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95th Congress
2d Session

COMMITTEE PRINT

PART 6

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REPORT

OF THE

SELECT COMMITTEE ON CONGRESSIONAL OPERATIONS

U.S. HOUSE OF REPRESENTATIVES

AND THE

COMMITTEE ON RULES AND ADMINISTRATION

U.S. SENATE

IDENTIFYING

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

CURRENT TO
DECEMBER 31, 1978

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Printed for the use of the House Select Committee on Congressional Operations and the Senate Committee on Rules and Administration

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95th Congress
2d Session } COMMITTEE PRINT { PART 6

REPORT

OF THE

SELECT COMMITTEE
ON CONGRESSIONAL OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

PURSUANT TO

HOUSE RESOLUTION 420
NINETY-FIFTH CONGRESS

AND THE

COMMITTEE ON
RULES AND ADMINISTRATION
U.S. SENATE

PURSUANT TO

SENATE RULE XXV, (n)(2)

IDENTIFYING

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

Current to December 31, 1978

Printed for the use of the House Select Committee on Congressional Operations and the Senate Committee on Rules and Administration

U.S. GOVERNMENT PRINTING OFFICE

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SELECT COMMITTEE ON CONGRESSIONAL OPERATIONS

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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.

* * * * * * *

SENATE RULE XXV, (n)(2)

COMMITTEE ON RULES AND ADMINISTRATION

* * * * * * *

Such committee shall also—

* * * * * * *

(B) Identify any court proceeding or action which in the opinion of the committee, is of vital interest to the Congress as a constitutionally established institution of the Federal Government and call such proceeding or action to the attention of the Senate.

INTRODUCTION

In accordance with the provisions of House Resolution 420 of the 95th Congress and Senate Rule XXV, the Select Committee on Congressional Operations and the Senate Committtee on Rules and Administration 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, the sixth report for the 95th Congress, provides case briefs, accounts of the status of court proceedings and the full text of decisions in cases which the committees have identified as being of vital interest to the Congress. Major changes in the briefs of previously reported cases appear in bold type. Those filed before the publication of the most recent preceding report but appearing in the reporting series for the first time are described as "(Newly Reported Cases)." Cases filed after the publication of the most recent preceding report are designated as "(New Cases)."

The committees intend to continue the practice of publishing reports of court proceedings and actions periodically throughout the 96th Congress. In addition, the committees also intend to publish a complete collection of the cases which have appeared in this series.

We encourage comments from all Members of Congress and others who use this report as an information source and research document. We also would welcome and appreciate any information or suggestions as to pending court proceedings and actions which do not appear in this report.

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 the United States District Court for the Central District of California. 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; Edmund 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 XLIII, 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 Supreme 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 in the District Court 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*

Nos. 78-1437 and 78-1438 (D.C. Cir.)

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." [*Laxalt* v. *Kimmitt,* No. 77-1230 (D.D.C.), 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 without similar risk candidates for the Senate who have earned, earn, or may earn in excess of the "outside earned income" limit prescribed by the Rule.

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.

The congressional defendants moved to dismiss the amended complaint on January 9, 1978.

On January 30, 1978, the intervening defendants, Common Cause, Mr. Cohen and Ms. Waterman, filed a memorandum in opposition to defendants' motion to dismiss.

The congressional defendants' motion to dismiss was heard and granted on March 3, 1978.

On March 13, 1978, an order dismissing the action was filed. The court first found that the amended complaint sufficiently alleged the requisite jurisdictional amount. The order declared that Rule XLIV does not add to the constitutional qualifications for Senate membership nor does it deprive the plaintiffs of their freedom of speech. Additionally, the order stated that the Rule's differentiation between earned and unearned income does not constitute unlawful discrimination. Therefore, the Court further concluded, the complaint fails to state a claim on which relief can be granted and that the amended complaint does not allege a justiciable case or controversy.

Finally, the Court declared that its disposition of the issues already mentioned made it unnecessary for the Court to address the question of standing.

Plaintiffs filed a notice of appeal on March 24, 1978.

On April 6, 1978, defendants Kimmitt and Stevenson filed a notice of cross-appeal from those portions of the final judgment of the District Court which (1) hold that the first amended complaint sufficiently alleges the requisite jurisdictional amount and (2) conclude that the disposition of other issues raised by the motions of the defendants makes it unnecessary to dispose of the issues raised with respect to the standing of the plaintiff, Committee for the Survival of a Free Congress and the intervenors, Common Cause, David Cohen and Nan Waterman.

The appeal and the cross-appeal were consolidated by order of Circuit Judge Wright, *sua sponte,* on June 5, 1978.

On December 8, 1978, appellants moved to add Senator Mike Gravel as a party appellant.

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

The March 13, 1978 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 4, May 15, 1978.

II. Constitutional Immunity of Members of Congress

Davis v. *Passman*

No. 78-5072 (U.S. Supreme Court)

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. She 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, promo-

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tion, 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 processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House' * * *." [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 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 asserted that the Justice Department's brief does not accurately describe the alleged burdens this decision would place upon Members of Congress. He asked that he be allowed to file an *amicus* brief if a rehearing were granted.

On May 17, 1977, the court granted the petition for a rehearing *en banc.*

On August 19, 1977, a letter was filed advising the court that the United States would appear at the oral argument as *amicus curiae.*

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

On April 18, 1978, the U.S. Court of Appeals for the Fifth Circuit rendered its decision *en banc* in an opinion reversing the earlier panel opinion. In so doing, the earlier judgment of the U.S. District Court dismissing Mrs. Davis' claim was affirmed on the ground that the law affords her no private right of action in the Federal

courts for money damages. The *en banc* opinion vacated the decision of the District Court in regard to that court's holding that the conduct of which Mrs. Davis complained did not violate the Constitution.

To determine whether a cause of action for money damages would lie for a violation of Fifth Amendment due process rights the court first noted that the Supreme Court had found that such a remedy was available to parties asserting a violation of their Fourth Amendment rights [*Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)]. Concluding that the award of money damages in *Bivens* was implied as a matter of Federal common law, and as such subject to the power of Congress to alter or withdraw, the court set forth a two-step analysis to determine whether the money damages sought by Mrs. Davis could be implied in the Federal common law for a violation of Fifth Amendment due process rights:

> First, we look to the jurisprudence of statutory implication to determine whether to imply a damage action of non-constitutional dimensions. Second, if this initial inquiry does not suggest that such an action should be implied, we must determine whether the Constitution nevertheless compels the existence of a remedy in damages to vindicate the rights asserted. [Slip Opinion at 3511.]

The majority noted four factors which have been utilized in the past to determine whether to imply a cause of action from a right created by statute: (1) whether the provision asserted creates an especial right in the plaintiff, (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy, (3) whether implication of the remedy would be consistent with the purpose of the right asserted, and (4) whether the cause of action implied would be one appropriate for Federal law. The court concluded that each of these factors militated against Mrs. Davis' claim.

As to the question of an especial right, the opinion stated:

> While the fifth amendment Due Process Clause surely exists for the "especial benefit" of Davis, as *Cort* [*Cort* v. *Ash,* 422 U.S. 66 (1975)] required, it does not exist with equal certainty to protect her tenure in a non-competitive personal aide position statutorily denominated as service at will. 2 U.S.C.A. § 92. [Slip Opinion at 3511.]

The court found that the action of the Congress in excluding Congressional employees from the protection of Title VII of the 1964 Civil Rights Act and the 1972 amendments thereto coupled with 2 U.S.C.A. § 92 (which provides that Members of a Congressman's personal staff are removable by him "at any time * * * with or without cause") was instructive as to Congressional intent.

The court further noted that:

> Implying the cause of action asserted by Davis would have the anomalous result of granting federal employees in non-competitive positions, whom Congress did not intend to protect, a remedy far more extensive than Con-

> gress adopted for federal employees in the competitive services, whom it did intend to protect. [Slip Opinion at 3512.]

As to the question of consistency of the implication of the remedy of damages with the statutory purpose, the court noted that substantial difficulties existed in providing money damages for violation of Fifth Amendment due process rights which were not present when the court implied such a remedy for violation of Fourth Amendment rights. On this point the court stated:

> Violations of fourth amendment rights occur in a well-defined setting familiar to the courts. The relationship is always one between law enforcement officials and citizens suspected of possessing evidence of crime. The context in which these violations may arise is sufficiently limited to allow the court to determine that an action for damages would be consistent with the purpose of the fourth amendment in future instances in which such an action might be invoked. The fifth amendment Due Process Clause presents no similarly focused remedial issue. To the contrary, the breadth of the concept of due process indicates that the damage remedy sought will not be judicially manageable and that there is simply no way a court can judge whether this remedy will be appropriate for securing the right in future situations where some plaintiff might assert it. [Slip Opinion at 3513.]

Summarizing the holding of the court on whether to imply a cause of action for money damages, the opinion stated:

> Not only does this case fail to present special remedial difficulties analogous to those faced by the court in dealing with the fourth amendment, but also Congress avoided creating an action for money damages for Congressional aides in non-competitive positions. Moreover, implying this damage action necessarily would draw into the Federal judicial system a wide range of cases whose resolution Congress has not committed to the Federal judiciary and whose resolution is better suited to courts of general jurisdiction. These special considerations * * * eliminate any question of our creating a remedial right under our federal common law power. [Slip Opinion at 3514.]

Turning to the question of whether the remedy of damages might yet be constitutionally compelled as indispensable to the effectuation of the Fifth Amendment Due Process clause and thus not subject to Congressional preclusion, the court noted:

> Denying an implied cause of action for money damages does not render meaningless any constitutional rights of Congressional employees. A plaintiff might still seek equitable relief where the employer remained in office, although Congressional employees in the non-competitive service whose allegedly discriminating employers are not in office may be left without a remedy for sex discrimination in employment unless Congress reverses its present

> statutory stand. Other due process wrongs would either continue to be remedied in traditional ways through tort actions in courts of appropriate general jurisdiction or through special statutory remedies provided by state legislatures or Congress. Admittedly, some not now covered would remain inactionable. [Slip Opinion at 3514–15; (footnote omitted).]

The opinion also noted that Article III, Section 1 of the Constitution, pursuant to which Federal District and Circuit Courts of Appeals are established, could be rendered meaningless by the increased number of cases which might be brought in those courts, "crushing an already precariously overloaded Federal judicial system" were an implied cause of action for damages for violation of Fifth Amendment due process rights held to be available.

In Circuit Judge Jones' special concurring opinion he declared:

> I do not believe that the constitutional provisions here pertinent are to be confined to the Speech and Debate clause.[1] The broader provisions by which all legislative powers are vested in the Congress[2] is relevant to the cause.

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[1] The Senators and Representatives for any speech or debate in either House shall not be questioned in any other place. U.S. Const. Art. I, Sec. 6(1).

[2] U.S. Const. Art. I, Sec. 1.

* * * * * * *

> [T]he court should say that the hiring and firing of his "alter ego" is a legislative activity and a part of the exercise of the legislative power. The question is not one of whether there is a judicial remedy. The question, as I see it, is whether the controversy is one involving the exercise of the legislative power and within the jurisdiction of the Congress. Let it decide whether there should be absolute immunity. Let it determine whether there is a right and if so to fashion a remedy and designate a tribunal to declare and enforce it. I think it should have been held that the complaint does not state a claim upon which relief can be granted. [Slip Opinion at 3515–3516.]

In dissent, Judge Goldberg, joined by Chief Judge Brown, rejected the majority's conclusion that no private cause of action for money damages could be implied from the Due Process clause of the Fifth Amendment. As to the question of whether the Speech or Debate clause served as a bar to the action, the dissent adopted the original decision of the Appeals Court panel which had concluded that it did not.

As to the majority's comment that equitable relief might be available to Congressional employees discriminatorily dismissed from their jobs, Judge Goldberg declared:

> The majority's unelaborated suggestion of "equitable relief" is oblivious to those constitutional values, critically implicated in this case, underlying the speech or debate clause and the doctrine of separation of powers. Congress has spoken specifically to its views on the nature of the

working relationship between Congressmen and their personal staffs by classifying employees like Mrs. Davis as removable "at any time * * * with or without cause." The Supreme Court has accorded congressional staffers speech or debate clause protections in certain circumstances, recognizing that staffers may act as congressional alter egos in the performance of certain legislative tasks. *Gravel* v. *United States,* 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). See *Davis* v. *Passman,* 544 F.2d at 877–81 (panel opinion). Apparently the majority feels these values can be better effectuated, consistent with the requirements of the fifth amendment, not by actions for damages but by injunctive orders requiring Congressmen to employ particular individuals. This is not the occasion for a definitive statement on the circumstances which might justify implication of a private action for equitable relief to vindicate fifth amendment rights. But on the facts of the case before us, I would have thought that such "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens,* 403 U.S. at 396, 91 S.Ct. at 2005, are more germane to the implication of equitable relief than to implication of an action for damages.

Similarly, it would seem to me that the special problems of congressional immunity under the speech or debate clause and the doctrine of separation of powers render this case uniquely appropriate for adjudication in the federal courts under a federal cause of action. Much of the *Bivens* opinion concerns the difficulties and inadequacies of state court or state law adjudications of federal immunities in the context of constitutional claims; that reasoning is, if anything, even more powerful with respect to the issues presented here. [Slip Opinion at 3528; (footnote omitted).]

Mrs. Davis filed a petition for writ of *certiorari* with the United States Supreme Court on July 17, 1978. The petition characterized the issues upon which the writ was sought as whether a cause of action for money damages may be implied directly from the Fifth Amendment where there is no alternative remedy available and, if so, whether the Speech or Debate clause bars the suit.

The petition for writ of *certiorari* was granted on October 30, 1978.

On December 14, 1978, the American Civil Liberties Union filed a brief as *amicus curiae* urging reversal.

Twenty-nine Members of the House of Representatives and three employees of the House of Representatives also filed a brief as *amicus curiae* urging reversal on December 14, 1978. The Representatives were Morris Udall, Patricia Schroeder, Charles Rose, Les AuCoin, Berkley Bedell, David Bonior, William M. Brodhead, George E. Brown, Jr., John H. Buchanan, Jr., Yvonne Brathwaite Burke, Robert Carr, John Conyers, Ronald V. Dellums, Thomas Downey, Robert F. Drinan, Don Edwards, Dante B. Fascell, Dale E. Kildee, William Lehman, Edward J. Markey, George Miller, Anthony Moffett, Richard Nolan, Leon Panetta, D. J. Pease, Fred Richmond, Bruce F. Vento, Harold L. Volkmer, and Ted Weiss.

Mrs. Davis filed her brief on December 18, 1978.

Status.—The case is pending before the U.S. Supreme Court. The complete text of the opinion of the Court of Appeals panel 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.

The full text of the *en banc* opinion of the Court of Appeals panel is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 4, May 15, 1978.

***McSurely* v. *McAdams* (formerly McClellan)**

C.A. No. 516-69 (D.D.C.)

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.

On October 16th, 4 days later, 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, Tennessee. 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' objections 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 was 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 Ratliff 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 ap-

plied 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 acquittal 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 legislative 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 McSurley's 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 McSurelys' 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 at 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 right 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. McSurleys' 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 subpeonas [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 testi-

mony 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 the case to the District Court for further consideration of some of the actions taken by the Congressional defendants. The court noted:

> 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 expressed 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.

Herbert H. McAdams, executor of the estate of the deceased Senator McClellan, was substituted for him as party petitioner on January 23, 1978.

The petition was argued before the Supreme Court on March 1, 1978.

In a one-sentence *per curiam* opinion, the writ of *certiorari* was dismissed as improvidently granted on June 26, 1978.

On August 31, 1978, Herbert H. McAdams II, executor of Senator McClellan's will, was substituted, by order of the District Court, as defendant in lieu of John L. McClellan, without prejudice to his right to claim that plaintiff's cause of action did not survive the death of Senator McClellan.

On September 15, 1978, the McSurely's filed, in the District Court, a motion for an order to show cause and for a stay, in order to restrain Mr. McAdams from proceeding further in the Probate Court of Pulaski County, Arkansas, where he had filed a petition seeking a declaration that the McSurely's claim against Senator McClellan's estate be rejected for failure to comply with a filing provision of Arkansas probate law, or alternatively, that the maximum liability and reserve for the contingency of the claim be fixed and that any distribution be made without personal liability of the executor. The stay was denied on the same day by District Judge Gasch.

On September 18, 1978, the McSurely's filed a notice of appeal from the order denying the stay and also filed, in the U.S. Court of Appeals for the District of Columbia Circuit, motions for emergency relief by way of a stay pending appeal and for expedited consideration of the motion for emergency relief. (78–1916, D.C. Cir.). The motion for emergency relief was denied on November 13, 1978. On November 22, 1978, a stipulation and agreement for voluntary dismissal of the appeal was filed and the appeal was dismissed.

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

The full text of the decision of the Court of Appeals in the criminal action for contempt of Congress was printed in the "Decisions" 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. 78–680 (U.S. Supreme Court)

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, allegedly telephoned various Federal agencies in an attempt to persuade those agencies to terminate grants or contracts for research being performed by Dr. Hutchinson. Senator Proxmire appeared, 7 months later, 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 content of the Senate speech;

(3) followup 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 knowl-

edge 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 would 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.

The appeals were argued on January 9, 1978.

The U.S. Court of Appeals for the Seventh Circuit issued its opinion on June 30, 1978, affirming the judgment of the District Court. Senior Circuit Judge Castle, writing for the court, described the issues on appeal as whether the alleged acts complained of are within the legitimate legislative sphere and hence absolutely immune from suit and, to the extent not so immune, whether they are protected by the qualified privilege of the First Amendment.

In analyzing the question of the possible applicability of absolute legislative immunity under the Speech or Debate clause, the court divided the allegations of the plaintiff into four parts: (1) the followup telephone calls to administrative agencies; (2) the press release of the speech; (3) the newsletters; and (4) the television, radio, and other interviews.

In considering the phone calls to NSF, NASA, and NIDA, the court relied upon *Gravel* v. *United States,* 408 U.S. 606 (1978), *McSurely* v. *McClellan,* 553 F.2d 1277 (D.C. Cir. 1976) (*en banc*), cert. dismissed as improvidently granted *sub nom., McAdams* v. *McSurely,* 438 U.S. 189 (1978), and especially *United States* v. *Johnson,* 383 U.S. 169 (1966). Specifically, the court held that:

> [W]hile there may be cases where the postinvestigation contact with administrative agencies is so integral to the investigation or other protected activities that application of absolute immunity would be compelled, the phone calls to NSF, NASA, and NIDA in this case cannot be accorded Speech or Debate protection.[9]

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[9] The District Court did not specifically address the Speech or Debate status of the followup phone calls. It appears, however, that the court below viewed these actions as merely a part of the total investigation and

> therefore absolutely privileged. 431 F. Supp. at 1321–22. In light of the language in *Gravel*, we must disagree.

[Slip Opinion at 7.]

The press release was held to be protected by Speech or Debate clause immunity. In reaching this holding, the court relied upon the standard put forth in *Doe* v. *McMillan*, 412 U.S. 306 (1973), wherein the Supreme Court held that the availability of legislative immunity in a situation where distribution of information outside Congress has occurred depends upon whether the "legitimate legislative needs" of Congress have been exceeded. Regarding the press release in the instant case, Judge Castle's opinion stated:

> Given the enormous amount of material addressed by Congress each day, strategic press releases may serve to alert a representative's colleagues about a matter of particular importance as well as to inform the appropriate Federal agencies and the public who can then comment on proper legislative action. We find the limited facilitation of press coverage of congressional action in this case to be protected by the Speech or Debate Clause. [Slip Opinion at 9.]

The Court of Appeals also found the newsletters mailed to Senator Proxmire's constituents to be protected by the Speech or Debate clause, stating that:

> If the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this. Senator Proxmire's newsletter informed his constituents of his particular responsibilities as a member of the Senate Committee on Appropriations. Denying a representative protection for newsletters to his constituents in circumstances such as this would effectively isolate the legislator from the people who elected him. [Slip Opinion at 10.]

Any defamatory remarks which may have been made by Senator Proxmire in television, radio or other interviews, however, were found by the court to be unprotected by the Speech or Debate clause. Absent special circumstances, the court held, public dissemination of information in such manner must be viewed as too far removed from serving legitimate legislative needs, since such methods are not generally necessary to the carrying out of a legislator's informing function and are more often used for political purposes.

Having found the telephone calls to administrative agencies and the interviews to be unprotected by the Speech or Debate clause, the court then considered whether the statements made in those communications were protected by the qualified privilege provided by the First Amendment right to free speech. The opinion of the Court of Appeals did not reach the issue of whether the statements, if unprotected, would constitute defamation under the applicable local law, since it went no further than to agree with the District Court that summary judgment on First Amendment grounds was proper. Dr. Hutchinson was correctly found by the District Court to be a public figure and hence, Judge Castle stated he would have to show that the statements were made with "actual malice," that is,

with actual knowledge that the statements were false or with reckless disregard for their truth or falsity, in order to disallow the qualified protection of the First Amendment. The District Court was held to have correctly found that Dr. Hutchinson had shown neither of these things.

Finally, the court rejected Dr. Hutchinson's contention that, even if the defendants are shielded by the First Amendment from liability for defamation, the District Court erred in not allowing a trial of the other claims made in the complaint, interference with contractual relations, intentional infliction of emotional anguish, and invasion of privacy. The Court of Appeals saw these as no more than the results of defendant's statements, which must be privileged if the statements themselves are privileged, since to hold otherwise would defeat the privilege of the statements.

A petition for rehearing was filed on July 14, 1978, and denied on July 26, 1978.

Dr. Hutchinson filed a petition for writ of *certiorari* in the United States Supreme Court on October 20, 1978. As enumerated in his petition, the issues presented are: (1) whether statements made in press releases and newsletters are protected under the Speech or Debate clause; (2) whether he is a "public figure" within the meaning of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); and (3) whether there is a genuine issue of fact as to the issue of malice.

Senator Proxmire and Mr. Schwartz filed a brief in opposition to Dr. Hutchinson's petition on November 22, 1978. In their brief, they argued that the Court of Appeals had properly decided the Speech or Debate issue and was correct in finding their actions privileged under the First Amendment, in finding Dr. Hutchinson to be a public figure, and in finding an absence of actual malice in the record.

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

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.

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 5, September 15, 1978.

United States* v. *Helstoski

No. 78–349 (U.S. Supreme Court)

and,

Helstoski* v. *Meanor

No. 78–546 (U.S. Supreme Court)

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 obstruction of 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 coconspirator 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 n.3 (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 deci-

sions 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 consitutional 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 leg-

islative 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, knowlege 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 a 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 disposition 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.

On April 13, 1978, the Court of Appeals, in an opinion written by Chief Judge Seitz, denied defendant's petition for writ of *mandamus* and affirmed the judgment of the District Court.

The opinion dealt first with the petition for writ of *mandamus.* In describing the writ of *mandamus,* the court noted:

> The Supreme Court recently has emphasized that, in determining when it is "appropriate" to issue the writ we must keep in mind that "[t]he remedy of *mandamus* is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976).
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> Generally, Federal courts have used the writ "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26 (1943), quoted in *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976). And while the Supreme Court in *Kerr* noted that it had "not limited the use of *mandamus* by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,'" the Court stressed that the writ should issue only in extraordinary situations: "the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.'" *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976), quoting *Will* v. *United States,* 389, U.S. 90, 95 (1967).
>
> In order to further the congressional determination that appellate review should come only after final judgment except in the most exceptional circumstances, the courts also have required that even where circumstances amount to a "judicial usurpation of power," the petitioner must satisfy certain other conditions for issuance of the writ. Thus, the party seeking the writ must have no other adequate means to attain the relief he seeks. And petitioner must also show that his right to issuance of the writ is clear and indisputable. *Id.* at 403.
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> Finally, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." [Slip Opinion at 9–10.]

Mr. Helstoski's argument that the District Court was without jurisdiction to try him, because the indictment charged him with legislative acts and so violated the Speech or Debate clause privilege, was rejected by the court. In refuting the argument, the court held that the indictment was not materially distinguishable from that upheld by the Supreme Court in *United States* v. *Brewster,* 408 U.S. 501 (1972). The Court of Appeals noted that since the allegations of the indictment charged a crime even without reference to any acts protected from inquiry under the Speech or Debate clause, Mr. Helstoski had not made sufficient showing to justify issuance of the writ on Speech or Debate grounds. The opinion stated that, in so holding, no opinion was expressed as to whether, or in what

circumstances, *mandamus* might be appropriate to prevent trial of an indictment which depended upon proof of materials embraced by the Speech or Debate clause.

Also rejected was the assertion by Mr. Helstoski that the District Court's order prohibiting the introduction at trial of any evidence by the Government of past legislative acts was an attempt by that court to obtain jurisdiction over an indictment otherwise invalid under the Speech or Debate clause. By modifying the proof to be presented at trial, Mr. Helstoski charged, the District Court had "constructively amended" the indictment, thereby depriving him of his Fifth Amendment right to be tried only upon the indictment of a grand jury. The Court of Appeals concluded that since a *prima facie* case may be established under 18 U.S.C. § 201(c) without any showing of legislative acts by the defendant, as *Brewster* made clear, the District Court's evidentiary limitation did not modify the proof of an essential element of the offense from that found by the grand jury. Hence, the order in question did not constitute a "constructive amendment" of the indictment changing the basic theory of the offense or the facts considered by the grand jury.

The court specifically declared that it expressed no opinion as to whether, or in what circumstances the "constructive amendment" of an indictment might justify issuance of a writ of *mandamus.*

Mr. Helstoski, in seeking the writ of *mandamus,* had also argued that presentation to the grand jury of evidence of his legislative acts produced an indictment beyond the grand jury's power to return, and beyond the court's jurisdiction to try. The Court of Appeals held that the indictment charges an offense for which Mr. Helstoski may be tried without violation of the Speech or Debate clause, and the indictment is valid on its face. The Appeals Court thus concluded that:

> Even in light of the expansive definition of "jurisdiction" that the Supreme Court has adopted in evaluating *mandamus* petitions, we do not believe that in these circumstances defendant's allegations concerning the grand jury make out "'exceptional circumstances amounting to a judicial "usurpation of power" [so as to] justify the invocation of this extraordinary remedy.'" *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976), quoting *Will* v. *United States,* 389 U.S. 90, 95 (1967). We conclude that the district court has jurisdiction to try the indictment returned against the defendant in this case, and accordingly refuse to grant the writ on grounds of grand jury abuse. [Slip Opinion at 15.]

The court also declared that:

> Any argument that the important policies underlying the [Speech or Debate] Clause require dismissal of an indictment returned by a grand jury that heard evidence in violation of the Clause's principles does not go to the jurisdiction of the district court, but to the proper means that this court should use to effectuate the Clause. As such, we believe it is an argument better left for decision on appeal from a final judgment.

We also note that it is far from "clear and indisputable" that defendant could prevail on his arguments that presentation to the grand jury of evidence in violation of the Speech or Debate Clause requires dismissal of the indictment. The Supreme Court consistently has refused to countenance challenges to the competency of evidence presented to a grand jury, holding that a valid indictment returned by a competent grand jury is enough to call for a trial. *United States* v. *Calandra,* 414 U.S. 338, 342–45 (1974).

> Moreover, in *United States* v. *Johnson,* 383 U.S. 169 (1966), the Court allowed retrial of the conspiracy count even though it was clear from the specification of a legislative act in the overt acts supporting that conspiracy count that the grand jury heard evidence that the Supreme Court held was barred at trial by the Speech or Debate Clause. And on appeal after the retrial, the Court of Appeals rejected Johnson's argument that the indictment was invalid because of the presentation of evidence of legislative acts to the grand jury. *United States* v. *Johnson,* 419 F.2d 56, 58 (4th Cir. 1969), cert. denied 397 U.S. 1010 (1970). See *United States* v. *Blue,* 384 U.S. 251, 255 n.3 (1966). [Slip Opinion at 16–17.]

The Government's arguments that Mr. Helstoski's petition was untimely and that he had waived his Speech or Debate privilege were not addressed by the Court of Appeals since his petition was denied on the grounds noted above.

The opinion turned next to the Government's appeal of the District Court's order of February 23, 1977, prohibiting the introduction by the Government of evidence of the performance of past legislative acts by Mr. Helstoski. The Government asserted that the Court of Appeals had jurisdiction to review the order pursuant to 18 U.S.C. § 3731 which reads in pertinent part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Mr. Helstoski's contention that the order in question did not suppress or exclude any specific items of evidence, and thus was not of the type granting jurisdiction to the Court of Appeals, was rejected, the court concluding:

> In light of the congressional intent that we recognized in *Beck* that § 3731 be liberally construed, as well as in light of the statute's specific command, we believe the district court's order in this case fairly may be characterized as one "suppressing or excluding evidence." The practical

effect of the district court's order is to prevent the Government from introducing evidence of defendant's past legislative acts that it otherwise almost certainly would have introduced at trial. Section 3731 was designed to allow appeals from such orders to insure that prosecutions are not unduly restricted by erroneous pretrial decisions to exclude evidence. [Slip Opinion at 19.]

Turning to the substantive question, the Court of Appeals rejected the Government's argument that it should be permitted to introduce the private bills themselves and correspondence and conversations referring to Mr. Helstoski's legislative acts in order to prove Mr. Helstoski's purpose in accepting the payments in question as contrary to the Supreme Court's holding in *Brewster, supra,* and *United States* v. *Johnson,* 383 U.S. 169 (1966). The opinion stated that legislative acts may not be shown in evidence for any purpose in this prosecution and that the Government may not circumvent this prohibition by introducing correspondence and statements which, while not themselves legislative acts, contain references to past legislative acts on the part of Mr. Helstoski. The Court of Appeals declared that to allow a showing of legislative acts by such secondary evidence could render the absolute prohibition of *Brewster* meaningless and would drastically reduce the effectiveness of the Speech or Debate clause and discourage the dissemination of information about legislative activities to the public.

The Court of Appeals also found that Mr. Helstoski had not waived his Speech or Debate privilege by testifying before the grand jury about legislative acts. While noting that the question of whether an individual legislator may waive his Speech or Debate privilege is an open one, the court found it unnecessary to decide that question in this case. Such a decision was found to be unnecessary since the Court of Appeals agreed with the District Court's holding that the purpose of the Speech or Debate clause as a protection for the legislature against encroachment by the other two branches precludes the finding of a waiver in the context of a criminal prosecution where the legislator has not expressly forfeited his privilege for the purposes for which the Government seeks to use the evidence of his legislative acts. On the facts of this case, the Court of Appeals found no such waiver.

A motion for rehearing *en banc* filed by the Government on June 14, 1978, on the issues raised in its appeal was denied on June 30, 1978.

The Government filed a petition for a writ of *certiorari* (No. 78–349) in the United States Supreme Court on August 29, 1978, seeking review of two questions. First, whether the Speech or Debate clause bars the introduction by the Government of any evidence which, although not a legislative act, refers to the defendant's past performance of a legislative act. Second, whether Mr. Helstoski's voluntary testimony and production of documents before the grand jury constituted a waiver of that privilege in regard to the use of the testimony and documents at trial.

On September 29, 1978, Mr. Helstoski also filed a petition for writ of *certiorari* (No. 78–546) in the Supreme Court. His petition

sought review of the judgment of the Court of Appeals insofar as it denied a petition for a writ of *mandamus.* In the petition, Mr. Helstoski noted his opposition to the petition filed by the Government and suggested to the Court the possibility of consolidation of two petitions. Mr. Helstoski's petition presents the following questions for review:

> 1. Does the United States District Court have jurisdiction to try petitioner on an indictment which on its face charges that as a Member of the Congress of the United States he performed certain specific and identified legislative acts, to wit, the introduction of bills in Congress, with corrupt motivation? Under the Speech or Debate Clause, does not Congress have exclusive jurisdiction to inquire into its Members' performance of legislative acts?
>
> 2. May an indictment of a Congressman described above, procured by calling into question before a grand jury the legislative acts of that Congressman, proceed to trial?
>
> 3. May an indictment offensive to the Speech or Debate Clause on its face and in the means by which it was procured, nevertheless be prosecuted by forbidding proof at trial of the legislative acts alleged in the indictment? Would not such a trial procedure amount to both an impermissible manipulation of the Speech or Debate Clause and a constructive amendment of the indictment, in violation of the Fifth Amendment right to be tried only upon the indictment voted by a grand jury?

(Petition for Writ of *Certiorari* at 2–3, *Helstoski* v. *Meanor,* No. 78–546.)

The Government filed a brief in opposition to Mr. Helstoski's petition on November 21, 1978. In its brief, the Government listed the following questions as being presented for review:

> 1. Whether an indictment charging a member of Congress with bribery, in violation of 18 U.S.C. 201(c), is invalid because it contains references to legislative acts that are not themselves punishable due to the Speech or Debate Clause.
>
> 2. Whether consideration by the grand jury of evidence showing legislative acts deprives the district court of jurisdiction to try an indictment alleging a violation of 18 U.S.C. 201(c).
>
> 3. Whether the district court's restriction of the government's proof at trial to prevent references to legislative acts constitutes a constructive amendment of the indictment.

(Brief for the United States in Opposition at 1–2, *Helstoski* v. *Meanor,* No. 78–546.)

On November 21, 1978, Mr. Helstoski moved in the U.S. District Court for the District of New Jersey to dismiss counts VII and VIII of the indictment for failure to charge an offense and as the product of the presentation to the grand jury of materials and facts proscribed by the Speech or Debate clause.

The petitions for writ of *certiorari* were granted and consolidated on December 11, 1978.

Status.—**The cases are pending before the U.S. Supreme Court.**

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.

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 5, September 15, 1978.

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. He 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 District 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.

Rusack* v. *Harsha (Newly Reported Case)

No. 77–1137 (M.D.Pa.)

Brief.—On December 16, 1977, plaintiff, Samuel Rusack, a United States Navy civilian employee working as a Supervisory Contract Negotiator at the United States Navy Ships Parts Control Center (hereinafter "SPCC") filed a defamation action in the U.S. District Court for the Middle District of Pennsylvania. The action named as defendants Representative William H. Harsha, Stanley L. Bishop, P. J. Kanistros, and Poli-Com, Inc. All of the defendants filed motions to dismiss. Representative Harsha filed a motion to dismiss or alternatively for summary judgment.

On December 14, 1978, in a memorandum and order issued by the District Court granted Congressman Harsha's motion to dismiss and rejected those of the other defendants.

The facts are reported in the court's memorandum and order, which states in pertinent parts:

> According to plaintiff's affidavit, he is a Supervisory Contract Negotiator * * * at the SPCC. His authority is derived from the Armed Forces Procurement Regulations, * * *. He is one of eleven individuals who have buying and contracting officer authority at the SPCC. His duties include solicitations and requests for proposals. Furthermore, as a contracting officer at a purchasing office such as the SPCC * * * he is authorized to enter into contracts in the name of and on behalf of the United States Government * * *.
>
> Defendant Harsha is a Representative in the United States House of Representatives from the Sixth Congressional District of Ohio. He is the ranking minority member * * * of the House Public Works Committee. He is involved with and has a particular concern in regard to, the spending policies of the United States Government. * * * In July of 1977, Mr. Harsha was contacted by Mr. Bishop involving "military procurement irregularities and taxpayer waste." * * * Mr. Bishop presented Mr. Harsha with material which, *inter alia,* dealt with plaintiff Rusack and his involvement with a particular contract and award. The material was reviewed by a member of Mr. Harsha's staff who then forwarded a prepared speech to the Congressman, who reviewed it and approved it for delivery and publication in the *Congressional Record* of August 3, 1977. [Slip Opinion at 12–13; this report at 198–199. (Footnotes omitted.)]

It was this August 3d speech which Mr. Rusack alleged contained defamatory material, specifically that he was charged therein with dishonest and illegal conduct, fraudulent and unethical practices and collusion and conspiracy to defraud.

Following the speech Congressman Harsha wrote a letter to Admiral T. J. Allhouse, commanding officer at the SPCC seeking

material concerning the award which was part of the basis for the August 3d speech. The Admiral sent a substantial volume of material to Congressman Harsha. This material was made available to Mr. Bishop by Congressman Harsha for his determination of whether it was responsive to the Congressman's request. Mr. Bishop determined that the material was not fully responsive and on August 31, 1977, Congressman Harsha sent a second letter to Admiral Allhouse. In this letter Congressman Harsha sought additional material and made several statements about Mr. Rusack which Mr. Rusack alleged were defamatory. Congressman Harsha claimed, and Mr. Rusack did not contest that neither he nor his staff distributed the letter to the general public.

The SPCC, responding to Congressman Harsha's letter sent additional information to the Congressman. The material was again analyzed with Mr. Bishop's help.

After Mr. Bishop had analyzed the material and presented his analysis to a member of Congressman Harsha's staff, that staff member edited it and submitted it to the Congressman. The Congressman made some final editorial changes and presented it to the Clerk of the House for publication in the *Congressional Record.* Mr. Rusack charges that the material inserted in the *Record* contained defamatory material.

Mr. Rusack further alleged that after placing the two speeches in the *Record,* Congressman Harsha maliciously distributed and caused to be republished the text of the speeches. Congressman Harsha responded that he sent copies of his correspondence with the SPCC, and their responses along with copies of his speeches from the *Record* to the U.S. Attorney for the District of Columbia, the Attorney General, and the Office of the Secretary of Defense. Other than that transmittal and the ordinary circulation of the *Congressional Record,* Congressman Harsha denied any republication or distribution of the two speeches.

The court, in its opinion of December 14, 1978, noted three categories into which the activities complained of by Mr. Rusack could be divided: (1) the insertion of the two speeches into the *Congressional Record* and the general distribution of those *Congressional Records;* (2) the August 31, 1977 letter to Admiral Allhouse; and (3) the forwarding by defendant Harsha of the copies of the two *Congressional Records* and copies of the correspondence between himself and the SPCC to the United States Attorney General, the United States Attorney and the District of Columbia, and the Office of the Secretary of Defense.

The court further noted the grounds on which Congressman Harsha sought dismissal:

> Summary judgment was sought on the grounds: (1) that all the activity is absolutely privileged under the Speech or Debate clause; (2) that reports of alleged criminal behavior to appropriate executive officials is constitutionally privileged; and (3) that criticism of plaintiff Rusack is privileged under the First Amendment because the plaintiff is a public official and the record establishes that there is no "*New York Times* malice." [*Rusack* v. *Harsha* (77-1127), Slip Opinion at 16, this report at 203.]

Turning first to the assertion that Congressman Harsha's actions were protected by Speech or Debate clause immunity, the court noted that Mr. Rusack conceded that congressman Harsha's speeches and their publication in the *Congressional Record* were activities which were absolutely privileged and protected by the clause. The letter of August 31, 1977 to Admiral Allhouse, the court concluded, was also protected by the Speech or Debate clause. The court declared:

> The August 31, 1977 letter to Admiral Allhouse is also behavior which is encompassed by the Clause. It has long been held that investigation by a Congressman regarding issues over which legislation may be had is legitimate legislative activity and, therefore, protected by the Speech or Debate Clause. *See Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 504 (1975), *Doe* v. *McMillan,* 412 U.S. 306 (1973); *Watkins* v. *United States,* 354 U.S. 178 (1957); *McGram* v. *Daughterty,* 273 U.S. 135 (1927), *McSurely* v. *McClellan,* 553 F.2d 1277, 1286–8 (D.C. Cir. *En Banc* 1976); writ of cert. dismissed as improvidently granted 46 U.S.L.W. 4878 (June 26, 1978). The power over appropriations and expenditures is at the heart of the business of Congress. Article 1, Section 8, Clause 13 of the United States Constitution specifically gives Congress power over the maintenance of the Navy. Knowing how the Navy spends the money allotted to it by Congress is essential if Congress is going to be able to exercise its power with any competency. Defendant Harsha's letter to Admiral Allhouse was an attempt to get needed information, and as such, it must be afforded the protection of the Clause. [Slip Opinion at 18–19, this report at 204–205. (Footnotes omitted.)]

Further, finding that the forwarding of the copy of the letter to Admiral Allhouse and the two *Congressional Records* to the United States Attorney for the District of Columbia, the United States Attorney General, and the Office of the Secretary of Defense is protected under other constitutional provisions, the court decided not to reach the question of whether it is encompassed by the Speech or Debate clause.

The court declared that where the complaint alleged that plaintiff was defamed by defendant Harsha in regard to the performance of his (plaintiff's) official duty, specifically alleging that Mr. Harsha accused plaintiff of violating 18 U.S.C. §1001, the whole thrust of the complaint and the brief in opposition to the motion was that defendant Harsha had accused plaintiff of criminal acts. To this the court concluded:

> The right to inform federal officials of possible violations of federal law continues to be constitutionally protected. *See United States* v. *Guest,* 383 U.S. 745, 771, 779 (1966), Harlan, J., concurring in part and dissenting in part; Brennan, J. concurring in part and dissenting in part; *Williams* v. *Allen,* 439 F.2d 1398 (5th Cir. 1971). I believe that the letter to Admiral Allhouse and the forwarding of the materials to the United States Attorney for the Dis-

> trict of Columbia, the United States Attorney General, and the Office of the Secretary of Defense are protected by this constitutional right to inform, afford defendant immunity, and, hence, cannot form the basis of a defamation action. [Slip Opinion at 21, this report at 207. (Footnotes omitted.)]

Finally the court addressed the question of whether Congressman Harsha's statements and letters were protected by the First Amendment. The court first found that Mr. Rusack was a public official. The court declared:

> [i]t is * * * evident that he is intimately involved in the expenditures of public funds, a matter of great importance so that there is an interest in his qualifications and performance beyond the interest which might be associated with any governmental employee. He is, therefore, a public official and since the allegedly defamatory remarks dealt with his performance as such an official the *New York Times* malice standard must be applied. [Slip Opinion at 23–24, this report at 209.]

Reviewing the facts, the court concluded that, as a matter of law, there could be no finding of malice against the Congressman.

In conclusion, the court declared:

> In sum, legislative immunity protects defendant Harsha from suit based on the two speeches, their insertion in the *Congressional Record,* and the letter to Admiral Allhouse. The right to inform creates a constitutional immunity from suit for the letter to Admiral Allhouse and the forwarding of the material to the United States Attorney General, the United States Attorney for the District of Columbia, and the Office of the Secretary of Defense, and the Constitutional privilege of the First Amendment encompasses all the behavior upon which this action is based because, as a matter of law, plaintiff is a public official and there can be no showing of *New York Times* malice based on the facts in the record. [Slip Opinion at 27, this report at 212–213.]

Status.—The case is pending in the U.S. District Court for the Middle District of Pennsylvania.

The opinion of the District Court is printed in the "Decisions" section of this report at 189.

III. Powers of Congressional Committees

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

Civil Action No. 76-1372 (D.D.C.)

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 vertification, 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 provided by 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, 1976, the court issued its decision. Rejecting the Department's approach, the court said:

> [T]o take this avenue would be to place form over substance. The effect of any injunction entered by this court enjoining the release of materials by A.T. & T. to the Subcommittee would have the same effect as if this court were to quash the Subcommittee 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:

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

be an unacceptable risk. Such a determination is entitled to great weight.

The court is not implying that the Members of the Subcommittee, or of the House of Representatives, will act negligently or in bad faith if they have access to these documents. But it does appear to the court that if a final determination as to the need to maintain the secrecy of this material, or as to what constitutes an acceptable risk of disclosure, must be made, it should be made by the constituent branch of government to which the primary role in these areas is entrusted. [419 F. Supp. at 460–61.]

Defendant-intervenors filed an appeal on August 2, 1976, with the Court of Appeals for the District of Columbia Circuit, 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 wiretapping 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 to the District Court without decision on the merits. 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 abstention 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 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 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 suits against them, the clause cannot be invoked to immunize the congressional subpoena from judicial scrutiny. [Slip Opinion at 18.]

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.]

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. [Slip Opinion at 22.]

The executive would be permitted to employ a substitution procedure, selecting at random another memorandum to be substituted, 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. The procedure could be implemented,

> [B]ut 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.]

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 invoking 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.]

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.]

On December 12, 1978, a joint motion to dismiss without prejudice, which indicated that the matter had been amicably resolved, was filed in the District Court.

Status.—**The case was dismissed without prejudice on December 21, 1978. No further action has been taken.**

The full text of the July 30, 1976 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.

The full text of the December 30, 1976 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 May 16, 1977 memorandum of the District Court to 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 full text of the October 20, 1977 and December 12, 1977 opinions of the Court of Appeals are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 3, December 31, 1977.

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

No. 78–512 (U.S. Supreme Court)

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. § 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 resolution of 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, and 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 the 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 advisers 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 consideration 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.
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> * * * * * * *

The Dingell hearings constituted an impermissible congressional interference with the administrative process. This situtation 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 demonstrable 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 in place of Thomas S. Kleppe as a party to these appeals.

The case was argued on March 24, 1977.

The U.S. Court of Appeals for the District of Columbia Circuit issued an opinion on April 28, 1978, affirming in part and reversing in part the ruling of the District Court. In the opinion, filed for the court by Judge Robb, the Circuit Court agreed with the District Court that the appellate procedure established for the determination of appeals made under the Claims Settlement Act did not meet the requirements of due process. The Circuit Court concluded that the original procedure established by the Secretary should have permitted the parties to take exceptions to the recommended decisions of the administrative law judge and to submit briefs to the Board for its consideration. Rather than directing the reinstatement of the Bureau of Indian Affairs decisions, as the District Court had done, the Circuit Court remanded the cases to the District Court for remand to the Secretary for a redetermination of the appeals.

The decision of the District Court was reversed by the Court of Appeals in regard to the issues of standing and Congressional interference. The Court of Appeals held that the State of Alaska and Federal agencies concerned with the possible impact of determinations made by the Bureau of Indian Affairs Area Office under the Claims Settlement Act had standing under the Interior Department's regulations.

The Circuit Court's opinion rejected the holding of the District Court that the hearings "constituted an impermissible Congressional interference with the administrative process" the lingering effects of which made the usual remedy of remand to the Secretary for redetermination impossible. It is unclear from the opinion whether the Court of Appeals concluded that there was no "interference" with the administrative process, or whether on this point the court only concluded that what "interference" there was was not severe enough to preclude a redetermination by the Secretary. The Appeals Court ruled that the decision in *Pillsbury (supra)* was not controlling since in this action none of the individuals called to testify before the Subcommittee was a decisionmaker as was the case in *Pillsbury.* The only possible exception, said the court, was

Mr. Brown, who briefed the Secretary on the administrative appeals before the Secretary made his determinations. About Mr. Brown's appearance, the court said:

> [E]ven if we assume that the *Pillsbury* doctrine would reach advisors to the decisionmaker, Mr. Brown was not asked to prejudge any of the claims by characterizing their validity. See *Pillsbury Co.* v. *FTC, supra,* at 964. The worst cast that can be put upon the hearings is that Brown was present when the subcommittee expressed its belief that certain villages had made fraudulent claims and that the Bureau of Indian Affairs decisions were in error. This not enough. [Slip Opinion at 19.]

The Court of Appeals also dealt with the question of whether a letter sent by Congressman Dingell to the Secretary two days before his determination of the ineligibility of eight of the villages constituted an improper interference in the administrative process. Terming the letter a "more serious matter", the court stated:

> A more serious matter is a letter that Congressman Dingell sent to the Secretary two days before he determined that eight of these villages were ineligible. The letter requested the Secretary to postpone his decisions on the cases pending a review and opinion by the Comptroller General, because it "appears from the testimony [at the hearings] that village eligibility and Native enrollment requirements of ANSCA [Alaska Native Claims Settlement Act] have been misinterpreted in the regulations and that certain villages should not have been certified as eligible for land selections under ANSCA." The letter did not specify any particular villages, but we think it compromised the appearance of the Secretary's impartiality.[9] *D.C. Federation of Civic Assn's* v. *Volpe,* 148 U.S. App. D.C. 207, 222, 459 F.2d 1231, 1246, cert. denied, 405 U.S. 1030 (1972); see *Pillsbury Co.* v. *FTC, supra,* at 964. Nevertheless, a remand to the Secretary, rather than a reinstatement of the BIA decisions, is the proper remedy in this case. Assuming the worst—that the letter contributed to the Secretary's decision in these cases—we cannot say that 3½ years later, a new Secretary in a new administration is thereby rendered incapable of giving these cases a fair and dispassionate treatment.
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> [9] We of course intimate no view as to the validity of the Congressman's criticism.

[Slip Opinion at 19–20.]

On April 28, 1978, the cases were remanded to the District Court for remand to the Secretary for redetermination of the appeals.

The appeals were remanded by the District Court to the Secretary on July 31, 1978.

On September 25, 1978, the villages filed a petition for writ of *certiorari* in the U.S. Supreme Court.

In their petition, the villages noted several questions as being presented, including, *inter alia,* whether a District Court, having

found that administrative proceedings have (a) violated plaintiffs' rights to due process and (b) been tainted by Congressional intrusion into the administrative process, exceeds the bounds of its discretion in fashioning a remedy by reinstating the last untainted determination where Congress has required that the matter before the agency be resolved rapidly and with certainty.

Petitioners sought review of the appellate court's decision with respect to (1) standing, (2) the remedy fashioned by the District Court, (3) the authority of the Secretary to redetermine residence for purposes of village eligibility, and (4) the propriety of the appellate court's remand order in the case of Salamatof Village. Among the reasons to grant *certiorari* put forth by petitioners is the assertion that the court has the responsibility to mark the appropriate limits of the investigatory power of Congressional committees and to assure the proper functioning of the Federal judiciary.

A brief in opposition to the petition for writ of *certiorari* was filed for the Secretary of the Interior on November 16, 1978. In the brief it was argued that the decision of the Court of Appeals was correct and was not in conflict with any decision of the Supreme Court, and that the issues presented were not of recurring importance.

Status.—**The petition for writ of *certiorari* was denied on December 11, 1978. No further action has been taken.**

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.

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 4, May 15, 1978.

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 pursu-

ant 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 states 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 to 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.

U.S. District Judge John H. Pratt issued an order on May 7, 1976, 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 further 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 Exxon and Kerr-McGee 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* until either he disposed of Union Carbide's motion for a preliminary injunction or 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 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 of *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, a 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.

The consolidated appeals were argued on February 13, 1978.

The Court of Appeals issued its opinion on October 19, 1978, affirming the judgment of the District Court in its entirety. In the opinion for the court filed by Circuit Judge MacKinnon, the question at issue was posed as whether any protective measures should be imposed on the FTC with respect to the divulging to Congress of "trade secrets" obtained by the FTC under the compulsion of a subpoena.

The opinion noted that some of the information that the appellants sought to protect, specifically data concerning Union Carbide's coal holdings, had already been disclosed, and that the appeal was moot as to this material. As to the issues which were not moot, the status of as yet undivulged material, the request for notice prior to disclosure, and the request for steps to be required to ensure that Congress keep such trade secret information confidential, Circuit Judge MacKinnon noted that most represented an attempt to have the court virtually engage in rulemaking for the FTC, which would be inappropriate and potentially overreaching.

Turning to appellants' prayer for a permanent injunction requiring 10 days advance notice to affected parties before the FTC could disclose confidential data pursuant to Congressional request, the Court of Appeals determined first that the material which the FTC proposed to divulge was fully within the scope of the ligitimate investigatory powers of Congress. In rejecting the request for a permanent injunction, Circuit Judge MacKinnon stated:

> **For this court on a continuing basis to mandate an enforced delay on the legitimate investigations of Congress whenever these inquiries touched on trade secrets could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality. While normally reasonable advance notice can be required, in exigent circumstances Congress has full authority to issue forthwith subpoenas and formally request immediate disclosure. To impose a mandatory notice period would skirt dangerously close to being at least the temporary "equivalent to an order quashing [the official request or subpoena] which is generally an impermissible frustration of the congressional power to investigate * * * and hence [would raise] serious constitutional issues," *United States* v. *American Tel. & Tel. Co.*, 551 F.2d 384, 388 (D.C. Cir. 1976), *citing, Eastland* v.

> *United States Servicemen's Fund,* 421 U.S. 491, 506 (1975). It would also abrogate the broad discretion of the Commission, *e.g., FTC* v. *Lonning,* 539 F.2d 202, 211 (D.C. Cir. 1976)—through which the FTC can make use of its considerable expertise to balance the private and public interests involved—to formulate its own reasonable confidentiality protections, *see FTC* v. *Anderson,* 442 F. Supp. 1118 (D.D.C. 1977). [Slip Opinion at 9; this report at 223. (Footnote omitted.)]

To impose any mandatory advance notice would, the Court of Appeals concluded, run directly contrary to the spirit of the U.S. Supreme Court's decision in *Eastland* v. *United States Servicemen's Fund, supra,* which emphasized the necessity for courts to refrain from interfering with or delaying the investigatory functions of Congress.

Furthermore, the court found no indication that disclosure to the subcommittee would in any way harm the appellants, since such disclosure does not constitute public disclosure. Reaffirming its rationale in *Ashland Oil Inc.* v. *FTC,* 548 F.2d 977 (D.C. Cir. 1976), the opinion stated that absent a showing that it is evident that Congress intends to make trade secrets divulged to it by the FTC publicly available, the FTC may, upon proper demand, release such secrets to the Congress without the necessity of prior notice to the parties involved, unless such information was obtained upon an agreement to give prior notice.

The Court of Appeals also rejected appellant's contention that the FTC should be required to obtain assurances that confidential information will not be publicly disclosed unless a majority of the members of the committee or subcommittee vote to do so. The opinion stated that for the court to establish such a requirement on the record in this case would clearly involve an unacceptable judicial intrusion into the internal operations of Congress. In regard to the possibility of leaks, the Court of Appeals stated:

> If, in fact, a Member or congressional staff member improperly "leaks" confidential data, the injured parties have a recourse against that individual directly, and the possibility of such action will serve to deter unjustified disclosure of trade secrets. Beyond provision for such suits, and in the absence of a concrete violation of law, rule or regulation, the courts are unable to aid the appellants in their request to oversee the activities of the legislature, allegations of the prevalence of "leaks" from some committees notwithstanding. The FTC should, and does, alert Congress when the information made available to it is confidential. In fact, some such cautionary statement could be impliedly required from the prohibition on the public disclosure of trade secrets imposed by 15 U.S.C. § 46(f). If the Commission failed to alert Congress to the fact that information being supplied to it was by statute prohibited from "public" disclosure the Commission would violate a duty implicitly imposed upon it by the statute. To impose further protective procedures upon Congress, without some immediate threat of illegal dis-

> **closure, would impermissibly interfere with the legislative branch—an action we refuse to take. [Slip Opinion at 15; this report at 229. (Footnote omitted.)]**

The Court of Appeals also declined to restrict the right of the FTC to discuss with Members of Congress or their staff, prior to Congressional demand, the general nature of available data and thus inform Congress about relevant information of which it may be unaware. The opinion noted that barring some prohibition, governmental agencies may interchange information, and that most problems in this connection will be obviated if the Commission merely notifies Congress whenever confidential trade secrets are requested or involved in potential delivery.

The opinion emphasized that the denial of appellants' requested injunctive and declaratory relief designed to limit the manner in which the FTC may respond to a subpoena or formal request, did not address the question of when a formal request or subpoena has been properly issued. The Court of Appeals stated that it is important that disclosure of information can only be compelled by authority of Congress or its committees or subcommittees, not solely by individual Members; and only for investigation and Congressional activities. In regard to ordinary publicly available information, there is no need to require the FTC to determine whether or not a request for such information is in fact a proper formal request or subpoena, which satisfies the requirement of the controlling Congressional rule. Trade secrets, however, may not be divulged except upon verified legally authorized requests, the opinion noted. While noting that it did not clearly appear that the request sent to the FTC by Senator Hart was a formal request authorized by the subcommittee, the Court of Appeals assumed that the FTC had verified that the request had been properly authorized.

The opinion also noted that in appealing a refusal to grant equitable relief, appellants bore heavy a burden and that to grant such relief the Court of Appeals would be required to interfere in the operation of Congress and also to depart from traditional doctrine concerning the availability of equitable relief.

On November 2, 1978, appellants filed a petition for rehearing and a suggestion for rehearing *en banc,* which were both denied on December 6, 1978.

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

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*).

The opinion of the Court of Appeals is printed in the "Decisions" section of this report at 215.

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 disclo-

sure 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.]

United States* v. *Berrellez

Cr. No. 78–00120–01 (D.D.C.)

Brief.—On March 20, 1978, a six-count information was filed in U.S. District Court for the District of Columbia against Robert Berrellez. The first count charges the defendant with a violation of 18 U.S.C. § 371 (Conspiracy). Specifically, Mr. Berrellez is charged with conspiring with Harold V. Hendrix, who is not charged in the information, and other persons from March 1972 to March 21, 1973, to: (1) obstruct a proceeding of the Subcommittee on Multinational Corporations of the Committee on Foreign Relations of the U.S. Senate (hereinafter "Subcommittee"), (2) commit perjury, and (3) defraud the United States of and concerning its right to have the business of the Subcommittee conducted honestly and impartially. The second count charges the defendant with violating 18 U.S.C. § 1505 (Obstruction of Proceedings) by giving false and blatantly evasive testimony before the Subcommittee concerning communications and relationships between employees, officers, and directors of the International Telephone and Telegraph Corporation (hereinafter "ITT") and Central Intelligence Agency (hereinafter "CIA") officials and communications and relationships between employees, officers and directors of ITT and certain Chileans. The third and fourth counts charge defendant with violating 18 U.S.C. § 1621 by committing perjury before the Subcommittee. The fifth count charges the defendant with perjury before a panel of arbitrators of the American Arbitration Association (hereinafter "Panel"). Mr. Berrellez had testified in June 1974, before the Panel, which was seeking to ascertain, in the course of conducting an arbitration proceeding, what activities of ITT were undertaken in Chile and elsewhere with regard to the 1970 Chilean Presidential election. On the basis of the same testimony upon which count five is based, the sixth count charges Mr. Berrellez with violating 18 U.S.C. § 1001 by knowingly and willfully making false and fictitious statements and representations as to material facts in connection with a matter within the jurisdiction of an agency of the United States, specifically, the Overseas Private Investment Corporation.

Defendant pleaded not guilty on March 29, 1978.

On April 27, 1978, defendant moved to dismiss the information.

Mr. Berrellez' motion to dismiss was argued on August 18, 1978, and taken under advisement. On August 21, 1978, the motion to dismiss was denied.

On September 29, 1978, Mr. Berellez moved to dismiss counts 5 and 6 of the information for failure to state an offense against the United States. The motions to dismiss counts 5 and 6 were denied on October 18, 1978.

On October 23, 1978, the oral motion of the Government to strike various alleged overt acts from the information was heard and granted.

At the status call on October 30, 1978, the trial was continued until a ruling from the Court of Appeals in regard to *mandamus.*

On November 8, 1978, the Government moved in the District Court to amend pages 4 through 7 of the information to reflect the changes made by the oral motion of October 23, 1978.

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

United States* v. *Gerrity

Cr. No. 78-00121-01 (D.D.C.)

Brief.—On March 20, 1978, a six-count information was filed in U.S. District Court for the District of Columbia against Edward J. Gerrity, Jr. The first count charges the defendant with violating 18 U.S.C. § 1505 (Obstruction of Proceedings) by giving false and blatantly evasive testimony before the Subcommittee on Multinational Corporations of the Committee on Foreign Relations of the United States Senate (hereinafter "Subcommittee") in March and April of 1973. The testimony was given in the course of an investigation being conducted by the Subcommittee into actions by or on behalf of the International Telephone and Telegraph Corporation (hereinafter "ITT") in relation to the course of the Presidential election in Chile in 1970. The second and third counts, also arising from defendant's testimony before the Subcommittee, charge him with violating 18 U.S.C. § 1621 (Perjury). The fourth count charges Mr. Gerrity with a violation of 18 U.S.C. § 1622 by suborning perjury by Harold V. Hendrix in testimony before the Subcommittee. The fifth count charges the defendant with perjury before a panel of arbitrators of the American Arbitration Association (hereinafter "Panel"). Mr. Gerrity had testified in June 1974, before the Panel, which was seeking to ascertain what activities of ITT were undertaken in Chile and elsewhere with regard to the 1970 Chilean Presidential election. On the basis of the same testimony upon which count five is based, the sixth count charges Mr. Gerrity with violating 18 U.S.C. § 1001 by knowingly and willfully making false and fictitious statements and representations as to material facts in connection with a matter within the jurisdiction of an agency of the United States, specifically, the Overseas Private Investment Corporation.

Defendant pleaded not guilty on April 28, 1978.

On May 19, 1978, the Government moved for a protective order and filed its response to Mr. Gerrity's motion for a bill of particulars.

Defendant moved on June 2, 1978 to dismiss Count 1 for failure to state a violation of Title 18 U.S.C. § 1505 and on grounds of vagueness; to dismiss Counts 2 and 5 on grounds of duplicity; to dismiss Count 4 on grounds of improper venue; to dismiss Counts 2, 3, and 4 on grounds of incompetency of the tribunal and immateriality of the inquiry; to dismiss Counts 5 and 6 for failure to state an offense against the United States and for failure of a material matter; and to dismiss Count 6 as inappropriate in this information, or in the alternative, to force the Government to elect between Counts 5 and 6. Mr. Gerrity also moved on June 2, 1978 to dismiss the information on the ground that his waiver of the constitutionally-required indictment was ineffective.

On August 18, 1978, at a hearing on Mr. Gerrity's motions to dismiss, the Government stated that it would not prosecute Counts 4, 5 and 6 of the information. Therefore, the motions pertaining to

those counts were not argued. The motion to dismiss the entire information because of ineffective waiver of indictment was submitted on pleadings. The other motions attacking the information were argued and taken under advisement. The motions were denied on August 21, 1978.

On September 27, 1978, the Government moved to dismiss Counts 4, 5 and 6 of the information. The counts were dismissed on October 5, 1978.

On November 8, 1978, the trial which had been set for December 4, 1978, was continued to a day not less than 45 days after a verdict or other resolution in *United States* v. *Berrellez* (Cr. 78–120).

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

Holy Spirit Association for the Unification of World Christianity et al.* v. *Fraser et al.

Civil Action No. 78–1153 (D.D.C.)

Brief.—This suit was filed in the U.S. District Court for the District of Columbia on June 22, 1978. Plaintiffs are the Holy Spirit Association for the Unification of World Christianity, (hereinafter "the Unification Church") and Bo Hi Pak, a South Korean citizen. Named as defendants in the suit are Donald M. Fraser, a U.S. Representative from Minnesota and chairman of the Subcommittee on International Organizations of the House Committee on International Relations (hereinafter "Subcommittee") and two staff members of that Subcommittee, Edwin H. Grogert and Martin J. Lewin.

The complaint contains two counts. The first count alleges a conspiracy by defendants to deprive the plaintiffs and the members of the Unification Church of their constitutional rights. Specifically, it is claimed that defendants and other unnamed individuals have conspired to deprive plaintiffs and "all persons associated with the Unification Church and Bo Hi Pak" of their rights of free speech, freedom of association, freedom of expression and freedom of religion. Plaintiffs allege that Congressman Fraser distributed defamatory materials regarding plaintiff, attempted to "deceive and trick" Bo Hi Pak during Pak's testimony before the Subcommittee, caused the payment of fees to witnesses who testified before the Subcommittee, and leaked, or permitted leaking of testimony given by Bo Hi Pak in Executive Session. The plaintiffs claim that these activities, in addition to violating their rights of freedom of religious exercise and association, damaged their reputation and resulted in financial damage to them due to curtailment of their activities and a reduction in financial contributions to the Unification Church. As relief under the first count, plaintiffs seek an injunction barring defendants from violating or conspiring to violate plaintiffs' rights under the First, Fourth, or Fifth Amendments and $5 million in compensatory damages and $10 million in punitive damages.

The second count asserts that defendants have deprived plaintiffs of their constitutional rights. It is also specifically alleged, in addition to the acts alleged in count one, that defendants Grogert and

Lewin, representing themselves as architects, gained entry to a Washington, D.C., Unification Church building.

Plaintiffs claim that as a result of this action by Grogert and Lewin, their rights to the free expression and exercise of their religion were abridged, their right of free association was impaired, they were subject to a warrantless search, and they were deprived of the due process of the law. Plaintiffs contend that the activities complained of in count two also resulted in damage to their reputations and financial harm. Their demands include an injunction, $5 million in compensatory damages and $10 million in punitive damages under count two, the same relief demanded under count one.

On October 10, 1978, defendants moved to dismiss the complaint or, in the alternative, for summary judgment.

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

In re Beef Industry Antitrust Litigation

No. 78-3344 (Fifth Cir.)

Brief.—In the course of conducting investigations of marketing restrictions and unfair competition in the beef industry, the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Small Business Administration and Small Business Investment Companies of the House Committee on Small Business, issued subpoenas *duces tecum* to some of the plaintiffs in *In re: Beef Industry Antitrust Litigation.* At least some of the documents sought by the committees were subject to a protective order previously issued by the court on November 23, 1976.

Those parties who were recipients of the committees' subpoenas asked the court to either clarify or modify its order to allow compliance with the committees' subpoenas. A hearing was held on the motion on March 22, 1978. On April 4, 1978, the motion was denied.

On May 30, 1978, the Subcommittees and the Clerk of the House filed with the District Court a "Motion For Leave to File". In the motion, the Subcommittees and the Clerk supported plaintiffs' earlier motion for leave to comply with the Subcommittees' subpoenas.

On July 27, 1978 the District Court held a hearing on the motion filed by the Subcommittees and the Clerk of the House.

On August 17, 1978, United States District Judge Taylor, in a memorandum opinion, denied the motion of the Congressional movants for clarification or modification of the protective order. Judge Taylor stated that the sole question was whether Congress can subpoena documents in the hands of a litigant who would not otherwise have them except for the discovery procedure of the Federal courts when there has been no showing of extraordinary circumstances. The memorandum opinion noted that the persons subpoenaed would not have had the documents but for the discovery rules of the Federal courts and that the Congressional movants had not based their motion on any extraordinary need for the documents to be subpoenaed from those particular individuals. Judge Taylor held that Congress, by subpoenaing the documents was interfering with the processes of a Federal court in an individual case. Furthermore, the memorandum opinion stated, had a

protective order not been in force covering the documents, a motion for one would have been entertained by the court.

On September 11, 1978, the Congressional movants filed a notice of appeal with the United States Court of Appeals for the Fifth Circuit of the denial of their motion for clarification or modification of the protective order.

On November 27, 1978, the Congressional-appellants filed a motion that their appeal be separated from other appeals growing out of this multidistrict litigation, with which it was docketed; for expedited oral argument; and for an early decision as soon as practicable after oral argument.

On December 4, 1978, appellee, Iowa Beef Processors, Inc., filed a memorandum in opposition to appellants' motion to expedite, on the grounds that appellants have not acted expeditiously themselves and that appellants have made no showing to justify expedited treatment.

On December 5, 1978, appellee, The National Provisioner, Inc., filed a motion to dismiss the appeal of the Congressional-appellants for lack of jurisdiction and as unauthorized.

On December 7, 1978, United States Circuit Judge, Robert A. Ainsworth, Jr., issued an order, dismissing that portion of the Congressional-appellants' motion to separate their appeal, since the Clerk had separately docketed other appeals growing out of this multidistrict litigation; and granted that part of their motion to expedite subject to the classification of the case under the court's screening procedures.

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

The memorandum opinion of the District Court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 5, September 15, 1978.

Iowa Beef Processors, Inc.* v. *Bagley (Newly Reported Case)

No. 78–1855 (Eighth Cir.)

Brief.—On August 1, 1977, Iowa Beef Processors, Inc. (hereinafter "IBP") filed suit against a number of defendants in the United States District Court for the Northern District of Iowa (C.A. No. 77–4040, N.D. Iowa). Named as defendants were Lex Hawkins, John O. Cochrane, and Hughes A. Bagley, among others. The complaint alleged that Mr. Bagley, a former vice president of IBP, had taken a number of documents with him when he left the employ of IBP in 1975. These documents allegedly contained confidential business information which would damage IBP's business if disclosed. The complaint also alleged that Mr. Bagley had in fact disclosed certain confidential information and records to Mr. Hawkins, Mr. Cochrane, and others in violation of both contractural obligations and common law fiduciary duties. Mr. Hawkins and Mr. Cochrane are lawyers who have been involved in a number of consolidated private antitrust suits brought by members of a group known as the Meat Price Investigators Association (hereinafter "MPIA") against IBP. (*See In re Beef Industry Antitrust Litigation* is printed in this report.)

Chief Judge McManus, in an order issued February 13, 1978, deciding various pretrial motions, granted IBP's motion, which had been filed on October 28, 1977, for a protective order preventing disclosure of IBP's confidential business information and limiting its use to defense counsel and to Hawkins and Cochrane for purposes of the consolidated antitrust cases.

In October 1978, the Subcommittee on SBA and SBIC Authority and General Small Business Problems (hereinafter "Subcommittee") of the Committee on Small Business of the United States House of Representatives (hereinafter "Committee"), served a subpoena *duces tecum* on Mr. Bagley requiring him to produce a number of documents covered by the protective order.

Mr. Bagley filed a motion on November 1, 1978, to lift the protective order or in the alternative for guidelines. On November 13, 1978, IBP filed a brief in opposition to the motion.

On November 24, 1978, Chief Judge McManus issued an order modifying the protective order to allow Mr. Bagley to comply with the subpoena. The order stated that the court could ascertain no great interference in proceeding with the suit by allowing the Committee to examine and copy the records as long as the original copies remained accessible to the parties in the suit. It was noted by Judge McManus that IBP was free to approach the Committee in regard to the scope of the use of the documents.

On November 27, 1978, a subcommittee investigator took physical possession of seven boxes of the documents.

IBP filed a notice of appeal from the District Court's order lifting the protective order. The appeal was docketed on December 4, 1978. A petition for writs preserving appellate jurisdiction and a stay of the District Court's order was filed by IBP on December 4, 1978. On the same day, the District Court's order was stayed to and including December 16, 1978. The motion for a stay was argued on December 12, 1978.

On December 14, 1978, the Court of Appeals, in a *per curiam* order, denied IBP's motion for a stay pending appeal and for extraordinary writs preserving appellate jurisdiction. The order expressed the opinion that a stay of the District Court order was both inappropriate and unnecessary at that time. The "very limited" scope of Judge McManus' order and the fact that the protective order remained otherwise in effect were noted. The Court of Appeals considered the fact that disclosure was to be made to a subcommittee of the House of Representatives and stated:

> In regard to the disclosure to the Subcommittee, it has represented in its papers filed in this court and during oral argument that it has no intention of making public any of these documents, if ever, until after the House of Representatives begins its next session in January, 1979. In good faith, we must accept these representations made by members of a coordinate branch of government at face value. We are further assured that the Subcommittee and its Special Counsel will take all appropriate precautions to insure that these documents are disclosed only to the extent necessary to allow the Subcommittee staff to begin the job of collating and classifying the information con-

tained therein. In present circumstances any disclosure beyond the immediate needs of the Subcommittee and its staff would appear to be both unnecessary and a matter of a grave import for all concerned.

Given the Subcommittee's representations to us and the limited nature of Judge McManus' order, we are of the opinion that granting a stay and compelling the return of the documents at this time is both unnecessary as a practical matter and inappropriate as a matter of comity. Such action would inevitably, albeit erroneously, be viewed as an expression of our lack of faith in the Subcommittee's representations to us. Such an expression would be particularly inappropriate in view of the Subcommittee's past cooperation with this court. [*Iowa Beef Processors, Inc.* v. *Bagley,* No. 78–1855 (8th Cir., Filed Dec. 4, 1978); Slip Opinion at 4–5; this report at 254.]

Stating that the case presented jurisdictional and substantive questions and implicated fundamental concepts of legislative and judicial authority, the Court of Appeals deemed it appropriate that the case be heard on an expedited basis and ordered it scheduled for argument on the merits on January 9, 1979.

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

The order of the District Court of February 13, 1978 is printed in the "Decisions" section of this report at 237.

The order of the District Court of November 24, 1978 is printed in the "Decisions" section of this report at 249.

The *per curiam* order of the Court of Appeals of December 14, 1978 is printed in the "Decisions" section of this report at 251.

United States* v. *Powell

Cr. No. 78–251 (N.D. Ga.)

Brief.—Claude Powell, Jr., was charged with contempt of Congress, a violation of 2 U.S.C. § 192, in an indictment filed by a Federal grand jury on August 8, 1978 in the U.S. District Court for the District of Columbia. The indictment charges that on February 6, 1978, Mr. Powell deliberately and intentionally refused and failed to appear to testify before the Subcommittee on the Assassination of Dr. Martin Luther King, Jr. (hereinafter "Subcommittee") of the Select Committee on Assassinations (hereinafter "Committee") of the U.S. House of Representatives, in defiance of a subpoena which had been issued on January 17, 1978 and served on Mr. Powell on January 20, 1978. According to the indictment, the subpoena had been issued in connection with information which had been obtained by the Committee and the Subcommittee to the effect that Mr. Powell and his brother Leon Powell had alleged that they had been asked in the fall of 1967 or the spring of 1968, in Atlanta, Ga., whether they might be interested in making a large sum of money by killing Martin Luther King, Jr.

On September 27, 1978, the case was transferred to the U.S. District Court for the Northern District of Georgia.

On October 11, 1978, Mr. Powell was arraigned and at that time tendered a plea of guilty and filed a petition to enter a plea of guilty.

On December 13, 1978, Mr. Powell was again arraigned. His plea of guilty was entered and he was sentenced to serve 1 month imprisonment and fined $100.00. The term of imprisonment was suspended and he was placed on probation for 3 months.

Status.—No further action has been taken.

Application of Senate Select Committee on Ethics

Misc. No. 78-0275 (D.D.C.)

Brief.—On September 1, 1978, the Senate Ethics Committee filed this application with the United States District Court for the District of Columbia to secure the testimony of Daniel Minchew in the committee's investigation of Senator Herman Talmadge. The application sought a grant of immunity from prosecution without which Mr. Minchew would have refused to testify.

The immunity statutes (18 U.S.C. §§ 6001-6005) provide that the Justice Department may have the order delayed for 20 days, allowing it to present to the court the evidence accumulated on the witness. This will enable the court to insure that the evidence given by the witness under the grant of immunity is not the foundation for any subsequent criminal action against the witness. The Justice Department was granted such a delay in this case.

Status.—On September 20, 1978, an order granting immunity to Mr. Minchew and compelling him to appear and testify was issued.

Application of House Select Committee on Assassinations (New Case)

Misc. No. 78-0350 (D.D.C.)

Brief.—On November 23, 1978, in the U.S. District Court for the District of Columbia, the Select Committee on Assassinations of the United States House of Representatives filed a petition for a writ of *habeas corpus ad testificandum* directed to the U.S. Marshals for the District of Columbia and the Eastern District of Missouri and the Chief of Police of St. Louis, Missouri, ordering the release of Mr. John Larry Ray, incarcerated at that time at the St. Louis City Jail, to testify on December 1, 1978, before the Subcommittee on the Assassination of Dr. Martin Luther King, Jr., of the Select Committee on Assassinations.

Status.—The writ of *habeas corpus ad testificandum* was ordered and issued on November 28, 1978.

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 able 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 cause why he should not be deported pursuant to § 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 § 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 § 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 effective if during both sessions neither House has passed a simple

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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. The filing of the petition 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. Petitioner claims the constitutional history of this doctrine demonstrates that one branch cannot perform the functions or control the performance of another, and that 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 the effect of law, but, since the one-House veto is not subject to Presidential veto, it is unconstitutional.

Finally, Mr. Chadha asserts that the one-House veto provision violates the requirement of a bicameral legislature. According to Mr. Chadha, 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 the President of the Senate and the Speaker of the House to file briefs *amicus curiae* within 30 days.

On February 27, 1978, an *amicus curiae* brief on behalf of the Senate, pursuant to Senate Resolution 338 of the 95th Congress, and a separate *amicus curiae* brief on behalf of Representative Frank Thompson, Jr., Chairman of the Committee on House Administration of the U.S. House of Representatives, were filed. Each of the briefs opposed Mr. Chadha's petition and contended, *inter alia,* that the one-House veto is constitutional and that Chadha lacked standing to challenge the constitutionality of the one-House veto.

The petition was argued on April 10, 1978.

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

Nixon* v. *Sampson

C.A. Nos. 74-1518, 74-1533, 74-1551 (D.D.C.)

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 (hereinafter "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 (hereinafter "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 then extended to Mr. Nixon's more recent challenge. On January 3, 1975, Mr. Nixon moved for a preliminary injunction against operation of the Act.

It was alleged that on five separate occasions, during the 5 weeks following institution of Mr. Nixon's action of December 20, 1974, 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 § 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 Freedon of the Press, *et al.*, Lillian Hellman, *et al.*, and the Special Prosecutor, on his counterclaim for declaratory relief, and as the intervenor-defendant in *Nixon* v. *Sampson et al.* (C.A. No. 74-1518).

B. Standing

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

C. Justiciability

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

D. Summary Judgment

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

E. Ownership

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

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

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

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

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

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

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

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

F. Privilege

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

G. Fourth Amendment

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

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

H. Remedy

The Court will require the following procedure with regard to effectuation of the November 9th Agreement, with regard to any requests for Presidential materials and

tape recordings made pursuant to court order or subpoena, or with regard to any 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 deemed private, as defined by this Court, then Mr. Nixon or his counsel shall so designate.

This procedure is to be effectuated as follows:

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

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

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

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

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

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

Following the release of Judge Richey's opinion, 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 § 2284 of Title 28 of the United States Code was eliminated in conference and the measure, with § 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 § 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 consolidate cases. Nowhere in the legislative history is there any suggestion that §§ 2282 and 2284 would not enable a separate suit presenting a constitutional challenge to the Act in the context of a demand for injunctive relief. It would have been simple for Representative Brademas to state, and indeed for Congress to require, that those sections would not apply to challenges to the Act, had that been what Congress had in mind. Neither, however, was done, and the courts are left with the problem of determining whether petitioner's separate-suit challenge requires the usual three-judge court, particularly in light of the general canon of construction that repeal of a statute by implication is disfavored.

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

* * * * * * *

But what Congress expected, and what § 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 §§ 2282 and 2284 to test in orthodox fashion the constitutionality of the Act before a three judge rather than a single-judge tribunal. [513 F.2d at 422–443.]

The court added that what Congress wanted "was speed in judicial handling of such [constitutional] 'challenges' whether properly to be considered and determined by three judges or one. Just as plainly, the text and history of § 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 was granted. The decision was immediately appealed to the Court of Appeals. [*Nixon* v. *Sampson,* Civil Action No. 75–2194 (D.C. Cir.).]

In the meantime, the three-judge panel in the challenge case heard oral argument on September 22, 1975. In a unanimous opinion released on January 7, 1976, the three-judge court upheld the constitutionality of the Act on its face. [*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 effective are explicity made subject to judicial review, the court considers only the injury to constitutionally protected interests of Mr. Nixon that is allegedly worked by the taking of his presidential materials into custody and their screening by government archivists.* * *

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 nonprivate 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 was assured. As respects current and future Presidents, legislating with respect to them risked disrupting current executive policymaking, and would be unwise before the Commission study of the sensitive and complex problems involved in regulating the records of federal officials had been completed. Only plaintiff has finished his service as President but has not yet established a presidential library. Prompt congressional action was reasonably deemed necessary to assure that the materials would remain preserved, and to begin the lengthy process of reviewing and classifying them. Finally, Congress could legitimately consider plaintiff to be less likely than his immediate predecessors or successors to dispose of the materials responsibly. * * *

Bill of Pains and Penalities

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

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 seeking return of certain papers. 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 vailidity 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 supported 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 Ad-

> ministrator 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 lawmakers 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 in 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 4245 (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. Justice Stevens stated, however, because Mr. Nixon resigned his office under unique circumstances and accepted a pardon for offenses committed in office, 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.

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 that 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 freedon of association provisions.

Finally, the Chief Justice stated that in his opinion the Act violates 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 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.

Notices of appeal from the order dismissing the consolidated cases were 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.

The District Court denied the motion to vacate the stay on January 9, 1978.

The appeals of the District Court order dismissing the consolidated cases were consolidated by the Court of Appeals on January 16, 1978.

On March 22, 1978, the Court of Appeals reversed the District Court's holding that certain documents asserted by Miss Woods to be her personal papers should be turned over to her.

The Appeals Court determined that the criteria which had been used by archivists to determine that the documents sought by Miss Woods were her personal papers were not compatible with the purposes of the Presidential Recordings and Materials Preservation Act. The Court concluded that:

> Since an elaborate regulatory scheme has now been established by the Administration the most appropriate disposition of this case is to dismiss appellee's suit without prejudice, and to remand her to her administrative remedies. Should those remedies prove unavailing, she will be able at that time to seek judicial review, under Sec. 105(a) of the Act. [Slip Opinion at 14 (footnote omitted).]

The consolidated cases were argued before the U.S. Court of Appeals for the District of Columbia on October 31, 1978.

On December 21, 1978, the Court of Appeals issued its opinion reversing the District Court in the consolidated cases and remanding the cases for further action.

On the issue of whether the Materials Act provided the exclusive means for obtaining access to the recordings and materials, the Court of Appeals concluded it did not. The court noted that § 104(d) of the Act declares:

> **The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.***

After quoting this provision and outlining its legislative history, the court concluded that the Materials Act did not bar processing of Freedom of Information Act requests for the Presidential materials in question.

As to the question of ownership which the District Court had determined was moot, the court declared:

> **As the district court recognized, an issue is moot if it has lost its character as a present, live controversy. *See Nixon* v. *Sampson,* 437 F. Supp. at 655 (citing *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412, 415 (1972)); *see generally Alton & Southern Railway* v. *IAM,* 463 F.2d 872, 876–77 (D.C. Cir. 1972). With respect to access under the FOIA, the ownership issue is not moot, because neither the Materials Act nor *Nixon* v. *Administrator,*[20] resolved the issue or changed its character. Accordingly, we hold that the ownership issue is not moot.[21]**
>
> ---
>
> [20] **The Supreme Court held that legal title to the Presidential materials was irrelevant to disposition of Mr. Nixon's constitutional claims. *Nixon* v. *Administrator,* 433 U.S. at 445–46 n.8.**
>
> [21] **Although we hold that the ownership issue is not moot, the District Court is free to examine whether this request for declaratory action fulfills other justiciability requirements. Specifically, the District Court may wish to examine whether these plaintiffs have established their standing to litigate in a declaratory judgment action the question of whether the Government or Mr. Nixon is the owner of all these materials, *see Duke Power Co.* v. *NRC,* 46 U.S.L.W. 4845, 4848–49 (1978); *Simon* v. *Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41–42 (1976), and whether the issue presented here is suitable for resolution by declaratory judgment; *see Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969). Of course, to the extent that the ownership of particular materials becomes an issue in the course of litigating an FOIA request for those materials in this or any other case, the FOIA plaintiffs will have standing to litigate that ownership question as well as all other issues relevant to their claim.**
>
> **[*Nixon* v. *Sampson* (77–2125)].**

[Slip Opinion at 14–15, this report at 270–271.]

Status.—**The cases are pending on remand in the U.S. District Court for the District of Columbia.**

The complete text of the decisions of the Court of Appeals and of Judge Richey are printed in the "Decisions" section of 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 "Decisions" section of 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 the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 2, August 15, 1977.

The complete text of Judge Robinson's memorandum of September 21, 1977, was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 3, December 31, 1977.

The complete text of the opinion of the Court of Appeals regarding the ownership of Miss Woods' materials is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 4, May 15, 1978.

The complete text of the Court of Appeals decision of December 21, 1978, in the consolidated cases is printed in the "Decisions" section of this report at 257.

Nixon* v. *Solomon

Civil Action No. 77–1395 (D.D.C.)

Brief.—This action was originally filed by former President Richard Nixon against Joel W. Solomon, as Administrator of General Services in U.S. District Court for the District of Columbia on August 10, 1977. The complaint sought declaratory and injunctive relief from certain provisions of the Regulations (41 C.F.R. § 105–63) promulgated by defendant pursuant to the Presidential Recordings and Materials Preservation Act (hereinafter "Act"), 44 U.S.C. § 2107 (1976) and from their enforcement by defendant. Nixon amended his complaint on August 19, 1977, in response to amendment of the regulations made on August 12, 1977 to challenge specifically sections 105–63.203, 105–63.204 (d), (e), (f), and (g), 105–63.302 and 105–73.303 of those regulations. The complaint was again amended on January 31, 1978.

In the second amended complaint, the first and second causes of action, out of a total of 19 causes of action, relate to the role of Congress in enacting Section 104(b) of the Act and in the promulgation of the regulations pursuant thereto. Mr. Nixon asserts, in the first cause of action, that Section 104(b) and all of the regulations promulgated pursuant thereto are unconstitutional, void, and violate his rights and privileges in that:

> (a) Section 104(b) on its face violates the Separation of Powers doctrine embodied in Articles I, II and III of the United States Constitution by reserving to Congress the power to disapprove regulations promulgated to administer an act, which is an Executive function and not within Congress' power under Article I;
>
> (b) Section 104(b) on its face constitutes an unlawful delegation of legislative power to one House of Congress;
>
> (c) Section 104(b) on its face illegally permits Congress to evade the presidential veto requirements of Article I, § 7, clauses 1, 2 and 3 of the Constitution by taking actions having the effect of laws but without following lawful legislative procedures;
>
> (d) Section 104(b) on its face violates Article I of the Constitution and the Separation of Powers doctrine by reserving to each House of Congress the power to change at any time the rules set by the Act under which proposed regulations may be disapproved, thereby permitting either House of Congress to accomplish an amendment of the Act without the signature of the President or a congressional override of a presidential veto; and
>
> (e) Section 104(b) on its face purports to endow a House of Congress with powers outside those specifically enumerated in Article I of the Constitution or necessary and proper to such specifically enumerated powers. [*Nixon* v. *Solomon*, C.A. No. 77–1395 (D.D.C.), Second Amended Complaint For Declaratory and Injunctive Relief at 5–6.]

The second cause of action assets that Section 104(b) of the Act is unconstitutional as applied in this case because Congress, under color of Section 104(b), improperly, unlawfully and unconstitutionally influenced the promulgation of regulations under the Act, in derogation of plaintiff's rights and privileges.

The Justice Department filed its answer on April 14, 1978. In regard to the first and second causes of action, the Justice Department "admitted" these paragraphs of the complaint "in that the fourth and now effective set of regulations are, in part or in whole, the product of the exercise of the Congressional one-House veto provided by Section 104(b) of the Act." [Answer at 2.]

The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenberg, Arthur Link, J. Anthony Lukas, Austin Ranney and Clement E. Vose moved to intervene as defendants on April 24, 1978. The motion was granted on June 14, 1978.

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

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

No. 5–31 (TECA)

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 decisions 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.

The Court of Appeals issued its opinion on August 25, 1978, remanding the cause to the District Court with the direction that it certify to the Temporary Emergency Court of Appeals (hereinafter "TECA") the substantial constitutional questions raised by Gulf's counterclaim concerning due process limits upon retroactivity. The opinion of the Court of Appeals, written by Circuit Judge Clark, stated that it would be improper to reach the merits of the appeal because it found that the District Court had erred in concluding that this case presented no substantial constitutional questions which required certification to TECA.

The Court of Appeals also noted:

> Citronelle has raised other constitutional issues in the case at bar. However, it would be premature to direct certification of those issues at this time. Under the provisions of Section 211(c), 12 U.S.C.A. § 1904 note, TECA, on receipt of a certified question, may direct that the District Court send it the entire case for disposition, remand the certified issue for further factual development, or give binding instruction on the certified issue and remand the

case to the District Court for further disposition. Depending upon TECA's determinations, the question whether to certify these remaining constitutional issues could become moot. [Slip Opinion at 6652.]

The District Court certified the cause to the Temporary Emergency Court of Appeals on August 28, 1978. On September 6, 1978 plaintiff filed a motion in the District Court to vacate the order certifying the cause to the Temporary Emergency Court of Appeals as having been prematurely entered. The motion vacating the order was granted on September 12, 1978.

On September 13, 1978, plaintiff filed a petition for rehearing and suggestion for rehearing *en banc* in the Court of Appeals.

Rehearing was denied on October 20, 1978.

On November 16, 1978, the District Court certified the cause to the TECA.

On November 21, 1978, the Federal Energy Administration moved to dismiss the appeal.

On December 4, 1978, Gulf Oil moved to dismiss the appeal.

Status.—**The case is pending before the Temporary Emergency Court of Appeals.**

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 5, September 15, 1978.

Goland* v. *Central Intelligence Agency et al.

No. 76-1800 (D.C. Cir.)

Brief.—Plaintiffs, Susan D. Goland and Patricia B. Skidmore, filed suit on January 26, 1976, pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552 (hereinafter "FOIA"). Named as defendants in the suit were the Central Intelligence Agency (hereinafter "CIA") and the Information Coordinator of the CIA.

This action was the result of a request of documents which was first made by Sara Holtz. On May 2, 1975, Sara Holtz, who is not a party to the suit, filed an FOIA request with the CIA seeking access to "all records concerning the legislative history" of the National Security Act of 1947, 50 U.S.C. § 403 (1970), the CIA Act of 1949, 50 U.S.C. §§ 403a–403j (1970), and two bills introduced into Congress in 1948 providing for the administration of the Agency.

The CIA responded to Ms. Holtz' request by advising her that the documents she sought were Congressional materials which would be available in the Library of Congress or the Government Printing Office. Ms. Holtz responded with a second letter, stating her belief that hearings had been held on the bills she cited for which no transcripts were available in the Library of Congress, and requesting access to records of these hearings and to "any House, Senate or Conference Reports, besides those available in public libraries, that more fully explain the basis for the Committees' action on these bills."

The CIA responded to this second letter by informing Ms. Holtz that a search of its records had revealed that it possessed one document relating to the legislative history of the CIA's organic statutes which was not publicly available, namely, a stenographic

transcript of hearings held before the House Committee on Expenditures in the Executive Departments on June 27, 1947 (hereinafter "Hearing Transcript"). The CIA stated, however, that the Hearing Transcript had been classified "Secret" by Congress and could be declassified only by that body; it suggested that Ms. Holtz request declassification and release of the document from the House of Representatives.

On October 20, 1975, plaintiffs, Ms. Goland and Ms. Skidmore notified the CIA that they, like Ms. Holtz, were investigating the authority, organization and administration of the Agency, and requested the documents sought by Ms. Holtz' letters. Treating the CIA's failure to respond within ten days as a denial of their request, plaintiffs in a letter to CIA Freedom of Information Coordinator Robert S. Young on November 20, 1975 appealed that denial. On November 26, 1975 the CIA offered to send plaintiffs copies of five previously published hearings and reports, however with respect to the Hearing Transcript, the CIA reiterated its position that the FOIA did not apply to the transcript because it was a "legislative document under the control of the House of Representatives" which was "classified 'Secret'".

On December 16, 1975, the plaintiffs wrote the CIA asserting that the Agency's letter of November 26, failed to make clear whether the Transcript and the five published documents accounted for all the materials they had requested and to expand the scope of their request to include any "materials which may have been the basis for testimony at hearings" or materials used by or submitted by the CIA or other Executive Branch sources which are included in "[unpublished] reports" on the cited bills.

The CIA's failure to respond within 20 working days resulted in the filing of this action in the U.S. District Court for the District of Columbia.

On March 10, 1976 the CIA notified plaintiffs' counsel that it had identified two additional documents. The first, which was released to plaintiffs in full, was entitled "Statement of Lt. General Hoyt S. Vandenberg, Director of Central Intelligence," delivered before the Senate Armed Services Committee on April 29, 1947. The second, which was released to plaintiffs with certain portions deleted, was entitled "Statement of the Director of Central Intelligence [Hillenkoetter] delivered before the House Armed Services Committee on April 8, 1948" (hereinafter "Hillenkoetter Statement"). The Agency claimed that the deleted material was exempt from disclosure under FOIA, by statutory mandate because it contained information regarding intelligence methodology and function.

On May 26, 1976, the District Court granted the CIA's motion for summary judgment. *Goland* v. *CIA* No. 76-0166 (D.D.C. May 26, 1976). The court found that the Hearing Transcript was a Congressional document released to the CIA for limited purposes as a reference document only. The court stated:

> Since this document is a record of a hearing held in Executive Session and remains within the control of Congress, this Court finds that the document is exempt from disclosure under the Freedom of Information Act. [*Goland* v.

C.I.A., No. 76-166, Findings of Fact at 2 (D.D.C. May 26, 1976).]

The court also found that the deleted portions of the Hillenkoetter Statement were properly withheld under FOIA Exemption 1, 5 U.S.C. § 552(b)(1) which provides, in pertinent part, that:

> (b) This section does not apply to matters that are—
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy * * *

The court also held that no further discovery was justified since the CIA had "made a full search in good faith."

On July 23, 1976, plaintiffs filed a notice of appeal. On May 23, 1978, the appellate court rendered its decision, affirming the judgment of the District Court.

The appellate court rejected plaintiffs' argument that, "since the CIA is an 'agency', its possession of the Hearing Transcript, without more renders that document 'an agency record' subject to disclosure absent specific exemption." In rejecting the plaintiffs argument, the court stated:

> Congress has undoubted authority to keep its records secret, authority rooted in the Constitution,[36] long standing practice,[37] and current Congressional rules.[38] Yet Congress exercises oversight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress' originating intent.[39] If plaintiffs' argument were accepted, Congress would be forced either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role.

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[36] U.S. Const. Art. I, Sec. 5: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ."

[37] See *Nixon* v. *Sirica,* 487 F.2d 700, 772-73 (D.C. Cir. 1973) (Wildey, J., dissenting).

[38] E.g., H.R. Rule XI(2)(k)(7), *reprinted in* H.R. Doc. No. 416, 93d Cong., 2d Sess. 427 (1975); "No evidence or testimony taken in executive session may be released or used in public session without the consent of the committee."

[39] See Letter from Deputy Att'y Gen. Harold R. Tyler, Jr. to Hon. Bella S. Abzug, 19 Feb. 1976, *quoted in* J.A. 60 (Justice Dept. declined to release confidential House report lest "communications and consultations between coequal branches" of government be stifled).

[Slip Opinion at 10-11.]
The court further stated:

> Whether a Congressionally generated document has become an agency record, rather, depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides. [Slip Opinion at 11-12.]

The court concluded that given the facts, the Hearing Transcript remains under the control of and continues to be the property of

the House of Representatives. The fact that the Transcript was denominated "Secret" plainly evidences a Congressional intent to maintain Congressional control over the document's confidentiality. The fact that the CIA retains the Transcript solely for internal reference purposes indicates, the court declared, that the document is in no meaningful sense the property of the CIA; the Agency is not free to dispose of the Transcript as it wills, but holds the document as a "trustee" for Congress.

In agreeing with the District Court that the deleted portions of the Hillenkoetter Statement were exempt from disclosure to plaintiffs, the appellate court however, based its decision on Exemption 3, 5 U.S.C. § 552(b)(3). The court stated:

> As originally enacted, FOIA provided that the Act's disclosure requirements "do not apply to matters that are * * * (3) specifically exempted from disclosure by statute." [51] Two statutes are relevant to an Exemption 3 claim by the CIA. A *proviso* to 50 U.S.C. § 403(d)(3) states that, "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." [52] Section 403g of the same title provides that, "in order further to implement" this proviso, "the Agency shall be exempted from * * * the provisions of any * * * law which require the publication or disclosure of the organization, function, names, official titles, salaries, or number of personnel employed by the Agency.[53]

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[51] 5 U.S.C. § 552(b)(3) (1970).

[52] National Security Act of 1947, ch. 343, tit. I, § 102, 61 Stat. 497 (presently codified at 50 U.S.C. § 403(d)(3) (1970)).

[53] CIA Act of 1949, ch. 227, 7, 63 Stat. 211 (presently codified at 50 U.S.C. § 403(g) (1970)).

[Slip Opinion at 16–17.]

Having decided that Sections 403(d)(3) and 403g remained unchanged by a 1976 Congressional amendment to Exemption 3, as statutes intended to qualify under Exemption 3, the court then determined that on the basis of affidavits, without the need for discovery or *in camera* inspection, the deleted portions of the Hillenkoetter Statement were properly withheld.

In affirming the District Court's award of summary judgment in favor of the CIA in its finding that "the CIA ha[d] made a full search in good faith and that no further discovery [was] justified," the court based its decision on affidavits, executed by Gene F. Wilson, the Agency's Information and Privacy Coordinator. The court stated:

> In order to prevail on an FOIA motion for summary judgment, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." [75] In determining whether an agency has met this burden of proof, the trial judge may rely on affidavits. Congress has instructed courts to accord "substantial weight to agency affidavits in national security cases,[76] and these affidavits are equally trustwor-

thy when they aver that identified documents are exempt. The agency's affidavit, naturally, must be "relatively detailed" and nonconclusory [77] and must be submitted in good faith. But if these requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits.[78]

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[75] *National Cable Television Ass'n. Inc.* v. *FCC,* 479 F.2d 183, 186 (D.C. Cir. 1973).

[76] S. Rep. No. 93–1200, 93d Cong., 2d Sess. 12 (1974) (Conference Report); 120 Cong. Rec. 36,870 (1974) (remarks of Sen. Muskie). See *EPA* v. *Mink,* 410 U.S. 73, 93 (1973).

[77] *Vaughn* v. *Rosen,* 484 F.2d 820, 826 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974).

[78] *See Nolen* v. *Rumsfeld,* 535 F.2d 890, 891–92 (5th Cir. 1976) (granting summary judgment upon agency's representations "in candor and in good faith" that all responsive documents were made available to plaintiff); *Association of Nat'l. Advertisers, Inc.* v. *FTC,* 38 Ad.L.2d 643, 644 (D.D.C. April 1, 1976) (where record indicates that agency search was "reasonably thorough," discovery may be limited by court; to justfy discovery where FTC "has already stated under oath that the search was Commission-wide and complete, * * * [p]laintiff must demonstrate some substantial discrepancy between the defendant's actions and words * * *"); *Exxon Corp.* v. *FTC,* 384 F. Supp. 755, 759–60 (D.D.C. 1974), *remanded,* 527 F.2d 1386 (D.C. Cir. 1976), *dismissed,* No. 73–1928 (D.D.C. Feb. 28, 1977) (limiting discovery where affidavits demonstrated adequacy of search).

[Slip Opinion at 23–24.]
In dissent Judge Bazelon declared:

> In my view, the record in this case establishes as a matter of law that the hearing transcript *is* an "agency record," and the court is empowered to order it withheld only if it qualifies for nondisclosure under FOIA exemptions one or three. First of all, the CIA claims to have had exclusive possession of this document for more than thirty years. More importantly, the CIA acknowledges that it employs this information in interpreting its organic legislation—*i.e.,* in making decisions with respect to policy and operations. The Act does not define "agency records." But the House and Senate reports reveal that the fundamental purpose of the FOIA was to open administrative policy and operations to the light of public scrutiny. [Slip Opinion (dissent) at 6–7. (Footnotes omitted.)]

Judge Bazelon further noted that in regards to the Hearing Transcript, he found the court's "control/property" test unpersuasive. He stated that:

> "Federal agencies regularly receive documents created by nonagencies that obviously become "agency records" in the ordinary course. See, *e.g., Washington Research Project, Inc.,* v. *H.E.W.,* 504 F.2d 238 (D.C. Cir. 1974) (grant application submitted to National Institute of Mental Health by noncommercial research scientist); *Irons* v. *Gottschalk,* 369 F. Supp. 403 (D.D.C. 1974) (patent application). [Slip Opinion (dissent) at 8.]

It was his opinion that:

> [T]he court would supplement the element of "control" with other concepts having to do with "property". The court's ultimate position, as I see it, would be that Congress has a property interest in, as well as control over, the contents of the transcript, the paper on which the contents are typed, and any copy of the transcript. But so sweeping a notion is plainly at odds with the majority's concession that the Hillenkoetter statement is an agency record. [Slip Opinion (dissent) at 10.]

The dissent further states:

> [A]ssuming the "control/property" standard is the correct one, factual ambiguities in the record would preclude summary judgment. If Congress does, generally speaking, exert control over, and maintain property interests in, documents possessed by federal agencies, the majority's test generates a need to ascertain the methods by which such control is exercised and relinguished, and the means by which such property interests are created and extinguished. In this case discovery is necessary specifically to determine whether Congress or the Committee that conducted the hearings ever instructed the CIA to preserve the secrecy of the transcript, and, if so, for how long. [Slip Opinion (dissent) at 12.]

The dissent would also deny summary judgment on the Exemption 3 status of the Hillenkoetter Statement because the CIA did not furnish a *Vaughn* v. *Rosen* index of that document, which would require that the agency submit an itemized index that would satisfy the "detailed justification," "specificity," and "separation" requirements the Vaughn index was meant to ensure. (*Vaughn* v. *Rosen,* 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).) Judge Bazelon was of the opinion that the affidavit filed by the CIA, "plainly fails to supply the information necessary to facilitate the adversary process and *de novo* review." [Slip Opinion (dissent) at 19.]

In regards to the thoroughness of the CIA's search for responsive documents, the dissent, while not seriously questioning the CIA's good faith, was of the opinion that discovery was needed in any event to ascertain whether the CIA personnel conducting the search used an "underinclusive" definition of "legislative history". The dissent was also of the opinion that such discovery would have revealed whether the persons conducting the search did in fact withhold otherwise responsive documents on the basis of the CIA's definition of "agency records".

On June 6, 1978, Ms. Goland and Ms. Skidmore filed a petition for rehearing and suggestion for rehearing *en banc.*

On June 16, 1978, plaintiffs-appellants filed a motion to vacate the decision of the Court of Appeals.

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

The complete text of the Findings of Fact of the District Court of May 26, 1976, is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 5, September 15, 1978.

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 5, September 15, 1978.

Daughtrey* v. *Carter

No. 77-1702 (D.C. Cir.)

Brief.—This action was filed in the United States District Court for the District of Columbia on February 12, 1977, by twelve retired military officers and enlisted men, one active duty military officer, one civilian former prisoner of war, a minor child of a prisoner of war who had died in captivity, one civilian, the wives of two of the military plaintiffs, and two members of the United States House of Representatives, George Hansen of Idaho and Lawrence McDonald of Georgia. The complaint, which named President Carter, and Griffin Bell, as Attorney General of the United States, defendants, sought declaratory and injunctive relief restraining the operation of the Presidential Proclamation entitled "Granting Pardon for Violations of the Selective Service Act, August 4, 1964 to March 28, 1973" (Pres. Proc. No. 4,483, 42 Fed. Reg. 4391 [1977]) (hereinafter "Proclamation") and the Executive Order implementing that Proclamation (Exec. Order No. 11,967, 42 Fed. Reg. 4393 [1977]), both of which President Carter signed on January 21, 1977.

Plaintiffs, in their first cause of action, sought a judgment declaring the Proclamation and Executive Order to be void and of no force and effect on the grounds that they are vague, ambiguous and impossible of application to specific individuals; that their implementation requires a constitutionally impermissible invasion of the legislative prerogatives of the Congress by abrogating of statutes and by creating special classes of persons and prospectively exempting them from the application of duly enacted statutes; that they create a dilution of the weight of the franchise (vote) of each of the plaintiffs; and that they invidiously discriminate among persons and classes of persons pardoned, in violation of the 14th Amendment. Alternatively, the first cause of action sought an order from the court directing the Attorney General to conduct hearings upon each person claiming to be a member of the class pardoned to determine if the pardon applies to that person and includes the restoration of full political rights, citizenship or any other benefits; and directing that the determination resulting from such hearing shall be reported to the President and shall be conclusive upon the President's concurrence.

In the second cause of action, plaintiffs sought a judgment declaring that Congress alone has the power to determine the manner of acquiring, losing or reacquiring citizenship; that, except as to recipients of Presidential Pardons, the penal provisions of the United States Code remain in full effect; and that the President has absolute pardon power over every offense against the United States excepting only impeachment.

The third and final cause of action asked for an injunction prohibiting the Attorney General from giving effect to that part of the Executive Order which suspends the effect of the Military Selective Service Act and the Aliens and Nationality Act.

The United States Attorney moved, on February 23, 1977, for leave to appear as an *amicus curiae* for the purpose of suggesting

to the court that as to the President, service of process should be quashed and he should be dismissed as a party defendant. Filed with the motion was the suggestion itself and a supporting memorandum of points and authorities. The motion to appear as *amicus curiae* was granted on March 21, 1977. In the memorandum of points and authorities, the United States Attorney argued that the President should be dismissed as a party defendant since the President is to be made a party to civil actions only where absolutely necessary and, in this case, plaintiffs may be afforded the complete relief they are seeking against the remaining party defendant, the Attorney General.

Plaintiffs filed a memorandum of points and authorities in opposition to the motion to quash on April 5, 1977, in which they argued, *inter alia,* that complete relief could not be obtained against the Attorney General alone.

The Attorney General filed a motion to dismiss the complaint on the grounds that the plaintiffs lacked standing and the court lacked subject matter jurisdiction.

District Court Judge Corcoran issued an order on May 11, 1977, dismissing the case on the grounds that plaintiffs had shown no injury to themselves resulting from the issuance of the Pardon or Executive Order and therefore had no standing to sue.

Plaintiffs filed a notice of appeal on June 22, 1977.

The judgment of the District Court was affirmed by the Court of Appeals in an opinion filed for the court July 25, 1978, by Circuit Judge Tamm. Judge Tamm first reviewed the allegations of the appellants, describing them in this manner:

> Although appellants challenge the Presidential Proclamation and Executive Order on multiple grounds, their principal contention is that the President exceeded the limits of his constitutional pardon power,[8] and usurped the power of Congress,[9] by directing the Attorney General to violate 8 U.S.C. § 1182 (1976), which states, in pertinent part:

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[8] U.S. Const., art. II, § 2, cl. 1.
[9] See generally *id.* art. I.

> (a) * * * the following classes of aliens * * * shall be excluded from admission into the United States:
>
> (22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants, or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants.

Appellants contend that the unlawful entry into the United States of persons who remained outside or left this country to avoid military service necessarily results in a dilution of their right to vote.[10] In the District Court, appellants averred that 198 persons had entered the United States in violation of section 1182(a) (22),[11] but at oral argument, counsel for appellants suggested that the number of such persons entering this country may be in the thousands.

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[10] R.E. [Record Entry] 1 ¶ XVII.
[11] R.E. 8, at 2–3.

Appellants contended in the District Court that persons who left or remained outside of the United States to avoid military service lost their citizenship by operation of law, and that the President unlawfully restored political rights to such persons.[12] However, appellees argued that appellants apparently relied upon a provision, 8 U.S.C. § 1481(a)(10) (1970),[13] that has been repealed.[14] See National Emergencies Act, Pub. L. No. 94–412, § 501(a) (1) and (2), 90 Stat. 1255, 1258 (1976).[15]

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[12] R.E. 1 ¶ XI.
[13] 8 U.S.C. § 1481(a)(10) (1970) provided, in pertinent part: "[A] person who is a national of the United States * * * shall lose his nationality by * * * departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."
[14] R.E. 7, at 2 n.3.
[15] The repealed section had provided explicitly for loss of nationality by any national of the United States who departed from or remained outside of this country during war or presidentially declared national emergency for the purpose of avoiding military service. Congress' repeal followed the Supreme Court's decision that the section was unconstitutional. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963). See S. REP. No. 94–1168, 94th Cong., 2d. Sess. 6 (1976). In *Kennedy,* the Supreme Court held that the automatic deprivation of citizenship as a penalty for leaving or staying outside the country to avoid military service was unconstitutional because it did not afford the procedural safeguards guaranteed by the fifth and sixth amendments. 372 U.S. at 165–66.

Appellants apparently do not now rely on their original assertion that persons who left or remained outside the United States to avoid military service became aliens by operation of law. Instead, they contend that the Presidential Proclamation and Executive Order restore full political rights, including voting rights, to such persons, and that such persons are ineligible for restoration of such rights under 8 U.S.C. § 1182(a)(22).[16]

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[16] See Reply for Plaintiffs Appellants at 1, 5.

Appellants additionally allege that the Executive Order accomplished either an unlawful delegation of the pardon power to the Attorney General, or a suspension of provisions of the Military Selective Service Act, codified in scattered sections of titles 10, 37, and 50 app. of the United

States Code (1976, 1970 & Supp. V 1975), in cases involving force and violence that the Attorney General deems not serious.[17] They contend that the Attorney General is violating 8 U.S.C. § 1182(d)(5) (1976), by failing to impose conditions of parole on persons entering the United States under provisions of the Presidential Proclamation and Executive Order.[18] Appellants also contend that the Proclamation and Executive Order are void because they invidiously discriminate among classes of potential recipients of the pardon.[19]

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[17] R.E. 1 ¶¶ XII, XIV.
[18] *Id.* ¶ XVI.
[19] ¶ XV.

Appellants sought a declaration that the Presidential Proclamation and Executive Order are void on the foregoing grounds, as well as a broad declaration that "[t]he Congress alone has the power to declare the manner of acquiring, losing or reacquiring citizenship; * * * [e]xcept as to recipients of [the] Presidential Pardon, the penal provisions of the United States Code, wherever codified, are and remain in full force and effects; and * * * [t]he President has absolute pardon power over every offense against the United States excepting only impeachment." [20]

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[20] *Id.* ¶ XIX.

[Slip Opinion 6–9.]

Judge Tamm next declared that in reviewing the dismissal of the action for lack of standing, the panel accepted the material allegations of the complaint as being true.

Judge Tamm noted three possible bases for standing that had been alleged by appellants:

> (1) as eligible voters, they are injured by the dilution of their votes necessarily resulting from the alleged unlawful entry of persons into the United States and restoration of full political rights to such persons; (2) as Congressmen, two appellants are injured by the President's usurpation of their lawmaking power; (3) as citizens, appellants are injured by the Attorney General's failure to enforce the law. [Slip Opinion at 10.]

The court turned first to appellants' allegation that their voting rights are diluted by the unlawful entry into the country of persons excluded from entry and the resulting exercise of full political rights by an unknown number of such persons. The court noted that the United States Supreme Court, in *Baker* v. *Carr*, 369 U.S. 186 (1962), held that qualified voters of various Tennessee counties had standing to consititutionally challenge a statewide apportionment scheme. The Court of Appeals held here, however, that, in its opinion, *Baker* v. *Carr* did not make every alleged dilution of voting rights a sufficient injury to confer standing, and that upon examination of the allegations in this case, appellants had not stated an injury in fact, the most important element of standing in Federal

court. The appellants, the opinion noted, live in various localities and did not contend that their votes are diluted in any particular election or geographical area, nor did they contend that they are an identifiable group of voters whose votes would be disfavored *vis-a-vis* some other group. At most, the court declared, the appellants' complaint could be read as claiming that their votes in elections for any office, whether National, State, or local, are being diluted as a result of the reentry into the United States and entitlement to vote of a relatively small and unknown number of persons. Therefore, the court concluded, the appellants had failed to satisfy the requirement enunciated in *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208 (1974), of the presentation of a "discrete factual context" within which "concrete injury occurred." The court also termed the alleged injury "too speculative" to support standing. The opinion also expressed the view that appellants were requesting broad constitutional adjudication which was unnecessary in this case and hence not to be entertained and that appellants lacked such a personal stake in the outcome as to confer standing.

The opinion of the Court of Appeals turned next to the issue of the standing of the Congressional appellants. Congressmen Hansen and McDonald based their claim to standing on their allegation of the usurpation of Congress' legislative power by the *de facto* repeal of acts of Congress as a result of the failure of the executive branch to enforce the law. On appeal, this claim was limited to the failure of the Attorney General to enforce certain provisions of the Immigration and Nationality Act. (8 U.S.C. §§ 1101–1503 and scattered sections of titles 18, 22, 31, 49 and 50 app. of the U.S. Code (1976, 1970 & Supp. V 1975).)

The court noted that, while injuries suffered by legislators may differ from those suffered by non-legislator litigants, for purposes of standing, the method of analyzing such alleged injuries for the purpose of determining standing is the same. The question to be answered is whether those alleging standing have asserted a judicially cognizable injury in fact. The Court of Appeals, in discussing this issue, cited its own earlier opinion in *Harrington* v. *Bush,* 553 F.2d 190 (D.C. Cir. 1977). In that case the court held that post-enactment impropriety in the administration of laws does not usurp the lawmaking power of an individual Congressman, nor does allegation of such illegality state an injury in fact to the individual legislator's lawmaking function. Since in this case, unlike the situation in *Harrington,* these Congressional appellants did not claim to have actually voted for the legislation in question, the opinion held that they alledged, at most, either (1) that through nonenforcement, the President has usurped their power to enact repealing legislation, or (2) that as Congressmen, they had a unique interest in ensuring that the laws are enforced. The Court of Appeals rejected both of these contentions as being without merit.

In conclusion the opinion stated:

> The failure or refusal of the executive branch to execute accomplished legislation does not affect the legal status of such legislation; nor does it invade, usurp, or infringe upon a Congressman's power to make a law. See *Harrington* v.

Bush, 553 F.2d at 212–13. Once a bill becomes law, a Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public. *Harrington* v. *Schlesinger,* 528 F.2d 455, 459 (4th Cir. 1975); accord, *Harrington* v. *Bush,* 553 F.2d at 213. Thus, in this case, the injury suffered by the congressional appellants is in no way unique to their status as legislators. [Slip Opinion at 14.]

As to the interest of all the appellants, as citizens, in the proper administration of the law, specifically the enforcement of the Immigration and Nationality Act by the Attorney General, the Court of Appeals held an injury to this interest to be an abstract, generalized interest insufficent to confer standing.

Status.—No further action has been taken. The time for further appeal has expired.

The July 25, 1978 decision of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 5, September 15, 1978.

Schwartz* v. *United States Department of Justice (Newly Reported Case)

No. 78–1334 (D.C. Cir.)

Brief.—This suit was filed on November 4, 1976, under the Freedom of Information Act, 5 U.S.C. § 3552 (hereinafter "FOIA"), by Robert Bennett Schwartz, to compel the release of materials relating to the investigation of the conduct of Peter R. Schlam, an Assistant United States Attorney for the Eastern District of New York, during the unsuccessful extortion and conspiracy prosecution of then-Representative Angelo Roncallo. Named as defendants in the complaint were the United States Department of Justice; Edward H. Levi, at that time Attorney General of the United States; and Peter A. Rodino, Jr., Chairman of the Judiciary Committee of the U.S. House of Representatives. Mr. Levi and Congressman Rodino were sued in their official capacities.

Mr. Schwartz alleged in the complaint that pursuant to the FOIA he was entitled to inspect and copy the documents in the possession of the Justice Department and the Judiciary Committee, and that he had exhausted all available administrative remedies in an attempt to secure such access. The complaint sought declaratory and injunctive relief providing for an order directing the defendants to produce the requested documents immediately, and expediting the complaint as provided in the FOIA.

Along with the complaint, Mr. Schwartz filed an application for leave to proceed in *forma pauperis.* On November 3, 1976, District Judge George L. Hart, Jr., granted the application and also dismissed the action under 28 U.S.C. § 1915(d), which provides for the dismissal of an action in *forma pauperis* if the allegation of poverty is untrue, or if the court is satisfied that the action is frivolous or malicious.

On November 17, 1976, Mr. Schwartz filed a notice of appeal from the order dismissing the action. Leave to appeal without prepayment of costs was denied as frivolous and not taken in good faith by District Judge Hart on November 17, 1976.

The United States Court of Appeals for the District of Columbia Circuit granted the motion of Mr. Schwartz to proceed on appeal in *forma pauperis* on January 19, 1977.

On March 4, 1977, a *per curiam* order was issued, *sua sponte,* vacating the order of the District Court and remanding the case to the District Court with instructions to serve the defendants with summonses in accordance with Rule 4(a) of the Federal Rules of Civil Procedure.

On July 11, 1977, Defendants, Department of Justice and Griffin B. Bell, Attorney General, who was automatically substituted in place of Mr. Levi, filed an answer to the complaint. The answer claimed, *inter alia,* that: the complaint failed to state a claim upon which relief could be granted; the court lacked subject matter jurisdiction; and Griffin B. Bell was not a proper party to the action.

On July 11, 1977, Representative Rodino filed a motion to dismiss and a supporting memorandum of points and authorities, in which he asserted that as Chairman of the House Judiciary Committee, he was not a proper party to the action, that the court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted.

Chairman Rodino argued in particular that neither he nor the House Judiciary Committee were within the perview of the FOIA. He noted that the act applied to "agencies" of the executive branch of the Federal Government and that the FOIA specifically excluded the Congress from its disclosure requirements.

Mr. Schwartz filed an affidavit in opposition to Congressman Rodino's motion to dismiss. In the affidavit, he requested that Representative Rodino be directed to appear and answer the complaint. The affidavit further stated that Congressman Rodino was sued under an asserted general common law right of plaintiff to inspect public records.

On August 30, 1977, District Judge Pratt issued a memorandum opinion denying the motion to dismiss. The memorandum opinion held that the historic common law right to inspect and copy public records has been recognized in the District of Columbia Circuit, that the general rule is that all three branches of Government are subject to the common law, and that Congressman Rodino had set forth no persuasive reason why Congress should be exempt from the common law rule. Judge Pratt stated that, absent a showing that the matters sought by plaintiff are not "public records" within the meaning of the common law rule or that Mr. Schwartz does not possess any "interest" required for application of the rule, the motion to dismiss could not be granted. He also noted that Congress could exempt itself from the common law rule if it so desired, but had not done so.

On September 30, 1977, Representative Rodino filed a motion to dismiss or, in the alternative, for summary judgment. The grounds put forth for the motion were that the court lacked subject matter jurisdiction and that there was no dispute as to any issue of material fact. In an affidavit attached to the motion, Congressman Rodino stated that no investigation or inquiry of any kind relating to the matters alluded to in the complaint had ever been undertaken by the committee or any staff person employed by the commit-

tee. An affidavit of Edmund L. Henshaw, Clerk of the United States House of Representatives was also attached to the motion. Mr. Henshaw stated that a search failed to turn up any documents or papers relating to any investigaton of Peter Schlam by the committee.

A supplement to the motion to dismiss or, in the alternative, for summary judgment and a second affidavit of Congressman Rodino were filed on December 7, 1977. Attached to the affidavit were a number of documents related to statements made by former Representative Roncallo on the floor of the House of Representatives and in a letter to Representative Rodino. The supplement to the motion reiterated that there were no House records within the scope of Mr. Schwartz' request.

A memorandum order was issued by District Judge Pratt on December 12, 1977, granting the motion of Congressman Rodino for summary judgment, denying the motion of the Department of Justice for a protective order and directing the Department of Justice to answer plaintiff's first set of interrogatories on or before January 6, 1978. The memorandum order noted that Congressman Rodino had indicated by sworn affidavit that he had directed a thorough records search and filed and delivered copies of all material compiled by his committee. Judge Pratt stated that a reviewing court must grant summary judgment in defendant's behalf when the defendant, in candor and good faith, has indicated that all available records have been turned over to the plaintiff. In denying the motion of the Department of Justice for a protective order, the memorandum order noted that plaintiff, proceeding *pro se,* had filed the action in November of 1976 and had been delayed over 1 year in his efforts to secure the information at issue. The court also noted that the interrogatories did not strike the court as unduly burdensome and they might assist plaintiff in his attempt to locate additional relevant documents.

On January 6, 1978, the Department of Justice filed a response to Mr. Schwartz' interrogatories. The Department released some of the documents requested by Mr. Schwartz and refused to release other documents, asserting that they were exempt from disclosure under the Freedom of Information Act. Also filed by the Justice Department on January 6, 1978, was a motion for summary judgment on the grounds that there existed no genuine issue as to any material fact. In a "statement of material facts pursuant to local rule 19(h) as to which there is no genuine issue" and a memorandum of points and authorities in support of its motion, the Department of Justice argued that the withholding of those documents denied to Mr. Schwartz was proper under FOIA exemptions 5, 6, 7(c) and 7(d) 5 U.S.C. § 552(b).

On February 9, 1978, District Judge Pratt issued a memorandum order granting the Department's motion to dismiss. The liability of the Attorney General in his official capacity was treated as incorporated into that of the Department of Justice. The memorandum order stated that the documents were variously protected by FOIA exemption 7(c), which exempts from mandatory disclosure investigatory records compiled for law enforcement purposes to the extent that the production of such records would constitute an unwarranted invasion of privacy; by FOIA exemption 7(d), which exempts

from mandatory disclosure investigatory records compiled for law enforcement purposes to the extent the production of such records would disclose the identity of a confidential source; and by FOIA exemption 6, which protects from disclosure personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Since the District Court held all of the documents in question to be protected by FOIA exemption 6, 7(c) or 7(d), the applicability of exemption 5, which protects interagency or intraagency communications which would not be available by law to a party other than an agency in litigation with the agency, was not reached in the opinion.

On March 3, 1978, Mr. Schwartz filed a notice of appeal from the memorandum order of February 9, 1978.

Status.—The appeal is pending before the United States Court of Appeals for the District of Columbia Circuit.

The District Court's memorandum opinion of August 30, 1977 is printed in the "Decisions" section of this report at 273.

The District Court's memorandum order of December 12, 1977 is printed in the "Decisions" section of this report at 275.

The District Court's memorandum order to February 9, 1978 is printed in the "Decisions" section of this report at 277.

Goldwater* v. *Carter (New Case)

Civil Action No. 78–2412 (D.D.C.)

Brief.—Plaintiffs, Members of the Senate and House of Representatives, filed suit on December 22, 1978, in the United States District Court for the District of Columbia, against President Carter and Secretary of State Cyrus Vance. Plaintiffs include Senator Barry Goldwater, Senator Strom Thurmond, Senator Carl Curtis, Senator Jake Garn, Senator Jesse A. Helms, Senator-elect Gordon Humphrey, Congressman Robert Bauman, Congressman Steve Symms, Congressman Larry McDonald, Congressman Robert Daniel, Jr., Congressman Bob Stump, Congressman Eldon Rudd, Congressman John Ashbrook and Congressman George Hansen.

The plaintiffs seek to have the court declare unconstitutional and illegal, and to enjoin, set aside, annul, suspend, or otherwise declare invalid and of no effect, the purported notice by President Carter to the Republic of China of the termination of the 1954 Mutual Defense Treaty (hereinafter "Defense Treaty"), TIAS 3178, 6 UST 433 (1955), between the United States and the Republic of China. Plaintiffs further seek to have the court declare that the termination of the 1954 Treaty cannot be legally accomplished, nor can notice be given of the intended termination of such treaty, without the advise and consent of the United States Senate, or the approval of both Houses of Congress.

The Congressional plaintiffs first assert that the Defense Treaty itself stipulates the only method for its abrogation. Article X of the Defense Treaty states in its entirety:

> This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party.

They then assert that Article 2 of the Vienna convention on the Law of Treaties defines the term "party" as "a State which has

consented to be bound by the treaty and for which the treaty is in force." The plaintiffs conclude that under the United States Constitution and as historically interpreted by the United States, the term "party", as used in Article X of the Defense Treaty, means the President acting together with the Senate or both Houses of Congress.

Plaintiffs further state that on July 25, 1978, the Senate passed by a vote of 94 to 0, the "Dole-Stone Amendment" to the International Security Assistance Act of 1978, which stated in pertinent part:

> It is the sense of the Senate that there should be prior consultation between the Senate and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.

Plaintiffs also state that on September 7, 1978, at the urging of conferees appointed by the House of Representatives, the committee on conference on the International Security Assistance Act of 1978, adopted the Senate provision with an amendment to change all references to the "Senate" to "Congress", with the exception of the reference to the "Senate" which remain in paragraph (a)(4) concerning advice and consent to treaties. The "Dole-Stone Amendment" was thus amended to read in pertinent part:

> It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954. [Complaint at 8.]

Plaintiffs further state that on September 26, 1978, the defendant, President Carter signed into law the International Security Assistance Act of 1978, including the "Dole-Stone Amendment" as approved by the committee on conference, and that on October 10, 1978, 5 days before the adjournment of the 95th Congress, plaintiff, Senator Goldwater introduced in the Senate, Senate Concurrent Resolution 109, which states in pertinent part:

> That, in accordance with the separation of powers under the Constitution, the President should not unilaterally take any action which has the effect of abrogating or otherwise affecting the validity of any of the security treaties, comprising the post-World War II complex of treaties, including mutual defense treaties, without the advice and consent of the Senate, which was involved in their initial ratification, or the approval of both Houses of Congress. [Complaint at 9.]

Plaintiffs further declare that the Congress has never directed the President to alter or terminate the Defense Treaty, and that on December 15, 1978, while the Congress was not in session, defendant, President Carter publicly announced his unilateral decision that the United States would recognize the Peoples Republic of China as the sole legal government of China as of January 1, 1979; and also publicly announced his unilateral decision to terminate the Defense Treaty with the Republic of China, or to give notice of

its termination, without having made any prior consultation with the Senate or the House of Representatives, without obtaining the Senate's advice and consent, and without the express or implied approval of either House of Congress.

Plaintiffs claim that the unilateral action by the President has deprived, and will continue to deprive them of their substantial constitutional and statutory rights to be consulted, and to exercise their right to vote on the matter of the continued application and operation of the Defense Treaty which the Senate approved in 1955, and that they have suffered and will continue to suffer a direct injury in fact to their right to vote and exercise their legislative duties.

Plaintiffs in their complaint pray not only that the President be enjoined from taking any further action or making any statements which will have the effect of terminating, or creating any expectations that the Defense Treaty has been or will be terminated; but also that the court declare that any decision by the United States to terminate the Defense Treaty cannot be made by the President alone since he is not the party to that treaty as specified under Article X of that treaty; and that any decision of the United States to terminate the Defense Treaty must be made by and with the full consultation of the entire Congress, and with the advice and consent of the Senate, or with the approval of both Houses of Congess.

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

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 alleged, *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 provisions 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.] [Footnote omitted.]

On April 17, 1978, the FEC filed its findings of facts pursuant to the January 17, 1977 order of the District Court.

Plaintiffs moved for summary judgment on June 26, 1978.

The FEC moved for summary judgment on August 31, 1978.

On December 29, 1978, plaintiffs, defendants, and intervenor-defendant jointly filed a stipulation of settlement along with a proposed order, judgment, and decree, whereby the Socialist Workers Party and its candidates, for a period up to and including the FEC's reporting period for 1984, would be required to keep records regarding campaign contributors but would not be required to disclose the information to defendant FEC.

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

The complete opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 3, December 31, 1977.

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

United States* v. *Elko

Cr. No. 77-739-ALS (C.D. Calif.)

and,

Brislin* v. *United States

No. 78-1558 (Ninth Cir.)

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 Patricia 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 for five unaccredited trade schools located in Los Angeles to participate in various Federal financial aid programs. 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.

The defendants were sentenced on January 9, 1978. Defendant Elko was sentenced to 3 years on each of counts one through five, to run concurrently, for a total of 3 years. Defendant Brislin was sentenced to 1 year on each of counts one, three, four and six to run concurrently for a total of 1 year.

Defendants filed motions for reduction of sentence on February 22, 1978. On March 6, 1978, defendant Brislin's motion for reduction of sentence was denied. Defendant Elko's motion was stayed for study for possible modification.

Defendant Brislin filed a notice of appeal on March 16, 1978.

On March 17, 1978, a brief memorandum and order was filed in the District Court detailing the reason for denial of defendants' various post-trial motions.

On June 26, 1978, Mr. Elko's sentence was reduced to 2 years on each count, to run concurrently.

Ms. Brislin's appeal was argued on December 7, 1978.

On December 11, 1978, the Court of Appeals issued an order affirming the judgment and sentence of Ms. Brislin.

Status.—No further action has been taken.

***Common Cause* v. *Bolger* (formerly 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 the Postmaster General, and the Secretary of the Treasury 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. [Defendant's 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, the Senate Select Committee on Standards and Conduct; David Ramage, House Majority Clerk; Thomas J. Lankford, House Minority Clerk; Joseph J. Fahey, Supervisor of the Senate Folding Room; Edmund L. Henshaw, then Assistant Sergeant at Arms of the House; John M. Swanner, Staff Director of the House Committee on Standards of Official Conduct; Eli Bjellos, Chief of the House Publications Distribution Service; Harold Needham, Superintendent of the Senate Services Department; James Estep, Manager of the Senate Computer Center; Buehl Berentson, Executive Director of the National Republican Senatorial Committee; Bill Goodwin of the National Republican Senatorial Committee; Lee MacGregor, former Aide to Senator Robert Griffin; Joyce Baker, a former employee of the Senate Republican Policy Committee; Richard Conlon, Staff Director of the House Democratic Study Group; Lynda E. Clancey, Richard P. Clifton, and Glee Gomien, Staff Assistants of the Republican Senatorial Campaign Committee; Jay Bryant, Special Assistant in the Office of the Minority Whip; Edward L. Beach, Staff Director and Secretary of the Senate Republican Policy Committee and Senate Republican Conference; Edwin F. Feulner, Executive Director of the House Republican Study Committee; Patricia Goldman, Director of the Wednesday Group; and Jay D. Sterling, Executive Director of the House Republican Research Committee.

On October 9, 1974, the Senate passed S. Res. 423 regarding Mr. Fern, and on October 11, 1974, passed S. Res. 431 regarding Messrs. Estep, Needham, and Fahey. The resolutions stated that by the privileges of the Senate no evidence of a documentary character under the control and in the possession of the Senate 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 arguments 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 not 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—was more serious and required further exploration, it too, was without merit:

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

contravene the First and Fifth Amendments of the Constitution.

Just as importantly, plaintiffs claim status as registered voters, representatives of registered voters, candidates for Congressional office, and supporters of candidates. It is alleged that over fifty members of Common Cause challenged incumbent members of Congress in the last election and many of its members supported challengers to incumbents. They assert that the present franking privilege confers substantial political benefits upon incumbents, while nonincumbent challengers and their supporters do not have the same advantage. As a result, the rights of challengers and their supporters to freely associate for political purposes are impaired, and the value of their votes is diluted and diminished, all in violation of the First Amendment. [*Baker* v. *Carr,* 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 Committee 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 informa-

tion, 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 supoena[; 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 was argued on July 16, 1975. On July 30, 1975, the court issued a memorandum and order which stated that:

> Objections to this attempted discovery are phrased in terms of (1) irrelevance, (2) burdensomeness, and (3) constitutional immunity under Article 1, Section 6 (The Speech and Debate clause) or Article 1, Section 5 (power of each body of Congress to enact its own rules).
>
> The Claim of lack of relevance is predicated on the narrow theory that, irrespective of the relevance of the requested materials in other frames of reference, they are simply irrelevant in a case where the gravamen of the complaint is that the statute complained of is alleged to be unconstitutional on its face. Aside from plaintiffs' continuing burden of maintaining standing, it is clear to us that a proper resolution of the issues raised by the complaint calls for a complete record consisting of the type of documentary materials sought to be discovered. For this reason, we hold these materials to be relevant and necessary.
>
> Likewise, the claims of constitutional immunity are without weight. The *Brewster* case [*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 cate-

gory, and the code designation of each category; the number of address labels affixed to franked mail for each Senator for each day or week; and the right to inspect copies of newsletters in the possession of the Senate Service Department. The stipulation further provided that Estep and Needham would not be further deposed.

Additionally, a protective order was issued defining: (1) the information on the volume of mail for each Senator that may be 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 advice and oral responses, or, in lieu of the actual text of the documents, a summary of each document with the full document made available to plaintiffs' counsel to verify the accuracy of the summaries; and
>
> (B) All internal memoranda of the Committee concerning the use of the frank which have been approved by the Select Committee or used as the basis for rendering advice to Members of the Senate.
>
> Actual text was defined by 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 to 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 was 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 concern 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 7, 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 responsibilities 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 the 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 noted that under the direction of the joint leadership of the Senate, 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. The letter declared that 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.

On April 29, 1977, the Senate passed S. Res. 136, 95th Cong., 1st Sess. (1977), which authorized Mr. Kennedy, counsel for the subpoenaed Senate employees, to furnish to the District Court, for *in camera* inspection:

> "(1) information on volume of mail for the year 1972 with the identity of the Senators coded, set out in the same fashion as the information previously authorized to be submitted to the court and to the plaintiffs for 1973, 1974, and 1975;
>
> "(2) those copies of what are known as computer code counts, identifying the categories of codes maintained in the Senate computer by each Senate office and the number of names in each category, which were retained by the computer Center in 1975, and the computer code count made near the close of 1976 for the Senate offices not included in the 1975 group, in each case with the identity of the Senators coded; * * *"

The resolution further provided that Mr. Kennedy was to furnish from the 100 Senators' administrative assistants:

> [A] form that the identity of the Senator is coded consistent with the manner in which earlier information was submitted in this case, the meaning assigned to such codes to the extent that he may have that information in his possession, as well as such general or specific instructions which he has in his possession with respect to the use of the code categories maintained by that office, * * *

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, Common Cause filed a notice of taking a deposition, on September 14, 1977, of the National Records Center, Accession and Disposal Branch, General Services Administration. The National Records Center had also been served with a subpoena *duces tecum* commanding the appearance of a representative to be designated by them at such deposition, and further commanding that the representative so designated produce for inspection; (1) copies of all Records Transmittal Receipt Forms which had been transmitted to the National Records Center since January 1, 1972; (2) copies of all Records Reference (Retrieval) Requests which have been transferred from the National Records Center since January 1, 1972; and (3) all documents, correspondence, memoranda, and other writings, or copies, received by the National Records Center relating to the use by the Senators so designated or their agents and/or employees, of direct mail, the Congressional mailing privilege, and/or direct mailing lists and/or techniques which were transmitted to the National Records Center since January 1, 1972.

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.

On September 7, 1977, the National Records Center, Accession and Disposal Branch, General Services Administration filed an objection to the production, by September 14, 1977, of the various documents as specified in the subpoena *duces tecum.*

An order was filed on September 23, 1977, directing that the material submitted to the court for *in camera* inspection as authorized by S. Res. 136, 95th Cong., 1st Sess. (1977), 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 Common Cause.

Notices of appeal to the Court of Appeals for the District of Columbia Circuit and to the U.S. Supreme Court by Peter Stavrianos and the other Senate employees, nonparty 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 furnish the material for use in the proceeding without restriction to *in camera* use, but subject to the protective provisions in the previously approved stipulation. The resolution also 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 notice 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 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.

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 texts of the orders of September 23, 1977 and December 23, 1977 are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 3, December 31, 1977.

Lewis* v. *Chisholm

Civil Action No. 78–0196 (D.D.C.)

Brief.—O'Dell Lewis, a former legislative assistant to Representative Shirley Chisholm, filed this suit along with Lewis' ex-wife Judy Ann Lewis in the United States District Court for the District of Columbia on February 3, 1978. Named as defendants are Congresswoman Shirley Chisholm; Carolyn J. Smith, Representative Chisholm's administrative assistant; Muriel Morrissey, chief legislative assistant to Congresswoman Chisholm; and Colleen O'Connor, press secretary to Representative Chisholm during the period of Mr. Lewis' employment with Congresswoman Chisholm.

The complaint states five causes of action. The first cause of action is a breach of contract claim charging defendants with employment discrimination based on sex in violation of the House Fair Employment Practices Agreement by discharging Lewis because of his sex, the second cause of action alleges employment discrimination based on sex in violation of the Fifth Amendment to the Constitution. The third cause of action is one of injurious falsehood, claiming that Ms. Smith submitted a false statement to the U.S. Department of Labor to the detriment of Mr. and Mrs. Lewis.

The fourth cause of action alleges interference with a prospective advantage and defamation on the basis of a letter allegedly sent by Representative Chisholm to a prospective employer of Mr. Lewis. The final cause of action is a claim of libel and slander based on statements allegedly made to a reporter for the *New York Post* and printed in that newspaper.

The complaint seeks $50,000 in compensatory damages, $500,000 in punitive damages and an order prohibiting defendants from making statements concerning the plaintiffs.

Defendants Chisholm, Smith and O'Connor filed an answer on February 23, 1978. Included in the answer was a counterclaim by defendant Smith for compensatory and punitive damages in the amount of $250,000. The counterclaim alleges that Mr. Lewis' claim against Ms. Smith is spurious, malicious and brought in bad faith solely for the purpose of harassing defendant Smith.

Defendant Morrissey also filed an answer on February 27, 1978.

On March 8, 1978, plaintiffs filed an answer to Ms. Smith's counterclaim.

On October 17, 1978, Congresswoman Chisholm, Ms. Smith and Ms. O'Connor filed a motion to dismiss.

The case was dismissed by District Judge Robinson on December 4, 1978.

Plaintiffs filed a notice of appeal on December 29, 1978.

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

The order of the District Court is printed in the "Decisions" section of this report at 283.

Abney v. *United States Capitol Hill Policeman*

Civil Action No. 78-1633

Brief.—On August 30, 1978, Mr. Stacey Abney filed an action in the U.S. District Court for the District of Columbia seeking $1 million in damages against an unnamed member or members of the Capitol Police.

In his complaint alleges that Mr. Abney was the victim of police brutality and harassment.

On the same day the complaint was filed, Judge George Hart dismissed it pursuant to 28 U.S.C. § 1915(d) which states:

> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Status.—**The time for appeal has expired.**

Martin Tractor Company v. *Federal Election Commission*

No. 78-2080 (D.C.Cir.)

Brief.—This action, filed on July 7, 1978, names the Federal Election Commission and its individual members including J. Stanley Kimmitt, Secretary of the Senate, and Edmund L. Henshaw, Clerk of the House, as defendants. The plaintiffs are Companies, Political Action Committees (hereinafter "PAC") organized by those companies, Corporate and PAC officers and one hourly employee who works for one of the plaintiff companies.

The plaintiffs state that in 1971, the Federal Election Campaign Act (hereinafter "FECA") codified existing judicial decisions by excepting from its definition of a prohibited corporate "contribution" or "expenditure" the costs incurred by a corporation in establishing, administering and soliciting contributions for a separate segregated fund to be used for political purposes (a "political action committee" or "PAC"). Prior to the 1976 Amendments, plaintiffs further state, a corporation and its PAC could communicate with all of the corporation's employees for the purpose of securing their financial contributions to the PAC, subject only to the proviso that no PAC contribution or expenditure could be made with moneys "secured by physical force, job discrimination, financial reprisals, or the threat of force * * *" 18 U.S.C. § 610. Pursuant to the 1976 amendments to the FECA, the plaintiffs declare, 18 U.S.C. § 610 was repealed, with the prohibitions formerly contained in 18 U.S.C. § 610 against corporate contributions or expenditures being placed in 2 U.S.C. § 441b.

Additionally, and the plaintiffs note, of particular significance to this action, 2 U.S.C. § 441b restricts the right of a corporation to communicate with some of its employees. Further, the prohibitions and restrictions which are applicable to a corporation under this section apply equally to a PAC created by a corporation.

The complaint states that 2 U.S.C. § 441b divides a corporation's employees into two classes. One such class, defined in the 1976 Amendments as "executive and administrative personnel", consists of those employees who are "paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities." The other such class consists of all other employees not defined as executive or administrative personnel ("hourly employees"). While the corporation and the PAC may communicate without restriction (except for the prohibition against the use of specified coercive tactics) with the corporation's stockholders and with its executive or administrative personnel, concerning contributions to its PAC. They may communicate with the corporation's hourly employees (to solicit contributions to its PAC) not more than twice in 1 year, and such communications must be in writing and addressed to those hourly employees at their residences. 2 U.S.C. § 441(b)(4). Additionally, the plaintiffs state that the FECA does not define the term "solicitation".

The plaintiff companies, PAC's and their officers assert that by restricting their right to communicate with the companies' hourly employees, the statute violates one or more of their rights of freedom of speech, assembly, association, and the right to hear, guaranteed by the First Amendment to the Constitution.

Mr. Bramlage, the hourly employee-plaintiff, also asserts that the FECA as amended, by dividing employees into two classes and restricting the free flow of information between those classes, discriminates against him in violation of his right to due process of law under the Fifth Amendment.

Plaintiffs further assert that:

> [B]y failing to define the term "solicitation", [FECA] creates an impermissible vagueness which prevents one or more Plaintiffs from determining the meaning of such

> term, causes such Plaintiffs to be uncertain as to the extent and application of the prohibitions of 2 U.S.C. § 441f, and when combined with the threat of criminal sanctions, restrains one or more of the Plaintiffs in their communications and conduct, and in their administration of political action committees, in violation of one or more of such Plaintiffs' rights to due process of law guaranteed by the Fifth Amendment to the Constitution and their rights of freedom of speech, assembly, association, and the right to hear, guaranteed by the First Amendment to the Constitution. [Complaint at 21.]

Plaintiffs ask the court to declare the provisions of 2 U.S.C. § 441b complained of be declared unconstitutional. They also seek an injunction against the defendants prohibiting them from enforcing any of the complained of provisions and regulations promulgated thereunder.

On September 25, 1978, defendants moved to dismiss. On October 20, 1978, Judge Oberdorfer granted defendants' motion and dismissed the action.

On October 31, 1978, plaintiffs filed a notice of appeal. The appeal was docketed in the U.S. Court of Appeals for the District of Columbia Circuit on November 6, 1978. The Court of Appeals remanded the record to the District Court on November 8, 1978, to permit the District Court to file its memorandum on the dismissal.

On November 8, 1978, District Judge Oberdorfer filed the memorandum explaining his dismissal order.

In his opinion Judge Oberdorfer concluded that the plaintiffs could not invoke the statutory provision for judicial review provided in 2 U.S.C. § 437(h) (a provision of the FECA) and even if they could qualify under that provision their allegations presented no case or controversy sufficiently ripe to invoke the declaratory powers of the Federal Court. As to the assertion of standing pursuant to the statute, Judge Oberdorfer declared:

> **Plaintiffs claim that they are entitled to invoke the Court's jurisdiction under a unique provision of the Act which authorizes particular persons to sue "for declaratory judgment as may be appropriate to construe the constitutionality of any provision of this act." 2 U.S.C. § 437(h)a. Section 437(h)a had the purpose and effect of expediting judicial review of questions raised in Congress about the constitutionality of particular provisions of the Act so that these questions could be authoritatively resolved before the Presidential Election of 1976. *See* Remarks of Senator James Buckley, 119 Cong. Rec. § 5707 (daily ed. April 10, 1974); *Buckley* v. *Valeo,* 424 U.S. 1, 11–12 (1976). Plaintiffs do not suggest that § 441(h) here at issue was among the provisions whose constitutionality was questioned in Congress. In any event, and crucial here (access to court pursuant to § 437(h)a was by its terms limited to "the Commission, the national committee of any political party, or any individual eligible to**

vote in any election for the office of President of the United States."

Neither the corporate plaintiffs, nor the political action committees are in the category of entities or individuals entitled to invoke the Court's jurisdiction under § 437(h)a. The decision to dismiss their complaint seems therefore to be *a fortiori.*

A closer question is raised with respect to the executive plaintiffs and the hourly employee plaintiff. The complaint alleges that they are eligible voters; the complaint puts at issue, however, not their rights as voters, but rather the constitutionality of the Act's provisions relating to communications between a corporation and its employees about voluntary contributions. Thus, as defendants persuasively contend, the individual plaintiffs do not sue in their individual capacities to protect their individual rights to vote or even to make contributions. They sue to vindicate a claimed right of their corporate employer to influence its employees (including one of the plaintiffs) to make voluntary political contributions. While the question is not free from doubt, the Court has concluded that this kind of derivative right was not the constitutional right of "an individual eligible to vote" which Congress considered "appropriate" for vindication in a special declaratory judgment action under § 437(h), particularly where, under the statutory scheme there is an alternative process for resolution of the substantive issue in the context of a particular transaction, *infra.* (*Martin Tractor Co., et. al* v. *Federal Election Commission* (78–1259) D.D.C. at 3–4. This report at 287–288.)

Judge Oberdorfer next noted that, even if the court assumed that the plaintiffs could qualify pursuant to the statute, he would still be compelled to dismiss the action. The judge cited *Abbot Laboratories* v. *Gardner,* 387 U.S. 136(1967) as establishing a two-pronged test for determining whether a Goverment agency's action created a "ripe" controversy sufficient to invoke the court's declaratory or injunctive powers. According to the judge, the elements of the test enunciated in *Abbot* are:

1. Is the issue fit for judicial decision?
2. What hardship to the parties is there in withholding judicial consideration?

In summarizing his conclusion on these questions Judge Oberdorfer declared:

> [T]he Court concludes, first, that the issue framed by plaintiffs is not readily amenable to judicial review, being uncertain as to both conduct and legal consequences and, secondly, that the harm in delaying review is minimal since plaintiffs have yet to take the relatively costless steps which would permit an initial determination of the legality of their intended conduct. (Slip Opinion at 8, this report at 291.)

Status.—The record was returned to the Court of Appeals on November 14, 1978. The action is pending in the United States Court of Appeals for the District of Columbia Circuit.

The memorandum of the District Court is printed in the "Decisions" section of this report at 285.

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 aside the election. [*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 Court dismissing the election contest. [*Moreau* v. *Tonry,* No. 58791 (Supreme Court of Louisiana Oct. 25, 1976).]

The Louisiana Supreme Court's 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. [*Moreau* v. *Tonry* No. 76-3087 (E.D. La. Oct. 7, 1976).]

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, in the Federal District Court for the Eastern District of Louisiana, an action for deprivation of rights under Article I of the United States Constitution and the Fourteenth Amendment of the

Constitution. [*Moreau* v. *Tonry,* No. 76-3290 (E.D. La. Oct. 26, 1976).]

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 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 to the District Court for consideration of the mootness of the entire action or for such further proceedings as the District Court might require.

On December 8, 1978, Mr. Moreau and a group of his supporters filed an amended complaint and a second amended complaint with the U.S. District Court.

The amended complaint prayed for a declaratory judgment declaring the election of October 2, 1976, and November 2, 1976, to be null, void and of no effect and to order a new Democratic Primary Election to be held between James A. Moreau, and defendant, Richard A. Tonry, for the purpose of selecting the Democratic nominee to run for the office of U.S. Representative from the First Congressional District, of Louisiana. It also prayed for the holding of another general election.

The second amended complaint prayed for judgment against the defendants for damages in the sum of $5 million for deprivation of their civil right to vote and to have their vote meaningfully and accurately counted, in the election held on October 2, 1976, plus $1.5 million, as attorney's fees.

Status.—The Federal action (76–3290) 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 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 No. 2271-71 (D.D.C.)

and,

Powell* v. *Dellums

No. 77-955 (U.S. Supreme Court)

and,

Wilson* v. *Dellums

No. 77-1129 (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 M. 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 to plaintiffs the names and addresses of the persons arrested on the Capitol steps on May 5, 1971, in order that notices of the class action could be sent to them, and permitted extensive discovery through the use of interrogatories.

On 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 (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 his 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 confidentiality, without more, works an absolute bar to discovery 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 in-

terests 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 decision 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 its chief of 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 unusal 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 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 held 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 might 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* on his appeal 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 for rehearing filed by both appellees Ronald V. Dellums *et al.* and appellants District of Columbia, *et al.;* 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.*

Mr. Powell filed a petition for writ of *certiorari* with the U.S. Supreme Court on January 3, 1978.

Mr. Wilson filed a petition for writ of *certiorari* with the U.S. Supreme Court on February 10, 1978.

Respondents moved to recuse Mr. Justice Blackmun in both 77–955 and 77–1129 on May 9, 1978. As the basis for the motion, the respondents cite statements allegedly made by Mr. Justice Blackmun at a Legal Aid Society ceremony in New York City on March 8, 1976. According to respondents' motion, Mr. Justice Blackmun publicly expressed the view that the May Day demonstrators were "trying to take over the government" and expressly stated his approval of the police handling of the demonstrations.

On June 13, 1978, respondents moved to disqualify Mr. Justice Rehnquist.

The motions of respondents to recuse Mr. Justice Blackmun and Mr. Justice Rehnquist and the petitions for writ of *certiorari* were denied on July 3, 1978.

Mr. Powell and Mr. Wilson filed petitions for rehearing on July 28, 1978.

On September 25, 1978, Mr. Wilson and the District of Columbia filed a motion in the District Court for a protective order or, in the alternative, for a stay of execution and related proceedings.

Mr. Powell filed a motion in the District Court seeking, alternatively, a protective order, partial relief from judgment, or a stay of execution on September 5, 1978.

The petitions for rehearing were denied by the Supreme Court on October 2, 1978.

On November 8, 1978, District Judge Bryant issued an order accompanied by a memorandum opinion detailing the procedure for the transcribing of those Nixon tapes dealing with the May Day demonstration and their transmittal of those transcripts to the court and subsequently to counsel for the plaintiffs.

On November 21, plaintiffs moved for a protective order.

On November 24, 1978, Mr. Nixon moved for a clarification of the District Court's order of November 5, 1978.

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.

The complete text of the memorandum opinion and accompanying order of the District Court of November 8, 1978, is printed in the "Decisions," section of this report at 293.

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 counter claim 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 protection 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.

Reuss* v. *Balles

No. 78–579 (U.S. Supreme Court)

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 legislative functions, both as a Member of the House and as Chairman of its Committee on Banking, Currency and Housing. He alleges he is affected in participating in the exercise of the following powers of Congress:

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

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 Representative Reuss lacked standing to sue, both as a Member of the House of Representatives and as an individual owner of securities.

Representative Reuss filed a motion on October 1 to amend his 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 Representative Reuss' 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 found that 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 was also without merit. 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 power 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.

The Court of Appeals issued its opinion on July 7, 1978, affirming the District Court and holding that Congressman Reuss lacked standing to sue, as either a legislator or a bondholder. The opinion noted that on appeal, Representative Reuss had pressed two theories of legislator standing and rejected both, stating that neither theory presented a situation where Representative Reuss' vote would be derogated, as had been the case in *Kennedy* v. *Sampson,* 511 F.2d 430 (D.C. Cir. 1974), or a situation sufficiently analogous to warrant a determination of standing to sue.

The opinion filed for the court by Circuit Judge Tamm first considered Congressman Reuss' argument that he was injured as a Member of Congress, so long as all members of the FOMC are not presidentially appointed, since the FOMC is thus essentially a private group to which legislative functions have been improperly delegated. The Court of Appeals concluded that the District Court had erred in making a determination that there was no improper delegation. Rather, the appeals panel noted, the District Court should have assumed that the FOMC is a private group exercising improperly delegated powers and then it should have asked whether Representative Reuss was injured thereby. The Court of Appeals held that no interest of Congressman Reuss was injured, explaining its conclusion in the following fashion:

> The interest sought to be protected by the appellant under this theory is his role in the formulation and regulation of general monetary policy. The defect in his theory, however, is that even if we were to declare, in effect, that all members of the FOMC had to be presidential appointees, the same responsibilities currently delegated to the FOMC would remain so delegated. The fact that appellant's role *vis-a-vis* monetary policy would in no way be enhanced by such a declaration indicates that his legislative powers, including relevant votes either in committee or on the floor, are not currently adversely affected in any respect; there is, therefore, no injury in fact that would be redressed by a favorable decision. Thus, we are in accord with the district court's determination of, but not all its reasoning for, a lack of standing under this theory. [Slip Opinion at 12–13.]

The opinion next rejected Congressman Reuss' second legislator standing theory, that the method of selecting the Reserve Banks' representative of the FOMC renders them "jurisdictionally immune" to the impeachment power of the House of Representatives, thus diminishing his power to initiate impeachment proceedings under Article I, Section 2, of the Constitution. Even if the court were to declare that Presidential appointment were required, Circuit Judge Tamm wrote, Congressman Reuss' interest relative to the impeachment process would not be changed in any way, since there is no indication that he cannot presently introduce a bill of impeachment. On this point the court declared:

> If he were to introduce a bill of impeachment, the question of whether *de facto* civil officers of the United States are "jurisdictionally immune to the impeachment process" would be sharply presented. We believe that there is particular benefit in this question arising first in the Congress, the branch entrusted by the Constitution with responsibility for exercise of the impeachment power. We venture no opinion on whether the House of Representatives, or the Senate, would reject such a bill on jurisdictional grounds, or on what course a court might take if confronted with such a rejection as a ground for standing. [Slip Opinion at 15.]

Therefore, the court concluded in requesting a declaratory judgment, Representative Reuss is actually seeking an advisory opinion in violation of Article III. Furthermore, the opinion noted, by rejecting Congressman Reuss' standing, he is not left without a means of remedying the allegedly unconstitutional composition of the FOMC, in that he may introduce and seek to have enacted a bill requiring all FOMC members to be Presidential appointees.

The court then turned to Representative Reuss' allegation of standing as a bondholder.

His claim of standing as a bondholder is based on the assertion that actions taken by the FOMC pursuant to its pervasive regulatory authority might cause him to be deprived of property without due process of law, particularly by inflation. The Court of Appeals found these allegations insufficient to confer standing because they

were too speculative. Also, the opinion noted, Congressman Reuss would have difficulty in establishing that the injury was caused to a sufficient degree by appellees, even if he could allege a more concrete injury. Furthermore, the court stated, there was no reason to believe that a declaration ultimately resulting in Presidential appointment of the entire FOMC would benefit Congressman Reuss in any way. Finally, the observation was made that his is a very generalized grievance, held in common, to some extent, with virtually all members of the public.

In rejecting Representative Reuss' allegations of standing, the court noted that there were strong similarities to the situation addressed by the Supreme Court in *Buckley* v. *Valeo,* 424 U.S. 1 (1976) (*per curiam*), wherein the assertion of standing by a Member of Congress to challenge the composition of the Federal Election Commission was upheld. But, the court in this case held that, unlike the plaintiffs in *Buckley,* Congressman Reuss had not demonstrated a personal stake sufficiently indicating that he would benefit from a favorable decision on the merits.

Judge Wright, in dissent, concluded that *Buckley* should be controlling, and that under *Buckley,* Representative Reuss should be declared to have standing as a bondholder to challenge the constitutionality of the composition of the FOMC.

Congressman Reuss filed a petition for rehearing and a suggestion for rehearing *en banc* on July 21, 1978. The petition and suggestion were denied on August 14, 1978.

On October 6, 1978, Congressman Reuss filed a petition for writ of *certiorari* in the United States Supreme Court which was denied on November 27, 1978.

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

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 5, September 15, 1978.

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* v. *Podell

Civil Action No. 77-6107 (2d Cir.)

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 he 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 Sec. 203 establishes, as a matter of law, a breach of a 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 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 Second Circuit, from the order of May 31, 1977.

On July 1, 1977, Mr. Podell moved in the District Court for reargument of the Government's motion for summary judgment.

On July 27, 1977, the Court of Appeals granted defendant's motion to withdraw his appeal without prejudice to refile by September 23, 1977.

On July 28, 1977, defendant's motion for reargument was denied.

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.

The Court of Appeals issued its opinion on February 6, 1978, affirming the grant of summary judgment in favor of the Government. The court rejected Mr. Podell's argument that his reluctance to acknowledge the clear implications of his guilty plea creates any material issue of fact. The court noted that it is well settled that a criminal conviction constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case. This general rule of

law was applied to the issue of Mr. Podell's guilty plea in the following manner:

Unlike most guilty plea cases appellant's guilty plea was not entered in an evidentiary vacuum, but rather after the Government had presented its entire case and Podell had begun to present his own. The teaching of the Supreme Court in *Emich Motors* v. *General Motors* [340 U.S. 558, 569 (1951)], is that in a situation involving the estoppel effect of a criminal judgment resting on a general conspiracy count, the court in a subsequent civil case should determine precisely what was decided in the criminal case by examining the record of the criminal trial, including the pleadings, the evidence submitted, and any opinions of the court. In this case, the elements of the charges in the indictment were amply supported in the trial record. [Slip Opinion at 1477–1478.]

Defendant-appellant Podell's argument that the Government failed to state a claim was also rejected. The opinion held that 18 U.S.C. § 218, which authorizes the United States to bring suit to recover any sum paid by the Government in relation to a violation of the conflict of interest statute, does not preclude actions to impress a constructive trust on money received by the wrongdoer from third persons.

Status.—No further action has been taken. The time for further appeal has expired.

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 4, May 15, 1978.

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 61857–F (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 orginally filed in the U.S. 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.

McRae* v. *Califano

No. 76–C–1804 (E.D.N.Y.)

Brief.—Plaintiffs in this case 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 obstretician 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 the 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).]

One 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 plaintiff's 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.*

On January 9, 1978, plaintiffs filed an amended complaint, to which defendants filed their answer on January 25, 1978.

On February 9, 1978, the Catholic League for Religious and Civil Rights moved to intervene as a party defendant. Plaintiffs opposed the motion, which was argued on February 14, 1978. The motion was denied at the hearing, except to the extent that petitioners were allowed to appear as *amici curiae.*

In the month of August 1978, various organizations, including the National Organization for Women Legal Defense and Education Fund and various psychiatric associations and religious organizations moved to file briefs as *amici curiae* and were granted permission to do so.

Plaintiffs filed a notice of motion for entry of default judgment on October 3, 1978, in opposition to which intervenor-defendants filed an affidavit on October 11, 1978.

On November 28, 1978, Judge Dooling ordered the further amendment of the amended complaint.

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

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

No. 78-5316 (U.S. Supreme Court)

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.

The Court of Appeals affirmed the ruling of the District Court on July 31, 1978. The *per curiam* opinion stated that, even given its broadest reading, the complaint did not denote any legally actionable conduct.

In its opinion, the court turned first to the claim that Ms. Ray had been libeled and her business disparaged in a letter written by Senator Proxmire to Senator Cannon, Chairman, at the time, of the Senate Select Committee on Standards and Conduct. Since Senator Proxmire was responding to a Senate inquiry into an exercise of his official powers, the court declared, he was engaged in a matter central to the jurisdiction of the Senate, and was therefore protected by the Speech or Debate clause of the Constitution (Art. I, Sec. 6, cl. 1). The opinion expressed no view as to whether the statement in question could be actionable under general principles of the law of defamation.

The other allegations against Senator Proxmire, that he arranged for use of Senate rooms by Whirl-Around's clientele and that he voted favorably to positions supported by its existing or potential customers in order to further Whirl-Around's interests, were also held to provide no basis for suit by appellant. In regard to these allegations the court stated:

As to the first, appellant alludes to a Senate rule supposedly prohibiting such uses of the rooms and to the proposition that governmental facilities should not be used for private gain at public expense. For the second, appellant invokes the criminal statute forbidding Senators from accepting favors in return for influence on their official performances. Neither of these considerations provides appellant with a private cause of action nor serves to define the Senator's duty of care in a common-law-tort cause of action. [Slip Opinion at 4–5.] (Footnotes omitted.)

The claim of unfair competition was deemed by the Court to be the strongest of appellant's claims. This claim was also rejected by the opinion which stated:

> In a society encouraging aggressive economic competition, this court has recognized that the tort of unfair competition is a somewhat anomalous creature. Its scope has therefore been limited to three categories: passing off one's goods as those of another, engaging in activities designed solely to destroy a rival and using methods themselves independently illegal. The case at bar does not fall within the first classification, and the second is intercepted by appellant's complaint itself.
>
> * * * * * * *
>
> That leaves only the third category—unlawful competitive mechanisms—and the insuperable difficulty there is that simple use of one's status in society is not itself illegal. [Slip Opinion at 8–9.] (Footnotes omitted.)

The Court of Appeals also dealt with appellant's suggestion that because she was formally without counsel until oral argument of the appeal, her complaint must be construed with great liberality. The complaint was dismissed, the opinion stated, not because appellant appeared *pro se* but because none of the factual allegations or inferences which could be deduced therefrom made out a cause of action against either appellee. Finding that there was no plausible suggestion that appellant could make out a cause of action with counsel, the Court of Appeals declined to remand the case to the District Court.

On August 31, 1978, Ms. Ray filed a petition for writ of *certiorari* with the United States Supreme Court.

Status.—The petition for writ of *certiorari* was denied by the Supreme Court on October 30, 1978. No further action has been taken.

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 5, September 15, 1978.

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 the 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 counterclaim against Representative Young asserting that the complaint had been filed solely to harass them. They ask for $2 million in damages.

An order granting the motion of plaintiff to dismiss the counterclaim was filed on January 31, 1978.

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.

Congressman Young filed a motion to dismiss on July 19, 1978. The motion was denied on July 27, 1978.

On November 6, 1978, Mr. Rosen filed an offer of judgment in which he offered to dismiss the action against Congressman Young in return for a dismissal of the Congressman's suit against

him, *Young* v. *New York Times et al.*, C.A. No. 77–894 (D.D.C., filed June 9, 1977). (A brief of that case appears in this report at 162.)

On November 14, 1978, Congressman Young filed a response to plaintiff's offer of judgment opposing the filing of the document and suggesting that it be stricken from the record.

Status.—The action is pending before the United States District Court for the District of Columbia.

Gardner v. *Young*

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 Congressman 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 punitive damages for each of the two statements.

Defendant's motion to dismiss was denied on January 31, 1978.

Congressman Young filed an answer to the complaint on February 21, 1978.

On November 6, 1978, Ms. Gardner filed an offer of judgment in which she offered to dismiss the action against Congressman Young in return for a dismissal of the Congressman's suit against her, *Young* v. *New York Times et al.*, C.A. No. 77–894 (D.D.C., filed June 9, 1977). (A brief of that case appears in this report at 162.)

On November 14, 1978, Congressman Young filed a response to plaintiff's offer of judgment opposing the filing of the document and suggesting that it be stricken from the record.

Status.—The action is pending before the United States District Court for the District of Columbia.

Helstoski v. *Goldstein*

Civil Action No. 75–1802 (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 brief of *United States* v. *Helstoski.*] 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 (3d Cir. 1977).]

On June 13, 1977, Mr. Helstoski filed a motion in the District Court seeking an entry of a default judgment, a bar to the use of Government funds, and a bar to 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, Mr. Helstoski's motion for entry of default judgment was withdrawn.

On the same day, Mr. Helstoski's motion to file an amended complaint was granted.

The amended complaint, filed on September 30, 1977, 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, in lieu 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.

Cervase* v. *Rangel

No. T-9576 (Second Cir.)

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.

On November 6, 1978, District Judge Broderick filed a memorandum order granting Congressman Rangel's motion to dismiss the complaint. Finding that Mr. Cervase did not have standing to bring the action and that this lack of standing would not be cured by the proposed amendment, District Judge Broderick denied Mr. Cervase's motion to amend, along with the dismissal of the complaint.

The memorandum order noted that the only injury alleged was that the defendant's allegedly illegal acts caused or would cause an increase in Mr. Cervase's Federal tax liability and therefore he could have standing only as a Federal taxpayer. The holding that Mr. Cervase lacked standing to sue as a Federal taxpayer was based upon the decisions of the Supreme Court in *Flast* v. *Cohen,* 392 U.S. 83 (1968) and *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208 (1974). Under *Flast,* Judge Broderick noted, to establish standing, a plaintiff must show a nexus between his taxpayer status and the legislation attacked; which legislation must constitute an exercise by Congress of its power under the taxing and spending clause of Article I, Section 8 of the Constitution, and he must establish a nexus between his taxpayer status and an alleged constitutional infringement. The memorandum order stated that the Supreme Court's decision in *Reservists Committee* indicates that the *Flast* test was applicable to Mr. Cervase's suit and that under that test he lacked standing. The court concluded:

> ***Reservists Committee*** **suggests that the *Flast* test is to be strictly applied to bar taxpayer suits that do not involve allegations that a federal statute is unconstitutional. *Reservists Committee* distinguishes between allegedly unconstitutional statutes and allegedly unconstitutional conduct of government officials. Alleging the former may confer standing, but alleging the latter will not. It would seem to follow that the mere allegation of illegal conduct by a Congressman does not suffice to confer standing on a taxpayer. [*Cervase* v. *Rangel,* 76–4344, S.D.N.Y.; Slip Opinion at 7, this report at 317.]**

Mr. Cervase filed a notice of appeal on November 21, 1978.

Status.—**Mr. Cervase's appeal is pending before the U.S. Court of Appeals for the Second Circuit.**

The complete text of the memorandum order is printed in the "Decisions" section of this report at 313.

United States* v. *Goldberg

Cr. 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, as 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; Stephen 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 meat which the employee-defendants of the firms 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 April 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:

> SEC. 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 *ad 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. The action against him 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.

On December 14, 1977, the District Court issued a memorandum and order reaffirming its earlier denial of Mr. Romano's motion to dismiss the indictment or suppress evidence on the ground that the Government's evidence was obtained in violation of his immunity agreement.

On December 28, 1977, Mr. Romano filed a notice of appeal of the guilty verdict.

The indictment against Stephen Ira Goldberg was dismissed on January 4, 1978. Also, on January 4, 1978, the other defendants were sentenced. Defendant Harry Goldberg was sentenced to 4 years in prison on count 1 and 2 years in prison on count 2, to be served concurrently and fined $5,000 on each of counts 1 and 2 for a total fine of $10,000. Defendant David Frank Goldberg was sentenced to 4 years in prison and fined $10,000. Defendant Frank Ravasini was sentenced to 3 years in prison and fined $5,000. Defendants Blue Ribbon Frozen Food Corp., Inc. and G & G Packing Company, Inc., were both fined $10,000.

On January 5, 1978, Mr. Ravasini moved to revise his sentence.

On January 8, 1978, the indictment was dismissed against Blue Ribbon Frozen Food Corporation, Inc. and G & G Packing Company, Inc.

On January 23, 1978, judgment and commitment order were entered against Manuel Pacheco.

On March 25, 1978, Mr. Pacheco moved to revise his sentence.

On May 2, 1978, Mr. Ravasini moved for a reduction of his sentence. On May 3, 1978, Mr. Harry Goldberg moved to reduce and revise his sentence and Mr. David Frank Goldberg moved to reduce his sentence. Mr. Harry Goldberg's motions and Mr. David Frank Goldberg's motion were denied on May 19, 1978. Mr. Pacheco's motion was denied on June 5, 1978.

On August 11, 1978, the Court of Appeals for the First Circuit issued an opinion in the appeal filed by defendant Romano. Mr. Romano had argued that the evidence adduced by the Government at trial had been obtained in violation of use immunity which had been granted to him pursuant to an application by the Senate Subcommittee on Spending Practices, Efficiency, and Open Government of the Senate Government Operations Committee.

Before trial, the District Court held a 3-day hearing on Mr. Romano's motion to dismiss the indictment or suppress evidence on this ground. The court concluded that:

> "the United States had met the heavy burden imposed by *Kastigar* v. *United States,* 406 U.S. 441, 460–62 (1972), and had shown that the source of the evidence that the Department of Justice intended to use in the Romano prosecution originated from sources completely independent of Romano's immunized Senate testimony." The district court also found that a proffer of evidence made in October 1975 by Romano's counsel to members of the Subcommittee in order to obtain a grant of immunity was not the source of any evidence relied on by the Government either before the grand jury or at the trial, and, additionally, that the information contained in the proffer was not insulated from Government use by the terms of Sec. 6002 or the *Kastigar* decision. [*United States* v. *Romano* No. 78–1046 (1st Cir.); Slip Opinion at 2.]

In reaching this conclusion the court noted that Mr. Romano had been subpoenaed to appear before the subcommittee. Mr. Romano, asserting his Fifth Amendment right against self-incrimination, refused to testify. Subsequently, Mr. Romano's attorney met with Senator Lawton Chiles, chairman of the subcommittee, and Senator Lowell Weicker, a ranking member of the subcommittee. In that meeting, Mr. Romano's attorney sought a grant of use immunity from the subcommittee in exchange for his client's testimony. Mr. Romano's attorney apparently gave the Senators some glimpse of what his client's testimony would be. This proffer was described as "a 'general' one outlining Romano's willingness to testify about some practices of G & G including the substitution of inferior for the specified cuts." [Slip Opinion at 4.] (Footnote omitted.)

The next day, the Senators met with the Justice Department official who had begun a criminal investigation of the defendants and informed him of the proffers. Although the Justice Department asked the subcommittee not to seek immunity, fearing that such action might complicate its ability to make its case, the subcommittee, on November 13, 1975, nonetheless voted to seek an immunity order. The order was granted by the United States District Court for the District of Columbia on November 24, 1975.

The subcommittee, responding to a request by the Attorney General, delayed hearing Romano's testimony. The Court of Appeals summarized the relevant events of April and May 1976 in this manner:

> In early April 1976, a grand jury began investigation of Romano and was presented with depositions of Pacheco and Reidinger and the testimony of Hoyer-Booth, Johnson and Kehl. Romano's testimony was finally scheduled for a closed executive session of the Subcommittee on April 29, 1976. Graham drafted and circulated a memo dated April 19, 1976, alerting his staff and the DIS [Defense Investigative Services, a branch of the Defense Department which assisted the Senate Subcommittee in its preliminary investigation] staff to the upcoming testimony, and directing

them to avoid all access or contact with any reports, personal or journalistic, of the testimony. On April 25, 1976, two DIS employees assigned to Romano's case drafted a memo summarizing the case against Romano as it stood before any testimony was taken: the memo refers to testimony of Edward Kehl and interviews with Hoyer-Booth as well as other unnamed sources, and details the substitution of cuts and bribery with which Romano was subsequently charged. On April 27, 1976, two days before Romano's scheduled testimony, the Department of Justice through the Attorney General received a packet of materials from Senators Chiles and Weicker, outlining "all evidence and 'leads' gathered by the subcommittee, particularly information which may not yet have come to the attention of the Justice Department, and which may suggest criminal wrongdoing by Mr. Romano."

Finally, on April 29, 1976, Romano testified before the Subcommittee. A press conference on the subject of the hearings, covering the evidence accumulated to date, was held by the Subcommittee on May 7, 1976, and received "fairly heavy press coverage." Romano again testified before the Subcommittee at a public session on May 13, 1976. [Slip Opinion at 6–7.]

18 U.S.C. § 6002, the statute pursuant to which the subcommittee sought use immunity for Mr. Romano reads, in pertinent part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> * * * * * * *
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except for a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Mr. Romano argued that his proffer to the Senators was "other information," the use of which is barred by the statute's prohibition upon reliance on "any information directly or indirectly derived from such testimony or other information." This assertion the court rejected, declaring:

> The parallel construction in the phrases emphasized above indicates that the "such testimony or other information" of which derivative use is prohibited, refers to the "testimony or other information compelled under the order" whose direct use is banned in the phrase immediately

preceding. By definition, a proffer cannot be considered testimony or information compelled by an order since, when made, no order has issued. Nor can it logically be said that in some sense a proffer is directly or indirectly derived from subsequent protected testimony. Such a casual relation is chronologically impossible. [Slip Opinion at 8–9.]

Mr. Romano also argued that the effect of permitting use of a proffer that resulted in protected testimony could discourage the use of the immunity statute by limiting or eliminating communication between the attorney for a witness and the investigative body. To this argument the court responded:

> Romano warns that such a rule would burden the negotiations for immunity by imposing a great risk on a proffer detailed enough to satisfy an investigative body that a grant of immunity would be in fair exchange. The immunity conferred on a party who makes a proffer and testifies under a Sec. 6005 order is not transactional immunity, however, but use and derivative use immunity. The investigative body does not need to learn a great deal about the witness' expected testimony in order to avoid buying "a pig in a poke": if the latter testimony is useless, the scope of the immunity will be correspondingly small. A general and brief outline of the areas in which the potential witness could aid the investigation might normally suffice. In any event, circumspection will necessarily characterize proffers of testimony in return for this limited immunity: when a proffer is made there can never be any certainty that it will result in a grant of immunity—this is a fact of life the person seeking immunity must face. See *United States* v. *Rothman, supra; United States* v. *DiMuro, supra.* These factors help explain why the proffer made in the present case by Romano's experienced counsel was couched in terms so broad that the district court felt if served neither as a direct nor indirect source of subsequent Department of Justice inquiry. [Slip Opinion at 9.]

Turning next to the question of whether the Fifth Amendment afforded greater protection to the proffer made by Mr. Romano's attorney to the Senators, the court declared that the protection of the Fifth Amendment was coextensive with § 6002. The court noted that Mr. Romano was not compelled to make the proffer to the Senators. The court concluded:

> There is, therefore, no fifth amendment barrier to use of any hint the Government may have gleaned from the brief encounter that Romano's counsel voluntarily had with Senators Chiles and Weicker. [Slip Opinion at 10.]

Finally, the court rejected Mr. Romano's assertion that the District Court had erred in finding that the Government's case was not "tainted", that is, derived in some measure from the immunized testimony given to the subcommittee, but was instead derived from independent and legitimate sources.

On October 11, 1978, Chief Judge Caffrey issued an order treating a letter filed by Mr. David Frank Goldberg on September 25, 1978, as a motion for reduction of sentence and denying said motion.

On December 18, 1978, Mr. Romano was ordered committed for a period of 3 years and 6 months.

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

The August 11, 1978 decision 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 5, September 15, 1978.

United States ex rel. Joseph* v. *Cannon

No. 78–1618 (D.C. Cir.)

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 re-election 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 perfunctory 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 7, 1977, defendants filed a motion to dismiss.

On May 25, 1978, District Court Judge Bryant filed a memorandum and order granting the motion of defendants to dismiss the action. As to plaintiff's first claim, the court found that it had no jurisdiction under the terms of the False Claims Act, since that act denies jurisdiction over private false claims if the evidence or information on which the suit is based was already in the possession of the Government. In the instant case, the information in question was already in the possession of the Government, since Senator Cannon had filed with the Secretary of the Senate and publicly disclosed that Mr. Sobsey was an aide authorized to receive and distribute campaign contributions.

In regard to the claim of fraud, Judge Bryant held that plaintiff had failed to state a claim upon which relief may be granted since plaintiff failed to point to one specific instance in which a member of Senator Cannon's personal staff was paid out of public income for personal tasks.

Mr. Joseph filed a notice of appeal on May 26, 1978.

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

United States* v. *Hanna

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 charged 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 were 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.

On January 9, 1978, defendant moved to dismiss the indictment. The motion was heard, argued and taken under advisement.

The motion to dismiss was denied on February 15, 1978.

A plea agreement was filed on March 17, 1978. Defendant withdrew his plea of not guilty and pleaded guilty to count one.

On April 24, 1978, defendant was sentenced to not less than 6 months nor more than 30 months on count one. The remaining counts were dismissed.

Mr. Hanna moved on July 27, 1978 for a reduction in his sentence, or alternatively, for modification thereof. The motion was denied on August 9, 1978. On August 21, 1978 Mr. Hanna filed a

second motion for reduction of sentence, or alternatively, for modification of his sentence.

Status.—No further action has been taken.

United States* v. *Passman

Criminal Case No. 78-30013-01 (W.D. La.)

Brief.—Otto E. Passman, former U.S. Representative from Louisiana, was indicted on March 31, 1978, in U.S. District Court for the District of Columbia on one count of conspiracy (18 U.S.C. § 371), three counts of bribery (18 U.S.C. § 201 (c)(1)), and three counts of receiving illegal gratuities (18 U.S.C. § 201(g)).

The indictment is primarily based upon alleged activities carried out by then-Congressman Passman and Tong Sun Park, named as an unindicted co-conspirator, in regard to the sale of U.S. rice to Korea under the Food-for-Peace Program (PL-480).

On April 28, 1978, Mr. Passman was named defendant in a second indictment which charged him with tax evasion.

Mr. Passman moved to consolidate the two indictments and on June 26, 1978 his motion was granted. Additionally, a motion by Mr. Passman to transfer the action against him to the United States District Court for the Western District of Louisiana was granted on July 14, 1978.

On October 2, 1978, the District Court denied Mr. Passman's motion to dismiss, rejecting his assertions that the indictment violated his constitutional rights. Mr. Passman had asserted two bases for his motion to dismiss. First, he argued that the indictment should be dismissed because 18 U.S.C. § 201, applicable to all counts in the indictment, was overbroad and so general, vague and obscure as to deny him his due process rights under the Fifth Amendment and freedom of speech under the First Amendment.

As a second allegation, Mr. Passman asserted that the denial of his motion to dismiss would put him in double jeopardy, subject him to the possible danger of a compromise verdict by the jury, and result in a multiplicitous indictment.

Subsequently, on November 24, 1978, Mr. Passman submitted a new motion to dismiss asserting prosecutorial misconduct and overreaching. Mr. Passman further alleged that undue and unjustified delay, coupled with the resulting prejudice to him, have deprived him of constitutional rights including his Fifth Amendment due process rights.

On December 14, 1978, the Government filed a motion for a court order that Mr. Passman had waived his right to raise Speech or Debate clause objections to the introduction at trial of all evidence which the Government had specifically indicated would be used at trial.

Status.—**The case is pending before the U.S. District Court for the Western District of Louisiana.**

The ruling of the District Court is printed in the "Decision" section of this report at 321.

United States* v. *Diggs

No. 78-2327 (D.C.Cir.)

Brief.—On March 23, 1978, Charles C. Diggs, Jr., Representative for the 13th Congressional District of Michigan, was indicted in the U.S. District Court for the District of Columbia. Representative Diggs is charged with 14 counts of violating 18 U.S.C. § 1341 (Mail Fraud) and 21 counts of violating 18 U.S.C. § 1001 (False Statement).

18 U.S.C. § 1341 reads, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter; any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 provides the same penalties for anyone who

> in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entity * * *

The indictment alleges that Representative Diggs:

> [D]id devise and intend to devise 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 defendant Diggs knew would be and were false when made.

Further allegations in the indictment state that Representative Diggs:

> [I]n order to pay for his personal, business, and House of Representatives expenses, would and did divert and cause to be diverted from the Treasury of the United States a sum in excess of one hundred and one thousand dollars ($101,000.00) in the form of salary kickbacks from certain House of Representatives employees and payments to others on the House of Representatives payroll who performed no work for the House of Representatives. [*United States* v. *Diggs* Cr. No. 78-142 (D.D.C.) (Indictment at 2.)]

On April 28, 1978, Representative Diggs filed a motion for a bill of particulars, a motion for discovery and inspection, and a motion to dismiss for selective prosecution counts 5 through 14 and 24 through 35 of the indictment. In a memorandum in support of the motion to dismiss, Congressman Diggs asserted that although the

Justice Department was aware of allegations that other Members of Congress were involved in activities similar to those alleged against him, no prosecution was instigated against those other Members.

The Government filed oppositions to each of the three motions on May 5, 1978.

On May 9, 1978, defendant's motion to dismiss counts 5 through 14 and 24 through 35 was heard and denied.

The case was reassigned from Judge Waddy to Judge Gasch on June 9, 1978.

On July 25, 1978, Judge Gasch filed the findings of the court for the issuing of subpoenas *duces tecum* to Robert V. Rota, Postmaster of the House of Representatives, Edmund L. Henshaw, Jr., Clerk of the House of Representatives, and Kenneth R. Harding, Sergeant at Arms of the House of Representatives, or their authorized representatives, and the subpoenas were issued on the same day.

On September 26, 1978, the trial was begun. Congressman Diggs was found guilty on all counts on October 7, 1978. He was sentenced on November 20, 1978 to 3 years on each count, to run concurrently.

On November 24, 1978, Representative Diggs filed a notice of appeal.

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

Community-Service Broadcasting of Mid-America, Inc. et al.* v. *Federal Communications Commission and United States

No. 76-1081 (D.C. Cir.)

Brief.—This petition for review of an order of the Federal Communications Commission (hereinafter "FCC") was filed in the U.S. Court of Appeals for the District of Columbia on January 26, 1976. The petition, which was filed by several noncommercial broadcasting stations, challenged the constitutionality of Section 399(b) of the Communications Act, 47 U.S.C. § 399(b) (Supp. V 1975), and the rules promulgated thereunder by the Federal Communications Commission, *Report and Order,* Docket 19861, 57 FCC 2d 19 (Dec. 19, 1975). That section of the Communications Act and the implementing rules require, *inter alia,* all noncommercial radio and television stations which receive any Federal funding to record all broadcasts "in which any issue of public importance is discussed", to retain a copy of the recording for 60 days and provide copies at cost to any person requesting them. The petition was argued before Circuit Judges Wright and Leventhal and District Judge Gesell, sitting by designation, on January 19, 1977.

On February 24, 1977, the case was remanded to the FCC for consideration of three questions: (1) What important or substantial Government interest is furthered by the recording requirement? (2) Is the governmental interest unrelated to suppression of free expression? (3) Assuming the validity of the statute, are there any alternatives as to implementing regulations that would result in a less drastic burden? The FCC noted, in response to the first question, that the legislative purpose of the statute is unclear, but suggested that one purpose may be "to give taxpayers who provide

the bulk of financial support for these stations, a means for reviewing the stations' performance". The FCC also answered that the recording requirement of Section 399(b) was not intended to, nor does it suppress free expression, and that it was unaware of any less drastic means of preserving the programs broadcast.

The Court of Appeals issued its opinion on September 15, 1977, in which it held Section 399(b) and the rules promulgated thereunder unconstitutional and vacated the FCC order in question. The court noted that Congress is responsible for appropriating funds for distribution to noncommercial stations and that in doing so may take account of the extent to which the Corporation for Public Broadcasting is meeting the statutory mandate of "objectivity and balance". However, this oversight function was not held by the court to encompass "sporadic review by Congressmen or the FCC of the contents of particular programs." The avoidance of Congressional interference was seen as the purpose behind the system of appropriations in this area, whereby Congress has no control over the ultimate distribution and use of funds once they are allocated. Section 399(b) was held to be a means of Government censorship of the specific contents of programs broadcast by noncommercial stations and as such was held to be unconstitutional.

The opinion stated that recording and access provisions might be permissible under some circumstances:

> This is not to say that recording and access provisions could not conceivably be grounded on any legitimate governmental objective. But given the absence of similar regulation of commercial stations, such alternative objectives cannot sustain the statute and regulations at issue here against a Fifth Amendment equal protection challenge. For the distinction between the requirements imposed on commercial and noncommercial stations is not even relevant to any legitimate government interests, see *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U.S. 420, 425–426 (1961), let alone sufficiently supported to meet the strict scrutiny appropriate where First Amendment rights are implicated, *see e.g., Chicago Police Department* v. *Mosley, supra,* 408 U.S. at 101–102; *NAACP* v. *Button,* 371 U.S. 415, 438 (1963); *Mancuso* v. *Taft,* 476 F.2d 187, 192–196 (1st Cir. 1973).
>
> Thus the Commission's claim in its response to remand that "one purpose" of the statute is "to give taxpayers, who provide the bulk of financial support for these stations, a means for reviewing the stations' performance" inevitably falters on equal protection grounds. For the fact is that public support is not limited to noncommercial stations; by providing and policing the exclusive channels and frequencies of commercial stations, the Government—and thus the taxpayers—provide a benefit to commercial stations which in all likelihood is many magnitudes larger than any benefits provided to noncommercial stations. If recording and access requirements are to be imposed on this basis, they must be applied to all stations. A similar conclusion must be reached with respect to any claim that

> these provisions are justified as a means of facilitating the responses secured by the fairness doctrine. Since that doctrine is equally applicable to commercial and noncommercial stations, see *Accuracy in Media, Inc.* v. *FCC, supra,* 521 F.2d at 296, requirements predicated on compliance with it cannot constitutionally be imposed, as they have been here, only upon noncommercial stations. [Slip Opinion at 6–7 (footnotes omitted).]

In conclusion, the Court of Appeals stated that it was unable to find any legitimate governmental interest served by Section 399(b) and the rules promulgated thereunder which does not at once fail on equal protection grounds.

Circuit Judge Leventhal filed a dissenting opinion in which he stated that the case did not involve the classification of noncommercial, but rather, the classification of publicly funded stations, which he indicated was not necessarily an invidious classification. Considering the nub of the case to be the question of whether the recording requirement is disguised censorship or a wedge for censorship, and answering that question negatively, Judge Leventhal stated:

> In my view, the court should give a provisional approval to the legislation subject to reconsideration in light of experience. If experience shows that this requirement leads to harassment or such intensive scrutiny of the noncommercial licensee as to be tantamount to censorship, or to veer strongly in that direction, then a regulation neutral on its face may be shown to be invalid in the light of experience. [Slip Opinion (dissent) at 5.]

The FCC filed a petition for rehearing and suggestions for rehearing *en banc* on October 13, 1977. On November 9, 1977, the case was ordered reheard *en banc.*

The Public Broadcasting Service moved for leave to file a brief as an *amicus curiae* on December 19, 1977.

Letters of consent to the filing of an *amicus curiae* memorandum of the Corporation for Public Broadcasting and the memorandum itself were filed on December 21, 1977. The brief urged that the court find the statute and the FCC order unconstitutional.

U.S. Senator Robert P. Griffin of Michigan filed a motion for leave to file a memorandum as *amicus curiae* on December 21, 1977.

A clerk's order granting the motions of the Public Broadcasting Service and Senator Griffin to file briefs *amici curiae* and the briefs themselves were filed on December 29, 1977. Senator Griffin's brief supported the constitutionality of the statute and the FCC order. The Public Broadcasting Service's brief urged the court to find the statute and order unconstitutional.

The Court of Appeals issued its opinion on August 25, 1978, again finding Section 399(b) unconstitutional and vacating the FCC order which promulgated rules and regulations implementing that statute. The opinion of the court held Section 399(b) and the FCC regulations invalid under the Fifth Amendment because they deny petitioners the equal protection of the laws. The court declared that while a classification which is not invidious and does not

affect fundamental rights will normally withstand equal protection scrutiny so long as the classification is rationally related to a legitimate governmental interest, where fundamental rights are involved, stricter scrutiny is required and it must be shown that the classification is narrowly tailored to fit a substantial Government interest. The court found none of the purposes put forward to support the recording requirement to adequately justify treating commercial and noncommercial broadcasters differently as done by the statute and FCC rules.

Circuit Judge Robinson filed an opinion concurring in part and concurring in the judgment in which he stated that there was no basis for a finding that the recording requirement reasonably related to any permissible governmental purpose and that no rational justification had been shown for the classification involved.

Circuit Judge Leventhal, joined by Circuit Judge Tamm, filed a dissenting opinion, in which they expressed this view:

> Under the Public Broadcasting Act of 1967, Congress appropriates funds for the production of programs to be broadcast by noncommercial stations. Every program or series of programs of a controversial nature is required to maintain a stringent standard of "strict adherence to objectivity and balance." That standard is more rigorous than that applicable to licensees generally under the fairness doctrine, which provides a loose standard of general balance in a licensee's overall programming and has no requirement for individual programs.
>
> Congress reserved for itself the oversight responsibility of assuring, primarily through reports and review of appropriations, that federally funded programs conform to the strict objectivity and balance standard. This is a legitimate and substantial government interest. Construed in light of its purpose and context, the minimal audio taping requirement of Sec. 399(b) is a permissible auxiliary of this congressional responsibility. The oversight does not abridge First Amendment freedom.
>
> The Act does not apply to commercial stations, but this does not mark an invalid classification. There is no corresponding congressional interest in a taping requirement for commercial licensees, which do not broadcast programs funded under the Act. [Slip Opinion (dissent) at 2.]

Circuit Judge MacKinnon, joined by Circuit Judge Robb, also filed a dissenting opinion in which he concluded that:

> [T]he statute is valid in its entirety, should be given its plain reading, and I would not issue an advisory opinion based essentially on a prophecy that beneficiaries of government largess necessarily need fear pressures that would violate the statute and the Constitution. [Slip Opinion (dissent) at 9.]

On September 22, 1978, the FCC filed a notice of appeal to the Supreme Court of the United States.

On November 10, 1978, the FCC filed an application (A–446) with the Supreme Court for an extension of time within which to

docket appeal. The application was granted on November 15, 1978, and the time extended December 21, 1978.

Status.—No further action has been taken. The time for appeal has expired.

The opinion of the Court of Appeals of September 15, 1977 is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 5, September 15, 1978.

The opinion of the Court of Appeals on rehearing *en banc* is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress,* Part 5, September 15, 1978.

Patterson* v. *Griffin

Civil Action No. 78–71458 (E.D. Mich.)

Brief.—L. Brooks Patterson, a candidate in the August 8, 1978 primary election for Republican candidate for Senator from Michigan, brought this suit on June 13, 1978 in the United States District Court for the Eastern District of Michigan. Named as defendant is Robert P. Griffin, United States Senator from Michigan. The complaint states that Senator Griffin has announced his intention to seek reelection and is also a candidate in the August 8, 1978 primary. The suit is based on a "pamphlet or newsletter" sent under the franking privilege by Senator Griffin to "many and various" persons in the State of Michigan and which allegedly violates Senate guidelines regulating the number of pictures of a Senator and the number of times a Senator's name may appear in franked mail. The complaint asks for a temporary restraining order, and preliminary and permanent injunctions enjoining Senator Griffin and his agents, servants, employees, attorneys and campaign committees from mailing any such pamphlet under authority of the frank until the Michigan general election of November 7, 1978. Plaintiff also seeks disclosure and reimbursement to the Treasury by Senator Griffin for any public funds, facilities, services, personnel, or instrumentalities used for the newsletter.

Senator Griffin filed a motion to dismiss or in the alternative for summary judgment on June 16, 1978. The memorandum submitted with the motion argued that the court has no jurisdiction to entertain any civil action concerning possible violation of the franking laws until a complaint has been filed with, and a decision rendered by, the Senate Select Committee on Ethics pursuant to 2 U.S.C. § 502, which provides in part:

> (c) Not withstanding any provision of law, no court or administrative body in the United States or in any territory thereof shall have jurisdiction to entertain any civil action of any character concerning or related to a violation of the franking laws or an abuse of the franking privilege by any person listed under subsection (a) of this section as entitled to send franked mail, until a complaint has been filed with the select committee and the committee has rendered a decision under subsection (b) of this section.

The memorandum also variously attacked plaintiffs prayers for relief as vague, indefinite and frivolous.

Mr. Patterson filed an affidavit of bias on June 22, 1978, in which he asked Judge Feikens to disqualify himself.

In a brief filed in opposition to defendant's motion to dismiss or for summary judgment, Mr. Patterson argued that exhaustion of administrative remedies was not required in this case since his interests would be irreparably harmed by the delay entailed in pursuing administrative relief, regardless of the outcome; and that summary judgment would be inappropriate, since genuine issues of fact were present.

On June 26, 1978, the motions to disqualify the motion for a preliminary injunction, and the motion to dismiss were all heard and denied.

On the same day, June 26, 1978, Mr. Patterson filed an amended complaint. In his amended complaint, Mr. Patterson asserted, in response to Senator Griffin's declaration that the court had no jurisdiction over the action until the Senate Select Committee on Ethics had acted, that he had filed a complaint with the Committee, but he had received no response. He also asserted that he would be denied effective relief if he were required to look exclusively to the Select Committee. He further asserted that 2 U.S.C. § 502 denies him his right to equal protection of the laws guaranteed by the United States Constitution.

On July 14, 1978, Judge Feikens issued an order denying Mr. Patterson's motion for a preliminary injunction and dismissed for lack of jurisdiction those parts of the complaint relating to an alleged violation of the Franking Act. Judge Feikens refused to dismiss that part of the action asserting the unconstitutionality of 2 U.S.C. § 502.

On August 15, 1978, Judge Feikens, in a supplemental order, noting that Mr. Patterson had failed to file briefs on the constitutionality question as the court had directed, dismissed that remaining claim.

Status.—**The time for appeal has expired.**

Littlejohn* v. *Talmadge

Civil Action No. C78-1375A (N.D. Ga.)

Brief.—Charles Littlejohn, a resident of Georgia, filed this action against U.S. Senator Herman Talmadge and the United States Senate in the United States District Court for the Northern District of Georgia on August 15, 1978.

Mr. Littlejohn, acting as his own attorney, asserts in a two count complaint that Senator Talmadge has engaged in certain illegal and unlawful financial dealings and that the Senate investigation of these activities is "self-serving and protective of" its Members.

Mr. Littlejohn seeks to:

> "enjoin said defendant Senate from further legislative acts in which the affairs of plaintiff are affected so long as defendant Talmadge is a sitting member of said Senate; enjoin Senator Talmadge from engaging in acts as a member of said Senate in any transaction in which the

> affairs of plaintiff are affected; enjoin said defendant Senate from continuing and conducting aforesaid self-serving investigation of said defendant Talmadge; and that this Honorable Court appoint an investigative body to conduct a proper and unbiased investigation [of Senator Talmadge]." [*Littlejohn* v. *Talmadge* (C78–1375A); complaint at 3–4.]

Mr. Littlejohn also asks the court to award him:

> [A] pro-rata share of all aforesaid monies obtained in an illegal and unethical manner by defendant Talmadge, and pay same, with interest, to Plaintiff as his pro-rata share with all taxpayers of the United States; along with consequential damages of $10,001.00, to compensate said Plaintiff for the corollary financial damages resulting from inflation caused by the greater costs of the Federal Government and the Government of the State of Georgia resulting from increased Senate budgets; property acquisition costs; State budgets; and legal and administrative costs occasioned by the illegal and unethical acts of said defendant Talmadge; and the failure of defendant Senate to control same and to act accordingly and timely; and the mental anguish and suffering of Plaintiff occasioned by aforesaid improper acts and failures to control such acts. [Complaint at 4.]

On October 3, 1978, Senator Talmadge filed a motion to dismiss the complaint on the ground that the facts alleged in the complaint fail to state a claim upon which relief can be granted, and that the court will not take cognizance of a case involving the conduct of an incumbent in the performance of official duties.

On October 17, 1978, the United States Senate, by and through the U.S. Attorney for the Northern District of Georgia, moved to dismiss the complaint on the grounds that the court lacked jurisdiction of the subject matter of the complaint.

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

United States* v. *Clark

No. 78–207 (W.D. Pa.)

Brief.—Frank M. Clark, former Congressman for the 25th Congressional District of Pennsylvania, was indicted by a Federal grand jury on September 5, 1978. The indictment, which was filed in the U.S. District Court for the Western District of Pennsylvania, charges Mr. Clark with illegal acts while he was a member of the U.S. House of Representatives. Mr. Clark was charged with nine counts of mail fraud (18 U.S.C. § 1341), one count of perjury before a grand jury (18 U.S.C. § 1623), and three counts of attempting to evade or defeat income tax (18 U.S.C. § 7201).

The mail fraud counts are based upon allegations that Mr. Clark placed several persons on the payroll of the House of Representatives as members of his staff for the purpose of paying them for their work in maintaining, staffing and operating his campaign headquarters. Specifically, the counts relate to nine U.S. Treasury

checks sent by mail to the individuals who were allegedly fraudulently placed on the House payroll.

The perjury count consists of an allegation that Mr. Clark, while appearing before a grand jury investigating his activities, denied that he had received any monies of any sort other than his Congressional salary and income from stocks he may have owned, when he knew that was not the case.

On September 12, 1978, Mr. Clark filed a motion for a bill of particulars, which requested that the Government state the theory or theories which form the basis of its proof of the alleged additional taxable income, and, if based on specific items of income allegedly not included in his tax returns for the years 1972, 1973 and 1974, that the Government state the source of said income, the amounts allegedly paid, and the date of each alleged payment.

On September 29, 1978, United States District Judge Snyder issued an order granting the motion for a bill of particulars insofar as it requested the sources and amounts of the specific items of income allegedly not included in Mr. Clark's income tax returns for the years in question. In a brief opinion filed with the order, Judge Snyder noted that the Government had indicated to counsel for Mr. Clark, in a conference subsequent to the motion, that it was relying on the specific items theory. Since Mr. Clark was not made aware, from the face of the indictment, of the specific items which the Government intended to use to support its theory of income tax evasion, a bill of particulars should be filed specifying the specific items in each count of the indictment on which it will rely to prove the amount of additional income tax that was allegedly evaded and the source of those items. However, Judge Snyder held that it was not necessary for them to set forth the dates of the payment as it need not weave the information at its command into the fully integrated trial theory.

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

The District Court opinion of September 29, 1978, is printed in the "Decisions" section of this report at 335.

United States v. *Flood*

Cr. No. 78-543 (D.D.C.) and Cr. No. 78-561 (D.D.C.).

Brief.—On September 5, 1978, an indictment was filed in the United States District Court for the Central District of California against Congressman Daniel J. Flood. The three-count indictment charges Congressman Flood with perjury before the U.S. District Court for the Central District of California and before a Federal grand jury (18 U.S.C. § 1623).

The case was transferred to the U.S. District Court for the District of Columbia on October 18, 1978.

On October 12, 1978, a 10-count indictment against Representative Flood was filed in the United States District Court for the District of Columbia. In the indictment, he was charged with one count of conspiracy (18 U.S.C. § 371) and nine counts of bribery and aiding and abetting bribery (18 U.S.C. §§ 201, 202).

On October 18, 1978, the indictment which had been filed in California was transferred to the U.S. District Court for the District of Columbia.

The two indictments were consolidated on October 23, 1978.

Status.—The cases are pending in the U.S. District Court for the District of Columbia.

United States* v. *Eilberg (New Case)

Cr. No. 78-311 (E.D. Pa.)

Brief.—On October 24, 1978, an indictment was filed in the United States District Court for the Eastern District of Pennsylvania, in which Joshua Eilberg, United States Representative from Pennsylvania was charged with a violation of 18 U.S.C. § 203(a). Under that section, it is illegal for any Member of Congress, except as provided by law, to receive directly or indirectly, or agree to receive, or ask, demand, solicit, or seek any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission.

The indictment specifically alleged that from approximately April 1975 to December 1977, Representative Eilberg, while he was a Member of Congress, unlawfully and knowingly, directly and indirectly received and agreed to receive compensation from the Hahnemann Medical College and Hospital of Philadelphia (hereinafter "Hahnemann"), in violation of 18 U.S.C. § 203(a). The Government charged in the indictment that the alleged compensation was for services rendered and to be rendered by Congressman Eilberg, by members of law firms in which he was a partner and by another U.S. Representative from Pennsylvania, Daniel J. Flood. The alleged services related a $14.5 million grant which Hahnemann was seeking from the Community Services Administration, an antipoverty agency of the executive branch of the U.S. Government.

On November 1, 1978, Congressman Eilberg entered a plea of not guilty.

On December 4, 1978, Representative Eilberg moved for a change of venue, to dismiss the indictment, and for a bill of particulars.

On December 18, 1978, the Government moved for production and inspection of telephone records. On December 27, 1978, the District Court granted the Government's motion and ordered a copy of the order granting the motion to be served on the Honorable Edmund L. Henshaw, Clerk of the U.S. House of Representatives.

Status.—The case is pending before the United States District Court for the Eastern District of Pennsylvania.

In re Japanese Electronic Products Antitrust Litigation (Newly Reported Case)

M.D.L. No. 189 (E.D.Pa.)

Brief.—On July 27, 1978, during the course of this multidistrict antitrust action in the United States District Court for the Eastern District of Pennsylvania involving various American and Japanese corporations involved in the manufacture of electronic products,

two notices of taking the deposition of Bernard Nash, an attorney who had been retained by Zenith Radio Corporation, were filed. The first notice, which was filed by defendant Motorola, Inc., sought, *inter alia,* any documents relating to remarks concerning Motorola made by Senator Robert B. Morgan on the Senate floor on June 27, 1978; any documents relating to the identity of anyone who communicated with Senator Morgan or his staff concerning Motorola; all documents communicated to any member or employee of the legislative or executive branch of Government, including but not limited to the Antitrust Subcommittee of the Senate Judiciary Committee, Senator Morgan or members of his staff, the Department of Justice, or the Securities Exchange Commission; and all documents relating to any communication relating to Motorola between Mr. Nash or his law firm and any member, employee, official or agency of the legislative or executive branch of the Government since January 1976. The second notice, which was filed by several corporate defendants, Toshiba, Matsushita, Hitachi, Sanyo and Sears, sought, *inter alia,* various types of documents relating to communications with any governmental body. Subpoenas *duces tecum* were served on Mr. Nash on July 28, 1978. Mr. Nash moved for a protective order on August 2, 1978.

The group of defendants who had served the second subpoena served a modified subpoena of narrowed scope on Mr. Nash on August 24, 1978, upon the instruction of the court at a pretrial conference held on August 16, 1978.

On August 28, 1978, Senator Robert Morgan filed a motion to intervene as intervenor of right. Senator Morgan sought to intervene in order to assert that the subpoenas infringe upon the investigatory authority of the Senate. To enforce the subpoenas, Senator Morgan's motion stated, would seriously inhibit the right of a Member of Congress to investigate coterminous legislative activity by deterring and chilling a citizen's willingness to provide information voluntarily or petition the Government for redress of grievances.

On October 4, 1978, Senator Morgan filed an amended motion to intervene as intervenor of right and an affidavit in support of the motion. Senator Morgan asserted that information supplied to him by Mr. Nash was privileged by the Speech or Debate clause of the U.S. Constitution and that the subpoenas should be quashed insofar as they seek any testimony or correspondence by Mr. Nash with Senator Morgan or members of his staff.

Senator Morgan's motion to intervene was granted on October 4, 1978.

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

DECISIONS

United States District Court for the Middle District of Pennsylvania

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No. 77-1137 Civil

SAMUEL RUSACK

v.

WILLIAM H. HARSHA, STANLEY L. BISHOP, P. J. KANISTROS, POLI-COM, INC.

MEMORANDUM AND ORDER

Plaintiff has filed this defamation action, asserting the court's diversity jurisdiction. Presently before the court are three defense motions. Defendant Bishop has moved to dismiss and to quash service of process on the grounds that the court lacks both subject matter jurisdiction over the action and personal jurisdiction over him, that venue is improper, and that he was not properly served. Defendants P. J. Kanistros and Poli-Com, Inc., have moved to dismiss and to quash service of process on the grounds that the court lacks personal jurisdiction over both the movants, that venue is improper, and that neither movant was properly served. Defendant Harsha, a member of the United States House of Representatives, who is named in Counts I through III of this ten-count complaint, has moved to dismiss or, in the alternative, for summary judgment, on the grounds that (1) the conduct upon which plaintiff bases his claim in the three counts, *see infra,* is legitimate legislative activity and as such is absolutely privileged under the Speech or Debate Clause of the United

States Constitution; (2) the conduct complained of which involved reports to government officials regarding a supposed violation of federal law is constitutionally privileged; and (3) defendant Harsha's actions are privileged under the First Amendment because plaintiff is a public official and there has been no showing of actual malice under the standards as originally set out in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). The motions of defendants Bishop, Poli-Com, Inc., and Kanistros will be denied. Defendant Harsha's motion will be granted and he will be dismissed from the action.

I. THE MOTIONS OF DEFENDANTS BISHOP, POLI-COM, INC., AND KANISTROS

A. *The Facts*

For the purpose of ruling on these two motions the court accepts as true the facts as set out in the complaint and the exhibits attached thereto. According to the complaint plaintiff is a resident of Harrisburg, Pa., and, at the time of the alleged defamation was a United States Navy civilian employee working as a Supervisory Contract Negotiator at the United States Navy Ships Parts Control Center (SPCC), Mechanicsburg, Pa.[1] Defendant Bishop is a resident of Washington, D.C. Defendant Kanistros is a resident of Ohio and is president of defendant Poli-Com, Inc., an Ohio corporation with its place of business in Ohio. It is alleged that the amount in controversy, exclusive of interest and costs, exceeds ten thousand ($10,000) dollars.

On or about August 19, 1976, defendant Bishop composed and sent a letter to the Honorable Donald Rumsfeld, then Secretary of Defense, which allegedly contained defamatory material directed at plaintiff. A certified copy of that letter was sent to, among other places, SPCC at Mechanicsburg, Pa. It is alternatively alleged that defendant Bishop was acting both individually and as an agent for defendants Poli-Com, Inc., and Kanistros when he wrote and published the letter. It is asserted that defendant Bishop, by "republication of the

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[1] He is apparently still employed as such.

said defamatory matter, has blackened the reputation of plaintiff and has exposed Plaintiff to contempt and ridicule in Plaintiff's community." *See* doc. No. 1, ¶ 54.

Defendant Bishop wrote another letter to Mr. Rumsfeld on or about January 11, 1977, which also allegedly contained defamatory material directed at plaintiff. A copy of this letter was sent to "SPCC." *See* document No. 1, exhibit E. The court accepts this as being SPCC-Mechanicsburg, Pa. In writing and publishing this letter it is claimed that defendant Bishop was acting both individually and as agent for defendants Poli-Com, Inc. and Kanistros.

Defendant Poli-Com, Inc., on or about July 21, 1977, sent a letter to the Honorable Neal Smith, then Chairman of the Small Business Committee, United States House of Representatives. This letter was signed by defendant Kanistros as president of Poli-Com, Inc. It is alleged that this letter also contained defamatory material directed at plaintiff. It is stated in the complaint that copies of this letter were sent to the persons "therein denoted." But there is nothing in the letter to indicate that a copy was sent to Pennsylvania or anywhere else. Nevertheless, it is alleged that defendant Poli-Com, Inc. "by republication of the said defamatory matter has blackened the reputation of Plaintiff and has exposed Plaintiff to contempt and ridicule in Plaintiff's community. "*See* Doc. No. 1, ¶ 76. Plaintiff also claims that defendant Kanistros, by writing and signing this July 21st letter, was acting in his own interest and that this was not authorized by Poli-Com, Inc.

Lastly, it is asserted that defendants Bishop, Kanistros, and Poli-Com, Inc. all conspired to deprive plaintiff of his good name and for the purpose of acquiring government contracts for Poli-Com, Inc. Plaintiff also contends that the allegedly defamatory statements made by defendant Harsha, *see infra,* were derived from the hereinbefore-mentioned letters and from other oral and written communications made to defendant Harsha. There are no allegations that any of the latter communications took place in Pennsylvania.

B. *Discussion Regarding Defendant Bishop's Motion*

As stated *supra,* defendant Bishop has moved to dismiss the complaint and quash service of process on the grounds that the court lacks both subject matter jurisdiction over the action and personal jurisdiction over him, that he was not properly served, and that venue is improper. As to the lack of subject matter jurisdiction, although it is not clear, it seems from movant's brief that this argument is not being pursued.[2] Furthermore, the allegations of the complaint regarding subject matter jurisdiction have not been challenged. Hence, the court may permit plaintiff to rest on those allegations. *See Jaconski* v. *Avison Corp.,* 359 F.2d 931, 934 (3rd Cir. 1966). They indicate that the requirements of 28 U.S.C. § 1332 (Diversity of citizenship; amount in controversy; costs) have been met and, therefore, this court has jurisdiction over the subject matter. In addition, in determining whether the allegation of jurisdictional amount is sufficient to grant the court subject matter jurisdiction, the test is whether the allegation is made in good faith, *i.e.,* the action will not be dismissed unless it appears to a legal certainty that the jurisdictional amount cannot be met. *See Davis* v. *Shultz,* 453 F.2d 497 (3rd Cir. 1971); *Jaconski, supra,* 359, F.2d at 934–935. I believe the allegations of the complaint meet that test.

Turning to the question of personal jurisdiction, the power of a federal court which is entertaining a suit based on diversity of citizenship to assert in personam jurisdiction over a nonresident or out-of-state defendant depends on two factors. first, the law of the state in which the federal court sits must confer in personam jurisdiction over the out-of-state defendant and secondly, if it does, the exercise of this in personam jurisdiction must not violate the due process requirements of the United States Constitution. *See Hicks* v. *Kawaski*

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[2] The court received very little help from the briefs submitted by the parties in regard to the motions by defendants Bishop, Kanistros, and Poli-Com, Inc. Any future motions must be supported and opposed by competent briefs, *i.e.,* briefs which cite appropriate legal precedent and which evidence some research and understanding of the subject area.

Heavy Industries, Civil No. 76-1373 (M.D. Pa. June 15, 1978); *George Transport and Rigging Co., Inc.* v. *International Publications Equipment Corporation,* 425 F. Supp. 1351 (E.D. Pa. 1977). Plaintiff has the burden of pleading and proving jurisdiction. *See Kenyatta* v. *Kelley,* 430 F. Supp. 1328 (E.D. Pa. 1977).

Plaintiff relies on two sections of the old Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. § 8301 *et seq.*,[3] as the basis for assertion of personal jurisdiction over defendant under Pennsylvania law, sepcifically §§ 8303 and 8305. Section 8305 provided:

> Causing Harm by Individuals
>
> Any nonresident of this Commonwealth who, acting outside of this Commonwealth, individually, under or through a fictitious business name, or through an agent, servant, or employee, shall have caused any harm within this Commonwealth on or after August 30, 1970, shall be subject to service of process in any civil action or proceeding instituted in the courts of this Commonwealth arising out of or by reason of any such conduct. Service of process in any such civil action or proceeding shall be effected through the Department of State as provided in this chapter.[4]

Defendant Bishop acted outside the Commonwealth of Pennsylvania when he sent the allegedly defamatory letters to Mr. Donald Rumsfeld. He was also acting outside the Commonwealth when he sent copies to SPCC, Mechanicsburg, Pa. It is claimed that the publi-

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[3] This long arm statute was repealed by the Judiciary Act of 1976, P.L. 586, N. 582. Pa. Stat. Ann. tit. 42 § 5301 *et seq.* (Purdon, Supp. 1977). However, this new act did not go into effect until on or about June 27, 1978.

[4] The new act provides that a Commonwealth tribunal may exercise jurisdiction over a person who has caused harm or tortious injury in this Commonwealth by an act or omission outside the Commonwealth. It also provides that jurisdiction of the Commonwealth may, where the individual is not present or domiciled in the Commonwealth when process is served and has not consented to process, be exercised over the individual to the fullest extent permitted by the United States Constitution. Pa. Stat. Ann. tit. 42 § 5322 (Purdon, Supp. 1977).

cation of the alleged defamatory material caused plaintiff harm in his Pennsylvania community.[5] Therefore, in personam jurisdiction is proper under the old Pennsylvania long arm statute. *Cf. Kurtz* v. *Draur,* 434 F. Supp. 958 (E.D. Pa. 1977).[6]

As to the constitutional question, *i.e.,* whether the assertion of in personam jurisdiction here offends the due process clause, since defendant is a nonresident and nondomiciliary of Pennsylvania who was not present in the state when served and who has not consented to suit, the constitutional standard to be applied is the "minimum contacts" test which was first set out by the United States Supreme Court in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). Due process requires that the defendant have "certain minimum contacts with (the forum state) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *International Shoe Co.* v. *Washington, supra* at 316, quoting *Milliken* v. *Meyer,* 311 U.S. 457 (1940).

The "minimum contacts" test does not allow for mechanical application. Also, since *International Shoe* involved the issue of under what circumstances a state could assert personal jurisdiction over an out-of-state *corporation* and since many of the subsequent cases dealt with a commercial setting, it is somewhat difficult to apply the reasoning of many of the cases considering the "minimum contacts" test to the case currently before the court. Nevertheless, the "minimum contacts" test is the standard to be applied here. *See Kulko* v. *Superior Court of California,* 436 U.S. 84 (1978).

Important factors in determining whether this test has been met are the quality of the contacts between the defendant and the forum state, *see McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1970), whether the cause of action flows from the contact or contacts, and whether the defendant has purposefully

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[5] This is a different situation from that where harm is caused outside the State and residual effects are felt inside the State.

[6] Also, since I find that personal jurisdiction here is constitutionally permissible, *see infra,* in personam jurisdiction is proper under the new Pennsylvania long arm statute. *See* n. 3, *supra.*

availed himself of the privilege of conducting activities in the forum state. *See Hanson* v. *Denckla,* 357 U.S. 235 (1958); *Scheidt* v. *Young,* 389 F.2d 58 (3rd Cir. 1968). Also, where a defendant's actions outside the state have caused effects inside the forum state, an important consideration, albeit not controlling, is whether these effects within the state were, or should have been, foreseeable. *Cf. McBreen* v. *Beech Aircraft Corp.,* 543 F.2d 26 (7th Cir. 1976). Lastly, although not binding on the court, I believe that the American Law Institute's Restatement (Second) of Conflicts § 37 (1971), quoted in *Kulko, supra* at 96, states a proposition which I believe is helpful in attempting to frame the correct analytical framework. Section 37, *inter alia,* provides:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

With all the above considerations in mind, I turn now to the facts of this case.[7]

As stated *supra,* it is alleged that defendant Bishop wrote letters containing defamatory material directed at plaintiff, that defendant Bishop mailed copies of these letters to plaintiff's place of employment at Mechanicsburg, Pa. and that these letters caused harm to plaintiff within Pennsylvania. This is the extent of defendant's connection to the state of Pennsylvania and, although it is not overwhelming,[8] I believe that it is

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[7] Movant has not advanced any argument that because this is a defamation action and, hence, the first amendment may be implicated, that different considerations of personal jurisdiction should be taken into account. *See* generally 4 Wright and Miller, Federal Practice and Procedure, § 1073 (1969). Given that fact, plus the fact that we are not dealing with a publication by a newspaper or magazine or the like, I do not think that a discussion of the First Amendment vis-a-vis personal jurisdiction is called for or that this case warrants a different analytical framework than set out above.

[8] The fact that the contacts are not extensive is not surprising given that this is a defamation action against an out-of-State de-

Footnotes continued on next page

sufficient to satisfy the due process requirements of the United States Constitution. First, defendant's connection to the state is based upon actions from which plaintiff's claim arose. Secondly, I believe it is foreseeable that if one defames another it will cause harm to that other person within his community, especially when copies of the defamatory material are sent to that community. And by sending those copies defendant Bishop has, in a sense, purposefully availed himself of the opportunity of conducting an activity in the state of Pennsylvania.[9] Furthermore, Pennsylvania has an interest in protecting its citizens from harm. Lastly, although much of the evidence regarding whether there has been a tort will be documentary, the evidence concerning whether plaintiff has been injured within his community may, if this action proceeds to trial, involve testimony by Pennsylvania area residents. I believe that on balance, given all the factors present, it is neither inequitable nor unreasonable to require that defendant Bishop appear here for the purposes of this action.

The two remaining issues in this motion are whether process was correctly served and whether venue is proper. As to service of process,[10] rule 4 of the Federal Rules of Civil Procedure permits service to be made here in accordance with the state law in existence at the time service was made. *See* 4 Wright and Miller, Federal Practice and Procedure, § 1112 (1969). Service was made on or about December 19, 1977. The applicable Pennsylvania statute at that time was the old Pennsylvania long arm statute, specifically 42 Pa. Cons. Stat. § 8307. It appears that the requirements of that section

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Footnotes continued from last page

fendant. Such action would not ordinarily carry with it an extended connection between the defendant and the forum State.

[9] This is different from the situation presented in *McBreen* v. *Beech Aircraft Corp.*, 543 F.2d 26 (7th Cir. 1976), where the only contact between the forum State and the defendant was his answer to an unsolicited phone call from a reporter working for a magazine which, unbeknownst to defendant, was located in the forum State. The answers were subsequently published in the forum State.

[10] The service of process rules do not affect jurisdiction or venue. *See* Fed. R. Civ. P. 82.

have been met, *see* document No. 2, U.S. Marshals Service, Process Receipt and Return, filed December 27, 1977, and that, therefore, service of process has been correctly effectuated.

As to venue, although counsel on both sides have been arguing in their briefs as to whether the claim arose here, the simple fact is that since this action appears to be based solely on diversity jurisdiction, venue is proper because plaintiff's unchallenged complaint alleges that he resides in this court's district. *See* 28 U.S.C. § 1391(a). Defendant Bishop's motion will be denied.

C. *Discussion Regarding the Motion of Defendants Kanistros and Poli-Com, Inc.*

Defendants Poli-Com, Inc. and Kanistros do not dispute that Mr. Bishop was acting as their agent when he wrote the letters and mailed copies to Pennsylvania. There is the added allegation as to these two defendants that the letter sent to Mr. Smith caused plaintiff harm in his community. As to defendant Kanistros, the same analysis as applied above with Mr. Bishop's motion applies here and personal jurisdiction is proper. As to defendant Poli-Com, Inc., Section 8309(b) of the old Pennsylvania long arm statute makes the statutory reach with out-of-state corporations in regard to personal jurisdiction coextensive with the constitutional requirements of due process.[11] Hence, the constitutional analysis as applied to Mr. Bishop's motion applies here and personal jurisdiction is properly asserted over defendant Poli-Com, Inc. Furthermore, it appears that service of process has been properly effectuated as to both these defendants, *see* document No. 2, U.S. Marshals Service Process Receipt and Return, filed December 27, 1977, and that venue is proper, *see* 28 U.S.C. § 1391(a). These motions will similarly be denied.

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[11] The new long arm statute does not change this.

II. DEFENDANT HARSHA'S MOTION

A. *The Facts*

Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleading,* but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis added)

In support of his motion for summary judgment defendant Harsha submitted his own affidavit, the affidavit of the Clerk of the United States House of Representatives, plus numerous exhibits. Part of defendant Harsha's affidavit controverts some of the most pertinent and important allegations of the complaint, *see infra.* Plaintiff originally did not submit any affidavits or other material, besides his brief, in opposing the motion. However, after defendant, in his reply brief, pointed out plaintiff's obligation under the summary judgment rule, an affidavit of plaintiff Rusack along with other material was submitted by plaintiff. The court will consider this material as if it were submitted with the opposition brief. But, in general, this material, including the affidavit of Mr. Rusack, does not controvert the relevant portions of Mr. Harsha's affidavit and the other supporting documents. Consistent with the proper procedure for ruling on a summary judgment motion, the court accepts as true facts alleged in those parts of the complaint which are uncontroverted by the movant, facts alleged in plaintiff's affidavit and in his documents submitted in opposition to the motion, and those parts of the material submitted in support of the motion, particularly the affidavit of defendant Harsha, which are uncontroverted by plaintiff.

According to plaintiff's affidavit, he is a Supervisory Contract Negotiator (formerly entitled Supervisory Procurement Agent) at the SPCC. His authority is derived from the Armed Forces Procurement Regulations, specifically 32 C.F.R. 1-400 *et seq.* He is one of eleven

individuals who have buying and contracting officer authority at the SPCC. His duties include solicitations and requests for proposals. Furthermore, as a contracting officer at a purchasing office such as the SPCC at Mechanicsburg,[12] he is authorized to enter into contracts in the name of and on behalf of the United States Government, by, *inter alia,* formal advertising and negotiating. *See* 32 C.F.R. 1–402. There is a dispute as to whether, after a contract has been entered into, plaintiff becomes involved with the administration of the contract. Plaintiff states he has authority regarding administration of contracts.

Defendant Harsha is a Representative in the United States House of Representatives from the Sixth Congressional District of Ohio. He is the ranking minority member (Republican) of the House Public Works Committee. He is involved with, and has a particular concern in regard to, the spending policies of the United States Government. *See* document No. 16, affidavit of William Harsha, p. 204. In July of 1977, Mr. Harsha was contacted by Mr. Bishop [13] involving "military procurement irregularities and taxpayer waste." *See* affidavit of William Harsha, *id.*, at p. 5.[14] Mr. Bishop present-

[12] Movant's brief asserts that the SPCC is a purchasing office. This assertion is borne out by some of the accompanying material, *see,* for example, document 16, exhibit 16. Plaintiff does not dispute that SPCC Mechanicsburg is a purchasing office.

[13] According to plaintiff Rusack's affidavit, Mr. Bishop is a paid representative of defendant Poli-Com, Inc.

[14] Mr. Harsha first met Mr. Bishop in 1969, after being advised that Mr. Bishop was knowledgeable regarding Department of Defense procurement practices and had been an editor of a newsletter dealing with military procurement. The outcome of this meeting was that Mr. Bishop presented Mr. Harsha with material dealing with procurement abuse or irregularity. This material was reviewed by Mr. Harsha's staff and was then presented to the House in the form of a speech which Mr. Harsha caused to be inserted in the *Congressional Record* of June 4, 1969. It appears from the material placed in the *Congressional Record* of August 3, 1977, that Mr. Kanistros was also involved in the dispute in 1969. He had filed a complaint with the General Accounting Office (GAO) regarding the award by the Air Force of a particular contract and alleging that his company, the low bidder, had improperly not been given the contract. Apparently the GAO agreed that Mr. Kanistros' firm should have been awarded the contract. *See* document 16, exhibits 1, 10, and 11.

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ed Mr. Harsha with material which, *inter alia,* dealt with plaintiff Rusack and his involvement with a particular contract and award. The material was reviewed by a member of Mr. Harsha's staff who then forwarded a prepared speech to the Congressman, who reviewed it and approved it for delivery and publication in the *Congressional Record* of August 3, 1977. It is this speech and its August 3rd publication in the *Congressional Record* which forms the basis of Count I of the complaint. It is alleged that the August 3rd speech contained defamatory material directed at plaintiff, specifically that it charged plaintiff with dishonest and illegal conduct, fraudulent and unethical practices, and collusion and conspiracy to defraud.

After the speech, by letter dated August 9, 1977, *see* document No. 16, exhibit 17, Mr. Harsha wrote a letter to the Commanding Officer, Admiral T. J. Allhouse, at the SPCC in Mechanicsburg, requesting the underlying contract files and other material concerning the award which was part of the basis of the August 3rd speech. Admiral Allhouse responded to this request on August 22, 1977, by forwarding to Mr. Harsha a large amount of material. Mr. Harsha made this material available to Mr. Bishop in order for the latter to determine whether it was responsive to the August 9th request. Mr. Bishop determined that the material was not fully responsive. On August 31st, Mr. Harsha wrote another letter to Admiral Allhouse wherein he again requested certain material and also made numerous statements. It is this letter that forms the basis of Count III of the complaint. It is alleged that the letter contained defamatory material directed at plaintiff in that it charged him with dishonest and illegal conduct, fraudulent and unethical practices, and collusion and conspiracy to defraud. Defendant Harsha states that neither he nor his office distributed this letter to the general public. This is not controverted.

The SPCC responded to this second request by forwarding additional information to Mr. Harsha. All the material was again analyzed with Mr. Bishop's help. Mr. Harsha states in his affidavit that although he still

felt the material was not fully responsive, he believed that it confirmed the allegations contained in his August 3rd speech. He also believed that further requests from SPCC would not be fruitful. Once again Mr. Bishop presented his analysis of the material to a member of Mr. Harsha's staff who edited it and presented it to the Congressman. Mr. Harsha made final editorial changes and on Nov. 22, 1977, "the analysis in speech form was presented to the Clerk of the House for insertion in the *Congressional Record* by unanimous consent." [15] *See* document 16, exhibit No. 1 affidavit of William Harsha. It is this "speech" which is the basis of Count II in that, once again, it is averred that it contained defamatory material directed at plaintiff.

The complaint charges further that Congressman Harsha subsequent to placing the two speeches in the *Congressional Record,* maliciously distributed and caused to be republished the text of the speeches. *See* document No. 1, ¶¶10 & 22. Defendant Harsha states that on November 30, 1977, he transmitted copies of his correspondence with the SPCC and their responses along with copies of the two *Congressional Records* containing the speeches referred to above to the United States Attorney for the District of Columbia, the United States Attorney General, and to the Office of the Secretary of Defense. These transmittals were marked secret and were not generally circulated. Other than that transmittal and the ordinary way in which the *Congressional Record* is circulated,[16] defendant Harsha denies

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[15] Apparently only the House as a whole can authorize the publication of a speech not actually delivered on the floor. *See* Rule XXIV of the Rules of the House of Representatives, § 929, document 16, exhibit 3. Although it is not completely clear, it appears to the court that the speech of August 31st was also not actually delivered on the floor of the House.

[16] The printing and distribution of the *Congressional Record* is basically controlled by statute. *See* 44 U.S.C. § 901 *et seq.,* and by House and Senate Rules and by a Joint Committee on Printing, composed of House and Senate Members. *See* document No. 16, exhibits 3 and 13. It appears from 44 U.S.C.A. § 906 (Supp. 1978) that each Member of the House of Representatives gets 40 copies, 34 of which may only be transferred to public agencies and institutions. Congressman Harsha states that he receives six copies, three

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in his affidavit that he republished or distributed the text of the two speeches contained in the *Congressional Record.* Plaintiff does not controvert this, except in the complaint. As stated *supra,* plaintiff may not rest on the allegations of the complaint when a summary judgment motion is properly supported, such as the one presently before the court. The court accepts for the purpose of this motion the fact that there has been no republication of the speeches contained in the *Congressional Records* of August 31, 1977, and November 22, 1977, except as detailed by defendant Harsha.[17]

DISCUSSION

The behavior upon which the complaint is based can be divided into three categories: (1) the insertion of the two speeches into the *Congressional Record* and the general distribution of those *Congressional Records;* (2) the August 31, 1977 letter to Admiral Allhouse; and (3) the forwarding by defendant Harsha of the copies of the two *Congressional Records* and copies of the correspondence between himself and the SPCC to the United

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of which he distributes among his staff in conjunction with the performance of their official duties. Furthermore, he supplies the Public Printer with a list of 30 people or organizations which receive copies of all the *Congressional Records.* The *Congressional Record* is also supplied to numerous people and organizations and it may be sold by the Public Printer.

[17] Plaintiff requests that this court not render a decision on this motion prior to his having an opportunity to engage in further discovery and to depose defendant Harsha regarding the issue of republication. Even in an ordinary action, one not involving Legislative Immunity or the First Amendment, I would not be inclined to grant such a request where a plaintiff has nothing upon which he can controvert an affidavit supporting a summary judgment motion. In the context of this motion the request is particularly inappropriate. First, it has been clearly stated that the Speech or Debate clause, *see infra,* protects Congressmen both from the possible consequences of litigation itself and from the burden of defending themselves. *See Dombrowski* v. *Eastland,* 387 U.S. 82 (1967). Secondly, when an action involves the First Amendment, the court should be careful that it does not needlessly create a situation which could have a chilling effect on the exercise of rights under that amendment. Granting plaintiff's request could have such an effect.

States Attorney General, the United States Attorney for the District of Columbia, and the Office of the Secretary of Defense. Summary judgment is sought on the grounds: (1) that all the activity is absolutely privileged under the Speech or Debate Clause; (2) that reports of alleged criminal behavior to appropriate executive officials is constitutionally privileged and (3) that criticism of plaintiff Rusack is privileged under the First Amendment because the plaintiff is a public official and the record establishes that there is no "*New York Times* malice." *See infra.* I will analyze each of the categories of behavior under each of the grounds asserted as a basis for summary judgment.

A. *Legislative Immunity*

Article 1, Section 6, Clause 1 of the United States Constitution, commonly referred to as the Speech or Debate Clause (hereinafter the Clause) states in pertinent part:

> "* * * Senators and Representatives * * * for any Speech or Debate in either House * * * shall not be questioned in any other Place."

The purpose of this Clause is to insure that Congress is able to perform its legislative functions independently and without fear of reprisal or intimidation. *See Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975). Furthermore, although not necessarily borne out by all the cases, it is often stated that the Clause is to be read broadly to effectuate its purposes. *See United States* v. *Johnson,* 383 U.S. 169, 180 (1966). When the United States Supreme Court first dealt with a challenge to this Clause, it said when discussing to what behavior the Clause applies:

> "In short to things generally done in a session of the House by one of its members to the business before it."

See Kilbourn v. *Thompson,* 103 U.S. 168, 204 (1880). Consistent with this, the Supreme Court has held that the standard to be met when determining whether the actions of a Congressman are encompassed by the

Clause is whether those actions are within the "sphere of legitimate legislative activity." *See Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 501 (1975) citing *Doe* v. *McMillan,* 412 U.S. 306, 312–313 (1973); *United States* v. *Brewster,* 408 U.S. 501, 516 (1972) and others. If the actions do fall within such sphere, they are absolutely privileged and the Congressman may "not be questioned in any other Place," including this court in a civil action.

Plaintiff concedes that defendant Harsha's speeches and their publication in the *Congressional Record* are activities which are absolutely privileged and protected by the Clause, *see* document No. 24, p. 3.[18]

The August 31, 1977 letter to Admiral Allhouse is also behavior which is encompassed by the Clause. It has long been held that investigation by a Congressman regarding issues over which legislation may be had is legitimate legislative activity and, therefore, protected by the Speech or Debate Clause. *See Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 504 (1975); *Doe* v. *McMillan,* 412 U.S. 306 (1973); *Watkins* v. *United States,* 354 U.S. 178 (1957); *McGram* v. *Daugherty,* 273 U.S. 135 (1927); *McSurely* v. *McClellan,* 553 F.2d 1277, 1286–8 (D.C. Cir. *En Banc* 1976); writ of cert. dismissed as improvidently granted 46 U.S.L.W. 4878 (June 26, 1978).[19] The power over appropriations and expenditures is at the heart of the business of Congress. Article 1, Section 8, Clause 13 of the United States Constitution specifically gives Congress power over the maintenance

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[18] I agree that these actions are absolutely privileged. Making a speech and/or following the procedures for submission of the speech for publication in the *Congressional Record* with all that generally implies are actions normally done in a session of the House by its Members, constitute "legitimate legislative activity" and as such are absolutely privileged under the clause. *See Doe* v. *McMillan,* 412 U.S. 306 (1973); *Doe* v. *McMillan,* 566 F.2d 713 (D.C. Cir. 1977). The fact that the speeches may have contained defamatory material directed at plaintiff does not affect the privilege. *See Doe* v. *McMillan, supra* at 312–313.

[19] In *Hutchinson* v. *Proxmire,* 579 F.2d 1027 (7th Cir. 1978), the parties admitted that the investigative actions by Senator Proxmire or his aides aimed at gathering information on public spending from administrative agencies was behavior encompassed by the Speech or Debate clause.

of the Navy. Knowing how the Navy spends the money allotted to it by Congress is essential if Congress is going to be able to exercise its power with any competency. Defendant Harsha's letter to Admiral Allhouse was an attempt to get needed information, and as such, it must be afforded the protection of the Clause.[20]

As to the forwarding of the copy of the letter to Admiral Allhouse and the two *Congressional Records* to the United States Attorney for the District of Columbia, the United States Attorney General, and the Office of Secretary of Defense, since that behavior is protected under other constitutional provisions, *see infra,* I have decided not to reach the question of whether it is encompassed by the Clause.

B. *The Right to Report Possible Criminal Violations to the Appropriate Officials*

The United States Supreme Court stated in *In Re Quarles and Butler,* 158 U.S. 532 (1894):

> It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. * * * It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offense against those laws; and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie * * *.

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[20] It is arguable that if the letter contained defamatory material directed at plaintiff, it was not within the legislative sphere or legitimate legislative activity. In some situations it may be that a primarily libelous letter which is only incidentally seeking information might not be protected under the clause. But here the letter was the second one defendant Harsha had sent to Admiral Allhouse in an attempt to gather information. The allegedly defamatory matter might well have been considered necessary by the Congressman in order to pinpoint the exact material he was after. In any event, I am not willing in the face of a legitimate and somewhat extensive legislative inquiry to strip away the legislative immunity unless the fact situation clearly warrants it. I do not believe this case to be of such a nature.

The Court did not specify any particular constitutional provision upon which this right and duty rested, but rather felt it arose out of the nature and structure of our system of government and of the constitution.

This "right to inform" is analogous to the First Amendment's right to petition the government for a redress of grievances. In *Stern* v. *United States Gypsum, Inc., et al.,* 547 F.2d 1329 (7th Cir. 1977), cert. denied 434 U.S. 975 (1977), plaintiff had been an agent of the Internal Revenue Service and involved with an audit of defendant United States Gypsum, Inc. He brought suit under 42 U.S.C. § 1985(1), with pendent state law claims sounding in defamation and malicious interference with contract. He alleged that the individual defendants, corporate officers of defendant United States Gypsum, Inc., conspired to impede him in the performance of his duties by making false and defamatory charges of serious professional misconduct to his Internal Revenue Service superiors regarding his behavior during the audit of United States Gypsum, Inc. The question before the appellate court was whether these allegations stated a claim under 42 U.S.C. § 1985(1). Although the court believed that the complaint may have stated a claim, it felt that the alleged behavior of defendants was constitutionally protected. The court stated:

> We think it plain that presenting complaints to responsible government officials about the conduct of their subordinates with whom the complainer has had official dealings is analogously central to the protections of the right to petition. p. 1342–1343 * * * we consider it irrelevant to the applicability to the right to petition that its exercise might have the effect of causing professional injury to the official about whom complaints are made. * * * p. 1343

Although defendant Harsha may not have had official dealings with plaintiff Rusack in the same manner as the defendants in *Stern, supra,* he did have official dealings in the sense that overseeing how the Navy spends part of its allotted monies is part of his general official duties.

The complaint alleges that plaintiff was defamed by defendant Harsha in regard to the performance of his (plaintiff's) official duty, specifically alleging that Mr. Harsha accused plaintiff of violating 18 U.S.C. § 1001 (Statements or entries generally; this is the first section of Chapter 47—Fraud and False Statements). The whole thrust of the complaint and the brief in opposition to the motion is that defendant Harsha has accused plaintiff of criminal acts.[21]

The right to inform federal officials of possible violations of federal law continues to be constitutionally protected. *See United States* v. *Guest,* 383 U.S. 745, 771, 779 (1966), Harlan, J., concurring in part and dissenting in part; Brennan, J. concurring in part and dissenting in part; *Williams* v. *Allen,* 439 F.2d 1398 (5th Cir. 1971).[22] I believe that the letter to Admiral Allhouse and the forwarding of the materials to the United States Attorney for the District of Columbia, the United States Attorney General, and the office of the Secretary of Defense are protected by this constitutional right to inform, afford defendant immunity, and, hence, cannot form the basis of a defamation action.

C. *First Amendment—Freedom of Speech*

Beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1966), the Supreme Court has strictly limited, as a matter of constitutional law, the right of a public official to sue and recover for alleged defamations relating to his or her official conduct. The first amendment right of free speech provides a qualified immunity from liability for defamation actions brought by public officials and others.[23] If a plaintiff is a public official and the alleged defamation relates to his official conduct he may only recover if he can show that the defamatory

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[21] *See* ¶¶ 10 and 15 of Count I, ¶¶ 25 and 28 of Count II, and ¶ 37 of Count III. Also, *see* Doc. 24, plaintiff's opposition brief, p. 1.

[22] The fact that defendant Harsha is a Congressman does not detract from the fact that he too is protected by constitutional rights applicable to the general citizenry.

[23] *See Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) reh. den. 389 U.S. 889 (1967).

statement was made with "actual malice," (hereinafter referred to as *New York Times* malice), *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether it was false or not. This *New York Times* malice must be proved by the plaintiff by clear and convincing evidence or by "convincing clarity." *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Dickey* v. *CBS, Inc.*, No. 77–2615 (3rd Cir., Sept. 18, 1978). A bare allegation of *New York Times* malice is not enough to withstand a summary judgment motion. *See Hutchinson* v. *Proxmire*, 431 v. Supp. 1311 (W.D. Wisc. 1977); *Fram* v. *Yellow Cab Company of Pittsburgh*, 380 F. Supp. 1314, 1335 (W.D.Pa., 1974).

The first issue is whether plaintiff is a public official. Although this is sometimes a difficult question, I believe that plaintiff clearly qualifies as such.[24] In *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), the Supreme Court, in discussing who qualifies as a public official for First Amendment purposes, stated:

> "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierachy of government who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.
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> "* * * The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, * * * the *New York Times* malice standards apply.
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> "* * * The employee's position must be one which would invite public scrutiny and discussion of the

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[24] Plaintiff does not controvert that he is a public official. However, he does state in his brief that the contention that he is a public official should be raised as a defense in the answer, implying it is not properly raised in a motion for summary judgment. Plaintiff cites no authority for this meritless contention.

> person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." P. 85–86, 89, fn. 13.

Plaintiff Rusack, in his complaint, states that the defamatory material which defendant Harsha allegedly directed at him "impede plaintiff's ability and fitness to serve the United States people in a position of trust." *See* Doc. No. 1, ¶¶ 13(e), 26(e), and 36(e). I agree that plaintiff holds a position of public trust. This is confirmed by 32 C.F.R. 1–113.1, the regulation dealing with the standard of conduct for government personnel engaged in procurement and related activities. Furthermore, as stated *supra,* plaintiff is involved in solicitations for contracts, requests for proposals, formal advertising, negotiating, and has buying and contract officer authority at the SPCC and, as such, is authorized to enter into contracts in the name of and on behalf of the United States government. Assuming that plaintiff is not involved with the administration of the contracts, it is nevertheless evident that he is intimately involved in the expenditures of public funds, a matter of great importance so that there is an interest in his qualifications and performance beyond the interest which might be associated with any governmental employee. He is, therefore, a public official and since the allegedly defamatory remarks dealt with his performance as such an official the *New York Times* malice standard must be applied.

Plaintiff, in his affidavit and accompanying exhibits, in effect attempts to show that the allegations made by defendant Harsha were incorrect. Apparently, plaintiff has been exonerated in regard to the contract in question by Navy investigations. And he states that "* * * Mr. Harsha's remarks and allegations have been made with a complete and reckless disregard of the truth." [25]

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[25] Of course, as stated *supra,* the mere statement, even if contained in an affidavit, that there was *New York Times* malice, does not meet plaintiff's burden. To reiterate, in order to prevail on the *New York Times* malice issue, he must produce facts and/or proof such that it would be possible for a factfinder to decide that *New York Times* malice has been shown by clear and convincing evidence.

Defendant Harsha, in his affidavit, states that he believed the statements in question to be true when made and that he still believes them to be true. This is not controverted. But the question is whether defendant Harsha has acted with reckless disregard as to the truth or falsity of the statements. Or, as has been stated, with a "high degree of awareness of * * * probable falsity." *See Hutchinson* v. *Proxmire,* 579 F.2d 1027 (1978) citing *St. Amant* v. *Thompson,* 390 U.S. 727, 730–731 (1968); *Gertz* v. *Robert Welch, Inc., supra* at 342.

In *St. Amant.* v. *Thompson,* 390 U.S. 727 (1968), the Supreme Court held that the failure to investigate does not satisfy the *New York Times* malice standard. There defendant St. Amant had been a candidate for public office in Louisiana and had made a televised speech. During the course of this speech St. Amant read a series of questions he had posed to a local union official and the answers the local official gave to those questions. One of those answers defamed plaintiff Thompson. The lower state court had found for plaintiff. An intermediate appellate court reversed, finding that there had been no showing of *New York Times* malice. The Louisiana Supreme Court reversed the intermediate appellate court, finding that there was sufficient evidence that St. Amant had recklessly disregarded whether the statements about Thompson were true or false. Several reasons were given supporting this conclusion. St. Amant had no personal knowledge of the activities of Thompson; he had relied solely on the affidavit of the union official, although the record was silent as to the union official's reputation for truthfulness; he did not verify the information with people in the union office who might have known the true facts; he went ahead without considering whether the statements defamed Thompson and heedless of the consequences; and he had mistakenly believed that he was not responsible for the broadcast because he was only quoting the union official's words. The United States Supreme Court found that these considerations did not establish reckless disregard or *New York Times* malice. The court stated:

"* * * reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." p. 731

The court recognized that the *New York Times* malice standard might allow erroneous and libelous publications to go unredressed. Nevertheless, this is the price that must be paid to "* * * insure the ascertainment and publication of the truth about public affairs * * *." The court went on to state:

> The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. p. 732

Based on the facts in the record, it is clear that, as a matter of law, there can be no finding of *New York Times* malice against defendant Harsha.[26] Assuming

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[26] Plaintiff has requested that if the court finds the averments of malice insufficient, leave be granted to amend the complaint. This request is obviously being denied. First, an amended complaint will be of no assistance to plaintiff when he cannot, via affidavit or with other appropriate material, controvert the relevant portions of the affidavits and material supporting the summary judgment motion. Secondly, there are the First Amendment and legislative immunity considerations, *See* n. 17 *supra,* which make granting summary judgment particularly appropriate where the facts warrant it. It may well be that in the situation such as the one presented here, a grant of summary judgment is the rule rather than the exception. *See Hutchinson* v. *Proxmire,* 431 F. Supp. 1311

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that Mr. Bishop is a paid employee of Poli-Com, Inc., that Mr. Harsha relied almost exclusively on his (Bishop's) analysis of the situation, and that this analysis was wrong, the standards as set out in *St. Amant* v. *Thompson, supra,* have not been met. Here defendant Harsha had satisfactory dealings with Mr. Bishop in the past regarding military procurement practices. A member of defendant Harsha's staff always reviewed the materials, which appear to this court to be extremely complex. The most that possibly can be said here is that defendant Harsha did not investigate as thoroughly as he might have, by, for example, contacting those who might present a different viewpoint from that espoused by Mr. Bishop.[27] This clearly does not satisfy the *New York Times* malice standard as set out in *St. Amant, supra.* All the alleged behavior upon which the complaint against Mr. Harsha is based is protected by the First Amendment and summary judgment is appropriate under the circumstances and will be granted.

In sum, legislative immunity protects defendant Harsha from suit based on the two speeches, their insertion in the *Congressional Record,* and the letter to Admiral Allhouse. The right to inform creates a constitutional immunity from suit for the letter to Admiral Allhouse and the forwarding of the material to the United States Attorney General, The United States Attorney for the District of Columbia, and the Office of the Secretary of Defense. And the constitutional privilege of the First Amendment encompasses all the behavior upon which this action is based because, as a matter of law, plaintiff is a public official and there can

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(W.D.Wisc. 1977), aff'd 579 F.2d 1027 (7th Cir. 1978) and the cases cited therein.

[27] The facts here are significantly different from those presented in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967). For further support that *New York Times* malice cannot be shown on the facts presented here, *see Dickey* v. *CBS, Inc.,* 77-2615 (3rd Cir. Sept. 18, 1978).

be no showing of *New York Times* malice based on the facts in the record.

WILLIAM J. NEALON, *Chief Judge,*
Middle District of Pennsylvania.

Dated: December 14, 1978.

ORDER

Now, this 14th day of December 1978, in accordance with the accompanying memorandum this day filed, it is hereby ordered that the motions of defendants Bishop, Kanistros, and Poli-Com, Inc. are denied. It is further ordered that defendant Harsha's motion for summary judgment is granted, judgment is entered for him, and he is dismissed from the action.

WILLIAM J. NEALON, *Chief Judge,*
Middle District of Pennsylvania.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1302

EXXON CORPORATION, APPELLANT

v.

FEDERAL TRADE COMMISSION, et al.

(Civil 76-0812)

No. 77-1303

KERR-MCGEE CORPORATION, APPELLANT

v.

FEDERAL TRADE COMMISSION, et al.

(Civil 76-0814)

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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No. 77-1304

UNION CARBIDE CORPORATION, APPELLANT

v.

FEDERAL TRADE COMMISSION, et al.

(Civil 76-0793)

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

Argued February 13, 1978

Decided October 19, 1978

Roberts B. Owen, for appellant in No. 77-1302. Argued on behalf of all appellants.

J. Randolph Wilson and *Steven S. Rosenthal* were on the brief, for appellant in No. 77-1303.

James H. Wallace, Jr. and *Thomas C. Arthur* were on the brief, for appellant in No. 77-1304.

Gerard P. Norton, Acting General Counsel, Federal Trade Commission, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, and *Joel S. Perwin*, Assistant United States Attorneys, *Jerald D. Cummins*, Acting Assistant General Counsel, and *Arthur W. Adeloug*, Attorney, Federal Trade Commission, were on the brief, for appellees.

Michael Lemov was on the brief, for *Amicus Curiae*, Congressman John E. Moss, urging affirmance.

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Before ROBINSON, MACKINNON and ROBB, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: Exxon appeals from the district court's refusal to grant injunctive or declaratory relief and from its subsequent denial of a stay pending appeal. At issue is whether any protective measures should be imposed on the Federal Trade Commission (hereafter the "Commission" or the "FTC") with respect to the divulgence to Congress of "trade secrets" obtained by it under the compulsion of a subpoena.[1] The controlling statute provides:

> The [Federal Trade] Commission shall also have power— * * * *
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> (f) To make public from time to time such portions of the information obtained by it hereunder, *except*

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[1] There is no question that the information in question here qualifies under this court's definition of "confidential" information for purposes of the Freedom of Information Act, 5 U.S.C. § 552 (1970). In National Parks and Conservation Assoc. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), *rev'g* 351 F. Supp. 404 (D.D.C. 1972) we stated that information will be considered confidential if its disclosure is likely to "cause substantial harm to the competitive position of the person from whom the information was obtained." Production forecasts such as are at question in this case would clearly cause such competitive harm were they disclosed to competitors. *See* JA 64 (Dickeman Affidavit for Exxon Co.); JA 73 (Zitting Affidavit for Kerr-McGee Co.); JA 78 (Thurber Affidavit for Union Carbide Co.). Trade Secrets and other confidential data are not immune to FTC investigation, Covey Oil Co. v. Continental Oil Co., 340 F.2d 973 (10th Cir.), *cert. denied*, 354 U.S. 925 (1965). For the broad range of the Commission's subpoena power in general, *see, e.g.*, Menzies v. FTC, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957); 12 Von Kalinowski, Trade Regulation § 86.06 (1977).

> *trade secrets* and names of customers, as it shall deem expedient in the public interest . . .

15 U.S.C. § 46(f) (emphasis added). The parties do not dispute, nor could they after our decision in *Ashland Oil, Inc. v. FTC*, 548 F.2d 977 (D.C. Cir. 1976), that Congress has a right of access to such information, including trade secrets. The issue before us concerns solely the question of notice to parties prior to disclosure of their confidential information and of safeguards to ensure the continued confidentiality of such information once disclosed to the Congress.

I

In 1975, pursuant to a subpoena, Exxon, Kerr-McGee, and Union Carbide made available to the Commission information relating to their ownership, operation of, and future expectations for their uranium holdings.[2] It is undisputed that some of this material involved trade secrets, particularly the data concerning the production and projected yield of individual mines. In April of 1976, in the course of considering S. 489, 94th Cong., 1st Sess., which proposed prohibiting oil companies from owning interests in fuel reserves other than oil and gas, Senator Hart wrote to the Commission on official stationery of the Senate Judiciary Subcommittee on Antitrust and Monopoly requesting the Commission to make available all information it had concerning the coal and uranium holdings of the oil companies.[3] The F.T.C., be-

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[2] Appellant Union Carbide also submitted, and sought to protect, data relating to its coal holdings. Government Brief at 2-3.

[3] Senator Hart at the time was Chairman of the Senate Subcommittee on Antitrust and Monopoly. He wrote to the FTC following receipt of a letter from Senator Abourezk, also a member of the Subcommittee on Antitrust and Monopoly. In his letter Senator Abourezk suggested that the information in the FTC's possession was "crucial" to the consideration of S. 489. JA 61.

cause of the relationship of its functions to those of Congress, treats such congressional requests as compulsive, even though they lack the formal status of congressional subpoenas. However, the Commission had previously assured the companies in writing that in the event of any congressional request for confidential information (trade secrets), it would both advise the Members of Congress who submitted the request that the information should be considered confidential when received, and give the companies themselves ten days prior notice of disclosure, whenever such notice was "reasonably possible" (Government's Brief at 2-3).

In early May, the Commission notified appellants of the subcommittee's requests, and appellant Union Carbide quickly obtained a court order restraining the disclosure of the requested information until ten days after the decision in the then pending *Ashland Oil, Inc. v. F.T.C.* case. Shortly after the Union Carbide order was issued, the subcommittee forwarded a formal request for *immediate* access to the information, and the Commission informed the parties that it would disclose the data requested the following day, except insofar as protected by the court order obtained by Union Carbide. At this point, Kerr-McGee and Exxon also succeeded, despite only 23 hours advance notice, in obtaining a preliminary injunction barring disclosure until the decision in *Ashland Oil.*

Some months later, in September, 1976, in *Ashland Oil, Inc. v. F.T.C.*, 548 F.2d 977 (D.C. Cir. 1976) this court decided that it was permissible for the Commission to disclose confidential information to Congress.[4] The

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[4] *Ashland Oil* did not consider or determine the amount of notice the Commission might be required to give corporations whose trade secrets were to be divulged to Congress, or what steps the Commission should or could take to safeguard the confidentiality of these secrets once revealed to Congress. The

district court thereupon dissolved the preliminary injunction granted to appellants, on the grounds that they were unlikely to succeed on the merits, as *Ashland Oil* had determined that disclosure to Congress did not constitute "public disclosure," and also that the companies were not threatened with irreparable injury.[5] The district court also denied appellants' request that the Commission be required to give ten days advance notice before revealing trade secrets to Congress. From this decision the appellants briefly obtained a stay pending appeal or until "further order of this Court," [6] but this stay too was later vacated in light of *Ashland Oil*.[7]

Some of the information that the appellants sought to protect has already been disclosed, and this appeal is moot as to this material.[8] Other information, although vulnerable to disclosure whenever Congress may request it, remains undivulged.[9] As regards this information, and

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question in *Ashland Oil* simply was whether or not the F.T.C. was authorized to divulge trade secrets at all, in light of 15 U.S.C. § 46(f)'s prohibition against "making public" such secrets. Likewise *Ashland Oil* did not consider the issue of liability for damages resulting from the disclosure of trade secrets in violation of 15 U.S.C. § 46(f).

[5] JA 90.

[6] JA 92, Order of March 30, 1977.

[7] JA 96, Order of May 6, 1977.

[8] The information disclosed consisted of the data concerning Union Carbide's coal holdings.

[9] Senator Kennedy, the new Chairman of the Subcommittee on Antitrust and Monopoly expressed the continued interest of the Subcommittee in the information originally requested by the late Senator Hart by a letter to Judge Leventhal of this Circuit Court, dated April 13, 1977. Senator Moss, Chairman of the Senate Committee on Oversight and Investigation, by letter of April 19, 1977 to the Clerk of the United States Court of Appeals expressed a similar interest. The status of these letters in this proceeding is unclear since the record does not indicate the authority for their issuance.

appellants' general request that the Commission be required to give ten days notice prior to disclosure, and that reasonable steps be required to ensure that Congress will keep such trade secrets confidential, the issues before us are not moot, and we resolve them here.[10]

It should be noted, however, that a large part of the questions raised by appellant while not moot, represent an attempt to have this court virtually engage in rule-making for the FTC.[11] Our situation is somewhat

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[10] If the FTC during the course of this appeal discloses the as yet undivulged information, this appeal will become moot as regards such information. However, appellant's request that the court issue a protective order requiring certain procedures to protect confidential data in the hands of the FTC when such data is requested by Congress will not itself be mooted by the disclosure of the information involved in this particular case. A suit for an injunction is not moot where the action which plaintiff seeks to enjoin may recur in the future. United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968); *see also,* United States v. W. T. Grant Co., 345 U.S. 629 (1953). The FTC admits that it fully intends to hold open the option of disclosing trade secrets in the future without the safeguards sought by appellants. The fact that some issues in a case have become moot does not prevent a court from reviewing nonmooted issues where these are sufficiently significant that the cause of action remains justiciable, *e.g.,* Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974); United Public Workers v. Mitchell, 330 U.S. 75 (1946); 6A J. Moore, Federal Practice § 57.13 at 57-121-125.

[11] Appellants assert (*see* Reply Brief for Appellant Exxon at 31-35) that the purpose of obtaining notice prior to disclosure is to have sufficient time to seek judicial review of the proposed divulgement. In this case, however, all appellants were able on very short notice to secure prior judicial review. Thus the fact pattern before this court is a particularly inappropriate one in which to evaluate the damage that might result if a company were unable to obtain judicial review before disclosure as the court does not have before it any evidence of the effect of such denial.

analagous to those in which expansive conceptions of standing and ripeness have occasioned adjudications in which the courts have been cast in the inappropriate, and possibly *ultra vires*, role of attempting to resolve essentially abstract questions in reviewing agency regulations, *see, e.g., ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part). In this case, appellants request this court to assume the inappropriate and potentially overreaching role of promulgating confidentiality guidelines for the Commission. We have, however, explicitly restricted our judgment in a previous case dealing with similar issues to the facts of that case, eschewing establishing any broad principle limiting the Commission's actions, *see FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977) and we see no reason, nor any justification for doing otherwise in deciding this appeal.

II

Concerning appellants' prayer for a permanent injunction requiring ten days warning to affected parties before the FTC can disclose confidential data pursuant to congressional request, although we are very sympathetic to the need to protect the owners of valuable trade secrets, *e.g., Underwater Storage, Inc. v. United States Rubber Co.*, 371 F.2d 950, 954 (D.C. Cir. 1966), *cert. denied*, 382 U.S. 911 (1967),—and would allow them to be disclosed only upon valid *formal* requests of Congress or its committees, *see* part V, *infra*—we consider, given no more basis for such an injunction than what is presented here, that no basis exists for us to inject the courts into what is only an incipient controversy.

The authority of the subcommittee to make a proper request for information of the nature that appellants seek to protect is not questioned. The disclosure was not to be used as "exposure for exposure's sake," *see Watkins*

v. United States, 354 U.S. 178 (1957), and the subject of the subcommittee's inquiry was one "on which legislation could be had" and thus was a proper topic of Congressional inquiry, *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927); *Braden v. United States*, 272 F.2d 653 (5th Cir. 1959); *Sacher v. United States*, 252 F.2d 828 (D.C. Cir.), *rev'd on other grounds*, 356 U.S. 576 (1958). The material that the FTC proposed to divulge, then, was fully within the scope of the legislature's legitimate investigatory powers.

For this court on a continuing basis to mandate an enforced delay on the legitimate investigations of Congress whenever these inquiries touched on trade secrets could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality. While normally reasonable advance notice can be required, in exigent circumstances Congress has full authority to issue forthwith subpoenas and formally request immediate disclosure. To impose a mandatory notice period would skirt dangerously close to being at least the temporary "equivalent to an order quashing [the official request or subpoena] which is generally an impermissible frustration of the congressional power to investigate . . ." *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 388 (D.C. Cir. 1976), *citing, Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975) and hence would raise serious constitutional issues. It would also abrogate the broad discretion of the Commission, *e.g.*, *FTC v. Lonning*, 539 F.2d 202, 211 (D.C. Cir. 1976),—through which the FTC can make use of its considerable expertise to balance the private and public interests involved—to formulate its own reasonable confidentiality protections, *see FTC v. Anderson*, 442 F. Supp. 1118 (D.D.C. 1977).[12]

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[12] The FTC argues that it would be without authority to resist forthwith subpoenas or formal requests for an im-

To impose any mandatory advance notice would run directly counter to the spirit expressed in *Eastland v. United Servicemen's Fund, supra*:

> This case illustrates vividly the harm that judicial interference may cause. A legislative inquiry has been frustrated for nearly five years, during which the Members and their aide [*sic*] have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry. The Clause [the Speech or Debate Clause] was written to prevent the need to be confronted by such "questioning" and to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority.

421 U.S. at 511.

The inquiry in *Eastland* differed from that in the present appeal,[13] but the decision's emphasis on the necessity for courts to refrain from interfering with or delaying the investigatory functions of Congress has an obvious relevance to appellants' demand that we impose a ten day delay on the FTC's compliance with any Congressional request for certain information.

Furthermore there is no indication that disclosure to the Subcommittee on Antitrust and Monopoly will in any way harm the appellants. We have heretofore held that

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mediate response, Brief for FTC at 20. Forthwith subpoenas in the areas involved in these cases are certainly a rarity because of the time necessary to gather the information and the speed with which congressional committees function.

[13] *Eastland* held that the subpoena of certain bank records from organizations being investigated as potentially harmful to the morale of the armed services was within the "legitimate legislative sphere" and that the Speech or Debate Clause precluded judicial interference with congressional investigations within this sphere.

release of information to the Congress does not constitute "public disclosure," *Ashland Oil, supra*, 548 F.2d at 979; *Exxon v. F.T.C.*, No. 76-0812 (D.D.C. March 29, 1977) at 1. Because such divulgement is not "public," it does not in itself impair the value of the trade secrets involved, and thus does not involve a deprivation prior to which a hearing is required. Thus, the protection of a judicial order, which mandating advance notice would require, is not necessary before such disclosure in order to accord with principles of due process, *see Roth v. Bd. of Regents*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972). The courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties, *Ashland Oil v. FTC, supra*, 548 F.2d at 979, *quoting Ashland Oil v. FTC*, 409 F. Supp. 297, 308 (D.D.C. 1976); *see also, Safeway Stores, Inc. v. FTC*, 428 F. Supp. 346, 347 (D.D.C. 1977). In sum, we reaffirm our rationale in *Ashland Oil* that absent a showing that it is "evident" that Congress intends to make trade secrets divulged to it by the FTC publicly available, the Commission may, upon proper demand, release such secrets to the Congress without the necessity of prior notice to the parties involved, unless of course the Commission obtained such information upon an agreement to give prior notice to the party.[14]

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[14] We thus decline to impose on the Commission either an unqualified ten day warning requirement or the more flexible alternative of mandating simply "reasonable prior notice." We have recently held in the specific context of congressional requests for confidential data from the F.T.C. that release to the Congressional Committee is not "public disclosure," Ashland Oil v. F.T.C., *supra*. Thus, such disclosure does not in itself injure appellants. Furthermore, as a general principle, judicial intervention to prevent potential injury from prospective government misconduct is only justified when such misconduct is imminent, not merely hypothetical, Reporters' Committee for Freedom of the Press v. A.T.&.T., No.

Our decision in *FTC v. Texaco, Inc.*, *supra*, 555 F.2d at 884 in which ten days notice was required by the court with respect to a specific request does not in any way conflict with our refusal here to order a similar general warning period. We do not interpret *Texaco* as authority for establishing such a period as a general requirement for FTC disclosure of trade secrets to Congress. In that case we explicitly stated:

> The Court is *not* herein adopting a rule of general applicability for a 10-day notice provision. It is rather adopting for purposes of this case a proposal for confidentiality *advanced by FTC* . . . .

555 F.2d at 884 n.64 (emphasis added). Clearly this court's decision to accept the F.T.C.'s own proposed settlement in a case which—as the district court noted [15]—was distinguishable on its facts from the present one, is not precedent for imposing a ten day rule in the situation before us now. Moreover, we also noted in *Texaco* that *F.C.C. v. Schreiber*, 381 U.S. 279, 295-296 (1965) made clear that "it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality," 555 F.2d at 884 n.62. The Commission has recently issued a notice of proposed rulemaking involving its protection of confidential information, 43 Fed. Reg. 3571 (January 26, 1978).[16] It would

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76-2057 (D.C. Cir. August 11, 1978) at 66, 76-77, citing Rizzo v. Goode, 423 U.S. 362 (1976); Allee v. Medrano, 416 U.S. 802 (1974); and Laird v. Tatum, 408 U.S. 1 (1972). To authorize such supervision as the appellants request would not only do violence to the presumption that congressional bodies will act responsibly, Ashland Oil v. F.T.C., *supra,* but also would place a significant impediment in the path of governmental investigations of important aspects of our economy.

[15] JA 84.

[16] The proposed rules provide that, in response to congressional requests for confidential data, "ten days notice shall be given *where possible*" (emphasis added), 43 Fed. Reg. 3574

be completely inappropriate in light of our interpretation of the *Schreiber* case, and the view we take of our judicial authority, to interfere at this point and impose what in effect would be a general protective order upon the F.T.C., *see also, F.T.C. v. United States Pipe and Foundry Co.*, 304 F. Supp. 1254, 1260 (D.D.C. 1969); Gelhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 126 (1968).

III

Appellants' further contention that prior to disclosure the FTC should obtain assurances that confidential information will not be publicly disclosed unless a majority of the members of the committee or subcommitee vote to do so, deserves only perfunctory discussion. Again, we are sympathetic to appellants' concern for safeguarding highly confidential information worth millions of dollars, but for this court on this record to establish any such requirement would clearly involve an unacceptable judicial intrusion into the internal operations of Congress. Although the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members, *e.g., Yellin v. United States*, 374 U.S. 109, 143-144 (1963); *Watkins v. United States, supra; United States v. Ballin*, 144 U.S. 1, 5 (1892); *Jordan v. Hutcheson*, 323 F.2d 597 (4th Cir. 1963), where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress, *e.g., Consumers Union of the United States v. Periodical Correspondents Assoc.*, 365 F. Supp. 18, 24 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975); *Con-*

(January 26, 1978). It would seem that the rule should provide that in all instances the party will be notified immediately whenever Congress makes a proper request for trade secrets.

sumers Union of the United States v. Periodical Correspondents Assoc., 515 F.2d 1341, 1347-1348 (D.C. Cir. 1975). This court cannot assume that Congress will act irresponsibly in regulating or disclosing appellants' trade secrets. Barring the imminence of such disclosure, appellants' constitutional rights are not in fact jeopardized by delivery of their secrets to Congress. On this record there is no justification for this court to interfere with the operations of the legislative branch, *see, Frothingham v. Mellon*, 262 U.S. 447, 488 (1923); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840); *Protestants and Other Americans for Separation of Church and State v. O'Brien*, 272 F. Supp. 712 (D.D.C. 1967).

It would exceed our jurisdiction for this court to require guarantees of specific congressional procedures in advance of any concrete threat to appellants' vital interests. The strong and long-standing principle of judicial abstention into the actions of the legislature demands that the courts, "avoid the possibility of unwarranted interference with a coordinate branch of government by requiring dismissal of applications [seeking to restrain congressional committees' use of information] not substantiated by a showing of need arising out of immediate threat to constitutional rights," *Cole v. McClellan*, 439 F.2d 534, 535-536 (D.C. Cir. 1970); *e.g., Davis v. Ichord*, 442 F.2d 1207 (D.C. Cir. 1970). Courts should refrain from creating "needless friction" with a coordinate branch of government, *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941); *Ansara v. Eastland*, 442 F.2d 751, 753 (D.C. Cir. 1971), and imposing a particular voting requirement to operate in the manner of a Congressional Rule, on the grounds that such a safeguard is necessary to ensure that Congress will act responsibly with secrets entrusted to it, is not only not refraining from, but actually provoking such "needless friction." The FTC and this court are compelled to rely on the assumption that Congressional committees will act

responsibly with confidential data revealed to them, *Ansara v. Eastland*, *supra*, 442 F.2d at 754; *Ashland Oil v. F.T.C.*, 409 F. Supp. 297, 308 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

If, in fact, a Member or congressional staff member improperly "leaks" confidential data, the injured parties have a recourse against that individual directly,[17] and the possibility of such action will serve to deter unjustified disclosure of trade secrets. Beyond provision for such suits, and in the absence of a concrete violation of law, rule or regulation, the courts are unable to aid the appellants in their request to oversee the activities of the legislature, allegations of the prevalence of "leaks" from some committees notwithstanding. The FTC should, and does, alert Congress when the information made available to it is confidential. In fact, some such cautionary statement could be impliedly required from the prohibition on the public disclosure of trade secrets imposed by 15 U.S.C. § 46(f). If the Commission failed to alert Congress to the fact that information being supplied to it was by statute prohibited from "public" disclosure the Commission would violate a duty implicitly imposed upon it by the statute. To impose further protective procedures upon Congress, without some immediate threat of illegal disclosure, would impermissibly interfere with the legislative branch—an action we refuse to take.

IV

Appellants also ask this court to require the FTC precisely to ascertain that the Congress specifically desires access to trade secrets, not merely more general (and less confidential) data, before it divulges such informa-

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[17] An official or employee of the Commission who makes an unauthorized public disclosure of confidential information may be guilty of a misdemeanor, *see* 16 C.F.R. § 4.10(c); *see also*, 12 Von Kalinowski, Trade Regulation § 89.04[2] at 89-33 (1977).

tion. Of course, the FTC should not simply disclose trade secrets to Congress "sua sponte." The Commission, however, will invariably know the nature of the information in its possession far more accurately than Congress, and oftentimes may be aware of data clearly pertinent to an investigation of which Congress has no knowledge or intimation. We would not restrict the right, prior to congressional demand, of the Commission to discuss with Members of Congress or their staff the general nature of available data and thus use its expertise to inform the legislature of relevant information of which the Congress may often be unaware.[18] Barring some prohibition, governmental agencies may interchange information. Most problems in this connection will be obviated if the Commission merely notifies Congress whenever confidential trade secrets are requested or involved in potential delivery. In III, *ante*, we noted the obligation of the Commission to do this.

V

It is important to emphasize that our denial of appellants' requested injunctive and declaratory relief de-

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[18] Imposing a general restriction on the FTC's ability to assist Congress in the latter's investigations would be unjustified particularly in light of the fact that the Commission was formed in part to act as an arm of the legislature, assisting Congress in its investigations. A member of the Conference Committee on the bill that originally established the F.T.C., Congressman Stevens, explained that:

> [The Commission] has the power to investigate for the benefit of Congress. It really performs the functions of a committee of Congress in the line of investigation and compilations and recommendations. It can ascertain all the facts, as we constitutionally have the power to do, or we can commit that power to a Commission or to a committee to do that. That is what we do in this case. It is an especially valuable function, and its beneficial work will be along the line of recommendation to Congress and the President. 51 Cong. Rec. 14935 (1914).

signed to limit the manner in which the F.T.C. may *respond* to a subpoena or formal request issued by Congress, does not address the question of when such a request or subpoena has been *properly issued.* While we are unable to agree with appellants' request for advance restrictions on the Commission's response to formal requests or subpoena, we feel that there is ample justification for insisting that the Commission only reveal statutorily protected *trade secrets* when it has indeed received such a proper request or subpoena.

There is no doubt that the subpoena power may be exercised on behalf of Congress by either House, *Eastland v. United Servicemen's Fund, supra; see* 2 U.S.C. § 190b(a) (1976); House Rule XI cl.2(A), and that the subpoenas issued by committees have the same authority as if they were issued by the entire House of Congress from which the committee is drawn, *e.g., In Re Motion to Quash Subpoenas and Vacate Service,* 146 F. Supp. 792, 794 (W.D. Pa. 1956). To issue a valid subpoena, however, a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers, and only those parties expressly authorized to sign subpoenas may do so validly. For example, where the resolution granting subpoena power to a committee stated that subpoenas would be issued only by the whole committee, not even the Chairman himself could individually issue such a document, *Liveright v. United States,* 347 F.2d 473 (D.C. Cir. 1965); *see also, Shelton v. United States,* 327 F.2d 601 (D.C. Cir. 1963).

The resolution which in *Liveright* was held not to justify the Chairman's issuing a subpoena by himself is nearly identical to that of 2 U.S.C. § 190b(a) governing the subpoena power of Senate committees and subcommittees. The resolution specified that "the committee or any duly authorized subcommittee thereof is authorized . . . to require by subpoena." Whereas the statute states

that "[e]ach standing committee of the Senate, including any subcommittee of any such committee is authorized . . . to require by subpoena or otherwise." The clear intent of 2 U.S.C. § 190b(a), is that only *committees* or *subcommittees* can issue subpoenas in the name of the committee or subcommittee, and *Liveright* indicates how narrowly the number of persons entitled to issue subpoenas is to be interpreted.

The purposes behind the limitation on the members of a committee or subcommittee who may issue subpoenas in its name is illuminated by the House Rule on this subject:

> A subpena may be authorized and issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of any investigation or series of investigations or activities, *only when authorized by a majority of the members voting, a majority being present.* The power to authorize and issue subpenas under subparagraph (1)(B) may be delegated to the chairman of the committee pursuant to such rules and under such limitations as the committee may prescribe. Authorized subpenas shall be signed by the chairman of the committee or by any member designated by the committee.

Rule XI cl. 2(m)(2)(A) Manual and Rules of the House of Representatives, 95th Congress (emphasis added).[19] This

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[19] The reform rule adopted by the 94th Congress required subpoenas to be "authorized by a *majority of the members of the committee . . .*" *Id.*, cl. 2.(m) (emphasis added). *See* Ashland Oil, Inc. v. FTC, 548 F.2d 977, 985-991 (D.C. Cir. 1976). The reform, however, was short lived, as the 95th Congress changed the rule to only require "a majority of the members voting, a majority being present."

The Senate rule authorizes "[e]ach standing committee . . . including any subcommittee of any such committee . . . to require by subpoena or otherwise the attendance of such wit-

rule is plainly directed at eliminating the possibility that an individual member of a committee will—solely on his own initiative—issue a "subpoena" compelling production of evidence, and a similar purpose can be discerned in 2 U.S.C. § 190b(a). The principle is important that disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members; and only for investigations and congressional activities. Election to the Congress does not give an individual subpoena power over whatever information be may happen to be interested in, and particularly not over trade secrets, whose oftentimes enormous value may be forfeited by disclosure to the public.

Although once a committee or subcommittee has in fact requested trade secret information, the separation of powers demands that the courts do little to interfere with how the Congress deals with this information; it is only when a formal committee or subcommittee request, or request by the committee chairman pursuant to an authorized investigation or activity, has been made that the doctrine of separation of powers becomes relevant at all. And as Congress itself has manifested a concern to prevent the issuance of subpoenas by individual members as opposed to committees, subcommittees or duly authorized committee chairmen, it is appropriate to require the FTC to take steps to ascertain the validity of a subpoena (or the formal requests it treats as subpoenas) before it releases data it is required by statute to be kept confidential.

Since the Freedom of Information Act makes a great deal of information available to the public and the FTC may volunteer certain *ordinary information* without any formal request, there does not seem to be any need for

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nesses and the production of such . . . documents [etc.] . . . as it deems advisable." Rules and Manual of the United States Senate, 95th Congress, § 190b.(a), p. 363 (1977).

requiring the F.T.C. to determine whether or not a request for such information is in fact a proper formal request or subpoena. However, *trade secrets* are explicitly excluded from that material which the Commission may in its good discretion "make public." 15 U.S.C. § 46(f), *supra*. *See Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). We thus note that Congress intended to prohibit the FTC from disclosing "trade secrets" and cannot therefore assume that it meant to allow divulgement of these secrets upon the casual request of individual Congressmen.[20] Accordingly, although we do not require the FTC to observe the procedures proposed by the appellants to limit the manner in which the Commission responds to *formal requests* for trade secrets from Congress or its committees it is nothing more than common sense for the FTC to not disclose trade secrets except upon legally authorized requests therefore and to verify that fact before delivery. Trade secrets, by statute, are in a different position than ordinary non-confidential information within the possession of the Commission.

In this particular appeal, it does not clearly appear that the request sent to the FTC by Senator Hart was a "formal request" authorized by the subcommittee. The Commission, however, may have been previously informed of subcommittee action that satisfied the necessary formalities. The Senate rules empowered the Chairman of the Subcommittee on Anti-Trust and Monopoly to issue subpoenas for proper purposes authorized by the sub-

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[20] We note that, in another context, Congress has manifested its solicitude to protect the interests of those individuals who are forced to entrust confidential data to agencies, *see, e.g.*, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966) (a report on the bill that became the Freedom of Information Act of 1967); *see generally*, Note, Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 NW.U.L.REV. 995 (1976).

committee, and the requests presented to the FTC in this case were signed by Senator Hart, on official stationery and asked that "the Commission make available to the *Subcommittee* that data which it has gathered on coal and uranium reserves." (Emphasis added). When the Commission receives such a letter and it has knowledge that said investigation has been duly authorized, it is reasonable of it to treat it as an authorized formal request. Had Senator Hart himself written in a capacity other than that of Subcommittee Chairman, or had some other senator on the committee requested the confidential data, however, the statutory protection due to confidential trade secrets in the hands of the Commission, *see* 15 U.S.C. § 46(f); *FTC v. Texaco, Inc., supra*, 517 at 151, demands that it not release such sensitive information without verifying that the request satisfies the requirements of the controlling congressional rule.

VI

As a final point, the fact that appellants are appealing from the district court's refusal to grant equitable relief places an exceptionally heavy burden on them if they are to succeed before this court. Not only does an appeal from a denial of injunctive relief require a showing that the trial court abused its discretion, *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943); *Independent Bankers Assoc. of America v. Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976), but also the burden on these particular appellants is considerably heightened by the clear public interest in maximizing the effectiveness of the investigatory powers of Congress. The welfare of the public is a factor to be weighed in determining whether or not to issue an injunction, *e.g., Yakus v. United States*, 321 U.S. 414 (1944); *Hecht Co. v. Bowles, supra; Harrisonville v.*

W. S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); *United States v. American Tobacco Co.*, 221 U.S. 10 (1911), and the investigatory power is one that the courts have long perceived as essential to the successful discharge of the legislative responsibilities of Congress, *McGrain v. Daugherty, supra.*

It would, then, require an extremely strong showing by the appellants to succeed in obtaining an injunction in light of the compelling public interest in denying such relief. Furthermore, there is no significant private injury present here to weigh against the public interest in unimpeded congressional investigation, *see Ohio Oil Co. v. Conway*, 279 U.S. 813 (1928); 7 J. MOORE, FEDERAL PRACTICE ¶ 65.18[3] at 65-138. Given the presumption of congressional propriety discussed above, *see also, Ansara v. Eastland, supra*—there is no risk of imminent injury to appellants. Injunctions, however, will not issue to prevent injuries neither extant nor presently threatened, but only merely "feared," *Connecticut v. Massachusetts*, 282 U.S. 660 (1931). To grant the injunction appellants request, this court would be required to interfere with the operation of Congress, and also to depart from traditional doctrine concerning the availability of equitable relief. Finding no justification for granting the relief requested by appellants, we affirm the judgment of the district court in its entirety.

Judgment accordingly.

In the United States District Court for the
Northern District of Iowa
Western Division

No. C 77-4040

IOWA BEEF PROCESSORS, INC., PLAINTIFF,

v.

PATRICK E. GORMAN, HARRY R. POOLE, AND SAM TALARICO, AS REPRESENTATIVES OF THE MEMBERS OF AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY; AND HANS AARSEN, DEFENDANTS.

ORDER

The matter before the court is the latest imbroglio of the parties.[1] Pending motions are:

(1) Defendant John A. Cochrane's resisted motions to dismiss and for a protective order, both filed July 22, 1977. Denied.

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[1] The court has examined the transcript of the hearing before the Judicial Panel on Multidistrict Litigation (September 30, 1977) wherein Judge Weinfeld described this litigation as "a donnybrook * * * [and] a case of crimination and recrimination charges and counter-charges, and carrying with it the usual bitterness * * * [where] almost every question that is put to a witness would draw an objection". The record to date appears to support this assessment.

(2) Defendant Lex Hawkins' resisted motions to dismiss and for a protective order, both filed July 22, 1977. Denied.

(3) Defendant Albert J. Krieger's resisted motion to dismiss filed August 15, 1977. Denied.

(4) Plaintiff's resisted motion to enjoin a separate action filed in the United States Court for the Southern District of Iowa filed August 15, 1977. Denied.

(5) Defendants Hawkins and Cochrane's resisted motions to dismiss and for a protective order, both filed August 30, 1977. Denied.

(6) Defendants Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Union), Patrick E. Gorman, Harry R. Poole, and Sam Talarico's resisted motion to dismiss filed September 6, 1977. Denied.

(7) Plaintiff's resisted motion to compel production of documents filed September 8, 1977. Granted.

(8) Defendant Irving Stern's resisted motion to dismiss filed September 26, 1977. Denied.

(9) Plaintiff's resisted motions for summary judgment, for a protective order and to compel discovery, all filed October 28, 1977. Granted and denied in part.

(10) Defendants Hawkins and Cochrane's resisted motion to compel answers to deposition questions filed December 13, 1977. Granted and denied in part.

In this diversity action plaintiff seeks damages and injunctive relief against defendants for their role in the alleged malicious inducement to breach and breach of a settlement agreement between plaintiff and defendant Hughes A. Bagley [Bagley], plaintiff's former Vice President.[2] Plaintiff claims that Bagley met with the defend-

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[2] The settlement agreement, summarized, compromised Bagley's compensation claims under his employment contract and released IBP from latent suits by Bagley in return for a release of Bagley from a covenant not to compete contained in his employment contract and a release of any cause of action IBP may have had to the time of the settlement agreement.

Paragraph 3.2 of the covenant bound Bagley to refrain from assisting third-party litigation against IBP, stating:

> 3.2. Bagley, for himself and heirs, legal representatives and assigns, covenants with IBP to forever refrain from aiding,

Footnotes continued on next page

ants several times and provided copies of plaintiff's documents, secured with the help of defendant Aarsen, to the defendant attorneys for the purpose of aiding antitrust litigation pending against plaintiff in Texas, (M.D.L. No. 248). Plaintiff alleges that the conduct by Bagley violates both the terms of his settlement agreement and his fiduciary duty to the company and that it was knowingly and maliciously induced by various defendants who conspired to use the inside information to cause damage to IBP's business.

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Plaintiff originally brought this suit against *inter alia* the Union as an entity. Defendants Hawkins and Cochrane originally sought to dismiss for lack of diversity averring that the Union had many members of Nebraska citizenship, the citizenship of plaintiff. Plaintiff then amended its complaint to drop Amalgamated and add its three top officers as representatives of the union and its members. The purpose of the amendment as stated in plaintiff's brief was to "utilize * * * the procedure provided in Rule 23.2 of the Federal Rules of Civil Procedure added in 1966 to avoid the absurdities created by the ancient doctrine that a labor union takes the citizenship of its members.* * *" [3]

Defendants Hawkins, Cochrane, Stern, Gorman, Poole and Talarico moved to dismiss, again on the basis of

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Footnotes continued from last page

abetting or in any way assisting any third person not a party to this agreement in the bringing of any action or the prosecution of any claim or demand of whatever kind or nature against IBP for any matter, fact, circumstances, happening or thing whatsoever occurring or failing to occur from the beginning of the world to the day of the date of these presents. Bagley hereby agrees that any breach of this covenant by him would not be adequately compensable in damages and agrees that, in the event of any breach by him of said covenant, IBP shall, in addition to any claim for damages for breach of covenant to which it may be entitled, be authorized and entitled to seek and obtain equitable relief by way of injunction or otherwise in a court of competent jurisdiction.

[3] IBP's opposition to the Hawkins and Cochrane Motion to Dismiss, filed August 1, 1977, at 5.

lack of subject matter jurisdiction. Defendants contend that Rule 23.2 FRCP is not a class action rule and that the citizenship of all union members is still the relevant determinant of diversity.

The question here is whether Rule 23.2 establishes a class action with respect to unincorporated organizations thereby making the citizenship of the representatives of the class, together with the citizenship of plaintiff, solely determinant of diversity. If the rule is a class action rule, jurisdiction is established since plaintiff and the representative parties are of diverse citizenship. If the rule is not a class action rule the court lacks jurisdiction since it is undisputed that some members of the Union are of the same citizenship as plaintiff.

The rule states:

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Wright & Miller and Moore agree that this rule provides a mechanism for class action treatment of unincorporated associations.[4] It is argued, however, that some courts have disagreed and held that the rule is merely a capacity-to-sue-or-be-sued provision to give entity treatment to an association.[5] The Advisory Com-

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[4] *See* 7A Wright & Miller, Federal Practice and Procedure: Civil § 1861 (1972); 3B Moore, Federal Practice, ¶ 23.2.02 (2d ed. 1977).

[5] *See Lee* v. *Navarro Savings Ass'n,* 416 F. Supp. 1186, 1190 (N.D. Texas 1976); *Suchem, Inc.* v. *Central Aguirre Sugar Co.,* 52 FRD 348, 351 (D. Puerto Rico 1971). *Lee* and *Suchem* are distinguishable, however, because neither court found that unincorporated associations did have entity status in Texas and Puerto Rico and therefore Rule 23.2 was not available. The Iowa rule, applicable by operation of Rule 17(b) FRCP, holds that unincorporated associations *do not* have entity status and cannot sue or be sued directly

Footnotes continued on next page

mittee's Note to Rule 23.2 lends support to this latter interpretation.[6]

An examination of the rule itself and the writings of the commentors leads this court to conclude that Rule 23.2 FRCP is a class action provision and that plaintiff may assert its claim against the union as a class. The rule itself incorporates by express reference portions of Rule 23 FRCP.[7] The requirements of numerosity, commonality and typicality contained in Rule 23 may be subsumed implicitly into Rule 23.2.[8] In any event they are present here. This is in fact a bona fide unincorporated association and there is no suggestion that Rule 23.2 was utilized to evade the constraints on the court's jurisdiction.[9] *See* 7A Wright & Miller, Federal Practice

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Footnotes continued from last page

in the absence of waiver or estoppel. *See Boyer* v. *Iowa High School Athletic Ass'n,* 138 NW2d 914, 915 (Iowa 1965). The language of *Wilson & Co.* v. *United Packinghouse Wkrs. of America,* 181 F. Supp. 809, at 817 (N.D. Ia. 1960) and *Coughlon* v. *Iowa High School Athletic Ass'n,* 150 NW2d 660, at 662 (Iowa 1967) put in context here, is not otherwise. Finding that Rule 23.2 is available, the issue before the court here was never addressed by *Lee* nor was it properly before the court in *Suchem.*

[6] The Advisory Committee's Note states:

> Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b).

39 FRD 108 (1966).

[7] Defendants point out that the provisions for notice and pleading present in Rule 23 are absent from Rule 23.2. This absence may be explained by the fact that the problems of defining the class and giving notice to the class that plague Rule 23 class actions are minimized in the context of an unincorporated association where the class is fairly defined and notice easily obtained.

[8] *See Merkey* v. *Board of Regents of State of Florida,* 344 F. Supp. 1296, 1303 (N.D. Fla. 1972) vacated on other grounds 493 F.2d 790 (5th Cir. 1973). But *see Management Television Systems, Inc.* v. *National Football League,* 52 FRD 162, 164 (E.D. Pa. 1971). 7A Wright & Miller, *supra;* 3B Moore, *supra.*

[9] As defendants point out in Reply Brief filed October 7, 1977, at 8:

> It is well-settled that * * * [diversity] jurisdiction is available * * * in a traditional class action under Rule 23 where

Footnotes continued on next page

and Procedure: Civil § 1861, at 461 (1972). Accordingly, this action is maintainable as a class action; the citizenship of the representative defendants and plaintiff are diverse; motion to dismiss for lack of subject matter jurisdiction denied. *See generally Patrician Towers Owners, Inc.* v. *Fairchild,* 513 F.2d 216, 220 (4th Cir. 1975); *Management Television Systems, Inc.* v. *National Football League, supra.*

Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted

Defendants Hawkins, Cochrane, Krieger and Stern next move to dismiss for failure to state a claim for which relief can be granted. All complain of a lack of specificity and factual allegations—in the case of defendants Cochrane and Hawkins, as to the allegations in the complaint of breach of fiduciary duty and conspiracy; in the case of defendant Krieger, as to the allegations in the complaint of inducing breach of contract; in the case of defendant Stern, as to all of the above.

The standard for a motion to dismiss is that such a motion cannot be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Cruz* v. *Beto,* 405 U.S. 319, 322 (1972). In this light defendants' motions fail and are denied.

Motion to Enjoin Prosecution of Separate Action in Lieu of Compulsory Counterclaim

Plaintiff sought, by this motion, to prevent defendants Hawkins and Cochrane from pursuing an abuse of process action in the United States District Court for the Southern District of Iowa. However, since that action was dismissed by Judge Stuart on November 17, 1977, this motion is denied as moot.

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only the citizenship of class representatives is considered in determining whether diversity exists. *See Montgomery Ward & Co.* v. *Longer,* 168 F.2d 182 (8th Cir. 1948).

Motions for Protective Order and Motions to Compel

A number of motions for protective orders and corresponding motions to compel have been filed in this action. In some instances the granting of one motion requires the denial of another. In each of these instances that result will be indicated.

The first motions for protective orders were filed by defendants Cochrane and Hawkins on July 22, 1977. They were unaccompanied by an affidavit of good faith attempts at resolution by alternate means and the movants were notified that no further action would be taken until Rule 16E of the Local Rules was complied with. Cochrane and Hawkins filed essentially the same motion for protective order, with affidavit, on August 30, 1977. The substance of the motion sought protection for documents subject to discovery requests in the antitrust suit M.D.L. No. 248 until such time as the documents are discoverable there. The motion also sought to protect documents alleged to be protected by the attorney-client privilege and work-product immunity. Finally, incorporating by reference a response to a request for production of documents, the defendants refused to produce requested documents so long as their motions to dismiss remained outstanding. Plaintiff's response was to move to compel production of those documents contained in its first request.

The overriding rationale applied with respect to all discovery motions is that discovery provisions are to be broadly and liberally construed. *Hickman* v. *Taylor,* 329 U.S. 495, 507 (1947); *accord Schlagenhauf* v. *Holder,* 379 U.S. 104, 114–15 (1964). Taking defendants' last claim first, it is clear that this matter has been resolved by the court's ruling today. As to the claim that the documents are protected by work-product immunity and attorney-client privilege the court concludes that a blanket invocation of these doctrines to bar discovery is inappropriate. In this case, where state law supplies the rule of decision, Rule 501 FREv, the burden of establishing attorney-client privilege is on the defendants. *Bailey* v. *Chicago, Burlington & Quincy Railroad Co.,* 179 NW2d 560, 564 (Iowa 1970). That burden cannot be met

by resort to a privilege incantation. The assertion must be document-specific with a sufficient articulation of the underlying circumstances and general substance, and identification of the parties involved, to establish a *prima facie* showing of privilege. This standard applies to the assertion of work-product immunity as well. In this instance defendants have not borne this burden.

The claim that defendants are protected from discovery requests pending in MDL No. 248 until the documents are allowed to be discovered in that action cannot be accepted. The effect of an assent to this idea would subordinate this action and ancillary discovery matters to another case filed in another district court. Discovery here cannot be predicated on what that court will do. However, this does not mean that the court is insensitive to the potential for interference with the conduct of orderly discovery in MDL No. 248. All parties have indicated that a voluminous amount of materials are subject to requests for discovery here. Bearing this in mind, together with the potential for interference with MDL No. 248, the court orders defendants Hawkins and Cochrane to comply with plaintiff's first request for production of documents[10] by producing the documents in the usual manner or by affording plaintiff a reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries at the place where the records are kept or at any other mutually agreed-upon place. *Cf.* Rule 33(c) FRCP. In the event discovery of the materials in this fashion results in undue interference with MDL No. 248 suitable protection may be obtained from this court on a *particularized* showing.

Plaintiff moved for a protective order on October 28, 1977, prohibiting defendants' inquiry into matters allegedly protected by attorney-client privilege, prohibiting inquiry into purported illegal acts by plaintiff, and restricting use of IBP business information to defense counsel for purposes of this case and to Cochrane and

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[10] The court notes that defendants maintain that they have no documents falling within Specification No. 6 of plaintiff's first request for production of documents. On this representation defendants need not comply.

Hawkins for the purposes of MDL No. 248. The court grants the protective order limiting the usage of IBP's confidential business information and denies the motion regarding the claim of attorney-client privilege and the claim of the irrelevance of illegal acts.

Plaintiff falls prey to the same lack of specificity that defendants Hawkins and Cochrane do regarding a claim of attorney-client privilege. A mere recitation of the privilege litany is insufficient. The standards applicable to meeting the burden of establishing a privilege set out above apply here. Plaintiff cannot meet that burden by requesting protection from inquiry into "matters protected by IBP's attorney-client privilege".

The court also rejects the claim that illegal acts by IBP are irrelevant to the case. The claim that the covenant between IBP and Bagley was intended to conceal illegal acts is central to defendants' case. A relevance objection is unavailing in this context.[11]

Defendants Cochrane and Hawkins filed a motion to compel answers to questions propounded during an oral deposition of William L. Heubaum, corporate counsel for IBP. The Court has examined the questions and the context in which they were asked. It seems apparent that work-product immunity or the attorney-client privilege is applicable to the information sought.[12] Defendants, however, seek to overcome the immunity or privilege by invoking the improper purpose exception.[13]

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[11] Plaintiff would have the court determine in the guise of a protective order, in addition to its motion for summary judgment discussed *infra,* that the Bagley covenant does not offend public policy. The court is not willing to make that determination at this stage of the litigation.

[12] This is *not* true as to all information sought. for example, counsel for IBP claimed attorney-client privilege as to the *number* and *bulk* of file drawers regarding antitrust at Heubraum's office (Heubaum deposition, Volume I at 146–147) and as to *whether* certain documents, oftentimes the contents of which were disclosed, were sent to IBP's attorneys (Heubaum deposition, Volume I at 155, 210–213). This information is clearly not privileged.

[13] Defendants also invoke the general rule that privilege does not lie when business, as opposed to legal, counsel is sought. Though it may be true that a corporation cannot merely utilize general counsel as a conduit to protect all its documents and other information

Footnotes continued on next page

Defendants' burden in this respect is heavy—they must make a *prima facie* showing that the information sought was transmitted in furtherance of a crime or tort. *Pfizer, Inc.* v. *Lord,* 456 F.2d 545, 549 (8th Cir. 1972). *See In re Murphy,* 560 F.2d 326, 338 (8th Cir. 1977). Defendants assert that "[t]he testimony in the present case * * * establishes conclusively the existence of antitrust violations by IBP". This assertion is exaggerated. In any event defendants must make a *prima facie* showing that the communication was pursuant to the crime or tort. *See In re Murphy, supra.* No such showing has been made. Except as noted herein, the motion to compel answers is denied.

Plaintiff moved to compel defendant Bagley to answer deposition questions which he has refused to answer on grounds of attorney-client privilege. An examination of the questions reveals that the information sought would be privileged. Plaintiff maintains, however, that the privilege was waived by Bagley's answer, paragraph 10, which allegedly injects a state-of-mind issue into the case. That paragraph states in part:

> It is affirmatively alleged that paragraph 3.2 of the Settlement Agreement was obtained by fraud and misrepresentation on the part of IBP.

Since this response does inject the question of reliance on IBP's statements or acts [14] Bagley cannot now prevent inquiry directed to that issue. This information is vital to plaintiff to meet Bagley's affirmative defense of fraud and misrepresentation. *See Haymes* v. *Smith,* 73 FRD 572, 577 (W.D.N.Y. 1976); *Hearn* v. *Rhay,* 68 FRD 574, 581 (E.D. Wash. 1975). Defendant Bagley is directed to answer questions relevant to the question of reliance; the attorney-client privilege is waived.

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it is also true that defendants have not shown in even the slightest degree that this activity has occurred here. Merely noting that Heubaum serves Iowa Beef as Secretary and Vice President as well as general counsel is insufficient.

[14] *See* 37 Am. Jur. 2d, Fraud and Deceit § 223 *et seq.; cf.* W. Prosser, Torts, 714 *et seq.* (4th ed. 1971).

MOTION FOR SUMMARY JUDGMENT

IBP moves for summary judgment against Bagley on the question of liability for breach of the settlement agreement with IBP and for violation of the fiduciary duty allegedly owed by IBP.

IBP has a particularly heavy burden of persuasion—the movant must show that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law. Rule 56(c) FRCP; *see Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). The court is required to review the facts in the light most favorable to the party opposing the motion and to give to that party the benefit of all reasonable inferences to be drawn from the facts. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 158–59 (1970). The court cannot say, at this point in the litigation, that there is no genuine issue of material fact. furthermore, though IBP attempts to de-emphasize the importance of the motion by carefully limiting it to Bagley, the preclusive effect of the ruling, if only from a reasoning standpoint, is apparent. The court considers it inappropriate at this time to resolve this issue and therefore a major portion of the lawsuit. Further discovery and a vigorous analysis of the relevant legal principles might make summary judgment feasible in the future.

It is therefore ORDERED

1. Motions 1–6 inclusive and 8 above are denied.
2. Motion 7 is granted.
3. Motions 9 and 10 granted and denied in part.

FEBRUARY 10, 1978.

EDWARD J. MCMANUS, *Chief Judge,*
United States District Court.

37-148 O - 79 - 18

In the United States District Court for the
Northern District of Iowa
Western Division

No. C 77–4040

IOWA BEEF PROCESSORS, INC., PLAINTIFF,

v.

PATRICK E. GORMAN, HARRY R. POOLE, AND SAM TALARICO, AS REPRESENTATIVES OF THE MEMBERS OF AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY; AND HANS AARSEN, DEFENDANTS.

ORDER

This matter is before the court on Iowa Beef Processors, Inc.'s unresisted motion to have certain documents filed under seal with the court, filed October 13, 1978, and defendant Hughes A. Bagley's resisted motion to lift protective order or in the alternative for guidelines, filed November 1, 1978.

The thrust of the motions involve an attempt by the Small Business Subcommittee on SBA and SBIC authority and General Small Business Problems of the House of Representatives (Committee) to secure access to certain documents produced by defendant Bagley pursuant

to plaintiff's first request for documents and which are presently under a protective order issued by this court.

Specifically, on February 13, 1978 this court granted IBP's motion for protective order restricting the use of Bagley's discovery material to counsel in this case for the purposes of this case and the Beef Industry Antitrust Litigation now pending in Dallas, Texas. The basis on which the protective order was originally issued was that the documents contained confidential information concerning IBP's business practices, etc. which would be detrimental to IBP's business if given to competitors.

From a review of the record it is the view of the court that the protective order should be modified as to the documents requested. The court can ascertain no great interference with its ability to proceed in this suit if the committee is allowed access to the records and the right to copy them as long as the originals still remain accessible to the parties to prosecute this action. IBP is free to approach the committee as to the scope of the use of the documents.

It is therefore ORDERED

This court's protective order is modified to allow defendant Hughes A. Bagley to comply with the committee subpoena served upon him in this action.

NOVEMBER 22, 1978.

EDWARD J. MCMANUS, *Chief Judge,*
United States District Court.

Copies mailed Certified, Return Receipt Requested, on 11-24-78 to: D. Douglas Titus, 510 Benson, Building, Sioux City, Iowa 51101; Edward W. Rothe and James T. Malysiak, One IBM Plaza, Suite 3200, Chicago, Ill. 60611; Richard Watt and Irving King, Room 4750 IBM Plaza, Chicago, Ill. 60611; Harry H. Smith, 632 Badgerow Bldg., Sioux City, Iowa 51101; Marvin F. Heidman, P.O. Box 3086, Sioux City, Iowa 51102; Wm. J. Rawlings, 300 Toy Nat'l. Bank Bldg., Sioux City, Iowa 51101; John J. Greer, Professional Bldg., Spencer, Iowa 51301; Frederick S. Nordenson, 436 Davidson Bldg., Sioux City, Iowa 51101; Stephen M. Glynn, 222 E. Mason St., Milwaukee, Wis. 53202; Harold I. Cammer, 9 East 40th St., New York, N.Y. 10016; and John M. Fitzgibbons, Special Counsel, Committee on Small Business, U.S. House of Representatives, 2361 Rayburn House Office Bldg., Washington, D.C. 20515.

E. C. HENRIKSEN, *Deputy.*

United States Court of Appeals for the Eighth Circuit

No. 78-1855

IOWA BEEF PROCESSORS, INC., APPELLANT,

v.

HUGHES A. BAGLEY, APPELLEE.

Appeal from the United States District Court for the Northern District of Iowa

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Submitted: December 12, 1978

Filed: December 14, 1978

Before BRIGHT, HENLEY and MCMILLIAN, *Circuit Judges*

PER CURIAM

This case comes before the court on motion of Iowa Beef Processors, Inc. (IBP) for a stay pending appeal and for other suitable orders in the nature of extraordinary writs which would preserve appellate jurisdiction. We deny the stay and decline to issue such orders.

This case is the most recent manifestation of a lengthy, and increasingly acrimonious, course of litigation involving IBP. IBP has been the subject of numerous private antitrust suits in recent years. Several of these lawsuits have been brought by members of a group calling themselves the Meat Price Investigators Association and have been pursued by two lawyers, Lex

Hawkins and John Cochrane. The Judicial Panel on Multidistrict Litigation transferred a number of these private antitrust cases to the United States District Court for the Northern District of Texas for consolidated pretrial proceedings. *See In Re Beef Industry Antitrust Litigation,* 432 F.Supp. 211 (Jud. Pan. Mult. Lit. 1977); *In Re Beef Industry Antitrust Litigation,* 419 F.Supp. 720 (Jud. Pan. Mult. Lit. 1976). As part of the discovery proceedings in these Texas cases, the district court entered a protective order prohibiting attorneys Cochrane and Hawkins, among others, from disclosing the contents of documents obtained through discovery on the defendants, including IBP. It appears that some of these documents are the same as the documents in question in this case.

The instant litigation was begun by IBP in the Northern District of Iowa on August 1, 1977. IBP sued a number of defendants including Hawkins, Cochrane, and one Hughes A. Bagley, a former vice president of IBP. IBP's complaint alleged that Bagley had taken a number of documents with him when he left IBP's employ in 1975 and that these documents contained confidential business information which would damage IBP's business if they were disclosed. The complaint further alleged that Bagley had disclosed certain confidential information and records to Hawkins, Cochrane, and others in violation of various contractural obligations and common law fiduciary duties. The case was referred to the docket of Chief Judge McManus who on February 13, 1978, issued an order deciding a number of petrial motions. The order granted IBP's motion for a protective order preventing disclosure of IBP's confidential business information and limiting its use to defense counsel and to Hawkins and Cochrane for the purposes of the consolidated Texas cases.

Over a period of time, it appears that the House Subcommittee on SBA and SBIC Authority and General Small Business Problems (the Subcommittee) of the House Committee on Small Business has become interested in alleged price-fixing or other antitrust violations in the meat industry. In that connection, the Subcom-

mittee served Hawkins and Cochrane with congressional subpoenas *duces tecum* compelling them to produce a number of documents, including some which were subject to the protective order issued in connection with the consolidated Texas cases. Hawkins and Cochrane moved to dissolve the protective order. The motion was denied by United States District Judge William M. Taylor, who held that the Subcommittee's attempt to subpoena the documents covered by the protective order violated the due process clause. *In Re Beef Industry Antitrust Litigation,* 1978–2 Trade Cases ¶ 62,189 (N.D. Tex. August 17, 1978). Judge Taylor's decision is currently on appeal to the Fifth Circuit.

Frustrated to this point in its efforts to obtain this material in the Texas proceedings, the Subcommittee changed tactics. In late October, 1978 it served a similar subpoena *duces tecum* on Bagley, requiring him to produce a number of documents covered by Judge McManus' protective order. Bagley moved to dissolve the protective order and IBP opposed the motion. By order filed November 24, 1978, Judge McManus granted Bagley's motion and lifted the protective order to the extent necessary to allow Bagley to comply with the subpoena.

John M. Fitzgibbons, Special Counsel to the Subcommittee, was apprised of Judge McManus' order in a telephone conversation the same day. On November 27 a Subcommittee investigator, Nick Wultich, appeared at the offices of Bagley's counsel and took physical possession of seven boxes of documents.

IBP's counsel learned of the order on November 28, and subsequently learned that the Subcommittee had acquired the documents. On November 30 IBP filed a notice of appeal from the order lifting the protective order. On December 4 IBP filed this motion for a stay and other appropriate relief. By order dated December 4 Judge Henley stayed the district court order pending a hearing before a panel of the court and recited an agreement whereby the Subcommittee and its staff would take no action with respect to the documents

until, and including, December 16. The matter came on for a hearing before this panel on December 12.

Having carefully considered the papers and oral arguments submitted by IBP and the Subcommittee, whose Special Counsel appeared specially, we are of the opinion that a stay of the district court order is both inappropriate and unnecessary at this time.

We begin by noting the very limited scope of Judge McManus' order. The protective order of February 13 remains in effect as to all other parties to the litigation and as to any disclosure by Bagley other than as necessary to comply with the subpoena.

In regard to the disclosure to the Subcommittee, it has represented in its papers filed in this court and during oral argument that it has no intention of making public any of these documents, if ever, until after the House of Representatives begins its next session in January, 1979. In good faith, we must accept these representations made by members of a coordinate branch of government at face value. We are further assured that the Subcommittee and its Special Counsel will take all appropriate precautions to insure that these documents are disclosed only to the extent necessary to allow the Subcommittee staff to begin the job of collating and classifying the information contained therein. In present circumstances any disclosure beyond the immediate needs of the Subcommittee and its staff would appear to be both unnecessary and a matter of grave import for all concerned.

Given the Subcommittee's representations to us and the limited nature of Judge McManus' order, we are of the opinion that granting a stay and compelling the return of the documents at this time is both unnecessary as a practical matter and inappropriate as a matter of comity. Such action would inevitably, albeit erroneously, be viewed as an expression of our lack of faith in the Subcommittee's representations to us. Such an expression would be particularly inappropriate in view of the subcommittee's past cooperation with this court.

We are aware that this case presents serious jurisdictional and substantive questions and implicates fundamental concepts of legislative and judicial authority. Accordingly, we deem it appropriate that the case be heard on an expedited basis. The case will be scheduled for argument on the merits on January 9, 1979, and the Clerk is directed to work out an appropriate briefing schedule with the parties.

The motion for a stay pending appeal and for other appropriate relief is denied.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2123

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, JAMES MACGREGOR BURNS, NAT HENTOFF, DONALD G. HERZBERG, WILLIAM LEUCHTENBURG, ARTHUR LINK, J. ANTHONY LUKAS, AUSTIN RANNEY AND CLEMENT E. VOSE, APPELLANTS

v.

ARTHUR F. SAMPSON, INDIVIDUALLY AND AS ADMINISTRATOR OF GENERAL SERVICES, ET AL.

No. 77-2124

LILLIAN HELLMAN, ET AL.

v.

ARTHUR SAMPSON, GENERAL SERVICES ADMINISTRATION, ET AL.

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., APPELLANTS

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.

No. 77-2125

RICHARD M. NIXON, INDIVIDUALLY AND AS THE FORMER PRESIDENT OF THE UNITED STATES, ET AL.

v.

ARTHUR F. SAMPSON, INDIVIDUALLY AND AS ADMINISTRATOR OF GENERAL SERVICES, ET AL.

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., APPELLANTS

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

(D.C. Civil Nos. 74-1533, 74-1551 and 74-1518)

Argued October 31, 1978

Decided December 21, 1978

Leonard B. Simon, with whom *Robert E. Herzstein*, *Andrew S. Krulwich*, *Mark J. Spooner*, and *Peter T. Grossi, Jr.*, were on the brief, for appellants.

Steven I. Frank, Attorney, Department of Justice, a member of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of court, with whom *Earl J. Silbert*, United States Attorney, *Barbara Allen Babcock*, Assistant Attorney General, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for federal appellees.

R. Stan Mortenson, with whom *Herbert J. Miller, Jr.*, was on the brief, for appellee Nixon.

William A. Dobrovir entered an appearance for appellee Jack Anderson.

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Richard J. Bacigalupo, *Charles S. Rhyne*, and *William S. Rhyne* entered appearances for appellee Rose Mary Woods.

Before WRIGHT, *Chief Judge*, J. EDWARD LUMBARD,* *Senior Circuit Judge for the Second Circuit*, and TAMM, *Circuit Judge*.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: Appellants here, plaintiffs below, seek access through the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), to Richard Nixon's presidential materials, which are in the control of the General Services Administration (GSA) pursuant to title I of the Presidential Recordings and Materials Preservation Act (the Materials Act), note following 44 U.S.C. § 2107 (Supp. V 1975); they also request a declaration that the government owns the materials. The district court granted the government defendants' motion to dismiss the plaintiffs' action on the ground that passage of the Materials Act rendered it moot. *Nixon v. Sampson*, 437 F. Supp. 654, 656 (D.D.C. 1977). We reverse and remand for proceedings not inconsistent with this opinion.

I

Richard Nixon resigned his office as President of the United States on August 9, 1974. On September 8, 1974, the same day that President Gerald Ford pardoned Mr. Nixon, the White House released the text of an agreement between Mr. Nixon and Arthur Sampson, Administrator of the GSA, concerning Mr. Nixon's presidential materials.[1] Under the terms of the agreement, Mr. Nixon retained all legal and equitable title to the materials and the GSA agreed to house them. Access to the materials

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] *See* 10 WEEKLY COMP. OF PRES. DOC. 1104, 1108-09 (Sept. 8, 1974); Nixon v. Sampson, 389 F. Supp. 107, 160-62 (D.D.C. 1975) (Appendix A).

was strictly limited. Mr. Nixon agreed to deposit materials other than the tape recordings described below for three years, during which no one could gain access without his approval. Mr. Nixon reserved the right to withdraw any materials he desired after three years. Tape recordings of White House or Executive Office Building conversations were to remain on deposit until September 1, 1979, and access was limited to persons approved by the former President. After September 1, 1979, GSA agreed to destroy tape recordings upon Mr. Nixon's request. Finally, all tape recordings were to be destroyed when Mr. Nixon died, or on September 1, 1984, whichever event occurred first.

On October 17, 1974, Mr. Nixon brought a suit seeking a temporary restraining order and preliminary injunction to enforce the Nixon-Sampson agreement.[2] Four days later, Jack Anderson, a journalist whose FOIA request for presidential materials had been denied on the basis of the Nixon-Sampson agreement, intervened to prevent implementation of the agreement.[3] Also on October 21, 1974, the Reporters Committee for Freedom of the Press, et al.,[4] appellants here, filed suit seeking to restrain the agreement and to obtain access to the materials pursuant to the FOIA.[5] Three days later, Lillian Hellman and

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[2] *See* Nixon v. Sampson, C.A. No. 74-1518 (D.D.C. filed Oct. 17, 1974).

[3] *See* Nixon v. Sampson, 389 F. Supp. at 117.

[4] Appellants include The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenburg, Arthur Link, J. Anthony Lukas, Austin Ranney and Clement E. Vose.

[5] Reporters Committee for Freedom of the Press v. Sampson, C.A. No. 74-1533 (D.D.C. filed Oct. 21, 1974); *see* Appendix (App.) at 20 (Complaint of the Reporters Committee for Freedom of the Press, et al.). For a description of the FOIA request, *see id.* at 45-49.

other members of the Committee for Public Justice, filed a similar action which sought specified presidential tape recordings.[6] All of these actions were consolidated.

On December 19, 1974, President Ford signed into law the Presidential Recordings and Materials Preservation Act, which included a provision giving the United States District Court for the District of Columbia exclusive jurisdiction to hear any challenges to the constitutionality of title I of the Act.[7] Mr. Nixon immediately filed a suit, *Nixon v. Administrator*,[8] to enjoin the operation of the Materials Act and asked that a three-judge court be convened to hear his constitutional challenges.

Before Mr. Nixon's request was acted upon, the district court issued an opinion in the consolidated cases, *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975), but entry of the order implementing the opinion was stayed by this

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[6] Hellman v. Sampson, C.A. No. 74-1551 (D.D.C. filed Oct. 24, 1974).

[7] Section 105(a) of the Presidential Recordings and Materials Preservation Act (the Materials Act), note following 44 U.S.C. § 2107 (Supp. V 1975), provides:

> The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

[8] C.A. No. 74-1852 (D.D.C. filed Dec. 20, 1974).

court pending the convening of a three-judge court.[9] The three-judge court held that the Materials Act was facially constitutional,[10] and the Supreme Court

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[9] Prior to the issuance of the district court's opinion in *Nixon v. Sampson*, this court denied Mr. Nixon's petition for mandamus to require the district judge to act immediately on his request for a three-judge court pursuant to 28 U.S.C. § 2282 (1970) and to give the constitutional challenge priority over a decision in the consolidated cases. Although this court denied Mr. Nixon's petition, it ordered the district court to consider the three-judge question before taking further action on the consolidated cases. Nixon v. Richey, 513 F.2d 427, 430 (D.C. Cir. 1975) (per curiam). The same day, the district court judge issued an opinion in the consolidated cases, Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), but the entry of the order was stayed. *See* Nixon v. Richey, 513 F.2d 430, 432 (D.C. Cir. 1975) (per curiam). A three-judge court was subsequently convened and the court in *Nixon v. Richey* directed that the stay be continued until the three-judge court asked it to be lifted, or until the three-judge court reached a decision. 513 F.2d at 448. The original district court judge thereafter recused himself from participation in the consolidated cases, and another district judge was assigned to them. App. at 13. That district judge later refused a request that he enter judgment in accord with the original *Nixon v. Sampson* opinion. Nixon v. Sampson, 437 F. Supp. 654, 655 n.5 (D.D.C. 1977).

[10] The three-judge court noted that regulations had yet to be promulgated pursuant to the access provision of the Materials Act, section 104(a), note following 44 U.S.C. § 2017 (Supp. V 1975), which provides:

> The Administrator shall, within ninety days after the date of enactment of this title [Dec. 19, 1974], submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:
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> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses

[Footnote continued on page 7]

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[10] [Continued]

of governmental power popularly identified under the generic term "Watergate";

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

See Nixon v. Administrator, 408 F. Supp. 321, 335 (D.D.C. 1976). The court, therefore, explicitly did not decide "constitutional claims directed at the regulations . . . that the promulgation of regulations might eliminate, limit, or cast in a different light." *Id.* at 336. The GSA, after three unsuccessful attempts, finally promulgated regulations that were not disapproved by one House of Congress pursuant to section 104 (b) (2) ("The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of Congress under this subsection."). *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 605-06 n.16 (1978). The final regulations appear at 42 Fed. Reg. 63626 (1977). Mr. Nixon has challenged the regulations. Nixon v. Solomon, C.A. No. 77-1395 (D.D.C. filed Aug. 10, 1977).

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affirmed.[11] *Nixon v. Administrator*, 408 F. Supp. 321 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977).

After the Supreme Court's decision, attention turned again to the consolidated cases, *Nixon v. Sampson*. The government defendants moved to dismiss the actions as moot in light of *Nixon v. Administrator*. Appendix at 67. The district court granted the motion, *Nixon v. Sampson*, 437 F. Supp. at 656. The district court held that the Materials Act's access provisions mooted the requests for presidential materials under the FOIA and the Materials Act's provision guaranteeing the government's custody and control of the materials mooted the ownership issue. *Id.* at 655-56. Mr. Nixon, who supported the government defendants' motion to dismiss, *id.* at 655 n.5, joins those defendants as an appellee in this challenge to the district court's decision.

II

Appellees argued in the district court that the Materials Act provides the exclusive means for obtaining access to the recordings and materials. Appellants point to the language of section 104(d) of the Materials Act to support their contention that their FOIA requests should proceed. Section 104(d), note following 44 U.S.C. § 2107 (Supp. V 1975), provides:

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[11] Like the district court, the Supreme Court limited its consideration to those constitutional claims "addressing the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists." Nixon v. Administrator, 433 U.S. 425, 439 (1977). In affirming the district court, the Supreme Court rejected constitutional claims based on separation of powers, presidential privilege, right of privacy, right of associational privacy and political speech, and the bill of attainder clause. *Id.* at 439-484.

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The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 et seq.

In spite of the seemingly clear language of section 104(d), appellees contend that various principles of statutory construction mandate that the Materials Act be interpreted to block these FOIA requests.[12] However, "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative in-

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[12] The government appellees invoke the principle of Brown v. GSA, 425 U.S. 820, 834 (1976), which states that "a precisely drawn, detailed statute pre-empts more general remedies," to reach its conclusion that the particular terms of the Act provide the exclusive access to these presidential materials. *Brown v. GSA* held that section 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment. *Id.* at 835. The Supreme Court was forced to resort to principles of statutory interpretation because "Congress simply failed explicitly to describe § 717's position in the constellation of antidiscrimination law." *Id.* at 825. Here Congress has explicitly related the operation of the FOIA to the Materials Act.

The government appellees also argue that allowing FOIA requests to proceed would lead to an absurd result incompatible with the structure of the Materials Act. However, we believe that the existence of an alternate method of access is completely compatible with Congress's intent to guarantee that materials from the Nixon presidency were available to the public; *see* 120 CONG. REC. at 33971-72 (1974) (remarks of Sen. Nelson); *id.* at 33855 (remarks of Sen. Ervin); *id.* at 37900-01 (remarks of Rep. Brademas); *id.* at 37905 (remarks of Rep. McKinney); H. REP. No. 93-1507, 93d Cong., 2d Sess. 2 (1974). After all, when the Materials Act was passed, Congress could well have believed that the FOIA would not cover all of Mr. Nixon's materials that related to Watergate or were of general historical interest. *See* 5 U.S.C. § 552(e) (1976); S. REP. No. 93-1200, 93d Cong., 2d Sess. 15 (1974); Soucie v. David, 448 F.2d 1067, 1072-76 (D.C. Cir. 1971).

tent." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). *See Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940). Accordingly, we have examined the legislative history of section 104(d) and we conclude that the Materials Act does not bar processing of FOIA requests for the presidential materials in question.

Section 104(d) had its genesis in the report of the House Committee on House Administration,[13] which substituted a House version of the Materials Act for that passed by the Senate.[14] The report explicitly stated that none of the Materials Act's provisions regarding access to materials "are intended to limit access by the public, otherwise granted by the Freedom of Information Act." [15] When the bill was returned to the Senate, Senator Nelson offered a floor amendment to codify the expressed intent of the House Committee. The amendment became section 104(d). 120 CONG. REC. 38532 (1974). In the subsequent House debate that preceded approval of the Senate amendment, Representative Brademas explained that the amendment "is intended to make clear that access to the material which may otherwise be authorized by the Freedom of Information Act shall not be limited by the provisions of this title." 120 CONG. REC. 38646 (1974). With the purpose of congressional action so clear, our conclusion follows the "cardinal principle" of legislative interpretation: to give effect to the intent of Congress. *City of New York v. Train*, 494 F.2d 1033, 1042 (D.C. Cir. 1974), *aff'd*, 420 U.S. 35 (1975).

The appellees suggest, however, that the interpretation of section 104(d) we adopt may cause constitutional difficulties. The appellees argue that release of presidential

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[13] H. REP. No. 93-1507, 93d Cong., 2d Sess. (1974).

[14] 120 CONG. REC. 33975 (1974).

[15] H. REP. No. 93-1507 at 5.

materials without the specific statutory safeguards embodied in section 104(a)[16] might impair Mr. Nixon's constitutional rights. This contention is based on appellees' reading of *Nixon v. Administrator*, 433 U.S. 425 (1977). The Supreme Court, upholding the Materials Act in face of Mr. Nixon's claim that the archival screening process would impair his constitutional right to privacy, focused attention on the specific provisions of the Act that protect Mr. Nixon's privacy. The Court concluded:

> [A]ppellant 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 § 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.

433 U.S. at 465 (footnote omitted). Even if, as Mr. Nixon asserts, the Materials Act's protection of his interests was the "touchstone" for the decision in *Nixon v. Administrator*, *see* Brief for Appellee Nixon at 7, Mr. Nixon's asserted constitutionally based privacy interests in some of the materials now under government control[17] will not be

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[16] *See* n. 10 *supra*.

[17] The Supreme Court noted that "appellant's privacy claim embracing, for example, 'extremely private communications

infringed by our decision today, which merely allows FOIA requests to proceed unhindered by the Materials Act. After this case returns to district court, Mr. Nixon will be free to raise constitutional objections to screening or disclosure carried on pursuant to any specific FOIA request. In the event a district court finds that any request for particular papers will lead to impingement upon Mr. Nixon's constitutional rights, it has the equitable power to protect Mr. Nixon's constitutional interests. *See Bell v. Hood*, 327 U.S. 678, 684 (1946); *Ex parte Young*, 209 U.S. 123, 149, 167-68 (1908); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1540-43 (1972). *See also* 5 U.S.C. § 552(b)(6) (1976).[18]

Mr. Nixon also contends that screening of documents mandated by an FOIA request will disrupt the screening undertaken to carry out the Materials Act. Like the constitutional argument previously discussed, this objection does not address whether the FOIA requests can go forward, but merely raises concerns with the procedures by which processing of the requests may be carried out. We believe that fears of massive disruption by requests for huge, vaguely defined chunks of presidential material are largely unfounded. The FOIA specifically requires that requests such as the ones made here "reasonably describe[]" the records sought. 5 U.S.C. § 552(a)(3)(A)

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between him and, among others, his wife, his daughter, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files,' 408 F. Supp. at 359, relates only to a very small fraction of the massive volume of official materials with which they are presently commingled." Nixon v. Administrator, 433 U.S. at 459 (footnote omitted).

[18] *See generally* Nixon v. Sampson, 389 F. Supp. at 157-60. Although the *Nixon v. Sampson* opinion is not precedent, it is of historical interest. Brandon v. Eckard, 569 F.2d 683, 686-87 n.15 (D.C. Cir. 1977).

(1976). *See Fonda v. CIA*, 434 F. Supp. 498, 501 (D.D.C. 1977), *remanded sub nom. Hayden v. CIA*, No. 77-1984 (D.C. Cir. Nov. 15, 1978) (per curiam). *See also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 3A.9-1 (1976); Note, *Developments Under the Freedom of Information Act 1974*, 1975 DUKE L. J. 416, 439-40 n.105 (1975); Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951, 959-60 (1975). In any event, the possible duplication of effort arising from availability of records under both the FOIA and the Materials Act cannot negate the clear intent of Congress to preserve rights of access under the FOIA.

III

In conjunction with their FOIA action, appellants sought a declaration that Mr. Nixon's presidential materials are owned by the United States. The district court dismissed the declaratory judgment action as moot on the ground that the provisions of the Materials Act gave custody and control of these presidential materials to the government.[19] The Materials Act itself leaves open the

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[19] Section 101 of the Materials Act, note following 44 U.S.C. § 2107 (Supp. V 1975), provides:

> (a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code any Federal employee in possession shall deliver, and the Administrator of General Services (hereinafter in this title referred to as the 'Administrator') shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—
>
> (1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;.
>
> (2) were recorded in the White House or in the office of the President in the Executive Office Build-

specific issue whether the United States owns the materials. *See* H. REP. NO. 93-1507, 93d Cong., 2d Sess. 7 (1974); 120 CONG. REC. 33850-51 (1974) (remarks of Sen. Nelson). Section 105(a) vests exclusive jurisdiction in the United States District Court for the District of Columbia to hear, *inter alia*, any action involving the question of ownership.

As the district court recognized, an issue is moot if it has lost its character as a present, live controversy. *See Nixon v. Sampson*, 437 F. Supp. at 655 (citing *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 415 (1972)); *see generally Alton & Southern Railway v. IAM*, 463 F.2d 872, 876-77 (D.C. Cir. 1972). With respect to access under the FOIA, the ownership issue is not moot, because neither the Materials Act nor *Nixon v. Administrator*,[20]

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ings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

(2) For purposes of this subsection, the term "historical materials" has the meaning given it by section 2101 of title 44, United States Code.

[20] The Supreme Court held that legal title to the presidential materials was irrelevant to disposition of Mr. Nixon's constitutional claims. Nixon v. Administrator, 433 U.S. at 445-46 n.8.

resolved the issue or changed its character. Accordingly, we hold that the ownership issue is not moot.[21]

Reversed and remanded.

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[21] Although we hold that the ownership issue is not moot, the district court is free to examine whether this request for declaratory action fulfills other justiciability requirements. Specifically, the district court may wish to examine whether these plaintiffs have established their standing to litigate in a declaratory judgment action the question of whether the government or Mr. Nixon is the owner of all these materials, *see* Duke Power Co. v. NRC, 46 U.S.L.W. 4845, 4848-49 (1978); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976), and whether the issue presented here is suitable for resolution by declaratory judgment, *see* Golden v. Zwickler, 394 U.S. 103, 108 (1969). Of course, to the extent that the ownership of particular materials becomes an issue in the course of litigating an FOIA request for those materials in this or any other case, the FOIA plaintiffs will have standing to litigate that ownership question as well as all other issues relevant to their claim.

United States District Court for the District of Columbia

Civil Action No. 76-2039

ROBERT BENNETT SCHWARTZ, PLAINTIFF,

v.

DEPARTMENT OF JUSTICE ET AL., DEFENDANTS.

MEMORANDUM

This is an action in which plaintiff seeks certain records from the Department of Justice and Peter A. Rodino, Jr., Chairman of the Committee on the Judiciary of the United States House of Representatives, on the investigation of one Peter R. Schlam. The Department of Justice is sued under the Freedom of Information Act. Mr. Rodino is sued under the common law right of access to public records. The matter is now before the Court on Mr. Rodino's motion to dismiss. Mr. Rodino claims that Congress is not subject to the common law rule which gives citizens a right of access to public records.

The historic common law right to inspect and copy public records is recognized in this jurisdiction. *United States* v. *Mitchell,* 551 F.2d 1252, 1257 (D.C. Cir. 1976). The general rule is that all three branches of government, legislative, executive, and judicial, are subject to the common law right. *Courier-Journal & Louisville Times Co.* v. *Curtis,* 335 S.W.2d 934, 936 (Ky. 1959), *cert. denied,* 364 U.S. 910 (1960), *partially overruled on other grounds, St. Matthews* v. *Voice of St. Matthews Inc.,* 519

S.W.2d 811 (Ky. 1974): 66 Am. Jur. 2d *Records and Recording Laws* § 15 (1973).

Defendant Rodino has set forth no persuasive reason why Congress should be exempted from the common law rule. It is true that Congress has exempted itself from the requirements of the Freedom of Information Act, 5 U.S.C. § 552, by 5 U.S.C. § 551(1)(A). That Act, however, is not coextensive with the common law rule under discussion. It applies to *all* matters in Government files; the common law rule applies only to "public records." Moreover, we can find no inconsistency or conflict between the Freedom of Information Act and the common law rule. Even if there were an inconsistency or conflict, the Act would have to be construed narrowly, favoring application of the common law, because the Freedom of Information Act is in derogation of the common law.

Accordingly, we hold that Congress is subject to the common law rule which guarantees the public a right to inspect and copy public records. Absent a showing that the matters sought by plaintiff are not "public records" within the meaning of the common law rule or that plaintiff does not possess any "interest" required by the rule, we cannot grant defendant Rodino's motion for dismissal.

If Congress wishes to exempt itself from the common law rule or to impose standards for its application, it has the means to do so readily at its disposal. It has, however, not done so and therefore remains subject to the common law rule.

An order will issue accordingly.

Dated: August 24, 1977.

JOHN H. PRATT,
United States District Judge.

United States District Court for the District of Columbia

Civil Action No. 76-2039

ROBERT B. SCHWARTZ, PLAINTIFF,

v.

DEPARTMENT OF JUSTICE ET AL., DEFENDANTS.

MEMORANDUM ORDER

Three matters regarding this Freedom of Information Act suit are currently before this Court. The motion of defendant Peter Rodino to dismiss the action as to him, or in the alternative for summary judgment, must be evaluated. In addition, plaintiff's motion to compel discovery and defendant Department of Justice's motion for a protective order merit this Court's attention.

A. *Motion of defendant Peter Rodino,* On September 30, 1977, defendant Rodino filed a motion to dismiss or, in the alternative, for summary judgment. That motion was opposed on October 11 and thereafter supported by a second affidavit and various documents on December 7, 1977.

It is the opinion of this Court that defendant Rodino's motion for summary judgment must be granted. Mr. Rodino has, by sworn affidavit, indicated that he has directed a thorough records search and that "no stone was left unturned in this matter." He has filed and delivered copies of all materials compiled by this Committee. When the defendant, in candor and good faith, indicates that all available records have been turned over to the plaintiff, a reviewing court must grant summary judgment in defendant's behalf. See *Nolen* v. *Rumsfeld,* 535 F.2d 890, 891 (5th Cir. 1976), *cert. denied,*

429 U.S. 1104 (1977); *Weisberg* v. *U.S. Department of Justice,* Civil Action No. 75-226 (D.D.C. Oct. 5, 1977).

B. & C. Motion of Plaintiff to Compel Discovery and Motion of Defendant Department of Justice for Protective Order. On August 1, 1977, plaintiff filed interrogatories in connection with this action. After being served with a motion to compel discovery on September 19, defendant Department of Justice indicated that it had not received the interrogatories via plaintiff's alleged service of process but that it would "initiate the preparation of appropriate responses." Plaintiff was not satisfied with this representation, and by reply of October 5 and letter to this Court on October 30 renewed his motion to compel.

On November 22 defendant Department of Justice filed a motion for protective order asserting that a dispositive motion was to be "imminently filed" and that discovery would be superfluous in the Freedom of Information Act context. Plaintiff opposed this motion on December 2. On December 9 this Court was advised that the Department of Justice would prepare a dispositive motion and a catalogue of relevant documents by January 23, 1978.

We cannot endorse defendant's request for a protective order. Plaintiff, proceeding *pro se,* filed this action in November 1976 and has been delayed over one year in his efforts to secure the information at issue. The interrogatories do not strike this Court as unduly burdensome, and they may assist plaintiff in his attempts to locate additional relevant documents.

For these reasons, it is by this Court this 12th day of December, 1977,

ORDERED, that the motion of defendant Peter Rodino for summary judgment be, and the same hereby is, granted; and it is further

ORDERED, that the motion of defendant Department of Justice for a protective order be, and the same hereby is, denied; and it is further

ORDERED, that defendant Department of Justice shall answer plaintiff's first set of interrogatories on or

before January 6, 1978. No further extensions will be granted.

J. H. PRATT,
United States District Judge.

United States District Court for the District of Columbia

Civil Action No. 76–2039

ROBERT B. SCHWARTZ, PLAINTIFF,

v.

DEPARTMENT OF JUSTICE ET AL., DEFENDANTS.

MEMORANDUM ORDER

Defendant Department of Justice has moved for summary judgment in this Freedom of Information Act (FOIA) action, producing numerous documents and withholding others pursuant to FOIA exemptions 5, 6, 7(C) and 7(D). 5 U.S.C. § 552(b). In support of its motion, defendant has submitted *Vaughn* v. *Rosen* affidavits analyzing in detail the documents themselves, and where pertinent, citing the provisions of the statute relied upon. We previously, by Order of December 13, 1977, granted summary judgment for the remaining defendant Peter Rodino, who was sued in his official capacity as Chairman of the House Judiciary Committee: defendant Rodino by sworn affidavit informed this Court that no records existed in his files responsive to plaintiff's request and that relevant background materi-

al voluntarily was being supplied to plaintiff by defendant Rodino.[1]

At issue in this action are documents pertaining to an investigation regarding the conduct of Peter Schlam, an Assistant United States Attorney for the Eastern District of New York, in the unsuccessful extortion and conspiracy prosecution of United States Representative Angelo Roncallo. Schlam fell ill during the final days of that trial as a result of the ingestion of a quantity of drugs, possibly self induced, and his illness attracted substantial public attention. Plaintiff seeks documents relating to the investigation of that drugging incident by the Department of Justice. Because we find that the documents are protected from disclosure by exemptions 6, 7(C) and 7(D), we do not find it necessary to analyze the applicability of exemption 5 as advanced by defendant.[2]

A. *Exemption 7(C).* The FOIA exempts from mandatory disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (C) constitute an unwarranted invasion of personal privacy." Our review of the itemizations of documents convinces us that the withheld documents were compiled for law enforcement purposes. It is not necessary that further enforcement proceedings be imminent in order to qualify under exemption 7. *Rural Housing Alliance* v. *U.S. Department of Agriculture,* 498 F.2d 73 (D.C. Cir. 1974) (*compilation* of records for adjudicatory purposes sufficient to achieve protection of exemption 7); *see Koch* v. *Department of Justice,* 376 F. Supp. 313, 315 (D.D.C. 1974) (records compiled for enforcement of regulatory provisions protected); *Green* v. *Kleindienst,* 378 F. Supp. 1397, 1400 (D.D.C. 1974) (business review letters protected). We find that these records were compiled for law en-

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[1] The Attorney General of the United States also was joined as defendant, in his official capacity, and his liability will be treated as incorporated into that of the Department of Justice.

[2] We have reviewed the itemizations of the withheld documents carefully, but do not in this memorandum discuss the individual documents. Notably, exemptions 6 and 7(C) are asserted for each and every document withheld.

forcement purposes relating to alleged improprieties in the prosecution of Congressman Roncallo, particularly noting that a letter of reprimand was placed in Schlam's file as a result of the investigation. *See* Defendant's Motion for Summary Judgment, Exhibit I (letter of V. Rakestraw, at 4).

It is also our opinion that release of intimate details regarding the drugging incident would constitute "an unwarranted invasion of personal privacy." Since we also hold that the release would constitute a *clearly* unwarranted invasion meriting exemption from disclosure pursuant to exemption 6 (see discussion, *infra*), we are satisfied that the less demanding burden on the Government in meeting the privacy invasion aspects of exemption 7 has been satisfied. *See Department of the Air Force* v. *Rose,* 425, U.S. 352, 378–79 n.16 (1976).

We therefore conclude that these documents are protected from disclosure by exemption 7(C),

B. *Exemption 7(D).* Exemption 7(D) protects "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (D) disclose the identity of a confidential source * * *." Defendant asserts that disclosure of the requested information would jeopardize the confidential relationships which enabled the Government to secure the information at issue, since a person familiar with this incident would be able to ascertain the identity of the source by an analysis of information involved. *See* Defendant's Motion for Summary Judgment, Exhibit III (Affidavit of G. R. Schweickhardt at 7–10). We accept this sworn testimony, and determine that these records are protected by exemption 7(D). *See Harbolt* v. *Alldredge,* 464 F.2d 1243, 1244 (10th Cir.), *cert. denied.* 409 U.S. 1025 (1972) (FBI interrogation reports not subject to disclosure).

C. *Exemption 6.* Exemption 6 protects from disclosure "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." To determine the applicability of this exemption, it is necessary to balance the privacy interest of Peter Schlam against the public interest purpose

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which would be satisfied by the production of the documents at issue,[3] recognizing that we should tilt the balance in favor of disclosure. *Getman* v. *N.L.R.B.*, 450 F.2d 670, 674–75 (D.C. Cir. 1971). In reaching our conclusion, we endorse the reasoning employed by the court in *Hiss* v. *Department of Justice,* C.A. No. 76Civ4672 (S.D. N.Y. Oct. 18, 1977) in upholding the applicability of exemption 6 to protect from disclosure records relating to the conduct of a private investigator engaged in the defense of Alger Hiss before the House Un-American Activities Committee. The Court there determined that disclosure of information relating to the investigator's relationship with government intelligence agencies would be embarrassing and clearly unwarranted. Plaintiff in this action protests the nondisclosure of unverified opinions and reports regarding Schlam's personal, social, professional and medical status, and it is this Court's conclusion that disclosure would constitute a serious privacy invasion. *See Columbia Packing Co., Inc.* v. *Department of Agriculture,* 417 F. Supp. 651, 654 (D. Mass. 1976).

In balancing the interests at issue in this litigation, we have evaluated plaintiff Schwartz's assertions that the public interest would be advanced by release of this information. Plaintiff asserts that such release would enable him "to judge the quality and fairness of [the Roncallo] judicial proceedings and the conduct of AUSA Peter R. Schlam." Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment at 2. While we find that this proffered interest may be a legitimate one, we do not find that it is sufficient to tip the balance in favor of disclosure. Furthermore, in the context of this case, we are prone to believe that plaintiff's real motivation may lie elsewhere.

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[3] We must evaluate the public interest with reference to the advantages to be secured by release *to this plaintiff. See Rural Housing Alliance* v. *Department of Agriculture, supra,* at 77; *Getman* v. *N.L.R.B.*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1974). *But see Dictlow* v. *Schultz,* 517 F.2d 166, 171 (D.C. Cir. 1975) (dictum) (evaluation should be with reference to the advantages to be secured by release to the general public). Our decision in this action would not be altered by application of the standard suggested in *Ditlow.*

In *Hiss* v. *Department of Justice, supra,* slip op. at 7, the Court in rejecting plaintiff's assertions that release of the information would be in furtherance of the public interest in the conduct of government prosecutions, characterized them as being invoked "only to satisfy the requirements of the FOIA," whereas the plaintiff's personal interests were paramount. We find plaintiff Schwartz's attempt to distinquish the *Hiss* case to be unpersuasive, and like the *Hiss* court determine that plaintiff here has not met his burden of demonstrating that the public interest in the disclosure outweighs the clear invasion of privacy which disclosure of these documents would constitute.

For these reasons, it is by the Court this 9th day of February, 1978,

ORDERED, that defendant's motion for summary judgment be granted; and it is further

ORDERED, that this action is dismissed.

JOHN H. PRATT,
United States District Judge.

United States District Court for the District of Columbia

Civil Action No. 78–0196

O'DELL LEWIS ET AL., PLAINTIFFS

v.

SHIRLEY CHISHOLM ET AL., DEFENDANTS.

ORDER

Upon consideration of Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted, Plaintiffs' opposition thereto and the entire record herein, it appearing to the Court that Plaintiff O'Dell Lewis' employment in the legislative branch of the United States Government was not in the competitive service, and it further appearing that 42 U.S.C. § 2000e–16 (1976) which provides the exclusive remedy for discrimination in employment by the federal government affords Plaintiff O'Dell Lewis no remedy and has not been raised in Plaintiffs' complaint, it is by the Court this 29th day of November, 1978,

ORDERED, that Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted be and hereby is GRANTED.

AUBREY E. ROBINSON, Jr.,
United States District Judge.

United States District Court for the District of Columbia

Civil Action No. 78-1259

MARTIN TRACTOR COMPANY ET AL., PLAINTIFFS,

v.

FEDERAL ELECTION COMMISSION ET AL., DEFENDANTS.

I. MEMORANDUM

Three corporations, their political action committees, executives of two of them and a non-salaried employee of one of them here sue the Federal Election Commission and its members for a declaratory judgment that one section of the Federal Election Campaign Act of 1971, as amended in 1976, 2 U.S.C. § 431 *et seq.*, (the Act) violates rights guaranteed to them by the First and Fifth Amendments of the Constitution. The alleged violations result from a threat, apparent on the face of § 441b of the Act, that if corporate and executive plaintiffs sought voluntary contributions to a political fund from hourly employees orally and in writing, on or off the corporation's premises, more than twice a year, they could be punished by fine and imprisonment. This threat has allegedly caused these plaintiffs to limit their exercise of their constitutional right to seek such voluntary contributions by communicating with hourly employees and concurrently impinged upon the right of the hourly employee plaintiff to receive such communication. Plaintiffs also seek injunctive relief to prevent

enforcement of § 441 and the regulations pursuant thereto.

Defendants have moved to dismiss this complaint for lack of jurisdiction over the subject matter or for failure to state a claim upon which relief can be granted. Recognizing that the spirit of the Act requires prompt Court attention to constitutional questions raised about it,[1] and also recognizing the possible need of the parties for prompt action by this Court in order to expedite appeal from whatever decision it might make, the defendants' motion to dismiss was granted on October 18, 1978, with an indication that an explanatory memorandum would be forthcoming promptly.

The decision to dismiss the complaint was based upon the Court's conclusions, first, that plaintiffs may not invoke the statutory provision for judicial review provided in 2 U.S.C. § 437(h) and, secondly, that even if they qualified under that section, they presented as yet no case or controversy sufficiently ripe to invoke the declaratory powers of a federal court. A brief outline of the statutory scheme for enforcement written into the Act by Congress is necessary background to those conclusions.

In general the statute contemplates that defendants should investigate any complaint about violation of the Act in confidence and allow any person there charged a reasonable opportunity to respond; 2 U.S.C. § 436(g). The Court accepts as binding upon the FEC its statement that a party may raise any defenses or arguments during such proceedings, including constitutional ones; Brief at 8. If the defendants later determine that there is reasonable cause to believe that a violation either has occurred or is threatened, they must attempt informal resolution of that alleged or threatened violation for at least thirty days. If the informal resolution fails, defendants may file a civil enforcement action in a federal district court; if they find that a knowing and willful violation has occurred, the defendants may refer the matter to the Attorney General who may or may not initiate criminal prosecution.

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[1] *See* 2 U.S.C. § 437(h)a, discussed further below.

II.

Plaintiffs claim that they are entitled to invoke the Court's jurisdiction under a unique provision of the Act which authorizes particular persons to sue "for declaratory judgment as may be appropriate to construe the constitutionality of any provision of this act." 2 U.S.C. § 437(h)a. Section 437(h)a had the purpose and effect of expediting judicial review of questions raised in Congress about the constitutionality of particular provisions of the Act so that these questions could be authoritatively resolved before the Presidential Election of 1976. *See* Remarks of Senator James Buckley, 119 Cong. Rec. S5707 (daily ed. April 10, 1974); *Buckley* v. *Valeo,* 424 U.S. 1, 11–12 (1976). Plaintiffs do not suggest that § 441(h) here at issue was among the provisions whose constitutionality was questioned in Congress. In any event, and crucial here, access to court pursuant to § 437(h)a was by its terms limited to "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States."

Neither the corporate plaintiffs, nor the political action committees are in the category of entities or individuals entitled to invoke the Court's jurisdiction under § 437(h)a. The decision to dismiss their complaint seems therefore to be *a fortiori.*

A closer question is raised with respect to the executive plaintiffs and the hourly employee plaintiff. The complaint alleges that they are eligible voters; the complaint puts at issue, however, not their rights as voters, but rather the constitutionality of the Act's provisions relating to communications between a corporation and its employees about voluntary contributions. Thus, as defendants persuasively contend, the individual plaintiffs do not sue in their individual capacities to protect their individual rights to vote or even to make contributions. They sue to vindicate a claimed right of their corporate employer to influence its employees (including one of the plaintiffs) to make voluntary political contributions. While the question is not free from doubt, the Court has concluded that this kind of derivative

right was not the constitutional right of "an individual eligible to vote" which Congress considered "appropriate" for vindication in a special declaratory judgment action under § 437(h), particularly where, under the statutory scheme there is an alternative process for resolution of the substantive issue in the context of a particular transaction, *infra*.

III. JUSTICIABILITY

The result would be no different if the Court assumed, contrary to the foregoing conclusion, that plaintiffs could qualify under § 437(h). That section, while it may confer standing on certain classes, cannot by itself create a justiciable controversy. All actions brought under the statutory provisions for judicial review are subject to the requirements of "case and controversy" and "ripeness." *See United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947); *Muskrat* v. *United States,* 219 U.S. 346 (1911). Whether required by Article III of the Constitution or in part an expression of the discretion inherent in equity and declaratory judgment jurisdiction, these restrictions upon the jurisdiction of the federal courts are well established. Under the facts of this case, the Court concludes that there is at present no case or controversy sufficiently ripe for declaratory action. Plaintiffs merely allege that they communicated more freely with employees about contributions before the Act became law and desire to resume the practice and would do so but for the Act. They have not, however, advised defendants of their desire to communicate with their employees differently from the times and manner prescribed by law, nor sought any ruling by defendants to accommodate that desire. Neither have defendants taken any steps to invoke the statutory enforcement procedures. Where then is the case or controversy?

Abbott Laboratories v. *Gardner,* 387 U.S. 136 (1967) establishes a test for determining whether action taken by an agency has created a sufficiently "ripe" controversy to permit granting of declaratory or injunctive relief. The challenge there was to a final action of the Federal Trade Commission in approving regulations

which required drug manufacturers to print the "established name" of a drug in a specified typeface on any label or printed material, whenever it printed the "proprietary name" of that drug.

Noting that the rationale of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," the Court set forth a twofold test involving the balancing of "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Id.* at 149.

As to the first factor, the Court noted that the issue for review was a "purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed." *Id.* In contrast in this case factual issues which have not yet been developed are central to evaluating the constitutionality of the challenged provisions. For example, whatever the First Amendment rights of corporations, *see First National Bank* v. *Belotti,* 46 U.S.L.W. 4371 (April 26, 1978), they are not without limits and have been long subject to regulation in the context of protecting employees from pressure from employers. *See NLRB* v. *Gissell Packing Co.,* 395 U.S. 575 (1969). The balancing of the interests of a corporation and its employees (as well as the rights of others in society which are sought to be protected by the provisions of the Act challenged here) requires a factual record. Such a record may be based upon actual conduct of the corporation since the provision was enacted, which conduct the Commission challenges, or upon a threat of such conduct sufficiently definite so that the Commission can determine whether it would violate the Act. Only such a record would permit a court confidentily to evaluate, among other relevant factors, the extent to which the conduct resembles speech activity or nonspeech activity, the extent of

the pressures the conduct exerts upon employees or others, and whether the corporation could accomplish its ligitimate objectives by alternative means consistent with the statute.[2]

In considering the fitness for judicial review, the *Abbott* Court also noted that there was no claim that further agency action would be contemplated. The Court found the regulations at issue to be "final agency action" within the meaning of 5 U.S.C. § 704. The ruling was "quite clearly definitive" with "no hint that this regulation is informal * * * or only the ruling of a subordinate official. * * *" *Id.* at 151. Here by contrast plaintiffs as of yet challenge no agency determination that their conduct violates or would violate the Act. The Court is required not only to speculate about the exact nature of plaintiffs' conduct, but also about whether in fact the FEC would find that conduct to violate the Act.

Turning to the second factor, the hardship of withholding court consideration until a later time, the *Abbott* Court noted that compliance would require petitioners to "change all their labels, advertisements, and promotional materials * * * and invest heavily in new printing type and new supplies. The alternative to compliance * * * may be even more costly. That course would risk serious criminal and civil penalties * * * To require [plaintiffs] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily." *Id.* at 152, 153.

By contrast, plaintiffs here face no Hobson's choice between costly compliance or the risk of serious criminal or civil penalties. Plaintiffs need not even engage in the conduct whose legality concerns them. There is no showing that they could not apply for and attempt to negotiate a ruling which would permit them safely to

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[2] *See* Scarpf, "Judicial Review and the Political Question: A Functional Analysis," 75 *Yale L. J.* 517, 531 (1966): "[T]he Court [in *United Public Workers* v. *Mitchell, supra*] may well have regarded the constitutional balance between the political rights of civil servants and the legitimate public interest in a neutral civil service as an extremely close one, depending very much upon the actual scope of enforcement and upon the concrete nature of the activities against which sanctions were to be applied."

accomplish their objectives consistently with the Act. Moreover, the enforcement procedures of the Act may be triggered either by actual conduct or a genuine threat thereof. Even if they engage in such conduct, however, the enforcement procedure which is yet to be invoked contemplates mandatory conciliation before legal action may be taken. After conciliation has failed, both the conduct to be reviewed and the FEC's position with respect to that conduct would be far more concrete and susceptible to judicial scrutiny through a declaratory action.

To summarize the application of the *Abbott* test, then, the Court concludes, first, that the issue framed by plaintiffs is not readily amenable to judicial review, being uncertain as to both conduct and legal consequences and, secondly, that the harm in delaying review is minimal since plaintiffs have yet to take the relatively costless steps which would permit an initial determination of the legality of their intended conduct.

In the course of reaching these conclusions, the Court has also considered whether, in a case involving First Amendment rights which requires a sensitivity to "chilling effects," such effects may create a ripe controversy at an earlier stage than in a case not involving First Amendment rights; *cf. Gardner* v. *Toilet Goods Association,* 387 U.S. 167, 187 (1967) ("Where personal status or liberties are involved the courts may well insist upon a considerable ease of challenging administrative order or regulations"). Although plaintiffs allege they did engage in solicitation which they have ceased since enactment of the Act, in light of the enforcement-cum-conciliation provisions of the statute and the minimal cost of triggering those provisions, any chilling effect is at present highly subjective and, as the Court concluded in *Laird* v. *Tatum,* 408 U.S. 1, 13–15 (1972), "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[3]

[3] There is no allegation here that plaintiff has sought through the enforcement procedures or otherwise to clear its intended conduct with the Commission and that the Commission has refused either to invoke those procedures or give informal approval. Use of the potential threat of those procedures as a "Sword of Damocles" might present a different case.

The conclusion that there is no controversy sufficiently ripe to invoke declaratory relief is further supported by *United Public Workers* v. *Mitchell, supra,* which itself involved First Amendment rights. There plaintiffs challenged provisions of the Hatch Act which forbade their participating in political campaign activities. The Court found it inadequate merely to "declare a desire to act contrary to the rule against political activity but not that the rule has been violated." *Id.* at 88. "No threat of interference by the [Civil Service] Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations." *Id.* at 91. Justice Douglas' dissent in that case noted that the appellants' alternative of violating the rule would result in the loss of jobs, seniority and benefits; as noted above, by contrast, plaintiffs will suffer little harm, if any, should they be required to "ripen" their claims before seeking judicial review.

It is for these reasons that the Court granted defendants' motion to dismiss.

LOUIS F. OBERDORFER, Jr.,
United States District Judge.

Dated: November 7, 1978.

United States District Court for the District of Columbia

Civil Action No. 2271–71

RONALD V. DELLUMS ET AL., PLAINTIFFS,

v.

JAMES M. POWELL ET AL., DEFENDANTS.

MEMORANDUM OPINION

This matter is before the Court on remand from the Court of Appeals for modification of this Court's memorandum and order of March 10, 1976, denying former President Nixon's motion to quash a subpoena *duces tecum* seeking discovery of recorded White House conversations.

Plaintiffs, Congressman Ronald Dellums and others, represent a class of approximately 1,200 persons who were arrested and detained by the Metropolitan Police of Washington, D.C. and the United States Capitol Police on May 5, 1971, for demonstrating on the steps of the Capitol against the war in Vietnam. Plaintiffs filed this suit on November 11, 1971, against the chiefs of the Metropolitan and Capitol Police Forces and other District of Columbia and federal defendants, including the then Attorney General, John Mitchell. The complaint alleged a civil conspiracy on the part of defendants to violate plaintiffs' First Amendment rights of free expression and assembly as well as civil rights guaranteed in the Fourth, Fifth, Sixth, and Eighth Amendments of

the Constitution. On December 2, 1974, this Court severed defendant John Mitchell because of his involvement in other judicial proceedings, and on December 11, 1974, this case went to trial. On January 16, 1975, a substantial jury verdict of more than twelve million dollars was rendered in favor of plaintiffs against the District of Columbia and federal defendants for false arrest, false imprisonment, malicious prosecution, and violation of First Amendment rights.[1]

The subpoena at issue here was served upon White House Counsel Philip Buchen prior to trial in the principal case on October 24, 1971. It directed Mr. Buchen to appear and produce "all tapes and transcripts of White House conversations during the period of April 16 through May 10, 1971, at which 'May Day' demonstrations (5/3–5/7/71) were discussed." Following unsuccessful efforts by Mr. Buchen to have the subpoena quashed, counsel for former President Nixon [hereinafter Mr. Nixon] filed their motion to quash, and the Court granted a stay of its order directing compliance with the subpoena pending the outcome of Mr. Nixon's motion. Matters remained in this state until after trial of the principal case. Plaintiffs, in February 1976, began to proceed against defendant Mitchell and filed a supplemental memorandum in oppositin to Mr. Nixon's

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[1] The damages awarded were the following:

A. *For False Arrest and False Imprisonment:*

(1) for 12 hours or less of detention, $120;

(2) for 12 to 24 hours of detention, $360;

(3) for 24 to 48 hours of detention, $960;

(4) for 48 to 72 hours of detention, $1,800.

B. *For Violation of First Amendment Rights: $7,500 for each class member and $7,500 for Congressman Dellums.*

C. *For Cruel and Unusual Punishment: $500 for each member of the plaintiff class.*

D. *For Malicious Prosecution:*

(1) $3,000 for each of eight persons who were defendants in a 1971 criminal trial;

(2) $50 for all other class members.

The judgment for cruel and unusual punishment was rendered against the District of Columbia alone. All other awards run jointly and severally against defendants Powell, Wilson, and the District of Columbia. *Dellums* v. *Powell,* 566 F.2d 167 (D.C. Cir. 1977), n.6 at p. 174.

motion to quash. Mr. Nixon filed a responsive memorandum.

Mr. Nixon's original contentions in support of his motion to quash were (a) that the President has an absolute privilege against discovery of presidential conversations as documents for use in civil litigation; (b) that even if the presidential privilege were presumptive instead of absolute, it could be overcome only upon a showing of compelling need and not merely by a showing of relevance; and (c) that to allow the White House counsel to review presidential recordings and documents to comply with the subpoena would be an infringement upon presidential confidentiality and upon Mr. Nixon's personal privacy with respect to conversations with his family, friends, and professional intimates. On March 10, 1976, the Court found against Mr. Nixon on the grounds that (a) there is no absolute presidential privilege to bar discovery in criminal or civil litigation; that (b) assuming a former President in lieu of an incumbent can raise executive privilege against judicial process, such a privilege is presumptive and can be overcome by a sufficient showing of specific and substantial need; and finally that (c) Mr. Nixon's claims that the White House counsel's review of the tapes would be an undue infringement upon presidential confidentiality and personal privacy were frivolous.[2]

On April 8, 1976, Mr. Nixon appealed from the order of the Court. The Court of Appeals rendered a decision on June 28, 1977, upholding the denial of Mr: Nixon's motion to quash and noting that in civil litigation, just as in criminal litigation, there is no absolute presidential privilege against discovery. *Dellums* v. *Powell,* 561 F.2d 242 (D.C. Cir. 1977). Rather, a presumptive presidential privilege exists, which is rebuttable upon a sufficient showing of specific need, and plaintiffs here have met that standard by making "at least a 'preliminary showing of necessity' for information that is not merely relevant but indeed substantially material to their

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[2] See the unpublished memorandum and order of March 10, 1976 (Civil Action No. 2271-71, D.D.C.).

case."[3] However, the Court of Appeals recommended modification of this Court's memorandum and order to establish procedures for the review, transcription, and disclosure of the subpoenaed materials that will adequately protect Mr. Nixon's personal privacy interests.[4]

Plaintiffs have submitted to the Court a proposed order and memorandum, consented to by the Administrator of General Services [hereinafter "the Administrator"], suggesting procedures for the review and dis- closure of the subpoenaed materials. Mr. Nixon and defendant Mr. Mitchell oppose plaintiffs' suggestions, and they too have submitted a proposed order and supporting memoranda. In addition, the Administrator, who is the sole legal custodian of the Nixon presidential materials, pursuant to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2197 and implementing regulations, 41 C.F.R. 105.63.103, has filed a statement addressing only the issue of the screening process to be utilized in enforcing the subpoena. The task of the Court now is to fashion an order for review and disclosure of the subpoenaed materials consistent with the mandate from the Court of Appeals and to modify its outstanding memorandum and order accordingly. The following three principal issues must be resolved.

(1) An appropriate description of the subject matter the Administrator's archivists should transcribe within the scope of the subpoena;

(2) the screening procedures to be used by archivists in selecting and transcribing; and

(3) the procedure for the *in camera* examination of the selected transcribed material before release.

Each issue is addressed below seriatim.

SCOPE OF THE SUBPOENA

The crux of the dispute over the scope of the subpoena is: just what falls within the meaning of the original language of the subpoena, which calls for "all tapes and transcripts of White House conversations during the

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[3] *Dellums* v. *Powell,* 561 F.2d 242, at 249 (D.C. Cir. 1977).
[4] *Id.*

period April 16 through May 10, 1971, at which 'May Day' demonstrations (5/3–5/7/71) were discussed."

Plaintiffs take the position that the wording of the subpoena standing alone is not enough. They assert that in a large number of conversations during the April 16 through May 10, 1971 time period, the May Day demonstrations were probably discussed in a general context of anti-war demonstrations and demonstrators and, though the precise phrase "May Day demonstrations" in all likelihood was not used, these conversations are relevant and should come within the scope of the subpoena. Counsel for the plaintiffs further inform the Court that, in the interest of judicial economy, they have consulted with counsel for the Administrator's archivists and counsel for the plaintiffs in ten separate "related" cases in which the tapes for the twenty-five day period here are also being sought.[5]

From this consultation comes a "Memorandum of Understanding Among Counsel," which applies both to the April 16 through May 10, 1971 time period as well as to a second time period, March 1, 1971 through May 31, 1971. Since the second period is inclusive of the time period designated in the subpoena at issue, plaintiffs propose to save the Administrator's archivists the time and effort that would be entailed in conducting review and transcription procedures for eleven separate descriptions relating to the April 16 through May 10, 1971 time period. Plaintiffs' proposed order is based upon the Memorandum of Understanding Among Counsel and would have the Administrator transcribe and produce all conversations relating "directly or indirectly" or having any bearing or significance to any of the following:

(1) Anti-war demonstrations;

(2) Anti-war demonstrators;

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[5] *Apton* v. *Wilson,* C.A. 798–72; *Kuhn* v. *Wilson,* C.A. 956–71; *Ream* v. *Wilson,* C.A. 75–0994; *Bornheim* v. *Wilson,* C.A. 75–1936; *Ames* v. *Wilson,* C.A. 76–0490; *Feldman* v. *Wilson,* C.A. 76–1149; *Grossman* v. *Wilson,* C.A. 76–0216; *Moran* v. *Wilson,* C.A. 76–1530; *Robinson* v. *Wilson,* C.A. 75–1680; *Wiland* v. *Wilson,* C.A. 75–1604. October 29, 1977 Memorandum of Understanding Among Counsel.

(3) Plans of the United States government or any officials of the United States government, or of any other government, relative to demonstrations held or to be held in Washington, D.C. during April or May, 1971;

(4) Responses of United States government officials, or officials of any other government, or of any private citizens, relative to demonstrations or other activities of persons opposed to the war in Vietnam during April or May of 1971;

(5) Plans, procedures or proposals for handling persons arrested or to be arrested or otherwise detained or controlled for anti-war activities in Washington, D.C. or elsewhere during April and May, 1971;

(6) Authority for law enforcement in the District of Columbia during demonstrations.

(7) Any and all doubts as to whether any given conversation is or is not covered by the above description shall be resolved in favor of inclusion.

Mr. Nixon and defendant Mr. Mitchell oppose plaintiffs' construction of the subpoena. As to the six descriptive categories, they argue that plaintiffs are attempting to enlarge the scope of the subpoena, retroactively, which would circumvent plaintiffs' having to make a sufficient showing of need to support a broader demand for discovery—a requirement which has been established in the extensive litigation before this Court and the Court of Appeals. Mr. Nixon and defendant Mr. Mitchell also maintain that plaintiffs' proposal providing for any doubts to be resolved by the Administrator in favor of inclusion further expands the scope of the subpoena, and they suggest a preliminary objection procedure to offset any overinclusion that may result.[6] Mr. Nixon does not object to using language other than the original language in the subpoena for the purpose of particularizing what is to be transcribed, but the particularization, he asserts, should remain "within the parameters of all conversations relevant to May Day demonstrations (5/3 to 5/7/71)," and would not include every conversation pertaining to anti-war demonstrations or demonstrators.

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[6] The preliminary objection procedure is addressed further on in this memorandum opinion.

In determining the proper scope of the subpoena, the Court looks first for guidance to the opinion of the Court of Appeals. Their principal concern was that only those portions of the tapes containing conversations relating to "the May Day demonstrations" be disclosed and not any entire tape simply because a portion of that tape may relate to the demonstrations. In *Dellums* v. *Powell, supra* at 250, the Court of Appeals states:

> * * * If the subpoena is read, as it is capable of being read if taken literally, as requiring an entire tape to be produced if any portion of it relates to the May Day demonstrations, plaintiffs would be entitled to discover all conversations recorded on such a day, including those of an intensely personal nature—some of which would be subject to an independent common law privilege. * * * The District Court's memorandum opinion indicates an intention to limit discovery to those portions of the recordings dealing with the demonstrations, but the accompanying order denying the motion to quash does not so explicitly limit the subpoena. While the memorandum opinion could fairly be interpreted as impliedly narrowing the apparently unintended scope of the subpoena, to avoid any possible misunderstanding we remand with direction to the District Court to make such limitation explicit in its order.

The Court modifies its order accordingly.

The contentions raised by plaintiffs, Mr. Nixon, and defendant Mr. Mitchell, go beyond the problem of insuring that only relevant tapes be disclosed. They address, instead, another even more fundamental concern of what criteria are to be used by the Administrator in interpreting which subject matter is relevant. The Court's view is that the standard for pretrial discovery set forth in Rules 26–37 of the Federal Rules of Civil Procedure is liberal and broad, *Hickman* v. *Taylor,* 329 U.S. 495 (1947), and the same standard is interrelated and applied to the production of documentary materials pursuant to subpoenaes *duces tecum* under Rule 45 of

the Federal Rules of Civil Procedure. *Freeman* v. *Seligson,* 405 F.2d 1326, 1334–35 (D.C. Cir. 1968).[7]

The judicial application of Rule 45(b), providing for the production of documentary evidence, has been that subpoenas *duces tecum* are enforced unless the documents sought are "privileged or the subpoena is unreasonable, oppressive, annoying, or embarrassing." *Freeman, supra* at 1335; see also, *Boeing Airplane* v. *Coggeshall,* 280 F.2d 654 (D.C. Cir. 1960). And whether a subpoena *duces tecum* is unreasonable or oppressive is a determination left to the full discretion of the court on a case-by-case basis. *Premium Service Corporation* v. *Sperry & Hutchinson,* 511 F.2d 225, 229 (9th Cir. 1975). If the Court "believes the subpoena has a meritorious basis but should not be enforced as drafted, it has authority * * * to modify the subpoena and impose such conditions on enforcement as justice may require." *Freeman, supra* at 1335; see also, *Boeing Airplane, supra* at 659. Generally, courts do not find oppressiveness or unreasonableness when (1) a subpoena calls for material within the possession, custody, or control of the person subject to the subpoena, *U.S.* v. *IBM Corp.,* 71 F.R.D. 88 (S.D.N.Y. 1976); (2) the language limits the scope to a reasonable period of time and specifies with reasonable particularity the subjects to which requested materials relate, *Democratic National Committee* v. *McCord,* 356

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[7] "Rules 26(b), 30(b), and 45(b) and (d) are controlling. These rules must be read in *pari materia.* [Citations omitted]. Rules 45(d) and 26(b) establish the outer limits of enforcement. Rule 45(d) permits a subpoena to order any person to produce papers 'which constitute or contain evidence relating to any of the matters within the scope of the examination permited by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of this Rule 45.' Rule 26(b) permits the discovery of 'any matter, not privilege, which is relevant to the subject matter involved in the pending action,' but is also limited by Rule 30(b).

"Rules 30(b) and 45(b) impose the following restrictions on enforcement under Rules 45(d) and 26(b): Rule 30(b) confers broad power on the court, 'for good cause shown,' to afford relief from a subpoena 'which justice requires to protect the party or witness [under subpoena] from annoyance, embarrassment, or oppression.' Rule 45(b) authorizes the District Court to 'quash or modify the subpoena if it is unreasonable and oppressive.'" n. 35. *Freeman* v. *Seligson,* 405 F.2d 1326 at 1335–1336.

F. Supp. 1394, 1396 (D.C.D.C. 1972); see also *Brown* v. *United States*, 276 U.S. 134 (1928); and (3) finally, and most importantly for the question at hand, the materials encompassed are relevant for the purpose of discovery.[8]

It is undisputed that the subpoena here, as written, meets these requirements. The requested presidential materials are in the possession, custody, and control of the Administrator who, in lieu of the counsel for the President, is now, by law, responsible for transcribing the described subject matter. The period of April 16 through May 10, 1971, designates a reasonable time limitation; and the language "all conversations at which 'May Day demonstrations' (5/3/71–5/7/71) were discussed" provides a material and relevant framework for discovery.

By the same token, the Court finds that plaintiffs' six descriptive categories, which are subject to explicit definitions of original language as to situs, time, particularity, and relevance, are a permissible adjunct in furthering the liberal discovery intended under the Federal Rules and for the specific need of inquiry in this case. It is not necessary for the purposes of discovery, that every conversation transcribed under the original language of the subpoena or any of the six categories be admissible at trial. It is only necessary that any conversation transcribed relate to the demonstrated purpose and need for discovery in this case, which is to aid in establishing "* * * whether and to what extent, former Attorney General Mitchell was involved in the particular constitutional violations of May 5, 1971." [9]

In reviewing the tapes for relevant conversations, the Administrator should exercise the discretion granted him by Congress to transcribe what he deems relevant in accord with the description given him.[10] To be transcribed, conversations need not contain the specific words "May Day" or any other catch words but should be subject to interpretation if, in the archivists' opinion,

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[8] *Freeman, supra* at 1335.

[9] *Dellums, supra* at 249.

[10] 41 C.F.R. 105.63 (1976) as revised 42 F.R. 40859 and 42 F.R. 54830.

the general context or import relates to the subject matter of the subpoena as described by the attached order. Any doubts may be resolved in favor of inclusion. In short, the objective of the Administrator should be to ferret out any and all conversations which relate, explicitly or by inference, to the subject of whether and to what extent the defendant Mr. Mitchell was involved in the violations of plaintiffs' fundamental constitutional rights during the May Day demonstrations. Defendant Mr. Mitchell and Mr. Nixon will have just and ample opportunities at the administrative appeal, *in camera* review, and appellate appeal stages of this process to raise objections based upon relevance and other privileges. Even considering *arguendo* the extreme of overly narrow discovery versus overboard discovery, it is far better, at this primal stage, to tip the balance in favor of leaving no stone unturned, disemboweling any information in the Administrator's custody bearing upon the serious allegations at issue. The alternative would be to risk overly cautious discovery, which, unlike the specter of overbroad discovery, should it happen, could not be corrected through pretrial *in camera* review by both parties and the Court.

The Court therefore accepts and adopts plaintiffs' proposed particularization of the subpoena as consistent with the legitimate purpose and need for discovery in this case.

Though the Court rejects defendant Mr. Mitchell's and Mr. Nixon's claims that the proposed particularization unduly expands the scope of the subpoena, the Court must briefly address the Memorandum of Understanding Among Counsel resulting from consultation by counsel for plaintiffs with counsel in ten separate cases. Allowing and directing the Administrator to transcribe White House conversations prescribed by the subpoena and by the six descriptive categories in this case does not establish, inferentially or otherwise, the use or need for these materials in other cases. Whether plaintiffs in other cases demonstrate the requisite need to have presidential materials transcribed by the Administrator

in this case released to them must be determined by the respective courts and parties in those cases.

THE SCREENING PROCEDURE

Defendant Mitchell and Mr. Nixon raise a number of contentions which are directed at the Administrator and the review and transcribing procedure itself. First, defendant and Mr. Nixon claim that any order concerning the review and possible disclosure of presidential conversations should be based on a "direct understanding" of how the review process works, which, they believe, neither plaintiffs nor the Administrator possess, not having listened to the White House recordings before, as prior White House counsel have done. Second, defendant Mitchell and Mr. Nixon assert that the Administrator, through his consultation and agreement with plaintiffs regarding the order proposed by plaintiffs and the government, has shown a desire to leave difficult questions of relevancy to the court and to be responsible for relevancy determinations only in the broadest context; therefore, significant questions arise as to the archivists' ability to be neutral and detached and protect the rights and privileges of those whose interests would be adversely affected. Third, defendant and Mr. Nixon contend that, as a precaution to limit unnecessary intrustions on private matters unrelated to this case, the archivists should be ordered to skip over or spotcheck those portions of the tapes which contain unrelated conversations of a highly intimate or personal nature. The Administrator has responded to defendant's and Mr. Nixon's contentions by submitting to the Court a statement which points out the following:

(1) The archivists did not initiate any meeting between themselves and counsel for the plaintiffs, and, of course, maintain impartiality as to which proposal—plaintiffs or defendant's and Mr. Nixon's—the Court should accept.

(2) The Administrator has assisted plaintiffs in drafting the language of plaintiffs' proposed order so that it would be in compliance with access procedure applicable to archival processing under the Presidential Re-

cordings and Materials Preservation Act, 44 U.S.C. 2107 [hereinafter "the Act"] and 41 C.F.R. 105.63.204,[11] and so that the obligations for archival processing under the order would be directly upon the Administrator, as provided by the Act, instead of upon an appointed Special Master.[12]

(3) The actual screening procedure employed in the review and transcription of the tapes should be left to the Administrator's archivists as provided for by Congress and affirmed by the Supreme Court.

After considering defendant's and Mr. Nixon's contentions with respect to the screening procedures and the role of the Administrator, and upon considering the response of the Administrator, the Court is unconvinced that the government archivists cannot or should not perform their statutory duty of reviewing and transcribing the subpoenaed materials. The Court deems frivolous any suggestion that the archivists lack some special "understanding" of the review process necessary to screen the White House materials, and is fully confident that the archivists have the professional integrity and ability to carry out their function in a neutral and detached manner and to protect the rights and privileges of any persons whose interests in the material may be adversely affected. Clearly, from the Act itself, the implementing regulations, and the reasoning set forth at length by a three-judge court in *Nixon* v. *GSA*, 408 F. Supp. 321 (D.D.C. 1976) and by the Supreme Court of the United States in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), the Administrator

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[11] See n. 18(b) *infra* for text of the pertinent portion of 41 C.F.R. 105.63.204.

[12] Before the Act was upheld as constitutional by the Supreme Court in June 1977, *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), the Court of Appeals, when ruling upon this case in January 1977, provided that a Special Master be appointed to review and transcribe the subpoenaed materials because of an injunction barring screening by an archivist. *Dellums, supra*, n. 18 at p. 250. Now that the Act and the regulations calling for screening by the Administrator, 41 C.F.R. 105.203–204, apply in full force, the need for appointment of a Special Master is eliminated. See *Nixon* v. *Administrator of General Services, supra* at 429–30.

is credited with having an "unblemished" [13] record for discretion in handling confidential material.[14] And by law, he is entrusted with the autonomous responsibility of carrying out screening processes guided by "long-standing archival screening standards." [15]

Accordingly, the order directing the review and transcription of the subpoenaed materials will not regulate or interfere with, in any respect, the actual screening procedures employed by the archivists. Mr. Nixon's and defendant's contentions regarding this aspect of the process are rejected.

THE IN CAMERA REVIEW PROCEDURE

Having defined the relevant scope and subject matter of the subpoena *duces tecum* at issue, and having disposed of contentions raised about the screening procedures to be used in the review and transcription of the subpoenaed White House tape recordings, the Court now turns to the *in camera* review process prescribed by the Court of Appeals for protection of Mr. Nixon's privacy interests. The provision for an *in camera* review procedure is the second [16] of two principal modifications that must be made to the Court's original order before the subpoena can issue:

> * * * Following transmittal of relevant materials to the Court, and before they are to be turned over to counsel for plaintiffs, Mr. Nixon shall be afforded the right to assert "any rights, defenses or privileges"—whatever they might be * * *
>
> * * * we contemplate a procedure in the District Court identical to that outlined in this court's *en banc* opinion in *Nixon* v. *Sirica, supra,* 159 U.S. App. D.C. at 79, 487 F.2d at 721. While the parties are directed to that order, we think it sufficient to indicate that the procedure there developed contem-

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[13] Nixon v. *Administrator, supra* at 452.

[14] *Id.*

[15] *Nixon* v. *Administrator, supra* at n. 29, p. 467.

[16] The first modification, discussed above, is that the Administrator submit to the Court only isolated transcripts of those protions of the recorded conversations which relate to the May Day activities.

> plates *in camera* review of the challenged material at which time Mr. Nixon will be able to assert any claims of privilege with particularity. Counsel for plaintiffs will be entitled to inspect the materials in chambers to assist the Court in determining the validity of any claim of privilege.

Dellums, supra at 250–251.

The opposing parties interpret the prescribed *in camera* procedure differently and disagree as to when counsel for the plaintiffs are entitled to inspect the transcribed materials. Plaintiffs take the position that immediately following the transmittal of the transcribed materials to the Court, and after Mr. Nixon has raised any rights, defenses, or privileges he may wish to assert, counsel for plaintiff will be entitled to inspect the materials in chambers to assist the Court in determining the validity of any claim of privilege. Mr. Nixon and Mr. Mitchell take the position that counsel for plaintiffs should be allowed to inspect the materials only after the Court has made a determination on Mr. Nixon's preliminary relevance objections and returned to the Administrator those materials the Court deems irrelevant. Materials deemed relevant by the Court and still in dispute would then be contested and inspected by counsel for plaintiffs. Based upon a careful reading of the mandate from the Court of Appeals and a thorough examination of the procedure followed in *Nixon* v. *Sirica,* 487 F.2d 700 (D.C. Cir. 1973) at 721, which the Court of Appeals directed this Court to follow, this Court agrees, in part, with both parties. Counsel for plaintiffs will be entitled to inspect the transcribed materials in chambers, should the court find it necessary to examine the materials themselves to resolve disputes over any right, defense, or privilege asserted by Mr. Nixon. Mr. Nixon or his representative will be entitled to raise relevance objections, and any other objections designated by a *Vaughn* v. *Rosen*-like [17] index before any *in camera* inspection takes place. However, as the Court will set out below, an *in camera* review proce-

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[17] *Nixon* v. *Sirica, supra,* n. 15, p. 721; cf. *Vaughn* v. *Rosen,* 484 F.2d 820 (D.C. Cir. 1973).

dure, which is consistent with that followed in *Nixon* v. *Sirica,* and tailored to the circumstances of this case varies somewhat from the proposals submitted by either side.

(1) At all times during the review and transcription of those portions of designated tapes that the Administrator's archivists deem relevant under the subpoena, as interpreted by the order of this Court, Mr. Nixon or his representative shall have an unqualified right to be present; however, the determination of what constitutes material in compliance with the subpoena shall be left to the Administrator. *Dellums* v. *Powell, supra* at 250. During the transcribing, or at some later time, but in any event before counsel for Mr. Nixon raise any claim of right, defense, or privilege with the Court, Mr. Nixon or his reprsentative should itemize and index the transcribed material and correlate indexed items with particular claims of privilege. See *Nixon* v. *Sirica, supra* at 721.

(2) While the transcribed materials are still in custody, possession and control of the Administrator and before their submission to the Court, Mr. Nixon should be given notice of contemplated release of the materials and opportunity to file and exhaust his administrative objections, in accordance with 41 C.F.R. 105–63.303 and 41 C.F.R. 105–63.204(f).[18]

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[18] These regulations were passed by Congress in 1976 to enforce Section 102(b) of the Act. 44 U.S.C. 2107.

(a) § 105–63.303. Access for use in judicial proceedings, provides in pertinent part:

> In accordance with the provisions of Subpart 105–63.2, and subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, the Presidential historical materials in the custody and control of the Administrator of General Services will be made available for use in any judicial proceeding, and are subject to subpoena or other lawful process. * * *

(b) § 105.63.204(f). Access procedures, states:

> Prior to releasing Presidential historical materials in accordance with an access authorized under §§ 105.63–302 or 105–63.303, the Administrator will give Mr. Nixon notice of the nature and identity of, and at his request allow him access to,

Footnotes continued on next page

(3) Upon compliance with 41 C.F.R. 105–63.204(f), the Administrator will transmit to the Court the materials he deems relevant. Following the transmittal of these materials, but before they are turned over to counsel for plaintiffs, Mr. Nixon shall be afforded the right to assert any rights, defenses, or privileges he may wish to raise in accordance with the provisions of 41 C.F.R. 105–63.303, *Dellums, supra* at 250. These claims of right, defense, or privilege are to be designated by an itemized index of the materials containing correlated descriptions specific enough to identify the basis of the particular claim or claims, *Nixon* v. *Sirica, supra* at 721, which should be submitted to the Court and opposing counsel at the time the claims are asserted. At this time, the Court will consider all of the claims raised by Mr. Nixon, and on the basis of reasoning advanced by the parties in their papers and at a hearing, if the Court deems it necessary, any material that the Court considers irrelevant or excusable on other bases will be returned to the Administrator without being shown to counsel for the plaintiffs.

(4) Should the Court need or choose to examine any materials to determine the validity of any privilege, the Court will conduct an *in camera* inspection and hearing with respect to the disputed materials, and counsel for both Mr. Nixon and plaintiffs will be entitled to be present.

(5) Mr. Nixon and plaintiffs will have ten (10) days within which to appeal any ruling adverse to their purported interests.

Footnotes continued from last page

those Presidential historical materials which the archivists have determined are covered by the subpoena, or other lawful process, or request. The notice will also inform Mr. Nixon that he may file a claim with the Administrator objecting to the release of all or portions of the described materials within 5 working days of his receiving the notice described herein. The claim should detail the alleged rights and privileges of Mr. Nixon which would be violated by the release of the materials. The Administrator will refrain from releasing any of the materials to the requestor during this period, and while any claim of right or privilege is pending before him will refrain from releasing the materials subject to the claim.

* * * * * * *

With respect to any materials received by counsel *in camera,* or any materials eventually released to counsel for potential use at trial, disclosure will be restricted to counsel unless and until the materials become part of the public record. Mr. Nixon is entitled to a protective order which provides:

(a) that before any of the transcribed materials are disclosed at trial or made part of the trial record, he will be given "due and ample notice and an opportunity to litigate the issue of need for public disclosure," [19] and

(b) that determinations of this is to be made "in the light of the actual litigating posture of the case and the contents of the materials." [20]

Should Mr. Nixon desire such an order, he should make proper application to the Court, including a memorandum of points of authority and a proposed order. Of course, the requirements of confidentiality for protection against improper disclosure which apply to all of the transcribed materials, unless and until they are made part of the public record, apply with double force to the substance of any *in camera* proceeding the Court may conduct. *United States* v. *Nixon,* 418 U.S. 683, 714–715 (1974),[21] and to any materials given to counsel but not put into evidence. *Nixon* v. *Warner Communications, Inc.,* —— U.S. ——, 46 Law Week 4320 (April 18, 1978). Counsel are admonished accordingly.

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[19] *Dellums, supra,* at 249.

[20] *Id.*

[21] It is elementary that *in camera* inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States.

Upon the filing of this memorandum and consistent with the order attached hereto, the subpoena *duces tecum* should issue.

WILLIAM B. BRYANT,
United States District Judge.

November 8, 1978.

United States District Court for the District of Columbia

Civil Action No. 2271-71

RONALD V. DELLUMS ET AL., PLAINTIFFS,

v.

JAMES M. POWELL ET AL., DEFENDANTS.

ORDER

For the reasons set forth in the accompanying memorandum opinion and in accordance with the provisions of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107; and its implementing regulations, 41 C.F.R 105.63 *et seq.;* and the prior decisions of this Court and the United States Court of Appeals for the District of Columbia Circuit, it is this 8th day of November, 1978.

ORDERED, that this Court's Memorandum and Order of March 10, 1976 be modified as provided herein, and that the subpoena *duces tecum* served in the above captioned matter, on October 24, 1974, be modified and enforced in the following manner:

(1) That the Administrator of General Services shall forthwith cause to be carried out the following duties on

or before September 1, 1978, unless said date be extended by further order of this Court:

(a) He or his duly authorized designee(s) shall personally listen to all tape-recordings included within the Nixon Presidential Historical Materials, whether or not such tapes have been previously transcribed, made during the period April 16, 1971, through May 10, 1971, inclusive.

(b) He shall cause to be transcribed any and all references contained on such tapes which relate, directly or indirectly, or have any bearing on or significance to, any of the following:

(i) Anti-war demonstrations;

(ii) Anti-war demonstrators;

(iii) Plans of the United States government or any officials of the United States government, or of any other government, relative to demonstrations held or to be held in Washington, D.C. during April or May, 1971;

(iv) Responses of United States government officials, or officials of any other government, or of any private citizens, relative to demonstrations or other activities of persons opposed to the war in Vietnam during April or May of 1971;

(v) Plans, procedures or proposals for handling persons arrested or to be arrested or otherwise detained or controlled for anti-war activities in Washington, D.C. or elsewhere during April and May, 1971;

(vi) Authority for law enforcement in the District of Columbia during demonstrations.

Any and all doubts as to whether any given conversation is or is not covered by the above description shall be resolved in favor of inclusion.

(2) Richard M. Nixon or his agent or attorney (hereinafter "Mr. Nixon") shall be allowed to be present during the listening procedure as provided for by the implementing regulations and by this Court's memorandum opinion. The determination of what consitutes material that must be transcribed in accordance with this Order, however, shall be the sole province of the Administrator, and neither Mr. Nixon nor his representative shall be permitted to object in any way, by word or by sign,

or to argue against, or otherwise seek to influence, the decision of the Administrator concerning what should and what should not be transcribed; and it is

FURTHER ORDER, that during the transcribing process, or at some later time, but before Mr. Nixon raises any claims of right, defense, or privilege, Mr. Nixon or his representative should itemize and index the transcribed materials and correlate the indexed items with particular claims of privilege; and it is

FURTHER ORDER, that after compliance with section 105.204(f) of the implementing regulations pertaining to the preservation and protection of and access to the presidential historical materials of the Nixon Administration, the Administrator of General Services shall turn over to this Court, *in camera,* the transcripts made by him pursuant to this Court's order; and it is

FURTHER ORDER, that after the transcribed materials are transmitted to the Court, and before any of these materials are made available to counsel for plaintiffs, Mr. Nixon shall be afforded the right to raise any rights defenses, or privileges he wishes, based upon claims designated in an itemized *Vaughn* index submitted to the Court and counsel for plaintiffs; and it is

FURTHER ORDER, that both counsel for Mr. Nixon and counsel for plaintiffs will be entitled to be present at any *in camera* inspection of the materials that the Court may choose to conduct in order to determine the validity of asserted objections; and it is

FURTHER ORDER, that all counsel are forbidden from disclosing any of the transcribed materials or the substance of the *in camera* proceedings, pending further order of the Court; and finally, it is

FURTHER ORDER, that Mr. Nixon or plaintiffs shall have ten (10) days within which to file an appeal from any ruling that either of them considers adverse to their interests.

WILLIAM B. BRYANT,
United States District Judge.

United States District Court Southern District of New York

76–4344 (VLB)

JOHN CERVASE, PLAINTIFF,

v.

CHARLES B. RANGEL, DEFENDANT.

VINCENT L. BRODERICK, U.S.D.J.

I. MEMORANDUM ORDER

This action, in which plaintiff seeks declaratory and injunctive relief, is based on defendant's alleged abuse of the franking privileges that are granted him as a member of Congress.[1]

Plaintiff is a United States citizen and a taxpayer of the United States and the State of New Jersey. Defendant represents the Nineteenth Congressional District of New York and is a member of the Congressional Black Caucus, Inc. Under 39 U.S.C. § 3210, defendant has the privilege of sending mail under frank in order to facilitate the conduct of defendant's offical duties.

In his complaint, plaintiff alleges that defendant has violated 39 U.S.C. § 3210[2] by using his frank to distribute Congressional Black Caucus literature, which literature is allegedly "unrelated to the official business" of defendant. Plaintiff further alleges that defendant's violation of 39 U.S.C. § 3210 has resulted in increased federal tax liability both for plaintiff and for the public at large.

Defendant has moved, pursuant to Rule 12(b)(3), Fed.R.Civ.P., to dismiss the complaint for lack of subject matter jurisdiction. Plaintiff has moved to amend his complaint to include allegations that jurisdiction is based on 28 U.S.C. § 1339 [3] and that defendant has violated 39 U.S.C. § 3215.[4]

II

I find that plaintiff does not have standing to bring this action; therefore, I grant defendant's motion to dismiss.[5] Because plaintiff's lack of standing would not be cured by the proposed amendment to his complaint, plaintiff's motion to amend is denied.

III

The Supreme Court has often emphasized that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies. See *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968). The concept of standing is part of this limitation." *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 37 (1976).

The key to the concept of standing is the injury a plaintiff alleges that he has suffered or is going to suffer. *See Flast* v. *Cohen,* 392 U.S. 83, 91 (1968). Here the only injury alleged by plaintiff is that defendant's allegedly illegal acts have caused or will cause an increase in his federal tax liability. Thus if plaintiff has standing it must be as a federal taxpayer.

The leading Supreme Court case on taxpayer standing is *Flast* v. *Cohen, supra.* In *Flast,* a group of taxpayers sued certain federal officials. Plaintiffs alleged, *inter alia,* that a federal statute, under which defendants sought to finance instruction and materials purchases in religious and sectarian schools, violated the religion clauses of the First Amendment. Given these allegations, the Court framed the standing issue as follows:

> In *Frothingham* v. *Mellon,* 262 U.S. 447 (1923), this Court ruled that a federal taxpayer is without

> standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers. In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment.

392 U.S. at 85.

After an extended discussion of the issue, the Court enunciated a two-pronged test to determine whether a federal taxpayer has standing. To establish standing, a) a plaintiff must show a nexus between his taxpayer status and the legislation attacked, which legislation must constitute an exercise by Congress of its power under the taxing and spending clause of Article I, § 8 of the Constitution; and b) plaintiff must establish a nexus between taxpayer status and an alleged constitutional infringement:

> Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.
>
> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. * * * Secondly, the taxpayer must establish a nexus be-

> tween that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

Id. at 102–03.

Applying this two-pronged test, the Court concluded that the taxpayer in *Flast* had "standing to invoke a federal court's jurisdiction for an adjudication on the merits." *Id.* at 106.

Flast is still the law on the issue of taxpayer standing. *See, e.g., United States* v. *Richardson,* 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee To Stop the War,* 418 U.S. 208 (1974). However, *Flast* itself emphasized that, in determining whether a particular taxpayer plaintiff has standing, consideration must be given to the nature of the claim such plaintiff advances. *Flast,* 392 U.S. at 101. In this case plaintiff claims that defendant has violated a federal statute; plaintiff does not claim, as plaintiffs in *Flast* claimed, that the relevant federal statute is unconstitutional. I must therefore determine whether the *Flast* test, which was announced in a case that involved alleged constitutional violations, applies where the plaintiff alleges only statutory violations.

On the basis of the relevant case law, I find that the *Flast* test applies. Application of that test leads to the conclusion that plaintiff does not have standing.

Perhaps the most important case in determining whether the *Flast* test applies is *Schlesinger* v. *Reservists Committee To Stop the War,* 418 U.S. 208 (1974). In *Reservists Committee,* respondents, who included five committee members who were U.S. citizens and taxpayers, brought a class action on behalf of all U.S. citizens

and taxpayers. Respondents challenged the Army Reserve membership of Members of Congress as violative of the Incompatibility Clause of the Constitution, Art. I, § 66, cl. 2.[6] The Supreme Court held that respondents did not have standing either as citizens or as taxpayers. 418 U.S. at 209.

The Court relied on *Flast* with respect to taxpayer standing, and the Court's reliance on *Flast* suggests that the *Flast* test should be applied here:

> Consideration of whether respondents have standing to sue as taxpayers raises a different question from whether they may sue as citizens. *Flast* v. *Cohen, supra,* established that status as a taxpayer can, under certain limited circumstances, supply the personal stake essential to standing. * * *
>
> Here the District Court, applying the *Flast* holding, denied respondents' standing as taxpayers for failure to satisfy the nexus test. *We agree with that conclusion since respondents did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status.*

Id. at 227–28 (footnotes omitted; emphasis added).

Reservists Committee suggests that the *Flast* test is to be strictly applied to bar taxpayer suits that do not involve allegations that a federal statute is unconstitutional. *Reservists Committee* distinguishes between allegedly unconstitutional statutes and allegedly unconstitutional conduct of government officials. Alleging the former may confer standing, but alleging the latter will not. It would seem to follow that the mere allegation of illegal conduct by a Congressman does not suffice to confer standing on a taxpayer.

Several lower court cases support this conclusion.

In *Public Citizen, Inc.* v. *Simon,* 539 F.2d 211 (D.C. Cir. 1976), taxpayers sought to recover from the Secretary of the Treasury all salaries that had been paid to persons on the White House staff for a period during which such persons were devoting most of their time to the presidential election campaign. Taxpayer plaintiffs alleged that defendant Secretary's payment of such sal-

aries violated both the Constitution and a federal statute. *Id.* at 213. On the issue of standing, the D.C. Circuit relied on, *inter alia, Reservists Committee* and concluded that the taxpayer plaintiffs did not have standing. The court also cited *Flast* as denying standing to federal taxpayers who do not squarely attack the validity of taxing and appropriation statutes:

> This is an area of the law where the result is clear, in view of the cases, but there is less clarity in the doctrinal development. What was wrought by the *Flast* opinion—in opening the door to taxpayer actions, yet opening it only part way—was pragmatic in result, avoiding the flood of all manner of taxpayer actions. And yet it was rooted in a conceptual underpinning, permitting federal taxpayer standing in a class of cases where taxpayer suits were particularly appropriate and manageable—specifically, in cases involving the validity of taxing and appropriation statutes (as distinguished from cases involving "incidental expenditure[s] of tax funds in the administration of an essentially regulatory statute").

Id. at 218, quoting *Flast,* 392 U.S. at 102. Thus the *Flast* test barred plaintiffs' suit in *Public Citizen, Inc.* even though plaintiffs had alleged that defendant's conduct was violative of both the Constitution and a federal statute.

In *Tax Analysts and Advocates* v. *Simon,* 390 F.Supp. 927 (D.D.C.), *appeal dismissed,* 512 F.2d 992 (D.C. Cir. 1975), *aff'd sub nom. Tax Analysts and Advocates* v. *Blumenthal,* 566 F.2d 130 (D.C. Cir. 1977), *cert. denied,* 98 S.Ct. 1280 (1978), plaintiffs sought a delaratory judgment that certain Revenue Rulings of the Internal Revenue Service were unlawful because such rulings violated the Internal Revenue Code. On the issue of the taxpayer standing of plaintiffs, who alleged *only* statutory violations, the district court applied the *Flast* test and concluded that the absence of constitutional attack upon a Congressional enactment was fatal to plaintiffs:

The *Flast* exception is a rigid one and the only exception to the *Frothingham* guidelines. Moreover it speaks in terms of constitutional challenges to Congressional action, not executive or administrative action. Since Plaintiffs Field and TAA as federal taxpayers do not assert the unconstitutionality of the IRC provisions in question here, but rather attack administrative rulings of the IRS interpreting those provisions, the Plaintiffs as taxpayers do not fall within the narrow exception of *Flast* v. *Cohen* and thus their taxpayer standing arguments must fall, particularly in light of two recent decisions of the Supreme Court in *United States* v. *Richardson,* * * * and *Schlesinger* v. *Reservists Committee To Stop the War.* * * *

390 F.Supp. at 935.

On appeal, the D.C. Circuit explicitly affirmed the district court's conclusion as to taxpayer standing "on the rationale stated in [the district court's] opinion." 566 F.2d at 134 (footnote omitted).[7]

Thus the *Flast* test is applicable in this case. Application of that test results in the conclusion that plaintiff, *qua* taxpayer,[8] lacks standing.[9]

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: November 2, 1978.
New York, N.Y.

United States District Court, Southern District of New York

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76 Civil 4344 (VLB)

JOHN CERVASE, PLAINTIFF,

v.

CHARLES B. RANGEL, DEFENDANT.

JUDGMENT

Defendant having moved the Court to dismiss the complaint, pursuant to Rule 12(b)(3), of the Federal Rules of Civil Procedure, and the said motion having come on before the Honorable Vincent L. Broderick, United States District Judge, and the Court thereafter on November 6, 1978, having handed down its memorandum decision granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and is hereby dismissed. Plaintiff's motion to amend complaint is denied.

RAYMOND F. BURGHARDT.

Dated: November 8, 1978.
New York, N.Y.

In the United States District Court for the Western District of Louisiana, Lake Charles Division

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Criminal No. 78–30013

UNITED STATES OF AMERICA

v.

OTTO E. PASSMAN

Messrs. *Jeffrey S. White* and *David R. Scott,* U.S. Department of Justice, Post Office Box 50168, F Street Station, Washington, DC 20004. Hon. *Edward L. Shaheen* and *William Goode,* United States Attorney and Assistant United States Attorney, Post Office Box 33, Shreveport, LA 71161, for the United States of America.

Camille F. Gravel, Jr., Gravel, Roy & Burnes, Post Office Box 1792, Alexandria, LA 71301. *William W. Taylor III, James Hamilton* and *James Ginsburg,* Ginsburg, Feldman & Bress, Suite 30, 1700 Pennsylvania Ave., N.W., Washington, DC 20006, for defendant.

EARL E. VERON, United States District Judge:

RULING ON MOTIONS

A seven count indictment was filed in the District of Columbia on March 31, 1978 against Otto E. Passman. This case was subsequently transferred to the Western District of Louisiana. Otto E. Passman was a United States Congressman from the State of Louisiana from January 1947 until January 1977. This indictment

charged Mr. Passman with violations of 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 201(c)(1) (bribery), and 18 U.S.C. § 201(g) (illegal gratuity).[1]

The defendant filed two pre-trial motions on July 14, 1978. The first motion seeks to have the indictment dismissed because of the alleged unconstitutionality of 18 U.S.C. § 201 (c)(1) and (g). The second motion seeks to have this court dismiss the indictment or compel election of counts of the indictment asserting multiplicity, double jeopardy, and danger of a compromise verdict by the jury.

Both motions considered herein are denied.

I. MOTION TO DISMISS INDICTMENT

Mr. Passman argues that the indictment should be dismissed "because the statute under which such prosecution is being conducted, 18 U.S.C. § 201, applicable to all counts in said indictment, is overbroad and so general, vague and obscure that it fails to set any ascertainable standards by which guilt or innocence may be determined." (Defendant's Motion to Dismiss Indictment.) More specifically, the defendant asserts that 18 U.S.C. § 201 (c)(1) and (g) [2] do not meet constitutional muster as prescribed by the first and fifth amendments to the United States Constitution because they are both vague and overbroad and therefore violate due process of law

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[1] On April 28, 1978, a second indictment was filed against Mr. Passman in the District of Columbia which was later consolidated with the March 31 indictment. This second indictment of April 28 is not at issue in this decision.

[2] 18 U.S.C. § 201 (c)(1) and (g) provide as follows:

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or * * *

(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; or

and inhibit free speech. We are not aware of any case that has ever held § 201 unconstitutional on these grounds.

In the leading case of *United States* v. *Brewster,* 506 F.2d 62, 76–77 (D.C. Cir. 1974), the court explicitly upheld the constitutionality of 18 U.S.C. § 201 (g).[3] This case involved the prosecution of a United States Senator who had been charged with violating 18 U.S.C. § 201 (c) but convicted of violating 18 U.S.C. § 201 (g). First, the court addressed the vagueness issue:

> Manifestly, then, the language of Section 201 (g), as authoritatively interpreted by the Supreme Court in its *Brewster* decision, "give[s] the person of ordinary intelligence a reasonable opportunity to act accordingly." The section's standards are sufficiently explicit to prevent delegation of "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Hence, Section 201 (g) is not impermissibly vague even under the standards applied to statutes governing the conduct of average citizens. That 201 (g) is directed at the conduct of public officials, who should exercise extraordinary caution to avoid acts potentially violative of their public trust, makes us even more reluctant to accept the argument that the Section is vague.[4]

Mr. Passman's assault on 18 U.S.C. § 201 (c)(1) is predicated on the mistaken belief that the word "corruptly asks" or "receives" anything of value is an uncertain standard that makes it impossible to fix a standard of guilt. The courts have interpreted this language to require a specific intent and have determined that the words "corruptly", "value", and "influence" should be construed in their ordinary, everyday sense. See *United States* v. *Pommerening,* 500 F.2d 92, 97 (10th Cir. 1974), *cert. denied* 419 U.S. 1088 (1974); *United States* v. *Brewster,* 506 F.2d 62, 76–77 (D.C. Cir. 1974); *United*

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[3] The court reversed the conviction on other grounds.

[4] *United States* v. *Brewster,* 506 F.2d 62, 77 (D.C. Cir. 1974) (footnotes omitted).

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States v. *Irwin,* 354 F.2d 192, 197 (2d Cir. 1965), *cert. denied* 383 U.S. 967 (1965).

The court in *United States* v. *Irwin, supra,* found it particularly fitting to distinguish the varying degrees of intent required by subsections b, c, d, and e of Section 201 and the lesser degree of intent required by subsections f, g, h, and i.

> The intent to influence, accompanying the corrupt giving or accepting of something of value, is an essential element of § 201 (b, c, d, e) which Congress dealt with in separate subsections, and for the violation of each of which it attached severe penalties. No similar provisions concerning corrupt giving and specific intent to influence or induce were included in § 201 (f, g, h, i), and the penalty provided for a violation of any of those subsections was much less severe. Obviously Congress made a distinction between the two groups of subsections and purposely omitted from the latter group the description of the specific intent which was an essential element of the former.

This last quoted paragraph should not be construed to mean that there is no requirement of mens rea in 18 U.S.C. § 201 (g) but rather that it does require a general criminal intent. This point brings us to the argument that § 201 is constitutionally overbroad because it reaches legitimate activities that are guaranteed by the United States Constitution. The defendant argues that under § 201 (g) [5] an elected official can be convicted for receiving money given by a grateful constituent who is pleased by a vote that has already been made and that, as a result, the statute infringes on the first amendment rights of political speech and association. This argument ignores the tripartite distinction between guilt under § 201 (c)(1), guilt under § 201 (g), and inno-

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[5] 18 U.S.C. § 201 (g) provides 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; or

cence that was outlined in *United States* v. *Brewster,* 506 F.2d 62, 78–79 (D.C. Cir. 1974):

> Where the statute does cause great difficulty for a trial judge, a difficulty which we hold proved fatal to the conviction in this case, is that in addition to the problem of drawing a distinction between one definable offense and innocent conduct, where both offenses are charged a trial judge must also draw a tripartite distinction between conduct with the defined intent to constitute an offense under the bribery section (c), conduct with the requisite intent to constitute an offense under the gratuity section (g), and conduct with an intent which constitutes no offense at all.

Title 18 U.S.C. § 201 (g) requires no element of *quid pro quo;* nor does it require a specific intent. Section (g) does, however, require a mens rea. It is necessary that the Government prove that the defendant committed the act prohibited knowingly and not through accident or mistake. If an elected official receives campaign money given by a grateful constituent who is pleased by a vote that has already been made, then clearly there is no violation of subsection (g). However, if this grateful constituent attaches a note saying this is for your vote which you cast last week in favor of our labor bill which was pending before you, then subsection (g) would be applicable. The difference between the two hypotheticals is that in the first example the contribution was unrelated to an official act while in the second example the elected official knew that the contribution was due to an official act, and therefore within the scope of 18 U.S.C. § 201 (g). The court in *United States* v. *Brewster* recognized the dissimilar degree of intent:

> The defendant further argues that section 201 (g) is unconstitutionally overbroad because it reaches legitimate campaign contributions, which arguably can be characterized as the sort of political, associational activity protected by the First Amendment. To the contrary, however, a public official's acceptance of a thing of value unrelated to the performance of any official act and all bona fide contribu-

tions directed to a lawfully conducted campaign committee or other person or entity are not prohibited by 201 (g). *What is outlawed is only the knowing and purposeful receipt by a public official of a payment, made in consideration of an official act for himself.* Congress has an indisputable interest in proscribing such conduct as a means for preserving the integrity of governmental operations. This interest supersedes any conceivable First Amendment value related to such conduct.

Id. at 77. (Emphasis added).

In light of the prevailing jurisprudence, which has explicitly upheld the constitutionality of 18 U.S.C. § 201, the defendant's attack must fail, and the motion to dismiss the indictment is therefore denied.

II. MOTION BY DEFENDANT TO DISMISS OR TO COMPEL ELECTION OF COUNTS

Mr. Passman's instant motion seeks to have this court dismiss counts 2 through 7 of the indictment or in the alternative to compel the prosecution to elect the counts on which it wishes to proceed. The indictment which the defendant is charged with is broken down into seven counts. The first count of the indictment charges Mr. Passman with the commission of 18 U.S.C. § 371, which is conspiracy. Counts 2 through 4 charge the defendant with 18 U.S.C. § 201 (c)(1), which is the criminal statute on bribery. The last three counts (counts 5 through 7) charge the defendant with the same acts that he allegedly committed under counts 2 through 4 but under 18 U.S.C. § 201 (g), which is the gratuity subsection of § 201.

The foundation of defendant's motion rests upon the supposition that to deny it would have the effect of placing the defendant in double jeopardy, subject him to the possible danger of a compromise by the jury, and result in an indictment that is multiplicitous. The defendant's motion reads in pertinent part:

* * * because those counts of that indictment are multiplications, and place the defendant in double jeopardy in that:

(1) Counts 2 and 5 each allege the same offense in two counts;

(2) Counts 3 and 6 each allege the same offense in two counts;

(3) Counts 4 and 7 each allege the same offense in two counts;

(4) Counts 2, 3 and 4 charge three parts of the same transaction, and thus the same offense, in three counts rather than three separate offenses;

(5) Counts 5, 6 and 7 charge three parts of the same transaction, and thus the same offense, rather than three separate offenses.

After careful consideration of the memorandum submitted by counsel, a review of the authorities, and the benefit of oral argument we have determined that this motion must be denied.

A. Multiplicity

Multiplicity is often used in discussing criminal *joinder*. Multiplicity is the charging of the same offense in more than one count. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 142, p. 306 (1969) (footnotes omitted).

1. *The relationship of counts 2, 3 and 4 to counts 5, 6 and 7 of the indictment.*—The defendant asserts, and correctly so, that both counts 2 and 5 of the indictment recite the same alleged transaction, involving the same $50,000.00, between Otto E. Passman and Tong Sun Park on the same date, April 11, 1973. In like manner, counts 3 and 6 allege the same transaction involving the same $20,000.00 on the same date, June 11, 1973. Additionally counts 4 and 7 allege the same transaction involving the identical $20,000.00, on June 13, 1973. Counts 2 through 4 charge violations of 18 U.S.C. § 201 (c)(1) and counts 5 through 7 charge violations of 18 U.S.C. § 201 (g). The fact that defendant is charged twice with the same transaction does not mean he is necessarily being charged with the same *offense*. One

act or transaction may violate two or more statutes and constitute independent offenses. *Morgan* v. *Devine,* 237 U.S. 632 (1914); *Burton* v. *United States,* 202 U.S. 344 (1906); *Hattaway* v. *United States,* 399 F.2d 431 (5th Cir. 1968).

There is ample authority that the bribery counts under 18 U.S.C. § 201 (c)(1) (Counts 2, 3 and 4) may be separate crimes composed of different elements from the three illegal gratuity counts under 18 U.S.C. § 201 (g) (counts 5, 6 and 7). See, e.g., *United States* v. *Brewster,* 506 F.2d 62, 67–76 (D.C. Cir. 1974). By charging the defendant under both subsections, the government is putting him on notice that he must defend against both. Depending upon the evidence presented at trial, the 201 (g) counts could be lesser included offenses under the § 201 (c)(1) charges, but they also could be entirely distinct and not necessarily included offenses under 201 (c)(1). *United States* v. *Brewster, supra.*

Section 201 of Title 18 of the United States Code was designed to protect the public against public officials and those people who interact with these officials in a culpable manner. Certainly, there is a high degree of overlap between the various subsections of § 201, but there is also dissimilarity and in some instances even inconsistencies between the subparts. The graphical analysis used in *United States* v. *Brewster, supra.* at 67, may prove helpful at this point:

Bribery Section (c)(1)	*Gratuity Section (g)*
(c) Whoever, being a public official [ ] or person selected to be a public official,	(g) Whoever, being a public official, [former public official,] or person selected to be a public official,
[A] corruptly *asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself*	[A] 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*
[B] or for any other person or entity,	
[C] in return for: (1) being influenced in his performance of any official act;	[C] for or because of any official act performed or to be performed by him;

A careful reading of the two subsections of § 201 makes it apparent that they vary in many ways. More specifically, subsection (c)(1) is broader than subsection (g) in that (c)(1) may be violated if the public official receives value for himself *or for any other person or*

entity, while (g) requires that the official receive value for *himself.* (See comparative clause [B] above.) The differences in criminal intent have already been discussed in the first part of this decision, but a quick inspection of comparative clause [A] will illustrate that (c)(1) clearly requires a specific intent by the use of the word *corruptly* and subsection (g) would call for only a general mens rea. Although there are other differences between these two subsections, *United States* v. *Brewster, supra.* at 68, one crucial clause for illustrative purposes is comparative clause [C]. Subsection (c)(1) requires a *quid pro quo,* value in return for being influenced in his performance of any official act. Subsection (g), on the other hand, applies to *any official act performed or to be performed by him.* This means that subsection (g) is not a necessarily lesser included offense. If subsection (g) is a lesser included offense, it need not be alleged in a separate count and, indeed, could prejudice the defendant if it were. Assuming that the evidence adduced at trial meets the requirements of *United States* v. *Whitaker,* 447 F.2d 314 (D.C. Cir. 1971), then the parties may ask for a charge to the jury of a lesser included offense. But subsection (g) will not always be a lesser included offense of subsection (c)(1). For subsection (g) to always be a lesser included offense it would have to be a necessarily lesser included offense. In a necessarily lesser included offense the greater always subsumes the lesser. This means that everytime you prove the greater offense you necessarily prove each and every element of the lesser included offense.

> One offense is necessarily included in another if it is impossible to commit the greater without also having committed the lesser. Thus murder includes such lesser offenses as second-degree murder, manslaughter, and negligent homicide. Robbery necesarily includes larceny, and assault with intent to rob. Rape necessarily includes assault with intent to rape. Assault with a dangerous weapon includes simple assault. Theft of property in excess of $100 includes the lesser wrong of theft of property of value not exceeding $100. In each of these instances

some of the elements of the greater crime charged are in themselves enough to constitute the lesser crime.

* * * The doctrine also does not apply if some element is required for the lesser offense but not for the greater. In this situation two different crimes are involved, and the lesser is not necessarily included in the greater, since it would be possible to commit the greater without also having committed the lesser.

2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 515 (1969) (footnotes omitted).

Subsection (g) is not a *necessarily* lesser included offense of subsection (c)(1) because there are some situations where proof of (c)(1) would not support a conviction under (g). For example, if there was a conviction under (c)(1) for receiving anything of value for any other person or entity this would not support a conviction under (g) because that subsection requires that value be received for himself. (See comparative clause [B].)

Conversely, for a crime to be a *necessarily* lesser included offense, the lesser included offense must be able to serve as a predicate for a conviction of the greater offense in all cases. Here, again, subsections (g) and (c)(1) deviate in certain cases. A conviction under (g) for an act done prior to receiving value would not serve as a predicate for a conviction on (c)(1), because (c)(1) does not apply to prior acts. (See comparative clause [C].)

It is important to note that, in *United States* v. *Brewster*, 506 F.2d 62, 67–76 (D.C. Cir. 1974), the court of appeal had the benefit of all the facts developed at trial. It is impossible, at this stage in the proceedings, to declare the indictment multiplicitous on these grounds. If the indictment subsequently becomes multiplicitous, the defendant would not be precluded from relief.

An indictment or information charging the same offense in more than one count is multiplicitous, but this also is not fatal and does not require dismissal of the indictment. Defendant may move to have the prosecution elect, and the counts will be

> consolidated and all but the one elected dismissed, but even this is discretionary with the court. The principal danger in multiplicity is that defendant will be given multiple sentences for the same offense. A remedy is available at any time if defendant is given multiple sentences.

2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 145 (1969) (footnotes omitted).

2. *The relationship of counts 2, 3, and 4.*—Mr. Passman contends that counts 2, 3, and 4 charge three parts of the same transaction, and thus the same offense, in three counts rather than three separate offenses. This position is incorrect and cannot be sustained for the following reasons.

As stated earlier, counts 2 and 5 recite a transaction of April 11, 1973 involving the sum of $50,000.00. Counts 3 and 6 allege a transaction on June 11, 1973, and the payment of $20,000.00. Finally counts 4 and 7 plead certain acts in connection with the receipt of $28,000.00 on June 13, 1973.

The bribery statute, 18 U.S.C. § 201, is drafted so that a violation occurs each time a thing of value is passed to a public official. *United States* v. *Anderson,* 509 F.2d 312, 333 (D.C. Cir. 1974). These statutes are designed to prevent abuse of governmental power. The transactions alleged in the indictment, although similar, are not *dependent* on each other. One transaction could have been completed as planned and the other may have gone according to plan. Each represents a distinct offense.

3. *The relationship of counts 5, 6 and 7.*—We hold that, for the same reasons given above (subsection 2), counts 5, 6 and 7 do not allege one offense but are separate and distinct offenses.

4. *The relationship of count 1 to counts 2, 3, 4, 5, 6, and 7.*—The defendant argues here that counts 2 through 7 of the indictment embody a continuous single offense as the object of the conspiracy alleged in Count 1. Apparently, defendant's contention is that, since the substantive offenses charged in Counts 2 through 7 also are listed as overt acts in the single conspiracy alleged,

the transactions charged as the objects of that conspiracy can only culminated in one offense.

The problem with this argument is that the hypothesis precedes the premise and the premise ignores the critical difference between a conspiracy charge and a substantive charge. It is well-settled that conspiracy to commit an offense and the offense itself are distinct crimes that may be separately charged and punished. *Pinkerton* v. *United States,* 328 U.S. 640 (1946); *Braverman* v. *United States,* 317 U.S. 49 (1942); *United States* v. *Toombs,* 497 F.2d 88 (5th Cir. 1974); *United States* v. *Bally Manufacturing Co.,* 345 F. Supp. 410 (E.D. La. 1972); *United States* v. *Boyle,* 338 F. Supp. 1028 (D.C. 1972). Moreover, one conspiracy may result in violations of several substantive statutes. *Braverman* v. *United States,* 317 U.S. 49 (1942); *United States* v. *DiStefano,* 361 F. Supp. 971 (M.D. Fla. 1973); *United States* v. *Bally Manufacturing Co.,* 345 F. Supp. 410 (E.D. La. 1972).

B. Double jeopardy

Mr. Passman argues that, to permit him to be tried both under Section 201 (c)(1) and 201 (g), for the same allegedly criminal act would risk placing him in double jeopardy. It is a basic principle of criminal law that double jeopardy applies only when there is a second prosecution, or a subsequent prosecution after a prior pleading of guilty on the same offense. 1B J. MOORE, FEDERAL PRACTICE, ¶ 0.418[2], at 2751 (2d ed. 1974). The case cited by the defendant, *United States* v. *Umans,* 368 F.2d 725 (2d Cir. 1966), did not discuss double jeopardy. In *Umans,* the court found subsection (f) to be a lesser included offense of (b) under 18 U.S.C. § 201 and therefore punishment under both to be improper, but it did not concern double jeopardy.

> * * * Therefore, the correct relationship between § 201 (b) and § 201 (f) is that § 201 (f) is a lesser included offense of § 201 (b). There is no reason to believe that Congress intended that there should be concurrent convictions and sentences under both sections, and we should not allow multiple convictions based on the same transactions even where

> the sentences are concurrent. The sentences on the lesser § 201 (f) counts therefore are vacated.

Id. at 730.

C. Compromise verdit

Congressman Passman finally argues that charging him under both subsections of Section 201 for each transaction presents a danger that the defendant may suffer by a compromise. The defendant argues that rather than risk a compromise by the risks inherent in explaining to the jury the difference between guilt under subsection (c)(1), guilt under subsection (g), and innocence, the prosecution should be forced from the outset to proceed under one subsection of Section 201. The authority cited in support of this position is *United States* v. *Brewster,* 506 F.2d 62, 79 (D.C. Cir. 1974). *Brewster,* cannot be read as authority for compelling the prosecution to elect between counts. Senator Brewster was indicted on bribery under § 201 (c)(1). The prosecution asked for instructions on a lesser included offense of § 201 (g), which the trial court granted. The court of appeal reversed the conviction on § 201 (g) because the trial court had failed to instruct the jury properly. The court did not hold that the government could be compelled to elect, but rather that the prosecution might wish to pursue the safer course of proceeding under only one of the subsections.

III. CONCLUSION

In summary and conclusion we find that neither 18 U.S.C. § 201 (c) or (g) is unconstitutionally vague or overbroad.

We find that the motion to dismiss or compel election of counts is not appropriate at this stage in the proceeding.

Accordingly, both motions herein are denied.

SIGNED in Chambers at Lake Charles, Louisiana, this 29th day of September, 1978.

EARL E. VERON,
United States District Judge.

In the United States District Court for the Western District of Pennsylvania

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Criminal Action No. 78–207

UNITED STATES OF AMERICA

v.

FRANK M. CLARK

SNYDER, J.

OPINION

The grand jury, by indictment filed September 5, 1978, charged Congressman Frank M. Clark in Counts One through Nine with devising and intending to devise a scheme to defraud the United States of America by preparing and submitting clerk-hire allowance and payroll authorization forms to the Office of Finance of the House of Representatives so that the individuals named in these Counts would receive checks from the House of Representatives to pay them for "maintaining, staffing, and operating various campaign headquarters opened for the purpose of reelecting the defendant to Congress" while these individuals "were performing little, if any, of the type of services which would entitle them to the salaries stated in the clerk hire forms." Various dates were set forth on which "for the purpose of executing the above scheme and artifice to defraud and attempting to do so", Congressman Clark "did knowingly cause to be sent and delivered by the United States Postal Service, envelopes addressed to the persons [listed in the indictment] containing United States Treasury

checks in the amounts [listed in the indictment]." All of the above actions are alleged to be in violation of 18 U.S.C. § 1341.[1]

Count Ten charges that during the investigation of alleged violations by Congressman Clark of 18 U.S.C. § 201, and other offenses against the United States, Congressman Clark, although sworn to testify truthfully, knowingly made false material declarations in the grand jury proceedings with respect to the following questions and answers:

> "Q. Have you ever received payment from any one other than your Congressional salary and of course stocks that you might have accumulated over the years?
>
> A. Rephrase that again please?
>
> Q. Have you ever received any monies?
>
> A. Are you talking about cash?
>
> Q. Cash, checks, whatever, any monies of any sort other than your Congressional salary and of course any stocks that you may have been able to accumulate over the years and I mean that sort of thing?
>
> A. No, except at campaign time and that is all logged for Clark For Congress Committee."

It is then charged that Congressman Clark knew these answers were not true in that he received cash, checks, and other monies in addition to those received as his Congressional salary and dividends from stocks he

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[1] 18 U.S.C. § 1341 provides in pertinent part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * *, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing shall be fined not more than $1,000 or imprisoned not more than 5 years, or both.

owned which were not reported by any campaign committee allegedly in violation of 18 U.S.C. § 1623.[2]

Counts Eleven, Twelve and Thirteen complete the indictment by charging the Defendant with a willful and knowing attempt to evade and defeat taxes due the United States for the calendar years 1972, 1973 and 1974, by concealing and covering up sources of income; placing funds in the name of nominees; falsifying records; and making a false declaration to a Federal grand jury. It is alleged that there was owing from him to the United States additional tax on $8,941.17 of $1,370.34 for 1972; for 1973, additional tax on $11,701.77 of $1,758.90; and for 1974, additional tax on $16,906.45 of $7,075.40.

The Defendant entered his plea of not guilty to this indictment on September 11, 1978, and immediately thereafter, filed a Motion for Bill of Particulars and a Motion for Extension of Time to File Additional Pretrial Motions.

The principal basis for the Motion for Extension of Time was that until the Motion for Bill of Particulars was granted and the detailed information requested in the Motion was obtained, defense counsel could not ascertain whether a motion for severance of counts for prejudicial joinder should be filed. In addition, defense counsel set forth that he would be engaged in trial in a remote Pennsylvania county commencing September 18, 1978, which could take up to one month, and that he would need additional time in which to prepare the defense in that case.

The Motion for Bill of Particulars requested that the Government state the theory or theories which form the basis of its proof of the alleged additional taxable

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[2] 18 U.S.C. 1623 provides in pertinent part:

"Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

income and, if based on specific items of income allegedly not included in the Defendant's tax returns for the years in question, set forth: a) the source of said income, b) each of the amounts allegedly paid, and c) the date of each alleged payment.

For the convenience of counsel for the Defendant, a conference was held the next day and, at that time, the Government indicated that it was relying on the specific items theory. The Motion for Extension of Time to File Additional Pretrial Motions was granted for 30 days, and the Motion for Bill of Particulars was taken under advisement with the Government to file a Reply to Defendant's Brief, already on file with the Court, within 10 days.

After consideration of the Briefs of counsel and their prior arguments at the conference, the Motion for Bill of Particulars will be granted as herein delineated. The Defendant argues with considerable merit that it is impossible for counsel to know from the indictment whether a motion for severance should be filed, for it is impossible to tell from the indictment whether there is any connection between the mail fraud charges and the tax evasion charges.

An application for a bill of particulars made pursuant to the provisions of Fed.R.Crim.P. 7(f) [4] is one addressed to the sound discretion of the court. *Wong Tai* v. *United States,* 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545 (1927); *United States* v. *Kafes,* 214 F.2d 887, *cert. den.* 348 U.S. 887, 75 S.Ct. 207, 99 L.Ed. 697 (1954). It is the function of the court at this time to insure that the Government has presented allegations which provide a defendant with certain minimum details concerning the charges against him to enable a defendant to adequately prepare his defense, to avoid prejudicial surprise at trial, and to permit a defendant to plead double jeopardy if

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[4] Fed.R.Crim.P.7(f) states:

"The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires." (As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972.)

subsequent prosecution for the same offense should follow. *United States* v. *Jaskiewicz,* 278 F. Supp. 525 (E.D.Pa. 1968). The 1966 Amendment to Fed.R.Crim.P.7(f) eliminating the requirement that cause be shown before a bill of particulars may be ordered was designed to encourage a more liberal attitude by the courts. The net result of the change seems to have been "to increase the instances in which particulars are granted, thus contributing to a desirable decline in the 'sporting theory' of criminal justice." *United States* v. *Addonizio,* 451 F.2d 49, 64 (3rd Cir. 1971), *cert. den.* 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972). As was stated by Judge Rosenn of our Circuit in *United States* v. *Addonizio, supra:*

> "This liberalization has, out of practical necessity, been limited in some important respects, however. It is still firmly established, for example, that a defendant is entitled neither to a wholesale discovery of the Government's evidence, *United States* v. *Birrell,* 263 F.Supp. 113 (S.D.N.Y. 1967), nor to a list of the Government's prospective witnesses, *United States* v. *Jaskiewicz, supra* [278 F.Supp. 525 (E.D.Pa. 1968)]; *United States* v. *Palmisano,* 273 F.Supp. 750 (E.D.Pa. 1967). In the final analysis then, the granting of a bill of particulars remains a discretionary matter with the trial court, and it is still 'obviously a matter of degree how far an accused must be advised in advance of the details of the evidence that will be produced against him, and no definite rules are possible.' *United States* v. *Russo,* 260 F.2d 849, 850 (2nd Cir. 1958)." (Footnote omitted)

From the face of the indictment, the Defendant is not aware of the specific items which the Government intends to use to support its theory of income tax evasion. After carefully weighing all the arguments, while neither the Government's evidence nor its prospective witnesses need be disclosed, we conclude that ten days should be given to the Government to file a Bill of Particulars specifying the specific items in each Count of the Indictment on which it will rely to prove the amount of additional income tax that was allegedly

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evaded and the source of those items. It is not necessary that the Government set forth the dates of payments as it need not weave the information at its command into the fully integrated trial theory. This Bill of Particulars is ordered solely because of the necessity of determining the inter-relationship of the Counts.

An appropriate Order will be entered.

DANIEL J. SNYDER, Jr.,
United States District Judge.

Dated: September 29, 1978.

cc: United States Attorney
Pittsburgh, Pa. 15219
Harold Gondelman, Esq.
10th Floor, Frick Building
Pittsburgh, Pa. 15219

In the United States District Court for the Western District of Pennsylvania

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Criminal Action No. 78–207

UNITED STATES OF AMERICA

v.

FRANK M. CLARK

ORDER

AND NOW, to-wit this 29th day of September, 1978, after hearing and due consideration of the briefs and arguments of counsel, and for the reasons set forth in the Opinion filed herewith,

IT IS ORDERED that the Defendant's Motion for Bill of Particulars is granted insofar as it requests the

source and amounts of the specific items of income allegedly not included in Defendant's income tax returns for the years 1972, 1973 and 1974.

IT IS FURTHER ORDERED that the Government furnish said Bill of Particulars within ten days of the date of this Order.

DANIEL J. SNYDER, Jr,
United States District Judge.

cc: United States Attorney
Harold Gondelman, Esq.

APPENDIX

Members of the 95th Congress Parties to or Directly Concerned With Litigation Affecting Congress

Alphabetical Listing by Member's Name

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