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95th Congress
2d Session

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REPORT

OF THE

SELECT COMMITTEE ON CONGRESSIONAL OPERATIONS

U.S. HOUSE OF REPRESENTATIVES

PURSUANT TO

HOUSE RESOLUTION 420

NINETY-FIFTH CONGRESS

IDENTIFYING

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

Cumulative to December 31, 1977

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U.S. GOVERNMENT PRINTING OFFICE

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SELECT COMMITTEE ON CONGRESSIONAL OPERATIONS

U.S. HOUSE OF REPRESENTATIVES

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HOUSE RESOLUTION 420 (95TH CONG., 1ST SESS.)

SELECT COMMITTEE ON CONGRESSIONAL OPERATIONS

* * * * * * *

FUNCTIONS OF SELECT COMMITTEE

SEC. 3. (a) The select committee shall continue the functions of the Joint Committee on Congressional Operations for the House, as follows:

* * * * * * *

(2) Identifying any court proceeding or action which, in the opinion of the select committee, is of vital interest to the Congress, or to the House of Representatives as a constitutionally established institution of the Federal Government, and calling such proceeding or action to the attention of the House.

* * * * * * *

INTRODUCTION

In accordance with the duty placed upon the Select Committee on Congressional Operations by H. Res. 420 of the 95th Congress and upon the Senate Committee on Rules and Administration by S. Res. 4 of the 95th Congress, the Committees are continuing the practice of reporting on court cases and actions of importance to the Congress as a constitutionally established institution of the Federal Government.

This report, Part 3 for the 95th Congress, contains case briefs, accounts of the status of court proceedings and the full texts of decisions in cases which the Committees have identified as being of vital interest to the Congress. Major changes in the briefs of cases reported in the previous report appear in bold type. Cases filed since the publication of the most recent preceding report are designated "(New Cases)". Cases previously filed but appearing in the reporting series for the first time are described as "(Newly Reported Cases)".

The Committees will continue to publish cumulative reports of court proceedings and actions periodically throughout the 95th Congress. We welcome comments from all Members of Congress and others who use this report as an information source and research document. We also would appreciate any suggestions as to pending court proceedings and actions which do not appear in this report for inclusion in future reports.

JACK BROOKS, *Chairman,*
House Select Committee on
Congressional Operations.

CLAIBORNE PELL, *Chairman,*
Senate Committee on Rules
and Administration.

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

I. Constitutional Qualifications of Members of Congress

Clancey v. *Albert*

Civil Action No. 77-3010 (Ninth Cir.)

Brief.—Michael Patrick Clancey, a resident of the 40th Congressional District of California, filed this complaint on March 25, 1976. In it he named as defendants then-Representative Carl Albert, individually and as Speaker of the U.S. House of Representatives; Representative John J. Flynt, individually and as Chairman of the House Committee on Standards of Official Conduct; then-Representative Andrew J. Hinshaw, individually and in his official capacity as a Congressman in the U.S. House of Representatives; Edward L. Henshaw, Jr., individually and in his official capacity as Clerk of the U.S. House of Representatives; and the U.S. House of Representatives.

The complaint alleges that the defendants have denied plaintiff and other U.S. citizens residing within the 40th Congressional District of California their constitutional right to be represented in the House of Representatives by enforcement of a rule which precluded then Congressman Andrew J. Hinshaw, who had been convicted in the California courts on two felony counts unrelated to his service in Congress, from voting or participating in Congressional matters. Rule XLIII, clause 10 of the U.S. House of Representatives states:

> A Member of the House of Representatives who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House, unless or until judicial or executive proceedings result in reinstatement of the presumption of his innocence or until he is reelected to the House after the date of such conviction.

Mr. Clancey argues that Rule XLIII, clause 10, is unconstitutional in that it contravenes Article I, Section 5 and other provisions of the U.S. Constitution and thereby results in taxation without representation.

He also contends that the House Rule which barred participation by Representative Hinshaw is defective and inappropriate, that it should be replaced by a House proposal to amend the Constitution to provide qualifications for Members of Congress in addition to those prescribed in Article I, Section 5, and therein to establish a

Code of Ethics through which a Member can be expelled and replaced for certain illegal or unethical activities.

On June 2, 1976, while this action was pending in the District Court, Mr. Clancey filed in the U.S. Supreme Court a motion for leave to file a petition for a writ of *mandamus* commanding the defendants to vacate Rule 43, clause 10 and that a writ of prohibition be issued prohibiting the defendants from enforcing this provision. On July 16, 1976, the defendants filed an opposition, stating that the Court had neither original nor appellate jurisdiction in this matter. On October 4, 1976, the Court denied Mr. Clancey's motion to file his petition.

On June 18, 1976, defendants Albert and Flynt filed a motion to dismiss on the grounds that (1) the court lacks jurisdiction over the subject matter of the complaint, (2) the U.S. House of Representatives may not be sued in that name, (3) this action as against the defendant Congressmen is barred by virtue of the Speech or Debate clause of the Constitution, (4) the action should be dismissed because venue is improper, and (5) the court lacks personal jurisdiction over the defendant Congressmen.

On July 27, 1976, the District Court entered orders:

(1) dismissing the U.S. House of Representatives from this action on the ground that the action as against the said defendant is barred by the doctrine of sovereign immunity; and (2) dismissing Congressmen Carl Albert and John J. Flynt, Jr., from the action on the grounds that the action as against them is barred by the Speech or Debate clause of the U.S. Constitution (Article I, Section 6, clause 1).

A motion to dismiss the Clerk of the House as a defendant was filed on January 21, 1977.

On April 4, 1977, the District Court dismissed the action as moot.

On April 19, 1977, the plaintiff filed a notice of appeal. **The cause was docketed in the Court of Appeals on September 1, 1977.**

Status.—**The appeal is currently pending before the U.S. Court of Appeals for the Ninth Circuit.**

Laxalt* v. *Kimmitt

Civil Action No. 77-1230 (D.D.C.)

Brief.—On July 14, 1977, Senators Paul Laxalt, Barry Goldwater, Carl Curtis, S. I. Hayakawa and Lowell Weicker filed this action in the Federal District Court for the District of Columbia and asked that a three-judge court be convened to hear the case. The Senators were joined in the suit by the Committee for the Survival of a Free Congress (hereinafter "CSFC") an unincorporated political committee which contributes to campaigns of candidates for public office.

The suit asks that Rule XLIV of the Senate Ethics Code, and if necessary, the entire Ethics Code be declared null and void as violative of several provisions of the Constitution. Named as defendants are the Chairman of the Senate's Select Committee on Ethics, Senator Adlai E. Stevenson III, and the Secretary of the Senate, J. S. Kimmitt, who as the chief administrative officer of the Senate, the plaintiffs assert "causes the Ethics Code and all reports, resolutions, and other actions of the Select Committee on Ethics to be

disseminated to Senators and elsewhere." [Complaint at 6.] Additionally, the plaintiffs allege that Senator Stevenson and Mr. Kimmitt are "responsible for and exercise ministerial jurisdiction over the enforcement of the Ethics Code by said Committee and by the Senate." [Complaint at 7.]

Particularly the plaintiffs attack the limits on outside earned income prescribed by Rule XLIV. The rule, which becomes effective in 1979 would, among other things, limit the amount of "outside earned income" a Senator could earn in a year to 15 percent of the aggregate amount of base salary paid to Senators and disbursed by the Secretary of the Senate.

The plaintiffs first allege that this limitation in fact constitutes a qualification for membership in the Senate in addition to and therefore in violation of Article I, Section 3, clause 3 of the Constitution which reads in full:

> "No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

Next the Senate plaintiffs assert that by limiting the compensation they can receive for speaking and by putting them in jeopardy of "political ruin and personal vilification" if they violate Rule XLIV, the Rule deprives them of their rights to freedom of speech under the First Amendment. They also assert that their First Amendment associational rights are denied by the Rule because they are precluded from supporting candidates for the Senate who have earned, earn, or may earn in excess of the "outside earned income" limit prescribed by the Rule without similar risk.

The CSFC also asserts that the Rule deprives it of its First Amendment right to support senatorial candidates "who have earned, earn, or may earn such prescribed sums." [Complaint at 8.]

As a third count the Senate plaintiffs assert that the Rule's limitation on "outside earned income" violates the Fifth Amendment of the Constitution in that by prohibiting them from receiving such "outside earned income" it deprives them of liberty and property without due process of law.

The Senate plaintiffs, in the fourth count of their complaint, allege that Rule XLIV denies and disparages their Ninth Amendment rights to earn "outside earned income" over the limit and to support candidates for the Senate "who have earned, earn, or may earn in excess of said limitation." [Complaint at 9.] Additionally they assert that the Rule is an unjustified intrusion of their privacy in violation of the Fifth and Ninth Amendments. The CSFC also asserts that the Rule violates its Ninth Amendment right to support candidates for the Senate who have earned, earn, or may earn in excess of the "outside earned income limitation."

As a final count, the Senate plaintiffs assert that the Rule invidiously discriminates against them and denies them the equal protection of the laws in that the Rule limits "outside earned income," but places no limitation on inherited income, "unearned" income, the income of a spouse, or income from a trust fund. They

further assert that the "outside earned income" limitation is "an improper classification" because it "bears no reasonable relation to the purported purpose of the Senate Ethics Code." [Complaint at 10.]

The CSFC also asserts that it is invidiously discriminated against and denied the equal protection of the laws in that Rule XLIV effectively precludes it from supporting Senate candidates whose "outside earned income" is in excess of the Rule's limitations.

On August 11, 1977, "Common Cause", David Cohen, President of Common Cause and Nan Waterman, Chairwoman of Common Cause, citing Common Cause's "history of involvement in the enactment of ethics rules" including the Rule complained of by the plaintiffs, filed a motion to intervene as defendants in the action.

On September 2, 1977, the motion to intervene as party defendants filed by "Common Cause," David Cohen, and Nan Waterman was granted.

On December 21, 1977, the intervening defendants moved to dismiss the action.

On December 23, 1977, plaintiffs filed an amended complaint in which they deleted their prayer for convocation of a three-judge District Court pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284.

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

II. Constitutional Immunity of Members of Congress

Davis v. *Passman*

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 then-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 official 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 did not violate 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.

Representative Passman filed his response with the Court of Appeals on June 9, 1976. While supporting the District Court's decision to grant his motion to dismiss, he reasserted his contention that the doctrines of "sovereign and official immunity" are a bar to Mrs. Davis' claim.

The Court of Appeals in its decision of January 3, 1977, rejected Representative Passman's assertions of sovereign, official and Speech or Debate clause immunity. After determining that the allegations asserted by Mrs. Davis would, if proven, constitute a violation of her constitutional rights, the majority took up the question of whether the claim was one upon which relief could be granted. The court noted that Mrs. Davis was seeking three types of relief: specific relief, damages, and a declaratory judgment.

Turning first to the question of specific relief the court noted that there were three remedies requested: Reinstatement, promotion,

and an injunction against unlawful discrimination. Of those three remedies only the claim for an injunction "might raise a sovereign immunity issue * * * ." [*Davis* v. *Passman*, 544 F.2d at 865, 871 (5th Cir. 1977).] The court further noted that Representative Passman's defeat in his bid for reelection has caused Mrs. Davis' requests for reinstatement and a promotion to lose their significance. "That the term is not yet completely over saves the specific-relief claims from technical mootness * * * ." [544 F.2d at 872.]

As for Mrs. Davis' claim for damages the court found that damages would be an appropriate remedy for the allegation of constitutional violation and that Representative Passman's assertions of immunity were not well taken. As to whether sovereign immunity would bar recovery, the court concluded that the damages sought were against Representative Passman individually, not against the United States. The court declared: "When, as here, an action seeks to impose liability upon a Government official in an individual capacity, sovereign immunity poses no bar. Although sovereign immunity sometimes shields the U.S. Treasury from a plaintiff's claims, it does not protect the personal checkbook of an individual Government official to any extent at all." [544 F.2d at 877.]

Turning next to the question of whether Speech or Debate clause immunity was an absolute shield against the action, the court stated that such immunity was available only for actions taken in the legislative process. The court concluded that "representatives are not immune from inquiry into their decisions to dismiss staff members. Such dismissal decisions certainly are not 'an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House' * * * ." [544 F.2d at 880.]

The court then rejected Representative Passman's argument that he was protected by the doctrine of official immunity. The court further noted that its rejection of Speech or Debate clause immunity precluded Representative Passman from asserting an absolute immunity. As for a qualified immunity, the court noted that such immunity was generally limited to good faith, nonmalicious action. The court concluded that "[i]n light of the settled, indisputable principle that federal government sex discriminations not supported by rational (or perhaps compelling) legitimate justifications are unconstitutional * * * , the likelihood that Representative Passman will be able successfully to maintain a good faith defense even under the liberal standard governing congressional staffing decisions appears very remote." [554 F.2d at 881–882.]

As for the declaratory relief requested by Mrs. Davis, the court declined to rule on the propriety of such relief, noting that "the absence of any forward-looking scope of operation for any declaration of Davis' rights as against Representative Passman, whose congressional tenure is virtually at its end, would make the propriety of such a declaration questionable." [544 F.2d at 882.]

The dissent concluded that the doctrine of separation of powers required that the dismissal of the action by the District Court be affirmed.

The case was remanded to the District Court for further action.

On February 16, 1977, Mr. Passman filed a motion for rehearing *en banc*.

On March 15, 1977, the Department of Justice filed a brief *amicus curiae* with the Court of Appeals supporting the motion for rehearing and asking for leave to participate in oral argument if the motion for rehearing were granted.

On March 31, 1977, a motion for leave to file an *amicus* brief in opposition to the motion for rehearing was filed by individuals who are members of the House Fair Employment Practices Committee. According to the motion:

> The House Fair Employment Practices Committee was formed pursuant to the House Fair Employment Practices Agreement. This committee is a voluntary organization; it is not a Standing or Select Committee formed by resolution of the House of Representatives. It consists of six elected members. Three of these members are the U.S. Representatives filing this motion who were elected by the Representatives signing the agreement. The other three members are the congressional employees who are joining in the filing of the motion and who were elected by the employees of those Representatives signing the agreement. [Motion by the Honorable Morris Udall, *et al.*, for Leave to File a Brief Amicus Curiae at 2, *Davis* v. *Passman*, No. 75–1691 (5th Cir.).]

The three Members of the House of Representatives on the committee, Representatives Morris Udall, Patricia Schroeder, and Charles Rose, and the three Congressional employees on the committee assert that the case was "competently and fully argued and decided," [*Id.* at 3], and that the petition for rehearing should be denied.

On April 18, 1977, Representative Don Edwards filed a letter with the court in which he said that the Justice Department had intervened in the matter without Congressional request or approval and that in his view the court's decision was sound and reconsideration or rehearing was not necessary. He also asserts that the Justice Department's brief does not accurately describe the alleged burdens this decision would place upon Members of Congress. He asked that if a rehearing is granted that he be allowed to file an *amicus* brief.

On May 17, 1977, the court granted the petition for a rehearing *en banc*. Oral argument has been set for September 26, 1977.

On August 19, 1977, a letter was filed advising the court that the United States would not appear at the oral argument as *amicus curiae*.

On September 26, 1977, the case was reheard *en banc*.

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

The complete text of the opinion of the Court of Appeals is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

McSurely* v. *McClellan

No. 76-1621 (U.S. Supreme Court)

Brief.—On August 11, 1967, pursuant to warrants issued under a State sedition statute, Kentucky officials arrested Alan and Margaret McSurely and seized books and papers from their home. The McSurelys filed a complaint in the District Court for the Eastern District of Kentucky, challenging the constitutionality of the State statute.

On September 11, 1967, the three-judge court which heard the case issued an order directing that:

> (1) the material seized in the raid on the McSurely home be left in the custody of the Kentucky Commonwealth Attorney, Thomas B. Ratliff;
>
> (2) the material be made available to the U.S. Marshal for the Eastern District of Kentucky;
>
> (3) Ratliff and the U.S. Marshal make an inventory of the seized material and file it with the record of the case; and
>
> (4) Ratliff return to the McSurelys such materials as he determined were not relevant to the investigation and prosecution of the McSurelys.

That same day the McSurelys were indicted by a Kentucky grand jury.

On September 14, 1967, the three-judge Federal District Court rendered its decision holding the Kentucky statute unconstitutional and enjoining prosecution of the McSurelys. The court directed that Ratliff retain the seized materials "in safekeeping until final disposition of this case by appeal or otherwise."

On September 25, 1967, Lavern Duffy, Assistant Counsel on the staff of the Permanent Investigations Subcommittee of the Senate Government Operations Committee, called Ratliff by phone to ask about the seized documents. Subsequently, on October 8, 1967, Committee Investigator John Brick went to Kentucky, talked with Ratliff and confirmed that the seized material in Ratliff's possession contained information relating to the activities of a number of organizations in which the subcommittee was interested.

Ratliff has claimed that at some point before Brick was first given access to the seized material, he tried unsuccessfully to contact all of the members of the three-judge court to obtain their concurrence in his decision to allow Brick to inspect the documents. While he was unsuccessful in reaching two of the judges, he has stated that he did talk to the third (Judge Moynahan). Ratliff's testimony at trial on his discussion with the judge implied (according to the opinion of the minority of the *en banc* Court of Appeals) that Judge Moynahan agreed to Brick's examining and copying the material. [*McSurely* v. *McClellan,* 553 F.2d 1277, 1307-1308 (D.C. Cir. 1976).]

On October 12, 1967, Brick examined the material for about 4 hours. He took notes, made copies of 234 of the documents, and then returned to Washington.

Four days later, on October 16th, Senator McClellan directed Brick to prepare subpoenas *duces tecum* for the seized material in

Ratliff's custody, which the Senator had determined was relevant to the subcommittee's investigations of an April 1967 riot in Nashville, Tenn. The next day, Brick, who had returned to Kentucky, notified Judge Moynahan of the issuance of the Congressional subpoenas before serving Ratliff, the U.S. Marshal (cocustodian with Ratliff of the seized materials), and the McSurelys. The next day the McSurelys filed motions with the three-judge court seeking orders blocking Ratliff from releasing the seized material to the subcommittee and directing him to return the materials to them (the McSurelys).

On October 30, 1967, the three-judge court issued an order in response to the McSurelys' motions. The court overruled motions that the materials in Ratliff's custody be returned to the McSurelys and that a restraining order be issued enjoining release of the materials requested "by a Committee of the United States Senate." Officers of the court and the parties to the action were directed "to cooperate with the Senate committee in making available such of the materials, or copies thereof, as the committee considers pertinent to its inquiry * * * ." [553 F.2d at 1308.]

On November 1, 1967, a motion for reconsideration and rehearing of the October 30th order was denied. The court granted a 24-hour stay to allow the McSurelys to apply to the Supreme Court for review, and directed that pending such review the material not be removed from Ratliff's custody and that "copies thereof shall not be made on or before 2:00 p.m., Eastern Standard Time, November 2, 1967." [553 F.2d at 1308.]

On November 10, 1967, Mr. Justice Stewart, for the Supreme Court, ordered that the documents remain in their then custody until the three-judge court could hear and rule on the McSurelys' objections to the Congressional subpoenas.

In an order issued on December 5, 1967, the three-judge court overruled the McSurelys' objection to the subpoenas. The court ordered Ratliff to comply with the Congressional subpoenas by allowing committee representatives to make copies of the materials in his possession pursuant to the court's order. A 5-day stay was ordered in the compliance required by the order to allow the McSurelys to seek Supreme Court review.

On January 20, 1968, Mr. Justice Stewart, again speaking for the Supreme Court, stayed the three-judge court order "to the extent that the seized documents shall remain in custody." [390 U.S. 914 (1968).] The stay was conditioned on the McSurelys filing an appeal of the October 30th three-judge court order with the Supreme Court.

On March 18, 1968, the Supreme Court declined to hear the case, dismissing the appeal in a *per curiam* order [390 U.S. 914 (1968)], but continued the stay to allow the McSurelys to apply to the Sixth Circuit Court of Appeals for a stay. By the time the McSurelys' appeal to the Sixth Circuit was taken, the time for the State to appeal the three-judge court's order of September 14, 1967, finding the Kentucky statute unconstitutional, had expired.

In July of 1968, the Sixth Circuit decided that since time for appeal of the September 14th order had run, "the right of the court to retain possession of the seized documents, which include no

contraband, has expired." [*McSurely* v. *Ratliff,* 398 F.2d 817, 819 (6th Cir. 1968).] The Appeals Court ordered that the materials be returned to the McSurelys without prejudice to the subcommittee's right to proceed with the enforcement of its subpoenas: "[Q]uestions [as to the subpoenas] may be adjudicated under the appropriate procedure for challenging subpoenas of Congressional Committees." [398 F.2d 818, cited in 553 F.2d at 1309.]

On November 8, 1968, the seized materials were returned to the McSurelys. The McSurelys, who were immediately served with new subcommittee subpoenas similar to the original subcommittee subpoenas, refused to comply with the new subpoenas.

The McSurelys filed a civil action in the U.S. District Court for the District of Columbia on the date named in the subpoenas for their appearance before the subcommittee. They sought a declaration that compliance with the subpoenas were not required, a preliminary and permanent injunction against institution of criminal proceedings against them for their failure to comply with the subpoenas, and monetary damages.

No action had been taken in this civil suit at the time the McSurelys were indicted for contempt of Congress for failure to comply with the subpoenas. Subsequently, in their civil action, they filed an amended and supplemental complaint seeking only compensatory and punitive damages. The McSurelys alleged that the defendants, Senator McClellan, three members of the subcommittee staff, and the Kentucky Commonwealth Attorney who initially seized from their 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." [Plaintiff's Amended and Supplemental Complaint, at 13–14.]

In the criminal action for contempt of Congress, the McSurelys were convicted and sentenced in June 1970. The convictions were appealed to the Court of Appeals. 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 of evidence applied to proceedings before Congressional committees as well as to criminal prosecutions, and therefore, the court held that the subcommittee's subpoenas were inadmissable as the fruit of an unlawful search and seizure. [*United States* v. *McSurely,* 473 F.2d 1178 (D.C. Cir. 1972).] The case was remanded to the U.S. District Court for the District of Columbia with instructions to enter judgments of acquital in the matter of the contempt convictions. The Solicitor General decided not to petition the Supreme Court for a writ of *certiorari.*

In the civil proceedings brought by the McSurelys, 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 legitimate activity. (2) The claimant fails to state a claim upon which relief can be granted against defendants who were a U.S. 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 ruling and remanded the case for further action consistent with its holding.

The three-judge panel of 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 of 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 of whether the defendants distributed copies of documents to individuals or agencies outside Congress—and, if so, whether such distribution was actionable. [*McSurely* v. *McClellan,* 521 F.2d 1024 (D.C. Cir. 1975).]

The McSurelys filed a petition for a rehearing by the Court of Appeals sitting *en banc.*

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

On December 21, 1976, the Court of Appeals *en banc* issued its opinion.

A majority of the court held that as a matter of law the Federal defendants were entitled to summary judgment on:

> (1) "allegations in the amended complaints pertaining to the subcommittee staff's inspection of the 234 documents

that Brick [the subcommittee investigator] brought to the subcommittee,"

(2) "the utilization of the information obtained by Brick as the basis for congressional subpoenas, and"

(3) "the issuance of Contempt of Congress citations * * *."

The majority further said that: "since no allegation has been made as to conspiracy in the original raid of the McSurelys' home, appellants are entitled to dismissal on this point." [553 F.2d at 1299.]

As to the first three points the court found that the activities complained of were done within the legislative process and were protected by Speech or Debate clause immunity or legislative immunity.

Left for the District Court's consideration and initial determination on remand were:

> (1) whether any cause of action against defendants Brick and Alderman survives their deaths; (2) whether Brick's inspection of the seized material put in Ratliff's possession under the three-judge court's "safekeeping" directive, and Brick's transport to Washington of copies of 234 documents, violated the McSurely's rights under the Fourth Amendment; (3) whether Brick selected and transported to Washington copies of documents he knew to be wholly unrelated to the legislative inquiry, and, if so, whether such conduct was actionable under the applicable law; (4) whether any other federal defendants acted in concert with Brick in action for which he enjoys no legislative immunity; (5) whether any of the federal defendants distributed copies of documents in the subcommittee's possession to individuals or agencies outside of Congress, and, if so, whether such distribution was actionable under the applicable law; and (6) other matters identified in this opinion as requiring further development. [553 F.2d at 1299.]

As to the refusal to grant summary judgment on two allegations relating to dissemination of some or all of the documents outside of the subcommittee and the Congress, the Court of Appeals found that such activity "is not legislative activity entitled to absolute immunity by force of the Speech or Debate clause, in the absence of a claim of legislative purpose." [553 F.2d at 1286.]

As to the inspection and transportation by Subcommittee Investigator Brick of documents held in "safekeeping" by court order, the refusal of the District Court to grant summary judgment was affirmed by an equally divided court. Five judges felt that on that point, "there is evidence in the record as it presently stands, 'which affords more than merely colorable substance' to the claim of an independent Fourth Amendment violation by Brick." [553 F.2d at 1289.] They hypothesized that the District Court's "safekeeping" order in effect at the time of Brick's inspection and transportation of the documents to Washington for the subcommittee's use precluded Brick from having access to the documents.

Judge Wilkey, writing for himself and four other judges, disagreed. These judges refused to accept that Brick's inspection and transportation of the documents constituted an unlawful search and seizure under the Fourth Amendment. They said that:

> After a tangential approach to this basic underlying issue, the majority opinion does refer to Brick's "search-and-taking" (p. 30), the "search and seizure of Brick" (p. 32), and then asserts flatly "two separate, independent search and seizures took place here" (p. 33).
>
> With this holding our colleagues make new law. The transfer from one investigating agency to another is not a "separate, independent search and seizure," and, as we show later, the rationale of all the Supreme Court "silver platter" decisions and the recent *en banc* specific holding of the Ninth Circuit in *United States* v. *Sherwin* [531 F.2d 1 (9th Cir. 1976)] are directly contrary.
>
> New law it is, but law absolutely necessary to the majority's holding that the McSurelys' Fourth Amendment rights were violated here, for without an "unreasonable search and seizure" by the Senate aide his investigative activities and related acts by his superiors are admittedly protected by the Speech or Debate clause. [553 F.2d at 1305.]

These five dissenting judges felt that the majority's reading of the "safekeeping order" was inaccurate. The minority concluded that the initial District Court order did not prohibit Brick's inspection and that subsequent orders by the District Court and eventually the Sixth Circuit Court of Appeals at least impliedly allowed Brick access to the documents.

During the course of the McSurelys' contempt trial, Brick "conceded that when 'he went to Pikeville to examine the documents in the Court House,' he looked through the papers and books and determined there were 'many' items that 'he didn't need at all * * *'." [553 F.2d at 1294–1295.] The majority noted: "The fact that Brick took and transported concededly extraneous material—and it is significant that he seized 'some personal letters'—takes this case outside the protection of legislative immunity." [553 F.2d at 1295.] On this point the majority concluded: "Brick's testimony at the contempt trial ultimately may be explained away to the satisfaction of a jury. But it is plainly sufficient to preclude an automatic dismissal of the lawsuit at the threshold, on the basis of legislative immunity." [553 F.2d at 1296.]

To this majority conclusion the minority responded:

> The majority holds that even if Brick did not violate the Fourth Amendment in his "search and seizure" he may have violated the rights of privacy of the McSurelys by taking private letters he believed to be irrelevant.
>
> The most simple and complete answer to the majority's position, which does not necessitate evaluating the facts as to relevance or irrelevancy, is to point out the clear law in the Supreme Court that, absent an illegal search and

seizure by Brick, the charge of invasion of privacy does not state a cause of action under the Constitution. Since the McSurelys' amended complaint does not allege any invasion of privacy on a statutory or common law basis, this cause of action should be dismissed if there has been no Fourth Amendment offense.

If undertaken without relevance to his official inquiry, Brick's inspection and copying of the private papers of Mrs. McSurely may amount to a cause of action at common law for "intrusion" upon her privacy. McSurelys' amended complaint, however, does not allege any such common law or statutory violation, but alleges rather a violation of the Fifth Amendment, which, of course, protects each person from deprivation by a federal official of life, liberty or property, without due process of law. Presumably, the McSurelys are alleging that Brick impaired the privacy interest that is implicit in the "liberty" protected by due process.

Does the Fifth Amendment provide liability under [*Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971)] against federal officers for what amount to common law torts? The Supreme Court appears to have answered that question in the negative in the recent case of *Paul* v. *Davis* [424 U.S. 693 (1976)]. [553 F.2d at 1326.]

Turning to the question of whether the documents selected and transported by Brick, "were needed by him for the performance of his duties," the minority attacked the majority's conclusion that the documents were irrelevant. While the minority agreed that Brick had conceded that some of the documents might have been irrelevant to the committee's inquiry, it stated: "This [the majority] decision still amounts to 'second guessing' the legislative process since it overrides an independent estimate of relevance that could be 'plausibly interposed,' and it appears to override a judgment of relevance inferable from the subpoenas [which were subsequently issued by the Committee]." [553 F.2d at 1328.] The minority further noted that the documents which were purported to be irrelevant may in fact have been relevant to the committee's investigation. The Senate investigator was required to take such documents to the committee for its determination of relevance since "[t]he Senators or others on the staff may easily have seen something of significance in any one of these letters, definitely relevant to the inquiry of the committee, which might have escaped the knowledge or attention of Brick." [553 F.2d at 1328.]

The minority continued:

> Without deigning to give any reasons therefore, the majority blandly treats the Senate investigator Brick's testimony that he did not "need that letter signed [sic] Dearest Cucumber" as a final irrevocable concession binding on the Senate Committee and this court that this particular letter (and all other letters similarily characterized by the

McSurelys) were totally irrelevant to the Senate inquiry. This is a rather astonishing assumption.

In the first place, Brick's testimony was only an expression of his own need for the letter, not that of the Committee's. Brick had read the letter and presumably remembered any important features of its contents. Neither Chairman McClellan nor Brick's staff superiors had seen the letter and had had the opportunity to evaluate its contents.

Secondly, we are at a total loss to understand by what principle of law it can be held that a subordinate Senate Committee staff member can bind the Senate Committee, or indeed this court, on the question of relevance. Surely the determination of the relevance of any of the documents which Brick had inspected was for the Senate Committee, or under its usual operating procedures, for the Committee Chairman. The agreed facts are that "on October 16, 1967, at the personal direction of Senator John L. McClellan, he prepared the subpoenas involved herein." Brick took the subpoenas to McClellan, "with whom he had conferred on the subject matter thereof since October 6, 1967," and McClellan signed the four subpoenas, two of which were directed to the McSurelys. This action of the Senate Committee Chairman, after a review of the copies of the documents brought back by Brick, evidenced the Committee Chairman's determination of what he thought was relevant for the Senate's inquiry, *i.e.*, the 234 documents. What Brick said he himself "needed for the performance of [his] duties" is of little importance in determining what the Senate Subcommittee might reasonably find relevant for its inquiries.

We would hold that, relevant or irrelevant, the Senate investigator's actions in regard to the allegedly personal letters of the McSurelys are in no way a ground for a claim of constitutional significance, as the Supreme Court held in *Paul* v. *Davis, supra,* and since the McSurelys have alleged no other type claim on this basis, their action on this point should be dismissed. [553 F.2d at 1330–1331 (footnotes omitted).]

In its conclusion, the minority objected strenuously to the majority's decision to remand on these points, noting:

> The purpose of an absolute immunity is to cut off claims against protected parties at the outset. To be true to this purpose, a court should make every effort to determine if a claim is inside or outside the protection of the Speech or Debate clause. A remand for further factual proceedings on the issue of absolute immunity itself should be required only in the case of clear need. Otherwise the "mini-trial" that the defendant is forced to undergo constitutes an erosion of the principle of absolute immunity. The majority is engaging in such an erosion of the Speech or Debate clause here.

> The uncontroverted facts of this case, the logic of the Fourth Amendment, and the available case law support our conclusion here that the inspections and copying by Brick did not amount to an unreasonable search and seizure. Not only does the majority err in its contrary conclusions, but it abrogates its duty in deciding absolute immunity by calling for a remand. [553 F.2d at 1332–1333.]

In a separate dissent, Judge Danaher, writing for himself and three other judges, concurred in Judge Wilkey's opinion, but also provided a general dissent from those portions of the majority's opinion which did not provide for complete dismissal of the complaint. He stated that:

> A Subcommittee of the U.S. Senate was engaged in the truthfinding process which it had been commanded to execute. So it is that the Chairman of that Subcommittee and the members of its staff, under the circumstances here, should be entitled to absolute immunity.
>
> It is respectfully submitted that this case should be remanded to the District Court with directions to dismiss the complaint. [553 F.2d at 1339.]

On May 19, 1977, the defendants filed a petition for a writ of *certiorari* with the U.S. Supreme Court.

On October 11, 1977, the petition for a writ of *certiorari* was granted.

Status.—**The case is currently pending before the U.S. Supreme Court.**

The full text of the decision of the Court of Appeals in the criminal action for contempt of Congress was printed in the "Decisons" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* December 1972.

The full text of the decision of October 28, 1975, of the Court of Appeals was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* December 31, 1975.

The full text of the decision of December 21, 1976, of the Court of Appeals *en banc* was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* December 1976.

Hutchinson v. *Proxmire*

No. 77-1677 and 77-1755 (Seventh Cir.)

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, the National Aeronautics and Space Administration, and the Office of Naval Research, made a statement on the floor of the Senate relating to certain research contracts awarded by those agencies to Dr. Ronald R. Hutchinson, a Michigan research scientist. A press release which consisted almost entirely of quotations from the Senator's floor statement was authorized by Senator

Proxmire's office and issued by the Senate Service Department, and at about the same time, Morton Schwartz, an aide to Senator Proxmire, alleged 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 study of certain aspects of the behavior of monkeys, rats, and human beings. [Although this was Dr. Hutchinson's project, he was not mentioned by name during Senator Proxmire's appearance.]

On April 15, 1976, Dr. Hutchinson filed a $6 million slander and libel action in the U.S. District Court for the Western District of Wisconsin 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, 1976 to have the case transferred to the District of Columbia.

On June 11, 1976, the court issued an order by U.S. District Court Judge Doyle in which he disqualified himself from the action. The case was transferred to the Northern District of Illinois, since Judge Doyle was the only judge in the Western District of Wisconsin. The case was still docketed in the Wisconsin court, however, and was handled as if it were there.

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 about the use of public funds were privileged; and (3) that there is no factual basis which will support a finding for the plaintiff.

On December 23, 1976, the court granted defendants' motion for summary judgment, with a written opinion to be issued by January 23, 1977. Subsequently the court extended until April 27, 1977, the date for filing its memorandum.

On April 22, 1977, the court issued its opinion. It concluded that in order to determine whether Senator Proxmire should be granted summary judgment three issues had to be resolved:

"(1) Whether the investigative activities of a Senator in connection with the duties as a Member of Senate subcommittees were privileged.

"(2) Whether a press release issued by the United States Senate Service Department and containing the Substance of a Senate floor speech by the United States Senator was privileged under the Speech or Debate clause of the United States Constitution;

"(3) Whether the statements made by the United States Senator to his constituents and in a television appearance were libelous or defamatory." [Slip Opinion at 2.]

For purposes of determining the applicability of Speech or Debate clause immunity to the allegations in the complaint the court

divided the actions of Senator Proxmire and Mr. Schwartz into four phases:

(1) investigation into Federal funding of Dr. Hutchinson's research;

(2) delivery of a speech on the Senate floor by the Senator and issuance of a press release reciting the facts and the content of the Senate speech;

(3) follow-up investigation by the Senator and his staff at appropriation hearings; and

(4) the Senator's statement on the Mike Douglas Show, his newsletter to constituents, and his other comments about the plaintiff.

Citing *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975) and *Doe* v. *McMillan,* 412 U.S. 306, 314 (1973), the court stated that: "The standard for involving congressional immunity under article I, section 6 of the Constitution is the standard of legitimate legislative activity. In the event of a suit, once it is determined that the conduct complained of meets that standard, the action must be dismissed." [Slip Opinion at 13.]

While noting that "considerable confusion exists as to what constitutes legitimate legislative activity," the court concluded that as to the aspects of the case related to the investigations conducted by Senator Proxmire and his staff:

> In this case, Senator Proxmire serves on several subcommittees of the Senate Committee on Appropriations. These subcommittees review the budgets of the various agencies with which Dr. Hutchinson has contracted. As a member of these subcommittees, Senator Proxmire votes on appropriations, makes recommendations regarding the distribution of government funds, and concerns himself with their expenditure. Therefore, his inquiries, and those of his administrative assistant, into how American taxpayers' moneys are spent by the agencies over which the subcommittees in question had jurisdiction were privileged as legitimate legislative activity under the *Kilbourn* test [*Kilbourn* v. *Thompson,* 103 U.S. 168 (1881)] of "things generally done in a session of the House by one of its members in relation to the business before it." [Slip Opinion at 14.]

Addressing the problems of the speech on the floor of the Senate and the authorization of the press release the court concluded that in both instances Senator Proxmire was protected by Speech or Debate clause immunity.

In regard to the press release, the court found Senator Proxmire's contention that his authorization of the press release was entitled to immunity as an exercise of the "informing function" to be compatible with the U.S. Supreme Court's holdings in *Doe* and *Gravel* v. *United States,* 408 U.S. 606 (1972). In support of this view the court noted the existence of the franking statute, 39 U.S.C. § 3210 (1970), which promotes the informing function by authorizing free use of the mails and cited two lower court cases dealing with the use of the frank as an exercise of the "informing function." *Hoellen* v. *Annunzio,* 348 F. Supp. 305 (N.D. Ill. 1972), *aff'd* 468 F.2d 522 (7th Cir. 1972), *cert. denied,* 412 U.S. 953 (1973) and *Bowie* v.

Williams, 351 F. Supp. 628 (E.D. Pa. 1972). The court stated that: "That press release, in a constitutional sense, was no different than would have been a television or radio broadcast of his speech from the Senate floor." [Slip Opinion at 22.]

As to the remaining issue of whether Senator Proxmire's statement on the Mike Douglas Show, his references in his newsletter to Dr. Hutchinson's research and his comments to news reporters and in interviews either mentioning Dr. Hutchinson by name or merely alluding to the Doctor's work were libelous or defamatory, the court concluded they were not.

The court first found that Dr. Hutchinson was, for purposes of the suit, both a "public figure" and a "public official." Thus, for the plaintiff to recover, it must be found that not only did Senator Proxmire publish a defamatory falsehood about him, but also that the publication was made with actual malice; that is, actual knowledge of falsity or reckless disregard of the truth (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279–280 (1964)).

The court concluded that none of Senator Proxmire's statements met the threshold requirements set forth in the *New York Times* case.

The court next noted that: Even if for the purpose of this suit it is found that Dr. Hutchinson is a private person so that First Amendment protections do not extend to Senator Proxmire and his administrative assistants, relevant State law dictates the grant of summary judgment. Although the court was not certain which State's law should be appropriately applicable to this case, the District of Columbia's ("the place where the defendants work and their allegedly wrongful conduct originated" [Slip Opinion at 34] or Michigan's ("the plaintiff's domicile, where the inquiry presumably had effect" [Slip Opinion at 34]), it concluded that by applying the relevant law of either jurisdiction Dr. Hutchinson would be unable to recover in this action.

The court then granted Senator Proxmire's motion for summary judgment. Additionally, the court stated that unless the plaintiff could show why it should not so order, it would within 30 days dismiss the complaint against Mr. Schwartz.

On May 20, 1977, Dr. Hutchinson filed notice of appeal. On June 22, 1977, the District Court dismissed the complaint against Mr. Schwartz. The appeals were consolidated on July 29, 1977.

Status.—**On November 11, 1977, oral argument was set for January 9, 1978.**

The decision of the United States District Court for the Northern District of Illinois is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977, at 197.

United States* v. *Helstoski

No. 77–1423 (Third Cir.)

and,

Helstoski* v. *United States

No. 77–1800 (Third Cir.)

Brief.—On June 2, 1976, then-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 the aliens' deportation. The indictment also included three counts of conspiracy and obstructing justice and four counts of lying to a Federal grand jury. Indicted with Mr. Helstoski were two members of his Congressional district staff and the treasurer of his reelection committee.

Before trial was scheduled to begin on 8 counts of a 12-count indictment, Mr. Helstoski moved to dismiss the first 4 counts. His dismissal motion was predicated upon the Speech or Debate clause, Article I, Section 6 of the U.S. Constitution. As enunciated by the court, in its opinion filed on February 18, 1977, "The defendant's position is that since the Speech or Debate clause precludes inquiry by a grand jury into the performance of his legislative acts, and since the grand jury obviously made such an inquiry, the implicated counts of the indictment are vitiated." [*United States* v. *Helstoski,* Criminal Action No. 76–201 (D.N.J.); Slip Opinion at 2.]

The Government opposed the dismissal motion asserting that an indictment, valid on its face, may not be attacked on the ground that incompetent or privileged evidence was presented to the indicting grand jury. Alternatively, the Government argued that the voluntary testimony about legislative activity given by the defendant to the grand jury and during a prior trial of another individual, alleged in the contested indictment to be a co-conspirator of the defendant, constituted a waiver of Speech or Debate clause rights. Such waiver, the Government further argued, precluded Mr. Helstoski from attacking the validity of the indictment and "renders evidence of his legislative acts admissible at trial for the purpose of establishing his guilt." [Slip Opinion at 2–3.]

As to Mr. Helstoski's motion to dismiss four counts of the indictment, the court concluded that such dismissal was not required.

The court noted:

> Defendant Helstoski's contention that Counts I through IV of the indictment must be dismissed because the indicting grand jury heard evidence regarding his legislative acts is untenable. *United States* v. *Johnson,* 419 F.2d 56 (4th Cir. 1969). This is not because there is any question that a Member of Congress may not be called to answer for his legislative acts before a grand jury, *Gravel* v. *United States,* 408 U.S. 606 (1972), but because courts simply will not go behind the face of an indictment, once it is returned, in order to test the competency of the evidence adduced before the grand jury. *United States* v. *Calandra,* 414 U.S. 338 (1974); *Lawn* v. *United States,* 355 U.S. 339 (1958); *Costello* v. *United States,* 350 U.S. 359 (1956); *Holt* v. *United States,* 218 U.S. 245 (1910); *United States* v. *Blue,* 384 U.S. 251, 255 n3 (1966) (dictum). This rule governs whether the evidence before the grand jury is attacked on the ground it is hearsay, *United States* v. *Costello, supra,* or on the ground the evidence was obtained and set before the grand

> jury in violation of the Constitution, *United States* v. *Calandra, supra; Holt* v. *United States, supra; United States* v. *Blue, supra.* [Slip Opinion at 3.]

As to Mr. Helstoski's assertion that the four counts of the indictment should be thrown out because of their "express reference" to his legislative actions, the court, relying on Supreme Court decisions in *United States* v. *Johnson,* 383 U.S. 169 (1966), and *United States* v. *Brewster,* 408 U.S. 501 (1972), declared that the counts involved did not violate the Speech or Debate clause "merely because they make reference to alleged legislative acts of defendant Helstoski." [Slip Opinion at 8.]

While the court concluded that presentation of such material to the grand jury was not a proper basis for dismissing the indictment, it nonetheless rejected the Government's contention that Mr. Helstoski's pretrial testimony waived the Speech or Debate clause protection to which he was entitled at trial.

On this point the court stated:

> [T]he purpose of the Speech or Debate Clause is to insulate the independent activities of the legislature from executive and judicial interference. This purpose can be achieved only if the executive is barred from utilizing evidence of legislative acts, and if the judiciary refuses to receive evidence of such acts, in a criminal prosecution of a legislator. I therefore believe that what the Speech or Debate Clause does is to erect an absolute constitutional immunity in favor of a member of Congress from having evidence of his legislative acts used in litigation against his interests. I am not certain whether a member of Congress has the power to waive this immunity. But I am certain that if such power exists, it is consistent with the constitutional obligation of the judiciary to eschew interference with the legislature that the courts employ a stringent test before finding such a waiver in a given case. A waiver of the Speech or Debate immunity ought not be found by implication. Such a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts. A less stringent standard would vitiate the prophylactic purpose underlying the Speech or Debate Clause. It is clear that by the above standard, Helstoski has not waived his Speech or Debate immunity from having evidence of his prior legislative acts used against him in the instant criminal prosecution. Accordingly, such evidence may not be admitted at trial on the ground of waiver. [Slip Opinion at 16–17.]

Turning to the Government's motion seeking a pretrial ruling on the admissibility of evidence the court stated the general proposition that:

> [I]t is clear that the Speech or Debate Clause creates no impediment to the introduction of evidence of an agreement by Helstoski to perform *in futuro* a legislative act.

> What is forbidden is the introduction of evidence of his past performance of such an act. [Slip Opinion at 17.]

As to Mr. Helstoski's particular situation the court noted:

> The Government argues, however, that Helstoski's statements, both verbally and in writing, referring to the introduction of private immigration bills, do not constitute legislative acts and thus may be admitted. The argument is beside the point. The offered evidence contains reference to Helstoski's past performance of a legislative act, and the Speech or Debate Clause forbids use of such evidence during the Government's case-in-chief. The same is true of the thesis that Helstoski's statements reciting the past performance of a legislative act may be used, not to corroborate the existence of a bribe, but on issues such as motive, intent, knowledge and the like. This ignores the absolute command of the Speech or Debate Clause as construed and applied in *Johnson* and *Brewster*. The clause does not say that evidence of a legislator's past performance of a legislative act may be used against him for some purpose but not others. It is, rather, that such evidence may not be used at all. If the Government, for whatever reason cannot prove its case without reference to Helstoski's past performance of a legislative act, then the prosecution will have to be foregone. [Slip Opinion at 17–18.]

The court concluded its opinion with a brief discussion of the constitutional power of the House and Senate to "Determine the Rules of Its Proceedings, punish its Members for Disorderly Behavior, and with the Concurrence of two-thirds, expel a Member." [U.S. Constitution, Article I, Section 5, clause 2.]

This power, the court declared would be an appropriate remedy for those actions of Members of Congress "where it is necessary to call into question their legislative acts in order to impose [punishment]." [Slip Opinion at 18.]

Reading the rulemaking and enforcement powers and the Speech or Debate clause together the court concluded that:

> The Speech or Debate Clause expressly permits a member to be called into question before the House on account of his performance of a legislative act. If the House does not exercise the power conferred by the Constitution to discipline its own members, such a failure provides no basis for the executive and the judiciary to interfere, ignore the Constitution, and violate the doctrine of separation of powers. [Slip Opinion at 19.]

On March 18, 1977, the Government filed a notice of appeal. On June 6, 1977, the court granted Mr. Helstoski's motion to have the Government's brief and appendix suppressed and ordered the brief and appendix resubmitted so that matters not properly subject to disclosure at that time might be filed *in camera*. Mr. Helstoski filed a petition for writ of *mandamus*/prohibition on June 17, 1977 in the Court of Appeals, asserting again that the indictment violated the Speech or Debate clause. [*Helstoski* v. *United States*, No.

77-1800(3d. Cir.).] On June 28, 1977, the petition and the appeal were consolidated for purposes of argument and for dispositon on the merits.

On October 6, 1977, the appeal and the petition were argued before a three-judge panel of the United States Court of Appeals for the Third Circuit.

Status.—**The appeal and the petition for writ of *mandamus*/prohibition are pending before the Court of Appeals.**

The full text of the memorandum and order of the District Court is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 1, April 15, 1977.

Chase* v. *Kennedy

Civil Action No. 77-2652 (Ninth Cir.)

Brief.—Trueman E. Chase, a resident of California, who had been unable to resolve a dispute with the Social Security Administration, sent a document styled "Congress of the United States of America * * * Petition for Redress" to Senator Edward Kennedy of Massachusetts, intending for Senator Kennedy to present the petition to the Congress or one of its committees. Instead, because Mr. Chase is a resident of California, Senator Kennedy forwarded the petition to Senator Alan Cranston of California.

Senator Kennedy advised Mr. Chase that he had forwarded the petition to Senator Cranston. Mr. Chase then wrote to Senator Adlai E. Stevenson III, Chairman of the Senate's Select Committee on Ethics, protesting Senator Kennedy's action. Senator Stevenson forwarded this letter to Senator Cranston and he also advised Mr. Chase that he had done so. Upon receipt of Mr. Chase's petition at his Washington, D.C. office, Senator Cranston forwarded it to his San Francisco office.

Mr. Chase then filed this action asserting that Senators Kennedy, Stevenson, and Cranston deprived him of his First Amendment right to petition the Government for a redress of grievances.

On July 12, 1977, the U.S. District Court for the Southern District of California issued its decision. Judge Turrentine dismissed the action concluding that Mr. Chase had not been denied his right to petition the Government. Rather he "has confused his right to petition with a supposed right to have his petition granted or acted upon in a certain way. But no such right is found in the Constitution." [*Chase* v. *Kennedy,* Civil Action No. 77-305-T (S.D. Calif., July 12, 1977); Slip Opinion at 2.]

As to the actions of the Senators, the court concluded that whatever action a Senator determines to take with petitions is "absolutely within his discretion and is not a proper subject of judicial inquiry, even if it might appear that he may be grossly abusing that discretion." [Slip Opinion at 3.]

On July 18, 1977, Mr. Chase filed a notice of appeal.

Mr. Chase also filed a notice of direct appeal to the United States Supreme Court on September 7, 1977, but no further action has been taken in regard to that appeal.

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

The complete text of the court's opinion is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

United States* v. *Garmatz

Criminal No. H-770379 (D. Md.)

Brief.—On August 1, 1977, an indictment was filed in the United States District Court for the District of Maryland against former U.S. Congressman Edward A. Garmatz. The one-count indictment brought under 18 U.S.C. § 371 charged Mr. Garmatz with conspiring with others to violate 18 U.S.C. § 201(g) which prohibits public officials from accepting bribes and illegal gratuities.

The indictment alleges that Mr. Garmatz agreed to receive cash payments in exchange for certain official acts to be performed by him as a Member of Congress and as Chairman of the House Committee on Merchant Marine and Fisheries, specifically his sponsorship, support, vote and decision on certain passenger ship legislation which was within the jurisdiction of the committee he chaired.

Motions by Mr. Garmatz to dismiss the indictment and to strike surplusage from the indictment were denied by Judge Alexander Harvey in a Memorandum and Order filed on December 5, 1977.

In his opinion Judge Harvey delineated two issues raised by the defendant's motion. First, did all the acts and events of the alleged conspiracy culminate when the bill in question became law in May of 1972 as Mr. Garmatz asserted? If so, and if the court therefore granted the defendant's motion to strike as surplusage all allegations concerning acts and events which occurred after May 1972, then the 5-year statute of limitations applicable to the alleged offense would have expired prior to the return of the indictment in August 1977. Additionally, venue would not properly be in the Maryland court since the only overt acts alleged to have occurred in Maryland took place after the passage of the bill in May 1972. Thus, the judge declared, if the motion to strike surplusage were granted the court would also be required to dismiss the indictment.

Such action was not required, the judge concluded because the conspiracy did not end when the bill became law but continued. The judge noted that:

> **Essentially, the objective of the conspiracy here was the exchange of money for an agreement or promise to perform official acts. The government charges that pursuant to the illegal agreement, defendant solicited and received gratuities both before and after the bill became law. Thus, the objective of the conspiracy was not attained until the solicitation and exchange of all money, both before and after the legislation in question became law. [Slip Opinion at 8; this report at 182.]**

The court further declared that:

> **In this particular case, a conspiracy to violate § 201(g) has been charged, not the substantive offense itself. The**

> indictment alleges that the conspiracy still existed within the five years prior to the indictment of August 1, 1977, and that at least one overt act in furtherance of the conspiratorial agreement was committed in Maryland within that period. These allegations are clearly sufficient. [Slip Opinion at 8; this report at 182–183.]

The second issue presented by Mr. Garmatz motion to dismiss was whether prosecution of the case would contravene the Speech or Debate clause (Art. I, Sec. 6, clause 1), of the Constitution. After discussing earlier Supreme Court cases bearing on the issue the judge concluded that the Garmatz indictment did not contravene the clause. The court noted that those earlier Supreme Court decisions do not

> bar an indictment under a general indictment under a general statute where the government can make a *prima facie* case without requiring into legislative acts. *United States* v. *Dowdy, supra* at 224. Just such an indictment is before the Court in this case. Under the one conspiracy Count contained in this indictment, the essence of the offense charged is an illegal agreement to accomplish an illegal objective and guilt can be established "by proof of the agreement, accompanied by proof of one or more non-legislative acts to carry it out, without proof of legislative acts immunized from inquiry by the speech or debate clause." *Dowdy, supra* at 227. [Slip Opinion at 14; this report at 189.]

Garmatz had particularly asserted that the Speech or Debate clause prohibited a prosecution for illegal solicitations pertaining to past legislative acts. This contention was rejected by Judge Harvey concluding that the case could be prosecuted "provided that the prosecution did not offer evidence of the performance by the defendant of legislative acts." [Slip Opinion at 14–15; this report at 190.]

Judge Harvey further declared:

> . . . [T]he essence of the offense charged in this case is the illegal agreement. To prove the essential elements of this indictment, there is no need for the government to inquire into how defendant Garmatz spoke, debated or voted or into anything he did in the Chamber or in committee. This indictment does not allege the performance by the defendant of any legislative acts, either as a part of the conspiracy or as overt acts committed in furtherance thereof. Furthermore, there is no need here for the government to show that defendant fulfilled the bargain, either in proving the conspiracy itself or any of the overt acts. [Slip Opinion at 15, this report at 190–191.]

Mr. Garmatz had also asserted that the validity of the indictment could be tested for purposes of the motion to dismiss by the court for conformity with the Speech or Debate clause only by examining in advance of trial the evidence to be offered by the Government. Only in that way Mr. Garmatz argued could the court determine whether evidence of legislative acts would be

presented by the Government to support the allegations in the indictment.

Such a procedure was not warranted because the court concluded that the indictment complied with the requirement that:

> **"legislative acts performed by a Congressman can not be alleged or proved in a case of this sort. Moreover, counsel for the government had agreed to make proffers of the prosecution's proof prior to the trial. At that time, this Court will determine whether any of the proof to be presented at the trial includes evidence of the performance by the defendant of legislative acts." [Slip Opinion at 15–16; this report at 191.]**

Garmatz had also asserted that the Speech or Debate clause protected him with respect to any discussions he had with any interested party which might be construed as part of the information gathering process of a Congressman or a Congressional committee. Judge Harvey declared that such assertion was not supported by the pertinent Supreme Court decisions. He concluded:

> **The Clause does not prohibit inquiry into illegal conduct "simply because it has some nexus to legislative functions," and the government is therefore not barred from presenting proof of "activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster, supra* at 528.**
>
> **Furthermore, the Speech or Debate Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process." *United States* v. *Brewster, supra* at 517. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *United States* v. *Brewster, supra* at 526. Thus, discussions relating to the giving or receiving of a bribe would not be barred at the trial, nor conversations of co-conspirators which might be casually or incidentally related to legislative affairs. [Slip Opinion at 16–17; this report at 192.]**

The court concluded its discussion of the Speech or Debate clause by declaring that:

> **If any proffer of evidence made in this case indicates that the government seeks to introduce direct evidence of the performance by defendant Garmatz of a legislative act, such evidence will be excluded. The question before this Court when the proffers are made will be whether the government is seeking to introduce direct evidence of the performance of a legislative act as that term was defined in *Brewster* and *Gravel*, not whether the legislative act in question was performed in the past or in the future. [Slip Opinion at 17–18; this report at 193.]**

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

The memorandum and order of the District Court is printed in full in the "Decisions" section of this report at 175.

III. Powers of Congressional Committees

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

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 & Telegraph (hereinafter "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 John 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 (hereinafter "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 would obstruct and impede the investigation.

The request letter includes the phone number, address, or other information 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 1 of the subpoena seeks such "national security request letters."

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

The executive branch presented the committee with an alternative proposal which the court described thus: "Under this proposal, following A.T. & T.'s preparation of an 'inventory' of the request letters held at 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." [*United States* v. *American Telephone and Telegraph Co.*, 419 F. Supp. 454, 458–59 (D.D.C. 1976).]

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, President Ford wrote to Representative Harley O. Staggers, Chairman of the 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. [419 F. Supp. at 459.]

The suit was filed by the executive branch when it became clear that notwithstanding the President's order, A.T. & T. was prepared to turn over the subpoenaed documents to the committee.

Chairman Moss 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. This argument was advanced, the Justice Department said, so that the court could avoid dealing with a constitutional confrontation between two of the three branches of the Federal Government. The Department argued that by following its approach 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.

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

> 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 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. [419 F. Supp. at 458.]

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 asserted 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. [419 F. Supp. at 459.]

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. [419 F. Supp. at 460.]

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 that the President had determined that release of the material would present an unacceptable risk 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 those documents. But it does appear to the court that if a final determination 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. [419 F. Supp. at 460–61.]

Defendant-intervenors immediately filed an appeal on August 2, 1976, 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.

On August 26, 1976, the House of Representatives passed House Resolution 1420, authorizing Chairman Moss to proceed in this action on behalf of the House of Representatives and the House Committee on Interstate and Foreign Commerce. Chairman Moss, on September 1, filed a motion for substitution of parties to reflect the change in his status pursuant to the House resolution. The motion was granted on September 14 and the caption of the case was changed by deleting the words "Member, United States House of Representatives," and inserting in lieu thereof "Individually and on behalf of the U.S. House of Representatives and the House Committee on Interstate and Foreign Commerce."

In his suggestion that the Appeals Court hear the case *en banc*, filed on September 17, 1976, Representative Moss set forth the issues he felt were present in the appeal:

> Appellant submits that the issues presented by this appeal are of exceptional public and constitutional importance, and should be decided by the Court *en banc*. Among such issues are the following:
>
> a. Whether the District Court erred in holding that the President has the unreviewable power to prevent Congress from receiving documents from a private company pursuant to an admittedly lawful Congressional subpoena, merely by asserting that Congress' receipt of such documents would be detrimental to national security;
>
> b. Whether the District Court erred in issuing an injunction that requires Congress to accept the opinion of the District Court as to the manner in which Congress should exercise its discretion in conducting an admittedly lawful investigation; and
>
> c. Whether, contrary to the decision of the District Court, Congress has the constitutional power and responsibility to inform itself as to the nature and extent of warrantless wire-tapping by the executive branch within the United States. [Suggestion of Appellant for Hearing *En Banc*, filed September 17, 1976, at 4.]

In its response to the suggestion for a hearing *en banc*, the Justice Department noted:

> The issue upon which this case turns is whether, under our system of government, the President of the United States, or the House Committee on Interstate and Foreign Commerce, ultimately must determine the acceptability of recognized risks to the national security. [Response to Appellant's Suggestion for Hearing *En Banc,* filed September 23, 1976, at 1.]

On October 8th, Chairman Moss' petition for a hearing *en banc* was denied.

On December 30, 1976, the Court of Appeals issued its opinion. The court, noting that both a new House and a new President would be in office early in 1977, remanded the case without decision on the merits to the District Court. The Appeals Court expressed the hope that through further negotiations the parties could reach agreement "without requiring a judicial resolution of a head-on confrontation * * *" [*United States* v. *American Telephone and Telegraph Co.*, 551 F.2d 384 (D.C. Cir., 1976)]; between the legislative and executive branches of Government. The Court of Appeals further ordered that the District Court report to the appeals panel within 3 months on the progress of the negotiations.

Although the Court of Appeals stated that it was not ruling on the merits of the injunction against compliance with the Congressional subpoena, it did direct the District Court to modify the injunction which it (the District Court) had issued so as "to exclude request letters pertaining to taps classified by the FBI as domestic, since there was no contention by the Executive nor any finding by the District Court, of undue risk to the national security from transmission of those letters to the subcommittee." [551 F.2d at 395.]

The parties met before U.S. District Judge Gasch for calendar calls on February 18, March 21, and April 6, 1977, to report on the progress of their negotiations. In a memorandum dated May 16, 1977, Judge Gasch reported to the Court of Appeals that the negotiations had not resulted in a resolution of the problem and that the District Court had no suggestions as to how the disputes could be resolved. Supplemental argument was heard by the Court of Appeals on June 3, 1977.

On October 20, 1977, the Court of Appeals issued an opinion in which it mandated a procedure to be supervised by the District Court in an effort to facilitate a compromise between the Subcommittee and the executive. Additionally, the Court of Appeals continued the injunction against A.T. & T., at least until the procedure it proposed has been tried and found inadequate.

Before setting forth the procedure to be followed, the court addressed two issues: 1) was judicial absentention warranted on "political question" grounds, and 2) whether judicial interference with the investigatory actions of the subcommittee was barred by the Speech or Debate clause of the Constitution.

The court first determined that judicial abstention on political question grounds was not warranted in the circumstances of this

case, noting generally that the judicial branch abstains on political question grounds it does so when it concludes that either the legislative or executive branches has the constitutional authority to make a decision that is dispositive of the dispute. Two factors were indicated in the opinion as militating against abstention. First, the dispute involved a conflict between two branches of the government, neither of which could be said to have an unequivocal and unilateral constitutional right to decide the matter in question. Furthermore, the court felt, effective judicial settlement of the issue was a possibility and judicial abstention would not lead to an orderly resolution of the dispute.

The court next rejected the contention that judicial interference with the actions of the investigation being conducted by the subcommittee was barred by the Speech or Debate clause. The court concluded that:

> **What the cases established is that the immunity from judicial inquiry afforded by the Speech or Debate Clause is personal to Members of Congress. Where they are not harassed by personal suits against them, the clause cannot be invoked to immunize the congressional subpoena from judicial scrutiny. [Slip Opinion at 18; this report at 214.]**

The court then set forth its plan which it characterized as a "gradual approach . . . consistent with our view that the present dispute should be regarded as a concerted search for accommodation between the two branches." [Slip Opinion at 21; this report at 217.]

As enunciated by the court:

> **Under our approach, the Subcommittee staff would select at random a sample of 10 unedited memoranda for the two sample years, and compare these with the corresponding expurgated ones. On the issue of notes, still a bone of contention, our approach would permit the staff to take notes on their impressions concerning the accuracy of the classification of the memoranda as relating to foreign intelligence surveillance and use of generic terms, but the notes would have to be left at the FBI under seal. The Subcommittee staff could report their conclusions orally to the Subcommittee. The Subcommittee would then decide whether to take a claim of inaccuracy—alleging, for example, executive abuse of the "foreign intelligence" rubric—to the District Court for resolution. If the District Court, upon *in camera* inspection of the original and edited memoranda and of the staff notes, found significant inaccuracy, it would take remedial action. The specifics of its actions are a matter for sound discretion. Relief might involve, for example, providing the Subcommittee staff access to a larger sample of unedited memoranda to determine whether any previously discovered inaccuracy was isolated or systematic.**

> If the initial inaccuracy suggested deviousness, the District Court might conclude that the cooperative approach is unfruitful and unmanageable, and that the court should withdraw from its assistance to the executive by dissolving the injunction.
>
> The executive would be permitted to employ the substitution procedure, but only upon an *in camera* showing of two things: the accuracy and fairness of the edited memorandum, and the extraordinary sensitivity of the contents of the original memorandum to the national security. The determination of the District Court will, of course, be subject to appellate review. [Slip Opinion at 22–23; this report at 218–219.]

The court emphasized the provisional nature of the remedy it ordered, and indicated that such an approach was required given the negotiating positions of the parties and the court's desire to accommodate their substantial needs and yet refrain, if possible, from upholding either of the claims of absolute authority.

The Government filed a petition for rehearing on December 12, 1977, which was denied on the same day. In its petition for rehearing the Government sought to have the Court of Appeals clarify, or if necessary modify, its opinion of October 20, 1977, so as to indicate that it is not the intent of the court to allow counsel for the parties to participate in the *in camera* proceedings directed at verifying the need for involving the substitution procedure.

The Court of Appeals refused to so clarify or modify its opinion and instead affirmed its intention to allow the District Court to permit participation by counsel for the subcommittee. The opinion distinguished the facts in the instant case from those in cases which have upheld *ex parte* proceedings in similar situations involving private parties:

> The present case does involve the additional consideration that it is a body of the legislature that is seeking access, and that it has not only threshold legal standing but claims the high ground of seeking information for a legislative purpose. [Slip Opinion at 3; this report at 224.]

The court further stated:

> Counsel for a legislative committee may be subject to the kind of security clearance that our decision contemplated for congressional staff, and may also be subject to a District Court's conditions on access to *in camera* material. In such respects, the participation of counsel is in aid of the court, his primary position is as an officer of the court, and he may even be precluded from consultation with his client on the matters involved. * * * We have not accepted the contention that the executive determination that national security may be involved is conclusive and not subject to any further inquiry, nor have we accepted the rival claim that Congressional right of access to documents for legislative purposes is at any time absolute. If

in the interest of national security the executive seeks the aid of the judicial branch, the courts are entitled to obtain, under circumscribed conditions, the aid they need for their task. [Slip Opinion at 3; this report at 224.]

Status.—**The case is pending before the District Court.**

The full text of the most recent opinions of the Court of Appeals are printed in the "Decisions" section of this report at 195 and 197.

The full text of the most recent memorandum and order of the District Court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.

The full text of the earlier opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* December 1976.

The full text of the earlier memorandum and order of the District Court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* August 15, 1976.

***Koniag, Inc.* v. *Andrus* (formerly Kleppe)**

Nos. 76–1325 through 76–1334 (D.C. Cir.)

Brief.—These actions were filed in the United States District Court for the District of Columbia by 11 Alaskan communities challenging decisions of the Secretary of the Interior which found each of them ineligible to receive land and money under the Alaska Native Claims Settlement Act (hereinafter "Claims Settlement Act"), 43 U.S.C. sec. 1601 *et seq.* (Supp. III, 1973.) [Civil Action Nos. 74–1061, 74–1134, 74–1790 to 74–1795, 75–452, 75–485, and 75–1097 (D.D.C.).]

The cases were consolidated in the District Court for those questions which plaintiffs and the defendant agreed could be adequately presented on cross-motions for summary judgment.

The Claims Settlement Act sought to accomplish a fair, rapid settlement of all aboriginal claims by Natives and Native groups of Alaska without litigation. Under it, 40 million acres of land and $962.2 million were to be disbursed to regional corporations and villages that qualified. The Secretary of the Interior was given the responsibility of administering the program outlined in the legislation. Among his responsibilities was the final determination of which applicants were "villages", as defined by the Claims Settlement Act, which were eligible for participation in the distribution. The Secretary's regulations required the Juneau, Alaska, Area Office of the Bureau of Indian Affairs to make these determinations not later than December 19, 1973. Prior to reaching a decision, the Area Office was required to publish proposed decisions, which became final unless appealed within 30 days. Upon receipt of a protest the Area Director was to consider and evaluate it and render a decision within 30 days. These decisions then became final unless an "aggrieved party" appealed to the Secretary of the Interior by filing a notice with the Alaska Native Claims Appeal Board (hereinafter "Board"). The Secretary of the Interior reserved to himself the right to make the ultimate decision in each case.

If a case was appealed, however, a record was usually built by assigning the case to an administrative law judge from Interior, who would hear the case *de novo* in an adversary proceeding. At these hearings the "aggrieved parties" were usually represented by an attorney from Interior Department's Solicitor's Office. The administrative law judge would hear evidence and make his decision *in camera*. The decision was forwarded *in camera* to the Board without being served on the communities. The Board made a formal decision and submitted it to the Secretary of the Interior *in camera*. The Secretary then consulted with his staff and reached a final decision. Only then were the communities notified as to what decisions had been reached.

In these cases the Area Director issued decisions determining that the 11 communities were "villages" eligible for benefits under the Claims Settlement Act. The Fish and Wildlife Service, the Forest Service, or the State of Alaska, and certain environmental groups appealed one or another of the 11 decisions. After full *de novo* proceedings before the administrative law judge and the Board, the Secretary's decision was that three of the communities were of one class of "villages" but not of another, thus reducing the benefits to which the communities believed they were entitled. The other eight plaintiffs were determined not to be "villages" as defined by the Claims Settlement Act. The 11 communities brought actions to obtain judicial relief from the Secretary's decisions.

While the village claims were being considered by the Secretary, the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, chaired by Representative John Dingell, held hearings which were described as oversight hearings on the implementation of the Claims Settlement Act by the Department of the Interior.

Plaintiffs argued that these hearings adversely affected their position on the issues in dispute and improperly influenced the ultimate decisions by the Secretary. In particular, plaintiffs noted the appearance of Kenneth Brown, "who served as legislative counsel and chairman of the Alaska Task Force Working Committee of the Department of the Interior and was one of the Secretary's two principal advisors who reviewed the cases with him at the time he made his decision in the plaintiffs' case." [*Koniag, Inc.* v. *Kleppe,* 405 F. Supp. 1360, 1371 (D.D.C. 1975).]

In a memorandum and order handed down on November 14, 1975, United States District Judge Gerhard A. Gesell ruled, *inter alia*, that the Dingell hearings were an impermissible interference with the administrative process, and that the Area Director's decisions designating plaintiffs as eligible villages should be reinstated since they were the last "untainted" decisions made before December 19, 1973, the date by which the Claims Settlement Act required decisions to be made.

The stated purpose of the hearings, the court noted, was to present a forum for discussing the implementation of the Claims Settlement Act. But, said the court:

> "in fact the Committee, through its chairman and staff members, probed deeply into details of contested cases then

under considerations indicating that there was "more than meets the eye." The entire rule-making process was re-examined, travel vouchers and other information were sought to probe the adequacy of the investigations made, all papers in the pending proceedings were demanded, the accuracy of data and procedures followed was questioned, and constantly the Committee interjected itself into aspects of the decision-making process. While representatives of Interior indicated they were very concerned about prejudice to the quasi-judicial administrative process, and the chair on several occasions denied that it was his purpose to pressure the agencies involved, Representative Dingell stated that he was obliged to confess that he had doubts as to whether the law was being properly carried out. On key issues now in dispute before the Court, representatives of the Government were obliged to take positions as to the interpretation of the Act. A strenuous effort was made by the chairman to encourage protest and appeals, coupled with comments indicating his clear impression that all that could be done was not being done and that some of the results being reached were contrary to congressional intent. It was following this experience that settlements arranged with two of the plaintiffs * * * were abandoned by the Department of the Interior because of the hearings. It should also be noted again that when the Secretary reached the crucial point of making his personal decision on the merits of cases that were investigated and criticized by the Committee he had as one of his two immediate personal advisors Mr. Brown, who had been subjected to the intervention and subtle harassment of the Legislative Branch.

* * * * * * *

The Dingell hearings constituted an impermissible congressional interference with the administrative process. This situation presents a disturbing conflict between the Congress and the Executive Branch, and it is the responsibility of the Judiciary in this instance to prevent an impermissible intrusion by one branch into the domain of the other. It is no less the responsibility of the Court to protect the procedural due process rights of litigants and "to preserve the integrity of the judicial aspect of the administrative process." [*Pillsbury Co.* v. *Federal Trade Commission*, 354 F.2d 952, 964 (5th Cir. 1966).] It cannot be gainsaid that the "appearance of impartiality—the *sine qua non* of American judicial justice—" was sacrificed in this instance. *Id.* "[P]rivate litigants [have a right] to a fair trial and, equally important, [a] right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences," *id.* The appearance of justice was breached and while the complaining party is not required to shoulder the virtually impossible burden of proving whether and in

> what way the outcome before the agency was actually influenced by the congressional intrusion, the evidence before the Court indicates that the Dingell hearings indeed had a direct and demonstratable effect at least on the cases of [the two plaintiffs with whom the settlement with the Interior Department was abandoned]. [405 F. Supp. at 1371–1372.]

The Department of the Interior appealed each of the cases to the Court of Appeals and asked that the cases be consolidated for the purpose of appeal. The motion to consolidate was granted.

On February 23, 1977, the new Secretary of the Interior, Cecil D. Andrus, was substituted as a party to these appeals in place of Thomas S. Kleppe.

The case was argued on March 24, 1977.

Status.—The action is pending before the Court of Appeals.

That portion of the District Court's opinion which is of interest to the House of Representatives is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

Exxon Corp.* v. *Federal Trade Commission

No. 77–1302 (D.C. Cir.)

Kerr-McGee Corp.* v. *Federal Trade Commission

No. 77–1303 (D.C. Cir.)

and,

Union Carbide Corp.* v. *Federal Trade Commission

No. 77–1304 (D.C. Cir.)

Brief.—On May 7, 1976, Union Carbide Corp. (hereinafter "Union Carbide") filed a complaint for injunctive and declaratory relief against the Federal Trade Commission (hereinafter "FTC"), and the Chairman, Commissioners, and Secretary of the FTC, to prevent the FTC from "releasing to two Congressional committees, and thus to the public, commercially sensitive trade secrets relating to plaintiffs' coal and nuclear business, which the Commission is required to keep confidential under Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and under common law protections for trade secret information." [Verified Complaint for Injunctive and Declaratory Relief, *Union Carbide Corp.* v. *FTC,* Civil Action No. 760793 (D.D.C.).] Union Carbide states that pursuant to an FTC subpoena dated January 31, 1975, they turned over to the FTC commercially sensitive data and trade secrets, and notified the FTC of the confidential nature of the data. The complaint says that Union Carbide and the FTC entered into an agreement that the FTC would give Union Carbide 10-days notice before releasing any information. On May 5, 1976, the FTC notified Union Carbide that it was considering releasing the data to the Senate Judiciary Committee's Antitrust and Monopoly Subcommittee and the House Interstate and Foreign Commerce Committee's Subcommittee on Oversight and Investigations, and that the commissioners expected

to vote unanimously to release the material by May 7, 1976. Furthermore, despite the 10-day notice agreement, the FTC said that Union Carbide might not receive any further notice. Union Carbide asserted that on numerous previous occasions commercially sensitive trade secret data submitted to Congressional committees and subcommittees had become public. They also alleged that if the FTC released this information it would be in violation of 15 U.S.C. § 46(f), which says the FTC may make public information it obtains "except trade secrets and the names of customers," and that the release of the data would also violate Union Carbide's common law right of confidentiality of its trade secrets. Union Carbide asked the court to enjoin the defendants from releasing the information to anyone outside the FTC, including, but not limited to, any committee or subcommittee of Congress, and to issue a declaratory judgment that the release of such data would violate 15 U.S.C. § 46(f) and Union Carbide's common law right to preserve its trade secrets.

Union Carbide also filed a motion for a temporary restraining order on May 7, 1976. U.S. District Judge John H. Pratt issued an order on that day enjoining the FTC from releasing the information to any person outside the FTC until 10 days after the disposition of *Ashland Oil Co.* v. *FTC,* No. 76–1174 (D.C. Cir.), since it appeared to the court that the same issue was before the U.S. Court of Appeals in that case. [For a brief of *Ashland Oil Co.* v. *FTC,* see *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977, at 25.]

Separate complaints were filed on May 11, 1976, by Exxon Corporation (hereinafter "Exxon") [*Exxon Corp.* v. *FTC,* Civil Action No. 76–0812 (D.D.C.)] and Kerr-McGee Corporation (hereinafter "Kerr-McGee") [*Kerr-McGee Corp.* v. *FTC,* Civil Action No. 76–0814 (D.D.C.)] against the same defendants as in *Union Carbide,* stating that they had turned over to the FTC certain confidential data relating to uranium mining, milling, exploration and production pursuant to FTC subpoenas issued in early 1975. Their complaints state that they emphasized to the FTC the confidential nature of the information when the materials were turned over to the FTC. They state that on May 5, 1976, the staff of the FTC notified them that the Commission was considering the imminent release of the data to the Senate Judiciary Committee's Antitrust and Monopoly Subcommittee and/or individual members of the committee. On May 10, 1976, the staff of the FTC advised them that the material would be turned over on May 11, 1976. Both plaintiffs assert that "the record of commercially sensitive trade secret information finding its way into the public domain from Congress shows that there is a high probability that submission of the data to a Congressional subcommittee would result in their release to the public. Both alleged that release of the information by the FTC would violate 15 U.S.C. § 46(f), 18 U.S.C. § 1905, and plaintiffs' common law right to protection of confidentiality of trade secrets. Both asked the court to enjoin the defendants from releasing the information to anyone outside the FTC, including, but not limited to, any committee or subcommittee of Congress, and to issue a declaratory judgment that the release of such information would violate 15 U.S.C. § 46(f), 18 U.S.C. § 1905, and plaintiffs' common law right to preserve their trade secrets. The plaintiffs also filed motions for

injunctive order similar to the one granted in *Union Carbide.*

On May 11, 1976, Judge Pratt issued injunctions in these cases similar to the one issued on May 7, 1976, in *Union Carbide.*

On July 8, 1976, the court granted the defendants motion for an extension of time to file an answer until 20 days after a decision by the U.S. Court of Appeals in *Ashland Oil.*

On September 20, 1976, the U.S. Court of Appeals issued its decision in *Ashland Oil Co.* v. *FTC,* essentially affirming the decision of the District Court that the materials could be turned over to a committee of Congress, without violating 15 U.S.C. § 46(f). The Court of Appeals in *Ashland* then entered a stay of its order until it could rule on a motion for rehearing.

On October 1, 1976, Judge Pratt continued the temporary restraining orders in *Union Carbide, Exxon,* and *Kerr-McGee* either until he disposed of Union Carbide's motion for a preliminary injunction or until the Appeals Court removed its stay in *Ashland Oil.*

On October 15, 1976, defendants filed their motions to dismiss, based upon the disposition in *Ashland Oil.*

On March 2, 1977, the Appeals Court denied the motion for rehearing in *Ashland Oil.*

On March 29, 1977, the court in *Union Carbide, Exxon,* and *Kerr-McGee* concluded that the transmission of the data from the FTC to a Congressional committee "does not constitute public disclosure within the meaning of * * * 15 U.S.C. (Supp. V) § 46(f); and that such transmission in this case would not cause irreparable harm to the plaintiff," citing *Ashland Oil.* The court denied the motions for summary judgment, granted defendants' motions to dismiss and dismissed the cases with prejudice, denied as moot the plaintiffs' motions for a preliminary injunction, and denied the plaintiffs' requests to stay the orders pending appeal.

On March 29, 1977, all three plaintiffs filed notices of appeal.

On March 30, 1977, the U.S. Court of Appeals for the District of Columbia consolidated the appeals on *Exxon* (No. 77-1302), *Kerr-McGee* (No. 77-1303), and *Union Carbide* (No. 77-1304) for purposes of appeal, and stayed the order of the District Court. In addition, the Senate Judiciary Committee was asked to advise the court whether it still sought the data originally requested.

On May 3, 1977, a motion by the three companies to expedite the proceedings was denied.

On May 6, 1977, the Appeals Court denied the companies motions for injunctions or stay pending appeals and vacated its stay of March 30, 1976 of the District Court's order. Chief Judge George E. MacKinnon considered it improper to surrender this material to any Member of Congress on a mere request, but felt he was bound by the decision in *Ashland Oil.*

On August 26, 1977, a *per curiam* order was filed dismissing appellant's motion for injunction pending appeal as moot.

On September 30, 1977, Congressman John E. Moss filed a motion for leave to file a brief as *amicus curiae.*

On October 25, 1977 Clerk's order was filed granting Congressman Moss' motion for leave to file a brief as *amicus curiae* and giving appellants 14 days to file a brief in response.

Congressman Moss' brief as *amicus curiae* and appellant's brief in response thereto were both filed on October 25, 1977.

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

The complete text of the orders of the District Court are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977, at 247 (*Union Carbide*), 243 (*Exxon*), and 245 (*Kerr-McGee*).

Note: In a footnote to its orders of March 29, 1977, the District Court stated that it was aware of footnote 63 in a decision by the Court of Appeals in *FTC* v. *Texaco,* No. 74–1547 (D.C. Cir. Feb. 23, 1977). Footnote 63 states:

> We think it not unreasonable to require notice to the producers even in the event of a proposed release to Congress, since the circumstances surrounding such a disclosure cannot presently be ascertained. [See *Ashland Oil* v. *FTC,* 548 F.2d 977.]

The court concluded: "we believe that action to be legally and factually distinguishable from the case at bar." In *Texaco,* the FTC had undertaken an investigation to determine whether certain corporations were violating Section 5 of the Federal Trade Commission Act by deliberately understating gas reserves in southern Louisiana. After an informal investigation effort proved inadequate, the Bureau of Competition of the FTC determined that the issuance of subpoenas would be necessary, and on June 3, 1971, the Commission issued a resolution directing the use of compulsory process in a nonpublic investigation. The companies refused to comply with the subpoenas which were subsequently issued, and the FTC filed petitions for enforcement in the Federal District Court.

The companies argued that the accuracy of the gas reserves estimates had already been determined by the Federal Power Commission in ratemaking proceedings before that body prior to 1971, and therefore it was improper for the FTC to subpoena documents for the same purpose. The District Court agreed, and determined, in general, that the FTC could only receive documents from 1969–71 and could use them only to investigate the possibility of a conspiracy in reporting reserves, but could not use them to determine reserves. In addition the court ruled that the documents used in that investigation could only be reviewed by FTC personnel assigned to that investigation, and had to be returned to the companies at the conclusion of the investigation, unless the court ruled otherwise.

A Court of Appeals panel upheld the decision of the District Court, but the panel's decision was vacated by the *en banc* Court of Appeals when it decided to rehear the case *en banc.* Among the parts of the District Court's order which the *en banc* court modified in its opinion and order of February 23, 1977, was the part dealing with protection of confidentiality of the information claimed by the companies. The *en banc* court concluded that until the FTC had a chance to review the documents and rule on specific requests of

confidentiality the District Court's order was premature and improper. They continued:

> Accordingly, we accept with some modifications, the FTC's proposed confidentiality protection, which would provide notice to the producers of any FTC decision. Specifically, we order that the FTC not disclose any of the documents produced which a company designates as confidential to any person [fn. 63] outside the employ of the FTC (other than an outside consultant retained by the FTC who has agreed not to disclose the documents) without first giving the company ten days' notice of its intention to do so. Such a procedure would, of course, provide an opportunity for judicial review at some later date, if the producers believe that a particular proposed disclosure is improper. [*FTC* v. *Texaco,* No. 74–1547 (D.C. Cir. Feb. 23, 1977); Slip Opinion at 43–44.]

American Public Gas Association* v. *Federal Power Commission

Nos. 76–2000 et al. (D.C. Cir.)

and,

American Public Gas Association* v. *Federal Energy Regulatory Commission

No. 77–695 (U.S. Supreme Court)

and,

Amerada Hess Corporation* v. *Federal Energy Regulatory Commission

No. 77–697 (U.S. Supreme Court)

Brief.—On December 4, 1974, the Federal Power Commission ("FPC") issued an order instituting proceedings to prescribe rules and regulations establishing just and reasonable rates for jurisdictional (interstate) sales of natural gas dedicated to interstate commerce on or after January 1, 1975, to and including December 31, 1976, and otherwise regulating such jurisdictional sales by natural gas producers on a nationwide basis. All interested persons were asked to file comments and replies by certain dates, although several extensions of these deadlines were later granted by the FPC.

> The FPC did not propose specific rates in its notice but stated it would rely on responses by the parties and Commission staff. The order designated as respondents all interstate pipeline companies, and all producers with jurisdictional sales exceeding 10 million Mcf per annum, who have since participated as Indicated Producer Respondents. Ultimately some 46 parties and groups of parties, representing all segments of the natural gas industry and the consuming public, filed written comments and cross-comments on a host of matters. [*American Public Gas Association* v. *FPC,* Nos. 76–2000 et al. (D.C. Cir. June 16, 1977); Slip Opinion at 15. (Footnote omitted).]

On July 27, 1976, the FPC issued Opinion No. 770 in which it made a number of findings in relation to the pricing of natural gas. It then issued clarifying orders in September and October 1976, and Opinion No. 770–A on November 5, 1976. In Opinion No. 770–A, the FPC set rates which were lower than those it had set in Opinion No. 770, but which were higher in effect at that time. The FPC estimated that the impact of the rates set in Opinion No. 770–A would be from $1.49 to $1.78 billion during the following 12 months.

Appeals were filed in the U.S. Courts of Appeals in almost every circuit, and the cases were consolidated and heard by the District of Columbia circuit. Basically, the consumer petitioners complained that the rates were set too high. Their attack encompassed the use by the FPC of the informal notice-and-comment rulemaking proceeding "for an enterprise of such magnitude and complexity" [Slip Opinion at 26.] as well as the weight given by the FPC to other factors considered in determining the new rates. The producers basically claimed that the rates were set too low.

In the meantime, on August 26, 1976, after Opinion No. 770 had been issued, Senators James Abourezk, John Durkin, and William Proxmire, and Representatives Berkley Bedell, William Brodhead, Michael Harrington, Herbert Harris, William Hughes, Andrew Maguire, Toby Moffett, John Moss, James Oberstar, Richard Ottinger, John Seiberling, and Gerry Studds ("the Congressional parties") together filed a petition for a rehearing on Opinion 770 with the FPC. The next day the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce of the House of Representatives held hearings on the "Federal Power Commission Rate Decision."

Four members of the subcommittee—Chairman Moss and Congressmen Ottinger, Maguire, and Moffett—were parties to the petition filed with the FPC the day before the hearings. FPC Chairman John Dunham, in his testimony before the subcommittee, stated that he was concerned about the possibility that reconsideration of Opinion No. 770 might be precluded because of the appearance of the commissioners before the subcommittee, based on *Pillsbury Co.* v. *FTC,* 354 F.2d 952 (5th Cir. 1966). Chairman Moss said that the subcommittee hearing should proceed and that the *Pillsbury* doctrine would not be violated by questioning the commissioners, even though he and three other subcommittee members were adversary parties. In his opening statement, Chairman Moss discussed the *Pillsbury* decision and noted that because the circumstances in that case were distinguishable the proceedings, conducted by his subcommittee would not be precluded by that decision.

On September 2, 1976, 6 days after the conclusion of the hearings, Chairman Moss reiterated his view that the commission's decision showed a "flagrant disregard" of the law, and stated that he was considering the possibility of instituting impeachment proceedings against the three commissioners who had joined in the issuing of Opinion No. 770.

On November 5, 1976, the FPC issued Opinion No. 770–A in which it set a price for the biennium 1973-74 at 93 cents instead of the $1.01 rate set in Opinion No. 770, and narrowed the eligibilty for the new higher rates.

Along with all of the other appeals filed with U.S. Courts of Appeals, the original Congressional parties, joined by Representatives Les Aspin and Christopher Dodd, filed a petition in the U.S. Court of Appeals for the District of Columbia circuit. They stated that they believed the new rates established by Opinion 770–A were still too high, and they asked the Appeals Court to set aside the decision of the FPC. [*Abourezk* v. *FPC,* No. 76–2001 (D.C. Cir.).] Their appeal was consolidated with the others.

In its initial brief in these cases, the Indicated Producer Petitioners and Intervenors ("IPPI") argued, *inter alia,* that under the *Pillsbury* doctrine the FPC was disqualified to issue 770–A. The IPPI asserted that the appearance of four of the FPC's commissioners at the hearings before the subcommittee, where they were "subjected to detailed examination as to the thorough processes by which they arrived at Opinion No. 770 and the reasoning and logic utilized in the opinion: [Joint Initial Brief of Judicated Producer Petitioners and Intervenors at 15. *American Public Gas Association* v. *FPC,* Nos. 76–2000 et al. (D.C. Cir.)], should have, under the *Pillsbury* doctrine, disqualified these commissioners from further consideration of the matter, thus requiring the reinstatement of Opinion 770.

On March 23 and 24, 1977, the U.S. Court of Appeals for the District of Columbia circuit heard oral argument, and on June 16, 1977, it issued its opinion affirming the order of the FPC.

Regarding the decision of the FPC on its rehearing, the Appeals Court decided that the FPC was not disqualified from issuing Opinion No. 770–A.

The court first noted the timing of the hearings and that "[t]he questioning was not confined to explication of 'what the opinion means and what its implications are.' Chairman Moss went further, stating:

> I am most committed as an adversary. I find that I am outraged by Order 770. I find it very difficult to comprehend any standard of just and reasonableness in the decision and I would not want the record to be ambiguous on that point for one moment." [Slip Opinion at 102.]

Next the court reviewed the facts in the *Pillsbury* case, in which several of the commissioners of the FTC had been severely criticized at committee hearings by Members in both the House and Senate for their decisions regarding enforcement of the Clayton Antitrust Act against Pillsbury. The hearings took place at a time when the FTC was considering changing its prior decision on *Pillsbury.* The court, in that case, held that the FTC's subsequent consideration and decision had not been consistent with due process of law and set aside the latter decision.

The present court refused to distinguish the two cases on the basis of the type of administrative proceeding involved, ratemaking in this action, adjudication in *Pillsbury,* stating:

> We doubt the utility of classifying the rate-making undertaken in the present proceedings by the Power Commission as entirely a judicial or a legislative function, or a

> combination of the two, for in any event the need for an impartial decision is obvious. See Davis, Administrative Law Treatise, § 7.03. Congressional intervention which occurs during the still-pending decisional process of an agency endangers, and may undermine, the integrity of the ensuing decision, which Congress has required be made by an impartial agency charged with responsibility for resolving controversies within its jurisdiction. Congress as well as the courts has responsibility to protect the decisional integrity of such an agency. [Slip Opinion at 104–105.]

However, the court concluded, the producers had to be denied relief under the circumstances here because they had failed to raise their objections before the FPC. They had been fully aware of these facts while Opinion No. 770 was being reconsidered, but not only did they not argue that the FPC should be disqualified, this giving all parties—including the FPC—an opportunity to reply to the charges, but they had actively participated in the proceedings, urging the FPC to make a new decision more favorable to their interests. The court said that parties cannot wait until a decision is made to assert disqualification—it must be asserted as soon as the party becomes aware of the grounds. The court also cited 15 U.S.C. § 717r which says that no objection to an order of the FPC can be asserted on appeal which has not been asserted before the FPC.

The court additionally stated that:

> Independent of the status of the parties seeking relief, we think it is obvious that within the equitable relationship between the reviewing court and the agency there resides—there inheres—judicial jurisdiction, and responsibility in the public interest, to decide whether there occurred here such an inroad upon the integrity of the decisional function of the independent agency as to require the court *sua sponte* to set aside the whole or any part of Opinion No. 770–A. [Slip Opinion at 106–107.]

The court then considered all of the facts in the case, including the fact that the FPC's original ruling on an income tax component was heavily criticized in the hearings but was left standing in Opinion No. 770–A, that there was no indication that the provisions of Opinion No. 770–A were influenced by the subcommittee proceedings, and that there was no appearance of partiality on the part of the commissioners. In view of these circumstances, the court refused to set aside any part of the opinion *sua sponte* because of the subcommittee hearings.

The court then said:

> In concluding as above, we recognize the possibility, but not the probability, that what occurred may have influenced the Commission. We consider the intervention through the Subcommittee regrettable and quite inconsistent with that due regard for the independence of the Commission which Congress and the courts must maintain. Nevertheless, when weighed in the context of the record as a whole, the possibility of influence upon the Commission

> is too intangible and hypothetical a basis for this court of its own motion to nullify Opinion No. 770–A. We think rather that the interests of the parties and the public are to be served by our review of the parties and the Opinion under the applicable statutory standards and decisions of the Supreme Court. [Slip Opinion at 107.]

On July 18, 1977, the Congressional parties filed a motion for a rehearing *en banc,* as did several other parties.

On August 17, 1977, a *per curiam* order was filed denying the petitions for rehearing filed by the Congressional petitioners, American Public Gas Association et al., Austral Oil Company Incorporated and Aztec Oil, and the Commonwealth of Pennsylvania. Separate statements on rehearing were filed by Senior Circuit Judge Leventhal, who was joined in his statement by District Judge Gesell.

Another *per curiam* order was also filed on August 17, 1977, denying all suggestions for rehearing *en banc* filed in these cases.

On November 15, 1977, American Public Gas Association and Amerada Hess filed petitions for writ of *certiorari* in the U.S. Supreme Court.

Status.—**The petitions for writ of *certiorari* are pending before the U.S. Supreme Court.**

The complete text of the order of August 17, 1977, denying the petitions for rehearing and the separate statements are printed in the "Decisions" section of this report 225.

The complete text of the opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.

United States* v. *Helms (New Case)

Criminal Case No. 77–650 (D.D.C.)

Brief.—On October 31, 1977, the Government filed an information in the United States District Court for the District of Columbia charging Richard M. Helms former Director of the Central Intelligence Agency with two violations of 2 U.S.C. § 192 (Refusal of Witness to Testify). In the information, the Government charged that on or about February 7, 1973 and again on or about March 6, 1973, Helms refused and failed to answer material questions during the course of inquiry of hearings held by the Committee on Foreign Relations of the United States Senate, a duly authorized standing Committee of the Senate.

The hearings on February 7, 1973 were held, pursuant to Rule 38 of the Standing Rules of the Senate, to inquire into the qualifications of Helms to hold the office of United States Ambassador to Iran. The material questions asked by the committee on February 7, 1973 related to the involvement of the Central Intelligence Agency in efforts to prevent Salvador Allende Gossens from becoming the President of Chile.

The hearings of March 6, 1973 were held pursuant to Rule 25 of the Standing Rules of the Senate to inquire into assertions that the Central Intelligence Agency and/or the International Telephone

and Telegraph Corporation attempted to influence the 1970 Chilean presidential campaign and elections. The material questions asked by the committee on March 6, 1973 related to Helms' knowledge of United States Government policy with respect to the 1970 Chilean presidential election.

In a "Statement of Facts" filed with the information setting forth the factual basis for the charges in the information, it was stated that on February 17, 1973, Helms failed to answer fully, completely and accurately, as required by law, questions asked about the involvement of the Central Intelligence Agency in efforts to prevent Salvador Allende Gossens from becoming President of Chile, and that on March 6, 1973 Helms failed to answer fully and completely questions about his knowledge of United States Government policy with respect to the 1970 Chilean presidential elections. According to the "Statement of Facts", Helms knew at the time of his testimony that in 1970 the Central Intelligence Agency, with the approval of the Forty Committee of the National Security Council, carried out a covert operation to prevent Allende from winning the September 4, 1970 Chilean presidential election, and that money and actions had been approved by the Forty Committee to prevent the selection of Allende in the October 24, 1970 run off election and to encourage, by economic pressure and other means, the prevention of Allende's accession to the presidency by the Chilean military.

The "Statement of Facts" further stated that the Department of Justice had determined that disposition of the case by means of a plea of *nolo contendere* and an agreement on suspension of the minimum sentence and the imposition of a fine is fair and just because trial of the case would involve tremendous costs to the United States, perhaps jeopardizing national secrets, and because Helms has had a distinguished career, during which he has performed outstanding services to the Government.

Additionally, the "Statement of Facts" indicated that the Department of Justice considered the law to require a witness to testify forthrightly before a legally constituted governmental proceeding and not give a false, inaccurate, incomplete, or evasive testimony under any circumstances. The "Statement of Facts" also described Helms' position on this matter, declaring that Helms had felt himself bound by the National Security Act of 1947 to protect intelligence sources and methods from unauthorized disclosure, and by an oath taken upon his departure from the Central Intelligence Agency not to divulge, publish or reveal any classified information or any information concerning Central Intelligence Agency operations to any unauthorized person. According to the "Statement of Facts", Helms had not at the time of his testimony, been authorized to reveal confidential information regarding American policy in Chile.

Also on October 31, 1977, Helms was arraigned, filed waivers of a trial by jury and of any possible objection or defense he may have had by virture of non-compliance with any of the provisions of section 194 of title 2, United States Code, entered a plea of *nolo contendere* and was found guilty on both counts.

Status.—On November 4, 1977, defendant was sentenced to 1 year

in prison and fined $1,000 on each of counts one and two. Execution of the prison sentence was suspended and Mr. Helms was placed on unsupervised probation for 1 year and ordered to pay a total fine of $2,000.

IV. Constitutional Powers of the Congress

Chadha v. *Immigration and Naturalization Service*

No. 77-1702 (9th Cir.)

Brief.—This is a petition for review of an order of the Immigration and Naturalization Service (hereinafter "INS"). The INS had promulgated an order which exempted the petitioner, Jagdish Rai Chadha, from deportation as an alien. That order was subsequently vetoed by the passage of a resolution by the U.S. House of Representatives. A new order which required Chadha's deportation was then issued. The petition challenges the constitutionality of the "one-House veto" by which the original order was overturned.

As set out in petitioners' brief, the facts are these: Petitioner was born and raised in Kenya, although his race was East Indian. In 1966, he was issued a passport to the United Kingdom. He was lawfully admitted to the United States as a student in 1966 and continuously resided in the United States since that time, except for one short trip to Canada.

After obtaining B.S. and M.A. degrees from an Ohio university, he discovered that neither the United Kingdom nor Kenya would allow him to return because of his race. He moved to California in 1971 to seek work but was unable to obtain work because he did not have lawful status in the United States. However, the petition asserts, he was unable to meet expenses from personal savings and from financial help from his family overseas.

Since his visa had expired in 1972, he was summoned to show why he should not be deported pursuant to section 241(a)(2) of the Immigration and Nationality Act (hereinafter "INA"), 8 U.S.C. § 1251(a)(2). A hearing was held before an immigration judge on January 11, 1974, at which Mr. Chadha requested a suspension of deportation pursuant to section 244(a)(2) of the INA, 8 U.S.C. § 1254(a)(2). Evidence presented as to his good character was uncontested.

On June 25, 1974, the immigration judge issued his decision, ordering that the deportation be suspended pursuant to section 244(a)(1) of the INA.

Section 244(a)(1) of the INA provides that suspensions may be granted when an alien (1) has been physically present in the United States for at least 7 years immediately preceding his application, (2) is of good moral character, and (3) would suffer extreme hardship if deported. (Although this authority is granted to the Attorney General, it has been delegated to the "immigration judges," with an appeal to the Board of Immigration Appeals.)

Once the decision to suspend deportation is made, notice of the action is transmitted to Congress with a detailed explanation and justification for the decision. The suspension does not become effective until the close of the session of Congress following the one in which the decision is transmitted, and then it only becomes effec-

tive if during both sessions neither House has passed a simple resolution disapproving the decision, pursuant to 8 U.S.C. § 1254(c)(2).

Mr. Chadha and five aliens whose deportation had been suspended by immigration judges lost their suspensions when on December 12, 1975, the House of Representatives passed H. Res. 926, 94th Cong., 1st Sess. (1975).

On August 4, 1976, the immigration judge ordered Mr. Chadha deported in view of the House resolution, and on appeal to the Board of Immigration Appeals, the Board affirmed the order of deportation on February 11, 1977.

Mr. Chadha filed a petition for review of the deportation order with the U.S. Court of Appeals for the Ninth Circuit on July 18, 1977, which automatically stayed his deportation.

The petition challenges the constitutionality of the one-House veto. It argues that neither the constitutional provisions granting Congress the power to regulate immigration nor the "Necessary and Proper" clause empowers Congress to contravene other constitutional provisions, and it asserts that the one-House veto does this in three ways. First, it says, the one-House veto violates the separation of powers doctrine. The constitutional history of this doctrine demonstrates that one branch cannot perform the functions or control the performance of another, petitioner claims, and since the one-House veto allows a single House of Congress to perform nonlegislative functions and control the actions of an executive agency, it is unconstitutional.

Next, Mr. Chadha argues, the one-House veto deprives the President of the opportunity to exercise his veto power under Article I, Section 7. The Framers of the Constitution intended that a single executive would be given the opportunity to veto every Congressional action having effect of law, but is not subject to Presidential veto, it is unconstitutional.

Finally, petitioner asserts that the one-House veto provision violates the requirement of a bicameral legislature. According to petitioner, the Framers of the Constitution intended that every power of the legislative branch not expressly granted to a single House must be exercised by both concurrently. Therefore, since the one-House veto provision allows a single House to make law without the concurrence of the other, it is unconstitutional.

On October 27, 1977, respondent INS filed a suggestion to invite the submission of *amici curiae* briefs by the U.S. Senate and House of Representatives.

Clerk's letters were sent on November 17, 1977, inviting Vice President Mondale and the Speaker of the House to file briefs *amicus curiae* within 30 days.

Both the House of Representatives and the Senate requested extensions of time to file *amicus curiae* briefs. The time was extended to January 16, 1978.

Status.—The petition is pending before the U.S. Court of Appeals for the Ninth Circuit.

Nixon* v. *Sampson

Civil Action No. 77–2125 (D.C. Cir.)

and,

Nixon* v. *Administrator of General Services

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 Mr. Nixon 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 Mr. Nixon, but the Government had a right to use said materials. Following that advisory opinion a "depository agreement" (Nixon/Sampson agreement) was signed by Mr. Nixon and Arthur F. Sampson, Administrator of the General Services Administration ("GSA"), on September 7, 1974.

Thereafter, Jack Anderson, a well-known columnist, and others filed a petition with GSA 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, Mr. Nixon filed a suit against Mr. 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 Judge Charles R. Richey issued a temporary restraining order on October 21, 1974, prohibiting the implementation of the agreement until a full hearing could be held on Mr. Nixon's motion for a preliminary injunction. [*Nixon* v. *Sampson,* Civil Action No. 74–1518 (D.D.C.).]

On October 21, 1974, a suit was filed by The Reporters Committee for Freedom of the Press, and several other parties, to gain access to these materials. [*The Reporters Committee for Freedom of the Press* v. *Sampson,* Civil Action No. 74–1533, (D.D.C.).]

Then, on October 24, 1974, Lillian Hellman and several other individuals also filed suit to gain access to the materials. [*Hellman* v. *Sampson,* Civil Action No. 74–1551 (D.D.C.).]

Mr. Nixon filed a motion on October 29 to consolidate the three cases, which the court did by an order issued on October 31, 1974. [Hereinafter these three cases will be referred to as the "consolidated cases."]

A petition for leave to participate as *amici curiae* in these cases was filed and granted on behalf of then-Senator Sam J. Ervin, Jr., Senators Gaylord Nelson and Jacob Javits, then-Representative Wayne L. Hays, and Representative John Brademas on November 11, 1974. 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.).]

At the time of the filing of the Ervin petition the Senate had passed a bill, S. 4016, which, while making no determination as to the ownership of the Presidential materials, provided for the preservation of access to materials by placing them under the control of the Administrator of GSA, with all the materials to remain in Washington, D.C. 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* urge 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.*]

A separate motion by Representative Elizabeth Holtzman for leave to file an *amicus* brief was also granted on November 11, 1974.

Although the Holtzman petition fully supported the *status quo* position of the Ervin petition, 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. 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 Mr. Nixon, 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.

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 (herinafter "Act"), was signed into law on December 19, 1974 [Pub. L. 93–526].

On the day after the Act went into effect, Mr. Nixon 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. [*Nixon* v. *Administrator of General Services,* 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 and 2284 to hear and determine the constitutional claims asserted. The case was assigned to Judge Richey, before whom the consolidated cases 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 than extended to Mr. Nixon's more recent challenge. On January 3, 1975, Mr. Nixon moved for a preliminary injuction 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, Mr. Nixon had 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 General Services, supra.*]

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

petition 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 Act. [*Nixon* v. *Richey,* No. 75–1063 (D.C. Cir.).]

The Appeals Court, in a *per curiam* order and opinion filed January 31, 1975, denied Mr. Nixon's petition, stating that the issuance of a writ of *mandamus* was unnecessary. It held, however, 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 Act requires the trial judge to give priority to such an application. It declared:

> 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 §§ 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 the Appeals Court issued its order and opinion, January 31, 1975, Judge Richey released a 98-page opinion in the consolidated cases. [*Nixon* v. *Sampson,* 389 F. Supp. 107 (D.D.C. 1975).] At the same time, Judge Richey issued a summary and synopsis of his opinion which appears in its entirety as follows:

SUMMARY AND SYNOPSIS 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. 74–15–18).

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 to 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 request 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 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, Mr. Nixon 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, 1975, 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 opinion of January 31, 1975, it took pains to alert Judge Richey to the peril of disposing of the consolidated cases before acting on Mr. Nixon'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 Mr. Nixon might be barred "from urging in the challenge case [*Nixon* v. *Administrator of General Services,* Civil Action No. 74-1852 (D.D.C.)] positions contrary to determinations which any decision of the consolidated cases might yield." [*Nixon* v. *Richey,* 513 F.2d 430, 438 (D.C. Cir. 1975).]

The Appeals Court proceeded to undertake a review of the history of the Act.

The court stated that there were two goals Congress intended to accomplish 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 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.

The Act did not, however, prohibit the petitioner from making an independent application under Section 2284. 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 provisions 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.
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> * * * * * * *
>
> 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 constitution-

> ality of the Act before a three judge rather than a single-judge tribunal. [513 F.2d at 422–443.]

The court added that what Congress wanted "was speed injudicial handling of such [constitutional] 'challenges' whether properly to be considered and determined by three judges or one. Just as plainly, the text and history of Section 105(a) indicate that Congress did not share the same concern for speed in the resolution of litigation not amounting to be 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 Mr. Nixon'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 of 1975, 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 was then 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 the pleadings were 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. [*Nixon* v. *Administrator of General Services,* 408 F. Supp. 321 (D.D.C. 1976).] 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 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 takings of his presidential materials into custody and their screening by government archivists. * * *

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. * * *

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. * * *

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. * * *

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 are 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. * * *

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 plain-

> tiff's interests, provisions that are wholly inconsistent with the hypothesis of punitive intent. * * *

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, in 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 * * * . [513 F.2d at 333.]

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 December 2, 1975 order in the consolidated cases which granted summary judgment to Rose Mary Woods 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 as to Miss Woods' ownership, 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 with the Supreme Court a notice of appeal of the decision of the three-judge court. The case was argued before the Court on April 20, 1977.

On June 28, 1977, the Supreme Court affirmed the three-judge court's decision upholding the constitutionality of the Act. Noting that no effective regulations under the Act had yet been promulgated, and that after such regulations are promulgated they may be challenged under other provisions of the Act, the Court limited its considerations of the merits of Mr. Nixon's several constitutional claims to those addressing the facial validity of those provisions of the Act requiring the Administrator of GSA to take custody of the materials and subject them to screening by Government archivists.

Mr. Nixon had made the same constitutional arguments against the facial validity of the Act in the Supreme Court as he had made in the three-judge court. Writing for the Court, Justice Brennan reached the same conclusion as the three-judge court that each claim was without merit, although his analysis differed somewhat on some questions.

The court rejected Mr. Nixon's assertion that the Act violated the separation of powers doctrine in that it infringed upon the President's right to control the operations of his office, and pointed out that neither former President Ford nor President Carter had sup-

ported this claim, and that under the Act the materials would remain at all times within the executive branch. Furthermore, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the executive branch, such as the Freedom of Information Act, and such regulation of materials generated in the executive branch has never been deemed to be an invasion of its autonomy. As for Mr. Nixon's "more narrowly defined claim that the Presidential privilege shields these records from archival scrutiny," the Court rejected the view that only the incumbent President may exercise the privilege, adding:

> [W]e think that the Solicitor General states the sounder view, and we adopt it:
>
> > "This Court held in *United States* v. *Nixon,* [418 U.S. 683 (1974)] that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure." [Brief for Federal Appellees 33.] [Slip Opinion at 20–21.]

But, the court noted, again the fact that neither President Ford nor President Carter supported Mr. Nixon's claims detracted from his contention that the Act impermissibly intruded into the executive function. Besides, said the Court, clearly Mr. Nixon may assert executive privilege only as to those items which fall within the scope of the privilege recognized in *United States* v. *Nixon,* 418 U.S. 683 (1974), and that means it would apply at most to only a small portion of the documents and recordings held in custody. In addition, the Court noted that all it need rule on at this time was to what extent an initial screening and cataloging by Government archivists would infringe upon the privilege, and that all Presidents since Herbert Hoover had put their papers into Presidential libraries where they were subject to eventual disclosure. The Court concluded that the screening process contemplated by the Act did not constitute a more severe intrusion of Presidential confidentiality than the *in camera* inspection approved in *United States* v. *Nixon,* and that if the guidelines adopted for review proved inadequate to safeguard Mr. Nixon's rights or to prevent the usurpation of executive powers, they could later be challenged in a specific factual context.

As for Mr. Nixon's claim that the Act violates his rights of expression and privacy under the First, Fourth, and Fifth Amendments, the Court found that:

> appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the

> Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, see Sec. 104(a)(7), the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by "a host of persons," [Brief for Appellant 150], we are compelled to agree with the District Court that appellant's privacy claim is without merit. [Slip Opinion at 37–38.]

The Court also agreed with the three-judge court that Mr. Nixon had a legitimate First Amendment rights claim that disclosure of the contents of certain conversations might cause some individuals to refuse to associate with him and would prevent him from being able to take inconsistent positions in the future. However, the Court also agreed that there was no reason to believe that his right to remove some of the politically sensitive documents before screening would not be protected by the regulations which are to be adopted.

Finally the Court addressed Mr. Nixon's claim that the Act was an unconstitutional bill of attainder proscribed by Article I, Section 9 of the United States Constitution. In concluding that the Act was not a bill of attainder, the Court said:

> Appellant's characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainded whenever it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the law-makers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which it finds burdensome may subjectively feel, and can complain, that it is being subjected to unwarranted punishment. *United States* v. *Lovett,* [328 U.S. 303, 324 (1946)] (Frankfurter, J., concurring). However, expansive is the prohibition against bills of attainder, it surely was not intended to serve as a variant of the Equal Protection Clause, invalidating every act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," *United States* v. *Brown,* [81 U.S. 436, 443 (1965)], it does not do so by

limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

Thus, in the present case, the Act's specificity—the fact that it refers to appellant by name—does not automatically offend the Bill of Attainder Clause. Indeed, viewed in context, the focus of the enactment can be fairly and rationally understood. It is true that Title I deals exclusively with appellant's papers. But Title II casts a wider net by establishing a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials. In this light, congress' action to preserve only appellant's records is easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention. The Presidential papers of all former Presidents from Hoover to Johnson were already housed in functioning Presidential libraries. Congress had reason for concern solely with the preservation of appellant's materials, for he alone had entered into a depository agreement, the Nixon-Sampson agreement, which by terms called for the destruction of certain of the materials. Indeed, as the Government argues, "appellant's depository agreement * * * created an imminent danger that the tape recordings would be destroyed if appellant, who had contracted phlebitis, were to die." [Brief for Federal Appellee 41.] In short, appellant constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors. [Slip Opinion at 42–45. (footnote omitted).]

In addition, said the Court, this Act could not be a bill of attainder because, even if the specificity element were present, it lacked the forbidden legislative punishment aspect, which is something more than the possible burdensome consequences imposed by the Act upon Mr. Nixon.

Justice Stevens concurred in the opinion for the Court, but said the Act raised serious questions under the Bill of Attainder Clause. However, because Mr. Nixon resigned his office under unique circumstances and accepted a pardon for offenses committed in office. Justice Stevens stated that Mr. Nixon had put himself in a different class from all other Presidents and constituted, a legitimate "class of one." Limiting himself to this case, and emphasizing that in his view this case is not a precedent for future legislation which is limited to one occupant rather than the Office of President, Justice Stevens voted to affirm the three-judge court's decision.

Justice White concurred in all of the opinion of the Court except that part dealing with the bill of attainder claim, and agreed in the result reached by the Court on that claim because he believed the Act is not a bill of attainder in that it does not prescribe any

punishment. He also concluded that contrary to the court's decision, all purely private materials should be returned to Mr. Nixon immediately, even if they have historical significance, since he does not believe that the Government is entitled to Mr. Nixon's purely private communications merely because it wants to preserve them and offers compensation.

Justice Powell concurred in the judgment of the Court and in all parts of its opinion except those dealing with Mr. Nixon's claims relating to privacy and the Bill of Attainder Clause, because he was uncertain as to the reach of the discussion by the Court of the competing constitutional interests implicated by the Act. For reasons different from the majority's he concluded that the Act is consistent on its face with the separation of powers doctrine. He first concluded that Congress had not acted beyond the scope of its constitutionally enumerated powers. This legislation serves the investigative and informative needs of Congress he said, and it did not assume executive branch functions. As to the argument that the Act impaired the Presidential privilege of receiving confidential communications, Justice Powell concluded that the fact that former President Ford, while he was in office, and now President Carter had both expressed the view that the Act furthered rather than hindered effective execution of the laws was dispositive of this issue for Justice Powell.

Justice Blackmun concurred in the decision of the Court for the same reasons as Justice Powell, but did not join in Justice Powell's opinion because for Justice Blackmun the opinions of the incumbent Presidents were not dispositive. He agreed their opinions were entitled to serious consideration, but pointed out that political realities and the often open hostilities between incoming and outgoing administrations can influence a President's opinions.

Chief Justice Burger dissented from the opinion and all conclusions of the Court. Title I of the Act violates the separation of powers doctrine in three ways, he said: first, Congress is compelling a President in the conduct of his office by forcing him to hand over his papers to the head of the GSA—a legislatively created agency; second, it is an attempt by Congress to use executive, not legislative powers, by gaining control of executive materials, and third, it makes a sweeping modification of the historical practice and constitutional privilege of confidentiality every President has enjoyed since 1789. Furthermore, the Chief Justice stated that he did not believe that the fact that the Act applies to only one President who has left office, justified what would otherwise be unconstitutional if it applied to an incumbent. In addition, Title I breaches the need for confidentiality of advice given to the President, said the Chief Justice, and he predicted that the Court's decision would force advisers to future Presidents to be circumspect in articulating their views to the President.

He also concluded that Title I intruded upon Mr. Nixon's right to privacy, violating the Fourth Amendment since it is a general warrant, and violating the First Amendment's freedom of speech and freedom of association provisions.

Finally, the Chief Justice stated that in his opinion the Act does violate the Bill of Attainder Clause, as it meets both criteria of a

bill of attainder by singling out an individual and by meting out punishment to him.

Justice Rehnquist also dissented, but since he believed the Act clearly violates the separation of powers doctrine, he limited his opinion to that issue. He concluded that the Act violated separation of powers in that (1) it hinders the communications of a President will receive from advisers, foreign heads of state and ambassadors, Members of Congress, and others who deal with the White House, (2) it hinders the necessary flow of information to and from future Presidents, and (3) it intrudes upon the effective discharge by the President of his duties, which intrusion, when balanced against the asserted interests of Congress fostered by the Act, cannot permit the Act to be sustained.

On August 15, 1977, defendants moved to dismiss the consolidated cases as moot, in view of the Supreme Court's decision in *Nixon* v. *Administrator of General Services.*

The consolidated cases were dismissed as moot by District Judge Robinson in an Order and accompanying Memorandum on September 21, 1977. The Memorandum stated that no further examination of the ownership of the Presidential materials was necessary since the holding of the Supreme Court in *Nixon* v. *Administrator of General Services* had resolved that question. Resolution of the issue of access to the Presidential materials under the Freedom of Information Act was also held to be inappropriate within the context of the consolidated cases since the Preservation Act establishes a comprehensive scheme governing all access to Presidential material.

A notice of appeal from the order dismissing the consolidated cases was filed on November 18, 1977 by plaintiffs' Reporters Committee for Freedom of the Press, *et al.*

On December 5, 1977, plaintiff-intervenor Woods moved the District Court to vacate the December 5, 1975 stay of its order of December 2, 1975 releasing to plaintiff-intervenor Woods her papers and materials within the custody of the Federal defendants.

Status.—**The consolidated cases are pending before the U.S. Court of Appeals for the District of Columbia. The appeal of the District Court's decision regarding Miss Woods' material is also pending before the court. Miss Woods' motion to vacate the District Court's stay is pending before the District Court.**

The complete text of Judge Robinson's memorandum of September 21, 1977 appears in the "Decisions" section of this report at 233.

The complete text of the decisions of the Court of Appeals and of Judge Richey are printed in the report of *Court Proceedings and Actions of Vital Interest to the Congress,* April 15, 1975.

The complete text of the opinion of the three-judge District Court is printed in the report of *Court Proceedings and Actions of Vital Interest to the Congress,* April 15, 1976.

The complete text of the Supreme Court's opinion is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.

Atkins* v. *United States

No. 77-214 (U.S. Supreme Court)

Brief.—Plaintiffs in these cases are 140 judges of United States District Courts and United States Courts of Appeals. Filed in the United States Court of Claims on March 25, 1976, the complaint is based on Article III, Section 1 of the Constitution of the United States which states that "The Judges, both of the supreme and inferior Courts, shall * * * receive for their Services, a Compensation which shall not be diminished during their Continuance in Office."

The complaint asserts that from March 15, 1969 to October 1, 1975, the nominal salaries of judges on both District and Circuit Court levels remained the same, but that their compensation was actually greatly diminished because of inflation; that in 1973, the Commission on Executive, Legislative, and Judicial Salaries ("Commission"), pursuant to the Federal Salary Act of 1967 (2 U.S.C. § 351 *et seq.*), recommended to the President that judicial salaries be increased by 25 percent to offset the effects of inflation from 1969 to that time, but that then-President Nixon rejected that proposal and instead recommended increases of 7½ percent effective each March from 1974 to 1976; and that even these smaller increases were prevented from being implemented by a "one-House veto" by the Senate.

The plaintiffs allege as a first cause of action that Article III, Section 1 of the Constitution precludes the legislative and executive branches from reducing, either directly or indirectly, the real value of judicial salaries and obligates those branches of the Federal Government to take action to prevent diminution of judicial compensation resulting from inflation.

As a second cause of action, the complaint states that the Federal Salary Act of 1967 requires the President to submit to the Congress every fourth year proposals for salary adjustments for the Federal judiciary. President Nixon did this in 1974, and then, pursuant to 2 U.S.C. § 359(1)(B), the Senate passed Senate Resolution 293 on March 16, 1974, which vetoed the recommendations. The plaintiffs allege that this was an unlawful, unconstitutional, and void exercise by the legislative branch of Executive power reserved by Article II, Section 1 to the President, and that to give effect to this action would also violate Article I, Section 1, which states that the legislative power is vested in both Houses, and Article I, Section 7, which allows the President the opportunity to veto acts of Congress.

The plaintiff judges asked the court to "vitiate Congress alleged disobedience to the Constitution by awarding them backpay in order to equalize the 'real dollar value' of their salary payments since 1969 as measured by the CPI [Consumer Price Index], with the level of compensation that Congress set for them in that year." [*Atkins* v. *United States,* 556 F.2d 1028, 1040 (Ct. Cl. 1977).]

During oral argument before the Court of Claims, Rex E. Lee, at that time Assistant Attorney General, Civil Divison, Department of Justice, "admitted that 2 U.S.C. § 359(1)(B) is unconstitutional." [Brief *Amicus Curiae* on Behalf of Frank Thompson, Jr., Chairman, Committee on House Administration, United States House of Representatives, *Atkins* v. *United States*, Numbers 41-76, 132-76, 357-76 (Ct. Cl.), filed November 23, 1976.]

The clerk of the Court of Claims, in a letter dated October 14, 1976, notified the President of the Senate and the Speaker of the

House of Representatives of the action of Mr. Lee and invited them to submit responses.

The Speaker of the House directed that a brief *amicus curiae* be filed on behalf of Representative Frank Thompson, the Chairman of the Committee on House Administration. This was done on November 23, 1976. In its introduction, the brief alleged that there had been no effort by counsel for the United States to preserve and defend the constitutionality of § 359(1)(B); that there was substantial question as to whether the Justice Department, acting in the name of the United States, could admit or concede that any law enacted by Congress and signed by the President was unconstitutional, especially where no express constitutional duty to see that the laws are faithfully executed, which duty runs to the executive departments, and which duty was breached in this case; and that the Department of Justice should have defended the validity of the statute or, if it was not going to do this, it should have notified Congress so that Congress might defend the statute. As constitutional arguments for upholding the validity of § 359(1)(B), the House argued that the Constitution commits to the Congress the exclusive power to ascertain judicial compensation and permits it to exercise this power by any means "necessary and proper"; that § 359(1)(B) of the Salary Act of 1967, being one of the means deemed "necessary and proper," is not prohibited by the separation of powers doctrine or any provision of the Constitution; that plaintiffs' second cause of action is nonjusticiable since it involves a political question; and that the pattern of cooperative accommodations between Congress and the Executive would be seriously jeopardized were the "one-House veto" to be declared constitutionally invalid.

As President of the Senate, then-Vice President Nelson A. Rockefeller also submitted a brief *amicus curiae* on November 22, 1976. In defense of the validity of the statute, the brief stated that the manner and means selected by Congress for determining judicial salaries is within its legislative powers; the statutory scheme they selected is consistent with the separation of powers doctrine; the effect of the actions by the Congress and the President was not to contravene the constitutional duties of either, but rather was to allow Congress to obtain information which prevents the President from raising salaries unilaterally and that on any law the President proposes, if one House doesn't sustain his proposal, it doesn't become law; that legislative disapproval does not constitute administration of a statute; and that if the one-House veto provisions of the Federal Salary Act of 1967 are held to be unconstitutional, the rest of the Act is also void, as these provisions are not severable.

On May 18, 1977, the Court of Claims issued its decision.

The court had first to address the question of whether it was disqualified from hearing the case because of the Judicial Disqualification Act, 28 U.S.C. § 455 and the requirements of Canon 3C(1)(C) of the Code of Judicial Conduct of the American Bar Association adopted by the Judicial Conference of the United States. The court decided that the "rule of necessity", which states that a judge is not disqualified from trying a case even where he has a personal interest in the matter at issue if there is no other judge available to

hear and decide the case, authorized and required them to hear the case.

The majority next turned to the question of whether the failure of Congress to raise Federal judicial salaries by more than 5 percent since 1969, in the face of severe economic inflation in the interim, violates Article III, Section 1, of the Constitution, and whether, as the plaintiffs asserted, the Compensation Clause not only protected them from substantial diminution of the purchasing power of their salaries, but is "self-executing" in so doing, *i.e.*, the clause itself creates a claim against the Treasury whether or not Congress had acted.

The executive branch had responded by asserting that the court lacks jurisdiction in this case "precisely because it [the Compensation Clause] is not self-executing, and in any event because it cannot be the basis for a claim for money beyond that authorized by statute at some point during a sitting judge tenure." [556 F.2d at 1043.]

This Government argument the court rejected noting:

> If discriminatory treatment is aimed at the judiciary by the political branches to effect what is obviously an attack on the tenure or decisional freedom of the judges, it should not assume that Article III does not mandate the fashioning of whatever relief is necessary to alleviate the situation. [456 F.2d 1049.]

In addressing the guaranteed real income assertion made by the plaintiffs the court noted that earlier Supreme Court decisions had declared that:

> Indirect, nondiscriminatory diminishments of judicial compensation, those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the Compensation Clause * * * . [556 F.2d at 1045.]

The majority noted however:

> Plaintiffs, however, contend not only that their salaries have, by inflation and by congressional neglect of their plight and by congressional action on behalf of others, been diminished in a discriminatory fashion and to an extent that compromises the autonomy of their department, but also that the "compensation" which the Clause promises them will not be lowered in a compensation in real dollars, not nominal ones. They assert that inflation and congressional unwillingness to adjust their salaries to mitigate the effects of it have caused a decline in that supposedly guaranteed real income level, thus giving them a right to recover in this action. [556 F.2d at 1045.]

The plaintiffs first argued that the debates of the Constitutional Convention showed that the Framers intended to insure by the Compensation Clause not merely a fixed nominal salary but a

guaranteed "real income" level. Following an analysis of the Convention debate the court declared:

> It must be concluded then, that the Constitution in granting Congress the power and duty to fix judicial compensation and in not forbidding it to raise that compensation from time to time, left to the sound discretion of the political branches the adjustment of the judges' salaries as economic and other circumstances—inflation, higher living standards, need for better judges more difficult cases, and greater caseload—required. [556 F.2d at 1048.]

As to the Government's assertion that the Compensation Clause is not "self-executing," the court noted:

> By this is meant, defendant explains, that the Clause itself requires Congress to act in the first instance to set the judges' nominal dollar salaries, before the Clause's protection comes into play. If Congress does not alter the nominal dollar figures, reasons defendant, no help can be forthcoming from the Clause for plaintiff's benefit beyond that which they enjoy under the existing salary levels. [556 F.2d at 1049.]

To this the court replied:

> The Clause's terms do not compel endorsement of defendant's restrictive view that the provision is not self-executing, and indeed its broad and benign purpose, fundamental to the constitutional system of checks and balances, leads to the contrary conclusion. Defendant's objection cannot stand to bar judicial relief pursuant to the Clause where a proper claim for relief is established. [556 F.2d at 1049.]

As to plaintiffs' argument that the court, as a matter of law, must allow judges greater compensation in order to attract individuals of high caliber to the Federal bench the court concluded:

> Certainly, if less than adequate salaries could be set by Congress in the first place, the real value of which alone is protected from diminishment by the Clause, it is difficult to understand how one can find in the Clause a promise of compensation adequate to lead those high in professional standing to quit the practice of law in favor of judicial posts. In addition, deciding upon the level of salary "adequate" to attract "quality" personnel is somewhat problematic—it is first necessary to define "quality" and to determine what degree of it is sought after. The Constitution obviously gives no answer to this problem, nor does it instruct how much an otherwise adequate salary may properly be discounted to allow for the honor and public service "sacrifice" that historically have accompanied judicial office. We take notice of the fact, however, that the so-called "psychic income" some attribute to prestige a federal judgeship is not legal tender for the payment of bills judges incur just the same as do other citizens. Yet,

> these are matters for Congress to resolve, and no claim for relief here may be founded only on plaintiffs' equation of salary adequacy and personnel quality. [556 F.2d at 1050.]

The court proceeded to reject two other arguments offered by the plaintiffs in support of their claim that the Compensation Clause entitles them to a real dollar compensation increase absent an assertion of discriminatory attack. First, the court rejected the assertion that the term "compensation" as applied to remuneration for judges inherently implied the idea of payment in "real value" as opposed to payments in nominal amounts. Next, the court rejected the plaintiffs' assertion that absent some linkage of judicial salaries to an inflation index judges would be subjected to "feelings of dependence upon the legislature for the maintenance of their compensation." [556 F.2d at 1051.]

To this assertion the court replied:

> The answer is that, while this may be true, no violation of the Constitution results. The Compensation Clause, though established in large part to guarantee the independence of the judicial department, permits and even contemplates a "feeling of dependence upon the legislature" to an extent. The Clause itself allows Congress to vary the nominal dollar value of judges' salaries by way of increase. [556 F.2d at 1051.]

The court also rejected the Government's argument that the claim for increased compensation required by inflation presents a political question and is therefore nonjusticiable. In support of this assertion the Government had asserted:

> that a decision in plaintiffs' favor on count I would (1) constitute a major incursion into the compensation-fixing responsibilities of the political branches, (2) involve the court in an area devoid of judicially discoverable and manageable standards for resolution, and (3) amount to the setting of judicial salaries by judges. [556 F.2d at 1052.]

Taking each point sequentially the court replied:

> Defendant's first point, that a judgment giving plaintiffs compensation in excess of that set by statute would impermissibly intrude into the responsibilities of the President and Congress, seems based on the notion that the Constitution commits the fixing of judicial compensation only to the discretion of the political branches. It is true that the Compensation Clause envisages the participation of both the legislative and executive branches in setting judges' salaries. However, as should by now be plain, the Clause goes on to declare that those salaries, once set, "shall not be diminished" while the judges continue in office. How can it be said that the matter of judicial compensation is totally committed by the Clause to determination by Congress and the President, without opportunity for judicial intervention, when the Clause contains

language that pointedly limits the kind of determination they may make? [556 F.2d at 1052.]

* * * * * * *

Likewise, we cannot agree that plaintiffs' claim should be ruled nonjusticiable for want of judicially discoverable and manageable standards. The standards for determining the existence of a discriminatory attack on the judiciary can hardly be called difficult to discern or apply. The federal courts have amassed considerable experience in discrimination claims of many varieties under the fifth and 14th amendments. [556 F.2d at 1053.]

* * * * * * *

The molding of relief may well present more of a problem. However, considering the imponderables involved in fashioning relief in such areas as reapportionment, school desegregation, antitrust, and Indian land rights, in all of which areas the courts have undertaken in the recent past to relieve violations of rights, the computation of a recovery for plaintiffs in the event they establish their discriminatory attack claim would be relatively simple. [556 F.2d at 1053.]

* * * * * * *

The basis in the political question doctrine of defendant's third argument for nonjusticiability, that judges would be engaged in the task of setting their own salaries, is difficult to perceive. In part this seems to recall defendant's original disqualification objection, disposed of in the discussion under part I of this opinion. To the extent it is an independent objection, it has already been answered in our treatment of defendant's first criticism, that a decision on Count I would amount to an incursion into the responsibilities of the political branches. In disposing of a discriminatory attack claim in plaintiffs' favor, the court would ultimately undertake to adjust judicial salaries. However, the court would not be doing so in a vacuum; informing and guiding the relief settled upon would be not only the surrounding economic circumstances, judicially proved, but also the treatment accorded to other classes, not subject to discrimination, by the President and Congress. The initial policy determinations regarding the real compensation that judges should receive would always remain with the political branches. Defendant's third point, if it has any substance, fails to convince us that this case presents a nonjusticiable political question. [556 F.2d at 1053–1054.]

The court then considered whether the allegations made by the plaintiff showed a discriminatory attack upon the judiciary by the other two branches and if so whether such discrimination is redressable in the action before it.

On this point the court stated:

> To make out a case, plaintiffs need not show a direct diminution of judicial compensation, but the indirect diminution that they complain of must be of a character discriminatory against judges and, paraphrasing Justice Holmes, must work in a manner to attack their independence as judges. Plaintiffs need to demonstrate the existence of a plan fashioned by the political branches, or at least of gross neglect on their part, ineluctably operating to punish the judges qua judges, or to drive them from office despite the Constitution's guarantee of tenure in office, "during good Behaviour." U.S. Const. art. III, Sec. 1 (hereinafter Tenure Clause). Whether, to merit relief the discrimination must be intentional, or may be in effect only, we need not decide now. [556 F.2d at 1054.]

Noting the interrelationship between the Compensation Clause and the Tenure Clause, the court, citing Justice Story's commentaries on the Constitution, stated:

> Without the one provision, he said, guaranteeing an undiminished compensation, "the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery." 2 STORY ON THE CONSTITUTION § 1628 (5th ed. 1891). The two clauses are inextricably tied to one another in pursuit of securing judicial independence, and to allow the indirect diminution of judges salaries to accomplish what the political branches are forbidden to do directly under the Tenure Clause would be to sanction a deplorable ruse at the expense of constitutional principle. If plaintiffs can demonstrate that the 7-year freeze on federal judicial pay has brought about or imminently threatens to bring about the general demise of tenure in judicial office, for want of means on the part of judges to meet the cost of living, they will have gone far toward showing the compromise of the Tenure Clause's integrity in the very fashion that its twin, the Compensation Clause, was designed to prevent, and thus will have gone far to make their case of an assault on judicial independence by economic duress. [556 F.2d at 1055.]

The court noted that the plaintiffs could not show any such "mass exodus" of judges from the Federal bench.

As further evidence that no discriminatory attack against the judiciary was underway, the court pointed to the general salary freezes in the executive and legislative branches. In this regard the court noted a general antagonism in the public at large against salary increases for high Government officials as well as the judgment of Congress and the President through the Salary Commission that the salaries in the three branches of Government should be linked.

As a second count the plaintiffs had attacked the one-House veto as violative of:

1. Article I, Section 1 of the United States Constitution, which vests the legislative power in a "bicameral legislature" not in one House alone.

2. Article I, Section 7 which vests in the President veto power over every order, resolution or vote to which the concurrence of both the House and Senate is necessary.

3. Article II, Section 7 which vests all executive power in the President.

An analysis of the constitutionality of the one-House veto in the Salary Act, the court noted, calls for two fundamental inquiries:

1. Does it conflict with the constitutional powers and obligations of Congress as a whole acting through both Houses?

2. Does it invalidly intrude on the constitutional sphere of the President?

The answers to these questions, the court concluded, are dominated by several special factors:

1. The subject matter (official pay) is at the heart of Congress own competence and concern.

2. The fixing of pay scales may be delegated to the President.

3. In making the delegation Congress retained an interest in its own pay and the relationship of its pay to judges and other officials.

4. Although it wished to delegate authority, Congress wanted to retain "a large measure of control" over the pay levels to be set.

5. The President's salary proposals do not, even when they become law, regulate any person either actually or potentially. The recommendations do not affect the rights of others nor do they restrict any preexisting rights or privileges of anyone other than those whose pay is thereby established.

The court noted that the constitutional underpinning of 359(1)(B), the one-House veto device used here, is a combination of Article I, Section 1, which vests legislative power in the Congress, and Article I, Section 8, clause 18, the so-called "Necessary and Proper" clause:

> "Article I, Section 1, endows Congress with the broadest reach of power in this instance, so long as executive functions are not infringed and presidential veto rights not compromised, because the subject of the one-House veto, the salaries of judges and congressmen and other Government officers, is at the center of the congressional sphere. On this foundation, the necessary and proper clause authorizes Congress to choose, first, to delegate the initial power to make proposals to the President, and, then, to select for itself the appropriate method for checking and monitoring the President's action." [556 F.2d at 1061.]

* * * * * * *

> "Where there has been no violation of separation-of-powers principles or of any specific provision of the Constitution, the necessary and proper clause can authorize a given method of obtaining a desired result, as well as ground a substantive provision (as in *McCulloch).* We therefore see no reason why the one-House veto should fail of authorization unless one of plaintiffs' three criticisms of the device listed above establishes such a violation." [556 F.2d at 1061.]

The court noted that the allegation that the one-House veto violates the bicameral nature of the legislative process established by Article I, Section 1 was based on plaintiffs' syllogism:

1. Congress possesses only those powers delegated by the Constitution.
2. The Constitution delegates only legislative power to Congress.
3. All legislative power is delegated to both Houses, acting bicamerally.
4. The one-House veto is either a legislative act or it is not.
5. If it is not legislative it is beyond the power of Congress.
6. If it is legislative, Congress must follow the constitutionally prescribed legislative route which involved action by both Houses.

In considering the plaintiffs' arguments, the court concluded that it must initially determine whether either House may perform some actions without concurrence of the other body. If so, does the legislative veto provision involved in this case fall within that class of acts which may properly be carried out unicamerally?

First, the court declared that legislative action need not always be bicameral. The court noted that the purpose of Article I, Section 1 is to locate in the Congress rather than in the executive or the judiciary the central source of legislative authority. It declared that "the clause does not itself, as a textual matter, mechanically direct the manner in which Congress must exercise the legislative power." [556 F.2d at 1062.] The court added that while Article I, Section 1 requires Congress to confine itself to legislative matters, the clause does allow some measure of leeway for the manner in which Congress fulfills its legislative function.

Turning to the second element of this consideration the court decided that the one-House veto here in controversy—being confined to the matter of salaries traditionally within the peculiar provenance of the legislative branch, not impinging upon Presidential functions or veto rights, and having no effect upon persons other than those whose salaries are at issue—does not fall within the class of acts that Congress must perform through the concurrence of both Houses, but rather is properly exercisable by a single House. [556 F.2d at 1063.]

The court noted that in this case the one-House veto did not make new law, but rather preserved the *status quo:*

> [h]ad neither House approved a resolution withholding effectiveness from the new salary rates, they would indeed have become the law with the running of time, but it is essential to realize that they would have done so, and received the authority for their effectiveness, not in and of themselves, but solely through the mandate of the Salary Act, which has a statute enacted by both Houses of Congress and signed by the President. [556 F.2d at 1063.]

The Salary Act, by its own terms provided that the President's recommendations would become effective only "absent objection from either House of Congress." [556 F.2d at 1063.]

The court further noted that in this context, the one-House veto is not "a device employed for the circumvention of the Constitu-

tion's scheme for the enactment of statutes." [556 F.2d at 1065.] Nor does it expand or contract the powers of either House or of the Congress.

The second constitutional argument presented by the plaintiffs was that the one-House veto usurps the President's constitutional right to have sole veto power over the law. On this point the court concluded that the President's veto power related only to those legislative actions requiring the concurrence of both Houses and since the one-House veto was not such a legislative action, the language of the clause requiring that legislation be presented to the President is not applicable in this instance. The court noted:

> "As for the policy of preserving the President's veto power vis-a-vis Congress, the problem handled by this particular Salary Act reflects perhaps the least need for such a veto with respect to rejection of Presidential pay recommendations." [556 F.2d at 1065.]

The court also noted that the President "is not forced to recommend any increase or decrease [in pay levels]; he can simply propose no change in the existing law. If he does that a statute will be necessary to modify the rates of pay (in the case of judges only to the extent constitutionally allowable). All in all, the possibility of undue legislative encroachment on the Executive—the focus of the Framers' stress on the veto power—is minimal in this situation." [556 F.2d at 1065.]

The third assault by the plaintiffs upon the constitutionality of the one-House veto is their assertion that it is violative of the "separation of powers" doctrine. The plaintiff's principle objections were:

1. The legislative power to adjust salaries, once delegated, becomes an Executive power. This argument the court rejected concluding that "when Congress delegates authority to the kind we have here to a member of the executive branch, the delegation does not convert the authority granted into irrevocable executive power, because in exercising the delegated functions, the executive officer merely acts as an agent of the legislative branch of the government." [556 F.2d at 1068.]

2. The legislative veto in the Act abrogates the President's constitutional duty to faithfully execute the laws. To this assertion the majority responded that "[i]n decrying the legislative veto as an abrogation of this constitutional 'power', plaintiffs propose an expansionist construction of this provision, conferring on the President implied powers which in some way are transgressed by the one-House veto in the Salary Act." On this point the court concluded: "Whatever power the President exercises under the Salary Act comes not from Article II, but from the delegation of Congress pursuant to the necessary and proper clause." [556 F.2d at 1068.]

3. "Congress can delegate power and can even delegate power with conditions, but it cannot affix an unconstitutional condition upon the delegation, *i.e.*, review or veto by one-House." [556 F.2d at 1065.] To this the majority replied: "The doctrine of unconstitutional condition is in no way pertinent to this case because as we have suggested repeatedly, the ultimate power with respect to

judges' and others' salaries—and that is all that is involved here—is vested by the Constitution in Congress and not in the President." [556 F.2d at 1068.]

4. "The legislative veto involves Congress in day to day administration and hence expands the role of legislators into administrators in violation of Article I, Section 6, Clause 2." [556 F.2d at 1066.] That provision precludes a Member of Congress "during the time for which he was elected [from being] appointed to any civil office under the authority of the United States which shall have been created, or the Emoluments whereof shall have been increased 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."

This argument the court rejected stating that the weakness of plaintiff's "Office" argument is found in the reason for the adoption of Article I, Section 6. This provision was generated out of a fear that corruption would result if the legislature multiplied the number or increased the salaries of public officials for the benefit of its own members. The legislative veto creates no new offices for Members of Congress.

In pressing the argument on this point, the plaintiffs had in part relied on the Supreme Court's recent opinion in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), in which the validity of the Federal Election Campaign Act had been challenged. The Court declared: "plaintiffs reliance on *Buckley* v. *Valeo, supra,* is misplaced. There the Supreme Court held that because of the broad enforcement power given by the Congress to the Federal Election Commission, Congress was precluded from vesting in itself the appointment power over Commission members. The decision is based squarely on the appointment power being constitutionally lodged in the Executive under Article II, Section 2, clause 2. Manifestly Congress has nowhere in the Salary Act attempted to exercise the power of appointment." [556 F.2d at 1070.]

In a separate opinion, Judge Nichols concurred in the reasoning and results of the court on the one-House veto issue, and concurred in the result reached by the court on the inflation and salary diminution claim, but for different reasons.

He first discussed the question of whether or not the court had jurisdiction to hear the case. He said that two barriers exist which the plaintiffs must surmount. The first is statutory—28 U.S.C. § 455, as amended (Supp. V., 1975), which requires the disqualifications of judges in cases where their impartiality might be questioned. While Judge Nichols stated that anyone might reasonably question his impartiality, he concluded that the question of the disqualification of the judges on the Court of Claims could be waived and had been waived by the parties. If, he said, the Court of Claims did not have jurisdiction because of disqualification under 28 U.S.C. § 445, then the fact that no other court could entertain the case did not permit the Court of Claims to entertain it under the "doctrine of necessity" because the Court of Claims is a court of limited jurisdiction.

He declared:

> To me it seems absurd for a court having such limited jurisdiction to invoke a "doctrine of necessity," saying we

must override an unambiguous statutory bar because if we do not, the poor fellows have no remedy. If they have none, they only join a club that has many other members.

The "doctrine of necessity" to my mind exists only for courts of general jurisdiction and cannot be availed of to override unambiguous jurisdictional limits. [*Atkins* v. *United States,* (Nichols, J., concurring); 556 F.2d at 1072.]

Judge Nichols discerned a second jurisdictional barrier in the maxim that no one can sue for the salary of a position, except a salary fixed by law as the salary of the position that individual actually holds, or held until unlawfully removed. Applying this concept to the case before it, Judge Nichols declared that the Court of Claims did not have jurisdiction to decide the action. He also rejected the plaintiffs' contention that their Article III rights are self-executing.

Stating that he recognized that nothing in his concurring opinion could ever be quoted as "the law", Judge Nichols then discussed the merits of the inflation and salary diminution claim.

Congress may well have a duty to offset the effect of inflation on salaries, he reasoned, but just because there is a constitutional violation does not mean it is remediable in court. Congress may have a duty to remedy the constitutional violation itself or widen the jurisdiction of the courts so they may do it, but Congress can not be forced to do either. He believed that Article III was violated by Congress inaction, even including the passage of the Federal Salary Act, and that some kind of damages, even if nominal should be available. However, since he was of the view that the court lacked jurisdiction he would never have reached the merits of this action.

Senior Judge Skelton, with whom Judges Kashiwa and Kunzig joined, wrote an opinion in which they concurred with the majority that the Constitution does not require the executive and legislative branches to take steps to offset the diminution in judicial salaries caused by inflation, but dissented from the majority's holding that the one-House veto is constitutional.

The minority opinion declared that the one-House veto violates (1) Article I, Section 1, which vests the legislative power of the United States in a Congress, and not in one House, (2) Article I, Section 7, clause 3, which reserves to the President the power to veto every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary, (3) Article II, Section 1, which vests all Executive power in the President, and (4) the separation of powers doctrine.

The opinion noted that the first law containing a one-House (or committee) vote was not enacted until 1939, and that every President since Herbert Hoover has been of the opinion that the one-House veto is unconstitutional, and each has been supported in this by his Attorney General. The minority also reviewed statements made by high ranking Government officials, who during their governmental careers had asserted the unconstitutionality of the one-House veto. In addition, the minority noted that:

It is very significant and most persuasive that the 140 able, experienced, and knowledgeable federal judges who

> *filed these suits, together with their distinguished attorney former Supreme Court Justice Arthur Goldberg, all of whom are learned in constitutional law, believe the one-House veto is unconstitutional* as shown by the allegations in their petitions and the arguments in their brief. [556 F.2d at 1077.]

The three judges quoted from Judge MacKinnon's dissent in *Clark* v. *Valeo,* in which he concluded that the one-House veto is unconstitutional because, *inter alia:*

> [it] makes it possible for a bare majority of a quorum (which frequently occurs) in either House of Congress to influence regulations constituting "rules of law," while completely depriving the President, possibly one-House of Congress, and one-third plus one of the members of each House, from exercising legislative power supposedly vested in them by the Constitution. Short reflection upon the enormity of these constitutional violations will convince anyone of the tremendous harm they cause to the basic procedures that the Constitution provides for the enactment of legislation to govern the Nation. [Emphasis in original] [Slip Opinion at 10.] [Quoted in *Atkins* v. *United States;* 556 F.2d at 1078.]

Judge MacKinnon's analysis is important, the minority added, because his is the only opinion written by an appellate judge which has considered the question of the constitutionality of the one-House veto in depth.

Furthermore, the minority was troubled by the fact that Clause B of the Salary Act allows one House to invalidate all or any part of the President's recommendations. They found that:

> the vice of the one-House veto created by Clause B of the Act is compounded by the fact that in exercising such veto by a bare majority of a quorum of either House a small group of Senators or Representatives, or even a larger group, can do so selectively, that is, they can veto "all or part" of the salary adjustments made by the President and there is no recourse or appeal from their decision. In this manner they can dictate, change, or rewrite the salary adjustments made by the President. Not even the President has such an "item veto" nor the security that his veto will not be overridden. Such a system ignores and is contrary to the Constitution and the doctrine of Separation of Powers of our Government. [556 F.2d at 1078–1079.]

The minority also believed that greater weight should have been given to the fact that in arguing the Government's position, Assistant Attorney General Lee conceded at oral argument the unconstitutionality of a one-House veto, and had added that if this were a proper case, nothing would please him more than to have the court so rule. The minority concluded that since Mr. Lee was arguing for the Government, and since 28 U.S.C. § 516 reserves the conduct of this type of litigation to the Justice Department, the Government should be bound by this admission.

The minority then discussed the Salary Act itself. Congress has, the minority noted, the constitutional power to fix the salaries of Federal judges. This power can be delegated and was validly delegated to the President by the Salary Act. Once made, said these judges, the delegated power became Executive in character and remains such until both Houses pass legislation withdrawing it. No such legislative rescission occurred here. They also asserted that while the majority and the statute speak of the President's proposals as "recommendations," it is clear that the meaning and intent of the statute was to delegate to the President the power and authority to set judicial salaries, and not just make recommendations. This was shown by the fact that the President's proposals became law when the salaries set in 1967 and 1977 became effective without any Congressional action. Had they been merely "recommendations," said the minority, they could not have become law without the approval of both Houses of Congress. They further stated that:

> Actually, these salary adjustments could be said to have the status of regulations issued by the heads of the various departments and other executive agencies of the government pursuant to statutes enacted by Congress. Such regulations have the force and effect of law without any action being taken regarding them by Congress. No one would contend that one House of the Congress could invalidate any of such regulation by a simple resolution. [556 F.2d at 1080.]

The minority further declared that since the one-House veto is legislative in character, it violates Article I, Section 1 of the Constitution which provides that all legislative power is vested in a Congress consisting of a Senate and a House of Representatives. The violation occurs because the House not exercising the veto power is deprived of its authority to enact legislation. In addition, Article I, Section 7, clause 3, is violated in that the President is not given an opportunity to approve or veto the legislation. The minority reasoned that assuming *arguendo* that the one-House veto power is not legislative, it is clearly not judicial—but if it is Executive, then its use violates the Constitution, because neither House nor both Houses nor officials of either House can exercise Executive powers, and because Article II, Section 1 provides that all Executive power is vested in the President. In addition, the doctrine of separation of powers is violated.

Finally, the minority disputed the claims of the Congressional *amici* that this was a valid enactment under the "Necessary and Proper" clause. The minority declared:

> The broad interpretation they give to this provision of the Constitution would authorize Congress to enact any and all kinds of legislation that suits its fancy so long as it does not conflict with an express provision of the Constitution. But as the plaintiffs point out, Congress can exclude aliens, but it could not admit aliens on condition that they agree not to exercise free speech. Further, Congress can confer jurisdiction upon the courts, but it cannot confer

> jurisdiction subject to the condition that judicial decisions must first be approved by the Senate Committee on the Judiciary. In other words, whether Congress can condition a delegation of authority depends upon the validity of that particular condition. This clause of the Constitution does not authorize Congress to ignore the bicameral provision of the Constitution, nor the necessity of submitting to the President every resolution to which the concurrence of both Houses are necessary, nor the provision that all executive authority is vested in the President. These provisions of the Constitution, in effect, prohibit the one-House veto, and the "reasonable and necessary" clause does not authorize Congress to ignore or transgress these fundamental provisions of our Constitution. No one can contend that the Constitution authorizes the one-House veto. A reasonable interpretation of its provisions points the other way. [556 F.2d at 1081–1082.]

Having determined that Clause B should have been held unconstitutional, the minority turned to the issue of severability. The test, as they enunciated it, was (1) are the valid provisions of the Act capable of standing alone, and (2) would the legislature have intended them to stand alone without the invalid provisions. Under this test, the minority concluded that Clause B is severable, and the remainder of the Act should continue in full force. They concluded that (1) the absence of a severability clause should not lead to a presumption of inseverability, (2) the legislative history showed that the one-House veto had little importance in the debate and Congress would have passed the Postal Revenue and Federal Salary Act of 1967 without the one-House veto provision, (3) removing Clause B would not end legislative control over judicial salaries because Congress can still pass legislation altering the President's recommendations, and (4) Congress willingly delegated its authority in this area, as witnessed by the Federal Pay Comparability Act of 1970, the Executive Salary Cost of Living Adjustment Act (which extended the provisions of the 1970 Act to judges, among others), and the 1977 pay raise under those acts. Finally, the minority viewed the way one-House veto bills have been treated as being dispositive of the severability issue. As noted earlier, each President since Hoover has stated his belief that the one-House veto is unconstitutional—yet many bills with one-House provisions have been enacted. The minority declared that a President obviously would not sign a bill which contained a provision he believed was unconstitutional if he did not believe that the unconstitutional provision was severable, since he would then in effect be signing into law a bill which would be unconstitutional. Noting that President Johnson believed the one-House veto was unconstitutional, the minority stated that he would only have signed the Federal Salary Act if he believed that the one-House provision was severable, thus allowing the rest of the Act to stand.

The minority next discussed the Government's contention that the Court of Claims lacked jurisdiction because the statute could not be interpreted as "mandating compensation by the Federal

Government for the damages sustained." This argument was based on the claim that Clause B was not severable from the remainder of the act, and therefore, if Clause B is unconstitutional, the whole Act must fall. Since the minority found Clause B severable, they also found the assertion of lack of jurisdiction to be without merit. Furthermore, the minority rejected the Government's contention that no relief could be granted if a portion of the Act must first be declared unconstitutional.

Finally, the minority discussed the defendant's argument that if the court declared the one-House veto unconstitutional the decision should only be applied prospectively. The Government asserted first that Congressional reliance on Clause B should preclude the court from applying the unconstitutionality of the Act to the parties in the case. Congress had used Clause B in 1973 to override the President's pay recommendations. Had the Congress known that Clause B would be declared unconstitutional, they would have passed a statute pursuant to Clause A(1) said the Government. The minority rejected this argument, concluding that Congress would always act according to constitutional methods if the alternative presented is to place reliance on an unconstitutional method rather than on constitutional procedures. To accept defendant's argument would make prospective application the general rule when laws are declared unconstitutional. This would be improper, the minority noted because the Supreme Court had ruled that neither propsective nor retrospective application is automatic, but that each case must be looked at individually. Nor did the minority agree with the defendant that a decision of unconstitutionality should be applied only prospectively because otherwise it would be inequitable to Congress. On the contrary, they said, to apply it only prospectively would be inequitable to the plaintiffs who brought the suit, since it would deny them relief and discourage other plaintiffs from challenging the constitutionality of statutes.

As a second argument for prospectivity, the Government asserted that plaintiffs should not be allowed to attack the constitutionality of an act under which they have received benefits. The minority said that in the cases the defendants cited as supporting this argument the plaintiffs in those actions had attacked the entire legislative scheme under which they had received benefits, whereas in the instant case plaintiff's attack only one provision which has not only not benefited them, but has denied them benefits.

The minority would have remanded the case to the trial judge to determine the amount due the plaintiffs, but would have denied them interest on their claims.

In addition to joining in Judge Skelton's opinion, Judge Kashiwa wrote an opinion concurring in part and dissenting in part. He said that when the President recommends salary increases there are 30 different possibilities in which a House may disapprove them either totally or partially. Of these, 28 are partial disapprovals which allow the other recommendations to become effective—and, argues Judge Kashiwa, these salary changes are changes in the law. Thus

changes are made in the law by the action of only one House, clearly a violation of the Constitution. He submitted:

> that since the provision is unconstitutional in 28 out of 30 instances (93 percent), the entire provision is unconstitutional in toto in that it has been held that where a portion of a statute is unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid on the basis of fortuitous circumstances only in a fraction of the cases it was originally designed to cover, the statue cannot be permitted to stand. [556 F.2d at 1094.]

Judge Kashiwa noted the relationship between the salaries covered by the Salary Act in all three branches of Government, asserting that the one-House veto would be "obviously unconstitutional" if used as a partial veto in rejecting some salary proposals while allowing others to become effective. Therefore, he concluded, Congress would veto all raises, including those it actually believed to be justified, in order to block the raises it felt were not justified. He stated:

> The practical effect of the unconstitutionality in the case of the 28 instances above mentioned is to defeat the purpose of the relationship clauses and to create a situation where deserving persons such as the plaintiffs in the present case will not be given raises which they deserve because a partial veto cannot be made even though the statute as Congress intended allows it. Because of the obvious unconstitutionality in the 28 out of 30 instances and its adverse practical effect and operation as above illustrated, it is my opinion that the single-house veto clause is unconstitutional in toto. [556 F.2d at 1094.]

As for standing to challenge the partial vetoes, Judge Kashiwa said that the plaintiffs had standing because the Government, through Assistant Attorney General Lee, had stated that the one-House veto is unconstitutional, and thus it had waived its objections to plaintiffs' standing to challenge the 28 partial veto possibilities as well as the two total vetoes. He concluded that:

> The loaf (§ 359(1)(B)) in this case is made up of 28 bad slices and of 2 slices which the majority claims are good slices. But the two are so related to the 28 * * * that I am of the opinion that the whole loaf of 30 slices is bad. [556 F.2d at 1096.]

On August 8, 1977, plaintiffs filed a petition for a writ of *certiorari* with the U.S. Supreme Court.

On November 2, 1977, the U.S. House of Representatives agreed to House Resolution 884 which authorized the chairman of the Committee on House Administration to intervene and appear as a party respondent in the case on behalf of the House of Representatives, "to defend therein the constitutional authority of Congress to make all laws as shall be necessary and proper for executing its constitutional powers." [H. Res. 884, 95th Congress.]

On December 9, 1976, U.S. Senators Jacob K. Javits and Edmund S. Muskie filed a brief of *amicus curiae* in support of the petition for writ of *certiorari.* In their brief Senators Javits and Muskie indicated that their sole reason for supporting the petition was to permit the Court to decide the question of the constitutionality of the legislative veto.

Status.—**The petition for writ of *certiorari* is pending before the U.S. Supreme Court.**

The complete text of the opinion of the Court of Claims is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.

McCorkle* v. *United States

No. 77-486 (U.S. Supreme Court)

Brief.—On April 25, 1975, William McCorkle, Jr., a Federal employee, filed this action for damages and a declaratory judgment against the United States, the Chairman of the Civil Service Commission and the Director of the Office of Management and Budget.

In his two count complaint, Mr. McCorkle brought suit on behalf of himself and all U.S. Government employees whose salaries were frozen by operation of 2 U.S.C. § 359(1)(B) and 5 U.S.C. § 5308, the Federal Pay Comparability Act (hereinafter "FPCA").

In seeking to have the FPCA declared unconstitutional, Mr. McCorkle alleged that the Act's effect is to create an invidious discrimination between those Federal employees whose salaries have been frozen at a rate not to exceed the basic pay for Level V of the Executive Schedule and those Federal employees whose salaries have not been frozen. The discrimination claimed by Mr. McCorkle allegedly injures both the employees and the Government. He also asserts that § 5308 "is without any rational justification. Its effect is to cripple the effectiveness of the very group of employees which the FPCA was designed to benefit". [Complaint at 4.]

In his second count, Mr. McCorkle alleges that the procedure whereby pay levels for legislative, judicial and executive officials become effective is unconstitutional in that:

> [T]he delegation of the power to veto the recommendation of the President to either House of Congress and the actual exercise of this power by the Senate is an unconstitutional delegation by Congress of the power to legislate violating the following provisions of the United States Constitution: Article 1, Section 1, vesting all legislative powers in the Congress; Article 1, Section 7, clause 2 providing that bills which pass the House of Representatives and the Senate are to be signed or vetoed by the President and that the vote of two-thirds of the membership of both Houses is required for repassage over veto; and Article 1, Section 7, clause 3 providing for the same procedure as Article 1, Section 7, clause 2 regarding approval or veto of orders, resolutions, or votes. [Complaint at 6.]

On December 31, 1975, the United States filed a motion to dismiss stating:

> Dismissal is sought on two grounds. First, it seems clear under sound constitutional principles that the plaintiffs

cannot demonstrate a legally protectable property interest in salaries as Federal employees beyond the amounts they are currently being paid, and thus without standing to invoke the due process guarantee of the Fifth Amendment. Secondly, it is the defendants' position that the plaintiffs' attack upon the constitutionality of the "one-house" veto provision of 2 U.S.C. § 359(1)(B) does not present a claim upon which this Court can premise meaningful relief, for we demonstrate that the Court, in the event the statutory mechanism for establishing the level of the salary ceiling were stricken, would be unable to judicially adjust that ceiling in plaintiff's favor. Accordingly, plaintiffs' claim in Count II is, in its constitutional posture, nonjusticiable, and alternatively inappropriate for the exercise of the Court's declaratory relief power. [Memorandum in Support of Motion to Dismiss, at 3.]

In a brief order filed March 17, 1976, the District Court granted the motion to dismiss holding that a "rational basis exists for the ceiling" on salaries under the General Services pay systems, and that setting salaries for Federal workers is an inappropriate area for judicial intervention, thus making the constitutional objections of the second count nonjusticiable. [*McCorkle* v. *United States,* Civil Action No. 75-317 (N.D. Va. Mar. 17, 1976).]

Plaintiffs filed a notice of appeal on April 30, 1976. The case was argued before the U.S. Court of Appeals for the Fourth Circuit on December 7, 1976.

On July 26, 1977, the Court of Appeals issued its decision.

As to McCorkle's first cause of action, that the salary schedules invidiously discriminate between employees of the Federal Government, the court concluded that the pay ceiling complained of "bears a reasonable relationship to Congress objective of balancing fiscal responsibility with employee needs. Since it justifiably furthers legitimate purposes identified by Congress, § 5308 does not deny McCorkle and his fellow employees equal protection of the law." [*McCorkle* v. *United States,* No. 76-1479 (4th Cir.); Slip Opinion at 7.]

The court next considered McCorkle's contention that the one-House veto of the President's recommendations for Executive schedule salaries as provided in the Federal Salary Act is unconstitutional. First, the court determined that Congress would not have enacted the Federal Salary Act without the one-House veto provision, thus concluding that the President's power to fix salaries pursuant to the Act is not separable from the restriction on his power set out in the Act, the one-House veto.

The court determined that "[i]f the veto were unconstitutional, as McCorkle contends, the provisions for the President's recommendations to become effective could not stand in isolation. Accordingly, McCorkle would not be entitled to damages and that while the appeal was pending a new pay statute had been passed eliminating the one-House veto provision, the court concluded that a declaratory judgment should be denied "because it would not serve a useful purpose in settling the controversy." [Slip Opinion at 12.]

On September 28, 1977, McCorkle filed a petition for writ of *certiorari* in the U.S. Supreme Court.

Status.—**The petition for writ of *certiorari* is now pending before the U.S. Supreme Court.**

The complete text of the opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.

Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.

No. 76-3712 (Fifth Cir.)

Brief.—Federal Energy Administration (hereinafter "FEA") price control regulations set the maximum price of crude oil at $5.40 per barrel. These regulations expired on August 31, 1975. In mid-August 1975, Citronelle-Mobile Gathering, Inc. (hereinafter "Citmoco") agreed to sell to Gulf Oil Corp. (hereinafter "Gulf"), and Gulf agreed to purchase crude oil at $13 per barrel, the price to be effective from September 1, 1975, until such time as new valid price controls were imposed.

On September 29, 1975, President Gerald R. Ford signed into law the Emergency Petroleum Allocation Act of 1975 (hereinafter "1975 Act") which extended the Emergency Petroleum Allocation Act of 1973 (hereinafter "1973 Act") to November 15, 1975. Section 3 of the 1975 Act said that "It is the intent of the Congress that the regulations promulgated [by the FEA] under the Emergency Petroleum Allocation Act of 1973 shall be effective for the period between August 31, 1975, and the date of enactment of this Act."

Between September 1, 1975 and December 14, 1975, Citmoco made six deliveries of crude oil to Gulf. Gulf paid $13 per barrel for the first delivery, but only $5.40 per barrel for the remaining deliveries. Citmoco filed suit on October 7, 1975, in the United States District Court for the Southern District of Alabama for the difference in the per barrel price of the oil delivered up to that time. On March 11, 1976, they amended their complaint to recover the difference for deliveries made from October 7, 1975 to December 14, 1975. Gulf filed a counterclaim on October 29, 1975, to recover the difference it had paid to Citmoco for the September 1, 1975 delivery for which Gulf had paid $13 per barrel.

Citmoco asserts that there were no valid regulations regarding price controls in effect during the period of these deliveries, the 1973 Act having expired on August 31, 1975, and with it all of the FEA's regulations. They claim that the mere establishment of a new statutory expiration date for a lapsed Executive regulation was not sufficient in and of itself to revive the lapsed regulation, and that it also could not be given retroactive effect.

They also argue that the legislative veto provisions of the 1973 Act and the 1975 Act are unconstitutional. Section 4(g)(z) of the 1973 Act provided that the President, upon finding that there was no longer an emergency shortage of a product, could exempt that product from price controls for 90 days by submitting an amendment to the regulations to the Congress, but the amendment could not take effect until it had been before the Senate for 5 legislative days and the House of Representatives for 5 legislative days, and it

would not take effect if either House passed a resolution disapproving the amendment. Citmoco asserts that these legislative veto provisions infringe upon the President's constitutional veto powers, contravene the specific constitutional provisions concerning the manner in which Congress can exercise its legislative powers, and are contrary to the constitutional doctrine of separation of powers.

The FEA was granted leave to intervene as a party defendant on March 10, 1976.

In an opinion and order filed on August 20, 1976, U.S. District Judge Virgil Pittman entered judgment for Gulf on the complaint and on its counterclaim for the difference it paid for the first delivery. The court found that Congress could and did extend the regulations and made them retroactive to August 31, 1975.

Regarding the issue of the legislative veto, the court said only:

> The Government agrees with the contention that Section 5 is a Congressional veto of Presidential authority [which?] raises a substantial constitutional question but asserts that the plaintiff has no standing to raise this question. This court agrees. [*Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 420 F. Supp. 162, 170 (S.D. Ala. 1976).]

Citmoco appealed the decision to the United States Court of Appeals for the Fifth Circuit on October 4, 1976. In its brief, Citmoco again asserted, *inter alia*, the unconstitutionality of the one-House legislative veto.

Status.—The case is pending before the United States Court of Appeals for the Fifth Circuit.

McClure* v. *Linowitz (Newly Reported Case)

Civil Action No. 77-0436 (D.D.C.)

Brief.—On March 14, 1977, James A. McClure, a United States Senator and George Hansen, a Member of the United States House of Representatives, filed a Complaint for Injunction and Mandamus in the United States District Court for the District of Columbia against Sol Linowitz and "Richard Roe" as Acting Treasurer of the United States. The complaint sought declaratory and injunctive relief to restrain defendant Linowitz from continuing to serve as negotiator for the United States with Panama in regard to the status of the Panama Canal until certain alleged requirements under 22 U.S.C. §§ 901, 901a were complied with, and to restrain the Treasurer from making payments to Linowitz for serving as negotiator. The complaint stated that Linowitz had been appointed by the President of the United States as chief U.S. negotiator of a treaty for the transfer of the Panama Canal and the Canal Zone to the Republic of Panama, that he had already entered upon the performance of that office and that his appointment had not been sent to the Senate for advice and consent. The complaint listed three causes of action. As the first cause of action, it was alleged that senatorial advice and consent was required for Linowitz' appointment pursuant to the Constitution and the reinforcing statute, 22 U.S.C. § 901(c). As the second cause of action it was asserted that the acting Treasurer had paid and would continue to pay Linowitz

for services upon a defective, null and void appointment. As the third cause of action, it was alleged that Linowitz was disqualified to act as negotiator since he had not made and filed a statement of political contributions made during the preceding 4 years, such statement being required by 22 U.S.C. § 901 of each person appointed ambassador or minister.

Also on March 14, 1977, plaintiffs moved for a preliminary injunction precluding Linowitz from acting further as a negotiator pending determination of the action on the merits and staying the Treasurer from making further payments to him as compensation for his negotiation efforts.

On March 16, 1977 the case was reassigned from Judge Green to Judge Flannery, who was already presiding in another case relating to the Panama Canal Treaties, *Helms* v. *Vance,* (formerly Kissinger), CA 77-0083. [A brief of *Helms* v. *Vance* (formerly Kissinger), and the complete text of Findings of Fact and Conclusions of Law by the District Court in that action appears in the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.]

On March 29, 1977, defendants filed a motion to dismiss the action on grounds that the court lacked jurisdiction over the subject matter because plaintiffs' claims were premature and not ripe for adjudication, that plaintiffs lacked standing, and also that the complaint failed to state a claim upon which relief could be granted.

On April 20, 1977, plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss were argued and taken under advisement.

On May 10, 1977, an order granting defendants' motion to dismiss and denying plaintiffs' motion was filed with an accompanying memorandum and opinion. In the memorandum opinion, the court reviewed the applicable law and noted that while 22 U.S.C. § 901(c) provided that no person shall be designated an ambassador or minister unless he has been appointed and confirmed by the Senate in accordance with § 901(a) or as provided by Article II, Section 3 of the Constitution, an exception to this rule is also found in § 901(c), whereby "the personal rank of ambassador or minister may be conferred by the President in connection with special missions for the President of an essentially limited and temporary nature of not exceeding six months." The court described this exception as one which "was apparently prompted by Congress' realization that, in certain cases involving special missions of essentially limited duration, procuring the advice and consent of the Senate might be a burdensome and unnecessary requirement." [Slip Opinion at 4; this report at 242.] The Linowitz appointment was considered to fall within the perimeters wherein the President is empowered by § 901(c) to appoint short term ambassadors and ministers. Plaintiffs' contention that the negotiations by their very nature cannot be "essentially limited and temporary" was rejected by the court, which stated:

> In this case, however, the appointment is limited by its very terms to six months. It is obvious that from the language used by the President that his intention was to

> bring the Linowitz appointment within the exception found in § 901(c). The court cannot challenge the good faith of the President by assuming, without any justification, that the six-month appointment of Linowitz will be allowed to continue for a longer period of time. The presumption of legality which attaches to the President's actions must be particularly strong in the delicate area of treaty negotiations, where the President's power is exclusive. [Slip Opinion at 4, this report at 242.]

The court also rejected plaintiffs' allegation that Linowitz was in violation of § 901a, which requires each person appointed by the President as ambassador or minister to file with the Committee on Foreign Relations of the Senate and the Speaker of the House, at the time of his nomination, a report of political contributions made by such person or members of his immediate family. The court declared that the Congress had not made the disclosure requirements of § 901a applicable to the "special missions" appointment envisioned by § 901(c), since the only contributions required by statute to be disclosed are political contributions as defined in 2 U.S.C. § 431 and it is therefore likely that § 901a was intended to reveal situations in which an ambassadorial appointment might be the result of a campaign contribution. Furthermore, the court noted, Linowitz was appointed without the advice and consent of the Senate, pursuant to § 901(c) and never "nominated" within the meaning of § 901a. Inasmuch as disclosure is required only at the time of "nomination", disclosure was not required in this case.

Turning to the question of ripeness, the court stated that, in the posture of the case at that time, the plaintiffs were compelled to contend that they believe that the negotiations cannot be completed in 6 months and that if the negotiations were still ongoing in 6 months that Linowitz would continue beyond that time in his ambassadorial position. The court stated that:

> In order to satisfy the "case or controversy" requirement of Article III of the Constitution, a complaint must allege a concrete, presently existing dispute. The injury of which plaintiffs complain must be direct and immediate, not conjectural or remote or hypothetical. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Golden* v. *Zwikler,* 394 U.S. 103 (1969); *International Longshoremen's and Warehousemen's Union* v. *Boyd,* 347 U.S. 222 (1954); *Helms* v. *Vance* Civ. No. 77-83 (D.D.C. Mar. 23, 1977). Plaintiffs' injuries are speculative in the purest sense, and their complaint must, therefore, be dismissed as unripe for judicial decision. [Slip Opinion at 6; this report at 244.]

The court also concluded that, as the case then stood, there was serious doubt in regard to the standing of plaintiffs to sue. The court stated that, as with other plaintiffs, the crucial question is whether a Congressional plaintiff seeking to sue in his Congressional capacity must show that he is somehow frustrated in his legislative role by the acts of which he complains. The court stated that:

> Since § 901 does not require the advice and consent of the Senate for an "essentially limited and temporary"

six-month appointment such as that of Linowitz, plaintiff McClure has not been deprived of any opportunity to cast a vote in the matter. Furthermore, neither plaintiff can properly allege that he has been injured by Linowitz' failure to disclose under § 901a since that statute does not require disclosure by one who is serving in such a "temporary" position.

Even if plaintiffs' interpretation of the statutes were correct, and Linowitz were required to disclose his past political contributions and submit to the advice and consent of the Senate, it is difficult to see how plaintiff Hansen, as a Member of the House of Representatives, would have standing to challenge Linowitz' failure to comply with the statute. In their opposition to the motion to dismiss, plaintiffs argue that Linowitz' failure to disclose under § 901a might have some unspecified future votes concerning the as yet unnegotiated treaty. Such an allegation is clearly insufficient, both because it is too speculative and because it does not point to any specific legislative function which would be harmed. See *Harrington* v. *Bush, supra* at 35–57. * * * As the case is currently presented, there has been no allegation of injury in fact sufficient to confer standing upon plaintiff McClure, and certainly not upon plaintiff Hansen. [Slip Opinion at 7; this report at 245.]

In conclusion, the opinion stated that, in light of the court's reading of the statutes involved the case was not ripe for judicial decision, the plaintiffs lacked standing to sue, and therefore the action must be dismissed.

On July 11, 1977, plaintiffs filed a notice of appeal from the order of May 11, 1977.

On August 19, 1977, the plaintiffs filed a notice of motion to withdraw appeal and on the same day, moved the court to dismiss the appeal on the ground that the issues had been rendered moot by subsequent events.

Status.—On August 31, 1977, an order was filed dismissing the appeal.

The complete text of the opinion of the District Court is printed in the "Decisions" section of this report at 239.

Edwards,* v. *Carter (New Case)

Civil No. 77-1733 (D.D.C.)

Brief.—On October 3, 1977, Mickey Edwards, Representative from Oklahoma and 50 other Congressmen filed a "Complaint for Declaratory Judgment" against President Carter. Plaintiffs seek a judgment declaring that submission of the Panama Canal Treaties to the Senate alone would divest the United States of property without the prior concurrence of the entire Congress, thereby precluding the Congressmen from exercising their official responsibilities as Members of the House and requiring that President Carter immediately send the treaties to the House for consideration. The plaintiffs also seek payment of costs incurred in the prosecution of the action.

The Congressmen base their complaint on Article IV, Section 3, clause 2 of the U.S. Constitution which reads as follows:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular States.

In support of their complaint, the plaintiffs note that under the Spooner Act, Public Law 183 of the 57th Congress, First Session, Congress authorized the acquisition of perpetual control of the land for the canal. Pursuant to that Act, President Theodore Roosevelt approved the Hay-Bunau-Varilla convention, under which, the complaint asserts the United States acquired in perpetuity the rights to the territory of the Canal Zone. The complaint also notes that since that time the Canal Zone has been administered at the President's direction in accordance with enabling legislation enacted at various times by Congress.

On November 11, 1977, plaintiffs moved to join nine additional Representatives as plaintiffs, which motion was granted on November 16, 1977.

On December 12, 1977, defendant filed a motion to dismiss.

Status.—The case is pending before the District Court.

State of Idaho* v. *Vance (New Case)

No. 75 Original (United States Supreme Court)

Brief.—On October 13, 1977, the States of Idaho, Iowa, Louisiana, and Nebraska, represented by their Attorneys General filed a motion for leave to file with the United States Supreme Court a complaint in an original action in opposition to the proposed Panama Canal Treaties. Named as defendants were Secretary of State Vance and President Carter. On the same day the same States' plaintiff, along with U.S. Senators Jesse A. Helms, James A. McClure, Strom Thurmond, and Orrin G. Hatch; U.S. Representative Daniel J. Flood; William R. Drummond, a United States citizen and a resident of the Canal Zone; and Theodore L. Sendak, Attorney General of the State of Indiana, filed the complaint, which seeks a judgment declaring:

> 1. The Canal, the rights to use of the Canal Zone and the improvements therein are properties of the United States;
> 2. The Congress has an exclusive constitutional authority to direct their disposition; or
> 3. In the event that the Executive possesses concurrent power under the treaty clause to dispose of such property, a further declaration that such authority may not be exercised (a) in contravention of existing legislation, or (b) so as to deprive citizens of their Constitutional and statutory recourse. [Complaint at 9.]

On September 3, 1977, plaintiffs applied for a preliminary injunction which was denied on September 6, 1977 by Justice Brennan and by Justice Rehnquist on September 7, 1977.

On December 23, 1977, defendants filed a brief in opposition to the motion for leave to file a bill of complaint.

Status.—The case is pending before the U.S. Supreme Court.

Curtis* v. *Carter (New Case)

Civil Action No. 77-2069 (D.D.C.)

Brief.—On December 2, 1977, Senator Carl Curtis, Senator S. I. Hayakawa and Representatives Jack Kemp and Robert Dornan filed this action in the Federal District Court for the District of Columbia seeking to enjoin the President from turning over to the present government of Hungary certain artifacts of historic significance to the people of Hungary. The complaint alleges that legal title to the artifacts, which includes the Crown of Saint Stephen (hereinafter "Crown"), is in the Government of the United States.

The plaintiffs assert that although the President has publicly stated his intention to return the Crown to the People's Republic of Hungary, such an action is beyond his authority. Their complaint asks for an injunction against any transfer of the Crown to the People's Republic of Hungary and for a declaratory judgment that pursuant to Article IV, Section 3, clause 2 of the Constitution, the Congress has the "sole right to dispose of and make all needful rules and regulations respecting the property of the United States." [Complaint at 5.]

On December 15, 1977, defendants moved to dismiss, or in the alternative for summary judgment.

On December 16, 1977, plaintiffs' motion for a preliminary injunction and for a stay of the District Court's order pending appeal were heard and denied. In the memorandum and order denying plaintiffs' motions, Judge June S. Green stated that plaintiffs had failed to meet the standards for issuance of a preliminary injunction as set forth in the controlling cases in the District of Columbia circuit. Judge Green also held that plaintiffs had failed to make a substantial showing of likelihood of success on the merits, noting that:

> Plaintiffs' theories of United States ownership of the Hungarian Coronation Regalia, and in particular, their latest contention that it is captured property of a hostile state, have thus far not been convincing. Hence, the applicability of Article IV, Section 3, Clause 2 and Article II, Section 2 of the United States Constitution is highly questionable. In the absence of any property interest, the return of the Regalia presents a nonjusticiable political question involving the conduct of our foreign relations. The Constitution places these matters exclusively in the hands of the Executive Branch. [Slip Opinion at 2; this report at 248.]

The memorandum also expressed doubts as to the standing of plaintiffs to bring the action, and indicated that the harm to other parties and the public interest outweighed any injury to plaintiffs resulting from nonissuance of the injunction.

On December 16, 1977, plaintiffs filed a notice of appeal and moved the Court of Appeals for an injunction pending appeal.

On December 19, 1977, a *per curiam* order was filed in the Court of Appeals affirming the order of the District Court and ordering, *sua sponte,* that no action be taken by the executive department with respect to the Crown until noon, Wednesday, December 21, 1977, in order to afford the appellants the opportunity to apply to the Supreme Court of the United States for relief.

Status.—Plaintiffs applied to the United States Supreme Court for injunctive relief and the petition was denied December 21, 1977.

The memorandum and order of the District Court is printed in full in the "Decisions" section of this report at 247.

Dole v. ***Carter*** (New Case)

No. 77-2117 (Tenth Cir.)

Brief.—Robert Dole, a United States Senator from Kansas, filed this complaint for declaratory and injunctive relief in the United States District Court for the District of Kansas on December 23, 1977. The complaint named Jimmy Carter, President of the United States as defendant.

In his complaint, Senator Dole seeks, *inter alia,* a declaration of right declaring that the arrangement made by the President to return the Crown of Saint Stephen and associated regalia (hereinafter "Crown and regalia") to the Peoples Republic of Hungary is tantamount to a treaty or treaty modification requiring the Advice and Consent of the Senate pursuant to Article 2, Section 2, of the Constitution of the United States. Senator Dole also seeks preliminary and permanent injunctions restraining the President from delivering the Crown and regalia to the Peoples Republic of Hungary and an order of *mandamus* requiring defendant to seek the advice and consent of the Senate before delivering the Crown and regalia to the Peoples Republic of Hungary.

The motion for a temporary restraining order was denied on the same day. A hearing on the request for the preliminary injunction was set for January 3, 1978.

On December 29, 1977, defendant moved to dismiss the complaint, or in the alternative, for summary judgment. A hearing on that motion as well as on the motion for preliminary injunction was heard on the same day. On the following day, the motion for a preliminary injunction was denied, as was plaintiff's request for a stay of any order pending appeal.

In the memorandum and order denying the preliminary injunction, Judge O'Connor noted that there was no indication that Hungarian officials who approved the 1947 Paris Peace Treaty, President Truman, or United States Senators who voted in favor of ratification of the treaty were aware of any "silent agreement by tacit omission" as alleged by plaintiff. Moreover, the contention that such a "silent agreement" could rise to the level of a formal treaty modifiable only by another formal treaty ratified by the Senate was rejected. Similarly rejected was plaintiff's contention that the agreement to return the Crown and regalia in and of itself

constitutes a new treaty which must be ratified by the Senate. In this connection the memorandum and order stated:

> The President's agreement here involves no substantial ongoing commitment on the part of the United States, exposes the United States to no appreciable discernible risks, and contemplates American action of an extremely limited duration in time. The plaintiff presented no evidence that agreements of the kind in question here are traditionally concluded only by treaty, either as a matter of American custom or as a matter of international law. Indeed, while the court has not exhaustively examined all possibly pertinent treaties, the court can hardly imagine that any such examination would lend support to the plaintiff's position. Finally, the agreement here encompasses no substantial reciprocal commitments by the Hungarian government. As a matter of law, the court is therefore persuaded that the President's agreement to return the Hungarian coronation regalia is not a commitment requiring the advice and consent of the Senate under Article II, Section 2, of the Constitution. [Slip Opinion at 9–10; this report at 260.]

Senator Dole has demonstrated no reasonable probability of ultimate success on the merits of his claim, Judge O'Connor concluded, and therefore the application for preliminary injunction must be denied. It was emphasized that the decision was rendered solely on grounds of the preliminary injunction question and that plaintiff's standing to bring the action and the subject matter jurisdiction of the court were assumed, but not decided. Consideration of those latter questions, as well as consideration of defendant's motions to dismiss or, in the alternative, for summary judgment were held to be necessary only if the case proceeds beyond the preliminary injunction stage.

Senator Dole appealed the order of the District Court on the same day it was issued, December 30, 1977, and moved for an injunction pending appeal and for expedited consideration of the appeal.

Status.—The appeal was argued on December 31, 1977, before a three-judge panel of the United States Court of Appeals for the Tenth Circuit. In a *per curiam* opinion issued on the same day, the motion for an injunction pending appeal was denied. In the opinion, the court stated that no justiciable controversy which would be within the court's jurisdiction under Article III, Section 2, clause 1 of the Constitution was presented by this action. Relying on the holding of the U.S. Supreme Court in *Baker* v. *Carr,* 369 U.S. 186, the Court characterized the case at bar as a controversy not susceptible to judicial resolution. The Court also stated that no violation of the Paris Peace Treaty was shown by the record presented. In the opinion, the court stated that it assumed that the assurance of defense counsel that the Crown would be retained by the President until the motion for a preliminary injunction could be heard would extend to permit consideration by the Supreme Court, or a Justice thereof, of the order denying an injunction pending appeal.

The complete text of the memorandum and order of the District Court appears in the "Decisions" section of this report at 251.

The complete text of the opinion of the Court of Appeals appears in the "Decisions" section of this report at 262.

V. Officers, Employees, and Agents of 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, asking the court to declare unconstitutional portions of the Federal Elections Campaign Act of 1971 (hereinafter "FECA").

Named as defendants in the case were 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 FECA are to be filed.

The plaintiffs allege, *inter alia*, that the provisions of the FECA 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. On October 10, 1974, 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. The denial was appealed, but on December 12, 1975, while the appeal was before the U.S. Court of Appeals for the District of Columbia Circuit, the District Court granted plaintiffs' motion for the three-judge court, so the appeal was dismissed.

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 as Secretary of the Senate; and Elmer B. Staats as 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 the date of the resolution, if the court determined that such documents were 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 provisions similar to those of H. Res. 863, allowing the Clerk to provide the court with copies of all "nonpublic" records or documents maintained by his office relating to plaintiffs or to any previous Socialist Workers Party committee, candidate or official which were requested in the subpoena *duces tecum* and were found by the court to be material and relevant.

On July 23, 1976, 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 (hereinafter "FEC") and Attorney General Edward Levi as defendants. The FEC was added because it is charged by the 1976 amendments (hereinafter "Amendments") to the FECA with monitoring and enforcing the recordkeeping and disclosure provisions of the FECA and the Amendments, and Attorney General Levi was added because he is charged with enforcing the FECA's criminal sanctions. The amended complaint states that under the Amendments the plaintiffs must maintain records of all contributors of $100 or more and identify them to the FEC and that plaintiffs have not identified them on unnamed 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 would 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 then Presidential candidate Peter Camejo, and to preliminarily and permanently enjoin their enforcement as to plaintiffs and as to candidate Camejo.

On August 31, 1976, the Clerk of the House, the Secretary of the Senate, and the Comptroller General moved for dismissal. These defendants asserted that as a result of the FECA Amendments of 1974, the duties they originally had under the FECA had been transferred to the FEC which under the 1974 and 1976 Amendments has the responsibility to enforce and administer the disclosure provisions challenged by the plaintiffs.

On September 29, 1976, the FEC filed its motion to dismiss. In support of its motion the FEC noted that it, not the courts, has exclusive primary jurisdiction over enforcement of the FECA. Additionally, the FEC asserted that the issues raised by the plaintiffs' complaint are all within its exclusive primary jurisdiction, and that the court "should remit the plaintiffs to the processes established by law for enforcement of the statutes." [Points and Authorities in Support of Defendant Federal Election Commission's Motion to Dismiss the Action for Lack of Jurisdiction, at 9.]

On October 21, 1976, Attorney General Levi filed a motion to dismiss, asserting that the plaintiffs' amended complaint failed to set forth a justiciable case or controversy between the plaintiffs and the Attorney General. The Attorney General noted that the plaintiffs had failed to allege that the Attorney General had either enforced or threatened to enforce against them the criminal provi-

sions of the FECA and its amendments. The Attorney General also asserted that the causes of action alleged by the plaintiffs were directed at actions taken by officials other than the Attorney General.

On October 21, 1976 and November 4, 1976, Common Cause filed memoranda in opposition to the motions to dismiss made by the FEC and the Attorney General.

The court, on January 17, 1977, granted the motions to dismiss filed by the Clerk of the House, the Secretary of the Senate, the Comptroller General, and the Attorney General. As to the Federal Election Commission, the court denied its motion to dismiss. However, the action was remanded by the court to the FEC "to develop a full factual record and make specific findings of fact concerning the present nature and extent of any harassment suffered by plaintiffs as a result of the disclosure provisions, including 'economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.' " [Order, *Socialist Workers* v. *Jennings*, Civil Action No. 74–1338 (D.D.C. 1977); Slip Opinion at 3.] The FEC was given 6 months to complete the factual record and make findings of fact, which then are to be reported to the court.

Additionally, the court ordered that as to the defendants who had been dismissed, plaintiffs were to be allowed to pursue and complete discovery against those individuals as if they had remained parties to the action.

On March 15, 1977, plaintiffs filed a motion for clarification of the order of January 17, 1977, which motion was granted on April 19, 1977. In the order granting the motion for clarification, the court reaffirmed in all respects its order of January 17, 1977, and ordered that pursuant thereto, the defendant FEC is not authorized to proceed pursuant to 2 U.S.C. § 437(g) nor to make any representation or determination that the FEC has "reason to believe" that plaintiffs have violated the challenged provision of the FECA, as amended.

On May 19, 1977, defendants filed a notice of appeal with the United States Court of Appeals for the District of Columbia Circuit.

On November 4, 1977, a Clerk's order was filed deferring, until a hearing on the merits, appellant's motion for a stay pending the outcome of the appeal.

The appeal was argued on December 6, 1977 and was dismissed on December 13, 1977, by a *per curiam* opinion of the court of appeals. In its opinion, the Appeals court declared that the order of April 19, 1977 clarifying the order of January 18, 1977, was clearly not a preliminary injunction, in the context of the special circumstances and procedures of this particular suit, and therefore the court was without jurisdiction to review it. The court further noted that:

> **The District Court obviously was aware of the necessity in appropriate cases to provide anticipatory judicial relief against prosecutions threatening sensitive First Amendment Freedoms. The District Court's order of January 17th was in the nature of an instruction to a master to prepare a record and findings, which order is not**

> **appealable. *Teamsters Local Unions 745, etc.* v. *Braswell Motor Freight Lines, Inc.*, 428 F.2d 1371, 1373 (5th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971). We fail to see how a second order, clarifying which procedures the FEC should use, or not use, in complying with the order to prepare a record, could be any more of an appealable injunctive restraint than the first order.** [Slip Opinion at 3, this report at 269.] [footnote omitted].

Status.—**The case is pending before the District Court.**

The complete opinion of the Court of Appeals is printed in the "Decisions" section of this report at 267.

The complete order of the District Court is printed in the "Decisions" section of the report of *Court Proceeding and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

United States* v. *McPherson

Civil Action No. 77-0510 (D.D.C.)

Brief.—This action was filed by the Justice Department on March 22, 1977, against Michael C. McPherson and his wife, Patricia Sanderson McPherson.

The complaint states that from January 3, 1969 to December 15, 1975, Mr. McPherson was the Administrative Assistant to Congressman William L. Clay and that in that capacity he was authorized to designate and supervise persons on Representative Clay's staff. Such staff members were paid by the House Finance Office, out of the House contingent fund, by checks drawn on the U.S. Treasury. During the times relevant to this action Mr. McPherson had designated to be placed on the payroll Mrs. McPherson's sister, Loretta V. Sanderson. (William McPherson and Patricia Sanderson were not married at the time Loretta Sanderson was placed on Representative Clay's payroll.) From December 1972 to October 1974, checks totaling approximately $44,100, less deductions were made payable to Loretta V. Sanderson. The complaint asserts that during that time Loretta V. Sanderson did not work in the offices of Congressman Clay, but was a full-time school teacher, working and residing in Los Angeles, Calif. It also states that she did not receive or endorse the checks made out to her. Instead, they were deposited in accounts controlled by the defendants or otherwise negotiated (with the forged or purported signature of Loretta V. Sanderson) at defendants' direction, for their use and benefit.

The first cause of action brought under 28 U.S.C. § 1345, states that this money was paid to the defendants by plaintiff in the mistaken belief that it was disbursing salary checks to an eligible employee, and seeks approximately $44,100 in damages. The second cause of action alleges that the defendants were unjustly enriched by Mr. McPherson's violations of the fiduciary duty he owed to the plaintiff, and asks $44,100 less deductions, in damages. The third cause of action asserts that plaintiff did not receive the honest, full, faithful, and unencumbered services of its agent, Michael McPherson, who breached his fiduciary duty and violated the confidence, authority and public trust reposed in him by plaintiff. It asks the court to impose a constructive trust upon defendants' assets and

property, or a trust *ex maleficio* upon all earnings, income, profits, and benefits of the alleged conduct, totaling $44,100, and the proceeds, however held, concealed, or disbursed, all for the use and benefit of the plaintiff as beneficiary. The fourth cause of action is brought under the False Claims Act (31 U.S.C. §§ 231–235). It asserts that the submission of the Payroll Authorization Form, designating Loretta V. Sanderson as a "clerk-hire," to the Finance Office was pursuant to a scheme to defraud the plaintiff, and that the defendants knew the vouchers submitted were false, fictitious or fraudulent, and that the defendants deposited in their own bank accounts or otherwise negotiated these checks with the forged or purported endorsement of Loretta V. Sanderson on them, thereby causing the submission of false claims upon or against the United States. It asks for double its damages of $44,100 and for the statutory forfeiture of $2,000 for each violation of the False Claims Act.

On June 28, 1977, the Government requested an entry of default against the McPhersons for their failure to appear, plead or otherwise defend the suit, the time for doing so having expired on April 25, 1977.

On the same day, the Clerk of the U.S. District Court for the District of Columbia signed a notice of default against the McPhersons.

On July 26, 1977, a judgment by default for the Government was entered by the court.

Defendants asked the District Court, on November 2, 1977, to set aside the default judgment.

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

Note: This action arises out of the same set of facts as *United States* v. *McPherson*, Criminal Action No. 76–136 (D.D.C.). For a brief of that case, see the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1976.

Cervase* v. *Architect of the Capitol

No. 77–1149 (Third Cir.)

Brief.—This action was filed on June 17, 1976, by John Cervase, "a citizen and a taxpayer of the United States and New Jersey", against the Architect of the Capitol and the Congressional Black Caucus, Inc. The plaintiff states that the Architect of the Capitol (hereinafter "Architect") controls and supervises the House Office Buildings; that the Congressional Black Caucus, Inc. (hereinafter "CBC") is a private nonprofit corporation organized in 1971 to promote the interests of black citizens, and that: (1) it selects its members on the basis of race, (2) all of its current members are black Members of Congress, (3) it is a tax exempt organization, (4) it has not been issued a nonprofit mailing permit, and (5) it has its permanent office and headquarters in House Office Building Annex No. 1.

Mr. Cervase further alleges that the CBC has unlawfully occupied the office space and unlawfully used U.S. Government furniture, and utility, security, maintenance, repair, communications and other services, and that in addition CBC has not reimbursed the

U.S. Government for the costs of the office, goods, and services used. He charges that the Architect owes him and the public at large the duty to initiate legal proceedings to evict the CBC and collect damages from them for their unlawful use of office, goods and services, that the Architect has breached his duty by not taking these actions, and that this breach of duty has injured him and the public at large "by permitting (a) a private organization to use public offices, goods and services for private purposes, (b) invidious racial discrimination on public property, and (c) public money to be spent for private purposes." The complaint prays for: (1) a declaratory judgment that the CBC has unlawfully occupied its office space and used U.S. Government goods and services, and that the CBC unlawfully selects its members on the basis of race; (2) a mandamus directing the Architect to initiate legal proceedings to evict the CBC from its office and to collect damages from them for their unlawful use of offices, goods and services, and to initiate legal proceedings to evict CBC from any public building with the Architect's jurisdiction if the CBC is selecting its members on the basis of race; (3) an order directing the defendants to pay plaintiff's costs; and (4) such other relief as the court may deem just and proper.

On December 16, 1976, the court dismissed the action in a brief order. [*Cervase* v. *Architect of the Capitol*, Civil Action No. 76–1164 (D.N.J. Dec. 16, 1976).]

Plaintiff filed a notice of appeal on December 27, 1976.

On October 11, 1977, a judgment order affirming the judgment of the District Court, and taxing costs against appellant Cervase was filed.

Status.—**No further action has been taken.**

United States ex rel. Thompson* v. *Pendergast

Civil Action No. 76–2006 (D.D.C.)

Brief.—This action, the complaint states, was filed under the False Claims Act, 31 U.S.C. §§ 231–232, which allows private citizens to bring suits on behalf of the United States against persons making a false claim for money upon the United States. The complaint was filed on October 28, 1976, against the then-Assistant Sergeant at Arms of the House of Representatives Paul Pendergast, the Sergeant at Arms of the House of Representatives, Kenneth R. Harding, and the Clerk of the House of Representatives Edmund Henshaw. Relators are W. Edward Thompson and George R. Douglas, Jr.

The complaint alleges that defendant Pendergast performed no known duties in his position as Assistant Sergeant at Arms, and that before defendant Henshaw became the Clerk of the House, he also was Assistant Sergeant at Arms and performed no known duties. Payment of salaries to both was approved by defendant Harding. The first cause of action states that both Pendergast and Henshaw knowingly submitted claims for salaries which were false, inflated, and contained material misrepresentations, though their claims were approved by Mr. Harding. The second cause of action states that the defendants, as employees or officers of Congress, have been unjustly enriched both in money and through benefits

such as pension plans, insurance plans, and medical plans. The third cause of action states that the defendants were paid under mistake of fact, the Government believing that they were being paid for services actually performed, when in fact they were being substantially overpaid. Plaintiffs ask that each defendant be held liable for repayment of such damages to the United States as may be shown at trial.

The False Claims Act requires those bringing the suit to notify the Justice Department of their action, and gives the Justice Department 60 days in which to assume the prosecution of the suit. On December 27, 1976, the Justice Department notified the court that it would not enter an appearance in the litigation because the relators had not provided any evidence from which the Justice Department could expect to prove that defendants Pendergast and Henshaw had performed no legislative-related work or that their claims for salaries were otherwise false or fraudulent. The Justice Department also stated that it appeared that the accusations did not set forth a case or controversy appropriate for resolution in a Federal court, since the manner in which the House of Representatives selects and pays its employees is not a matter in which either the Executive or the Judiciary should intrude absent a clear showing of fraud or wrongdoing, which the Justice Department did not find here.

On December 30, 1976, the defendants filed a motion to dismiss on the ground that the controversy is nonjusticiable under the political question doctrine because it involves a matter solely within the constitutional purview of the Congress. As additional grounds, the motion asserts that 31 U.S.C. 232(c) declares that a court shall not have jurisdiction if it appears that the information upon which the complaint is based was in the possession of the Justice Department at the time the suit was filed. The motion asserts that the Justice Department's statement, filed with the court on December 27, 1976, clearly shows that plaintiffs had failed to supply any evidence whatsoever, and therefore the court is without jurisdiction to hear the case.

Defendants filed a new motion on January 31, 1977, seeking dismissal on the ground that plaintiffs had failed to file an opposition to the motion to dismiss within the 10 days allowed by the Federal Rules of Civil Procedure.

Plaintiff-relators filed a motion in opposition to the motion to dismiss on February 1, 1977.

On June 6, 1977, the court heard argument on the defendant's motion to dismiss the complaint.

On June 7, 1977, U.S. District Judge Oliver Gasch issued a memorandum order granting the motion to dismiss. The court concluded that the basis for the action was an article that appeared in *The Washington Post* and that:

> this legislation and the amendments thereto were not intended to authorize suits by relators who have no information or facts of their own but rather have obtained their information simply from governmental investigations and newspaper articles and that the instant action being based

on the above-mentioned newspaper article is beyond the purview of this legislation. * * * [*United States ex rel. Thompson* v. *Pendergast*, Civil Action No. 76-2006 (D.D.C. June 6, 1977); Slip Opinion at 1.]

Status.—The time for appeal has expired.

The complete text of the memorandum order of the District Court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977, at 669.

United States* v. *Elko

Criminal Action No. CR 77-739-ALS (C.D. Calif.)

Brief.—On June 9, 1977, an indictment was filed in the United States District Court for the Central District of California charging Stephen B. Elko and Patrica Brislin with the following offenses: Conspiracy (18 U.S.C. § 371); perjury (18 U.S.C. § 1623); subornation of perjury (18 U.S.C. § 1622); obstruction of justice (18 U.S.C. §§ 1503; 1510); and aiding and abetting interstate travel to commit bribery, (18 U.S.C. § 2). Additionally, Elko was charged with interstate travel to commit bribery (18 U.S.C. § 1952).

The indictment charged that Mr. Elko, while serving as Administrative Assistant for Representative Daniel J. Flood, conspired with Miss Brislin and unindicted co-conspirators William Fred Peters and others to accept bribes and did accept bribes in exchange for using Mr. Elko's position as Representative Flood's Administrative Assistant to attempt to secure accreditation and extensions of eligibility to participate in various Federal financial aid programs for five unaccredited trade schools located in Los Angeles. The schools are owned by Automation Institute of Los Angeles, a corporation of which Mr. Peters was president. The indictment further charged that the defendants and the co-conspirators committed various overt acts in furtherance of the conspiracy, including giving false testimony before a Federal grand jury in Los Angeles.

On June 20, 1977, defendants entered pleas of not guilty.

On August 1, 1977, defendants' motion to dismiss the indictment was denied.

On September 27, 1977, a trial by jury was begun. At that time, count seven of the indictment, which charged defendants with procuring Deryl Fleming to commit perjury before a Federal grand jury, in violation of 18 U.S.C. § 1622 was dismissed and paragraph 1a of count four, which also related to procuring and committing perjury before the same grand jury, in violation of 18 U.S.C. § 1503 was stricken on motion of the Government.

On October 19, 1977, defendants were found guilty on all remaining counts.

On November 10, 1977, defendants' motion for a judgment of acquittal or a new trial was denied.

Status.—**No further action has been taken.**

Doe* v. *McMillan

No. 75-2016 (D.C. Cir.)

Brief.—Plaintiffs, parents of certain pupils at a junior high school in the District of Columbia, filed this action in the U.S. District Court for the District of Columbia against the then Chairman of the House District Committee, members of the committee, some committee staff, the Superintendent of Documents, the Public Printer, and various officials of the public school system of the District.

The complaint alleged that a report issued by the committee entitled "Investigation and Study of the Public School System of the District of Columbia," [H. Rept. 91-1681 (1970)], contained certain derogatory information regarding named students—specifically, attendance lists, disciplinary letters and memoranda, test papers and other school documents—and asked for declaratory and injunctive relief and damages.

The District Court denied plaintiffs' motion for a temporary restraining order and dismissed the complaint. In a motion before the U.S. Court of Appeals for the District of Columbia circuit, plaintiffs then sought summary reversal of the dismissal, or, in the alternative, an injunction against the printing and distribution of the report pending action on the appeal. Motions for summary affirmance of the dismissal were filed by defendants.

An order issued by the Court of Appeals enjoining all defendants, except the members of the House District Committee, from the further printing and distribution of the report—unless the offending matter were deleted—in order to preserve the status of the parties until the case could be heard by the court on the merits.

In a subsequent action, the court denied the motions for summary affirmance and reversal of the District Court dismissal of the complaint and modified its earlier order to permit distribution of the report—excluding only the student test papers and disciplinary correspondence—again, until the case could be heard on the merits.

A motion was then filed on behalf of Representatives Brock Adams, Charles C. Diggs, Jr., Donald M. Fraser, Gilbert Gude, and Andrew Jacobs, Jr.—all then members of the committee—to sever them as defendants and dismiss their appeal. This motion was granted upon their stipulation that they opposed distribution of the report—so long as the students were identified—and that they would have voted against publication of the report in its present form, had they been afforded the opportunity to do so in committee.

Arguments on the merits were heard by the Court of Appeals in June 1971, and the dismissal of the action was affirmed by that court in a 2 to 1 decision on January 20, 1972.

Judge George E. MacKinnon, in his majority opinion for the court, held the dismissal of the action, as to the Federal legislative employees—in, which category he included the members and employees of the committee named as defendants and the Superintendent of Documents and Public Printer—to be proper due to their legislative immunity under the provisions of Article I, Section 6 of the Constitution. This section, the well-known Speech or Debate clause, provides that "for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place."

Judge MacKinnon stated:

> The Speech or Debate Clause not only provides a defense on the merits, but it generally protects a legislator from

the annoyance of having to devote his time and efforts to defending himself in court. * * * The only question which a trial court should consider is "whether from the pleadings it appears that the [legislators] were acting in the sphere of legitimate legislative activity." * * * Since we believe that the activities of the defendant-members of the Committee * * *, "may fairly be deemed within [the Committee's] province," it is clear that the District Court properly dismissed the suit as to them.

* * * * * * *

"Our function, at this point, is * * * not to pass judgment upon the general wisdom or efficacy of the activities of this Committee in a vexing and complicated field." * * * It was merely to determine whether the defendant-legislators were acting within the sphere of their legitimate activity when they collected the information in question and issued the House Committee Report in its present form. Since it is readily apparent that their actions were within the discretionary area of their constitutional authority, the defendant-Representatives are absolutely protected by the Speech or Debate Clause. [*Doe* v. *McMillan,* 459 F.2d 1304, 1312–14 (D.C. Cir. 1972) (citations and footnotes omitted).]

Within specific reference to the legislative branch defendants, other than Members of Congress, Judge MacKinnon continued:

> The legislative immunity provided by the Speech or Debate Clause is not limited to Congressmen, although the doctrine's protection is less absolute * * * when applied to officers or employees of a legislative body, rather than to legislators themselves. * * * Therefore, when congressional employees or officers are acting pursuant to valid legislative authorization, in furtherance of a proper legislative purpose, they also come within the scope of the Speech or Debate Clause protection. [459 F.2d at 1314.]

The other defendants—officials and employees of the public school system of the District—were held to be immune from liability under the judicially created doctrine of official immunity, as defined by the Supreme Court in *Barr* v. *Matteo,* 360 U.S. 564 (1959). In that decision, the Court stated that:

> * * * officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government. [*Barr* v. *Matteo,* 360 U.S. 564, 570 (1959).]

The court included the employees of the legislative branch in this immunity for Government officials, affording them this protection in addition to the Speech or Debate clause immunity. Judge

MacKinnon noted, further, that the action of the District Court was proper on the basis of the constitutional doctrine of separation of powers.

A petition for a writ of *certiorari* was filed by plaintiffs in the Supreme Court on March 17, 1972. The Court granted *certiorari* on June 26, 1972, and heard arguments in the case on December 13, 1972.

Justice White wrote the opinion for the majority of the Court, handed down on May 29, 1973, in which he was joined by Justices Douglas, Brennan, Marshall and Powell.

Justice White described the scope of the inquiry of the Court as "whether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals." [*Doe* v. *McMillan,* 412 U.S. 306, 314 (1973).]

He then concluded that there must be some "reasonable bounds" for legislative tasks.

> Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, *Kilbourn* v. *Thompson,* * * * 103 U.S. 168 (1880), but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the sergeant-at-arms in *Kilbourn* v. *Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be "without authority." *Id.,* at 200. * * * The Clause does not protect "criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction." *Gravel* v. *United States,* * * * 408 U.S. 606, 622 (1972). Neither, we think, does it immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of legislative function. [412 U.S. at 315–316.]

Justice White held such reasonable requirements of the legislative function to be limited, in regard to the case before the Court, to the printing and internal distribution of the report within the Congress.

Finding that the Members of Congress and personnel of the House committee had done nothing more than "conduct the hearings, prepare the Report, and authorize its publication," and that complaint had thus been properly dismissed as to them, Justice White turned his attention to the officers of the Government Printing Office named as defendants—the Superintendent of Documents and the Public Printer. [The Court stated in a footnote that the public school officials were not subject to injunctive relief at this time due to the adoption of new policies concerning the handling of confidential information.]

The Printing Office defendants were described as enjoying the protection of the Speech or Debate clause "to the extent that they

serve legislative functions, the performance of which would be immune conduct if done by congressmen. * * *" [412 U.S. at 420.]

Justice White concluded that the independence of the establishment of the Printing Office did not carry with it an independent immunity for its functions.

> Rather, the Printing Office is immune from suit when it prints for an executive department for example, only to the extent that it would be if it were part of the department itself or, in other words, to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents. To hold otherwise would mean that an executive department could acquire immunity for non-immune materials merely by presenting the proper certificate to the Public Printer, who would then have the duty to print the materials. Under such a holding, the department would have a seemingly foolproof method for manufacturing immunity for materials which the court would otherwise hold immune if not sufficiently connected with the "official duties" of the department. [412 U.S. at 323.]

Justice Douglas wrote a separate, concurring opinion, in which Justices Brennan and Marshall joined. He described the issue as whether the report infringed upon the constitutional rights of the school children named in the report, and concluded that the naming of the school children was "totally irrelevant to the purposes of the study" and that the bounds of legitimate legislative activity had been exceeded.

Chief Justice Burger filed an opinion in which he concurred in the grant of immunity to the Members of Congress and their staff aides and dissented from the majority's holding that the Superintendent of Documents and Public Printer could be liable for public distribution of the printed report.

Justice Rehnquist, in an opinion in which he was joined by the Chief Justice and Justice Blackmun and, in part by Justice Stewart, concurred in the holding of the majority granting immunity to the Congressional defendants. In contrast to the majority, however, he concluded that the Speech or Debate clause confers immunity upon Congressionally authorized public distribution of committee reports. Finally, Justice Rehnquist stated:

> Entirely apart from the immunity conferred by the Speech or Debate Clause on these respondents, I believe that the principle of separation of powers forbids the granting of injunctive relief by the District Court in a case such as this. We have jurisdiction to review the completed acts of the Legislative and Executives Branches. * * * But the prospect of the District Court enjoining a committee of Congress, which, in the legislative scheme of things, if for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution. [412 U.S. at 343–44.]

In a separate opinion, Justice Blackmun, joined by the Chief Justice, concurred in part and dissented in part to the holding of the majority and added comments of his own to Justice Rehnquist's opinion, in which he had joined. Justice Blackmun stated:

> Although it is regrettable that a person's reputation may be damaged by the necessities of the mistakes of the legislative process, the very act of determining judicially whether there is "substantial evidence" to justify the inclusion of "actionable" information in a committee report is a censorship that violated the congressional free speech concept embodied in the Speech or Debate Clause and is, as well, the imposition of this Court's judgment in matters textually committed to the discretion of the Legislative Branch by Art. I of the Constitution. [412 U.S. at 337.]

On remand the District Court dismissed the action against the Printer and Superintendent concluding that the record before it established that the extent of the distribution and publication of the report was not in excess of the legitimate legislative need of the Congress. Additionally, the District Court refused to allow the plaintiffs to amend their complaint to allege public distribution of the report by the Congressional defendants and to join, as a party-defendant, a District of Columbia school official.

On both of these holdings the plaintiffs appealed, and on each, in an opinion issued on July 29, 1977, the Court of Appeals affirmed the lower court's ruling.

As to the dismissal of the action against the Printer and the Superintendent, the appeals panel concluded, as did the lower court, that their publication and limited distribution of the report to Federal Government agencies and to some members of the public were within the legitimate needs of the Congress and thus protected by the Speech or Debate clause. The court noted that distribution to Government agencies of Congressional reports allows those agencies to comment to the Congress upon proposed legislation which may directly affect the agency. The court also concluded that the limited distribution of the report to some individuals outside the Government was similarly within the legislative needs of the Congress. Distribution of Congressional reports, the court noted, permits individuals whose interest may be affected by proposed Congressional action to take steps to petition their Government, a right protected by the First Amendment of the Bill of Rights. On this point, the Court noted that the distribution to the public which occurred in this case was in response to standing requests by those individuals to receive all Congressional reports, and so, the Court added, it reached no conclusion as to what the result might be in an action in which distribution was made in response to a specific request or continued for a period after notice of objection was received.

The Court next declared that even if the Printer and Superintendent were not protected by Speech or Debate clause immunity, the doctrines of official immunity would nonetheless shield them in this instance. Such a qualified immunity, the Court noted, would protect

the officials because they had acted in their official capacity in good faith and in reasonable belief in the legality of their actions.

As to the plaintiffs' attempt to amend their complaint to allege distribution of the report by the Congressional defendants and to add a new party-defendant, the Court noted that the case had been before the District Court, the Court of Appeals and the Supreme Court for more than 38 months before the plaintiffs first sought to amend their complaint. When such a tardy filing occurs, it is within the discretion of the District Court to deny leave to amend. The Court concluded that the District Court's denial of leave to amend was not an abuse of its discretion.

On October 13, 1977, the Court of Appeals denied appellants' petition for rehearing.

Circuit Judge Leventhal filed a statement concurring in the denial of the petition for rehearing. The principal ground of apppeal concerned the ruling of the District Court, which was sustained by the Court of Appeals, that the distribution of the report was entirely routine and usual and did not exceed the legitimate legislative needs of the Congress, according to Judge Leventhal who stated he concurred in that ruling. The attempt to amend the complaint to allege participation by the Congressional defendants in the public distribution was characterized in the statement as a subsidiary issue and as requiring the plaintifffs to supply, before pressing any claim to discovery, at least a concrete factual indication that there was indeed a "public" distribution.

Status.—**On December 6, 1977, appellants applied to the Supreme Court of the United States for an extension of time to file a petition for *certiorari.* The application was granted and on December 8, 1977, the time to file was extended to February 13, 1978.**

The complete text of the opinion of the Court of Appeals of January 20, 1972 is printed in the "Decisions" section of the *Report of Court Proceedings and Actions of Vital Interest to the Congress,* December 1972.

The complete text of the opinion of the Supreme Court is printed in a special report of *Court Proceedings and Actions of Vital Interest to the Congress,* May 29, 1973.

The complete text of the opinion of the Court of Appeals on July 29, 1977 is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interests to the Congress,* Part 2, August 15, 1977.

The complete text of the order of the Court of Appeals of October 13, 1977 and the concurring statement appears in the "Decisions" section of this report at 271.

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 then-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, then-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 as grounds 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 * * * 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 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 current and former Congressional employees. A partial list follows: Victor C. Smiroldo, Staff Director of the House Commission on Congressional Mailing Standards: Benjamin R. Fern, Chief Counsel for 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 Direc-

tor of the House Democratic Study Group; Lynda E. Clancey, Richard P. Clifton, and Glee Gomien, Staff Assistants of the Republican Senatorial Republican Policy 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 may 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, after receiving a copy of the motion filed by the plaintiffs to compel their testimony wrote letters to Judge Pratt.

In these letters, each informed Judge Pratt of his view that both by statute and by 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 privileges 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 plaintiffs had issued. Counsel for the plaintiffs, 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 was 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 plaintiffs 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 the 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.]

In addition, the court said, neither Congress nor the membership of Congress is an indispensable party—and though defendants' third allegation—that plaintiffs lacked standing to sue—were 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 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,* 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* 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, plaintiffs submitted their "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, plaintiffs 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.]

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. [*Id.*]

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. [*Id.*]

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 plaintiffs' 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 allowance 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 of legislative immunity for 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 plaintiffs' 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 were 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 [*United States* v. *Brewster,* 408 U.S. 501 (1972)] 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 the 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 plaintiffs' 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 plaintiffs and Senate employees Estep and Needham, and a stipulation between plaintiffs 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; 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 publicly filed; (2) the information that is to be available to plaintiffs' 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 plaintiffs 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 plaintiffs 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 responses thereto and (c) deponent Fern's notes or other memoranda concerning oral requests for ad-

vice 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 plaintiff's 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); 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 plaintiffs 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 plaintiff's 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* [418 U.S. 683 (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. [*Id.* at 4–5.]

The stipulation with the House employees stated 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. Plaintiffs 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 included:

> 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) at 5–6.]

Furthermore, still a different code will be used in place of Members' names in this 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. [*Id.* at 6.]

Finally, the court's order stated that with respect to subpoenas issued by plaintiffs 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-minute 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.

On September 9 an order was filed granting the Commission's motion.

In its answer to the complaint filed by Common Cause, the Commission denied the allegations asserted in each cause of action, contested the courts jurisdiction over the subject matter, attacked the standing of the plaintiffs, answered that the complaint failed to state a claim upon which relief could be granted, and asserted that the plaintiffs had failed to exhaust the administrative remedies available to them.

On September 24, 1976, Judge Pratt, without comment, denied the April 7th motion for a protective order filed by the Senate administrative assistants.

On January 31, 1977, a copy of a letter dated January 21, 1977, from Senator Lee Metcalf to Cornelius Kennedy, the attorney for the Senate employees, was filed with the court. Senator Metcalf was writing as the Chairman of the Senate's Ad Hoc Committee on Legislative Immunity, which is considering the actions to be taken in the *Common Cause* v. *Bailar* lawsuit. The letter noted the large volume of information which the Senate had already authorized be turned over to Common Cause in July of 1976. Senator Metcalf asserted that categories of names used before the statute went into effect on December 18, 1973, or those in the computer but not used after the statute went into effect, cannot represent any priority use of these categories for political purposes. Furthermore, he alleged, the actual use made of these categories of names supersedes any manuals or instructions in any Senate office, since the actual use would reflect the ultimate decisions with respect to the use of the computer and the categories of names stored therein. Senator Metcalf stated that the information furnished had involved a substantial cost and had resulted in a significant disruption of the work in all 100 Senate offices. He noted that despite the heavy workload of the Senate leadership at the beginning of the 95th Congress, the Senate Democratic Conference had met on January 13, 1973, to discuss this case, and had advised the Ad Hoc Committee that Common Cause had persisted in attempts to go beyond the actual use of the frank as reflected by the information which the Senate had already provided, and Common Cause had resisted efforts by Mr. Kennedy to reach an agreement on the information already supplied by the Senate employees in connection with the proceeding. The Ad Hoc Committee was instructed to study the case further and report its findings to the Senate Democratic Conference no later than March 1, 1977.

Attorneys for the parties appeared at a status call on March 14, 1977 before U.S. Circuit Judge Malcolm R. Wilkey and U.S. District Judge John R. Pratt. During the discussion, Cornelius Kennedy, the attorney for the Senate parties, was asked why the Senate had not

yet furnished Common Cause with all of the computer codes promised. Mr. Kennedy replied that they had furnished all the codes they stipulated would be filed, which were the codes used for mass mailings. Judge Wilkey said he understood that all codes would be furnished, not just those that had actually been used for mass mailings since all codes could be used for mass mailings. Common Cause verified that it wanted all codes, not just those that had actually been used. They also said that they wanted the data on mailings for 1972. Mr. Kennedy said that while part of those data was available, the key to producing the data in any useable form was the computer center work order, and these work orders do not exist because they were not kept.

Regarding the letter which Senator Metcalf had filed with the court on January 31, 1977, the following colloquy took place:

> Judge WILKEY. And what is the style of this ad hoc committee that issued the 2 volume report [to the Senate on this suit, copies of which Mr. Kennedy provided the court and plaintiffs at this status call]?
>
> You referred to its appointment last March, I think.
>
> Mr. KENNEDY. Last February, actually.
>
> Judge WILKEY. What is the style of it?
>
> Mr. KENNEDY. It is the ad hoc committee on legislative immunity. It achieved that title, I guess, because it was involved specifically in this case.
>
> * * * * * * *
>
> Judge WILKEY. Well, we have read with some interest this 3 page letter of Senator Metcalf as to what has been done, specifically not exactly what has been done, but what hasn't been done, and I am struck by a certain misconception that is in the letter. I think there is a misconception in this letter, and you as a lawyer—Senator Metcalf is a lawyer, he once was.
>
> Mr. KENNEDY. He was a State Supreme Court Justice.
>
> Judge WILKEY. Of the State of Montana.
>
> Judge PRATT. That's right.
>
> Judge WILKEY. There is a certain misconception that the relevance of these matters is to be determined by one of the parties. That's not so. The relevance of these matters is for the Court, after argument by the parties, but the determination of relevance cannot be made in this case, or any other case, by one of the parties. And I think that is a fundamental misconception which should be set straight, because the Court is going to act on the basis that relevance will be determined by the Court, after argument, of course, by the parties.
>
> Thank you, Mr. Kennedy. [Transcript of Status Call of March 14, 1977 at 23–25, *Common Cause* v. *Bailar,* Civil Action No. 1887–73 (D.D.C.).]

Later in the status call, the following exchange took place:

> Judge PRATT. Will you be communicating with your principals between now and the 4th of April, Mr. Kennedy?

Mr. KENNEDY. Very much so, Your Honor.

Judge PRATT. I think you should impress on them the conern of the Court with the present lack of discovery on the part of the Senate, and also the fact that we have not only the subpoena, the stipulation of January 4, 1976, the Court's order incorporating the stipulation, the Court's order of September 24, 1976, having to do with our denial of motions for relief from our March 1st, 1976 order, and that one of these days we are going to have to bite the bullet. And I think the record should show that you filed this committee report in two volumes, entitled "Communication with constituents of codes the Senator's duty to inform the people, the report of the ad hoc committee on legislative immunity, United States Senate, to the Senate Democratic and Republican conferences, dated March 1, 1977."

I assume that is the complete report that Senator Metcalf's committee will be presenting; is that correct?

Mr. KENNEDY. It is the report which they are submitting to the two conferences. I cannot anticipate what action the conferences will take, or whether they will ask for further reports.

Judge PRATT. I see. Thank you, Mr. Kennedy.

Judge WILKEY. Mr. Kennedy, I view this matter, and I am sure Judge Jones does too, this matter of all the code categories have not been produced, code categories which were used or could be used for the frank[ed] mail is interpretation we put on the original subpoena, on the stipulation which you entered, and on two orders, and this cannot long go with the Court's orders and your stipulation is ignored.

Now, that is just about as plain as we can make it at this time. We're going to wait and see what the facts show, but on the facts as they stand now you have a problem.

Mr. KENNEDY. Thank you, Your Honor.

* * * * * * *

[Transcript of Proceedings of March 14, 1977 at 34-35, *Common Cause* v. *Bailar,* Civil Action No. 1887-73 (D.D.C.).]

On April 1, 1977, plaintiffs filed with the court a list of documents which had not been produced by James Estep, the Manager of the Senate Computer Service and by the 100 Senate administrative assistants. Sought from Mr. Estep was data for 1972 and the codes maintained in the Senate computer for franked mail purposes by each Senator and the number of names in each category. From the 100 administrative assistants the plaintiffs still sought the identity of the categories of names maintained in the Senate computer for franked mail purposes since December 18, 1973, and documents which contained general or specific instruction on the use of the names in the computer for franked mail purposes.

On April 4, 1977, another status call was held. Mr. Kennedy pointed out that neither the Senate nor any of its employees are

parties in this case, and that the Senate employees are all subject to Senate Rule 30, providing that no memorial or other paper presented to the Senate shall be withdrawn from its files except by order of the Senate. In addition, he said, these employees are bound by S. Res. 411, 94th Congress, 2d Sess. (March 24, 1976), and the information sought by Common Cause is under the control of the Senate and the individual Senators. Mr. Kennedy reviewed the reasons why the Senate takes the position that the franking privilege is part of the official responsibilites and duties of the Members of the Senate to keep constituents informed. He pointed out that despite this constitutional assertion, the Senate in this action had acted within the judicial framework, appealing court decisions and seeking protective orders, and that the Senate had directed him, with respect to discovery, to work out an arrangement agreeable to court and the plaintiffs, but if none could be worked out, then the Senate would appeal any decision adverse to its interests. He stated he had earnestly tried to work out what documents would be produced, but quoted counsel for Common Cause as telling him "But when are you going to understand I don't want to work this out with you, stop wasting your time?" [Transcript of Status Call of April 4, 1973, at 10. *Common Cause* v. *Bailar,* Civil Action No. 1887–73 (D.D.C.).] He also asserted that plaintiffs didn't need this information and alleged that this could be shown by the fact that they had distorted the information they had already received.

Mr. Kennedy also told the court that on April 1, 1977, the Senate had passed Senate Rule 48 prohibiting Senators from abusing the nonfranking data stored in the Senate's computer by using it for franked mail purposes, regardless of whether or not the statute challenged in this action is found unconstitutional. He explained Rule 48 to the court, step by step, and then told the court that the items sought by plaintiffs which they said had not been provided either did not exist, or else, with the consent of the Senate which Mr. Kennedy would seek, they would be provided to the court for *in camera,* inspection, so that the court might rule on their relevancy. Mr. Kennedy said that the reason they were doing this is that since the Senate and its employees are not parties to the actions they could not confront false implications at trial.

Finally, Mr. Kennedy read a letter from Senator Metcalf, and placed it in the record at the court's request. The letter stated the position of the Ad Hoc Committee on Legislative Immunity had been studying the matters in connection with the lawsuit for over a year, and its report had been adopted by both the Senate Democratic and Republican Conferences and issued as Senate Document No. 95–33 on March 28, 1977. The Ad Hoc Committee concluded that the dissemination of information relating to proposed or enacted legislation, the administration of legislation by the executive, or the review of such legislation by the judiciary are all an integral part of a legislator's function and are indistinguishable from a Senator's legislative activities, and that the distribution of this information is part of his official business and is entitled to be mailed under the frank. It said the Senate had gone to extraordinary lengths to serve the interests of justice in this action by authorizing and permitting its employees to testify and by

supplying voluminous materials to the plaintiffs. However the Ad Hoc Committee had reviewed the request for additional materials made upon the administrative assistant of every Senator and had determined that there was no connection between the materials sought and the use of the frank by Senate offices. Therefore, the Ad Hoc Committee was not recommending that the Senate authorize the subpoenaed administrative assistants to turn over these materials. The letter concluded:

> The Senate cannot simply accede to excessive demands of this kind. Not only do such demands disrupt the operation of the Senate and involve extensive costs, they also intrude without cause into its functions and privileges.
>
> The committee recognizes that there is at present no statute defining the scope of the Senatorial privilege involved here. While there is a body of case law defining the express immunity reserved to the Congress in the Constitution, the Courts have yet to address the privilege of the Houses of Congress deriving from the supremacy of each branch of the government within its own assigned area of Constitutional responsibilities.
>
> Whether the privileges and immunities of the Senate can be properly invoked in the case now before this Court is, of course, for the Courts to decide—just as the Courts will decide all other judicial questions raised, including what information is relevant and necessary.
>
> Until there is a final judicial determination to the contrary, however—and after appeal, if necessary, as to the issues of relevancy and privilege—the committee, with the concurrence of both the Senate Democratic and Republican Conferences, will continue to contest the relevance of the additional materials sought by the plaintiff and to assert the privileges and immunities of the Senate in order to preserve and protect the powers and prerogatives granted and reserved to the Congress by the Constitution. [Letter from Senator Lee Metcalf to Cornelius B. Kennedy, dated April 4, 1977.]

Mr. Kenneth J. Guido, Jr., Counsel for Common Cause, disputed the assertions of Mr. Kennedy, and asked that the materials sought in the subpoena be turned over to the plaintiffs.

At the conclusion of the status call, the court directed Mr. Kennedy, to submit the materials to the court for *in camera* inspections.

The Senate passed S. Res. 136, 95th Cong., 1st Sess. (1977) on April 29, 1977, authorizing Mr. Kennedy to furnish the subpoenaed documents in dispute to the District Court for *in camera* inspection.

On May 2, 1977, U.S. District Judge George L. Hart was named to replace Judge William B. Jones on the three-judge District Court.

At a status call on May 25, 1977, Mr. Kennedy was directed to file the requested documents *in camera* by June 15, 1977. The court stated that before it would release any of the information to the plaintiffs it would notify the Senate and give it 60 days to obtain a stay order.

On August 31, 1977, plaintiff Common Cause filed a notice of taking a deposition of the National Records Center, Accession and Disposal Branch, General Services Administration.

On September 2, 1977, the Federal defendants filed a report regarding a meeting held on July 20, 1977, between the Federal defendants, the intervening defendant and the Senate deponents and a subsequent agreement to provide plaintiff with an opportunity to inspect documents of the U.S. Department of Agriculture relating to the Department of Agriculture's farmers' bulletins publications program.

The National Records Center, Accession and Disposal Branch, General Services Administration filed an objection on September 7, 1977 to the supboena *duces tecum.*

An order was filed on September 23, 1977 that the material submitted to the court for *in camera* inspection be retained by the court for 60 days pending appeal and that, if no appeal has been noted within 60 days, the material be released to plaintiffs.

A notice of appeal to the Court of Appeals for the District of Columbia Circuit to the U.S. Supreme Court by Peter Stavrianos and the other Senate employees, non-party deponents, of the order, were filed on October 21, 1977.

Plaintiffs moved the court on October 26, 1977 to compel the 100 Senate Administrative Assistants to produce documents.

On November 15, 1977, the Senate agreed to S. Res. 325, 95th Congress, 1st Sess. (1977) which authorized the counsel for the subpoenaed Senate employees to file for leave to intervene on behalf of the Senate in order to protect and defend the duties, responsibilities, rights and privileges of the Senate under Article I of the Constitution.

A memorandum in opposition to plaintiffs' motion to compel the 100 Senate Administrative Assistants to produce documents was filed on November 17, 1977 by the 100 Senate Administrative Assistants.

On November 29, 1977 the Senate employee deponents filed a motion to withdraw their notive of appeal. On the same day, an order was filed granting the motion to withdraw the separate notices of appeal to the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit.

The motion of plaintiffs to compel the 100 Senate Administrative Assistants to produce documents was argued and granted on November 29, 1977 and an order granting the motion was filed on December 19, 1977.

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

The full texts of the orders of September 23, 1977 and December 23, 1977 are printed in the "Decisions" section of this report at 275 and 278.

The full text of the court's "Memorandum and Order" of July 30, 1975, 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.

VI. Disputed Elections

Moreau v. *Tonry*

No. 76-3290 (E.D.LA.)

Brief.—On October 2, 1976, a runoff primary was held for the Democratic nomination for the U.S. House of Representatives for the First Congressional District of Louisiana. The apparent winner of the runoff, Richard Tonry, then defeated the Republican candidate in the general election on November 2, 1976, and was seated as a Member of the 95th Congress on January 4, 1977.

From the runoff primary election three civil actions have arisen.

In the first action, James Moreau, the other candidate in the runoff primary, brought suit in the State District Court pursuant to the Louisiana election statute (La. R.S. 18:364). [*Moreau* v. *Tonry,* No. 28-837 (25th Jud. Dist. Ct. of Parish of St. Bernard, La. Oct. 15, 1976).] Mr. Moreau asserted that but for fraud and irregularities he, rather than Mr. Tonry, would have been the nominee and in fact, by reason of the legal votes cast in the race, he was the nominee. The State District Court found no basis for voiding the election, but the Louisiana Court of Appeals, sitting *en banc,* decided to set the election aside. [*Moreau* v. *Tonry,* No. 8222 (4th Cir. of La. Oct. 21, 1976).] The State Court of Appeals decision was subsequently overturned by the Louisiana Supreme Court which reinstated the judgment of the district dismissing the election contest. [*Moreau* v. *Tonry,* No. 58791 (Supreme Ct. of La. Oct. 25, 1976).]

The decision was appealed to the U.S. Supreme Court which, on March 21, 1977, dismissed the appeal for want of a properly presented Federal question. [*Moreau* v. *Tonry,* 45 U.S.L.W. 3646 (U.S. Mar. 21, 1977).]

As the election contest was progressing through the Louisiana State courts, Mr. Moreau filed suit as an elector in the U.S. District Court for the Eastern District of Louisiana for deprivation of rights under the Fourteenth Amendment to the Constitution and the Civil Rights Act of 1965.

Mr. Moreau sought to enjoin the Louisiana Secretary of State from recognizing Mr. Tonry as the Democratic nominee and from conducting a general election on November 2, 1976, for the 1st District House seat. The suit was dismissed "for failure to state a claim upon which relief can be granted and/or for lack of jurisdiction." [Appellants' Brief at 3, *Moreau* v. *Tonry,* No. 74-4230 (5th Cir.).] No appeal was taken.

On October 26, 1976, Mr. Moreau and a group of his supporters filed an action for deprivation of rights under Article I of the United States Constitution and the Fourteenth Amendment of the Constitution.

The defendants, including Mr. Tonry, filed motions to dismiss asserting, *inter alia*, "that the action was either *res judicata* or collaterally estopped because of the dismissal of plaintiff's case[s] in

State and Federal court[s]." [*Id.* at 4.] The District Court refused to dismiss, holding that the doctrine of *res judicata* was not applicable and that the action was collaterally estopped as to only part of the asserted irregularities. The defendants appealed.

As articulated by the appellants the issues presented for review by the 5th Circuit Court of Appeals were:

> 1. Whether the District Court has jurisdiction over election contest suits concerning elections for United States Representatives to Congress brought by electors when a State contest remedy is provided and finally adjudicated;
> 2. Whether the action is *res judicata* or is collaterally estopped because of the disposition of the issues in Louisiana State courts; and the disposition of plaintiff's previous action in Federal court;
> 3. Whether laches bars the assertion of a Federal cause of action to annul primary election brought so near the date of the general election that neither a new election or appointment of a nominee under State law is an available remedy;
> 4. Whether mootness bars this action, in that after the election the House of Representatives has the power to decide whom it will seat. [*Id.* at 1.]

Oral argument was held in the action before the 5th Circuit Court of Appeals on January 26, 1977.

On April 13, 1977, the 25th Judicial District Court of the Parish of St. Bernard reopened its case. On April 21, 1977, Judge Melvin A. Shortess vacated his judgment of October 15, 1976. Finding that "but for" the fraud perpetrated upon the court by the witnesses who testified the action would not have been dismissed, Judge Shortess concluded that his original decision had to be vacated. Because of the fraud which he found, he also concluded that:

> As a consequence, Tonry rather than Moreau became the Democratic nominee, and Tonry now sits in Congress. The language of Article 1, Section 5, of the U.S. Constitution makes Congress the sole judge of the qualification of its members. Congress must now decide. Hopefully, it will bear in mind that this court, for all of the reasons set forth above, does now annul and set aside its prior judgment of October 15, 1976. [*Moreau* v. *Tonry,* No. 29-542 (25th Jud. Dist. Ct. of Parish of St. Bernard, La. April 21, 1977); Slip Opinion at 17.]

On May 4, 1977, Mr. Tonry resigned his seat in the U.S. House of Representatives.

A special panel of the Committee on House Administration of the U.S. House of Representatives had also been investigating the alleged vote fraud. With Mr. Tonry's resignation, the panel dropped its inquiry, although it did issue a report in the form of a committee print on June 2, 1977.

On June 9, 1977, the U.S. Court of Appeals for the 5th Circuit announced its decision *per curiam.* Noting that Mr. Tonry's resignation mooted the appellee's chief requests to set aside the results of

the Democratic primary, the court concluded that nothing remained of the action for which the court could grant the interlocutory appeal. The court thus vacated the decision of the District Court allowing the appeal and remanded the action back to the District Court for consideration of the mootness of the entire action or for such further proceedings as the District Court might require.

Status.—The Federal action is pending before the U.S. District Court for the Eastern District of Louisiana.

The complete text of the April 21, 1977 decision of the 25th Judicial District Court for the Parish of St. Bernard is printed in the "Decisions" section of the *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.

The complete text of the *per curiam* opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.

The complete texts of the opinions of the Supreme Court of Louisiana, the Louisiana 4th Circuit Court of Appeals, and the 25th Judicial District Court for the Parish of St. Bernard, are printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 1, April 15, 1977.

VII. Other Actions Involving Members in a Representative Capacity

Dellums* v. *Powell

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

and,

Nixon* v. *Dellums

No. 77-81 (U.S. Supreme Court)

Brief.—This 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, arises 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 James W. Powell, the Chief of the Metropolitan Police Department, the District of Columbia, then-U.S. Attorney General John Mitchell, and then-Deputy Attorney General Richard Kleindienst.

Numerous pretrial motions were filed on behalf of the parties to the 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 the 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 December 2, 1974, defendant Mitchell was granted a severance because of his involvement with other judicial proceedings.

On January 16, 1975, a $12 million judgment against the defendants (other than Mr. Mitchell and Mr. Kleindienst) 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. [*Dellums* v. *Powell,* Civil Action No. 2271-71 (D.D.C. 1975).]

Appeals were filed by the defendants on October 1, 1975 (nos. 75-1974 and 75-1975). On October 22, 1975, plaintiffs filed an appeal

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(No. 75-2117) from an October 20, 1975 final judgment by the District Court dismissing defendant Kleindienst as a party to the action.

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

All five cases were consolidated for purposes of appeal on June 3, 1976, and oral argument was heard by the Appeals Court on January 14, 1977.

Plaintiffs, meanwhile, had begun to proceed with their action against Mr. Mitchell. Before the severance of the trial on December 2, 1974, a subpoena *duces tecum* had been served upon Philip Buchen, counsel to then-President Ford, demanding production of "all tapes and transcripts of White House conversations during the period of April 16 through May 10, 1971, at which "May Day" demonstrations * * * were discussed." The subpoena was served in October 1974. Mr. Buchen filed a motion to quash the subpoena, stating that although he had actual physical control over the tapes, he was not their custodian. Alternatively he argued that the material sought was not relevant to the case. The District Court denied the motion on November 14, 1974, and ordered production of the material. Counsel for former President Nixon then filed a motion for a stay of the November 14 order and also filed a motion to quash the subpoena. The motion for a stay and Mr. Mitchell's motion for severance were both granted on December 2, 1974.

No action was taken on the subpoena until the plaintiffs began making preparations to proceed with their case against Mr. Mitchell. On February 17, 1976, plaintiffs filed a memorandum in opposition to Mr. Nixon's motion to quash. The District Court denied Mr. Nixon's motion to quash on March 10, 1976, lifted its stay order of December 2, 1974, and ordered Mr. Buchen to advise the court of the time necessary for compliance with the subpoena. Mr. Nixon immediately appealed, and the Court of Appeals stayed the District Court's order pending appeal.

The Appeals Court issued its opinion on the Nixon appeal on January 28, 1977. The court rejected "Mr. Nixon's contention that a formal claim of privilege based on the generalized interest of Presidential conversations in civil litigation, regardless of the relevancy or necessity of the information sought." [*Dellums* v. *Powell*, No. 76-1336 (D.C. Cir. Jan. 28, 1977); Slip Opinion at 61.] The court concluded that the privilege is only presumptive, not absolute, requiring a balancing approach weighing the interests to be protected against the necessity for production. The Appeals Court affirmed the District Court's finding that plaintiffs had made a showing sufficient to overcome the claim of privilege. However, the Appeals Court ruled that the District Court erred in failing to provide adequate protections for Mr. Nixon's personal privacy interests in the subpoenaed materials, and it ordered the District Court to take certain steps to insure that privacy. The court ordered the District Court's memorandum order remanded for modification and ruled that the subpoena may thereafter issue.

Judge MacKinnon, in a separate opinion concurring in part and dissenting in part, said that Presidential privilege should protect former Presidents to the same extent it protects the incumbent because the privilege belongs to the office.

On March 11, 1977, Mr. Nixon filed a petition for rehearing *en banc.*

On April 14, 1977, the petition for rehearing was denied. Mr. Nixon then moved for a stay of mandate, which the Court of Appeals granted until at least 30 days after a decision by the U.S. Supreme Court in *Nixon* v. *Administrator of General Services.*

On June 28, 1977, the U.S. Supreme Court handed down its opinion in *Nixon* v. *Administrator of General Services.*

On July 13, 1977, Mr. Nixon filed a petition for a writ of *certiorari* with the U.S. Supreme Court. [*Nixon* v. *Dellums,* No. 77–81 (U.S. Supreme Court).]

The Court of Appeals issued its opinions in the consolidated cases on August 4, 1977. For its own convenience, the court wrote separate opinions in each case.

In the appeals of James M. Powell, the Chief of the United States Capitol Police (No. 75–1974), and the District of Columbia and the chief of its police at that time, Jerry V. Wilson (No. 74–1975), the court (1) affirmed the jury's verdict in all respects on its findings that appellants were liable for false arrest and false imprisonment and that the lower court had not incorrectly denied a directed verdict or a new trial to the defendants on those counts, (2) vacated the judgment of liability and damages for cruel and unusual punishment as being duplicative and contrary to law, since the jury had already considered these matters in awarding damages for false arrest and false imprisonment, (3) affirmed the liability as to violation of First Amendment rights, but ordered a new trial as to damages, finding that the $7,500 awarded to each member of the class was in these circumstances, "totally out of proportion to any harm that has been suffered * * *" [*Dellums* v. *Powell,* No. 75–1974 (D.C. Cir. August 4, 1977); Slip Opinion at 53] and (4) vacated the judgment on liability for malicious prosecution and ordered a new trial on this charge as to Mr. Powell only.

Regarding the awarding of $7,500 to Representative Dellums for deprivation of his First Amendment rights, the court agreed with Representative Dellums that he had suffered a First Amendment wrong when his listeners were arrested. The court concluded that damages could be awarded for loss of these rights, but just as it concluded that the damages awarded to the class for loss of its First Amendment rights were excessive, it also found the $7,500 awarded to Representative Dellums to be excessive. It therefore affirmed the jury's findings that the defendants were liable to Representative Dellums for his loss of First Amendment rights, but ordered a new trial as to damages.

In the appeals of the orders reinstating into the class the three plaintiffs who had been dismissed from the suit as original plaintiffs (Nos. 76–1418 and 76–1419), the Appeals Court affirmed the decision of the trial judge reinstating two of the plaintiffs, but ruled that the third should not have been reinstated.

In all of these August 4, 1977 decisions of the Court of Appeals Judge Edward A. Tamm dissented. Judge Tamm was of the opinion

that had the trial court taken proper judicial notice of the events preceding the arrests, the actions of the police would have been immune from civil liability as a matter of law.

The court also unanimously affirmed the District Court's dismissal of Mr. Kleindienst from the suit.

On August 11, 1977, appellants in the consolidated cases filed a motion for an extension of time to file a petition for rehearing.

On September 1, 1977, a *per curiam* order was filed in the court of appeals granting the motions of the District of Columbia appellants in numbers 75–1975 and 76–1419 to file petitions for rehearing and extending to September 19, 1977, the time within which the District of Columbia appellants may file petitions for rehearing and/or suggestions for rehearing *en banc* in numbers 75–1975 and 76–1419.

On October 3, 1977, Mr. Nixon's petition for writ of *certiorari* was denied by the United States Supreme Court.

On October 19, 1977, the District of Columbia appellants filed a petition for rehearing *en banc* in the Court of Appeals.

On October 21, 1977, the U.S. Supreme Court extended the time for defendant Powell to file a petition for writ of *certiorari* to January 1, 1978.

On November 14, 1977, a *per curiam* order was filed in the Court of Appeals denying the petitions of appellees Ronald V. Dellums *et al.* and appellants District of Columbia *et al.* for rehearing.

On the same day, a *per curiam* order *en banc* was also filed in the Court of Appeals denying appellants' suggestion for a rehearing *en banc.*

Status.—**New trials are pending in the District Court as to damages and as to the malicious prosecution complaint against defendant Powell.**

The complete text of the opinions of the Court of Appeals are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977, as follows: No. 75–1974 [Mr. Wilson] at 711; No. 75–1975 [Mr. Powell and the District of Columbia] at 815; and Nos. 76–1418 and 76–1419 [reinstated plaintiffs] at 845.

The complete text of the opinion of the Court of Appeals in *Dellums* v. *Powell,* No. 77–1336 [Nixon appeal] is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

Sportservice Corp.* v. *Steiger

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

Brief.—On January 25, 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 then 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 million 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 immunity." 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 million 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*, 536 P.2d] 689 (Ariz. 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 1 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 protestion of 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.

Pressler* v. *Blumenthal (formerly Simon)

No. 77-450 (U.S. Supreme Court)

Brief.—On May 7, 1976, Representative Larry Pressler filed suit in the U.S. 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]." [Complaint at 6.]

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 House passes a resolution disapproving of all or part of the recommendations or other rates are enacted.

Congressman Pressler contends that the procedure, insofar as it provides a mechanism for adjusting salaries of Members of Congress, violates Article I, Section 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, Section 6, clause 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." [Complaint at 8.]

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 I, Section 1, and Article I Section 6 clause 1 of the Constitution.

Congressman Pressler initiated the action in his capacity as a citizen, as a taxpayer and as a Member of Congress.

Defendants argued that the complaint did not meet the "case or controversy" jurisdictional requirement of Article III of the Constitution for the reason that the issues presented raised a nonjusticiable "political question." Defendants also argued that Congressman Pressler did not have "standing," *i.e.,* was not a proper party to raise these issues in that he failed to demonstrate any particular injury to himself that would qualify him to bring this action any more than any other citizen with a general interest in the subject matter.

On July 20, 1976, the court dismissed the complaint without prejudice for want of prosecution. On July 23, 1976, the court granted plaintiff's motion for reconsideration and vacated its order of July 20, 1976. On September 21, 1976, Representative James M. Jeffords was denied permission to intervene as a party plaintiff but was granted leave to file an *amicus* brief in support of Congressman Pressler's position.

Also on September 21, 1976, the issues were argued before the court on cross-motions for summary judgment and dismissing the complaint. As to the challenge to Representative Pressler's standing, the court said:

> A Congressman has standing to sue by reason of his office where Executive action has impaired the efficacy of his vote, *Kennedy* v. *Sampson,* 511 F.2d 430, 436 (D.C. Cir. 1974); cf. *Coleman* v. *Miller,* 307 U.S. 433 (1939), or certain other congressional duties. *Mitchell* v. *Laird,* 488 F.2d 611 (D.C. Cir. 1973). The resulting injury under such circumstances is said to create a personal stake in the outcome sufficient to assure that a suit by Congressmen affected would be in a proper adversary context. *Kennedy* v. *Sampson, supra;* see *Baker* v. *Carr,* 369 U.S. 186 (1962). Congressman Pressler alleges not that the efficacy of his legislative vote was impaired by the Executive, but rather that his vote was impaired by the failure of other Members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution. While it is clear that legislators have no special right to invoke court consideration of the validity of a statute passed over an objecting vote, *Korioth* v. *Briscoe,* 523 F.2d 1271 (5th Cir. 1975), where, as here, a Member of Congress alleges he is prevented from voting to perform a specific legislative duty expressly mandated by the Constitution, the suit may be cognizable by the courts so long as there is no attempt being made to interfere with the internal workings of the Congress.
>
> Mr. Pressler's suit meets this requirement, but he must also show that he has been, or will be, injured before standing is recognized. *Sarth* v. *Seldin,* 422 U.S. 490 (1975). Plaintiff's theory of injury is somewhat unclear, but sufficient facts have been alleged at this stage to support his claim of injury in fact. Under the Salary Act and the Adjustment Act the *status quo* as to congressional salaries may be altered without affirmative action by both Houses

of Congress. While salaries may be changed in the traditional fashion, the availability of the procedures created by the statutes under attack make the vote of any single affected Congressman somewhat less efficacious.

In 1969, congressional salaries were raised by the new process for the first time. But Mr. Pressler was not yet a Member of Congress and cannot claim his vote was impaired. In 1975, a proposed salary increase was vetoed by a Senate Resolution. The *status quo* was unaltered and we can see no injury to Mr. Pressler, though he was then a Congressman. While the next Commission should report to the President shortly, any injury from this action is far too speculative to support standing.

However, in October, 1975, congressional salaries, including Mr. Pressler's were raised under the Adjustment Act. This change was effected without action by the House and Senate. This circumvention of the traditional legislative process impaired the efficacy of Mr. Pressler's vote. He has, therefore, standing to challenge the Adjustment Act. But the Act increases, on a percentage basis, the compensation as determined by Salary Act procedures. For this reason, Congressman Pressler has standing to challenge both pieces of legislation. Accordingly, standing will be afforded under the unique circumstances of this particular case. [*Pressler* v. *Simon,* 428 F. Supp. 302, 304–305 (D.D.C. 1976).]

As for the merits of Congressman Pressler's argument that the phrase "to be ascertained by law" constitutes an explicit mandatory requirement that whenever the compensation of Members of Congress is redetermined it must be fixed at that time by a law which is debated and passed like any other law, and that Congress cannot in effect delegate that responsibility, the court considered this argument to be directed at a matter of form rather than substance, and pointed out that initially Congress did legislate, Members of Congress do serve on the Commission which recommends pay levels, and the delegation of authority is hardly absolute, since Congress explicitly reserved the right to enact legislation regardless of any recommendation it may receive from the President.

The court observed that:

> Congress continues to be responsible to the public for the level of pay its members received. There is no concealment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the executive branches was certainly not intended to be foreclosed by the ascertainment phrase. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which plaintiffs seeks. [428 F. supp. at 306.]

The court concluded that:

> The Salary Act and the Adjustment Act fix congressional compensation by law and these statutes are not prohibited

by Article I, Section 6. Neither of these Acts insofar as they govern ascertainment of congressional compensation contravene the Constitution. Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed. [428 F. Supp. at 306.]

On October 22, 1976, Congressman Pressler filed a notice of appeal to the United States Supreme Court.

In his jurisdictional statement, filed with the Supreme Court on January 20, 1977, Representative Pressler asserted that: (1) his interpretation of Article I, Section 6, is supported by prior decisions the constitutional debates, and the conduct of early sessions of Congress; (2) the District Court had erred in its reasoning, in that: (a) it said that Congress had acted "by law" in passing the acts governing its compensation because it had set up a series of commissions, (b), it retained a veto power in each House, (c) it can refuse to appropriate sufficient sums to fund the salary levels, and (d) because two of the nine members of the salary commission are appointed by the Speaker of the House and two are appointed by the President of the Senate; (3) his claim raises important questions of public policy; and (4) his claim will not subvert the methods of ascertaining non-Congressional salaries or result in any undue hardship to Members of Congress.

With the change in administrations, W. Michael Blumenthal was substituted as a defendant in his official capacity as Secretary of the Treasury in place of Mr. William Simon.

On April 1, 1977, Representative Jeffords and 18 other Members of the House of Representatives filed a motion for leave to file an *amicus curiae* brief in support of Representative Pressler's position.

Mr. Blumenthal filed a motion to affirm on April 5, 1977.

The next day, the Secretary of the Senate and Sergeant at Arms of the House filed motions to dismiss or affirm. Each motion challenged Representative Pressler's standing and asserted that the issue presented is a nonjusticiable political question. They state that the District Court's reasoning was correct, Representative Pressler's interpretation of Article I, Section 6, is not supported by prior decisions, the constitutional debates or the conduct of prior Congresses, and that his action could subvert the methods of ascertaining non-Congressional salaries even if only propsective relief is sought. Finally, both motions assert that the one-House veto issue may be moot as to the Salary Act, since on April 4, 1977, both the Senate and House adopted a conference report on a bill to extend the Emergency Unemployment Act of 1974 for an additional year and sent the bill to the President, and the bill contained an amendment requiring each House to conduct a separate recorded vote on the President's recommendations as to Congressional, judicial, and executive salaries within 60 days after they are received, and to thereby approve or disapprove the proposals.

In his reply brief, filed on April 15, 1977, Representative Pressler asserted, *inter alia,* that the case was not mooted because he seeks to enjoin all pay raises which have occurred under the Salary Act, and the proposed amendment would not repeal the 1969 and 1977 salary adjustments which have occurred, nor does it affect the

automatic cost-of-living adjustments made annually to Congressional salaries.

On May 16, 1977, the U.S. Supreme Court issued a brief *per curiam* decision. Noting that the amendment passed by Congress had been signed into law by President Carter on April 12, 1977, the Court said:

> It appearing that the amendment to the Postal Revenue and Federal Salary Act will alter materially the scope and perhaps the nature of appellant's suit, the judgment of the District Court is vacated and the case is remanded to that court for further consideration in the light of the new legislation. [*Pressler* v. *Blumenthal*,——U.S.——, 52 L.Ed. 2d 216 (1977).]

The decision also said that Mr. Justice Stevens would have affirmed the lower court's decision dismissing the complaint.

On remand, an order was filed on July 19, 1977, reinstating the original memorandum and order of the District Court.

On August 2, 1977 plaintiff filed a notice of appeal to the United States Supreme Court.

On September 21, 1977, Mr. Pressler filed an appeal with the United States Supreme Court.

In the jurisdictional statement filed in the U.S. Supreme Court on September 21, 1977, Appellant Pressler characterized the question presented in the following fashion:

> **Whether the methods of determining salary rates for Senators and Representatives under Section 225 of the Postal Revenue and Salary Act of 1967 and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in compensation for Members of Congress without requiring a direct vote by either House of Congress. [Jurisdictional Statement at 4].**

Appellant submitted that the question presented in the Appeal is substantial and that the Court should note probable jurisdiction and decide the case only upon full briefing and oral argument.

On October 11, 1977 "We The People," which describes itself as a "non-partisan, public interest group", filed a brief amicus curiae urging the Court to grant a full hearing on the merits of the appeal.

On October 26, 1977, Representative James M. Jeffords and eighteen other Members of the U.S. House of Representatiaves filed both a motion for leave to file a brief *amicus curiae* and the brief itself, in support of appellant.

Appellees Harding and Kimmitt filed motions to dismiss or affirm on November 16, 1977.

A motion to affirm was filed by the Secretary of the Treasury on December 14, 1977.

Status.—**The appeal is pending before the Supreme Court of the United States.**

The complete text of the original memorandum and order of the District Court is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* December 1976.

Reuss* v. *Balles

No. 77-1012 (D.C. Cir.)

Brief.—Representative Henry Reuss brought this action (in a complaint filed on June 21, 1976, and in an amended complaint filed on July 7, 1976) against the individual members of the Federal Open Market Committee (hereinafter "FOMC") who are not members of the Board of Governors of the Federal Reserve System, and against the 12 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 § 12A(a) of the Federal Reserve Act (12 U.S.C. § 326(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, *inter alia,* to 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 (the Appointments Clause) of the Constitution because such members have not been appointed officers of the United States in accordance with the procedures outlined 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 legislavtive 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 Article I, Section 8, clause 5 of the Constitution.

(b) Providing for offices under the United States not otherwise provided for by the Constitution; and establishing the qualifications therefor, prescribing the duties and compensation thereof, and providing 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 asserts that in carrying out the orders of the FOMC, which are made by the allegedly 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 of 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.

Also, on June 21, 1976, Representative Reuss made application for a three-judge court to hear the case pursuant to 28 U.S.C. § 2882.

Defendants filed an opposition to the convening of a three-judge court and a motion to dismiss on July 30, 1976. The motion to dismiss asserted that Reuss standing to sue, both as a Member of

the House of Representatives and as an individual owner of securities.

Plaintiff filed a motion on October 1 to amend the complaint to join the FOMC as a party defendant.

Oral argument on all motions was held on November 30, 1976.

In a memorandum opinion issued December 22, 1976, U.S. District Judge Barrington D. Parker granted defendants' motion to dismiss the complaint. The court held that Representative Reuss lacked standing to bring the suit either as a Congressman or as a bondholder.

Each of the plaintiff's allegations of injury was considered by the court. As a Congressman, Representative Reuss alleged injury in that the Reserve Bank's representatives were not properly designated as "inferior officers" and they therefore escaped the reach of the impeachment power. The court stated that since there was no specific allegation of wrongdoing, the claim was "remote, conjectural and insufficient." [*Reuss* v. *Balles,* Civil Action No. 76–1142 (D.D.C. 1976); Slip Opinion at 12.] The court held as without his argument that because these Reserve Bank members are not inferior officers of the United States that any delegation of Congressional authority to them is improper and thereby injures him. The majority of the FOMC are clearly officers of the United States, said the court, and the other members had to be approved by the Board of Governors of the Federal Reserve, so it could not be argued that the FOMC was a private agency and the delegation of authority was improper. The court stated that Representative Reuss had also failed to show injury in fact in his assertion that he was harmed in his powers to affect the confirmation process through negotiation with Members of the Senate, since it is the Senate, and not the House of Representatives, which confirms Presidential appointments made pursuant to the Appointments Clause.

Finally, the court said service on the FOMC by the Reserve Bank members in no way affected Congressman Reuss' ability to perform his legislative duties because he could introduce legislation at any time to overrule the policies or the regulations of the FOMC. As to plaintiff's standing as a bondholder, the court stated that "[a]t best the plaintiff's contentions are generalized concerns of the public, and therefore the alleged injury is abstract and speculative." [Slip Opinion at 14–15.]

Representative Reuss filed a notice of appeal on December 23, 1976, and on January 7, 1977, he filed a motion to expedite the appeal.

On March 11, 1977, the Court of Appeals denied the motion to expedite the appeal.

The appeal was argued on December 5, 1977.

Status.—**The case is pending before the United States Court of Appeals for the District of Columbia Circuit.**

The full text of the District Court's memorandum opinion is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* December 1976.

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

No. 77–1459 (D.C. Cir.)

Brief.—Plaintiff seeks double actual and punitive damages under title 31 U.S.C., § 232, the False Claims Act. The complaint was filed in the U.S. District Court for the District of Columbia, on June 24, 1976. Named as defendants were: Richard J. Daley, as Mayor of Chicago, Representative John G. Fary, and Gloria Johnson, Michael Healy and Raymond Anderzunas, employees on Representative Fary's Congressional payroll, who it is alleged did not perform duties directly related to Representative Fary's legislative functions, but in fact worked in Chicago, Ill., under the direction of Mayor Daley.

The complaint also alleges that Gloria Johnson actually performs services for the Democratic Party headquarters in Chicago's 13th ward under the control of Daley during hours when she is paid for working for Representative Fary, that Michael Healy is employed in Chicago as an attorney and works in private law offices during the hours when he is paid for working for Representative Fary, and that similarly, Raymond Anderzunas is a funeral director in a Chicago funeral home, and that Johnson, Healy and Anderzunas have each received at least 22 United States Treasury checks for salary fraudulently obtained.

The complaint also alleges that Mayor Daley knowingly caused and conspired with Representative Fary to put Johnson, Healy and Anderzunas on Representative Fary's Congressional payroll for the purpose of working at Daley's direction for his partisan political purposes, and that Representative Fary knowingly authorized payments to these individuals for salaries in excess of the work for which they performed relating to Representative Fary's legislative functions.

On August 5, 1976, the defendants moved the court to dismiss the suit on the ground that it lacked jurisdiction to entertain the matter because the plaintiff, Anthony R. Martin-Trigona, had not demonstrated that he had come forward with evidence of the alleged misdoings not already in the hands of the Justice Department.

Defendants further argued that the allegations contained in the complaint consist substantially of statements excerpted from an article written by Jack Anderson and Les Whitten which appeared in *The Washington Post* on June 17, 1976.

The Department of Justice made a special appearance before the court on August 24, 1976 to contest the jurisdiction of the court and to move that the complaint be dismissed, and in support of the motion to dismiss, filed an affidavit to the effect that the information supplied by Martin-Trigona did not supplement information already known to the Department at the time the action was instituted.

On November 12, 1976, the District Court entered an order granting defendants' motion for dismissal for lack of jurisdiction under the False Claims Act, and the court concluded that the plaintiff had no standing to raise these issues as a taxpayer.

Mr. Martin-Trigona filed a notice of appeal on December 10, 1976.

On January 26, 1977, the Clerk of the Court of Appeals notified Mr. Martin-Trigona that the time had expired for docketing the case by paying the filing fee. On March 17, 1977, Representative

Fary, Mr. Healy and Mr. Anderzunas filed a motion to dismiss for relator's failure to cause a timely docketing of the appeal.

On June 9, 1977, the U.S. Circuit Court of Appeals for the District of Columbia issued an order dismissing the appeal of the relators.

Status.—**No further action has been taken. The time for appeal has expired.**

The complete text of the District Court's order is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1976.

United States ex rel. Thompson* v. *Madden

No. 77-1157 (D.C. Cir.)

Brief.—This action was filed on October 27, 1976, under the False Claims Act, 31 U.S.C. § 231-235, by W. Edward Thompson, Anthony D. Cennamo, and George R. Douglas, Jr., all private citizens, against Ray J. Madden, Robert E. Jones, and Otto E. Passman (at that time Members of the U.S. House of Representatives), and Margaret M. Heckler, Tim Lee Carter, Walter Flowers, Bill D. Burlison, George E. Shipley, and Gene Taylor (all Members of the U.S. House of Representatives).

The complaint alleges that each of the defendants has at various times submitted vouchers to the Finance Office of the Clerk of the House for reimbursement for travel for trips which could not have been taken because records indicate that they were voting or were traveling to other destinations at the time of the alleged trips. The complaint further asserts that each defendant submitted vouchers which he or she knew to be false, or inflated, and which contained material misrepresentations of facts, and that each claimed reimbursement based upon travel by automobile when in fact each traveled by common carrier and was entitled to reimbursement on that basis, which would result in a smaller payment than travel by automobile. It asks for double the damages established at trial, plus the statutory forfeiture of $2,000 for each violation of the False Claims Act.

As a second cause of action, the relators assert jurisdiction under 28 U.S.C. § 1345, stating that defendants had a fiduciary duty to the United States and that each has been unjustly enriched. On this count, the complaint seeks such damages as may be established at trial. The third cause of action, also asserting jurisdiction under 28 U.S.C. § 1345, alleges that said payments were made under mistake of fact, and seeks such damages as may be shown at trial.

The False Claims Act requires the relators to advise the Justice Department of the suit and to turn over to them any evidence in their possession. The Justice Department then has 60 days in which to assume the prosecution of the case.

On November 19, 1976, the Justice Department entered a special appearance on behalf of plaintiff United States for the purpose of contesting the jurisdiction of the court and presenting a motion to dismiss. Affidavits filed by the Department indicated that all of relators' information came from a newspaper article which was already in the Department's possession, and the Justice Department had already undertaken and completed its own investigation

of the entire matter, terminating its investigation on October 27, 1976. This information already being in the hands of the Justice Department, under 31 U.S.C. § 232(c) the court had no jurisdiction to hear the matter, the motion to dismiss said. In addition, the Justice Department suggested that the court decide the jurisdictional matter before it required the defendants to answer or otherwise respond to the complaint.

On December 13, 1976, U.S. District Judge Thomas A. Flannery dismissed the action *sua sponte*, stating that the court had no jurisdiction because of 31 U.S.C. § 232(c)3. [*United States ex rel, Thompson* v. *Madden*, Civil Action No. 76–1990 (D.D.C. December 13, 1976).]

On December 23, 1976, the relators filed an appeal with the United States Court of Appeals for the District of Columbia Circuit.

On April 5, 1977, the Clerk of the Court of Appeals notified the the relators that the time for filing their appellate brief had expired.

The Court of Appeals, in an order issued on May 18, 1977, ordered the relators to show cause within 15 days why the appeal should not be dismissed for failure to file a brief or otherwise prosecute the case. The relators then asked for and were granted an extension of time to reply to the court's order.

On June 20, 1977, the relators informed the Appeals Court by letter that they did not object to the dismissal of the appeal.

On July 13, 1977, a *per curiam* order was filed discharging the order to show cause and dismissing the appeal *sua sponte*.

Status.—**No further action has been taken. The time for appeal has expired.**

The complete text of the order of the District Court is printed in the "Decisions" section of the report *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

United States* v. *Hastings

Criminal Action No. 76–606 (D.D.C.)

Brief.—Former Representative James F. Hastings of New York was indicted on September 21, 1976, by the Federal grand jury in the District of Columbia. The indictment charged him with 35 counts of mail fraud and submitting false statements to the Office of Finance of the U.S. House of Representatives.

On October 1, 1976, a plea of not guilty was entered.

The defendant's motion to transfer the case to the Western District of New York was heard and denied on November 9, 1976.

On December 17, 1976, a jury returned a verdict of guilty on 28 counts of mail fraud and not guilty on the 7 counts of submitting false statements.

On January 31, 1977, U.S. District Judge June L. Green sentenced Mr. Hastings to be incarcerated for not less than 20 months nor more than 5 years in prison for each count for which he was found guilty, said sentences to run concurrently.

No appeal was filed.

Mr. Hastings filed a motion for reduction of sentence on May 27, 1977, on the grounds that the sentence was causing his family

considerable financial hardship and that the sentence was unduly harsh for a first offender. The motion was denied on June 10, 1977.

Status.—**On November 23, 1977, an order was filed, modifying defendant's sentence by eliminating the requirement of any minimum time to be served and making Mr. Hastings eligible for parole.**

United States* v. *Hastings

Civil Action No. 77-0511 (D.D.C.)

Brief.—This action filed on March 22, 1977, seeks to recover from former Representative James F. Hastings certain funds which were paid out while the defendant was serving in the United States House of Representatives. The complaint alleges that from January 3, 1969, to January 20, 1976, while serving in the House, Mr. Hastings had placed on his personal staff payroll several persons who then returned part of their salaries directly to him or to his personal accounts for the purchase or payment of personal goods or services for Mr. Hastings. The complaint also alleges that district office space was rented from the defendant's brother whose insurance agency also had offices in the building, and that personnel on the defendant's staff payroll in that office were also employed by the insurance agency on a full-time salary basis. The complaint further asserts that the rent and salaries were used to defray the costs and expenses of the insurance company.

The first cause of action states that the defendant has breached his fiduciary duty to the United States and asks for the imposition of a constructive trust or a trust *ex maleficio* upon all of defendant's assets and property and all profits, earnings, income, and benefits arising from the alleged unlawful conduct, with the proceeds to be used for the benefit of the plaintiff as beneficiary. The second cause of action asserts that plaintiff paid these moneys out of mistake of fact, thinking that they were being paid to these people for work actually done, and seeks from defendant $50,000. The third cause of action is based on the False Claims Act, 31 U.S.C. §§ 231-235, stating that the defendant knowingly submitted false, fictitious, or fraudulent statements with the finance officer of the House, with the intent of defrauding the United States, and asks for double the plaintiff's damages, which are claimed to be over $30,000, and for the statutory forfeiture of $2,000 for each violation of the act.

Mr. Hastings filed an answer on April 25, 1977, in which he claimed, among his defenses, that the court lacks jurisdiction over all allegations relating to two of the former employees because the right of action against them arose more than 6 years ago, and the action is therefore barred by the provisions of the False Claims Act. Mr. Hastings also asserts that the first and second cause of action relating to these two employees derives from the allegation of making a false claim for which the False Claims Act is the exclusive remedy, and therefore these actions are also barred. He claims that 31 U.S.C. § 235 is more than just a statute of limitations—it is also a jurisdictional bar. As to the allegations relating to another employee, Mr. Hastings, without admitting or denying the allegations,

demanded strict proof. Regarding the other employees and the district rental payments, Mr. Hastings, denied all allegations.

On June 24, 1977, the Government filed a motion for partial summary judgment in the amount of $12,406.19, which they asked the court to double under the False Claims Act, plus eight $2,000 forfeitures pursuant to the Act. The Government asserts that Mr. Hastings is collaterally estopped by his prior criminal conviction from contesting certain issues relevant to the civil proceedings, and that the United States is entitled to summary judgment not only under the False Claims Act, but also under the common law principles calling for an accounting for moneys paid in breach of a fiduciary duty and for moneys paid by mistake.

August 5, 1977, defendant filed an opposition to the Government's motion for partial summary judgment, on grounds that the Government is entitled neither to forfeiture nor to consideration of its common law remedies.

On September 30, 1977, the District Court issued an order granting the Government's motion for partial summary judgment ordering defendant to pay $40,812.38 under the False Claims Act and denying the Government's request for a constructive trust and other common law relief.

In a memorandum opinion which accompanied the order, Judge Richey noted that, since the defendant did not contest the liability issue, the only issue involved in the motion for partial summary judgment was that of the extent of the relief granted. In regard to the relief available to the Government, Judge Richey stated:

> **Under the False Claims Act, the United States is entitled to collect $2,000 for each false "claim" and double the amount of the damages which were sustained. 31 U.S.C. § 231. In this case, the United States claims that it is entitled to $2,000 for each of the eight payroll authorization forms. Defendant responds that the plaintiff is only entitled to $2,000 for each of the two employees for whom the allowance forms had been submitted. The Court finds that the payroll authorization forms are "claims" under the statute and, therefore, the United States is entitled to eight forfeitures of $2,000 each. [Slip Opinion at 6, this report at 286.]**

In reaching this conclusion, Judge Richey relied upon the opinion of the U.S. Supreme Court in *United States* v. *Bornstein,* 423 U.S. 303 (1976), a case which elaborated the method whereby the number of forfeitures should be counted in the context of a False Claims Act allegation against a subcontractor. Judge Richey drew an analogy between the facts in *United States* v. *Bornstein* and the present case, stating that defendant Hastings was similar to a "prime contractor" who hired employees as "subcontractors" and that the number of forfeitures should be the number of "individual false payment demands:, (i.e. the number of payroll authorization forms submitted by the defendant) and not the number of "subcontractors" (i.e. the number of employees hired). The opinion also stated that this conclusion was supported by the language of the statute.

> **The statute provides that the $2,000 forfeiture be paid for doing "any" of the acts prohibited by § 5438 of the Revised**

Statutes. *United States* v. *Hess,* 317 U.S. 537, 552 (1943). Section 5438 is the direct antecedent of section 1001 of the present criminal code. *United States* v. *Bramblett,* 348 U.S. 503, 504 (1955). Thus, the statute provides for the award of a forfeiture for every act in violation of section 1001. Defendant Hastings has been convicted of eight such violations. Accordingly, the defendant will be required to pay eight forfeitures of $2,000—one for each false claim made upon the United States. [Slip Opinion at 8; this report at 288.]

The opinion held the legislative intent behind the Act to be to provide a complete remedy for fraudulent claims against the United States and therefore plaintiff's request for imposition of a constructive trust and other common law relief was denied.

Status.—**The case is pending in the District Court.**

The Memorandum Opinion of the District Court appears in the "Decisions" section of this report at 280.

[Note: the factual situation in this case is the same as that in *United States* v. *Hastings*, Criminal Action No. 76-606 (D.D.C. December 17, 1976); see this report at 150 for a brief of that case.]

United States* v. *Podell

Civil Action No. 76-0509 (S.D.N.Y.)

Brief.—On October 1, 1974, then-Representative Bertram L. Podell entered a plea of guilty to 2 counts of a 10-count indictment charging him with conspiratorial and substantive violations of 18 U.S.C. § 203(a). The indictment charged that while serving as a Member of Congress, Mr. Podell appeared before the Civil Aeronautics Board and the Federal Aviation Administration and sought favorable treatment of an application for a new route for a small Florida-based airline, and that he was paid $41,350 for his services. Mr. Podell was fined $5,000 and was sentenced to a 2-year imprisonment with 18 months of the sentence suspended. [See the brief of *United States* v. *Podell*, Criminal Action No. 73 CR 675 (S.D.N.Y. October 1, 1974) in the report of *Court Proceedings and Actions of Vital Interest to the Congress,* April 15, 1975.]

On January 30, 1976, the United States filed a civil suit against Mr. Podell under 28 U.S.C. § 1345, seeking to recover the $41,350 which he allegedly was paid for representing the airline before the agencies.

In his answer, filed on May 20, 1976, Mr. Podell specifically denied each allegation in the complaint and further argued that prosecution was barred by the statute of limitations.

The Government filed a motion for summary judgment on February 22, 1977, to which Mr. Podell filed his opposition on April 5th. On May 30, 1977, U.S. District Judge Kevin T. Duffy issued an opinion and order granting the Government's motion for summary judgment in the amount of $40,000. The Government had argued that Mr. Podell's guilty plea in the criminal case estopped him from contesting his violation of 18 U.S.C. § 203 in this case, that the acts thereby admitted constituted a breach of the fiduciary duty owed

the United States, and that the Government could therefore recover under 28 U.S.C. 1345 all amounts paid to Mr. Podell for these activities. The court added that a violation of § 203 establishes, as a matter of law, a breach of his fiduciary duty owed the United States, and that such a criminal conviction precludes a defendant in a subsequent civil case from contesting those matters on which the conviction rests. As such, the court concluded, Mr. Podell's plea of guilty in the criminal case conclusively established his breach of his fiduciary duty and he is accountable for the breach. His affirmative defense that the statute of limitations for fraud had run was without merit, said the court, since the charge against him was not for fraud, but breach of a fiduciary duty. All that remained to be determined was the amount recoverable. The court found that as a matter of law $40,000 of the amount paid constituted Mr. Podell's compensation for his services in breach of his fiduciary duty, and granted the Government's motion for summary judgment in that amount.

On June 30, 1977, defendant filed a notice of appeal to the United States Court of Appeals for the 2d Circuit, from the order of May 31, 1977.

On July 1, 1977, defendant moved for reargument of the Government's motion for summary judgment.

On July 28, 1977, defendant's motion for reargument was denied.

On August 3, 1977, the Court of Appeals granted defendant's motion to withdraw his appeal without prejudice to refile by September 23, 1977.

A judgment of $78,021 was entered against defendant on August 16, 1977, representing the $40,000 recoverable by the Government with 6-percent interest and costs.

On September 21, 1977, defendant filed an amended notice of appeal.

Status.—**The appeal is currently pending before the U.S. Court of Appeals for the Second Circuit.**

The complete text of the opinion and order of the District Court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977, at 859.

Clay* v. *Bauman

Cause 61857F (Circuit Court of the City of St. Louis, Mo.)

Brief.—Representative William L. Clay brings action for damages in the amount of $2 million for libel against G. Duncan Bauman (publisher of the *St. Louis Globe Democrat*), The Herald Company's Globe Democrat Division (a Missouri corporation), and Dennis McCarthy (reporter), George A. Killinberg (managing editor), and Martin Duggan (editor).

The suit was originally filed in the District Court for the District of Columbia, but pursuant to defendants' motion, the cause was dismissed from that jurisdiction on the basis of forum *non conveniens.*

On August 4, 1976, Representative Clay filed his petition for relief in Circuit Court of the City of St. Louis. He alleges that the *St. Louis Globe Democrat* printed two libelous articles about him with knowledge that both were false.

On September 24, 1976, defendants filed their answer, in which they denied the allegation that they knew or should have known the articles were untrue, asserted both articles are privileged under the First Amendment to the Constitution, and stated that their statements were true in substance in all respects.

Status.—The case is pending before the Missouri Court.

Newcomb* v. *Brennan

No. 77–1006 (7th Cir.)

Brief.—The former Deputy City Attorney of Milwaukee, Wis., James Newcomb, alleged that James Brennan, the elected City Attorney, conspired unlawfully with Representative Henry Reuss to discourage Newcomb from running against Representative Reuss in the 1976 Democratic Congressional Primary in the fifth district of Wisconsin, and further, that when Newcomb declined to withdraw his candidacy, his employment was terminated by Brennan with Representative Reuss' knowledge and consent contrary to the established policy and practice of the City and County of Milwaukee which permitted its attorneys to retain their jobs while conducting political campaigns.

Mr. Newcomb argued that he was entitled to recover damages from Mr. Brennan and Representative Reuss in the amount of $1.5 million for the unconstitutional loss of his job, injury to his reputation, and embarrassment, humiliation and mental anguish. Mr. Newcomb argued further that he was entitled to punitive and exemplary damages in the amount of $3 million.

Defendant Brennan filed a motion to dismiss and in support thereof argued that under city ordinances plaintiff had neither tenure nor city service status, that plaintiff served at the pleasure of the City Attorney as a political appointee with a policy level job which did not entitle him to claim the protection of due process in connection with his dismissal, and that while the First Amendment may guarantee his right to run for political office, it did not guarantee that he could do so and retain a politically appointed policy level job.

Representative Reuss argued that it was defendant Brennan's prerogative to discharge Newcomb, and alleged that Brennan's decision was made without Representative Reuss' involvement.

On November 15, 1976, the court filed a "Memorandum and Order" dismissing the complaint. The court said that:

> As the number two man in the city attorney's office, plaintiff was directly responsible for the implementation of the policies of the city attorney. The highly political and sensitive nature of the position is self-evident. The sole question presented therefore is whether an individual in such a policymaking position may be discharged for reasons which are concededly political in nature and yet unrelated to the duties and responsibilities of that position.
>
> Both the Supreme Court and the Seventh Circuit Court of Appeals have distinguished the situation involving patronage dismissals of policymaking employees from the

involving nonpolicymaking employees. [*Newcomb* v. *Brennan,* Civil Action No. 76–C–357 (E.D. Wis., Nov. 15, 1976); Slip Opinion at 3–4.]

The court found nothing improper about Brennan's firing of Newcomb and held that "plaintiff's discharge failed to give rise to a constitutional deprivation." [*Id.* at 5.]

On November 22, 1976, Mr. Newcomb filed a notice of appeal.

On July 11, 1977, the U.S. Court of Appeals for the Seventh Circuit issued an opinion affirming the dismissal by the District Court.

The Appeals Court first reviewed the Supreme Court decisions dealing with the First Amendment and the right to run for political office and concluded that "[t]hese decisions indicate that plaintiff's interest in seeking office, by itself, is not entitled to constitutional protection." [*Newcomb* v. *Brennan,* No. 77–1006, (7th Cir. July 11, 1977); Slip Opinion at 4; *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977, at 872.] The Appeals Court said it would therefore affirm the dismissal without ever reaching the grounds upon which the District Court dismissed the case—that Mr. Newcomb held a policymaking position—if the First Amendment claim was based solely on the right to seek office, but it read the claim as being much broader. Since this was not a case of a State enforcing a facially neutral statute by which a candidate was denied access to the ballot, but rather one in which a State officially allegedly tried to discourage a specific candidacy, "[w]e conclude that under the circumstances of this case plaintiff's interest in seeking office was protected by the First Amendment. * * * Therefore, the dismissal of the complaint can only be affirmed if the State's interest in permitting the City Attorney to fire his deputy for political reasons is of sufficient importance to justify the infringement of plaintiff's First Amendment rights." [Slip Opinion at 5–6.]

The court next ruled that the District Court had not erred in finding that Mr. Newcomb held a policymaking position, but did agree that previous decisions in cases dealing with dismissals from policymaking positions did not and should not extend beyond situations in which the dismissed employee would retard a new administration's policies because of his political affiliation.

The Appeals Court then determined that because of the nature of the Deputy Attorney's position and the necessity for avoiding an open rift between the City Attorney and his deputy—even if the feud were unrelated to the performance of the job—the City Attorney had the right to dismiss the Deputy Attorney for reasons of personal loyalty. In a footnote at the end of the opinion, the court said that since Mr. Brennan and Representative Reuss were insufficient to establish the liability of Representative Reuss under color of State law for the purposes of 42 U.S.C. §§ 1983 and 1985.

On October 6, 1977, a petition for a writ of *certiorari* was filed in the United States Supreme Court on behalf of Mr. Newcomb.

Status.—**On November 28, 1977, the petition for writ of *certiorari* was denied.**

The complete text of the memorandum and order of the District

Court is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* December 1976.

The complete text of the decision of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977, at 869.

***Missouri* v. *Adams* (formerly Coleman)**

Nos. 77-1336 and 77-1339 (D.C. Cir.)

Brief.—The State of Missouri, the Missouri-St. Louis Metropolitan Airport Authority and Thomas Eagleton, who, the complaint notes, "represents the people of Missouri as a U.S. Senator", filed this action on September 8, 1976 against then-Secretary of Transportation William Coleman. On February 22, 1977, Senator John Danforth and other Missouri parties were granted permission to intervene as parties plaintiff.

The complaint alleged that Mr. Coleman's decision to establish a St. Louis area airport in Illinois rather than Missouri is unlawful as: exceeding his authority under the Airway Development Act of 1970; violative of the equal protection clause; and an abuse of administrative discretion.

The plaintiffs asked for a judgment declaring Mr. Coleman's action illegal, a permanent injunction against proceeding with an Illinois site application unless and until the pertinent statutory and constitutional requirements have been met, a preliminary injunction against the Secretary pending a final determination of the case, and such other relief as the court deems just and proper.

On October 12, 1976, Mr. Coleman filed a motion for summary judgment.

On November 19th, an order was issued denying plaintiffs' request for a preliminary injunction and giving the plaintiffs 30 days to respond to defendant's motion for summary judgment.

In a memorandum and order filed February 8, 1977, the court denied plaintiff's "Motions for Leave to Conduct Discovery and Deferral of Consideration of defendant's Motion for Summary Judgment, Temporary Restraining Order, and Preliminary Injunction, and in Opposition to defendant's Motion for Summary Judgment," and granted the defendant's "Motion for Summary Judgment."

The court concluded that:

> There can be no doubt that while Plaintiffs may disagree with the decision that was reached they have presented to this Court nothing from which it can be legally determined that it was improper under the existing statutory and case law. [*Missouri* v. *Coleman,* 427 F. Supp. 1252, 1263 (D.D.C. 1977).]

On March 30, 1977, newly appointed Secretary of Transportation Brock Adams announced that for various reasons he had decided "that it would be premature to approve further Federal funding for land acquisition of the [Illinois site] at this time". [Decision of Brock Adams, Secretary of Transportation on Federal Funding of Land Acquisition for a New Airport to Serve the St. Louis Region, March 30, 1977, at 4.]

On May 13, 1977, the State of Missouri filed a motion to vacate the judgment of the District Court and remanding the case to the District Court with instructions to dismiss the case upon the decision of Secretary Adams, since although he had stated only that he decided not to approve funding at this time, "it is clear from his decision that he does not contemplate re-examining the matter in the near future." [Memorandum of Points and Authorities in Support of Appellants' Motion to Vacate Judgment Below and Remand Case to District Court With Instructions to Dismiss as Moot at 4, *Missouri* v. *Coleman,* No. 77-1336 (D.C. Cir.).] Another plaintiff, HUSTLE (a group of local residents in the St. Louis area), also filed a motion that same day to vacate its appeal as moot, and joined the State of Missouri in asking the Appeals Court to vacate the judgment of the District Court and to remand the case to the District Court with instructions to dismiss the case as moot.

On July 5, 1977, the U.S. Court of Appeals for the District of Columbia issued a *per curiam* order in each case granting the motion to vacate the appeal, vacating the order of the District Court, and remanding the case to the District Court with instructions to dismiss the complaint as moot.

Status.—On September 20, 1977, an order was filed in the District Court dismissing the complaint as moot. The time for appeal has expired.

The complete text of the memorandum and order of the District Court is printed in the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 1, April 15, 1977.

Buckley* v. *McRae

No. 76-694 (U.S. Supreme Court)

and

Califano* (formerly Mathews) v. *McRae

No. 76-1113 (U.S. Supreme Court)

Brief.—Plaintiffs in these cases sought to invalidate Section 209 (the Hyde amendment) of the 1977 Appropriations Act for the Department of Labor and the Department of Health, Education, and Welfare (hereinafter "HEW") [Pub. L. 94-439] including funding for Title 19 of the Social Security Act (Medicaid). Section 209 provides that:

> None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term.

Cora McRae is a citizen of New York who was in the first trimester of her pregnancy and had decided to terminate her pregnancy after consulting with her physician.

Other plaintiffs are Planned Parenthood of New York City, Inc., Dr. Irwin B. Teran, an obstetrician and gynecologist suing individually and on behalf of others similarly situated, and the New York City Health and Hospitals Corporation. Named as defendant in the suit filed in the United States District Court for the Eastern District of New York was the Secretary of the Department of Health, Education, and Welfare (at that time David Mathews).

During the proceedings, Representative Henry J. Hyde, Senator Jesse A. Helms, and then-Senator James Buckley sought to intervene in support of the legislation. They cited as grounds their interest as Members of Congress in seeking to protect their votes in favor of the Hyde amendment for judicial nullification, and their interest as citizen-taxpayers. They argued that in passing Section 209, Congress made it clear that it was not appropriating any money for elective, nonmedically dictated abortions for the period October 1, 1976 to September 30, 1977. They also asserted that because Article I, Section 9, clause 7 of the Constitution grants Congress the exclusive power of appropriating money, and a judicial invalidation of the Hyde amendment would amount to a judicial appropriation of funds in violation of the Constitution, "[i]t is beyond the competence of any court, State or Federal, to sit in judgment respecting the wisdom of Congress when Congress refuses to make appropriations."

On October 22, 1976, U.S. District Judge John Dooling issued a preliminary injunction against enforcement of the Hyde amendment. He reviewed Title 19 of the Social Security Act, saying that it had been enacted to enable each State to furnish medical assistance on behalf of families with dependent children and that it had authorized a new appropriation for each fiscal year of a sum "sufficient to carry out the purposes" of Title 19. The court declared that New York adopted Title II of the New York Social Services Act, with a goal of making high quality medical care available to everyone regardless of race, age, national origin, or economic standing. The court also reviewed a 1976 New York decision which said that Medicaid payments may not constitutionally be denied for elective abortions, and a 1975 Connecticut Federal District Court decision which held that a State cannot constitutionally deny medical assistance to indigent women seeking elective abortions.

HEW argued that plaintiffs would suffer no harm from the cutoff of funds, since the State, under its own laws and possibly under Federal constitutional imperatives, must continue to reimburse providers of elective abortions for indigents. The court rejected this argument, saying that these people were citizens of the United States as much as of the individual States—the relationship involved is one in which the States are charged with carrying out the responsibilities of the Federal Government to the Federal Government's own citizens, and not one in which the Federal Government merely grants voluntary benefits to States for providing services to the States' citizens. The State might well find funds to provide for these services said the court, but merely because a catastrophe may not follow an unconstitutional denial of an entitlement does not make such action tolerable.

The court then turned to the petition of the Members of Congress to intervene. First, Judge Dooling rejected as grounds for intervening their interest as Members of Congress. He found that they had suffered no legal injury to the validity of their votes, as was the case in *Kennedy* v. *Sampson,* 511 F.2d 430 (D.C. Cir. 1974). The court continued:

But that clear right—in effect, to have his vote counted at its full legal value—is not involved here. No one has challenged the correctness of the process of enactment. The challenge is to the constitutional validity of one section of a correctly enacted law. To grant intervention on the ground of the members' participation in enacting the law would involve accepting as a principle that each member of the Congress has an interest to intervene in every case in which the substantive constitutionality of a provision in a federal enactment was drawn into question, or, indeed, in which the interpretation of a federal statute was in question. [*McRae* v. *Mathews,* 421 F. Supp. 533 (E.D.N.Y. 1976).]

However, the court then found that, since they were challenging the legality of a specific expenditure, the interest of the Members as citizen-taxpayers was sufficient to allow them to intervene under *Flast* v. *Cohen,* 392 U.S. 83 (1968). The court then noted that even had this interest not been sufficient, their comments would have been welcome as the submission of *amici curiae.*

The court said that in declaring the Hyde amendment unconstitutional it was not appropriating funds in violation of Article I, Section 7, clause 9. Congress had determined that the funds it appropriated were sufficient to carry out title 19 and had only sought to restrict the circumstances in which the funds could be used to pay providers of lawful abortional services. Since that prohibition transcends constitutional rights, the court ruled, it cannot be given effect. Determining that plaintiff McRae and others similarly situated would suffer irreparable harm if the section were given effect, the court issued the injunction.

On October 29, 1976, the court denied a motion of HEW to amend its order of October 22, 1976, to provide that Medicaid reimbursement paid under the order was subject to recoupment if the order were to be reversed on appeal.

The Congressional intervenors filed an appeal with the Supreme Court on November 17, 1976. Their jurisdictional statement asserted that the questions presented to the court for its determination are:

> (1) Whether the United States District Court for the Eastern District of New York exceeded its jurisdiction in entertaining respondent's complaint on its merits and in directing the Secretary of Health, Education and Welfare to expend federal funds for elective abortions.
>
> (2) Whether there is a rational basis for the Congressional classification between medically dictated abortions and elective abortions. [Appellants' Jurisdictional Statement at 10, *Buckley* v. *McRae,* No. 76–694 (U.S. Supreme Court).]

The Justice Department filed an appeal on behalf of Joseph A. Califano, now the Secretary of HEW, on February 11, 1977. [*Califano* v. *McRae,* No. 76–1113 (U.S. Supreme Court).]

On June 29, 1977, the U.S. Supreme Court dismissed the appeal in *Buckley* v. *McRae* in a brief order. That same day they also

vacated the judgment of the lower court in *Califano* v. *McRae* and remanded the case to Judge Dooling for further consideration in light of the Supreme Court's decision in *Maher* v. *Roe,* 45 U.S.L.W. 4787 (U.S. June 20, 1977). [In that case the Court held that a State participating in the medicaid program was not required by the Equal Protection clause of the Fourteenth Amendment to pay for nontherapeutic abortions for indigent women simply because, as a matter of policy, the State paid for expenses incident to childbirth.]

In the District Court, plaintiffs filed a motion for a temporary restraining order on July 27, 1977.

At a hearing on July 28, 1977, Judge Dooling granted the order temporarily restraining effectuation of the Hyde amendment pending a hearing on the plaintiffs' motion for a preliminary injunction, and ordered the defendants to continue to pay the Federal share of abortions in accordance with procedures prior to the enactment of the Hyde amendment.

On August 4, 1977, at a hearing before Judge Dooling, the temporary restraining order was vacated.

The case was called before Judge Dooling on August 11, 1977, and the hearing was resumed. At the conclusion of the proceedings that day, the hearing was continued to September 6, 1977.

The case was again called before Judge Dooling on September 6, 1977, and hearing resumed.

On October 3, 1977, the U.S. Supreme Court denied the petition for rehearing in *Califano* v. *McRae.*

Status.—**On October 14, 1977, the case was called before Judge Dooling in the District Court and adjourned without a date for resumption set.**

The memorandum and order of the District Court is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 1, April 15, 1977.

Ray* v. *Proxmire

Civil Action No. 77-1522 (D.C. Cir.)

Brief.—On February 10, 1977, Candis O. Ray, acting as her own attorney, filed this action in the United States District Court for the District of Columbia. Named as defendants were Senator William Proxmire and his wife, Ellen Proxmire.

The complaint alleges among other things, that Mrs. Proxmire, a salaried officer of the Washington Whirl Around Tour Company, is using her position and her husband's Senate position "for profit making purposes in competition to Plaintiff, in luring the Congress—Bill—lobbying association customers away from plaintiff, damaging her and her chances of income and a livelihood, thus forcing her out of business by engaging in influence peddling and unfair competition, and conflict of interest activities. * * *" [Complaint at 2.]

On April 6, 1977, in a brief order the complaint was dismissed, and on May 3, 1977, notice of appeal was filed.

Status.—The case is pending before the United States Court of Appeals for the District of Columbia circuit.

Young* v. *New York Times Company

Civil Action No. 77-0984 (D.D.C.)

Brief.—On June 9, 1977, Representative John Young filed this action against the New York Times Company and New York Times News Service which published and transmitted to numerous newspapers for publication a series of articles which asserted that Congressman Young had engaged in certain illegal and improper conduct. John Crewdson and Nicholas Horrock, both reporters for the *New York Times* who were involved in the preparation of the articles complained of, are also defendants. Also named as defendants are Colleen Gardner, a former employee of Congressman Young, and her attorney Sol Rosen, who are alleged to have entered into a conspiracy with the above-named defendants.

Congressman Young's complaint asserts that the articles which were caused to be published by the defendants were false and published with malice in that the defendants knew that material statements in the article were false, and the statements were published with the intent of injuring him.

Congressman Young also alleges that as part of the conspiracy the defendants caused a number of telephone conversations between himself and others to be intercepted and recorded without his knowledge in an attempt to injure him. Additionally, Congressman Young alleges that in furtherance of the conspiracy defendants caused false statements to be made about him and his activities to the Federal Bureau of Investigation and the Justice Department.

Each of the acts complained of by Congressman Young was done, he asserts, for the purpose of creating a lurid scandal and to damage his private life and his public career.

As damages Congressman Young asks $1 million in general damages and $1 million in punitive damages.

On November 14, 1977, defendants Gardner and Rosen filed their answer to the complaint. As part of their answer they filed a counter claim against Representative Young asserting that the complaint had been filed solely to harass them. They ask for two million dollars in damages.

Status.—**The action is pending before the United States District Court for the District of Columbia.**

Rosen* v. *Young

Civil Action No. 76-1663 (D.D.C.)

Brief.—On September 7, 1976. Sol Z. Rosen, filed this action in the United States District Court for the District of Columbia. Mr. Rosen, a Washington, D.C. attorney, alleged that Representative John Young, had, in a press release, accused him of making false accusations about Representative Young. Later, Mr. Rosen amended the complaint to include a second count alleging that Representative Young had once again made a statement to a newspaper asserting that Mr. Rosen had made misstatements and misrepresentations about him.

On August 18, 1977, an order was filed denying plaintiff's motion to compel discovery as moot.

Status.—**The action is pending before the United States District Court for the District of Columbia.**

Gardner v. ***Young*** (New Case)

Civil Action No. 77-1435 (D.D.C.)

Brief.—On August 22, 1977, Colleen Gardner filed this complaint in the United States District Court for the District of Columbia. Ms. Gardner asserts that Congrssman Young in two separate statements to the press made slanderous and defamatory accusations about her.

Ms. Gardner seeks $5 million in compensatory damages and $5 million in punative damages for each of the two statements.

Status.—The action is pending before the United States District Court for the District of Columbia.

Helstoski v. ***Goldstein***

Civil Action No. 75-1803 (D.N.J.)

Brief.—On October 21, 1975, then-Representative Henry Helstoski filed this suit as a class action primarily seeking injunctive relief against the Office of the United States Attorney for the District of New Jersey and Jonathan Goldstein, the United States Attorney for that district, to prevent alleged violations of the plaintiff's constitutional rights. The complaint set out "innumerable violations of due process in the utilization of multiple Grand Juries" and "numerous violations of the plaintiff's rights which were occurring as a result of an alleged investigation being conducted by the defendants. * * * " [Brief and Appendix on Behalf of Henry Helstoski—Plaintiff-Appellant at 1.]

Mr. Helstoski asked the court to mandate several remedial actions including damages, the disqualification of the defendant-prosecutors relative to the investigation of the plaintiff, an injunction against certain activities taken by the prosecutors allegedly in violation of the plaintiff's rights, and the return of numerous of plaintiff's records which had been obtained by the defendants.

On January 12, 1976, the defendants moved for a dismissal. On June 2, 1976, an indictment was returned against the plaintiff [see *United States* v. *Helstoski; Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977, at 19], and 6 days later, on June 8, 1976, the defendants' motion to dismiss in this action was granted.

Appeal was taken by the plaintiff to the Third Circuit Court of Appeals.

On March 28, 1977, the Court of Appeals issued its *per curiam* opinion reversing the judgment of the District Court and remanding the action for further proceedings.

The court concluded that certain of the allegations made in Mr. Helstoski's complaint assert action by the U.S. Attorney's office which are outside the sphere of the proper elements of a prosecutor's job. The court particularly noted that Mr. Helstoski had asserted that the U.S. Attorney's office deliberately leaked false information about him in an effort to injure him politically. This type of activity, the court declared, if it occurred, would "lie outside

of the rationale for absolute immunity. * * * At most, it would be subject to a qualified good-faith immunity." [*Helstoski* v. *Goldstein*, 552 F.2d 564, 566 (3rd Cir. 1977).]

On June 13, 1977, Mr. Helstoski filed a motion in the District Court seeking an entry of a default judgment, to bar of the use of Government funds, and to bar the taking of depositions by defendant.

On the same day, the defendant filed an answer and a demand for a jury trial.

On September 1, 1977, plaintiff's motion for entry of default judgment was withdrawn.

On the same day, plaintiff's motion to file an amended complaint was granted.

The amended complaint was filed on September 30, 1977. The amended complaint sought a declaratory judgment that plaintiff's rights under the First, Fifth, and Sixth Amendments of the U.S. Constitution and the principles of the Separation of Powers have been violated as well as $250,000 in compensatory damages and an equal amount in punitive damages, instead of the injunctive relief sought in the original complaint.

Status.—**The case is pending in the United States District Court for the District of New Jersey.**

The complete text of the opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

United States* v. *Tonry

Criminal Action No. 77-260 (E.D.La.)

Brief.—On May 12, 1977, Richard A. Tonry, who 8 days earlier had resigned from the U.S. House of Representatives, was indicted on 11 counts for conspiracy to obstruct justice (18 U.S.C. § 371); promising benefits for political contributions (18 U.S.C. §§ 2, 600); violations of a Federal Election Campaign Act (various sections of 2 U.S.C. §§ 431-441(j) and 18 U.S.C. § 2); obstruction of justice (18 U.S.C. §§ 2, 1503) making false declarations before a grand jury (18 U.S.C. § 1623).

Indicted with Mr. Tonry was John W. Mumphrey, a former law partner of Mr. Tonry, chairman of his campaign for Congress and his Congressional district director.

On July 1, 1977, the Government filed a bill of information charging Mr. Tonry with one count of conspiracy, one count of accepting political contributions in violation of the Federal Election Campaign Act, and two counts of promising benefits for political contributions. Mr. Tonry pled guilty that day to all four counts. The indictment was then dismissed as to Mr. Tonry and Mr. Mumphrey.

On July 28, 1977, Mr. Tonry was sentenced to serve 1 year in prison, fined $10,000, and placed on probation for 3 years during which time he may not run for political office or engage in political activity.

On August 15, 1977, Mr. Tonry entered the Federal Prison Camp at Maxwell Air Force Base in Montgomery, Ala., to begin serving his sentence.

On November 11, 1977, Mr. Tonry filed a motion for reduction of sentence which was heard on December 14, 1977.

Status.—**Mr. Tonry's motion for reduction of sentence is pending before the District Court.**

Cervase* v. *Rangel

Civil Action No. 76 CIV 4344 (S.D.N.Y.)

Brief.—On September 30, 1976, this action was filed in the United States District Court for the Southern District of New York.

The complaint alleges that the defendant Representative Charles Rangel has mailed, under his frank, and in envelopes printed at Government expense, newsletters and literature from the Congressional Black Caucus.

Mr. Cervase asserts that these mailings which he alleges causes public money to be spent for the benefit of a private corporation violate 39 U.S.C. § 3210.

The complaint asks for a declaratory judgment that the mailings violate the law, and for an injunction prohibiting Congressman Rangel from using his frank for the mailing of Congressional Black Caucus documents.

On March 1, 1977, Representative Rangel filed a motion to dismiss. As grounds he asserted that 2 U.S.C. § 501(e) denied the jurisdiction of the courts over this subject matter and that the amount in controversy did not meet the $10,000 threshold requirement for diversity jurisdiction.

Status.—The action is pending before the District Court.

United States* v. *Goldberg

Criminal Action No. 77-33 (D. Mass.)

Brief.—Defendants in this case are, according to the indictment, Blue Ribbon Frozen Food Corporation, Inc. (hereinafter "Blue Ribbon"), located in Hamden, Conn. and its wholly owned subsidiary, G & G Packing Co., Inc. (hereinafter "G & G"), located in Roxbury, Mass., both of whose principal business was the processing and sale of beef to the U.S. Department of Defense, Defense Supply Agency, Harry Goldberg, a joint owner and president of both firms; David Frank Goldberg, a joint owner of both firms, vice president and treasurer of Blue Ribbon and treasurer of G & G; and Stephan Goldberg, Fred Romano, and Frank Ravasini, all employees of G & G; and Manuel Pacheco, a senior Army meat inspector, assigned by the Army to inspect meat for it at G & G. The indictment was returned by a grand jury sitting in the district of Massachusetts on February 2, 1977, and a superseding indictment was returned on March 16, 1977.

The indictment charged each defendant with one count of violating 18 U.S.C. § 371 (conspiracy), 23 counts of violating 18 U.S.C. § 210 (bribery and gratuities), and 24 counts of violating 18 U.S.C. § 1001 (concealment). In general the nonmilitary defendants were charged with providing Department of the Army meat inspectors with bribes in exchange for their accepting from Blue Ribbon and G

& G lower grades of meat than were called for by Army regulations, and by accepting less costly cuts, of which meat firms' defendants had prepared to resemble more expensive cuts.

On March 14, 1977, pursuant to a plea bargain agreement, Mr. Pacheco pleaded guilty to the conspiracy count of the indictment. His disposition date was continued.

On March 25, 1977, defendants Harry Goldberg, Blue Ribbon, and G & G filed a plea bargain agreement in which Mr. Goldberg pleaded guilty to the conspiracy count and one count of bribery, and the corporations pleaded guilty to the conspiracy count. Their cases were continued for disposition until the conclusion of the remainder of the case.

On June 24, 1977, the Senate adopted S. Res. 205, 95th Cong., 1st Sess. (1977), which reads in part:

> § 4. That, Senator Lawton Chiles, Senator Lowell Weicker, and Senator Sam Nunn are authorized in response to subpoenas *duces tecum;* and Lester A. Fettig, Claudia T. Ingram, and Edward Roeder are authorized in response to subpoenas *add testificandum;* issued on behalf of Ferdinand Romano, defendant in the case of *United States* v. *Harry Goldberg et al.,* (No. CH–77–33–C) pending in the United States District Court, District of Massachusetts to appear together with documents relating to the consideration of Congressional use immunity for said defendant and to testimony taken under a grant of such immunity, and testify to and only to, any alleged proffers of information made by the above named defendant or his counsel to a Senator of the United States or an officer or employee of the United States Senate, any testimony taken under a grant of use immunity to said defendant, the use, if any, of information obtained from any such proffers and to information, if any, turned over to the Department of Justice of the United States as a result of any such proffers or testimony.

On September 26, 1977, a plea bargain agreement was filed, and a plea of guilty entered by David Frank Goldberg. His case was continued for disposition until the conclusion of the rest of the case.

On November 9, 1977, the court found Mr. Romano to be competent to stand trial and a trial by jury of the charges against him was begun on November 14, 1977. On November 17, 1977, the jury returned a verdict of guilty.

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

Attorney General of the United States* v. *Casey, Lane and Mittendorf

Civil Action No. 77–1272 (D.D.C.)

Brief.—This complaint was filed in the U.S. District Court for the District of Columbia on July 21, 1977, by the Attorney General of the United States against: Casey, Lane & Mittendorf (hereinafter "Casey, Lane") a New York City law firm with an office in Wash-

ington, D.C.; John R. Mahoney, a partner in "Casey, Lane"; Philip R. McKnight, an associate in "Casey, Lane" until August 1976; the "South Africa Foundation" (hereinafter "Foundation"), an entity comprised of, among others, member corporations and individuals, with headquarters in South Africa and an office in the District of Columbia; and John Chettle, the director of the Foundation's office in the United States.

According to the complaint, "Casey, Lane" is the registered agent of the South African Sugar Association (hereinafter "SASA"), and Mr. Mahoney and Mr. McKnight were the attorney who were principally responsible for representing SASA in this country. Their principle concern was in obtaining sugar quotas for SASA, and they often appeared before committees of Congress, "especially the Agriculture Committee of the House of Representatives" [Complaint at 3], prepared testimony, and lobbied Members and committee staff. The Foundation is the registered foreign agent of its home office. SASA is the largest financial contributor to Foundation, and certain SASA officials are also officials of the Foundation. The Foundation often assisted "Casey, Lane" in its lobbying on behalf of SASA. Furthermore, from November 1968 to May 1975, "Casey, Lane" was counsel for the Foundation.

The complaint charges in the first count that in September 1970, defendants Mahoney, McKnight, and "Casey, Lane" have assisted SASA in extending an invitation to Representative W. R. Poage, at that time, Chairman of the House Agriculture Committee, to vist South Africa while he and other Congressmen were traveling through Africa on official business, and that they provided Representative Poage and two unnamed Congressmen on the House Agriculture Committee with a private executive jet to travel to Rhodesia and back to South Africa at no expense to them. In order to avoid a conflict of interest because the Congressmen were members of a committee which was instrumental in providing sugar quotas, the defendants assisted with travel preparations to make it appear that the Foundation, not SASA, had been the host. In March 1972, the complaint alleges, the "Casey, Lane" defendants learned Congressman Poage would again be in Africa, and again a private executive jet transported the Congressman and his administrative assistant from Rhodesia to South Africa at no expense to them, and again it was made to appear that the Foundation had paid the expenses, and not SASA, which really had paid them. The complaint further alleges that in June 1973, the "Casey, Lane" defendants assisted SASA in extending an invitation to Representative William C. Wampler, a member of the House Agriculture Committee, and John F. O'Neal, at that time general counsel to the committee to visit South Africa. Both received a free 10-day visit in August 1973, and again SASA paid the expenses but defendants made it appear that the Foundation did so. Finally, the first count of the complaint asserts that from November 1970, to January 1974, defendants filed false and misleading foreign registration statements. Defendants are alleged in count one to have violated Section 2(b) of the Foreign Agents Registration Act of 1939 ("Act") as amended, 22 U.S.C. § 612(b) and Rule 203 thereunder, 28 C.F.R. § 5.203.

Count two of the complaint asserts, that in November 1971, an official of SASA, at the urging of Mr. Mahoney, presented to Representative Poage eight-round trip tickets from Washington, D.C., and Dallas, Tex., worth about $18,000, which were given to him with the express purpose of aiding him in his 1972 re-election campaign, that Mr. Mahoney had the tickets purchased in the name of an individual who had no connection with the purchase or ownership of the tickets, and that in December 1971, Mr. Mahoney had that individual endorse the tickets so that they could be transferred to Representative Poage. Also alleged, is that in December 1971, Mr. Mahoney made a $1,000 cash contribution to the Democratic Congressional Campaign Committee which was specifically allocated to Representative Poage, but that the money actually came from SASA and had been channeled through "Casey, Lane" through whose books Mr. Mahoney made it appear as though it was his personal contribution. Finally, count two alleged that Mr. Mahoney caused "Casey, Lane" to file false and misleading statements omitting these activities. By reason of all these activities, count two charges defendants Mahoney and "Casey, Lane" with violating Section 2(b) of the Act, 22 U.S.C. § 612(b) and Rule 203 thereunder, 28 C.F.R. § 5.203.

The complaint asked the court to issue: (1) a permanent injunction restraining and enjoining the defendants from violating Section 2(b) of the Act, 22 U.S.C. § 612(b) and Rule 203, 28 C.F.R. § 5.203; (2) a mandatory injunction requiring "Casey, Lane" and the Foundation to file supplemental statements "disclosing time and accurate information regarding all of their activities engaged in by Defendant registrants on behalf of their foreign principals to include full details of all their activities, including among other things, their relations, interests and policies sought to be influenced and the means employed to achieve such purposes, as well as full disclosure of their financial activities for the period January 1, 1970 to date hereof," and (3) a permanent injunction restraining and enjoining defendants from acting as foreign agents until they have complied with relief sought in (1) and (2) above.

On October 17, 1977, defendants South Africa Foundation and Chettle filed a joint answer to the complaint and a joint motion to dismiss count two of the complaint.

On October 20, 1977, defendant Mahoney filed an answer to the complaint.

On November 3, 1977, the motion of defendants Foundation and Chettle to dismiss count two of the complaint was granted and count two was dismissed as to those two defendants.

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

United States ex rel. Joseph* v. *Cannon

Civil Action No. 77-0452 (D.D.C.)

Brief.—This suit was filed March 15, 1977, by a private citizen, Joel D. Joseph, pursuant to 31 U.S.C. §§ 231 and 232 (the False Claims Act), which allows 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. Anyone convicted under Section 231 shall pay and forfeit $2,000, plus double the amount of damages the United States may have suffered as a result of the false claim, as well as the costs of the suit. Under Section 232, the relator is required to notify the Justice Department of the suit and the Justice Department is then allowed 60 days in which to take over the case. If an appearance is entered by the United States, the private citizen may be awarded fair and reasonable compensation, in amount not exceeding one-tenth of the amount recovered, for disclosure of information or evidence not in the possession of the United States when the suit was brought. If the case is not taken over by the United States, the relator may be awarded up to one-fourth of the amount recovered as compensation for his services.

Defendant Howard W. Cannon is a U.S. Senator from Nevada. Chester B. Sobsey, Administrative Assistant to Senator Cannon, is also named as a defendant in the suit.

The complaint alleges that from March of 1975 to November 1976, defendant Sobsey worked extensively and exclusively on Senator Cannon's reelection campaign or on related tasks not part of Senator Cannon's official duties, and that Senator Cannon knowingly authorized and Sobsey knowingly accepted regular pay for services ostensibly performed as Senator Cannon's Administrative Assistant during this period, although such services "* * * were not performed or otherwise performed in a prefunctory or nominal manner." [Complaint at 3.] It is further alleged by the complaint that during this period "* * * and at other times * * *" Senator Cannon:

> had other members of his staff perform services to him and his family, which were not part of Senator Cannon's official legislative and representational duties, but were nevertheless paid with public funds. [Complaint at 3.]

The relator's complaint contends that the alleged acts constitute violation of 31 U.S.C. § 231.

On May 27, 1977, the Justice Department declined to enter an appearance on behalf of the United States.

On June 27, 1977, defendants filed a motion to dismiss.

Status.—**No further action has been taken.**

United States* v. *Hanna (New Case)

Criminal No. 77-00607 (D.D.C.)

Brief.—On October 14, 1977, the United States filed an indictment against former U.S. Representative Richard T. Hanna. The indictment consisted of 40 separate counts, and charges Hanna with the violation of 6 separate U.S. statutes; 18 U.S.C. § 371 (Conspiracy to commit offense or to defraud United States; 18 U.S.C. § 201(c) (1) and (2) (Bribery of public officials and witnesses; 18 U.S.C. § 201(g) (Illegal gratuity); 22 U.S.C. §§ 612, 618 (Foreign Agent Registration Act); and 18 U.S.C. § 1341 (Mail Fraud). Also named as unindicted co-conspirators in the indictment are Tong Sun Park, a citizen of the Republic of Korea; Kim Hyung Wook, Director of the Korean

Central Intelligence Agency between 1963 and 1969, and Lee Hu Rak, Director of the Korean Central Intelligence Agency between 1970 and 1973.

On December 8, 1977, defendant moved for dismissal of the indictment, for production of documents, for production of all electronic overhearings or interceptions of his communications, and for severance of the counts of the indictment for the purpose of trial.

Status.—The case is pending before the District Court.

Banta* v. *Talmadge (New Case)

Civil Action No. 77-1996 (D.D.C.)

Brief.—On November 21, 1977, Frank H. Banta filed this action in the Federal District Court for the District of Columbia. The complaint styled "Complaint for Writ in the Nature of Mandamus", seeks an order which apparently would direct the four United States Senators named as defendants (Talmadge, Scott, Bayh, and Byrd of West Virginia) to introduce a resolution in the Senate which would disband the Federal Bureau of Investigation and void that agency's charter.

Status.—The case is pending before the District Court.

United States Postal Service* v. *Citizens Committee For The Right To Keep And Bear Arms (New Case)

No. C77-846S (W.D. Wash.)

Brief.—The General Counsel of the U.S. Postal Service brought an administrative complaint (Postal Service Docket No. 6/48) against the Citizens Committee For The Right To Keep And Bear Arms (hereinafter "Committee") on November 18, 1977. The administrative complaint alleged that the Committee was engaged in conducting a scheme or device for obtaining money or property through the mails by means of false representations in violation of 39 U.S.C. § 3005.

Specifically, the Committee was charged with sending literature to various people seeking support and contributions for its cause in window envelopes through which the notation "From Congressman [name of addressee's Congressman]" was visible. The notation, or the notation together with the contents of the mailing piece might have been reasonably construed as making some or all of three allegedly false representations, according to the administrative complaint. The alleged representations are: (1) That the Congressional Representative whose name appears on the mailing piece sent the mailing piece; (2) That the Representative authorized the Committee to use his or her name in such a manner; (3) That the Representative is involved in an unstated way with the solicitation. Alternatively, the administrative complaint alleges that the contents of the mailing piece together with the notation noted above are at best ambiguous, creating confusion on the part of the reader in regard to the three representations noted above. An order conforming with 39 U.S.C. § 3005(a) (1) and (2) against the Committee was requested in the administrative complaint. 39 U.S.C. § 3005(a) reads as follows:

"(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which—

"(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender: and

"(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note."

On November 22, 1977, the United States Postal Service filed complaint against the Committee in the United States District Court for the Western District of Washington. The complaint sought a temporary restraining order and preliminary injunction pursuant to 39 U.S.C. § 3007 directing the detention by the Postal Service of defendant's incoming mail addressed to the Committee, subject to the defendant's right to examine and receive mail clearly not related to the representations complained of, pending the outcome of the statutory proceedings against the Committee and any appeals therefrom.

The temporary restraining order and preliminary injunction were granted on November 23, 1977.

A consent agreement was reached between the Postal Service and the Committee on December 22, 1977. Under its terms, the Committee stipulated that it would permanently refrain from solicitation practices of the type alleged in the administrative complaint and that it would return, with a specified written explanation, all remittances being detained by order of the District Court and other remittances received in the future related to the discontinued activities.

The agreement also stipulated, that General Counsel of the Postal Service may, without prior notice and on an *ex parte* basis seek an interim order against the Committee from the Judicial Officer of the Postal Service. The Postal Service agreed to dismiss the administrative action and have the preliminary injunction vacated.

Status.—The preliminary injunction was vacated and the complaint dismissed on December 22, 1977.

The full text of the consent agreement is printed in the Addendum to the "Decisions" section of this report at 293.

DECISIONS

In the United States District Court for the District of Maryland

Criminal No. H–77–0379

UNITED STATES OF AMERICA

v.

EDWARD A. GARMATZ

Frank C. Razzano, Special Assistant United States Attorney, and *Richard D. Shapiro,* Special Assistant United States Attorney, Newark, New Jersey, for the government.

Arnold M. Weiner and *M. Albert Figinski,* Baltimore, Maryland, for defendant.

HARVEY, District Judge:

MEMORANDUM AND ORDER

The defendant in this criminal case, Edward A. Garmatz, is a former United States Congressman from Maryland. He has here been charged in a one-Count indictment brought under 18 U.S.C. § 371 with conspiring with others to violate 18 U.S.C. § 201(g),[1] one of the federal statutes which prohibit public officials from accepting illegal bribes and gratuities. It is alleged that defendant

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[1] 18 U.S.C. § 201(g) provides in pertinent part as follows:
"(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; * * * Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

Garmatz agreed with others to receive cash payments for official acts to be performed by him, namely his sponsorship, support, vote and decision on certain passenger ship legislation pending before him in his official capacity.

The defendant has timely filed various motions, including a motion to dismiss the indictment and a motion to strike surplusage from the indictment. Following the submission of extensive briefs by counsel for the parties, a hearing on these and other motions has been held in open court.[2] For the reasons set forth herein, this Court has concluded that defendant's motion to dismiss the indictment and defendant's motion to strike surplusage from the indictment should both be denied.

I. THE INDICTMENT

The one-Count indictment returned by the Grand Jury in this case is a lengthy one, describing the conspiracy in 19 separate paragraphs and further alleging that 18 separate overt acts were committed in furtherance thereof. At all times mentioned in the indictment until December 31, 1972, defendant Garmatz was a Congressman and Chairman of the Merchant Marine and Fisheries Committee of the House of Representatives.[3] During a portion of the period covered by the indictment, two shipping companies, Moore McCormack Lines, Inc. and United States Lines, Inc., owned three American flag passenger vessels, the *Brasil*, the *Argentina* and the *United States*.[4] All three of these vessels had been constructed with federal subsidies under the terms of the Merchant Marine Act of 1936, which required that vessels built with such subsidies remain documented and registered under the laws of the United States. At all times mentioned in the indictment until they were sold, these three vessels had been laid up and taken out of active

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[2] Defendant's motion for a bill of particulars was granted in part and denied in part. Defendant's motion for discovery was denied. Rulings on other motions were deferred until the pretrial conference.

[3] The facts set forth herein are taken from the allegations of the indictment.

[4] Moore McCormack owned the *Brasil* and the *Argentina*, and United States Lines owned the *United States*.

service because of operating losses incurred by the two companies. Accordingly, the two companies sought legislation in the Congress of the United States to authorize the sale of these three ships to foreign ownership or, alternatively, to authorize the Secretary of Commerce to purchase the *United States*.

On February 12, 1971, Moore McCormack entered into a contract to sell the *Brasil* and the *Argentina* to a Netherlands corporation for approximately $20,000,000, conditioned upon appropriate legislation being passed by Congress exempting these two vessels from the terms of the Merchant Marine Act of 1936 and permitting their sale to a foreign buyer. Although not alleged in the indictment, it is agreed that the legislation in question, introduced at various times as H.R. 10577 and H.R. 11589, was signed into law by the President as Public Law 92–296 on May 16, 1972. On August 4, 1972, title to the *Brasil* was transferred to a subsidiary of the Netherlands corporation, and on August 21, 1972, title to the *Argentina* was transferred to another subsidiary of that same corporation. On February 5, 1973, United States Lines transferred title to the *United States* to the United States Government. At all times mentioned in the indictment, James R. Barker was President of Moore McCormack, Edward Heine was President and Chief Executive Officer of United States Lines and Robert McElroy was Chief Clerk of the House Merchant Marine and Fisheries Committee.

Paragraph 12 of the indictment charges that defendant Garmatz entered into an illegal conspiracy with other persons. Paragraph 12 provides as follows:

> 12. From at least as early as September, 1971 and continuing thereafter until April, 1973, the exact dates being to the Grand Jury unknown, in the State and District of Maryland and elsewhere, the defendant
>
> EDWARD A. GARMATZ
>
> together with other persons, did knowingly, willfully and unlawfully conspire, combine, confederate and

agree to commit certain offenses against the United States in violation of Title 18, United States Code, Sections 201(g), that is:

A. Directly and indirectly, to ask, demand, exact, solicit, seek, accept, receive, and agree to receive a thing of value for the use and benefit of the defendant EDWARD A. GARMATZ, being a public official of the United States, that is a member of the House of Representatives, otherwise than as provided by law for the proper discharge of his official duties, because of official acts to be performed by him, to wit: his sponsorship, support, vote, and decision on certain passenger ship legislation which might at any time be pending before him in his official capacity and in his position of trust and profit.

Paragraphs 13 through 18, inclusive, describe other acts which were allegedly a part of the conspiracy charged, as follows:

13. It was further a part of said conspiracy that in or about November, 1971, James R. Barker caused $5,000.00 in United States currency to be transported from New York, New York, to Washington, D.C., and delivered to Robert McElroy for the use and benefit of the defendant EDWARD A. GARMATZ.

14. It was further a part of said conspiracy that on or about January 20, 1972, Edward J. Heine, on behalf of United States Lines, caused at least $5,000.00 in United States currency to be transported from New York, New York, to Washington, D.C., to be paid to the defendant EDWARD A. GARMATZ.

15. It was further a part of said conspiracy that on or about January 21, 1972, Robert McElroy received $1,000.00 in United States currency from United States Lines for the use and benefit of the defendant EDWARD A. GARMATZ.

16. It was further a part of said conspiracy that on or about February, 1972, Robert McElroy received $5,000.00 in United States currency for the

use and benefit of the defendant EDWARD A. GARMATZ from James R. Barker in New York, New York.

17. It was further a part of said conspiracy that on or about August 11, 1972, United States Lines paid the defendant EDWARD A. GARMATZ $4,000.00 in United States currency in Baltimore, Maryland.

18. It was further a part of said conspiracy that between September 1972 and April 1973, the defendant EDWARD A. GARMATZ requested from Edward J. Heine, the payment by United States Lines of an additional $10,000.00 in cash or as a fictitious consulting fee.

Nineteen separate overt acts are then alleged, the first such act occurring on November 3, 1971 and the last such act occurring on April 13, 1973. These acts include meetings between Heine and defendant Garmatz, between Heine and McElroy, and one meeting at which Heine, McElroy and defendant Garmatz were all present; telephone conversations between Heine and Barker, between Heine and McElroy and between Heine and defendant Garmatz; the receipt of cash by McElroy for the use and benefit of the defendant Garmatz; and the receipt of cash by the defendant Garmatz.

Defendant's motions essentially raise two questions. Defendant first contends that in view of the narrow scope of the conspiracy alleged in the indictment, the return of this indictment on August 1, 1977 in this District violates the applicable federal statute of limitations and federal venue requirements. Closely linked to this argument is defendant's motion to strike surplusage from the indictment, which counsel for the defendant concedes has no independent significance. Accordingly, this Court will also deal with the motion to strike in considering defendant's arguments in support of his motion to dismiss because of the scope of the conspiracy alleged. Defendant's second major contention is that proof of the various allegations of the indictment would necessarily transgress the Speech or Debate Clause of the United States Constitution.

Article I, Section 6 of the Constitution provides in pertinent part: "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place." Each of these contentions will be considered separately.

II. THE SCOPE OF THE CONSPIRACY ALLEGED

Defendant contends that the scope of the alleged conspiracy is defined solely in Paragraph 12 of the indictment and that the language in Paragraph 12 restricts the offense charged to that of bribery in connection with official acts to be performed in the future. Defendant expressly relies on the following language of the indictment "That defendant EDWARD A. GARMATZ *being a public official*" conspired to "ask, demand, solicit, seek, accept, receive, and agree to receive a thing of value * * * because of official acts *to be performed* by him, to wit: his sponsorship, support, vote, and decision on certain passenger ship legislation which might at any time be pending before him in his official capacity and in his position of trust and profit." (Emphasis added.) Defendant asserts that since the proposed legislation which permitted the sale or transfer of these vessels became law on May 16, 1972, he could not have solicited or received payments for future official acts to be performed after the May 16, 1972 date. It is thus defendant's contention that the conspiracy charged was complete when the bill in question became law on May 16, 1972 and that subsequent events and overt acts alleged in the indictment were not in furtherance of the conspiracy and should be stricken.

If defendant is correct as to the scope of the indictment, and if this Court were to grant defendant's motion to strike as surplusage all allegations concerning events and overt acts occurring after May 16, 1972, then the applicable five-year statute of limitations would have expired before this indictment was returned on August 1, 1977.[5] Moreover, were this Court to accept defendant's contentions, venue would not properly be laid in Mary-

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[5] The controlling statute of limitations is 18 U.S.C. § 3282.

land in this case inasmuch as the only overt acts alleged to have occurred in Maryland took place after May 16, 1972. Accordingly, if the motion to strike surplusage were to be granted, this Court would also grant defendant's motion to dismiss.

In *Grunewald* v. *United States*, 353 U.S. 391 (1957), the Supreme Court said the following at page 397:

> * * *, the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy * * *

Defendant reads the indictment in this case much too narrowly. To understand the scope of the crime charged in a particular indictment, it is necessary that the indictment be read in its entirety. *United States* v. *Tomasetta*, 429 F. 2d 978, 979 (1st Cir. 1970); 8 Moore's *Federal Practice*, Par. 7.04. Defendant places heavy reliance on certain language in Paragraph 12 of the indictment, ignoring not only other allegations in Paragraph 12 but also the allegations of Paragraphs 13 through 18 and of Overt Acts Nos. 1 through 19.

At the very outset of Paragraph 12, it is alleged that the conspiracy lasted from September 1971 until April 1973. There was a meeting in November of 1971 and the delivery of cash in that month. Between September 1972 and April 1973, the defendant requested an additional payment of cash. Meetings were held in January, February and April 1973.

Were a public official to enter into a conspiratorial agreement with others whereby certain payments would be made to him before he performed certain acts and other payments would be made to him after he performed these acts, it could hardly be doubted that the conspiracy would not be at an end until after the final payments had been made or until after the official solicited final payments which were due him or believed to be due him under the illegal agreement. In such a conspiracy case,

the conspiracy would not have been ended by performance of the acts but only by the subsequent payments or solicitations for subsequent payments believed to be due.

A reading of the indictment here in its entirety indicates that this illegal conspiracy involved solicitation and receipt of money by the defendant in return for a promise to perform official acts. The conspiracy thus terminated not when the passenger ship legislation became law on May 16, 1972, but only after all money had been solicited or received by the defendant pursuant to the alleged illicit agreement. Inasmuch as the indictment alleges in Paragraphs 17 and 18 that as a part of the conspircy defendant received $4,000 in Baltimore, Maryland from United States Lines on August 11, 1972 and solicited an additional payment of $10,000 between September 1972 and April 1973, this prosecution would not be barred by limitations or because of lack of venue.

Moreover, this Court is satisfied that the scope of the conspiracy alleged here encompasses all of the overt acts charged. Essentially, the objective of the conspiracy here was the exchange of money for an agreement or promise to perform official acts. The government charges that pursuant to the illegal agreement, defendant solicited and received gratuities both before and after the bill became law. Thus, the objective of the conspiracy was not attained until the solicitation and exchange of all money, both before and after the legislation in question became law.

In the arguments he has presented to the Court, the defendant has confused the limitations period applicable to a substantive offense charged under 18 U.S.C. § 201(g) with the limitations period applicable to a conspiracy offense charged under 18 U.S.C. § 371. Under § 201(g), it is a violation of the law for a public official to solicit, accept, receive or agree to receive anything of value for himself for or because of any official act performed or to be performed by him. Under § 371, a public official who conspires with another to do any of these acts likewise violates the law. In this particular case, a conspiracy to violate § 201(g) has been charged, not the substantive

offense itself. The indictment alleges that the conspiracy still existed within the five years prior to the indictment of August 1, 1977 and that at least one overt act in furtherance of the conspiratorial agreement was committed in Maryland within that period. These allegations are clearly sufficient. *Grunewald* v. *United States, supra* at 397.

Defendant argues that the words in Paragraph 12 "because of official acts to be performed by him" limit the duration of the conspiracy to a period ending on May 16, 1972, when the legislation in question was signed into law by the President. Noting that he was no longer a public official after December 31, 1972, defendant further contends that the words "being a public official" in Paragraph 12 mean that the conspiracy must in any event have ended before 1973. But the language relief upon quite obviously refers to the period in 1971 when the illegal agreement was first formulated. At that time, defendant was indeed a public official of the United States and the promised acts were indeed to be performed in the future. Other allegations of the indictment make it clear that the conspiracy allegedly commenced while defendant was a member of the House of Representatives but did not terminate until at least four months after he had left public office. § 201(g) by its express terms applies to both public officials and to former public officials.

Defendant's reliance on *United States* v. *Davis,* 533 F. 2d 921 (5th Cir. 1976) is misplaced. That case involved a conspiracy to violate 18 U.S.C. § 1001. The Fifth Circuit held that the sole object of the conspiracy charged was the submission of false statements to the Department of Labor, that the conspiracy ended with such submission and that subsequent issuance of a contract by the Department of Labor in reliance on the false statements was not an overt act within the scope of that conspiracy. Here, the conspiracy which has been alleged contemplated payments both before and after any official acts performed by the defendant and both during and after the time that he was a public official.

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III. THE SPEECH OR DEBATE CLAUSE

As his second major argument in support of his motion to dismiss the indictment, defendant contends that prosecution of this case would contravene the Speech or Debate Clause of the Constitution, as interpreted by recent decisions of the Supreme Court and of the Fourth Circuit.

In *United States* v. *Johnson,* 383 U.S. 169 (1966), a former Congressman from Maryland had been charged in a multi-Count indictment with violating the federal conflict of interest statute and with conspiracy to defraud the United States. The Fourth Circuit set aside Johnson's convictions on all Counts, concluding that the Speech or Debate Clause had been violated. *United States* v. *Johnson,* 337 F. 2d 180 (4th Cir. 1964). While the indictment had focused on improper interference with the Department of Justice, one overt act in the conspiracy Count had alleged that Johnson had accepted money to deliver a speech on the floor of the House of Representatives. In affirming, the Supreme Court held that inquiry into a Congressman's legislative acts such as a speech on the House floor, or inquiry into his motives for making such a speech, violated the Speech or Debate Clause. The case was remanded for a new trial, the Court noting that, with regard to the Counts charging that Johnson improperly interceded with the executive branch, it could not be successfully contended that the Clause reached conduct "that is in no wise related to the due functioning of the legislative process." *Id.* at 172. Following remand, the District Court, with the consent of the government, dismissed the conspiracy Count, and Johnson was subsequently convicted on the improper influence Counts. The Fourth Circuit affirmed those convictions, and the Supreme Court denied certiorari. *United States* v. *Johnson,* 419 F. 2d 56 (4th Cir. 1969), *cert. denied,* 397 U.S. 1010 (1970).

More recently, in *United States* v. *Brewster,* 408 U.S. 501 (1972), a former United States Senator from Maryland had been charged with various offenses in an indict-

ment which included four Counts of soliciting and receiving bribes to perform legislative acts in the future in violation of 18 U.S.C. § 201(c)(1) and one Count of having solicited and received a gratuity in return for the performance of past legislative acts in violation of 18 U.S.C. § 201(g). In an Opinion by Chief Justice Burger, the Supreme Court held that the Speech or Debate Clause did not compel dismissal of an indictment for bribery, even where the *quid pro quo* for the bribe was a patently legislative act.[6] The Chief Justice explained the interaction of the bribery statute and the Speech or Debate Clause in the following language, at pages 526–527:

> The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an "act resulting from the nature, and in the execution, of the office." Nor is it a "thing said or done by him, as a representative, in the exercise of the functions of that office," 4 Mass., at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson,* for use of a Congressman's influence

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[6] This was a 6–3 decision, with Justices Brennan, White and Douglas dissenting.

with the Executive Branch. And an inquiry into the purpose of a bribe "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." 383 U.S., at 185.

Nor does it matter if the Member defaults on his illegal bargain. To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act. If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a given bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime?

In discussing the Count which charged the giving of a gratuity for an act already performed, the Chief Justice said the following, at pages 527–528:

> Another count of the indictment against appellee alleges that he "asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive" money "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity * * *" This count is founded on 18 U.S.C. § 201(g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money with knowledge that the donor was paying

him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

MR. JUSTICE WHITE rests heavily on the fact that the indictment charges the offense as being in part linked to Brewster's "action, vote and decision on postage rate legislation." This is true, of course, but our holding in *Johnson* precludes any showing of how he acted, voted, or decided. The dissenting position stands on the fragile proposition that it "would take the Government at its word" with respect to wanting to prove that we all agree are protected acts that cannot be shown in evidence. Perhaps the Government would make a more appealing case if it could do so, but here, as in that case, evidence of acts protected by the Clause is inadmissible. The Government, as we have noted, need not prove any specific act, speech, debate, or decision to establish a violation of the statute under which appellee was indicted. To accept the arguments of the dissent would be to retreat from the Court's position in *Johnson* that a Member may be convicted if no showing of legislative act is required.

MR. JUSTICE BRENNAN suggests that inquiry into the alleged bribe is inquiry into the motivation for a legislative act, and it is urged that this very inquiry was condemned as impermissible in *Johnson*. That argument misconstrues the concept of motivation for legislative acts. The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions. In *Johnson,* the Court held that, on remand, Johnson could be retried on the conspiracy-to-defraud count, so long as evidence concerning his speech on the House floor was not admitted. The Court's opinion plainly implies that had the Government chosen to retry Johnson on that count, he could not have obtained immunity from prosecution by asserting

that the matter being inquired into was related to the motivation for his House speech. See n. 7, *supra.*

The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself. Under this indictment and these statutes no such proof is needed.

Accordingly, the judgment of the District Court dismissing the indictment was reversed and the case was remanded for further proceedings. Following remand, the District Judge dismissed that Count of the original indictment which charged the receipt of a gratuity for past acts on the ground that since it related explicitly to payment for acts already performed, the government could not prove its case without proving the performance of legislative acts. *See United States* v. *Brewster,* 506 F. 2d 62 (D.C. Cir. 1974) at 65, n.4. Following conviction of defendant Brewster on three of the Counts, the convictions were vacated on appeal and the case was again remanded for a new trial because of erroneous instructions to the jury. *United States* v. *Brewster, supra* at 83.[7]

United States v. *Dowdy,* 479 F. 2d 213 (4th Cir.), *cert. denied,* 414 U.S. 823 (1973), involved the conviction in this Court of former Congressman Dowdy of Texas of each of the charges contained in an eight-Count indictment. On appeal, the Fourth Circuit held that while the wording of the two conspiracy Counts was generally proper under the Speech or Debate Clause as interpreted by *Brewster,* Dowdy's conviction on two Counts of conspiracy, one Count of interstate travel to facilitate bribery, and two of the five Counts of perjury had been obtained by the use of evidence which infringed the Clause. However, in his Opinion, Judge Winter expressly

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[7] On June 25, 1975, defendant Brewster entered a plea of *nolo contendere* to one Count charging the acceptance of an illegal gratuity in violation of 18 U.S.C. § 201(g). *See Attorney Grievance Commission* v. *Brewster,* 280 Md. 473 (1977).

noted that convictions under these five Counts might well have been obtained without improper inquiry into the Congressman's legislative acts, and the government was accordingly permitted to retry Dowdy on these Counts, if it wished.[8] Judge Winter said the following, at page 227:

> * * *, since the essence of the offenses charged was an illegal *agreement* to accomplish illegal objectives, guilt could be established by proof of the agreement, accompanied by proof of one or more non-legislative overt acts to carry it out, without proof of legislative acts immunized from inquiry by the speech or debate clause. (Emphasis in original)

From an analysis of these cases, this Court concludes that the indictment here does not contravene the Speech or Debate Clause. Under the *Johnson* and *Brewster* decisions of the Supreme Court, this Clause does not bar an indictment under a general statute where the government can make a prima facie case without inquiring into legislative acts. *United States* v. *Dowdy, supra* at 224. Just such an indictment is before the Court in this case. Under the one conspiracy Count contained in this indictment, the essence of the offense charged is an illegal agreement to accomplish an illegal objective and guilt can be established "by proof of the agreement, accompanied by proof of one or more nonlegislative acts to carry it out, without proof of legislative acts immunized from inquiry by the speech or debate clause." *Dowdy, supra* at 227.

Defendant here relies on language in the Supreme Court's *Johnson* Opinion indicating that the Clause should be construed broadly to effectuate its purposes. *See* 383 U.S. at 180. However, the *Brewster* decision, handed down six years after *Johnson,* would appear to

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[8] Inasmuch as Dowdy's conviction on three of the perjury Counts had been affirmed and concurrent sentences had been imposed, the government, following remand, chose not to retry the Congressman on any of these other five Counts. *See United States* v. *Dowdy*, Criminal No. 70–0123–T (D. Md. Order of Dismissal dated April 23, 1975).

have contracted the broader interpretation of the term "legislative act" suggested in the earlier Opinion. *Dowdy, supra* at 222; Comment, *Brewster, Gravel* and Legislative Immunity, 73 Col.L.Rev. 125, 146 (1973).

Pointing out that some of the allegations of this indictment refer to payments or solicitations occurring after the legislation in question was enacted, defendant in particular argues that the Speech or Debate Clause prohibits a prosecution for illegal solicitations pertaining to past legislative acts. In support of this argument, defendant relies on Judge Hart's dismissal of a similar Count following remand of the *Brewster* case. *See* 506 F. 2d at 65, n. 4. But the indictment in *Brewster* charged a violation of the substantive offense. Here, a conspiracy has been charged involving some acts occurring before the legislation was enacted and others occurring afterwards. Even if this indictment did charge the substantive offense of a solicitation or receipt of money for acts already performed, this Court concludes that the case could still go forward, provided that the prosecution did not offer evidence of the performance by the defendant of legislative acts.[9] As Chief Justice Burger observed in *Brewster,* even if an indictment alleges that the bribe was given for an act that was actually performed, a conviction may be sustained if it is shown that the public official solicited or received money with knowledge that the donor was paying him compensation for an official act. 408 U.S. at 527.

In any event, the essence of the offense charged in this case is the illegal agreement. To prove the essential elements of this indictment, there is no need for the government to inquire into how defendant Garmatz spoke, debated or voted or into anything he did in the Chamber

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[9] This Court does not agree, as defendant contends. that the District of Columbia Circuit Court approved the District Court's dismissal of Count 9 of the *Brewster* indictment. *See United States* v. *Brewster*, 506 F. 2d 62, 65, n. 4 (D.C. Cir. 1974). The Circuit Court expressed no opinion concerning the action taken by the trial judge. Moreover, the jury instructions discussed by the Circuit Court had been given by the same trial judge who had dismissed Count 9 and pertained to future not past legislative acts.

or in committee. This indictment does not allege the performance by the defendant of any legislative acts, either as a part of the conspiracy or as overt acts committed in furtherance thereof. Furthermore, there is no need here for the government to show that defendant fulfilled the bargain, either in proving the conspiracy itself or any of the overt acts.

Relying on *United States* v. *Dowdy, supra,* defendant contends that the validity of this indictment can be determined only if this Court examines in advance the actual evidence to be offered by the government at the trial. Only then, argues defendant, can this Court ascertain whether evidence of legislative acts will be presented by the government in support of the allegations of the indictment.

This Court is satisfied that no such cumbersome procedure is necessary in order to afford an indicted Congressman the protections guaranteed by the Speech or Debate Clause. The allegations of this indictment have been carefully scrutinized by the Court, and they satisfy the *Brewster* requirement that legislative acts performed by a Congressman cannot be alleged or proved in a case of this sort. Moreover, counsel for the government has agreed to make proffers of the prosecution's proof prior to the trial. At that time, this Court will determine whether any of the proof to be presented at the trial includes evidence of the performance by the defendant of legislative acts.

This Court cannot agree with the all-encompassing definition which defendant gives to the term "legislative act." Defendant relies on *McSurley* v. *McClellan,* 553 F. 2d 1277 (D.C. Cir. 1976), *cert. granted,* 46 U.S.L.W. 3239 (1977) in asserting that he is entitled to the protections of the Clause with respect to any discussion with any interested party which might be construed as a part of the information gathering process of a Congressman or of a Congressional committee. Pertinent decisions of the Supreme Court do not support such a proposition. The Speech or Debate Clause has "finite limits", *Doe* v. *McMillan,* 412 U.S. 306 (1973). Legislative acts "are not all-encompass-

ing", and matters other than actual speech or debate in either House must be "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings," before they receive the protections of the Clause. *Gravel* v. *United States*, 408 U.S. 606, 625 (1972); *United States* v. *Dowdy*, *supra* at 222. The Clause does not prohibit inquiry into illegal conduct "simply because it has some nexus to legislative functions," and the government is therefore not barred from presenting proof of "activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster*, *supra* at 528.

Furthermore, the Speech or Debate Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process." *United States* v. *Brewster*, *supra* at 517. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *United States* v. *Brewster*, *supra* at 526. Thus, discussions relating to the giving or receiving of a bribe would not be barred at the trial, nor conversations of co-conspirators which might be casually or incidentally related to legislative affairs.

Nor does *United States* v. *Helstoski*, —— F.Supp. —— (D.N.J. February 22, 1977) [10] support the position taken by the defendant here. In that case, the District Judge denied a motion filed by New Jersey Congressman Helstoski to dismiss four Counts of an indictment charging him with conspiracy and substantive violations of 18 U.S.C. § 201(c.) Relying on *Brewster*, the Court there held that the indictment Counts in question did not violate the Speech or Debate Clause even though they made specific reference to legislative acts of defendant Helstoski.

The defendant here relies in particular on further rulings made by the District Judge in *Helstoski* prohibiting the introduction by the government at the trial of evidence of the Congressman's past performance of a legis-

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[10] The government has appealed from certain rulings made by the District Judge in *Helstoski*. That appeal is presently pending before the Third Circuit and has been docketed as No. 77–1423.

lative act. Twenty-three offers of proof had been submitted to the Judge *in camera,* and after considering these proffers, he made the rulings which are now being challenged by the government on appeal.[11] But those rulings were made as to evidence to be offered in support of an indictment quite different from the one involved in this case. Unlike the indictment filed in this Court which charges only a conspiracy to violate § 201(g), the *Helstoski* indictment involved substantive offenses charging violations of § 201(c). Moreover, the proof itself was not discussed by the District Judge in his Opinion and has not been made available to this Court because it is under seal. Some of the proof apparently included direct evidence of the actual introduction by the Congressman of bills in the House of Representatives, proof which on its face would appear to involve the performance of a legislative act. If any proffer made in this case indicates that the government seeks to introduce direct evidence of the performance by defendant Garmatz of a legislative act, such evidence will be excluded. The question before this Court when the proffers are made will be whether the government is seeking to introduce direct evidence of the performance of a legislative act as that term was defined in *Brewster* and *Gravel,* not whether the legislative act in question was performed in the past or in the future.

For the reasons stated, it is this 5th day of December, 1977, by the United States District Court for the District of Maryland,

ORDERED:

1. That the defendant's motion to dismiss the indictment be and the same is hereby denied; and

2. That the defendant's motion to strike surplusage from the indictment be and the same is hereby denied.

ALEXANDER HARVEY II,
United States District Judge.

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[11] One of the substantial issues on appeal is whether Congressman Helstoski waived his privilege under the Speech or Debate Clause by voluntarily testifying and producing documents before the Grand Jury.

NOTE: The synopsis prepared by the Reporter is printed herewith, preceding the opinion, as a convenience for readers, and is not part of the opinion.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1712

UNITED STATES OF AMERICA

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.

JOHN E. MOSS, Individually and on behalf of the U.S. House of Representatives and the House Committee on Interstate and Foreign Commerce, APPELLANT

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

(D.C. Civil 76-1372)

Argued June 3, 1977

Decided October 20, 1977

Synopsis

Justice Department brought action to enjoin telephone company from complying with subpoena of subcommittee of House of Representatives issued in course of investigation into warrantless "national security" wiretaps.

Chairman of subcommittee intervened. The United States District Court for the District of Columbia, Oliver Gasch, J., 419 F.Supp. 454, issued the injunction and subcommittee chairman appealed. The Court of Appeals, 551 F.2d 384, remanded for negotiation by the parties. After remand, the District Court prepared its report of negotiations between the parties. The Court of Appeals, Leventhal, Circuit Judge, held that: (1) complete judicial abstention on political question grounds was not warranted; (2) neither the claims of the executive nor the legislative branches of the propriety of their acts was conclusive on the court; (3) the constitution does not confer on the executive absolute discretion in the area of national security; (4) the "Speech or Debate" Clause was not intended to immunize congressional investigatory actions from judicial review; (5) accommodation between the two branches is contemplated by the Constitution. The court proposed an approach of gradualism rather than a rigid arrangement, and set forth for the benefit of the parties a procedure involving limited committee access and verification, and *in camera* resolution of disputes.

Order in accordance with opinion.

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Decided OCT 20 1977

Joseph M. Hassett, with whom *E. Barrett Prettyman Jr.*, *Jean S. Moore* and *Janet L. McDavid* were on the brief, for appellant.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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Irwin Goldbloom, Deputy Assistant Attorney General, with whom *Barbara Allen Babcock*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney, *Thomas S. Martin*, Special Assistant, *Leonard Schaitman*, *Neil H. Koslowe*, *David J. Anderson* and *John T. Boese*, Attorneys, Department of Justice, were on the brief for appellee United States of America.

Nathaniel Hawthorne entered an appearance for appellees American Telephone & Telegraph Company, et al.

Before: LEVENTHAL, ROBINSON and WILKEY, *Circuit Judges*

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

LEVENTHAL, *Circuit Judge*: This case brings to us for a second time conflicting assertions by the executive and legislative branches, contentions that require the third branch to decide whether its constitutional mandate to decide controversies extends to such a conflict, and if so what measure of judicial resolution is sound and appropriate.

This is a general and abstract preface for a specific and concrete clash. The dispute arose out of an investigation by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. In the course of the investigation, the Subcommittee issued a subpoena for certain documents in the hands of the American Telephone and Telegraph Co. (AT&T). The Justice Department sued to enjoin AT&T from complying with the subpoena, on the ground that compliance might lead to public disclosure of the documents, with adverse effect on national security. Congressman Moss, chairman of the Subcommittee, intervened on behalf of the House, as the real party in interest. The District Court issued the injunction and Chairman Moss appealed.

When we first came to the case, we developed a novel and somewhat gingerly approach for the delicate problem of accommodating the needs and powers of two coordinate branches in a situation where each claimed absolute authority. *See United States v. AT&T*, —— U.S.App. D.C. ——, 551 F.2d 384 (1976). To the extent possible, we wished to avoid a resolution that might disturb the balance of power between the two branches and inaccurately reflect their true needs. We therefore refrained from deciding the merits of their claims, and indeed did not resolve the preliminary issue of whether the dispute presented a nonjusticiable political question. Instead we remanded the record to the District Court for further proceedings during which the parties and counsel were requested to attempt to negotiate a settlement. We called for a report by the District Court within three months. That time was later extended, to permit the new officials of the incoming administration to grapple with the problem. On April 22, 1977, District Judge Gasch made his report. We heard oral argument on June 3, 1977.

Negotiation has narrowed but not bridged the gap between the parties. Accordingly, we must adopt a somewhat more traditional approach. We begin by deciding that complete judicial abstention on political question grounds is not warranted. In addressing the merits, however, we continue to move cautiously. Taking full account of the negotiating positions, we have charted the course that we think is most likely to accommodate the substantial needs of the parties. Doubtless, neither will be satisfied. But in our view there is good reason to believe that the procedure set forth in this opinion will prove feasible in practice, with such adjustments and refinements as may be evolved by the parties and the district court. What we decide is only that, so long as this procedure gives promise of satisfying the substantial needs of both parties, this court may appropriately con-

tinue to refrain from a decision upholding either of the claims of absolute authority. Should the parties test our approach and encounter difficulties, we may have to determine whether further relief is warranted. In that effort we will be aided by the experience of the parties.

I. Factual Background

A. Facts Culminating in Our Earlier Opinion

The facts as of our prior opinion, set forth in 551 F.2d at 385-88, may be summarized briefly.

The purpose of the Subcommittee's investigation was to examine the nature and extent of warrantless wiretapping in the United States for asserted national security purposes, and to determine whether legislation was required to curb possible abuse of that power. In carrying out warrantless taps authorized by the Attorney General, the FBI used AT&T facilities—"leased lines"—to carry tapped communications to its monitoring stations. It obtained these lines through "request letters" addressed to AT&T, which specified a target line to be tapped, identified by telephone number, address, or other numerical designation.

In furtherance of the investigation, a subpoena, issued on June 22, 1976, required AT&T to turn over to the Subcommittee all national security request letters. Thereupon, the Justice Department sought to negotiate with Subcommittee Chairman Moss an alternative means of satisfying the Subcommittee's needs which would, at the same time, minimize the risk to national security posed by the possibility of public disclosure of request letters pertaining to foreign intelligence surveillance.[1]

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[1] The Justice Department perceived little risk to national security from release of backup memoranda pertaining to domestic surveillance. Dispute has focused on access to backup memoranda concerning foreign intelligence surveillance.

Negotiations focused upon the possibility of substituting for these request letters expurgated copies of the backup memoranda upon which the Attorney General had based his decisions to authorize the warrantless taps. All information in these memoranda that would identify the targets of the taps would be replaced by generie descriptions. The Subcommittee agreed to an initial canvass of two years, 1972 and 1975. These memoranda, providing information as to the purpose and nature of the tap, would probably have been more useful to the Subcommittee than the request letters themselves.

The stumbling block in the negotiations was the means of verifying the accuracy of the executive's classification of surveillance as domestic or foreign, and of the generic descriptions. The Subcommittee proposed that three of its staff members conduct verification by examining the original memoranda corresponding to a subsample of the edited memoranda. They would inspect the original memoranda at the FBI, but would be permitted to take notes back to the Subcommittee. The White House rejected this proposal, in view of the House rule giving any member of the House access to such notes.[2]

The White House proposed that Chairman Moss, rather than the Subcommittee staff, inspect the subsample of unedited memos. This was rejected by the Subcommittee.

The executive's final proposal, made by President Ford to Chairman Moss, was that the Attorney General would conduct the verification. If the Subcommittee were dissatisfied, it could appeal to the President. Chairman Moss rejected this proposal.

On July 22, after negotiations had broken down, the Justice Department sued to enjoin AT&T from complying with the Subcommittee subpoena. Chairman Moss in-

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[2]Rule XI §2(e)(2) of the House of Representatives. See 551 F.2d at 386 & n. 3.

tervened as a defendant. The District Court granted the injunction and Chairman Moss appealed.

Rather than attempt to resolve the dispute at that time, this court remanded to the District Court, with the suggestion that the parties attempt to negotiate a settlement. We indicated at that time what appeared to be the outlines of a possible settlement, 551 F.2d at 395 & n. 18: Subcommittee access to edited backup memoranda seemed likely to satisfy the Subcommittee's needs more readily than access to the request letters, without posing so serious a risk to national security. Verification of the accuracy of classification and generic descriptions might be done by Subcommittee staff members, with disputes to be resolved by the District Court after *in camera* inspection of the edited and original memoranda.

B. Subsequent Developments

On March 11, 1977, in the first negotiating session after our remand, the Justice Department offered to furnish to the Subcommittee only expurgated backup memoranda. If the Subcommittee should raise a question concerning the classification of a memorandum as pertaining to foreign or domestic surveillance, the Attorney General would review the material and verify the propriety of the classification. The Subcommittee balked at the absence of independent verification. As a counterproposal, it suggested that it receive, in addition, a sample of unexpurgated memoranda and request letters, which would be kept under adequate security arrangements.[3] Justice Department representatives rejected this proposal.

In the second negotiating session, on March 14, the Department of Justice proposed *in camera* review of un-

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[3] Suppl. Appendix for Appellee at 152. See note 2 *supra* concerning access by other members of the House to such material.

expurgated memoranda by the court, if the Subcommittee should raise a question concerning any expurgated version. Subcommittee representatives rejected this proposal, arguing that verification must be done by the Subcommittee itself, since the Court was not in a position to determine what was important to the Subcommittee's investigation.[4] The Subcommittee proposed that its selected staff members have access to original memoranda at the FBI, with the privilege of taking their notes back to the Subcommittee.[5] The Justice Department continued to oppose a procedure whereby unexpurgated memoranda or staff notes would be lodged with the Subcommittee, and hence available to all members of the House.

On March 21, Chairman Moss met with Attorney General Bell. Discussion centered on the possible examination by the Subcommittee of unexpurgated memoranda, with the privilege of taking notes, and appropriate safeguards against dissemination of sensitive information through such note-taking. The Attorney General agreed to submit to the Subcommittee a specific proposal along these lines.[6]

On April 12, Attorney General Bell wrote to Chairman Moss offering a "no strings attached" examination of all expurgated memoranda for the two sample years to see if it would satisfy the needs of the Subcommittee.[7] On April 18, he formally proposed the *in camera* verification procedure that had been proposed and rejected on March 14. Chairman Moss rejected this proposal.[8]

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[4] Suppl. Appendix for Appellee at 159.

[5] *Id.* at 162.

[6] Suggestions of Defendant Moss as to Matters to be Reported to the Court, at 5.

[7] *Id.*, Exhibits, tab B-13.

[8] *Id.* at 8. The proposal of April 18, and presumably that of April 12, did not permit notes on the memoranda to be

On April 22, the district court submitted its report to this court, noting that there were still significant differences between the parties.

On May 11, the Justice Department amended the above offer,[9] in an attempt to satisfy the "spirit" of the suggestion in our earlier opinion, 551 F.2d at 395 & n. 18. The amended offer went beyond the April 18 proposal by proffering for inspection by the Subcommittee staff and for use in verification not only all expurgated memoranda for the two sample years, but also 10 unexpurgated memoranda randomly selected by the Subcommittee. The Attorney General reserved the right, however, to make a substitution if an unexpurgated memorandum, as randomly selected, was in his opinion of such a nature that disclosure would cause grave injury to the national security or might result in physical harm to any person. Such right of substitution would be subject to approval of the District Court after *in camera* examination of the relevant documents. Subcommittee staff would not be permitted to convey notes or information regarding the contents of any memoranda to the Subcommittee.

The Subcommittee, in its last meeting with the District Court and Justice Department representatives on May 12, rejected this proposal on three grounds: 1. That the sample size (less than 5% of the 217 "foreign intelligence surveillance" backup memoranda) was too small to be statistically valid; the Subcommittee stated that a 25% sample of unexpurgated memoranda was the minimum it would accept. 2. That the right of substitution reserved by the Attorney General further impaired the validity of the sample. 3. That *in camera* verification

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lodged with the Subcommittee. *Id.*, Exhibits, tab B-17 (Memorandum of Understanding, dated April 15, prepared by Attorney General).

[9] Transcript of Proceedings in the District Court, Apr. 20, 1977.

procedures [10] were not acceptable since the court was not equipped to carry these out properly, and since such judicial involvement would violate the Speech or Debate Clause.

II. Questions Presented

A. Political Question

Preliminarily, we must consider whether this case calls for judicial abstention under the political question doctrine. The issues are the possible unseemliness of a judicial exploration of the needs and motives of the other two branches, and the question whether there are "judicially discoverable and manageable standards" [11] for balancing the conflicting constitutional powers asserted by the parties. We noted these considerations in our earlier opinion.[12]

The simple fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution. See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 162 U.S.App.D.C. 183, 498 F.2d 725 (1974).[13] Indeed,

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[10] *In camera* verification would now serve *two* functions: to verify the necessity of the Attorney General's substitution, and to check on misclassification or use of inaccurate generic terms if the Subcommittee thinks such impropriety has occurred.

[11] Baker v. Carr, 369 U.S. 186, 217 (1962).

[12] 551 F.2d at 394.

[13] More generally, disputes concerning the allocation of power between the branches have often been judicially resolved. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952); Myers v. United States, 272 U.S. 52 (1926); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973), vacated on other grounds, 420 U.S. 136 (1975); State High-

disputes between two branches of the government are inherently different from those to which the political question abstention doctrine has traditionally been applied.[14] The fact that a case is viewed as a "political case," or involves a "political controversy," does not mean that it presents only "political questions" beyond the jurisdiction or proper role of the court. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Normally, when the court abstains on political question grounds it acquiesces in a "commitment of the issue" to one of the political branches for resolution of the merits. 369 U.S. at 217. That branch is recognized as having the constitutional authority to make a decision that settles the dispute. Where the dispute consists of a clash of authority between two branches, however, judicial abstention does not lead to orderly resolution of the dispute. No one branch is identified as having final authority in the area of concern. If negotiation fails—as in a case where one party, because of chance circumstance, has no need to compromise—a stalemate will result, with the possibility of detrimental effect on the smooth functioning of government.

We now come to consider whether the "political question" doctrine, which has been developed by the courts as a pragmatic and prudential doctrine to abstain from

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way Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973). These cases can be distinguished from the present dispute as involving suits by or against a state or private person who had a material stake in the outcome. See generally Cox, Executive Privilege, 122 U. Pa. L. Rev. 1384 (1974) (arguing that in the absence of such an interest in the outcome, judicial abstention is warranted). Nevertheless, for the reasons set forth in the text, we feel obligated to address the merits of the present dispute.

[14] The role of the political question doctrine in the setting of this case is explored in Comment, United States v. AT&T: Judicially Supervised Negotiation and Political Questions, 77 Colum. L. Rev. 466 (1977).

certain matters even though within their constitutional ambit, dictates that we should withdraw from further consideration of this case, notwithstanding the lack of a political branch to which the question stands "committed." Such a withdrawal would be rooted in a lack of "competence" of the judiciary to decide the issues.[15] The pragmatic origin and quality of the "political question" doctrine has a corollary in pragmatic application, focusing on whether the questions involved at any stage present "judicially discoverable and manageable standards" (369 U.S. at 217), and thus are susceptible to competent adjudication by the courts. The present dispute, in its original stance, raised serious questions as to the competence of a court to resolve it on the merits. It was not difficult to identify the relevant considerations in general terms: the need of the Subcommittee for the information sought, the likelihood of public disclosure, and the magnitude of resultant harm to national security. What loomed as unmanageable, or at least elusive, was the process of weighing these factors to determine their relative magnitude.[16] Our earlier decision to encourage further negotiation has, we believe, largely obviated this problem by bringing into sharper focus the needs of the parties. *See* Part IIB *infra*.

We do not accept the claims of either the executive or the legislative branch that its determination of the propriety of its acts is conclusive on the court.[17] Such claims

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[15] See Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), aff'd without opinion sub nom. Atlee v. Richardson, 411 U.S. 911 (1973); Baker v. Carr, 369 U.S. 186, 217 (1962).

[16] 551 F.2d at 394.

[17] Each branch has argued that its discretion to act under the circumstances of this case is not subject to judicial review. Congress bases its claim of absolute discretion on the Speech or Debate Clause, Brief for Appellant at 49-57, while the executive relies on its obligation to safeguard the national security, Brief for Plaintiff-Appellee at 23.

invite this court to adapt the political question doctrine for the situation where the political branches are in conflict.[18]

In our view, neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title, and it is or may be possible to establish an effective judicial settlement.

As Judge Friendly recalled in his 1976 Bicentennial lecture, it is one of the major strengths of the Constitution, and far from a weakness, that conflicting viewpoints have been resolved through intermediate positions.[19] Much of this spirit of compromise is reflected in the generality of language found in the Constitution—generality which allows for dispute as to which of the coordinate branches may exercise authority in a particular fact situation.[20]

The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in effi-

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[18] The facts of this dispute thus present two analytically distinct opportunities for judicial abstention under the political question doctrine. This Court could abstain *completely*, on the ground that judicial intervention in a dispute between the political branches is inappropriate; or we could intervene only for the purpose of determining that one branch's claim of absolute discretion is valid. *See* Comment, United States v. AT&T: Judicially Supervised Negotiation and Political Questions, 77 Colum. L. Rev. 466, 487-88 (1977). We reject both alternatives.

[19] Address by Hon. Henry J. Friendly (January 29, 1976) (U.S. Department of Justice Bicentennial Lecture Series).

[20] See Friendly Speech, *supra* note 19, at 17-18.

cient and effective functioning of our governmental system.[21] Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes. Professor Freund has cautioned that "[i]n the eighteenth-century Newtonian universe that is the Constitution, an excessive force in one direction is apt to produce a corresponding counterforce." [22]

The present dispute illustrates the danger of polarization, as well as the road to mediation. The positions of the parties are closer now than they were initially. Nevertheless, agreement has not been reached, and it is necessary for this Court to consider the conflicting claims of the parties to absolute authority. Both claims are put in absolute terms, to run without limit; and neither can be accepted as put.

The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While the Constitution assigns to the President a number of powers

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[21] One commentator has noted that "where such a conflict of powers arises, the constitutional scheme would seem to require no less than that the line between them be drawn at the point of optimal accommodation." Comment, United States v. AT&T: Judicially Supervised Negotiation and Political Questions, 77 Colum. L. Rev. 466, 490 (1977).

[22] Freund, Foreword: On Presidential Privilege, 88 Harv. L. Rev. 13, 20 (1974). Recent and early examples of this phenomenon are surveyed by Judge Friendly in his Bicentennial Speech (Jan. 26, 1977) (U.S. Dept. of Justice Bicentennial Lecture Series at 17-25).

relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors.

More significant, perhaps, is the fact that the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security.[23] These powers have been viewed as falling within a "zone of twilight" in which the President and Congress share authority or in which its distribution is uncertain.[24] The present dispute illustrates this uncertainty. The concern of the executive that public disclosure of warrantless wiretapping data may endanger national security is, of course, entirely legitimate. But the degree to which the executive may exercise its discretion in implementing that concern is unclear when it conflicts with an equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative functions.

The Subcommittee has pressed a different argument, that judicial interference with its actions in this dispute is barred by the Constitution. Reliance is placed on the Speech or Debate Clause, which provides that "for any Speech or Debate in either House, [Senators or Representatives] shall not be questioned in any other place." [25]

In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, the Supreme Court had occasion to scrutinize

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[23] L. Henkin, Foreign Affairs and the Constitution 16-17 (1972).

[24] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[25] Const. Art. I, § 6, cl. 1.

the role of the Speech or Debate Clause in immunizing a Congressional subpoena from judicial interference. There, a Senate Subcommittee investigating internal security matters issued a subpoena directing a bank to produce bank records of an organization suspected of subversive activity. The organization, arguing that its First Amendment rights were being infringed, sued members of the Subcommittee to enjoin implementation of the subpoena. The Supreme Court held that where the actions of members of Congress fall within the "sphere of legitimate legislative activity," the Speech or Debate Clause is an absolute bar to judicial interference. *Id.* at 503. This broad language must, however, be examined in the context of other decisions concerning the congressional investigatory power.

In *Eastland* itself, the Supreme Court acknowledged its earlier holdings that, in a criminal prosecution for refusal to answer congressional inquiries, defendants could assert as a defense the claimed infringement of their First Amendment rights, and the Court would balance this against the public interest in the congressional investigation going forward. *Id.* at 509 n. 16; *see Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959).

Another instance of judicial balancing of executive and legislative interests emerged when the Senate Committee investigating improper activities in the 1972 presidential campaign issued a subpoena directing the President to deliver certain relevant tapes and documents. The President declined on the ground of executive privilege. The Committee sought to enforce the subpoena. This court weighed the public interest protected by the President's claim of privilege against the interest that would be served by disclosure to the Committee, and declined to enforce the congressional subpoena. *Senate Select Com-*

mittee on Presidential Campaign Activities v. Nixon, 162 U.S.App.D.C. 183, 498 F.2d 725 (1974).

It appears from *Watkins*, *Barenblatt* and *Senate Select Committee* that individual members of Congress are not impermissibly "questioned in any other place" regarding their investigatory activities merely because the validity and permissibility of their activities are adjudicated. In these cases, unlike *Eastland*, the challenge to congressional investigatory activity was raised as a defense. The distinction should not be dismissed as merely procedural, since it sheds light on the nature and purpose of the protection afforded by the Speech or Debate Clause. The Clause was intended to protect legislators from executive and judicial harassment.[26] "[L]egislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. at 503 (*quoting Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). As is clear from *Watkins*, *Barenblatt*, and *Senate Select Committee*, however, the Clause does not and was not intended to immunize congressional investigatory actions from judicial review. Congress' investigatory power is not, itself, absolute. *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959). And the fortuity that documents sought by a congressional subpoena are not in the hands of a party claiming injury from the subpoena should not immunize that subpoena from challenge by that party. *See* Justice Marshall's concurring opinion in *Eastland*, 421 U.S. at 513.

If the request letters were only in the hands of the Justice Department, it could have refused to comply with the legislative demand, citing *Senate Select Committee*. The fact that the request letters are available from AT&T

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[26] United States v. Johnson, 383 U.S. 169, 179 (1966).

as well as from the Justice Department does not make the legislative authority unreviewable in court, for AT&T could have refused to comply and insisted on an ultimate court decision to avoid prosecution.[27] The fact that the Executive is not in a position to assert its claim of constitutional right by refusing to comply with a subpoena does not bar the challenge so long as members of the Subcommittee are not, themselves, made defendants in a suit to enjoin implementation of the subpoena. *See Eastland*, 421 U.S. at 513, Justice Marshall concurring.[28]

The approach by which the Executive here achieves judicial consideration of its challenge is not properly subject to reproach as exalting form over substance. The role of the court often turns on matters of procedure. The contrary position of the Subcommittee is itself an exercise in procedural refinement: The Subcommittee argues that the court can act only if AT&T itself initiates a challenge to the subpoena; so long as AT&T merely awaits a court ruling on the Executive's challenge, the court must abstain. It would be strange indeed if the Constitution made judicial consideration available to one who defies the legislature outright, but not to one like AT&T, who seeks an orderly resolution of a disputed question.

In sum, while this case is similar in several respects to the situation in *Eastland*, as earlier noted (551 F.2d at 391), for purposes of considering whether the Executive's claim is entitled to at least some judicial consideration, we emphasize that no member of the Subcommittee in the present dispute has been made a defendant in a

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[27] The court would decide whether AT&T had standing to raise the national security question when it had been directed by the Executive branch to resist production on that ground. *See* 551 F.2d at 387.

[28] In the present case, of course, the legislative parties intervened on their own motion.

judicial proceeding. The courts do not accept the concept that Congress' investigatory power is absolute. What the cases establish is that the immunity from judicial inquiry afforded by the Speech or Debate Clause is personal to members of Congress. Where they are not harassed by personal suit against them, the clause cannot be invoked to immunize the congressional subpoena from judicial scrutiny.

B. Balancing

We now address the task of weighing the claims and accommodating the needs of the disputing parties. As already noted, we encouraged negotiations in order to avoid the problems inherent in formulating and applying standards for measuring the relative needs of the parties, 551 F.2d at 394. While negotiations did not resolve the dispute, they did narrow the gap between the parties and provide a more informed basis for further judicial consideration.

The course of negotiations reflects something of greater moment than the mere degree to which ordinary parties are willing to compromise. Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations,[29] the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme. Correspondingly, a court judgment that reflects the compromises achieved through negotiation marks an allocation of powers determined in furtherance of the constitutional process.

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[29] See Part IIA *supra*.

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Turning to concrete matters, we first summarize the issues on which negotiations focused, and the final positions of the parties on these issues. The key issue was whether the Subcommittee would have access to unedited backup memoranda. Related questions concerned what the size of the sample of unedited memoranda would be if access were allowed; whether the Subcommittee staff would be permitted to take notes of the unedited memoranda and deliver such notes to the Subcommittee; what the role of *in camera* resolution of disputes would be; and the possibility of the executive's making a substitution for one or more unedited memoranda chosen by the Subcommittee because of the extraordinary sensitivity of the contents.

The Subcommittee has mentioned throughout this dispute that it must have access to unedited backup memoranda to verify the accuracy of the Justice Department's generic substitution for deleted terms and its classification of memoranda as pertaining to foreign or domestic intelligence. The Subcommittee regards *in camera* verification by the district court as inadequate, viewing the court as ill equipped to make such judgments.

In connection with its access to both edited and unedited memoranda, the Subcommittee has also demanded that its representatives be permitted to take notes for use by the Subcommittee members.

Until a short while ago, the Justice Department refused to consider allowing the Subcommittee access to unexpurgated memoranda. Recently, however, spurred by a memorandum and order of this Court,[30] the executive has offered to the Subcommittee an arrangement modeled after a suggestion in our earlier opinion: the executive has relaxed its position on the issue of unexpurgated memoranda to the extent that it is willing to permit Subcommittee staff members to inspect 10 ran-

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[30] Memorandum and Order of Apr. 28, 1977.

domly selected original memoranda for the two sample years for purposes of verification, as well as all expurgated memoranda for the two sample years. If staff members conducting the verification conclude that domestic surveillance material has been improperly classified as foreign, or that generic substitutions are inaccurate, the district court would make an *in camera* determination of this matter and decide whether, in light of its finding, further disclosure to the Subcommittee was warranted.

The Justice Department refused to allow notes to be carried back to the Subcommittee, however;[31] and it insists on retaining a protective device: if any of the randomly selected original memoranda would, in the opinion of the Attorney General, cause grave injury to the national security or possibly result in physical harm to any person it disclosed, another randomly selected memorandum may be substituted. The substitution would have to be approved by the District Court after *in camera* inspection of the relevant documents to assure that the Attorney General's concerns were warranted.

The Subcommittee's response to this most recent proposal by the executive was lukewarm at best. The Subcommittee objected to the sample size (10 out of 217) offered by the Executive, asserting that a fair sampling required access to the original versions of 25% of the memoranda for the sample years (1972 and 1975).[32] The

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[31] The Justice Department has insisted that all memoranda, expurgated and unexpurgated, be examined at the F.B.I. House Rule XI would permit access by all members of the House to notes carried back to the Subcommittee. See note 2 supra.

[32] At proceedings before the District Court on April 20, 1977, where the parties reported their progress in negotiations, the Subcommittee counsel appeared to suggest that this figure had some statistical significance:

[Continued]

Subcommittee further objected to the substitution procedure, as destroying the validity of the random sample. It was not satisfied that *in camera* inspection would sufficiently guard against misuse of this procedure by the executive.

Two significant points on which the parties remain apart are the size of the sample of unexpurgated memoranda and the substitution procedure.[33] The parties are sufficiently close at this point, and have demonstrated their major concerns with sufficient clarity, to permit this Court to intervene responsibly. Rather than impose a rigid arrangement, however, we choose to continue our approach of gradualism. We propose an approach that should be tested by the parties. We are not required to say whether the Subcommittee is entitled to all that it seeks when time and experience may confirm that it does not need, in any genuine and substantial sense, more than is provided by our approach.

This gradual approach is consistent with our view that the present dispute should be regarded as a concerted search for accommodation between the two branches. If the procedure we outline proves deficient, adjustments may be required—but meanwhile the needs of the parties and the available means of accommodation will be brought into even sharper focus.

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[32] [Continued]
The Committee met with the General Accounting Office and asked them to indicate what would be a reasonable sample to validate and to check, and there is a computer program and a memo which suggested something greater than 25 percent but the Committee is willing to accept 25 percent.

[33] We do not regard the note-taking issue as one of major significance at this time; nor are the Subcommittee's objections to *in camera* inspection of primary concern, since the Executive has agreed that initial verification will be conducted by Subcommittee staff members.

Under our approach, the Subcommittee staff would select at random a sample of 10 unedited memoranda for the two sample years, and compare these with the corresponding expurgated ones.[34] On the issue of notes, still a bone of contention, our approach would permit the staff to take notes on their impressions concerning the accuracy of the classification of the memoranda as relating to foreign intelligence surveillance[35] and use of

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[34] We are not unmindful of the issue raised by the Subcommittee as to the adequacy of a sample of 10 documents. (See footnote 31, *supra*). But there is a difference in objectives between, e.g., a sample that must be large enough to be representative of the whole population, for valid statistical extrapolation; a sample that must be large enough to check on a private citizen subject to no constraints other than the criminal law; and a sample large enough to deter high officials, in whom special trust and confidence have been reposed, from any tendency to manipulate or deceive. What our approach provides is a window that lets in enough light to inhibit chicanery.

[35] There has been some dispute between the parties as to the definition of "foreign intelligence surveillance." Early in the course of negotiations, the parties agreed that "[f]oreign intelligence surveillances are surveillances of the communications of foreign governments, political parties or factions, military forces, agencies or enterprises controlled by such entities or organizations composed of such entities . . . or foreign-based terrorist groups or persons knowingly collaborating with any of the foregoing; domestic surveillance include[s] all other surveillances." 551 F.2d at 386 n. 1. Subsequently, the Justice Department expanded its definition of "foreign intelligence surveillance" to include "targets of a recruitment effort by any of the foregoing"—i.e., persons who were not knowingly collaborating with a foreign party.

In classifying surveillance as domestic or foreign for purposes of the procedure we outline, the Justice Department should not unilaterally adopt its own definition, but should identify those in the disputed area to bring them to Congress's attention. This identification should be done for all edited memoranda in the two sample years, rather than being left to be discovered by the random selection procedure.

generic terms, but the notes would have to be left at the FBI under seal. The Subcommittee staff could report their conclusions orally to the Subcommittee. The Subcommittee would then decide whether to take a claim of inaccuracy—alleging, for example, executive abuse of the "foreign intelligence" rubric—to the District Court for resolution. If the District Court, upon *in camera* inspection of the original and edited memoranda and of the staff notes, found significant inaccuracy, it would take remedial action. The specifics of its actions are a matter for sound discretion. Relief might involve, for example, providing the Subcommittee staff access to a larger sample of unedited memoranda to determine whether any previously discovered inaccuracy was isolated or systematic. If the initial inaccuracy suggested deviousness, the District Court might conclude that the cooperative approach is unfruitful and unmanageable, and that the court should withdraw from its assistance to the executive by dissolving the injunction.

The executive would be permitted to employ the substitution procedure, but only upon an *in camera* showing of two things: the accuracy and fairness of the edited memorandum,[36] and the extraordinary sensitivity of the contents of the original memorandum to the national security.[37] The determination of the District Court will, of course, be subject to appellate review.[38]

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[36] In this regard, the District Court will take scrupulous care in comparing the two documents and in considering the implications of the deletions.

[37] We contemplate that the executive will have to satisfy a "very heavy burden," New York Times Co. v. United States, 403 U.S. 713, 731 (1971) (White, J., concurring), in demonstrating its need to invoke the substitution procedure.

[38] The Court of Appeals will review the documents under seal. United States v. Lemonakis, 158 U.S.App.D.C. 162, 183-84, 485 F.2d 941, 962-63 (1973).

[Continued]

In order to gain necessary assistance in making its *in camera* determinations, the District Court may give the parties' counsel access to the material in question. The presentations of counsel regarding the fairness of the editing and the sensitivity of the material may be of significant help to the Court. *Compare Nixon v. Sirica*, 159 U.S.App.D.C. 58, 79, 487 F.2d 700, 721 (1973).

While the parties are testing this verification procedure, the Subcommittee should have access, if desired, to all memoranda for the sample years, in edited form.[39]

Our holding, as noted, determines only the *present* needs of the Subcommittee. Its *future* needs will depend on what the verification procedure uncovers. If it reveals cheating or deceptiveness, our assessment of the relative needs of the parties will naturally be altered.

We are aware that from the legislative viewpoint, any alternative to outright enforcement of the subpoena entails delay. The additional time required by the procedure

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[38] [Continued]

The Subcommittee has expressed concern that the Attorney General may abuse the substitution procedure to destroy the validity of the random sample. A safeguard against this is, of course, provided by the requirement that substitution must be approved by the District Court after *in camera* inspection of the relevant materials. In addition, should it develop that the substitution procedure is used often—even if justifiably—the sample size may ultimately have to be enlarged. We leave this matter to be determined in light of subsequent events.

[39] Memoranda that were edited in connection with the Executive's earlier settlement offers may have been prepared under the assumption that they would not be removed from the FBI. They may contain only absolutely essential deletions and thus remain sensitive. In light of our conclusion that the Subcommittee should have these memoranda to carry on its work, we permit the executive to further edit such memoranda to the extent necessary to assure security.

now outlined should be modest.[40] More importantly, there is an offset, in that the memoranda are likely to be more revealing than the request letters. But even assuming that there will be some delay while the executive and the judicial branches conduct their respective review, this is an inherent corollary of the existence of coordinate branches. The Separation of Powers often impairs efficiency, in terms of dispatch and the immediate functioning of government. It is the long-term staying power of government that is enhanced by the mutual accommodation required by the Separation of Powers.[41]

We sustain the injunction against AT&T at least until the procedure outlined above has been tried and has proved inadequate.

So ordered.

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[40] With an important legislative interest involved, there is a plain duty on both the executive and judicial branches to advance any problems for prompt consideration.

[41] *See* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1712

UNITED STATES OF AMERICA

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.

JOHN E. MOSS, Individually and on behalf of the U.S. House of Representatives and the House Committee on Interstate and Foreign Commerce, APPELLANT

Supplemental Opinion on Petition for Rehearing

(D.C. Civil 76-1372)

Filed December 12, 1977

Before: LEVENTHAL, ROBINSON and WILKEY, *Circuit Judges*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDER

On consideration of appellees' petition for rehearing, it is

ORDERED by the court that the aforesaid petition for rehearing is denied, for the reasons stated in the following supplemental opinion filed this date.

Per Curiam

SUPPLEMENTAL OPINION

The government has filed a petition for rehearing, focusing upon the portions of our opinion of October 20, 1977, relating to *in camera* proceedings.

The government asks us to clarify that it was not our intent to permit counsel for the parties to participate in those *in camera* proceedings directed at verifying the need for invoking the substitution procedure. If our intent was to permit such participation by counsel, the government moves that we modify the opinion to preclude such participation, in the interest of national security.

It was and is our intention to give the district court the authority to permit the participation of counsel for the Subcommittee if the court deems such participation necessary in order to make the *in camera* determinations called for by our opinion.

This power should, of course, be exercised gingerly, particularly in regard to determinations concerning the need for the substitution procedure, which by definition means that the executive has concluded that especially sensitive documents are involved. It is to be used only if the court finds it necessary in order that it may engage in a considered way in the judicial function we have outlined.

We are aware of the cases that have upheld *ex parte* proceedings, and accordingly have held that private parties do not have a *right* to have their counsel par-

ticipate in *in camera* proceedings. *See Phillippi v. Central Intelligence Agency*, 178 U.S.App.D.C. 243, 247, 546 F.2d 1009, 1013 (1976); *Fonda v. Central Intelligence Agency*, 434 F. Supp. 498 (D.D.C. 1977).* The present case does involve the additional consideration that it is a body of the legislature that is seeking access, and that it has not only threshold legal standing but claims the high ground of seeking information for a legislative purpose.

Counsel for a legislative committee may be subject to the kind of security clearance that our decision contemplated for congressional staff, and may also be subject to a district court's conditions on access to *in camera* material. In such respects, the participation of counsel is in aid of the court, his primary position is as an officer of the court, and he may even be precluded from consultation with his client on the matters involved.

We are here dealing with hypothetical problems—which we presume and hope will never arise. We grapple, however, with the problem put forward by the executive in order to obviate unnecessary doubt. We have not accepted the contention that the executive determination that national security may be involved is conclusive and not subject to any further inquiry, nor have we accepted the rival claim that Congressional right of access to documents for legislative purposes is at any time absolute. If in the interest of national security the executive seeks the aid of the judicial branch, the courts are entitled to obtain, under circumscribed conditions, the aid they need for their task.

The petition for rehearing is denied.

So ordered.

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* We are asked to waive our Rule 8(f) and resort to an unpublished memorandum in another case. We find no need to do so, however, because the principle to be established is clear.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE SECOND NATIONAL NATURAL GAS RATE CASES

No. 76-2000, et al.

AMERICAN PUBLIC GAS ASSOCIATION, et al., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITIONS FOR REHEARING

Filed August 17, 1977

Before FAHY, *Senior Circuit Judge*, LEVENTHAL, *Circuit Judge*, and GERHARD A. GESELL,* *United States District Judge* for the United States District of Columbia

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* Sitting by designation pursuant to Title 28, U.S.C. § 292(a).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDER

On consideration of the petitions for rehearing filed by American Public Gas Association, et al; Austral Oil Company Incorporated and Aztec Oil & Gas Company; Commonwealth of Pennsylvania; and Congressmen petitioners, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

LEVENTHAL, *Circuit Judge*, joined by GESELL, *District Judge*: The petitions for rehearing that have been filed [1] do not require an opinion to supplement or repeat the already long opinion of June 16, 1977.

We write rather to say that the concerns that trouble our distinguished colleague, and occasion a further word from him, also trouble us; but in our view they cannot control the decision in this case.

It is hardly disputed that there will be some considerable increase in taxes paid by the industry. That is what Congress and the people wanted. The only fairly disputable point is—how much? However, if the Commission were confined to a doctrine strictly insisting on evidence of "actual taxes paid," the plain fact is that, at a time when the nation cannot tolerate any undue block to gas supplies, producers selling to the interstate market

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[1] By APGA, et al; Congressmen petitioners (Abourezk, et al.); Commonwealth of Pennsylvania; and by Austral Oil Co. and Aztec Oil and Gas.

The Austral-Aztec petition, which deals with replacements for indefinite term contracts, questions whether its contention can soundly be rejected on a theory of preserving a bargain. This particularized question may merit further reflection, but in the last analysis the court is of the view that there are considerations both ways and the primary responsibility for decision must be left to the agency.

would have to forego any price increase whatever notwithstanding an inescapable income tax cost increase of considerable extent.

The court's opinion sanctions the use of a model as substantial evidence, but it contemplates that this model will be subjected to the test of experience. If a flaw in the model is revealed, then there can be (slip opin. pp. 48-9) an adjustment for the future, an adjustment readily approached through withholding the benefit of future escalations. While this will not affect prices for gas already delivered, it would have substantial impact, and if error is found would forestall an undue perpetuation. It strikes a balance that is, in our view, in "the interest of justice." 28 U.S.C. § 2106.[2]

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[2] The reference to § 2106 does not imply, as some petitioners for rehearing suppose, that the court has discarded the requirement of substantial evidence to support the Commissioners' findings and result. The court does feel bound in application of that standard to give deference to the Commission if it has asked the right questions and sought answers, and if it relies on material that is reasonably regarded as substantial in finding the answers. In the circumstance and with the information at hand, the economic model is substantial evidence. In the light of experience, the standard of substantial evidence might require the agency to take a different course.

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FAHY, *Senior Circuit Judge*: Though a rehearing is denied, I take this opportunity to explain further one aspect of my dissenting views about the income tax components under consideration.

Establishment of nationwide rates for jurisdictional gas unavoidably strains the efficacy of the Natural Gas Act to support the effort; the Act was enacted long prior to contemplation of such a development. Realizing the situation, the court must be as open-minded as is reasonably possible in seeking authority in the Act to accommodate the Commission's difficulites in such an undertaking. However, the Act is not open-ended; and it remains, as originally purposed, primarily protective of the consumer interest. While the nature of this interest may vary with the times, an inexorable standard binds Commission and court: Essential elements of a rate order must be supported by substantial evidence. This applies to the dollar amount of an essential rate element as well as to the inclusion of the element in the rate structure.

The amount of an income tax component in a nationwide rate must achieve a reasonably close relationship to the amount a representative group of the producers are required to pay, or to assume liability for, as their income taxes. This reasonable relationship may be found consistently with the substantial evidence standard when a tax component is mathematically calculated as an estimate of taxes per Mcf of jurisdictional gas, subject, however, to verification or modification grounded in substantial evidence of actual income tax data.

Here, the record contains no data that the 43.05¢ per Mcf tax component included in the rate for 1975-76 vintage gas, for example, is reasonably comparable to any income taxes which have been or are being paid or assumed by such a representative group of producers. Concededly, the record contains no data of actual payment or assumption of liability in any tax return filed with

the Internal Revenue Service by any producer or by a cross-section of producers representative of the national industry involved. The model does incorporate evidence of certain other costs to be recovered by producers in the rate. On that foundation the model then proceeds to calculate that to enable the producers to recover those costs and also to earn a 15% rate of return they must realize such an amount of income from the rates to be charged as will enable the producer to meet an income tax liability of 43.05¢ for each Mcf of jurisdictional gas sold. This calculation does not proceed from or incorporate actual tax data such as I have previously referred to. The resulting component, then, is entitled at most to the status of an estimate of such income taxes as producers might be called upon to assume. I do not now revert to the difficulties mentioned in my dissenting opinion in arriving at definite jurisdictional tax costs under the separate entity theory; those difficulties aside, I now assume *arguendo* that the Natural Gas Act would permit the court, in light of the difficulties encountered by the Commission in establishing a nationwide rate, to accept such an estimate as supported by substantial evidence. By definition, however, in this on-going context, the estimate is not an acceptable basis for a component unless it is tested for its correctness by the Commission's resort to what develops factually regarding the actual income taxes of producers. Yet here the Commission, neither by the model nor by any other means, provides for such verification or correction. The model does provide for readjustment of other cost factors in the light of experience, at the next biennial review, but not for readjustment of the income tax component on the basis of the experience of a reasonably representative cross-section of the industry in actually paying, assuming liability for, or in not paying, income taxes as evidenced by returns filed with the Internal Revenue Service or in any other evidentiary manner. To revise the tax com-

ponent in some other manner, as by simply adjusting the figures for non-tax costs included in the formula originally used to calculate the component, does not test it against actual tax-liability experience and is wholly inadequate to verify or correct the estimate. In this situation—in the context of this rate proceeding—I think the court should hold not only that the income tax components lack the support of substantial evidence as a definite reckoning of recoverable tax costs,[1] but that neither the Opinion nor the model contains verification or modification requirements which establish the components as legally acceptable estimates. To permit their continuing and indefinite collection from consumers without testing their accuracy in the manner suggested above I think we should also hold is not within the discretion available to the Commission under the Natural Gas Act.

This problem in my opinion calls for resort to the outstanding and accumulating evidence respecting income taxes, and for its analysis by the Commission in a manner to enable it to reach a satisfactory conclusion respecting the subject on the basis of the most important evidence relevant to it and which is in the possession of the regulated industry or is under its control. One must know what is actually the situation, at least to a reasonably degree, to reach a just and reasonable conclusion about it. It seems to me that simple justice requires that the amount the consumer ultimately pays to enable the producer to recover its income tax must be supported by tax payments or accruals evidenced by tax returns or

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[1] In the context of this proceeding, where the most relevant facts as to income taxes are in the possession of the producers, but not available to the Commission in arriving at the income tax components, a fair application of the substantial evidence standard requires the court in my opinion to withhold deciding that the standard is complied with unless and until this evidence, which may refute the accuracy of the components, is made available.

other supporting data, reasonably representative of the situation. The question in the end is whether such evidence justifies a tax component included *a priori* in the rate. The integrity of the model as an answer to this question has not yet been established, or required to be established by the Commission or the court. It is neither just nor reasonable in my opinion to make the model the master regardless of those facts.[2]

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[2] The court's opinion states in its footnote 33 that natural gas consumers should not "pay less" for gas simply because, for example, a producer such as *Mobil* loses money in a nonjurisdictional enterprise. This simplistic justification for the present tax components based upon the separate entity theory used to establish them ignores the failure of the producer to adopt that theory in computing its income tax. When a consolidated return is filed, losses due to nonjurisdictional non-gas activities are used to reduce taxes which the single entity theory would require to be paid. Moreover, the court assumes that the present "pay more" rate borne by the consumer for the purpose of covering the producer's income-tax cost has already been validly established in an amount comparable to that cost. My concern is also that the "pay more" component may be used by the producer, in whole or in part, not to pay its income tax, but to recoup losses as to which neither Commission nor court has knowledge whether such losses are related to the cost of producing and marketing jurisdictional gas.

20-477 O - 78 — 16

United States District Court
for the District of Columbia

Civil Action 74–1518

RICHARD M. NIXON, PLAINTIFF

v.

ARTHUR F. SAMPSON ET AL., DEFENDANTS

and

Civil Action 74–1533

THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS ET AL., PLAINTIFFS

v.

ARTHUR F. SAMPSON ET AL., DEFENDANTS

and

Civil Action 74–1551

LILLIAN HELLMAN ET AL., PLAINTIFFS

v.

ARTHUR F. SAMPSON ET AL., DEFENDANTS

ORDER

In accordance with the Memorandum filed herewith, it is by the Court this 21st day of September, 1977,

ORDERED, that Defendants' Motion to Dismiss be and it is hereby GRANTED, and these cases are hereby DISMISSED as moot.

AUBREY E. ROBINSON, JR.,
United States District Judge.

United States District Court
for the District of Columbia

Civil Action 74–1518

RICHARD M. NIXON, PLAINTIFF
v.
ARTHUR F. SAMPSON ET AL., DEFENDANTS

and

Civil Action 74–1533

THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS ET AL., PLAINTIFFS
v.
ARTHUR F. SAMPSON ET AL., DEFENDANTS

and

Civil Action 74–1551

LILLIAN HELLMAN ET AL., PLAINTIFFS
v.
ARTHUR F. SAMPSON ET AL., DEFENDANTS

MEMORANDUM

In October 1974, former President Nixon brought an action [1] to enforce the terms of a depository agreement entered into between himself and the Administrator of General Services regarding the disposition of the materials of his presidency. Shortly thereafter, two groups of plaintiffs filed suit [2] seeking to have the materials declared the property of the United States, to void the de-

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[1] *Nixon* v. *Sampson*, Civil Action No. 74–1518 (DDC, filed October 17, 1974. See 389 F. Supp. 107 (DDC 1975).

[2] Reporters Committee for *Freedom of the Press* v. *Sampson*, Civil Action No. 74–1533 (DDC, filed October 21, 1974) and *Hellman* v. *Sampson*, Civil Action No. 74–1551 (DDC, filed October 24, 1974).

pository agreement, and to gain access to the materials under the Freedom of Information Act (the "FOIA"),

5 U.S.C. § 552, *et seq.* These lawsuits were consolidated. Subsequent to the filing of these cases, Congress passed the Presidential Recordings and Materials Preservation Act (the "Preservation Act"), P.L. 93–526, 44 U.S.C. § 2107, governing the disposition of and access to the tape recordings and documents of the Nixon Administration. Mr. Nixon then initiated a new action [3] challenging the constitutionality of the Preservation Act. This Court held the consolidated cases *sub judice* pending resolution of this latter challenge.[4] The Preservation Act was ultimately upheld by the Supreme Court in *Nixon* v. *Administrator of General Services*, 45 U.S.L.W. 4917 (June 28, 1977). The Government has since moved to dismiss the consolidated actions as moot.[5] For the reasons discussed below, the Court finds that these cases should be dismissed.

Defendants claim that these actions are moot in light of the statutory scheme set out in the Preservation Act and in light of the opinion of the Supreme Court in *Nixon* v. *Administrator, supra.* Plaintiffs insist that issues with respect to ownership of the presidential materials and access to the materials under the FOIA remain for resolution.

The standard for determining mootness is whether the case has lost its character as a live justiciable controversy. *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412 (1972). This Court is satisfied that no present con-

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[3] See *Nixon* v. *Administration of General Services*, 45 U.S.L.W. 4917 (June 28, 1977).

[4] For background, see *Nixon* v. *Richey*, 513 F.2d 427 (D.C. Cir. 1975) (per curiam), motion for reconsideration granted 513 F.2d 430 (D.C. Cir. 1975) (per curiam).

[5] Plaintiff Nixon has joined in the motion of the Government. The other plaintiffs (hereafter referred to as "plaintiffs") have opposed the motion. Plaintiffs have also requested that this Court enter judgment in accord with the opinion filed by Judge Richey in *Nixon* v. *Sampson*, 389 F. Supp. 107 (DDC 1975). The Court, however, agrees with the position set out in Defendants' papers that entry of judgment would not be appropriate.

troversy exists as to this litigation with respect to ownership of the presidential materials. While ownership was a relevant consideration when these suits were filed, the Supreme Court's holding in *Nixon* v. *Administrator, Supra*, that custody and control of the materials properly reside with the Government makes any further examination of the ownership question unnecessary in relation to these proceedings.

The Court is also satisfied that resolution of the issue of access to the presidential materials under the FOIA is inappropriate within the context of these pending actions. The Preservation Act establishes a comprehensive scheme governing all accesses to presidential materials.[6] While the terms of the Act do not in any way affect rights to access applicable under the FOIA,[7] the Preservation Act does purport to create a procedural framework within which such accesses are to occur. See *Nixon* v. *Richey*, 513 F.2d at 443–444. The precise details concerning how these accesses will occur will be set forth in the regulations under the Act relating to public accesses.[8] These regulations have not yet been promulgated. If the regulations unduly restrict rights to access asserted under the FOIA, a challenge to those regulations may be brought before this Court. That is not the situation, however, which the Court confronts in this litigation.

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[6] This Court is not persuaded by plaintiffs' argument that the Preservation Act covers only those Nixon materials not subject to the FOIA. Plaintiffs' interpretation is not supported by the legislative history of the Act and would serve to defeat the Act's underlying purposes. Such a construction of the Act is not mandated by § 104(d) and would raise serious constitutional questions. This Court finds that the specific statutory scheme of the Preservation Act prevails over the more general scheme of the FOIA.

[7] Section § 104(d) of the Act provides:

"The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act * * *"

[8] This Court is of the opinion that § 104(d) requires that the regulations differentiate between accesses under the FOIA and accesses otherwise allowed by the Preservation Act. The regulations should establish procedural guidelines for each type of access.

There is nothing which this Court can presently do with respect to plaintiffs' requests for disclosure of certain of the Nixon presidential materials. These cases were brought under factual circumstances that no longer pertain. Thus this Court is persuaded that it is appropriate to dismiss these actions as moot.

AUBREY E. ROBINSON, JR.,
United States District Judge.

Date: SEPTEMBER 21, 1977.

United States District Court for the District of Columbia

(Civil Action No. 77–436)

JAMES A. MCCLURE ET AL., PLAINTIFFS
v.
SOL LINOWITZ ET AL., DEFENDANTS

MEMORANDUM OPINION

In this action for declaratory and injunctive relief, plaintiffs seek to restrain defendant Linowitz from acting as a negotiator for the United States until he has complied with certain alleged requirements under 22 U.S.C. §§ 901, 901a. Plaintiff McClure and plaintiff Hansen are members of the United States Senate and House of Representatives, respectively. They assert that Linowitz has been improperly appointed by the President to act as chief negotiator for a proposed new treaty concerning the Panama Canal Zone without the advice and consent of the Senate, which they believe is required by § 901(a) and (c). Plaintiffs further contend that, even if the advice and consent of the Senate were not a prerequisite to Linowitz' service as negotiator, he has in addition failed to comply with the disclosure requirements of § 901a. In addition to injunctive relief against Linowitz, plaintiffs seek to have the Treasurer of the United States restrained from making payments to Linowitz for his services rendered as negotiator.[1]

The complaint in this action was filed March 14, 1977. Prior to any response by defendants, the complaint was reassigned from Judge Green to Judge Flannery. The action of the Calendar Committee in reassigning the case

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[1] Apparently plaintiffs were not aware that Linowitz is serving without compensation. *See* Affiadavit of William H. Luers, Acting Assistant Secretary for Inter-American Affairs, Department of State, ¶ 6.

was based upon Local Rule 3–4(a)(2)(iii), which provides that cases shall be deemed related when they "grow out of the same event or transaction", and Local Rule 3–4(d)(2), which provides that the later of two related cases may be transferred to the judge assigned to the earlier case. In this instance, the complaint was found to be related to the earlier case of *Helms* v. *Vance,* Civ. No. 77–83 (dismissed by memorandum opinion and order of March 23, 1977), and in the interests of judicial economy was accordingly reassigned.[2] On March 29, 1977, defendants opposed plaintiffs' motion for a preliminary injunction and at the same time moved to dismiss.

I. THE FACTS

The current efforts by the United States negotiating team, headed by defendant Linowitz and Ambassador Ellsworth Bunker, are a culmination of approximately thirteen years of negotiation between the United States and the Republic of Panama. The admitted purpose of discussions between the two nations is a renegotiation of the treaty governing the status of the Panama Canal Zone with an eye toward increasing Panamanian control over the Zone. In these discussions, Linowitz, as one of the chief negotiators, obviously plays a key role.

Effective February 9, 1977, Linowitz assumed the position of "Foreign Affairs Officer (Expert)" in accordance with 5 U.S.C. § 3109, which allows agencies to employ "experts or consultants" for temporary service not to exceed one year in duration. The purpose of his appointment was to serve as co-negotiator with Ambassador Bunker in matters relating to the Panama Canal Zone. Linowitz agreed to serve in this position without compensation from the Department of State. He has complied, however, with the applicable Department of State regulation requiring disclosure of financial and employment interests. *See* 22 C.F.R. § 10.735–401(a) (1976).

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[2] Plaintiffs' suggestion that the court was somehow influenced by defendants to reassign the case is clearly inconsistent with the fact that the reassignment was effected March 16, 1977, well before any papers were submitted by defendants.

On February 10, 1977, the President conferred upon Linowitz the personal rank of ambassador to accompany his designation as United States Co-Negotiator of the Panama Canal Treaty. The letter of appointment from the President clearly stated that "[i]n no event would this rank extend beyond the six-month limitation period governing personal ranks." According to the affidavit of Mr. William H. Luers, Acting Assistant Secretary of State for Inter-American Affairs, the according of the personal rank of ambassador to the United States' chief negotiator was felt to be important to the success of the negotiations.[3] Since commencement of the negotiations between the United States and Panama, the chief United States representatives have all held the rank of ambassador or, in the case of Ellsworth Bunker, the position of ambassador-at-large. Linowitz previously held rank of ambassador in connection with his duties from 1966 to 1970 as the representative of the United States to the Organization of American States.[4]

II. THE APPLICABLE LAW

Under 22 U.S.C. § 901(a) and (c), the appointment of ambassadors and ministers by the President is in general subject to approval by the Senate. Article II, § 2, of the Constitution is codified in § 901(a), which provides:

> The President shall, by and with the advice and consent of the Senate, appoint ambassadors and ministers, including career ambassadors and career ministers.

It is further provided by § 901(c) that no person shall be designated an ambassador or minister unless he has been appointed and confirmed by the Senate in accordance with § 901(a) or as provided by Article II, § 3, of the Constitution.[5] An exception to this general rule is,

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[3] Luers Affidavit ¶ 9(c).

[4] The facts discussed here are gleaned from the Luers Affidavit.

[5] Article II, § 3, of the Constitution provides that "[t]he President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

however, also found in § 901(c). Under the exception, "the personal rank of ambassador or minister may be conferred by the President in connection with special missions for the President of an essentially limited and temporary nature of not exceeding six months." 22 U.S.C. § 901(c).

This exception was apparently prompted by Congress' realization that, in certain cases involving special missions of essentially limited duration, procuring the advice and consent of the Senate might be a burdensome and unnecessary requirement. The President is thus empowered by § 901(c) to appoint short-term ambassadors and ministers in certain circumstances. The Linowitz appointment, which is designed to facilitate the sensitive negotiations concerning the Canal Zone, falls within these circumstances. As the statute contemplates, the appointment was made "in connection with special missions for the President." Plaintiffs contend that negotiations so important, which have already lasted thirteen years, cannot by their nature be "essentially limited and temporary." In this case, however, the appointment is limited by its very terms to six months. It is obvious from the language used by the President that his intention was to bring the Linowitz appointment within the exception found in § 901(c). The court cannot challenge the good faith of the President by assuming, without any justification, that the six-month appointment of Linowitz will be allowed to continue for a longer period of time. The presumption of legality which attaches to the President's actions must be particularly strong in the delicate area of treaty negotiations, where the President's power is exclusive.

Plaintiffs further contend that, even if the Linowitz appointment were not required by § 901 to be submitted to the Senate for advice and consent, Linowitz is nevertheless in violation of § 901a, which provides:

> From and after October 18, 1973, each person appointed by the President as ambassador or minister *shall, at the time of his nomination file* with the Committee on Foreign Relation of the Senate and the Speaker of the House of Representatives a report of

contributions made by such person and by members of his immediate family during the period beginning on the first day of the fourth calendar year preceding the calendar year of his nomination and ending on the date of his nomination, which report shall be verified by the oath or affirmation of such person, taken before any officer authorized to administer oaths.

(Emphasis added.) Given the fact that the only contributions required to be disclosed are political contributions as defined in 2 U.S.C. § 431, it is likely that § 901a was intended to reveal situations in which an ambassadorial appointment might be the result of a campaign contribution. Accordingly, the Congress did not make the disclosure requirements of § 901a applicable to the "special missions" appointment envisioned by § 901(c). Disclosure of campaign contributions is mandatory only "at the time of his nomination." Since Linowitz was not "nominated" to be an ambassador within the meaning of § 901a but was instead appointed without the advice and consent of the Senate pursuant to § 901(c), disclosure was not required in his case.

III. RIPENESS

The Linowitz appointment, as limited by the President to six months, is for the present a valid exception to the requirement that ambassadorial appointees be offered to the Senate for its advice and consent. In the present posture of this case, all plaintiffs can contend is that they do not believe that the negotiations can be completed in six months.[6] That, of course, is speculation on their part.

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[6] The only affidavit submitted by plaintiffs on this point is somewhat inconsistent. The affidavit of plaintiff Hansen admits that he "has been informed and believes that Linowitz was not presented to the Senate because his appointment is temporary and is expected to be completed within six months." Hansen Affidavit ¶ 3. Yet despite this apparent admission, the affidavit goes on to assert that "[a]n appointment, admittedly in a chain that has lasted thirteen years and within which the latest two episodes of negotiation have each lasted three years, cannot be considered of less than six months expected duration." *Id.* ¶ 6.

And further speculation is required to conclude that, even if the negotiations are still ongoing, Linowitz will continue in his ambassadorial position for longer than six months. In order to satisfy the "case or controversy" requirement of Article III of the Constitution, a complaint must allege a concrete, presently existing dispute. The injury of which plaintiffs complain must be direct and immediate, not conjectural or remote or hypothetical. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Golden* v. *Zwickler,* 394 U.S. 103 (1969); *International Longshoremen's and Warehousemen's Union* v. *Boyd,* 347 U.S. 222 (1954); *Helms* v. *Vance,* Civ. No. 77–83 (D.D.C. Mar. 23, 1977). Plaintiffs' injuries are speculative in the purest sense, and their complaint must, therefore, be dismissed as unripe for judicial decision.

IV. STANDING

In its present posture, this case also raises serious doubts concerning the standing to sue of these plaintiffs. The concept of standing as it applies to congressional plaintiffs was fully examined by the court of appeals in its recent decisions in *Harrington* v. *Bush,* No. 75–1862 (D.C.Cir. Feb. 18, 1977), and *Metcalf* v. *National Petroleum Council,* No. 76–1223 (D.C.Cir. Feb. 18, 1977), and by this court in *Helms* v. *Vance, supra.* As with other plaintiffs, the crucial inquiry is whether the congressional plaintiff has alleged that he has suffered some injury in fact. *Harrington* v. *Bush, supra,* slip opinion at 28 & n. 68. One who seeks to sue in his congressional capacity "must demonstrate that the acts of which he complains somehow frustrate him in his legislative role." *Helms* v. *Vance, supra,* memorandum opinion at 6.

The allegations concerning defendant Linowitz are basically twofold: that the Senate has been illegally deprived of its obligation to advise and consent to his appointment as an ambassador and that his failure to disclose past political contributions imposes a further barrier to the Senate's proper consideration of him as an ambassadorial candidate. These allegations, as previously discussed, rest upon improper readings of the relevant

statutes as they relate to the circumstances of Linowitz' appointment. Since § 901 does not require the advice and consent of the Senate for an "essentially limited and temporary" six-month appointment such as that of Linowitz, plaintiff McClure has not been deprived of any opportunity to cast a vote in the matter. Furthermore, neither plaintiff can properly allege that he has been injured by Linowitz failure to disclose under § 901a since that statute does not require disclosure by one who is serving in such a "temporary" position.

Even if plaintiffs' interpretation of the statutes were correct, and Linowitz were required to disclose his past political contributions and submit to the advice and consent of the Senate, it is difficult to see how plaintiff Hansen, as a member of the House of Representatives, would have standing to challenge Linowitz' failure to comply with the statute. In their opposition to the motion to dismiss plaintiffs argue that Linowitz' failure to disclose under § 901a might have some unspecified deleterious effect on unspecified future votes concerning the as yet unnegotiated treaty. Such an allegation is clearly insufficient, both because it is too speculative and because it does not point to any specific legislative function which would be harmed. *See Harrington* v. *Bush, supra* at 35–37. If Linowitz were to continue as ambassador beyond the six-month limit imposed by the statute, then plaintiff McClure might have standing to bring suit since he arguably would have been deprived of the opportunity to cast a specific vote, as was the case in *Kennedy* v. *Sampson*, 511 F. 2d 430 (D.C. Cir. 1974). But the question of plaintiff McClure's standing in such circumstances is not one which the court can decide on the facts before it now. As the case is currently presented, there has been no allegation of injury in fact sufficient to confer standing upon plaintiff McClure, and certainly not upon plaintiff Hansen.

V. CONCLUSION

Plaintiff's action here is based upon a misreading of the purpose and effect of the applicable statutes. In light of this court's reading of the statutes, the case is not

at the present ripe for judicial decision, and the plaintiffs lack standing to sue. Since the court has concluded that the action must, for those reasons, be dismissed, it is not necessary to discuss plaintiffs' motion for a preliminary injunction. An appropriate order accompanies this memorandum opinion.

THOMAS A. FLANNERY,
United States District Judge.

DATED: *May 10, 1977.*

United States District Court for the District of Columbia

(Civil Action No. 77–436)

JAMES A. MCCLURE ET AL., PLAINTIFFS

v.

SOL LINOWITZ ET AL., DEFENDANTS

ORDER

This matter came before the court on defendants' motion to dismiss and plaintiffs' motion for a preliminary injunction. After consideration of the motions, the memoranda submitted in support thereof, opposition thereto, oral argument thereon, and the entire record herein, and for the reasons set forth in the accompanying memorandum opinion, it appears to the court that this action must be dismissed and that plaintiffs' request for preliminary injunctive relief must accordingly be denied. Therefore, it is, by the court, this 10th day of May, 1977,

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction be, and the same hereby is, denied; and it is further

ORDERED that this action is hereby dismissed.

THOMAS A. FLANNERY,
United States District Judge.

United States District Court for the District of Columbia

Civil Action No. 77–2069

CARL T. CURTIS ET AL., PLAINTIFFS

v.

JIMMY CARTER, PRESIDENT OF THE UNITED STATES ET AL., DEFENDANTS

MEMORANDUM AND ORDER

This matter is currently before the Court on Plaintiffs' motion for preliminary injunction and defendants' opposition thereto.[1] The Court heard extensive oral argument on the issues involved on December 16, 1977.

Plaintiffs in this action are members of both houses of Congress.[2] They seek to prevent defendants, President Carter and other members of the Executive Branch, from returning the Hungarian Coronation Regalia to Hungary.[3] An exchange of letters between the United States and Hungarian officials indicates that this property is scheduled to be returned on January 6 and 7 1978.

The Court has carefully considered the submissions of both sides, the arguments of counsel, and the entire record herein. Based thereon, the Court finds that plaintiffs have failed to meet the standards for issuance of a preliminary injunction as set forth in *Virginia Petroleum Jobbers Ass'n.* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958)

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[1] Defendants have also filed a motion to dismiss, or in the alternative, for summary judgment. Plaintiffs have not yet had an opportunity to respond thereto.

[2] Initially, plaintiffs in this action were two Senators and two Congressmen. On the morning of the hearing, they filed a motion, *inter alia*, to add 13 additional Congressmen as parties plaintiff. Defendants do not oppose this motion.

[3] The Regalia includes: The Crown of St. Stephen; the Sword of St. Stephen, the Sceptre of St. Stephen, the Holy Apple and the Coronation Robe.

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and *Washington Metropolitan Area Transit Comm'n.* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), the controlling cases in this Circuit.

Plaintiffs have failed to make a substantial showing of likelihood of success on the merits, even when this showing is governed by "the balance of equities as revealed through an examination of the other three factors." *Washington Metropolitan Area Transit Comm'n., supra.* Plaintiffs' theories of United States ownership of the Hungarian Coronation Regalia, and in particular, their latest contention that it is captured property of a hostile state, have thus far not been convincing. Hence, the applicability of Article IV, Section 3, Clause 2 and Article II, Section 2 of the United States Constitution is highly questionable. In the absence of any property interest, the return of the Regalia presents a nonjusticiable political question involving the conduct of our foreign relations. The Constitution places these matters exclusively in the hands of the Executive Branch. Additionally, plaintiffs' standing to bring this action is doubtful under the analysis set forth in *Harrington* v. *Bush*, 553 F.2d 190 (D.C. Cir. 1977).

With regard to the balance of equities as to the other relevant standards set forth in *Virginia Petroleum Jobbers Ass'n., supra,* the "harm to other parties in the proceedings" and the public interest outweigh the injury to plaintiffs if the injunction is not issued. A delay in the President's plans for return of this property to Hungary under terms which have been agreed upon by both governments may have an impact on the effective conduct of our foreign affairs, and specifically on our steadily improving relations with Hungary. Such a result would not be in the public interest. Accordingly, plaintiffs' motion for preliminary injunction is denied.

At the close of oral argument, plaintiffs' counsel moved for a stay of this Court's order pending appeal. The above-mentioned factors set forth in *Virginia Petroleum Jobbers Ass'n., supra* also apply to a motion for a stay pending appeal. *Washington Metropolitan Area Transit*

Comm'n., supra at n. 1. Therefore, said motion must also be denied.

Based upon all of the foregoing, it is by the Court this 16th day of December 1977,

ORDERED that plaintiffs' motion for a preliminary injunction is hereby denied; and it is further

ORDERED that plaintiffs' motion for a stay of this Court's order pending appeal is hereby denied.

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

In the United States District Court for the District of Kansas

Civil Action No. 77–2310

ROBERT DOLE, PLAINTIFF

v.

JIMMY CARTER, PRESIDENT OF THE UNITED STATES, DEFENDANT

MEMORANDUM AND ORDER

This case, a declaratory judgment action seeking to enjoin the President of the United States from returning to the People's Republic of Hungary the Hungarian coronation regalia, is now before the court for determination of the plaintiff's motion for a preliminary injunction. The action was filed on December 23, 1977, eight days after release of a joint communique by the governments of the United States and Hungary to the effect that said regalia, safeguarded in the United States since the close of World War II, would be returned to the people of Hungary in ceremonies in Budapest on January 6 and 7, 1978. On the same day that this action was filed, the court held a hearing, attended by counsel for both parties, on the plaintiff's motion for a temporary restraining order. Said motion was denied upon the court's receipt of assurances by defense counsel that the President would retain custody of the coronation regalia until such time as the court could hear the plaintiff's motion for a preliminary injunction and render a decision thereon. On December 29, 1977, the court conducted an expedited hearing on the latter motion, together with the motion to dismiss or, in the alternative, a motion for summary judgment filed by defendant. In view of the urgent circumstances surrounding the litigation and ad-

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judication of the claims advanced herein, the court has had little opportunity to prepare an extensive opinion expounding upon the vast array of constitutional, political, and legal issues in this case. Nevertheless, after scrutinizing the relevant law in light of the facts developed in the record before us, the court is convinced that the plaintiff's motion for a preliminary injunction must be denied.

The salient facts in this case, briefly summarized, are as follows: In approximately 1000 A.D., Pope Sylvester II donated to Stephen, then Duke of Hungary, a crown establishing Stephen as the first King of Hungary and declaring Hungary a state in the international system of Europe. This crown, which became known as the Holy Crown of St. Stephen or the Holy Crown of Hungary, thereafter assumed extraordinary historical importance to the people of Hungary, symbolizing both the constitutional monarchy of Hungary and the freedom of religion from governmental interference in Hungary. The Holy Crown apparently remained in Hungarian custody from 1000 A.D. until July 25, 1945, shortly after the surrender of all German forces in Europe at the conclusion of World War II but prior to the signing of the Paris Peace Treaty of February 10, 1947, ending the state of war between the Allied Powers and Hungary. At that time the Hungarian Commander of the Crown Guards entrusted to the United States for safekeeping the Holy Crown and other coronation regalia including the Coronation Robe, Orb, Sceptre and Sword. To date, the United States has secured said regalia in an undisclosed location with a view to its eventual return to the people of Hungary.

As previously noted, on December 15, 1977, the United States and Hungarian governments jointly announced that the President of the United States had determined it "appropriate and fitting" that the Hungarian coronation regalia be returned to the people of Hungary at ceremonies on January 6 and 7, 1978, and that it be thereafter placed on permanent public display in an appropriate historical location in Budapest for "the population

of the country, Hungarians living abroad, and foreigners alike to see." This communique resulted from an exchange of diplomatic letters on December 13, 1977, outlining various agreements of the United States and Hungary as to the conditions under which the coronation regalia was to be returned, the nature of the attendant ceremonies, and ceremonial objectives of emphasizing "traditional United States-Hungarian ties, friendship between our two peoples, and our mutual desire to continue the development of better bilateral relations." Announcement of the proposed return of the Holy Crown generated not inconsiderable public controversy in various sectors, including groups of Hungarian nationals in the United States and elsewhere, members of the Roman Catholic Church, and certain members of the United States Senate and House of Representatives.

On December 23, 1977, Robert Dole, a United States Senator from the State of Kansas, filed the instant action seeking to enjoin delivery of the Holy Crown and coronation regalia to the People's Republic of Hungary on the ground that such action, undertaken by the President without the prior advice and consent of the United States Senate, constitutes a violation of Article II, Section 2, of the Constitution of the United States. That constitutional provision, in relevant part, confers upon the President the power, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." The plaintiff's argument is premised upon his factual assertion that the subject of custody of the Holy Crown was by tacit agreement of the American and Hungarian authorities deliberately omitted from the text of the Paris Peace Treaty of February 10, 1947, in order to prevent the Soviet Union—a co-signer of the Treaty, then occupying Hungary—from asserting any claim of right to possession thereof. According to the plaintiff, the American and Hungarian authorities not only agreed that the Paris Peace Treaty would be silent on this subject; they also tacitly agreed that (1) the United States would retain custody of the coronation regalia until such time as Soviet troops were withdrawn from Hungary in accord

with Article 22 of the Paris Peace Treaty; and (2) return of the regalia would be effectuated only after negotiation of an appropriate treaty between the United States and a legitimate Hungarian government at some future date. The plaintiff contends that this "silent agreement" is an integral part of the Paris Peace Treaty of 1947 that cannot be varied or modified without the making of another formal treaty ratified by the Senate. In the alternative, he claims that any agreement to return the coronation regalia to Hungary in and of itself constitutes a new bilateral treaty for which the President must seek Senate approval. Therefore, the President's unilateral undertaking to return said regalia, evidenced by the December 13, 1977, exchange of letters, is said to be *ultra vires* and beyond the scope of his lawful constitutional authority.

In assessing the merits of the plaintiff's motion for injunctive relief, the court commences with the fundamental rule of law that a preliminary injunction is an "extraordinary remedy" that should be granted only upon a proper showing. The burden is clearly upon one requesting such relief to make a "prima facie case showing a reasonable probability" that he will ultimately prevail on the merits of his claim. *E.g., Penn* v. *San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir. 1975); *Continental Oil Company* v. *Frontier Refining Company*, 338 F.2d 780 (10th Cir. 1964). In addition, the applicant has the burden of showing that "irreparable injury" will result if the requested injunction is not granted. *E.g., Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569 (10th Cir 1970); *Crowther* v. *Seaborg*, 415 F.2d 437 (10th Cir. 1969).

In determining whether the plaintiff here has established a reasonable probability of success on the merits of his claim, the court must confront the two crucial issues in this case: (1) whether the alleged "tacit agreement" is such an integral part of the Paris Peace Treaty that it can be modified only by enactment of a formal treaty approved by a two-thirds vote of the Senate; and (2) whether the President's agreement to return the Hungarian coronation regalia constitutes a treaty obligation that must be ratified by the Senate.

The first issue must be resolved contrary to the plaintiff's argument. The only evidence he produces in support thereof consists of affidavits by individuals who allegedly are familiar with the circumstances under which the coronation regalia was turned over to American authorities. No affidavits have been provided from individuals who were involved in the actual treaty negotiation process. Defendant, however, has provided us with the affidavit of Mark B. Feldman, Deputy Legal Advisor of the Department of State. Mr. Feldman states that after having searched all relevant files he "has not discovered any indication of any understanding between United States and Hungarian authorities concerning the application or nonapplication of the 1947 Treaty of Peace to the Crown of St. Stephen, tacit or otherwise." The record is void of anything indicating that Hungarian officials who approved the 1947 Paris Peace Treaty, President Truman, and United States Senators who voted in favor of ratification of the treaty, were aware of and understood the "silent agreement by tacit omission." The court is not impressed with plaintiff's contention that this alleged "silent agreement" can rise to the level of a formal treaty which can only be modified by another formal treaty ratified by the Senate.

We turn now the plaintiff's argument that the agreement to return the coronation regalia to Hungary in and of itself constitutes a treaty which must be ratified by the Senate. It is well established, and even plaintiff admits, that the United States frequently enters into international agreements other than treaties. Indeed, as of January 1, 1972, the United States was a party to 5,306 international agreements, only 947 of which were treaties and 4,359 of which were international agreements other than treaties. See J. Murphy, *Treaties and International Agreements*, 23 Kan.L.Rev. 221, 223 n.15 (1975).[1] These "other agreements" appear to fall into three categories:

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[1] Citing statement of John R. Stevenson, Legal Advisor, Department of State, in Subcommittee on Separation of Powers, Senate Committee on the Judiciary, Ninety-second Congress, Second Session Hearings on Congressional Oversight of Executive Agreements 249 (Commercial Print, 1972).

(1) so-called Congressional-Executive agreements, executed by the President upon specific authorizing legislation from the Congress; (2) executive agreements pursuant to treaty, executed by the President in accord with specific instructions found in a prior, formal treaty; and (3) executive agreements executed pursuant to the President's own constitutional authority (hereinafter referred to as "executive agreements"). See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 119–121 (1965). Defendant contends that his agreement to return the coronation regalia to Hungary falls into the latter category, and the court agrees.

Section 121 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES reads as follows:

> "§ 121. Scope of Executive Agreement Pursuant to President's Constitutional Authority.
>
> An international agreement made by the United States as an executive agreement without reference to a treaty or act of Congress may, subject to the limitations indicated in § 117, deal with any matter that under the Constitution falls within the independent powers of the President."

Specific constitutional grants of power to the President are scattered throughout Article II. The "executive Power" is vested in the President (Article II, Section 1) and this provision has traditionally been cited as the authority for the President to conduct the foreign relations of the United States. See Comment to Section 121 of the RESTATEMENT (SECOND), *supra*. The President is also the "Commander in Chief of the Army and Navy" (Article II, Section 2); is empowered to make treaties, and to nominate and appoint ambassadors and other public ministers and consuls, with the "Advice and Consent of the Senate" (Article II, Section 2); and is also given the obligation to see that the "Laws be faithfully executed" (Article II, Section 3).

The Supreme Court has long ago recognized that the President has the "power to make such international agreements as do not constitute treaties in the constitutional sense."[2] *United States* v. *Curtiss-Wright Export Corp.* 304 U.S. 299, 318 (1936), citing *Altman & Co.* v. *United States,* 224 U.S. 583 600–601 (1912). This power, although not "expressly affirmed by the Constitution," nevertheless exists "as inherently inseparable from the conception of nationality." The justifications for the power are found "not in the provisions of the Constitution, but in the law of nations." *Curtiss-Wright,* 304 U.S. at 318.

Since the *Curtiss-Wright* decision, the Supreme Court has twice upheld the validity of an executive agreement made by President Franklin Roosevelt with the Soviet Union. In the Litvinov Agreement, the President recognized and established diplomatic relations with that nation. In addition, for the purpose of bringing about a final settlement of claims and counterclaims between the Soviet Union and the United States, it was agreed that the Soviet Union would take no steps to enforce claims against American nationals, but all such claims were assigned to the United States with the understanding that the Soviet Union would be notified of all amounts realized by the United States. In speaking for the Court in *United States* v. *Belmont,* 301 U.S. 324 (1937), Justice Sutherland, who also authored the majority opinion in *Curtiss-Wright, supra,* stated:

> "[A]n international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations." 301 U.S. at 330–331.

Justice Sutherland further expounded upon the nature of executive agreements in *United States* v. *Pink,* 315 U.S. 203 (1942):

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[2] Treaties are mentioned in three constitutional provisions other than Article II, Section 2. None of these provisions make any attempt at definition. U.S. Const., Art. I, § 10; Art. III, § 2; Art. VI.

"Recognition is not always absolute; it is sometimes conditional * * *. Power to remove such obstacles to full recognition as settlement of claims of our nationals * * * certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' * * * Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs * * * is to be drastically revised." 315 U.S. at 229–230 (citations omitted).

The problem of what the President may or may not do without formal Senate consent is one of line-drawing. As one prominent author has put it, "One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate, but neither Justice Sutherland nor anyone else has told us which are which." L. Henkin, *Foreign Affairs and the Constitution*, p. 179 (The Foundation Press, 1972). We need not attempt to reach the constitutional perimeters of this problem, however, for we are of the opinion that the transaction which gave rise to this lawsuit has the indicia of an executive agreement.

The court attaches considerable weight to the quoted language from the *Pink* case. It is true that the United States does, at this time, formally "recognize" the Hungarian government. However, as counsel discussed at oral argument, relations between the United States and Hungary, as well as other Eastern European countries, have not been "normalized" since the end of World War II. The United States' continued dominion over the Hungarian coronation regalia, in which this country claims no property interest, can reasonably be viewed as a serious

"obstacle" which may impede the "rehabilitation of relations'' between the United States and Hungary. The decision to remove such an obstacle appears to be well within the traditional powers of the President.[3]

As noted above, neither the Constitution nor the relevant case law offers significant legal guidance as to which kinds of international agreements must be concluded in "treaty" form subject to the advice and consent of the Senate, and which kinds of agreements may be concluded on the independent executive authority of the President in the area of foreign affiairs. However, the court's review of authorities on the subject of treaties indicates that by common practice from the beginning of the Republic, treaties have customarily exhibited such fundamental characteristics as substantial ongoing defense or political commitments on the part of the United States and substantial ongoing reciprocal commitments by co-signers. The very substantiality of the bilateral commitments traditionally embodied in treaties underlies the Article II, Section 2, requirement of Senatorial consent and, in addition, occasions the formality and deliberation with which treaties are generally negotiated and executed. It appears that these characteristics are often lacking in the case of executive agreements. While such agreements are recognized as having the same effect as treaties in international law, they my involve such relatively minor subjects as the "administrative working details for carrying out a treaty or agreement" or be "in the nature of commercial contracts relating to sales of equipment and commodities." 1972 U.S. Code Cong. and Adm. News p. 3069. The United States enters into approximately 200 executive agreements each year, *Id.* at 3068, and it has been observed that the constitutional system "could not last a month" if the President sought Senate or Congressional consent for every one of them. L. Henkin, *Foreign Affairs and the Constitution, supra,* at 182. Congress itself recognized this fact in passing P.L. 92–403, 1 U.S.C.

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[3] Indeed, as noted earlier, the government has indicated that a prime purpose of the return of the coronation regalia and the attendant ceremony is to aid the "development of better bilateral relations" between the two countries.

§ 112b, requiring the Secretary of State to transmit for merely informational purposes the text of all international agreements other than treaties to which the United States becomes a party. The House Committee on Foreign Affairs stated in recommending passage of that statute that while it wished to be apprised of "all agreements of any significance," "[c]learly the Congress does not want to be inundated with trivia." 1972 U.S. Code Cong. and Adm. News, p. 3069.

While the President's undertaking to return the Hungarian coronation regalia is hardly a "trivial" matter to either the United Statees or the people of Hungary, the court is yet convinced that the President's agreement in this regard lacks the magnitude of agreements customarily concluded in treaty form. The President's agreement here involves no substantial ongoing commitment on the part of th United States, exposes the United States to no appreciable discernible risks, and contemplates American action of an extremely limited duration in time. The plaintiff presented no evidence that agreements of the kind in question here are traditionally concluded only by treaty, either as a matter of American custom or as a matter of international law. Indeed, while the court has not exhaustively examined all possibly pertinent treaties, the court can hardly imagine that any such examination would lend support to the plaintiff's position. Finally, the agreement here encompasses no substantial reciprocal commitments by the Hungarian government. As a matter of law, the court is therefore persuaded that the President's agreement to return the Hungarian coronation regalia is not a commitment requiring the advice and consent of the Senate under Article II, Section 2, of the Constitution.

For all of the foregoing reasons, the court must conclude that the plaintiff has demonstrated no reasonable probability of ultimate success on the merits of his claim. This finding necessarily requires the court to deny the plaintiff's application for preliminary injunctive relief.

In rendering a decision grounded solely on the preliminary injunction question, we have assumed without deciding that plaintiff has standing to bring this action and

that the court has jurisdiction of the subject matter. Determination of those matters, together with the defendant's motions to dismiss or, in the alternative, for summary judgment, will be necessary only if the case proceeds beyond the preliminary injunction stage. The court has also considered plaintiff's "Motion in Camera" and the same is denied.

At the time this case was submitted, counsel for each side requested the court to stay any order granting or denying a preliminary injunction pending appeal of such order by the non-prevailing party. For the reasons expressed herein, plaintiff's motion for stay under Rule 62(c), Federal Rules of Civil Procedure, is denied.

The clerk is directed to enter the attached Journal Entry of Judgment denying a preliminary injunction.

IT IS SO ORDERED.

Dated this 30th day of December, 1977, at Kansas City, Kansas.

EARL E. O'CONNOR,
United States District Judge.

In the United States District Court for the District of Kansas

Civil Action No. 77–2310

ROBERT DOLE, PLAINTIFF

v.

JIMMY CARTER, PRESIDENT OF THE UNITED STATES, DEFENDANT

Journal Entry of Judgment

For the reasons stated in the court's Memorandum and Order of this date,

JUDGMENT IS ENTERED denying plaintiff's motion for a preliminary injunction.

Dated this 30th day of December 1977, at Kansas City, Kansas.

EARL E. O'CONNOR,
United States District Judge.

United States Court of Appeals, Tenth Circuit

No. 77–2117

ROBERT DOLE, APPELLANT

v.

JIMMY CARTER, PRESIDENT OF THE UNITED STATES OF AMERICA, APPELLEE

MOTION FOR INJUNCTION PENDING APPEAL

(D.C. No. 77–2310)

Kenneth J. Reilly and *Kenneth E. Holm* of Boddington and Brown for Appellant.

Michael Kimmel of the Appellate Section, Civil Division, Department of Justice, for Appellee.

Before McWILLIAMS, BREITENSTEIN and BARRETT, *Circuit Judges.*

PER CURIAM.

This matter is before the court on appellant's motion for an injunction pending appeal. See Rule 8(a), Federal Rules of Appellate Procedure. The court has expedited the hearing and has considered the record, the briefs, and the oral arguments of counsel. The motion is denied.

Plaintiff-appellant Dole is a United States Senator. Defendant-appellee Carter is the President of the United States. The controversy relates to the crown of St. Stephen and related regalia. The crown is a symbol of Hungarian national identity and has played an important role in Hungarian history for many centuries. At the end of hostilities in World War II, the crown was voluntarily turned over to armed forces of the United States by an Hungarian emissary and is presently held by the United States. The parties seem to agree that the crown belongs to the Hungarian people. No claim is made that the crown is the property of the United States.

On December 13, 1977, the American Ambassador to Hungary wrote the Hungarian Minister of Foreign Affairs saying that President Carter had determined that "it is appropriate and fitting" that the crown be returned to the people of Hungary at a ceremony to be held in Budapest. The letter stated that certain arrangements had been decided by the two governments and specified those arrangements. The letter asked confirmation "of the arrangements as specified above." By letter dated the same day, the Hungarian Minister confirmed the arrangements. The ceremony is to be held on January 6–7, 1978.

On December 23, 1977, Senator Dole filed in the United States District Court for the District of Kansas, a complaint for declaratory and injunctive relief. He claims that the understanding for the return of the crown is a bilateral treaty between the United States and Hungary which, under Art. II, Sec. 2, cl. 2 of the Constitution of the United States, requires the advice and consent of the Senate.

After a hearing at which it gave consideration to affidavits and documents offered by the parties, the court on December 30 denied Senator Dole's request for a preliminary injuction. An appeal to this court was filed the same day.

An application to enjoin the return of the crown was denied by the United States District Court for the District of Columbia on December 18, 1977. See Civil Action No. 77–2069, *Curtis* v. *Carter*. The court of appeals summarily affirmed on December 19, 1977. See No. 77–2105, *Curtic* v. *Carter*, D.C. Cir. —— F.2d ——. In that case reliance was had on Art. IV, Sec. 3, cl. 2 of the Constitution relating to the power of Congress over the property of the United States and apparently no consideration was given to the treaty question. In the case before us no claim is made that the crown is the property of the United States.

The district court held that the understanding between the United States and Hungary was an executive agreement not within the purview of Art. II, Sec. 2, cl. 2 of

the Constitution. The court specifically declined to consider matters relating to standing or jurisdiction.

Art. III. Sec. 2, cl. 1 of the Constitution provides that the judicial power extends to cases and controversies. Jurisdiction depends on whether a justiciable controversy is presented. That in turn depends on whether the understanding between the United States and Hungary is a treaty or an executive agreement not requiring Senate action. That in turn depends on the nature of the transaction. In discussing political questions arising in the context of foreign relations, the Supreme Court said in *Baker* v. *Carr,* 369 U.S. 186, 211–212:

> "Our cases in this field [foreign relations] seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."

In *United States* v. *Bishop,* 10 Cir., 555 F.2d 771, 776–777, we considered *Baker* v. *Carr* and in the circumstances of that case held that the issue presented, sufficiency of notice, was susceptible to judicial handling. In the case at bar we conclude that the controversy is not so susceptible.

The action of the President is to return to the people of Hungary property which belongs to them. The situation is one which "uniquely demand[s] single-voiced statement of the Government's views." *Baker* v. *Carr,* 369 U.S. at 211. We are aware of no "judicially discoverable and manageable standards for resolving [the issue]." We have no way of ascertaining the interest of the United States, or of its people, in the controversy. The President has decided that our foreign relations are best served by the return of the crown. We decline to enter into any controversy relating to distinctions which may be drawn between Executive Agreements and treaties. We say only that on the facts before us we find no justiciable controversy.

We realize that Senator Dole contends that the President's action violates the Paris Peace Treaty of 1947. On the record presented to us we find no violation of that treaty.

The motion for injunction pending appeal is denied. We note the statement in the order of the trial court that defense counsel have assured that the President will retain possession of the crown until such time as the court could hear the motion for a preliminary injunction. We assume that this assurance will carry over to permit consideration by the Supreme Court, or a Justice thereof, of this order denying an injunction pending appeal. No petition for rehearing or reconsideration of the motion for an injunction pending appeal wil be considered by this court.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1490

SOCIALIST WORKERS 1974 NATIONAL CAMPAIGN COMMITTEE, *et al.*

v.

Honorable W. PAT JENNINGS, Clerk, United States House of Representatives, Office of the Secretary, Capitol Hill, *et al.*

FEDERAL ELECTION COMMISSION, APPELLANT

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

(D.C. Civil Action No. 74-1338)

Argued December 6, 1977

Decided December 13, 1977

Charles N. Steele, Associate General Counsel, Federal Election Commission, with whom *William C. Oldaker*,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

20-477 O - 78 — 19

General Counsel, Federal Election Commission, was on the brief, for appellant.

Joel M. Gora for appellees.

Before WRIGHT, MCGOWAN, and WILKEY, *Circuit Judges.*

Opinion for the court *per curiam.*

PER CURIAM: In September 1974 the Socialist Workers Party (SWP) sued certain federal officials (later succeeded by the Federal Election Commission (FEC))[1] to obtain anticipatory judicial relief against being prosecuted criminally and civilly under the Federal Election Campaign Act of 1971, in violation of its First Amendment freedoms, for not disclosing contributors' names and other information.[2] As an *ad hoc* method of fact-finding

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[1] The SWP originally sued the Clerk of the U.S. House of Representatives, the Secretary of the U.S. Senate, and the Comptroller General, who were the "supervisory officers" for disclosure requirements under the Federal Election Campaign Act (hereinafter FECA) of 1971, Pub. L. No. 92-225, 86 Stat. 3. During the pendency of the suit, the FECA of 1971 was substantially amended by the FECA Amendments of 1974, Pub. L. No. 93-343, 88 Stat. 1263, and the FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475. As amended, the Act made provision for civil prosecutions by the newly-created Federal Election Commission, FECA Amendments of 1976, § 109, 2 U.S.C. § 437g (Supp. 1976), and for criminal prosecutions by the Attorney General, FECA Amendments of 1976, § 112(2), 2 U.S.C. § 441j (Supp. 1976). Accordingly, in July 1976 plaintiffs amended their complaint to add the Federal Election Commission and the Attorney General as defendants. The Attorney General declared that he would not institute criminal actions during the pendency of this action and therefore, by order of January 17, 1977, the District Court granted the Attorney General's motion for dismissal as to him.

[2] *See Shelton v. Tucker,* 364 U.S. 479 (1960); *NAACP v. Alabama,* 357 U.S. 449 (1958); *Pollard v. Roberts,* 283 F. Supp. 248 (E.D. Ark.), *aff'd per curiam,* 393 U.S. 14 (1968).

devised for this case, the District Court on January 17, 1977 ordered the FEC to compile a "factual record" concerning harassment of the SWP. On motion by the SWP the court stated in an "order of clarification" on April 19, 1977 that "in complying with" its January 17th order the FEC was not to use the procedures and determinations of 2 U.S.C. § 437g.[3] The FEC seeks to appeal the order of April 19th, contending that it is a preliminary injunction. Simultaneously, the FEC has prepared the required factual record using other procedures.

In the context of this particular suit, with its special circumstances and procedures, it is clear that the order of April 19, 1977 is not a preliminary injunction, and that this court has no jurisdiction to review it. The District Court obviously was aware of the necessity in appropriate cases to provide anticipatory judicial relief against prosecutions threatening sensitive First Amendment freedoms.[4] The District Court's order of January 17th was in the nature of an instruction to a master to prepare a record and findings, which order is not appealable. *Teamsters Local Unions 745, etc. v. Braswell Motor Freight Lines, Inc.*, 428 F.2d 1371, 1373 (5th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971). We fail to see how a second order, clarifying which procedures the FEC should use, or not use, in complying with the order to prepare a record, could be any more of an appealable injunctive restraint than the first order.

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[3] *See* note 1 *supra*.

[4] *Buckley v. Valeo*, 519 F.2d 821, 868 (D.C. Cir. 1975), *aff'd on these grounds*, 424 U.S. 1, 71 & n.87 (1976); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Steffel v. Thompson*, 415 U.S. 452 (1974) (declaratory relief); *Civil Service Com'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973); *Bradley v. Saxbe*, 388 F.Supp. 53, 55-56 (D. D.C. 1974).

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Accordingly, we hold that this appeal be, and the same hereby is,

Dismissed.[5]

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[5] Under the FECA as amended, the FEC has broad powers to make rules, render advisory opinions, and enter into conciliation agreements barring civil and limiting criminal prosecution. FECA Amendments of 1974, § 208(a)(8), 2 U.S.C. § 437d(a)(8) (Supp. 1976); FECA Amendments of 1976, §§ 108(a), 109, 2 U.S.C. §§ 437f, 437g (Supp. 1976). *See Buckley v. Valeo*, 424 U.S. 1, 140 (1976). The FEC informed the District Court that it had the power to promulgate rules creating procedures by which parties could obtain exemptions, Appellee's Appendix at 29-30. Thus, perhaps before this litigation is over, the FEC may voluntarily or by judicial order provide exemption procedures which would eliminate the need for the court to decide some or all of the issues in this and similar cases. *See Doe v. Martin*, 404 F.Supp. 753 (D. D.C. 1975).

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2016

JOHN DOE, BY HIS GUARDIAN MARY DOE, ET AL.,
APPELLANTS

JOHN L. MCMILLAN, CHAIRMAN OF THE COMMITTEE OF THE DISTRICT OF COLUMBIA OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL

ON PETITION FOR REHEARING

(D.C. Civil 56-71)

Filed October 13, 1977

Before: TAMM, LEVENTHAL and MACKINNON, *Circuit Judges.*

ORDER

On consideration of the petition for rehearing filed by appellants John Doe, et al., it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Statement of *Circuit Judge* LEVENTHAL concurring in the denial of the petition for rehearing.

LEVENTHAL, *Circuit Judge*, concurring: I concur in the denial of the petition for rehearing, but believe it calls for another word concerning Part IV of the per curiam opinion.

The particular issue is denial of leave to file an amended complaint against the Congressmen because of the report challenged as an egregious violation of plaintiffs' privacy. The Supreme Court's opinion affirming dismissal of the original complaint against the Congressmen stated that it was material that there had been no claim of public distribution by the Congressmen. *Doe v. McMillan*, 412 U.S. 306 (1973).

On remand, plaintiffs sought leave to amend the complaint to allege "public distribution of the report by the Congressional appellees." That motion was denied, and this was one of the grounds of appeal.

This court's opinion of affirmance rested on the ground that the amendment was tardy and this was a matter within the discretion of the district court. This ground was not briefed by the government, and I now consider it inappropriate. The occurrences in both courts, marshaled in the petition for rehearing, indicate first that plaintiff's counsel acted with reasonable expedition all things considered, and second that the district court did not purport to exercise a discretion on the ground of tardiness, but rather used other grounds that are questionable.*

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* The original complaint was dismissed a few days after it was filed. There were difficulties with seeking to amend the complaint in the trial court while the case was lodged in the appellate court. Procedures are available for use when a point is crucial, but that did not develop until the Supreme Court's ruling. The Supreme Court judgment in Doe v. McMillan issued May 29, 1973. On July 24, 1973, this court requested supplemental memoranda as to the action to be

I join in denying the petition for rehearing on the ground that it relates to a secondary issue of no current import. The principal ground of the appeal in the present case, No. 75-2016, concerned the ruling of the district court that the incidental public distribution of the report, to those who had a standing order for committee reports with the Government Printing Office, was entirely routine and usual and did not exceed the legitimate legislative needs of the Congress. This court sustained the district court, and I concur in that ruling.

The attempt to claim that the Congressional defendants participated in the public distribution was a subsidiary issue. There was no inkling that the "public distribution" now claimed as to the Congressmen was anything other than the routine distribution which the court held not to exceed the legitimate needs of Congress.

When the court is confronted with something as unusual as an attempt to sue Congressmen for participating

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taken in the light of the Supreme Court decision. Plaintiffs' counsel filed a memorandum of Aug. 23, 1973, announcing the intention to move the district court for leave to amend the complaint. This court remanded on Oct. 15, 1973. On remand, the case was reassigned to a new district judge. At his status call, plaintiffs' counsel was given two weeks to seek leave to file the amended complaint. A motion, with amended complaint attached, was filed timely on March 27, 1974.

At a session held April 17, 1974, the district court denied the motion, saying (Tr. 15): "Under the Supreme Court decision they are out of the case. I don't think you can use a vehicle denominated as an Amended Complaint to state a complete new theory and try to avoid the thrust of the statute of limitations."

On April 29, 1974, the district court entered an order which recited that "no motion for leave to file with regard to same amended complaint [relating to Congressional defendants] having been filed," and directed that the amended complaint be "stricken".

in a "public" distribution, the least plaintiffs must supply, before pressing any claim to discovery, is a concrete factual indication that there was indeed a "public" distribution.

United States District Court for the District of Columbia

Civil Action No. 1887–73

COMMON CAUSE ET AL., PLAINTIFFS,
v.
BENJAMIN BAILAR ET AL., DEFENDANTS.

ORDER

This complaint in the above-captioned case was filed October 3, 1973. Since that date, plaintiffs have engaged in an extensive and extended effort to obtain discovery from certain Senate and House employees with respect to congressional franking practices relevant to a determination of the issues in this case. It is our understanding that plaintiffs' problems with respect to discovery from the House employees have been resolved entirely or in substantial part by virtue of a stipulation between counsel for plaintiffs and for House employees dated February 24, 1976 and approved by Order of Court dated March 1, 1976.

On the other hand, the plaintiffs to this date have been unsuccessful in their attempts to obtain complete discovery from the Senate employees. The following chronology is instructive.

As long ago as July 30, 1975, this Court entered an Order granting plaintiffs' motion to compel discovery from Senate employees Estep, Needham and Fern, and denying defendants' motion for a protective order. Defendants' objections to the attempted discovery were phrased in terms of (1) irrelevance, (2) burdensomeness, and (3) constitutional immunity under Article 1, Section 5 (power of each body of Congress to enact its own rules). After holding the materials claimed to be "rele-

vant and necessary," we also stated, with respect to the constitutional grounds asserted:

> "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 the 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."

Defendants did not file a Notice of Appeal until September 29, 1975, some fifty-one (51) days after the Order of July 30, 1975, and the Notice was stricken as untimely filed.

On January 7, 1976, counsel for plaintiffs and for the Senate employees, Estep, Needham and Fern, entered into a stipulation approved by the Court, which stipulation was designed to encompass a resolution of all of the plaintiffs' then outstanding discovery requests. Unfortunately, this purpose was not to be so easily achieved. The Court was confronted with a continuing succession of dilatory tactics, the full detail of which it is not necessary to set forth.

On April 7, 1976, defendants, in resistance to certain subpoenas served on 100 Administrative Assistants (AAs) to United States Senators, filed a motion for a protective order which was denied, after hearing, on September 24, 1976. However, despite our previous Orders and the January 7, 1976 stipulation, discovery was still not forthcoming.

As of April 4, 1977, almost one year later, when a status call was held, the following relevant and important material was still to be produced by the Senate employees:

By Mr. Estep:

1. (a) Volume data for the year 1972;
   (b) The codes maintained in the Senate computer for franked mail purposes and the number of names in each category.

By the Senate AAs:

2. (a) Identification for the categories of names maintained in the Senate computer for franked mailing purposes since December 8, 1973;

(b) General or specific instructions on the use of categories of names maintained in the Senate computer for mailing purposes.

During the April 4, 1977 hearing, counsel for Senate employees agreed to produce for an *in camera* inspection for a determination as to *relevancy,* the material still outstanding with some minor exceptions. It was promised that certain of the material would be supplied by April 18, 1977, and the balance at a later date after consultation with members of the Senate. Instead of producing the material on schedule as promised, counsel for the Senate defendants on April 15, 1977 advised that the whole matter of production had been referred to the Senate Rules Committee for consideration.

On April 29, 1977, the Senate passed S. Res. 136 authorizing counsel for the Senate employees to produce the material requested (with some variations) for an *in camera* inspection by the Court. The Resolution also provided that:

> "In the event the documents authorized to be submitted to the court for in camera inspection are determined to be relevant by the district court and not within the Senate's privileges and immunities, they may either continue to be retained by the court in camera pending final judicial determination of these issues on an appeal of that determination, or be returned to the subpenaed Senate employees in order that an appeal may be had of any final order the district court may enter imposing a sanction under the rules and procedures of the court relating to discovery."

Delivery of said material was made to the Court by counsel for the Senate employees on May 31, June 15, June 16, and June 24, 1977.

The Court upon receiving the material has made an *in camera* inspection. After careful consideration, it has

determined, as it previously concluded in its Order of July 30, 1975, more than two (2) years ago, without the benefit of an *in camera* inspection, from which Order no timely appeal was taken, that the material submitted is clearly relevant and not within the Senate's privileges and immunities. Accordingly, it is this 23rd day of September, 1977,

ORDERED that:

(1) The material submitted to the Court for *in camera* inspection shall be retained by the Court *in camera* pending appeal;

(2) Defendants shall have sixty (60) days from date to note an appeal;

(3) Upon expiration of said sixty (60) days, an appeal not having been noted, the material submitted to the Court shall be released to plaintiffs.

MALCOLM R. WILKEY,
United States Circuit Judge.
GEORGE L. HART, JR.,
United States District Judge.
JOHN H. PRATT,
United States District Judge.

In the United States District Court for the District of Columbia

Civil Action No. 1887–73

COMMON CAUSE ET AL., PLAINTIFFS,
v.
BENJAMIN BAILAR ET AL., DEFENDANTS.

ORDER

This matter came on for hearing on plaintiffs' Motion to Compel the 100 Senate Administrative Assistants to Produce Documents, and it appearing that plaintiffs' Motion should be granted, it is hereby ordered this 18th day of December, 1977, subject to the protective provi-

sions of the January 7, 1976 stipulation previously approved by this Court, that:

1. Each individual subpoenaed by plaintiffs on February 5, 1976 who then was the administrative assistant for a Senator who at this time is no longer a member of the Senate shall supply to the Court and counsel for plaintiffs a verified statement setting out whether he has possession, custody or control of the subpoenaed documents at this time, and if he does not, whether the subpoenaed documents were collected after receipt of the subpoena, whether the documents have been lost or destroyed, what happened to the documents when the Senator's office was closed (including the name and address of the person to whom the documents were entrusted and where they were stored), and the present location of such documents (including the name and address of the person who currently has possession, custody or control of the subpoenaed documents). Each such subpoenaed individual who has possession, custody or control of the subpoenaed documents at this time shall produce them for plaintiffs' inspection and copying.

2. Each individual subpoenaed by plaintiffs on February 5, 1976, or his successor, shall produce for plaintiffs' inspection and copying all manuals or memoranda in his possession, custody or control containing specific or general instructions relating to the use of codes maintained in the Senate computer for franked mail since December 18, 1973, including any direct mail plans or proposals for franked mail, whether or not such instructions or plans were approved for use or were utilized.

3. Each individual subpoenaed by plaintiffs on February 5, 1976, or his successor shall produce for plaintiffs' inspection and copying the subpoenaed documents that are located at the Federal Records Center. To reduce the burdensomeness of the search for these documents, plaintiffs' counsel will inspect the indices of documents stored for Senators and provide counsel for the subpoenaed administrative assistants with a list of the files

believed to contain documents which fall within the terms of the subpoena served on the administrative assistants showing for each Senator the Federal Records Center accession number, the box number and the identifying caption. The deponents shall then retrieve the identified documents from the Archives, review them, and produce for plaintiffs' inspection and copying the documents which fall within the terms of the subpoena as construed by this Order.

JOHN H. PRATT,
U.S. District Judge.
GEORGE L. HART,
U.S. District Judge.

United States District Court for the District of Columbia

(C.A. No. 77–0511)

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES F. HASTINGS, DEFENDANT

APPEARANCES

For the Plaintiff

Barbara Allen Babcock, Assistant Attorney General, Civil Division; *Earl J. Silbert,* United States Attorney; *Robert N. Ford,* AUSA; *John Oliver Birch,* AUSA; *J. Roger Edgar,* Esquire; *Robert L. Ashbaugh,* Esquire; all of Washington, D.C.

For the Defendant

Illona M. Hogan, Esquire, Forestville, Maryland.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This case is before this Court on plaintiff's motion for partial summary judgment. The United States

brought this suit under the False Claims Act, 31 U.S.C. § 231, and on several common law theories, seeking damages and equitable relief for defendant's alleged receipt of kickbacks from his Congressional office allowance. This partial summary judgment motion pertains only to the defendant's alleged receipt of monies arising from schemes involving Leonard B. Jones and David C. Walden.

I. FINDINGS OF FACT

This Court finds, and the defendant agrees, that there is no genuine issue of material fact in plaintiff's claim for relief arising from the defendant's conduct with respect to Mr. Jones and Mr. Walden. The following facts are established:

1. Defendant James F. Hastings is within this Court's jurisdiction and is subject to its processes by operation of Rule 4(e), Federal Rules of Civil Procedure, and Title 13, District of Columbia Code, section 13–423.

2. On January 3, 1969, the defendant James F. Hastings took the oath of office and thereafter served continuously until approximately January 20, 1976, as a member of the House of Representatives, representing, sequentially, the Thirty-eighth and then the Thirty-ninth Congressional District of New York during the 92nd through 94th Congresses.

3. While serving in said capacity, as an elected member of the House of Representatives, defendant James F. Hastings received the salary, badges, and emoluments of his public office and held a position of public trust, serving in a fiduciary and agency capacity on behalf of the plaintiff, United States of America.

4. In his capacity as a Member of Congress, defendant James F. Hastings received a clerk-hire allowance, pursuant to 2 U.S.C. § 332(a), to be used for the employment of persons to staff defendant's congressional offices in Washington, D.C., and in his congressional district and to assist him in the performance of his official and rep-

resentative duties. Accordingly, the defendant was authorized and entrusted:

(a) to designate and appoint persons to serve in the position designated as "clerk-hires" to assist the defendant in the discharge of his duties as aforesaid;

(b) to establish and to adjust or modify the salaries they receive; and,

(c) to supervise their work and assure that the services rendered were commensurate with their compensation.

5. These persons, or "clerk-hires," were employees of the House of Representatives and were paid from the House contingent fund by checks drawn on the United States Treasury.

6. The contingent fund of the House of Representatives is that portion of the legislative branch appropriation set aside to pay the cost of the administration, official expenses and payroll of the House of Representatives. Said fund constitutes Federal monies and is disbursed and administered by the Finance Office under the direction of the Clerk of the House of Representatives and his subordinates pursuant to regulations and instructions promulgated by the Committee on House Administration.

7. On September 21, 1976, the defendant James F. Hastings was endicted by a Federal grand jury sitting in the United States District Court for the District of Columbia. The prosecution of the defendant, entitled *United States* v. *James F. Hastings,* Cr. No. 76–606, culminated in a trial before a jury, the Honorable June L. Green, United States District Judge, presiding. On December 17, 1976, the defendant was found guilty of Counts 1, 2, 4, 5, 8–12, 14, 16, 18, 19–26, 28–35 of the indictment, in violation of 18 U.S.C. §§ 1341, 1001. There has been no appeal filed or taken from the verdict and conviction, and therefore, under Rule 4(b), Federal Rules of Appellate Procedure, the defendant has waived his right of appeal.

8. The criminal conviction of the defendant established the following facts:

(a) James F. Hastings ("Hastings") was a duly-elected congressman and maintained congressional offices in Washington, D.C. and in Jamestown, Allegany, and Elmira, New York.

(b) Leonard B. Jones owned and operated the Wellsville Lincoln-Mercury Sales, Incorporated, located in Wellsville, New York, and was employed part-time by Hastings as his District Representative.

(c) David C. Walden was employed as a mechanic at the Rushford-Kinzua Marine Supply, Incorporated ("R-K Marina") located in Rushford Lake, New York, and was employed part-time by Hastings as a chauffeur in his congressional district.

(d) Hastings was directly responsible for hiring and supervising Jones and Walden; he was solely responsible for determining and approving their salary. Jones and Walden were designated in Clerk-Hire Allowance and Payroll Authorization forms submitted by Hastings to the Office of Finance as members of Hastings' congressional staff and thereby were authorized to receive salary checks from the Treasury of the United States in payment for services performed.

(e) From approximately May 1, 1969, to December 4, 1975, Hastings unlawfully, knowingly and willfully devised and intended a scheme and artifice to defraud the United States of America, and to obtain money and property by false and fraudulent pretenses, representations, and promises which Hastings well knew would be and were false when made.

(f) Hastings' scheme to defraud the United States included the following:

1.) Hastings would submit Clerk-Hire Allowance and Payroll Authorization forms to the House Office of Finance to increase the salaries paid to Jones and Walden in order to generate funds from the Treasury from which kickbacks and rebates could be procured.

2.) Hastings did request and solicit Jones to kickback and rebate his congressional salary to

pay the outstanding balance on Hastings' personal account at the Wellsville Lincoln-Mercury Sales, Incorporated.

3.) Hastings did periodically authorize an increase in Walden's congressional salary and did solicit and receive as kickbacks and rebates from Walden all money so authorized and received by Walden, which exceeded his regular net monthly salary based upon a gross monthly salary of $208.33. Walden's "regular net monthly salary" was approximately $169.71.

4.) Hastings used the money obtained from these kickbacks and rebates to pay his personal obligations, including automobiles, boats, snowmobiles and services, as enumerated in the indictment, and for other expenses.

5.) Hastings did knowingly and willfully make false statements and representations to the House Finance Office that the fully amount of the money set forth as salary was for the benefit of Jones and Walden.

6.) Hastings knowingly and willfully concealed from the House Finance Office

—that he was manipulating the salaries of Jones and Walden to generate kickbacks;

—that he received the kickbacks and rebates from Jones' salary to pay for Hastings' personal obligations for automobiles, parts and services at the Wellsville Lincoln-Mercury Sales;

—that he received the kickbacks and rebates from Walden's salary to pay for Hastings' personal obligations for boats, snowmobiles, gasoline, parts and service at the R-K Marina, and for other personal expenses.

(g) For the purpose of executing the above-described scheme to defraud the United States, Hastings caused the following U.S. Treasury checks to be sent and delivered:

Exhibit No.	Date	Addressee	Amount
4–C	3/30/73	David C. Walden	$597. 72
4–D	4/30/73	David C. Walden	597. 72
4–E	5/31/73	David C. Walden	597. 72
4–F	6/29/73	David C. Walden	597. 72
5–F	10/31/73	Leonard B. Jones	849. 70
5–G	11/30/73	Leonard B. Jones	849. 70
5–I	1/31/74	Leonard B. Jones	849. 70
4–N	2/28/74	David C. Walden	918. 72
4–O	3/29/74	David C. Walden	420. 74
4–P	4/30/74	David C. Walden	420. 74
5–N	6/28/74	Leonard B. Jones	691. 36
4–T	8/30/74	David C. Walden	595. 14
4–U	9/30/74	David C. Walden	595. 14
4–V	10/31/74	David C. Walden	627. 98
4–W	11/29/74	David C. Walden	627. 98
4–EE	7/31/75	David C. Walden	848. 57
4–FF	8/29/75	David C. Walden	1, 171. 41
4–GG	9/30/75	David C. Walden	1, 171. 41
4–HH	10/31/75	David C. Walden	1, 171. 41
4–II	11/28/75	David C. Walden	1, 171. 41

9. Further, Hastings unlawfully, knowingly, and willfully concealed and covered up by a trick, scheme, and artifice a material fact inasmuch as Hastings submitted and caused to be submitted Payroll Authorization forms to the House Office of Finance designating Leonard B. Jones and David C. Walden as members of his congressional staff, effective on the dates shown, to receive compensation at the salary specified, thereby concealing and covering up the fact that Jones and Walden did not receive the use and benefit of the entire salary so authorized, and that there was a private arrangement between Hastings and Jones and Walden that a portion of the money they received was to be kicked back and rebated to Hastings. These misrepresentations were contained in the following payroll forms:

Exhibit No.	Date	Person	Effective date	Gross salary
1	3/14/73	D. C. Walden	3/1/73	$8, 500. 00/yr. 708. 33/mo.
2	5/15/73	L. B. Jones	5/1/73	12, 000. 00/yr. 1, 000. 00/mo.
1	2/11/74	D. C. Walden	2/1/74	13, 200. 00/yr. 1, 100. 00/mo.
2	3/13/74	L. B. Jones	3/1/74	9, 600. 00/yr. 800. 00/mo.
1	3/13/74	D. C. Walden	3/1/74	6, 000. 00/yr. 500. 00/mo.
1	8/ 3/74	D. C. Walden	8/1/74	8, 500. 00/yr. 708. 33/mo.
1	7/14/75	D. C. Walden	7/1/75	12, 000. 00/yr. 1, 000. 00/mo.
1	7/30/75	D. C. Walden	8/1/75	16, 800. 00/yr. 1, 400. 00/mo.

II. CONCLUSIONS OF LAW

Because of the collateral estoppel effect of the prior criminal conviction of the defendant, the Court finds that the defendant is liable to the plaintiff for the allegations that are in issue in this motion. *See Emich Motors* v. *General Motors Corp.*, 340 U.S. 558 (1951). The defendant does not contest the liability issue; he only challenges the extent of the relief sought.

A. *Plaintiff is entitled to $2,000 for each of the eight payroll authorization forms.*

Under the False Claims Act, the United States is entitled to collect $2,000 for each false "claim" and double the amount of the damages which were sustained. 31 U.S.C. § 231. In this case, the United States claims that it is entitled to $2,000 for each of eight payroll authorization forms. Defendant responds that the plaintiff is only entitled to $2,000 for each of the two employees for whom the allowance forms had been submitted. The Court finds that the payroll authorization forms are "claims" under the statute and, therefore, the United States is entitled to eight forfeitures of $2,000 each.

In *United States* v. *Bornstein*, 423 U.S. 303 (1976), the Supreme Court elaborated on how the number of forfeitures should be counted in the context of a False Claims Act allegation against a subcontractor. However, before discussing the term "claim" as applied to the fraud of a subcontractor, the Court noted at length that:

> in cases involving [the fraud of] prime contractors the number of imposable forfeitures has generally been set at the number of *individual false payment demands* that the contractor has made upon the Government. *See, e.g., United States* v. *Woodbury*, 359 F. 2d 370, 377–378 (CA 9); *Fleming* v. *United States*, 336 F. 2d 475, 480 (CA 10); *United States* v. *National Wholesalers*, 236 F. 2d 944, 950 (CA 9); *Faulk* v. *United States*, 198 F. 2d 169, 171 (CA 5); *United States* v. *Grannis*, 172 F. 2d 507, 515–516 (CA 4); *United States* v. *Collyer Insulated Wire*

Co., 94 F. Supp. 493, 496–498 (R.I.). *Cf. United States* v. *Ueber*, 299 F. 2d 310 (CA 6). This result is in accord with this Courts statement that "'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.'" [citing cases.]

423 U.S. at 309 n.4. (emphasis added). By analogy, the case at bar deals with the fraud of a "prime contractor." Defendant Hastings was a "prime contractor" who hired employees as "subcontractors." The number of forfeitures then, according to the Supreme Court, should be the number of "individual false payment demands," not the number of subcontractors. Therefore, the number of forfeitures should be the number of payroll authorization forms submitted by the defendant and not the number of employees hired.

The *Bornstein* Court expressly rejected the argument, similar to that advanced by the defendant in this case, that the number of contracts should determine the number of forfeitures. The Court declared:

> The language of the statute focuses on false claims, not on contracts. * * * To equate the number of forfeitures with the number of contracts would in a case such as this result almost always in but a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed. This result would not only be at odds with the statutory language; it would defeat the statutory purpose.

423 U.S. at 311 (footnote omitted). *See also Brown* v. *United States*, 524 F. 2d 693, 706 (Ct. Cl. 1975). To rely upon the number of employees (as defendant urges this Court to do) to determine the number of forfeitures is analogous to relying upon the number of "contracts" with employees. The Supreme Court's position makes clear that this method of determining the number of forfeitures is an erroneous interpretation of the False Claims Act.

This Court's holding that the defendant is liable for eight forfeitures is also supported by the other language

of the statute. The statute provides that the $2,000 forfeiture be paid for doing "any" of the acts prohibited by § 5438 of the Revised Statutes. *United States* v. *Hess,* 317 U.S. 537, 552 (1943). Section 5438 is the direct antecedent of section 1001 of the present criminal code. *United States* v. *Bramblett,* 348 U.S. 503, 504 (1955). Thus, the statute provides for the award of a forfeiture for every act in violation of section 1001. Defendant Hastings has been convicted of *eight* such violations. Accordingly, the defendant will be required to pay eight forfeitures of $2,000—one for each false claim made upon the United States.

B. *Plaintiff is not entitled to a constructive trust in addition to damages under the False Claims Act.*

Plaintiff contends that it is entitled to the imposition of a constructive trust in addition to the damages it will receive under the False Claims Act. Plaintiff argues that this common law remedy is supplemental to damages and will provide plaintiff with the authority to trace the proceeds of the defendant's crime into the hands of third parties. Defendant responds that the plaintiff cannot recover the same damages under two different causes of action and that awarding the plaintiff with harsh penalties under the False Claims Act precludes further relief. The Court agrees with the defendant.

Although no case has decided this issue, the basic purpose of the Act suggests that it was intended to be a complete remedy for fraudulent claims against the United States. In *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 551–52 (1942), the Supreme Court remarked:

> We think the chief purpose of the [False Claims Act] was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made *completely whole.* This conclusion is consistent with a statement made immediately before final passage of the bill * * * The inherent difficulty of choosing a proper specific sum which would give *full restitution* was a problem for Congress.

[Emphasis added.] Again, in *United States* v. *Bornstein, supra,* the Court noted:

> [T]his method of computation [under the False Claims Act] comports with the congressional judgment that double damages are necessary to compensate the Government *completely* for the costs, delays, and inconveniences occasioned by fraudulent claims.

423 U.S. at 315 (emphasis added, footnote deleted). *See Peterson* v. *Weinberger,* 508 F.2d 45 (5th Cir.), *cert denied,* 423 U.S. 830 (1975) (denied pre-judgment interest on recoverable amount of damages because damages under False Claims Act would make Government whole); *United States* v. *Hibbs,* 420 F. Supp. 1365 (E.D. Pa. 1976) (same). Thus, it appears that the "double damages plus $2,000 forfeiture" was a remedy intended to provide the United States with all the relief it needed. Consequently, it is improper to allow the United States to obtain relief under both the common law and the False Claims Act. *See United States* v. *Cooperative Grain and Supply Co.,* 476 F.2d 47, 61 n.12 (8th Cir. 1973).

The Supreme Court implicitly recognized the completeness of the Act's remedy in its discussion of computation of damages in *Bornstein, supra.* Before bringing suit for the fraudulent claims made by United, Inc., the Government received some compensatory damages from Model, Inc. In assessing the amount of damages recoverable from United under the False Claims Act, the Court had to decide how to treat the damages which the Government had already recovered from Model. The Government had originally urged that the compensatory payments already received should not be deducted from its statutory damages. In explaining why this position had been abandoned by the Government, the Court intimated that this would in effect be an assessment of "triple damages" against United. 423 U.S. at 314 n.9. Instead, the Court held that the Government's actual damages are to be doubled and then the compensatory payments are to be *subtracted.* 423 U.S. at 316. In this way, the Government's recoverable damages cannot exceed the amount prescribed under the False Claims Act.

In the case at bar, the constructive trust relief can be analogized to the compensatory damages paid by Model to the Government. A constructive trust is a mechanism for recovering proceeds from third parties. Model, who paid some compensatory damages, is such a third party. Therefore, if Model's payments to the Government are to be deducted from the damages recoverable from United under the Act, then payments by third parties to the Government in the case at bar would have to be *deducted* from the damages recoverable from defendant Hastings under the Act. However, because the Government will recover the full amount of damages under the Act in this case, the most efficient way to prevent the government from recovering more damages than that prescribed by the Act, and thereby effectuate this "deduction" requirement, is to deny the request for a constructive trust.[1]

III. CONCLUSION

The Court will grant plaintiff's motion for partial summary judgment, finding no issues of material fact as to the fraudulent schemes involving Mr. Jones and Mr. Walden. Fed.R.Civ.P. 56(d). It is undisputed that the defendant Hastings is liable to the United States under the False Claims Act in the amount of $12,406.19, which must be doubled. The Court finds that the United States is also entitled to the $2,000 forfeiture for each of the eight fraudulent payroll forms, but not a constructive trust in addition to the damages already recovered.

An Order in accordance with the foregoing will be issued of even date herewith.

CHARLES R. RICHEY,
United States District Judge.

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[1] One other way to reach the same result would be to impose the trust and deduct the amounts later recovered (from third parties) from the amount of damage now paid by the defendant. This method is rejected because it is too cumbersome.

United States District Court for the District of Columbia

(C.A. No. 77–0511)

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES F. HASTINGS, DEFENDANT

ORDER

Upon consideration of plaintiff's motion for partial summary judgment, and all responses thereto, and in accordance with the Memorandum Opinion issued of even date herewith, it is, by the Court, this 30th day of September, 1977,

ORDERED, that plaintiff's motion for partial summary judgment be, and the same hereby is, granted; and it is

FURTHER ORDERED, that in accordance with this Court's Opinion of this date, the defendant James F. Hastings will pay to the plaintiff the sum of $40,812.38 under the False Claims Act; and it is

FURTHER ORDERED, that plaintiff's request for a constructive trust and other common law relief be, and the same hereby is, denied.

CHARLES R. RICHEY,
United States District Judge.

ADDENDUM

In the Matter of the Complaint Against Citizens Committee For The Right To Keep And Bear Arms.

Postal Service Docket No. 6/48

Consent Agreement

Whereas, on November 21, 1977, the United States Postal Service initiated a complaint, P.S. Docket No. 6/48, alleging that the Respondent mailed literature seeking support and contributions for its cause in a manner which caused to be visible through window envelopes the notation "FROM CONGRESSMAN [name of addressee's congressman]."
and

Whereas, the mailing was not, in fact, from the designated Congressman,
and

Whereas, in consideration of this agreement the General Counsel agrees to terminate formal proceedings under Title 39 U.S. Code, §§ 3005 and 3007, being P.S. Docket No. 6/48 and Cause No. C77–846S before the United States District Court for the Western District of Washington,

Therefore, the Citizens Committee for the Right to Keep and Bear Arms stipulates as follows:

1. (a) That the soliciation described in the complaint could reasonably be construed as making, expressly or implicitly, the representations alleged in said complaint.

(b) That the use of said representations for obtaining money or property through the mails has permanently been discontinued.

(c) That solicitations making, expressly or implicitly, representations substantially similar to any of the representations described in the complaint will not hereafter

be employed under any name or through any corporate or other device in any attempt to obtain money or property through the mails.

2. (a) That all remittances hereafter received (including those being detained by order of the district court for the Western District of Washington) which relate to the activities discontinued hereby will be returned by respondent to senders within five (5) business days of receipt, with the following statement:

> "We are returning herewith your contribution to CCRKBA, in accordance with an agreement with the U.S. Postal Service.
>
> It has been brought to our attention that the placement of the mailing label in the solicitation you received may have led you erroneously to believe that your congressional representative had sent the solicitation or had authorized or otherwise concurred in the use of his name on the solicitation.
>
> Please be advised that the solicitation was sent by this Committee and that the authorization or concurrence of your congressional representative was neither sought nor obtained.
>
> We are also enclosing herewith a preaddressed, postage paid envelope for your use in the event you nevertheless desire to contribute to the Citizens Committee for the Right to Keep and Bear Arms. *If you do so desire to contribute, please return this letter with your contribution.*
>
> Sincerely,
>
> ALAN GOTTLIEB,
> *Chairman.*

(b) That until January 16, 1978, all remittances received without accompanying material clearly establishing that said remittance was prompted by a solicitation other than that described in the complaint shall be presumed to have resulted from said solicitation irrespective of whether respondent's return envelope was used and will be returned by respondent to senders within five (5) business days of receipt, accompanied by the statement described in subparagraph 2(a), *supra*.

(c) No written or printed material other than that described in subparagraph 2(a), *supra,* shall accompany said return of remittance.

3. (a) That in any solicitation made subsequent to this agreement, Respondent will not, through any means or device, imply that said solicitation was sent, authorized, or concurred in by any Member of Congress or any Senator, unless such is in fact true.

(b)(i) Respondent will not, in any solicitation distributed after the date of this Agreement, mention the name of any representative* except as part of textual material which makes clear from the immediate context that the mailing is not sent, authorized, or concurred in by said representative unless such is, in fact, true.

(ii)(A) Notwithstanding (i), *supra,* and subject to subparagraph 3(b)(iii) *infra,* Respondent may print the name of the addressee's Congressman or representative on the mailing label of the solicitations provided said name is immediately preceded by the phrase "Your representative is:"

(B) The phrase described in subparagraph 3(b)(ii)(A), *supra,* shall appear on the mailing label and in the same case, style, and size type as is used for the name of the representative.

(C) When Respondent mentions the name of addressee's representative on the mailing label, Respondent shall explicitly state on the same sheet or page as the mailing label appears, and as the first sentence of text therein, that said solicitation was not sent, authorized, or concurred in by said representative, unless such is, in fact, true. This statement shall be in type no smaller than that used for any other word in the text.

(iii) Nothing herein shall be construed to prohibit Respondent from enclosing pre-addressed reply postcards where a member of Congress or Senator is the ad-

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* "Senator" shall be substituted for "Representative" or "Congressman," as appropriate, in complying with subparagraphs 3(b)–(c) of this agreement.

dressee, provided the accompanying material states that the purpose of the enclosed postcards is intended by respondent to facilitate communication of views to elected representatives, and provided further that if such postcards are used, respondent will not print or otherwise place the name of said representatives on the mailing label of the solicitation.

(c) Neither the representative's name nor the phrase described in subparagraph 3(b), *supra,* shall be visible when the envelope is sealed.

(d) Compliance with subparagraphs 3(b) and (c), *supra,* shall not relieve Respondent from compliance with subparagraph 3(a), *supra.*

4. (a) That, in the event respondent by any act or omission breaches this agreement, the General Counsel may, without prior notice to the undersigned, file a petition with the Judicial Officer, U.S. Postal Service, setting forth the alleged violation of this agreement and requesting the issuance of the order described in 39 U.S.C. § 3005(a) against the name appearing in the caption hereof or any other name then in use by the undersigned.

(b) That, upon the filing of such petition, the Judicial Officer, may upon an *ex parte* finding that the allegations of said petition, if true, would constitute a *prima facie* showing that this agreement has been breached, issue an interim order directing that mail received for delivery to the name and address identified in said petition be detained by the Postal Service pending final administrative determination of the allegations of said petition, and any judicial review thereof.

(c) That said interim order shall afford respondent an opportunity to examine the detained mail at reasonable times in the presence of the postmaster or his agent, and to receive any part of such detained mail as is clearly not related to the promotion described in said petition.

5. Respondent further stipulates that the following conditions shall apply to the determination of the date upon which representations alleged to breach this agreement were made:

(a) The date, if any, appearing upon any written or printed solicitation shall, irrespective of the actual date

of publication or distribution, be presumed the date of making the representation, subject to the right of the General Counsel, but not respondent, to demonstrate that the representation was made on a different date.

(b) Any written or printed solicitation not bearing a date shall be presumed to postdate this agreement, and the burden of proof to the contrary shall be upon respondent.

6. That this agreement relates exclusively to 39 U.S.C. §§ 3005, 3007, and shall not constitute a defense or a release of respondent of any responsibility for violation of any other statute.

7. That the failure of the General Counsel to prove that this agreement has been breached shall not preclude remedial action other than that based upon breach of this agreement, if deemed warranted by the General Counsel.

8. That no officer, employee, or agent of the United States Postal Service has expressly or impliedly accepted or approved any advertising matter or practice presently employed or contemplated for future use by respondent, except as stated in paragraph 3, *supra*.

9. It is agreed and understood that the Citizens Committee, by entering into this consent agreement, does not admit any elements of the complaints referred to above, and it is agreed and understood that both parties enter into this consent agreement without admissions or acknowledgments of any kind.

10. Upon execution hereof, the General Counsel will cause the proceedings commenced under U.S. Postal Service Docket No. 6/48 to be dismissed and the preliminary injunction issued by the U.S. District Court for the Western District of Washington in Cause Number C 77–846S to be vacated.

CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS
By Alan M. Gottlieb
UNITED STATES POSTAL SERVICE
By Daniel S. Greenberg

APPENDIX

Members of the 95th Congress Parties to or Directly Concerned With Litigation Affecting Congress

Alpahbetical Listing by Member's Name

SENATE

James Abourezk	*American Public Gas Association* v. *Federal Power Commission*
Birch Bayh	*Banta* v. *Talmadge*
Robert C. Byrd	*Banta* v. *Talmadge*
Howard W. Cannon	*United States ex rel. Joseph* v. *Cannon*
Alan Cranston	*Chase* v. *Kennedy*
Carl T. Curtis	*Laxalt* v. *Kimmitt*
	Curtis v. *Carter*
John C. Danforth	*Missouri* v. *Coleman*
Robert Dole	*Dole* v. *Carter*
John Durkin	*American Public Gas Association* v. *Federal Power Commission*
Thomas F. Eagleton	*Missouri* v. *Coleman*
Barry Goldwater	*Laxalt* v. *Kimmitt*
Orrin G. Hatch	*State of Idaho* v. *Vance*
S. I. Hayakawa	*Laxalt* v. *Kimmitt*
	Curtis v. *Carter*
Jesse A. Helms	*Buckley* v. *McRae*
	State of Idaho v. *Vance*
	Helms v. *Vance*
Jacob Javits	*Nixon* v. *Sampson*
	Atkins v. *United States*
Edward M. Kennedy	*Chase* v. *Kennedy*
Paul Laxalt	*Laxalt* v. *Kimmitt*
John L. McClellan	*McSurely* v. *McClellan*
James A. McClure	*McClure* v.*Linowitz*
	State of Idaho v. *Vance*
Edmund S. Muskie	*Atkins* v. *United States*
Gaylord Nelson	*Nixon* v. *Sampson*
William Proxmire	*American Public Gas Association* v. *Federal Power Commission*
	Hutchinson v. *Proxmire*
	Ray v. *Proxmire*
William L. Scott	*Banta* v. *Talmadge*
Adlai E. Stevenson III	*Chase* v. *Kennedy*
	Laxalt v. *Kimmitt*
Herman E. Talmadge	*Banta* v. *Talmadge*
Strom Thurmond	*State of Idaho* v. *Vance*
Lowell P. Weicker	*Laxalt* v. *Kimmitt*

HOUSE OF REPRESENTATIVES

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