure requirements "deprive the plaintiffs and their supporters of the right to associational privacy and to political anonymity under the First, Fourth, and Ninth Amendments to the constitution. * * *"

On October 2, 1974, Common Cause moved to intervene as a defendant. The motion to intervene was granted and plaintiffs' motion for a three-judge Federal district court to rule on the constitutionality of the law was denied on October 10, 1974. The denial was appealed, and on December 12, 1975, the district court granted plaintiffs' motion for the three-judge court.

Plaintiffs sent interrogatories to and requested the production of documents from: W. Pat Jennings and his successor Edmund L. Henshaw as Clerks of the House of Representatives; Francis R. Valeo, Secretary of the Senate; and Elmer B. Staats, Comptroller General of the United States. The House passed H. Res. 863 on November 13, 1975, authorizing the Clerk to answer the interrogatories and to provide copies of notifications of noncompliance or apparent violations sent by the Clerk to campaign organizations affiliated with the Socialist Workers Party from January 1, 1975 to date, after the court has determined that such documents are material and relevant. The court so determined on November 19, 1975.

A second set of interrogatories and requests for the production of documents relating to the Socialist Workers Party was received by each of the defendants on March 8, 1976. The House passed H. Res. 1122 on March 31, 1976, which had similar provisions to those of H. Res. 863 in allowing the Clerk to take with him copies of all "non-public" records or documents relating to plaintiffs or to any

previous Socialist Workers Party committee, candidate or official maintained by his office which are requested in the subpoena *duces tecum* and found by the court to be material and relevant.

On July 23, plaintiffs filed a first supplemental and amended complaint for declaratory relief, adding several State Socialist Workers Parties as plaintiffs and adding the Federal Election Commission (FEC) and Attorney General Edward Levi as defendants. The FEC was added because it is charged by the 1976 amendments ("Amendments") to the Federal Election Campaign Act of 1971 ("Act") with monitoring and enforcing the recordkeeping and disclosure provisions of the Act and the Amendments, and Attorney General Levi because he is charged with enforcing their criminal sanctions. The complaint states that under the Amendments the plaintiff must maintain records of all contributors of $100 or more and identify such to the FEC. It states that plaintiffs have not identified them on constitutional grounds. It states that recent information concerning government harassment and surveillance of persons associated with the Socialist Workers Party shows further proof that disclosure of these contributors will deter and intimidate persons from associating with, contributing to, and supporting the plaintiffs and their candidates. It asks the court to declare 2 U.S.C. §§ 432 (b), (c), and (d), and 438(a)(8) and 434(b)(1)–(8) unconstitutional on their face as applied to plaintiffs and to contributions and expenditures on behalf of their presidential candidate Peter Camejo, and to preliminarily and permanently enjoin their enforcement as to plaintiffs and as to candidate Camejo.

Status.—The case is now pending before the U.S. District Court for the District of Columbia.

United States* v. *McPherson

Criminal Action No. 76–136 (D.D.C.)

Brief.—On March 31, 1976, an information was filed in the United States District Court for the District of Columbia charging Michael C. McPherson with mail fraud. The information stated that while serving as Administrative Assistant for Representative William L. Clay, McPherson had placed on the staff payroll an individual who at all times was employed as a school teacher in Los Angeles, Calif. The paychecks, 22 in all totaling over $32,000, were sent to McPherson or the teacher's sister, who later became McPherson's wife, and the checks were signed by someone other than the teacher and placed in the accounts of the sister or McPherson.

McPherson pleaded guilty to one count of mail fraud on March 31, 1976.

At a hearing prior to sentencing, U.S. District Court Judge William B. Jones ordered the defendant to enter a plea of not guilty and sent the case to a grand jury to determine whether an indictment was warranted.

Status.—The charges are now being investigated by a grand jury.

Peroff* v. *Manuel

Civil Action No. 76–0341 (D.D.C.)

Brief.—On February 11, 1976, Franklin Peroff filed this action against Philip C. Manuel, a member of the staff of the Senate Permanent Investigations Subcommittee. Peroff, who has been a Government informer, alleges that Manuel made public his [Peroff's] cover name and address. Peroff further alleges that Manuel's failure to maintain the confidentiality of the information has resulted in several attempts to kill him [Peroff].

On March 11, 1976, the case was removed to the Federal District Court for the District of Columbia.

Defendant Manuel filed an answer on April 27, in which he claimed as his second defense that at all times material to the complaint he was performing his duties in his capacity as an investigator for the subcommittee, and therefore his actions are absolutely privileged. He also filed a motion to dismiss on June 27, in which he states as one of his grounds that plaintiff's claims against him are completely barred by the doctrine of congressional immunity.

Status.—A hearing on defendant Manuel's motion to dismiss has been set for September 30, 1976, in the U.S. District Court for the District of Columbia.

V. Other Actions Involving Members in Representative Capacity

Dellums v. *Powell*

Civil Action Nos. 75–1974, 75–1975, 75–2117, 76–1418, and 76–1419 (D.C. Cir.)

Brief.—This was an action for declaratory and injunctive relief and for damages, brought in the U.S. District Court for the District of Columbia on November 11, 1971, arising out of the arrest of some 1,200 persons assembled on the steps of the House of Representatives at the Capitol Building on May 5, 1971.

Representative Ronald V. Dellums, a plaintiff, brought the action as an individual for violation of his constitutional rights and for interference with the discharge of his constitutional duties as a Member of Congress. The other plaintiffs, all arrested demonstrators, sued individually and as members of their class, seeking damages, expungement of arrest records and destruction of illegally obtained fingerprints and photographs.

Defendants named in the complaint included the Chief of the Capitol Police, Chief of the Metropolitan Police Department, the District of Columbia and the U.S. Attorney General.

Numerous pretrial motions were filed on behalf of the parties to this action resulting in a number of rulings by U.S. District Judge William B. Bryant, in which he denied plaintiffs' motion for a preliminary injunction, granted plaintiffs' motion to maintain the action as a class action and required defendants to supply to plaintiffs the names and addresses of the persons arrested on the Capitol steps on May 5, 1971, in order that notices of the class action could be sent to them and permitted extensive discovery through the use of interrogatories.

On January 16, 1975, a $12 million judgment against the District of Columbia for false arrest and infringement of basic rights under the First, Fourth and Eighth Amendments to the Constitution, was awarded to the 1,200 antiwar demonstrators. Representative Dellums was awarded $7,500 for deprivation of his rights of free speech under the First Amendment.

Appeals were filed by the defendants on October 1, 1975 (Civil Action Nos. 75–1974 and 75–1975). On October 22, 1975, plaintiffs filed an appeal (Civil Action No. 75–2117) from a final judgment by the district court dismissing defendant Richard Kleindeinst as a party to the action, which was entered on October 20, 1975. At the time of the arrests, Kleindeinst was Deputy Attorney General.

On March 4, 1976, the district court reinstated into the class the three plaintiffs who had been dismissed from the suit as original plaintiffs. Defendants immediately appealed this decision (Civil Action Nos. 76–1418 and 76–1419).

All five cases were consolidated for purposes of appeal on June 3, 1976.

Status.—The appeals are pending before the U.S. Court of Appeals for the District of Columbia.

Kennedy* v. *Jones

Civil Action No. 74–194 (D.D.C.)

Brief.—In a suit filed January 29, 1974, in the U.S. District Court for the District of Columbia, Senator Edward M. Kennedy of Massachusetts sought an order in the nature of *mandamus*, or, in the alternative, a permanent injunction, to require defendants to publish H.R. 10511 (93d Congress, 1st Session), an act to amend the Urban Mass Transportation Act of 1964, to authorize buses purchased under its provisions to be used for chartered bus services.

Defendant Thomas M. Jones was sued in his official capacity as Chief of White House Records. It is his duty to receive bills presented by Congress to the President and to deliver those that have become law to the Administrator of the General Services Administration (GSA) for publication.

Defendant, Arthur F. Sampson, the Administrator of GSA, is required to publish, both in slip form and in the United States Statutes at Large, bills that have become law.

On December 21, 1973, Congress completed action on H.R. 10511.

On December 22, 1973, the 1st session of the 93d Congress adjourned *sine die.* Under Rule III of the House of Representatives, the Clerk of the House was authorized to receive messages from the President during adjournment.

The 10-day period for the President to approve or veto the bill having expired on January 3, 1974, the President issued a "Memorandum of Disapproval" on January 4, 1974, in which he announced his disapproval of said bill and sought reliance on the pocket veto provision of Article I, Section 7, clause 2 of the Constitution for his veto of the legislation.

On March 24, 1975, plaintiff filed a supplemental complaint which included a second claim for which the same relief was sought. This second claim involved H.R. 14225, which had been cleared by Congress on October 16, 1974, for action by the President. The bill amended the Vocational Rehabilitation Act by extending for one year authorization of appropriations for programs for the handicapped, amended certain Federal programs for the blind, and provided for the convening of a White House Conference on Handicapped Individuals. On October 17, 1974, Congress adjourned for a 32-day recess encompassing the mid-term Congressional elections, the Clerk of the House being authorized to receive messages from the President during the adjournment. That same day the bill was presented to the President. His ten days for approving the bill were to expire on October 29, 1974. On that day he returned the bill to the Clerk of the House with his objections, stating that the absence of his signature from the bill prevented it from becoming law because of the pocket veto. Congress reconvened on November 18, 1974, and the House on November 20 and the Senate on November 21 voted by over two-thirds to override the President's veto. On November 22 the bill was delivered to defendant Sampson, who had refused to publish it as a law of the United States.

The plaintiff alleged that defendants' acts denied him the effectiveness of his vote as a U.S. Senator, denied him the opportunity to override a veto and injured him as a taxpayer and as a United States citizen by depriving him of his right to have the executive branch comply with the mandates of his elected representatives in the Congress.

On January 19, 1976, the district court rejected the defendants' motion for dismissal which argued that Senator Kennedy lacked standing and that the controversy was moot since Congress had subsequently passed and the President had signed into law identical legislation.

The court held that Senator Kennedy's vote in favor of the initial legislation was sufficient to convey standing.

As to the question of mootness, the court noted that the Senator had alleged that the failure to publish the initial legislation as laws of the United States was a violation of his rights as a United States Senator.

"To date," the court said, "the defendants have not published H.R. 10511 and H.R. 14225 as laws and it is their failure to perform their duty which is in contest here. * * * Here plaintiff requests a declaratory judgment that the bills became law in accordance with the provisions of the Constitution and seeks a mandatory injunction requiring the defendants to publish the bills as law. This relief has not been obtained and the case is not moot on this basis."

On April 13, 1976, the Justice Department filed a one-sentence statement of consent by defendants to the entry of the judgment sought by plaintiff in his supplemental complaint and his motion for summary judgment. That same day the Justice Department issued a press release which stated in part:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and intersession recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Status.—The court filed an order on April 21 granting plaintiff's motion for summary judgment and directing that judgment be entered for the plaintiff.

The full text of the court's memorandum and order of January 19, 1976 was printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1976, at 199.

Common Cause v. _Bailar_ (formerly Klassen)

Civil Action No. 1887–73 (D.D.C.)

Brief.—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 for actions they allegedly performed or failed to perform, in the course of their official duties, relating to the congressional franking privilege.

Plaintiffs, Common Cause and John W. Gardner, Chairman of Common Cause, amended their original complaint on March 12, 1974,

following the enactment of the Franking Act of 1973 [Pub. L. 93–191] on December 18, 1973, to incorporate references to the new statutory language.

Plaintiffs allege that the use of the frank for newsletters and news releases by a Member of Congress—then a candidate for nomination or election or engaged in fundraising for a candidacy—and the use of the frank on mail matter such as condolences, biographies, pictures or writings laudatory or complimentary to a Member on the basis of performance of official duties: (1) abridges plaintiffs' First Amendment rights; (2) denies their Fifth Amendment rights; (3) is an unlawful appropriation of public funds for nonpublic purposes; (4) violates the Postmaster General's statutory duty; and (5) is an unlawful disbursement of public funds contrary to the statutory duties of the Secretary of the Treasury.

On May 31, 1974, the defendants filed a motion to dismiss, together with supporting memorandum, asserting that:

> The court lacks jurisdiction over the subject matter of this action in that neither of the above-named defendants are proper parties to this proceeding, the plaintiffs have failed to exhaust the administrative remedies available to them, the plaintiffs lack standing to maintain this action, and that the complaint fails to state a claim upon which relief may be granted. [Defendants' motion to dismiss, May 31, 1974]

On June 14, 1974, plaintiffs filed a memorandum in opposition to the defendants' motion to dismiss as well as an application to convene a three-judge district court. On June 26, 1974, U.S. District Court Judge John H. Pratt denied without opinion defendants' motion to dismiss. On July 1, 1974, Judge Pratt signed an order convening the three-judge district court requested by the plaintiffs. A week later, on July 8, 1974, the defendants filed their Answer to the Amended Complaint.

Since September 9, 1974, plaintiffs have attempted to depose and serve subpoenas *duces tecum* on numerous individuals. A partial list follows: Victor C. Smiroldo, Staff Director of the House Commission on Congressional Mailing Standards; Benjamin R. Fern, Chief Counsel of the Senate Select Committee on Standards and Conduct; David Ramage, House Majority Clerk; Thomas J. Lankford, House Minority Clerk; Joseph J. Fahey, Supervisor of the Senate Folding Room; Edmund L. Henshaw, then Assistant Sergeant at Arms of the House; John M. Swanner, Staff Director of the House Committee on Standards of Official Conduct; Eli Bjellos, Chief of the House Publications Distribution Service; Harold Needham, Superintendent of the Senate Services Department; James Estep, Manager of the Senate Computer Center; Buehl Berentson, Executive Director of the National Republican Senatorial Committee; Bill Goodwin of the National Republican Senatorial Committee; Lee MacGregor, former Aide to Senator Robert Griffin; Joyce Baker, a former employee of the Senate Republican Policy Committee; Richard Conlon, Staff Director of the House Democratic Study Group; Lynda E. Clancy, Richard P. Clifton, and Glee Gomien, Staff Assistants of the Republican Senatorial Campaign Committee; Jay Bryant, Special Assistant in the Office of the Minority Whip; Edward L. Beach,

Staff Director and Secretary of the Senate Republican Policy Committee and Senate Republican Conference; Edwin F. Feulner, Executive Director of the House Republican Study Committee; Patricia Goldman, Director of the Wednesday Group; and Jay D. Sterling, Executive Director of the House Republican Research Committee.

On October 9, 1974, the Senate passed S. Res. 423 regarding Mr. Fern, and on October 11, 1974, passed S. Res. 431 regarding Messrs. Estep, Needham and Fahey. The resolutions stated that by the privileges of the Senate no evidence of a documentary character under the control and in the possession of the Senate can be taken without its permission by the mandate of process of ordinary courts of justice; that the employees were authorized to appear before the court but not to take with them any papers or documents on file in their offices or in their possession; and that when the court determined that any of the subpoenaed documents and papers had become part of the official transcripts of public proceedings of the Senate, and that they were material to the case, the court could receive copies of the documents. On November 22, 1974, a similarly worded S. Res. 436 was passed regarding Joyce Baker.

The subpoenas of House employees Bjellos, Swanner, Smiroldo, Ramage, and Lankford were presented by the Speaker to the House for its consideration on September 30, 1974. When the employees failed to appear for their depositions, plaintiffs filed motions to compel their testimony.

On October 21, 1974, two of the subpoenaed employees, Eli Bjellos and John Swanner, wrote a letter to Judge Pratt after receiving a copy of the motion filed by the plaintiffs to compel their testimony. Each informed Judge Pratt of his view that both by statute and by the custom of the House, they were forbidden to testify or to remove documents belonging to the House without the permission of the House. The letters also informed Judge Pratt that the question of the subpoenas was under active consideration by the House and that the two men were therefore awaiting further guidance from the House on the course of action they should follow.

On December 18, 1974, the House adopted H. Res. 1517 which was similar to the Senate Resolutions, except that it resolved that:

> When it appears by the order of the court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice or before any judge or such legal officer, for the promotion of justice, this House will take such action thereon as will promote the ends of justice consistently with the priveges and rights of the House. [H. Res. 1517, 93d Cong. 2d Sess. (1974)]

On January 23, 1975, the House again took up the matter of the subpoenas in H. Res. 85, which observed that:

> a large variety and volume of [the materials sought by plaintiffs from the five House employees] do not appear to bear any essential relationship to the causes of action and relief requested in the plaintiffs amended complaint. * * * [H. Res. 85, 94th Cong. 1st Sess. (1975)]

The resolution also stated that, consistent with its privileges, the House would act "to promote the ends of justice * * * upon a determination of relevancy by the * * * court," and it authorized the Speaker to appoint counsel to represent the House and its employees in the proceedings.

On January 27, 1975, oral argument was held on a renewed motion to dismiss which had been submitted by the defendants. This motion raised the same arguments that had been made in defendants' first motion to dismiss, and made the additional allegation that plaintiffs had failed to join an indispensable party—the Congress—as required by Rule 19 of the Federal Rules of Civil Procedure.

Also discussed at the beginning of the January 27 hearing were the subpoenas which plaintiff had issued. Counsel for the plaintiff, in answering an inquiry regarding the mass of material being sought, stated that although the challenge was to the constitutionality of the franking laws on their face, the discovery was necessary to show that the statute was designed for and being used for political purposes. The court suggested that perhaps the volume of material sought could be reduced, probably through stipulation between counsel, since the ultimate argument seemed to be on constitutional issues in which the facts involved would be rather undisputed. The court directed plaintiff to submit an itemized list of the documents it was seeking within 10 days after it ruled on the motion to dismiss, if its ruling was a denial of the motion.

By a Memorandum and Order of February 10, 1975, the court denied the defendants' renewed motion to dismiss. In rejecting the defendants' argument that plaintiffs had failed to exhaust their administrative remedies, the court wrote:

> The claim that plaintiffs have not exhausted their administrative remedies in failing to file complaints concerning violations of the statute with the House Commission on Congressional Mailing Standards or the Select Committee on Standards and Conduct of the Senate has no merit. Plaintiffs make no contention that there have been abuses or violations of the statute, consideration of which are in the sole jurisdiction of the House Commission or the Senate Committee, but rather that the statute on its face is unconstitutional, a matter beyond the jurisdiction of such bodies. Obviously, the House Commission and Senate Committee have no power to declare an act of Congress unconstitutional. It is well settled that the doctrine of exhaustion does not apply where the administrative process is inadequate to dispose of the constitutional claim. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752 (1947). [*Common Cause* v. *Klassen*, Civil Action No. 1887–73. (D.D.C. 1975); Slip Opinion at 2; see complete text in "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1975].

In addition, the court said, the Congress or the membership of Congress are not indispensable parties—and though defendants' third allegation—that plaintiffs lacked standing to sue—was more serious and required further exploration, it too, was without merit:

Plaintiffs sue as taxpayers with a taxable income of over $6 billion annually and federal tax liability in excess of $1 billion each year. They assert that federal funds appropriated under the franking privilege are being used to finance the distribution of partisan political literature specifically authorized by Section 3210 and that such expenditures of federal funds violate the limitations upon the taxing and spending power of Congress under Article I, Section 8, and contravene the First and Fifth Amendments of the Constitution.

Just as importantly, plaintiffs claim status as registered voters, representatives of registered voters, candidates for Congressional office, and supporters of candidates. It is alleged that over fifty members of Common Cause challenged incumbent members of Congress in the last election and many of its members supported challengers to incumbents. They assert that the present franking privilege confers substantial political benefits upon incumbents, while nonincumbent challengers and their supporters do not have the same advantage. As a result, the rights of challengers and their supporters to freely associate for political purposes are impaired, and the value of their votes is diluted and diminished, all in violation of the First Amendment. *Baker* v. *Carr*, [*Baker* v. *Carr*, 369 U.S. 186 (1962).] In addition, it is alleged that this practice invidiously discriminates in favor of incumbent members in violation of the due process clause of the Fifth Amendment. In short, as citizens with a particularized interest in the electoral process, plaintiffs claim standing to attack Section 3210 as violative of their constitutional rights.

From the foregoing brief discussion, it is clear to us that the plaintiffs have met the test laid down in *Flast* [*Flast* v. *Cohen*, 392 U.S. 83 (1968)] and subsequent cases. They have asserted (1) an injury in fact, not a generalized complaint common to all citizens and taxpayers, and they have demonstrated (2) a nexus between the injuries suffered and the constitutional infringements alleged. [Slip Opinion at 3–4.]

On February 21, 1975, plaintiff submitted its "Itemized List of Documents Subpoenaed from House Employees." From Victor Smiroldo, Staff Director and Counsel of the House Commission on Congressional Mailing Standards, and John M. Swanner, Staff Director of the House Committee on Standards of Official Conduct, plaintiff sought:

> * * * all complaints concerning possible violation of the franking statute, and attachments thereto, or copies thereof, brought to the attention of the Commission and all memoranda or other writings or copies thereof which relate to or reflect the disposition of these complaints[;]
>
> * * * all advisory opinions and attachments thereto, or copies thereof, which relate to the mailing or contemplated mailing of franked mail, issued to any Member of the House of Representatives or Member-elect, surviving spouse of any

of the foregoing persons, or other House of Representatives officials, their agents or employees[;]

* * * all letters, memoranda or other writings, and attachments thereto, or copies thereof, which relate to or reflect information, guidance, assistance, advice or counsel given in connection with the mailing or contemplated mailing of franked mail[;]

* * * all formal or informal correspondence, or copies thereof received by the Commission requesting information, guidance, assistance, advice or counsel in connection with the mailing or contemplated mailing of franked mail[;]

* * * all informal opinions and attachments thereto, or copies thereof, issued by the Commission concerning use of the franking privilege[; and]

* * * all regulations or proposed regulations or copies thereof, governing the proper use of the franking privilege by any Member of the House of Representatives or Member-elect, surviving spouse of any of the foregoing, or other House of Representatives official, entitled to send mail as franked or any employee or agent of any and all of the foregoing persons. [Itemized list of documents subpoenaed from House employees, filed February 21, 1975, hereinafter "Itemized List"].

From David Ramage and Thomas Lankford, respectively the Majority and Minority Clerks of the House of Representatives:

> * * * all documents, correspondence, memoranda, worksheets and other writings, or copies thereof, which reflect or relate to the printing or preparation of Congressional newsletters or news releases by the House Majority Room from December 31, 1973 through the date of this subpoena[; and]
>
> * * * all documents, correspondence, memoranda, and other writings, or copies thereof, including but not limited to books, records or receipts, which relate to or reflect a bill or payment for services provided by the House Majority Room in printing or preparing Congressional newsletters or news releases provided between December 3, 1973 and the date of this subpoena. [Itemized List]

From Eli S. Bjellos, Chief of the House Publications Distribution Service:

> * * * all documents, correspondence, memoranda, worksheets and other writings, or copies thereof, which reflect or relate to the monthly work units of the Publications Distribution Service from January 1, 1967 through the date of this subpoena[;]
>
> * * * all documents, correspondence, memoranda, and other writings, or copies thereof, including but not limited to books, records or receipts, which relate to or reflect a bill or payment for services provided by the Publications Distribution Service for the period from December 1, 1973 to the date of this subpoena[; and]

> * * * all documents, correspondence, memoranda, and other writings or copies thereof, which relate to or reflect the manner of, or handling of mass mailed matter, including, but not limited to instructions on the handling of Congressional newsletters for the period from December 1, 1973 to the date of this subpoena. [Itemized List]

Plaintiffs had also sought documents from certain Senate employees and when the employees, pursuant to the instructions of the Senate, failed to produce them, plaintiffs filed a motion to compel the production of the documents. On May 21, 1975, Senate employees Fern, Needham, and Estep filed memoranda in opposition to plaintiff's motion to compel them to produce documents, stating that the records sought were not material to the subject matter of the pending litigation, which is that the franking statute is unconstitutional on its face, and the records sought involve use of the frank in specific instances, which question is not in issue. Furthermore, they stated that the records are internal administrative records of the Senate which are privileged; that the use of the Senate folding room and computer are part of the pay and allowances of Members of Congress which is a policy question and not a legal one; and, in Mr. Fern's case, that the lawyer-client privilege applies. Later the three Senate employees filed supplemental memoranda invoking the decision of the Supreme Court in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), as supporting their position on legislative immunity of the records.

On June 17, 1975, House employees Bjellos, Swanner, Smiroldo, Ramage and Lankford filed their memorandum in opposition to plaintiff's motion to compel testimony and the production of documents. It claimed that plaintiff's discovery should not be allowed since the data sought were irrelevant to a facial attack upon the constitutionality of the franking act, the information is privileged against forced disclosure under the Speech or Debate Clause of the Constitution, and the subpoenas were needlessly burdensome.

The motion by plaintiffs to compel testimony and the production of documents was argued on July 16, 1975. On July 30, 1975, the court issued a memorandum and order which stated that:

> Objections to this attempted discovery are phrased in terms of (1) irrelevance (2) burdensomeness and (3) constitutional immunity under Article 1, Section 6 (The Speech and Debate clause) or Article 1, Section 5 (power of each body of Congress to enact its own rules).
>
> The claim of lack of relevance is predicated on the narrow theory that, irrespective of the relevance of the requested materials in other frames of reference, they are simply irrelevant in a case where the gravamen of the complaint is that the statute complained of is alleged to be unconstitutional on its face. Aside from plaintiffs' continuing burden of maintaining standing, it is clear to us that a proper resolution of the issues raised by the complaint calls for a complete record consisting of the type of documentary materials sought to be discovered. For this reason, we hold these materials to be relevant and necessary.

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 1, Section 5, requires no discussion.

The claim of burdensomeness is more serious. On the one hand, the materials requested are relevant to the issues raised by the complaint and plaintiffs are entitled to a substantial degree of discovery. On the other hand, there may be problems concerning the sheer bulk of the materials requested, about which we are not presently apprised. In addition, considerations of fairness dictate that the names of individual members of Congress not be disclosed, as far as it is possible to achieve this result without unduly hampering the full and expeditious processing of this lawsuit. Where possible, submission under protective order may be a reasonable alternative.

Fortunately, as to the House employees, we are not presently faced with any of these problems since these employees through counsel have offered to submit voluntarily information respecting the use of franked mail broken down as to (1) categories of congressional membership to compare frequency and volume of franked mail as it varies between members depending on estimated difficulties to be faced at primary or at election, (2) sources of payment for materials mailed, and (3) certain non-public interpretive materials, including but not limited to advisory opinions and more informal advice. We commend this effort of House defendants' counsel and urge counsel for plaintiffs to consider and determine the adequacy of such proposal and, if unable to agree with House employees' counsel, to be prepared to demonstrate the need of further materials.

Unlike the House employees, the Senate employees have made no move to supply any of the requested materials. Being satisfied as to plaintiffs' entitlement to substantial discovery, we herein require that counsel for Senate employees confer with plaintiffs' counsel in an effort to work out an accommodation along the general lines of the proposal made on behalf of the House employees. [Memorandum and Order, *Common Cause* v. *Bailar*, Civil Action No. 1877–73 (D.D.C. 1975); Slip Opinion at 3–4.]

The court granted plaintiff's motion to compel discovery from the Senate and House employees, "it being understood that the exact nature and bulk of the materials to be produced are left to further negotiation between counsel for the respective parties."

On March 1, 1976, the court issued an order approving a stipulation between plaintiff and Senate employees Estep and Needham, and a stipulation between plaintiff and House employees Ramage, Lankford, Bjellos and Smiroldo.

The stipulation regarding Estep, Manager of the Senate Computer Center, and Needham, Superintendent of the Senate Services Department stated that plaintiffs were to receive a User's Guide for the Senate Computer Center and a description of the computer programs used; a compilation of the work orders from Senators designating the categories of individuals who are to receive franked mail, the work-order number and week thereof; a compilation detailing the categories of names maintained by the Senate Computer Center for each Senator, the number of names in each category, and the code designation of each category; the number of address labels affixed to franked mail for each Senator for each day or week; and the right to inspect copies of newsletters in the possession of the Senate Service Department. The stipulation further provided that Estep and Needham would not be further deposed.

Additionally, a protective order was issued defining: (1) the information on the volume of mail for each Senator that may be publically filed; (2) the information that is to be available to plaintiff's counsel under seal; and (3) the extent to which the information available to plaintiffs' counsel under seal may be publicly filed in this action. The Senate employees will be given a list of all Senators with certain characteristics of the State each represents, voting percentages in elections since 1966, information on reelection, section of the country, and other general information. The Senate employees will then substitute a code for the name of each Senator, the key to which will be kept *in camera* and not made available to plaintiffs or defendants or their counsel or anyone else. If a party needs the information he must first serve notice on the Senate employees' counsel. Finally, all documents sought by plaintiff from others will first be submitted to the court and the code will be substituted for the Senator's name, deponents and witnesses will use only the code, and plaintiff will refer to individual Senators only by their code.

As for Senate employee Fern, Chief Counsel of the Senate Select Committee on Standards and Conduct, the court stated:

> Plaintiffs seek production of the following internal documents of the Senate Select Committee on Standards and Conduct:
>
> > (A) The actual text of (a) all complaints to the Select Committee concerning the use of the frank by Members of the Senate and the disposition thereof, (b) all written requests from Members of the Senate to the Select Committee for advice concerning the use of the frank and the written reponses thereto and (c) deponent Fern's notes or other memoranda concerning oral requests for advice and oral responses, or, in lieu of the actual text of the documents, a summary of each document with the full document made available to plaintiffs' counsel to verify the accuracy of the summaries; and
> >
> > (B) All internal memoranda of the Committee concerning the use of the frank which have been approved by the Select Committee or used as the basis for rendering advice to Members of the Senate.

> Actual text was defined by plaintiffs' counsel as a copy of the full text of the document or the original document itself, with only the identification of the Senator deleted. [Order, *Common Cause* v. *Bailar*, Civil Action No. 1887–73 (D.D.C. March 1, 1976) [hereinafter "Order"]; Slip Opinion at 3.]

The court noted that after the Select Committee had decided not to allow Mr. Fern to produce the documents, the Senate on December 17, 1975, had adopted a resolution reaffirming a previous Senate resolution prohibiting the disclosure of the internal records of the Select Committee. On January 27, 1976, the Select Committee had again considered the matter and determined that under order of the Senate it could make no change in its position. Fern had offered to supply summaries of documents in list (A) above, but plaintiff had insisted upon inspection of the actual records to insure the accuracy of the summaries, and the Select Committee had rejected this proposal. The court continued:

> We have given careful thought to the contentions of the parties. 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 in some sense defeat the privilege, if in ultimate analysis these documents were found to be properly entitled to protection. However, there is no doubt that the privilege claimed, if it exists, 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 showing is made that the overriding considerations of the public interest require disclosure. The body to make such a determination is the judiciary after an *in camera* inspection of the material. *United States* v. *Nixon*—U.S.—(1974).
>
> It is our judgment that plaintiffs have up to this point failed to demonstrate the showing of particular need to overcome the Select Committee's claim of privilege. It may well be that the summaries themselves plus additional discovery in other areas will satisfy the plaintiffs' evidentiary problems and will make it unnecessary for us to order at this time the production of the documents themselves. On the other hand, we see no reason why Mr. Fern should not be required also to supply summaries of "all internal memoranda" described in subparagraph (B) above. It is understood that the entire file of original documents is quite limited in size. Accordingly, it is by the Court,

Ordered, that plaintiffs' motion to compel production of original documents by the witness Fern be and is hereby denied *without prejudice;* and it is

Further ordered, that the witness Fern be and is hereby ordered to produce summaries of all documents covered in subparagraphs (A) and (B) above. [Order at 4–5.]

The stipulation with the House employees states that plaintiffs will receive: (1) the sources of funds used to defray printing costs for mass-mailed franked materials on a per seat breakdown, and the banks and account numbers where the proceeds of the printing operations are kept; and (2) access to the files of the House Publications Distribution Service (PDS) for the purpose of preparing compilations of the per seat volume and timing of franked mail, with the research and results to be done either by PDS at plaintiffs' expense or by plaintiffs, with PDS then compiling the information and using a code for a Member's name. The information will then be compiled and coordinated with coded numbers and a coded list of the attributes of the Member similar to those of the Senate, with similar access and protections. Plaintiff will also receive from Mr. Smiroldo of the House Commission on Congressional Mailing Standards, at plaintiffs' expense

copies of all documents and other writings pertaining to all formal complaint proceedings, pending or completed. In addition, Plaintiffs will receive copies of all documents in the files of the Commission that embody (a) formal or informal advice rendered by the Commission and/or its staff to Members of Congress regarding their use of the franking privilege; or (b) policy statements or regulations of general applicability adopted by the Commission regarding permissible uses of the franking privilege by Members of Congress; or (c) communications of the Commission or its staff with third parties outside the House of Representatives that relate to the franking privilege. The only omissions from these materials will be such details as identify a particular Congressman.

This voluntarily offered material includes:

a. Correspondence and other communications from the Commission to Members of Congress or their staffs, advising a Member with respect to the frankability of a proposed mailing.

b. Correspondence and other communications from Members of the House Commission staff to Members of Congress or their staffs that provide such advice.

c. Correspondence and other communications relating to the franking privilege, between, on the one hand, the House Commission or its staff and, on the other hand, individuals other than Members of Congress or their staff.

d. Internal staff memoranda addressed to the Commission in cases where staff memoranda have been adopted by the Commission as the basis for its final action in (i) rendering advice on the frankability of a proposed mailing, or (ii) adopting policies or regulations of general application with

> respect to permissible uses of the franking privilege by Members of Congress. [Stipulation and Protective Order Regarding Production of Information and Documents By Certain Employees of the House of Representatives, *Common Cause* v. *Bailar*, Civil Action No. 1887–73 (D.D.C. March 1, 1976) (hereinafter "Stipulation"); Slip Opinion at 5–6.]

Furthermore, still a different code will be used in place of Members' names in compilation than in the previous one, and it was:

> specifically understood and agreed that Mr. Smiroldo will not provide Plaintiffs with information or access to other materials consisting of (a) internal memoranda that were not adopted by the Commission as the basis for advice or policy decisions by the Staff or the Commission, (b) requests for advice by members, except as otherwise provided for above, and (c) either the identity or the code number for the members involved. [Stipulation; Slip Opinion at 6.]

Finally, the court's order stated that with respect to subpoenas issued by plaintiff on February 15, 1976, to the administrative assistants or aides of all 100 U.S. Senators, which commanded each one to bring with him "all documents, correspondence, memoranda, and other writings or copies thereof, which relate to or reveal the types of lists, 'codes,' or groupings of names maintained for mailing purpose in the Senate computer since December 18, 1973," in conjunction with each one being deposed at 15 minutes intervals from February 18 to 23, 1976, it was understood that counsel for both parties were trying to work out a solution including the directing of one subpoena to a single staff member who would represent all 100 Senators in the furnishing of documents anonymously, and it ordered the proposed procedure as approved, with the court to be advised of the precise procedure agreed upon.

On March 9, 1976, the House passed H. Res. 1082 giving its consent to the House employees to furnish the documents requested in the stipulation.

The Senate passed S. Res. 411 on March 24, 1976, which authorized the preparation of a list showing the codes used by each Senator on work orders for mailings sent under the frank, and authorizing employees to furnish the meaning of such codes.

On April 7, 1976, the 100 administrative assistants moved for a protective order from the court limiting the scope of discovery to the terms of S. Res. 411.

On July 1, 1976, the House of Representatives passed H. Res. 1382 authorizing the House Commission on Congressional Mailing Standards to seek to intervene in the case. The motion to intervene was filed on August 6.

Status.—The case is pending before the three-judge court in the U.S. District Court for the District of Columbia.

The full text of the court's "Memorandum and Order" of July 30, 1976, the "Stipulation and Protective Order Regarding Production of Information and Documents By Certain Employees of the House of Representatives," filed on March 1, 1976, and the "Order" of the court filed on March 1, 1976, were printed in the "Decisions" section

of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1976.

The full text of the memorandum and order of February 10, 1975, was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1975.

Harrington* v. *Colby

Civil Action No. 75–1862 (D.C. Cir.)

Brief.—This action, filed December 27, 1974, in the U.S. District Court for the District of Columbia, concerns certain allegedly illegal activities of the Central Intelligence Agency including the procedures by which these and other activities of the Agency are reviewed and funded by the Congress.

The purpose of the suit, according to the plaintiff, Representative Michael Harrington, is to require the Agency to:

> * * * operate within the limits imposed by law prohibiting foreign covert political operations and domestic intelligence activities. * * * The oversight committees of Congress have repeatedly failed to exercise any real control over CIA operations, rendering legal limitations meaningless in practice. A long history of CIA covert operations abroad, including the Bay of Pigs invasion and the secret war in Laos, attests to the complete abdication of Congressional responsibility by those on the oversight committees. Evidence of domestic surveillance adds to the pressing need for a reassertion of applicable legal limitations on CIA operations. [Press Release of Congressman Harrington, December 27, 1974.]

Named as defendants in the suit, in addition to William E. Colby, Director of the Central Intelligence Agency, were Henry Kissinger, in his capacity as Security Advisor to the President, Chairman of the Intelligence Committee of the National Security Council and Chairman of the 40 Committee, and William E. Simon, in his capacity as Secretary of the Treasury.

Mr. Harrington brings this action in his capacity as a taxpayer and as a Member of Congress. He contends that as a Congressman his rights have been curtailed and his authority impaired in the following respects:

> (a) Under Article I, Section 2, clause 5 and Article 2, Section 4 of the Constitution to consider, initiate, support or vote for the impeachment of the defendants Colby, Kissinger and other civil officers of the United States;
>
> (b) Under Article I, Sections 1 and 8 of the Constitution to consider, initiate, support or vote for legislation, civil or criminal, prescribing the Agency's activities and ensuring that such prescriptions are obeyed;
>
> (c) Under Article I, Sections 1 and 8 and Article I, Section 9, clause 7 of the Constitution. to consider, initiate, support or vote for legislation prescribing or limiting the use by the Agency of any public funds; and
>
> (d) To take other legislative actions relative to the activities of the Agency.

Plaintiff's complaint alleges that the Agency has violated its statutory authority under 50 U.S.C. §§ 403, *et seq.*, in that it has participated in "activities designed and calculated to affect or manipulate political, military, economic or social developments in foreign countries and in foreign affairs as distinguished from the activities of collecting, analyzing, integrating, interpreting and disseminating information." The complaint outlines specific instances of these alleged illegal activities; *e.g.*, financial support to Chilean trade organizations opposed to the election of Salvador Allende as President of Chile. Plaintiff asserts, as well, that in light of recent statements made by President Ford and Director Colby such activities can be expected to continue.

As a second cause of action, plaintiff alleges that the expenditure of public funds drawn from the Treasury for Agency nonintelligence related activities violates Article I, Section 9, clause 7 of the Constitution, which states that "[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Mr. Harrington contends that such activities of the Agency violate 50 U.S.C. § 403f(a) (receipt of funds from other Government agencies) and 31 U.S.C. §§ 11, 628, 696 (transmittal of the Budget to Congress, application of moneys appropriated, and limitation on use of appropriations by agencies).

The final cause of action in Mr. Harrington's complaint alleges that the Central Intelligence Agency violated its statutory authority by engaging in illegal domestic spying and surveillance, including collecting information and maintaining files on at least 10,000 American citizens. It is claimed that such files contain information regarding the political beliefs, activities and associations of American citizens and were obtained by the Agency through break-ins, burglaries, wiretaps and surreptitious inspection of mail. Representative Harrington states that such activities are not within the authority of the Agency under 50 U.S.C. § 403(d)(3) which states that "the Agency shall have no police, subpoena, law enforcement powers, or internal security functions.* * *"

Plaintiff requests the court to declare the following activities of the CIA illegal: Foreign nonintelligence related activities; domestic surveillance and information gathering operations of the Agency directed at U.S. citizens; current appropriation and funding procedures; failure to publish in the Federal Register nonintelligence related aspects and domestic police-internal security operations; and failure of the Agency and Department of Treasury to identify specifically the receipt and expenditure of funds for nonintelligence and police-internal security functions. Harrington asks that defendants, and their successors in office, be permanently enjoined from engaging in such illegal activities. Plaintiff also requests that defendants, and their successors in office, be required to report Agency nonintelligence and police-internal security activities in compliance with 5 U.S.C. § 552 (publication of information for the public record) and identify specifically the funding for such activities pursuant to Article I, Sec-

tion 9, clause 7 of the Constitution and 31 U.S.C. § 1029 (receipt and expenditure of public money).

Plaintiff finally requests that the court preliminarily enjoin the defendants from engaging in all alleged illegal activities pending final determination of this action.

Defendants motion to dismiss was granted on July 3, 1975. Plaintiffs then filed an appeal on July 28, 1975.

Status.—The case is pending before the U.S. Court of Appeals for the District of Columbia.

Oral argument has been set for September 15, 1976.

United States* v. *Gurney

Criminal Action No. 74–122–CR–J–K (M.D. Fla.)

Brief.—On July 10, 1974, former U.S. Senator Edward J. Gurney of Florida, two members of his staff and several other individuals were indicted by a Federal grand jury in Jacksonville. The 11-count indictment charged the Senator with bribery, conflict of interest, conspiracy to defraud the United States, and knowingly making false material declarations to a grand jury [§§ 2, 201, 203, 371 and 1623 of Title 18, U.S. Code]. The Senator's aides were also charged with violating §§ 2, 201, 203, and 371 of Title 18.

Senator Gurney and his aides pled not guilty to each count of the indictment.

On August 6, 1975, Senator Gurney was acquitted of bribery, receiving unlawful compensation and three counts of perjury. A mistrial was declared with respect to the conspiracy charge.

Status.—A new trial on the conspiracy charge is pending.

Metcalf* v. *National Petroleum Council

Civil Action No. 76–1223 (D.C. Cir.)

Brief.—Senator Lee Metcalf, on March 21, 1975, filed this action in the U.S. District Court for the District of Columbia, under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1 (Supp. III, 1973), and the Federal Energy Administration Act of 1974 (FEAA), 15 U.S.C. §§ 761–786 (Supp., 1975), to enjoin the Department of Interior and the Federal Energy Administration from obtaining advice or recommendations from the National Petroleum Council until the Council "conforms to the provisions of the Federal Advisory Committee and the Federal Energy Administration Act[s]." In addition, the suit asked that the Council be enjoined from advising Federal agencies "until it is lawfully constituted and properly sanctioned by the Office of Management and Budget." Plaintiff Metcalf filed this suit as a residential and general consumer of petroleum products, and as a Member of the United States Senate. As a residential and general consumer of petroleum products, Senator Metcalf alleged that because "the Council membership presently is not fairly balanced or reasonably representative in accordance with law, and is inappropriately influenced by special interests," the advice and recommendations which it transmits to the executive agencies will not adequately consider or prevent potential environmental damage, thereby directly affecting the health and safety of his family.

As a United States Senator, plaintiff Metcalf sponsored and voted for the Federal Advisory Committee Act and voted for the Federal Energy Administration Act. The complaint alleged that because of defendants' failure to comply with requirements of current law he has had his votes for and legislative efforts to insure compliance with them effectively nullified. Moreover, the Senator alleged that in his work as a Member of the Senate Interior and Insular Affairs Committee—which committee has jurisdiction over the Department of Interior's activities concerning mineral resources—he has been injured in the proper assessment of Interior's requirements because of the effects of the allegedly illegal advice provided Interior by the Council.

Senator Metcalf was joined in his suit by Robert Clarke Brown who also sued as a residential and general consumer of petroleum products. The complaint alleged that as a result of defendants unlawful activities Mr. Brown has been paying higher prices for petroleum products and is further injured by the environmental damage and hazards associated with petroleum products which are threats to his health and safety.

Defendants in this case are the National Petroleum Council and each of its subgroups which the complaint alleged are advisory committees within the meaning of the Federal Advisory Committee Act and the Federal Energy Administration Act of 1974. Other named defendants are John E. Swearingen, Chairman of the Council and also Chairman of the Board of the Standard Oil Company of Indiana; Kenneth E. BeLieu, Executive Director of the Council; the Department of the Interior, and its Secretary, Rogers C. B. Morton; the Federal Energy Administration and its Administrator, Frank G. Zarb; the Office of Management and Budget, and its Director, James P. Lynn.

The complaint further alleged that about 140 of the approximately 155 Council members appointed by the Secretary of the Interior are affiliated with or employed by the petroleum industry, and virtually all of the additional members of the council subgroups are either employees of, paid by, or responsible to the petroleum industry. The complaint further stated that throughout the year the Council and its subgroups advised, informed, and influenced Interior, FEA, and other Federal agencies on petroleum and energy related issues, all in violation of Section 5(b)(2) and (b)(3) of FACA which states that the President and agency heads shall require "the membership of the advisory committee to be fairly balanced in terms of points of view represented and the functions to be performed by the Advisory Committee," and that the President and agency heads shall "insure that the advice and recommendation of the Advisory Committee will not be inappropriately influenced * * * by any special interest."

The case came before Judge John H. Pratt, United States District Judge for the District of Columbia on defendants' motion to dismiss or in the alternative for summary judgment.

The court granted defendants' motion to dismiss with prejudice and held that the plaintiffs lacked standing to maintain the action.

In its memorandum opinion of February 9, 1976, the court noted that both plaintiffs alleged three types of injury to themselves as consumers: (1) Anticipated higher costs for petroleum products; (2)

Potential environmental damage and threats to health and safety; and (3) Anticipated denial of benefits from the development of alternative sources of energy. The court held that these allegations of consumer injury fail to establish a real and immediate injury or threat of injury—that at best they are speculative and represent grievances shared by all or most of the general public. The court concluded that the plaintiffs failed to make out a "case" or "controversy" and that "standing to sue may not be predicated upon an interest * * * which is held in common by all members of the public" citing *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220 (1973); see also *United States* v. *Richardson*, 418 U.S. 166 (1973).

The court also dismissed Senator Metcalf's allegations that defendants' actions have diminished the effectiveness of his votes for the FACA and FEAA and have impaired him in carrying out his legislative duties. The court said:

> Plaintiff Metcalf in an affidavit supplementing plaintiffs' opposition to defendants' motions spells out the type of injury claimed as a United States Senator. They are that (1) the data and information from Interior and FEA, to the extent that such includes data and advice from the Council, are biased and unreliable, thereby impairing his legislative work because of his need for unbiased data and advice, and (2) further legislative activities in the direction of correcting these abuses will be adversely affected until the legal issues raised by the complaint are resolved. The very recital of these alleged injuries indicates their lack of substance. Plaintiff Metcalf as a legislator of sophistication and long experience is not a neophyte. It is difficult to accept the premise that he is in any way misled by the data or information received from government agencies such as Interior or FEA or that he is unable to identify and discount any bias arising from the Council's input into that process. As for the necessity of a judicial declaration to determine his future legislative course of action, plaintiff Metcalf is not without a remedy. He is well aware that each standing committee of the Senate (and he is a member of such committee or committees) in the exercise of its legislative review function, is required to "make a continuing review of the activities of each advisory committee under its jurisdiction." (5 U.S.C. App. I, 1975 Supp. § 5(a).) In addition, it is no secret to him that both Interior and FEA are completely dependent on Congress for appropriations. In short, this suit is an effort to obtain an advisory opinion from this Court. Such is forbidden by the "case" or "controversy" requirements of Article III. As was said in a recent case,
>
> > "Pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptedly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.

> And it is equally true that the allegations must be true and capable of proof at trial." *United States* v. *SCRAP*, 412 U.S. 669, 688–89 (1973). [*Metcalf* v. *National Petroleum Council*, Civil Action No. 75–397 (D.D.C.); Slip Opinion at 5–6.]

Finally, the court added that there was a further defect in plaintiffs' position:

> They have failed to show that their injuries came as a result of the actions challenged herein. * * * In attempting to show that defendants' actions have caused and will cause their injuries, plaintiffs have assumed, if the Council's membership were changed, (1) that Council's advice would be different, (2) that Interior or FEA would act on a certain way or not act upon receipt of said advice, (3) that plaintiffs would not be harmed by such action or inaction, (4) that with different advice from the Council, Interior and FEA would act in a way different from their present actions, and (5) that assuming a different course of conduct by the governmental agencies, such changed conduct would favor plaintiffs' interests. These assumptions in every instance lack record support. They do not provide the factual foundation upon which one could reasonably infer that, in the absence of the defendants actions which plaintiffs seek to change, the injuries complained of would not and will not occur, and that, if the plaintiffs are granted the relief they seek, that those injuries would cease and disappear. [Slip Opinion at 6–8.]

Plaintiffs filed an appeal with the court of appeals on February 23, 1976, asking for a summary reversal. On March 22, defendants filed a motion with the court of appeals asking for summary affirmance.

The court of appeals denied both motions on May 12, 1976, and at the same time ordered the clerk of the court to schedule the case for oral argument on the same day and before the same panel as *Harrington* v. *Colby* (see this report at 75 *supra*).

Status.—The appeal is pending before the U.S. Court of Appeals for the District of Columbia.

The full text of the district court's memorandum opinion is found in the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1976.

National Tribal Chairmen's Association* v. *Abourezk

Civil Action No. 75–0803 (D.D.C.)

Brief.—On May 20, 1975, the National Tribal Chairmen's Association (hereinafter referred to as NTCA) filed suit against the American Indian Policy Review Commission and its Commissioners, who include six Senators and Congressmen appointed to the Commission by the President Pro Tem of the Senate and Speaker of the House.

The Commission was created by a joint resolution of Congress with the approval of the President. Its five Indian representatives were appointed by the six congressional Members and selected from the Indian community as follows:

(1) three members shall be selected from Indian tribes that are recognized by the Federal Government;
(2) one member shall be selected to represent urban Indians; and
(3) one member shall be selected who is a member of an Indian group not recognized by the Federal Government. P.L. 93–580; § 1(c); 88 Stat. 1911.

The Commission is to conduct a comprehensive review of the historical and legal developments underlying the Indian's unique relationship with the Federal Government in order to determine the nature and scope of the necessary revisions in the formulation of policies and programs for the benefit of Indians.

The NTCA describes itself as a voluntary nonprofit organization composed of those Chairmen, Presidents, Governors, or Chiefs of reservation Indians or of federally recognized tribes with Federal trust land who have been selected according to their tribal constitution as heads of their respective tribes. The NTCA includes the elected leaders of approximately 190 federally recognized tribes.

NTCA complains that the five Indian members of the Commission are "inferior officers" within the meaning of Article II, Section 2, clause 2 of the Constitution and that their appointment by six members of a Commission created by, but wholly distinct from, Congress to execute Public Law 93–580 is repugnant to the aforesaid provision of the Constitution because such body is not lawfully vested with the power of appointment. It also alleges that Public Law 93–580 is unconstitutional because it unlawfully vests the power of appointment of inferior officers in a body other than the President, the Courts of Law, or the Head of a Department.

The selection of the Director and General Counsel of the Commission is also attacked because they were named prior to the appointment of the five Indian Commissioners. The Association further complains that they were neither appropriately selected under the formula prescribed by the joint resolution, nor reflective of the diverse character of the Indian community.

The composition of the Commission is so unrepresentative, NTCA alleges, that it constitutes a breach of the trust relationship between the Federal Government and the federally recognized land based Indian tribes.

The Association asks that the Commission and its enabling statute be declared unconstitutional, that the appointment of the five Indian members of the Commission be declared unconstitutional, and that the members of the Commission be enjoined from carrying out their responsibilities or expending authorized funds.

The case came before a three-judge panel of the United States District Court for the District of Columbia on cross-motions for summary judgment.

On February 19, 1976, the panel granted defendants' motion for summary judgment and denied same to plaintiffs. In its order of the 19th the court found that:

(1) the powers and responsibilities vested in the American Indian Policy Review Commission ("Commission") are ex-

clusively legislative in nature, *see McGrain* v. *Daugherty*, 273 U.S. 135 (1927), *Watkins* v. *United States*, 354 U.S. 178 (1957), *Barenblatt* v. *United States*, 360 U.S. 109 (1959), *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), and, consequently, neither the creation of the Commission nor the appointment of its membership by Congress, or designated subgroups thereof, is violative of the doctrine of separation of powers or the Appointments Clause of the Constitution, art. II, § 2, cl. 2, *Buckley* v. *Valeo*,—U.S.—, 44 U.S.L.W. 4127 4162–70 (U.S. January 30, 1976), *cf. In re Hennen*, 13 Pet. (38 U.S.) 230, 258 (1839), *Collins* v. *United States*, 14 Ct. Cl. 568 (1878), *Springer* v. *Philippine Islands*, 277 U.S. 189 (1928); (2) the Indian members of the Commission are not "inferior officers" of the United States within the meaning of the Appointments Clause, *Buckley* v. *Valeo*, *supra*, 44 U.S.L.W. at 4164–70; (3) the present Indian membership of the Commission reflects the criteria for selection detailed in Section 1(c) of the American Indian Policy Review Commission Act ("Act"), 25 U.S.C. § 174 (1975); and (4) the Director and General Counsel of the Commission were appointed "by record vote of a majority of the Commission members," as required by Section 6(a) of the Act. [*National Tribal Chairmen's Association* v. *Abourezk*, Civil Action No. 75–803 (D.D.C.), Order at 1–2; footnotes omitted.]

Plaintiffs filed a notice of appeal to the United States Supreme Court on March 19, 1976.

Status.—On May 19, 1976, plaintiffs filed a motion to dismiss their own appeal before the Supreme Court.

The full text of the district court's order of February 19, 1976, is found in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1976.

Sportservice Corp.* v. *Steiger

Civil Action No. C286651 (Superior Court, State of Arizona for Maricopa County)

Brief.—Early in 1974 Sportservice Corporation and its subsidiaries, which are engaged in various businesses including horse racing, dog racing, and businesses identified with those activities, as well as the operation of food and beverage concessions, filed suit against Representative Sam Steiger, one of his former aides, and others alleging a conspiracy to damage plaintiff's business activities for defendant's personal benefit. The complaint asks $1,000,000 in damages.

Among other charges, Sportservice alleged that statements made by Representative Steiger and dissemination by him of material to certain publications were part of the conspiracy.

Representative Steiger in his answer denied any conspiracy, responded that all the statements he had made and the material he had furnished were true, and claimed that all acts done or performed were in his capacity as a Member of Congress in furtherance of his official duties. As such, Representative Steiger claimed that they were protected by the "doctrines of legislative privilege and legislative immu-

nity." As for the statements made by him and alleged by Sportservice to be defamatory, Representative Steiger asserted that his statements were true, made in good faith in the belief that they were true, and in any event, privileged as statements made in the public interest involving matters of public concern.

Representative Steiger's answer to Sportservice's complaint contained a counterclaim alleging that Sportservice was engaging in an effort to defame him and to damage his reputation individually and as a Member of Congress. Representative Steiger's counterclaim seeks $2,000,000 in damages.

During the course of the proceedings, the trial court ordered Representative Steiger's former aide to answer questions put to him in a discovery deposition. Representative Steiger asserted Speech or Debate Clause immunity to prevent the aide from responding. Sportservice then sought a court order to require the aide to answer. Such an order was issued by the trial court, but Representative Steiger appealed. The matter came before the Arizona Supreme Court [*Steiger* v. *The Superior Court of the State of Arizona for Maricopa County*, Number 11752 (1975)] and was decided on June 4, 1975.

Before the State Supreme Court, Representative Steiger again asserted that the actions complained of by Sportservice were carried out in his official capacity and that Speech or Debate Clause immunity was a bar to inquiry into his legislative activities.

The court held that while activities that are clearly related to the legislative process are immune from inquiry, even when general criminal statutes might otherwise apply, Speech or Debate Clause immunity does not shield everything related to a congressman's office. Only acts done in the process of enacting legislation are protected. While Representative Steiger had asserted that the acts which were to have been the subject matter of the deposition were part of an investigation he was conducting, the court noted that there was no showing that the investigation was related to any pending congressional inquiry or legislation. The court also noted that more than one year after the acts occurred, Representative Steiger introduced a bill to provide criminal penalties for fixing certain horse or dog races. While the court said it was arguable that the impetus for the legislative proposal may have resulted from the investigation and as such was related to the legislative process, it refused to accept that such a connection was sufficient to bring the acts within the protection of the Speech or Debate Clause immunity.

Status.—A trial on the merits is pending in the Arizona State court system. The decision of the Arizona Supreme Court in *Steiger* v. *The Superior Court of the State of Arizona for Maricopa County* is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, August 15, 1975.

Drinan v. _Richardson_ (formerly Morton)

Civil Action No. 75–1916 (D.D.C.)

Brief.—On November 11, 1975, Representative Drinan and 24 other Members of the House of Representatives filed suit, as Members of Congress, against Rogers C. B. Morton as Secretary of Commerce and Thomas Kleppe as Secretary of the Interior, alleging that certain

actions and inactions of the defendants had violated Section 3(5) of the Export Administration Act (hereafter referred to as "Act").

Section 3(5) of the Act provides as follows:

> It is the policy of the United States (A) to oppose restrictive trade practices fostered or imposed by foreign countries against other countries friendly to the United States, and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States.

The plaintiffs state that under the Constitution, it is the duty of the Congress to determine and state national policy, and the duty of the executive department to implement and effectuate it and to refrain from actions that hinder, impair or frustrate it; that Israel is a country friendly to the United States; and that a number of countries in the Near East and North Africa now and for many years have engaged in a systematic and continuing boycott of Israel and of American domestic concerns engaged in trading or doing business with or in Israel.

The complaint alleges that under Morton, the Commerce Department acted to hinder the implementation of the Act's policy by promoting business between the Near East and North African countries and American concerns that comply with their boycott policies and practices through publications encouraging businessmen not now doing business with those countries to begin doing so, and offering the services of the Department in helping them start. It states that Morton wrote an article in a Department publication entitled "Mideast Trade and the Boycott," which failed to mention Section 3 of the Act. Further, the Department issued Export Regulations Section 369.1 which states that it is the policy of the United States to oppose restrictive boycotts imposed by foreign countries against any country not included in a certain group, and all exporters are "encouraged and requested to refuse to take (but are not legally prohibited from taking) any action" that would further the boycotts. The complaint states that there is nothing which allows the executive branch of the Government to advise American concerns that they can take actions directly contrary to the national policy as expressed by the Congress, that the statement is an erroneous statement of law, and that its only purpose can be to invite and encourage American concerns to violate the anti-boycott policy of the United States. Finally, plaintiffs complain that the Department violates the policy (1) by circulating notices of trade opportunities or tenders from Near East and North African countries to American concerns without informing them that these countries participate in boycott policies and practices against which Section 3 of the Act is specifically aimed; (2) by circulating such notices and tenders in which the inviting country expressly excludes concerns that are (or use materials manufactured by concerns that are) officially boycotted by the inviting country; (3) by circulating such notices and tenders without stating that compliance with the terms violates the

Act; and (4) by circulating such notices and tenders with a statement that compliance with the boycott provision is contrary to American policy but is not illegal or legally prohibited.

The complaint alleges that under Kleppe's direction or approval, the Department of Interior, in purchasing materials for use by its Geological Survey Bureau in Near East and North African countries required the American vendors to submit certification that neither the steamship on which the materials was to be sent nor the company insuring the materials were on the boycott list of the country involved.

The suit asks for declaratory and injunctive relief to prevent defendants from encouraging trade between American concerns and the Near East and North African countries.

On March 10, 1976, defendants filed a motion to dismiss, claiming that plaintiffs lacked standing, the complaint presented a non-justiciable question, and the action was moot, since the President and Departments of Commerce and Interior had announced policies and regulations to enforce the laws against discrimination based on religious or ethnic origins and against secondary boycotts based upon such discrimination.

Plaintiffs filed their opposition to the motion to dismiss on June 2, alleging that they did have standing, as they were injured by having the effectiveness of their votes nullified by the actions of the Executive, and because they have responsibilities to legislate with respect to the subject matter of the Export Administrations Act. They also argued that once Congress has enacted legislation setting forth specific policy with respect to foreign commerce, the question of whether the Executive is nullifying this policy is an appropriate subject for judicial review. They stated that it was not they who were attempting to challenge the foreign policy of the United States, as defendants claimed, but it was defendants who were violating the foreign policy of the United States as spelled out by Congress. They argue that the act presents a "clear and judiciable manageable standard for resolving the issue in this case." Finally, they state that the controversy is not moot, since the actions of the President and the Departments of Commerce and Interior cited by the defendants "are either wholly irrelevant or so tentative and inadequate as to bolster the thrust of this action and confirm the need for the relief sought. None of them is sufficient to moot the controversy raised by the complaint herein." [Plaintiff's "Points and Authorities in Opposition to Defendants' Motion to Dismiss," at page 23.]

On June 18, Plaintiffs' motion of June 8 to substitute Elliott Richardson, now Secretary of Commerce, for Mr. Morton, was granted.

Status.—The case is pending before the U.S. District Court for the District of Columbia.

Simon* v. *United States Postal Service

Civil Action No. 76–322 (D.D.C.)

Brief.—On February 26, 1976, U.S. Representative Paul Simon and 50 other Congressmen and Senators filed suit against the U.S. Postal Service seeking injunctive and declaratory relief.

The complaint alleges that the Postal Service has been putting into effect a program which will cause the closing of small post offices which

are operating at a loss. Such a program, the Representatives and Senators argue, is a violation of 39 U.S.C. § 101(b). Additionally, the complaint alleges that the closings violate the statutory requirement that a change in the nature of postal service requires an advisory opinion from the Postal Rate Commission prior to its being put into effect. (39 U.S.C. § 3661). Furthermore, the closings are alleged to be in violation of Postal Service regulations which require an official recommendation including a description of the proposed action and a 90-day waiting period between the time an action is proposed and its date of effectiveness.

The court granted a temporary restraining order and on March 3d heard argument on the plaintiffs' request for a preliminary injunction.

On March 5th the court granted the motion for a preliminary injunction. While the court rejected the argument that the Postal Service program violated the statutory provisions, as alleged, it found that the program conceived by the Postal Service did violate its notice and recommendation requirements.

In its order the court enjoined the Postal Service from closing or consolidating any post office until the regulatory requirements are met.

On March 22 the case was consolidated with *National Association of Postmasters of the United States, et al.* v. *U.S. Postal Service, et al.*, Civil Action No. 75–1954 (D.D.C.).

On April 2, the Postal Service filed motion to dismiss or in the alternative for summary judgment.

Status.—The case is pending before the U.S. District Court for the District of Columbia.

Hutchinson* v. *Proxmire

Civil Action No. 76–C257 (W.D.Wis.)

Brief.—On April 18, 1975, Senator William Proxmire, Chairman of the Subcommittee on Housing and Urban Development and Independent Agencies of the Senate Appropriations Committee which has jurisdiction over funds for the National Science Foundation (NSF) and the National Aeronautics and Space Administration (NASA) and the Office of Naval Research (ONR), made a statement on the floor relating to certain research contracts awarded by those agencies to Dr. Ronald R. Hutchinson, a Michigan research scientist. Subsequently, a press release which consisted almost entirely of quotations from the Senator's floor statements was issued by Senator Proxmire's office. At about the same time, Morton Schwartz, an aide to Senator Proxmire, allegedly telephoned various Federal agencies in an attempt to persuade those agencies to terminate grants or contracts for research being performed by Dr. Hutchinson. Seven months later, Senator Proxmire appeared on a nationally syndicated television show. During that appearance Senator Proxmire made statements regarding the expenditure of Federal funds for a study of certain aspects of the behavior of monkeys, rats, and human beings. Dr. Hutchinson was not mentioned by name during this appearance.

On April 15, 1976, Dr. Hutchinson filed a $6 million slander and libel action against Senator Proxmire and his aide alleging that they "maliciously and with knowledge of the consequences of their conduct

interfered with the numerous valid contractual relationships that the plaintiff had with the supporters of his research." Dr. Hutchinson's complaint seeks relief based on the statements made in the press release, on the television show, and by Mr. Schwartz over the telephone to the various Federal agencies.

The defendants filed a motion with the court on June 10 to have the case transferred to the District of Columbia.

On June 11 the court issued an order by U.S. District Court Judge Doyle in which he disqualified himself from the action.

Senator Proxmire filed a motion to dismiss or alternatively for summary judgment on July 9. In it he claimed: (1) that the alleged misconduct was legitimate legislative activity and, accordingly, absolutely privileged, (2) that his statements and inquiries of the use of public funds were privileged, and (3) that there is no factual basis which will support a finding for the plaintiff.

Status.—The case is now in the Northern District of Illinois before Judge Leighton, since Judge Doyle is the only judge in the Western District of Wisconsin. The case is still docketed in the Wisconsin court, however, and will be handled as if it were there. The case is now pending before the court in Illinois.

Maremont Corporation* v. *Rumsfeld

Civil Action No. 76–0895 (D.D.C.)

Brief.—Maremont Corporation and the entire Maine congressional delegation has filed suit against the current and immediate past Secretaries of Defense and the current Secretary of the Army. The complaint seeks to enjoin the current officers from awarding a contract to a Belgian company for the production of a tank machinegun either permanently or at least until such time as the Comptroller General has reached a decision as to complaints filed by Maremont with the GAO.

The congressional plaintiffs assert standing "on their own behalf as Members of the United States Congress and on behalf of those citizens of the State of Maine adversely affected . . ." by the action of the officials of the Department of Defense.

The complaint alleges that the Defense Department's decision to contract with the Belgian firm for the purchase of 18,191 machineguns at a cost of $1,517 each as opposed to $707 for equivalent Maremont-made weapons is violative of 41 U.S.C. § 10a *et seq.*, the "Buy American Act," § 723 of the 1976 Department of Defense Appropriation Act, P.L. 94–212, the military procurement statutes of the United States, including 10 U.S.C. § 2304, the Armed Services Procurement Regulation, and the Fifth Amendment to the United States Constitution.

The complaint was filed on May 19, 1976. At the same time plaintiffs filed a motion for a preliminary injunction to prevent defendants from entering into a contract with the Belgian company until at least after GAO had issued a report on its findings. A hearing on that motion was held on July 1, 1976.

On July 2, 1976, Judge June L. Green of the U.S. District Court for the District of Columbia issued a memorandum order. Noting that defendants had violated their own regulations regarding procurement,

and that GAO had stated that it could reach a determination within 25 days, the court granted the motion for a preliminary injunction and enjoined defendants from issuing the contract for production and/or purchase of the Belgian machineguns until 5 days after GAO issues its ruling on Maremont's bid protest.

Status.—The case is pending before the U.S. District Court for the District of Columbia.

The full text of the "Memorandum Order" is found in the "Decisions" section of this report at 117.

Pressler* v. *Simon

Civil Action No. 76–0782 (D.D.C.)

Brief.—On May 7, 1976, Representative Larry Pressler filed suit in the district court for the District of Columbia challenging the constitutionality of "automatic annual" pay raises for Members of Congress.

The complaint, accompanied by an application for a three-judge District Court, seeks a declaratory judgment that the Federal Salary Act of 1967 and the Executive Salary Cost-of-Living Adjustment Act which set forth procedures for establishing new rates of compensation for Members of Congress are unconstitutional. The complaint also seeks to enjoin executive officers, the Sergeant at Arms of the House, and the Secretary of the Senate "from requisitioning, authorizing payment of or disbursing increases in congressional salaries effected pursuant to the [acts]."

The 1967 act established a Commission on Executive Legislative and Judicial salaries which recommends to the President, at 4-year intervals, rates of pay for Senators, Representatives, Federal judges, cabinet officers, and certain other officials in the three branches of government. Based on the Commission's recommendation, the President submits, in his next proposed budget, his own recommendations for governmental salaries. The President's recommendation becomes effective 30 days after his proposals have been transmitted to the Congress unless either at least one House has passed a resolution disapproving of all or part of the recommendations or other rates have been enacted.

Congressman Pressler contends that the procedure insofar as it provides a mechanism for adjusting salaries of Members of Congress violates Article I § 1 of the Constitution which provides that "[a]ll Legislative Power herein granted shall be vested in a Congress of the United States"; and Article I § 6 cl. 1 which provides "[t]he Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law and paid out of the Treasury of the United States."

Congressman Pressler further contends that the Executive Salary-Cost-of-Living Adjustment Act of 1975 which provides for an automatic annual cost-of-living adjustment in the salaries of certain governmental officers, including Members of Congress, is unconstitutional. The Act states that the annual rate of pay for Members of Congress is to be the rate established pursuant to the provisions of the 1967 Act. Congressman Pressler asserts that insofar as the Act establishes procedures for the establishment of salaries for Members of Congress, it also violates Article 1 § 1 and Article I § 6 cl. 1 of the Constitution.

Status.—On July 20th the court dismissed the action without prejudice. Three days later the court vacated the order granting dismissal and set oral argument on motion for summary judgment for September 21, 1976.

Reuss* v. *Balles

Civil Action No. 76–1142 (D.D.C.)

Brief.—Representative Henry Reuss brought this action (in a complaint filed on June 21, 1976, and in an amended complaint filed on July 7) against the individual members of the Federal Open Market Committee (FOMC) who are not members of the Board of Governors of the Federal Reserve System and against the twelve Federal Reserve Banks.

The individual defendants are all presidents or first vice presidents of the Federal Reserve Banks, each of whom was appointed as an officer by his Bank's board of directors, with approval of the Board of Governors of the Federal Reserve System. Under the provision of § 12A(a) of the Federal Reserve Act (12 U.S.C. § 263(a)), the FOMC consists of the seven members of the Board of Governors of the Federal Reserve System, plus five others (and their alternates) selected by the boards of directors of the Federal Reserve Banks who must be either presidents or first vice presidents of said Banks. Each board of directors of a Bank consists of nine members, three of whom are chosen by the Board of Governors of the Federal Reserve System and six of whom are chosen by the commercial banks who are the stockholders of said Bank.

Representative Reuss states that he is "a Member of the House of Representatives and is Chairman of the Committee on Banking, Currency and Housing, which, pursuant to Rule X.1(d) of the Rules of the House of Representatives, has jurisdiction of legislative matters relating to, *inter alia*, banks and banking, Federal monetary policy, money and credit, valuation and revaluation of the dollar, and international finance. The plaintiff is also Chairman of the Subcommittee on International Economics of the Joint Economic Committee established by the Employment Act of 1946 (15 U.S.C., Chapter 21)." He also states that he is the owner of certain marketable bonds whose aggregate cost, aggregate marketable value, and aggregate face value are in excess of $20,000. The complaint states that the FOMC makes decisions to buy or sell United States Government securities and the currencies of foreign governments, which decisions are then carried out by the Federal Reserve Banks, and that these purchases or sales have a substantial effect on the value of foreign currencies relative to the currency of the United States, and upon domestic bank reserves, bank credit, money supply, interest rates, overall credit conditions, economic activity, jobs, and prices. It states that the five defendant members of the FOMC have the same vote as the seven who are members of the Board of Governors of the Federal Reserve System, and that they exercise substantial power in the formulation of the decisions on open market policy.

Representative Reuss alleges that the method of selection of the five defendant members and their alternates violates Article II. Section 2 of the Constitution because they have not been appointed officers of the United States in accordance with the procedures out-

lined therein. He alleges that by voting on the FOMC they create for themselves *de facto* offices of the United States, thereby diminishing or usurping his legislative functions, both as a Member of the House and as Chairman of its Committee on Banking, Currency and Housing. He alleges he is affected in participating in the exercise of the following powers of Congress:

(a) Regulating the value of money and foreign exchange under Title I, Section 8, clause 5 of the Constitution.

(b) Providing for offices under the United States not otherwise provided for by the Constitution; and to establish the qualifications therefor, prescribe the duties and compensation thereof, and provide for the terms of office and grounds for removal.

(c) Regulating interstate and foreign commerce.

(d) Borrowing money on the credit of the United States.

(e) Participating in the process of selection of officers of the United States as provided in Article II, Section 2, of the Constitution through negotiation with representatives of the Senate on issues and nominees in the context of the overall functioning of the legislative process in the Congress of the United States.

He also alleges that the individual defendants can substantially and adversely affect the value of his property, thereby depriving him of property without due process, by increasing or decreasing interest rates on government securities and by affecting the availability of money. The complaint alleges that in carrying out the orders of the FOMC, which are made by the unconstitutional participation of the defendant individuals, the defendant banks regulate the value of money and of foreign currency, thereby interfering with plaintiff's legislative functions under Article I, Section 8, clause 5, and that these actions may also deprive him of property to the extent of more than $10,000 without due process of law.

The suit asks that the defendant individuals and their successors be permanently enjoined from serving as members or alternate members of the FOMC, that defendant banks be permanently enjoined from complying with any FOMC decisions made while any of these individuals sit as members of it, and that the court render a judgment declaring void for repugnance to Article II, Section 2, clause 2 of the Constitution, such parts of section 12A(a) of the Federal Reserve Act as provide for the selection of members and alternates of the FOMC by the boards of directors of the Federal Reserve Banks.

Representative Reuss also made application for a three-judge court to hear the case pursuant to 28 U.S.C. § 2282 on June 21, 1976.

Defendants filed an opposition to the convening of a three-judge court and a motion to dismiss on July 30. The motion to dismiss argues that plaintiff lacks standing to sue, both as a Member of the House of Representatives and as an individual owner of securities.

Status.—The case is pending before the U.S. District Court for the District of Columbia.

United States ex rel. Hollander* v. *Clay

Civil Action No. 76–493 (D.D.C.)

Brief.—This suit was filed by a private citizen pursuant to 31 U.S.C. §§ 231–32, which allow private citizens to bring suits in the name of

the United States against anyone making a false claim against the United States. The plaintiff is required to notify the Justice Department, which has 60 days after receiving the notice to take over as plaintiff. If the Justice Department takes over the case, the private citizen may be awarded up to one-tenth of the amount recovered for bringing facts and evidence to the attention of the government; if he must prosecute the case alone, he may be awarded up to one-fourth of the amount recovered for his services.

The action, filed on March 26, 1976, alleges that Representative William Clay had, during the 6 years prior to the filing of the suit, made numerous claims, which Representative Clay knew to be false, upon the Finance Officer in the Office of the Clerk of the House of Representatives for $212.80 each as reimbursement for the cost of a round trip by automobile from Washington, D.C., to Representative Clay's home in St. Louis, Mo., for trips not actually made. It asks pursuant to 31 U.S.C. § 232, that Representative Clay pay double the amount of claim, plus $2,000 for each claim falsely filed.

On June 4, 1976, the Justice Department took control of the litigation.

The Justice Department then filed an amended complaint on June 18. The complaint alleges that since he assumed office in 1969, Congressman Clay has submitted vouchers for, and received payment for, at least 21 trips to his State congressional district which he did not and could not have taken, inasmuch as he was officially recorded as travelling to other destinations for which he received reimbursement from the Finance Office, or else he was officially recorded as having voted in the House of Representatives during the time of the purported travel. It also states that he submitted vouchers that represented that he travelled by private automobile and claimed reimbursement on that fact, when the trips were actually made by common carrier, thus entitling him to a lesser reimbursement than he received for the claimed trips by private automobile. The complaint asks for such damages as may be established at trial, which is subject to doubling and such statutory forefeitures as the court might allow, together with interest at the maximum allowable rate. The complaint alleges as a second cause of action that Representative Clay, as a Member of Congress, holds a public trust and owed a duty of accountability for public moneys entrusted to his use and paid for his benefit in and of his performance of his official and representative responsibilities, and that because of the false claims he has unjustly enriched himself at the expense of the United States. For this cause of action the Government seeks damages equal to the amount of unjust enrichment plus the maximum interest allowable. Finally, the complaint asserts as a third cause of action that the United States has paid moneys to Representative Clay under a mistake of fact, that being that it believed the moneys were being paid for trips made at the applicable House standard, when in fact he was overpaid and reimbursed for trips not actually taken. The suit asks for judgment in the amount paid by mistake of fact and maximum interest.

On July 7, the plaintiff filed a motion for an order directing the issuance of a subpoena for the attendance of witnesses and production of documents to Edmund L. Henshaw, the Clerk of the House of Representatives.

Representative Clay filed a motion to dismiss for lack of jurisdiction on July 8. The motion states that under the Speech or Debate Clause, the Members are not only given a defense on the merits, but are protected from litigation itself, and that its protection extends to all acts generally done in a session by a Member in relation to the business before the House. Since the submission of a travel voucher to his district is an action generally done by a Member in the course of his legislative duties, this action is protected by the Speech or Debate Clause. The Member represents his constituency, and must travel to it to ascertain the needs and wishes of his constituents. This is part of his job as a legislator, and thus it is protected. The motion says that the court lacks jurisdiction also because Article I, Section 5, clause 2 gives each House the right to punish its own Members, and thus entertainment by the court of this action would violate that clause. It also alleges that this is a "political question" which cannot be entertained by the courts, because under *Powell* v. *McCormack*, 395 U.S. 486 (1969), if there is a "textually demonstrable commitment" to Congress of the power to take action, the case is not justiciable. The motion argues that such a "commitment" is present here.

Finally, the motion asserts a statutory prohibition, in that in *United States* v. *Brewster*, 480 U.S. 501 (1972), which upheld a former U.S. Senator's conviction on accepting a bribe for casting a vote, the Supreme Court had said:

> If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century. [408 U.S. at 524.]

Congressman Clay asserts that such an exemption exists in this case. 2 U.S.C. § 95 reads:

> 95. Payments from contingent fund of House of Representatives—No payment shall be made from the contingent fund of the House of Representatives unless sanctioned by the Committee on Accounts of the House of Representatives [Committee on House Administration]. Payments from the contingent fund made upon vouchers approved by said committee shall be deemed, held, and taken, and are hereby declared to be conclusive upon all the departments and officers of the Government. No payment shall be made from said contingent fund as additional salary or compensation to any officer or employee of the House of Representatives.

The provision was enacted into law in 1888 and re-enacted as recently as 1974.

Status.—The case is pending before the U.S. District Court for the District of Columbia. Oral argument on all pending motions is set for September 16, 1976.

United States ex rel. Martin-Trigona* v. *Hays

Civil Action No. 76–1140 (D.D.C.)

Brief.—This suit was filed by a private citizen on behalf of the United States against: Representative Wayne L. Hays; former Rep-

resentative Kenneth Gray; Elizabeth Ray, a former employee of "the House of Representatives Administration Committee; and before that for then-Representative Gray;" and Donald R. Gosny, "employed by both the House of Representative Administration Committee (sic) and by Defendant Hays on his Ohio staff." It was filed under 31 U.S.C. § 232, which allows a private citizen to bring a suit in the name of the United States against anyone making a false claim against the United States. The statute requires the plaintiff to notify the Justice Department that the suit has been filed, and allows the Justice Department to take over the suit if done within 60 days after the plaintiff's notification. Plaintiff may be awarded up to one-fourth of the amount recovered if the Justice Department does not assume the case, and up to one-tenth if it does.

The complaint alleges that Miss Ray was kept on the government payroll to perform illegal sexual acts for former Representative Gray and Representative Hays and others at their direction while on their staffs, that they paid her far in excess of the value of the lawful services she performed, and that she knowingly received public funds in excess of the value of the lawful services she provided; that Representative Hays knowingly authorized the office manager of the Committee on House Administration to pay Miss Ray $325 for her rent, for which she provided no lawful services and which she nevertheless knowingly received; that Mr. Gosny received funds from two full-time positions, one as Representative Hays' field representative in Ohio and the other as an assistant clerk for the Committee on House Administration, and that Representative Hays knowingly authorized the payments although Mr. Gosny could not have fulfilled the functions of both jobs; that Representative Hays and former Representative Gray breached their duty as public officers under 31 U.S.C. § 521 by using public funds for personal matters and for improper and illegal sexual acts performed by Miss Ray; that defendants have knowingly violated 31 U.S.C. § 529 by authorizing payment of or receiving payment in excess of the lawful services rendered; that all defendants except Mr. Gosny violated 31 U.S.C. § 551 by using public moneys for food and lodging for assemblages of two or more persons; that Representative Hays and former Representative Gray violated 31 U.S.C. § 628 by using public funds for illegal purposes by causing them to be paid to Miss Ray for performing sexual acts with them and others, and violated 18 U.S.C. §§ 2421–22 by personally and with the assistance of others transporting Miss Ray "in interstate commerce" to perform these acts; and that Representative Hays and former Representative Gray violated 31 U.S.C. § 671 by knowingly using funds appropriated for contingent expenses of the House of Representatives for personal, sexual services provided by Miss Ray which were not intimately connected with routine legislative functions.

The suit asks $2,000 for each false claim paid to defendants or paid at their request or authority; that they pay to the Treasury of the United States double the total amount of these claims; that defendants pay $100,000 in punitive damages; and that plaintiff Martin-Trigona be awarded reasonable compensation for prosecuting the suit.

Former Representative Gray filed motions on July 26, asking the court to: (1) dismiss all but the cause of action based on 31 U.S.C.

§ 232, since that is the only statute allegedly violated which authorizes suit by a private individual, (2) dismiss the § 232 cause of action or in the alternative require a more definite statement of the facts of the alleged fraud, and (3) dismiss the complaint for lack of jurisdiction because the information was already in the possession of the United States when the action was filed, and 31 U.S.C. § 232(c) states that no court has jurisdiction if the complaint is based upon information in the possession of the United States at the time the suit is filed.

On August 9, plaintiff filed oppositions to defendant Gray's motions, stating (1) that his injury as a taxpayer should give him standing to sue on all counts, (2) that his allegation on the fraud charge was clear enough, and (3) that whether the Government had the information was a question of fact, and the Justice Department should be allowed the statutory 60 days to answer, and that even if they had the information, there are diversity and Federal question grounds for jurisdiction. Plaintiff also filed a motion to join the United States as an involuntary plaintiff.

Representative Hays filed motions to dismiss on August 10. He asked that all but the fraud count be dismissed for lack of standing, and that the fraud charge be dismissed for lack of jurisdiction, since 31 U.S.C. § 232(c) states that no court shall have jurisdiction of actions brought under this statute if it appears that the information upon which the suit is based was in the possession of the Government at the time the suit was filed. He also asked for a protective order limiting discovery to questions of the court's jurisdiction until that motion is ruled on.

Status.—The case is pending before the U.S. District Court for the District of Columbia.

United States ex rel. Thompson* v. *Hays

Civil Action No. 76–1078 (D.D.C.)

Brief.—Plaintiff, a private citizen, filed this suit under Sections 231 and 232 of Title 31 of the United States Code, which allow a private citizen to file a claim on behalf of the United States against any person making a false claim for money upon the United States. Section 231 states that anyone convicted shall pay and forfeit $2,000, plus double the amount of damages the United States may have incurred as a result of the false claim, plus the costs of the suit. Section 232 requires the plaintiff to notify the Justice Department of the suit, and allows the Justice Department 60 days from such notice to take over the case from the plaintiff and carry on the suit on its own. If the United States fails to enter an appearance, the plaintiff may carry on the suit. If the United States enters an appearance, the private citizen may still be awarded fair and reasonable compensation for disclosure of information or evidence not in the possession of the United States when the suit was brought. The amount may not exceed one-tenth of the amount recovered. If the United States does not take over the case, the court may award up to one-fourth of the amount recovered to the plaintiff as compensation for his services.

Plaintiff filed this action on June 16, 1976, against Representative Wayne L. Hays, and Elizabeth Ray "as a private citizen of the United States." It alleges that during a number of years defendants made

numerous claims or acted in concert to make claims, which they knew to be false, upon the Finance Officer of the Clerk of the House of Representatives as payments to defendant Ray to serve as the mistress of Representative Hays. The suit asks double the amount of $14,000 for each of the number of years the payments complained of were made, plus $2,000 for each claim made by defendants.

On August 10, Representative Hays filed a "Motion to Dismiss and for a Protective Order." He stated that the court lacks jurisdiction under the statutes, since 31 U.S.C. § 232(c) provides that a court shall not have jurisdiction of a suit brought under this section if such suit is based upon evidence or information already in the possession of the United States at the time the suit was brought. The motion states that the substance of the charges in the complaint first appeared in a front page article in *The Washington Post* on May 23, 1976, that on May 25 several well-known papers carried the story that the Justice Department was conducting a criminal investigation of the charges, and that on June 1, U.S. District Chief Judge William B. Jones issued a gag order which once again gave public acknowledgment to the Government's investigation. It states that this complaint was filed 2 weeks later, and that it contains no new information, but is based only upon charges made earlier in the press. The motion also asks that while the court is considering the motion to dismiss that it issue a protective order limiting the scope of discovery to questions relating to its jurisdiction over the subject matter.

Status.—The suit is pending before the U.S. District Court for the District of Columbia.

United States ex rel. Cennamo* v. *Ray

Civil Actions No. 76–1132 (D.D.C.)

Brief.—This suit was filed on June 18, 1976, by two private citizens, Anthony D. Cennamo and his attorney, George R. Douglas, Jr., against Elizabeth Ray, Representative Wayne L. Hays, and Dell Publishing Co., Inc. It was filed pursuant to 31 U.S.C. §§ 231 and 232 which allow a private citizen to bring a suit on behalf of the United States where such person has knowledge of a false claim which has been filed against the United States. The Justice Department must then be notified of the suit, and it has 60 days after the notification to assume control of the prosecution. If they assume control, the court may still award the instigators up to one-tenth of the amount recovered; if the instigators must prosecute the case on their own, the court may award them up to one-fourth of the amount recovered.

The complaint states that the defendants have, over a number of years prior to the filing of the complaint, made numerous claims, or acted in concert and entered into agreements, combinations, or conspiracies with each other in making claims, knowing them to be false and fictitious, upon the Finance Officer of the Office of the Clerk of the House of Representatives, in the amounts of or about $14,000 per year. As a second cause of action, the complaint states that over a number of years, defendant Ray conspired with Dell and Representative Hays to defraud the Finance Officer of the Office of the Clerk of the House of Representatives or the Copyright Office of the Library of Congress or other agencies of the United States "to obtain the pay-

ments and registration for copyright of false, fictitious and fraudulent claims for serving as the friend of defendant Wayne L. Hays." The third cause of action states that defendant Ray did not possess the skills for being a secretary or for holding any other position commensurate with the compensation she received; that while she was employed by the Government she was assigned and did perform tasks wrongful in nature; that she utilized the time, materials, and facilities of the Government to benefit and enhance her wrongful conduct; that she used the time, materials, and facilities of the Government to keep a record of her wrongful conduct, with the knowledge that it was contrary to the proper performance of a compensated Government employee; that she disclosed her conduct to the media for publicity purposes for monetary gain; that through her actions she and Dell have become unjustly enriched at the "burden of the United States;" and that she had reduced her wrongful conduct to writing as a book in novel form ("but with the clear and unequivocal impression to the reader that it is a recount of her wrongful conduct and acts") which was copyrighted and therefore permits her to become unjustly enriched by her wrongful conduct.

The complaint asks for a judgment against all defendants in amounts of about $14,000 for each of the number of years the payments complained of were made, said amount to be doubled as the prescribed penalty under 31 U.S.C. § 231, together with an amount of $2,000 for each false claim made; that the Government be declared the owner of Miss Ray's copyright and all income, royalties, and assets thereunder; that all moneys received by defendants Ray, Dell, and Hays resulting from such enrichment be returned to the Government; that all moneys received by Miss Ray due to appearances, interviews, tapes, poses, and so forth be returned to the Government; that all moneys, compensation, or royalties received for the publication of Miss Ray's book be held in trust for the Government; and that the case be consolidated with *United States ex rel. Thompson* v. *Hays*, Civil Action No. 76–1078 (this report at 76).

On July 8, plaintiff individuals filed an amended complaint. In it they additionally allege that Frank Vannelle and Donald R. Gosny, two "purported employees" of Representative Hays, in conspiracy with each other made numerous false claims for compensation as employees when in fact they were not employees in the service of Representative Hays, as they maintained other employment or positions "for services not related to the services for the U.S. Government but which employment services are to advance, serve, and otherwise benefit the personal and political interests of defendant Hays." It also alleges that as a Member of the House of Representatives and as chairman of certain committees, Representative Hays supervised and controlled appropriated funds for various voyages to foreign countries and through the "in excess" countries and other various and devious means did make claim and otherwise obtain funds of the United States much greater than the allotted per diem and travel expenses, knowing that such claims were false and that such moneys obtained would not be used for the benefit of the Government, but only for his personal benefit or interests.

The amended complaint asks that Representative Hays be made to provide an accounting for all claims and payments made to "alleged

employees," that a judgment be entered against all three for these amounts, that Representative Hays provide an accounting for all moneys appropriated for foreign travel and expenses for himself, other Members, employees and others, that a judgment be entered against him for all moneys received in excess of the per diem and travel expenses allotted, and that the judgment include all moneys for travel not for the benefit of the Government.

Plaintiff individuals also that day filed a motion to require Represenative Hays to provide an accounting for all Federal funds spent under 22 U.S.C. 276(c)(1) from fiscal 1971 to the present.

On July 9, plaintiff individuals filed a motion to order Representative Hays to submit to a physical and mental examination by a physician appointed by the court. The motion states that the Congressman had been absent from House sessions for a bout 60 days while recuperating from an overdose of sleeping pills, that 2 U.S.C. § 39 requires that deductions shall be made from a Member's salary for each day he is absent unless he or a member of his family is sick, that Representative Hays was up and about and engaged in a variety of activities during part of these 60 days, and that there is no way to know whether he was still ill and therefore excused from House sessions, or whether he was not and therefore by law these funds should be returned to the Government, unless he submits to such an examination.

On August 10, Representative Hays filed a motion to dismiss, citing the court's lack of jurisdiction under 31 U.S.C. §§ 231 and 232, since plaintiff individuals had provided no new information not in the possession of the Government at the time of the filing of the action. He also asked for a protective order limiting discovery to questions of jurisdiction until the jurisdictional question has been decided.

Status.—The case is pending before the U.S. District Court for the District of Columbia.

United States* v. *Helstoski

Criminal action No. 76-201 (D.N.J.)

Brief.—On June 2, 1976, Representative Henry Helstoski was indicted by a grand jury on three counts of soliciting and accepting bribes from Chilean and Argentinean aliens in exchange for introducing private citizenship bills in Congress with the intent of delaying their deportation. The indictment also included three counts of conspiracy and obstructing justice and four counts of lying to a federal grand jury. Indicted with him were two members of his congressional district staff and the treasurer of his re-election committee.

Status.—The case is pending before the U.S. District Court for New Jersey.

United States* v. *Podell

Civil Action No. 76–0509 (SDNY)

Brief.—On January 30, 1976, the United States filed this action under 28 U.S.C. § 1345 against former Representative Bertram L. Podell for $41,350 which Podell alleged was illegally paid while a Member of Congress to seek favorable treatment from Federal agencies for a small Florida airline.

Podell's answer specifically denied each allegation of the complaint and further claimed that prosecution was barred by the statute of limitations.

Status.—No further action has been taken.

Genesis Publications, Inc. v. Mondale

Civil Action No. 76–2242 (S.D.N.Y.)

Brief.—This is an action for libel against Senator Walter F. Mondale. The complaint, filed on May 19, 1976, states that the plaintiff "is in the business of publishing a sophisticated men's magazine called *Genesis*," which it admits publishes pictures of nude and seminude women, although it states that it also publishes articles of "great public interest" by eminent authors. It states that Senator Mondale is the author of a book titled "The Accountability of Power," and that the book's publisher, David McKay, Inc., offered plaintiff the right to publish an excerpt from the book. Plaintiff accepted the offer and published the excerpt in its May 1976, issue.

The complaint states that, having learned of the appearance of the excerpt in *Genesis*, Senator Mondale called a press conference in his Senate office on or about April 14, 1976. It alleges that there, before representatives of the leading newspapers of the United States, "intending that what he said should be published in the said leading newspapers and carried on the wires of the news services," Senator Mondale falsely and maliciously contrived to injure the plaintiff and its magazine in their good name, fame, credit, and reputation and to bring plaintiff and its magazine into public scandal, infamy, ill repute, and disgrace and to hold them up as objects of scorn, ridicule, and shame by stating that he was "outraged and furious" that the excerpt was published in *Genesis* and that he wanted the people of Minnesota to know that, by calling *Genesis* a "filthy piece of literature," and by describing as a "despicable act" his publisher's granting of permission to *Genesis* to publish the excerpt and threatening to sue the publisher.

The plaintiff alleges that the publication of Senator Mondale's charges has injured its good name, fame, credit, and reputation; that a number of firms who have dealt with plaintiff by selling articles or excerpts to them or by advertising with them have ceased to do so or threatened to cease, thereby causing plaintiff to lose revenue; and that plaintiff has been deprived of literary material which would have been available to them. The complaint asks $1 million in damages.

On July 9, the parties stipulated and the court issued an order granting that an answer need not be filed until September 13, 1976.

Status.—The case is pending before the U.S. District Court for the Southern District of New York.

DECISIONS

In the United States District Court for the Northern District of Ohio, Western Division

(Civil No. C 75–166)

WILLIAM S. JORDAN, PLAINTIFF

v.

DELBERT LATTA, ETC., ET AL., DEFENDANTS

OPINION AND ORDER

YOUNG, J:

This cause came to be heard upon motion of defendants to dismiss the complaint for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment. *See* Rules 12(b)(6) and 56, Federal Rules of Civil Procedure.

Technically, since this motion is supported by matters outside the pleadings, including various affidavits, the Court is required to treat it as a motion for summary judgment. There are, however, numerous genuine issues as to material facts, thus precluding the possibility of summary disposition. Unfortunately, the motion is not that simple. The defenses of congressional, official and sovereign immunity are raised by the defendants and thus the key question to be decided at this time is whether the suit may be brought at all.

Plaintiff has sued the Honorable Delbert Latta, a member of the United States House of Representatives, two special agents of the Federal Bureau of Investigation, and the United States of America. Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1343, and 1361, and plaintiff seeks relief pursuant to 28 U.S.C. § 2201, Rule 65 Fed. R. Civ. P., and the First and Fourteenth Amendments to

the United States Constitution. Plaintiff believes that the defendants have interfered with and voilated his constitutionally protected right of freedom of the speech and his right to petition the government for a redress of grievances.

It is clear with respect to congressional immunity that if the doctrine applies, legislators are protected not only from the consequences of litigation but also from the burden of going through the process of defending themselves. *Eastland v. United States Servicemen's Fund*, 95 S.Ct. 1813 (1975) citing *Dombroski v. Eastland*, 387 U.S. at 85 (1967). The Court, then, if it were to hold the doctrine applicable to the present case would have to dismiss as to the defendant Latta.

Article I, Section 6, Clause 1 of the United States Constitution states:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the treasury of the United States. They 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 to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

As can be seen from a literal reading of the clause, it does not provide that a congressman may not be sued. Rather it has been construed to mean that senators and representatives may not be questioned in any other place, including the judicial forum, concerning activities which fall within the sphere of legislative activities. *Eastland, supra* at 1820 and the cases cited therein. The clause has always been given a very broad interpretation so that congressmen could perform their legislative function independently. *United States v. Brewster*, 408 U.S. 501 (1971); *United States v. Johnson*, 383 U.S. 169 (1966).

In determining whether particular activities other than literal speech and debate fall within the "legitimate legislative sphere," we look to see whether the

activities are done in a Session of the House by one of its members in relation to the business before it. *Eastland,* supra at 1821 citing *Kilbourn v. Thompson,* 103 U.S. at 204 (1881).

Legislative acts are not all-encompassing. The heart of the Clause is speech and 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 process by which members participate in the committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. *Gravel v. United States,* 408 U.S. 606, 625 (1971).

The fact that certain acts are performed in an official capacity as senator or representative is not sufficient to make such acts legislative in nature. *Id.* The privilege has been extended to matters beyond pure speech and debate but "only when necessary to prevent the indirect impairment of such deliberations." *Id.* citing *United States v. Doe,* 455 F. 2d at 760 (1st Cir. 1972).

This Court is of the opinion that the activities involved in this case fall within the legitimate legislative sphere of defendant Latta's duties as a congressman. He is, therefore, cloaked with congressional immunity and may not be questioned in this Court concerning said activities. *Eastland, supra* at 1820. Plaintiff came to defendant Latta seeking help with an employment problem. The congressman said he would try to help and accepted plaintiff's papers and documents. He turned said papers over to his staff for possible action. The staff examined the documents and consulted with the Assistant General Counsel for the Ohio area of the National Labor Relations Board and recommended that a formal charge be filed with the NLRB. A letter to this effect was apparently sent to plaintiff from defendant Latta's office. Before it was received, however, plaintiff again contacted the defendant by telephone. Mr. Jordan was upset that

the matter had not been handled more promptly. Defendant Latta, in his affidavit (attached to motion filed July 3, 1975, pp. 4–5) states that plaintiff told him that he would "get action alright, he was now going to take care of matters his way. . . . He said he was tired of getting the run around and was now going to take care of the matter himself and besides he was not going to vote for me." While plaintiff did not threaten the life of defendant Latta, he, according to Mr. Latta, did put the fear of God into him (affidavit p. 5). The next day Mr. Latta contacted the F.B.I.

It is clear that Mr. Latta's contact with the F.B.I. was not the result of a fear of adverse publicity or of losing votes. *See* affidavit of William Jordan filed August 11, 1975, p. 4; affidavit of Latta, p. 5. Rather, it was the fear that plaintiff was going to take matters into his own hands. At page 5 of his affidavit, Mr. William Jordan does not deny that he had threatened to take matters into his own hands, stating only that he had not threatened to do it through violent means. This is corroborated by the affidavit of the plaintiff's father, Garner Jordan, who states:

> * * * nor did William S. Jordan at any time threaten to take matters into his own hands using physical violence against anyone. Affidavit of Garner Jordan filed Aug. 11, 1975, p. 2.

It does not make any difference that plaintiff did not explicitly state that he would use force or violence to achieve his goals. Implicit in the statement that he would take care of matters his way is the likelihood that force or violence would be resorted to if necessary. Once the defendant Latta determined that plaintiff would resort to self-help, he had the right, if not the duty, as a federal officer, to contact the F.B.I. No sinister motives can be implied from such conduct.

This Court has no sympathy for people who take the law into their own hands. If such activity were to be condoned, there would be no necessity for congressmen or legislatures; for judges or courts. This Court is not willing to let the judicial branch of our government be

used as a tool to justify and approve the deliberate circumvention of the legislative branch by resort to self-help. Mr. Latta was performing the legitimate legislative function of listening to and attempting to solve the problems of his constituency. He appears to have performed said function in an honest and sincere manner. In order to insure that he continues to perform said function independently, he must be protected from lawsuits of this nature. *See United States* v. *Brewster, supra; Eastland* v. *United States, supra.*

With regard to the F.B.I. agents who are defendants in this case, this Court finds that they were merely serving the defendant Latta in his legislative function and thus they are entitled to gain constitutional protection under Article I, § 6, Cl. 1. *Doe* v. *McMillan,* 412 U.S. 306 (1972). Furthermore, since the United States has not consented to be sued in this case, it must be dismissed as a defendant. Any reliance on 28 U.S.C. § 1346 is misplaced if for no other reason than that the amount in controversy exceeds $10,000.00. Plaintiff is suing for $15,000.00 in compensatory damages and $100,000.00 in punitive damages. The entire complaint against all defendants will therefore be dismissed.

For the reasons stated herein, good cause therefor appearing, it is

Ordered, That the motion of all defendants to dismiss the complaint or, in the alternative, for summary judgment, should be, and it hereby is, granted, and it is further

Ordered, That the complaint should be, and it hereby is dismissed with prejudice as to all defendants.

It is so ordered.

WM. J. YOUNG,
United States District Judge.

MARCH 24, 1976.
Toledo, Ohio.

United States Court of Appeals for the District of Columbia Circuit

No. 74–2025

PUBLIC CITIZENS, INC., ET AL., APPELLANTS

v.

WILLIAM E. SIMON, SECRETARY OF THE TREASURY

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action 2280–72)

Argued October 21, 1975

Decided June 25, 1976

Girardeau A. Spann, for appellants. *Alan B. Morrison,* was on the brief for appellants.

David J. Anderson, Attorney, Department of Justice, with whom *Carla A. Hills,* Assistant Attorney General, at the time the brief was filed, *Earl J. Silbert,* United States Attorney and *Leonard Schaitman,* Attorney, Department of Justice, were on the brief for appellee. *Morton Hollander,* Attorney, Department of Justice, also entered an appearance for appellee.

Before: LEVENTHAL and MACKINNON, *Circuit Judges* and MCMILLAN,* *United States District Judge* for the Western District of North Carolina.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

Dissenting opinion filed by *District Judge* MCMILLAN.

LEVENTHAL, *Circuit Judge:* This appeal raises the question whether taxpayers have standing as taxpayers,

---

*Sitting by designation pursuant to 28 U.S.C. § 292(d).

75–565—76——7

without congressional authorization of their suit, to challenge executive spending claimed to be in derogation of constitutional and statutory strictures. The District Court deemed the action barred by *United States* v. *Richardson,* 418 U.S. 166 (1974), and *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208 (1974). We agree.

I. Parties and Proceedings Below

Appellants are a taxpaying non-profit organization supported by contributions and a prominent taxpayer-public causes advocate. They allege injury as taxpayers.[1] Their action is brought against the Secretary of the Treasury, sued in his official capacity. Appellants seek declaratory and injunctive relief to require appellee "to take appropriate action to recover all salaries paid to persons on the White House Staff while they were devoting substantially all of their working time to the 1972 Presidential election campaign, rather than to the official business for which their positions are authorized."[2] Asserting that Congress has made no appropriation for substantial, on-working time political activity by members of the White House Staff, appellants allege that this activity violated the Appropriations Clause of the Constitution[3] and 31 U.S.C. § 628,[4] and that appellee is under a duty implied from these provisions to ensure that all congressional appropriations are being used for their designated purposes, and to recover the misspent

---

[1] There is some question as to whether Public Citizen, Inc. is a federal taxpayer for purposes of this suit. Appellants' counsel asserted at the argument that although Public Citizen is a non-profit organization it pays social security taxes, but there is no averment in the complaint or evidence in the record that it pays general federal taxes. Appellee does not challenge the bona fides of Public Citizen's claim to taxpayer status. If the issue were critical, we would remand to the District Court to determine whether Public Citizen is in fact "a taxpaying non-profit organization," *see Protestants and Other Americans, etc.* v. *Watson,* 132 U.S.App.D.C. 329, 330, 407 F.2d 1264, 1265 (1968). A remand is unnecessary here because of the presence of co-appellant Nader as an individual taxpayer.

[2] J.A. 4.

[3] "No Money shall be drawn from the Treasury, but in Consequence of Appropriation made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Art. I, § 9, cl. 7.

[4] Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

appropriations for the use and benefit of the United States Treasury.[5]

On November 14, 1972 appellants instituted this action in District Court. Shortly after the filing of the complaint, appellee moved to dismiss for lack of standing. The District Court denied the motion without opinion on March 8, 1973. Appellants then proceeded to take discovery. Following the conclusion of discovery, appellee renewed his motion to dismiss, which the District Court granted on September 27, 1974. This appeal followed.

II. Supreme Court Precedents on Taxpayer Standing

Appellants hinge their standing to sue on a proposed extension of *Flast v. Cohen,* 392 U.S. 83 (1968), to permit taxpayer challenges to executive spending. In *Flast* the Court modified the doctrine of standing which, since *Frothingham v. Mellon,* 262 U.S. 447 (1923), had barred suits by federal taxpayers to enjoin allegedly unconstitutional expenditures. *Flast,* in turn, has been accorded a restrictive reading in the recent decisions of *United States v. Richardson,* 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208 (1974). The viability of appellants' proposed extension turns on an appreciation of this doctrinal development, which we now set forth.

Frothingham, involving a Tenth Amendment challenge to federal legislation providing grants to the States for participation in programs to reduce infant and maternal mortality, erected what appeared at the time to be an absolute barrier to federal taxpayer suits. It did so on a rationale which, although interlaced with non-constitutional policy considerations, was grounded in the Arti-

---

[5] Appellants requested the following relief: (1) a declaration that appellee was not authorized to pay the salaries of persons who had devoted a substantial part of their working time to the Nixon reelection campaign; (2) an injunction directing appellee to investigate and prepare a report on such persons and the amount paid on salaries while they were working on the campaign, and to take the necessary action to recover such salaries; (3) such further relief as may be just and proper including the appointment of a Special Assistant Attorney General in the event appellee and the Attorney General of the United States fail to take effective action within a reasonable time; (4) an injunction as to future payments to, and use of federal property or facilities by, "any person who is devoting substantially all of his/her working time to any political campaign"; and (5) costs. J.A. 7–8.

cle III concept that the federal judicial power may be invoked only in a genuine "case or controversy." The Court held that a federal taxpayer, unlike his state counterpart, has a "comparatively minute and indeterminable interest" in the moneys of the Treasury, such that injury to him occasioned by obnoxious legislation is indistinguishable from that suffered by the general public. To permit such suits, the Court feared, would expose to taxpayer challenge every appropriation act whose administration requires the outlay of money, and would thrust the Judiciary into conflict with the other branches of government without the direct, particularized harm that lends legitimacy and urgency to the call on the courts to act.[6]

Frothingham remained undisturbed for forty-five years. It generated considerable confusion as to whether it stated a constitutional requirement for Article III standing or simply a policy of judicial self-restraint.[7] Reexamination finally came in *Flast,* which involved a challenge to a federal statute providing disbursement of federal funds to finance secular instruction in religious schools. The Court, per Chief Justice Warren, phrased the issue before it as "whether the Frothingham barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment."[8]

Flast answered some of the questions raised by *Frothingham.* It made clear that Article III is not an absolute barrier to taxpayer actions, that the question of standing relates to whether one is "a proper party to maintain the action" and "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government."[9] Whether taxpayers have standing to challenge the constitutionality of a federal spending program becomes a question of whether "they can demonstrate the necessary stake as taxpayers in the

---

[6] 262 U.S. at 486–89.
[7] *See* Flast v. Cohen, *supra,* 392 U.S. at 92 & n. 6.
[8] *Id.* at 85.
[9] *Id.* at 100–01.

outcome of the litigation to satisfy Article III requirements." This, in turn, requires satisfaction of a two-pronged test:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in Doremus v. Board of Education, 342 U.S. 429 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.[10]

The Court found the first prong satisfied because the challenge was to an exercise by Congress of its spending power, its power under Article I, § 8 "to pay the Debts and provide for the . . . general Welfare of the United States," and because the challenged program involved a substantial[11] expenditure of federal tax funds. It found the second prong satisfied by the allegation that the challenged expenditures violated the Establishment

---

[10] *Id.* at 102–03.

[11] The Court noted that almost a billion dollars had been appropriated to implement the statute in question. *Id.* at 103 & n. 23. This court in Protestants and Other Americans, etc. v. Watson, *supra* note 1, 132 U.S. App. D.C. at 330–31, 407 F.2d at 1265–66, has held that *Flast* requires not only that the challenge be to a spending program but also that the expenditures be "substantial."

Clause, in light of the Court's gloss on the history of the clause as having been adopted as "a specific bulwark" against the government's employment of its taxing and spending power in support of religion.[12] *Frothingham* was distinguished as failing the second prong, for the Tenth Amendment claim was an attempt "to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power."[13]

Although *Flast's* criteria for taxpayer standing have been subjected to considerable criticism for failing to provide a measurement of the adverse interest of a plaintiff in the outcome,[14] the "nexus" test did restrict the range of taxpayer actions.[15] It avoided the spectre raised by *Frothingham* of taxpayer use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."[16] The Court's 1974 opinions establish the continuing vitality of the *Frothingham* barrier to taxpayer actions and the limited breach effected by *Flast,* by declining to recognize taxpayer standing in cases not satisfying the literal terms of the *Flast* "nexus" test.[17]

In *Richardson* a taxpayer claimed that a statute authorizing the refusal of the Executive Branch to reveal

---

[12] 392 U.S. at 103–04.

[13] *Id.* at 105.

[14] Justice Harlan, dissenting in *Flast*, found "[t]he difficulties with these criteria are many and severe, but it is enough for the moment to emphasize that they are not in any sense a measurement of any plaintiff's interest in the outcome of any suit." 392 U.S. at 121–24. Justice Harlan's critique has been seconded by several commentators. *See, e.g.*, United States v. Richardson, *supra*, 418 U.S. at 183–85 (Powell, J., concurring); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 661–62 (1973); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 604–07 (1968).

[15] *See* The Supreme Court, 1967 Term, 82 HARV. L. REV. 63, 230–31 (1968); Scott, *supra*, note 14, at 661.

[16] 392 U.S. at 106.

[17] The Court subsequently considered a taxpayer standing contention in *Warth* v. *Seldin*, 422 U.S. 490, 508–10 (1975). There taxpayer-petitioners claimed they were suffering economic injury because a suburb's exclusionary zoning practices required them and other residents of the city of Rochester, New York to subsidize housing and essential services for persons of low and moderate income. The Court rejected the claim as an attempt to assert the rights of third parties, persons of low and moderate income who were excluded by the suburb's zoning from living there.

expenditures of the Central Intelligence Agency (CIA) violated the Statement and Account Clause of the Constitution.[18] The Court denied standing because the taxpayer's "challenge is not addressed to the taxing and spending power, but to the statutes regulating the CIA," and he makes "no claim that appropriate funds are being spent in violation of a 'specific constitutional limitation upon the * * * taxing and spending power. * * *'" [19] With the conditions of *Flast* not met, the Court deemed the challenge a "generalized grievance" not entitled to invocation of judicial power because of the absence of "any particular concrete injury." [20]

Schlesinger was a challenge to executive conduct by a group of anti-war activists who, as citizens and taxpayers, argued that the Pentagon policy which allows members of Congress to retain their status in the Armed Forces Reserves is prohibited by the Incompatability Clause of the Constitution.[21] The Court held that plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to retain their reserve status." [22] It dismissed the "citizen standing" ground relied on by the lower court because of the absence of "judicially cognizable injury." [23]

---

[18] For text, see note 3 *supra*.

[19] 418 U.S. at 175.

[20] *Id.* at 176–80.

[21] "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Art. I, § 6, cl. 2.

[22] 418 U.S. at 228.

[23] *Id.* at 216–27. From some of the language in the *Richardson-Schlesinger* opinions, particularly the emphasis on the absence of "direct injury," "particular, concrete injury," or "judicially cognizable injury," it would seem that the Court would find public actions falling outside of the literal terms of *Flast*, whether brought by taxpayers or citizens, barred by the Article III requirements for standing. However, the Court's suggestion that Congressional authorization of the taxpayer suits deemed barred by *Flast* would be consistent with Article III suggests that *Richardson* and *Schlesinger* should be read as stating nonconstitutional prudential limitations on taxpayer standing. *Compare Richardson*, 418 U.S. at 176 n. 9, 178 n. 11, *with Schlesinger*, *id.* at 224 n. 14. *See The Supreme Court 1973 Term*, 88 HARV. L. REV. 41, 241–43 (1974). Justice Powell, concurring separately in *Richardson*, would "explicitly reaffirm traditional prudential barriers against [federal taxpayer and citizen] public actions," by "limit[ing] the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the *results* in *Flast* and *Baker* v. *Carr*." 418 U.S. at 196 & n. 18 (emphasis in original).

III. The Issue Whether Executive Spending Is Subject to Taxpayer Suit on a Test Analogous to *Flast*

The District Court held appellants failed to come within *Flast* because their challenge is to the conduct of the executive branch, and the constitutional provision they invoke is not a specific limitation on the congressional taxing and spending power.[24]

Appellants argue that *Flast* did not announce an exclusive test for all taxpayer suits but merely stated the requirements for such challenges to legislative enactments, and that challenges to executive spending may be posited on an analogous test. Appellants' formulation modifies the language of the *Flast* "nexuses" to require a taxpayer in an "executive spending" case to (1) "establish a logical link between that status and the type of [executive action] attacked," in that the challenge must be directed at executive spending rather than regulatory action involving incidental expenditures; and (2) "show that the challenged action [executive spending] exceeds specific constitutional [or statutory] limitations imposed upon the exercise of the [executive's] spending power and not simply that the [executive action] is generally beyond the powers delegated to [the executive by the Constitution or by statute]." Appellants assert that their challenge to the wrongful diversion of tax revenues by members of the White House staff establishes a logical nexus between their status and the executive action involved, and their invocation of the Appropriations Clause establishes a specific limitation on the power of the executive to spend on matters not authorized by Congress.[25]

Appellants' proposed test cannot stand in light of *Richardson* and *Schlesinger*, which presented clear invitations to extend *Flast* by analogy in order to broaden the availability of "public actions" by taxpayers to enforce the general mandates of the Constitution. Instead,

---

[24] J.A. at 26. The court stated that the Appropriations Clause "is not a specific limitation on congressional power under the taxing and spending clause but rather a 'restriction upon the disbursing authority of the Executive department,'" *quoting* Cincinatti Soap Co. v. United States, 301 U.S. 308, 321 (1937).

[25] Brief of Plaintiffs-Appellants at 20–22.

the Court expressly declined the opportunity to lower the *Frothingham* barrier except for actions that could clear the hurdles set by the express terms of the Flast "nexus" test.

The challenge in *Richardson* to the nondisclosure of CIA expenditures was, in the view of the Third Circuit, "integrally related" to taxpayer ability to challenge the CIA appropriations themselves, and this consideration persuaded it to fashion an analogous test for taxpayer actions seeking disclosure of fiscal information.[26] The majority found this claim an attempt to raise a "generalized grievance" rather than the particularized, direct injury necessary to proper exercise of the judicial power.

The action in *Schlesinger* bears certain similarities to the instant case. Although the primary thrust of the anti-war activists' challenge was to prevent the conflict of interest potential inhering in the dual status of Reservist-Congressman, it also raised the issue of executive spending in violation of the Incompatibility Clause. And even though plantiffs there requested the District Court to direct the Secretary of Defense to reclaim Reserve pay received by Reservist members of Congress, the majority opinion of Chief Justice Burger ruled that "[s]uch relief would follow from the invalidity of Executive action in paying persons who could not lawfully have been Reservists, not from the invalidity of the statutes authorizing pay to those who lawfully were Reservists." 418 U.S. at 228 n.17. That the *Schlesinger* challenge failed because it was directed at executive conduct is made clear by Justice Stewart, who dissented in *Richardson* but agreed there could be no taxpayer standing in the Reservist Congressmen case "since there is simply no challenge to an exercise of the taxing and spending power." *Id.* at 229.

Appellants urge that *Richardson* and *Schlesinger* are distinguishable. They maintain that *Richardson* was not a challenge to spending but rather to the regulation, by statute, permitting nondisclosure of CIA expenditures, and that the primary aim of the suit in *Schlesinger* was

---

[26] *See* 465 F.2d 844, 853–54 (1972).

to vindicate the essentially regulatory purposes of the Incompatibility Clause. Although these distinctions are not without some force,[27] classification of particular challenges as between "executive spending" and "executive regulatory action" is a more elusive enterprise than might appear at first glance. For example, appellants' challenge can be characterized as regulatory in aim—to compel an accounting by White House officials of the time spent on campaigning as opposed to official duties—and the "executive spending" on the salaries of the White House Staff members merely an incidental feature.

Passing by the issue of nomenclature, appellants' analogous test for executive spending would ignore the clear thrust of the *Richardson* and *Schlesinger* decisions to accord *Flast* a viability restricted to its express terms. And the fair implication of appellants' position is to recognize taxpayer standing to attack any executive action that draws on an outstanding appropriation on the ground that the purchases or services are not in accord with the congressional intent in passing the appropriation. This would place the judiciary in the role of management overseer of the Executive Branch. Such oversight is a function of Congress. Taxpayer standing here would bring into play the separation of powers concern pervading *Frothingham, Richardson* and *Schlesinger*.

Appellants' final argument is that if they are not granted standing, the constitutional violation alleged will go unremedied and the funds diverted to the Nixon reelection campaign will never be recouped.[28] We need not consider whether there is a "better plaintiff" than a taxpayer to maintain the instant challenge. If not, the taxpayer's claim is still barred. In *Richardson* the Court rejected this factor as a basis for finding taxpayer standing, and viewed "the absence of any particular individual or class" litigant as lending "support to the argument

---

[27] The District Court in the Reservist Congressmen case noted: "[w]hile Congressmen in their position as Reservists also receive funds from the public treasury, it is not the expenditures thus incurred, but the possibility of undue Executive influence over the Congress, which the Constitution seeks to forbid. Plaintiffs' claim in no way depends upon the fact that some Congressmen receive pay as Reservists. * * *" 323 F. Supp. 833, 840 (D.D.C. 1971).

[28] Appellants concede that the Comptroller General and the General Accounting Office have authority to audit executive spending, but argue they have no authority to prevent or recover wrongful disbursements of federal funds contributed by taxpayers. Reply Brief of Plaintiffs-Appellants at 5–6.

that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." [29]

This is an area of the law where the result is clear, in view of the cases, but there is less clarity in the doctrinal development. What was wrought by the *Flast* opinion—in opening the door to taxpayer actions, yet opening it only part way—was pragmatic in result, avoiding the flood of all manner of taxpayer actions. And yet it was rooted in a conceptual underpinning, permitting federal taxpayer standing in a class of cases where taxpayer suits were particularly appropriate and manageable—specifically, in cases involving the validity of taxing and appropriation statutes (as distinguished from cases involving "incidental expenditure[s] of tax funds in the administration of an essentially regulatory statute"). The impact on federal taxpayers in such cases is conceptually direct, even though the dollar-and-cents consequence for a taxpayer is minimal. The doctrine thus evolved for federal taxpayers reflects considerations similar to those developed by the Court in the "good-faith pocketbook action" limitation on state taxpayer standing in the Supreme Court.[30]

---

[29] 418 U.S. at 179. It has been pointed out that *Richardson* and *Schlesinger* involved practices that are unlikely to be remedied by operation of the political process. "In *Richardson*, the failure of the CIA to account for any of its expenditures suppresses public indignation and may hinder the arousal of political opposition. In *Schlesinger*, the fact that many congressmen are in the reserves makes congressional action on the issue unlikely, and a remedy through the electoral process may be difficult if being a reservist enhances a congressman's image in his home district." *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 41, 242 (1974).

[30] The Court indicated that the first prong of its "nexus" test was "consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952)." 392 U.S. at 102. In *Doremus* the Court would not recognize Article III standing in state taxpayers to challenge a statute providing for Bible reading in public schools, because of the absence of requisite "direct dollars-and-cents injury" when there was "no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it." 342 U.S. at 433, 434. The Court distinguished an earlier finding of Article III standing in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), where a school district taxpayer challenged a state statute and board of education resolution authorizing reimbursement of school transportation expenses to parents of children attending sectarian schools. As Justice Jackson put it, "*Everson* showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." 342 U.S. at 434.,

Although state taxpayers may be able to challenge executive conduct, as was the case in *Everson*, while federal taxpayers after *Richardson* and *Schlesinger* are restricted to congressional exercises of the taxing and spending power, this anomaly is a consequence of the Court's traditional differentiation between state and federal taxpayers for purposes of standing. *See, e.g., Frothingham*, 262 U.S. at 486–87; *Doremus*, 342 U.S. at 433–34. The *Flast* "nexus" test, at least its first prong, is an attempt to frame a federal equivalent for the *Doremus* "good-faith pocketbook action" limitation on state taxpayer suits.

Appellants' proposal to open the *Flast* door another arc is an attempt to build on the premise that they can claim the same dollars-and-cents impact as *Flast*. That is a necessary but not sufficient aspect of *Flast*. What appellants lack is what *Flast* found in the case of taxing and appropriations statutes—measures which in their very nature are directed toward taxpayers as a class. When what is involved is expenditures in implementation of a regulatory statute, or mere executive activity that is vouched for expenditures,[31] there is no similar arrow aimed at taxpayers as a class, but an activity of concern to the public at large.[32]

The District Court's grant of appellee's motion to dismiss is

Affirmed.

McMillan, *District Judge, dissenting:* The plaintiffs in this case have, in my opinion, "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness * * * upon which the court so largely depends for the elimination of difficult constitutional questions," and have therefore alleged the "gist of the question of standing," *Flast* v. *Cohen*, 392 U.S. 83, 99 (1967). In addition, one plaintiff at least is noted for his tenacity and perspicacity in the pursuit of public interest cases. A live "case or controversy" exists.

This case is unlike *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), because it attacks directly a misuse of funds by executive officers rather than executive action like that challenged in

---

[31] In Protestants and Other Americans, etc. v. Watson, *supra* note 1, this court permitted an Establishment Clause challenge by taxpayers to the Postmaster General's issuance of a commemorative Christmas postage stamp allegedly religious in character. Although it is unclear from the court's opinion whether a congressional appropriation was involved, this case was decided well before the recent learning in *Richardson* and *Schlesinger*.

In Allen v. Hickel, 138 U.S. App. D.C. 31, 33, 424 F. 2d 944, 946 (1970), we found standing in park users to challenge the crèche display in the annual Christmas Pageant of Peace in the Ellipse as a violation of the Establishment Clause, without deciding whether they also had standing as taxpayers to challenge the expenditures of public funds entailed.

[32] *See Morrison* v. *Callaway*, 369 F. Supp. 1160, 1162 (D.D.C. 1974), rejecting a taxpayer's Incompatibility Clause challenge to General Haig's service as assistant to former President Nixon while an officer in the Army ("It is [the] very narrow relationship between the taking of one's tax dollars and Congress' power to tax and spend which elevates the relationship to the level of a logical link referred to by the Court").

Schlesinger v. *Reservists, supra,* which did not directly call for spending public funds but merely continued in effect a military reserve status for legislators.

This case is unlike *United States* v. *Richardson,* 418 U.S. 166 (1974), because *Richardson* did not attack executive spending at all, but sought to require the Executive to make more meaningful *reports* on CIA operations.

This case is unlike both *Reservists* and *Richardson* because it alleges that defendants' use of tax money for political purposes runs counter to concrete prohibitions in both the Constitution and in an Act of Congress.

"Standing" requirements have already done much to close the door of the federal court house to citizen complaints about government operations; and I would not add any unnecessary impetus to that closing, unless existing controlling authority absolutely requires such a result. Though *Richardson* and *Reservists* might inferentially support a denial of standing, they do not in my opinion require such a result. I would not dismiss for lack of standing, but would uphold standing based upon the considerations set out above, and on those expressed in Mr. Justice Brennan's dissenting opinion in *Reservists,* 418 U.S. 208, 235.

It is true that many federal employees are exempt from the Hatch Act, and that some of the defendants may come under the exemption covering employees whose salaries are paid out of the "appropriations for the office of the President" under 5 U.S.C. § 7324(d). That, of course, is a factual issue for the trial court.

In summary, I would find that plaintiffs have standing to bring the suit and that the case should be decided on the merits in favor of those defendants who may be covered by the express exemptions under 5 U.S.C. § 7324(d), but against any defendants not expressly so covered, including any persons whose salaries come from sources other than "appropriations for the office of the President."

United States District Court for the
District of Columbia

(Civil Action No. 76–1372)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

AMERICAN TELEPHONE & TELEGRAPH CO., ET AL.,
DEFENDANTS

JOHN E. MOSS, MEMBER, UNITED STATES HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANT.

MEMORANDUM

This is an action brought on behalf of the Executive Branch of the United States seeking to restrain the American Telephone & Telegraph Company (hereinafter AT & T) from disclosing to the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, pursuant to a subpoena of that Subcommittee, certain documents, the delivery of which the President has determined "would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States."

On June 22, 1976, the Subcommittee on Oversight and Investigations (hereinafter Subcommittee) voted to issue a subpoena to AT & T. This subpoena was issued by the Chairman of the Interstate and Foreign Commerce Committee on the same date. The subpoena seeks all documents falling within the following categories:

1. Full and complete copies of Federal Bureau of Investigation (FBI) national security request letters, in

the possession or control of American Telephone and Telegraph (A.T. & T.) and its 24 operating companies listed below, for access to phone lines handling either verbal or non-verbal communications.

2. Copies of any and all records in the possession of control of A.T. & T. or its operating companies prior to 1969 when written FBI requests were not routinely requested by A.T. & T. and its operating companies.

3. Copies of any and all applicable Bell System Practices (BSP's) describing company policy regarding national security "taps" or "provision of facilities" to law enforcement or intelligence agencies. This should include both current BSP's and any BSP's on the subject which have since been revised or discontinued.

4. Copies of internal memorandum correspondence, board minutes, or other records relative to A.T. & T., and/or any A.T. & T. operating company, practice or policy with respect to national security "taps" or "provision of facilities" to law enforcement or intelligence agencies, covering the last 10 years.

The subpoena is directed to A.T. & T. and its chief operating officer. The materials demanded were originally scheduled to be turned over to the Subcommittee on June 28, 1976. Because of ongoing negotiations, the compliance date was extended to July 23, 1976. On July 22, 1976, this suit was filed with the plaintiff seeking a temporary restraining order enjoining A.T. & T.'s planned compliance with the subpoena. The parties appeared in open Court. The Chairman of the Subcommittee, Representative Moss, filed a motion to intervene as a party defendant, which was granted. Counsel were heard including counsel for the intervenor. A temporary restraining order was entered that afternoon by the Court in order to maintain the status quo pending hearing on the motion for preliminary injunction, which was set for July 28, 1976. The Court with the consent of counsel further ordered that the action on the merits be advanced and consolidated with the hearing on preliminary injunction. The plaintiff has moved for summary judgment. The intervenor filed a motion to dismiss or in the alternative for summary judgment.

On the basis of the entire record before the Court and for the reasons to be detailed in this Memorandum, the Court concludes that the plaintiff is entitled to summary judgment and that A.T. & T. should be permanently enjoined from complying with the Subcommittee's subpoena. The following constitute the Court's findings of fact and conclusions of law.

The Executive Branch has in the past and continues to conduct electronic surveillance based upon national security without judicial warrant. The legality of such procedures is not presently before this Court. It is necessary, however, to understand the procedures by which such surveillance is instituted. The affidavit of Robert L. Keuch, Deputy Assistant Attorney General for the Criminal Division of the Department of Justice, details these procedures which are designed to limit the use of such surveillances to appropriate cases. These procedures are as follows: An intelligence agency requesting such electronic surveillance must submit a memorandum to the Director of the Federal Bureau of Investigation, explaining the need for the proposed surveillance. In order to obtain approval, its intent must be either (1) to prevent an actual attack or hostile act of a foreign power; (2) to protect foreign intelligence information deemed essential to the security of the United States; or (3) to protect the national security information against foreign intelligence activities. The Director, if he approves of the request, forwards the request to the Attorney General. The Attorney General then confers with two Assistant Attorneys General and determines whether the electronic surveillance should be approved.

If approved, the FBI institutes the requested surveillance by hand-delivering, in a secure fashion, to the local office of the telephone company, subsidiaries of defendant A.T. & T., a "national security request letter" which includes the phone number, the address, or some other indication identifying the object of the electronic surveillance. Such a request is necessary because the information intercepted is moved from the point of interception (i.e., the telephone line leading to the object structure)

to the point of monitoring (which may be the local FBI office) by way of a leased telephone line, which can be installed only by A.T. & T. and its subsidiaries. It is such "national security request letters" which are sought in paragraph 1 of the subpoena at issue in this case.

Until the late 1960's, records of requests to, or cooperation by, A.T. & T. in national security electronic surveillances were not maintained. However, in the late 1960's, A.T. & T. and the Department of Justice entered into negotiations resulting in a form letter, called the national security request letter, which served to reduce to writing and refine the existing policy. Thereafter, beginning in the late 1960's, each time a national security request for leased lines between the points of interception and the point of monitoring was requested from A.T. & T. or its subsidiaries, a national security request letter was forwarded, which included (1) a request that a leased line be provided at the usual commercial rate, (2) a statement that the request was made upon a specific authorization of the Attorney General for purposes of national security, (3) the phone number, location or other information relating to the lines to be intercepted, and (4) the statement that A.T. & T. was not to disclose the existence of the request because such disclosure could obstruct and impede the investigation.

It is the release of these post-1969 letters that the plaintiff finds most inappropriate, because of the highly sensitive information contained therein. One portion of the letter (called the "To" portion) refers to the local FBI monitoring station which, if it were to become public knowledge, would require the relocation of those stations. However, it is the "From" portion of the request letter which is of crucial importance. An analysis of what is included after the word "From" could identify the subject of the national security surveillance in one of three ways. First, the target of the surveillance may be identified by the listing of the specific telephone number to be intercepted; second, the target of the surveillance may also be identified by the listing of the specific addresses that are to be covered in the surveillance; and third, the target of the surveillance may be identified

by the use of technical terms referring to A.T. & T. lines or junction points.

The plaintiff has asserted that the disclosure of these letters or the information contained in them would have extremely serious national security and foreign policy repercussions. First, the information in these letters would disclose the identity of every foreign power, or agent of a foreign power or entity, which is, or which has been, a subject of intelligence interest to the United States. While it may be understood that, as part of its intelligence and counterintelligence activities, the United States conducts such surveillances, public confirmation of this fact would be seriously detrimental to the foreign relations of the United States and would provide those governments whose interests are inimical to the interests of this nation with propaganda and negotiating resources which would be very harmful to our national security.

Second, plaintiff has asserted, publication and disclosure of the telephone numbers included in the request letters would disclose the identifies of all those individuals who are, or who have been, the subject of national security electronic surveillance. Under the Executive Branch's announced policy, such electronic surveillances for national security purposes are conducted only when there is reason to believe that an individual is an agent of a foreign power engaged in clandestine activities, including espionage, sabotage, or terrorism. Identification of those individuals who have been subject to surveillance will point out not only the foreign agents that are known, but would be counterintelligence information useful to unfriendly countries or powers because it would indicate those agents who have not been identified by United States intelligence agencies.

Moreover, in some instances the individual who is the subject of surveillance is a deep-cover foreign agent whose identity could only come from a very small or select group of sources, and disclosure of the United States' knowledge of the agent's existence or identity would seriously jeopardize the well-being of important agents or the integrity of intelligence sources. In some

instance, the lives of source personnel could be jeopardized.

Finally, plaintiff asserts, disclosure of locations which foreign powers are known to be utilizing to conduct business in a secure manner will serve to notify the foreign agents of those unfriendly nations which of their "safe" houses may or may not be used, because it will identify both the "safe" houses of which the United States is aware and those of which it is not aware.

Considering this sensitive nature of the information sought, the Executive Branch proposed an alternative means of providing the Subcommittee with the information it considered relevant. Under this proposal, following A.T. & T.'s preparation of an "inventory" of the request letters held by A.T. & T., the FBI would identify by date those which were "foreign intelligence surveillances" and those which were "domestic surveillances." In regard to the past domestic surveillances, the FBI would furnish to the Subcommittee the memoranda on which the Attorney General based his authorization for such surveillances, with only minor deletions necessary to protect ongoing investigations. From the "foreign intelligence surveillances," the Subcommittee could select sample items for any two years, and representatives of the Subcommittee would be given access to the memoranda on which the Attorney General based his authorization of those surveillances with names, addresses or other information identifying targets and sources deleted.

The President also proposed a procedure whereby verification, and resolution of any questions, would be accomplished by the direct participation of the Attorney General and if necessary by the President himself. This proposal was rejected by Subcommittee Chairman Moss. On July 22, 1976, the President wrote to Representative Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, stating:

> I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of

> extremely sensitive foreign intelligence and counter-intelligence information and would be detrimental to the national defense and foreign policy of the United States and damaging to the national security. Compliance with the Committee' subpoena would, therefore, be contrary to the public interest. Accordingly, I have instructed the American Telephone and Telegraph Company, as an agent of the United States, to respectfully decline to comply with the Committee's subpoena.

Later that day, when it became clear that A.T. & T. would not comply with the President's demand, this action was instituted.

The intervenor, Chairman Moss, ostensibly participating in this action on behalf of the Subcommittee, has taken the position that the Speech or Debate Clause of the Constitution is an absolute bar to judicial interference with a Congressional subpoena issued pursuant to a legitimate legislative investigation. The Speech or Debate Clause in Art I, Section 6 of the Constitution provides "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

The plaintiff has taken the position that this action should be considered one seeking solely to restrain a private entity, A.T. & T., from releasing documents in its possession. In this way, plaintiff argues, the Court need not consider the applicability of the Speech or Debate Clause, since the immunity of that constitutional provision runs only to members of Congress and their close aides when defending against a lawsuit, and does not afford any protection to a private entity such as A.T. & T. This argument is advanced so that the Court can avoid dealing with a constitutional confrontation between two of the three branches of our Government. But to take this avenue would be to place form over substance. The effect of any injunction entered by this Court enjoining the release of materials by A.T. & T. to the Subcommittee would have the same effect as if this Court were to quash

the Subcommittee's subpoena. In this sense the action is one against the power of the Subcommittee and should be treated as such, assuming that Representative Moss has authority to speak for the Subcommittee.

The Court is thus faced with a conflict between two substantial and fundamental components of our Constitutional system. On the one hand is the power of the Congress to investigate in aid of the legislative function. See *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1959); *Watkins* v. *United States*, 354 U.S. 178, 187 (1957); *McGrain* v. *Daugherty*, 273 U.S. 135, 174–175 (1927). Moreover, the Supreme Court has written that the policies expressed in the Speech or Debate Clause are designed "to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 511 (1975).

On the other hand is the authority of the Executive to invoke the claim of privilege concerning matters of national security, foreign affairs or national defense, where the Executive determines disclosure would be inimical to those interests. The courts have accorded great deference to the Executive's judgment in this area. In *United States* v. *Reynolds*, 345 U.S. 1 (1953), dealing with a private claimant's request for evidence in a Tort Claims Act case against the federal government, the Supreme Court stated:

> It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in Chambers.

345 U.S. at 10. *See also United States* v. *Nixon*, 418 U.S. 683, 710–711 (1974); *C & S Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

The Court accepts the position of the intervenor that the subpoenaed materials are sought pursuant to a legitimate legislative investigation. Contrary to the intervenor's argument, however, the Court's inquiry cannot conclude at this point. The legislative authority to investigate is not absolute. In our system of government the Constitution is supreme, but no one portion of the Constitution is sacrosanct. Here, the nature, the extent and the relative importance of the power of one coordinate branch of government must be balanced against that of the other. Neither can be considered in a vacuum.

This balancing of the powers and needs of the constituent branches of government has been considered by the courts in somewhat similar circumstances. See *United States* v. *Reynolds*, 345 U.S. 1, 11 (1953); *United States* v. *Nixon*, 418 U.S. 683 (1974). Such balancing is not precluded by the decision in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). In *Servicemen's Fund* there was no countervailing interest at stake of the magnitude of that involved here. The absolute language used by the Court in *Servicemen's Fund* should be considered in the light of the facts of that case: a private party challenging the Congressional investigatory power. Mr. Justice Marshall in his concurrence in *Servicemen's Fund* (in which he was joined by two other Justices) elaborated on the scope of the *Servicemen's Fund* decision:

> I write today only to emphasize that the Speech or Debate Clause does not entirely immunize a congressional subpoena from challenge by a party not in a position to assert his constitutional rights by refusing to comply with it.
>
> * * * * * * *
>
> The Speech or Debate Clause cannot be used to avoid meaningful review of constitutional objections to a subpoena simply because the subpoena is served on a third party. Our prior cases arising under the Speech or Debate Clause indicate only that a Member of Congress or his aide may not be called upon to

> defend a subpoena against constitutional objection, and not that the objection will not be heard at all.

421 U.S. at 513, 516. In the context of this case, the assertion of Executive privilege is properly before the Court, as this is the only juncture at which it can be considered. It must therefore be weighed against the Legislature's assertion of investigative power.

In balancing the competing interests of the Legislature and the Executive, the Court will examine a number of factors. The Court must consider whether the information requested is essential to "the responsible fulfillment of the Committee's functions." *Senate Select Committee* v. *Nixon,* 498 F.2d 725, 731 (D.C. Cir. 1974) (concerning a congressional subpoena of Executive documents *not* related to national security). The Court must consider whether there is "an available alternative" which might provide the required information "without forcing a showdown on the claim of privilege." *United States* v. *Reynolds,* 345 U.S. 1, 11 (1953). Finally the Court must consider the circumstances surrounding and the basis for the Presidential assertion of privilege. *Id.; United States* v. *Nixon,* 418 U.S. 683, 710–711 (1974). Thus the necessity for compelling production must be balanced against the circumstances and grounds for the assertion of the privilege.

In the context of this case, and the Court emphasizes that this decision is limited to the circumstances of this case, the Court determines that there are alternative means available for obtaining the information required by the Subcommittee, that the particular form in which that information is sought is not absolutely essential to the legislative function, and that the President's determination that release of this material would present an unacceptable risk of disclosure of matters concerning the national defense, foreign policy and national security outweighs the Subcommittee's showing of necessity.

The primary purpose for which the Subcommittee is seeking this information is to investigate the possibility that federal agencies are conducting domestic warrantless

wiretaps. The President has offered to provide to the Subcommittee the background material used by the Attorney General in making his determination whether a warrantless wiretap is necessary (1) to prevent an actual attack or hostile act of a foreign power; (2) to protect foreign intelligence information deemed essential to the security of the United States; or (3) to protect the national security information against foreign intelligence activities. Such material would have deletions of target, source and method information. But it would ostensibly afford the Subcommittee relevant information upon which to determine whether the wiretaps were instituted for foreign intelligence surveillance rather than domestic surveillance and to make the determination as to whether new legislation should be drawn. The helpfulness of the national security request letters in determining the basis on which the wiretaps were instituted is minimal. These form letters would provide (1) the location of the FBI installation used for monitoring the surveillance, and (2) identifying information regarding the surveillance target. While this information may be helpful in verifying the accuracy or completeness of the President's offered release of information, it is not of absolute importance to the Committee's investigation.

On the other hand, the President has determined that release of the material would present an unacceptable risk of disclosure of the most sensitive national security and foreign policy matters. The possible effect of such disclosure has been detailed above. Such a determination by the Executive is generally accorded great deference by the courts. *United States* v. *Nixon,* 418 U.S. 683, 710–711 (1974); *United States* v. *Reynolds,* 345 U.S. 1, 10 (1953); *C. & S. Air Lines, Inc.* v. *Waterman S.S. Corp.,* 333 U.S. 103, 111 (1948). Moreover, in this case, if the materials were turned over to the Subcommittee, the information could legally be released upon the majority vote of a quorum (8 members) of the Subcommittee unless such a determination were reversed by the affirmative action of the House. In addition, each of the 435 members of the

House of Representatives would have access to such material pursuant to Rule XI(2)(e)(2) of that Chamber's Rules. The potential for disclosure of this highly sensitive information, if put into the hands of so many individuals, has been determined by the President to be an unacceptable risk. Such a determination is entitled to great weight.

The Court is not implying that the members of the Subcommittee, or of the House of Representatives, will act negligently or in bad faith if they have access to these documents. But it does appear to the Court that if a final determination as to the need to maintain the secrecy of this material, or as to what constitutes an acceptable risk of disclosure, must be made, it should be made by the constituent branch of government to which the primary role in these areas is entrusted. In the areas of national security and foreign policy, that role is given to the Executive.

OLIVER GASCH, *Judge*.

July 30, 1976.

United States District Court for the District of Columbia

(Civil Action No. 76–1372)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

AMERICAN TELEPHONE & TELEGRAPH CO., ET AL., DEFENDANTS,

JOHN E. MOSS, MEMBER, UNITED STATES HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANT.

ORDER

Upon consideration of the Court's Memorandum entered this day, and the entire record herein, it is by the Court this 30th day of July, 1976,

Ordered, That plaintiff's motion for summary judgment be, and it hereby is, granted; and it is further

Ordered, That intervenor-defendant's motion to dismiss or for summary judgment be, and it hereby is, denied; and it is further

Ordered, That compliance by defendant American Telephone & Telegraph Company, its officers, agents, employees, or anyone acting in active concert or participation with them, and defendants Fox and Sharrett, with the subpoena issued on June 22, 1976 (hereinafter "subpoena") by the Committee on Interstate and Foreign Commerce on behalf of its Subcommittee on Oversight and Investigations, or disclosure of any materials coming within the scope of that subpoena, is, in the facts and circumstances of this case, unlawful and unauthorized without the prior authorization of the Executive Branch of the United States Government; and it is further

Ordered, That the defendants, their officers, agents, and employees, and all those in active concert or participation with them, be and hereby are permanently enjoined from the date hereof from transmitting or otherwise providing to the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, United States House of Representatives, or any other person, group, or entity, any documents or materials which are or may be determined to come within the scope of the subpoena issued to the defendants on June 22, 1976, without the prior authorization of the Executive Branch of the United States Government.

OLIVER GASCH, *Judge.*

United States District Court for the District of Columbia

Civil Action No. 76–895

MAREMONT CORPORATION, ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, ET AL., DEFENDANTS

Memorandum Order

This matter is before the Court on plaintiffs' motion for a preliminary injunction which seeks to enjoin the defendants from awarding a Department of Army contract for the purchase of machine guns to Fabrique Nationale ("Fabrique"), a foreign manufacturer located in Herstal, Belgium, pending the final determination of plaintiff Maremont's protest to the General Accounting Office (GAO).

Plaintiffs allege that the defendants' decision to award the contract at issue to Fabrique is violative of the "Buy American Act", 41 U.S.C. 10a *et seq.*, the 1976 Department of Defense Appropriation Act, Public Law 94–212 (Feb. 9, 1976), the military procurement statutes, 10 U.S.C. 2304, and the regulations thereunder and the Fifth Amendment to the United States Constitution. The ultimate relief sought by the complaint herein is a permanent injunction against the defendants restraining the awarding of the contract to Fabrique.

Briefly stated, the defendants have opposed the preliminary injunction by arguing that the Belgian guns are 3.5 times as reliable as plaintiffs' model and that the Secretary of Defense seeks to purchase the best weapon quickly to assure the maintenance of a strong defense posture. Argument was heard before the Court on July 1, 1976.

Plaintiffs in this action are the Maremont Corporation, a Chicago based concern, Senators Edmund S. Muskie and William D. Hathaway, and Congressmen William S. Cohen and David F. Emery, all of Maine, who are bringing this action on their own behalf and on behalf of the citizens of Maine who are adversely affected.

Maremont Corporation operates a New England Division which manufactures machine guns, other weapons and automobile shock absorbers. According to the plaintiffs, Maremont employs approximately 1,200 workers in Saco, Maine, is responsible for nearly 11% of the taxes collected in Saco and is the largest private employer in York County. Maremont's Saco factory is the only non-governmental production facility in the United States currently manufacturing machine guns.

From 1959 to present, the U.S. Army (Army) has used the M219 machine gun on its tanks. Because of the M219's unreliability, the Army, in late 1973, began giving serious thought to replacing it, and in 1974 made plans to conduct comparison tests of potential replacement guns by United States and foreign candidates. (Domestic makers were subjected to field tests, the foreign models to laboratory tests.)

The tests were conducted from November 1974 through February 1975. As a result of the tests done on the United States competitors, it was tentatively decided that the Army should purchase Maremont's modified version of the M60 (M60 MOD coaxial gun) as the replacement for the M219. Final tests were to be performed after certain corrections were made to alleviate problems which were discovered.

Maremont has alleged that during the period of November 1974 to February 1975, it worked closely with the Army to develop the gun to fit specified needs. Maremont claims that it refrained from making changes in design which would improve performance and reliability because the Army stressed the importance of interchangeability of parts between the M60 and the M219. The defendants have not rebutted this allegation.

During late 1974 and early 1975, laboratory tests were also conducted on foreign-made machine guns. The Belgian MAG58 proved to be the superior [1] of these weapons.

The M60 (MOD) was then modified and designated M60E2 and field tests were performed in April 1975. The report recommended purchasing the M60E2.[2]

Up until March 28, 1975, when the Army Headquarter Officials were briefed on the U.S. test results, the M60E2 was strongly favored. However, defendants claim that around this time the MAG58's performance became known and it was decided to introduce it as a contender. Thus, in April 1975, plans were made to conduct a side-by-side competitive test between the M60E2 and the MAG58. Plaintiffs contend that this decision and the decision to purchase the MAG58 were based upon an agreement by the Secretary of Defense with the Belgian government that the *quid pro quo* for Belgium's purchase of the F–16 aircraft made by a U.S. concern would be the Army's selection of the Belgian MAG58. The defendants state that plaintiffs' allegations are not supported by evidence, and that the Secretary of Defense is merely looking for the best weapon. A GAO report indicates that in January 1975 the F–16 was picked by the Air Force as the winner of the U.S. competition and subsequently, five concerned nations (Belgium, Denmark, Norway, the Netherlands and the United States) negotiated four preliminary contracts to produce the F–16. The MAG58 was not brought into the discussion until June 1975 when the Secretary of Defense indicated the Army was impressed by its performance and would give the MAG58 due consideration after tests. The GAO said it could not find the charge substantiated from "available documents".

Because of his suspicion about this *quid pro quo,* plaintiff Muskie wrote the Comptroller General and asked that

---

[1] The performance was so superior that speculation arose as to whether the gun was assembled from specially selected parts rather than coming from the production line. Subsequent engineering tests did not show the previous high performance of firing 30,000 rounds without a stoppage.

[2] In July 1975, the Army awarded a contract to Maremont for the purchase of M60E2's for use on specified Marine Corps tanks.

the GAO oversee, review and report on the Army's comparative testing of the M60E2 and MAG58, which tests were conducted from October through December 1975. The Comptroller Generals' report (GAO report), mentioned previously, was issued March 23, 1976.

As to the cost of the two items, the MAG58 has a quoted figure of $1,517 per unit; the M60E2 of $707, or, if purchased with the bolt assembly replacement unit recommended by Maremont, of $922 per unit. The total cost of 18,191 guns would be $55,466,000 for the MAG58 and $41,817,500 for the M60E2 (with the bolt assembly).

The results of the side-by-side tests as primarily indicated by the aforementioned GAO report, are as follows:

(a) *Reliability:*

(i) During the first 15,000 rounds fired, the malfunctions in the MAG58 and the M60E2 were few and "nearly equivalent". (*Id.* at 18);

(ii) Between 15,000 rounds and 50,000 rounds, malfunctions increased slowly in the MAG58 although the MAG58 suffered extremely serious problems with rivets which required maintenance at a higher organizational level than any M60E2 malfunctions. (*Id.* at 18–19);

(iii) Between 15,000 rounds fired and 50,000 rounds, malfunctions increased to a greater degree in the M60E2 than the MAG58, but the Army did not utilize Maremont's recommended bolt assembly replacement procedure. (*Id.* at 18, 21). The major problems suffered by the M60E2 were related to the bolt mechanism. (*Id.* at 19);

(iv) The Army concluded after the tests that the MAG58 was 3.5 times as reliable as the M60E2. (*Id.* at 18);

(v) If the Maremont bolt assembly replacement procedure had been utilized when bolt malfunctions began to appear (after approximately 15,000 rounds had been fired), a new bolt assembly would have been inserted and the Maremont gun would have con-

tinued to operate at the same level of efficiency as it did during the first 15,000 rounds;

(vi) If the Maremont bolt assembly replacement procedure were followed, the M60E2 and the MAG58 would be comparably reliable;

(vii) The Army agrees that Maremont's bolt assembly replacement proposal would significantly improve the reliability of the M60E2. (*Id.* at 21). However, the Army indicated its procedure for making repairs is under a "piece-part basis". By this method the Army would seek to find the particular malfunctioning part and replace it.

(b) *Durability:* All the M60E2's tested were fired successfully to 100,000 rounds as required by the testing procedure. All the MAG58's suffered cracked receivers between 66,000 to 75,000 rounds and only two of the five tested were fired to 100,000 rounds. (*Id.* at 20). Accordingly, the M60E2 has an expected life cycle of 15 years while the Belgian MAG58, absent a rotation system, has an expected life cycle of only 11 years. (*Id.* at 28). Because of the shorter life cycle of the MAG58, up to $18 million could be added to the cost of the MAG58 (*Id.*).

(c) *Rate of Fire:* The Army specified that rate of fire be between 400 and 650 rounds per minute with the lower limit preferred. (*Id.* at 19). The M60E2 averaged 570 rounds per minute while the MAG58 averaged 820 rounds per minute. (*Id.* at 19).

(d) *Standardization:* The contribution that either the MAG58 or the M60E2 would make to NATO standardization of equipment appears marginal. It would, therefore, appear that this would not be a major factor influencing the selection of either guns. (*Id.* at 11).

(e) *Interchangeability:* Selection of the M60E2 would contribute significant benefits to interchangeability of parts within the United States Armed Forces since 63 percent of the M60E2 parts are interchangeable with the M60 infantry machine gun. (*Id.* at 10). By choosing the M60E2, there would be less discord within the Army weapon inventory. (*Id.*). The MAG58 would contribute

75-565—76——9

no benefits to interchangeability of parts within the United States Armed Forces.

On March 29, 1976, the Army indicated its intention to award the contract to Fabrique for the MAG58. On April 7, 1976, Maremont submitted its formal protest. Although the Army's response was due twenty-five working days later, it was not filed until June 30, 1976, the evening before the hearing on the instant motion.

The Army's present supply of M219's will be exhausted in December 1976; however, plaintiffs have indicated their ability to provide any necessary replacement weaponry during the pendency of this action.

A stipulation was entered into by the parties extending the time for the hearing on the instant motion from June 4 to July 1, 1976, with defendants further agreeing not to award the contract for the production or purchase of the MAG58 until July 7th, or until the Court ruled on the motion for preliminary injunction, whichever occurred first.

In *Wheelabrator Corporation* v. *Chafee,* 455 F.2d 1306, 1316 (D.C.Cir. 1971), the Court endorsed the philosophy that in cases where a GAO determination on a bid protest was pending, the district court, under the doctrine of primary jurisdiction, could issue a preliminary injunction limited in time to the period of the GAO determination to preserve the status quo and to secure the expertise of the GAO. Additionally, *Wheelabrator* indicated that the Court must make a considered judgment as to the probability of success on the merits. *Wheelabrator, supra,* at 1317.

The plaintiffs have raised serious questions as concerns defendants' compliance with the Armed Service Procurement Act and the regulations thereunder. The defendants have acknowledged that they are awarding the contract on the basis of negotiation for a sole source procurement of the MAG58's as opposed to the route of formal advertising. When proceeding by the sole source method, the procuring agency must make a written Determination and Findings which "clearly and convincingly establish * * * that formal advertising would not have been feasible and practicable". 10 U.S.C. 2310. This is to be

"signed by the appropriate official prior to issuance of a request for proposals or quotations". Armed Service Procurement (ASPR) § 3–306. The required Determinations and Findings were not issued prior to the active negotiations with Fabrique or prior to March 1976 when the Army announced its intention to award the contract for the MAG58.

Secondly, the plaintiffs have made a showing that the Army violated ASPR § 3–501 by failing or misrepresenting the nature of the significant evaluation factors and the relative order of importance the government attached to price relative to other factors.

In view of the Court's conclusion with respect to the Army's conduct under ASPR, we need not reach plaintiffs' other arguments which might indicate a probability of success on the merits.

In closing, the Court notes that a representative of GAO's General Counsel's Office addressed the Court and indicated that GAO could reach a determination in twenty-five days. Consequently, any delay of the contract award is brought on only by the defendants, for had the Army responded to the protest in a timely manner the GAO review might well have been concluded. Additionally, the public interest is served by assuring proper compliance with the letter and spirit of the laws and irreparable injury will befall plaintiffs without the injunction since they would lose the contract award which might well result in loss of jobs in Saco, Maine.

In accordance with the foregoing, it is by the Court this 2nd day of July 1976,

Ordered, That plaintiffs' motion for a preliminary injunction should be and the same hereby is granted; and it is further

Ordered, That the defendants should be and the same hereby are enjoined from issuing the contract for production and/or purchase of the MAG58 machine guns from Fabrique Nationale until five (5) days after the GAO issues its ruling with respect to plaintiff Maremont's bid protest.

JUNE L. GREEN,
U.S. District Judge.

APPENDIX

APPENDIX

Members of the 94th Congress Parties to or Directly Concerned With Litigation Affecting Congress

Alphabetical Listing by Member's Name

SENATE

James G. Abourezk	*National Tribal Chairmen's Association* v. *Abourezk*
	Simon v. *United States Postal Service*
James O. Eastland	*Nixon* v. *Sampson*
Mike Gravel	*Simon* v. *United States Postal Service*
Mark O. Hatfield	*National Tribal Chairmen's Association* v. *Abourezk*
William Hathaway	*Maremont Corporation* v. *Rumsfeld*
Jacob Javits	*Nixon* v. *Sampson*
Edward M. Kennedy	*Kennedy* v. *Jones*
John L. McClellan	*McSurely* v. *McClellan*
George S. McGovern	*Simon* v. *United States Postal Service*
Lee Metcalf	*Metcalf* v. *National Petroleum Council*
	National Tribal Chairmen's Association v. *Abourezk*
Walter F. Mondale	*Simon* v. *United States Postal Service*
	Genesis Publications, Inc. v. *Mondale*
Edmund Muskie	*Maremout Corporation* v. *Rumsfeld*
Gaylord Nelson	*Nixon* v. *Sampson*
William Proxmire	*Hutchinson* v. *Proxmire*

HOUSE OF REPRESENTATIVES

Bella S. Abzug	*Drinan* v. *Richardson*
William Alexander	*Simon* v. *United States Postal Service*
Mark Andrews	*Simon* v. *United States Postal Service*
Les AuCoin	*Simon* v. *United States Postal Service*
Alvin J. Baldus	*Simon* v. *United States Postal Service*
Edward P. Beard	*Simon* v. *United States Postal Service*
James J. Blanchard	*Drinan* v. *Richardson*
	Simon v. *United States Postal Service*
William M. Brodhead	*Drinan* v. *Richardson*
Tim L. Carter	*Simon* v. *United States Postal Service*
William Clay	*United States ex rel. Hollander* v. *Clay*
William S. Cohen	*Maremont Corporation* v. *Rumsfeld*
Robert J. Cornell	*Simon* v. *United States Postal Service*
Ronald V. Dellums	*Dellums* v. *Powell*
John J. Duncan	*Simon* v. *United States Postal Service*
Joshua Eilberg	*Drinan* v. *Richardson*
David Emery	*Maremont Corporation* v. *Rumsfeld*

Frank E. Evans	*Simon* v. *United States Postal Service*
Floyd J. Fithian	*Simon* v. *United States Postal Service*
Walter Flowers	*Simon* v. *United States Postal Service*
William D. Ford	*Simon* v. *United States Postal Service*
Donald M. Fraser	*Drinan* v. *Richardson*
Tim L. Hall	*Simon* v. *United States Postal Service*
Thomas R. Harkin	*Simon* v. *United States Postal Service*
Michael J. Harrington	*Drinan* v. *Richardson*
William H. Harsha	*Simon* v. *United States Postal Service*
Wayne L. Hays	*United States ex rel. Martin-Trigona* v. *Hays*
	United States ex rel. Thompson v. *Hays*
	United States ex rel. Cennamo v. *Ray*
Ken Hechler	*Simon* v. *United States Postal Service*
Elizabeth Holtzman	*Drinan* v. *Richardson*
Richard Ichord	*Simon* v. *United States Postal Service*
Ed Jones	*Simon* v. *United States Postal Service*
Martha Elizabeth Keys	*Simon* v. *United States Postal Service*
Edward I. Koch	*Drinan* v. *Richardson*
Delbert Latta	*Jordan* v. *Latta*
William Lehman	*Drinan* v. *Richardson*
Clarence D. Long	*Drinan* v. *Richardson*
Trent Lott	*Simon* v. *United States Postal Service*
John Y. McCollister	*Simon* v. *United States Postal Service*
Mike McCormack	*Simon* v. *United States Postal Service*
Matthew F. McHugh	*Drinan* v. *Richardson*
	Simon v. *United States Postal Service*
Lloyd Meeds	*National Tribal Chairmen's Association* v. *Abourezk*
Edward Mezvinsky	*Simon* v. *United States Postal Service*
Anthony Moffett	*Simon* v. *United States Postal Service*
John E. Moss	*Ashland Oil, Inc.* v. *Federal Trade Commission*
	United States v. *American Telephone and Telegraph Co.*
William Nichols	*Simon* v. *United States Postal Service*
Robert N. C. Nix	*Drinan* v. *Richardson*
Richard M. Nolan	*Simon* v. *United States Postal Service*
James L. Oberstar	*Drinan* v. *Richardson*
	Simon v. *United States Postal Service*
James G. O'Hara	*Simon* v. *United States Postal Service*
Richard L. Ottinger	*Drinan* v. *Richardson*
Otto Passman	*Davis* v. *Passman*
Carl D. Perkins	*Simon* v. *United States Postal Service*
J. J. Pickle	*Simon* v. *United States Postal Service*
Larry Pressler	*Pressler* v. *Simon*
William Randall	*Simon* v. *United States Postal Service*
Frederick W. Richmond	*Drinan* v. *Richardson*
Donald W. Riegle, Jr.	*Simon* v. *United States Postal Service*

Fred B. Rooney	*Simon* v. *United States Postal Service*
Charles Rose	*Simon* v. *United States Postal Service*
Benjamin S. Rosenthal	*Drinan* v. *Richardson*
Philip E. Ruppe	*Simon* v. *United States Postal Service*
James H. Scheuer	*Drinan* v. *Richardson*
Robert L. F. Sikes	*Simon* v. *United States Postal Service*
Paul Simon	*Drinan* v. *Richardson*
	Simon v. *United States Postal Service*
B. F. Sisk	*Simon* v. *United States Postal Service*
Joe Skubitz	*Simon* v. *United States Postal Service*
Stephen J. Solarz	*Drinan* v. *Richardson*
Fortney H. Stark, Jr	*Simon* v. *United States Postal Service*
Sam Steiger	*National Tribal Chairmen's Association* v. *Abourezk*
	Sportservice Corporation v. *Steiger*
W. S. Stuckey, Jr	*Simon* v. *United States Postal Service*
Gene Taylor	*Simon* v. *United States Postal Service*
Charles Thone	*Simon* v. *United States Postal Service*
Morris K. Udall	*Drinan* v. *Richardson*
Henry A. Waxman	*Drinan* v. *Richardson*
Charles Wilson (Tex.)	*Drinan* v. *Richardson*
Lester L. Wolff	*Drinan* v. *Richardson*
Sidney R. Yates	*Drinan* v. *Richardson*
	National Tribal Chairmen's Association v. *Abourezk*
Gus Yatron	*Simon* v. *United States Postal Service*

INDEX

INDEX

Table of Cases Reported

A

Page

Abourezk, National Tribal Chairmen's Association *v*---------- 62
Administrator of General Services, Nixon *v*---------- 19
American Telephone and Telegraph Co., United States *v*---------- 15
Ashland Oil, Inc. *v*. Federal Trade Commission---------- 11

B

Bailar, Common Cause *v*---------- 45
Balles, Reuss *v*---------- 71

C

Clark *v*. Valeo---------- 33
Clay, United States ex rel. Hollander *v*---------- 72
Colby, Harrington *v*---------- 57
Common Cause *v*. Bailar---------- 45

D

Davis *v*. Passman---------- 1
Dellums *v*. Powell---------- 43
Drinan *v*. Richardson---------- 65

F

Federal Trade Commission, Ashland Oil, Inc. *v*---------- 11

G

Gurney, United States *v*---------- 59
Genesis Publications, Inc. *v*. Mondale---------- 80

H

Harrington *v*. Colby---------- 57
Hays, United States ex rel. Martin-Trigona *v*---------- 74
Hays, United States ex rel. Thompson *v*---------- 76
Helstoski, United States *v*---------- 79
Henshaw, Socialist Workers *v*---------- 39
Hutchinson *v*. Proxmire---------- 68

J

Jones, Kennedy *v*---------- 44
Jordan *v*. Latta---------- 6

K

Page

Kennedy *v.* Jones ---- 44

L

Latta, Jordan *v* ---- 6

M

Manuel, Peroff *v* ---- 41
Maremont Corporation *v.* Rumsfeld ---- 69
McClellan, McSurely *v* ---- 1
McPherson, United States *v* ---- 40
McSurely *v.* McClellan ---- 1
Metcalf *v.* National Petroleum Council ---- 59
Mondale, Genesis Publications Inc. *v* ---- 80

N

National Petroleum Council, Metcalf *v* ---- 59
National Tribal Chairmen's Association *v.* Abourezk ---- 62
Nixon *v.* Administrator of General Services ---- 19
Nixon *v.* Sampson ---- 19

P

Passman, Davis *v* ---- 1
Peroff *v.* Manuel ---- 41
Podell, United States *v* ---- 79
Powell, Dellums *v* ---- 43
Pressler *v.* Simon ---- 70
Proxmire, Hutchinson *v* ---- 68
Public Citizen, Inc. *v.* Simon ---- 31

R

Ray, United States ex rel. Cennamo *v* ---- 77
Reuss *v.* Balles ---- 71
Richardson, Drinan *v* ---- 65
Rumsfeld, Maremont Corporation *v* ---- 69

S

Sampson, Nixon *v* ---- 19
Simon, Pressler *v* ---- 70
Simon, Public Citizen, Inc. *v* ---- 31
Simon *v.* United States Postal Service ---- 67
Socialist Workers *v.* Henshaw ---- 39
Sportservice Corporation *v.* Steiger ---- 64
Steiger, Sportservice Corporation *v* ---- 64

U

	Page
United States *v.* American Telephone and Telegraph Co	15
United States ex rel. Cennamo *v.* Ray	77
United States ex rel. Hollander *v.* Clay	72
United States ex rel. Martin-Trigona *v.* Hays	74
United States ex rel. Thompson *v.* Hays	76
United States *v.* Gurney	59
United States *v.* Helstoski	79
United States *v.* McPherson	40
United States *v.* Podell	79
United States Postal Service, Simon *v*	67

V

Valeo, Clark *v*	33

○