ORDER FOR PERIOD FOR TRANSACTION OF ROUTINE MORNING BUSINESS TOMORROW

Mr. MANSFIELD. Mr. President, I ask unanimous consent that tomorrow after the recognition of the joint leaders there be a period for the transaction of routine morning business for not to exceed 15 minutes, with statements limited to not more than 3 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

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ORDER FOR RECOGNITION OF SENATOR HUGHES ON MONDAY, NOVEMBER 29, 1971

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on Monday, one week from today, November 29, 1971, immediately following the recognition of the two leaders under the standing order, the distinguished Senator from Iowa (Mr. HUGHES) be recognized for not to exceed 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

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ORDER FOR RECOGNITION OF SENATOR WEICKER ON TUESDAY, NOVEMBER 23, 1971

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that tomorrow, immediately following the recognition of the two leaders under the standing order, the distinguished Senator from Connecticut (Mr. WEICKER) be recognized for not to exceed 15 minutes, just prior to the period for the transaction of routine morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADJOURNMENT TO 10 A.M.

Mr. BYRD of West Virginia. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the previous order, that the Senate stand in adjournment until 10 a.m. tomorrow.

The motion was agreed to; and (at 10 o'clock and 28 minutes p.m.) the Senate adjourned until tomorrow, Tuesday, November 23, 1971, at 10 a.m.

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NOMINATION

Executive nomination received by the Senate November 22, 1971:

U.S. DISTRICT COURTS

Kenneth K. Hall, of West Virginia, to be a U.S. district judge for the southern district of West Virginia, vice John A. Field, Jr., elevated.

# EXTENSIONS OF REMARKS

THE PENTAGON PAPERS

## HON. MIKE GRAVEL

OF ALASKA

IN THE SENATE OF THE UNITED STATES

*Monday, November 22, 1971*

Mr. GRAVEL. Mr. President, I ask unanimous consent to have printed in the Extensions of Remarks the following legal motions, applications, affidavits, memoranda, orders, petitions and other papers dealing with the publication of the so-called Pentagon Papers.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

Oath of office;
Mr. GRAVEL letter to Mr. Garrity;
Motion to intervene—Mr. GRAVEL;
Brief in support of motion to intervene—Mr. GRAVEL;
Government opposition to motion to intervene;
Notice of hearing;
Motion for specification—Mr. GRAVEL—and order;
Motion to quash—Mr. GRAVEL—and order;
Motion to quash—Mr. Rodberg;
Brief in support of motion to quash—Mr. GRAVEL;
Affidavit of Mr. Dunphy;
Ridgely letter;
Affidavit of Mr. Rodberg;
Affidavit of Mr. GRAVEL;
Government opposition to motion for specification;
Government brief in opposition to motion to quash;
Mr. Rodberg brief in support of motion to quash;
Memorandum and decision of October 4, 1971;
Second. Mr. Rodberg subpena;
Motion in reconsideration and stay—Mr. GRAVEL;
Brief in support of motion for reconsideration—Mr. GRAVEL;
Brief in support of motion for reconsideration—Mr. Rodberg;
Government motion for extension of time;
Motion, and Government brief in opposition to reconsideration;
Government motion for order and order commanding Mr. Rodberg to appear before the the grand jury;
Reply memo for reconsideration;
Motion to intervene—Mr. Webber;
Motion to quash—Mr. Webber;
Order granting motion to intervene—Mr. Webber;
Order granting motion to stay—Mr. Webber;
Motion for further relief—Mr. GRAVEL;
Motion for stay pending proposition of motion for further relief;
Government for modification of order;
Motion and order denying steno copy of grand jury minutes;
Subpena to N. E. Merchants Bank;
Order denying motion for reconsideration;
Order denying Mr. Rodberg's motion for certification;
Order denying motion for further relief;
Supplemental protective order of October 29, 1971;
Notice of appeal—Mr. Rodberg;
Notice of appeal—Mr. Webber;
Government notice of cross-appeal;
Motion for stay pending appeal—Mr. GRAVEL;
Motion for stay pending appeal—Mr. GRAVEL;
Order of October 29;
Motion for postponement of argument;
Order of November 1;
Government brief on appeal;
Brief on appeal—Mr. GRAVEL;
Motion for order to show cause;
Order to show cause;
Affidavit of Charles Fishman;
Brief on appeal—Mr. Rodberg;
Reply brief—Mr. GRAVEL;
Government motion in opposition to Mr. Rodberg brief;
Rejected stipulation;
Granted stipulation;
Order withdrawn—order to show cause;
Order granting Government motion in opposition to Mr. Rodberg's brief;
Mr. Rodberg's motion for reconsideration;
Order denying reconsiderations; and
Letter to clerk and attachment.

OATH OF OFFICE (WITHOUT COMPENSATION)

I, Paul C. Vincent, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of Special Attorney under letter of appointment dated July 2, 1971 authorizing me to assist in presentation to the grand jury and trial of the case or cases in the District of Massachusetts in which the Department is informed that various persons have violated in the District of Massachusetts the laws relating to the retention of public property or records with intent to convert (18 U.S.C. 641), the gathering and transmitting of national defense information (18 U.S.C. 793), the concealment or removal of public records or documents (18 U.S.C. 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. 371) on which I am about to enter: So help me God.

PAUL C. VINCENT.

Date of Birth Dec. 4, 1914.
Date of entry upon duty July 7, 1971.
Subscribed and sworn to before me this 7th day of July A.D., 1971, at R———, Mass.

RICHARD M. PELL,
*Clerk.*

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UNITED STATES SENATE,
*Washington, D.C., August 26, 1971.*

Hon. W. ARTHUR GARRITY, Jr.,
*United States District Judge,*
*Federal Court House,*
*Boston, Massachusetts*

DEAR JUDGE GARRITY: I have been informed by Leonard Rodberg, a personal servant of mine, that he has been subpoenaed to appear before a Federal Grand Jury in Boston at 10 AM, August 27, 1971. I do not know why Mr. Rodberg has been ordered to appear.

However, if Mr. Rodberg has been subpoenaed for the purpose of testifying about any matter or activity done with respect to the performance of my constitutional duties as a United States Senator, I have authorized my attorney, Charles Louis Fishman, to intervene in the matter to assert my

constitutional right to be free of any judicial inquiry for such activities.

Specifically, I have ordered Mr. Fishman to intervene if the Federal Grand Jury attempts to inquire into my actions, or the actions of any of my personal servants, in placing the "Pentagon Papers" into the Official Record of the Senate Subcommittee on Buildings and Grounds or releasing a copy of that Official Record.

I thank you for your time and consideration.

Sincerely,

MIKE GRAVEL.

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[In the U.S. District Court for the District of Massachusetts, Civil Division, Civil Action No. EBO–71–172]

MOTION TO INTERVENE

(In re the matter of Leonard Rodberg)

Comes now Movant, United States Senator Mike Gravel and moves this Honorable Court for leave to intervene in the above captioned cause and as reasons therefore states:

(1) Leonard Rodberg is a personal servant of the Movant.

(2) As Movant's personal servant, Leonard Rodberg has performed acts which are now the subject of an inquiry by a Federal Grand Jury.

(3) The aforesaid Federal Grand Jury has subpoenaed Leonard Rodberg to appear and give testimony with respect to the aforesaid acts on Friday, August 27, 1971 at 10 a.m.

(4) All of the aforesaid acts performed by Leonard Rodberg for the Movant were under the Movants' direction and control.

(5) All of the acts performed by Leonard Rodberg upon orders from the Movant are immune from judicial inquiry by virtue of Movant's constitutional privileges and constitutional duties.

(6) The question presented herein raises serious and substantial constitutional issues which have not but should be decided by this Court.

(7) No other party to the above captioned cause can adequately represent the interest of Movant.

(8) The granting of this motion would best serve the interest of Justice.

*Wherefore,* Movant respectfully requests that this Honorable Court grant the above captioned Motion to Intervene.

CHARLES LOUIS FISHMAN,
*Attorney for Movant.*

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[In the U.S. District Court for the District of Massachusetts, Docket No. EBD 71–172]

BRIEF IN SUPPORT OF MOTION TO INTERVENE

(United States of America versus John Doe)

On August 24, 1971, a grand jury subpoena was served upon Dr. Leonard S. Rodberg, who has been and is presently a member of the personal staff of United States Senator Mike Gravel. In moving to quash the subpoena, Dr. Rodberg alleged, *inter alia,* that the subject matter of the inquiry to be made by the grand jury related to acts done by Senator Gravel, with the necessary assistance of his staff, in reading and inserting into the record the so-called "Pentagon Papers" at the June 29, 1971, hearing of the Senate Subcommittee on Buildings and Grounds; and Affidavits have been submitted by Dr. Rodberg in support of this allegation. Counsel for the Department of Justice have not rebutted this allegation in any way; indeed, during oral argument at the August 27 hearing before this Court they declined to state whether it was true or false.[1]

Assuming Dr. Rodberg's allegations to be true—as we must in light of the record of this proceeding—Senator Gravel has moved to intervene in order to protect his right to be free of judicial inquiry of his official acts, secured to him as a United States Senator by Article I, Section 6 of the Constitution. It is our contention that the subpoenaing by a grand jury of a personal assistant of a member of Congress with respect to the acts of that member done in the course of his official duties, or with respect to the acts of a personal staff assistant in aiding that member in the discharge of his duties, violates that member's constitutional privilege. Since the right asserted by Senator Gravel is personal to him and will be abridged if Dr. Rodberg is obligated even to appear before the grand jury, Senator Gravel is entitled to intervene in this proceeding, for only Senator Gravel can adequately represent his own interests.[2]

The argument in support of intervention necessarily involves an analysis of the nature which is threatened by the grand jury subpoena. We will therefore demonstrate in this Brief that: (1) the actions of Senator Gravel concerning the Pentagon Papers were done in the course of his duties as a member of Congress and are totally immune from judicial inquiry of any kind by virtue of the prohibitions of Article I, Section 6; and (2) the Federal Courts are without power to order a staff assistant of Senator Gravel to appear and testify before a grand jury about these matters.

A. THE ACTIONS TAKEN BY SENATOR GRAVEL IN RELATION TO THE PENTAGON PAPERS ARE ABSOLUTELY IMMUNE FROM JUDICIAL INQUIRY

The Constitution provides that members of Congress, "for any Speech or Debate in either House . . . shall not be questioned in any other Place." Article I, Section 6, Clause 1. A literalistic reading of this Clause might imply that Congressional immunity applies only with respect to words spoken on the floor. However, this narrow construction has been rejected by the Supreme Court since the earliest cases. In the landmark decision of *Kilbourn v. Thompson,* 103 U.S. 168 (1881), the Court held that the Speech and Debate Clause affords protection for all normal functions of a member of Congress, including, in addition to words spoken in debate, resolutions offered, votes taken, and actions of committees.

Decisions following *Kilbourn* have reaffirmed these principles. Perhaps most significant is *United States* v. *Johnson,* 383 U.S. 169, 179 (1966), where the Court emphasized that the privilege of the Speech and Debate Clause "should be read broadly to include not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it.' " Moreover, in holding that the privilege was even more applicable to criminal cases than to civil tort suits the Court traced its lineage to the seditious libel prosecutions of members of Parliament whom the Crown believed had acted in subversive or treasonable ways. "[I]t is apparent from the history of the Clause that the privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." Id., at 180–81. It would seem, therefore, that the subject-matter of the present case—a statement in committee critical of executive conduct in foreign relations—falls squarely within the hard-core protection of the Speech and Debate Clause. *See also Powell* v. *McCormack,* 395 U.S. 486, 502–03 (1969).

Finally it is clear that the privilege cannot be defeated by the Executive challenging the legitimacy of the actions of a member of Congress in committee. If this were so, *Kilbourn,* where the committee members were found to have lacked jurisdiction but were nevertheless immune, and *Powell,* where the committee members were held immune even though found to have acted unconstitutionally, would have been decided otherwise. Similarly, the Supreme Court has held on other occasions that the motivations of committee members and the legality of their conduct in committee are beyond the cognizance of the courts. *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951). If a court were to oblige the Executive by pursuing such inquires, it would leave members of Congress open to the harassment and intimidation which the Clause seeks to prevent.

Accordingly, the actions taken by Senator Gravel in making public the Pentagon Papers are absolutely immune from judicial inquiry.

B. SENATOR GRAVEL'S PRIVILEGE UNDER THE SPEECH AND DEBATE CLAUSE WILL BE VIOLATED IF A STAFF ASSISTANT IS ORDERED TO TESTIFY BEFORE THE GRAND JURY ABOUT HIS OFFICIAL CONDUCT

The Speech and Debate Clause is one of the principle instruments in the Constitution to preserve the separation of powers among the three independent branches of government. The Clause is designed to insure that a member of Congress is able to act fearlessly in the discharge of his official duties, without being afraid of retaliation from a possibly hostile Executive. In order for the Clause to have vitality in achieving this end, it must be construed to immunize a Senator's immediate staff from criminal prosecution or other forms of retaliation for assisting the Senator in carrying out his official duties. No Senator or Congressman could even attempt to meet his official responsibilities without the aid of a personal staff. In determining how to cast his vote on complex issues, in preparing a speech or comments to persuade his colleagues, and in communicating with his constituents, a member of Congress must of necessity rely in part on research and secretarial assistance and the advice of trusted aides. But if a Senator or Congressman is faced with the prospect of possible criminal sanctions against his assistant, he will be deterred from acting courageously on controversial issues. It is no answer to suggest that he will cavalierly sacrifice the interests of those closest to him so as to accomplish the greatest good; this is just the sort of grisly choice which the Speech and Debate Clause sought to foreclose. Nor is it an answer to say that these adverse consequences can be avoided by inviting his staff to desert and isolate him in situations in which he needs their assistance the most. If the Speech and Debate Clause is to have meaning, its privilege must afford protection to a Senator's or Congressman's personal staff.

History and the case law combine with fundamental policy to compel this conclusion. In what is without doubt the single most authoritative interpretation of the scope of Congressional privilege under the Constitution, Thomas Jefferson stated unequivocally that members of the legislature ". . . are at all times exempted from question elsewhere, for anything said in their own House; that during the time of privilege, . . . neither a member himself, his . . . wife, *nor his servants . . . may be arrested* or mesne process, in any civil suit . . . *nor impleaded, cited, or subpoenaed in any court . . .* ". Jefferson's Manual of Parliamentary Practice, Section III, reprinted in Constitution, Jefferson's Manual

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[1] The subpoena itself is totally devoid of any information on this issue. It does not even contain a statutory reference to the alleged criminal violations under investigation.

[2] This intervention is without prejudice to Dr. Rodberg's asserting his own privileges and rights as a bar to the grand jury summons. And there may, of course, by a confluence of arguments with respect to the scope of the Congressional privilege, in much the same way as would result if an attorney were called before the grand jury and his client intervened and asserted the attorney-client privilege.

and Rules of the House of Representatives, p. 124 (1971 edition).[3] (emphasis supplied)

Jefferson's interpretation of the scope of the Speech and Debate Clause has gone unquestioned until the present. There are, happily, few cases which have arisen under the Clause and none on this precise issue, for the Executive branch has historically respected the Constitutional privileges of members of Congress.[4] The decided cases do, however, elucidate upon the underpinnings of the Clause in a manner which bears significantly upon this case.

*First*, the Speech and Debate Clause was drafted as a guarantee of absolute freedom of speech for members of Congress. *See generally Tenney v. Brandhove*, 341 U.S. 367, 372–75 (1951). It drew its roots from the English Bill of Rights of 1689, which declared: "That the Freedom of Speech, and Debates or proceedings in Parliament, ought not to be impeached or questioned in any Court or place out of parliament." The Articles of Confederation and several of the first State Constitutions anticipated the 1789 document in containing similar unequivocal guarantees. The reason for carrying these forward into Article I, Section 6 was stated cogently by James Wilson, who was second only to Madison in his contributions to the Constitution:

"In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." [5]

The Supreme Court has emphasized that the legislative privilege set forth in the Speech and Debate Clause "will be read broadly to effectuate its purposes." *United States v. Johnson*, 383 U.S. 169, 180 (1966). The ultimate purpose of the free speech guarantee in the Clause, as with the First Amendment generally, is to vindicate the rights of the people in a representative government. *Tenney v. Brandhove, supra* at 373–74. The public has the right to be represented to the fullest by its elected Senators and Congressmen and the right to be informed to the fullest of their actions. Each of these rights would be jeopardized if a member of Congress cannot rely unhesitatingly upon the assistance of his staff, for otherwise he would be deterred from meeting his constitutional *duties* to his constituents. As the Supreme Court said in *Tenney v. Brandhove, supra* at 377:

"One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."

Nor would the privilege be of value if a legislator were to fear like action against his staff. The adverse effects of a possible criminal prosecution upon a legislator's freedom of speech is the same whether the named defendant is the legislator or his staff.

*Second*, the historical underpinnings of the Speech and Debate Clause take on added significance in this particular case. The actions of Senator Gravel which the Executive wishes apparently to make the subject of a criminal prosecution is the disclosure to his colleagues in Congress and to his constituents of material critical of Executive decisions in an area of prime importance to the country. Such retaliation by the Executive not only flies in the face of the free speech guarantees of the Speech and Debate Clause but is also unfortunately reminiscent of the very prosecutions which made the Clause necessary. The immediate root of the Speech and Debate Clause rested in the seditious libel prosecutions brought by the Crown to silence critical members of Parliament. *See generally United States* v. *Johnson*, supra at 178–82; *Powell* v. *McCormack*, 395 U.S. 486, 502–03 (1969). The immediate purpose of the Clause was "to prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson, supra* at 181. Unless the as yet undenied allegations by Dr. Rodberg are rebutted, we are presented in this case with the same techniques of intimidation of Congress which led, after hundred of years of struggle, to the incorporation of this Constitutional privilege. The historical abuses which brought the Speech and Debate Clause into being ought not be allowed to be resurrected under a perhaps more subtle guise. These abuses are "part of the intellectual matrix within which our own constitutional fabric was shaped," *cf. Marcus* v. *Search Warrants*, 367 U.S. 717, 729 (1961), and if allowed to intrude into the present will have the same disastrous consequences for representative democracy. No exception to the Clause should be made which could make possible the muzzling of Congress.

*Third*, both the Courts and the Executive have recognized that an official's privilege immunizes his assistants who aid him in the discharge of his duties. The court-created concept of judicial immunity has consistently been read to confer immunity on those who assist judges in deciding cases. *See, e.g., Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam* 275 U.S. 503 (1927). No one would suggest that a judge could fearlessly discharge his obligations if he himself were immune from say, libel suits attacking his opinions but his law clerks and secretary who assisted him in preparing the opinions were fair game. A legislator should expect no less immunity from his staff, particularly when the source of the legislative privilege is a constitutional provision and not merely a common-law rule. Compare *Tenny v. Brandhove, supra*, with *Pierson v. Ray*, 386 U.S. 547 (1967).

The Executive Branch also has asserted that official privilege extends to staff assistants. For the past two and one-half years, Dr. Henry Kissinger and others have refused to accede to the wishes of Congress to testify before Congressional committees. They have so refused on the grounds that as personal staff assistant to the President they may not be held to question by a coordinate branch of Government. The source of this privilege is said to be, by implication, in Article II of the Constitution. Surely the Executive Branch cannot now say that constitutional privilege is a one-way street—that it immunizes the staff of the Executive even from Congressional inquiry but that it gives no protection to the staff of a Senator from hostile Executive action.

We are not arguing, of course, that every individual who acts on behalf of a public official enjoys immunity for his actions. Such an argument would run contrary to the principle of *Marbury* v. *Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803). Persons such as the Sergeant-at-Arms who enforce the orders of Congress are subject to judicial accountability in the same manner as any law enforcement official. *Powell* v. *McCormack, supra* at 504–05; *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967) (general counsel of committee executing orders of committee to conduct illegal search). Similarly, police officials or United States marshals who enforce court orders are not immune from later accountability. *Pierson* v. *Ray, supra*. But these individuals occupy positions and perform functions that differ totally from those who assist a Senator or a judge in his primary official conduct.

*Fourth*, in one case the Supreme Court has suggested that legislative immunity extends to prohibiting the testimony of staff assistants concerning their actions in concert with the legislator. In *United States* v. *Johnson, supra*, Congressman Johnson was prosecuted for accepting a bribe to give a speech. Both Johnson and his administrative assistant were questioned on how the speech was prepared and written. The Supreme Court unanimously held that this evidence was "clearly proscribe[d]" by the Speech and Debate Clause. *Id.*, 383 U.S. at 173. The vice was not that Johnson himself had testified but that "an intensive judicial inquiry" had been made into the legitimacy of a speech of a member of Congress, and this "violate[d] the express language of the Constitution and the policies which underlie it." *Id.*, at 177. This consequence would entail whether Senator Gravel or Dr. Rodberg were to be subjected to grand jury inquiry with respect to Senator Gravel's actions in making public the Pentagon Papers at a committee hearing.

C. THE MOTION TO QUASH IS NOT PREMATURE, FOR ANY APPEARANCE BY DR. RODBERG WOULD VIOLATE SENATOR GRAVEL'S PRIVILEGE

The Court has asked counsel to brief the issue of what questions might properly be asked Dr. Rodberg by the grand jury. It is our position, as set forth above, that no inquiry may be made about Senator Gravel's disclosure of the Pentagon Papers or about Dr. Rodberg's assistance of the Senator. More fundamentally, however, unless the allegations in Dr. Rodberg's motion are rebutted, the motion to quash the subpoena must be granted. For if the grand jury intends to investigate into the official conduct of a United States Senator and his staff, any action by it in furtherance of that intention is unconstitutional. The Executive branch has asked this Court to invoke its process to compel the grand jury appearance of Dr. Rodberg. We respectfully submit that this Court, before lending its assistance, must determine the purpose and scope of the grand jury proceedings. For, assuming as we must under the present state of the record that the legislative privilege of Article I, Section 6 of the Constitution is in danger of invasion, any order by this Court in aid of the grand jury proceedings may itself work an unconstitutional end.

Further, the legislative privilege of Senator Gravel cannot adequately be protected by waiting until questions are propounded to Dr. Rodberg. Aside from the fact that the questioning itself is barred by the terms of the Speech and Debate Clause, regardless of the outcome of the proceedings, it is important to note that the proceedings themselves are secret. Neither Senator Gravel nor his representatives is entitled to witness the testimony, and the Senator's rights can be

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[3] The Manual was prepared by Jefferson when he was President of the Senate during his Vice-Presidency, from 1797 to 1801. It has been adopted by both Houses of Congress as governing except when in conflict with a standing rule. The Manual is also considered in Great Britain as an authoritative statement of Parliamentary procedure for the period in which it was compiled.

[4] Only five cases relate directly to the Speech and Debate Clause or discuss it extensively. They are Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhoven, 341 U.S. 367 (1951); and Kilbourn v. Thompson, 103 U.S. 168 (1881).

Other cases in which the Clause is cited are Marshall v. Gordon, 243 U.S. 521 (1917); Williamson v. United States, 207 U.S. 425 (1908); Burton v. United States, 196 U.S. 283 (1905); United States v. Kirby, 7 Wall. 482 (1868); Prigg v. Pennsylvania, 16 Pet. 619 (1843); Anderson v. Dunn, 6 Wheat. 204 (1821); and United States v. Cooper, 4 Dall. 341 (1800).

[5] II Works of James Wilson 38 (Andrews ed. 1896), quoted in Tenney v. Brandhove, *supra* at 373.

assured only by a prior judicial determination of the legal status of the proceedings. This in turn requires counsel for the Department of Justice to state on the record the precise purpose and scope of the grand jury investigation. If the record in this case remains as it is now, the subpoena must be quashed; we respectfully submit that this Court lacks the constitutional power to be a party to the violation of the Speech and Debate Clause.

CONCLUSION

The constitutional questions set forth in Senator Gravel's motion to intervene are of the highest magnitude. The rights asserted in that motion are personal and can best be represented by the Senator. We therefore request that this Court grant the motion to intervene.

Further, it is our view, as argued above, that any inquiry by the grand jury into the official actions of Senator Gravel, or his staff, through the compulsory testimony of his personal assistant, would do irreparable injury to separation of powers in the Government and is condemned by the Speech and Debate Clause. Accordingly, unless counsel for the Justice Department is prepared to show that the grand jury does not intend and will not inquire into these protected activities, we request this Court to quash the subpoena.[6]

Respectfully submitted,

ROBERT J. REINSTEIN,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.**

*Certificate of service*

I hereby certify that I served this Brief upon counsel for the parties by causing a copy of it to be mailed, postage prepaid, to Doris Peterson and James Reif, 588 Ninth Avenue, New York, New York, 10036, and by causing a copy of it to be hand-delivered to Alice Brady, United States Attorney Office, U.S. Post Office & Court House, Rm. 1107, Boston, Mass.

ROBERT J. REINSTEIN,
*Attorney for Senator Gravel.*

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U.S. DEPARTMENT OF JUSTICE,
*Washington, D.C., September 1, 1971.*

CHARLES LOUIS FISHMAN,
*Washington, D.C.*

DEAR MR. FISHMAN: Enclosed please find a copy of the Government's Opposition to your Motion for Intervention in the matter of the appearance of Leonard Rodberg before a Federal Grand Jury and a copy of my letter to Judge Garrity.

PAUL C. VINCENT, *Attorney.*

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SEPTEMBER 1, 1971.

Hon. W. ARTHUR GARRITY, Jr.,
*U.S. District Judge,*
*U.S. Post Office & Courthouse Building,*
*Boston, Mass.*

DEAR JUDGE GARRITY: Pursuant to your request, I am enclosing a copy of the Government's Opposition to Senator Gravel's Motion for Intervention in the matter of the appearance of Leonard Rodberg before a Federal Grand Jury.

The original has been filed with the Clerk of the Court and a copy mailed to Mr. Fishman, Attorney for Senator Gravel.

Sincerely,

PAUL C. VINCENT, *Attorney.*

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[6] Following Supreme Court practices, we are filing herewith a Motion for Specification and a Motion to Quash the Indictment. Should this Court grant the Motion to Intervene, we ask this Court to then consider these other motions.

*Counsel wish to acknowledge the assistance of Ralph Kates, a third-year student at Temple Law School, in the preparation of this Brief.

[In the U.S. District Court for the District of Massachusetts, Docket No. EBD–71–172–G]

GOVERNMENT'S POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO INTERVENE

(In the matter of the grand jury investigation (John Doe))

A Grand Jury in this district is engaged in investigating possible violations of 18 U.S.C. 793 (gathering and transmitting national defense information); 18 U.S.C. 641 (theft or conversion of government property); 18 U.S.C 2071 (concealment of public documents) and 18 U.S.C. 371 (conspiracy to commit such offenses) and possible violations of other laws. A witness, Leonard Rodberg, has been subpoenaed to appear before this Grand Jury. Upon receipt of the subpoena Mr. Rodberg filed a motion to quash that subpoena. United States Senator Mike Gravel has filed a motion to intervene in any actions taken by Mr. Rodberg.

In his motion to intervene, Senator Gravel contends that the subpoenaing of Leonard Rodberg to appear and give testimony before a Federal Grand Jury raises serious and substantial constitutional issues because (1) Leonard Rodberg is a personal servant of the Senator; (2) As the Senator's personal servant Leonard Rodberg has performed acts which are now the subject of an inquiry by the Federal Grand Jury; (3) These acts performed by Leonard Rodberg for the Senator were under the Senator's direction and control, and (4) All of the acts performed by Leonard Rodberg upon orders from the Senator are immune from judicial inquiry by virtue of his constitutional privileges and constitutional duties. The Senator further avers that no other party to this cause can adequately represent his interest.

The only provision in Federal law for intervention is contained in Rule 24, Federal Rules of *Civil* Procedure, which provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Federal Rules of Civil Procedure govern the procedure in United States District Courts *only* in suits of a *civil* nature and are not applicable in criminal proceedings. Rule 1, *F.R.C.P.; United States* v *Burdette*, (D.C Mich 1957), 161 F Supp 326, *affd* 254 F.2d 610, *cert. den.* 359 U.S. 976; *United States* v *Solomon* (D.C. Ill 1944), 3 FRD 411.

It is submitted that Rule 24 is not applicable in this matter and, moreover, there is no basis in law for a person to intervene in a matter such as this which involves a criminal investigation being conducted by a Federal Grand Jury

Even if Rule 24 were to be held applicable in a criminal case, it would have no application here because grand jury proceedings are not adversary in nature, and there is no "law suit" here in which to intervene. The right to intervene presupposes the existence of a pending suit. *Davis* v. *Jury Commission of Montgomery County* (M.D. Ala. 1966), 261 F. Supp. 591.

The motion to intervene is based upon speculation and conjecture. The Grand Jury has broad powers of investigation, and the scope of its investigation cannot be questioned by a witness—much less by one not under subpoena such as this movant. In *Blair* v. *United States*, 250 U.S. 273, the Supreme Court stated,

[The grand jury] is a grand inquest, a body with powers of investigation and inquisition the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable results of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

It is apparent, therefore, that a *witness* cannot control the scope of an investigation by the grand jury. To permit *third parties* to intervene for the purpose of asserting rights with respect to the testimony of subpoenaed witnesses would create chaos in the grand jury system, frustrating the traditionally broad investigatory functions of the grand jury.

At the time the Motion to Intervene was filed with this Court, counsel for Senator Gravel represented that the Motion should be granted since the subpoena served upon the witness Rodberg did not set forth the scope of the grand jury's investigation. It is axiomatic that a witness may be compelled to testify before a grand jury without being apprised, in the subpoena, of the subject matter under inquiry or the names of persons about whom he is to testify. *In Re Meckley*, (D.C.M.D. Penn. 1943), 50 F. Supp. 274; *affd.* 137 F.2d 310; *Cert. den.* 320 U.S. 370.

Even under Rule 24 the intervention of a party as a matter of right presupposes that the intervenor's interests are or may not be adequately represented by existing parties to the litigation. *Sam Fox Publishing Company* v. *United States* (N.Y. 1961), 366 U.S. 683. The movement in this cause contends that the question presented here raises serious and substantial constitutional issues, and that no other party can adequately represent his interest. However, in his motion to quash the subpoena of the grand jury, Leonard Rodberg has contended that his compelled appearance before the grand jury violates Congressional privilege, separation of powers, and the Speech and Debate Clause of the Constitution. Mr. Rodberg expressed the opinion that the matters concerning which he would be questioned will directly relate to and concern the discharge of his responsibilities as a member of Senator Gravel's staff.

Mr. Rodberg also averred that he would show by affidavit the need to insulate from executive and judicial scrutiny the performance of his responsibilities as an aide and agent of a United States Senator, acting at the express direction of the Senator, in order adequately to protect the fulfillment of that Senator's constitutional rights, duties, and responsibilities as a Senator. Moreover, Mr. Rodberg stated his intention to submit the affidavit of Senator Gravel.

It is apparent from the foregoing that the Senator's interests, if any, in this matter can be adequately protected by Mr. Rodberg, who has raised the same constitutional issues noted in the instant motion.

The Government submits that this Motion does not properly lie for all of the foregoing reasons. The Government also submits that the usual and proper method for an individual desirous of protecting his interests before a grand jury is to make an application for his voluntary appearance before that grand jury so that he may present his side of the story and answer any pertinent questions posed by the grand jury.

Wherefore, for all of the foregoing, this motion should be denied.

Respectfully submitted,

PAUL C. VINCENT,
*Attorney, Department of Justice.*
JON MARPLE,
*Attorney, Department of Justice.*

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CERTIFICATE OF SERVICE

A copy of the foregoing Opposition to Senator Gravel's Motion for Intervention

was mailed, postage paid, this date, the first day of September 1971 to Charles Louis Fishman, Esq. 633 East Capitol Street, Washington, D.C. 20003.

PAUL C. VINCENT,
*Attorney, Department of Justice.*

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[In the U.S. District Court for the District of Massachusetts, Docket No. EBD 71–172]

MOTION FOR SPECIFICATION

(United States of America versus John Doe)

Comes now movant, United States Senator Mike Gravel, and respectfully moves this Court for an Order requiring the Government to specify in detail the purpose, scope and exact nature of the questions to be asked of Dr. Leonard Rodberg by the Federal grand jury. Movant submits that absent such specification, the appearance of Dr. Rodberg before the grand jury will violate movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, movant states as follows:

1. Dr. Rodberg was served with a subpeona on Tuesday, August 24, 1971, which seeks to compel Dr. Rodberg's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

2. Dr. Rodberg is a personal servant of movant and assisted movant in the discharge of his duties as a United States Senator, and in so doing has acted under movant's direction and control.

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[In the U.S. District Court for the District of Massachusetts, Docket No. EBD 71–172]

MOTION TO QUASH GRAND JURY SUBPENA

(United States of America versus John Doe)

Comes now movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing a subpoena served upon Dr. Leonard Rodberg on Tuesday, August 24, 1971, which seeks to compel Dr. Rodberg's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Dr. Rodberg should be quashed because it violates movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to movant by the Speech and Debate Clause of the Constitution, Article I, Section 6. Clause 1.

In support of this Motion, movant states as follows:

1. Dr. Rodberg is a personal servant of movant and has assisted movant in the discharge of his duties as a United States Senator, and in so doing has acted under movant's direction and control.

2. In his aforesaid capacity as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure.

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[In the United States District Court for the District of Massachusetts, Docket No. EBD 71–172]

United States of America versus John Doe

MOTION FOR SPECIFICATION

Comes now movant, United States Senator Mike Gravel, and respectfully moves this Court for an Order requiring the Government to specify in detail the purpose, scope and exact nature of the questions to be asked of Dr. Leonard Rodberg by the Federal grand jury. Movant submits that absent such specification, the appearance of Dr. Rodberg before the grand jury will violate movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, movant states as follows:

1. Dr. Rodberg was served with a subpoena on Tuesday, August 24, 1971, which seeks to compel Dr. Rodberg's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

2. Dr. Rodberg is a personal servant of movant and assisted movant in the discharge of his duties as a United States Senator, and in so doing has acted under movant's direction and control.

3. In his aforesaid capacity as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," wnicn were critical of the Executive's conduct in the field of foreign relations.

4. It is believed that the questions to be asked of Dr. Rodberg by the grand jury will concern the acts of movant and of Dr. Rodberg set forth in paragraphs 2 and 3.

5. All of the said acts performed by movant and by Dr. Rodberg are immune from judicial inquiry by virtue of movant's constitutional privileges and constitutional duties.

Respectfully submitted.

ROBERT J. REINSTEIN,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

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CERTIFICATE OF SERVICE

I hereby certify that I served this Motion upon counsel for the parties by causing a copy of it to be mailed, postage prepaid, to Doris Peterson and James Reif, 588 Ninth Avenue, New York, New York, 10036, and by causing a copy of it to be hand-delivered to

ROBERT J. REINSTEIN.

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[In the U.S. District Court for the District of Massachusetts]

MOTION TO QUASH GRAND JURY SUBPOENA

(United States of America versus John Doe)

Comes now movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing a subpoena served upon Dr. Leonard Rodberg on Tuesday, August 24, 1971, which seeks to compel Dr. Rodberg's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Dr. Rodberg should be quashed because it violates movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, movant states as follows:

1. Dr. Rodberg is a personal servant of movant and has assisted movant in the discharge of his duties as a United States Senator, and in so doing has acted under movant's direction and control.

2. In his aforesaid capacity as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.

3. It is believed that the questions to be asked of Dr. Rodberg by the grand jury will concern the acts of movant and of Dr. Rodberg set forth in paragraphs 1 and 2.

4. All of the said acts performed by movant and by Dr. Rodberg are immune from judicial inquiry by virtue of movant's constitutional privileges and constitutional duties.

5. The appearance of Dr. Rodberg before the grand jury would violate movant's constitutional privileges.

Respectfully submitted,

ROBERT J. REINSTEIN,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

CERTIFICATE OF SERVICE

I hereby certify that I served this Motion upon counsel for the parties by causing a copy of it to be mailed, postage prepaid, to Doris Peterson and James Reif, 588 Ninth Avenue, New York, New York, 10036, and by causing a copy of it to be hand-delivered to

ROBERT J. REINSTEIN.

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[U.S. District Court for the District of Massachusetts, Docket No. EBD 71–172]

(United States of America versus John Doe)

APPLICATION FOR AN ORDER TO SHOW CAUSE AND A STAY OF A GRAND JURY SUBPOENA

Applicant Dr. Leonard S. Rodberg, upon a grand jury subpoena served upon him on the 24th day of August, 1971, the motion to quash said subpoena, the verified affidavits of Dr. Leonard S. Rodberg and of James Reif and exhibits annexed thereto, and all the proceedings heretofore had herein, respectfully moves this Court:

(1) for the issuance of an Order to Show Cause as annexed hereto and;

(2) for a stay of the execution of the specified grand jury subpoena presently returnable on August 27, 1971, until disposition of applicant's motion to quash said subpoena; and

(3) granting such other and further relief as to this Court may seem just and proper in the premises.

Respectfully submitted

DORIS PETERSON,
JAMES REIF,
*c/o Center for Constitutional Rights.*
NEW YORK, N.Y., *August 27, 1971.*

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[U.S. District Court for the District of Massachusetts, docket No. —— ]

(United States of America versus John Doe)

ORDER TO SHOW CAUSE

Upon the grand jury subpoena served upon Dr. Leonard S. Rodberg, the motion to quash, the verified affidavits of Leonard S. Rodberg and James Reif and the exhibits annexed thereto and all the proceedings heretofore had herein let the government show cause before this Court at the United States Courthouse, Boston, Massachusetts, in Courtroom ——, at —— o'clock, on the —— day of —, 1971, why an order should not be granted quashing the above specified subpoena on each of the following independent grounds:

1. that a compelled appearance by Leonard S. Rodberg before the secret grand jury proceedings violates congressional privilege, separation of powers and the Speech and Debate Clause,

2. that it abridges movant's rights to freedom of the press, freedom of expression and freedom of association in violation of the First Amendment,

3. that it violates movant's rights under the Fourth Amendment and Title 18 U.S.C. Sections 2510–20 to be free from unconstitutional and illegal electronic surveillance,

4. that in failing to delimit its scope, the subpoena is unreasonable under the Fourth Amendment, a denial of due process under the Fifth Amendment, and a denial of the right to effective counsel under the Sixth Amendment, and

5. that it constitutes an abuse of process; or alternatively, why a protective order should not be entered limiting the questioning of movant before the grand jury to a scope consistent with law.

Be it further ordered that execution of the above specified subpoena be hereby stayed pending disposition of the motion to quash said subpoena.

And be it further ordered that personal service or by certified mail by the —— day of August, 1971, of this Order to Show Cause and the papers above specified upon which it is granted shall be deemed sufficient.

Dated August —, 1971.

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[U.S. District Court for the District of Massachusetts, Docket No. ——]

(United States of America v. John Doe)

MOTION TO QUASH GRAND JURY SUBPOENA AND TO STAY GRAND JURY APPEARANCE PENDING DISPOSITION OF THIS MOTION

Dr. Leonard S. Rodberg respectfully moves this Court for an order quashing a subpoena served upon him on Tuesday, August 24, 1971, which seeks to compel his appearance before a federal grand jury sitting in this district, to wit, in Boston, Massachusetts, on Friday, August 27, 1971 at 10:00 a.m. Alternatively, Dr. Rodberg moves for the entry of a protective order limiting the questioning of movant before the grand jury to a scope consistent with law. Further, Dr. Rodberg respectfully requests that his subpoena be adjourned and his appearance before the grand jury be stayed pending disposition of this motion and that he be permitted time in which to prepare and submit to this Court substantial affidavits and other documentary material in support of this motion.

Movant submits that this subpoena should be quashed upon, *inter alia*, each of the following independent grounds:

a. That it violates Congressional privilege, separation of powers and the Speech and Debate Clause;

b. That it abridges movant's rights to freedom of the press, freedom of expression and freedom of association in violation of the First Amendment.

In support of paragraphs (a) and (b), movant alleges as follows:

1. On June 29, 1971 Mike Gravel, United States Senator from the State of Alaska, in the course of a meeting of the Senate Subcommittee on Public Buildings and Grounds read publicly a portion of the so-called "Pentagon Papers," and inserted the rest of the papers in his possession into the record of the subcommittee.

2. Immediately after that reading and at the express direction of Senator Gravel, aides and assistants to the Senator distributed to members of the press and others copies of the papers from which Senator Gravel had read.

3. On the night of June 29, 1971, movant was and continues to be, down to the present date, a member of Senator Gravel's staff.

4. On Wednesday, August 18, 1971, it was reported and alleged in the Washington Post that Senator Gravel had turned over copies of the "Pentagon Papers" to a Boston, Massachusetts, publisher for publication as a book. It was further alleged that movant here had arranged on Senator Gravel's behalf the transfer and publication of these papers. It was further alleged that movant here had made previous unsuccessful efforts to arrange publication of the papers in Senator Gravel's possession. See *Washington Post* article attached hereto as Exhibit "A."

5. On Tuesday, August 24, 1971, it was reported and alleged in an article in "Boston After Dark," a weekly newspaper, that, after several earlier unsuccessful attempts, movant had, at Senator Gravel's behest, arranged the publication of the papers in Senator Gravel's possession. See the article attached hereto as Exhibit "B."

6. On the evening of that same day, Tuesday, August 24, movant was served at his home in Silver Spring, Maryland, by an agent of the Federal Bureau of Investigation with the instant subpoena which seeks to compel his appearance on Friday, August 27 at 10:00 a.m. before a federal grand jury here in Boston. See subpoena attached hereto as Exhibit "C."

7. It is believed (as shown in the affidavit attached hereto) that the questions to be asked of movant before the grand jury will concern the June 29 meeting of the Subcommittee on Public Buildings and Grounds and the distribution of papers that occurred immediately thereafter.

8. It is further believed that the questions to be asked of movant before the grand jury will concern the allegation made in the newspaper articles attached hereto as Exhibits "A" and "B" that he has been involved in an effort to publish as a book the documents in Senator Gravel's possession.

9. Movant believes that an appearance for the purpose of questioning him regarding these matters raises substantial and fundamental issues concerning the scope of Congressional privilege and of the Speech and Debate Clause, and the distribution of governmental authority among the separate and distinct branches of government.

10. Movant further believes that such questions raise important and delicate issues regarding First Amendment freedoms, particularly freedom of the press, freedom of expression and freedom of association.

11. Movant therefore sought to retain legal counsel in connection with his appearance before the grand jury.

12. Informed late Wednesday, August 25, that Doris Peterson and James Reif were attorneys who had had experience in representing citizens subpoenaed to appear before grand juries, movant contacted them by telephone that same afternoon at their law offices in New York City and arranged to meet with them in person the following morning, Thursday, August 26.

13. Movant met with the aforementioned attorneys on Thursday, August 26. This was the first time they had ever met.

14. After some discussion it became apparent that time would be needed in order properly to protect Dr. Rodberg's rights and, in particular, to prepare and obtain affidavits in support of the claims enunciated above.

15. Therefore James Reif, one of Dr. Rodberg's attorneys, called Paul Vincent, United States Attorney, on Thursday, August 26 seeking a voluntary adjournment of movant's subpoena until movant and his attorneys had had sufficient time to prepare a memorandum of law and affidavits in support of Dr. Rodberg's position.

16. Mr. Vincent declined to adjourn the subpoena. He was thereupon informed of Dr. Rodberg's intention to seek a stay from this Court.

17. The affidavits and documentary material which movant seeks time to prepare, will show that the matters concerning which he would be questioned will directly relate to and concern the discharge of his responsibilities as staff member of the Honorable Mike Gravel, United States Senator from Alaska.

18. Movant would show by affidavit the need to insulate from executive and judicial scrutiny the performance of his responsibilities as an aide and agent of a United States Senator, acting at the express direction of that Senator, in order adequately to protect the fulfillment of the Senator's constitutional rights, duties and responsibilities as a Senator.

In connection with the showing described in this paragraph and paragraph 17, movant intends to submit the affidavit of Senator Mike Gravel, who will describe in detail the responsibilities of his office and his relationship with movant. Senator Gravel is presently in his home state of Alaska and his affidavit is therefore presently unobtainable.

19. The affidavits will further show that Dr. Rodberg's appearance before the grand jury will constitute great and immediate irreparable injury to the First Amendment rights of movant and of others. In particular, movant would show that his appearance would exert a chilling effect and constitute a prior restraint upon the public distribution and publication of the papers in the possession of Senator Gravel and other alleged copies of the Pentagon Papers. The appearance would also chill and inhibit the future discussion and distribution in the press and elsewhere of any facts which may reflect unfavorably on past or present national administrations, facts of which every American citizen must have knowledge if he or she is to fulfill his or her responsibilities as an informed and intelligent participant as a voter and citizen in a democratic society.

21. Movant would further show by affidavits that compelling the appearance of a citizen before a grand jury for the express purpose of testifying about the distribution and publication of materials whose distribution and publication may not, consistent with the First Amendment, be suppressed, *New York Times* v. *United States*, 91 S.Ct. 2140 (1971), would deter the future distribution and publication of the same or other similar materials by deterring persons with access to such materials from supplying them to the press, thus drying up press sources of information about matters of great public importance.

Movant submits that in consideration of the aforegoing he should be excused from appearance before the grand jury or, alternatively, that this Court enter a protective order limiting the permissible scope of interrogation, unless and until the government demonstrates a compelling justification for movant's appearance and testimony. Specifically, movant submits that the government, to meet its burden must show (i) reasonable grounds to believe that Dr. Rodberg has information (ii) relevant to a specific and specified incident the grand jury has grounds for investigating as a possible violation within its jurisdiction of designated statutes, and (iii) that the government has no alternative sources for the same or equivalent information whose use would not entail an equal degree of incursion upon First Amendment rights. Movant further alleges that his subpoena should be quashed on the grounds:

c. That it violates movant's right under the Fourth Amendment and Title 18 U.S.C. Sections 2510–20 to be free from unconstitutional and illegal electronic surveillance; specifically, that the subpoena itself as well as the questions to be propounded to movant are the direct or indirect product of unlawful electronic surveillance of or directed at movant or of premises the surveillance of which movant has standing to object to.

In connection with this issues, movant requests a hearing pursuant to *Alderman* v. *United States*, 394 U.S. 165 (1969) and 18 U.S.C. § 3504, wherein the government must affirm or deny the existence of such surveillance and wherein, if the government represents that no such surveillance has occurred, movant may examine the accuracy and adequacy of that representation.

d. That in failing to delimit its scope, the subpoena is unreasonable under the Fourth Amendment; a denial of due process under the Fifth Amendment; and a denial of the right to the effective assistance of counsel under the Sixth Amendment; and

e. That it constitutes an abuse of process.

Respectfully submitted.

DORIS PETERSON,
JAMES REIF,
*c/o Center for Constitutional Rights.*

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[From the Washington Post, Aug. 18, 1971]

SENATOR GRAVEL TO PUBLISH WAR PAPERS

(By Ken W. Clawson)

Mike Gravel, the Alaska senator who stunned his colleagues with a midnight reading of portions of the secret Pentagon study of the Vietnam war, has turned over the documents to a Boston publisher for compilation into a book.

Beacon Press and Gravel said yesterday the four-volume book would be released in late October in paperback and hard cover editions. New disclosures will be contained in the volumes, they said.

The book will be titled, "The Senator Gravel Edition of the Pentagon Papers: The Defense Department History of Decision Making on Vietnam."

Beacon Press officials said the initial printing would range between 10,000 and 15,000 in paperback and fewer than 5,000 in hard cover.

A Justice Department spokesman said the Beacon announcement is being studied "to determine what, if any, action will be taken." He pointed out that Attorney General John N. Mitchell has said that "no avenue of criminal prosecution has been ruled out in connection with theft and unauthorized disclosure of the classified papers.

Beacon agreed to publish Gravel's copies of the documents after negotiations with Dr. Leonard S. Rodberg, a former University of Maryland physicist who is now a fellow at the Institute for Policy Studies here. Five other publishers turned Rodberg down.

Gravel, in a speech yesterday before the Commonwealth Club in San Francisco, said the controversial papers "deserve the widest possible dissemination." He said that was his reason for shocking the Senate on June 29 by alternately reciting and weeping as he read parts of the documents and placed about 4,000 pages into the record of his public works subcommittee. That record has never been published.

"Every American is entitled to the opportunity of examining and digesting for himself the lessons they contain as a means for ensuring that never again will this great nation be duped into waging a war under false pretenses," Gravel said.

Beacon officials said in Boston the edition would contain 14 times as much of the voluminous papers as has been published in the nation's newspapers or in the Bantam-New York Times book, "The Pentagon Papers," issued in July.

The book will contain 95 per cent of the Pentagon task force narrative on the history of U.S. involvement in Vietnam, Beacon officials said.

Beacon is a nonprofit publishing firm associated with the Unitarian-Universalist Association.

Beacon officials criticized the American press for losing interest in the study after the Supreme Court upheld the right of the New York Times and The Washington Post to publish the classified material. Daniel Ellsberg, who worked on the study in the Pentagon, is awaiting trial in Los Angeles after he admitted disseminating the material to the press as an act of conscience.

Beacon officials said they did not anticipate legal repercussions, because they were printing—with the exception of a foreword by Sen. Gravel—only those documents that the Alaska senator had placed in the subcommittee record.

That record has not been published because Chairman Jennings Randolph (D-W. Va.) reportedly was so furious with Gravel for calling the unauthorized, nongermane subcommittee meeting that he refused to authorize payment of a stenographer or a public record.

Before Beacon agreed about 10 days ago to publish the papers, at least five New York publishing houses and the MIT Press in Cambridge, Mass., turned them down, according to Rodberg.

Rodberg said yesterday the New York publishing house of Simon and Shuster was prepared to publish the documents supplied by Gravel—by an as yet unidentified source—until the Bantam book went on the market in July. He said four other major houses turned down the material, also on grounds that it was a losing commercial venture.

A Beacon spokesman said yesterday the Gravel book is the biggest venture in the history of the small publishing firm. More than $100,000 is required to bring out the book by October, the spokesman said.

The documents and narrative will be published verbatim in contrast to the Bantam book, which also contained New York Times news stories about the documents.

Gravel will receive no royalties. The Times paid contributors to the Bantam book a flat fee for their work in addition to their salaries as editors, reporters, and aides.

The Pentagon Papers was jointly published by Bantam Books and Quadrange Books, a subsidiary of the New York Times. Profits go to the two firms.

Rodberg's involvement with Sen. Gravel stems from the Alaska Senator's June 29 reading, although the physicist's antiwar activities have been increasingly visible.

During the 1969 Senate controversy over the anti-ballistic missile system, Rodberg was one of the authors of a study for Sen. Edward M. Kennedy (D-Mass.) that concluded the ABM would not work and would appear to Russia as an escalation of the arms race.

Rodberg was a member of the executive committee of the Federation of American Scientists in 1967 when the group declared in a policy statement that no university should accept grants that require research findings to be kept secret. Last April, Rodberg edited a book, "The Pentagon Watchers," which explored military propaganda and secrecy.

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[From Boston After Dark, Aug. 24, 1971]

### Why MIT and Harvard Suppressed the Pentagon Papers

(By Bo Burlingham)

On the cluttered desk of Howard R. Webber, the director of the MIT Press, sits a double pen holder inscribed with the words "Publish and be damned." Next to it is a sealed box decorated with an intricate, celestial pattern of suns and moons and stars. Beneath the design appears the phrase, "Exorcise the Pentagon."

These sentiments notwithstanding, the MIT Press declined last month to publish the Pentagon Papers out of a fear that the Nixon Administration might retaliate with legal action against the Press and the university of which it is a subdivision.

It had impressive company in its decision. Although several copies of the top secret study are floating around Congress and the New York *Times* has one from which it prepared its articles, no one seemed willing to make it available to the public, until Sen. Mike Gravel of Alaska and the Beacon Press ironed out a publishing agreement at the end of July. Last Tuesday, in simultaneous statements, they announced the publication of a four volume, 2.5 million word, 3000 page Senator Gravel Edition of the Pentagon Papers, to be available in bookstores by late October.

Knowledgeable sources indicated that the Gravel edition will include all of the original study except the section dealing with diplomacy. Dr. Daniel Ellsberg has said that he gave the diplomatic documents only to Sen. William Fulbright, Chairman of the Senate Foreign Relations Committee, because he feared that publicity would compromise secret channels which might prove important in a serious search for peace.

Now the common wisdom has it that the publication of the "complete" Pentagon Papers comes as no surpirse. Yet prior to the Beacon decision, at least six other publishing houses—including the MIT and Harvard University Presses—passed up the opportunity to publish them. It is in fact one of the ironies of the Pentagon Papers episode that, except for the efforts of Sen. Gravel and the Boston Press, the study might have remained unavailable to the public for an indefinite period of time.

Gravel took it upon himself to put the Papers into the public domain shortly after a set came into his possession on July 24. "The Senator believed that the public had a right to the Pentagon Papers," an aide said later. "The executive branch was trying to keep them under wraps, and it was unclear at the time which way the courts would decide. He was determined to get them out by hook or by crook."

Failing in his attempt to introduce the document into the Congressional Record, he called a meeting of his Subcommittee of Public Buildings and Grounds on June 29, at which he read extensively from the study. He placed the entire work on file with the subcommittee and let it be known that reporters could have copies for the asking. The next day, several journalists took him up on his offer. At least one newspaper, the St. Louis *Post-Dispatch*, subsequently ran articles based on the Gravel papers.

Meanwhile, a former physicist at the University of Maryland, now a fellow of the Institute for Policy Studies in Washington, had become involved in Gravel's project. Informed of the Senator's intention to release the Pentagon Papers to the public, Dr. Leonard S. Rodberg attended the July 29 subcommittee meeting as a sort of chronicler of the events. The following Tuesday, July 6, he returned to Capitol Hill to gather background material for an article, at which time he discussed with Gravel the possibility of publishing the entire study. The Senator liked Rodberg and recruited him as his publishing agent.

With Gravel's approval, Rodberg approached a friend of his, well known in left intellectual circles for his ability to get controversial works into print. The friend contacted Simon and Shuster, which expressed an interest in the idea. On Thursday, July 8, Gravel, Rodberg, and a lawyer flew to New York to confer with Bernard Shur-Cliff, the executive editor in charge of the Pocketbooks Division.

They discussed the project well into the night. Gravel insisted, first, that the book appear soon; second, that it be relatively inexpensive; and third, that it be widely distributed. Shur-Cliff considered these terms acceptable and spoke of publishing a mammoth paperback containing the entire narrative, but not the documents (the official memoranda, letters, telegrams, reports, etc., included as an appendix in the original study). The book would be ready in three weeks, and the first edition would run between 100,000 and 200,000 copies. It would sell for $3.95.

On Friday morning, Gravel spoke with the President of the publishing house, Leon Shimkin, and then left for Alaska. Rodberg and the others stayed behind to confer with Simon and Shuster's lawyer (a retired general) and the production personnel.

Later that same day, Bantam Books put on sale a collection of New York *Times* articles, under the title, *The Pentagon Papers*.

On Friday evening, the network newscasts included reports about Bantam's first day on the market, complete with films of the lines of customers who purchased the entire stock at the bookshop in the Pentagon. The executives of Simon and Shuster watched the national news coverage and received their own reports as well. The Bantam edition, they decided, had cornered the market for Pentagon Papers. "We estimated," Shur-Cliff said later, "that Bantam would sell a million copies of its paperback within four or five days. That meant that the Gravel project was no longer commercially feasible for us." At midnight, he telephoned Rodberg to call off the deal.

On Monday, July 19, Rodberg telephoned Arnold Tovell, the editor-in-chief of the Beacon Press, to outline for him Gravel's proposal. Tovell listened and asked him to call back on Tuesday. He then conferred with of-

ficials of Beacon and its parent organization, the Unitarian Universalist Association. The next day, he informed Rodberg that Beacon was "very interested" and invited him to come to Boston with the documents. Rodberg flew here on Wednesday to work out an arrangement with Beacon.

Beacon is a relatively small publishing house and could not make an offer comparable to that of Simon and Shuster. It would take the firm two to three months to have its edition in the bookstores; the complete, four volume, paperback work would sell for $20; and the first edition would number not more than 25,000 sets (100,000 books).

Even such an arrangement would strain Beacon's resources to the limits. While it has not given a precise estimate of the cost of producing the *Gravel Edition*, Goban Stair, director of the publishing house, has put the figure at "well in excess of $100,000" and admits, "Frankly, I very much wish somebody else were publishing this." As a non-profit, public-interest corporation, commercial considerations play a secondary role in Beacon's publishing decisions. The publication of the Pentagon Papers, its officials point out, will at least delay the appearance of other works they consider important.

And so when Rodberg left the Beacon offices on Thursday, he was still looking for a publisher for the Pentagon Papers. He had learned that the MIT Press might be interested and, from Logan Airport, he tried to reach its director, Howard Webber. On Friday, July 23, he contacted Webber on vacation in New Hampshire.

Gravel's offer came as a surprise to Webber, but not a shock. By coincidence, members of the faculty board which oversees the operation of the Press had discussed the possibility of publishing the Pentagon Papers at their last meeting in June. Webber described the conversation as "speculative" and "casual," but it was serious enough to lead him to believe that they might well accept Gravel's proposal.

He invited Rodberg to visit him in New Hampshire and to bring along the Papers. Rodberg obliged, and the two spent most of Friday discussing the project.

According to Rodberg, Webber seemed to have little doubt that the MIT Press would publish the study. It was capable of doing the job quickly (in three or four weeks) and distributing the work widely. Moreover, before Rodberg left, Webber telephoned several members of the faculty board, the legal counsel for the Press and the Institute, and Provost Walter Rosenblith—the highest ranking administration official in the absence of MIT President Jerome Wiesner—and received encouragement in the project. Every board member he reached expressed keen interest, though they did advise further consideration.

Rodberg left for Washington on Friday evening believing that the MIT Press would publish the Gravel edition of the Pentagon Papers. It was left that he would discuss the arrangements with Gravel and telephone Webber on Saturday about the Senator's response. The following Wednesday, Charles Fishman, the director of a Washington peace group named War No More, would travel to Boston to handle the final arrangements with the Press. Royalties, it was agreed, would go to War No More.

But Rodberg did not reckon with the administration of MIT or the strength of the Institute's ties to the government, nor did he take into account the fickleness of the faculty board members.

On Monday, July 26, four of the eight members of the board held an extraordinary meeting with Rosenblith, the Institute's lawyer, and Webber in the Provost's office. For two hours, they discussed the project, at the end of which they decided that the MIT Press would not publish the Pentagon Papers—notwithstanding the fact that it met all of their normal criteria for publication.

The difference in this case was the legal factor. After listening to the advice of counsel, the board members concluded that publication of the Pentagon Papers would violate the Espionage Act of 1917, under which Daniel Ellsberg has been indicted. They considered it a good possibility, moreover, that the Nixon administration would decide to prosecute MIT. If the MIT Press knowingly broke the law, so the reasoning went, it would be performing a political act, and that would run counter to Institute policy, i.e., that the university should not take political stands and should not engage in any activity which a significant minority of the university community finds objectionable.

In addition, Rosenblith argued that the publication of the Pentagon Papers by the MIT Press would tend to link MIT and Ellsberg in the public mind. Ellsberg, he said, has been careful to avoid associating MIT with his actions, and the Institute preferred that the separation be scrupulously maintained.

No one, it seems, raised the issue of freedom of the press, nor was the independence of the university thought to be a relevant question. Most important, the board members apparently accepted the lawyer's analysis as the accurate opinion of a competent technician, and did not suggest that another point of view be sought out—say, that of a constitutional rather than a corporation lawyer.

By the end of the meeting, only Webber remained unconvinced. On Tuesday morning, he informed Rodberg of the board's decision.

The latter received the news with dismay. That afternoon he returned to Boston to work out the final arrangements with Beacon. First, however, he had a friend approach the Harvard University Press with the offer of the Pentagon Papers. Director Mark Carroll rejected it out of hand.

Curiously, the legal question played no significant role in Beacon's consideration of the project, nor did it appear to have much influence on the decisions of the New York publishing houses. "They (Gravel's aides) went over the legal implications in some detail with our house lawyer," said executive editor Shur-Cliff of Simon and Shuster, "and we all pretty much agreed that this would present no particular obstacle."

In fact, only with MIT did the possible violation of the Espionage Act become a major factor in the decision not to publish. Skeptics say that it provided a convenient loophole through which the Institute escaped a situation which might have compromised its standing with the Pentagon. They note that MIT holds more Defense Department contracts than any other university in the country.

It is, indeed, remarkable that no one at the meeting challenged the view that publication of the documents would constitute a clear violation of the law. "Anyone who says that," commented one Harvard Law School professor known for his work in constitutional law, "is either very ill-informed or a charlatan, pure and simple."

Said Rodberg, an MIT alumnus, "It's obvious that no one considered the publication of the Pentagon Papers very important. If they had, they would have looked for other advice. . . . But even if you accept their reasoning, you see they had a double allegiance. In the end the members of the board decided that their loyalty to a MIT as it now exists was stronger than their loyalty to a free press, which they are supposedly custodians of."

Some of those present at the special meeting on July 26 point out in self-defense that the board members knew of Beacon's willingness to publish the Papers, "so it wasn't as if we were keeping them from the public."

However, this view was not shared by all members of the board. As one of them, Prof. Ernest Rabinowicz, observed, "If you see a man drowning, you don't count on the next person to save him. You decide either to save him or to let him drown."

In this case, evidently, Rabinowicz and his colleagues decided to let him down.

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[U.S. District Court for the District of Massachusetts, Docket No. —]

UNITED STATES OF AMERICA VERSUS JOHN DOE

Leonard S. Rodberg, being duly sworn, deposes and says:

1. I am thirty-eight years old and have a Ph.D. in physics. I am married, have four children and live in Silver Spring, Maryland.

2. I am presently and have been since June 29, 1971, a member of the staff of Mike Gravel, United States Senator from the State of Alaska. I am also a Fellow at the Institute for Policy Studies in Washington, D.C.

3. Upon information and belief, the purpose of compelling my appearance before the grand jury is to ask questions of me directly relating to the discharge of my responsibilities as an aide to and agent of Senator Gravel.

4. The subpoena to appear before the grand jury on August 27, 1971, at 10:00 a.m. in Boston, Massachusetts, was served upon me without prior notice on Tuesday evening, August 24, 1971, by an agent of the Federal Bureau of Investigation in Maryland.

5. Due to prior professional commitments, attorneys who I had anticipated would be able to represent me proved unable to do so. After some investigation I learned that James Reif and Doris Peterson were attorneys experienced with respect to grand jury proceedings. I contacted them at their office on Wednesday, August 25, 1971, and arranged to meet and did thereafter meet with Mr. Reif and Ms. Peterson on Thursday morning, August 26.

6. Said meeting was the first occasion that I met with either Mr. Reif or Ms. Peterson.

7. Having had no prior notice of my subpoena and having had only one day in which to consult with counsel, I have not had an opportunity to gather affidavits and other material which I believe will support my claim that I should not be required to appear before the grand jury, or that in the alternative a protective order should be entered limiting the scope of the questions that can be asked of me.

8. In particular, I would like to obtain the affidavit of Senator Gravel who, I have been informed, is presently in his home state of Alaska.

9. Further, I would like to obtain affidavits if possible of reporters and publishers relative to the general practice with regard to their sources of information and the reasons for that practice. They would also include affidavits by other persons in the academic community relative to the circulation of documents generally therein. These would be for the purpose of demonstrating the importance of the First Amendment rights which are involved.

10. Upon information and belief, I have been the subject of unlawful electronic surveillance, which surveillance has resulted in the issuance of the subpoena commanding my appearance before the instant grand jury and has tainted the questions to be asked of me therein.

LEONARD S. RODBERG, Ph.D.

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[U.S. District Court for the District of Massachusetts, Docket No. —]

UNITED STATES OF AMERICA VERSUS JOHN DOE

James Reif, being duly sworn, deposes and says:

1. I am an attorney-at-law duly licensed as such in the State of New York. I make this affidavit in support of the relief prayed for in the attached motion.

2. On Wednesday afternoon, August 25, 1971, I received a telephone call from Dr.

Leonard S. Rodberg in Maryland, asking that Doris Peterson and I consult with him in connection with a subpoena that had been served on him the previous evening, August 24, 1971, compelling his appearance before a grand jury in Boston, Massachusetts, at 10:00 a.m. on Friday, August 27, 1971.

3. I arranged for Dr. Rodberg to meet with Mrs. Peterson and myself at our office the following morning in New York.

4. On Thursday, August 26, 1971, Dr. Rodberg met with Mrs. Peterson and me at our office. This was the first time either Mrs. Peterson or I had met Dr. Rodberg.

5. After some discussion, we decided that to protect fully Dr. Rodberg's rights, it would be necessary to prepare and obtain affidavits in support of the claims enunciated in the moving papers to which this affidavit is annexed, as well as to prepare a memorandum of law.

6. Therefore I called Paul Vincent, United States Attorney, that same day, Thursday, August 26, 1971, seeking a voluntary adjournment of movant's subpoena until movant and his attorneys had had sufficient time to prepare a memorandum of law and affidavits in support of Dr. Rodberg's position.

7. Mr. Vincent declined to adjourn the subpoena. I thereupon informed him of Dr. Rodberg's intention to seek a stay from this Court.

8. Upon information and belief, the grand jury before which Dr. Rodberg has been subpoenaed is the grand jury which has received widespread notoriety for its investigation of the "Pentagon Papers."

9. Upon information and belief the questions to be asked of Dr. Rodberg before the grand jury will concern the June 29, 1971, meeting of the Senate Subcommittee on Public Buildings and Grounds at which, upon information and belief, Senator Mike Gravel read and put into the record of the Subcommittee part of the Pentagon Papers and through aides, distributed them immediately thereafter.

10. Upon information and belief, the questions to be asked of Dr. Rodberg before the grand jury will concern also the allegation made in the newspaper articles attached hereto as Exhibits "A" and "B" that he has been involved in an effort to publish as a book the documents in Senator Gravel's possession.

11. As an attorney I believe that Dr. Rodberg's interests will be best served if affidavits supporting the attached motion to quash are submitted with it. Due to the shortness of time, however, it has not been possible to prepare or obtain these affidavits upon which Dr. Rodberg's claims will necessarily turn.

JAMES REIF.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the aforegoing Motion to Quash and papers submitted in support thereof was served upon Paul Vinvent, United States Attorney, Department of Justice, by hand deliver, this 27th day of August, 1971.

_____ _____.

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[In the U.S. District Court for the District of Massachusetts, EBD 71–172]

BRIEF OF INTERVENER, SENATOR MIKE GRAVEL, IN SUPPORT OF MOTION TO QUASH SUBPOENA

(MIKE GRAVEL, U.S. Senator, intervener versus United States of America in the matter of Leonard S. Rodberg, United States of America versus John Doe)

In our brief of support of Motion To Intervene, filed September 1, 1971, we set forth in detail our reasons for concluding that the appearance of Dr. Rodberg before the federal grand jury under the present record in this proceeding will violate Senator Gravel's privilege to be immune from any judicial inquiry of acts done by him and his personal staff in the course of his duties as a United States Senator this privilege being secured to Senator Gravel by the Speech and Debate Clause of the Constitution. In order to avoid undue repetition, we incorporate those basic arguments by reference and limit this brief to a supplementation of some of the points previously made.

(1) We observed in our previous brief (page 10) that the Executive branch itself has asserted, contrary to the position taken in this proceeding, that an official's privilege to be free from question by a coordinate branch of government extends in full force to his staff assistants. In addition to insulating staff assistants from questioning in Congress, the Executive has invoked the privilege to suppress from Congressional inquiry planning reports prepared by staff assistants which involve important aspects of foreign relations. (See the *Boston Globe*, September 1, 1971, page 8 attached hereto as Exhibit A.) It ill befits the Executive to now contend that a similar privilege does not attached to Members of Congress and to their assistants.

Research has also revealed that the Executive has in fact successfully litigated in court the proposition that subordinate officials and staff assistants are also privileged for acts done in the discharge of their duties.

In *Barr v. Matteo*, 360 U.S. 564 (1959), a subordinate official in the Executive department was sued for libel after maliciously issuing a press release which challenged the integrity of two critics and referred their names to Senator Joseph McCarthy. Barr's only defense was that this communication was absolutely privileged from judicial inquiry.[1] The Supreme Court agreed. After noting that the court has created rules of absolute privilege to immunize judges and their staffs and Executive officers of Cabinet rank, in a matter paralleling the Constitutional privilege of Members of Congress, *id* 569–70, and observing that the reason for each privilege was that adverse court action would otherwise "inhibit the fearless, vigorous, and effective adminstration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," *id* 571, the court held that these considerations dictate its application to subordinate officials.

"The privilege is not a badge or emoluent of exalted office but an expression of policy designed to aid in the effective function of government. The complexities and magnitude of governmental action have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the Executive hierarchy." Id, 572–73. (Footnote omitted.)

Even closer to the factual setting of this proceeding is the companion case to Barr, *Howard v. Lyons*, 360 U.S. 563 (1959). That case was a libel suit against a Captain in the Navy for preparing a memorandum to his immediate superior and sending a copy to Members of Congress, concerning conditions in the Boston Naval Shipyard. Following the principles enunciated in Barr, the Supreme Court held Captain Howard to be immune from suit.

The Barr and Howard decisions therefore lend additional support to the thesis that official privilege, to be viable cannot be cabined in an arbitrary manner to the exclusion of staff assistants. It seems indisputable that were Dr. Rodberg a member of the staff of a judge or Executive official he would be entitled to absolute privilege for the conduct of his duties under official roles. Since the source of the privilege herein asserted is a provision of the Constitution which "itself gives an absolute privilege to Members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in Session," *Barr v. Matteo, supra* 569, the scope of the Congressional privilege surely must be given at least as much respect.

(2) Perhaps in no other area of Constitutional law is Mr. Justice Holmes' admonition so valid that a "page of history is worth a volume of logic." *New York Trust Company v. Eisner*, 256 U.S. 345, 349 (1921). Behind the "simple phrases" of the Speech and Debate Clause "lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. *United States v. Johnson*, 383 U.S. 169, 178 (1966). The Supreme Court has reminded us that in considering the application of the Speech and Debate Clause to criminal prosecutions we must "look particularly to the prophylactic purposes of the clause," molded by "the long struggle for Parliamentary privilege in England," *id* 182. Courts must therefore construe the clause bearing in mind the fact, imprinted in our Constitutional heritage, that "there is little doubt that the instigation of criminal charges against critical or disfavored legislators by the Executive in a judicial forum . . . in England and in the context of the American system of separation of powers, is the predominate thrust of the Speech and Debate Clause." *Ibid.*

It is against these contours that the instant proceedings must be judged—striking against the "taproots" of legislative privilege and the "presupposition of our political history." *Tenny* v. *Brandhove*, 341 U.S. 367, 372 (1951). For, under the undisputed facts of this proceeding, the Executive branch has determined to turn the clock back for our Constitutional history. The institution of criminal proceedings in retaliation for a speech of a United States Senator critical of Executive conduct of foreign policy is a recreation of the seditious libel prosecutions which are the historical root of the clause. When Charles I was at first criticized and eventually denied funding from Parliament to continue fighting a needless and bloody war overseas, he struck back at his critics by prosecuting Sir John Elliot and others for "seditious" speeches in Parliament. 3 *How. St. Tr.* 294, 332. The result was the greatest Constitutional crisis in English history, until, in 1668, "after a long and bitter struggle, Parliament finally laid to rest the ghost of Charles I." *Tenny* v. *Brandhove, supra*, 372.[2]

Even if history were not so clear in condemning retaliation by the Executive against Senator Gravel for exposing and criticizing a disastrous chapter in American foreign policy, the subpena would still be void, for it "threatens those consequences which the Framers so deeply feared." *Cf. School District* v. *Shempt*, 374 U.S. 203, 230, 236 (1963). (Mr. Justice Brennan concurring). Invoking the grand jury in such a retaliatory manner jeopardizes separation of powers in the government in three ways:

(A) It deprives the people of adequate representation in Congress. No Member of Congress who fears retaliation against himself or his staff can represent his constituents in the manner intended by the Framers. Such action by the Executive would, to borrow from the language of *Barr* v. *Matteo, supra* 571, "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of . . . duties."

(B) It violates the freedom of speech indispensable to representative government. The people have the right to be informed by their representatives of the complete workings of the government so that they can meaningfully exercise their franchise. "The people, not the government, possess the absolute sovereignty." See *New York Times v.*

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[1] Barr was represented by an attorney from the Department of Justice.

[2] At the opening of every new Parliament since the Great Revolution, the Speaker of the House of Commons has demanded of the King an oath of fidelity to the privilege. (I *Blackstone's Commentaries* * 164–65.)

*Sullivan*, 376 U.S. 254 (1964). One branch of government does not possess the power to censor another and prevent or deter it from communicating with the people. For the consequence would be censoring the public's right to know. As Madison said, "If we avert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government and not in the Government over the people." 4 *Annals of Congress* 934 (1794).

(C) It is an illegitimate intrusion by the Executive into the Senate's perogatives in foreign affairs and in the conduct of war. With the history of war dictated by the Crown against the wishes of Parliament fresh in their minds, the framers of the Constitution vested the war-making and appropriation powers in Congress. Article I, Section 8, Clause 11–14. As a further insurance of the separation of powers in the foreign relations sphere, the Senate was given the Advise and Consent power on treaties. Article II, Section 2, Clause 2.

In his speech on the Vietnam war and disclosure of the Pentagon papers, Senator Gravel's actions fit into the past and continuing deliberations in the Senate on how its powers should be used to terminate the conflict in Indochina. This debate implicates all of the Constitutional powers and duties of the Senate over foreign affairs. It is a flagrant violation of separation of powers for the Executive to retaliate against critical Senators so as to affect the outcome of deliberations of a coordinate branch of government.

Furthermore, in discharging its obligations over foreign relations, the Senate has the right to obtain and use all relevant information. As the Supreme Court says in *Watkins* v. *United States*, 354 U.S. 178 (1957):

(Citation omitted.)

To put the matter simply the Executive does not possess the Constitutional power to tell the Senate what it may or may not read.

(3) In our previous brief we pointed out the essential differences between a staff assistant and someone such as the Sergeant at Arms, so that Congressional immunity extends to the former but not to the latter. The arguments set forth herein further highlight those differences. The purposes behind the Constitutional privilege—insuring fearless representation or an unfettered communication to constituents, preventing retaliation by a hostile Executive, and preserving other values in our scheme of separation of powers—all require that personal staff assistants be immune for aiding Members of Congress in the discharge of their duties. On the other hand, none of these factors would affect the accountability of persons such as the Sergeant at Arms.

When, as in *Powell* v. *McCormack*, 395 U.S. 486 (1969) and *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881) the Sergeant at Arms and other officers carried out Congressional orders in excluding a Member and arresting a third person, they acted exactly as any federal law enforcement official does in executing a Congressional statute. Similarly, in *Dombrowski* v. *Eastland* 387 U.S. 82 (1967), Sourwine, the General Counsel of the Committee, conspired with others and then carried out an unconstitutional search and seizure, for which he, like every other law enforcement official is subject to accountability in the courts.[4] If the enforcement actions of these persons were not subject to judicial review, the Constitutional rights of citizens could not be preserved and *Marbury* v. *Madison* would be reduced to mere rhetoric. This, indeed, was the reasoning articulated in *Kilbourn* and reiterated in *Powell*. 395 U.S. 506.

[4] Indeed, Sourwine was afforded the limited immunity of every police officer who enforces a statute. See *Pierson* v. *Ray*, 386 U.S. 547 (1967).

No Senator or Congressman will be deterred in discharging his responsibilities, or in communicating freely with his colleagues and constituents, or will be open to retaliation by a hostile Executive because of the fear that a law enforcement official will be held judicially accountable for carrying out the orders of Congress, whether made by resolution or statute. Nor will he be deterred if a person such as Sourwine acts as a policeman is subject to judicial review. On the other hand, each of these adverse consequences will be realized, and judicial review will not be enhanced if a staff assistant can be held liable for advising and helping a Member of Congress in preparing and distributing a speech, casting a vote and otherwise discharging his duties.

CONCLUSION

The subpoena issued by the Executive branch in this case challenges the most basic and bedrock principles of our Constitutional form of government. It cannot withstand analysis under the terms, history and policies of the Speech and Debate Clause. The subpoena must be quashed.

Respectfully submitted,

ROBERT J. REINSTEIN,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

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[In the U.S. District Court for the District of Massachusets, Docket No. EBD 71–172]

AFFIDAVIT OF ROBERT G. DUNPHY

(MIKE GRAVEL, intervenor, versus United States of America versus John Doe in re Leonard Rodberg)

Robert G. Dunphy, Sergeant at Arms, United States Senate, Washington, D.C. 20510, being duly sworn, deposes and says:

1. By letter to me dated June 29, 1971, Senator Gravel designated Dr. Leonard Rodberg as a member of his personal staff. Senator Gravel's letter is set forth below:

MR. ROBERT G. DUNPHY,
*Sergeant at Arms,*
*U.S. Senate,*
*Washington, D.C.*

DEAR MR. DUNPHY: Effective this date please add to my personal staff roll the name of Dr. Leonard Rodberg.

Dr. Rodberg will serve as a special assistant to me, with full access to my office, performing duties I assign and under my direct supervision.

Sincerely,

MIKE GRAVEL.

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U.S. DEPARTMENT OF JUSTICE,
*Washington, D.C.*

WILLIAM A. RIDGELY,
*Financial Clerk,*
*U.S. Senate,*
*Washington, D.C.*

DEAR MR. RIDGELY: We would appreciate your causing a search to be made of the official records of the United States Senate to ascertain whether the name of Leonard S. Rodberg appears as an employee of the United States Senate.

Thank you for your cooperation in this matter.

Sincerely,

A. WILLIAM OLSON,
*Deputy Assistant Attorney General,*
*Internal Security Division.*

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[U.S. District Court, District of Massachusetts, Docket No. EBD 71–172]

AFFIDAVIT

(MIKE GRAVEL, U.S. Senator, intervenor versus United States, United States versus John Doe in re Leonard S. Rodberg)

Leonard S. Rodberg, being duly sworn, deposes and says:

1. I have been subpoenaed to appear before a federal grand jury in Boston, Massachusetts. I make this affidavit to show why my appearance before this secret grand jury would violate the rights and privileges of Mike Gravel, United States Senator from the State of Alaska, and my obligation to assert those rights and privileges, and would violate as well my rights under the First Amendment to the Constitution of the United States.

2. My background, insofar as it bears upon the instant matter, may be summarized briefly:

In 1956 I was awarded a Ph.D. in physics from the Massachusetts Institute of Technology. In the following year I was a Research Associate in nuclear physics at M.I.T. and, in the two years after that, Research Physicist at the University of California at Berkeley, California.

In 1959 I became Assistant Professor of Physics at the University of Maryland, a position I held through 1961, when I obtained a leave of absence to work as a Physical Science Officer in the Disarmament Administration in the Department of State. For this position I received Top Secret Clearance from the Department.

In 1962 when the Policy Research Office of the Science and Technology Bureau of the United States Arms Control and Disarmament Agency was created. I was appointed Chief of that office. In that position I was responsible for directing and conducting studies on United States disarmament policy and had occasion to work with officials from the Defense Department, Central Intelligence Agency, White House, and other agencies concerned with national security questions. I also supervised contract studies with academic and industrial researchers and served as liaison between them and the government. Further, I directed the work of academic consultants on arm control studies of interest to the government. I continued in these various functions until 1966.

I should also mention that in the years 1960–67, I was a Consultant to the Los Alamos Scientific Laboratory on questions relating to nuclear physics. In order to be appointed Consultant I had to and did receive Top Secret clearance from the Atomic Energy Commission.

From 1966 until 1970, I was Associate Professor and Associate Chairman of the Department of Physics and Astronomy at the University of Maryland.

In the period 1967–70, I was also a Visiting Fellow at the Institute for Policy Studies in Washington, D.C. In July 1970, I became a full-time Resident Fellow at the Institute.

3. In addition to my work as described in Paragraph #2, I have also authored numerous written works and speeches. For example, in 1967 I wrote a graduate textbook on physics, *Introduction To The Quantum Theory Of Scattering*, published by Academic Press. In 1966–69, I published several articles and delivered a number of speeches to both university and general audiences on ABM and arms control. The articles included "ABM: Some Arms Control Issues," Bulletin Of The Atomic Scientists (June, 1967) and "Limiting Strategic Technology," Bulletin Of The Atomic Scientists (November, 1969).

4. Since 1966, I have been sought out by a number of members of Congress for advice and suggestions concerning ABM, arms control, the military budget, military policy, economic conversion, how to study and evaluate military organizations and policies, United States policy in Vietnam, and new economic priorities.

In the summer of 1969, I was asked to organize a Congressional conference sponsored by more than fifty Senators and Congressmen, on Planning for New Priorities. I organized, participated in and spoke at that two day conference which was held in the Senate Office Building during June, 1969, After consultation with and under the direction of some of these Congressmen, I secured the participation of approximately fifteen academic experts in foreign and military policies and economics. Press reports were issued on the conference by the Congressional sponsors;

newsmen were present and reported on the proceedings.

On another occasion, at the request of the sponsoring Congressmen, I spoke at and participated in, and drafted the report for another Congressional conference, which report was subsequently published by the sponsoring Congressmen.

In 1969 I wrote a chapter in a book commissioned by Senator Edward Kennedy, entitled, *"ABM: An Evaluation of the Decision to Deploy an Anti-Ballistic Missile System"* (Harper and Row). Senator Kennedy wrote the introduction to this book. My chapter was entitled "ABM Reliability."

5. In the summer of 1969, I was co-director of a study of United States military organization and policy. A dozen college students participated in this three month conference under my direction. The results of this study were subsequently published in a book I coedited: *The Pentagon Watchers* (Doubleday, 1970).

During 1970 I directed two student studies—one on defense contracting and the other commissioned by Ralph Nader, on analytical consulting firms. A draft report was written on the first study and press reports issued. A book is in preparation on the second study which will be published next summer.

In my position as Fellow at the Institute For Policy Studies, I have been conducting research and writing on the Vietnam War, particularly the United States decision making process, the operation of the United States national security agencies, military budget, economic conversion and the uses of advanced technology. I also have organized conferences and seminars, directed the research of students and am in communication with scholars from around the country in connection with the aforementioned areas.

In April, 1971 I helped to organize, participated in, spoke at and wrote the report of the Conference on Economic Conversion sponsored jointly by a number of Congressmen and public organizations. In the course of this activity I worked closely with a number of aides to individual Congressmen. The report of the Conference has been published by the Coalition on National Priorities and has been distributed to members of Congress and interested members of the public.

6. Since 1967 I have been on the executive committee of the Federation of American Scientists (hereinafter FAS). FAS is a nonprofit organization of scientists and engineers concerned with the impact of science on public affairs. As an executive committee member of FAS, I participate in developing policy position by preparing expert analyses of issues under consideration based on my special background and access to information. In 1968, I submitted written testimony on behalf of FAS to the House Armed Services Committee. The positions taken by FAS have in the large been opposed to official administration policy. As the only member of the executive committee resident in Washington, I have discussed FAS positions and expert analyses with members of Congress, often at their request.

I have also been on the Executive Board of the Coalition on National Priorities and Military Policy (hereinafter Coalition) since 1969. The Coalition is a coalition of peace groups, church groups and other organizations concerned with military spending, arms control and economic conversion. I have the same role with respect to the Coalition as with FAS. It, too, has adopted positions opposed to current administration policy, primarily concerned with reducing military spending. In the spring of this year I testified on the defense budget on behalf of the Coalition before the Senate and House Armed Services Committees.

7. On June 29, 1971, I was asked by Mike Gravel, United States Senator from the State of Alaska, to become a member of his personal staff and have been acting in that capacity since that date. Everything I have done as Senator Gravel's aide, I have done only after consultation with him and upon his express direction.

8. From the foregoing, it can be seen that my roles have been multiple: research, writing, lecturing, supervising research projects, as well as providing advise, assistance, information, expertise to Senators and Congressmen for the performance of their official duties, as well as liaison to other persons whose expertise Congressmen require. Experience has shown that my success in fulfilling these multiple roles depends upon my ability to maintain access to a wide variety of confidential sources of information. My knowledge of and ability to communicate and advise on issues relating to government policy in the areas mentioned above would be seriously jeopardized if I should be forced to appear before a secret grand jury.

Within the academic community, information concerning matters of political importance often becomes available through confidential sources. These sources are moved to provide previously and otherwise nonpublic information by the unwritten but certain assurance that the fact of their disclosing such information shall remain confidential. Disclosure of that confidence would jeopardize the source in any one of numerous ways, as, for example, loss of one's job.

This has been particularly true with regard to American involvement in Vietnam. As the published reports from the Pentagon Papers make clear, much information bearing directly upon American responsibility for the tragedy of Vietnam has been kept from the American public, wholly without just cause. And much of what the citizenry knows has been supplied to it by the academic world. That community has played a primary role in the dissemination of facts regarding the war in Southeast Asia, and thus has played a significant part in the growth of American opposition, indeed revulsion, toward the war. This role has been fulfilled directly as by the writing of articles, books, monographs, the giving of lectures and speeches, the participation in conferences, discussions and debates. It has been done indirectly as by supplying information to the press or to Senators and Congressmen.

I have fulfilled nearly all these functions in the last several years. My ability to obtain this information which is of substantial importance to the American public has depended in large part upon confidential sources. In connection with American involvement in Vietnam, I have received information from numerous persons who were willing to provide that information upon their belief that the facts surrounding its transfer would not be revealed.

If, contrary to that expectation, I could be questioned regarding those sources, such a possibility would severely undermine my effectiveness as a scholar and writer with regard to Vietnam, for the fear of disclosure of their confidences would force those sources away. Without those sources, my contributions to the education of Americans with regard to Vietnam would necessarily be undermined.

Upon reflection it seems to me that perhaps this is precisely what the government is trying to achieve. Subpoenaing persons within the academic community quite clearly tends to intimidate their continuing to work to get out the truth about Vietnam. My own personal experience since August 4 is testimony to that. By intimidating that small group of scholars who have access to information about Vietnam that is otherwise being kept from the American public, the government can effectively inhibit continued efforts within the academic community to inform the people of the facts about Vietnam. Perhaps this is unintentional, but the motive is irrelevant. Whether intended or not, the inevitable effect of an effort to question that small number of scholars who have access to confidential sources with regard to American responsibility in Vietnam about those sources is to dry up those sources. I feel very strongly that this is most unfortunate: it is only because the public has become increasingly informed about Vietnam that it has been able to exert some small measure of control over executive policy here. And as noted earlier, it is the academic community that has been largely responsible for informing the public.

9. With particular reference to the assistance which I render to Congressman, in addition to jeopardizing necessary confidential sources, my future usefulness to them in the capacities described earlier would be greatly reduced if I should be forced to appear before a secret grand jury where they might think that privileged Congressional information about their functioning in their official role as Congressmen was obtained through me. In view of the fact that grand jury proceedings are secret their reliance on the confidentiality of their relationship with me would be greatly jeopardized.

10. I believe that the danger of losing the confidence of sources presently available to me arises from my appearance before the grand jury, unaffected by whether or not I respond to particular questions. Information is made available to me because my sources believe their communications will be kept in confidence. This confidence is a fragile thing. If sources fear that I can be forced to appear in a secret proceeding to be questioned in any way about their confidences they will assuredly refuse in the future to provide me with other information about which the public has a right to know. It is the appearance *per se* which creates this danger, for sources of information are of course unable to witness or participate in the secret proceedings and thus have no way to assure that their confidences are being preserved.

LEONARD S. RODBERG.

Sworn and Subscribed to before me this 8th day of September, 1971.

NANCY STEARNS,
*Notary Public.*

CERTIFICATE OF SERVICE

I hereby certify that I served this affidavit upon counsel for the parties by causing a copy of it to be mailed, postage prepaid, to Robert J. Reinstein at 1715 N. Broad Street, Philadelphia, Pa., 19122, and Charles L. Fishman, 633 E. Capitol Street, Wash., D.C., 20003, and by causing a copy of it to be hand delivered to the office of the United States Attorney for the District of Massachusetts, Boston, Mass.

——— ———.

[U.S. District Court for the District of Massachusetts, Civil Action, No. EBD 71–172–G]

AFFIDAVIT OF MIKE GRAVEL

(MIKE GRAVEL, intervenor versus United States of America, United States of America versus John Doe, In Re.: Leonard Rodberg)

I, Mike Gravel, being first duly sworn, do depose and say that Dr. Leonard Rodberg is, and has been since June 29, 1971, a member of my personal staff in the United States Senate.

MIKE GRAVEL.

Subscribed and Sworn to before me this 10th day of September, 1971.

MARGARET M. FLAHERTY,
*Notary Public.*

GOVERNMENT OPPOSITION TO INTERVENOR'S MOTION FOR SPECIFICATION

(In the matter of a grand jury subpoena served upon Leonard S. Rodberg)

Intervenor, United States Senator Mike Gravel, requests the Court for an Order requiring ". . . the government to specify in detail the purpose, scope and exact nature of the questions to be asked of Dr. Leonard Rodberg by the Federal Grand Jury." The

motion is totally without precedent. The Federal Rules of Criminal Procedure certainly do not provide for such an unusual motion. The Federal Rules of Civil Procedure do provide for a "Motion for More Definite Statement," but this is not what movant is requesting, nor is this a civil matter governed by the Federal Rules of Civil Procedure.

On the merits, a witness need not be apprised of the subject matter under inquiry by a Grand Jury. *In Re Meckley,* (D.C.M.D. Penn. 1943), 50 F. Supp. 274; *affd.* 137 F.2d 310; *cert. den.* 320 U.S. 370.

Further, a witness can neither question nor control the scope of a Grand Jury investigation. *Blair* v. *United States,* 250 U.S. 273.

Wherefore, this motion should be denied.

Respectfully submitted,

PAUL C. VINCENT,
*Attorney, U.S. Department of Justice.*
JON H. MARPLE,
*Attorney, U.S. Department of Justice.*

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(In the matter of a grand jury subpoena served upon Leonard S. Rodberg)

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO LEONARD S. RODBERG'S MOTION TO QUASH A GRAND JURY SUBPENA

(This Memorandum, In Addition To Opposing The Motion of Leonard S. Rodberg Is Also Addressed To The Motion To Quash The Rodberg Subpoena Brought By The Intervenor, Senator Mike Gravel)

I. THE SPEECH AND DEBATE CLAUSE CONFERS NO LEGISLATIVE PRIVILEGE OR IMMUNITY UPON SERVANTS, EMPLOYEES, OR AGENT OR INDIVIDUAL SENATORS

Dr. Leonard S. Rodberg claims that the subpoena served upon him violates the Speech and Debate clause of the United States Constitution on the grounds that he ". . . was and continues to be, down to the present date, a member of Senator (Mike) Gravel's staff." (Motion, p. 2). Further, he claims that his activities directed toward procurement of a publisher for the "Pentagon Papers" were undertaken by virtue of this servant/employee/agent relationship. Assuming that Rodberg occupied a bona fide staff position to the Senator* this allegation is insufficient as a matter of law to establish any privilege to excuse responding to this subpoena regardless of the scope of inquiry of the Grand Jury or the questions to be presented to Rodberg.

The Constitution on its face provides for a very limited privilege:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. (Art. I § 6).

Hereafter, "immunity" refers to the exemption from arrest; "privilege" refers to the exemption from inquiry on account of a speech made in Congress. The "Speech and Debate Clause," however, refers to entire Constitutional provision quoted herein.

The wording of this clause makes no provision for its extension to even a Senator's family or body servants, much less his professional assistants or staff. In the absence of express provision, this court should be reluctant to find therein, as no other court has yet done, a "privilege" or "immunity" which would exempt an ordinary citizen from the obligations of the law.

Constitutional history shows us that the framers expressly excluded all other persons from protection and for good purpose. At the time this country was founded, England had just succeeded in curbing the excesses of Parliamentary privilege and immunity unreviewable by King or judiciary, which had been gradually extended to the family, servants, and agents of the members of Parliament. *Merrick & Durant* v. *Giddings,* 1 MacArthur & M (11 D.C.) 55 (S.C.D.C. 1879); *Stockdale* v. *Hansard,* 7 C&P 737; as cited in *Long* v. *Ansell* 69 F. 2d 386 at 387 (C.A.D.C. 1934). The fruit of this restatement was codified in an Act of Parliament, 10th George III, Chapter 50, declaring that any person could commence or prosecute an action or suit against any member of Parliament, his family, or his servants; that he was not immune from service of process; that in no wise could an action be stayed, dismissed, or delayed on the basis of a claim of Parliamentary membership. The sole exception thereto was provided in Sec. 2:

> But nothing in this act shall extend to subject the person . . . of any of the members . . . to be arrested or imprisoned upon any such suit or proceeding.

This very limited immunity, the exclusion of the person of the member from physical detainment through civil arrest characterizes the scope of the Speech and Debate Clause as enacted into the Constitution. *Williamson v. United States,* 207 U.S. 425, 446 (1908).

No less an authority than Thomas Jefferson has construed the Speech and Debate Clause in precisely this fashion. In compiling Jefferson's Manual on Parliamentary Practice, soon after the Constitution was ratified he recounted how the Parliamentary Privilege and immunity in England had continually expanded, untrammeled by judicial definition, until the enactment of the aforementioned Statute of 10 G III. However,

> It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their case to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, *have only privileged Senators and Representatives themselves* from the single act of arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective houses, and in going to and returning from the same, and from being questioned in any other place for any speech or debate in either house. (*Jefferson's Manual, supra,* Sec. III as reprinted in the Senate Manual, 1967 at 382–383)

There has been found no post-revolutionary judicial decision whatsoever which has extended legislative privilege to any member of a Senator's staff, regardless of his status. It must be considered, moreover, that Jefferson's exposition constitutes a present aspect of Senate procedure. Dr. Rodberg can hardly claim an extension of the scope of a Constitutional provision which the Senate itself has not exercised and has in fact disclaimed.

Further, Dr. Rodberg is in no position to claim any exemption for himself even if it extends to him. The rights are owing to the house as a body or to the Senators as an elected official, and the traditional practice has been that, where a member has been served with legal process in the form of a subpoena *duces tecum* or *ad testificandum,* he should receive permission of his house to respond thereto. Cannon's Precedents of the House of Representatives, 1936, §§ 585–588 at pp. 824–829; *Trimable* v *Johnston,* 173 F. 2d 651, 653 (C.A.D.C. 1959). Not being a member of the Senate or of the staff of that body the Senate has no interest in securing his presence for the conduct of legislative business. Consequently, any exemption which Dr. Rodberg could possibly have will have to be claimed by the Senator of whose staff he is a member. Denial of this motion would leave Senator Gravel perfectly capable of asserting whatever privilege or immunity he may feel is due him on account of a subpoena served upon a staff member.

II. NO IMMUNITY SUBSISTS IN A SENATOR TO QUASH A GRAND JURY SUBPOENA ISSUED TO PROCURE TESTIMONY RELATIVE TO ALLEGED FELONIOUS ACTIVITY

Dr. Rodberg claims his legislative immunity by derivation as a staff member of Senator Mike Gravel. Conversely, should the Senator be without immunity to resist a similar subpoena Dr. Rodberg is without immunity as well. As will be demonstrated *infra,* the Constitution grants no immunity for members of Congress to resist criminal process in Grand Jury proceedings.

The Constitutional provision here at issue was adopted for the sole purpose of exempting legislators from the archaic legal measuse of civil arrest. *Williamson* v. *United States, supra.* After a thorough review of the legislative precedents in England and in this country, the Supreme Court concluded in that case that immunity has never been thought to interfere with the administration of criminal justice. In fact, the stipulation relating to "treason, felony, or breach of the peace" is not intended to be limited but having been lifted verbatim from the English Bill of Rights of 1689, 1 W & M, Sess 2, C. 2, refers to ". . . all criminal cases and proceedings whatsoever . . ." Cushing, 9th ed. §§ 546, 567 as quoted in *Williamson, supra,* at 445–446. Thus, Congressman Williamson was indicted, tried and convicted for conspiracy. This is the law today, *United States* v. *Johnson,* 383 U.S. 185 (1966), though prosecution in some cases may be made difficult due to the admissibility in evidence of legislative records not available to the prosecution or that the defendant is privileged from inquiry in that the alleged crime was committed through giving a speech on the floor of Congress. This liability to criminal law is completely in accord with the scope and intent of the Constitutional Convention: to guarantee an unfettered freedom of exchange in the legislative process by removing the prospect of retribution, either through ". . . possible prosecution by an unfriendly executive and conviction by a hostile judiciary. . . ." *United States* v. *Johnson, supra* at 179. Moreover, it serves the "additional function of reinforcing the separation of powers so deliberately established by the founders." *Ibid.,* at 178.

Yet the convention remained aware that government by legislative excess and disregard of the lawful processes was no fanciful danger; and that unless kept within legitimate bounds this power could sap the integrity of our Federal system. Madison pointed out at the time of ratification that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." He believed that specific obstacles had to be erected against such possible abuses of power. See The Federalist, No. 48, pp. 338–340 (Bourne ed. 1914) and Nos. 49, 56 and 73. In the same vein, Jefferson wrote to Madison in 1789 that "[t]he tyranny of the legislatures is the most formidable dread at present, and will be [so] for long years." See *Tenney* v. *Brandhove,* 341 U.S. 367, 375 n.4; *United States* v. *Brown,* 381 U.S. at 443–444, and note 17 (1965). Should legislators succeed in disregarding the judicial powers of inquiry into criminal conduct by refusing compliance with a Grand Jury subpoena, they would have elevated themselves above the criminal law virtually by their bootstraps. No testimony sought here will seek to review a Congressman's political views, his motives or any exercise of legislative discretion. In responding to a subpoena, Sena-

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* The Government contends that, in fact, Rodberg was not a staff member of Senator Gravel for purposes of exposure of or soliciting publication of the Pentagon papers. His affidavit, a self-serving statement devoid of specifics, constitutes the sole allegation of his agency; indeed, the news articles filed therewith indicate that he had represented himself to the Washington Post (P. A1, August 18, 1971) and Boston After Dark (P. 1, August 24, 1971) as being a fellow of the Institute for Policy Studies.

tor Gravel would only fulfill his own duty as a citizen to assist the Executive branch in its own Constitutional obligation to enforce the laws of the United States. Should questioning prove self-incriminating, the Senator would retain his own Fifth Amendment privilege, in this regard. To withhold testimony on the basis of exemption would frustrate the separation of powers doctrine by interfering in executive proceedings, and in this case to forswear Senator Gravel's own vested duty to uphold the Constitution and laws of the United States.

The Speech and Debate Clause has been previously construed to require compliance by legislators with proper subpoena issued to obtain testimony in the criminal prosecution of third party defendants. Mr. Justice Chase held, when the issue was first presented, that a Congressman is subject to subpoena regardless of whether Congress might then be in session. *United States* v *Cooper*, 4 Dallas (4 U.S.) 341 (1800). The case has been followed without distinction or overruling for over 170 years, and most recently in *United States* v. *Segar*, 180 F. Supp. 467, 468 (S.D.N.Y. 1960) at n.4. But cf: *Trimble* v. *Johnston*, supra at 653 (dicta).

The Government neither affirms nor denies that this proceeding is brought to investigate the disclosure of the so-called "Pentagon Papers". Yet assuming *arguendo*, that such be the case the Senator could not claim further that the grand jury cannot lawfully inquire into the business of reading and publishing the "Pentagon Papers" as it constitutes privileged legislative business. The speech and debate clause has been construed to protect not only speeches given on the floor of Congress, as in *Johnson, supra*, but also to protect debates and speeches in committee hearings, as well as reports, resolutions, the act of voting and "in short, to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880). Yet the action of Senator Gravel which he assumes has led to the subpoena of Dr. Rodberg stands in no such footing. The Senator convened a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), for the purpose of reading the documents and thereafter placed all unread portions in the subcommittee record, with Dr. Rodberg soliciting publication following the meeting. (See news articles attached to motion of Dr. Rodberg). The Congress does not enjoy uncurbed power to conduct business; excursions of committee hearings into private lives unconnected with a legitimate legislative purpose have long been held unconstitutional. *Kilbourn* v. *Thompson, supra; Marshall* v. *Gordon*, 243 U.S. 531 (1917). The power of the judiciary to reject unauthorized legislative activity stands upon no less a precedent than *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 87 (1803). The prerogative of Judicial review has been exercised often in recent years to curb extra-legislative excursions by Congressional committees. *Watkins* v. *United States*, 354 U.S. 178 (1957); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927); *Hentoff* v. *Ichord*, 318 F. Supp. (D.C. 1970). The reading of the paper in question can have no possible relationship to the legislative business with which Senator Gravel has sought to cloak himself. Even the Senate has disclaimed official sanction for his action. (See clipping, Washington Post August 18 attached to motion of Dr. Rodberg). Not being engaged in official subcommittee business, his actions cannot be above scrutiny by those charged to enforce the criminal statutes.

Even if Senator Gravel's activity can be deemed official, his subsequent negotiations for and contracting for the publication of the Pentagon Papers divested him of whatever privilege he may have had. In *Long* v *Ansell*, 69 F. 2d 386 (C.A.D.C. 1934) the court noted that whereas a legislator might be privileged from being called into civil liability for statements made on the floor of the Senate, the privilege stopped with the legitimate conduct of Congressional business; thus, if he republished the statement outside the Senate, he might well be subject for liability therefor. 69 F. 2d at 389. By analogy, whatever legitimate purpose he may have had in conducting Subcommittee proceedings, was lost by republishing the documents under his own name. A subpoena issued to require grand jury testimony relating to such activity would require compliance, and by derivation the compliance of Dr. Rodberg.

III. NO IMMUNITY SUBSISTS IN ANY SENATE STAFF MEMBER TO RESIST A SUBPOENA ISSUED TO PROCURE TESTIMONY IN AN INVESTIGATION CONCERNING UNLAWFUL ACTIVITY

Dr. Rodberg implies in the alternative that he acted and continues to act as a member of the Senate staff of the House and Grounds Subcommittee (as opposed to being a member of Senator Mike Gravel's personal staff). The Government does not concede that such implication represents fact. Moreover, even assuming that Rodberg can support this implication, it affords no grounds to excuse compliance with a subpoena. The law specified criminal liability for Congressional staff members for unlawful acts committed while acting under color of their official duties. *United States* v. *Nathan Voloshen*, Cr. no. 70–20 (S.D.N.Y. November 24, 1970). Congressional staff members have likewise been subject to civil suit for unauthorized or unconstitutional acts committed in their official capacities. Accordingly, the House Sergeant-at-Arms was held liable for false imprisonment as an aftermath of *Kilbourn* v. *Thompson, supra*, and the Senate Judiciary Committee was held subject to suit in tort for false imprisonment in *Dombrowski* v. *Eastland* 387 U.S. 82 (1967). This rule prevails even if the action precipitating litigation was ordered by Congress. *Powell* v. *McCormack*, supra, at 505, and even if the court should find that the Congressmen or Senators themselves would not be susceptible to suit for the same actions or for directing the deeds complained of. *Powell, supra; Trimble* v. *Johnson, supra*, at 654: The law relative to legislative employees thus appears no different than that specifying immunity for other employees or agents of the Executive branch, who can be sued for any activity which was unauthorized or for which the purported authorization was unlawful or unconstitutional. *Bivens* v. *Six Agents*, — U.S. —, 39 U.S.L.W. 4821 (June 21, 1971). By analogy, should this court find that Dr. Rodberg's actions, taken at the behest of Senator Gravel were not strictly in accord with Congressional mandate, or that such mandate was without lawful or Constitutional support, then they are fully subject to whatever criminal or civil implications arising therefrom, and the employee should be required to respond to a subpoena relating thereto. Such a finding would not conflict with any privilege of Senate employees to resist any subpoena issued to procure testimony concerning their official actions properly executed under lawful directive.

IV. A SUBPOENA REQUIRING TESTIMONY BEFORE THIS GRAND JURY IS NOWHERE VIOLATIVE OF THE WITNESS' FIRST AMENDMENT RIGHTS

The most favorable view of the law relating to protection of First Amendment rights upon which movant can rely is that for the Government to justify compelling disclosures which would effect a violation of a witness' First Amendment rights an overriding Governmental interest must be demonstrated. *Watkins* v *United States*, 354 U.S. 178 ( ). In conducting Congressional inquiries, for example, "[w]here First Amendment rights are asserted to bar Governmental interrogation resolution of the issue always involves a balancing by the courts of the competing public and private interests at stake in the particular circumstances shown." *Barenblatt* v. *United States* 360 U.S. 109 (1959) at 126. "It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred. . . . The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness." *Watkins, supra* at 198.

The Government contends that these proceedings have not yet reached the stage at which this court must balance the interests of the Government against the infringement to be resulting from testimony.

Since Rodberg has not yet appeared to testify, the questions to which he must respond and the scope of inquiry for which he has been summoned are as yet undetermined. Moreover, the harm to result from answering them cannot be asserted, giving no basis for evaluation. For just this reason (but by way of dicta) a Federal Court dismissed an action for restraining order to prevent compliance with a Senate subpoena in *Cole* v *Trustees of Columbia University*, 300 F. Supp. 1026 (S.D.N.Y. 1969). The plaintiffs in that case failed to show that the mere act of appearance, regardless of questions to be asked, would present an imminent threat of irreparable injury. (400 F. Supp. at 1031). Previous cases allowing a witness exemption from having to give testimony have arisen in the context of prosecution for contempt of Congress, when the subject of inquiry and specific questions had become known.

Should this court deem it necessary to weigh the competing public and individual interests involved, the balance can only tip in favor of compelling testimony. On the part of the witness, the sole claim to individual harm is that by merely being called to give testimony, he will be subject to grave retribution. On the contrary, this duty befalls every good citizen in the same manner as jury duty or serving as witness at trial. Further, Rodberg cannot claim that questions he will answer or responses to be required will subject him to community publicity, social approbation or pecuniary liability since hearings are held in secret. For this reason, Congressional hearing cases such as *Barenblatt* where intimate personal matters were required to be divulged in public are no authority for the proposition that Rodberg will suffer similar ridicule. On the other hand, the Government is engaged in a crucial step of enforcing the criminal law. "The power to investigate is basic." *Anderson* v. *Sills*, 265 A. 2d 678, 56 N.J. 210 (S.C. N.J. 1970). In that case, a state court denied an injunction against the use of certain intelligence-gathering procedures promulgated by the Attorney General of New Jersey. The interests of the Government in enforcing criminal statutes go to the very purpose of Government's existence; to protect citizens and property:

The First Amendment itself would be meaningless if there were no constituted authority to protect the individual from suppression by others who disapprove of him or the company he keeps. Hence, the First Amendment rights must be weighed against the competing interests of the citizen. If there is no intent to control the content of speech, an overriding public need may be met even though the measure adopted to that end operates incidentally to limit the unfettered exercise of the First Amendment right. [265 A. 2d at 687]

The Government sees no possible circumstances under which the hypothetical deterrents to free speech or freedom of the press alluded to in the witness' motion can inure as a result of his mere appearance at this grand jury investigation. Should questions or testimony be raised which place him at a disadvantage, time enough remains for this court to again weigh the competing interests

involved and protect whatever rights are in danger of violation.

IIIA. GRAND JURY PROCEEDINGS CONSTITUTE NO "PRIORITY RESTRAINT" RELATIVE TO THIS WITNESS

A subpoena issued to procure testimony in a grand jury proceeding has no characteristics whatever of a "prior restraint" on the exercise of individual rights under the First Amendment. This proceeding, regardless of outcome, will not affect the publication of any papers of materials such as the witness has succeeded in having published. A "prior restraint" by definition constitutes action taken before the fact to insure that speech or publication of questionable materials does not occur. *Near* v. *Minnesota*, 833 U.S. 697 (1931); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). It was the highly publicized litigation brought to restrain previous publication of the "Pentagon Papers" which raised and disposed of the prior restraint question. *New York Times* v. *United States*, —— U.S. ——, 91 S. Ct. 2140 (June 30, 1971). Indeed, that decision excepted treatment of any issues which might be subsequently raised in a criminal proceeding on account of such publication. (Slip Op. of Mr. Justice White, p. 10)* To that extent, *New York Times* is authority for the proposition that these grand jury proceedings have no characteristics of a prior restraint on publication of these documents.

IIIB. TESTIMONY MAY NOT BE EXCUSED ON GROUND OF ITS CHILLING EFFECT ON THE EXERCISE OF FREE SPEECH

In the *New York Times* case the Supreme Court again viewed with approval the deterring effect upon publication of vital defense information effected by the passage of the Espionage Act, 18 U.S.C. § 793, noting that Congress refrained from passing additional provisions allowing the Executive Branch to seek injunction in the belief that criminal sanctions alone would be sufficient. (Slip op. of Mr. Justice White, p. 10). Thus, whatever "chilling effect" is wrought by this statute is deemed no violation whatever of a citizen's First Amendment rights. Many previous cases deciding this same question have reached a like conclusion. *Abrams* v. *United States*, 250 U.S. 616, 619 (1919); *Schenck* v. *United States*, and *Bauer* v. *United States*, 249 U.S. 47 (1918); *Frowork* v. *United States*, 249 U.S. 204 (1918). Having proved the statute Constitutional, the measures prerequisite to its enforcement can in no wise be less so. Moreover, the witness cannot indirectly raise an attack upon the constitutionality of a statute which has long since been proved viable.

Further, validly constituted Grand Jury proceedings convened to enforce a time-tested criminal statute can in no wise be deemed to have such a "chilling effect" upon the exercise of individual Constitutional rights so as to justify exemption from compliance with a lawful subpoena. The Supreme Court has exercised this doctrine only so far as to grant injunctive relief against state officials threatening prosecution under patently unconstitutional criminal statutes when the mere initiation of prosecution insured certain and irrevocable harm. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). This does not deny that where Government-instituted Civil litigation will have a deterring effect upon the exercise of individual Constitutional rights, state interests supporting the action must outweigh the need for protection of the individual rights. *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449 (1958). But where the Federal Government has enacted legislation essential to the national economy and having strong roots in the protection of national security, some slight infringement on the rights of a relatively few individuals will be tolerated. *American Communications Association* v. *Douds*, 399 U.S. 382 (1950). This grand jury proceeding has been initiated as a vital and unavoidable step in the investigation of possible violations of criminal statutes. It threatens no Federal or official sanctions whatever unless the witness should be indicted. Since all testimony will be given and received entirely in secret, no private or community sanctions can attach to any testimony given. As to the potential deterrent effect upon commission of crimes affected by indictment, this as aforestated stands as one of the most approved and intentional effects of criminal jurisprudence.

Finally, the Supreme Court has just this term taken further steps to limit the "chilling effect" doctrine in *Younger* v. *Harris*, 401 U.S. 37 (1971), refusing to enjoin prosecution in a state court unless the danger from prosecution itself presented an unconstitutional and irreparable injury. No such threat can be asserted here.

Indeed, Dr. Rodberg's entire allegation relative to violation of his First Amendment rights amounts to no more than the possibility that the threat of required testimony may inhibit "future discussion" of facts reflecting unfavorably to a national administration. (Motion, p. 5). In so stating, he seeks to invoke the rights of others, a procedure proscribed in *Titleston* v. *Ullman*, 318 U.S. 44 (1943) and to raise Constitutional issues not yet *in esse* nor for which there exists any ascertainable case or controversy. The disposition of his motion in his favor would thus not appear proper judicial treatment of delicate and complex questions.

III. COMPLIANCE WITH THIS SUBPENA WILL CONSTITUTE NO INFRINGEMENT ON THE WITNESS' FREEDOM OF THE PRESS

The witness further seeks to suggest that requiring his testimony series to infringe on freedom of the press. No such problem is presented with respect to him personally as he has alleged neither that he is a reporter nor that he is a publisher. He should not be allowed to obfuscate the issues before this court by raising rights on behalf of others not present and unidentified. But assuming that Dr. Rodberg had sufficient standing to claim a newsman's privilege, there is insufficient legal precedent to sustain his claim. No statute has ever exempted news personnel from testifying in grand jury proceedings, nor has such a privilege been specified in the Bill of Rights. Only scant judicial treatment has been accorded the question.

The Massachusetts Supreme Court has recently ruled, however, that no such privilege exists within this jurisdiction. *In Re Pappas*, 266 N/E.2d 297 (S.C.Mass 1971). In *Pappas* the court ruled that a newsman is required to testify before a grand jury convened to investigate possible unlawful activity by members of the Black Panther Party in the Boston area, even if such testimony required the divulgence of his news sources:

"Requiring a newsman to testify about facts of his knowledge does not prevent their publication or the circulation of information. Any effect on the free dissemination of news is indirect, theoretical, and uncertain, and relates at most to the future gathering of news . . . We adhere to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury. The obligation of newsmen we think is that of every citizen, vis. to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries. Such appearance, however, like those of other citizens, are subject to supervision by the presiding judge to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation (and of course, subject to due protection of the privilege of any witness against self-incrimination)." [266 N.E.2d at 302–303; footnotes and citations omitted]

In so ruling, the court expressly rejected a recent Ninth Circuit case, *Caldwell* v. *United States*, 434 F.2d 1081 (C.A. 9 1970) now on certiorari to the Supreme Court (cert. granted 39 U.S.L.W. 3478 (May 3, 1971)). That court allowed a newsman to decline testifying at a grand jury proceeding also convened to investigate Black Panther activity:

We hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness' presence before judicial process properly can issue to require attendance.

We go no further than to announce this general rule. As we noted at the outset, this is a case of first impression. The courts can learn much about the problems in this area as they gain more experience in dealing with them. For the present we lack the omniscience to spell out the details of the Government's burden or the type of proceeding that would accommodate efforts to meet that burden. [footnotes omitted]

The unique facts in that case were exceedingly important to the court's holding. The reporter, Caldwell, was a Black newsman who had gained special access to the militant Black Panther Party as a specific source of news that was of great interest to the public. (434 F.2d at 1090). Based upon its finding that on these facts the Government had not shown a compelling need that would outweigh the threat to First Amendment rights, the court recognized Caldwell's right to abstain from both appearing and testifying.

In rejecting *Caldwell*, the *Pappas* court noted that:

Were we to adopt the broad conclusions of that decision, [Caldwell] that a newsman's privilege exists because of the First Amendment, we would be engaging in judicial amendment to the Constitution or judicial legislation. . . . The opinion in the *Caldwell* case largely disregards important interests of the Federal Government and the several States in enforcement of the criminal law for the benefit of the general public. We are of the view also that the opinion unnecessarily expresses in terms of newly discovered constitutional absolutes, interests of the news media, which (so far as reasonably requiring protection) may be guarded by sound judicial discretion and administration. [266 N.E.2d at 302–303]

These considerations compelled the *Pappas* court to reiterate the following general rule:

On the meager record before us, we can do no more than to state (1) that a grand jury, to carry out its ancient and important public information, must be allowed appropriate scope of investigation; (2) that it is the duty of all citizens having relevant knowledge to assist in such inquiries when called upon to do so; (3) that the burden rests upon a witness, asserting impropriety in a grand jury inquiry, to establish that the grand jury inquiry is improper or oppressive; and (4) that, in exercising his supervisory discretion, the presiding judge (with respect to the examination of any witness and not merely as to news gatherers) may take into account all pertinent circumstances affecting the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony of the particular witness to the investigation in progress. (266 N.E. 2d at 303–304) [Emphasis in original]

CONCLUSION

Dr. Rodberg has alleged no grounds whatever to justify exemption from full and complete cooperation with the Grand Jury hear-

*. . . [F]ailure by the Government to justify prior restraints does not measure its Constitutional entitlement to a conviction for criminal publication (Ibid., p. 4)

ing now in session. Having been served with lawful subpoena, he is obliged to comply therewith under threat of judicial sanctions.

Dr. Rodberg is no staff member of any United States Senator. Yet if he were, this fact would not exempt him from compliance. The Constitutional privilege extended to members of Congress reaches no further, even to members of their personal staff or their families. Again, even if a Senate staff member were entitled to protection under the Speech and Debate Clause, this exemption can only be claimed by the Senator whom he serves or by the house. Such a privilege, being derivative in nature, cannot be claimed where it would not protect the Senate member concerned; here, Senator Gravel can himself claim no exemption. The Speech and Debate clause was enacted in its present form specifically to insure that Senators would remain subject to obligations and sanctions of the criminal law and it has been applied in precisely this fashion for over 170 years. Accordingly, legislators have been deemed subject to subpoena and have occasionally been prosecuted. Under the "privilege" provision, Congressmen and their servants have always been subject to judicial limitation upon their actions where, even though garbed in the trappings of Congressional propriety, they have issued subpoenas or ordered imprisonment which transgressed their Constitutional powers. Thus, this court has complete powers to find that the activities in which the Senator and Dr. Rodberg were engaged were far removed from legitimate Congressional business and cannot therefore claim the protection of the privilege clause. Even if Senator Gravel's activity in the subcommittee hearing was privileged, efforts to have the "Pentagon Papers" published thereafter comprised no official action. Finally, Dr. Rodberg can claim no immunity by virtue of being a Senate staff member. The law in this area is no different from the laws of immunity governing the officials of the Executive Branch: an official is fully accountable for his actions taken outside the scope of his authority or prescribed in excess of his agency's Constitutional powers. By analogy, he cannot claim immunity from criminal subpoena in connection with any actions characterized as *ultra vires*.

Nor can Rodberg reach for the well-worn cloak of First Amendment privilege. This Grand Jury proceeding constitutes no prior restraint on his freedom of speech or expression; that issue has been previously litigated in *New York Times* v. *United States*. Nor can this proceeding be characterized as having a chilling effect upon the exercise of his rights. This proceeding threatens no patently unconstitutional harm, irretrievable after the initial act of testifying; no courts have ever reached this finding, whose effect would be to disable the administration of criminal justice. And, since Dr. Rodberg is not a newsman he can claim no privileges as such.

The Government has not addressed itself to the Movant's contention involving electronic surveillance, since this Court has previously denied his motion in that respect.

WHEREFORE, for all of the foregoing, it is submitted that this motion should be denied.

Respectfully submitted,

PAUL C. VINCENT,
*Attorney, Department of Justice.*
JON H. MARPLE,
*Attorney, Department of Justice.*

CERTIFICATE OF SERVICE

Copies of the foregoing Memorandum in Opposition to Leonard S. Rodberg's Motion to Quash a Grand Jury Subpoena were mailed, postage paid, this date, the fifth day of September 1971 to Doris Peterson and James Reif, c/o Center for Constitutional Rights, 588 Ninth Avenue, New York, New York 10036, attorneys for Movant. A copy has also been mailed to Charles Louis Fishman, Esq., 633 East Capitol Street, Washington, D.C. 20003, attorney for Intervenor, Senator Gravel.

JON H. MARPLE,
*Attorney, Department of Justice.*

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[In the U.S. District Court for the District of Massachusetts, Docket No. EBD 71-172]

STATEMENT OF FACTS

(MIKE GRAVEL, U.S. Senator, intervenor versus United States of America, United States of America versus John Doe, in re Leonard S. Rodberg)

THE PRESENT POSTURE OF THE CASE

On August 24, 1971, a subpoena was served on Dr. Leonard S. Rodberg, directing him to appear to testify before a federal grand jury in Boston, Massachusetts, on August 27. The subpoena gives no indication on its face as to the nature of the testimony to be sought from the witness. It does not state what persons or crimes are allegedly the subject of investigation. The person claimed to be the subject of the investigation is designated as John Doe and no statutes are cited.

Dr. Rodberg is a member of the staff of United States Senator Mike Gravel. Under date of August 27, Dr. Rodberg moved this Court to quash the grand jury subpoena and for a stay pending disposition of the motion. The Court under date of August 27 granted such a stay and set the motion for argument on September 10.

In Dr. Rodberg's motion he alleged that the subpoena should be quashed upon, *inter alia*, each of the following independent grounds:

(a) That it violates Congressional privilege, separation of powers and the Speech and Debate Clause;

(b) That it abridges his right to freedom of the press, freedom of expression and freedom of association, in violation of the First Amendment.

On August 27, Senator Gravel moved to intervene in this matter, alleging in essence that Dr. Rodberg was employed by him to perform work in respect to the business of the United States Senate and that all such acts performed by Dr. Rodberg are immune from judicial inquiry by virtue of the constitutional provisions referred to above and the privileges of members of the United States Senate. On September 1 the motion to intervene was granted. On that date Senator Gravel moved to quash the aforesaid subpoena upon substantially the foregoing grounds.

There are thus pending before the Court at this time the motions of Senator Gravel and Dr. Rodberg to quash the subpoena.

THE FACTUAL BASIS FOR THE MOTIONS

This is a further development of the New York Times case (*New York Times Company* v. *United States*, 91 Sup. Ct. 2140 (1971)).

While the government was litigating the question of the right of the *New York Times* to publish the so-called Pentagon papers, to wit, on June 29, 1971, Senator Gravel, in the course of a meeting of the Senate Subcommittee on Public Buildings and Grounds, of which he is chairman, read publicly a portion of said papers and inserted those papers in his possession into the record of the Subcommittee. Immediately after that reading, and at the express direction of Senator Gravel, his aides and assistants distributed to members of the press and others copies of the papers from which the Senator had read.

In connection with Senator Gravel's work on the Pentagon papers, Dr. Rodberg was engaged to perform analytical and advisory work for the Senator because, as the record shows, Dr. Rodberg has been a student of the decision-making process of the United States government, especially in regard to the Vietnam war. Dr. Rodberg's work for the Senator was in the area of his expertise and he assisted the Senator in threading his way through the massive material which the Senator had obtained.

Dr. Rodberg, as the affidavits show, was awarded a Ph. D. in physics from M.I.T. in 1956 and thereafter engaged in research and teaching in that field. From 1960 to 1967 he was a consultant at the Los Alamos Scientific Laboratories on questions relating to nuclear physics. Beginning in 1961 he was engaged by the Disarmament Administration in the Department of State, and in 1962 he became Chief of the Policy Research Office of the Science and Technology Bureau of the United States Arms Control and Disarmament Agency. He thus developed expertise in the field of arms control, disarmament, and the general matter of decision-making process of the government in the war in Vietnam. In addition to publications in his original field of physics, including *Introduction to the Quantum Theory of Scattering*, published in 1967, he wrote a chapter of a book commissioned by Senator Edward Kennedy entitled *ABM: An Evaluation of the Decision to Deploy an Anti-Ballistic Missile System*, and was co-director of the study of U.S. military organizations and policy which resulted in the publication of a book entitled *The Pentagon Watchers*, of which he was co-editor. He has spoken and written extensively on arms control, the ABM, and the strategy and technology of military policies of the United States.

His expertise in these areas led to his developing a consultant relationship with a number of members of Congress who came to him beginning in 1966, and up to the present time, for advice and suggestions concerning arms limitation, the military budget and policy, problems of economic conversion, study and evaluation of military organizations and policies, the United States policy in Vietnam, and the impact of that policy on the allocation of priorities within this country.

Indeed, in the summer of 1969, Dr. Rodberg was asked by a group of Congressmen to organize a Congressional conference on planning for new priorities. The conference, which was held at the Senate Office Building, was sponsored by approximately 50 members of Congress. Dr. Rodberg participated in and spoke at the Congressional conference. Under the direction of Congressmen, he secured for them the participation of academic experts in foreign and military policies and economics. At the request of Congressmen he also spoke at, participated in, and drafted the report for another Congressional conference, which report was subsequently published by sponsoring Congressmen.

In the summer of 1970 Dr. Rodberg became a full-time research fellow at the Institute for Policy Studies, in which position he has been conducting research and writing on the Vietnam war, particularly, the United States decision-making process, the operation of the United States national security agencies, military budget, economic conversion, and the uses of advanced technology. He has also organized conferences and seminars, directed the research of students, and is in communication with scholars from around the country in connection with the aforementioned areas.

In April 1971, he helped to organize, participated in, spoke at, and wrote the report of the Conference on Economic Conversion, sponsored jointly by a number of Congressmen and public organizations. In this activity he worked closely with a number of aides to individual Congressmen. The report of the conference has been published by the Coalition on National Priorities and has been distributed to members of Congress and interested members of the public.

It is evident from the affidavits that Dr.

Rodberg is one of the experts in this country on a great many matters having to do with the decision-making process of the United States and with the war in Vietnam and has, at their request, and supplied his expertise to Senators and Congressmen concerned with the development of public policy in these areas.

As is clear from the affidavits, the relationships with Congressmen and Senators are necessarily confidential and based upon mutual trust. The ability of Dr. Rodberg to furnish his expertise and the willingness of Congressmen and Senators to consult with him is entirely dependent upon the confidential character of their relationships. The ability of Senators and Congressmen to consult Dr. Rodberg and use his expert knowledge and skills would be greatly restricted and hampered if they could not do so in complete confidentiality.[1]

Insofar as the evidence adduced in behalf of movant in *In re Grand Jury Subpoena: Richard Falk, Witness*, EBD 71–165, supports our position, we respectfully incorporate that evidence here.

*Argument*

I. The subpoena violates the Congressional privilege with respect to speech and debate and, Senator Gravel having asserted that privilege, Dr. Rodberg is barred from responding thereto.

In the instant case the Court has granted a motion to intervene on behalf of Senator Gravel, who has asserted that the subpoena addressed to Dr. Rodberg, a member of Senator Gravel's personal staff, is violative of the Speech and Debate Clause of the Constitution of the United States.

The issue as far as concerns Dr. Rodberg is not whether he has any privilege not to testify but whether indeed he does not have a duty to testify in light of the assertion of the privilege by the Senator.

We will not burden the Court with repetition of the arguments as to the scope and meaning of the Speech and Debate Clause, those issues having been fully presented to the Court by Senator Gravel. Our only concern therefore is to make clear Dr. Rodberg's legal obligation in light of the threatened abridgement of Senator Gravel's constitutional duties. Our submission at this point is that Dr. Rodberg is duty-bound not to testify in the light of the Senator's assertion of privilege.[2] The relationships here are not dissimilar from those that exist between an attorney and a client. The privilege with respect to confidential communications to attorneys, as the courts have repeatedly said, is a privilege of the client, and subject to waiver only by the client—not by the attorney. See *Poliafico* v. *United States*, 237 F. 2d 97 (6th Cir., 1956), *cert. den.*, 352 U.S. 1025; *Magida on Behalf of Vulcan Detinning Co.* v. *Continental Can Co.*, 12 F.R.D. 74 (D. C.N.Y., 1952); *Petition of Sawyer*, 129 F. Supp. 687 (D.C. Wisc., 1955), affirmed, 229 F. 2d 805, *cert. den.*, 351 U.S. 966. As stated by the court in *Timken Roller Bearing Co.* v. *United States*, 38 F.R.D. 57, 64 (D.C.Ohio, 1964): "Thus only the client can unseal his attorney's lips; only the patient can authorize disclosure of sickbed confidences."

Thus in this case Dr. Rodberg is duty-bound to respect the assertion of privilege by Senator Gravel and is in no position to frustrate the Senator's claim under the Constitution.

II. The subpoena must be quashed because under the circumstances of this case Dr. Rodberg's appearance before the grand jury would violate fundamental first amendment rights.

The record establishes that Dr. Rodberg is a highly regarded scholar in the field of the decision-making mechanism regarding Vietnam within the government of the United States. He has not only been able to disseminate ideas directly to the American public through writings and speeches but he has acted frequently as consultant to legislators who have themselves acted upon his advice and expertise.

In this regard Dr. Rodberg is one of a small number of scholars within the academic community who have played and continue to play a unique role with respect to the war in Vietnam. As the Court is undoubtedly aware, opposition to the war did not arise full-blown at the war's inception. Indeed, it is not inaccurate to state that the war was, if not endorsed, at least accepted without question, in 1965 by a substantial majority of Americans. However, as the Court is no doubt equally aware, the last six years have witnessed a staggering change in the opinions of Americans toward the war. Today, the war is strongly opposed by a substantial majority of Americans.

We submit that the key to understanding the full extent of the threat to First Amendment rights posed by the proposed appearance by Dr. Rodberg before the grand jury lies in the understanding of how this profound opposition to further American involvement in Vietnam has grown. We would respectfully suggest two interrelated elements: (1) that opposition has grown largely as a result of information made available to the American people by that small number of scholars of which Dr. Rodberg is one, and (2) that the ability of Dr. Rodberg (and others like him, as for example, Professor Richard Falk) to obtain such information of vital public concern flows ineluctably from sources which are confidential.

American opposition to the war has grown in large measure as a result of the people's growing awareness of the realities of the war. Some of the realities uncovered are notorious: the massacre at My Lai, the corruption of the Saigon regime, the maiming and disfiguring of human beings by the use of napalm, etc. etc. The list is endless, stark newspaper headlines following each upon the other. Equally as important in the American people's understanding of this tragedy has been their education as to the how and the why behind each new story. It is in this regard that Dr. Rodberg and other scholars in the field of American decision-making have performed so vital a function. It is these scholars who through laborious digging and searching have uncovered the how and the why and have then brought them to the attention of the American public. It is the nature of the decision-making process and its implementation which best explain the individual incidents which result.

In digging and searching for information with respect to American decision-making regarding Vietnam, Dr. Rodberg has had access to a variety of confidential sources. Such sources attend the work of a man like Dr. Rodberg in much the same way that confidential sources attend the work of a newspaper man (or indeed the work of federal law enforcement officials). They are indispensable to obtaining the how and the why regarding Vietnam. These sources are persons in sensitive personal positions who are moved to communicate important information with assurances that their communications will be kept confidential. These relationships between sources and Dr. Rodberg are delicate and fragile. They depend upon a trust which, once breached, is not reconstructed. We are not suggesting that Dr. Rodberg or other scholars are the recipients of official secrets or information not lawful to obtain. The wealth of confidential information which they receive is entirely proper, but not available generally for the obvious reason that government experts knowledgeable in these matters do not feel free to air their knowledge or opinions in public.

We take it to be unquestioned that there is a substantial First Amendment interest in the dissemination of information regarding matters of public importance. The Supreme Court has said:

"The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

It cannot for a moment be doubted that the interest in the exposure to the American people of information regarding American involvement in Vietnam and the deception of the government with respect thereto, the most important public issue of the day, is as substantial as any other. Were there such doubt, one need only read the enduring words of Justice Black in this regard:

"In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." *New York Times Co.* v. *United States*, 91 S. Ct. 2140, 2143 (1971).

The *Times* case settled what should have been clear all along—that the foundation of our government is the people's right to know the basic facts upon which governmental policy is based. And the constitutional clause which establishes that principle is of course the First Amendment.

In the *New York Times* case the government sought to impede by injunctive process the constitutional right of the people to "know" the facts upon which their governmental policy was being determined. The Court refused and concluded that the people's right to know far outweighed any claims of the executive to maintain secrecy. The basic point was that it was the purpose and intent of the First Amendment to prevent that very type of secrecy.

The right to acquire information regarding American involvement in Vietnam is a necessary right, one concomitant to the right to disseminate that information. See, e.g., *Caldwell* v. *United States*, 434 F.2d 1081 (9th Cir., 1970), *cert, granted*, 402 U.S. 542 (1971). The principle that information must

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[1] Due to the shortness of time and the difficulty in contacting several persons including Senators, we have not been able to obtain as of this date the full evidence we intend to present to the Court. However, we expect to receive much of that evidence by the date of the hearing on this motion and will present it at that time.

[2] Had the Senator not intervened, then Dr. Rodberg would have been duty-bound to have asserted the privilege on behalf of the Senator, no differently than is the responsibility of the lawyer to assert the attorney-client privilege on behalf of an absent client. See, for example, *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967), where the court dealt with this question precisely and held that the lawyer was "duty-bound to raise the claim [of privilege] in any proceeding in order to protect communications made in confidence" in the absence of his client. Indeed in his first presentation to this Court before the Senator was a party Dr. Rodberg did assert this privilege.

not unnecessarily be cut off at its source is fundamental to the concept of an unabridged flow of that information to the people. As Madison wrote:

"A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." [3]

The Supreme Court has long recognized that First Amendment freedoms can be violated as readily by indirect abridgement as by direct and has, accordingly, acted to protect those rights however they are threatened. As Justice Stewart declared for a unanimous Court in *Bates* v. *City of Little Rock*, 361 U.S. 561, 523 (1960): "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Furthermore, the Court has, in an unbroken line of cases, recognized that compelling disclosure of facts intended to be kept confidential may constitute just such a "more subtle governmental interference." See *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *City of Little Rock, op cit.*; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825 (1966).

In the present case it can be seen that an effort to compel Dr. Rodberg to testify regarding matters disclosed to him in confidence will interfere with the free flow of information regarding Vietnam and thus interfere with the dissemination of ideas which lies at the core of the First Amendment. Sources of confidential information will no longer be sources if their communications are no longer confidential. The people's right to know will suffer accordingly, for the explanation of the how and the why of Vietnam will be based on just that much less information.

That conndential sources of information will dry up if they come to fear exposure is not a novel perception. That fact is shown not only here but in the companion case of Professor Falk. The fact was shown (and judicially recognized) in the landmark case of *Caldwell* v. *United States*, 434 F. 2d 1081 (9th Cir., 1970), *cert. granted*, 402 U.S. 542 (1971). Because *Caldwell* discusses the abridgement of the public's First Amendment right to know that can occur where, as here, a person is subpoenaed to appear and testify before a federal grand jury concerning information disclosed to him in confidence, it is appropriate to examine that case in some detail.

*Caldwell* involved a newspaper reporter who had access to confidential sources of information which was a matter of general public interest. He demonstrated to the court that the only way he could maintain his line of communication with his confidential sources was to maintain the absolute confidentiality of his relationships. He then argued that the very process of his appearance before a secret grand jury would render him suspect and would dry up his sources of confidential information.

The court in *Caldwell* accepted this proposition and concluded that the public's right to know and Caldwell's need to maintain his lines of communication so as to serve that interest of the public, outweighed any claimed interest of the government to proceed by way of secret grand jury proceedings at least unless the government could show some compelling countervailing justification.

The essence of *Caldwell* is that in respect to persons who function in the area of the dissemination of information in the public interest, and whose very functioning requires the maintenance of confidentiality and trust, the device of a secret grand jury proceeding is recognized as an impermissible interference with such rights absent a strong showing of governmental necessity.

This case, and its companion, that involving Professor Falk, poses exactly the same issue in the context of the work of scholar-journalists who have contributed so much to the final exposure of the deceptive nature of government policy in Vietnam.

The role of scholarship and the dissemination of information on the development of the war in Vietnam is nowhere more clearly revealed than in the careers and work of Dr. Rodberg and Dr. Falk. The current determination by the American people and their representatives in Congress to reassert control over the policies of their government in respect to the war is the product of years of effort by journalists and scholars who have dug deep and have exposed governmental policies.

Scholarship is based upon access to information. The value of the material is such that it is not all available in libraries. Much of the material upon which serious studies have been made comes from personal interviews of a most confidential nature. The ability of a scholar to function—just as the ability of Caldwell to function—is dependent upon the lines of communication remaining open. There is a compelling right of the people to have available to them information regarding a matter not only of general importance but a matter which is the most important issue of the day. Therefore the employment of a process which impedes these lines of communication is an impermissible burden upon the First Amendment, absent a strong showing, not made here, of government necessity. The infringement of the First Amendment is accomplished in this case merely by Dr. Rodberg's appearance before the grand jury. In this regard, *Caldwell* is again instructive.

Emphasizing that "[t]hroughout history secret interrogation has posed problems and caused unease," 434 F. 2d at 1089, the Court of Appeals concluded that because of the *secret* nature of the grand jury proceedings, the First Amendment issues in that case required that the subpoena itself be quashed. The essence of *Caldwell* was that the confidential relationships between a newspaper reporter and his sources of information would be destroyed by the very requirement that he appear for a secret interrogation—after all, nobody could be sure what he would say under compulsory process behind closed doors and the basis of trust would thus be destroyed.

As the court in *Caldwell* said in referring to a reporter's relationship with his sources:

"The relationship depends upon a trust and confidence that is constantly subject to re-examination and that depends in turn on actual knowledge of how news and information imparted have been handled and on continuing reassurance that the handling has been discreet.

"This reassurance disappears when the reporter is called to testify behind closed doors. The secrecy that surrounds Grand Jury testimony necessarily introduced uncertainty in the minds of those who fear a betrayal of their confidences."

The conclusion in *Caldwell* as to the effect of the witness's appearance on his confidential source is as fully applicable to such a source when his communication is to a scholar-writer as when it is to a newspaper reporter. Indeed, the instant case is even stronger than *Caldwell* on the issue that the mere appearance before a grand jury would be destructive of fundamental First Amendment interests. This is because Dr. Rodberg not only makes his expertise, achieved in large measure by reason of confidential information, available to the public at large, but makes it available on a direct consulting basis to Senators and Congressmen.

The facts in the record establish that Dr. Rodberg is a highly regarded scholar in the field of the decision-making mechanism within the government of the United States, particularly on the issues of the Vietnam war. He has been consulted frequently by legislators in that respect. An indispensable element of his ability to function is the complete confidence placed in him by those who give him information, as well as by those who utilize his information. If it was true, in *Caldwell*, that there is a First Amendment public interest in the preservation of the confidential relationship between a newspaperman and his sources of information, how much more true is it that there is a First Amendment public interest in the preservation of confidential relationships between an expert on one of the most important issues of the day, and those Senators and Congressmen who seek his counsel.

It is literally true that the effective functioning of the Congress of the United States would be threatened if its members could not rely on knowledge they obtained in confidence from experts in a field. If the executive branch seeks to force such persons to testify in secret, the legislative process, which is at the heart of the democratic functioning of our society, is impaired.

The issues go far beyond the rights of Dr. Rodberg or even his relationship with a particular Senator. The chilling effect upon all persons engaged in the legislative process—Congressmen, Senators, their aides, and persons called upon to give them the benefit of their knowledge and expertise—can have devastating impact upon the workings of the democratic process. Again, as pointed out in *Caldwell*, the objective of the First Amendment "is the maximization of the 'spectrum of available knowledge' ". *Id.* at 1084. How much more true is it that the objective of the First Amendment is to assure the maximization of the spectrum of available knowledge to the representatives of the people engaged in the legislative process.

It is common knowledge, as pointed out in Senator Gravel's brief before this Court, that the executive branch has frequently insisted on its need to have confidential communication within its own branch. Thus, it is notorious that the President has refused to permit Mr. Kissinger to testify before various committees and only last week the administration refused to disclose to the Senate Foreign Relations Committee a planning report on the United States military aid program which the Pentagon had termed an "internal working paper." Attorney General Mitchell in the President's name invoked executive privilege to keep an F.B.I. investigative report out of the hands of a House subcommittee.

The need of Congressmen and Senators to have the benefit of confidential communication of experts is even greater, for without such communication they have no possibility of being informed of the basis on which they are to exercise their legislative powers. And the interest is not that of legislators; it is rather the interest of the public at large, because the informed functioning of the legislative body allows the expression of the body politic.

What we ask the Court to recognize, exactly as did the Court of Appeals in *Caldwell*, is that the very process of secrecy in interrogation of an expert in American policy who has access to confidential communications is inherently inconsistent with the character of relationships which the First Amendment and the legislative process require to be protected. Legislators will not soon again avail themselves of Dr. Rodberg's expertise, if his communications with Senator Gravel can be scrutinized in secret before a grand jury.

CONCLUSION

This is in large part an unprecedented matter touching upon principles which go to the root of our system of government. If the obligations of the Legislature can be questioned in the manner the Government seeks here, this case will be remembered as a turn-

[3] 6 Writing of James Madison 393 (Hunt ed., 1906).

ing point in our constitutional history, a point at which the most basic principle of separation of powers was blurred and our system of checks and balances sacrificed. For the aforegoing reasons, the subpoena served upon Dr. Rodberg should be quashed.

Respectfully submitted,

JAMES REIF.

SEPTEMBER 8, 1971.

CERTIFICATE OF SERVICE

I hereby certify that I served this brief upon counsel for the parties by causing a copy of it to be mailed, postage prepaid, to Robert J. Reinstein at 1715 N. Board Street, Philadelphia, Pa., 19122, and Charles L. Fishman, 633 E. Capitol Street, Washington, D.C., 20003, and by causing a copy of it to be hand delivered to the office of the United States Attorney for the District of Massachusetts, Boston, Mass.

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[District of Massachusetts, E.B.D. No. 71-165-G]

MEMORANDUM OF DECISION, OCTOBER 4, 1971

(United States of America versus John Doe, in the matter of a grand jury subpoena served upon Richard Falk)

Garrity, J. Petitioner, a prominent professor of international law and critic of the war in Vietnam, seeks to quash a subpoena compelling his appearance before a federal grand jury ostensibly investigating crimes related to the release and dissemination of the much-publicized "Pentagon Papers." At a hearing on August 20, 1971, the court stayed Professor Falk's appearance and ordered that petitioner and the government file affidavits and memoranda of law prior to a further hearing on September 10.

That the grand jury is investigating crimes related to the Pentagon Papers, which were the subject of the decision of the Supreme Court in *New York Times Company* v. *United States*, 1971, 403 U.S. 713, and for whose alleged unauthorized possession and conversion Daniel Ellsberg has been indicated in the Central District of California, is apparent from the prosecuting attorneys' oaths of office on file with the Clerk. They describe the current investigation as being based on information "that various persons have violated in the District of Massachusetts the laws relating to the retention of public property or records with intent to convert (18 U.S.C. 641), the gathering and transmitting of national defense information (18 U.S.C. 793), the concealment or removal of public records or documents (18 U.S.C. 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. 371)." The parties' arguments have proceeded on this assumption.

The nature of the petitioner's claim, which is supported by thirty affidavits, including his own, is indicated by the following excerpts from his affidavit:

"My motion to quash this subpoena is based on the principal contention that my *mere appearance* before *this particular* Grand Jury will impair greatly my capacity to carry on my professional duties in an effective fashion. This contention arises from the rather distinctive character of my professional identity. Much of my professional work has involved writing and advising on the United States role in the Vietnam War. This effort has been dependent upon the trust of many individuals and upon access to a variety of kinds of confidential information. My contact with the subject-matter of this Grand Jury investigation is solely a consequence of this trust and with the exclusive purpose of carrying out my professional role as an author and a journalist. To require my appearance in a secret proceeding of this type that is concerned with this subject would undermine the confidence of others in my capacity to protect my sources of information against disclosure . . . .

"My professional work involves a number of different roles. In several of these roles relating to writing and advising on matters of United States foreign policy, especially in the setting of the Vietnam War, the relevance of confidentiality should become apparent from a recital of my actual experience over the last several years. In brief, confidentiality of relationship has been essential for me in the following roles: (1) as a scholar devoted to revealing the truth as it relates to issues of American foreign policy and, in particular, to the Vietnam War; (2) as a journalist who writes for the public on these issues in national newspapers and magazines; (3) as a consultant for TV and radio broadcast activity in relation to this subject-matter; (4) as an expert witness for defendants who rely on arguments relating to the legal status of the war; (5) as a consultant and adviser to Members of Congress and other government officials concerned with these issues."

At the hearing, in arguing the breadth of the interest relied upon by petitioner, counsel quoted as follows from the affidavit of Professor Stanley Hoffman of Harvard University, Professor of Government and Chairman of the University's Standing Committee on West European Studies:

"This scholarly function goes beyond the role which the media perform in informing the public, also on the basis of research whose confidentiality must be protected. To be sure, governments do not always like the analyses or advice scholars produce. But the destruction of the function scholars provide is too high a price to pay in retaliation for unwelcome views or unorthodox judgments. Scholars are of course morally and legally responsible for what they prescribe. But such responsibility is one thing, an obligation to divulge their sources is quite another—and would come dangerously close to harassment."

The parties rely heavily on two recent decisions, one by the Court of Appeals for the Ninth Circuit concerning a newspaper reporter and one by the Supreme Judicial Court for Massachusetts concerning a newsman-photographer, in which the Supreme Court has granted certiorari. Petitioner's precedent is *Caldwell* v. *United States*, 9 Cir., 1970, 434 F. 2d 1081, cert. granted 402 U.S. 942. There a federal grand jury conducting a "general investigation" into a possible criminal activity by members of the Black Panther Party subpoenaed petitioner, a black reporter for the New York Times specializing in news concerning Panther activities. By motion in the District Court, petitioner sought to quash the subpoena, arguing (as the court later found) that "compelled disclosure of information received by a journalist within the scope of . . . confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish the news . . ." *Application of Caldwell*, N.D. Calif., 1970, 311 F. Supp. 358, 361. The district court nevertheless ordered that he testify, entering instead a broad protective order designed to shut off investigation into confidential information while permitting "questions concerning . . . statements or information . . . given to him for publication or public disclosure . . ." *Id.* at 362.

Caldwell refused to appear, and on appeal from the ensuing contempt order the Court of Appeals reversed, holding that even his mere appearance before the grand jury would jeopardize "the public's First Amendment right to be informed . . ." *United States* v. *Caldwell*, *supra* at 1089.[1] The court emphasized, however, the narrowness of its holding; while recognizing that the threat of lost sources was dominant in the case before it, it stated that "not every news source . . . is as sensitive as the Black Panther Party . . ." *Id.* at 1090.

The government cites *In Re Pappas*, 1971 Mass. Adv. Sh. 69, cert. granted 402 U.S. 942, in which a newsman-photographer employed by a television station refused to answer certain questions of the grand jury about what he saw and heard in a store serving as a Black Panther Headquarters. Pappas had been allowed to enter the headquarters on condition that he not report anything he saw or heard inside the store except a police raid. In rejecting his contentions that his testimony before the grand jury would violate a privilege to protect the source of information acquired in confidence and his rights under the First and Fifth Amendments to the Constitution of the United States, the court stated at 76:

"Were we to adopt the broad conclusions of that [Caldwell] decision, that a newsman's privilege exists because of the First Amendment, we would be engaging in judicial amendment of the Constitution or judicial legislation. Requiring a newsman to testify about facts of his knowledge does not prevent their publication or the circulation of information. Any effect on the free dissemination of news is indirect, theoretical and uncertain, and relates at most to the future gathering of news. The opinion in the *Caldwell* case largely disregards important interests of the Federal government and the several States in enforcement of the criminal law for the benefit of the general public. We are of the view also that the opinion unnecessarily expresses, in terms of newly discovered constitutional absolutes, interests of the news media, which (so far as reasonably requiring protection) may be guarded by sound judicial discretion and administration."

In the court's opinion petitioner does not fit within the *Caldwell* doctrine, though not mainly because he is not a newspaper reporter. The public interest under the First Amendment in the "maximization of the 'spectrum of available knowledge'" which the *Caldwell* court deemed sufficient to override an unlimited grand jury subpoena clearly is of the same general nature as the public interest alleged by petitioner here. In no way do his facts become any less a part of the "spectrum of available knowledge." *Griswold* v. *Connecticut*, 1965, 381 U.S. 479, 482, for appearing in books and articles rather than in a newspaper. Such media are "vehicle[s] of information and opinion" of a type long recognized by the Supreme Court as being within its definition of "the press." *Lovell* v. *Griffin*, 1938, 303 U.S. 444, 452.

Even though a substantial First Amendment right is here involved, the *Caldwell* protection is not applicable because, upon consideration of all the affidavits filed in support of the motion, the court perceives no real likelihood that petitioner's sources of lawfully transmitted information will be inhibited by his mere appearance before the grand jury.[2] The facts here and in the *Caldwell* case are crucially distinguishable. Reporter Caldwell's sources were members of the Black Panther Party, persons often lacking in education and sophistication whose distrust of government, especially of police and prosecutors, is well known. No persuasive analogy can be drawn between a Black Panther's fear of harassment and prosecution and the anxieties of petitioner's sources who

[1] "Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt* v. *United States*, 1959, 360 U.S. 109, 126.

[2] The issue of the legality of Professor Falk's information and sources is not before the court and for purposes of this decision the information is presumed both lawful and of public value. Obviously, sources of illegally revealed information may and must be "inhibited" by investigation and prosecution.

likely are highly trained and sophisticated individuals. Such persons, highly placed in the councils of government, education and industry, undoubtedly will continue to "leak" confidential but otherwise lawful information to petitioner and indeed to other scholars, journalists and consultants too. The facts here fall far short of showing a confidential relationship between petitioner and his "contacts" as unique and exclusive as that which obtained between Caldwell and his Black Panther acquaintances.

In addition, the grand jury in the California case was engaged in a "general investigation" not focused on specific crimes. *Caldwell* v. *United States, supra* at 1082. While even such a general investigation may be conducted, *Hale* v. *Henkel*, 1906, 201 U.S. 43, it is clear that one might operate to place reasonable fear of disclosure and jeopardy into the minds of diverse law-abiding citizens. Here, however, the government has indicated the specific statutory offenses which it is investigating, *State* v. *Knops*, 1971, 49 Wis.2d 647, and the reasonableness of such investigation is supported by the fact that at least some of the Pentagon Papers, or copies thereof, were possessed by persons in Massachusetts, since portions were published by a Boston newspaper.[3] Where the investigation is thus focused, the court will not presume that men of substantial intelligence and good intent will be inhibited from pursuing otherwise lawful activity; it is more rational, and more likely, that such persons will presume that the grand jury process will not be misused against them.

The motion to quash is denied. So ordered.

W. ARTHUR GARRITY, Jr.,
*U.S. District Judge.*

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[U.S. District Court for the District of Massachusetts]

SUBPOENA TO TESTIFY BEFORE GRAND JURY

(U.S. versus John Doe)

To: Leonard Rodberg, 420 Eisner Sreet, Silver Spring, Md.

You are hereby commanded to appear in the United States District Court for the District of Massachusetts at P.O. & Courthouse Building in the city of Boston on the 14th day of October 1971 at 11:00 o'clock A.M. to testify before the Grand Jury and bring with you [1]

Please report to: Richard E. Bachman, Asst. U.S. Attorney, Chief, Criminal Division, Rm. 1107 P.O. & Courthouse, Boston, Mass.

RUSSELL H. REID,
*Clerk.*

Date October 4, 1971.
By Denise Irwin, Deputy Clerk.

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[In the U.S. District Court for the District of Massachusetts, No. E.B.O. 71-172]

MOTION OF INTERVENOR-PETITIONER FOR RECONSIDERATION AND STAY PENDING RECONSIDERATION AND/OR APPEAL

(Mike Gravel, United States Senator, Intervenor-Petitioner versus United States, United States versus John Doe, in the matter of a grand jury subpoena served upon Leonard Rodberg)

1. Senator Mike Gravel, intervenor-petitioner, respectfully moves this Court to reconsider its resolution of two issues in the "Memorandum of Decision and Protective Order" entered on October 4, 1971. Movant respectfully submits that these issues ought to be reconsidered because they present complex and important questions of constitutional law and were not heretofore discussed in sufficient depth by the parties. Movant further respectfully submits that given the holding of the Court the appearance of Dr. Rodberg before the grand jury will violate movant's privileges and rights secured by the Speech and Debate Clause.

2. The first issue upon which movant seeks reconsideration relates to this Court's holding that the actions of Senator Gravel to inform fully his constituents about Executive conduct in foreign relations, by arranging for the republication and public distribution of the official record of the Subcommittee on Public Buildings and Grounds, were not protected by the Speech and Debate Clause and could be investigated by the Grand Jury and made the subject of criminal proceedings instituted by the Executive.

3. In the course of its discussion on this issue this Court stated (Slip Opinion, page 12, fn. 5):

"The Senator has made no specific claim that his legislative privilege extends to his actions subsequent to the Subcommittee hearing. However, this claim has been advanced by Dr. Rodberg and contested by the Government and hence the Court has considered it."

Movant respectfully submits that he *did* specifically assert that republication of the Subcommittee record was protected by the Speech and Debate Clause. A significant portion of oral argument was devoted to this issue, and there was an extended colloquy between the Court and counsel for movant. Furthermore, counsel for movant did not anticipate that the Government would argue that the Congressional privilege did not extend to republication, and in fact this argument was contained in only one paragraph of the Government's brief, with citation to dictum in a paragraph of a decision decided 37 years ago. (Government Brief, p. 11). There was at that point no time to file a reply brief, and counsel for movant could only outline their arguments orally.

4. The issue of whether the Grand Jury can interrogate and the Executive institute criminal proceedings against a member of Congress or his staff assistant for republishing a committee record critical of Executive conduct in foreign relations is of utmost importance to separation of powers in our tripartite system of government. As is elaborated in the Memorandum of Law attached hereto, movant believes that the precedents and policies of the Speech and Debate Clause demand that the privilege is applicable to republication of the Subcommittee record under the facts of this case. At the very least, this issue is of such magnitude that a final decision on it should be based on more research and argument of counsel for the parties than has heretofore been presented. Movant therefore respectfully requests this Court to reconsider its decision on this question.

5. The other issue upon which movant seeks reconsideration relates to whether or not the protective order issued by the Court adequately protects movant's constitutional privilege. For the reasons set forth in the accompanying Memorandum of Law, movant respectfully submits that this Court's findings that "the government's interest in (Dr. Rodberg's) testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the Grand Jury," (Slip Opinion, pages 5-6) when combined with the failure of the government to specify the purpose and scope of the questioning (as it has done in similar cases of privilege) and the secrecy of the Grand Jury proceedings, compels a quashing of the subpoena as a matter of law or at a minimum a more inclusive protective order.

6. Due to the importance and complexity of these issues, movant respectfully requests this Court to stay enforcement and execution of the subpoena served upon Dr. Rodberg pending reconsideration. Such a stay is essential to preserve the status quo and will not unduly affect any legitimate interests of respondent.

7. Should this Court deny reconsideration, movant respectfully requests a stay pending appeal. The issues presented herein, in the context of a criminal proceeding, are of first impression and have never previously been decided by the Court of Appeals or by the Supreme Court. The precedent set in this case will have far-ranging implications in the relations of the three branches of government and in the construction of Article I, Section 6 of the Constitution. A stay pending appeal is necessary to preserve the status quo, and preserve for appeal these important issues. As to movant, the denial of the motion to quash and the motion for specification is a final order, inasmuch as movant himself has not been directed to appear before the grand jury and cannot thereby obtain review by refusal to comply with this Court's order. Appellant's rights cannot be protected by waiting until questions are asked of Dr. Rodberg, because: (a) appellant is not entitled to attend the secret grand jury proceedings; and (b) any questioning of Dr. Rodberg concerning the official actions of appellant itself violates the terms of the Speech and Debate Clause, regardless of the answer given thereto by Dr. Rodberg and regardless of the outcome of the grand jury inquiry.

8. Movant requests oral argument upon this motion.

Respectfully **submitted,**

CHARLES L. FISHMAN,
HERBERT O. REID,
ROBERT J. REINSTEIN,
*Attorneys for Senator Gravel.*

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[In the U.S. Court of Appeals for the First Circuit, No. —]

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF APPELLANT FOR STAY PENDING APPEAL

(MIKE GRAVEL, U.S. Senator, appellant against United States, appellee)

INTRODUCTION

In the "Memorandum of Decision and Protection Order" issued October 4, 1971, the Court below made three basic findings of fact and ten conclusions of law. The findings of fact, which are relevant to this motion, are: [1]

1. Dr. Leonard E. Rodberg is a personal staff assistant of Senator Gravel. Slip Opinion, p. 4).

2. "[A]s personal assistant to [Senator gravel], Dr. Rodberg assisted [Senator Gravel] in preparing for disclosure and subsequent disclosing to [Senator Gravel's] colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called 'Pentagon Papers,' which were critical of the Executive's conduct in the field of foreign relations." (Slip Opinion, p. 2).

3. "Viewing together the crimes which this grand jury is investigating and the chronology of acts and events leading up to Dr. Rodberg's subpoena, the Court infers that the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (Slip Opinion, pp. 5-6).

The conclusions of law made by the Court below may be summarized as follows:

1. The Speech and Debate Clause "is limited specifically to legislative acts and antecedent conduct so intimately related to them such as cannot be proved without re-

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[3] In *New York Times Co.* v. *United States, supra,* at 754, Mr. Justice Harlan, dissenting, referred to "the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the [New York Times and Washington Post] newspapers received them with knowledge that they had been feloniously acquired."

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

Footnotes at end of article.

sort to inquiry into legislative acts." (Slip Opinion, p. 7).

2. Senator Gravel's legislative acts may not consistently with the Speech and Debate Clause be the subject of questioning of any witness before the grand jury. (Slip Opinion, p. 9).

3. All actions taken by Senator Gravel at the June 29 Subcommittee meeting, and in preparation for and intimately related to this meeting, are privileged. (Slip Opinion, pp. 10, 16).

4. The judiciary may not inquire into the purpose or legitimacy of the Subcommittee meeting. (Slip Opinion, pp. 10–11).

5. "[T]he legislative privilege conferred by the Speech or Debate Clause belongs to Congressmen only and not to their assistants and aides." (Slip Opinion, p. 7).

6. However, in order to protect a Senator's privilege, it "must extend to some activities of a member of his personal staff acting at his direction." (Slip Opinion, p. 14.)

7. Therefore, "the Speech and Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." (Slip Opinion, p. 14; see p. 17).

8. Dr. Rodberg may be questioned about subjects beyond the protection of the privilege, including "the activities of third parties with whom he and the Senator dealt" and "with his own conduct previous to his joining the Senator's personal staff . . ." (Slip Opinion, p. 8).

9. Senator Gravel's "arranging for private publication of the Pentagon Papers . . . is not embraced by the Speech or Debate Clause," and Dr. Rodberg and other witnesses (Including, presumably, Senator Gravel) may therefore be interrogated about it by the grand jury. (Slip Opinion, p. 12; see pp. 16–17).

10. The protective order which delimits the subject matter of questions which may not be asked of witnesses before the grand jury "fully protects" Senator Gravel's Constitutional rights.

It is our contention that the policies underlying the Speech and Debate Clause and the case law compel the conclusion that the actions of a Senator in republishing and distributing to his constituents the contents of an official, public record of a Senate subcommittee which is critical of Executive conduct in foreign relations is immune from Executive harassment and retaliation and cannot be the subject of interrogation by the grand jury or the institution of criminal proceedings by the Executive. We further believe that under the facts as found by the Court and the conclusions of law reached, the protective order which has been entered by the Court below does not protect adequately Senator Gravel's Constitutional rights.

*I. The republication and public distribution by a Senator of an official, public record of a subcommittee critical of executive conduct in foreign relations is protected by the speech and debate clause*

A. Republication of Committee Records is Related to the Due Functioning of the Legislative Process

Ever since the landmark decision of *Kilbourn* v. *Thompson*, 103 U.S. 168 (1968), the Supreme Court has rejected attempts to confine the Speech and Debate Clause to words spoken on the floor of Congress and has held that it affords protection for things "generally done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204. Reiterating this test as recently as 1967, the Court added that an action of a Member of Congress is protected by the Congressional privilege if it is "related to the due functioning of the legislative process." *United States* v. *Johnson*, 383 U.S. 169, 172, 179.

In considering whether any given practice falls within these standards, two benchmarks are suggested from the decisions. First, a court may ask whether that practice is necessary to fulfill any of the goals of representative government as established by the Constitution. Second, a court may look for guidance at the actual workings of Congress to determine whether the practice is widely utilized by Members of Congress and uniformly regarded as legitimate; in other words, whether it is "generally done . . . by . . . its members in relation to the business before it."

It is clear that republication of speeches or committee reports or transcripts and their dissemination to the electorate meets each of these criteria. The scheme of representative democracy envisaged by the Framers presupposes the maximum amount of communication between the citizens and their elected representatives. Under our system of government, the ultimate power resides in the people. As Madison, who is appropriately called the Father of the Constitution, said, "The people, not the government, possess the absolute sovereignty." [2] For this system to be viable, the people must be informed fully of the workings of government so that they may be able meaningfully to exercise their Constitutional rights to vote intelligently and to "free public discussion of the stewardship of public officials." [3] Madison well understood that this imposes a *duty* on public officials to inform the electorate:

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." [4]

James Wilson, another architect of the Constitution, had precisely this in mind when he emphasized the "informing function" of Congress as an essential part of the due functioning of the legislative process:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the ignorance of the very affairs which it is most important that it should understand and direct." [5]

In concluding that "[t]he informing function of Congress should be preferred even to its legislative function," [6] Wilson surely was not drawing an unbridgeable distinction between the two. Informing the electorate is a "legislative act" since it is clearly "related to the due functioning of the legislative process." *United States* v. *Johnson*, supra at 172.[7] In fact, it is no exaggeration to say that direct communication with the electorate is an essential bedrock of the legislative process, for it insures that the constituents of a Member of Congress inform *him* and his colleagues of their well-considered views on pending and future legislation—an indispensable prerequisite for a Congressman deciding how to cast his own vote.

It should go without saying that the republication of speeches, committee reports or transcripts is necessary for a Member of Congress to inform and carry on a dialogue with his constituents. Few people have access to the *Congressional Record*, and fewer still to the original transcripts of committee hearings. Nor can the press be depended upon solely to report the views of Congressmen to their constituents. The press gives at best a summary, perhaps overlaid with editorial comment. There is no substitute for the dissemination of the original.

Secondly, if one were to examine the actual workings of Congress to determine whether republication of speeches is "generally done," *Kilbourn* v. *Thompson, supra*, the same conclusion would be reached. The informing function of Congressmen and its relationship to the legislative process has been documented in many scholarly studies. See, e.g., Griffith, *Congress: Its Contemporary Role* (3rd Ed. 1961); Key, *Politics, Parties and Pressure Groups* 3d Ed. 1952). Perhaps every Congressman, without exception and since the earliest days of the Republic, has circulated copies of his speeches to the public, held press conferences elaborating upon what he said on the floor, issued press releases, and spoken directly to his constituents in explaining his votes or speeches and inviting their views. And we doubt that a single Member of Congress could be found who thought that these actions were not "related to the functioning of the legislative process." *United States* v. *Johnson, supra* at 182. "Republication" is not a talismanic phrase signifying an act done outside the proper sphere of Congressional activity. On the contrary, when analyzed it is evident that the term bespeaks an integral part of the legislative process and of the entire system of representative government.[8] Mr. Justice Black expressed this cogently in holding that an executive official was immune from damage suits for issuing a defamatory press release:

"The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employers. Such an informed understanding depends, of course, on the freedom people have to applaud or criticize the way public employees do their jobs, from the least to the most important." *Barr* v. *Matteo*, 360 U.S. 564, 577 (1958).

In sum, it is clear that an examination of both the theoretical framework of our representative government and its actual practices leaves no doubt that direct communication by a Congressman to the electorate, through the republication and public distribution of speeches, committee reports or transcripts, is conduct "generally done" by Members of Congress "in relation to the business before it" and is clearly "related to the due functioning of the legislative process" Accordingly this conduct is protected from grand jury investigation by the Speech and Debate Clause.

B. Prior Decisions Confirm that Republication by a Member of Congress of a Speech or Committee Record is Privileged Under the Speech and Debate Clause

Prior to the case at bar, courts have on five occasions expressed views upon the scope of privilege with respect to republication of official documents. We believe that these decisions fully support our position.

1. *Hearst* v. *Black*, 87 F. 2d 68 (D.C. Cir. 1936), was an action to enjoin the Members of a Special Senate subcommittee from retaining possession and distributing copies of documents which it had allegedly secured illegally. The Court of Appeals agreed that the seizure of the documents violated statutory and Constitutional rights, id., at 70, but held nevertheless that Congressional privilege barred the judiciary from intervening in any way with the use of the documents by the Subcommittee, including republication (copying) and distribution to people outside of Congress. The Court stated:

". . . The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of the ap-

Footnotes at end of article.

pellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.

"The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the Constitutional separation of powers invaded . . ." *Id.*, at 71–72.

2. After a twenty-year hiatus, the republication issue was again presented, this time in a libel suit. In *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (D.D.C. 1956) (three-judge court), the Senate Internal Security Subcommitte had printed a limited number of pamphlets accusing several well-known and respectable groups, including the plaintiff, of being Communist-front organizations. The Subcommittee then ordered another 75,000 copies to be printed. Claiming that the accusations in the pamphlet were false and defamatory and would cause irreparable injury, the plaintiff requested a restraining order against republication and distribution of the pamphlet. The Court assumed the plaintiff's assertions to be true but dismissed the case on the grounds of the Congressional privilege of the Speech and Debate Clause holding:

"By express provision of the Constitution, Members of Congress, 'for any Speech or Debate in either House . . . shall not be questioned in any other place.' Art. I, Sec. 6.

"The premise that courts may refuse to enforce legislation that think unconstitutional does not support the conclusion that they may censor Congressional language they think libelous. We have no more authority to prevent Congress, or a Committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the *Congressional Record*. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.

"The Constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament, or an American court to restrain Congress, from publishing any statement . . .

"As to the members of the Senate Subcommittee, the complaint is dismissed for lack or jurisdiction. *Cf. Hearst* v. *Black, supra.*" Id., at 731–732.

Thus, in this case, as in *Hearst* v. *Black*, the Court concluded that the Constitutional privilege of Members of Congress embraced republication of Subcommittee reports and placed this action beyond the cognizance of the judiciary.

3. In *Hentloff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) the Court held unequivocally that the Speech and Debate protects Members of Congress from any judicial accountability for republishing a committee report. The action was brought to prevent the Members of the House Committee on Internal Security and the public printer from republishing and distributing 6,000 copies of a Committee Report which, if circulated, would infringe the plaintiffs' First Amendment right. The relief sought was an injunction against republication and distribution, limiting the Report's disclosure to insertion in the *Congressional Record* and such discussion as would ordinarily follow in debate on the floor.

Relying on the Speech and Debate Clause, the Court *dismissed the complaint as to the Members of Congress*. After reviewing the precedents, Judge Gesell stated:

". . . These cases establish that the courts lack jurisdiction to entertain an action seeking any remedy against a Member of Congress for any statement made or action taken in the sphere of legitimate legislative activity.

"Plaintiffs contend that . . . this Court may restrain Congressmen from publishing, filing, or distributing, except by insertion in the *Congressional Record*, a report that impinges upon First Amendment rights.

"The Court is of a contrary view. Members of Congress have the same right to speak as anyone else. *Their legislative activities are not limited to speech or debate on the Floor of Congress. Information in this Report involves matters of public concern, and the Court will take no action which limits the use that individual Congressmen choose to make of the Report or its contents on or off the Floor of Congress.* No injunction is appropriate against any Congressman named defendant." Id., at 1179 (emphasis added)

The Court then followed the distinctions in *Kilbourn* v. *Thompson, supra* and *Powell* v. *McCormack, supra*, between Members of Congress, who are totally immune from judicial accountability, and ministerial agents, who may be held liable for enforcing Congressional orders. Thus, the Court restrained the public printer from republication but held the Members of Congress absolutely privileged from accountability. And with respect to the latter, Judge Gesell explicitly stated that the privilege of Congressmen for republication of Committee reports stemmed from the recognition that the informing function of Congressmen was within "the sphere of legitimate legislative activity." [9]

4. The only case which even suggests that a Congressman's privilege may be diluted for republishing a speech or Committee report is *McGovern* v. *Martz*, 182 F. Supp. 343 (D.D.C. 1960). However, a close reading of the facts and opinion in that case shows that it lends but very limited support for the proposition that the Speech and Debate Clause does not extend to republication.

The *McGovern* case involved a libel action by Congressman (now Senator) McGovern, who sued the publisher of a newsletter for falsely reporting that he had sponsored a "Communist front." The defendant counterclaimed that the Congressman had inserted certain defamatory remarks into the *Congressional Record*. There was no republication of these remarks.[10] The Court granted McGovern's motion to dismiss the counterclaim on the ground of Congressional privilege. Id. at 348. The Court then addressed itself to whether the privilege would protect circulation of reprints from the *Congressional Record*. Its remarks on this issue are *obiter dictum* since neither reprints nor unofficial dissemination was involved. Further, the Court recognized that Congressmen must be "protected and thereby free to inform their constitutents," and believed that a privilege, albeit qualified by a malice requirement, was applicable. *Id.* at 348.[11]

It is evident that *McGovern* v. *Martz* can not be read broadly as a precedent that republication of committee reports or transcripts is not protected by the Speech and Debate Clause, for four basic reasons:

(a) The discussion was *obiter dictum*. Due to the failure of proper adversary presentation the Court was unaware of prior precedents, including *Hearst* v. *Black, supra*, which is binding on the District Courts for the District of Columbia. And the only holding of the case related to insertions in the *Congressional Record*.

(b) Even in dictum, the Court did *not* say that republication was not protected by the Speech and Debate Clause. Rather it stated that a privilege existed but was not absolute. As we shall show, *infra section C.*, the Court's logic in a libel suit would compel an absolute privilege in a criminal prosecution case.

(c) In qualifying the privilege by a malice standard the Court was clearly in error. The Supreme Court in *Tenney* v. *Brandhove, supra* at 377, held explicitly that if the privilege exists it is absolute: "The claim of an unworthy purpose does not destroy the privilege." See also *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930) cert. denied 283 U.S. 874. Having determined that republication was within "the sphere of legitimate legislative activity," the Court was bound to hold the privilege absolute. And as long ago as 1896, the Supreme Court held that an official's personal malice is relevant only when the official acted "in reference to matters . . . manifestly or palpably beyond his authority." *Spalding* v. *Vilas*, 161 U.S. 483. See also *Barr* v. *Matteo* 360 U.S. 564 (1959).

(d) The qualifying dictum in the *McGovern* case has not been followed. *Hentoff* v. *Ichord, supra* at 1179.

5. The Supreme Court has settled decisively that the privilege of a non-elected Executive official encompasses republication and that the privilege is absolute even in libel cases. In *Barr* v. *Matteo*, 360 U.S. 564 (1959) and its companion case *Howard* v. *Lyons*, 360 U.S. 593 (1959), two subordinate officials in the Executive Department were sued for issuing and circulating copies of defamatory press releases.[12] Invoking the judicially-created doctrine of Executive privilege for acts within the legitimate sphere of official conduct, the Court stated:

". . . It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty." 360 L.S. at 575.

And the Court held: *"The fact that the action here was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable . . ." Ibid.* (Emphasis added.)

As the Court below observed in its decision (Slip Opinion, pp. 14–15), judicially developed rules in cases of non-Constitutional privilege bear upon the scope of the Congressional privilege since the former "surely does not warrant broader protection than the legislative privilege based upon the Speech and Debate Clause." By a parity of reasoning, the Supreme Court's holding that republication of documents and their distribution to the public by Executive officials is absolutely privileged applies with at least equal force to the Constitutional privilege of Members of Congress. And no amount of legal alchemy can make a public press release by a subordinate official of the Executive department more within his legitimate sphere of activity than the circulation of copies of the official record of a Senate Subcommittee by a Member of Congress who is under the Constitutional obligation to inform his constituents about the workings of government.

In sum, the civil cases which have been heretofore decided uphold the Constitutional privilege of Members of Congress to republish and distribute to the electorate official committee records.

C. The Purposes of the Speech and Debate Clause Require that the Privilege Protect Members of Congress who inform the Electorate about Executive Conduct of Foreign Affairs, from Intimidation and Harassment by the Executive

Even if prior precedents were ambiguous and qualified the legislative privilege in civil

Footnotes at end of article.

cases, their logic, when combined with the historical purposes of the Speech or Debate Clause and the sphere of its contemporary importance would establish an absolute privilege to govern the facts of this case. The civil cases presented typically a claim that a Member of Congress was using the authority of his office to violate willfully an individual's rights. That kind of situation creates the maximum temptation for intervention by the judiciary on the side of the individual.

On the other hand, what is now before this court is a classic separation of powers case. The judiciary is not being asked to balance the preferred Constitutional rights of individuals against the privileges of Members of Congress; to the contrary, the Executive branch of government has come to the Court below and claimed that it may determine what a Member of Congress may tell his constituents about matters of overwhelming public concern. We do not exaggerate by saying that this claim challenges the fundamental character of our tripartite system of government. To any such claim, the Constitution must stand as an impenetrable barrier.

First, the Executive's contention that it may institute criminal proceedings against a Congressman for speaking to the electorate flies in the face of the historical purposes of the Speech or Debate Clause. The Clause was drafted to secure absolute freedom of speech for Members of Congress.

It was the end product of a lineage of legislative free speech guarantees from the English Bill of Rights of 1689 to the first State constitutions and the Articles of Confederation. See generally *Tenney* v. *Brandhove, supra* at 372–75. None of these provisions drew a distinction between a speech of a legislator directed at his colleagues and one to his constituents.[13] On the contrary, the Court in *Tenney* stated that the clause was designed to protect both. *Id.*, at 377 and fn. 6. This is consistent with no less an authority than Thomas Jefferson. When a Federal grand jury protested against abuses by Congressmen who disseminated slanderous accusations to the public, Jefferson responded that the framers of the Constitution wrote the Speech or Debate Clause to allow Congressmen to inform the electorate without inhibition:

"[T]hat in order to give to the will of the people the influence it ought to have, *and the information which may enable them to exercise it usefully*, it was part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive." Writings of Thomas Jefferson 158 (Ford Ed. 1896) (Emphasis added).

The privilege must be read to protect republication and public distribution of speeches and committee records. As we have shown above (Part A), this is a principal avenue relied upon by Members of Congress to provide the people with "the information which may enable them to exercise it usefully."[14]

The Constitutional evil which would result from denying the privilege's applicability to the informing function of Congress is magnified when this is done at the behest of the Executive and with respect to material which is critical of Executive behavior. If the Executive branch may, at will institute criminal proceedings against and interrogate Members of Congress before grand juries about publications of their speeches and committee reports which they sent to the electorate, it will possess the power to isolate effectively all but the most courageous legislators from their constituents. If such a rule applies Congressmen will have to watch what they say to the people—in press releases, newsletters and anything spoken outside of the four walls of the Capitol—lest it offend the Executive and open them up to harassment, grand jury inquisitions and prosecutions. Yet if the Speech and Debate Clause means anything, it is that courts and prosecutors are not referees over what Congressmen say to their constituents.

Nor are these consequences mere speculation. For this case reveals the present importance of the Speech and Debate Clause "to prevent intimidation by the Executive and accountability before a possibly hostile Judiciary," *United States* v. *Johnson, supra* at 181. Having for years kept secret from the American people the real history of our involvement in Indo-China, and having attempted to impose a prior restraint on the press, the Executive now retaliates against a Senator who revealed to the people—the true sovereign—the reasons why the Executive, without Congressional authorization, took the country into war. The Executive would thereby establish that it, and it alone, has sole authority to reveal to or withhold from the people any information it chooses. As long as government is to continue as one of separation of power, this cannot be. The proper rule of Constitutional law was stated in *Methodist Federation* v. *Eastland, supra* at 731:

"Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement . . . similarly nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement."

In conclusion, we wish to bring to the Court's attention a speech given by Senator Sam Ervin on the Floor of the Senate on September 20, 1971. Coming as it does from an acknowledged expert on Constitutional law, we wish to set forth herein some significant excerpts from this speech:

* * * * *

"The events now transpiring in Boston before a Federal grand jury put into question (a) principle of freedom secured by our predecessors.

* * * * *

"I have in mind, of course, the efforts of the administration to inquire into the actions of the junior Senator from Alaska (Mr. Gravel) in connection with the revelations of the contents of the Pentagon Papers.

* * * * *

"The Administration, through its lawyers in the Internal Security Division of the Justice Department, has made a direct and broadscale attack on the rights of all Senators, upon the prerogatives of the Senate, and upon the Constitutional guarantees which have been established to protect the Congress from harassment by a vindictive Executive. It is an attack on the independence and freedom of this body.

* * * * *

"The privilege of the Speech and Debate Clause protects legislators not only from prosecution by the Executive and from the judiciary. Quite obviously it also protects them from instrumentalities such as the grand jury, which can be used as the Executive's instrument of harassment and persecution.

"It must be stressed that the privilege does more than immunize the legislator against attempts to punish him or to exact retribution for the things he says in the course of performing his legislative duties. The privilege also protects him against having to defend or justify or explain what he has said. The privilege seeks to free the legislator from being harassed by law suits, grand juries, and prosecutors. Were this not so, the independence of the legislator might just as well be destroyed by forcing him to defend himself all over the country.

* * * * *

"There is another reason why the privilege against inquiry into a speech does not depend on the legality or Constitutionality of the act to which it is tied. That is because the privilege seeks to avoid any abridgement of the freedom of a legislator, even from fear of future retribution. If a legislator knew that he had to account for the possibility that he would have to defend or justify his speech sometime in the future, then he would not be as willing to express himself on controversial matters.

* * * * *

"The administration's motives in pressing this action are not only aimed at the privilege, but at a Senator who dared oppose it on the war, and who had the effrontery to use information the administration desired to keep from the people. If the administration were to have its way, we must remain in total ignorance of what has transpired in Vietnam, and anything else the Government does, unless it chooses to tell us. By suppressing this information, the executive branch has tried to keep the Congress and the Nation in total ignorance. Now it tries to dictate what the scope of a Senator's business is, and where and when and how he may conduct it. The tendency if not the intent, of this effort is to harass the Senator from Alaska, and thereby to silence him and other critics in this body along with those who are outside these halls.

* * * * *

"The purpose of the privilege is to protcet the legislative branch from a vindictive executive and a hostile judiciary. It is an element of the principle of separation of powers.

* * * * *

"Here, that is precisely the case. Ultimately, I suppose the question of a criminal action may be involved. But the prosecution will be to protect the special interests of the Executive in its efforts to keep its secrets from the Congress and the people. The motive, of course, is to suppress opposition to Executive policy in the Congress and in the country. When the Speech and Debate Clause is involved in a clash between the executive and the legislative, the history of this legislative immunity is especially important. The immunity was finally gained only after Charles I has lost his head. And he lost his head in part at least because he imprisoned members of Paliament who had opposed him in needless and costly overseas wars, even to the extent of presuming to vote to deny him funds for the war. The establishment of the legislative privilege came during the fight by the legislature to establish its independence from a king who claimed total power. The historical precedents are too close to be ignored. We see history repeating itself."

We respectfully request this Court to grant a stay pending appeal from the decision of the Court below holding that a United States Senator may be subjected to grand jury interrogation and the institution of criminal proceeding for making available to the people copies of an official subcommittee record dealing with Executive conduct in foreign affairs.

*II. The protective order does not guarantee adequately Senator Gravel's constitutional rights, and under the facts of the case the subpoena must be quashed*

As the Court below stated in its decision, the Constitutional interests which must be protected in this proceeding by virtue of the Speech and Debate Clause are those of Senator Gravel, and not the witness. However, since Senator Gravel is not entitled to be present during the grand jury proceedings, a delicate mechanism is necessary to protect his rights against both what is asked and what the witness may answer. We tendered

Footnotes at end of article.

such a mechanism in our Motion for Specification, which gave the Justice Department an opportunity to narrow the scope of its inquiry and allow the Court and counsel for Senator Gravel to examine in advance whether the questions to be asked violate the Senator's privilege. Despite disclaimers by the Justice Department to the contrary, this technique has been heretofore voluntarily used by it in other privilege cases. For instance, in *United States* v. *George*, 444 F. 2d. 310 (6th Cir. 1971), the witness moved to enjoin enforcement of a grand jury subpoena on the grounds that his testimony might incriminate his wife and that he was already under indictment for the transactions being investigated. The Justice Department filed an affidavit with the District Court setting forth the scope and purpose of the investigation, and the Court concluded that neither privilege was jeopardized.

Even more directly on point are cases involving First Amendment rights in which the government specified the nature of the proposed inquiry by the grand jury, either voluntarily or pursuant to Court order. In *Caldwell* v. *United States*, 434 F. 2d 108 (9th Cir. 1970), cert. granted 402 U.S. 942 (1971), after Caldwell had filed a motion to quash the subpoena, the Justice Department filed documents stating the extent of legal proceedings already underway with respect to certain members of the Black Panther Party, and particularizing the specific incidents about which it was believed that Caldwell had knowledge and would therefore be questioned by the grand jury. (A summary of this specification is contained in the appendix to the petitioner's brief to the Supreme Court, pages 64–68.) In the case of *In Re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971), which presented analogous Constitutional issues, the Court ordered a governmental showing of specificity. The specificity technique was utilized in these cases as the only feasible method for obtaining the precise record indispensible for Constitutional adjudication. Otherwise, as both the Justice Department and the Courts recognized, there was a significant chance that substantive rights and privileges would, in effect, bottom out for lack of procedural safeguards. The necessity for such safeguards is surely as great in the present case, which implicates the Constitutional privileges of Members of Congress and basic tenets of our system of separation of powers.

Not only did the Justice Department decline to follow this procedure in this case, but it asserted the right to inquire into the actions of Dr. Rodberg in assisting Senator Gravel and to subpoena the Senator himself and question him about his official actions. Given the record in the case, the District Court's findings are certainly justified "that the government's interest in (Dr. Rodberg's) testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (Slip Opinion, Pages 5–6). And this finding compels that the subpoena must be quashed, for there are no legitimate areas of inquiry about which the government intends to question Dr. Rodberg. All of the actions taken by Senator Gravel with respect to the Pentagon Papers are privileged under the Speech and Debate Clause, including, as we have shown in Part I *supra*, arranging for its republication. There is not the slightest indication in this record that the Justice Department wishes to question Dr. Rodberg about "his own actions previous to his joining the Senator's personal staff."[16] This speculative hypothesis is foreclosed by the record of this case by the refusal of the Justice Department to specify (which it surely would have done if it were interested in activities of Dr. Rodberg's unconnected with the Senator), and by the District Court's findings of fact. Since, therefore, the subpoena was issued for a wholly unconstitutional purpose, it must be quashed.

The Protective Order is under-inclusive because it does not encompass activities of Senator Gravel with respect to the Pentagon Papers which followed the Subcommittee hearing.

Furthermore, even if we assume *arguendo* that there are legitimate areas into which the grand jury may and intends to inquire of Dr. Rodberg, Senator Gravel's Constitutional rights cannot adequately be protected by the Protective Order of October 4, 1971. The reason is, quite simply that Senator Gravel will not be present during the questioning and cannot assure that the Protective Order is obeyed scrupulously. We do not case aspersions on either counsel for the Justice Department or on Dr. Rodberg by pointing out that they cannot be the final arbiters of Senator Gravel's privilege. It is readily apparent that even with both acting in utmost good faith, counsel for the Justice Department may ask and Dr. Rodberg might answer an illegitimate question. We list the following as examples of how Senator Gravel's rights will be jeopardized by the Protective Order:

a. Counsel for the Justice Department may ask who supplied Senator Gravel with the Pentagon Papers. He may think this justified by referring to the language of the Court's opinion allowing questioning "as to the activities of third parties with whom he and the Senator dealt." We think the question would be barred by Paragraph (1) of the Protective Order[17] and would certainly object to it. Yet we would not be able to and, if Dr. Rodberg decides in his discretion to answer it, he becomes the final arbiter, reaching an unreviewable and unconstitutional end.

b. Similarly, other questions about "third parties with whom . . . the Senator dealt" may well relate to whose advice the Senator sought and received on whether to hold the hearing, who helped in drafting the introductory remarks, and who helped prepare the material for inclusion into the record—all of which, in our view, would be barred by the same provision and possibly Paragraph (2) as well.[18] Here, too, some mechanism is necessary to enable Senator Gravel himself to assert his rights without being forced to depend on the judgments of the witness.

c. The Justice Department may also wish to rely broadly on the Court's statement that Dr. Rodberg may be questioned about "his own actions previous to his joining the Senator's personal staff." Yet those questions may relate directly to Senator Gravel's official activities and blatantly violate the Speech and Debate Clause (and the Protective Order), but there is no means by which Senator Gravel can prevent the witness from answering and turning a Constitutional violation into a *fait accompli*.

Examples such as these can be multiplied many times over. We ask this Court for a stay pending appeal because the order of the Court below has the effect if allowing the violation of Senator Gravel's Constitutional rights in a manner which cannot subsequently be remedied. The probability of irreparable Constiutional violations is so high that questioning of Dr. Rodberg cannot be permitted under the unrealistic hope that Senator Gravel's rights will not be infringed. The government is playing with loaded dice, and this Court cannot wait until it rolls the wrong number. We think there are only three methods that will provide for scrupulous compliance with the Constitution: (a) a detailed specification can be made so that proposed questions may be considered in advance; (b) the grand jury proceedings can be made public so that Senator Gravel may be present; or (c) the subpoena can be quashed. Having rejected the first two, the Justice Department is in no position, under the facts of this case, to oppose the third. Respect for the Constiution is more important than respect for the convenience of the Justice Department. We therefore request this Court to stay the decision of the District Court requiring Dr. Rodberg to appear before the grand jury pending appeal.

CONCLUSION

For the reasons stated herein above, we respectfully request the Court to grant a stay of the decision of the Court below pending disposition of this appeal. The Constitutional issues raised are of utmost importance and must be presented to this Court in a posture in which Senator Gravel's legal position has not been mooted and his rights, if we are correct, irreparably violated.

Respectfully submitted,

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*Attorneys for Senator Gravel.*

FOOTNOTES

[1] Of course, the District Court made other findings of fact on pages 1–5 of the Slip Opinion. We do not set them out because they are not material to this motion. We do wish to point out, however, a possible error in the District Court's recitation of events leading up to the June 29 meeting of the subcommittee. There may be an inference in the opinion that Senator Gravel read and inserted into the record from the set of Pentagon Papers sent under seal from the President to Congress. This is not true; Senator Gravel read from documents which he had independently obtained. Furthermore, these documents are not identical in every respect to the documents furnished under seal to Congress.

[2] Quoted in *New York Times* v. *Sullivan*, 376 U.S. 254, 274 (1964).

[3] *Id.*, at 275.

[4] *Elliot's Debates* 575 (Virginia Resolution of 1798).

[5] Wilson, Congressional Government 303 (1885), quoted in *Tenney* v. *Brandhove*, 341 U.S. 367, 377 fn. 6 (1951).

[6] *Ibid.*

[7] The term "legislative act," used by the District Court in its decision (Slip Opinion p. 12), does not appear in any Supreme Court opinions. The Court in *Kilbourn* spoke of "things generally done in a session of the House by one of its members in relation to the business before it," 103 U.S. at 204. In *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951), the Court referred to "the sphere of legitimate legislative activity," and included investigations whose functions were either to propose legislation or inform the public, *id.*, at 377 and fn. 6. In *Johnson*, the Court used the phrase "related to the due functioning of the legislative process," 383 U.S. at 172, and also quoted the *Kilbourn* language, *id.*, at 179. And in *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Court quoted the above phrases from *Kilbourn*, *Tenney* and *Johnson*.

If, by using the new phrase "legislative acts," the District Court intended simply a shorthand for the above standards, our disagreement is only to its application. On the other hand, if the Court below intended to use the phrase as including only those acts in which a Member of Congress proposes, debates upon and votes on legislation, we think that this is inconsistent with and much narrower than the Supreme Court standard. Certainly, for example, in *Dombrowski* v. *Eastland*, 387 U.S. 82, 82 (1967), the actions of Senator Eastland were not even remotely connected with pending or proposed legislation. And neither are many speeches given on the floor of Congress. Yet surely the Court of Appeals was correct in *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930), *cert. denied* 282 U.S. 874, that no showing was necessary that words spoken between Congressmen must be pertinent to any pending or future legislation.

[8] While a Member of the House of Representatives, Madison said: "If we advert to the nature of Republican Government, we

shall find the censorial power is in the people over the Government, and not in the Government over the people." 4 *Annals of Congress* 934 (1794). If the people's representatives default on their duty to inform the electorate, the converse would be true.

[9] In its decision (Slip Opinion, p. 13), the Court below quoted certain language from *Hentoff*. These comments dealt solely with the liability of the Public Printer, and not the scope of the Speech and Debate Clause. Judge Gesell distinguished Committee Reports from the *Congressional Record* because Article I, Section 5 of the Constitution requires a journal of proceedings to be kept; thus the Court would not enjoin the Public Printer from including the report in the *Congressional Record*. 318 F. supp. at 1180. But, as noted in the text, the Court held that the privilege absolutely immunized the Members of Congress themselves from judicial inquiry for causing the Committee report to be republished anywhere. We therefore respectfully submit that the above-quoted language is inapposite to the issue of this case, which is whether a Senator may be held accountable for republishing an official Subcommittee record. *Hentoff* holds that he may not.

[10] A second counterclaim alleged republication of certain other letters by Mr. McGovern. This was held barred by the Statute of Limitations, and was not decided on the merits. 182 F. Sup. at 349.

[11] While the Court stated at one point that the reason for the rule of Congressional privilege was "complete and uninhibited discussion among legislators," it also recognized the informing function as another purpose. Any reading of the Court's opinion which picks out the former to the total exclusion of the latter makes the opinion incomprehensible. Why should the Clause protect intralegislative communication but not a Congressman's statement to his electorate? And if the reason for the privilege related only to intralegislative communications, why should there be even a qualified immunity for distribution of speeches to the public? How would a republication of a libelous speech to another Member of Congress fare? And finally, if *only* intralegislative communication is protected, why have the courts gone beyond the literal language of the Speech or Debate Clause? Each of these questions would have had to be answered by the Court in *McGovern* if it had meant to exclude public dissemination of speeches from the Clause altogether.

[12] In Howard, copies of the press release were sent to various newspapers and wire services and to members of the Massachusetts delegation in the Congress . . ." 360 U.S. at 594. The press release in *Barr* similarly was given wide circulation. In both cases, the Executive officials went far beyond merely sending reports to their immediate superiors.

[13] And when, after the drafting of the Constitution, a British court purported to draw such a distinction (see *Stockdale* v. *Hansard*, 9 A. & E. 1, 112 Eng. Rep. 1112 (1839), the reaction in Parliament was so intense that the decision was almost immediately overruled by statute 3 & 4 Vict. c. 9 (1840).

[14] And even if this were somehow put on the "outer perimeter" of a Congressman's duties, *Barr* v. *Matteo, supra*, teaches that it must be protected by an absolute privilege.

[15] While the witness appeared but refused to answer eight questions, the significance of the case is in the specification made by the Justice Department.

[16] cf. Slip Opinion, p. 8.

[17] Par. (1) provides:

"No witness . . . may be questioned about Senator Mike Gravel's conduct at the meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting." And how, conceivably, could Dr. Rodberg determine whether a question refers to conduct "intimately related" to the Senator's subcommittee meeting?

[18] Par. (2) provides:

"Dr. Leonard S. Rodberg may not be questioned about his own actions as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

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MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING OR CERTIFICATION AND FOR A STAY

[In the U.S. District Court for the District of Massachusetts, Docket No. EBD 71–172–G]

(Mike Gravel, U.S. Senator, Intervenor v. United States of America; United States of America v. John Doe In re Leonard S. Rodberg)

PRELIMINARY STATEMENT

This is the memorandum of law on behalf of Dr. Leonard S. Rodberg in support of the motion for rehearing or certification of the Court's order entered October 4, 1971, and for a stay pending disposition of the motion. The relevant facts are set forth fully in the affidavit in support of the motion and, accordingly, will not be repeated here.

*I. This Court should grant a rehearing on the motion to quash the subpoena served upon Dr. Leonard S. Rodberg*

A. The First Amendment

We recognize that a rehearing is an unusual proceeding but we respectfully submit that the special circumstances of this case warrant such rehearing.

In its memorandum decision of October 4, 1971, this Court recognized "the importance and usefulness of th[e] type of work by men like Dr. Rodberg and acknowledg[ed] the existence of First Amendment interests here" [1] but rejected Dr. Rodberg's First Amendment argument for the reasons stated in its contemporaneous opinion in *Application of Falk*, E.B.D. No. 71–165–G. In *Falk*, the Court held that the rights asserted are indeed "substantial" but "crucially distinguishable" [2] from those in *Caldwell* v. *United States*, 434 F. 2d 1081 (9th Cir., 1970) cert. granted 402 U.S. 942 (1971).

In the *Falk* opinion this Court noted that the: public interest under the First Amendment in the "maximization of the 'spectrum of available knowledge' " which the *Caldwell* court deemed sufficient to override an unlimited grand jury subpoena clearly is of the same general nature as the public interest alleged by petitioner here.

* * * *Alabama ex rel. Flowers*, 377 U.S. 288, 307–308 (1964). The Court in *Caldwell* said that when it has been found that requiring testimony before a grand jury may infringe on First Amendment rights the power to compel testimony should not be exercised "until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means." [3]

Mr. Justice Brennan, speaking for the Court in *Smith* v. *California*, 361 U.S. 147, 155 (1959), said that "It is plain to us" that when governmental action (in that case an ordinance) aimed at unlawful activity had "such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." Similarly, the inhibiting effect of a subpoena on lawful First Amendment activity was recognized in *In re Verplank*, 329 F. Supp. 433, 437 (C.D. Cal., 1971).[4] After noting that although there "is nothing inherently sinister in the efforts of a draft counseling center to collect and disseminate that material," the court recognized various adverse effects of the subpoena on the legitimate business of the center:

This court also recognizes that in order for the Center to give valid advice to registrants, it must first obtain personal information from them. The possibility that such information will be revealed indiscriminately could certainly deter many registrants from seeking or receiving information from the Center. Production of lists of medical personnel acting as consultants to the Center may also have an adverse effect on the willingness of any professionals to be connected in any way with its activities.

The court concluded: "Thus, a definite impact on the exercise of First Amendment rights may be readily discerned."

Thus, the facts of this case are closer to the facts of *Caldwell* than this Court understood when it wrote its opinion. Further, the distinction made by the Court between professionals and persons "lacking in education and sophistication . . ." was made without any basis in the record, and was reached without the benefit of the *Verplank* decision which reaches the contrary conclusion and which was handed down before this Court's opinion of October 4. For these reasons, we ask the Court to reconsider its ruling on movant's First Amendment claim. The Court's statement that Dr. Rodberg is "only incidentally a journalist," [3] should not control in view of this Court's recognition of the First Amendment rights here involved. In *Verplank, supra*, at 437–8, the court said, "All citizens have a right to receive accurate, up-to-date information concerning the selective service system and army induction procedures, as well as a right to associate in order to obtain such information." The draft counseling center supplying that information was certainly not a journalist nor was Rev. Verplank whose subpoena was quashed with respect to matters that threatened First Amendment rights.

Further, we believe that the Court's conclusion that Dr. Rodberg's sources of information are less sensitive than reporter Caldwell's is incorrect as a matter of fact. When it comes to inhibiting the exercise of First Amendment freedoms, professional people are no different from "persons often lacking in education and sophistication." *Falk*, Sl. Op., p. 7. As Judge Gray noted in *Verplank* with respect to a draft counseling center: Production of lists of medical personnel acting as consultants to the Center may also have an adverse effect on the willingness of any professionals to be connected in any way with its activities." *Op. cit.*

The public interest in not frightening off persons supplying information to Dr. Rodberg is greater than in the *Caldwell* case. Here, the rights of a Senator and the people to effectively participate in and control their government is at stake. Such issues are even more important than the right to know which lead the *Caldwell* court to quash the subpoena there.

B. The Speech or Debate Clause

This Court stated unequivocally that "Senator Gravel's legislative acts may not consistently with the Speech or Debate Clause be the subject of questioning before the grand jury." [5] It further holds that "the Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore, privileged, if performed by the Senator personally." [6] In holding that making arrangements for republication of the sub-committee report is not embraced by the Speech and Debate Clause the Court relied *inter alia* on *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C., 1970). The court in *Hentoff* specifically noted that that report was "devoid of legislative purpose" and "on its face contradicts any assertion of such a purpose." [7] This Court did not make such a finding. Quite to the contrary, it noted: "It has not been suggested by the Government that the subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action." *Rodberg*, at p. 11. Furthermore, the Court

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Footnotes at end of article.

in *Hentoff, supra* at 1182, noted that publication of the report "will inhibit free speech and assembly" whereas in this case it is the subpoenaing of Dr. Rodberg that will have the effect of inhibiting free speech and free press. In *Hentoff* the court was protecting individual rights against violation by governmental action. Even so, it specifically refused to enjoin individual Congressmen, stating:

Their *legislative activities are not limited to speech or debate on the floor of Congress.* Information in this Report involves matters of public concern, and the Court will take no action which limits the use that individual Congressmen choose to make of the Report or its contents *on or off the floor of Congress.* No injunction is appropriate against any Congressman named defendant. *Hentoff, supra* at 1179.

The Court thus held that republication of the report by a Congressman was within the ambit of the Speech or Debate Clause. Only the Public Printer and Superintendent of Documents, performing non-discretionary functions for the House at large could be held accountable.

*II. Insofar as it denies the motion to quash, the order of this court involves a controlling question of law as to which there is substantial ground for difference of opinion and an appeal from that order will materially advance the ultimate termination of this litigation, thus making appropriate certification to the court of appeals*

Alternatively to the motion for rehearing, Dr. Rodberg respectfully requests that pursuant to 28 U.S.C. § 1292(b), this Court certify its order of October 4, 1971, to permit an appeal to the Court of Appeals and to stay his subpoena pending disposition of that appeal.

The denial of a motion to quash a grand jury subpoena has been held to be an interlocutory order, and such an order is ordinarily not appealable. See *United States* v. *Ryan*, 91 S. Ct. 1580 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940). However, the Interlocutory Appeals Act of 1958 specifically provides an exception to this general rule. Title 28 U.S.C. 1292(b) provides as follows:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 129(b) thus provides express statutory authority for appealing this Court's order and for staying execution of movant's subpoena pending that appeal. As stated in § 1292(b) the criteria for such an appeal are that the order involve a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal from the order will materially advance the ultimate termination of this litigation. The Court of Appeals had occasion soon after the enactment of this statute in 1958 to discuss its scope and purpose. See *Oskoian* v. *Canuel*, 264 F. 2d 591 (1st Cir., 1959); *In re Heddendorf*, 263 F. 2d 887 (1st Cir., 1959). We will not repeat that discussion but respectively submit, on the basis of the analyses in those decisions, that both criteria are met in the circumstances of this case and that it therefore warrants certification to the Court of Appeals.

Movant has raised two primary issues: the scope of protection afforded him by the First Amendment and that afforded him by legislative privilege arising out of the Speech or Debate Clause. In the circumstances of this case, his very appearance would violate each of those constitutional safeguards.

As to the First Amendment contention, the Court relied upon its contemporaneous opinion in *Application of Falk*, E.B.D. No. 71–165. The Court agreed with witnesses' contention that "a substantial First Amendment right is here involved." [8]

But the Court held that movants' sources of information would not be inhibited by mere appearance before the grand jury because they "are highly trained and sophisticated individuals." [9] We have discussed in Point I why we feel such a conclusion is not warranted. Whether or not the Court is in agreement with our position it cannot be gainsaid that there is substantial ground for difference of opinion. Specifically, on the question of the chilling effect upon First Amendment freedoms caused by appearance before a grand jury, the court in *In re Verplank*, 329 F. Supp. 433 (C.D.Cal., 1971) has disagreed with the distinction drawn by this Court between professional people and those "lacking in education and sophistication whose distrust of government, especially of police and prosecutors, is well known." *Application of Falk*, Sl. Op. p. 7. The *Verplank* court quashed a subpoena *duces tecum* directed to a Presbyterian minister serving as a draft counselor insofar as the subpoena sought the production of records of counselees or lists of physicians, dentists or psychiatrists to whom counselees had been referred. Like this Court, Judge Gray recognized that "First Amendment activities are involved." *Id*, at 437. But he went further, recognizing not only the inhibiting effect of the subpoena upon registrants seeking or receiving information from the draft counseling center but the inhibiting effect upon "highly trained and sophisticated individuals," *Application of Falk*, Sl. Op. p. 7, the doctors, dentists and psychiatrists:

Production of lists of medical personnel acting as consultants to the Center may also have an adverse effect on the willingness of any professionals to be connected in any way with its activities. Thus a definite impact on the exercise of First Amendment rights may be readily discerned. 329 F. Supp. at 437 Because the government failed to demonstrate a compelling need for the information sought, Judge Gray prohibited its coerced production. That another federal judge has reached a contrary conclusion on the particular point in question demonstrates, we believe, that there exists a substantial ground for difference of opinion.

The same is true with respect to the one disagreement the Court had with Dr. Rodberg's position under the Speech or Debate Clause. The Court agreed that "Senator Gravel's legislative acts may not consistently with the Speech or Debate Clause be the subject of questioning before the grand jury," Sl. Op. p. 9, and that his insertion of the Pentagon Papers into the Congressional Record was a legislative act. The Court further agreed, because movant was performing non-ministerial duties for the Senator, that "the Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." Sl. Op., p. 15. In light of these holdings the Court's conclusion that Dr. Rodberg could be questioned about alleged republication by Senator Gravel of material already inserted into the Congressional Record because such republication was not legitimate legislative activity is inconsistent with the position taken by Judge Gesell in *Hentoff* v. *Ichord*, 318 F.Supp. 1175 (D.D.C., 1970). In *Hentoff*, plaintiffs sought to enjoin members of Congress, the Public Printer and the Superintendent of Documents from republishing a Congressional report. The plaintiffs conceded what the Court has found here as a matter of law, that insertion of material into the Congressional Record is legitimate legislative activity protected by the Speech or Debate Clause. *Supra* at 1179. However, the plaintiffs sought to enjoin general public distribution of the report and alleged that an injunction would lie against both members of Congress and the Printer and Superintendent. Judge Gesell agreed as to the latter two because they were not members of Congress but rather were "administrative personnel whose non-discretionary duties to the legislative body as a whole in no substantial way related to the specific furtherance of the legislative tasks of individual members." *Rodberg*, Sl. Op., p. 15. But as to the members of Congress, the Court said:

Plaintiffs contend that the discussion in *Powell*, together with such decisions as *McGovern* v. *Martz*, 182 F. Supp. 343 (D.D.C., 1960), and *Long* v. *Ansell*, 63 U.S. App. D.C. 68, 69 F.2d 386 (1934), indicates that this Court may restrain Congressmen from publishing, filing, or distributing, except by insertion into the *Congressional Record*, a report . . .

The Court is of a contrary view. Members of Congress have the same right to speak as anyone else. Their legislative activities are not limited to speech or debate on the floor of Congress. Information in this Report involves matters of public concern, and the Court will take no action which limits the use that individual Congressmen choose to make of the Report or its contents on or off the floor of Congress. *Hentoff, supra*, at 1179. The Court thereby held that republication by a member of Congress of a Congressional report was legitimate legislative activity within the sphere of the Speech or Debate Clause, a conclusion at variance with the Court's conclusion here.[10] As noted *supra*, we believe such disagreement demonstrates conclusively that there is substantial ground for difference of opinion.

We further submit that an interlocutory appeal with materially advance the disposition of this litigation. This case presents the unusual, almost unique, situation wherein an appearance by a witness before a grand jury will threaten not only the witness' constitutional rights but the rights of a United States Senator. This the Court has already recognized by granting Senator Gravel's motion to intervene. Ordinarily the denial of a motion to quash a subpoena is deemed interlocutory because it is said the witness can subsequently risk contempt and litigate again the issue(s) he has raised on the motion. But that reasoning does not apply to Senator Gravel who stands on a different legal footing. Since the subpoena is not directed to him, the Senator can in no way refuse to comply with it and then litigate the issues raised here; there can be no contempt proceeding for the Senator because there is no outstanding order of the Court for him to disobey. In other words, as to him, the denial of the motion to quash is a final order and, hence, appealable under Title 28 U.S.C. § 1291.

As noted in the affidavit, we have been informed that Senator Gravel intends to file a notice of appeal if this Court declines to grant a rehearing upon the motion. This case will then be in the following posture: the constitutionality of the subpoena under the Speech or Debate Clause will be properly before the Court of Appeals, but being litigated by the intervenor, rather than the party to whom it is directed. On the other hand, the First Amendment claim, not raised by the Senator will not be before the Court of Appeals and will first have to be litigated at the

Footnotes at end of article.

District Court level. Neither one of these results is desirable. As long as the issue of the lawfulness of the subpoena under the Speech or Debate Clause will properly be before the Court of Appeals, regardless of what Dr. Rodberg may do, the policy against piecemeal appeals which lies behind the general prohibition against interlocutory appeals, has no application. As long as the issue will be properly appealed by the intervenor there is no sound reason for denying Dr. Rodberg, the man to whom the subpoena is directed, the right to litigate that issue himself.

Secondly, the bifurcation of this case that would be caused by the litigating of the Speech or Debate Clause issue in the Court of Appeals while the First Amendment claim remains at the District Court level itself, directly contradicts the "policy against piecemeal appeals." *Switzerland Cheese Association* v. *E. Horne's Market*, 385 U.S. 23, 24 (1966). Under the unique circumstances presented here, it is wholly consistent with that policy, if not indeed mandated by it, that the Court's order be certified so as to permit litigation in the Court of Appeals of *all* the issues presented to this Court. Such certification would prevent, not encourage, piecemeal appeal.

Finally, we have asked for a stay of movant's subpoena pending disposition of this motion. The subpoena is returnable on Thursday, October 14, 1971, and a stay will therefore be necessary to preserve the status quo while this Court considers the instant application. As noted in the supporting affidavit, a temporary adjournment will not prejudice the government as it has apparently subpoenaed several witnesses for this week. If this Court grants a rehearing to reconsider its decision of October 4, a continuance of the stay would be most appropriate. Likewise, if the Court certifies its order to permit an interlocutory appeal, a stay, authorized by § 1292(b), would be necessary to preserve the status quo and prevent a mooting out of this litigation.

CONCLUSION

For the aforegoing reasons, this Court should grant a rehearing or certify its order, and grant a stay.

Respectfully submitted,

JAMES REIF
DORIS PETERSON
MORTON STAVIS
PETER WEISS,

c/o Center for Constitutional Rights, 588 Ninth Avenue, New York, New York 10036. (212) 265-2500.

NEW YORK, N.Y., *October 11, 1971.*

FOOTNOTES

[1] *Application of Rodberg*, Sl. Op. p. 3.
[2] *Falk*, Sl. Op. p. 6.
[3] *Caldwell*, 434 F.2d at 1086.
[4] The opinion in *Verplank, supra*, was not available to counsel for movant at the time of oral argument. It was officially reported last week.
[5] *Rodberg*, at p. 9.
[6] *Id.*, p. 15.
[7] *Hentoff, supra* at 1182.
[8] *Application of Falk*, Sl. Op. p. 6.
[9] *Ibid.*, P. 7.
[10] This Court relied on Hentoff in its discussion of whether republication of the particular report at issue there fulfilled a valid legislative purpose. It should be noted that the conclusion that republication of that *particular* report did not fulfill a valid legislative purpose can in no way control the determination whether publication of an entirely different document, the Pentagon Papers, fulfills such a purpose. Secondly, the discussion in *Hentoff* was in the context of a discussion of an injunction against persons performing non-discretionary functions for the House generally, a group this Court has itself distinguished from Dr. Rodberg, Sl. Op., p. 15.

[U.S. District Court, District of Massachusetts, United States of America v. John Doe, E.B.D. No. 71-172-G]

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE GOVERNMENT'S BRIEF IN OPPOSITION TO MOTIONS OF LEONARD S. RODBERG AND INTERVENOR MIKE GRAVEL, UNITED STATES SENATOR, FOR RECONSIDERATION AND STAY, ET CETERA, AND ORDER THEREON

(In the Matter of a Grand Jury Subpoena Served Upon Leonard S. Rodberg)

The United States of America moves the Court for an order extending the time within which the government may file its brief in opposition to the motions of Leonard S. Rodberg and Intervenor Mike Gravel, United States Senator, for reconsideration of this Court's ruling on October 4, 1971, and other relief, from Friday, October 15, 1971, to Monday, October 18, 1971, at 12:00 p.m.

This motion is based on the attached affidavit of Warren P. Reese.

Respectfully submitted,

HERBERT F. TRAVERS, Jr.,
*U.S. Attorney.*

By WARREN P. REESE,
*Assistant U.S. Attorney.*

Good cause appearing therefore, it is so ordered.

/S/ W. ARTHUR GARRITY,
*U.S. District Judge.*

Dated: October 14, 1971.

AFFIDAVIT

BOSTON, MASS., OCTOBER 14, 1971.

*Suffolk, ss:*

Warren P. Reese, being first duly sworn states:

1. I am an Assistant United States Attorney temporarily assigned to assist the United States Attorney for the District of Massachusetts, and I am authorized to represent the government in grand jury investigations and judicial proceedings ancillary thereto.

2. On October 12, 1971, Leonard S. Rodberg, a witness subpoenaed by the grand jury, and United States Senator Mike Gravel, an intervenor in the Rodberg matter, filed motions for reconsideration of this Court's ruling on October 4, 1971, and other relief. During a brief hearing concerning the matter, I agreed and the Court instructed me to file the government's brief in opposition by Friday, October 15, 1971.

3. Because of the complexity of the issues presented and the impact of various conflicting assignments and responsibilities, I requested that attorneys in the Internal Security Division, Department of Justice, write the brief for my approval to assure its timely and well considered preparation. I was informed this date by the responsible attorney that the brief is now being typed in preliminary draft form, and that the review draft would be finished sometime on Friday, October 15.

4. It is my desire and intention to travel to Washington, D.C., following completion of other government business in Boston, to confer with Departmental Attorneys on Friday, October 15, and review the brief for approval. This circumstance is expetced to prevent delivery of the brief to Boston for filing on Friday, even if the brief is considered acceptable in its existing form.

5. To assure appropriate treatment of the issues, and in view of the circumstances, it is respectfully requested that the government be permitted to file its brief by 12:00 p.m. Monday, October 18, 1971.

6. James Reif, Attorney for Rodberg, and Charles Fishman, attorney for Senator Gravel, have been advised of the foregoing and have agreed to the extension subject to the Court's order. Mr. Fishman informed me that, based on our conversation, a reply Memorandum from Senator Gravel might be indicated, and that due to a death in his family which will require his presence in Florida this coming weekend, he would prefer the extension be granted, with the expectation that the Court would allow sufficient time for a reply brief to be filed.

WARREN P. REESE,
*Assistant U.S. Attorney.*

MOTION FOR ORDER COMMANDING MOVANT TO APPEAR BEFORE THE GRAND JURY ON OCTOBER 28, 1971

(Mike Gravel, U.S. Senator, Intervenor v. United States of America; United States of America v. John Doe; in the matter of a grand jury subpoena served upon Leonard Rodberg)

Comes now the United States by and through the undersigned counsel and moves the Court for an Order commanding Leonard S. Rodberg to appear before the grand jury on October 28, 1971.

In support of the Motion there is attached hereto a Memorandum of Points and Authorities to which this Court's attention is respectfully invited.

Respectfully Submitted,

HERBERT F. TRAVERS, Jr.,
*U.S. Attorney.*

WARREN P. REESE,
*Assistant U.S. Attorney.*

OCTOBER 18, 1971.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR RECONSIDERATION AND STAY PENDING RECONSIDERATION AND/OR APPEAL

A. BACKGROUND

*1. Status of the proceedings*

This matter arose when a subpoena was served on Leonard S. Rodberg to compel his appearance before the grand jury and testify regarding matters presently under investigation by that body. He filed a motion to quash the subpoena and to stay his order to appear before the grand jury *pendente lite*. Senator Mike Gravel's motion for leave to intervene was granted, and he filed a motion to quash and for other relief.

After briefing and oral argument, this Court entered a memorandum of decision and protective order on October 4, 1971, denying the motions to quash the subpoena but restricting the scope of inquiry. A new subpoena was thereafter served on Rodberg.

Rodberg and the Intervenor now seek to have this Court reconsider its initial decision and grant a stay of the subpoena pending such reconsideration. The Intervenor requests that, if reconsideration of the motion to quash is denied, a stay be granted pending appeal to the Court of Appeals. Rodberg requests a stay and certification of the issue to the Court of Appeals pursuant to 28 U.S.C. 1292(b) and Rule 5(a) Federal Rules of Appellate Procedure, in the event of an adverse ruling.

2. CONTENTIONS OF THE MOVING PARTIES

*(a) Intervenor*

(1) The Speech or Debate Clause applies to unofficial publication and distribution, by the Intervenor of a classified study of the Department of Defense covering U.S.-Vietnam relations (hereinafter the "McNamara Papers") and protects the Intervenor and his employees from grand jury inquiry concerning such publication and distribution.

(2) The protective order included in this Court's order of October 4, 1971, does not adequately protect the Intervenor's constitutional rights.

(3) This Court's order of October 4, 1971 is final as to the Intervenor and therefore is appealable.

*(b) Leonard Rodberg*

(1) The mere fact of Rodberg's appearance before the grand jury will have a chilling ef-

fect upon First Amendment freedoms of press and association.

(This issue will not be treated in this memorandum in view of this Court's decision in the case of *In the Matter of a Grand Jury Subpoena Served on Richard Falk*, E.B.D. No. 71–165–G, reconsideration denied October 12, 1971, the issues and facts of that case being substantially indistinguishable from those of the instant case.)

(2) The Speech or Debate Clause protects Intervenor from any grand jury inquiry concerning unofficial publication and distribution of the "McNamara Papers"; and Rodberg, by virtue of his status as a member of the Intervenor's personal staff, is also protected.

(3) Should this Court affirm its denial of the motions to quash the subpoena, the issue relating to the Speech or Debate Clause should be certified to the Court of Appeals for review because there is substantial ground for difference of opinion, and appeal will materially advance the ultimate termination of this litigation.

*3. The factual setting*

The facts are essentially not in dispute. They are, as excerpted from the court's opinion, set forth below:

"Dr. Leonard S. Rodberg, a physicist and resident fellow at the Institute for Policy Studies in Washington, D.C., and currently engaged as a staff member of United States Senator Mike Gravel of Alaska, petitioned the court on August 27, 1971, to quash a subpoena ordering him to appear before a federal grand jury ostensibly investigating crimes relating to the release and dissemination of the much-publicized classified study by the Department of Defense entitled 'History of U.S. Decision-Making Process on Viet Nam Policy,' popularly called the 'Pentagon Papers.'

"The crimes being investigated by the grand jury include the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371), as is indicated in the prosecuting attorneys' oaths of office on file with the Clerk. [Footnote omitted]

* * * * *

"Both motions of the Senator allege, and the court finds, that 'as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.'

"Late in the evening of June 29, Senator Gravel, a member of the Committee on Public Works, called a meeting of its Subcommittee on Public Buildings and Grounds, of which he is chairman. Earlier that same day, the Senator had added Dr. Rodberg to his personal staff. At the meeting he read extensively from the study and, at its conclusion, placed the entire study comprising 7,000 pages of complex material in 47 volumes on file with the subcommittee, thereby making it widely available to the press. About seven weeks later, on August 18, it was reported in the Washington Post that Senator Gravel had turned over the Pentagon Papers to a Boston publisher, Beacon Press, for compilation into a four-volume book to be released in late October under the title, 'The Senator Gravel Edition of the Pentagon Papers: the Defense Department History of Decision Making on Vietnam;" and that Beacon Press came to agreement with the Senator after negotiations with his assistant Dr. Rodberg. In the August 24 edition of a weekly newspaper, Boston After Dark, an article, 'Why MIT & Harvard Suppressed the Pentagon Papers,' described in detail Dr. Rodberg's prior negotiations with publishers other than Beacon Press. On the evening of August 24, Dr. Rodberg was subpoenaed to appear and testify before the current grand jury."

B. ARGUMENT

*1. The speech or debate clause*

(a) Introductory Statement

Great emphasis is placed by intervenor on the practice and necessity of communications between the electorate and their representatives in his endeavor to persuade this Court to consider the private publication of classified documents as being no different from the republication of speeches and reports delivered and developed in the normal course of legislative activity. Such publication of classified documents which were prepared by an executive agency hardly comports with the test espoused by the intervenor that the Speech or Debate Clause affords protection for things "generally done in a session of the House by one of its members in relation to the business before it" or action "related to the due functioning of the legislative process." (Intervenor's Brief, pp. 4–5.)

Although a legislator's issuance of press releases, the holding of press conferences, and speaking to constituents regarding his views on matters pending before the Congress may be legitimate activity concerning his legislative responsibilities, publication by a legislator through a commercial printer of classified documents under the circumstances herein could hardly have been contemplated historically as a proper subject for protection under the Speech or Debate Clause. The reason for this conclusion is apparent. There has been unwavering consistency in the articulation of the purposes and benefits of the Speech or Debate Clause in the cases in which it has been considered.

Perhaps the earliest declaration of purpose was uttered by Mr. Chief Justice Parsons in *Coffin* v. *Coffin*, 4 Mass. 1, (1808) which was adopted by the Supreme Court in *Kilbourn* v. *Thompson*, 103 U.S. 168:

These privileges are thus secured, not with the intention of protecting the members against *prosecutions for their own benefit, but to support the rights of the people* by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act *resulting from the nature and in the execution of the office*. And I would define the article as securing to every member exemption from prosecution for everything said or done by him *as a representative, in the exercise of the functions of that office*, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber (Emphasis added, pp. 203–204.)

The purpose was reiterated in 1950 by Mr. Justice Frankfurter in *Tenney* v. *Brandhove*, 341 U.S. 367 (1950):

The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege. The Maryland Declaration of Rights, Nov. 3, 1776, provided: "That freedom of speech, and debates or proceedings, in the legislature, ought not to be impeached in any other court or judicature." Art. VIII. The Massachusetts Constitution of 1780 provided: "The freedom of deliberation, speech and debate, in either house of the legislature, *is so essential to the rights of the people*, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever." Part The First, Art. XXI. (Emphasis added, p. 373.)

* * * * *

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of *their legislative duty, not for their private indulgence but for the public good.* (Emphasis added, p. 377.)

Writing for the Majority in *United States* v. *Johnson*, 383 U.S. 169 (1966), Mr. Justice Harlan observed—

The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the "practical security" for *ensuring the independence of the legislature.* (Emphasis added, p. 179.)

The initial inquiry then is whether such private publication by a senator of material of the character of the "McNamara Papers" is (1) legitimate legislative activity, and (2) an activity, the protection of which is conducive to the achievement of the constitutional purpose, to secure the independence of the legislature and thereby benefit the public. A more complete answer to these questions requires a determination of the scope of the Speech or Debate Clause.

b. Private Publication by a Senator of Classified Documents is not Embraced Within the Speech or Debate Clause

In ruling that Dr. Rodberg could be questioned concerning arrangements made for private publication of the "McNamara Papers", this Court properly ruled that the privilege embodied in the Speech or Debate Clause does not apply. *McGovern* v. *Martz*, 182 F.Supp. 343 (D.D.C., 1960) and *Long* v. *Ansell*, 69 F.2d 386 (C.A. D.C., 1934), *aff'd.* 293 U.S. 76 also make it clear that "the reason for the rule—complete and uninhibited discussion among legislators—is not here served." Accord, *Restatement of Torts*, 1938 ed. § 590 Comment b.

In reaching its decision, this Court relied in part on *Hentoff* v. *Ichord*, 318 F.Supp. 1175 (D.D.C., 1970). The Government, in discussing the decision in Hentoff, Would hasten to point out that although it does not agree with the holding in that case as applied to the specific facts therein, the rationale employed by the court was proper (any publication which may involve the Speech or Debate Clause requires a determination whether the publication was a part of the legislative process). However, notwithstanding the specific holding in *Hentoff*, the application of the rationale applied there to the facts in this case, which are distinguishable from those in *Hentoff*, demonstrates that this Court's initial decision was proper.

In *Hentoff* v. *Ichord*, *supra*, the court considered an action for injunctive relief against certain Congressmen and the Public Printer to prevent the printing and distribution of an official study prepared for the House Internal Security Committee. In that case, injunctive relief against Congressmen was denied *not* because the court was unwilling to recognize a broad extension of the Speech or Debate Clause to cloak the acts of individual Congressmen outside the scope and forum of their legislative business. Rather, the Court chose to deny relief as to the Congressmen purely on the grounds of their First Amendment rights:

Members of Congress have the same right to speak as anyone else. . . . [T]he court will take no action which limits the use that individual Congressmen choose to make of the report. . . . (318 F.Supp. at 1179).

That decision, which held that a legislative employee who was ordered to print the report could be enjoined, supports this Court's deci-

sion that the Speech or Debate Clause does not protect extra-legislative publication. And, this much this Court recognized in quoting *Hentoff* in its opinion (p. 13):

Nothing in the Constitution or the cases suggests, however, that a committee report is a necessary adjunct to speech or debate in Congress. . . . [a]nd its further printing and public distribution is not necessary to give effect of the freedom of Congressmen to speak and debate on or off the floor. (*Hentoff, supra,* at 1180).

*(1) Private publication bears no relation to legislative business*

Such legislative business of the Senate, the Intervenor was engaged in at midnight on June 29, 1971, terminated at the close of the Subcommittee hearing that night. Thus, applying the test suggested by *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), that the immunity conferred by the Speech or Debate Clause envisions only ". . . things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204, *Kilbourn* supports the conclusion that any subsequent private publication of any documents disclosed that night is not barred from a grand jury investigation by the Speech or Debate Clause.

More importantly, the Intervenor's or Dr. Rodberg's actions in unofficially publishing these documents through the Beacon Press stand on no different footing than those of any person seeking to print and distribute documents he wishes disseminated. Their actions are thus entitled to no greater privilege from inquiry than those of a private citizen, and this grand jury is entitled to determine whether criminal acts by anyone else have been committed in the process.

*2. Prior decisions confirm that no privilege exists as to unofficial publication outside of Congress of the content of official speeches or Records*

Assuming *arguendo* that certain documents were given by the Intervenor to Beacon Press (or given at his direction) and that they constitute a proper legislative record of the Senate Subcommittee for House and Grounds, no privilege exists whatever insofar as their subsequent publication and distribution outside of Congress is concerned.

The Speech or Debate Clause provides that insofar as members of Congress are concerned:

". . . for any speech or debate in either House, they shall not be questioned in any other place."

This provision, therefore, does not apply to statements made or distributed outside of the scope of the official business of the Congress, in which any such statements or documents are used. Instead, the privilege protects and insures only that the official business of the Congress will be free from interference.

The Court of Appeals for the District of Columbia Circuit has already considered and decided a case, controlling here, which raises this question in a factual setting surprisingly close to this proceeding, *Long* v. *Ansell,* 69 F.2d 386 (D.C. Cir., 1934), affd. 293 U.S. 76 (1934). In that case, a libel suit was filed against Senator Long for printing and distributing several libelous articles alleged to be a reprint of a speech made by him in the Senate. The lower court noted, in affirming denial of a motion to quash the subpoena served upon the legislator, that:

"The charge here is not for slander resulting from a speech made on the floor of the Senate, but for libel in publishing and distributing a copy of the speech. . . . The acts charged have only remote connection with the speech. While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate but in the publication and circularizing of the documents."

*Long* has not only been cited and relied on since 1934 as good law, see, e.g., *McGovern* v. *Martz,* 192 F. Supp. 343 (D.D.C. 1960), but it confirms the long-standing rule in both American and English common law that republication of legislative documents is privileged only to a qualified extent. For example, the American Law Institute's Restatement of Torts § 590, comment b, reads in part:

"* * * Defamatory matter spoken or otherwise uttered in a legislative proceeding is a publication thereof and a report of the legislative proceeding is a republication of the defamatory matter. Such republication is not absolutely privileged under the rule stated in this Section, but is conditionally privileged under the rule stated in § 611. Thus there is no absolute privilege to disseminate the Congressional Record of reprints therefrom, either by a Senator or a Congressman or by a third person."

See also, *Rox* v. *Abingdon,* 1 Esp. 226 Peake 310 (1795); *Rex* v. *Creevy,* 3 Eq. 2. Cases, 228, 1 M & S. 273 (1813), Kent's Commentaries 249 N.C. (8th ed. 1954), 1 Story, "Commentaries on the Constitution of the United States." (5th Ed. 1905) § 866, N. (a), *Cole* v. *Richards,* 108 N.J.L. 356 A. 466 (1932), and *Methodist Federation for Social Action* v. *Eastland, infra.*

This rule is, of course, in complete harmony with other collateral areas of our legal system. For example, the judicial privilege is also qualified as to unauthorized publication. While a judge enjoys an absolute privilege for the official publication of a judicial statement, i.e., by reading an opinion in open court or filing it in the clerk's office, there is only a qualified privilege for the unofficial circulation of copies of a defamatory opinion. See, e.g., *Murray* v. *Brancato,* 290 N.Y. 52, 48 N.E. 2d 257 (1943); *Francis* v. *Branson,* 168 Okl. 24, 31 F. 2d 870 (1933); and, Note, 12, Ford L. Rev. 193 (1943).

Furthermore, an analysis of the precedents provided by the Intervenor in support of his motion confirms, by the absence of any one point, that there is no authority for the proposition that private publication is performed with the benefit of the Congressional privilege against inquiry after the subsequent publication. In *Hearst* v. *Black,* 87 F. 2d (D.C. Cir. 1936) the court was not even faced with a question regarding republication but, rather, a suit to prevent disclosure *in the first instance* of material gathered for committee investigations. The court ruled only that:

"If courts cannot enjoin the enactment of unconstitutional laws . . . they cannot enjoin legislative debate or discussion of constitutional measure because of incidental disclosure or publication of knowledge unconstitutionally acquired." 87 F. 2d at 72.

Such a ruling hardly supports any contention that a wholesale private printing and public distribution of the material would be above judicial inquiry after the fact. Here, the Intervenor would have this Court believe that judicial reluctance to exercise supervision over Congressional deliberations *before they had commenced* constituted an acknowledgement that a grand jury was utterly without power to inquire into the activities of non-legislative members after the fact.

And, in *Methodist Federation* v. *Eastland,* 141 F. Supp. 729 (D.D.C. 1956) the court again considered whether it could enjoin a discretionary act of Congress *before* it has transpired on the basis of allegations of irreparable injury. Again, no finding was made that a court could not entertain a suit for redress after the fact and, as in *Long,* assess whatever liability may be appropriate. And, as in *Hearst, Methodist Federation* involved only a request for an injunction against publication prior to the publication.

And *Hentoff* v. *Ichord, supra,* is no support for Intervenor's contention that members of Congress are "absolutely privileged" from accountability for what they do. Moreover, in *Hentoff* v. *Ichord,* even in circumstances where the Court held the members of the House to be absolutely privileged, circumstances not present here, the Court none the less held that their agent was not immune. *Cf Powell* v. *McCormack,* (1969) 395 U.S. 486, 504–506.

In his next case, the Intervenor candidly acknowledges (Mem., p. 13) that *McGovern* v. *Martz,* 182 F.Supp. 343 (D.D.C. 1960) supports the Government position. There the court said:

"But what of republication? Should an absolute privilege exist to bar suits for defamation resulting from a Congressman's circulation of reprints or copies of the Congressional Record to non-Congressmen? The reason for the rule—complete and uninhibited discussion among *legislators*—is not here served. Accordingly, the absolute privilege to inform a fellow legislator (either by way of speech on the floor or writings inserted in the Record) become a qualified privilege for the republication of the information. 'Though a member of congress is not responsible out of congress for words spoken there, though libelous upon individuals; yet if he causes his speech to be published, he may be punished as for a libel by action or indictment. This is the English and the just law.' 1 Kent's Commentaries 249, note c 8th Ed. 1854). (182 F.Supp. at 347)"

And, in so ruling, a further precedent was created for the proposition that *republication* enjoys only a *qualified* privilege. Even when the Senator alludes (Mem., p. 14 n. 11) to the "informing" function which should be protected by the privilege he points to a portion of the Court' opinion which shows that a qualified privilege fulfills this need completely:

"Congressmen undoubtedly have a responsibility to inform their constituents, and undoubtedly circulation of the Congressional Record is a convenient method. It does not follow from this however, that an absolute privilege is necessary; a qualified privilege is enough."

The Intervenor's final majority, *Barr* v. *Matteo,* 360 U.S. 564 (1959), is equally inopposite. There, the Court recognized a privilege where executive officials were acting in the scope of their official duties. In *Barr,* an official was sued for defamation caused by a press release he had issued. The Court found that the initial release constituted an act "in the line of duty." Important here is the fact that neither a republication nor a grand jury investigation was involved.

For these reasons, the grand jury should be permitted to inquire into any efforts to effect private publication of the "McNamara Papers."

The four qualifying restrictions with which the intervenor seeks to constrict this inquiry should also be rejected. The above discussion in *McGovern* was in no wise *obiter dictum* as he suggests (Mem., p. 14); but for the ruling as to the extent of privilege, the court would have been obliged to dismiss defendant's counterclaim with prejudice. The discussion is thus the controlling ground of the final result. Even if the *McGovern* court erred in qualifying the privilege by a malice standard as intervenor suggests, that error was on the side of failing to qualify sufficiently the republication privilege. *Tenney* v. *Brandhove,* 341 U.S. 367, (1951) which intervenor cites as authority for an unqualified privilege, involved a defamation suit for an in-committee investigation which resulted in damages. No republication was involved and the Supreme Court concluded, "We have only considered the scope of the privilege as applied to the facts of the present case." 341 U.S. at 378. *Cockran* v. *Couzens,* 42 F. 2d 783 (D.C. Cir. 1930) *cert. denied* 283 U.S. 874 says no more than that an *absolute* privilege applies to *any speeches made on the floor of the Senate* even if unrelated to official business, a conclusion which has no bearing on this proceeding.

3. Rodberg Has No Claim to Derivative Status Under the Speech or Debate Clause.

Given the conclusion that publication of the "McNamara Papers" by the Intervenor through Beacon Press is not protected by the Speech or Debate Clause, Rodberg, as well, has no status under the Clause in the context of that enterprise for a number of reasons. First, his immunity is derived from the Intervenor. Second, it can be no greater than that possessed by the Intervenor, which in this case is none. Finally, an agent can, and often does, have less immunity than does his employer. As stated in a per curiam decision in *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967), in which respondent Sourwine was the chief counsel:

". . . It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech and Debate Clause of the Constitution, *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881), that legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney* v. *Brandhove, supra*, 341 U.S. at 376, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves. This Court has held, however, that this doctrine is less absolute, although applicable, when applied to officers of employees of a legislative body, rather than to legislators themselves. As the Court said in *Tenny* v. *Brandhove, supra*, the doctrine, in respect to a legislator, 'deserves greater respect than where an official acting on behalf of the legislature is sued . . . .' (341 U.S. at 378) Cf. *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963). In the light of this principle, we are compelled to hold that there is a sufficient factual dispute with respect to respondent Sourwine to require reversal of the judgment below as to him."

Thus, it is difficult to conceive how the independence of the legislature is insured in any way by inclusion within the protective ambit of the Speech or Debate Clause the commercial publication and distribution of classified material by a Senator and therein lies the problem presented by the Intervenor's request.

The basic error of intervenor's position can be simply stated. The privilege conferred by the Speech or Debate Clause lies only where the act done was a part of the legislative process. (Mem., pp. 4–5). Here, intervenor contends that he did nothing more than reprint only what was a part of the Subcommittee's record. Assuming *arguendo* that he is correct and further assuming that his initial insertion of the documents into the record was a proper part of the legislative process, does it follow that any subsequent private publication of that information is, thereby, privileged from inquiry? The obviousness of the answer that it does not renders extended discussion unnecessary.

As the court in *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) makes clear by its holding, whether or not the initial publication was proper, the legislative privilege, if invoked for any subsequent publication, requires a determination be made anew as to the legislative purpose for the republication. In other words, if a document were published in the *Congressional Record* for a proper legislative purpose, a subsequent republication solely "for exposure's sake" (Id. at 1182) would not be privileged in all circumstances.

Thus, it is of no concern whether the information was originally made a part of any congressional record or report; rather, it must be determined whether the publication at issue served any proper legislative purpose—e.g., was it published "in a session of the House by one of its members in relation to the business before it" and was it "related to the due functioning of the legislative process" (Intervenor's Mem., pp. 4–5) or was it published solely for the private use and benefit of a Member. If it was the latter, then the privilege will not lie. Here, the republication was not accomplished by inserting it in the *Congressional Record* or by making it a part of a Committee report. Nor was it mailed by the Intervenor to his constituents in Alaska. Instead, the publication was accomplished by using the services of a private commercial printer (in Massachusetts) to prepare a four-volume book entitled "The Senator Gravel Edition of the Pentagon Papers . . ." to be sold to purchasers throughout the entire Nation. Notwithstanding the question whether this was really an attempt to inform his constituents in Alaska of his position on matters pending before the Congress, it was undoubtedly not a part of the legislative process; thus, the privilege does not lie in this case.

For all of these reasons, Dr. Rodberg is not immune from any grand jury inquiry into his activities, and, therefore, his and the Intervenor's motions should be denied.

*2. This Court's Order Is Not Appealable*

As mentioned earlier, both parties have requested a stay of Dr. Rodberg's appearance pending appeal of this Court's Order denying their motions to quash his subpoena. The first issue presented by their requests for a stay is whether or not this Court's Order is appealable.

Thirty years ago, in *Cobbledick* v. *United States*, 309 U.S. 323, the Supreme Court decided the issue whether a district court order denying a motion to quash a grand jury subpoena *duces tecum* was a "final decision of [a] district court" and, as such, reviewable under what is now 28 U.S.C. 1291. In setting forth the basis for its ultimate conclusion that it was not, the Court said:

"Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginnnig has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases [footnote omitted]. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. * * * 309 U.S. at 325–326.

After reviewing these considerations, the Court found them to be compelling in the context of a grand jury proceeding. The grand jury was in the Court's view an integral part of the criminal justice system, and in that regard, the Court said at 327–328:

"* * * The Constitution itself makes the grand jury a part of the judicial process. * * * The proceeding before a grand jury constitutes 'a judicial injury' * * * of the most ancient lineage. * * * The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than it was in the *Alexander* case. *Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. * * * At that point the witness' situation becomes so severea from the main proceeding as to permit an appeal. * * *"* (Footnote omitted and emphasis supplied.)

Thus, *Cobbledick* established the firm principle that the interest in avoiding delay overrides the interest of a grand jury witness in interlocutory appellate review of the obligations imposed upon him by a subpoena.

In the years, since a number of lower courts have uniformly applied the *Cobbledick* rule where attempts have been made to seek review of orders denying motions to quash grand jury subpoenaes. See, e.g., *Lampman* v. *United States District Court*, 418 F. 2d 215 (C.A.9) *cert. denied*, 397 U.S. 919; *In re Buckey*, 395 F. 2d 533 (C.A. 6); *In re Grand Jury Investigation of Violations*, 318 F. 2d 533 (C.A. 2), petition for certiorari dismissed, 375 U.S. 802; *Dugan & McNamara* v. *Clark*, 170 F. 2d 118 (C.A. 3).

Very recently the Supreme Court in *United States* v. *Ryan*, 402 U.S. 530 (1971) reaffirmed the principles set forth in *Cobbledick, supra*. There, Mr. Justice Brennan, speaking for the Supreme Court, said:

". . . one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its command or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." 402 U.S. at 532

For this reason, the Supreme Court reversed an appellate court decision that a denial of a motion to quash a subpoena is appealable.

Dr. Rodberg's position on this point can be, and was for that matter, simply stated. Citing the Supreme Court's decision in *Cobbledick* and *Ryan*, he said:

"The denial of a motion to quash a grand jury subpoena has been held to be interlocutory order, and such an order is not ordinarily appealable." (Memorandum, p. 12), after which he immediately turned to a discussion of a potential exception to this rule, 1292(b). (This question is discussed in the following section.) If Dr. Rodberg is correct, which he is, all that remains to be determined is whether the Intervenor can appeal the Order.

Originally, Dr. Rodberg was the only moving party in this matter. The Intervenor sought protection of his constitutional privilege and was permitted to intervene on the ground such privilege was potentially subject to invasion, depending on questions put to Rodberg by the grand jury. An appropriate protective order was rendered; the Intervenor has achieved his purpose.

The privilege extended to a Senator is only qualifiedly available to his representatives.[1]

If Rodberg possesses status as the alter ego of the Intervenor such status is only part of Rodberg's legal identity as a witness. For this reason an *interlocutory* protective order is all the Intervenor could hope to expect and that was granted. Thus, he has all the protection he is entitled to receive. Just as Dr. Rodberg can have no greater immunity than that possessed by the Intervenor so it is, by analogy, that the Intervenor can have no greater rights in this case regarding quashing

[1] As mentioned earlier, in *Dombroski* v. *Eastland*, 387 U.S. 82 (1967), a plaintiff was permitted to bring an action against the chief counsel for a Senate subcommittee (a decidedly more sensitive position than that occupied by Rodberg) although his employer, the Committee chairman, was found privileged from accountability in the suit.

of the subpoena than does Dr. Rodberg. Here, the Intervenor has not been subpoenaed and unlike Dr. Rodberg, the Court's order denying the motion to quash the subpoena in no way affects his rights for they are expressly protected by the protective orders.

For these reasons, neither Dr. Rodberg nor the Intervenor has a right under 28 U.S.C. 1291 to appeal this Court's Order.

*3. A denial of the motions to quash Dr. Rodberg's subpoena does not constitute grounds for certifying the question to the Court of Appeals*

Dr. Rodberg has also asked this Court for an order certifying the questions he raises in his initial motion to the Court of Appeals within the meaning of Title 28 U.S.C. Section 1292(b) and pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure. His request presents one basic issue: Is a denial of a motion to quash a grand jury subpoena, which is not normally appealable, appealable under 28 U.S.C. 1292(b). The short answer is that it is not.

Section 1292(b) affords him no relief for a number of reasons:

(1) There is no controlling questions of law about which there is a *substantial ground for differences of opinion* which will

(2) materially advance the ultimate *termination* of the *litigation*.

The central question presented here is whether a private publication of material, which was also disclosed in part on the floor of the Senate by a Senator, is rendered immune from inquiry by a grand jury by the Speech or Debate Clause. The government's position, as discussed in detail earlier, is that it is not. See, e.g., *Long* and *McGovern*, both *supra*. Neither Dr. Rodberg nor the Intervenor has cited one case in support of his proposition that it is privileged conduct. Thus, the first showing that must be made in order for a question to be certified under 1292(b)—there is a substantial ground for differences of opinion on the controlling question—is not present.

Most obvious here, the second requirement, has not been met for the question would not "materially advance the ultimate termination of the litigation."

The purpose of the second requirement is clearly set out in the Senate Report:

"The bill results from a growing awareness of the need for expedition of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, result in a final order which would then be appealable to the circuit courts of appeals of the United States. However, such motions, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not, therefore, under existing provisions of law, appealable. For example, in a recent case a motion to dismiss for want of jurisdiction was filed in the district court early in the proceedings. The district court denied the motion and the matter then proceeded to trial. The disposition of that case took almost 8 months. Upon final order the case was appealed and the court of appeals determined that the district court did not have jurisdiction and entered an order accordingly.

Had this legislation been in effect at that time, the district judge could have stated in writing his opinion that the motion was controlling and the defendant could thereupon have made application to the court of appeals for a review of the order denying the motion. Had the court of appeals entertained such a motion and reached the conclusion that it ultimately did, it would have resulted in a saving of the time of the district court and considerable expense on the part of the litigants.

"There are many civil actions from which similar illustrations could be furnished. For example, in an antitrust action a plea may be entered that the claim is barred by the the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. Disposition of antitrust cases may take considerable time, yet upon appeal following final disposition of such cases, the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction.

"Another instance in which the provisions of this bill might prove useful is where the litigant desires to join a third party defendant. At present, there is no appeal from an order joining a third party defendant or refusing to do so. The instant legislation would permit an appeal within the limitations previously described." S. Rep. No. 2434, 85th Cong. 2d Sess. 2–3, set out in 1958 U.S. Code Cong. & Admins. News 5256.

The House Report also describes other illustrative orders to which § 1292(b) is applicable:

"Without cataloging all of the cases in which interlocutory appeals could be proper, the following categories are those which would generally be affected: (a) cases where an accounting is necessary upon an adjudication of liability under a contract, (b) cases where a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action, (c) cases involving third party defendants where there would be no reason for continuing the actions if the third parties could not be held liable and (d) cases relating to the transfer of the action where it is claimed that the transfer is not authorized by law." H. Rep. No. 1667, 85th Cong. 2d Sess. 1.

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*4. A stay pending appeal should not be granted*

It cannot be gainsaid that a stay pending appeal should not be granted where no appeal is permitted by law. Here, as just discussed, neither Dr. Rodberg nor the Intervenor has a right to appeal this Court's Order. Instead, Dr. Rodberg must, if he so chooses, await an order holding him in contempt of court before he can appeal. *Ryan, supra*. Therefore, this Court should deny their motions for a stay pending appeal.

C. CONCLUSION

For all of the foregoing reasons, Dr. Rodberg's and the Intervenor's motion should be denied and this Court should enter an Order commanding movant Rodberg to appear before the grand jury on October 28, 1971, at 10:00 a.m.

Respectfully submitted,

HERBERT F. TRAVERS, Jr.,
*U.S. Attorney.*

WARREN P. REESE,
*Assistant U.S. Attorney.*

OCTOBER 18, 1971.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the attached Motion and Memorandum in Support thereof on Senator Mike Gravel and Leonard S. Rodberg, by mailing a copy thereof to their counsel of record, specifically Charles L. Fishman, Esquire, 633 East Capitol Street, Washington, D.C. 20003, and James Reif, Esquire, c/o Center for Constitutional Rights, 588 9th Avenue, New York City, New York 10036, respectively, this day, October 18, 1971.

WARREN P. REESE,
*Assistant U.S. Attorney.*

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[Mike Gravel, U.S. Senator, Intervenor v. United States of America. United States of America v. John Doe]

MOTION FOR ORDER COMMANDING MOVANT TO APPEAR BEFORE THE GRAND JURY ON OCTOBER 28, 1971

(In the matter of a grand jury subpoena served upon Leonard Rodberg)

Comes now the United States by and through the undersigned counsel and moves the Court for an Order commanding Leonard S. Rodberg to appear before the grand jury on October 28, 1971.

In support of the Motion there is attached hereto a Memorandum of Points and Authorities to which this Court's attention is respectfully invited.

Respectfully Submitted,

HERBERT F. TRAVERS, Jr.,
*U.S. Attorney.*

WARREN P. REESE,
*Assistant U.S. Attorney.*

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[Mike Gravel, U.S. Senator, Intervenor-Petitioner versus United States.—United States versus John Doe.]

REPLY MEMORANDUM IN SUPPORT OF MOTION OF INTERVENOR-PETITIONER FOR RECONSIDERATION AND STAY PENDING RECONSIDERATION AND/OR APPEAL

(In the matter of a grand jury subpoena served upon Leonard Rodberg)

In our Memorandum in Support of Motion for Reconsideration and Stay, filed October 12, 1971, we stated in considerable detail our arguments underlying our request for this Court to reconsider two of the holdings made in its October 4 decision. The Government on October 18, 1971, filed a Memorandum in opposition to this motion. Since the respective positions of the parties have now been presented at length, we do not wish to burden the Court with further extended discussion,

particularly with respect to even more analysis of the cases upon which both sides rely. However, we feel that it is necessary to reply briefly to three salient features of the Government's legal position.

1. In Part II of our Memorandum (pp. 23–29), we argued that the Protective Order entered by this Court does not guarantee adequately Senator Gravel's constitutional rights and that a more sensitive mechanism, such as a specification, was indispensable. We also pointed out that such a mechanism has been heretofore employed in grand jury proceedings involving claims of lesser magnitude. *The Government did not answer these arguments at all in its Memorandum.*

Further support for our position may be found in a long line of cases in which the Supreme Court has imposed extraordinarily strict procedural requirements in situations where the utilization of normal procedures would affect adversely the exercise of First Amendment rights. The Court has, for example, required that a full adversary hearing precede any court order to seize allegedly unprotected written material, *Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), or to enjoin allegedly unlawful demonstrations, *Carroll* v. *Princess Anne County*, 393 U.S. 175 (1968). These requirements were imposed as "sensitive tools," *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), so that protected speech would not be suppressed inadvertently as a result of *ex parte* determinations of constitutionality. Similar procedural mechanisms must be employed in this case, or else there is significant danger that unconstitutional questions will be posed to and answered by the witness, with Senator Gravel not present and unable to object, and therefore without any realistic possibility of judicial review or remedy. Prior judicial determination, in an adversary hearing, of the constitutional status of proposed questions is thus essential. The only constitutional alternative is quashing the subpoena.

2. The Government asserts that the denial of *Senator Gravel's* motion to quash and motion for specification is not a final order and thus not appealable under 28 U.S.C. § 1293 (Govt. Mem., pp. 22–23). No case is cited in support of this proposition,[1] and, with due respect, we believe that it is specious. In *Perlman* v. *United States*, 247 U.S. 7 (1918), the Supreme Court held that a non-witness intervenor could appeal as of right from the denial of his motion to quash a grand jury subpoena. In that case, the Government sought a subpoena directed to a third party to produce for grand jury inspection certain documents owned by Perlman.[2] Perlman moved to intervene and to quash the subpoena on the grounds that it violated his Fourth Amendment rights. Intervention was allowed and the motion to quash denied. On appeal to the Supreme Court, the Government argued that the denial of Perlman's motion to quash was interlocutory. Rejecting this argument, the Court stated that Perlman had no other means to obtain review and therefore the denial of his motion to quash was a final, appealable order. *Id.*, at 12–13.

As in *Perlman*, Senator Gravel cannot obtain review from the denial of the motion to quash except by direct appeal, inasmuch as he has not been called to answer and cannot, by refusal to comply, be adjudicated in contempt. Numerous other cases are in accord with *Perlman* that the denial of a motion to quash a subpoena issued in either a civil or grand jury proceeding is appealable under 28 U.S.C. § 1291 where no other means of obtaining appellate review is available to the person affected, particularly a non-witness. *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993 (10th Cir. 1965), *cert. denied*, 380 U.S. 964; *First National Bank* v. *Arisguieta*, 287 F. 2d 219 (2d Cir. 1960), *cert. denied* 365 U.S. 840; *Overby* v. *U.S. Fidelity & Guar. Co.*, 224 F. 2d 158 (5th Cir. 1955) and cases cited therein at p. 162 nn. 3, 4; *In re Investigation by U.S. Atty Gen.*, 104 F. 2d 658 (2d Cir. 1939).[3]

Accordingly, a denial of the motion to quash is, as to Senator Gravel, a final order; and should this Court deny our motion for reconsideration, a stay pending appeal should be granted in order to preserve Senator Gravel's legal position on issues of great constitutional importance for ultimate determination by the appellate courts.

3. The thrust of the Government's argument on republication seems to be that some instances of republication of speeches and committee records by a Member of Congress are protected by the Speech and Debate Clause—e.g., in "press releases, . . . press conferences, and speaking to constituents" (Govt. Mem., pp. 5–6)—while others are not. It chooses to characterize the public committee record in this case as "classified," and invites the court to weigh the motives of Members of Congress and to scrutinize on an *ad hoc* basis the content of committee reports as a prerequisite to permitting Congressmen to inform the electorate about matters of public importance. This argument turns the constitutional privilege on its head, for the privilege was designed to foreclose just those sort of inquiries into motive and propriety. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Cochran* v. *Couzens*, 42 F. 2d 783 (D. C. Cir. 1930), *cert. denied* 282 U.S. 874. By definition, if a *privilege* is applicable to a given activity, it cannot be defeated by an *ad hoc* assertion of illegality.

The essential, undisputed fact is that the material which Senator Gravel has attempted to make available to the people comprises the official public record of the subcommittee of which he is chairman. This conduct by a Member of Congress, in making available to the people a committee record concerning matters of overwhelming importance to the Nation, is an exercise of the constitutional privilege in its classic and most pristine sense.

As stated before, further discussion of the cases relied upon by both parties and their relevance to criminal proceedings would be superfluous.[4] While we believe that our construction of the cases is correct, at the very least it is clear that they give enough support for our position so that the issue is not free from doubt. The constitutional questions presented by Senator Gravel are therefore ripe for final adjudication by the appellate courts. As a Member of the United States Senate, representing the rights of Congress as secured by the Constitution, Senator Gravel is entitled to have these bedrock questions of separation of powers decided by the highest court of the land. For these reasons as well, a stay pending appeal ought to be issued should this Court deny the relief requested by Senator Gravel.

Respectfully submitted,

ROBERT J. REINSTEIN,
*Temple University Law School.*
HERBERT O. REID,
*Howard University School of Law.*
CHARLES L. FISHMAN,
*Washington, D.C.*

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the attached Reply Memorandum on Dr. Leonard S. Rodberg and the United States by mailing this day a copy to their counsel of record, to wit, Doris Peterson, Esq., Center for Constitutional Rights, 588 Ninth Avenue, New York, N.Y. 10036, and Warren P. Reese, Esq., Office of the United States Attorney, United States Post Office and Courthouse Building, Boston, Massachusetts.

ROBERT J. REINSTEIN.

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[Mike Gravel, U.S. Senator, Intervenor-Petitioner v. United States.—United States v. John Doe]

SUPPLEMENTAL CERTIFICATE OF SERVICE

(In the matter of a grand jury subpoena served upon Leonard Rodberg)

I, Harvey A. Silverglate, a Member of the Bar of this Court, hereby certify that I served the following document upon the United States by delivering by messenger on this day a copy of same to Herbert F. Travers, Jr., Esquire, United States Attorney, 1107 U.S. Post Office & Courthouse, Post Office Square, Boston, Massachusetts 02109: "Reply Memorandum [of Mike Gravel] in Support of Motion of Intervenor—Petitioner for Reconsideration and Stay Pending Reconsideration and/or Appeal."

Done this 22nd day of October, 1971.

HARVEY A. SILVERGLATE.

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[Mike Gravel, U.S. Senator v. John Doe]

MOTION TO INTERVENE

(In re the matter of Howard Webber)

Comes now Movant, United States Senator Mike Gravel and moves this Honorable Court for leave to intervene in the above captioned cause and as reasons therefore states:

1. Howard Webber is the editor of M.I.T. Press.

2. As the editor of M.I.T. Press, Mr. Weber had contact and discussions with members of Movant's personal staff which contacts and discussions are now the subject of an inquiry by a Federal Grand Jury.

3. The aforesaid Federal Grand Jury has subpoenaed Mr. Webber to appear and give testimony with respect to the aforesaid contact and discussion on Wednesday or Thursday, October 27 or 28, 1971.

4. All of the aforesaid contacts and discussions between Mr. Webber and members of Movant's personal staff relate to the publication of the June 29, 1971 official transcript of the United States Senate Subcommittee on Buildings and Grounds.

5. All of the aforesaid contacts and discussions between Mr. Webber and Movant's personal servants are immune from judicial inquiry by virtue of Movant's constitutional privileges and duties.

6. The question presented herein raises serious and substantial constitutional issues which have not but should be decided by this Court.

7. No other party to the above captioned cause can adequately represent the interest of Movant.

8. The granting of this motion would best serve the interest of Justice.

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[1] All of the cited cases apply only to *Dr. Rodberg's* position, which is distinct since he can secure review by refusing to appear or answer.

[2] The third party was an attorney who came into possession of the documents as exhibits introduced in a civil case involving Perlman.

[3] And see the decisions holding that an order granting a motion to quash a subpoena, although ordinarily interlocutory, is a final order when "the party seeking the subpoena has no other means of obtaining review." *Horizons Titanium Corp.* v. *Norton Co.*, 290 F. 2d 421 (1st Cir. 1961); *Carter Products, Inc.* v. *Eversharp, Inc.*, 360 F. 2d 868 (7th Cir. 1966); *Westinghouse Electric Co.* v. *Burlington*, 351 F. 2d 762 (D.C. Cir. 1965).

[4] We did not discuss *Long* v. *Ansell*, 69 F. 2d 386 (D.C. Cir. 1934), because it is not a Speech and Debate Clause case. Senator Long refused to accept service of process in the libel suit *only* on the grounds of the immunity from arrest during a session of Congress. As the Court made clear, he did not even argue the privilege of the Speech and Debate Clause as a bar to the service of process. The only reference to the Speech and Debate Clause by the Court is found in *dictum* in a somewhat opaque last paragraph. We do not understand how the Government can assert that *Long* is "surprisingly close to this proceeding." (Mem., p. 11).

9. Movant has no information upon which to determine if Mr. Webber plans to appear before the Grand Jury and give testimony in violation of Movant's constitutional rights.

*Wherefore,* Movant respectfully requests that this Honorable Court grant the above captioned Motion to Intervene.

ROBERT REINSTEIN,
*Temple University School of Law.*
HOWARD O. REID, Sr.,
*Howard University School of Law.*
CHARLES LOUIS FISHMAN,
*Attorney for Movant.*

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[United States of America versus John Doe]

MOTION TO QUASH OR STAY GRAND JURY SUBPOENA

(In re the matter of Howard Webber)

Comes now Movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing or staying a subpoena served upon Howard Webber which seeks to compel Mr. Webber's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Mr. Webber should be stayed because it violates Movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to Movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

1. The United States has subpoenaed Mr. Webber for the purpose of questioning him about the publication of the official Senate Subcommittee transcript involved in the case of *Mike Gravel, United States Senator* v. *United States* (Docket No. EBD 71–172).

2. This Court has under consideration Movant's Motion For Reconsideration in the case of *Mike Gravel, United States Senator* v. *United States* (Docket No. EBD 71–172).

3. If this Court decides that publication of the official record of a Senate Subcommittee is constitutionally protected the grand jury will be barred from questioning anyone, including Mr. Webber, about his conduct with respect thereto.

4. If this Court decides that publication of the official record of a Senate Subcommittee is not constitutionally protected Movant has asked for a stay of this Court's decision pending appeal. To permit Mr. Webber to testify with respect to the publication of the aforesaid transcript would moot the constitutional claim of Movant prior to the final resolution of the important and complex constitutional issues presented herein.

5. No substantial injury will result to the United States from the granting of this Motion.

Wherefore, Movant respectfully requests that this Honorable Court grant the above Motion to Quash or Stay the subpoena served upon Howard Webber pending final disposition of the case entitled *Mike Gravel,* U.S.S. v. *United States* EBD 71–172.

CHARLES LOUIS FISHMAN,
*Attorney for Movant.*
ROBERT REINSTEIN,
*Temple University School of Law.*
HOWARD O. REID, Sr.,
*Howard University School of Law.*

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[Mike Gravel, U.S. Senator versus John Doe]

MOTION TO INTERVENE

(In re the matter of Howard Webber)

Comes now Movant, United States Senator Mike Gravel and moves this Honorable Court for leave to intervene in the above captioned cause and as reasons therefore states:

1. Howard Webber is the editor of M. I. T. Press.

2. As the editor of M. I. T. Press, Mr. Webber had contact and discussions with members of Movant's personal staff which contacts and discussions are now the subject of an inquiry by a Federal Grand Jury.

3. The aforesaid Federal Grand Jury has subpoenaed Mr. Webber to appear and give testimony with respect to the aforesaid contact and discussion on Wednesday or Thursday, October 27 or 28, 1971.

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MOTION TO QUASH OR STAY GRAND JURY SUBPOENA

[United States of America v. John Doe]

(In re the matter of Howard Webber)

Comes now Movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing or staying a subpoena served upon Howard Webber which seeks to compel Mr. Webber's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Mr. Webber should be stayed because it violates Movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to Movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

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[Mike Gravel, U.S. Senator, Intervenor-Petitioner vs. United States—United States vs. John Doe]

MOTION FOR FURTHER RELIEF

(In the matter of a grand jury subpoena served upon Leonard Rodberg)

Comes now Movant, Mike Gravel, United States Senator, and respectfully moves this Court for an order granting further relief to prevent the abridgement of Movant's constitutional rights under the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, Movant states as follows:

1. This Court has under consideration Movant's Motion for Reconsideration and/or Stay Pending Appeal of this Court's Memorandum of Decision and Protective Order entered on October 4, 1971 in the above captioned cause.

2. The United States has subpoenaed certain witnesses for the purpose of inquiring into matters protected from inquiry by Article I, Section 6, Clause 1 and the Protective Order issued by this Court on October 4, 1971. Specifically, the government wishes to inquire into how and from whom Movant received certain material commonly referred to as the Pentagon Papers.

3. The United States has subpoenaed certain other witnesses for the purpose of inquiring into Movant's publication of the official transcript of the Senate Subcommittee on Building and Grounds. The constitutional permissibility of such an inquiry is now before the Court for reconsideration in the above captioned cause.

4. Movant has no control over the willingness of those subpoenaed to answer questions prohibited by this Court's Protective Order of October 4, 1971 or Article I, Section 6, Clause 1.

5. Movant has no control over the willingness of those subpoenaed to answer questions concerning Movant's publication of the official transcript of the aforesaid Senate Subcommittee.

6. If this Court decides that publication of the official record of a Senate Subcommittee is constitutionally protected the grand jury will be barred from questioning anyone about his conduct with respect thereto.

7. If this Court decides that publication of the official record of a Senate Subcommittee is not constitutionally protected Movant has asked for a stay of this Court's decision pending appeal. To permit any witness to testify with respect to the publication of the aforesaid transcript would moot the constitutional claim of Movant prior to the final resolution of the important and complex constitutional issues presented herein.

8. If the United States seeks answers to questions prohibited by this Court's Protective Order of October 4, 1971, Movant has no procedure with which to object and to secure a ruling from this Court.

9. If the United States seeks answers to questions concerning publication of the aforesaid official record of a Senate Subcommittee now under submission to this Court, Movant has no procedure with which to object and to secure a ruling from this Court.

10. If this Court permits inquiry into the aforesaid areas and others before the grand jury Movant's constitutional rights will have been irreparably violated.

Wherefore, Movant respectfully requests this Honorable Court to grant the following further relief:

1. To require a listing from the United States of all those who have been subpoenaed or are to appear before the grand jury to give testimony.

2. To hold a hearing to determine which of the listed witnesses has privileged information which, constitutionally, cannot be inquired into, or should not be inquired into pending final determination on reconsideration.

3. To require the United States to specify all questions to be asked each witness, covered by Paragraph 2 above, and to rule on the constitutional permissibility of each said question.

If this Court should deny this Motion, Movant requests this Court to grant a stay of all subpoenas now outstanding or to be issued, pending appeal to the United States Court of Appeals for the First Circuit.

ROBERT J. REINSTEIN,
*Temple University School of Law.*
HOWARD O. REID, Sr.,
*Howard University School of Law.*
CHARLES LOUIS FISHMAN,
*Attorney for Movant.*

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MOTION FOR STAY OF GRAND JURY SUBPOENAS PENDING DISPOSITION OF MOTION FOR FURTHER RELIEF

(Mike Gravel, U.S. Senator, Intervenor-Petitioner versus United States; United States versus John Doe)

Comes now Movant, Mike Gravel, United States Senator, and respectfully moves this Court to issue an order staying enforcement and execution of all subpoenas now outstanding or to be issued compelling the appearance of witnesses before the Federal grand jury sitting in Boston, Massachusetts, and involved herein, pending disposition by this Court of the Motion for Further Relief filed heretofore by Movant.

Movant requests this stay for the following reasons:

1) The Federal grand jury is scheduled to sit on Thursday, October 28, 1971, at 9:00 A.M. and hear the testimony of witnesses upon whom subpoenas have been heretofore served.

2) This Court has before it a Motion for Further Relief filed by Movant which seeks to prevent the questioning of witnesses before the grand jury concerning matters which Movant asserts is immune from inquiry by virtue of Article I, Section 6, Clause 1 of the Constitution, and this Court's Protective Order of October 4, 1971. Other matters into which the grand jury intends to inquire are before this Court on Movant's Motion for Reconsideration and/or Stay Pending Appeal.

3) A stay of grand jury subpoenas pending disposition of the Motion for Further Relief is necessary to preserve the status quo and prevent Movant's legal position from being mooted and, assuming the correctness of

Movant's legal position, the irreparable violation of Movant's constitutional rights.

Respectfully submitted.

ROBERT J. REINSTEIN,
*Temple University School of Law, Philadelphia, Pa.*
CHARLES L. FISHMAN,
*Washington, D.C.*
HOWARD O. REID, Sr.,
*Howard University School of Law, Washington, D.C.*

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MOTION FOR MODIFICATION OF ORDER

(MIKE GRAVEL, U.S. Senator, Intervenor-Petitioner vs. United States; United States vs. John Doe, in the matter of a grand jury subpena served upon Leonard Rodberg; in the matter of a grand jury subpena served upon Howard Webber)

The United States of America moves the Court for an Order modifying its Order announced in the above matter on October 28, 1971, staying enforcement of the subpoenas which have been served on Leonard Rodberg and Howard Webber, and barring the questioning of all witnesses regarding republication by Senator Gravel of the Pentagon Papers.

It is requested that the stay Order as to Rodberg and Webber's subpoenas be vacated or modified to permit the taking of evidence from Webber and Rodberg other than by questions bearing upon republication.

The grounds for this motion are that the present stay Order prevents the government from seeking evidence which is not related to the purpose of the protective Order. The general protective Order adequately preserves the status quo to permit resolution on appeal of the issues raised in support of Senator Gravel's Motions to Quash Rodberg's and Webber's subpoenas and will prevent questioning by the Grand Jury which might moot the issue on appeal.

Respectfully submitted.

JAMES N. GABRIEL,
*U.S. Attorney,*
WARREN P. REESE,
*Assistant U.S. Attorney,*
*Attorney for the United States.*

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MOTION FOR STENOGRAPHIC COPY OF GRAND JURY MINUTES

Mike Gravel, U.S. Senator v. United States; United States v. John Doe

Comes now Movant, United States Senator Mike Gravel, and moves this Honorable Court for an Order requiring that a daily stenographic copy of the transcript of the testimony of all witnesses who have or will in the future testify before the Federal grand jury involved herein. Movant represents that such an Order is necessary to insure his rights as guaranteed by the Constitution and by this Court's Protective Orders.

Respectfully submitted,

ROBERT J. REINSTEIN,
*Temple University Law School, Philadelphia, Pa.*
CHARLES L. FISHMAN,
*Washington, D.C.*
HERBERT O. REID, Jr.,
*Howard University Law School, Washington, D.C.*

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UNITED STATES V. JOHN DOE

STEPHEN PARKHURST,

*Vice-President and Cashier, New England Merchants Bank, Prudential Center, Boston, Mass.*

You are hereby commanded to appear in the United States District Court for the District of Massachusetts at P.O. & Courthouse Building, in the city of Boston on the 10th day of November 1917 at 10 o'clock A.M. to testify before the Grand Jury and bring with you the records of the checking accounts, both special and regular, maintained by the Unitarian Universalist Association, Inc., and Beacon Press, Inc., 25 Beacon Street, Boston, Massachusetts from June 1, 1971 through October 15, 1971, such records to include, but not limited to, all deposits and withdrawals during the aforementioned period of time, and copies of all deposit slips and checks drawn on each account, and items deposited, in the amounts of $10,000 and above.

This subpena is issued on application of the United States.

Please report to: Richard E. Bachman, assistant U.S. Attorney, Chief, Criminal Division, Room 1107, P.O. & Courthouse Building, Boston, Mass.

Date, October 28, 1971.

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MOTION OF INTERVENOR-PETITIONER FOR RECONSIDERATION AND STAY PENDING RECONSIDERATION AND/OR APPEAL

(Mike Gravel, U.S. Senator, Intervenor-Petitioner v. United States; United States v. John Doe; in the matter of a grand jury subpoena served upon Leonard Rodberg)

1. Senator Mike Gravel, intervenor-petitioner, respectfully moves this Court to reconsider its resolution of two issues in the "Memorandum of Decision and Protective Order" entered on October 4, 1971. Movant respectfully submits that these issues ought to be reconsidered because they present complex and important questions of constitutional law and were not heretofore discussed in sufficient depth by the parties. Movant further respectfully submits that given the holding of the Court the appearance of Dr. Rodberg before the grand jury will violate movant's privileges and after hearing, motion for reconsideration is denied; motion to stay is allowed to the extent that * * * of the subpoena on Leonard Rodberg is stayed for 10 days.

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MOTION FOR REHEARING OR CERTIFICATION AND FOR STAY

(Mike Gravel, U.S. Senator, Intervenor, v. United States of America; United States of America v. John Doe; in re Leonard S. Rodberg)

Upon the affidavit annexed hereto and the supporting memorandum of law, Dr. Leonard S. Rodberg respectfully moves this Court for an order granting a rehearing upon the motion to quash the subpoena served upon him, which motion was denied by Hon. W. Arthur Garrity, Jr. (U.S.D.J.) on October 4, 1971, in a Memorandum of Decision and Protective Order. Alternatively, movant asks for the entry of an order certifying the decision of Judge Garrity as an interlocutory appeal within the meaning of Title 28 U.S.C. § 1292 (b) pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure. Dr. Rodberg further moves for a stay of his appearance before the grand jury, now scheduled for October 14, 1971, pending disposition of the aforesaid alternative motions and, if a rehearing or certification is granted, for an extension of that stay until the motions for rehearing and certification denied; motion for stay is mooted by stay of 10 days, granted on motion of intervenor Sen. Gravel.

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MEMORANDUM AND ORDER DENYING MOTION FOR FURTHER RELIEF

OCTOBER 29, 1971

(United States of America v. John Doe; in the matter of a grand jury subpoena served upon Leonard S. Rodberg)

By memorandum of decision and protective order issued October 4, 1971, the court prohibited a grand jury inquiry into the legislative acts of intervenor United States Senator Mike Gravel. By a motion for further relief the Senator seeks a further order requiring the government to list the names of prospective grand jury witnesses and to specify all questions to be asked each witness and moves that the court by a hearing in advance of a witness's appearance determine whether a witness has privileged information which may not be the subject of inquiry consistently with the Speech or Debate Clause of the Constitution of the United States, Art. I, § 6, cl. 1.* At a hearing on the motion, counsel for the intervenor submitted that, unless further relief of the type requested is ordered, the court and intervenor have no way of assuring that the court's protective order of October 4, 1971 is being observed and that questions which may arise during the grand jury proceedings regarding the applicability of the protective order will be properly decided. The court denied the motion from the bench and stated that this memorandum and order would subsequently be filed.

Intervenor's motion is denied on the following grounds: (a) The court has no reason to doubt that its protective order will be obeyed. At the hearing, government counsel stated that it would be. Attorneys are officers of the court on whose good faith the court customarily relies and there is no reason why an exception should be made in this case. (b) The court believes that its protective order issued October 4 is unambiguous. The purport of the order is explained at length in the memorandum accompanying it. (c) The relief sought by the intervenor in his motion for further relief would impede the grand jury's investigation. A balance must be struck between the intervenor's right not to be intimidated by the Executive by an inquiry into his legislative acts, *United States* v. *Johnson*, 1966, 383 U.S. 169, 181, and the grand jury's right not to be hobbled by a daily dissection of its activities.

In connection with the court's staying the enforcement of subpoenas on witnesses Leonard Rodberg and Howard Webber, the court has today issued a supplemental protective order prohibiting for a ten-day period inquiry into Senator Gravel's arranging for publication of the so-called Pentagon Papers. At the hearing counsel for the intervenor urged that the same further relief be granted for the purpose of implementing any such supplemental protective order. For the same reasons the court also denies the intervenor's motion as applied to the supplemental protective order.

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[United States District Court, District of Massachusetts, E.B.D. No. 71–172–G, E.B.D. No. 71–209–G]

SUPPLEMENTAL PROTECTIVE ORDER, OCTOBER 29, 1971

(United States of America versus John Doe, in the matter of a grand jury subpoena served upon Leonard S. Rodberg, in the matter of a grand jury subpoena served upon Howard Webber)

Garrity, J. In its memorandum of decision dated October 4, 1971 the court rejected the contention of the witness Rodberg and the intervenor Senator Gravel that private publication of the so-called Pentagon Papers may not be inquired into consistently with the Speech or Debate Clause of the Constitution of the United States, Art. I, § 6, cl. 1. However, the arguments urged on behalf of the witness and intervenor are substantial and by no means frivolous. In order that the intervenor's position may be preserved on appeal, the court orders that the following Supplemental Protective Order be entered and remain in effect for ten days: **

No witness before the grand jury currently investigating the release of the Pentagon

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* The intervenor filed a separate motion that he be furnished with a transcript of the grand jury proceedings to date. By separate order endorsed on the motion it was also denied.

** This period corresponds with the duration of the stays ordered on October 28, 1971 staying enforcement of subpoenas on witnesses Leonard Rodberg and Howard Webber on application of the intervenor.

Papers may be questioned about Senator Mike Gravel's conduct in arranging for the private publication of the Pentagon Papers nor about Dr. Leonard S. Rodberg's conduct in arranging for said publication to the extent that what he did was in his capacity as a member of the Senator's personal staff.

———— ————,
*United States District Judge.*

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[In the United States District Court for the District of Massachusetts. No. E.O.B. 71–172]

Mike Gravel, United States Senator, Intervenor-Petitioner versus United States, United States versus John Doe, in the matter of a Grand Jury subpoena served upon Leonard Rodberg)

NOTICE OF APPEAL

Notice is hereby given that Senator Mike Gravel, intervenor-petitioner above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final order, denying the Motion of Quash Subpoena and Motion for Specification, entered in this action on the 4th day of October, 1971.

ROBERT J. REINSTEIN,
HERBERT O. REID,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

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[In the United States District Court for the District of Massachusetts, No. E.O.B. 71–172]

Mike Gravel, United States Senator, Intervenor-Petitioner versus United States, United States versus John Doe, in the matter of a Grand Jury subpoena served upon Leonard Rodberg)

NOTICE OF APPEAL

Notice is hereby given that Mike Gravel, United States Senator, Intervenor-Petitioner above named, hereby and herein appeals to the United States Court of Appeals for the First Circuit from the final order, denying Movant's Motion For Further Relief or for a stay pending appeal, entered in this action on the — day of October, 1971.

ROBERT J. REINSTEIN,
HERBERT O. REID, SR.
CHARLES LOUIS FISHMAN,
*Attorney for Movant.*

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[United States District Court, District of Massachusetts, No. E.B.D. 71–172]

(Mike Gravel, United States Senator Intervenor—Petitioner versus United States, United States versus John Doe, in the matter of a Grand Jury subpoena served upon Leonard Rodberg)

NOTICE OF CROSS APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the First Circuit from the United States District Court "Protective Order"' entered herein on October 4, 1971.

DAVID R. NISSEN,
WARREN P. REESE,
*Assistant U.S. Attorneys.*

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BOSTON, MASS., OCTOBER 29, 1971.

CERTIFICATE OF SERVICE

Suffolk, ss.

Assistant U.S. Attorneys David R. Nissen and Warren P. Reese hereby certify that they have this day served a copy of the foregoing Notice of Cross Appeal upon:

Robert J. Reinstein, Temple University School of Law, Philadelphia, Pa.; Howard O. Reid, Sr., Howard University School of Law, Washington, D.C.; and Charles Louis Fishman, 633 East Capitol Street, Washington, D.C. 20003 by mailing same to them in franked official envelopes.

DAVID R. NISSEN,
WARREN P. REESE,
*Assistant U.S. Attorneys.*

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[In the United States Court of Appeals for the First Circuit, No. 71–1331]

MOTION FOR STAY PENDING APPEAL

(Mike Gravel, United States Senator, Appellant versus United States, Appellee)

On Appeal from the Final Order of the United States District Court for the District of Massachusetts, Hon. W. Arthur Garrity, Jr., Docket No. E.B.D. 71–172.

HERBERT O. REID, Sr.
ROBERT J. REINSTEIN,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

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[In the U.S. Court of Appeals for the First Circuit, No. —]

MOTION FOR STAY PENDING APPEAL

Mike Gravel, U.S. Senator, Appellant, versus United States, Appellee

Appellant, United States Senator Mike Gravel, by his counsel respectfully requests that this Court stay pending appeal, the execution and enforcement of the Order of the United States District Court for the District of Massachusetts, Hon. W. Arthur Garrity, Jr., denying Appellant's Motion for Further Relief (attached hereto and made a part hereof as Exhibit "A") which Motion sought to require a listing of all witnesses to be brought before a federal grand jury sitting in Boston, hearing to determine which witnesses have privileged information which should not be inquired into, and specification of all questions to be asked each witness with such privileged information.

Appellant has appealed to this Court from the aforesaid Order on the grounds that such inquiry by the grand jury into the official conduct of a United States Senator violates Appellant's constitutional privilege secured by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause I and the Separation of Powers Doctrine. Appellant submits the following reasons in support of the Motion for Stay Pending Appeal.

(1) Appellant is a United States Senator from the State of Alaska and at all times material to this proceeding was acting in his official capacity.

(2) On June 29, 1971 Appellant, as Chairman, conducted a meeting of the Senate Subcommittee on Buildings and Grounds.

(3) During the course of the aforesaid Subcommittee meeting a transcript was compiled. Part of the aforesaid transcript consists of material commonly referred to as the "Pentagon Papers."

(4) Subsequent to the aforesaid Subcommittee meeting Appellant made the aforesaid transcript available to the press and the aforesaid transcript was public published.

(5) On August 24, 1971, a Federal grand jury subpoena was served upon Dr. Rodberg, seeking to compel his appearance before a Federal grand jury sitting in the District of Massachusetts, in Boston.

(6) Dr. Rodberg moved to quash said subpoena, alleging, *inter alia,* that the subject matter of the inquiry to be made by the grand jury related to acts done by Senator Gravel, with the necessary assistance of his staff, in reading and inserting into the record the so-called "Pentagon Papers," at the June 29, 1971 hearing of the Senate Subcommittee of Buildings and Grounds and in subsequently arranging to have the record of the subcommittee published.

(7) On August 24, 1971, Appellant, Senator Gravel, filed a motion to intervene before the District Court. Appellant alleged in support of that motion that Dr. Rodberg is a personal staff assistant of appellant, who aided Appellant in the discharge of his official duties, and that the grand jury seeks to inquire of Dr. Rodberg into the official conduct of Appellant and his assistants. Appellant contended that any such grand jury proceeding would violate Appellant's constitutional right to be immune from judicial inquiry into his official conduct and that intervention was necessary in order for Appellant to protect his own rights.

(8) On September 1, 1971, the District Court granted Appellant's Motion to Intervene. That same date, Appellant moved to quash the grand jury subpoena and moved also for a specification of the purpose, scope and questions to be asked of Appellant's assistant by the grand jury. Appellant alleged, *inter alia,* that the grand jury intended to question Appellant's assistant, Dr. Rodberg, about the official acts of Appellant and his staff in preparing for disclosure and subsequently disclosing to Appellant's colleagues and constituents, at a Senate Subcommittee hearing, the contents of the Pentagon Papers, which were critical of the Executive's conduct in the field of foreign relations.

(9) On October 4, 1971, the District Court issued a "Memorandum of Decision and Protective Order" (attached hereto and made a part hereof as Exhibit "B"). The Court found as a fact that Dr. Rodberg is, and has been since June 29, 1971, a personal assistant of Senator Gravel. (Slip. Op., page 3). The Court also concluded, on the basis of (a) the undisputed allegations of Senator Gravel and Dr. Rodberg, (b) the crimes under investigation by the grand jury and (c) the events leading up to Dr. Rodberg's subpoena, that "the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (Slip. Op., pages 5–6).

(10) Despite these findings, the District Court denied Appellant's Motion to Quash and Motion for Specification.

(11) The District Court held that the actions of Senator Gravel to inform fully his constituents about Executive conduct in foreign relations, by arranging for the publication and public distribution of the official record of the Subcommittee on Public Buildings and Grounds, were not protected by the Speech and Debate Clause and could be investigated by the grand jury and made the subject of criminal proceedings instituted by the Executive. (Slip. Op., pages 12–13).

(12) The District Court held that the only official actions of Senator Gravel immune from judicial inquiry by virtue of the Speech and Debate Clause related to the preparation for and conduct of the June 29, 1971, meeting of the Subcommittee on Public Buildings and Grounds by the Senator and his personal staff. The District court entered the following protective order:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

(13) Since October 4, 1971, Appellant has filed a Motion For Reconsideration and/or Stay Pending Appeal from the Memorandum Decision and Protective Order issued by the Court below. The Court below denied the Motion for Reconsideration and for stay pending appeal on October 28, 1971, but granted a 10-day stay in order to present this matter to this Court.

(14) Since October 4, 1971, Appellant has discovered that the United States has subpoenaed several witnesses to appear before the grand jury on October 27 and 28, 1971 for the purpose of inquiring into questions and events prohibited under the Protective Order of October 4, 1971. Specifically, Appellant has

learned that the United States seeks to ascertain how and by whom the "Pentagon Papers" reached Appellant.

(15) Since October 4, 1971, Appellant has discovered that the United States has subpoenaed several witnesses to appear before the grand jury on October 27 and 28, 1971, for the purpose of inquiring into the publication of the official transcript of the aforesaid Senate Subcommittee meeting of June 29, 1971.

(16) Appellant moved the Court below on October 27, 1971 for further relief to prevent the United States from bringing the aforesaid classes of witnesses before the aforesaid grand jury for the aforesaid purposes.

(17) On October 28, the Court below denied Appellant's Motion For Further Relief or for a Stay in excess of ten days Pending Appeal to this Court. A Notice of Appeal was filed on October 28, 1971.

(18) A stay of execution and enforcement of the District Court order is necessary to preserve the status quo and to protect fully the rights of Appellant and will not injure or harm any legitimate interests of Appellee. It is Appellant's contention that any testimony by witness with privileged information before the grand jury under the facts of this proceeding will itself violate Appellant's rights under the Speech and Debate Clause. As to Appellant, the denial of the Motion to Quash and the Motion for Specification is a final order, inasmuch as Appellant himself has not been directed to appear before the grand jury and cannot thereby obtain review by refusal to comply with the order of the District Court. Appellant's rights cannot be protected by waiting until protected questions are asked of the witnesses because: (a) Appellant is not entitled to attend the secret grand jury proceedings; (b) any questioning of the witnesses concerning the official actions of Appellant itself violates the terms of the Speech and Debate Clause, regardless of the answer given thereto by the witnesses and regardless of the outcome of the grand jury inquiry; (c) Appellant has no vehicle for controlling the witnesses or their answers; (d) Appellant has no method of seeking judicial review of the questions asked.

(19) By Order dated October 28, 1971 (a copy of which is not available), the Court below entered a supplemental provision to its Protective Order, effective for an interim period of ten days pending appeal and determination by this Court of Appellant's motion for stay pending appeal. Said supplemental provision prohibits the questioning of any witness concerning the actions taken by Senator Gravel in republishing the Subcommittee Record. For the reasons fully set out in Part II of the Memorandum of Law attached hereto, Appellant submits that the Protective Order, as temporarily amended, does not protect adequately Appellant's constitutional rights. Appellant has no right to be present in the grand jury proceedings, has no method of raising objections to questions which in Appellant's view may be barred by the Constitution and the amended Protective Order, cannot control the witnesses or their inclination to answer, and has no method of securing judicial review. A stay of enforcement of the execution of the subpoenas presently returnable is essential in order to preserve for appeal the contention of Appellant that the only constitutional methods for protecting Appellant's constitutional rights are quashing the subpoenas or requiring a specification, as has been done in other analogous proceedings (see Part II of Memorandum of Law).

(19A) The issues asserted by Appellant involve important questions of separations of powers and the construction of the Speech and Debate Clause and are therefore of the highest magnitude. The precise issues set forth herein have not been heretofore decided by this Court or by the Supreme Court. For the reasons stated in the Memorandum in Support of Stay, attached hereto, Appellant submits that:

(a) the District Court erred in holding that the actions of a United States Senator in republishing and distributing to his constituents the official record of a Senate subcommittee, of which he is Chairman, is not immune under the Speech and Debate Clause from grand jury inquiry and the institution of criminal proceedings by the Executive.

(b) the protective order by the District Court does not adequately protect Senator Gravel's constitutional privileges and rights; and

(c) upon the undisputed facts of this proceeding and the findings made by the District Court, the subpoenas must be quashed as a matter of law.

(20) Appellant has appealed to this Court from the final judgment of the District Court.

Wherefore, Appellant respectfully requests that this Court stay execution and enforcement of all grand jury proceedings pending consideration of the appeal which has been taken by Appellant. Appellant requests a hearing on this motion for stay pending appeal.

Respectfully submitted.

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Attorneys for Senator Gravel.

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[In the U.S. District Court for the District of Massachusetts, No. E.B.D. 71–172]

MOTION FOR FURTHER RELIEF

Mike Gravel, United States Senator, Intervenor-Petitioner versus John Doe * * * (In the matter of a Grand Jury Subpoena served upon Loenard Rodberg)

Comes now Movant, Mike Gravel, United States Senator, and respectfully moves this Court for an order granting further relief to prevent the abridgement of Movant's constitutional rights under the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, Movant states as follows:

(1) This Court has under consideration Movant's Motion for Reconsideration and/or Stay Pending Appeal of this Court's Memorandum of Decision and Protective Order entered on October 4, 1971 in the above captioned cause.

(2) The United States has subpoenaed certain witnesses for the purpose of inquiring into matters protected from inquiry by Article I, Section 6, Clause 1 and the Protective Order issued by this Court on October 4, 1971. Specifically, the government wishes to inquire into how and from whom Movant received certain material commonly referred to as the Pentagon Papers.

(3) The United States has subpoenaed certain other witnesses for the purpose of inquiring into Movant's publication of the official transcript of the Senate Subcommittee on Building and Grounds. The constitutional permissibility of such an inquiry is now before the Court for reconsideration in the above captioned clause.

(4) Movant has no control over the willingness of those subpoenaed to answer questions prohibited by this Court's Protective Order of October 4, 1971 or Article I, Section 6, Clause 1.

(5) Movant has no control over the willingness of those subpoenaed to answer questions concerning Movant's publication of the official transcript of the aforesaid Senate Subcommittee.

(6) If this Court decides that publication of the official record of a Senate Subcommittee is constitutionally protected the grand jury will be barred from questioning anyone about his conduct with respect thereto.

(7) If this Court decides that publication of the official record of a Senate Subcommittee is not constitutionally protected Movant has asked for a stay of this Court's decision pending appeal. To permit any witness to testify with respect to the publication of the aforesaid transcript would not moot the constitutional claim of Movant prior to the final resolution of the important and complex constitutional issues presented herein.

(8) If the United States seeks answers to questions prohibited by this Court's Protective Order of October 4, 1971, Movant has no procedure with which to object and to secure a ruling from this Court.

(9) If the United States seeks answers to questions concerning publication of the aforesaid official record of a Senate Subcommittee now under submission to this Court, Movant has no procedure with which to object and to secure a ruling from this Court.

(10) If the Court permits inquiry into the aforesaid areas and others before the grand jury Movant's constitutional rights will have been irreparably violated.

*Wherefore,* Movant respectfully requests this Honorable Court to grant the following further relief:

(1) To require a listing from the United States of all those who have been subpoenaed or are to appear before the grand jury to give testimony.

(2) To hold a hearing to determine which of the listed witnesses has privileged information which, constitutionally, cannot be inquired into, or should not be inquired into pending final determination on reconsideration.

(3) To require the United States to specify all questions to be asked each witness, covered by Paragraph 2 above, and to rule on the constitutional permissibility of each said question.

If this Court should deny this Motion, Movant requests this Court to grant a stay of all subpoenas now outstanding or to be issued, pending appeal to the United States Court of Appeals for the First Circuit.

Robert J. Reinstein, Temple University School of Law, Philadelphia, Pennsylvania.

Charles Louis Fishman, Attorney for Movant, 633 East Capitol Street, Washington, D.C.

Howard O. Reid, Sr., Howard University School of Law, Washington, D.C.

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[United States District Court, District of Massachusetts No. E.B.D. No. 71–172–G]

MEMORANDUM OF DECISION AND PROTECTIVE ORDER—OCTOBER 4, 1971

United States of America versus John Doe in the matter of a Grand Jury subpoena served upon Leonard S. Rodberg

Garrity, J. Dr. Leonard S. Rodberg, a physicist and resident fellow at the Institute for Policy Studies in Washington, D.C., and currently engaged as a staff member of United States Senator Mike Gravel of Alaska, petitioned the court on August 27, 1971 to quash a subpoena ordering him to appear before a federal grand jury ostensibly investigating crimes related to the release and dissemination of the much publicized classified study by the Department of Defense entitled "History of U.S. Decision-Making Process on Viet Nam Policy," popularly called the "Pentagon Papers."

The crimes being investigated by the grand jury include the retention of public property or records within intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371),

as is indicated in the prosecuting attorneys' oaths of office on file with the Clerk.[1]

At the initial hearing on Dr. Rodberg's motion, the court stayed his appearance before the grand jury until after the parties had filed affidavits and briefs and presented further oral argument. Senator Gravel moved for leave to intervene and, after briefing, intervention was allowed and the court accepted motions by the Senator to quash the subpoena and for specification of the exact nature of the questions to be asked of Dr. Rodberg. Both motions of the Senator allege, and the court finds, that "as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called 'Pentagon Papers,' which were critical of the Executive's conduct in the field of foreign relations."

Dr. Rodberg's first contention in support of his motion to quash is separate from the argument advanced jointly by him and Senator Gravel. This contention is that the subpoena violates rights of his under the First Amendment. In a supporting affidavit, Dr. Rodberg states in part that:

"My roles have been multiple: research, writing, lecturing, supervising research projects, as well as providing advice, assistance, information, expertise to Senators and Congressmen for the performance of their official duties, as well as liaison to other persons whose expertise Congressmen require. Experience has shown that my success in fulfilling these multiple roles depends upon my ability to maintain access to a wide variety of confidential sources of information. My knowledge of and ability to communicate and advise on issues relating to government policy in the areas mentioned above would be seriously jeopardized if I should be forced to appear before a secret grand jury."

While recognizing the importance and usefulness of this type of work by men like Dr. Rodberg, and acknowledging the existence of First Amendment interests here, he is only incidentally a journalist and the court rejects this argument for the reasons stated in its memorandum of decision in E.D.D. No. 71–165, *Application of Falk*, filed contemporaneously herewith.

Dr. Rodberg's other contention, identical to that urged by Senator Gravel, is that the grand jury subpoena served upon him contravenes the Speech or Debate Clause, Article I, section 6, clause 1, of the Constitution of the United States.[2] It is based upon an unusual sequence of events occurring at the height of the court battle over newspaper publication of the controversial Papers. The Court of Appeals for the District of Columbia Circuit had ruled that no prior restraint should issue against publication but the Court of Appeals for the Second Circuit had reached the opposite result. Oral arguments had been heard by the Supreme Court on June 26, 1971. Pending decision by the Supreme Court, publication was temporarily barred. Meanwhile the President had sent a set of the documents to the Congress. On June 30, the Supreme Court affirmed the judgment of the District of Columbia Circuit and reversed that of the Second District, thereby permitting publication. *New York Times Company* v. *United States, supra.*

Late in the evening of June 29, Senator Gravel, a member of the Committee on Public Works, called a meeting of its Subcommittee on Public Buildings and Grounds, of which he is chairman.[3] Earlier that same day, the Senator had added Dr. Rodberg to his personal staff. At the meeting he read extensively from the study and, at its conclusion, placed the entire study comprising 7,000 pages of complex material in 47 volumes on file with the subcommittee, thereby making it widely available to the press. About seven weeks later, on August 18, it was reported in the Washington Post that Senator Gravel had turned over the Pentagon Papers to a Boston publisher, Beacon Press, for compilation into a four-volume book to be released in late October under the title, "The Senator Gravel Edition of the Pentagon Papers: the Defense Department History of Decision Making on Vietnam"; and that Beacon Press came to agreement with the Senator after negotiations with his assistant Dr. Rodberg. In the August 4 edition of a weekly newspaper, Boston After Dark, an article, "Why MIT & Harvard Suppressed the Pentagon Papers," described in detail Dr. Rodberg's prior negotiations with publishers other than Beacon Press. On the evening of August 42, Dr. Rodberg was subpoenaed to appear and testify before the current grand jury.

In opposing the motions to quash and for specification, the Government has pointed out that the grand jury proceedings are secret and it has not been proved by the moving parties that Dr. Rodberg will be interrogated about the subjects described in the newspaper stories. However, given the secrecy and flexibility of all grand jury proceedings, no movant ever could demonstrate with certainty the specific facts about which he had been subpoenaed to testify. Viewing together the crimes which this grand jury is investigating and the chronology of acts and events leading up to Dr. Rodberg's subpoena, the court infers that the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury.

The Speech or Debate Clause, in the context of criminal proceedings, has been applied definitively in *United States* v. *Johnson*, 1966, 383 U.S. 169. Defendant Johnson was a Maryland congressman accused of violating the conflict of interest statute, 18 U.S.C. § 281, and conspiring with codefendants to defraud the United States in violation of 18 U.S.C. § 371. As part of the conspiracy, defendant allegedly delivered for pay a speech in Congress favorable to certain loan companies. Johnson and codefendants were convicted of both crimes. The Court of Appeals had upheld the conspiracy conviction of the coconspirators and the conviction of Johnson under the conflict of interest statute, but held that the conspiracy count was "unconstitutional as applied to . . . Johnson." 337 F.2d at 192. In effect, the Court of Appeals read the Speech or Debate Clause to create an immunity against prosecutions for unlawful acts or motives underlying otherwise privileged legislative conduct. On certiorari granted on the Government's petition, the Supreme Court affirmed the judgment of the Court of Appeals but did not agree as to the breadth of the application of the Speech or Debate Clause. Rejecting the interpretation that the privilege barred the conspiracy prosecution, the Supreme Court instead remanded for a new trial on that count, admonishing however that no evidence of, or inquiry into, the privileged speech would be permitted.

In its opinion in the *Johnson* case, the Supreme Court stated that the privilege must "be read broadly to effectuate its purposes," 383 U.S. at 180, and that "the privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary," at 181. The Court also ruled that the Clause does not reach "conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process," at 172, and that its "decision does not touch a prosecution which . . . does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them," at 185. Thus, the privilege is limited specifically to legislative acts and antecedent conduct so intimately related to them such as cannot be proved without resort to inquiry into legislative acts.

Another relevant fundamental principle is that the legislative privilege conferred by the Speech or Debate Clause belongs to Congressmen only and not to their assistants and aides. In the first place, the Constitution mentions only Senators and Representatives. Secondly, Thomas Jefferson's authoritative interpretation of the privilege, in Jefferson's Manual of Parliamentary Practice, Section III, reprinted in the Senate Manual, 1967, 382–383, states that "the framers of our Constitution . . . have only privileged Senators and Representatives themselves. . . ." Thirdly, no case or other authority indicates to the contrary. Cf. *Powell* v. *McCormack*, 1969, 395 U.S. 486, 504–506, holding that employees of the House of Representatives might be sued in a civil action which would be barred against Congressmen by the legislative privilege.

It follows that while the Speech or Debate Clause plainly sets limitations upon the grand jury's investigation, the motions to quash the subpoena served on Dr. Rodberg seek too broad a result. Without doubt he may be questioned as to the activities of third parties with whom he and the Senator dealt. He may also be questioned about, and is legally responsible for, his own actions previous to his joining the Senator's personal staff on June 29 and many of his actions thereafter. That the Senator's legislative privilege will serve to bar some questions, as hereinafter ruled, does not by any means excuse Dr. Rodberg from appearing and answering questions on subjects beyond the protection of the privilege.

Similarly, Senator Gravel's motion for specification which seeks an order requiring the Government to specify in detail the purpose, scope and exact nature of questions to be asked of Dr. Rodberg will not be granted in terms. In the court's opinion such an order is unnecessary in the circumstances of this case to afford full protection to the Senator's legislative privilege and would more-

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[1] Various opinions in *New York Times Company* v. *United States*, 1971, 403 U.S. 713, 727–740, emphasized that a criminal prosecution might lie for acts related to the publication of classified materials. Whether such a prosecution would lie for acts subsequent to the placing of classified materials in the public record of a congressional subcommittee, the Supreme Court opinions did not intimate and we have not considered. Obviously there may be no prosecution for publication of declassified materials.

[2] Art. I, § 6, cl. 1 provides, "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*" [Emphasis added.] The last clause is known as the Speech or Debate Clause.

[3] Most of the facts stated in this paragraph appear only in Dr. Rodberg's unverified motion which incorporates as exhibits two newspaper stories thereto attached. They have been adopted as findings by the court for purposes of this decision because not disputed in any way by the Government and because underlying the parties' legal submissions.

over impede the grand jury in the discharge of its investigative duties. As stated in *Blair* v. *United States*, 1919, 250 U.S. 273, 282, regarding the nature of the grand jury,

"It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

On the other hand, it is equally clear from the *Johnson* case that Senator Gravel's legislative acts may not consistently with the Speech or Debate Clause be the subject of questioning before the grand jury.[4] The question of what constitutes legislative acts has been treated in decisions in civil actions cited with approval in the *Johnson* case. The classic statement appears in *Kilbourn* v. *Thompson*, 103 U.S. 168, 204, as follows:

"It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it."

In view of the primary purpose of the privilege "to prevent intimidation by the Executive and accountability before a possibly hostile Judiciary," *United States* v. *Johnson*, *supra* at 181, the protection of the privilege afforded by the Speech or Debate Clause may be broader in criminal proceedings than in civil. Therefore the court sustains Senator Gravel's claim that whatever he did at the subcommittee meeting on June 29 and certain acts done in preparation therefore are privileged.

The Government has argued that the Senator's conduct at the subcommittee meeting is unprivileged because the purpose of the meeting, the reading of the Pentagon Papers, was unrelated to any investigation or undertaking authorized by the parent Committee on Public Works or by the Senate in its delegation of power to the parent committee. Senator Gravel has suggested that the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations. "To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Tenney* v. *Brandhove*, 1951, 341 U.S. 367, 378.

There are, of course, occasions when a court is obliged to scrutinize the powers of a congressional committee and the relationship of its activities to its legitimate legislative purpose. But such occasions have been limited to cases in which the power of Congress under the Constitution has been at issue, e.g., *Kilbourn* v. *Thompson*, *supra*, or where the constitutional rights of individuals have been jeopardized by congressional action, as in cases dealing with prosecutions under 2 U.S.C. § 192 for contempt of Congress, e.g., *Watkins* v. *United States*, 1957, 354 U.S. 178. As stated in the latter case, at 205:

"It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected."

It has not been suggested by the Government that the subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action. Also, the individual rights at stake in these proceedings are not those of a witness before a congressional committee or of a subject of a committee's investigation, but only those of a congressman and member of his personal staff who claim "intimidation by the executive." *United States* v. *Johnson*, *supra*, at 181. "The courts have no right to dictate . . . the procedures for Congress to follow in performing its functions. . . ." *United States* v. *Hintz*, N.D. Ill., 1961, 193 F. Supp. 325, 331. Judging the applicability of the legislative privilege in the exercise of the functions of a legislator's office should be done "without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules." *Coffin* v. *Coffin*, 1808, 4 Mass. 1, 27.

Senator Gravel's arranging for private publication of the Pentagon Papers by Beacon Press stands on a different footing and, in the court's opinion, is not embraced by the Speech or Debate Clause.[5] The test is not the public benefit or political value of such private publication[6] but whether it is a legislative act, i.e., "related to the due functioning of the legislative process," *United States* v. *Johnson*, *supra* at 172, or "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, *supra* at 204. Guidance is available mainly in decisions in civil actions dealing with congressmen's civil liability for libel. A distinction has been drawn in the cases between defamatory words inserted in the Congressional Record, held to be privileged, and defamation resulting from a congressman's circulation of reprints or copies of the Congressional Record to his constituents. As to the latter, *McGovern* v. *Martz*, *D.D.C.*, 1960, 182 F. Supp. 343, held that the absolute privilege of the Speech or Debate Clause does not apply to republication, stating at 347, "The reason for the rule—complete and uninhibited discussion among *legislators*—is not here served." See *Restatement of Torts*, 1938 ed., § 590, comment b. In *Hentoff* v. *Ichord*, D.D.C., 1970, 318 F. Supp. 1175, an issue was whether the court had power to enjoin distribution of a House committee report by the Public Printer and Superintendent of Documents. In holding that it did, the court said at 1180,

"Nothing in the Constitution or the cases suggests, however, that a committee report is a necessary adjunct to speech or debate in Congress . . . and its further printing and public distribution is not necessary to give effect to the freedom of congressmen to speak and debate on or off the floor. The Speech or Debate Clause does not necessarily bar an action to enjoin the Public Printer from printing a committee report for public distribution."

While recognizing a special vitality attaching to the Speech or Debate Clause in criminal proceedings, *United States* v. *Johnson*, *supra* at 180–182, the court nevertheless concludes that the reasoning of these civil cases is valid and in the instant case controlling.

Having delineated the area of Senator Gravel's conduct which may not be investigated by the grand jury, the court turns to the question whether some of Dr. Rodberg's activities are also protected from investigation, not because of any privilege of his own but by reason of his having acted as the Senator's agent and assistant in the Senator's performing various legislative acts.[7] The Senator and witness submit, and the court agrees, that the legislative privilege enjoyed by a senator must extend to some activities of a member of his personal staff acting at his direction. To rule otherwise would dilute and jeopardize the privilege itself. For example, speeches delivered on the floor of Congress are often drafted by a skilled staff assistant and not by the congressman himself; to make such an assistant accountable for the content of a speech drafted by him would serve to defeat the privilege. A legislator's dependence upon confidential assistants is analogous to a lawyer's, whose client's privilege against disclosure of confidential communications has been held applicable to the lawyer's assistants. *United States* v. *Kovel*, 2 Cir., 1961, 296 F. 2d 918. The opinion in that case stated at 921, "The complexities of modern existence prevent attorneys from effectively handling clients' affair without the help of others . . ." This holding has been adopted by the Proposed Rules of Evidence for the United States Courts, Preliminary Draft, 1969, Rule 5–03(b). Although the attorney-client privilege is of ancient origin, 8 Wigmore Evidence (McNaughton Rev. 1961), § 2290, p. 542, and is grounded on strong social policy, it is not a constitutional privilege and surely does not warrant broader protection than the legislative privilege based upon the Speech or Debate Clause. In this respect the legislative privilege is akin to the executive privilege about which the Supreme Court in *Barr* v. *Matteo*, 1959, 360 U.S. 564, commented at 573:

"The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy."

*Powell* v. *McCormack*, 1969, 395 U.S. 486, and similar cases permitting actions against subordinate employees of legislative bodies are distinguishable. Employees held accountable in such cases were administrative personnel whose non-discretionary duties to the legislative body as a whole in no substantial way related to the specific furtherance of the legislative tasks of individual members. Such institutional employees clearly have less impact upon legislation than personal staff members entrusted by the legislator

[4] On a later appeal from Johnson's conviction upon retrial, *United States* v. *Johnson*, 4 Cir., 1969, 419 F. 2d 56, it was held that the grand jury's receipt of evidence about Johnson's speech, while "constitutionally impermissible," did not invalidate the indictment, citing *Costello* v. *United States*, 1956, 350 U.S. 359.

[5] The Senator has made no specific claim that his legislative privilege extends to his actions subsequent to the subcommittee hearing. However, this claim has been advanced by Dr. Rodberg and contested by the Government and hence the court has considered it.

[6] The importance of the "informing function of Congress" is described in powerful terms in a quotation from Wilson, Congressional Government (1885), 303, set forth in fn. 6 of the opinion of the Court in *Tenney* v. *Brandhove*, *supra* at 377.

[7] Despite *Kilbourn* v. *Thompson*, *supra*, and *Tenney* v. *Brandhove*, *supra*, the related doctrine of legislative immunity is applicable, though not absolutely, to officers and employees of legislative bodies. *Dombrowski* v. *Eastland*, 1967, 387 U.S. 82, 85. In this sense, therefore, such employees have rights flowing from the Speech or Debate Clause.

himself with sensitive and confidential duties. Therefore the court holds that the Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally.

Lastly, the relief to which Senator Gravel is entitled under the particular circumstances here presented must be determined in the light of two of the principles derived from the decisions discussed in this memorandum: a congressman may not be prosecuted for legislative acts but may be prosecuted for non-legislative acts; and in any such prosecution no evidence from any source of a congressman's legislative acts may be considered against him. A further consideration is the self-evident proposition that no prosecuting attorney, grand jury foreman or other official has lawful authority to prohibit or foreclose a federal grand jury from investigating any offenses against the United States. Therefore, if Senator Gravel's rights under the Speech or Debate Clause are to be fully protected, a protective order will be required limiting the subject matter of the current grand jury's investigation and not merely the questions which may be put to Dr. Rodberg, the witness under subpoena.

For the foregoing reasons it is ordered that the motion to quash and for specification be denied, but that the following protective order be entered:

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

W. ARTHUR GARRITY, Jr.,
*United States District Judge.*

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MEMORANDUM OF LAW IN SUPPORT OF MOTION OF APPELLANT FOR STAY PENDING APPEAL

Mike Gravel, U.S. Senator, appellant v. United States, appellee

On Appeal from the Final Order of the United States District Court for the District of Massachusetts, Hon. W. Arthur Garrity, Jr., Docket No. E.B.C. 71–172.

HERBERT O. REID, Sr.,
ROBERT J. REINSTEIN,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

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MEMORANDUM OF LAW IN SUPPORT OF MOTION OF APPELLANT FOR STAY PENDING APPEAL

Mike Gravel, U.S. Senator, appellant v. United States, appellee

INTRODUCTION

In the "Memorandum of Decision and Protection Order" issued October 4, 1971, the Court below made three basic findings of fact and ten conclusions of law. The findings of fact, which are relevant to this motion, are: [1]

1. Dr. Leonard S. Rodberg is a personal staff assistant of Senator Gravel. (Slip Opinion, p. 4).

2. "[A]s personal assistant to [Senator Gravel], Dr. Rodberg assisted [Senator Gravel] in preparing for disclosure and subsequently disclosing to [Senator Gravel's] colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations." (Slip Opinion, p. 2).

3. "Viewing together the crimes which this grand jury is investigating and the chronology of acts and events leading up to Dr. Rodberg's subpoena, the Court infers that the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (Slip Opinion, pp. 5–6).

The conclusions of law made by the Court below may be summarized as follows:

1. The Speech and Debate Clause "is limited specifically to legislative acts and antecedent conduct so intimately related to them such as cannot be proved without resort to inquiry into legislative acts." (Slip Opinion, p. 7).

2. Senator Gravel's legislative acts may not consistently with the Speech and Debate Clause be the subject of questioning of any witness before the grand jury. (Slip Opinion, p. 9).

3. All actions taken by Senator Gravel at the June 29 Subcommittee meeting, and in preparation for and intimately related to this meeting, are privileged. (Slip Opinion, pp. 10, 16).

4. The judiciary may not inquire into the purpose or legitimacy of the Subcommittee meeting. (Slip Opinion, pp. 10–11).

5. "[T]he legislative privilege conferred by the Speech or Debate clause belongs to Congressmen only and not to their assistants and aides." (Slip Opinion, p. 7).

6. However, in order to protect a Senator's privilege, it "must extend to some activities of a member of his personal staff acting at his direction." (Slip Opinion, p. 14).

7. Therefore, "the Speech and Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." (Slip Opinion, p. 14; see p. 17).

8. Dr. Rodberg may be questioned about subjects beyond the protection of the privilege, including "the activities of third parties with whom he and the Senator dealt" and "with his own conduct previous to his joining the Senator's personal staff . . ." (Slip Opinion, p. 8).

9. Senator Gravel's "arranging for private publication of the Pentagon Papers . . . is not embraced by the Speech or Debate Clause," and Dr. Rodberg and other witnesses (including, presumably, Senator Gravel) may therefore be interrogated about it by the grand jury. (Slip Opinion, p. 12; see pp. 16–17).

10. The protective order which delimits the subject matter of questions which may not be asked of witnesses before the grand jury "fully protects" Senator Gravel's Constitutional rights.

It is our contention that the policies underlying the Speech and Debate Clause and the case law compel the conclusion that the actions of a Senator in republishing and distributing to his constituents the contents of an official, public record of a Senate subcommittee which is critical of Executive conduct in foreign relations is immune from Executive harassment and retaliation and cannot be the subject of interrogation by the grand jury or the institution of criminal proceedings by the Executive. We further believe that under the facts as found by the Court and the conclusions of law reached, the protective order which has been entered by the Court below does not protect adequately Senator Gravel's Constitutional rights.

I. The republication and public distribution by a Senator of an official, public record of a subcommittee critical of executive conduct in foreign relations is protected by the speech and debate clause.

A. Republication of Committee Records is Related to the Due Functioning of the Legislative Process.

Ever since the landmark decision of *Kilbourn* v. *Thompson*, 103 U.S. 168 (1968), the Supreme Court has rejected attempts to confine the Speech and Debate Clause to words spoken on the floor of Congress and has held that it affords protection for things "generally done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204. Reiterating this test as recently as 1967, the Court added that an action of a Member of Congress is protected by the Congressional privilege if it is "related to the due functioning of the legislative process." *United States* v. *Johnson*, 383 U.S. 169, 172, 179.

In considering whether any given practice falls within these standards, two benchmarks are suggested from the decisions. First, a court may ask whether that practice is necessary to fulfill any of the goals of representative government as established by the Constitution. Second, a court may look for guidance at the actual workings of Congress to determine whether the practice is widely utilized by Members of Congress and uniformly regarded as legitimate; in other words, whether it is "generally done . . . by . . . its members in relation to the business before it."

It is clear that republication of speeches or committee reports or transcripts and their dissemination to the electorate meets each of these criteria. The scheme of representative democracy envisaged by the Framers presupposes the maximum amount of communication between the citizens and their elected representatives. Under our system of government, the ultimate power resides in the people. As Madison, who is appropriately called the Father of the Constitution, said, "The people, not the government, possess the absolute sovereignty." [2] For this system to be viable, the people must be informed fully of the workings of government so that they may be able meaningfully to exercise their Constitutional rights to vote intelligently and to "free public discussion of the stewardship of public officials." [3] Madison well understood that this imposes a *duty* on public officials to inform the electorate:

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." [4]

James Wilson, another architect of the Constitution, had precisely this in mind when he emphasized the "informing function" of Congress as an essential part of the due functioning of the legislative process:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the ignorance of the very affairs which it is most important that it should understand and direct." [5]

In concluding that "[t]he informing function of Congress should be preferred even to its legislative function," [6] Wilson surely was not drawing an unbridgeable distinction be-

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tween the two. Informing the electorate is a "legislative act" since it is clearly "related to the due functioning of the legislative process." *United States* v. *Johnson*, supra at 172.[7] In fact, it is no exaggeration to say that direct communication with the electorate is an essential bedrock of the legislative process, for it insures that the constituents of a Member of Congress inform *him* and his colleagues of their well-considered views on pending and future legislation—an indispensable prerequisite for a Congressman deciding how to cast his own vote.

It should go without saying that the republication of speeches, committee reports or transcripts is necessary for a Member of Congress to inform and carry on a dialogue with his constituents. Few people have access to the *Congressional Record*, and fewer still to the original transcripts of committee hearings. Nor can the press be depended upon solely to report the views of Congressmen to their constituents. The press gives at best a summary, perhaps overlaid with editorial comment. There is no substitute for the dissemination of the original.

Secondly, if one were to examine the actual workings of Congress to determine whether republication of speeches is "generally done," *Kilbourn* v. *Thompson, supra*, the same conclusion would be reached. The informing function of Congressmen and its relationship to the legislative process has been documented in many scholarly studies. See, e.g., Griffith, *Congress: Its Contemporary Role* (3rd Ed. 1961); Key, *Politics, Parties and Pressure Groups* (3d E. 1952). Perhaps every Congressman, without exception and since the earliest days of the Republic, has circulated copies of his speeches to the public held press conferences elaborating upon what he said on the floor, issued press releases, and spoken directly to his constituents in explaining his votes or speeches and inviting their views. And we doubt that a single Members of Congress could be found who thought that these actions were not "related to the functioning of the legislative process." *United States* v. *Johnson, supra* at 182. "Republication" is not a talismanic phrase signifying an act done outside the proper sphere of Congressional activity. On the contrary, when analyzed it is evident that the term bespeaks an integral part of the legislative process and of the entire system of representative government.[8] Mr. Justice Black expressed this cogently in holding that an exective official was immune from damage suits for issuing a defamatory press release:

"The effective functioning of a free government like our depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employers. Such an informed understanding depends, of course, on the freedom people have to applaud or criticize the way public employees do their jobs, from the least to the most important." *Barr* v. *Matteo*, 360 U.S. 564, 577 (1958).

In sum, it is clear that an examination of both the theoretical framework of our representative government and its actual practices leaves no doubt that direct communication by a Congressman to the electorate, through the republication and public distribution of speeches, committee reports or transcripts, is conduct "generally done" by Members of Congress "in relation to the business before it" and is clearly "related to the due functioning of the legislative process." Accordingly this conduct is protected from grand jury investigation by the Speech and Debate Clause.

B. Prior Decisions Confirm that Republication by a Member of Congress of a Speech or Committee Record is Privileged Under the Speech and Debate Clause.

Prior to the case at bar, courts have on five occasions expressed views upon the scope of privilege with respect to republication of official documents. We believe that these decisions fully support our position.

1. *Hearst* v. *Black*, 87 F. 2d 68 (D.C. Cir. 1936), was an action to enjoin the Members of a Special Senate subcommittee from retaining possession and distributing copies of documents which it had allegedly secured illegally. The Court of Appeals agreed that the seizure of the documents violated statutory and Constitutional rights, id., at 70, but held nevertheless, that Congressional privilege barred the judiciary from intervening in any way with the use of the documents by the Subcommittee, including republication (copying) and distribution to people outside of Congress. The Court stated:

". . . The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of the appellant's legal rights, we should say to the commitee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongly exercise, is not a subject for judicial interference.

"The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the Constitutional separation of powers invaded. . . ." *Id.*, at 71–72.

2. After a twenty-year hiatus, the republication issue was again presented, this time in a libel suit. In *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (D.D.C. 1956) (three-judge court) the Senate Internal Security Subcommittee had printed a limited number of pamphlets accusing several well-known and respectable groups, including the plaintiff, of being Communist-front organizations. The Subcommittee then ordered another 75,000 copies to be printed. Claiming that the accusations in the pamphlet were false and defamatory and would cause irreparable injury, the plaintiff requested a restraining order against republication and distribution of the pamphlet. The Court assumed the plaintiff's assertions to be true but dismissed the case on the grounds of the Congressional privilege of the Speech and Debate Clause holding:

"By express provision of the Constitution, Members of Congress, 'for any Speech or Debate in either House . . . shall not be questioned in any other place.' Art. I, Sec. 6

"The premise that courts may refuse to enforce legislation that think unconstitutional does not support the conclusion that they may censor Congressional language they think libelous. We have no more authority to prevent Congress, or a Committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the *Congressional Record*. If it unfortunately happens that a documents which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.

"The Constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament, or an American court to restrain Congress, from publishing any statement . . .

"As to the members of the Senate Subcommittee, the complaint is dismissed for lack of jurisdiction. *Cf. Hearst* v. *Black, supra.*" Id., at 731–732.

Thus, in this case, as in *Hearst* v. *Black*, the Court concluded that the Constitutional privilege of Members of Congress embraced republication of Subcommittee reports and placed this action beyond the cognizance of the judiciary.

3. In *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) the Court held unequivocally that the Speech and Debate protects Members of Congress from any judicial accountability for republishing a committee report. The action was brought to prevent the Members of the House Committee on Internal Security and the Public Printer from republishing and distributing 6,000 copies of a Committee Report which, if circulated, would infringe the plaintiffs' First Amendment right. The relief sought was an injunction against republication and distribution, limiting the Report's disclosure to insertion in the *Congressional Record* and such discussion as would ordinarily follow in debate on the floor.

Relying on the Speech and Debate Clause, the Court *dismissed the complaint as to the Members of Congress*. After reviewing the precedents, Judge Gesell stated:

". . . These cases establish that the courts lack jurisdiction to entertain an action seeking any remedy against a Member of Congress for any statement made or action taken in the sphere of legitimate legislative activity.

"Plaintiffs contend that . . . this Court may restrain Congressmen from publishing, filing, or distributing, except by insertion in the *Congressional Record*, a report that impinges upon First Amendment rights.

"The Court is of a contrary view. Members of Congress have the same right to speak as anyone else. *Their legislative activities are not limited to speech or debate on the Floor of Congress. Information in this Report involves matters of public concern, and the Court will take no action which limits the use that individual Congressmen choose to make of the Report or its contents on or off the Floor of Congress.* No injunction is appropriate against any Congressman named defendant." Id., at 1179 (emphasis added)

The Court then followed the distinctions in *Kilbourn* v. *Thompson, supra* and *Powell* v. *McCormack, supra*, between Members of Congress, who are totally immune from judicial accountability, and ministerial agents, who may be held liable for enforcing Congressional orders. Thus, the Court restrained the Public Printer from republication but held the Members of Congress absolutely privileged from accountability. And with respect to the latter, Judge Gesell explicitly stated that the privilege of Congressmen for republication of Committee reports stemmed from the recognition that the informing function of Congressmen was within "the sphere of legitimate legislative activity." [9]

4. The only case which even suggests that a Congressman's privilege may be diluted for republishing a speech or Committee report is *McGovern* v. *Martz*, 182 F. Supp. 343 (D.D.C. 1960). However, a close reading of the facts and opinion in that case shows that it lends but very limited support for the proposition that the Speech and Debate Clause does not extend to republication.

The *McGovern* case involved a libel action by Congressman (now Senator) McGovern, who sued the publisher of a newsletter for falsely reporting that he had sponsored a "Communist front." The defendant counterclaimed that the Congressman had inserted certain defamatory remarks into the *Congressional Record*. There was no republication of these remarks.[10] The Court granted

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McGovern's motion to dismiss the counterclaim on the ground of Congressional privilege. *Id.* at 348. The Court then addressed itself to whether the privilege would protect circulation of reprints from the *Congressional Record*. Its remarks on this issue are *obiter dictum* since neither reprints nor unofficial dissemination was involved. Further, the Court recognized that Congressmen must be "protected and thereby free to inform their constituents," and believed that a privilege, albeit qualified by a malice requirement, was applicable. *Id.* at 348.[11]

It is evident that *McGovern* v. *Martz* cannot be read broadly as a precedent that republication of committee reports or transcripts is not protected by the Speech and Debate Clause, for four basic reasons:

(a) The discussion was *obiter dictum*. Due to the failure of proper adversary presentation the Court was unaware of prior precedents, including *Hearst* v. *Black*, *Supra*, which is binding on the District Courts for the District of Columbia. And the only holding of the case related to insertions in the *Congressional Record*.

(b) Even in dictum, the Court did *not* say that republication was not protected by the Speech and Debate Clause. Rather it stated that a privilege existed but was not absolute. As we shall show, *infra* section C., the Court's logic in a libel suit would compel an absolute privilege in a criminal prosecution case.

(c) In qualifying the privilege by a malice standard the Court was clearly in error. The Supreme Court in *Tenney* v. *Brandhove*, *supra* at 377, held explicitly that if the privilege exists it is absolute: "The claim of an unworthy purpose does not destroy the privilege." See also *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930) cert. denied 283 U.S. 874. Having determined that republication was within "the sphere of legitimate legislative activity," the Court was bound to hold the privilege absolute. And as long ago as 1896, the Supreme Court held that an official's personal malice is relevant only when the official acted "in reference to matters . . . manifestly or palpably beyond his authority." *Spalding* v. *Vilas*, 161 U.S. 483. See also *Barr* v. *Matteo* 360 U.S. 564 (1959).

(d) The qualifying dictum in the *McGovern* case has not been followed. *Hentoff* v. *Ichord*, *supra* at 1179.

5. The Supreme Court has settled decisively that the privilege of a non-elected Executive official encompasses republication and that the privilege is absolute even in libel cases. In *Barr* v. *Matteo*, 360 U.S. 564 (1959) and its companion case *Howard* v. *Lyons*, 360 U.S. 593 (1959), two subordinate officials in the Executive Department were sued for issuing and circulating copies of defamatory press releases.[12] Invoking the judicially-created doctrine of Executive privilege for acts within the legitimate sphere of official conduct, the Court stated:

". . . It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty." 360 U.S. at 575. And the Court: *"The fact that the action here was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable . . ." Ibid* (Emphasis added.)

As the Court below observed in its decision (Slip Opinion, pp. 14–15), judicially developed rules in cases of non-Constitutional privilege bear upon the scope of the Congressional privilege since the former "surely does not warrant broader protection than the legislative privilege based upon the Speech and Debate Clause." By a parity of reasoning, the Supreme Court's holding that republication of documents and their distribution to the public by Executive officials is absolutely privileged applies with at least equal force to the Constitutional privilege of Members of Congress. And no amount of legal alchemy can make a public press release by a subordinate official of the Executive department more within his legitimate sphere of activity than the circulation of copies of the official record of a Senate Subcommittee by a Member of Congress who is under the Constitutional obligation to inform his constituents about the workings of government.

In sum, the civil cases which have been heretofore decided uphold the Constitutional privilege of Members of Congress to republish and distribute to the electorate official committee records.

C. The Purposes of the Speech and Debate Clause Require that the Privilege Protect Members of Congress who Inform the Electorate about Executive Conduct of Foreign Affairs, from Intimidation and Harassment by the Executive.

Even if prior precedents were ambiguous and qualified the legislative privilege in civil cases, their logic, when combined with the historical purposes of the Speech or Debate Clause and the sphere of its contemporary importance would establish an absolute privilege to govern the facts of this case. The civil cases presented typically a claim that a Member of Congress was using the authority of his office to violate willfully an individual's rights. That kind of situation creates the maximum temptation for intervention by the judiciary on the side of the individual.

On the other hand, what is now before this Court is a classic separation of powers case. The judiciary is not being asked to balance the preferred Constitutional rights of individuals against the privileges of Members of Congress; to the contrary, the Executive branch of government has come to the Court below and claimed that it may determine what a Member of Congress may tell his constituents about matters of overwhelming public concern. We do not exaggerate by saying that this claim challenges the fundamental character of our tripartite system of government. To any such claim, the Constitution must stand as an impenetrable barrier.

First, the Executive's contention that it may institute criminal proceedings against a Congressman for speaking to the electorate flies in the face of the historical purposes of the Speech or Debate Clause. The Clause was drafted to secure absolute freedom of speech for Members of Congress. It was the end product of a lineage of legislative free speech guarantees from the English Bill of Rights of 1689 to the first State constitutions and the Articles of Confederation. See generally *Tenney* v. *Brandhove*, *supra* at 372–75. None of these provisions drew a distinction between a speech of a legislator directed at his colleagues and one to his constituents.[13]

On the contrary, the Court in *Tenney* stated that the clause was designed to protect both. *Id.*, at 377 and fn. 6. This is consistent with no less an authority than Thomas Jefferson. When a Federal grand jury protested against abuses by Congressmen who disseminated slanderous accusations to the public, Jefferson responded that the framers of the Constitution wrote the Speech or Debate Clause to allow Congressmen to inform the electorate without inhibition:

"[T]hat in order to give to the will of the people the influence it ought to have, *and the information which may enable them to exercise it usefully*, it was part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive." Writings of Thomas Jefferson 158 (Ford Ed. 1896) (Emphasis added).

The privilege must be read to protect republication and public distribution of speeches and committee records. As we have shown above (Part A), this is a principal avenue relied upon by Members of Congress to provide the people with "the information which may enable them to exercise it usefully." [14]

The Constitutional evil which would result from denying the privilege's applicability to the informing function of Congress is magnified when this is done at the behest of the Executive and with respect to material which is critical of Executive behavior. If the Executive branch may, at will, institute criminal proceedings against and interrogate Members of Congress before grand juries about publications of their speeches and committee reports which they sent to the electorate, it will possess the power to isolate effectively all but the most courageous legislators from their constituents. If such a rule applies Congressmen will have to watch what they say to the people—in press releases, newsletters and anything spoken outside of the four walls of the Capitol—lest it offend the Executive and open them up to harassment, grand jury inquisitions and prosecutions. Yet if the Speech and Debate Clause means anything, it is that courts and prosecutors are not referees over what Congressmen say to their constituents.

Nor are these consequences mere speculation. For this case reveals the present importance of the Speech and Debate Clause "to prevent intimidation by the Executive and accountability before a possibly hostile Judiciary," *United States* v. *Johnson*, *supra*, at 181. Having for years kept secret from the American people the real history of our involvement in Indo-China, and having attempted to impose a prior restraint on the press, the Executive now retaliates against a Senator who revealed to the people—the true sovereign—the reasons why the Executive, without Congressional authorization, took the country into war. The Executive would thereby establish that it, and it alone, has sole authority to reveal to or withhold from the people any information it chooses. As long as government is to continue as one separation of power, this cannot be. The proper rule of Constitutional law was stated in *Methodist Federation* v. *Eastland*, *supra*, at 731:

"Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement . . . similarly nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement."

In conclusion, we wish to bring to the Court's attention a speech given by Senator Sam Ervin on the Floor of the Senate on September 20, 1971. Coming as it does from an acknowledged expert on Constitutional law, we wish to set forth herein some significant excerpts from this speech:

* * * * *

"The events now transpiring in Boston before a Federal grand jury put into question [a] principle of freedom secured by our predecessors.

* * * * *

"I have in mind, of course, the efforts of the administration to inquire into the actions of the junior Senator from Alaska (Mr. Gravel) in connection with the revelations of the contents of the Pentagon Papers.

* * * * *

"The Administration, through its lawyers in the Internal Security Division of the Justice Department, has made a direct and broad scale attack on the rights of all Senators, upon the prerogatives of the Senate, and upon the Constitutional guarantees which have been established to protect the Congress from harassment by a vindictive

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Executive. It is an attack on the independence and freedom of this body.

* * * * *

"The privilege of the Speech and Debate Clause protects legislators not only from prosecution by the Executive and from the judiciary. Quite obviously it also protects them from instrumentalities such as the grand jury, which can be used as the Executive's instrument of harassment and persecution.

"It must be stressed that the privilege does more than immunize the legislator against attempts to punish him or to exact retribution for the things he says in the course of performing his legislative duties. The privilege also protects him against having to defend or justify or explain what he has said. The privilege seeks to free the legislator from being harassed by law suits, grand juries, and prosecutors. Were this not so, the independence of the legislator might just as well be destroyed by forcing him to defend himself all over the country.

* * * * *

"There is another reason why the privilege against inquiry into a speech does not depend on the legality or Constitutionality of the act to which it is tied. That is because the privilege seeks to avoid any abridgement of the freedom of a legislator, even from fear of future retribution. If a legislator knew that he had to account for the possibility that he would have to defend or justify his speech sometime in the future, then he would not be as willing to express himself on controversial matters.

* * * * *

"The administration's motives in pressing this action are not only aimed at the privilege, but at a Senator who dared oppose it on the war, and who had the effrontery to use information the administration desired to keep from the people. If the administration were to have its way, we must remain in total ignorance of what has transpired in Vietnam, and anything else the Government does, unless it chooses to tell us. By suppressing this information, the executive branch has tried to keep the Congress and the Nation in total ignorance. Now it tries to dictate what the scope of a Senator's business is, and where and when and how he may conduct it. The tendency if not the intent, of this effort is to harass the Senator from Alaska, and thereby to silence him and other critics in this body along with those who are outside these halls.

* * * * *

"The purpose of the privilege is to protect the legislative branch from a vindictive executive and a hostile judiciary. It is an element of the principle of separation of powers.

* * * * *

"Here, that is precisely the case. Ultimately, I suppose the question of a criminal action may be involved. But the prosecution will be to protect the special interests of the Executive in its efforts to keep its secrets from the Congress and the people. The motive, of course, is to suppress opposition to Executive policy in the Congress and in the country. When the Speech and Debate Clause is involved in a clash between the executive and the legislative, the history of this legislative immunity is especially important. The immunity was finally gained only after Charles I had lost his head. And he lost his head in part at least because he imprisoned members of Parliament who had opposed him in needless and costly overseas wars, even to the extent of presuming to vote to deny him funds for the war. The establishment of the legislative privilege came during the fight by the legislature to establish its independence from a king who claimed total power. The historical precedents are too close to be ignored. We see history repeating itself."

We respectfully request this Court to grant a stay pending appeal from the decision of the Court below holding that a United States Senator may be subjected to grand jury interrogation and the institution of criminal proceeding for making available to the people copies of an official subcommittee record dealing with Executive conduct in foreign affairs.

II. The protective order does not guarantee adequately Senator Gravel's constitutional rights, and under the facts of the case the subpoena must be quashed.

As the Court below stated in its decision, the Constitutional interests which must be protected in this proceeding by virtue of the Speech and Debate Clause are those of Senator Gravel, and not the witness. However, since Senator Gravel is not entitled to be present during the grand jury proceedings, a delicate mechanism is necessary to protect his rights against both what is asked and what the witness may answer. We tendered such a mechanism in our Motion for Specification, which gave the Justice Department an opportunity to narrow the scope of its inquiry and allow the Court and counsel for Senator Gravel to examine in advance whether the questions to be asked violate the Senator's privilege. Despite disclaimers by the Justice Department to the contrary, this technique has been heretofore voluntarily used by it in other privilege cases. For instance, in *United States v. George*, 444 F. 2d 310 (6th Cir. 1971), the witness moved to enjoin enforcement of a grand jury subpoena on the grounds that his testimony might incriminate his wife and that he was already under indictment for the transactions being investigated. The Justice Department filed an affidavit with the District Court setting forth the scope and purpose of the investigation, and the Court concluded that neither privilege was jeopardized.

Even more directly on point are cases involving First Amendment rights in which the government specified the nature of the proposed inquiry by the grand jury, either voluntarily or pursuant to Court order. In *Caldwell v. United States*, 434 F. 2d 108 (9th Cir. 1970), cert. granted 402 U.S. 942 (1971), after Caldwell had filed a motion to quash the subpoena, the Justice Department filed documents stating the extent of legal proceedings already underway with respect to certain members of the Black Panther Party, and particularizing the specific incidents about which it was believed that Caldwell had knowledge and would therefore be questioned by the grand jury. (A summary of this specification is contained in the appendix to the petitioner's brief to the Supreme Court, pages 64–68.) In the case of *In re Verplank*, 329 F. Supp. 433 (C.D.Cal.1971), which presented analogous Constitutional issues, the Court ordered a governmental showing of specificity. The specificity technqiue was utilized in these cases as the only feasible method for obtaining the precise record indispensible for Constitutional adjudication. Otherwise, as both the Justice Department and the Courts recognized, there was a significant chance that substantive rights and privileges would, in effect, bottom out for lack of procedural safeguards. The necessity for such safeguards is surely as great in the present case, which implicates the Constitutional privileges of Members of Congress and basic tenets of our system of separation of power.

Not only did the Justice Department decline to follow this procedure in this case, but it asserted the right to inquire into the actions of Dr. Rodberg in assisting Senator Gravel and to subpoena the Senator himself and question him about his official actions. Given the record in the case, the District Court's findings are certainly justified "that the government's interest in (Dr. Rodberg's) testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (Slip Opinion, Pages 5–6). And this finding compels that the subpoena must be quashed, for there are no legitimate areas of inquiry about which the government intends to question Dr. Rodberg. All of the actions taken by Senator Gravel with respect to the Pentagon Papers are privileged under the Speech and Debate Clause, including, as we have shown in Part I *supra*, arranging for its republication. There is not the slightest indication in this record that the Justice Department wishes to question Dr. Rodberg about "his own actions previous to his joining the Senator's personal staff." [16] This speculative hypothesis is foreclosed by the record of this case by the refusal of the Justice Department to specify (which it surely would have done if it were interested in activities of Dr. Rodberg's unconnected with the Senator), and by the District Court's findings of fact. Since, therefore, the subpoena was issued for a wholly unconstitutional purpose, it must be quashed.

The Protective Order is under-inclusive because it does not encompass activities of Senator Gravel with respect to the Pentagon Papers which followed the Subcommittee hearing.

Furthermore, even if we assume *arguendo* that there are legitimate areas into which the grand jury may and intends to inquire of Dr. Rodberg, Senator Gravel's Constitutional rights cannot adequately be protected by the Protective Order of October 4, 1971. The reason is, quite simply that Senator Gravel will not be present during the questioning and cannot assure that the Protective Order is obeyed scrupulously. We do not cast aspersions on either counsel for the Justice Department or on Dr. Rodberg by pointing out that they cannot be the final arbiters of Senator Gravel's privilege. It is readily apparent that even with both acting in utmost good faith, counsel for the Justice Department may ask and Dr. Rodberg might answer an illegitimate question. We list the following as examples of how Senator Gravel's rights will be jeopardized by the Protective Order:

a. Counsel for the Justice Department may ask who supplied Senator Gravel with the Pentagon Papers. He may think this justified by referring to the language of the Court's opinion allowing questioning "as to the activities of third parties with whom he and the Senator dealt." We think the question would be barred by Paragraph (1) of the Protective Order [17] and would certainly object to it. Yet we would not be able to and, if Dr. Rodberg decides in his discretion to answer it, he becomes the final arbiter, reaching an unreviewable and unconstitutional end.

b. Similarly, other questions about "third parties with whom . . . the Senator dealt" may well relate to whose advice the Senator sought and received on whether to hold the hearing, who helped in drafting the introductory remarks, and who helped prepare the material for inclusion into the record—all of which, in our view, would be barred by the same provision and possibly Paragraph (2) as well.[18] Here, too, some mechanism is necessary to enable Senator Gravel himself to assert his rights without being forced to depend on the judgments of the witness.

c. The Justice Department may also wish to rely broadly on the Court's statement that Dr. Rodberg may be questioned about "his own actions previous to his joining the Senator's personal staff." Yet those questions may relate directly to Senator Gravel's official activities and blatantly violate the Speech and Debate Clause (and the Protective Order), but there is no means by which Senator Gravel can prevent the witness from answer-

Footnotes at end of article.

ing and turning a Constitutional violation into a *fait accompli*.

Examples such as these can be multiplied many times over. We ask this Court for a stay pending appeal because the order of the Court below has the effect of allowing the violation of Senator Gravel's Constitutional rights in a manner which cannot subsequently be remedied. The probability of irreparable Constitutional violations is so high that questioning of Dr. Rodberg cannot be permitted under the unrealistic hope that Senator Gravel's rights will not be infringed. The government is playing with loaded dice, and this Court cannot wait until it rolls the wrong number. We think that there are only three methods that will provide for scrupulous compliance with the Constitution: (a) a detailed specification can be made so that proposed questions may be considered in advance; (b) the grand jury proceedings can be made public so that Senator Gravel may be present; or (c) the subpoena can be quashed. Having rejected the first two, the Justice Department is in no position, under the facts of this case, to oppose the third. Respect for the Constitution is more important than respect for the convenience of the Justice Department. We therefore request this Court to stay the decision of the District Court requiring Dr. Rodberg to appear before the grand jury pending appeal.

CONCLUSION

For the reasons stated herein above, we respectfully request the Court to grant a stay of the decision of the Court below pending disposition of this appeal. The Constitutional issues raised are of utmost importance and must be presented to this Court in a posture in which Senator Gravel's legal position has not been mooted and his rights, if we are correct, irreparably violated.

Respectfully submitted,

ROBERT J. REINSTEIN,
HERBERT O. REID, Sr.,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

FOOTNOTES

[1] Of course, the District Court made other findings of fact on pages 1–5 of the Slip Opinion. We do not set them out because they are not material to this motion. We do wish to point out, however, a possible error in the District Court's recitation of events leading up to the June 29 meeting of the subcommittee. There may be an inference in the opinion that Senator Gravel read and inserted into the record from the set of Pentagon Papers sent under seal from the President to Congress. This is not true; Senator Gravel read from documents which he had independently obtained. Furthermore, these documents are not identical in every respect to the documents furnished under seal to Congress.

[2] Quoted in *New York Times* v. *Sullivan*, 376 U.S. 254, 274 (1964).

[3] *Id.*, at 275.

[4] *Elliot's Debates* 575 (Virginia Resolution of 1798).

[5] Wilson, Congressional Government 303 (1885), quoted in *Tenney* v. *Brandhove*, 341 U.S. 367, 377 fn. 6 (1951).

[6] *Ibid.*

[7] The term "legislative act," used by the District Court in its decision (Slip Opinion p. 12), does not appear in any Supreme Court opinions. The Court in *Kilbourn* spoke of "things generally done in a session of the House by one of its members in relation to the business before it," 103 U.S. at 204. In *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951), the Court referred to "the sphere of legitimate legislative activity," and included investigations whose functions were either to propose legislation or inform the public, *id.*, at 377 and fn. 6. In *Johnson*, the Court used the phrase "related to the due functioning of the legislative process," 383 U.S. at 172, and also quoted the *Kilbourn* language, *id.*, at 179. And in *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Court quoted the above phrases from *Kilbourn*, *Tenney* and *Johnson*.

If, by using the new phrase "legislative acts," the District Court intended simply a shorthand for the above standards, our disagreement is only to its application. On the other hand, if the Court below intended to use the phrase as including only those acts in which a Member of Congress proposes, debates upon and votes on legislation, we think that this is inconsistent with and much narrower than the Supreme Court standard. Certainly, for example, in *Dombrowski* v. *Eastland*, 387 U.S. 82, 82 (1967), the actions of Senator Eastland were not even remotely connected with pending or proposed legislation. And neither are many speeches given on the floor of Congress. Yet surely the Court of Appeals was correct in *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930), *cert. denied* 282 U.S. 874, that no showing was necessary that words spoken between Congressmen must be pertinent to any pending or future legislation.

[8] While a Member of the House of Representatives, Madison said: "If we advert to the nature of Republican Government, we shall find the censorial power is in the people over the Government, and not in the Government over the people." 4 *Annals of Congress* 934 (1794). If the people's representatives default on their duty to inform the electorate, the converse would be true.

[9] In its decision (Slip Opinion, p. 13), the Court below quoted certain language from *Hentoff*. These comments dealt solely with the liability of the Public Printer, and not the scope of the Speech and Debate Clause. Judge Gesell distinguished Committee Reports from the *Congressional Record* because Article I, Section 5 of the Constitution requires a journal of proceedings to be kept; thus the Court would not enjoin the Public Printer from including the report in the *Congressional Record*. 318 F. supp. at 1180. But, as noted in the text, the Court held that the privilege absolutely immunized the Members of Congress themselves from judicial inquiry for causing the Committee report to be republished anywhere. We therefore respectfully submit that the above-quoted language is inapposite to the issue of this case, which is whether a Senator may be held accountable for republishing an official Subcommittee record. *Hentoff* holds that he may not.

[10] A second counterclaim alleged republication of certain other letters by Mr. McGovern. This was held barred by the Statute of Limitations, and was not decided on the merits. 182 F. Supp. at 349.

[11] While the Court stated at one point that the reason for the rule of Congressional privilege was "complete and uninhibited discussion among legislators," it also recognized the informing function as another purpose. Any reading of the Court's opinion which picks out the former to the total exclusion of the latter makes the opinion incomprehensible. Why should the Clause protect intra legislative communication but not a Congressman's statement to his electorate? And if the reason for the privilege related only to intra legislative communications, why should there be even a qualified immunity for distribution of speeches to the public? How would a republication of a libelous speech to another Member of Congress fare? And finally, if *only* intralegislative communication is protected, why have the courts gone beyond the literal language of the Speech or Debate Clause? Each of these questions would have had to be answered by the Court in *McGovern* if it had meant to exclude public dissemination of speeches from the Clause altogether.

[12] In Howard, copies of the press release were sent to various newspapers and wire services and to members of the Massachusetts delegation in the Congress . . ." 360 U.S. at 594. The press release in *Barr* similarly was given wide circulation. In both cases, the Executive officials went far beyond merely sending reports to their immediate superiors.

[13] And when, after the drafting of the Constitution, a British court purported to draw such a distinction (see *Stockdale* v *Hansard*, 9 A. & E. 1, 112 Eng. Rep. 1112 (1839), the reaction in Parliament was so intense that the decision was almost immediately overruled by statute 3 & 4 Vict., c. 9 (1840).

[14] And even if this were somehow put on the outer perimeter" of a Congressman's duties, *Barr* v. *Matteo*, *supra*, teaches that it must be protected by an absolute privilege.

[15] While the witness appeared but refused to answer eight questions, the significance of the case is in the specification made by the Justice Department.

[16] cf. Slip Opinion, Page 8.

[17] Paragraph (1) provides:

"No witness . . . may be questioned about Senator Mike Gravel's conduct at the meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting." And how, conceivably, could Dr. Rodberg determine whether a question refers to conduct "intimately related" to the Senator's Subcommittee meeting?

[18] Paragraph (2) provides:

"Dr. Leonard S. Rodberg may not be questioned about his own actions as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

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[In the U.S. Court of Appeals for the First Circuit, No. —]

MOTION FOR STAY PENDING APPEAL

(Mike Gravel, U.S. Senator, appellant, versus United States, appellee)

On Appeal from the Final Order of the United States District Court for the District of Massachusetts, Hon. W. Arthur Garrity, Jr., Docket No. —.

HERBERT O. REID, Sr.
ROBERT J. REINSTEIN,
CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

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[In the U.S. Court of Appeals for the First Circuit, No. —]

MOTION FOR STAY PENDING APPEAL

(Mike Gravel, U.S. Senator, appellant, versus United States, appellee)

Appellant, United States Senator Mike Gravel, by his counsel respectfully requests that this Court stay, pending appeal, the execution and enforcement of the Order of the United States District Court for the District of Massachusetts, Hon. W. Arthur Garrity, Jr., denying Appellant's Motion to Quash a subpoena served upon Howard Webber which seeks to compel his appearance before a Federal grand jury sitting in Boston, Massachusetts to testify concerning the official conduct of Movant in the discharge of his duties as a United States Senator. A copy of said Motion to Quash is attached hereto as (Exhibit "A").

Appellant has appealed to this Court from denial of the aforesaid Motion on the grounds that such inquiry by the grand jury into official conduct of a United States Senator violates Appellant's constitutional privilege secured by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause I and the Separation of Powers Doctrine. Appellant submits the following reasons in support of the Motion for Stay Pending Appeal.

1) Appellant is a United States Senator from the State of Alaska and at all times

material to this proceeding was acting in his official capacity.

2) On June 29, 1971 Appellant, as Chairman, conducted a meeting of the Senate Subcommittee on Buildings and Grounds.

3) During the course of the aforesaid Subcommittee meeting a transcript was compiled. Part of the aforesaid Subcommittee transcript consists of material commonly referred to as the "Pentagon Papers".

4) Subsequent to the aforesaid Subcommittee meeting Appellant made the aforesaid official transcript available to the press and the aforesaid transcript was publicly published.

5) On August 24, 1971, a Federal grand jury subpoena was served upon Dr. Leonard S. Rodberg, seeking to compel his appearance before a Federal grand jury sitting in the District of Massachusetts, in Boston.

6) Dr. Rodberg moved to quash said subpoena, alleging, *inter alia*, that the subject matter of the inquiry to be made by the grand jury related to acts done by Senator Gravel, with the necessary assistance of his staff in reading and inserting into the record the so-called "Pentagon Papers," at the June 29, 1971 hearing of the Senate Subcommittee of Buildings and Grounds and in subsequently arranging to have the record of the subcommittee published.

7) On August 24, 1971, Appellant, Senator Gravel, filed a motion to intervene before the District Court. Appellant alleged in support of that motion that Dr. Rodberg is a personal staff assistant of appellant, who has aided Appellant in the discharge of his official duties, and that the grand jury seeks to inquire of Dr. Rodberg into the official conduct of Appellant and his assistants. Appellant contended that any such grand jury proceeding would violate Appellant's constitutional right to be immune from judicial inquiry into his official conduct and that intervention was necessary in order for Appellant to protect his own rights.

8) On September 1, 1971, the District Court granted Appellant's Motion to Intervene. That same date, Appellant moved to quash the grand jury subpoena and moved also for a specification of the purpose, scope and questions to be asked of Appellant's assistant by the grand jury. Appellant alleged, *inter alia*, that the grand jury intended to question Appellant's assistant, Dr. Rodberg, about the official acts of Appellant and his staff in preparing for disclosure and subsequently disclosing to Appellant's colleagues and constituents, at a Senate Subcommittee hearing, the contents of the Pentagon Papers, which were critical of the Executive's conduct in the field of foreign relations.

9) On October 4, 1971, the District Court issued a "Memorandum of Decision and Protective Order" (attached hereto and made a part hereof as Exhibit "B"). The Court found as a fact that Dr. Rodberg is, and has been since June 29, 1971, a personal staff assistant of Senator Gravel. (Slip. Op., page 3). The Court also concluded, on the basis of (a) the undisputed allegations of Senator Gravel and Dr. Rodberg, (b) the crimes under investigation by the grand jury and (c) the events leading up to Dr. Rodberg's subpoena, that "the Government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (Slip. Op., pages 5–6).

10) Despite these findings, the District Court denied Appellant's Motion to Quash and Motion for Specification.

11) The District Court held that the actions of Senator Gravel to inform fully his constituents about Executive conduct in foreign relations, by arranging for the publication and public distribution of the official record of the Subcommittee on Public Buildings and Grounds, were not protected by the Speech and Debate Clause and could be investigated by the grand jury and made the subject of criminal proceedings instituted by the Executive. (Slip Op., pages 12–13).

12) The District Court held that the only official actions of Senator Gravel immune from judicial inquiry by virtue of the Speech and Debate Clause related to the preparation for and conduct of the June 29, 1971, meeting of the Subcommittee on Public Buildings and Grounds by the Senator and his personal staff. The District Court entered the following protective order:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

13) Since October 4, 1971, Appellant has filed a Motion for Reconsideration and/or Stay Pending Appeal from the Memorandum Decision and Protective Order issued by the Court below. The Court below stayed the execution and enforcement of a second subpoena served upon Dr. Rodberg pending reconsideration. The Court below has not yet decided the Motion for Reconsideration and/or Stay Pending Appeal.

14) Subsequent to October 4, 1971, Appellant learned that the United States has subpoenaed Howard Webber to appear before the grand jury on October 28, 1971 for the purpose of inquiring into the actions of Appellant in attempting to publish and thereby disclose to the electorate the contents of the record of the aforesaid Subcommittee transcript. The legitimacy or illegitimacy of this grand jury inquiry is now under active reconsideration by the Court below in proceedings with respect to the subpoena served upon Dr. Rodberg and the stay entered in that case.

15) On August 24, 1971, Appellant, Senator Gravel, filed a Motion to Intervene before the District Court and a Motion to Quash or Stay the subpoena served upon Mr. Webber (attached hereto as Exhibit "C").

16) On October —, the Court below denied Appellant's Motion to Quash or Stay the subpoena served upon Mr. Webber. The Court below also denied Appellant's Motion for Stay Pending Appeal to this Court. A Notice of Appeal was filed on October —, 1971.

17) A stay of execution and enforcement of the District Court order is necessary to preserve the status quo and to protect fully the rights of Appellant and will not injure or harm any legitimate interests of Appellee. It is Appellant's contention that any testimony by Mr. Webber before the grand jury concerning Appellant's official conduct as a United States Senator will itself violate Appellant's rights under the Speech and Debate Clause. As to Appellant, the denial of the Motion to Quash is a final order, inasmuch as Appellant himself has not been directed to appear before the grand jury and cannot thereby obtain review by refusal to comply with the order of the District Court. Appellant's rights cannot be protected by waiting until protected questions are asked of the witness because: (a) Appellant is not entitled to attend the secret grand jury proceedings; (b) any questioning of the witness concerning the official actions of Appellant itself violates the terms of the Speech and Debate Clause, regardless of the answers given thereto by the witness and regardless of the outcome of the grand jury inquiry; (c) Appellant has no vehicle for controlling the witness or his answers; (d) Appellant has no method of seeking judicial review of the questions asked.

18) The constitutional issues asserted by Appellant involve important questions of separation of powers and the construction of the Speech and Debate Clause and are therefore of the highest magnitude. The precise issue presented on appeal here have not been heretofore decided by this Court or by the Supreme Court. For the reasons stated in the Memorandum in Support of Stay, attached hereto, Appellant submits that:

(a) the District Court erred in holding that the actions of a United States Senator in republishing and distributing to his constituents the official record of a Senate Subcommittee, of which he is Chairman, is not immune under the Speech and Debate Clause from grand jury inquiry and the institution of criminal proceedings by the Executive;

(b) the protective order by the District Court does not adequately protect Senator Gravel's constitutional privileges and rights; and

(c) upon the undisputed facts of this proceeding and the findings made by the District Court, the subpoena must be quashed as a matter of law.

19) Appellant has appealed to this Court from the final judgment of the District Court.

Wherefore, Appellant respectfully requests that this Court stay execution and enforcement of the subpoena served upon Mr. Webber pending consideration of the appeal which has been taken by Appellant.

Respectfully submitted,

HERBERT O. REID, Sr.,
CHARLES L. FISHMAN,
ROBERT J. REINSTEIN,
*Attorneys for Senator Gravel.*

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[In the U.S. District Court for the District of Massachusetts, Civil Division, Civil Action No. —]

MOTION TO INTERVENE

(Mike Gravel, U.S. Senator, versus John Doe, in re the matter of Howard Webber)

Comes now Movant, United States Senator Mike Gravel and moves this Honorable Court for leave to intervene in the above captioned cause and as reasons therefore states:

1) Howard Webber is the editor of M. I. T. Press.

2) As the editor of M. I. T. Press, Mr. Webber had contact and discussions with members of Movant's personal staff which contacts and discussions are now the subject of an inquiry by a Federal Grand Jury.

3) The aforesaid Federal Grand Jury has subpoenaed Mr. Webber to appear and give testimony with respect to the aforesaid contact and discussion on Wednesday or Thursday, October 27 or 28, 1971.

4) All of the aforesaid contacts and discussions between Mr. Webber and members of Movant's personal staff relate to the publication of the June 29, 1971 official transcript of the United States Senate Subcommittee on Buildings and Grounds.

5) All of the aforesaid contacts and discussions between Mr. Webber and Movant's personal servants are immune from judicial inquiry by virtue of Movant's constitutional privileges and duties.

6) The question presented herein raises serious and substantial constitutional issues which have not but should be decided by this Court.

7) No other party to the above captioned cause can adequately represent the interest of Movant.

8) The granting of this motion would best serve the interest of Justice.

9) Movant has no information upon which

to determine if Mr. Webber plans to appear before the Grand Jury and give testimony in violation of Movant's constitutional rights.

*Wherefore,* Movant respectfully requests that this Honorable Court grant the above captioned Motion to Intervene.

CHARLES LOUIS FISHMAN,
*Attorney for Movant.*
ROBERT REINSTEIN,
*Temple University School of Law.*
HOWARD O. REID, Sr.,
*Howard University School of Law.*

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[In the U.S. District Court for the District of Massachusetts, Docket No. —]

MOTION TO QUASH OR STAY GRAND JURY SUBPOENA

(United States of America versus John Doe, In re the matter of Howard Webber)

Comes now Movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing or staying a subpoena served upon Howard Webber which seeks to compel Mr. Webber's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Mr. Webber should be stayed because it violates Movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to Movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

1. The United States has subpoenaed Mr. Webber for the purpose of questioning him about the publication of the official Senate Subcommittee transcript involved in the case of *Mike Gravel, United States Senator* v. *United States* (Docket No. EBD 71–172).

2. This Court has under consideration Movant's Motion For Reconsideration in the case of *Mike Gravel, United States Senator* v. *United States* (Docket No. EBD 71–172).

3. If this Court decides that publication of the official record of a Senate Subcommittee is constitutionally protected the grand jury will be barred from questioning anyone, including Mr. Webber, about his conduct with respect thereto.

4. If this Court decides that publication of the official record of a Senate Subcommittee is not constitutionally protected Movant has asked for a stay of this Court's decision pending appeal. To permit Mr. Webber to testify with respect to the publication of the aforesaid transcript would moot the constitutional claim of Movant prior to the final resolution of the important and complex constitutional issues presented herein.

5. No substantial injury will result to the United States from the granting of this Motion.

*Wherefore,* Movant respectfully requests that this Honorable Court grant the above Motion to Quash or Stay the subpoena served upon Howard Webber pending final disposition of the case entitled *Mike Gravel,* U.S.S. v. *United States* EBD 71–172.

CHARLES LOUIS FISHMAN,
*Attorney for Movant.*
ROBERT REINSTEIN,
*Temple University School of Law.*
HOWARD O. REID, Sr.,
*Howard University School of Law.*

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[U.S. District Court, District of Massachusetts]

MEMORANDUM OF DECISION AND PROTECTIVE ORDER

(October 4, 1971)

United States of America v. John Doe, in the matter of a grand jury subpoena served upon Leonard S. Rodberg, E.B.D. No. 71–172–G.

Garrity, J. Dr. Leonard S. Rodberg, a physicist and resident fellow at the Institute for Policy Studies in Washington, D.C., and currently engaged as a staff member of United States Senator Mike Gravel of Alaska, petitioned the court on August 27, 1971 to quash a subpoena ordering him to appear before a federal grand jury ostensibly investigating crimes related to the release and dissemination of the much-publicized classified study by the Department of Defense entitled "History of U.S. Decision-Making Process on Viet Nam Policy," popularly called the "Pentagon Papers."

The crimes being investigated by the grand jury include the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371), as is indicated in the prosecuting attorneys' oaths of office on file with the Clerk.[1]

At the initial hearing on Dr. Rodberg's motion, the court stayed his appearance before the grand jury until after the parties had filed affidavits and briefs and presented further oral argument. Senator Gravel moved for leave to intervene and, after briefing, intervention was allowed and the court accepted motions by the Senator to quash the subpoena and for specification of the exact nature of the questions to be asked of Dr. Rodberg. Both motions of the Senator allege, and the court finds, that "as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called 'Pentagon Papers,' which were critical of the Executive's conduct in the field of foreign relations."

Dr. Rodberg's first contention in support of his motion to quash is separate from the argument advanced jointly by him and Senator Gravel. This contention is that the subpoena violates rights of his under the First Amendment. In a supporting affidavit, Dr. Rodberg states in part that:

"My roles have been multiple: research, writing, lecturing, supervising research projects, as well as providing advise, assistance, information, expertise to Senators and Congressmen for the performance of their official duties, as well as liaison to other persons whose expertise Congressmen require. Experience has shown that my success in fulfilling these multiple roles depends upon my ability to maintain access to a wide variety of confidential sources of information. My knowledge of and ability to communicate and advise on issues relating to government policy in the areas mentioned above would be seriously jeopardized if I should be forced to appear before a secret grand jury."

While recognizing the importance and usefulness of this type of work by men like Dr. Rodberg, and acknowledging the existence of First Amendment interests here, he is only incidentally a journalist and the court rejects this argument for the reasons stated in its memorandum of decision in E.B.D. No. 71–165, *Application of Falk,* filed contemporaneously herewith.

Dr. Rodberg's other contention, identical to that urged by Senator Gravel, is that the grand jury subpoena served upon him contravenes the Speech or Debate Clause, Article I, section 6, clause 1, of the Constitution of the United States.[2] It is based upon an unusual sequence of events occurring at the height of the court battle over newspaper publication of the controversial Papers. The Court of Appeals for the District of Columbia Circuit had ruled that no prior restraint should issue against publication but the Court of Appeals for the Second Circuit had reached the opposite result. Oral arguments had been heard by the Supreme Court on June 26, 1971. Pending decision by the Supreme Court, publication was temporarily barred. Meanwhile the President had sent a set of the documents to the Congress. On June 30, the Supreme Court affirmed the judgment of the District of Columbia Circuit and reversed that of the Second Circuit, thereby permitting publication. *New York Times Company* v. *United States, supra.*

Late in the evening of June 29, Senator Gravel, a member of the Committee on Public Works, called a meeting of its Subcommittee on Public Buildings and Grounds, of which he is chairman.[3] Earlier that same day, the Senator had added Dr. Rodberg to his personal staff. At the meeting he read extensively from the study and, at its conclusion, placed the entire study comprising 7,000 pages of complex material in 47 volumes on file with the subcommittee, thereby making it widely available to the press. About seven weeks later, on August 18, it was reported in the Washington Post that Senator Gravel had turned over the Pentagon Papers to a Boston publisher, Beacon Press, for compilation into a four-volume book to be released in late October under the title, "The Senator Gravel Edition of the Pentagon Papers: the Defense Department History of Decision Making on Vietnam"; and that Beacon Press came to agreement with the Senator after negotiations with his assistant Dr. Rodberg. In the August 24 edition of a weekly newspaper, Boston After Dark, an article, "Why MIT & Harvard Suppressed the Pentagon Papers", described in detail Dr. Rodberg's prior negotiations with publishers other than Beacon Press. On the evening of August 24, Dr. Rodberg was subpoenaed to appear and testify before the current grand jury.

In opposing the motions to quash and for specification, the Government has pointed out that the grand jury proceedings are secret and it has not been proved by the moving parties that Dr. Rodberg will be interrogated about the subjects described in the newspaper stories. However, given the secrecy and flexibility of all grand jury proceedings, no movant ever could demonstrate with certainty the specific facts about which he had been subpoenaed to testify. Viewing together the crimes which this grand jury is investigating and the chronology of acts

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[1] Various opinions in *New York Times Company* v. *United States,* 1971, 403 U.S. 713, 727–740, emphasized that a criminal prosecution might lie for acts related to the publication of classified materials. Whether such a prosecution would lie for acts subsequent to the placing of classified materials in the public record of a congressional subcommittee, the Supreme Court opinions did not intimate and we have not considered. Obviously there may be no prosecution for publication of declassified materials.

[2] Art. I, § 6, cl. 1 provides, "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*" (Emphasis added.) The last clause is known as the Speech or Debate Clause.

[3] Most of the facts stated in this paragraph appear only in Dr. Rodberg's unverified motion which incorporates as exhibits two newspaper stories thereto attached. They have been adopted as findings by the court for purposes of this decision because they were not disputed in any way by the Government and because underlying the parties' legal submissions.

and events leading up to Dr. Rodberg's subpoena, the court infers that the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury.

The Speech or Debate Clause, in the context of criminal proceedings, has been applied definitively in *United States* v. *Johnson*, 1966, 383 U.S. 169. Defendant Johnson was a Maryland congressman accused of violating the conflict of interest statute, 18 U.S.C. § 281, and conspiring with codefendants to defraud the United States in violation of 18 U.S.C. § 371. As part of the conspiracy, defendant allegedly delivered for pay a speech in Congress favorable to certain loan companies. Johnson and codefendants were convicted of both crimes. The Court of Appeals had upheld the conspiracy conviction of the coconspirators and the conviction of Johnson under the conflict of interest statute, but held that the conspiracy count was "unconstitutional as applied to . . . Johnson." 337 F.2d at 192. In effect, the Court of Appeals read the Speech or Debate Clause to create an immunity against prosecutions for unlawful acts or motives underlying otherwise privileged legislative conduct. On certiorari granted on the Government's petition, the Supreme Court affirmed the judgment of the Court of Appeals but did not agree as to the breadth of the application of the Speech or Debate Clause. Rejecting the interpretation that the privilege barred the conspiracy prosecution, the Supreme Court instead remanded for a new trial on that count, admonishing however that no evidence of, or inquiry into, the privileged speech would be permitted.

In its opinion in the *Johnson* case, the Supreme Court stated that the privilege must "be read broadly to effectuate its purposes," 383 U.S. at 180, and that "the privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary," at 181. The Court also ruled that the Clause does not reach "conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process," at 172, and that its "decision does not touch a prosecution which . . . does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them," at 185. Thus, the privilege is limited specifically to legislative acts and antecedent conduct so intimately related to them such as cannot be proved without resort to inquiry into legislative acts.

Another relevant fundamental principle is that the legislative privilege conferred by the Speech or Debate Clause belongs to Congressmen only and not to their assistants and aides. In the first place, the Constitution mentions only Senators and Representatives. Secondly, Thomas Jefferson's authoritative interpretation of the privilege, in Jefferson's Manual of Parliamentary Practice, Section III, reprinted in the Senate Manual, 1967, 382–383, states that "the framers of our Constitution . . . have only privileged Senators and Representatives themselves. . . ." Thirdly, no case or other authority indicates to the contrary. Cf. *Powell* v. *McCormack*, 1969, 395 U.S. 486, 504–506, holding that employees of the House of Representatives might be sued in a civil action which would be barred against Congressmen by the legislative privilege.

It follows that while the Speech or Debate Clause plainly sets limitations upon the grand jury's investigation, the motions to quash the subpoena served on Dr. Rodberg seek too broad a result. Without doubt he may be questioned as to the activities of third parties with whom he and the Senator dealt. He may also be questioned about, and is legally responsible for, his own actions previous to his joining the Senator's personal staff on June 29 and many of his actions thereafter. That the Senator's legislative privilege will serve to bar some questions, as hereinafter ruled, does not by any means excuse Dr. Rodberg from appearing and answering questions on subjects beyond the protection of the privilege.

Similarly, Senator Gravel's motion for specification which seeks an order requiring the Government to specify in detail the purpose, scope and exact nature of questions to be asked of Dr. Rodberg will not be granted in terms. In the court's opinion such an order is unnecessary in the circumstances of this case to afford full protection to the Senator's legislative privilege and would moreover impede the grand jury in the discharge of its investigative duties. As stated in *Blair* v. *United States*, 1919, 250 U.S. 273, 282, regarding the nature of the grand jury.

"It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

On the other hand, it is equally clear from the *Johnson* case that Senator Gravel's legislative acts may not consistently with the Speech or Debate Clause by the subject of questioning before the grand jury.[4] The question of what constitutes legislative acts has been treated in decisions in civil actions cited with approval in the *Johnson* case. The classic statement appears in *Kilbourn* v. *Thompson*, 103 U.S. 168, 204, as follows:

"It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it."

In view of the primary purpose of the privilege "to prevent intimidation by the Executive and accountability before a possibly hostile Judiciary," *United States* v. *Johnson*, *supra* at 181, the protection of the privilege afforded by the Speech or Debate Clause may be broader in criminal proceedings than in civil. Therefore the court sustains Senator Gravel's claim that whatever he did at the subcommittee meeting on June 29 and certain acts done in preparation therefor are privileged.

The Government has argued that the Senator's conduct at the subcommittee meeting is unprivileged because the purpose of the meeting, the reading of the Pentagon Papers, was unrelated to any investigation or undertaking authorized by the parent Committee on Public Works or by the Senate in its delegation of power to the parent committee. Senator Gravel has suggested that the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations. "To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Tenney* v. *Brandhove*, 1951, 341 U.S. 367, 378.

There are, of course, occasions when a court is obliged to scrutinize the powers of a congressional committee and the relationship of its activities to its legitimate legislative purpose. But such occasions have been limited to cases in which the power of Congress under the Constitution has been at issue, e.g., *Kilbourn* v. *Thompson*, *supra*, or where the constitutional rights of individuals have been jeopardized by congressional action, as in cases dealing with prosecutions under 2 U.S.C. § 192 for contempt of Congress, e.g., *Watkins* v. *United States*, 1957, 354 U.S. 178. As stated in the latter case, at 205:

"It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected."

It has not been suggested by the Government that the subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action. Also, the individual rights at stake in these proceedings are not those of a witness before a congressional committee or of a subject of a committee's investigation, but only those of a congressman and member of his personal staff who claim "intimidation by the executive." *United States* v. *Johnson*, *supra*, at 181. "The courts have no right to dictate . . . the procedures for Congress to follow in performing its functions. . . ." *United States* v. *Hintz*, N.D. Ill., 1961, 193 F.Supp. 325, 331. Judging the applicability of the legislative privilege in the exercise of the functions of a legislator's office should be done "without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules." *Coffin* v. *Coffin*, 1808, 4 Mass. 1, 27.

Senator Gravel's arranging for private publication of the Pentagon Papers by Beacon Press stands on a different footing and, in the court's opinion, is not embraced by the Speech or Debate Clause.[5] The test is not the public benefit or political value of such private publication[6] but whether it is a legislative act, i.e., "related to the due functioning of the legislative process," *United States* v. *Johnson*, *supra* at 172, or "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, *supra* at 204. Guidance is available mainly in decisions in civil actions dealing with congressmen's civil liability for libel. A distinction has been drawn in the cases between defamatory words

[4] On a later appeal from Johnson's conviction upon retrial, *United States* v. *Johnson*, 4 Cir., 1969, 419 F.2d 56, it was held that the grand jury's receipt of evidence about Johnson's speech, while "constitutionally impermissible," did not invalidate the indictment, citing *Costello* v. *United States*, 1956, 350 U.S. 359.

[5] The Senator has made no specific claim that his legislative privilege extends to his actions subsequent to the subcommittee hearing. However, this claim has been advanced by Dr. Rodberg and contested by the Government and hence the court had considered it.

[6] The importance of the "informing function of Congress" is described in powerful terms in a quotation from Wilson, Congressional Government (1885), 303, set forth in fn. 6 of the opinion of the Court in *Tenney* v. *Brandhove*, supra at 377.

inserted in the Congressional Record, held to be privileged, and defamation resulting from a congressman's circulation of reprints or copies of the Congressional Record to his constituents. As to the latter, *McGovern* v. *Martz*, D.D.C., 1960, 182 F. Supp. 343, held that the absolute privilege of the Speech or Debate Clause does not apply to republication, stating at 347, "The reason for the rule—complete and uninhibited discussion among *legislators*—is not here served." See *Restatement of Torts*, 1938 ed., § 590, comment b. In *Hentoff* v. *Ichord*, D.D.C., 1970, 318 F. Supp. 1175, an issue was whether the court had power to enjoin distribution of a House committee report by the Public Printer and Superintendent of Documents. In holding that it did, the court said at 1180:

"Nothing in the Constitution or the cases suggests, however, that a committee report is a necessary adjunct to speech or debate in Congress. . . . and its further printing and public distribution is not necessary to give effect to the freedom of congressmen to speak and debate on or off the floor. The Speech or Debate Clause does not necessarily bar an action to enjoin the Public Printer from printing a committee report for public distribution."

While recognizing a special vitality attaching to the Speech or Debate Clause in criminal proceedings, *United States* v. *Johnson*, *supra* at 180–182, the court nevertheless concludes that the reasoning of these civil cases is valid and in the instant case controlling.

Having delineated the area of Senator Gravel's conduct which may not be investigated by the grand jury, the court turns to the question whether some of Dr. Rodberg's activities are also protected from investigation, not because of any privilege of his own but by reason of his having acted as the Senator's agent and assistant in the Senator's performing various legislative acts.[7] The Senator and witness submit, and the court agrees, that the legislative privilege enjoyed by a senator must extend to some activities of a member of his personal staff acting at his direction. To rule otherwise would dilute and jeopardize the privilege itself. For example, speeches delivered on the floor of Congress are often drafted by a skilled staff assistant and not by the congressman himself; to make such an assistant accountable for the content of a speech drafted by him would serve to defeat the privilege. A legislator's dependence upon confidential assistants is analogous to a lawyer's, whose client's privilege against disclosure of confidential communications has been held applicable to the lawyer's assistants. *United States* v. *Kovel*, 2. Cir., 1961, 296 F. 2d 918. The opinion in that case stated at 921, "The complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others. . . ." This holding has been adopted by the Proposed Rules of Evidence for the United States Courts, Preliminary Draft, 1969, Rule 5–03(b). Although the attorney-client privilege is of ancient origin, 8 Wigmore, Evidence (McNaughton Rev. 1961), § 2290, p. 542, and is grounded on strong social policy, it is not a constitutional privilege and surely does not warrant broader protection than the legislative privilege based upon the Speech or Debate Clause. In this respect the legislative privilege is akin to the executive privilege about which the Supreme Court in *Barr* v. *Matteo*, 1959, 360 U.S. 564, commented at 573:

"The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy."

*Powell* v. *McCormack*, 1969, 395 U.S. 486, and similar cases permitting actions against subordinate employees of legislative bodies are distinguishable. Employees held accountable in such cases were administrative personnel whose non-discretionary duties to the legislative body as a whole in no substantial way related to the specific furthreance of the legislative tasks of individual members. Such institutional employees clearly have less impact upon legislation than personal staff members entrusted by the legislator himself with sensitive and confidential duties. Therefore the court holds that the Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally.

Lastly, the relief to which Senator Gravel is entitled under the particular circumstances here presented must be determined in the light of two of the principles derived from the decision discussed in this memorandum: a congressmen may not be prosecuted for legislative acts but may be prosecuted for non-legislative acts; and in any such prosecution no evidence from any source of considered against him. A further consideration is the self-evident proposition that no prosecuting attorney, grand jury foreman or other official has lawful authority to prohibit or foreclose a federal grand jury from investigating any offenses against the United States. Therefore, if Senator Gravel's rights under the Speech or Debate Clause are to be fully protected, a protective order will be required limiting the subject matter of the current grand jury's investigation and not merely the questions which may be put to Dr. Rodberg, the witness under subpoena.

For the foregoing reasons it is ordered that the motion to quash and for specification be denied, but that the following protective order be entered:

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

W. ARTHUR GARRITY, Jr.,
*U.S. District Judge.*

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[U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT
NO. 71–1331 AND NO. 71–1332]

UNITED STATES OF AMERICA v. JOHN DOE, MIKE GRAVEL, U.S. SENATE, INTERVENOR, APPELLANT, SAME v. SAME, SAME

MEMORANDUM AND ORDER

(Entered October 29, 1971)

Hearing have been held on Intervenor's motion for stay pending appeal from the district court's denial of his motion for further relief and, it appearing that: (1) the integrity of the processes of a grand jury must not be lightly regarded; (2) the grand jury here convened is not restricted to investigation of the specific crimes described below; (3) the allegations of possible infringements of the rights of the Intervenor under Article I, Section 6, Clause 1, of the Constitution of the United States as well as allegations of violation of the doctrines of separation of powers, raise important issues of substance, the harm of any such alleged infringements being irreparable; (4) an expedited schedule for hearing appeals on related issues has been adopted, such hearing to be held on November 4, 1971, and it being contemplated that speedy disposition of these issues including those raised by the instant motion, may be forthcoming.

It Is Hereby Ordered that until further order of this court, the grand jury shall not pursue its inquiry into the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), or conspiracy to commit such offenses or to defraud the United States (18 U.S.C. § 371) insofar as these or any other crimes may relate to the so-called "Pentagon Papers", in whatever form. However, it shall be empowered to continue its investigation into any other crimes.

It is further ordered that the parties be excused from reproducing the records on appeals in appendix form, that appellants' brief is to be filed on or before five p.m., Monday, November 1, 1971, and that appellee's brief is to be filed on or before five p.m., Wednesday, November 3, 1971. It is further ordered that the parties are granted leave to file four copies of their briefs in reproduced form to comply with Rule 5(d) and that service of said briefs is to be made in hand.

By the Court:

/s/ DANA H. GALLUP, *Clerk.*

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[U.S. Court of Appeals for the First Circuit, No. 71–1331, and No. 71–1332]

UNITED STATES OF AMERICA v. JOHN DOE, MIKE GRAVEL, U.S. SENATOR, INTERVENOR, APPELLANT, SAME v. SAME, SAME

MOTION FOR POSTPONEMENT OF ORAL ARGUMENT

Comes now Intervenor—Appellant, Mike Gravel, United States Senator, and moves this Honorable Court for a postponement of oral argument until such time as this Court may direct and as reasons therefore states:

(1) Appellees on Friday, October 29, 1971, filed a notice of cross appeal in this case.

(2) Appellees did not notify counsel for Senator Gravel of this action until Monday November 1, 1971 and then the notification was by ordinary mail notwithstanding the expedited schedule adopted by this court and obvious need for oral communication on Friday, Saturday or Sunday.

(3) Intervenor-Appellant has not yet been notified by Appellee of the issues he intends to raise in the cross appeal. Therefore it is impossible for counsel to discuss the issues in his brief.

(4) Intervenor—Appellant is under order from this Court to file its brief on appeal with the Clerk of the Court by 5 p.m. Monday, November 1, 1971. Therefore it will be impossible for Counsel for Senator Gravel to brief the issues involved in the cross appeal even if they were known to counsel.

(5) Intervenor—Appellant is entitled to an opportunity to adequately brief and present his position on the issues whatever they may be, which are raised in the cross appeal.

(6) Whatever inconvenience may result to appellee from the granting of this motion is caused by Appellee's failure to properly and timely notify counsel for Senator Gravel of their cross appeal and the issues presented therein. Counsel for Senator Gravel was available all day Friday, October 29, 1971 in Boston until 8 pm at a location known to counsel for appellee and was not so notified. Counsel was available but not notified all day Saturday and Sunday in Washington at the Senate Office Building where he has been reached by counsel for appellees on various other occasions.

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[7] Despite *Kilbourn* v. *Thompson*, *supra*, and *Tenney* v. *Brandhove*, *supra*, the related doctrine of legislative immunity is applicable, though not absolutely, to officers and employees of legislative bodies. *Dombrowski* v. *Eastland*, 1967, 387 82, 85. In this sense, therefore, such employees have rights flowing from the Speech or Debate Clause.

Wherefore, Intervenor-Appellant respectfully moves this Honorable Court for an order postponing the oral argument scheduled for November 4, 1971, until counsel for Senator Gravel has had a reasonable opportunity to brief the issues presented on appellees cross motion.

CHARLES L. FISHMAN,
*Attorney for Senator Gravel.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Motion for Postponement of Oral Argument was hand delivered to the United States Attorney for Massachusetts, U.S. Post Office Building, Post Office Square, Boston, Massachusetts, this first day of November, 1971.

CHARLES L. FISHMAN,
*Attorney for Senator Gravel.*

[U.S. Court of Appeals, No. 71-1331, No. 71-1332, and No. 71-1335]

United States of America, v. John Doe, Mike Gravel, U.S. Senator, Intervenor, Appellant, Same, v. Same, v. Same

Order of Court, Entered November 1, 1971

It is ordered that the order of this court of October 29, 1971, be amended by striking the third paragraph thereof and substituting the following in place thereof:

"It is further ordered that the parties be excused from reproducing the records on appeals in appendix form, that appellants' brief is to be filed on or before 5:00 P.M. on Thursday, November 4, 1971, that appellees' brief is to be filed on or before 5:00 P.M. on Monday, November 8, 1971, and that these cases be heard at 11:00 A.M. on Wednesday, November 10, 1971. It is further ordered that the parties are granted leave to file four (4) copies of their briefs in reproduced form to comply with Rule 5(d) and that service of said briefs is to be made in hand."

It is further ordered that this new paragraph is to be applicable to the case No. 71-1335.

By the Court:

DANA H. GALLUP, *Clerk.*

[U.S. Court of Appeals for the First Circuit, No. 71-1331, No. 71-1332, and No. 71-1335]

UNITED STATES OF AMERICA v. JOHN DOE, MIKE GRAVEL, U.S. SENATOR, INTERVENOR, APPELLANT, v. SAME, v. SAME

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

The United States of America has consolidated its brief as Appellant and Appellee for the convenience of the court in order to avoid the making of lengthy arguments in separate briefs which would be in most respects identical.

In the event that Appellant Intervenor raises issues not anticipated by the government, we will file a short supplemental appellee's brief.

I: ISSUES PRESENTED FOR REVIEW

Cross-Appeal by the United States: 1. Does the Speech or Debate clause bar the questioning of persons about legislative activities or conduct related thereto.

On Appeal by the Intervenor: 2. Same as No. 1 above. 3. Has the Intervenor presented an appealable issue for review.

II: STATEMENT OF THE CASE

This is an appeal from an Order entered by the District Court on October 4, 1971, reaffirmed on October 28, 1971, which denied the motions of the Appellant-Intervenor and witness Leonard Rodberg to quash a grand jury subpoena served on Rodberg and granted certain relief to the Intervenor through a protective Order. This Order brought to culmination a series of proceeding precipitated by service of the subpoena on Rodberg which commanded his appearance before the grand jury in Boston on August 27, 1971.

Rodberg moved to quash subpoena on August 27. Thereafter, Appellant-Intervenor moved to intervene alleging that Rodberg was his personal servant; that the grand jury sought to elicit testimony from Rodberg concerning his actions directed and controlled by the Intervenor, and upon his orders, which was immune from judicial inquiry by virtue of the Intervenor's constitutional privileges and duties; and that no other party could adequately represent the interest of the Intervenor. He was permitted to intervene, and he thereupon moved (1) to quash the Rodberg subpoena and (2) for an Order requiring the Government to specify in detail the purpose, scope and exact nature of the questions to be asked Rodberg by the grand jury.

The facts are not essentially in dispute. They are recited favorably to the Intervenor in the District Court's memorandum of decision entered October 4 as follows:

"Dr. Leonard S. Rodberg, a physicist and resident fellow at the Institute for Policy Studies in Washington, D.C., and currently engaged as a staff member of United States Senator Mike Gravel of Alaska, petitioned the court on August 27, 1971, to quash a subpoena ordering him to appear before a federal grand jury ostensibly investigating crimes relating to the release and dissemination of the much-publicized classified study by the Department of Defense entitled 'History of U.S. Decision-Making Process on Viet Nam Policy', popularly called the 'Pentagon Papers.'

"The crimes being investigated by the grand jury include the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371), as is indicated in the prosecuting attorneys' oaths of office on file with the Clerk. [Footnote omitted]

* * * * *

"Both motions of the Senator allege, and the court finds, that 'as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called 'Pentagon Papers,' which were critical of the Executive's conduct in the field of foreign relations.'

"Late in the evening of June 29, Senator Gravel, a member of the Committee on Public Works, called a meeting of its Subcommittee on Public Buildings and Grounds, of which he is chairman. Earlier that same day, the Senator had added Dr. Rodberg to his personal staff. At the meeting he read extensively from the study and, at its conclusion, placed the entire study comprising 7,000 pages of complex material in 47 volumes on file with the subcommittee, thereby making it widely available to the press. About seven weeks later, on August 18, it was reported in the Washington Post that Senator Gravel had turned over the Pentagon Papers to a Boston publisher, Beacon Press, for compilation into a four-volume book to be released in late October under the title, 'The Senator Gravel Edition of the Pentagon Papers: the Defense Department History of Decision Making on Vietnam;' and that Beacon Press came to agreement with the Senator after negotiations with his assistant Dr. Rodberg. In the August 24 edition of a weekly newspaper, Boston After Dark, an article, 'Why MIT & Harvard Suppressed the Pentagon Papers,' described in detail Dr. Rodberg's prior negotiations with publishers other than Beacon press. On the evening of August 24, Dr. Rodberg was subpoenaed to appear and testify before the current grand jury."

Rodberg contended that the mere fact of his appearance before the grand jury would have a chilling effect on his First Amendment freedoms of press and association. Both Rodberg and the Intervenor protested that the Speech or Debate Clause[1] insulated them from grand jury questioning regarding (1) the meeting of the Senate Subcommittee on Public Buildings and Grounds on June 29, 1971, during which the Senator read from the Defense Department study on U.S.-Vietnam relations popularly known as the Pentagon Papers, and (2) subsequent efforts by Senator Gravel, through Rodberg, to publish the Pentagon Papers.

The Motions to Quash and for specification were denied in the District Court's decision of October 4 in which the Court made the following conclusions of law, among others:

(1) Intervenor's legislative acts may not consistently with the Speech or Debate clause be the subject of questioning before the grand jury [Memorandum of Decision, p. 9];

(2) The privilege is limited specifically to legislative acts and antecedent conduct so intimately related to them such as cannot be proved without resort to inquiry into legislative acts. [ibid, p. 7];

(3) Whatever Intervenor did at the subcommittee meeting on June 29 and certain acts done in preparation therefor are privileged [ibid., p. 10];

(4) Intervenor's arranging for private publication of the Pentagon Papers by Beacon Press is not embraced by the Speech or Debate clause [ibid., p. 12];

(5) The legislative privilege enjoyed by a Senator must extend to some activities of a member of his staff acting at his direction [Ibid., p. 14];

(6) Therefore, the Speech or Debate clause prohibits inquiry into things done by Dr. Rodberg as the Intervenor's agent or Assistant which would have been legislative acts, and therefore privileged, if performed by the intervenor personally [Ibid., p. 15];

(7) If Intervenor's rights under the Speech or Debate clause are to be fully protected, a protective Order will be required limiting the subject matter of the current grand jury's investigation and not merely to the questions which may be put to Dr. Rodberg, the witness under subpoena [Ibid., p. 16].

The protective order was framed as follows:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and

[1] Art. I, § 6, cl. 1 provides, "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." The last clause is known as the Speech or Debate Clause.

Grounds or in preparation for and intimately related to said meeting."

The Intervenor filed a motion for reconsideration and for a stay pending decision emphasizing the proposition that his activities concerning republication of the Pentagon Papers fell within the protection of the Speech or Debate clause. Rodberg filed a motion for rehearing or certification to the Court of Appeals, pursuant to 28 U.S.C. 1292(b) as an interlocutory appeal, and for a stay. Rodberg's subpoena was ordered stayed pending the District Court's decision following reconsideration of the October 4 ruling.

In the interim a subpoena was served on Howard Webber, editor of M.I.T. Press, and his appearance before the grand jury was scheduled for October 29, 1971. Intervenor, on October 27, 1971, moved for leave to intervene with regard to the Webber subpoena (which was granted) and for an Order quashing or staying that subpoena. Additionally, the Intervenor moved for the following:

(1) An order requiring the government to provide a listing of all those who had been subpoenaed or are to appear before the grand jury to give testimony;

(2) Hearings to determine which of the witnesses had privileged information which, constitutionally, could not be inquired into, or should not be inquired into pending final determination on reconsideration;

(3) An Order requiring the government to specify all questions to be asked each witness, and a ruling on the constitutional permissibility of each such question.

Finally, the Intervenor moved for an Order staying enforcement and execution of all subpoenas then outstanding or to be issued compelling appearance of witnesses before the Boston grand jury pending disposition of the motion for further relief outlined above in Paragraphs 1, 2 and 3.

All of the foregoing described motions were denied by a Memorandum and Order Denying Further Relief, entered in E.B.D. No. 71-172-G, October 29, 1971. By a supplemental Protective Order entered that same date in E.B.D. Nos. 71-172-G and 71-209-G the Court ordered the Rodberg and Webber subpoenas stayed for 10 days and barred questioning by the grand jury touching upon the Intervenor's conduct in arranging for private publication of the Pentagon Papers and upon Rodberg's conduct in arranging for such publication to the extent that what he did was in his capacity as a member of the Intervenor's personal staff.

The motions for reconsideration were denied and the District Court's decision of October 4 reaffirmed. Rodberg's request for certification was denied.

The Intervenor appeals from the orders denying the motions to quash the Webber subpoena and for reconsideration of the order denying the motions to quash the Rodberg subpoena and for specification of the purpose and scope of the questions to be asked Rodberg.

The Government appeals from the District Court's October 4, 1971 decision (reaffirmed October 28, 1971) (1) that Senator Gravel's legislative acts may not consistently with the Speech or Debate Clause be the subject of questioning before the grand jury; (2) that the Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally; and (3) the protective order designed to implement the court's ruling.

On October 29, 1971, Intervenor filed his notices of appeal and the government filed notice of its appeal from the above-mentioned initial protective order. On the same date the Court of Appeals granted Intervenor's motion for a stay pending appeal and halted the grand jury's inquiry until further order of this court.

III: ARGUMENT

[On Intervenor's Appeal]

A. THE DISTRICT COURT PROPERTY DENIED INTERVENOR'S MOTIONS TO QUASH SUBPENAS AND SUPERVISE THE GRAND JURY

1. The "Speech or Debate" Clause Does Not Require or Permit the Granting of the Relief Demanded by Intervenor.

Article 1, Section 6, Cl. 1 of the United States Constitution creates a legislative privilege for "Senators and Representatives" by providing that "for any Speech or Debate in either House, they shall not be questioned in any other Place."

It is the meaning of this clause and the nature and extent of the privilege it creates which will be determinative of the issues raised on this appeal and cross-appeal.

(a) The "Speech or Debate" Clause Does Not Prohibit Questioning Regarding Legislative Activities.

The provision that "they shall not be questioned in any other place" does not mean that legislators may not be asked questions about their speeches or debates outside of Congress. If the clause carried this meaning, fellow legislators, constituents, news gatherers and others could not ask legislators outside of Congress about the meaning of a speech, the basis for factual assertions contained therein, the sources of information employed, or the speaker's motivation, all of which are common matters of inquiry by the groups mentioned above.

The Intervenor has argued, and the District Court apparently concluded, that such questioning of anyone about a legislator's speech or debate activities is violative of the legislative privilege, if the questioning occurs in a *judicial proceeding*. This also is incorrect. The error is due in part to attributing modern day meaning to the words "questioned in any other place" despite the fact that the words are of ancient origin and meaning. The error also stems from failure to note that the clause forbids the questioning of legislators "*for*" speeches or debates, not *about* them, and applies only to legislators, not to other persons.

The proposition that the legislative privilege does not preclude the questioning of legislators or others as witnesses in judicial proceedings, about legislative activity can be demonstrated by two brief illustrations:

Case No. 1:

A legislator enters the House chamber and makes the following speech: "Fellow members, I am appalled by what has occurred here today. This morning on my way to this chamber I came across our colleague John Smith lying on the floor of the corridor with a severe wound in his head. He had been rendered unconscious and robbed. I did not see the crime occur, and do not know who committed it, but I urge the proper authorities to make every effort to apprehend the culprit."

Weeks later, the legislator is called to Court as a prosecution witness in the case against two defendants for assaulting and robbing John Smith. The legislator testifies on direct examination that on the day in question, while walking down the pertinent corridor, he saw two men depart hurriedly from the area where John Smith lay, and he identifies the defendants as the men.

On cross-examination, defendants' counsel would not be precluded from exploring the arguably inconsistent prior statement made by the legislator in his speech. The legislative privilege would not prevent such interrogation because the inquiry is *about* his prior speech and not "for" it, and because he is not being "questioned" for the speech as that term is used in the Speech or Debate Clause, as will be shown hereafter.

Case No. 2:

A legislator makes the following speech on the chamber floor: "Fellow members, I have received detailed information showing that a respected business executive is in fact the head of a criminal syndicate in my District. His name is Paul Brown. Tomorrow in this chamber I will disclose the details."

That evening, the legislator is gravely wounded in an assassination attempt. A grand jury inquires into the the crime and finds circumstantial evidence that Paul Brown directed the attempted murder. The grand jury would not be precluded by the legislative privilege from gathering evidence of Brown's motive by receiving testimony as to the giving of the speech and its content either from the legislator himself, or from others who heard it. Again, this is so because the legislator would not be "questioned" "for" the speech within the meaning of the Speech or Debate Clause, but would merely be asked about it.

The historical antecedents of the Constitution are instructive on what it means to be "questioned" "for" a speech or debate. The Supreme Court in *Tenney* v. *Brandhove*, 341 U.S. 367, 373 (1951), stated that "[t]hat [Speech or Debate] provision in the United States Constitution was a reflection of political principles already firmly established in the States." Comparison of the following is enlightening:

The English Bill of Rights of 1689 provided:

"That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." (1W. & M., Sess. 2, C. 2.)

Our Articles of Confederation, 1777, Article V provided:

"Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress. . . ."

The Maryland Declaration of Rights, Nov. 3, 1776, provided:

"That freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other Court or judicature."

The Massachusetts Constitution of 1780, Article XXI, provided:

"The freedom of deliberation, speech, and debate in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other Court or place whatsoever."

The New Hampshire Constitution of 1784, Part 1, Article XXX, provides:

"The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other Court or place whatsoever."

The foregoing provisions make it plain that the word "questioned" as used in the Constitution's Speech or Debate Clause, is synonymous with "impeached," called to account, and called to answer charges in a court of law. In this clause the word simply does *not* have its present day meaning of being "asked about" something.

The Oxford English Dictionary, Vol. VIII (1933), gives the following illuminating information on the historical meaning of the word "Question":

"2.c. In question: Under judicial examination; on trial.

d. To call in (or into) question: To examine judicially, bring to trial; to take to task, call to account.

1611 Bible Acts xix.40

We are in danger to be called in question for this day's uproar.

A1641 Bp. Montague Acts & Mon. (1642) 59

Socrates . . . was called into question, and had sentence of death pronounced against him.

1647 J. Carter Nail & Wheel 78

Presently he was . . . called in question as a delinquent." (p. 47)

"1.b. To examine Judicially; hence, to call to account, challenge, accuse (of).

1637 Heylin Answ. Burton 60

When you were questioned publickely for your misdemeanors.

a1641 Bp. Montague Acts & Mon. (1642) 240

Socrates was questioned and condemned at Athens.

1656 Bramhall Replic. ii 96

He had rather his own Church should be questioned of Idolatry.

1789 Constitution U.S. Art 1, § 6

For any speech or debate in either house [members of Congress] shall not be questioned in any other place.

1839 Macaulay Ess. (1843) II. 458

[He] cannot be questioned before any tribunal for his baseness and ingratitude." (p. 48)

The special meaning of the term "questioned" is illustrated by the case of *Ex Parte Wason*, L.R. 4 Q.B. 573 (1869), in which the Court held that statements made in the House of Lords "could not be made the foundation of civil or criminal proceedings. . . ." (p. 576) Mr. Justice Lush stated that "the motives or intentions of members of either House cannot be *inquired into by criminal proceedings* with respect to anything they may do or say in the House." (emphasis added) (p. 577). This clearly indicates the nature of the questioning prohibited by the legislative privilege. In short, the questions prohibited by the legislative privilege are not those asked by inquirers, but are those raised by the institution of judicial action against the legislator.

(b) The "Speech or Debate" Clause Bars Civil and Criminal Prosecution of Legislators for their Legislative Activities.

In *Coffin* v. *Coffin*, 4 Mass. 1 (1808), Chief Justice Parsons said:

"These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office *without fear of prosecutions, civil or criminal.* I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. *And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative,* in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules." (emphasis added.)

In the English case of *Stockdale v. Hansard*, 9 Adolphus & Ellis 1 (1839), it was said that by virtue of the legislative privilege:

"whatever is done within the walls of either assembly must pass without *question in any other place.* For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys *complete impunity.* For every paper signed by the speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, *the speaker cannot be arraigned in a court of justice.*" (emphasis added)

Both the cases, and text writers describe the legislative privilege as an exemption from civil and criminal prosecution. See, for example, Cushing LEGISLATIVE ASSEMBLIES, § 601 (2d Ed. 1866), which states that:

"[I]n short, * * * the privilege in question secures the members of a legislative assembly against all *prosecutions,* whether civil or criminal, on account of any thing said or done by them, during the session, resulting from the nature and in the exercise of their office." (emphasis added)

Every case found by the government in which a court has held the legislative privilege applicable, has involved a legislator who has had a civil or criminal prosecution brought against him for his legislative activities. For example, several civil cases have found the privilege applicable. In *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880), the court held that representatives could not be sued for false imprisonment based upon what they had done in the course of their legislative activities.

*Tenney* v. *Brandhove*, 341 U.S. 367 (1951), held that a suit against a California legislator for alleged violation of federal civil rights legislation by virtue of his legislative activities must be dismissed as violative of the legislative privilege. In both the *Tenney* and *Kilbourn* cases, the Supreme Court refers to the *Coffin* opinion, *supra*, as authoritative. In *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930); *cert. den.* 282 U.S. 874 (1930), the court affirmed a dismissal of a complaint for slander in a speech on the floor of the Senate. The court held that:

"The words forming the basis of plaintiff's action were uttered in the course of a speech in the chamber of the Senate of the United States, and were absolutely privileged and not subject to 'be questioned in any other place.'"

More importantly, the legislative privilege insures against criminal prosecutions. As the Court of Appeals said in *United States* v. *Johnson*, 337 F. 2d 180, 190 (4th Cir. 1964),

"The constitutional protection against *being called upon to answer* in 'any other place' for a speech delivered in the House is equally impaired whether the court proceedings are criminal or civil. Indeed, fear of criminal prosecution may be the graver inhibition." (emphasis added)

The Supreme Court in *United States* v. *Johnson*, 383 U.S. 169 (1966), approved the Court of Appeals conclusion as follows:

"The legislative privilege, protecting against possible *prosecution* by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." (emphasis added) (p. 179)

* * * * *

". . . it is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in Kilbourn and Tenney, but rather to prevent *intimidation* by the executive and *accountability* before a possibly hostile judiciary." (emphasis added) (pp. 180–181)

* * * * *

"There is little doubt that the instigation of *criminal charges* against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominant thrust of the Speech or Debate Clause. In scrutinizing this criminal prosecution, then, we look particularly to the prophylactic purposes of the clause." (emphasis added) (p. 182).

The indictment involved in the *Johnson* cases contained a conspiracy count which alleged that as part of the conspiracy, Representative Johnson was paid to make a speech in Congress and to persuade officials of the Department of Justice to postpone and dismiss a criminal action pending against a co-conspirator.

The Court of Appeals construed the case as raising the issue, not of whether questions could be asked about the speech, but of whether such a prosecution could be brought. The court said:

"This is the first case, within our knowledge, squarely raising the question whether the congressional privilege deprives a court of *jurisdiction to try* a member on a criminal charge of accepting money to make a speech in the House of which he is a member." (emphasis added) (337 F. 2d 186).

The Appellate Court concluded that it was not questions asked about the speech, but the indictment itself which was prohibited by the legislative privilege. The court declared:

"Inevitably, *the indictment* required an inquiry into Johnson's reason for delivering the speech, the very inquiry which the Supreme Court has explicitly declared to be beyond a court's power." (337 F. 2d 189) (emphasis added).

The Supreme Court in *United States* v. *Johnson*, 383 U.S. 169 (1966), reached the same conclusion. In extensive passages, the court indicated that it was the criminal charge, not the asking of questions, which was barred by Art. I, § 6, of the Federal Constitution:

"It is the *application* of this broad conspiracy *statute* to an improperly motivated speech that raises the constitutional problem with which we deal." (emphasis added) (p. 172).

* * * * *

"The constitutional infirmity infecting this prosecution is *not* merely a matter of the introduction of *inadmissible evidence.* The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence. The conspiracy *theory* depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or deliveries an ordinary speech." (emphasis added) (pp. 176–177).

* * * * *

"We see no escape from the conclusion that such an intensive judicial inquiry, made *in the course of a prosecution* by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it." (emphasis added) (p. 177).

* * * * *

"The essence of such a *charge* in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." (emphasis added) (p. 180).

* * * * *

"The *indictment* itself focused with particularity upon motives underlying the making of the speech and upon its contents:

'(15) It was a part of said conspiracy that the said Thomas F. Johnson should . . . render services, for compensation, . . . to wit, the making of a speech [***] on the floor of the House of Representatives.' * * *

"We hold that a *prosecution* under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause." (emphasis added) (pp. 184–185).

The conclusion is inescapable that the legislative privilege creates an immunity from civil or criminal prosecution. It does not bar the questioning of witnesses about legislative activities in proceedings in which the legislator himself is not being so called to account.

2. Only Senators and Representatives are protected by the Legislative Privilege.

The Intervenor has contended that Leonard Rodberg is his employee and as such shares the legislative privilege given the Intervenor by the Speech or Debate Clause.

This contention is clearly refuted by the language of the Speech or Debate Clause itself, as well as by the holding of *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967).

However, whether the Intervenor or the Government is correct in its view of the law is of no consequence in the present posture of this case. The legislative privilege creates an exemption from civil and criminal prosecutions for the legislative activities of those persons to whom its protection extends. Since witness Rodberg has not been prosecuted civilly or criminally for any activity which he or the Intervenor allege to be privileged, there is no occasion for any Court to decide whether he is covered by the legislative privilege or not. For the Court to do so would make its decision anticipatory and advisory, and would conflict with long established rules of jurisprudence. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961); *Muskrat* v. *United States*, 219 U.S. 346 (1911).

3. Senators and Representatives Are Protected by the Legislative Privilege Only in Their Legislative Activities

The intervenor has insisted that the acquisition of documents later used in a speech, and their subsequent publication by a private printer are all activities protected by the legislative privilege.

In fact, the Speech or Debate Clause does not apply to such acquisitions or publications and the reason for the rule would not be served by such an application because such activities are not necessary to give legislators freedom to speak and debate. *McGovern* v. *Martz*, 182 F. Supp. 343 (D. D.C. 1960); *Long v. Ansell*, 69 F. 2d 386 (D.C. Cir. 1934), *aff'd* 293 U.S. 76 (1934); *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D. D.C. 1970); *Restatement of Torts*, 1938 ed. § 590 Comment b.

The intolerable situation which would be created by cloaking such activities with legislative immunity is readily seen from a simple illustration. If such activities were privileged, a legislator could receive a valuable stolen literary property, enter it as an exhibit in a committee hearing and then dispose of it to a publisher for a handsome profit, all with complete impunity.

Here too, however, the question of whether the Intervenor or the government is correct in its view of the law is of absolutely no consequence in the present posture of this case. Because the Intervenor has not been, and is not now, the subject of civil or criminal prosecution for any activity which he alleges to be privileged, there is no occasion for any Court to decide whether the activities he alleges to be privileged are in fact so privileged. Such a Court decision would be entirely anticipatory and advisory and would contravene long established rules of jurisprudence. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961); *Muskrat* v. *United States*, 219 U.S. 346 (1911).

4. The Legislative Privilege Is Enforced by Obtaining Court Action Against Offending Prosecutions.

Because Intervenor has completely misconstrued the nature of the legislative privilege, he has also failed to apprehend the manner in which a legislator obtains its protection. He views the legislative privilege as prohibiting the government from asking any witnesses questions about: (1) how and from whom he received certain stolen government papers, and (2) publication of the papers after he placed them into the record of a Senate subcommittee. His proposed method for securing this fancied privilege is alternatively: (1) to quash the grand jury subpoenas of all witnesses who could be asked such questions, or (2) to supervise the grand jury's investigation himself by: (a) obtaining a list of all grand jury witnesses, (b) determining by Court hearing which witnesses know answers to questions he claims cannot be asked, and (c) obtaining in advance a list of all questions to be asked such witnesses.

However, as has been shown heretofore, the legislative privilege does not forbid the asking of questions but exempts legislators from civil and criminal prosecution. A legislator secures the protection of the privilege when—and only when—a civil or criminal charge is brought against him, for until that time his immunity from prosecution has not been infringed in any way. At such time he may then request the judiciary to dismiss the offending charge. He may not, however, seek to protect his legislative privilege by standing outside the grand jury door and complaining to the Court that he must know what witnesses are being called, what they know, and what they are being asked.

A legislator's immunity from prosecution by virtue of his position is to be guarded in the same way that the immunity of a witness testifying under an immunity statute such as 18 U.S.C. § 2514 is protected. Such a witness cannot complain that other witnesses are being questioned about matters on which he possesses immunity. Nor can he successfully demand a list of witnesses, or disclosure of their knowledge or the questions to be asked them. His immunity simply is not violated unless he is charged with an offense from which he is immune. His remedy—like the legislator's—is then to have the Court remove the offending charge.

In addition to its inappropriateness as a means of securing his legislative privilege. Intervenor's requested "mechanism" for controlling the grand jury would be violate of long-established rules, statutes and case law governing the secrecy of grand jury proceedings. Rules 6, 16, Federal Rules of Criminal Procedure; Title 18, United States Code, Section 3500; *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395 (1959); *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958).

The case of *United States* v. *Johnson*, 383 U.S. 169 (1966), is instructive in this area also. Had Representative Johnson *not* been charged in the Indictment, there would have been no constitutional impediment to the questioning of witnesses concerning the details of his bribe-prompted speech in a prosecution of the other defendants. In fact, they were tried with Johnson and, according to the Supreme Court, at the trial

"Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by outsiders representing the loan company." (p. 173)

Despite this extensive questioning into matters for which defendant Johnson had legislative immunity, the convictions of Johnson's co-defendants were allowed to stand because they had no right that the evidence not be introduced against them. See *United States* v. *Johnson*, 337 F. 2d 180, 192 (4th Cir. 1964).

On the appeal from his conviction following his retrial, Johnson sought reversal claiming that the grand jury had violated his privilege by hearing evidence concerning his speech. The Appellate Court in *United States* v. *Johnson*, 419 F. 2d 56, 58 (4th Cir. 1969), in no way agreed with his contention but disposed of his argument by saying:

"Johnson contends that the counts of the indictment on which he was convicted are invalid because the grand jury that returned them heard evidence concerning his Congressional speech. Johnson's argument, however, is foreclosed by authorities that we deem controlling." [citing cases including *Costello* v. *United States*, 350 U.S. 359 (1956)]

Although too obvious to mention, it is abundantly clear that the existence of a grand jury investigation does not constitute a civil or criminal prosecution against the Intervenor or anyone else. As the Supreme Court has pointed out in *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940), "a grand jury proceeding has no defined litigants and . . . none may emerge from it . . ." In *Blair* v. *United States*, 250 U.S. 273, 282 (1919), the Court said of a Grand Jury investigation:

"The identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

B. THE DENIAL OF INTERVENOR'S REQUESTED RELIEF IN THE DISTRICT COURT IS NOT APPEALABLE

Finality as a condition of review is a long-standing characteristic of federal appellate procedure. Denial of a motion to quash a grand jury subpoena has been held interlocutory and not appealable in *Cobbledick* v. *United States*, 309 U.S. 323 (1940), and *United States* v. *Ryan*, 402 U.S. 530 (1971).

It is true that in the present situation the Intervenor has no means of having himself held in contempt for disobedience to a subpoena so that he could appeal from such an order. However, this does not mean that he faces irreparable injury unless he is allowed to appeal, so as to invoke the rule in *Perlman* v. *United States*, 247 U.S. 7 (1918); permitting an appeal.

Perlman made a claim which if correct and not adjudicated on appeal could have meant that his constitutional right would have been violated. The Intervenor here has made a claim of legislative privilege for himself and his employee covering certain activities, but if the correctness of his claim is not reviewed by this Court he not only does not face irreparable injury, but he faces no injury whatever because no civil or criminal prosecution has infringed his constitutional immunity. In fact, he should not have been permitted to intervene in the District Court, and has no right or privilege to vindicate on this appeal.

If Intervenor's position on appealability were correct, then any legislator who wished to hamper or retard a grand jury investigation could claim a fear that witnesses may be asked about his activities, move to quash their subpoenas, and appeal from the lower courts' denials. If a civil or criminal charge were later brought against him he could seek its dismissal in court on grounds of legislative privilege and could appeal from denial of such a motion.

If a legislator were given such a series of appeals, it would be obvious both that the initial appeals were interlocutory and that he faced no injury—irreparable or otherwise—at the time the initial appeals were taken.

In the event that the Intervenor or his employee were charged with a civil or criminal offense, appeal could be had from any lower court ruling on their claim of legislative privilege. This would be full and adequate appellate review of his constitutional claim. Any review of claims made previous to such time would be premature and advisory.

[On the Government's Appeal]

C. THE DISTRICT COURT'S "PROTECTIVE ORDER" IMPROPERLY LIMITS THE GRAND JURY'S INQUIRY

The District Court's protective order states that: (1) "no witness before the grand jury . . . may be questioned about" certain conduct of Senator Mike Gravel, and that (2) Witness Rodberg "may not be questioned about" certain of his own actions taken at the Senator's direction.

As has been demonstrated in preceding portions of this brief, the Speech or Debate Clause prohibits a legislator from being "questioned" for legislative activities by civil or criminal prosecution, but does not preclude witnesses from being "questioned about" such activities in proceedings in which the legislator himself is not being so called to account.

In view of the nature of the legislative privilege, a protective order to insure a legislator's rights under it is neither necessary nor proper. The privilege creates an immunity from civil and criminal prosecution for legislative activities. This immunity is fully protected by resort to the courts when such an offending prosecution is brought. Any protective order issued in the absence of such a prosecution is entirely anticipatory and ad-

visory, and is an improper interference with the lawful functions of the grand jury.

IV. CONCLUSION

For the reasons previously stated, with regard to the appeal of the Intervenor, the appeal should be dismissed, or in the alternative the District Court's denial of his requested relief should be affirmed.

With regard to the appeal of the government, the District Court's protective order should be vacated.

Respectfully submitted,

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[U.S. Court of Appeals for the First Circuit]

BRIEF OF INTERVENOR, APPELLANT

(No. 71-1331—United States of America, verses John Doe, Mike Gravel, U.S. Senator, Intervenor, Appellant)

(No. 71-1332—Same, versus Same, Same)

ROBERT J. REINSTEIN,
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CHARLES L. FISHMAN,
*Attorneys for Senator Gravel.*

JURISDICTION

The Jurisdiction of this Court to hear and decide this matter is based upon 28 U.S.C. § 1291, in that this is an appeal from a final order of the District Court denying Appellant's motions to quash subpoenas, for specification, and for further relief. The argument in support of this Court's jurisdiction under 28 U.S.C. § 1291 is presented *infra* at pp. 13-17.

STATEMENT OF THE CASE

Appellant, Mike Gravel, is a duly elected and certified member of the United States Senate and Chairman of the Senate Subcommittee on Buildings and Grounds. On June 29, 1971, he duly convened a public meeting of the Subcommittee, with United States Congressman John Dow testifying as a witness; and during the course of the meeting Senator Gravel read and inserted into the official subcommittee record part of the material commonly referred to as the "Pentagon Papers."

At the end of the hearing, Senator Gravel ordered that the record of the subcommittee hearing be publicly released, and excerpts from it were widely reported in the press. In July of 1971, Senator Gravel ordered a copy of the record delivered to Beacon Press, a nonprofit publishing house operated by the Unitarian-Universalists Association. Also in July the United States Attorney requested the Court below to convene a grand jury.

On August 24, 1971 a subpoena was served upon Dr. Leonard S. Rodberg ordering him to appear and give testimony three days later before the grand jury. Dr. Rodberg had become a member of Senator Gravel's personal legislative staff on the morning of June 29 and acted from that point on under Senator Gravel's direction and control.[1] On August 27, 1971 Dr. Rodberg moved to quash the subpoena in the Court below. On that same date Senator Gravel moved to intervene, which motion was briefed by the parties and granted by the Court below on September 1, 1971.

Senator Gravel then moved to quash the grand jury subpoena or for a specification of the purpose and scope of the inquiry and the questions to be asked. Senator Gravel and Dr. Rodberg both alleged that the government intended to interrogate Dr. Rodberg before the grand jury about the actions of Senator Gravel and his aides in making available to his colleagues and the electorate the contents of the "Pentagon Papers," which were critical of Executive conduct in foreign relations. Evidence in support of this allegation was introduced, and the government did not deny it. On the contrary, the government asserted that none of the actions taken by Senator Gravel, including those at the Subcommittee hearing, were privileged by the Speech or Debate Clause and that the government could subpoena and criminally prosecute Senator Gravel himself.[2] Oral argument was heard on these motions on September 10, 1971.

On October 4, 1971, the Court below issued its Memorandum of Decision and Protective Order (see *infra* pp. 8-11.) which denied Senator Gravel's Motions to Quash or For Specification. The Court below held that Article I, Section 6, Clause I of the Constitution—the Speech or Debate Clause—prohibited the grand jury from making any inquiry of any witness about Appellant's "conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 [or] about things done by the Senator in preparation for and intimately related to said meeting." (Memorandum of Decision and Protective Order of October 4, 1971, p. 16); and prohibited questioning of Dr. Rodberg "about his own actions on June 29, 1971, after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for or intimately related to said meeting." (Memorandum of Decision and Protection Order of October 4, 1971, p. 17.) The Court below held, however, that Senator Gravel's actions in securing the public distribution of the official Subcommittee record by its republication "stands on a different footing and, in the Court's opinion, is not embraced by the Speech or Debate Clause." (Memorandum of Decision and Protective Order of October 4, 1971, p. 12).

On October 12, 1971, Appellant filed before the Court below a Motion for Reconsideration and/or Stay Pending Appeal. The Court below stayed enforcement of Dr. Rodberg's subpoena pending reconsideration and asked for a brief from the government on the issues presented. While this Motion was under consideration by the Court below, counsel for Appellant discovered that the grand jury had subpoenaed and intended to question witnesses about matters Appellant believes are protected from inquiry by Article I, Section 6, Clause I, and the District Court's Protective Order of October 4, 1971. Specifically, counsel for Appellant was informed by the United States Attorney that the grand jury wished to inquire into how and from whom Appellant received the material which he read at the Subcommittee hearing. Counsel for Appellant also discovered that the grand jury had subpoenaed and intended to question witnesses about matters which were then under submission to the Court below. Specifically, counsel for Appellant was informed by the United States Attorney that the grand jury wished to inquire into Appellant's and Dr. Rodberg's conduct in releasing the official Subcommittee record for public dissemination. Among these witnesses was Howard Webber, Director of M.I.T. Press, whose activities with Senator Gravel and Dr. Rodberg were described in documents previously filed in the Court below. Appellant moved to intervene and quash the Webber subpoena, alleging that the government intended to interrogate him solely about the above activities. Appellee did not deny any of these allegations, either in the Court below or in this Court on Appellant's Motion for Stay Pending Appeal, and admitted in the Court below that its primary interest in Mr. Webber related to the conduct of Senator Gravel and his aides in attempting to republish the Subcommittee record. Moreover, the subpoena issued on Webber was *duces tecum* and directed him to produce records and notes of conversations held on July 23 with Dr. Rodberg "concerning the Pentagon Papers."

On October 27, 1971, Senator Gravel filed in the Court below a Motion for Further Relief seeking to prevent the inquiries discussed above by providing the Court and Appellant with some judicial mechanism for assuring that the Court's protective Orders and stays were being observed and that questions regarding the applicability of the Court's protective order would be properly decided. The District Court denied Senator Gravel's Motion on three grounds.

"(a) The court has no reason to doubt that its protective order will be obeyed. At the hearing, government counsel stated that it would be. Attorneys are officers for the court on whose good faith the court customarily relies and there is no reason why an exception should be made in this case.

"(b) The court believes that its protective order issued October 4 is unambiguous. The purport of the order is explained at length in the memorandum accompanying it.

"(c) The relief sought by the intervenor in his motion for further relief would impede the grand jury's investigation. A balance must be struck between the intervenor's right not to be intimidated by the Executive by an inquiry into his legislative acts, *United States* v. *Johnson*, 1966, 383 U.S. 169, 181, and the grand jury's right not to be hobbled by a daily dissection of its activities."

The Court below granted Appellant's Motion to Intervene with respect to the subpoena issued on Mr. Webber. While the Court below denied on October 28, 1971, Appellant's Motion to quash Mr. Webber's subpoena, it granted Appellant a ten (10) day stay on Webber's subpoena pending appeal to this Court. On the same day (October 28, 1971) the Court below denied Appellant's Motion For Reconsideration in Dr. Rodberg's case but granted Appellant a ten (10) day stay of Dr. Rodberg's subpoena pending appeal to this Court. On October 28, 1971, Appellant sought by motion but was denied stenographic copies of the grand jury minutes.

On October 29, 1971 the District Court issued a supplemental Protective Order to its Order of October 4, 1971. The Court below characterized Appellant's constitutional claims as substantial and by no means frivolous. To protect Appellant's position the District Court for a period of ten (10) days ordered the grand jury not to question any witness about Appellant's conduct in arranging for the republication of the Subcommittee record or about Dr. Rodberg's conduct in arranging for publication to the extent that Dr. Rodberg was acting in his capacity as a member of the Senator's personal staff.

On October 28, 1971, Appellant filed his notice of appeal in both cases with the Clerk of the District Court and moved immediately in this Court for a stay pending appeal. This Court held an emergency hearing on October 29, 1971 and entered a Memorandum and Order prohibiting, until further order of this Court, any grand jury inquiry in whatever form into any crimes which may relate to the so-called "Pentagon Papers." On October 29, 1971, the United States filed a cross appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE COURT BELOW

In the "Memorandum of Decision and Protective Order" issued October 4, 1971, the Court below made three basic findings of fact and ten conclusions of law. The findings of fact, which are relevant to this appeal, are: [3]

1. Dr. Leonard S. Rodberg is a Personal staff assistant of Senator Gravel. (Slip Opinion, p. 4.)

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Footnotes at end of article.

2. "[A]s personal assistant to [Senator Gravel], Dr. Rodberg assisted [Senator Gravel] in preparing for disclosure and subsequently disclosing to [Senator Gravel's] colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations." (Slip Opinion, p. 2.)

3. "Viewing together the crimes this grand jury is investigating and the chronology of acts and events leading up to Dr. Rodberg's subpoena, the Court infers that the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (Slip Opinion, pp. 5–6.)

The conclusions of law made by the Court below may be summarized as follows:

1. The Speech or Debate Clause "is limited specifically to legislative acts and antecedent conduct so intimately related to them such as cannot be proved without resort to inquiry into legislative acts." (Slip Opinion, p. 7.)

2. Senator Gravel's legislative acts may not consistently with the Speech or Debate Clause be the subject of questioning of any witness before the grand jury. (Slip Opinion, p. 9.)

3. All actions taken by Senator Gravel at the June 29 Subcommittee meeting, and in preparation for and intimately related to this meeting, are privileged. (Slip Opinion, pp. 10, 16.)

4. The judiciary may not inquire into the purpose or legitimacy of the Subcommittee meeting. (Slip Opinion pp. 10–11.)

5. "[T]he legislative privilege conferred by the Speech or Debate Clause belongs to Congressmen only and not to their assistants and aides." (Slip Opinion, p. 7.)

6. However, in order to protect a Senator's privilege, it "must extend to some activities of a member of his personal staff acting at his direction." (Slip Opinion, p. 14.)

7. Therefore, "the Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." (Slip Opinion, p. 14; see p. 17.)

8. Dr. Rodberg may be questioned about subjects beyond the protection of the privilege, including "the activities of third parties with whom he and the Senator dealt" and "his own conduct previous to his joining the Senator's personal staff . . ." (Slip Opinion, p. 8.)

9. Senator Gravel's "arranging for private publication of the Pentagon Papers . . . is not embraced by the Speech or Debate Clause," and Dr. Rodberg and other witnesses (including, presumably, Senator Gravel) may therefore be interrogated about it by the grand jury and made the subject of criminal prosecution. (Slip Opinion, p. 12; see pp. 16–17.)

10. The protective order which delimits the subject matter of questions which may not be asked of witnesses before the grand jury "fully protects" Senator Gravel's Constitutional rights.

In the "Memorandum and Order Denying Motion for Further Relief" entered on October 29, 1971, the Court below held that Appellant must rely entirely upon the good faith of the United States Attorney to enforce the Protective Order of the District Court.

In the District Court's "Supplemental Protective Order" of October 29, the Court below made the following conclusions of law:

1) Appellant's contentions are substantial and by no means frivolous. (Slip Opinion, p. 1.)

2) The subpoenas served upon Dr. Rodberg and Mr. Webber were stayed for a period of ten (10) days.

3) No witnesses called before the grand jury could be questioned about Appellant's or Dr. Rodberg's conduct in arranging for publication of the so-called "Pentagon Papers" for a period of ten (10) days.

QUESTIONS PRESENTED

I. Whether the decision of a United States District Court denying the Motion of a United States Senator to quash a grand jury subpoena or for specification is appealable under 28 U.S.C. § 1291 when the constitutional rights of the Senator under the Speech or Debate Clause are threatened with irreparable injury by the testimony of third parties over whom the Senator has no control and when the Senator has no other means of securing judicial review?

II. Whether the Executive Branch may seek the aid of the Judicial Branch in convening a grand jury, subpoenaing witnesses and seeking the employment of the Court's contempt powers to assist the Executive in its inquiry into the publication by a United States Senator of the official record of a Senate Subcommittee of which he is Chairman?

III. Whether the Court below committed error in holding that Senator Gravel's constitutional rights were threatened with violation but nevertheless refused to establish any judicial procedures to enforce those rights or provide for judicial review of quesitons of constitutional fact, requiring instead that Senator Gravel rely entirely upon the "good faith" of counsel for the Executive Branch to interpret and enforce the Court's order?

ARGUMENT

*I. This court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291*

The Appellee has asserted that the denial of Senator Gravel's motions to quash, for specification and for further relief, is not a final order and thus not appealable under 28 U.S.C. § 1291. In *Perlman* v. *United States*, 247 U.S. 7 (1918), the Supreme Court held that a non-witness intervenor could appeal as of right from the denial of his motion to quash a grand jury subpoena. In that case, the Government sought a subpoena directed to a third party to produce for grand jury inspection certain documents owned by Perlman.[4] Perlman moved to intervene and to quash the subpoena on the grounds that it violated his Fourth Amendment rights. Intervention was allowed and the motion to quash denied. On appeal to the Supreme Court, the Government argued that the denial of Perlman's motion to quash was interlocutory. Rejecting this argument, the Court stated that Perlman had no other means to obtain review and therefore the denial of his motion to quash was a final, appealable order. *Id.*, at 12–13.

As in *Perlman*, Senator Gravel cannot obtain review from the denial of the motion to quash except by direct appeal, inasmuch as he has not been called to answer and cannot, by refusal to comply, be adjucated in contempt. Numerous other cases are in accord with *Perlman* that the denial of a motion to quash a subpoena issued in either a civil or grand jury proceeding is appealable under 28 U.S.C. § 1291 where no other means of obtaining appellate review is available to the person affected, particularly a non-witness, and the injury complained of is irreparable. *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993 (10th Cir. 1965), *cert. denied*. 380 U.S. 964; *First National Bank* v. *Arisguieta*, 287 F. 2d 219 (2d Cir. 1960), *cert. denied* 365 U.S. 840; *Overby* v. *U.S. Fidelity & Guar. Co.*, 224 F. 2d 158 (5th Cir. 1955) and cases cited therein at p. 162 nn. 3, 4; *In re Investigation by U.S. Atty Gen.*, 104 F. 2d 658 (2d Cir. 1939).

Footnotes at end of article.

The inverse situation—appeal of an order granting a motion to quash—although ordinarily interlocutory, has been held final and therefore appealable under 28 U.S.C. § 1291 when no other avenue of judicial review is feasible. *Carter Products* v. *Eversharp, Inc.*, 360 F. 2d (7 Cir. 1966); *Westinghouse Electric Co.* v. *Burlington*, 351 F. 2d 762 (D.C. Cir. 1965). This Court has followed and applied that rule in *Horizons Titanium Corp.* v. *Norton Co.*, 290 F. 2d 421 (1st Cir. 1961). In all of these cases the test has been the availability or lack of alternative means of obtaining judicial review to prevent an irreparable injury.

The government, through the Solicitor General, has acknowledged and applied the *Perlman* rule in a strikingly analogous case. In *McSurely* v. *Ratliff*, 389 U.S. 949 (1967), officials of the State of Kentucky illegally seized the personal property of McSurely who sought to retain possession of his property through the federal courts. After a statutory three-judge court decided the case in favor of McSurely, 282 F. Supp. 848 (E.D. Ky. 1967), but granted a stay pending appeal to the government, a United States Senate Committee issued a subpoena *duces tecum* to Ratliff. McSurely then moved to quash the subpoena sought by the Senate Committee by moving in the ongoing action. The three-judge District Court refused to quash the subpoena. McSurely then appealed to Circuit Justice Stewart who granted a stay of the subpoena and at the suggestion of the Solicitor General sent the case back to the District Court for a hearing. The Memorandum of the Solicitor General states:

"Appellants' essential contention as stated in their application to the Circuit Justice is that the order of the District Court insofar as it directs officials of the Commonwealth of Kentucky to make available to the Senate Committee the documents here in question precludes them from an effective exercise of their right to test the validity of the Committee's subpoena by contempt or otherwise. Thus they argue that whereas in the ordinary situation where a legislative body direct it's subpoena *duces tecum* to the owner of the records he may present his objections to production to that body, and, if they are overruled, test his claim by reusing to produce and running the risk of a citation for contempt, here, the opportunities to contest will be lost if a third party who has obtained possession without consent should be obliged to produce them directly.

"At the same time the Committee has no purpose to prevent the applicants from securing a judicial determination of the validity of any defenses which they may have, provided that they present their claims expeditiously. Moreover we do not dispute the proposition that their opportuntly to present such defenses as they might otherwise have should not be lost by virtue of the fact that the documents here involved are in the hands of a third party. Accordingly we acknowledge applicants standing to challenge the subpoena issued to the state authorities. Compare *Reisman* v. *Caplin*, 375 U.S. 440."

On remand the District Court denied McSurely's Motion to Quash and the Supreme Court granted another stay while ordering McSurely to file a jurisdictional statement. 390 U.S. 412 (1968). Thereafter the Supreme Court ruled that the appeal properly belonged in the Court of Appeals for the Sixth Circuit. On remand the Sixth Circuit heard and decided the case in favor of McSurely. See *McSurely* v. *Ratliff*, 398 F. 2d 817 (6th Cir. 1968). The subpoena was quashed. Here, as in *McSurely*, jurdisdiction is in this Court because Senator Gravel has no other available means of securing judicial review to prevent irreparable injury to vested constitutional rights.

For the above reasons Appellant submits that this Court has jurisdiction of this case under 28 U.S.C. § 1291.

*II. The republication and public distribution by a Senator of an official, public record of a subcommittee critical of Exectuive conduct in foreign relations is protected by the speech or debate clause.*

Preliminary Statement

This appeal as distinguished from appellee's cross appeal involves only two conclusions of law from the Memorandum of Decision & Protective Order of October 4, 1971 of the Court below. They are: (1) that Senator Gravel's "arranging for private publication of the Pentagon Papers . . . is not embraced by the Speech or Debate Clause," and Dr. Rodberg and other witnesses (including, presumably, Senator Gravel) may therefore be interrogated about it by the grand jury (Slip Opinion, p. 12); and (2) that the protective order which delimits the subject matter of questions which may not be asked of witnesses before the grand jury "fully protects" Senator Gravel's constitutional rights (see pp. 16–17, Slip Opinion).

The two issues presented before this Court on appeal with respect to the scope of the privilege relate to the constitutional protection to be given to republication of the official record of the June 29 meeting of the Senate Subcommittee on Public Buildings and Grounds by its chairman. We submit that the holding of the Court below that a Member of Congress is privileged for reading material into a committee record but may be subjected to executive inquiry and possible criminal prosecution for then making the record, containing information of overwhelming public concern, available to the public contravenes the history, logic and principles of the Speech or Debate Clause and of separation of powers.

While the Senator's actions at the June 29 Subcommittee meeting are not in question in this appeal but may be in the cross appeal, some discussion of the rationale for the applicability of the privilege to them is necessary for an understanding of the scope of the privilege conferred by the Speech or Debate Clause. We are not suggesting that a Senator is immune from prosecution with respect to all actions taken, simply because of his status as a Member of Congress (e.g. armed robbery or even bribery are obviously beyond the scope of the privilege). The test is not geographical or physical and it does not depend on the fortuitous location of the Senator's activities. Nor does the Clause give Congressional immunity to the speeches of a Senator only when those speeches occur on the Senate floor, as a literalistic reading of the Speech or Debate Clause might imply, for such narrow construction has been rejected by the Supreme Court since the earliest cases. In the landmark decision of *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), the Court held that the Speech or Debate Clause affords protection for all normal functions of a Member of Congress, including in addition to words spoken in debate, resolutions offered, votes taken, and actions of committees, without reference to the location of these activities.

This test which the Supreme Court applied in *Kilbourn* has been reaffirmed in the decisions following that case, the most significant being *United States* v. *Johnson*, 383 U.S. 169, 179 (1966) where the Supreme Court emphasized that the privilege "shall be read broadly to include not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it'." The standard to be applied, then, under the Speech or Debate Clause, and the only one consistent with the history and policy of the privilege, is whether or not the activities sought to be protected are "related to the due functioning of the legislative process." *U.S.* v. *Johnson, supra*, at 169, 172, 179. This standard immunizes a Member of Congress for actions taken in the discharge of his duties as a representative of the electorate and prevents harassment and retaliation by the Executive which would thereby endanger our system of separation of powers. Accordingly, the Court below was clearly correct in holding that the privilege must immunize conduct of a Senator taken at a committee hearing. *Kilbourn* v. *Thompson, supra*; *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *Powell* v. *McCormack*, 395 U.S. 486, 502–03 (1969). We think it evident, however, that direct communication by a Senator with the electorate through the publication and distribution of committee records plays as large a roll in our system of representative government and is thus entitled to like protection.

A. Republication of Committee Records is Related to the Due Functioning of the Legislative Process.

As noted above, ever since the landmark decision of *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), the Supreme Court has rejected attempts to confine the Speech or Debate Clause to words spoken on the floor of Congress and has held that it affords protection for things "generally done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204. Reiterating this test as recently at 1967, the Court added that an action of a Member of Congress is protected by the constitutional privilege if it is "related to the due functioning of the legislative process." *United States* v. *Johnson*, 383 U.S. 169, 172, 179.

In considering whether any given practice falls within these standards, two benchmarks are suggested from the decisions. First, a court may ask whether that practice is necessary to fulfill any of the goals of representative government as established by the Constitution. Second, a court may look for guidance at the actual workings of Congress to determine whether the practice is widely utilized by Members of Congress and uniformly regarded as legitimate; in other words, whether it is "generally done . . . by . . . its members in relation to the business before it."

It is clear that republication of speeches and committee records and their dissemination to the electorate meets each of these criteria. The scheme of representative democracy envisaged by the Framers presupposes the maximum amount of communication between the citizens and their elected representatives. Under our system of government, the ultimate power resides in the people. As Madison, who is appropriately called the Father of the Constitution, said, "The people, not the government, possess the absolute sovereignty." [5] For this system to be viable, the people must be informed fully of the workings of government so that they may be able meaningfully to exercise their Constitutional rights to vote intelligently and to "free public discussion of the stewardship of public officials." [5a] Madison well understood that this imposes a *duty* on public officials to inform the electorate:

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." [6]

James Wilson, another architect of the Constitution, has precisely this in mind when he emphasized the "informing function" of Congress as an essential part of the due functioning of the legislative process:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most importanct that it should understand and direct." [7]

In concluding that "[t]he informing function of Congress should be preferred even to its legislative function," [8] Wilson surely was not drawing an unbridgeable distinction between the two. Informing the electorate is a "legislative act" since it is clearly "related to the due functioning of the legislative process." *United States* v. *Johnson*, supra at 172. In fact, it is no exaggeration to say that direct communication between a Member of Congress and the electorate is an essential bedrock of the legislative process, for it insures that the people will inform *him and his colleagues* of their well-considered views on pending and future legislation—an indispensable prerequisite for each Congressman deciding how to cast his own vote.[9]

It should go without saying that the republication of speeches, committee reports or transcripts is necessary for a Member of Congress to inform and carry on a dialogue with the people. Few individuals have access to the *Congressional Record*, and fewer still to the original transcripts of committee hearings. Nor can the press be depended upon solely to report the views of Congressmen to their constituents. The press gives at best a summary, perhaps overlaid with editorial comment. There is no substitute for the dissemination of the original.[10]

Secondly, if one were to examine the actual workings of Congress to determine whether republication of speeches and committee records is "generally done," *Kilbourn* v. *Thompson, supra*, the same conclusion would be reached. The informing function of Congressmen and its relationship to the legislative process has been documented in many scholarly studies. See, e.g., Griffith, *Congress: Its Contemporary Role* (3rd Ed. 1961); Key, *Politics, Parties and Pressure Groups* (3rd Ed. 1952). Perhaps every Congressman, without exception and since the earliest days of the Republic, has circulated copies of his speech made on the floor and in committee to the public, held press conferences elaborating upon what he said on the floor, issued press releases, and spoken directly to his constituents in explaining his votes or speeches and inviting their views. And we doubt that a single Member of Congress could be found who thought that these actions were not "related to the due functioning of the legislative process." *United States* v. *Johnson, supra* at 182.

"Republication" is not a talismanic phrase signifying an act done outside the proper sphere of Congressional activity. On the contrary, when analyzed it is evident that the term bespeaks an integral part of the legislative process and of the entire system of representative government. The heart of representative democracy is the communicative process between the people and their agents in government. If the people's representatives do not fulfill their duty to inform the electorate, there will be endangered the ideal of self-government upon which our Republic was founded—"If we advert to the nature of Republican Government, we shall find the censorial power in the people over the Government, and not in the Government over the people." [11] Mr. Justice Black expressed this cogently in holding that an executive official was immune from damage suits for issuing a defamatory press release:

"The effective functioning of a free government like ours depends largely on the

Footnotes at end of article.

force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employers. Such an informed understanding depends, of course, on the freedom people have to applaud or criticize the way public employees do their jobs, from the least to the most important." *Barr* v. *Matteo*, 360 U.S. 564, 577 (1958).

In sum, it is clear that an examination of both the theoretical framework of our representative government and its actual practices leaves no doubt that direct communication by a Congressman to the electorate, through the republication and public distribution of speeches and committee records, is conduct "generally done" by Members of Congress "in relation to the business before it," *Kilbourn* v. *Thompson, supra* at 204, is clearly "related to the due functioning of the legislative process," *United States* v. *Johnson, supra* at 179, and is surely within "the sphere of legitimate legislative activity," *Tenney* v. *Brandhove, supra* at 376. Accordingly this conduct is protected from grand jury investigation by the Speech or Debate Clause.

B. Prior Decisions Confirm that Republication by a Member of Congress of a Speech or Committee Record is Privileged Under the Speech or Debate Clause.

Prior to the case at bar, courts have on five occasions expressed views upon the scope of the Congressional privilege with respect to republication of official documents. We believe that these decisions fully support our position.

1. *Hearst* v. *Black*, 87 F. 2d 68 (D.C. Cir. 1936), was an action to enjoin the Members of a Special Senate Subcommittee from retaining possession and distributing copies of documents which they had allegedly secured illegally. The Court of Appeals agreed that the seizure of the documents violated statutory and Constitutional rights, *id.*, at 70, but held nevertheless that Congressional privilege barred the judiciary from interfering in any way with the use of the documents by the Subcommittee, including republication (copying) and distribution to people outside of Congress. The Court stated:

"The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of the appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongly exercised, is not a subject for judicial interference.

"The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the Constitutional separation of powers invaded." *Id.*, at 71–72.

2. After a twenty-year hiatus, the republication issue was again presented, this time in a libel suit. In *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (D.D.C. 1956) (three-judge court), the Senate Internal Security Subcommittee has printed a limited number of pamphlets accusing several well-known and respectable groups, including the plaintiff, of being Communist-front organizations. The Subcommittee then ordered another 75,000 copies to be printed. Claiming that the accusations in the pamphlet were false and defamatory and would cause irreparable injury, the plaintiff requested a restraining order against republication and widespread distribution of the pamphlet. The Court assumed the plaintiff's assertions of malicious defamation and irreparable injury to be true but dismissed the case on the grounds of the Congressional privilege of the Speech or Debate Clause, holding:

"By express provision of the Constitution, Members of Congress, 'for any Speech or Debate in either House . . . shall not be questioned in any other place.' Art. I, Sec. 6 . . .

"The premise that courts may refuse to enforce legislation they think unconstitutional does not support the conclusion that they may censor Congressional language they think libelous. We have no more authority to prevent Congress, or a Committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the *Congressional Record*. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.

"The Constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament, or an American court to restrain Congress, from publishing any statement . . .

"As to the members of the Senate Subcommittee, the complaint is dismissed for lack of jurisdiction. Cf. *Hearst* v. *Black*, supra," *Id.*, at 731–732.

Thus, in this case, as in *Hearst* v. *Black*, the Court concluded that the Constitutional privilege of Members of Congress embraced republication of Subcommittee reports and placed this action beyond the cognizance of the judiciary.

3. In *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) the Court held unequivocally that the Speech or Debate protects Members of Congress from any judicial accountability for republishing committee reports. The action was brought to prevent the Members of the House Committee on Internal Security and the Public Printer from republishing and distributing to the public 6,000 copies of a Committee Report which, if circulated, would infringe the plaintiffs' First Amendment right. The relief sought was an injunction against republication and distribution, limited the Reporter's disclosure to insertion in the *Congressional Record* and such discussion as would ordinarily follow in debate on the floor.

Relying on the Speech or Debate Clause, the Court *dismissed the complaint as to the Members of Congress.*

After reviewing the precedents, Judge Gesell stated:

". . . These cases establish that the courts lack jurisdiction to entertain an action *seeking any remedy* against a Member of Congress for any statement made or action taken in the sphere of legitimate legislative activity.

"Plaintiffs contend that . . . this Court may restrain Congressmen from publishing, filing, or distribution, except by insertion in the *Congressional Record*, a report that impinges upon First Amendment rights.

"The Court is of a contrary view. Members of Congress have the same right to speak as anyone else. *Their legislative activities are not limited to speech or debate on the Foor of Congress. Information in this Report involves matters of public concern, and the Court will take no action which limits the use that individual Congressmen choose to make of the Report or its contents on or off the Floor of Congress.* No injunction is appropriate against any Congressman named defendant." *Id.*, at 1179 (emphasis added).

The Court then followed the distinctions in *Kilbourn* v. *Thompson, supra* and *Powell* v. *McCormack, supra,* between Members of Congress, who are totally immune from judicial accountability, and ministerial agents, who may be held liable for enforcing Congressional orders. Thus, the Court restrained the Public Printer from republication but held the Members of Congress absolutely privileged from accountability. And with respect to the latter, Judge Gesell explicitly stated that the privilege of Congressmen was within "the sphere of legitimate legislative activity." [12]

4. The only case which even suggests that a Congressman's privilege may be diluted for republishing a speech or Committee report is *McGovern* v. *Martz*, 182 F. Supp. 343 (D.D.C. 1960). However, a close reading of the facts and opinion in that case shows that it lends but very limited support for the proposition that the protection of Speech or Debate Clause does not extend to republication.

The *McGovern* case involved a libel action by Congressman (now Senator) McGovern, who sued the publisher of a newsletter for falsely reporting that he had sponsored a "Communist front." The defendant counterclaimed that the Congressman had inserted certain defamatory remarks into the *Congressional Record*. There was no republication of these remarks.[13] The Court granted McGovern's motion to dismiss the counterclaim on the ground of Congressional privilege. *Id.* at 348. The Court then addressed itself to whether the privilege would protect circulation of reprints from the *Congressional Record*. Its remarks on this issue are *obiter dictum* since neither reprints nor unofficial dissemination was involved. Further, the Court recognized that Congressmen must be "protected and thereby free to inform their constituents," and believed that a privilege, albeit qualified by a malice requirement, was applicable. *Id.* at 348.[14]

It is evident that *McGovern* v. *Martz* cannot be read broadly as a precedent that republication of committee reports or transcripts is not protected by the Speech or Debate Clause, for four basic reasons:

(a) The discussion was *obiter dictum*. Due to the failure of proper adversary presentation the Court was unaware of prior precedents, including *Hearst* v. *Black, supra,* which is binding on the District Courts for the District of Columbia. And the only holding of the case related to insertions in the *Congressional Record*.

(b) Even in dictum, the Court did *not* say that republication was not protected by the Speech or Debate Clause. Rather it stated that a privilege existed but was not absolute. As we shall show, *infra* section C., the Court's logic in a libel suit would compel an absolute privilege in a criminal prosecution case.

(c) In qualifying the privilege by a malice standard the Court was clearly in error. The Supreme Court in *Tenney* v. *Brandhove*, supra at 377, held explicitly that if the privilege exists it is absolute: "The claim of an unworthy purpose does not destroy the privilege." See also *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930) cert. denied 283 U.S. 874. Having determined that republication was within "the sphere of legitimate legislative activity," the Court was bound to hold the privilege absolute. And as long ago as 1896, the Supreme Court held that an official's personal malice is relevant only when the officials acted "in reference to matters . . . manifestly or palpably beyond his authority." *Spalding* v. *Vilas*, 161 U.S. 483. See also *Barr* v. *Matteo* 360 U.S. 564 (1959).

(d) The qualifying dictum in the *McGovern* case has not been followed. *Hentoff* v. *Ichord, supra* at 1179.

5. The Supreme Court has settled decisively that the privilege of a non-elected Executive official encompasses republication and

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that the privilege is absolute even in libel cases. In *Barr* v. *Matteo*, 360 U.S. 564 (1959) and its companion case *Howard* v. *Lyons*, 360 U.S. 593 (1959), two subordinate officials in the Executive Department were sued for issuing and circulating copies of defamatory press releases.[15] Invoking the judicially-created doctrine of Executive privilege for acts within the legitimate sphere of official conduct, the Court stated:

*". . . It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty."* 360 U.S. at 575. (Emphasis added.)

And the Court held: *"The fact that the action here was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable . . ." Ibid.* (Emphasis added.)

As the Court below observed in its decision (Slip Opinion, pp. 14–15), judicially developed rules in cases of non-Constitutional privilege bear upon the scope of the Congressional privilege since the former "surely does not warrant broader protection than the legislative privilege based upon the Speech or Debate Clause." By a parity of reasoning, the Supreme Court's holding that republication of documents and their distribution to the public by Executive officials is absolutely privileged applied with at least equal force to the Constitutional privilege of Members of Congress. And no amount of legal alchemy can make a public press release by a subordinate official of the Executive department more within his legitimate sphere of activity than the circulation of copies of the official record of a Senate Subcommittee by a Member of Congress who is under the Constitutional obligation to inform his constituents about the workings of government.

In sum, the civil cases which have been heretofore decided uphold the Constitutional privilege of Members of Congress to republish and distribute to the electorate official committee records.[16]

C. The Purposes of the Speech or Debate Clause and the Principles of Separation of Power Require that the Privilege Protect Members of Congress who Inform the Electorate about Executive Conduct of Foreign Affairs, from Intimidation and Harassment by the Executive.

Even if prior precedents were ambiguous and qualified the legislative privilege in civil case, their logic, when combined with the historical purposes of the Speech or Debate Clause and the sphere of its contemporary importance in our system of separation of powers would establish an absolute privilege to govern the facts of this case. The civil cases presented typically a claim that a Member of Congress was using the authority of his office to violate willfully an individual's rights. That kind of situation creates the maximum temptation for intervention by the judiciary on the side of the individual, and there may very well be circumstances, in which no other means is available to safeguard the preferred constitutional rights of the individual, that the judiciary will be compelled to draw the balance on the side of the individual *Cf. Hentoff* v. *Ichord, supra.*

On the other hand, what is now before this Court is a classic separation of powers case. The judiciary is not being asked to balance the rights of individuals, including preferred Constitutional rights, against the privileges of Members of Congress; to the contrary, the Executive branch of government has come to the Courts and claimed that it may determine what a Member of Congress may tell his constituents about matters of overwhelming public concern. We do not exaggerate by saying that this claim challenges the fundamental character of our tripartite system of government. To any such claim, the Constitution must stand as an impenetrable barrier.

The Executive's contention that it may institute criminal proceedings against a Congressman for speaking to the electorate flies in the face of the historical purposes of the Speech or Debrate Clause. The Clause was drafted to secure absolute freedom of speech for Members of Congress. It was the end product of a lineage of legislative free speech guarantees from the English Bill of Rights of 1689 to the first State constitutions and the Articles of Confederation. See generally *Tenney* v. *Brandhove, supra* at 372–75. None of these provisions drew a distinction between a speech of a legislator directed at his colleagues and one to his constituents.[17] On the contrary, the Court in *Tenney* stated that the Clause was designed to protect both. *Id.*, at 377 and fn. 6. This is consistent with no less an authority than Thomas Jefferson. When a Federal grand jury protested against abuses by Congressmen who disseminated slanderous accusations to the public, Jefferson responded that the framers of the Constitution wrote the Speech or Debate Clause to allow Congressmen to inform the electorate without inhibition:

"[T]hat in order to give to the will of the people the influence it ought to have, *and the information which may enable them to exercise it usefully*, it was part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive." 7 *Writings of Thomas Jefferson* 158 (Ford Ed. 1896) (Emphasis added).

The privilege must be read to protect republication and public distribution of speeches and committee records. As we have shown above (Part A), this is a principal avenue relied upon by Members of Congress to provide the people with "the information which may enable them to exercise it usefully." [18]

The Constitutional evil which would result from denying the privilege's applicability to the informing function of Congress is magnified when this is done at the behest of the Executive and with respect to material which is critical of executive behavior. If the Executive branch may, at will, institute criminal proceedings against and interrogate Members of Congress before grand juries about publications of their speeches and committee reports which they sent to the electorate, it will possess the power to isolate effectively all but the most courageous legislators from their constituents. If such a rule applies, Congressmen will have to watch what they say to the people—in press releases, newsletters and anything spoken outside of the four walls of the Capitol—lest it offend the Executive and open them up to harassment, grand jury inquisitions and prosecutions. Yet if the Speech or Debate Clause means anything, it is that courts and prosecutors are not referees over what Congressmen say to people.

Nor are these consequences mere speculation. For this case reveals the present importance of the central historical purpose of the Speech or Debate Clause, "to prevent intimidation by the Executive and accountability before a possible hostile Judiciary," *United States* v. *Johnson, supra* at 181. Having for years kept secret from the American people the real history of our involvement in Indo-China, and having attempted to impose a prior restraint on the press, the Executive now retaliates against a Senator who revealed to the people—the true sovereign—the reasons why the Executive, without Congressional authorization, took the country into war. The Executive would thereby establish that it, and it alone, has sole authority to reveal to or withhold from the people any information it chooses. As long as our government is to continue as one of separation of power, this cannot be. The proper rule of Constitutional law was stated in *Methodist Federation* v. *Eastland, supra,* at 731:

"Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement . . . similarly nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement."

In conclusion, we wish to bring to the Court's attention a speech given by Senator Sam Ervin on the Floor of the Senate on September 20, 1971. Coming as it does from an acknowledged expert on Constitutional law, we wish to set forth herein some significant excerpts from this speech:

* * * * *

"The events now transpiring in Boston before a Federal grand jury put into question [a] principle of freedom secured by our predecessors.

* * * * *

"I have in mind, of course, the efforts of the administration to inquire into the actions of the junior Senator from Alaska (Mr. Gravel) in connection with the revelations of the contents of the Pentagon Papers.

* * * * *

"The Administration, through its lawyers in the Internal Security Division of the Justice Department, has made a direct and broadscale attack on the rights of all Senators, upon the prerogatives of the Senate, and upon the Constitutional guarantees which have been established to protect the Congress from harassment by a vindictive Executive. It is an attack on the independence and freedom of this body.

* * * * *

"The privilege of the Speech or Debate Clause protects legislators not only from prosecution by the Executive and from the Judiciary. Quite obviously it also protects them from instrumentalities such as the grand jury, which can be used as the Executive's instrument of harassment and persecution.

"It must be stressed that the privilege does more than immunize the legislator against attempts to punish him or to exact retribution for the things he says in the course of performing his legislative duties. The privilege also protects him against having to defend or justify or explain what he has said. The privilege seeks to free the legislator from being harassed by law suits, grand juries, and prosecutors. Were this not so, the independence of the legislator might just as well be destroyed by forcing him to defend himself all over the country.

"There is another reason why the privilege against inquiry into a speech does not depend on the legality or Constitutionality of the act to which it is tied. That is because the privilege seeks to avoid any abridgement of the freedom of a legislator, even from fear of future retribution. If a legislator knew that he had to account for the possibility that he would have to defend or justify his speech sometime in the future, then he would not be as willing to express himself on controversial matters.

"The administration's motives in pressing this action are not only aimed at the privilege, but at a Senator who dared oppose it on the war, and who had the effrontery to use information the administration desired to keep from the people. If the administration were to have its way, we must remain in total ignorance of what has trans-

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pired in Vietnam, and anything else the Goverment does, unless it chooses to tell us. By suppressing this information, the executive branch has tried to keep the Congress and the Nation in total ignorance. Now it tries to dictate what the scope of a Senator's business is, and where and when and how he may conduct it. The tendency, if not the intent, of this effort is to harass the Senator from Alaska, and thereby to silence him and other critics in this body along with those who are outside these halls.

"The purpose of the privilege is to protect the legislative branch from a vindictive executive and a hostile judiciary. It is an element of the principle of separation of powers.

* * * * *

"Here, that is precisely the case. Ultimately, I suppose the question of a criminal action may be involved. But the prosecution will be to protect the special interests of the Executive in its efforts to keep its secrets from the Congress and the people. The motive, of course, is to suppress opposition to Executive policy in the Congress and in the country. When the Speech or Debate Clause is involved in a clash between the executive and the legislative, the history of this legislative immunity is especially important. The immunity was finally gained only after Charles I had lost his head. And he lost his head in part at least because he imprisoned members of Parliament who had opposed him in needless and costly overseas wars, even to the extent of presuming to vote to deny him funds for the war. The establishment of the legislative privilege came during the fight by the legislature to establish its independence from a king who claimed total power. The historical precedents are too close to be ignored. We see history repeating itself."

We respectfully submit that the Court below erred in holding that a United States Senator may be subjected to grand jury interrogation and the institution of criminal proceeding for making available to the people copies of an official subcommittee record critical of Executive conduct in foreign affairs.

*III. The protective orders issued by the court below do not adequately guarantee Senator Gravel's constitutional rights, and it was error to deny the motion for further relief*

A determination of the ambit of the constitutional protection secured by the Speech or Debate Clause, or, conversely, a delineation of the legitimate scope of grand jury questioning, is only one aspect of the instant litigation. Another aspect, which is equally important, concerns the procedures which must be established to protect adequate these substantive rights. The Supreme Court has admonished on numerous occasions that the vindication of legal rights is largely dependent upon the procedural rules under which these rights are enforced. "[T]he procedures by which . . . as case [is] determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important the procedural safeguards surrounding those rights." *Speiser* v. *Randall*, 357 U.S. 513 (1958).

Since the constitutional rights which seek protection in this proceeding are of the highest order of magnitude, it is essential that the procedures utilized be examined with the strictest scrutiny so that these rights do not, in effect, bottom-out for lack of procedural safeguards. In failing to allow for any procedural mechanism to enforce its protective orders, the Court below has stripped these legal rights of any safeguards. In the first part of this section, we shall demonstrate why the protective orders issued by the Court below, standing alone, do not adequately protect Senator Gravel's constitutional rights. In the second part, we tender an alternative procedure under which the legitimate interests of both Senator Gravel and the respondent may be realized.

A. Because Enforcement of the Protective Order is Vested Unchallengably, and Unreviewably in the Government, it Does Not Guarantee Adequately Senator Gravel's Constitutional Rights.

As the Court below correctly observed in its decision of October 4, 1971, the constitutional interests which must be protected in this proceeding by virtue of the Speech or Debate Clause are those of Senator Gravel, and not prospective witnesses. Ordinarily, a party may protect against illegitimate questioning by the grand jury by simply refusing to answer a given question and securing judicial review. Yet in this case, Senator Gravel will not be present during the questioning and has no means of assuring that the protective orders are not violated. Senator Gravel thus has no method of objecting to questions which in his view may be impermissible under the Constitution and the protective orders. Nor can he control the witnesses and their inclination to answer. Thus a legally prohibited question may be posed and answered without the party whose legal rights are violated—Senator Gravel—being able to object and secure judicial review. Under the decision of the Court below, the prosecutor and the witness are, in their unchallengable and unreviewable discretion, the final arbiters of Senator Gravel's constitutional privilege. Realistically, of course, this reduces to the discretion of the prosecutor. The witness will probably be unaware of the protective orders; [19] if aware, he is hardly in a position to construe them; [20] and even if able, he would have to be willing to risk a contempt citation on behalf of the rights of another.[21] The grand jurors are no check since they too were not informed by the Court below of the protective orders, would not in any event know how to construe them, and might even on their own initiative pursue illegitimate inquiries.

Nor can an after-the-fact remedy cure the illegitimate inquiry. Exclusionary rules are usually relied upon to protect privileges such as the attorney-client and husband-wife, for those privileges seek to bar the use of privileged information in a criminal trial. The privilege of the Speech or Debate Clause, however, by its very terms prohibits the illegitimate *questioning* itself. Such inquiry into the official conduct of a Member of Congress violates the separation of powers principles at the root of the Clause. And, as Senator Ervin stated (*supra*, p. 47), the privilege must protect legislators from instrumentalities such as the grand jury which "can be used as the Executive's instrument of harassment and persecution." He continued:

"It must be stressed that the privilege does more than immunize the legislator against attempts to punish him or to exact retribution for the things he says in the course of performing his legislative duties. The privilege also protects him against having to defend or justify or explain what he has said. The privilege seeks to free the legislator from being harassed by law suits, grand juries, and prosecutors."

And see *United States* v. *Johnson*, 419 F. 2d 56 (4th Cir. 1969), where the Court stated that the grand jury's receipt of evidence about the Congressman's speech was "constitutionally impermissible."

Accordingly, if illegitimate questions are posed to and answered by a witness, with Senator Gravel not present and unable to object, there is no realistic possibility of judicial review or remedy and the constitutional violation becomes an irreparable *fait accompli*. In sum, the Court below has decreed rights without a remedy.

The Court below has attempted to justify the creation of these unenforceable unreviewable rights by positing that its protective orders will be complied with scrupulously as a result of the "good faith" of government counsel.[22] With all due respect, we believe that this theory is totally unsupportable for three fundamental reasons.

*First*, in an adversary system such as ours, no party has ever been forced to depend *entirely* on the untrammelled discretion of his opponent to enforce his vested rights. It is one thing to say that we generally rely in part on the good faith of government officials to carry out their orders; it is quite another for a court to foreclose every opportunity in the party for whom the order is issued—the party whose rights are at stake—to determine for himself whether it is being complied with, to make objections where necessary to obtain a final judicial determination, and, perhaps, to never know with certainty whether his rights were respected.[23] Surely no court would hold that a black plaintiff who proves a denial of his right to vote or right to desegregated education on the grounds of race is then left for his remedy *entirely* to the good faith of the State voting registrars or school board, without any ability to determine whether they comply or to seek judicial review. Yet that is the logic of the Court below, for it found that the government attorneys issued subpoenas for purposes of inquiry before the grand jury in violation of Senator Gravel's rights and nevertheless held that the enforcement of his rights must be unchallengeable and unreviewable. Not only is there no method by which Senator Gravel can object to a question and thereby secure a judicial determination, but the order of the Court below effectively bars any appellate review of questions of constitutional fact. The duty of this Court, as all appellate courts, "is not limited to the elaboration of constitutional principles; [the court] must also review the evidence in proper cases to make certain that those principles have been constitutionally applied." *New York Times* v. *Sullivan*, 376 U.S. 254, 285 (1964). As Mr. Justice Brennan said, "to accept this suggestion"—that judicial review of questions of constitutional fact may be dispensed with—

"Would be to abnegate the responsibility, ultimately the responsibility of the United States Supreme Court, to uphold constitutional guarantees. In . . . areas involving constitutional rights the Court has consistently recognized its duty to apply constitutional standards on the basis of an independent review of the facts of each case." Brennan, "The Supreme Court and the Meikeljohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1, 7 (1965) (footnote citing cases omitted).

We respectfully submit that the order of the Court below amounts to an abdiction of ultimate judicial enforcement that is constitutionally impermissible, is unprecedented in the history of constitutional jurisprudence, and stands the principle of *Marbury* v. *Madison* on its head.

*Second*, the nature of this particular proceeding must be borne in mind. Senator Gravel has come to court charging the Executive "with intimidation," *United States* v. *Johnson*, *supra* at 181. This charge is not lightly made; it is shared by respected members of Congress and by noted and objective historians.[24] Nor may its relationship to history be ignored. Perhaps in no other area of constitutional law is Mr. Justice Holmes' admonition so valid that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). The institution of criminal proceedings against

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a Member of Congress in retaliation for a speech critical of Executive conduct in foreign affairs is a recreation of the seditious libel prosecutions which are at the historical root of the Clause. *United States* v. *Johnson, supra* at 178. When Charles I was at first criticized and eventually denied funding from Parliament to continue fighting a needless war overseas, he struck back at his critics by prosecuting Sir John Elliot and others for "seditious" speeches in Parliament. The consequence was the greatest constitutional crisis in English history until, in 1668, "after a long and bitter struggle, Parliament finally laid the ghost of Charles I." *Tenney* v. *Brandhover, supra* at 372. As Senator Ervin observed, "We see history repeating itself."

In a conflict such as this one between coordinate branches of government, the very principles and history of the doctrine of separation of powers belies the notion that a legislator must depend for the preservation of his privilege upon the good will of officials of the executive department. As we have noted above, the privilege was the final result of a long and bloody struggle between the Crown and Parliament and secures the rights of legislators on much firmer foundation than the good faith of the executive. This imposes a peculiar obligation on the judiciary to act as a neutral and ultimate arbiter of the privilege. Any rule of procedure which denies this role to the judiciary and, in the face of historical condemnation, places it in the executive, is unconstitutional.

*Third*, even if the utmost good faith of counsel for the executive is assumed, the Protective Order standing alone would not guarantee adequately Senator Gravel's constitutional rights. For it is readily apparent that with both acting in good faith, counsel for the government may ask and a witness might answer illegitimate questions. All lawyers of experience know that, as with any statute or court opinion, no order of a court can be free from ambiguity or the need for interpretation. Borderline situations are bound to occur, and it does not denigrate counsel for the government to suggest that they surely will be influenced in their construction by their interests and their views of the legal principles involved, which may be very different than our own and those of the court.

Throughout the proceedings in the Court below, counsel for the government vigorously asserted legal arguments on the scope of the Speech or Debate Clause which were based on construing precedents and history in the narrowest possible manner, and we were not able to agree on even minor issues of law. In fact, the government's initial legal position, which has been retreated from reluctantly only in the face of adverse rulings by the Court below, was that the Speech or Debate Clause had no applicability at all to these proceedings and that Senator Gravel could be interrogated by the grand jury and criminally prosecuted for holding the Subcommittee hearing. In light of this and similar positions taken by counsel for the government, it is fanciful to assume that their opinion of the permissibility of questioning will coincide with our's or the court's. Cf. *Alderman* v. *United States*, 394 U.S. 165 (1968).

It should also be pointed out that we and counsel for the government have not been able to agree upon the operative scope of the orders of the Court below. On October 12, 1971, we moved in the Court below for reconsideration on the issue of republication and requested a stay of Dr. Rodberg's subpoena pending reconsideration. The stay was granted, and the Court took the matter under advisement and asked for briefs from the government. While the stay was in effect and the matter under advisement, counsel for the government sought to compel the appearance of Howard Webber, Director of M.I.T. Press, before the grand jury to testify about the conduct of Senator Gravel and his aide, Dr. Rodberg, in attempting to have the subcommittee record republished. Moreover, the subpoena was *duces tecum*, ordering Mr. Webber to produce all records and notes of conversations with Dr. Rodberg on July 23, 1971, "concerning the Pentagon Papers." This action was clearly in violation of the intendment of the stay, and it is hard to believe that counsel for the government did not realize that this action would moot the legal issue taken under advisement. Only as a result of our discovering this accidentally were we able to intervene and preserve our legal position. And even *after* the Court below granted a ten-day stay of Mr. Webber's subpoena to retain the status quo for appeal, the government still intended to enforce the subpoena *duces tecum* by resorting to a strained reading of the stay orders. The only reason that the legal issues before this Court have not been mooted is that this Court, at the conclusion of argument on the motion for stay pending appeal, was able to persuade government counsel to temporarily suspend its efforts to enforce the Webber subpoena.

If the counsel for the government is allowed in their absolute discretion to interpret and enforce the protective orders in the same fashion, the constitutional harm will be irreparable.

Finally, the language of the Memorandum Decision of the Court below and the protective orders do not dispel fears that Senator Gravel's rights will be respected scrupulously. It is apparent that even in good faith illegitimate questions might be posed and answered. We list the following as examples of how Senator Gravel's rights will be jeopardized by sole reliance on counsel for the government and the witness in enforcing the protective orders:

a. Counsel for the Justice Department has informed us that they intend to ask how and from whom Senator Gravel obtained the material which he read to the Subcommittee. Counsel may think this justified by referring to the language of the Court's opinion allowing questioning "as to the activities of third parties with whom [Rodberg] and the Senator dealt." We think the question would be barred by Paragraph (1) of the Protective Order [25] and would certainly object to it. Yet we would not be able to and, if the witness decides in his discretion to answer it, he becomes the final arbiter, reaching an unreviewable and unconstitutional end.

b. Similarly, other questions about "third parties with whom . . . the Senator dealt" may well relate to whose advice the Senator sought and received on whether to hold the hearing, who helped in drafting the introductory remarks, and who helped prepare the material for inclusion into the record—all of which, in our view, would be barred by the same provision and possibly Paragraph (2) as well.[26] See also *United States* v. *Johnson, supra*. Here, too, some mechanism is necessary to enable Senator Gravel himself to assert his rights without being forced to depend on the judgments of the witness.

c. The Justice Department may also wish to rely broadly on the Court's statement that Dr. Rodberg may be questioned about "his own actions previous to his joining the Senator's personal staff." Yet those questions may relate directly to Senator Gravel's official activities and blantantly violate the Speech or Debate Clause (and the Protective Orders), but there is no means by which Senator Gravel can prevent the witness from answering and turning a Constitutional violation into a *fait accompli*.

Examples such as these can be multiplied many times over. The decision of the Court below has the effect of allowing the unreviewable and unremediable violation of Senator Gravel's constitutional rights and of the principles of separation of powers. The probability of irreparable constitutional violations is so high that questioning of the witnesses under the terms set forth by the Court below cannot be permitted under the unrealistic hope that Senator Gravel's rights will not be infringed.[27] The government is playing with loaded dice, and the courts cannot wait until the wrong number is rolled. We now address ourselves to the procedures which we think ought to be applied.

B. The Court Below Erred in Denying the Motion for Further Relief.

A delicate mechanism in this case is essential to protect Senator Gravel's constitutional rights from predictable infringements in these grand jury proceedings. As in First Amendment cases, "sensitive tools" are necessary in order to insure that protected rights are not suppressed through the use of insufficient procedural safeguards. *Speiser* v. *Randall*, 357 U.S. 513 (1958). We believe that a delicate mechanism is available which will safeguard the constitutional rights at stake in this proceeding and at the same time allow the grand jury to investigate into lawful areas of inquiry. But we wish to emphasize, before discussing our proposed procedures, that the burden is not on us but on Appellee to come forward with acceptable procedures.

The grand jury is an integral part of the judicial branch of government and is not merely a tool of the prosecution. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Brown* v. *United States*, 357 U.S. 41 (1959). The constitutional conflict has arisen in this proceeding because the executive has chosen to ignore the function intended for the grand jury by the Constitution, which is to safeguard constitutional liberties and "to stand between the prosecutor and the accused," *Hoffman* v. *United States*, 341 U.S. 479 (1951), and has determined instead to turn it into an investigative and prosecutorial instrument. The executive does not thereby rely on its own powers and processes; instead, it comes to the Federal courts and asks the judiciary to invoke the judiciary's compulsory process, enforceable by the contempt power, in a manner which will violate important constitutional rights in our system of separation of powers. Unless and until the executive can prove that these rights are not in danger of infringement, the courts must refuse to lend assistance. For, absent such a showing, any order by the courts in aid of the grand jury proceedings will itself work an unconstitutional end by making the judiciary a party to the violation of separation of powers and the privilege of the Speech or Debate Clause. Preventing the government's investigation through the grand jury from being impeded is not a sufficient justification for abridging constitutional rights, as the Supreme Court has emphasized time and again in Fifth Amendment cases:

"If this result adds to the burden of diligence and efficiency resting on enforcement authorities, any other conclusion would compromise in important constitutional liberty." *Hoffman* v. *United States*, *supra* at 489–90.

Thus, it must be said, as in *Speiser* v. *Randall*, *supra* at 529 that the government "clearly has no compelling interest at stake such as to justify a short-cut procedure which must inevitably result in suppressing protected [rights]." To put the matter another way, respect for the Constitution is more important than respect for the convenience of the Justice Department.

Guidance for the construction of constitutionally acceptable procedures in this case is available from analogous First Amendment decisions and techniques on

Footnotes at end of article.

occasion employed before the grand jury. In a long line of First Amendment cases, the Supreme Court has imposed extraordinarily strict procedural requirements in situations where the utilization of normal procedures would affect adversely the exercise of First Amendment rights. The Court has, for example, required that a full adversary hearing precede any court order to seize allegedly unprotected written material, *Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), or to enjoin allegedly unlawful demonstrations, *Carroll* v. *Princess Anne County*, 393 U.S. 175 (1968). A similar procedural mechanism is called for in this case. When it becomes apparent that the government seeks to question a certain witness in an area which implicates the constitutional privilege, a prior judicial determination, in an adversary hearing, of the constitutional permissibility of the proposed inquiry is essential.

A technique along these lines has been heretofore used voluntarily by the government in other privilege cases involving testimony before the grand jury. For instance, in *United States* v. *George*, 444 F. 2d. 310 (6th Cir., 1971), the witness moved to enjoin enforcement of a grand jury subpoena on the grounds that his testimony might incriminate his wife and that he was already under indictment for the transactions being investigated. The Justice Department filed an affidavit with the District Court setting forth the scope and purpose of the investigation, and the Court concluded that neither privilege was jeopardized.[28] Even more directly on the point are cases involving First Amendment rights in which the government voluntarily specified the nature of the proposed inquiry by the grand jury or was ordered to do so by a court. In *Caldwell* v. *United States*, 434 F. 2d 108 (9th Cir. 1970), *cert. granted* 402 U.S. 942 (1971), after Caldwell filed a motion to quash the subpoena, the Justice Department filed documents stating the extent of legal proceedings already underway with respect to certain members of the Black Panther Party, and particularizing the specific incidents about which it was believed that Caldwell had knowledge and would therefore be questioned by the grand jury. (A summary of this specification is contained in the appendix to the petitioner's brief to the Supreme Court, pages 64–68 and is reproduced in the margin.) [29] In the case of *In Re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971), which presented analogous Constitutional issues, the Court quashed a subpena because the government failed to show with sufficient specificity the scope and purpose of legitimate inquiry.

We believe that these precedents suggest sensible and workable procedures which can be used in the instant case. We therefore propose the following:

1. The government should disclose to the Appellant and the Court below the names of all persons who have been subpoenaed or who are to appear before the grand jury in connection with the Pentagon Papers investigations.[30] Disclosure of this information to others may be barred by a protective order.

2. Such a list is necessary because Senator Gravel is obviously in the best position to determine, as a threshold matter, which persons possess privileged information. He will then state to the Court which witnesses do *not*, to his knowledge, possess such information, and they may be called and questioned in the usual manner.

3. With respect to witnesses whom Senator Gravel contends do possess privileged information, the Court can then hold a Fifth Amendment-type hearing, see *Hoffman* v. *United States, supra*, to determine for itself whether there is a colorable claim of privilege.[31]

4. If a colorable claim of privilege is shown for a witness, the government should be required to specify the nature and scope of the porposed inquiry. The specification in the *Caldwell* case, serves as an excellent model.

5. If it is evident from this specification that none of the proposed areas of inquiry implicate the privilege, the witness may then be called. On the other hand, if a cetrain area does implicate the privilege, the government should be required to specify the questions which it intends to ask concerning this area. This detailed specification in a perhaps limited area of inquiry is also not novel, for the government has frequently used it in cases in which it justifies an offer of immunity in a contempt proceeding. *See, e.g., United States* v. *Fitzgerald*, 235 F. 2d 453, 454 (2d Cir. 1956); *In re Ullman*, 128 F. Supp. 617, 628 (S.D.N.Y. 1955), *affirmed* 350 U.S. 422 (1956). The necessity for such a specification, in advance, of the questions to be asked concerning subject matter which implicates the privilege is illustrated in the Webber proceeding. Counsel for the government stated in the Court below that republication of the Subcommittee record was the primary area of intended inquiry and that other areas were "ancillary." Only an examination of the questions to be asked can sort out—and allow for judicial review of—the legitimate and illegitimate.

With respect to other witnesses, on the other hand, the area implicating the privilege may be distinct from other areas of clearly legitimate inquiry, and a specification of questions in only the former area would be required.

6. As a final safeguard, the Court should instruct the grand jurors and the witnesses of its orders and a transcript of testimony should be kept by which the Court can verify *in camera* that its orders have been complied with.

We believe that this procedural mechanism will adequately safeguard the rights of Senator Gravel under the Speech or Debate Clause, will preserve the separation of powers essential to our scheme of government and will allow the grand jury to conduct legitimate investigations. Two arguments appear to be asserted by Appellee against it—impeding the grand jury process and breaching its secrecy. We do not think that these procedures will unduly impede the *legitimate* processes of the grand jury; even if they did, as we have shown *supra*, pp. 63–65, the Supreme Court has consistently held that the balance must be drawn in favor of constitutional rights. Certainly the rule that a witness may leave the grand jury room after each question to confer with counsel is a greater impediment, yet the Sixth Amendment right prevails.[32] So, too, is an impediment created by the colorable claim hearing on the Fifth Amendment enunciated in *Hoffman* v. *United States, supra*. There is no reason why rights secured by the Speech or Debate Clause—rights which insure the continued viability of separation of powers—should be treated with less dignity.

Similarly, the secrecy argument does not provide a compelling reason to renounce these procedures. The secrecy rule was designed to protect witnesses, not prosecutors; and since we seek *prior* determinations of legality, the rule would appear to be inapposite. Moreover, secrecy of grand jury proceedings has never been adhered to absolutely. A party who can show a "particularized need" may obtain a transcript, *Dennis* v. *United States*, 384 U.S. 855, 868–75 (1961); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959); or where there is a "compelling necessity," *United States* v. *Procter and Gamble Co.*, 356 U.S. 677 (1958); or where "good cause" has been shown, *Blumenfield* v. *United States*, 284 F. 2d 46 (8th Cir., 1960) *cert. denied*, 365 U.S. 812 (1961); or where "the ends of justice require it," *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959); or where such disclosure may be required "either in the general public interest or in the protection of private rights," *Palmentere* v. *Campbell*, 205 F. Supp. 261 (D.C.Mo., 1962); or finally, where strong or "substantial reasons" have been shown for disclosure, *United States* v. *Elliott*, 266 F. Supp. 318 (D.C.N.Y., 1967). And it is noteworthy that the Court in *Dennis, supra* at 855, rejected the contention that protection of rights can be secured solely by the supervision of the courts:

"In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

And *cf. Alderman* v. *United States*, supra.

In sum, we are convinced that these procedures are both feasible and constitutionally compelled. It was therefore error for the Court below to have denied the Motion for Further Relief. And as we stated before, the burden of establishing constitutionally acceptable procedures rests on the government, which affirmatively seeks the compulsory processes of the Federal courts to aid its investigation. It is not enough for the government to criticize our proposals—the government must come forward with an acceptable alternative or be denied the assistance of the judiciary to reach an illegitimate end. The Constitution demands no less.

CONCLUSION

For the reasons set forth herein above, Appellant respectfully submits that this Court should reverse the decision of the District Court and hold that (a) the republication by Appellant of the official record of a Senate Subcommittee is immune from grand jury inquiry and (b) Appellant is entitled to the relief requested in Part III of this Brief.

Respectfully submitted.

Robert J. Reinstein, Temple University Law School; 1715 N. Broad Street; Philadelphia, Pa.

Herbert O. Reid, Sr., Howard University; School of Law; Washington, D.C.

Charles L. Fishman, 633 East Capitol Street; Washington, D.C.

Attorneys for Appellant*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Brief of Intervenor-Appellant was hand-delivered to the United States Attorney for Massachusetts, U.S. Post Office Building, Post Office Square, Boston, Massachusetts, this first day of November, 1971.

Charles L. Fishman, Attorney for Appellant.

FOOTNOTES

*Counsel wish to acknowledge the assistance of Ralph Kates, a third-year law student at Temple University Law School, in the preparation of this Brief.

[1] Senator Gravel duly notified the Sergeant at Arms of the Senate of Dr. Rodberg's appointment by letter on June 29, 1971.

[2] Government's Memorandum in Opposition to Motion to Quash, pp. 5–11. This argument was also vigorouly presented orally.

[3] Of course, the District Court made other findings of fact on pages 1–5 of the Slip Opinion. We do not set them out because they are not material to this appeal. We do wish to point out, however, a possible error in the District Court's recitation of events leading up to the June 29 meeting of the subcommittee. There may be an inference in the opinion that Senator Gravel read and inserted into the record from the set of Pentagon Papers sent under seal from the President to Congress. This is not true; Senator Gravel read from documents which he had independently obtained. Furthermore, these documents are not identical in every respect to the documents furnished under seal to Congress.

[4] The third party was an attorney who came into possession of the documents as ex-

hibits introduced in a civil case involving Periman.

[5] Quoted in *New York Times* v. *Sullivan*, 376 U.S. 254, 274 (1964).

[5a] *Id.*, at 275.

[6] *Elliot's Debates* 575 (Virginia Resolution of 1798).

[7] Wilson, *Congressional Government* 303 (1885), quoted in *Tenney* v. *Brandhove*, 341 U.S. 367, 377 fn. 6 (1951).

[8] *Ibid.*

[9] The Supreme Court has never required that the privilege encompasses only those acts for which a nexus can be shown with pending legislation. On the contrary, the Court has, for example, held investigations privileged whose functions were either to propose legislation or to information the public, since they were "within the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, *supra* at 376–77 and fn 6. Similarly, in *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), Senator Eastland was held privileged for actions which were not remotely connected with pending or future legislation. Neither are many speeches on the Floor of Congress; yet surely the Court of Appeals was correct in *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. Cir. 1930), *cert. denied* 282 U.S. 874, that no showing was necessary that words spoken between Congressmen were pertinent to pending or future legislation.

[10] Likewise, Congressmen must have, and in fact exercise, wide discretion in selecting modes of direct communication to the electorate with respect to the dissemination of speeches and committee records on matters of public interest. A Subcommittee record of thousands of pages, such as involved here, can hardly be distributed in newsletter form. And the government's attempts in the Court below to characterize the instant publication as a "commercial enterprise" are both misplaced and irrelevant. The undisputed facts in the record establish that Senator Gravel will obtain no royalties from the publication. And, in any event, the Supreme Court has unambiguously held that material of social value which is otherwise protected by the Constitution does not lose that protection because it is published commercially. *New York Times* v. *Sullivan*, 376 U.S. 254, 265–66 (1964). And uncountable public documents are commercialized by the Public Printer and private publishers to enhance circulation.

[11] James Madison, 4 *Annals of Congress* 934 (1794).

[12] In its decision (Slip Opinion, p. 13), the Court below quoted certain language from *Hentoff*. These comments dealt solely with the liability of the Public Printer, and not the scope of the Speech or Debate Clause. Judge Gesell distinguished Committee Reports from the *Congressional Record* because Article I, Section 5 of the Constitution requires a journal of proceedings to be kept; thus the Court would not enjoin the Public Printer from including the report in the *Congressional Record*. 318 F. Supp. at 1180. But, as noted in the text, the Court held that the privilege absolutely immunized the Members of Congress themselves from judicial inquiry, for causing the Committee report to be republished anywhere. We therefore respectfully submit that the above-quoted language is inapposite to the issue of this case, which is whether a Senator may be held accountable for republishing an official Subcommittee record. Hentoff holds that he may not, in an action *"seeking any remedy."* Finally, Judge Gesell did not, as respondents suggested in the Court below, state that the courts would investigate into the purpose of the republication and hold the privilege applicable only if a valid legislation purpose, in the sense of relating to proposed legislation, were shown. On the contrary, the Court had no difficulty in concluding that the report was "devoid of legislative purpose" and "on its face contradicts any assertion of such a purpose," *id.* at 1182, but nevertheless held the Members of Congress unaccountable in the judiciary because the report contained information of public interest and its distribution was thus part of the Congressmen's "legislative activities." *Id.*, at 1179. It may be noted that in the present case, the Court below stated: "It has not been suggested by the Government that the subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action." (Slip Opinion, p. 11).

[13] A second counterclaim alleged republication of certain other letters by Mr. McGovern. This was held barred by the Statute of Limitations, and was not decided on the merits. 182 F. Supp. at 349.

[14] While the Court stated at one point that the reason for the rule of Congressional privilege was "complete and uninhibited discussion among legislators," it also recognized the informing function as another purpose. Any reading of the Court's opinion which picks out the former to the total exclusion of the latter makes the opinion incomprehensible. Why should the Clause protect intra-legislative communication but not a Congressman's statement to the electorate? And if the reason for the privilege related only to intra-legislative communications, why should there be even a qualified immunity for distribution of speeches to the public? How would a republication of a libelous speech to another Member of Congress fare? And finally, if *only* intralegislative communication is protected, why have the courts gone beyond the literal language of the Speech or Debate Clause? Each of these questions would have had to be answered by the Court in *McGovern* if it had meant to exclude public dissemination of speeches from the Clause altogether.

[15] In *Howard*, copies of the press release were sent to various newspapers and wire services and to "members of the Massachusetts delegation in the Congress . . ." 360 U.S. at 594. The press release in *Barr* similarly was given wide circulation. In both cases, the Executive officials went far beyond merely sending reports to their immediate superiors.

[16] In the Court below, the Respondent placed heavy reliance upon *Long* v. *Ansell*, 69 F. 2d 386 (D.C. Cir. 1934), calling it "surprisingly close to this proceeding." The simple answer is that *Long* is not a Speech or Debate Clause case. Senator Long refused to accept service of process in a libel suit *only* on the grounds of the provision in Article I, Section 6 that immunizes Congressmen from arrest during a session of Congress. As the Court made clear, Senator Long did not even argue the privilege of the Speech or Debate Clause as a bar to service of process, and the only discussion of the Clause is in an extremely brief and somewhat opaque final paragraph.

The Court below did not rely on *Long* v. *Ansell*, *supra*. It did, however, cite for support *Restatement of Torts*, 1938 ed., Sec. 950, comment b. It may be observed that the rules of defamation proposed by The American Law Institute in 1938 have not, as a general matter, been accepted by the courts in constitutional adjudication. *See*, e.g., *Restatement of Torts*, 1938 ed. Sec. 598, comment a, which was not followed in *New York Times* v. *Sullivan*, 376 U.S. 254, 280 and fn. 2d (1964).

[17] And when, after the drafting of the Constitution, a British court purported to draw such a distinction (see *Stockdale* v. *Hansard*, 9 A.&E.1, 112 Eng. Rep. 112 (1839)), the reaction in Parliament was so intense that the decision was almost immediately overruled by statutes 3 & 4 Vict., c. 9 (1840).

[18] And even if this were somehow put on the "outer perimeter" of a Congressman's duties, *Barr* v. *Matteo*, *supra*, teaches that it must be protected by an absolute privilege.

[19] Mr. Webber being an example.

[20] How, for instance, could anyone but Senator Gravel object and a court decide the legal question of whether his conduct was "intimately related" to the Subcommittee meeting, as specified in Paragraph 1 of the October 4 Protective Order?

[21] It should be noted in this respect that Mr. Webber was prepared to appear before the grand jury, bring with him notes of conversations with Senator Gravel's aides and perhaps answer all questions about Senator Gravel—until prevented by the stay pending appeal.

[22] Memorandum and Order Denying Motion for Further Relief, dated October 29, 1971, p. 2.

[23] The Court below denied our motion for stenographic copies of grand jury minutes, thus keeping Senator Gravel in an indefinite state of uncertainty as to whether his constitutional privilege was violated.

[24] Henry Steele Commager, "A Senator's Immunity," *New York Times*, October 15, 1971, p. 39 M, col. 5–8.

[25] Paragraph (1) provides: "No witness . . . may be questioned about Senator Mike Gravel's conduct at the meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting."

[26] Paragraph (2) provides: "Dr. Leonard S. Rodberg may not be questioned about his own actions as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

[27] Compare *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958): "The vice in the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding . . . will create the danger that the legitimate utterance will be penalized."

[28] While the witness appeared but refused to answer eight questions, the significance of the case is in the specification made by the Justice Department.

[29] The government stated in *Caldwell* that the following matters in the public domain indicate to a limited extent the scope of the matters currently under investigation involving certain members of the Black Panther Party:

(1) On June 24, 1969, several Black Panther Party members were granted immunity by the District Court in connection with an asserted grand jury investigation of possible violations of 18 U.S.C. §§ 2101 and 231, *supra*. They refused to testify, were held in contempt, appealed, lost the appeals; and their cases were pending in this Court in petition for *certiorari*.

(2) On August 26, 1969, a motion was made to quash a grand jury subpoena *duces tecum* seeking records of the Huey P. Newton Fund in connection with an asserted investigation of possible violations of 18 U.S.C. § 1341, *supra*. The subpoena was modified by agreement of counsel and a consent order entered by the District Court, September 9, 1969.

(3) On December 3, 1969, the grand jury indicted Black Panther Party Chief of Staff David Hilliard for a violation of 18 U.S.C. § 871 allegedly committed on November 15, 1969.

(4) On February 5, 1970, the Government moved to compel compliance with grand jury subpoenas served on Black Panther leaders Raymond "Masai" Hewitt, John Seale and Sam Napier, requiring production of documents relating to publication of three numbers (November 22, 1969; December 27, 1969; and January 3, 1970) of the Panther Party newspaper, *The Black Panther*. On March 4, 1970, the Government moved the District Court to grant immunity to grand jury wit-

nesses Sherrie Bursey and Branda Joyce Presley. In connection with these proceedings, the District Court was informed by the Government that threats to kill the President had been published in the three designated numbers of *The Black Panther*, and that the grand jury was investigating possible violations of 18 U.S.C. § 1751, "as well as other matters."

The Government also asserted in *Caldwell* that the "following matters relate to [the] issuance of a subpoena for the testimony of Earl Caldwell:"

(1) In a New York Times article published on December 14, 1969, Mr. Caldwell attributed to David Hilliard the statement that the Black Panther Party "advocate[d] the very direct overthrow of the Government by way of force and violence [and by] . . . picking up guns . . . [and] armed struggle," and went on to note that "[in] their role as the vanguard in a revolutionary struggle the Panthers have picked up guns." This statement "coming after the threat of the Panthers to kill President Nixon, made in the November 22, 1969, issue of *The Black Panther*, and prior to the same threat made in the December 27, 1969 and the January 3, 1970 issues, appeared relevant to an inquiry or investigation of a possible violation in connection with the publication of these statements and related activities of the responsive individuals."

(2) Mr. Caldwell's *New York Times* articles of June 15, June 20, and July 28, 1969 quoted Panther Party Chairman Bobby Seale and Chief of Staff David Hilliard, and recounted Mr. Caldwell's observations and reflections on the Panthers. [ ] (sic) These included observations that the Panthers "had been transformed from a street gang type of organization to an organization based on an ideology," and that the Panthers now talk in terms of such concepts as "class struggle."

(3) After David Hilliard's November 15, speech, "a number of instances of similar statements, made in various parts of the country, were reported by investigative agencies." "In most instances," these statements were attributed to reported Panther Party members, or persons reportedly "linked to it or associated with it in some manner." The statements, in the context of having guns attacking the system, the establishment, etc., and coupled with obscene invective, included "Nixon must die," etc. They were sometimes made "to small groups of sympathizers," sometimes made by "full use of coverage by the press and the facilities of commercial and educational radio and television to disseminate their messages to a wide audience."

(4) On December 3, 1969, a San Francisco disk jockey who had written articles for *The Black Panther*, suggested in a program dedicated to David Hilliard's indictment, that listeners could support free speech by wiring the President a fifteen-word telegram quoting the allegedly threatening passage in Hilliard's Moratorim (sic) Day speech.

(5) On January 5, 1970, Eldridge Cleaver, Black Panther Party Minister of Information, was interviewed over CBS. In the interview, he announced plans to return to the United States from his exile in Africa to go underground, and to lead a "war of liberation from the fascist imperialist social order in the United States," which would include taking off the heads of Senator McClellan and President Nixon. Mr. Cleaver added: "This is not rhetoric."

[30] When we tendered our Motion for Further Relief, we did not know that this grand jury was investigating other areas. As a result, our request for a list of all witnesses to appear was obviously too broad.

[31] Obviously, this hearing cannot be used to elicit *all* privileged information known to this witness for, as in the analogous Fifth Amendment cases, this would itself defeat the privilege. *Hoffman* v. *United States*, *supra*.

[32] See also *Sheridan* v. *Garrison*, 273 F. Supp. 637, 684–685 (E.D. La. 1967), Rev. on other grounds 415 F. 2d, 699 (5th Cir. 1969).

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[U.S. Court of Appeals for the First Circuit]

MOTION FOR ORDER TO SHOW CAUSE AND FOR IMPOSITION OF COURT SANCTIONS

(No. 71–1331—United States of America versus John Doe, Mike Gravel, U.S. Senator, intervenor, appellant)

(No. 71–1332—Same versus same, same.)

Comes now Movant, United State Senator Mike Gravel, and moves this Honorable Court for an order directing Richard Bachman, Assistant United States Attorney, David Nissen, Assistant United States Attorney, Warren Reese, Assistant United States Attorney and John Doe of the F.B.I. to show cause why they should not be adjudged in contempt of this Court's order entered on October 29, 1971, and as reasons therefor state:

1) On October 29, 1971, this Court entered an order in the above captioned cause. Paragraph 2 of that order states:

"It is Hereby Ordered that until further order of this court, the grand jury shall not pursue its inquiry into the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), or conspiracy to commit such offenses or to defraud the United States (18 U.S.C. § 371) insofar as these or any other crimes may relate to the so-called 'Pentagon Papers' in whatever form. However, it shall be empowered to continue its investigation into any other crimes."

2) On October 28, 1971, the aforesaid grand jury issued two subpoenas *duces tecum* signed by Richard Bachman to the New England Merchants National Bank directing the bank to appear before the aforesaid grand jury on November 10, 1971 at the Post Office Building, Boston, Massachusetts, and to bring with it all records of checks drawn of $5,000 or more on the accounts of Beacon Press or the Unitarian-Universalists Association.

3) The aforesaid subpoenas were served on officials of the New England Merchants National Bank on October 29, 1971.

4) Since October 29, 1971 and pursuant to the aforesaid grand jury subpoenas John Doe and other agents of the Federal Bureau of Investigation have been examining and seizing under the grand jury subpoenas the bank records of Beacon Press and the Unitarian-Universalists Association. This conduct is continuing at the present time.

5) Upon information and belief Movant alleges that the actions of Richard Bachman in issuing the aforesaid subpoena and the agents of the Federal Bureau of Investigation who served and are executing the subpoena and have seized records pursuant thereto were taken under the order, supervision and control of David Nissen and Warren Reese.

6) The actions taken by Richard Bachman, David Nissen, Warren Reese and John Doe are in direct violation of this Court's order of October 29, 1971; were knowingly committed and constitute contemptuous conduct.

Wherefore, Movant respectfully requests that this Honorable Court call Respondents before the Bar of this Court and hold a hearing forthwith and in any event no later than 1 P.M., Friday, November 5, 1971 and order Richard Bachman, David Nissen, Warren Reese and John Doe to show cause why this Court should not adjudge them in contempt of its order of October 29, 1971.

CHARLES LOUIS FISHMAN,
*Counsel for Movant.*

[U.S. Court of Appeals for the First Circuit, No. 71–1331]

ORDER TO SHOW CAUSE AND FOR IMPOSITION OF COURT SANCTIONS

(United States of America versus John Doe, Mike Gravel, U.S. Senator, intervenor, appellant)

(Same versus same, same)

Richard Backman, David Nissen, Warren Reese and John Doe are hereby ordered to appear before the Bar of this Court on November 4, 1971, at —— M to show cause why they should not be adjudged in contempt of this Court for violation of this Court's order of October 29, 1971.

———— ————,
*Judge, U.S. Court of Appeals.*

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COMMONWEALTH OF MASSACHUSETTS *ss:*

AFFIDAVIT OF CHARLES LOUIS FISHMAN

Charles Louis Fishman, being first duly sworn according to law deposes and say that:

1. I am counsel to United States Senator Mike Gravel in the following cases now before this court, Nos. 71–1331 and 71–1332.

2. On November 4, 1971, I was informed by Norman Zalkind, counsel for Beacon Press and Frank B. Fredrick, counsel for the Unitarian Universalist Association that two subpoenas duces tacum were issued by the grand jury involved in the aforesaid cases to the New England Merchants National Bank commanding the bank to appear before the grand jury on November 10, 1971 and to bring with them all bank records of checks drawn on the accounts of Beacon Press or the Unitarian Universalists Association of $5,000 or more and drawn between June 1, and October 1, 1971.

3. I was further informed that agents of the Federal Bureau of Investigation, under compulsion of the aforesaid subpoenas, have seized and are continuing to seize the aforesaid checks.

4. I was further informed that the aforesaid subpoenas were signed by Richard Backman, Assistant United States Attorney.

5. I notified David Nissen, Assistant United States Attorney of the intended filing of the attached Order To Show Cause on November 4, 1971.

CHARLES LOUIS FISHMAN.

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[U.S. Court of Appeals for the First Circuit, No. 71–1335]

BRIEF OF WITNESS-APPELLEE—ISSUES PRESENTED FOR REVIEW

(United States of America, Appellant, v. John Doe, in the matter of a grand jury subpoena served upon Leonard Rodberg)

Whether the protective order entered by the District Court is necessary to protect the rights and interests safeguarded by the legislative privilege embodied in the Speech or Debate Clause of the United States Constitution?

A. Whether the convening of a legislative subcommittee and the insertion of material into the CONGRESSIONAL RECORD and things done in preparation for and related thereto are protected by the Speech or Debate Clause?

B. Whether the protective order issued by the District Court is necessary to protect the rights threatened by Dr. Rodberg's appearance before the grand jury?

PRELIMINARY STATEMENT

This is an appeal by the government from the protective order entered on October 4, 1971 by the District Court for the District of Massachusetts (Hon. W. Arthur Garrity, Jr.) with respect to the scope of the grand jury questioning of Dr. Leonard S. Rodberg that may properly be permitted consistent

with the Speech or Debate Clause of the United States Constitution.[1]

On the evening of August 24, 1971, Dr. Rodberg was served at his home in Silver Spring, Maryland with a subpoena which sought to compel his appearance on the morning of August 27 before a federal grand jury in the District of Massachusetts. At that time and since June 29, 1971, Rodberg was a personal aide to Senator Mike Gravel, United States Senator from Alaska. The subpoena was served by the FBI on the same day an article had appeared in the weekly newspapers, *Boston After Dark*, which stated that Dr. Rodberg was a legislative assistant to Senator Gravel who had assisted the Senator in the insertion of the so-called "Pentagon Papers" into the Congressional Record at the June 29, 1971 meeting of the Subcommittee on Public Buildings and Grounds (a subcommittee of the Senate Committee on Public Works). The article further stated that Dr. Rodberg had assisted in the Senator's subsequent efforts to make those documents in the Congressional Record generally available to the public. A similar article had appeared only a few days earlier in the *Washington Post*.

Dr. Rodberg (and Senator Gravel, whose motion to intervene was granted by the district court) moved to quash the subpoena on the ground, *inter alia*, that questioning of Rodberg would violate the legislative privilege embodied in the Speech or Debate Clause. Movants alleged that the government sought to question Dr. Rodberg solely in connection with the insertion of the Pentagon Papers into the Congressional Record and the effort by Senator Gravel to make them generally available to the public. The government did not deny this claim. On October 4, Judge Garrity issued a "Memorandum of Decision and Protective Order." In his opinion the Judge stated:

"[G]iven the secrecy and flexibility of all grand jury proceedings, no movant ever could demonstrate with certainty the specific facts about which he had been subpoenaed to testify. Viewing together the crimes which this grand jury is investigating and the chronology of acts and events leading up to Dr. Rodberg's subpoena, the court infers that the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." Sl. Op., pp. 5–6.

Although denying the motions to quash, the District Court noted that "the Speech or Debate Clause plainly sets limitations upon the grand jury's investigation."[2] More particularly, "it is . . . clear from the *Johnson* case that Senator Gravel's legislative acts may not consistently with the Speech or Debate Clause be the subject of questioning before the grand jury."[3] The Court "sustain[ed] Senator Gravel's claim that whatever he did at the subcommittee meeting on June 29 and certain acts done in preparation therefor are privileged."[4] Further, relying upon *Barr* v. *Matteo*, 360 U.S. 564 (1960), the Court concluded that "the legislative privilege enjoyed by a senator must extend to some activities of a member of his personal staff acting at his direction. To rule otherwise would dilute and jeopardize the privilege itself." Sl. Op., p. 14.

Therefore, to ensure the adequate protection of the rights threatened by Dr. Rodberg's appearance before the grand jury, the District Court entered the following order:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

It is this protective order which the government challenges here.[5]

ARGUMENT

The protective order entered by the District Court is necessary to protect the rights and interests safeguarded by the legislative privilege embodied in the speech or debate clause of the United States Constitution.

A disposition of this appeal requires a resolution of two questions: (1) whether the legislative activity in question is legislative activity protected by the Speech or Debate Clause and (2) how can that activity be properly protected against executive interference under the circumstances of this case? We will discuss these issues separately.

A. The convening of a legislative subcommittee and the insertion of material into the Congressional Record and things done in preparation for and related thereto are protected by the Speech or Debate Clause.

The initial inquiry, whether Senator Gravel's convening of the Subcommittee on Public Buildings and Grounds and his insertion into the Congressional Record of the "Pentagon Papers" are safeguarded by the Speech or Debate Clause, need not detain us long.[6] It has been clear for at least ninety years that the Clause protects all normal functions of a member of Congress including, in addition to words actually spoken in debate, resolutions offered, votes taken, and actions of committees. *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). As the Supreme Court said in *United States* v. *Johnson*, 383 U.S. 169, 179 (1966), in relying upon *Kilbourn*, the Clause "should be read broadly to include not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it.'" In this light it is apparent that the activities involving Senator Gravel described above are protected by the Speech or Debate Clause, that they are the very essence of the activity which that Clause was intended to safeguard. Indeed, we do not understand appellant to contend otherwise.[7]

B. The protective order entered by the District Court is necessary to protect the rights threatened by Dr. Rodberg's appearance before the Grand Jury.

The government's entire argument is based on the following interpretation of the Speech and Debate Clause: the Clause prohibits the questioning of Senators and Representatives "for any Speech or Debate in either House;" "for" does not include "about"; therefore the executive branch may investigate, probe and question anyone "about" that legitimate legislative activity. As long as no one entitled to the safeguards of the Speech or Debate Clause is *prosecuted*, the executive is in no way limited by the strictures of that constitutional provision.[8] We submit that such an interpretation is fundamentally flawed, that it misconceives the basic thrust and purpose of the Speech or Debate Clause and finds no support in the authoritative decisions of the Supreme Court.

That Court has long rejected the government's claim that the Speech or Debate Clause should be narrowly construed; to the contrary, "the legislative privilege will be read broadly to effectuate its purposes." *United States* v. *Johnson*, *supra* at 180. And so it has been. For example, as earlier noted, the provision has not been limited to "Speech or Debate in either House," but rather has been interpreted to include anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. at 204. Thus, in the very first case to come before it involving the Speech or Debate Clause the Supreme Court plainly rejected the notion that its scope should be confined to narrow, literal terms.

In *Tenney* v. *Brandhove*, 341 U.S. 367, 373 (1951) the Supreme Court observed of the legislative privilege:

"The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.'" II Works of James Wilson (Andrews ed. 1896) 38.[9]

The Court has made abundantly clear that the "powerful" of whom Wilson spoke, refers primarily to the executive branch. In *United States* v. *Johnson*, the Court said:

"[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *Supra* at 180–1.

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[1] Dr. Rodberg is not now a party in Nos. 71–1331 and 71–1332. The latter involves a subpoena directed to Howard Webber, director of MIT Press. The former is an appeal from the denial of the motion to quash the subpoena directed to Dr. Rodberg. His application for certification of the district court's order so as to permit him to appeal from that order was denied on October 28, 1971. We have therefore confined our discussion here solely to the issue raised by the government's appeal, reserving for the appropriate time other objections. We of course agree with the position urged by Senator Gravel that everything he has done in connection with the Pentagon Papers is within "the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U.S. 367 376 (1951) and thus by virtue of the Speech or Debate Clause immune from executive scrutiny in any way.

[2] Sl. Op., p. 8.

[3] *Id.* at 9.

[4] *Id.* at 10.

[5] Counsel for Dr. Rodberg were not informed that the government was appealing the District Court's order until Tuesday, November 2, and then only by virtue of a telephone conversation with counsel for Senator Gravel. We did not receive the government's brief in this matter until late Friday afternoon, November 5. Despite these difficulties we have sought to comply with schedule established by this Court's order entered November 1.

[6] The Clause, which is Article I, Section 6, Clause 1 of the United States Constitution, provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place."

[7] The government claimed below that this activity was beyond the purview of the Constitutional provision. However, the District Court flatly rejected this assertion, Sl. Op., pp. 10–12, and the government has not pursued it here.

[8] This argument is the premise of *every* separate section of the government's brief. See pp. 10–11, 21, 22, 23–4, 27, 28 of Consolidated Brief of the United States.

[9] In *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969) the Court again quoted with approval this passage.

In this respect the Clause implicates fundamental considerations involving separation of powers.

This case presents perhaps the clearest possible example of an executive hostile to the legislature. It is a well-known fact, of which this Court may take judicial notice, that a conflict has arisen in recent years between the executive and legislative branches of government over the conduct of the war in Southeast Asia. The conflict is most clearly drawn between the President and the United States Senate. The executive has been the subject of increasing criticism by the Senate over its conduct of the war and the executive's frequent assertions of unquestionable power in the area of foreign affairs, and specifically the war, subject to increasing question. The effort by the Senate to fulfill its constitutional responsibilities with respect to the conduct of the war, and to limit the claims of the executive to sole authority in this area, has grown in direct proportion to the Senate's knowledge about the war and its recognition that much information about the war has been kept from it. Not surprisingly, therefore, the effort by a United States Senator to inform the American public about the facts regarding the war and the reality that much about Vietnam and Southeast Asia has been kept secret meets with executive disfavor. The attempt by the executive to probe the legislative activities by Senator Gravel in this respect presents the classic example of the kind of situation to which the Speech or Debate Clause was meant to apply.

The history and function of the Clause and the particular facts of this case notwithstanding, the government argues that no Speech or Debate question is here presented because there is as yet no sanction sought to be imposed upon those protected by the Clause, as by initiating of a judicial proceeding. Such a reading of the Clause is entirely too narrow and is inconsistent with its very purpose.

In terms of attempting to intimidate the legislative branch, secret questioning before a grand jury can as effectively abridge the interests protected by the Speech or Debate Clause as any other method, if not more so. In many respects, the Speech or Debate Clause overlaps the First Amendment. Wilson wrote that it was "indispensably necessary" that a legislator should have "the fullest liberty of speech." *Op. cit;* by inserting the Pentagon Papers into the Congressional Record, Senator Gravel performs a dual role, each of which is the fulfillment of First Amendment interests. On the one hand, he acts for his constituents and expresses their views; on the other he informs the people of information previously kept from them, thus satisfying the public's right to know, *Lamont* v *Postmaster General,* 381 U.S. 301, 308 (1965) (concurring opinion) by helping to maximize the "spectrum of available knowledge." *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965). The intended effect of inserting the Pentagon Papers into the record was, in the words of Justice Black, to "bare the secrets of government and inform the people." *New York Times Co.* v. *United States,* 403 U.S. 713, 717 (1971).

We emphasize the First Amendment roots of the Speech or Debate Clause because the First Amendment cases are the ones which most decisively reject a claim that intimidation of deterrence of constitutionally protected activity does not come until a prosecution is instituted. Over and over, the precedents recognize that compelling an unwilling witness to subject himself to interrogation and investigation may as effectively abridge the performance of constitutionally protected activity as the application of judicial sanctions. See, e.g., *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Gibson* v. *Florida Legislature Investigation Committee,* 372 U.S. 539 (1963); *DeGregory* v. *Attorney General,* 383 U.S. 825 (1966); *Caldwell* v. *United States,* 434 F. 2d 1081 (9th Cir., 1970), cert. granted 402 U.S. 942 (1971). What the Supreme Court has said with respect to First Amendment rights applies equally well to the related rights under the Speech or Debate Clause:

"The fact that Alabama . . . has taken no direct action . . . to restrict the right of petitioner's members to associate freely, does not end inquiry . . . In the domain of these indispensable liberties . . . the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Thus, in *Douds,* the Court stressed that the legislation there challenged . . . would have the effect 'of discouraging' the exercise of constitutionally protected political rights . . . Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying . . ." *NAACP* v. *Alabama, supra* at 461.

Questioning a United States Senator or his legislative aide about the performance of legislative responsibilities in a proceeding whose purpose is to obtain criminal indictments will necessarily deter the vigorous exercise of that legislator's constitutional duties. As the Supreme Court noted in *Tenney* v. *Brandhove,*. "[o]ne must not expect uncommon courage even in legislators." 341 U.S. at 377. It is both understandable and accurate to say that legislators may well curtail the vigor of the performance of their representative duties if they have to fear disclosure of confidential matters or other questioning by the executive branch. The Supreme Court has recognized that the key to the enforcement of the Speech or Debate Clause is not immunity from criminal or civil sanction but immunity from the threat of such sanctions. In *Powell* v. *McCormack,* the Court noted that the Clause "insures that legislators are free to represent the interests of their constituents *without fear* that they will be later called to task in the courts for that representation." *Supra* at 503 [Emphasis added]. In the context of the analogous executive privilege, the Court has spoken of the importance "that officials of government should be free to exercise their duties unembarrassed by the *fear* of damage suits in respect of acts done in the course of those duties . . ." *Barr* v. *Matteo,* 360 U.S. at 571 (Emphasis added).

The *Barr* Court recognized that "the threat of [such suits] might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* As the Court has noted in the closely related First Amendment context: "The threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).[10] We therefore conclude that the Speech or Debate Clause is a constitutional limitation upon the scope of questioning before the grand jury, and precludes questioning of witnesses about Senator Gravel's activities in connection with his insertion of the Pentagon Papers into the Congressional Record.[11]

*Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967) recognizes that legislative immunity applies to legislative officers and employees (although less absolutely in circumstances not relevant here). In light of that application and from the decisions of the Supreme Court in *Barr* v. *Matteo, supra* and *Howard* v. *Lyons,* 360 U.S. 593 (1959), it is apparent that the second part of the District Court's protective order was constitutionally required. In *Barr* the Supreme Court held that a press release issued by an acting director of a government agency announcing his intention to suspend two agency employees was within the scope of the director's duties and absolutely privileged, despite the claim that the issuance was done maliciously. The Court first quoted from *Spalding* v. *Vilas,* 161 U.S. 483, 498–99 (1896) in establishing the executive privilege. It then held that the privilege was not only available to executive officers but also to executive employees of lower rank as well:

"We do not think that the principle announced in Vilas can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Supra* at 572–3 [12]

*Barr* thus forcefully established the principle which the government would now have this Court repudiate: that a governmental privilege must necessarily extend to those upon whom a legislator or executive necessarily depend for the performance of official duties. As the District Court said:

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[10] In the present case, the investigation occurs in context of a grand jury proceeding and the threat of criminal sanctions is therefore apparent. But we wish to emphasize that even were such a threat removed, the Speech or Debate Clause would still bar the inquiry which the government seeks. This is because, as we have shown, the Clause guards against *all* deterrence of a legislator's constitutional responsibilities, whatever the source. And it is plain from the experience with the House Un-American Activities (HUAC), now the House Internal Security Committee (HISC), that compelled questioning, even without the threat of criminal or civil sanctions, effectively deters protected activity. (For years HUAC has questioned unwilling witnesses about the details of their political activity with the effect, if not the purpose, of inhibiting that activity, the absence of sanctions not withstanding. See *Stamler* v. *Willis,* 371 F.2d 413, 414 (7th Cir., 1966).

[11] The effort by the government to exclude grand jury investigations from the protection of the Speech or Debate Clause is reminiscent of its argument long ago that the Fifth Amendment privilege against self-incrimination did not apply to such proceedings. See *Counselman* v. *Hitchcock,* 142 U.S. 547, 562–4(1892). The Fifth Amendment declares "no person . . . shall be compelled in any criminal case to be a witness against himself." The Court, in rejecting the argument that the privilege did not apply to grand jury proceedings, noted: "The privilege is limited to criminal matters but it is as broad as the mischief against which it seeks to guard." *Id.* at 562. The legislative privilege must necessarily apply to grand jury proceedings in the same way as the Fifth Amendment, if it is to adequately protect against the "mischief," "against which it is intended to guard," the deterrence of vigorous representative government.

[12] *Howard* v. *Lyons, supra,* a companion case to *Barr* and decided the same day, involved a letter written by the commanding officer of the Boston Naval Shipyard to members of Congress explaining why he intended to withdraw recognition of a labor organization in the shipyard. The Supreme Court held that the executive privilege extended even to this officer and that since his circulation of the letter to Congressmen was within the scope of his official duties, the officer was absolutely privileged from civil liability. *Lyons* is thus even a stronger example on its facts than *Matteo* of the application of a governmental privilege to employees.

"[T]he legislative privilege enjoyed by a senator must extend to some activities of a member of his personal staff acting at his direction. To rule otherwise would dilute and jeopardize the privilege itself. For example, speeches delivered on the floor of Congress are often drafted by a skilled staff assistant and not by the congressman himself; to make such an assistant accountable for the content of a speech drafted by him would serve to dilute the privilege." Sl. Op., p. 14.

The District Court analogized, properly we submit, the legislator's dependence upon confidential assistants to a lawyer's reliance upon assistants to whom the attorney-client privilege regarding confidential communications applies. *United States* v. *Kovel*, 296 F. 2d 918 (2nd Cir., 1961). In order to ensure the accomplishment of the responsibilities which the Speech or Debate Clause seeks to protect, it is necessary to protect not only the legislator but also his personal aides without whom those responsibilities could not be fulfilled.

*Powell* v. *McCormack, supra*, and similar cases permitting civil actions against subordinate employees of legislative bodies have no application to the facts of this case. Again, as the District Court concluded: "Employees held accountable in such cases were administrative personnel whose non-discretionary duties to the legislative body as a whole in no substantial way related to the specific furtherance of the legislative tasks of individual members. Such institutional employees clearly have less impact upon legislation than personal staff members entrusted by the legislator himself with sensitive and confidential duties." Sl. Op., p. 12.[13]

[13] We confess we are surprised at the position taken in this case by the government for it is fully inconsistent with its position elsewhere. For example, presidential aide Henry Kissinger has long refused a Senate request that he appear before committee to be "questioned about" certain aspects of United States involvement in Southeast Asia. He has declined to do so on the basis of the analogous executive privilege.

Moreover in at least two pending lawsuits the same Justice Department which seeks to question Dr. Rodberg has resisted civil actions against legislative employees on the grounds of legislative immunity. In *USSF* v. *Eastland*, Civ. No. 1474–70 (D.D.C.) the plaintiffs seek injunctive relief against execution of a subpoena issued by the Subcommittee on Internal Security of the Senate Judiciary Committee. Asserting the legislative privilege, the government has argued in its "Memorandum in Support of the Defendant's Opposition to Plaintiff's Motion for Order Compelling Answers . . ." that J. G. Sourwine, a defendant and staff counsel to the subcommittee may not be questioned about, by means of depositions, "information secured by him pursuant to his official duties as an employee of the Senate."

*McSurely* v. *McClellan*, Civ. No. 516–69 (D.D.C.) is an action against a Senator and employees of a legislative subcommittee for damages for the unconstitutional issuance of a Congressional subpoena, alleged to have been issued outside the scope of legitimate activity. The Justice Department has moved to dismiss the complaint or alternatively for summary judgment on the ground that the Senator and the legislative employees are immune from suit by virtue of the legislative privilege. We quote from the Justice Department's "Memorandum of Points and Authorities" in support of those motions:

"Moreover, in light of the details set forth in Senator McClellan's affidavits concerning the involvement of the defendants with the McSurelys, it is equally plain that [the legislative employees] are entitled to legislative immunity. Particularly is this so in view of Senator McClellan's affidavit, which states that all actions of [those employees] in relation to the McSurelys were done within the scope of their duties as agents and employees or representatives of a Senate Subcommittee and that all such actions were taken pursuant to lawful congressional investigation within the legislative authority of the Senate of the United States as assigned to the Senate Subcommittee."

Putting aside the question whether the government lacks equity to seek to enforce a subpoena on the basis of an argument it expressly repudiates in other cases, we submit that if the government is correct in its contentions in the *USSF* and *McSurely* matters, then *a fortiori*, it may not question Dr. Rodberg about his own actions or those of Senator Gravel in connection with the June 29 reading of the Pentagon Papers into the Congressional Record. For we have seen that the Speech or Debate Clause "was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive . . ." *United States* v. *Johnson, op. cit.* If legislative employees may not be questioned in a civil action about their activities which are alleged to be outside "the sphere of legitimate legislative activity," *Tenney* v. *Brandhove, supra* at 376, then clearly they may not be questioned in the context of a criminal investigation commenced by the executive.

[14] We have discussed the protective order only in the context of the issue presented by the government's appeal: whether it was necessary or proper. While we believe it was, we wish to emphasize that we do not believe it was sufficient to protect the constitutional interests at stake. We believe it should extend to all activities of the Senator and his aides with respect to the Pentagon Papers. Moreover, if, as the District Court held, Dr. Rodberg cannot be questioned about certain of his actions involving activity encompassed by the Speech or Debate Clause, it should follow that no other witness can be questioned about Dr. Rodberg's actions in that regard. Because these qeustions are touched upon in Nos. 71–1331 and 71–1332 and because they are not squarely presented by the government's appeal in this case, No. 71–1335, we do not discuss them at length, but only mention them so as to make our position clear.

Dr. Rodberg is not an administrative employee of the legislative body as a whole who is assigned ministerial duties (as is, for example, the Sergeant-at-Arms). Rather he is a personal aide to Senator Gravel, charged with the responsibility for the accomplishment of "sensitive and confidential duties." In order to protect the Senator, Dr. Rodberg must therefore be protected from executive scrutiny of his own duties in that regard to the same extent as is the Senator. The protective order entered by the District Court was thus constitutionally required.[14]

CONCLUSION

For the aforegoing reasons, the protective order of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing brief was served by hand deliver upon the office of the United States Attorney for the District of Massachusetts, United States Courthouse, Boston, Massachusetts this 8th day of November, 1971.

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[U.S. Court of Appeals for the First Circuit, Nos. 71–1135, 71–1331, and 71–1332]

UNITED STATES OF AMERICA, APPELLANT VERSUS MIKE GRAVEL, U.S. SENATOR, APPELLEE

BRIEF OF INTERVENOR APPELLEE AND REPLY BRIEF OF INTERVENOR APPELLANT

PRELIMINARY STATEMENT

In these proceedings (Nos. 71–1331 and 71–1332), now before this Court, Intervenor Senator Mike Gravel has appealed first the District Court's failure to grant or provide adequate and necessary judicial relief to properly safeguard the Constitutionally protected rights of Senator Gravel arising out of the Speech and Debate Clause recognized by the District Court and secondly, the failure of the District Court to include within the protection of the Speech and Debate Clause the conduct of Senator Gravel in the publication of the official Subcommittee minutes. In No. 71–1335 the government appeals so much of the District Court's order which recognized and applied the Speech and Debate Clause to preclude the Grand Jury from inquiry of the Senator or his aides about the Senator's conduct preliminary to and during the holding of the Subcommittee Hearing, in which the so-called "Pentagon Papers" were made public.

This is Intervenor Senator Mike Gravel's brief as Intervenor—Appellee in No. 71–1335 (the Government's appeal), and Intervenor Appellant's reply brief to Appellee's brief in Nos. 71–1335 and 71–1332. This merger on the part of the Intervenor is necessitated by the consolidated brief of the United States of America filed in Nos. 71–1331, 71–1332, and 71–1335.

The appeal and the cross-appeal in this matter raise the extent of the protection afforded Senator Gravel by the Speech and Debate Clause from Grand Jury investigation into his official legislative conduct in holding a Subcommittee meeting, publishing the minutes of such meeting, and the extent to which his personal aides are likewise barred from interrogation, the necessary protective machinery to guarantee any rights recognized by the Court.

PART I—APPELLEE'S BRIEF

*Question presented*

The question presented by the government's appeal is whether the Executive Branch may utilize the compulsory processes of secret grand jury proceedings to conduct an intensive investigation into the legislative activities of a Member of Congress.

*Argument*

The speech or debate clause prohibits interrogation by the grand jury into the legislative activities of a Member of Congress

The government's basic position in this proceeding, as we understand it, is that a Member of Congress has no protection under the Constitution from interrogations by Federal grand juries, accomplished by the use of the court's compulsory processes, about his legislative activities. Although now apparently conceeding that Senator Gravel's conduct at the Subcommittee hearing falls within the scope of the Speech or Debate Clause[1], the government nevertheless maintains that the Clause permits the Executive Branch, by use of the compulsory process of the grand jury to compel anyone it wishes, including Senator Gravel, and under threat of contempt sanctions, to testify and produce documents about any and all phases of this protected conduct.

The government's argument proceeds under the headings:

A. The District Court properly denied in-

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Footnotes at end of article.

tervenor's motions to quash subpoenas and supervise the grand jury.

1. The "Speech or Debate" Clause Does Not Require or Permit The Granting of the *Relief Demanded by Intervenor.*

(a) The "Speech or Debate" Clause Does Not Prohibit Questioning Regarding Legislative Activities.

(b) The "Speech or Debate" Clause Bars Civil and Criminal Prosecution of Legislators for their Legislative Activities.

2. Only Senators and Representatives are *Covered by the Legislative Privilege.*

3. Only Legislative Activities Are *Covered by the Legislative Privilege.*

4. The Legislative Privilege is Enforced by Obtaining Court Action Against *Offending Prosecutions.*

To argue and conclude at page 20 as follows:

The conclusion is inescapable that the legislative privilege creates an immunity from civil or criminal prosecution. It does not bar the questioning of witnesses about legislative activities in proceedings in which the legislator himself is not being so called to account.

The government argues its cross-appeal for one page under the heading:

C. The District Court's "Protective Order" improperly limits the grand jury's inquiry.

to conclude:

As has been demonstrated in preceding portions of this brief, the Speech or Debate Clause prohibits a legislator from being "questioned" for legislative activities by civil or criminal prosecution, but does not preclude witnesses from being "questioned about" such activities in proceedings in which the legislator himself is not being so called to account.

In view of the nature of the legislative privilege, a protective order to insure a legislator's rights under it is neither necessary nor proper. The privilege creates an immunity from civil and criminal prosecution for legislative activities. This immunity is fully protected by resort to the courts when such an offending prosecution is brought. Any protective order issued in the absence of such a prosecution is entirely anticipatory and advisory, and is an improper interference with the lawful functions of the grand jury.

The crux of the government's position is that Senator Gravel's conduct, including the Subcommittee hearing, is not protected by the Speech and Debate Clause from the instant inquiry, and therefore no agent of the Senator is protected.

The government's case is positioned on the proposition that the Speech and Debate Clause protects only against criminal prosecution, and objection is premature unless the Senator is prosecuted, and information secured in derogation of the privilege is "used."

The grand jury in exercising its legitimate functions is limited by the Speech and Debate Clause to the same judicial restrictions as are placed upon the courts which authorized the grand jury compulsions.

The government's argument misconceives first, the true posture of the grand jury and the relationship between the United States District Attorney and its investigative agents and agencies on one hand, and the grand jury and its function on the other. Secondly, the government's argument misconceives the judicial power of control which may be exercised over the grand jury to constrain that body or persons acting with it from engaging in illegal and unconstitutional conduct.

The Grand Jury is both a sword and a shield of justice—a sword because it is the terror of criminals, a shield because it is the protection of the innocent against unjust prosecution.

*United States* v. *Cox,* 342 F.2d 167, 186, n. 1 (5th Cir. 1965).

The purpose of the grand jury, historically, has been to stand as a buffer between the citizen and the prosecutive functions of government. It was never supposed to perform the functions of the executive branch. To the contrary, it was intended to stand wholly independent of, and apart from, the executive branch of government.

Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

*Wood* v. *Georgia,* 370 U.S. 375, 390 (1962).

There are two ways in which a grand jury may discharge its function. It may commence its own investigation into a particular subject matter. Alternatively, it may pass upon evidence already in the possession of the United States Attorney and presented by the latter to it. In each case the grand jury is to determine whether there is probable cause to believe that a crime has been committed. If it finds probable cause, it is then to return an indictment. If it fails to find probable cause, it is to return a "no bill" or *"ignoramus."*

The subpoena power of the court is used to summon witnesses and to compel their testimony before the grand jury. Since the court's judicial power is employed to effectuate this compulsion, the court may prevent abuses of the employment of subpoenas. The grand jury itself has no independent power to summon witnesses and compel their testimony; only the court has this subpoena power. Similarly, the Department cannot compel the attendance and testimony of witnesses in the furtherance of its investigations or for any other purpose.

As the court observed in *Dunkin* v. *United States,* 221 F. 2d 520, at 522:

" 'The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure.' They do not recognize the United States Attorney's office as a proper substitute for the grand jury room and they do not recognize the use of a grand jury subpoena, a process of the District Court, as a compulsory administrative process of the United States Attorney's office.

"It was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition."

Because of this constraint on the prospective and investigative arm of government, the Department has developed the practice of subpoenaing witnesses to appear before the grand jury and answer questions which the government wishes answered in furtherance of its own investigation. Through this mechanism, the Department achieves by indirection what it could not achieve directly—compulsory interview of witnesses. In such cases, the grand jury does not pursue either of its legitimate functions. It is not passing upon evidence assembled by the prosecutor, which he is presenting in order to persuade the grand jury to indict. Nor in this instance is the grand jury initiating or conducting its own investigation. Instead it is pursuing the investigation initiated and conducted by the prosecutor.

In *United States* v. *O'Connor,* 118 F. Supp. 248, 250–251, the Court stated:

"So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases, Cf. In re National Window Glass Workers, D.C.N.D. Ohio, 287 F. 219. Rule 17(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., has only the limited function of procuring production of papers in use in evidence at a trial. It is not the equivalent of pre-trial discovery. Cf. Bowman Dairy Co. 1. United States, 341 U.S. 214, 220, 71 S.Ct. 675, 95 L.Ed. 879.

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See *Hale* v. *Henkel,* 201 U.S. 43, 26 S. Ct. 370, 50 L.Ed. 652."

There probably is no clearer case of the prostitution of the grand jury process than is daily evidenced in the matter of "The Boston Grand Jury Inquiry into the Publication of the Pentagon Papers." The grand jury has not initiated its investigation, nor may it be said that it is conducting its own investigation. Sitting to hear evidence already in the possession of the United States Attorney is the only proper remaining grand jury function. From the inception of this grand jury until the present the government has made it abundantly clear that the executive is conducting an exploratory investigation, using the grand jury compulsion because it possesses no such power of its own while conducting executive investigations.

This Court is thus presented by the government with a flagrant misuse of the subpoena power of the grand jury. The facts show that the Justice Department denied a subpoena power by Congress, *United States* v. *Minker,* 350 U.S. 179, 191 (1956) (Concurring opinion of Black, J.), is seeking to use the subpoena power *of the grand jury* to perform its own executive function of accumulating evidence. This represents a fundamental perversion of the function of the grand jury and a violation of the principle of separation of powers. While the history of the grand jury has been an attempt to establish its full independence from the executive branch of government, the action taken here by that branch is an attempt to subvert that independence and return the grand jury to a position whereby it would be an appendage of the executive branch rather than of the judicial branch. The precedents establish beyond any doubt that grand jury process may not be invoked to perform functions that lie exclusively with the Justice Department. *United States* v. *Minker,* 350 U.S. 179, 190–2 (concurring opinion of Black, J.); *Durbin* v. *United States,* 221 F. 2d 520 (D.C. Cir., 1954); *United States* v. *O'Connor,* 118 F. Supp. 248 (D. Mass., 1953); *United States* v. *Pack,* 150 F. Suppl (D. Del., 1957); *In re National Window Glass Workers,* 287 F. 219 (N.D. Ohio, 1922); *United States* v. *Procter & Gamble* Co., 356 U.S. 677, 683–4 (1957); *United States* v. *Procter & Gamble Co.,* 187 F. Supp. 55 (D.N.J., 1960).

The government seeks to pursue its investigation by the use of the grand jury's compulsory process and argues that the court may not interfere or restrain the grand jury or those acting pursuant to the grand jury powers until the stage of prosecution and use of information which may be objectionable. This is nothing short of executive power "run riot."

The Court held *In re National Window Glass Workers* (N.D. Ohio E.D. ) 287 Fed. 219, at 225:

"A grand jury has no existence aside from the court which calls it into existence and upon which it is attending. A grand jury does not become, after it is summoned, im-

paneled, and sworn, an independent planet, as it were, in the judicial system, but still remains an appendage of the court on which it is attending * * * All indictments or presentments of a grand jury become effective only when presented in court and a record is made of such action. A grand jury is not, therefore, and cannot become, an independent, self-functioning, uncontrollable agency. It is and remains a grand jury attending on the court, and does not, after it is organized, become an independent body, functioning at its uncontrolled will, or the will of the district attorney or special assistant. The process by which witnesses are compelled to attend a grand jury investigation is the court's process and not the process of the grand jury, nor of the district attorney. If a witness fails to attend, the power, as well as the duty, to compel his attendance, is vested in the court. If, after appearing, he refuses to testify, the power, as well as the duty, to compel him to give testimony is vested in the court, and not in the grand jury. It can therefore never become an immaterial matter to the court what may be done with its process or with its grand jury. A court would not be justified, even if it were so inclined, to create or call into existence a grand jury, and then go off and leave it. A supervisory duty, not only exists, but is imposed upon the court, to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice."

See *Levine* v. *United States*, 362 U.S. 610, 617, 4 L.Ed 2d 989, 995, 80 S. Ct. 1038, 1043.

Recently the Supreme Court of the State of Illinois, in *The People of the State of Illinois, Appellee*, vs. *Barnabas F. Sears, Appellant.—The People ex. rel. Barnabas F. Sears et al., Petitioners*, vs. *Joseph A. Power, Judge, et al., Respondents*, Docket Nos. 44287, 44288, 44299, 44348—Agenda 45,—(Decided May, 1971.) held:

"Much of petitioners' argument deals with the necessity for secrecy of the grand jury proceedings contending that a prosecutor can not fearlessly perform his duties if at any time the court 'can intrude itself in these proceedings and exercise the powers claimed here.' The short answer to that is that the grand jury is an integral part of the court and not the tool of the prosecutor and neither the prosecutor nor the grand jury is vested with power to proceed without regard to due process.

"Nor do we find persuasive the argument that a defendant wrongfully indicted has his day in court at trial, and assuming vindication by acquittal has not been harmed thereby. We agree with the statement *In re Fried* (2d cir.), 171 F. 2d 453, that a wrongful indictment inflicts substantial harm on a defendant not entirely remedied by acquittal. That a court may act prior to indictment to prevent injustice and abuse of process is settled law. See *Austin* v. *United States* (4th cir.), 297 F. 2d 356, and cases cited therein."

The government's contention, if accepted, would effectively vitiate the Speech or Debate Clause as an instrument in the preservation of separation of powers. The Supreme Court made clear in *United States* v. *Johnson*, 383 U.S. 169 (1966), that the Clause was intended to insulate the freedom of speech and activity of Members of Congress from intimidation and harassment by the Executive, and that the Clause was written in the broadest terms to bar *all* forms of legal proceedings which could be used by the Executive to intimidate Congress:

"Although historically seditious libel was the most frequent instrument for intimidating legislators, this has never been the sole form of legal proceedings so employed, and the language of the Constitution is framed in the broadest terms." *Id.*, at 182–83 (foonote omitted).

The Court therefore concluded that in considering its applicability to any form of legal proceeding, we must "look particularly to the prophylactic purpose of the clause." *Id.*, at 182.

The government attempts to justify its position by a process of construction in which the terms of Speech or Debate Clause are read in the narrowest possible way; "questioned" is thereby transmuted into "prosecuted"; and the Clause is reduced merely to affording a defense to a criminal or civil prosecution. Not only is this technique of construction directly contrary to the Supreme Court's admonition that "the clause will be read broadly to effectuate its purposes," *United States* v. *Johnson*, 383 U.S. 169, 180 (1966), but the conclusion that the Clause protects the legislator only from accountability has been consistently rejected by the Court. Thus, in *Powell* v. *McCormack*, 395 U.S. 486, 502–503, 505 (1969), the Court explicitly stated that ". . . [T]he clause not only provides a defense on the merits but also protects a legislator from the burden of defending himself," and "insure[s] that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." And in *Tenney* v. *Brandhove*, 341 U.S. 367, 373 (1951), the Court said:

"The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distraction of a trial upon a conclusion of the pleader, or the hazard of a judgment against them based upon a jury's speculation as to motives."

See also *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967). It seems incontrovertible that an intensive grand jury investigation into the protected legislative activities of a Member of Congress will result in the same hindrance and distraction from his duties as the actual filing of a suit against him.[2] So too will the concomitant uncertainty as to whether he will be indicted for engaging in protected legislative conduct. For as the Court of Appeals said in Johnson, "Indeed, fear of criminal prosecution may be the graver inhibition." *United States* v. *Johnson*, 337 F. 2d 180, 190 (4th Cir. 1964).

Furthermore, the Supreme Court's decision in *United States* v. *Johnson*, *supra*, held that the Speech or Debate Clause means exactly what it says in barring not only prosecution for but judicial questioning into legislative activities. The Court began its opinion by ruling inadmissible all evidence concerning the preparation of the Congressman's speech (383 U.S. at 173):

"The language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial. Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much his admininstrative assistant, and how much by outsiders representing the loan company."

Indeed, there was so much evidence introduced about the speech—through the questioning not only of Johnson but his aide and others as well (*id.*, at 173–76, fn. 4, 5)—that the Court held that an entire count of the indictment was tainted:

"We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a criminal prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it . . .

"The essence of such a charge in this context is that the Congressman's conduct is improperly motivated, and . . . that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Id.*, at 177, 180.

It necessarily follows from these decisions that the Speech or Debate Clause prohibits "executive and judicial inquiry" of the legislative activities of a Member of Congress in grand jury proceedings. And since grand jury proceedings are criminal in nature, the applicability of the Clause to them is more forceful than to civil proceedings such as *Tenney*, *Powell*, and *Dombrowski*, in which there was no involvement by the Executive Branch. This was at least implicitly recognized by the Court of Appeals when Johnson argued, after being convicted a second time, that all indictments against him were void because of illegal questioning in the grand jury. While following the rule of *Costello* v. *United States*, 350 U.S. 359 (1956), and refusing to void the indictments, the Court acknowledged that the grand jury's receipt of evidence about Johnson's speech was "constitutionally impermissible." 419 F 2d 56 (4th Cir. 1969).

Even apart from these decisions, the doctrine of official privilege has always been understood to bar inquiry by one branch of government into the official activities of another. While not of constitutional magnitude, the Executive privilege has been invoked by successive Presidents since Jefferson[3] as a bar to themselves and their personal staff assistants being called to testify before Congressional committees. For the past two and one-half years, Dr. Henry Kissinger and others have refused to appear before Congressional committees, and they have done so on the grounds that they may not be held to question by a coordinate branch of government. The Executive has also invoked its privilege to suppress from Congressional inquiry several planning reports which were prepared by staff assistants and involve important aspects of foreign relations.[4] The source of this privilege is said to be, by implication, in Article II of the Constitution. It ill befits the Executive Branch to now say that privilege is a one-way street—that it immunizes the Executive from Congressional inquiry but that it gives no protection at all to a Senator from the compulsory processes and investigation of the grand jury.

The government's position is even more inconsistent, for it has successfully argued in court that the legislative privilege not only protects Congressmen from accountability but also prohibits testimony about privileged activities. In *United States Servicemen's Funds* v. *Eastland*, Civ. No. 1474–70 (D.D.C. October 21, 1971), an action for damages was brought against Senator Eastland and employees of the Subcommittee for Internal Security for issuing subpoenas which allegedly violated First Amendment rights. The plaintiffs sought to take the deposition of Sourwine, Counsel for the Subcommittee, and he refused to testify or disclose written or verbal information about the Subcommittee's activities which were not of public record. Sourwine was represented by the Internal Security Division of the Justice Department, which is coincidentally the Division involved in the present grand jury proceedings, and they argued as follows:[5]

"To permit in the present posture of this case, a full-scale examination, by the attempted deposition of the Subcommittee's counsel of the Subcommittee's judgment in issuing its subpoena would be an invasion of the prerogatives of the legislature and a serious interference with Congressional investigations and with Congressional privilege."

The District Court agreed, and held that Sourwine did not have to appear and testify. See also *Smith* v. *Crown Publishers, Inc.*, 14 F.R.D. 514, 515 (S.D.N.Y. 1953).

We hasten to add that the facts of the *Servicemen's* case make the legal issue very difficult. In civil litigation where First Amendment rights are at stake, there are cogent arguments that courts should not permit one part of the Constitution to be used to shield from judicial review the violation of another. Even there, however, the Justice De-

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Footnotes at end of article.

partment had no trouble in asserting the traditional argument that the privilege prohibits judicial inquiry into legislative conduct. It is only now that the shoe is on the other foot that the Executive claims—and in a proceeding which involves the Executive, Legislative and Judicial Branches in a classic confrontation—that the privilege is inapplicable except as a defense on the merits.

Finally, the government argues in its Brief (pp. 12–15) that the Framers, in using the term "questioned" in Article I, Section 6, intended a unique meaning akin to "impeached." First of all, this argument may prove too much. It is clear beyond doubt that "impeached," as used in the Constitution, is not equatable with "prosecuted." In cases of impeachment, the House of Representatives acts precisely like an indicting grand jury. Thus, if the Congressional immunity applies in impeachment proceedings, it is more than a defense on the merits and extends to grand jury proceedings.

In any event, the historical interpretation of a clause in the Constitution should not turn into a dispute over mere semantics or a battle of dictionaries.[6] For behind the "simple phrases" of the Speech or Debate Clause "lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." *United States* v. *Johnson,* 383 U.S. 169, 178 (1966). This history reveals beyond doubt that the intimidating conduct which lies at the "taproots" of the Clause, *Tenney* v. *Brandhove, supra,* took a wide variety of forms and was certainly not limited to the institution of criminal proceedings. The Crown's arsenal also included issuing direct orders to the Speaker to cease debate on certain subjects, bribing corruptable Members of Parliament, summarily arresting others and arraigning them before the Star Chamber or directly committing them to the Tower, and spreading rumors of Royal displeasure and threats of retaliation; and each of these actions led Parliament to protest that its freedom of speech and debate was infringed. See generally Taswell-Langmead, *English Constitutional History* 318–21, 336–37, 541–79, 770–772 (4th Ed. 1890).

Secret, inquisitorial bodies with contempt power—the equivalent of the modern-day investigating grand jury—also played their part as the Crown's instruments of intimidation, and were in fact employed to suppress a legislator in one of the most important clashes between the Crown and Parliament prior to the Great Revolution.[7]

The conflict began in 1575 when Peter Wentworth protested on the Floor of Parliament the detention by the Privy Council of another legislator. Queen Elizabeth released the legislator but ordered the elimination of long speeches in Parliament. Undeterred, several legislators, including Wentworth, debated a bill concerning religious rites and the succession; and they were ordered to stop by the Queen, who also caused rumors to be spread of future retribution. Peter Wentworth then took the Floor and delivered "the most remarkable speech on the rights and liberties of the Parliament."[8] Wentworth protested *all* intimidating conduct by the Crown as a violation of Parliament's privileges, and he decried the rumors and royal commands in particular as blatant violations of the rights of the House of Commons. Before he finished, Wentworth was arrested and taken before a committee composed of Privy Council members and other state officials, who interrogated him about his speeches in Parliament. Wentworth responded that if the committee were acting on behalf of the Crown it had no right to question him and he would not answer, the sole body with authority to examine him being the House of Commons; and he was thereupon committed to the Tower for contempt.

We are presented in this case with the use of the grand jury in the same manner which led, after hundreds of years of struggle, to the vindication of the privilege. The abuses which occurred in cases such as Wentworth's and Eliot's, who was persecuted for protesting a disastrous war, were deeply embedded in the memory of those who created our system of government. So firm was the understanding of the widespread nature of these abuses that Thomas Jefferson, in what is without doubt the single most authoritative interpretation of the scope of the Congressional privilege, wrote that it bars intrusions of all forms by the Executive into the unhindered freedom of speech and debate in Congress. *Jefferson's Manual of Parliamentary Practice* (1797–1801), reprinted in Senate Manual (1969), at pp. 413–14.

The abuses which gave rise to the legislative privilege and necessitated its inclusion in the Constitution ought not be allowed to be resurrected under a perhaps more subtle guise. For they are "part of the intellectual matrix within which our own constitutional fabric was shaped," *cf. Marcus* v. *Search Warrant,* 367 U.S. 717, 729 (1961), and if allowed to intrude in the present will have the same disastrous consequences for representative democracy. No exception to the Speech or Debate Clause should be made which makes possible the muzzling of Congress.

PART II—APPELLANT'S REPLY

The government's answer to the first argument of the appellant, that this Court has jurisdiction of this appeal, is contained in the government's consolidated brief under the heading:

"B. The Denial of Intervenor's Requested Relief in the District Court is not Appealable."

The substance of the government's reply is that the District Court's order is not appealable since it is not final because an order to quash a grand jury subpoena has been held to be interlocutory and hence not appealable. Further, the government contends that since the Speech or Debate Clause protects only against prosecution and prosecutional use of information, any objection raised before such prosecution is premature. The government concludes that there is no "irreparable injury" because there is no injury. The government's position is summarized in their consolidated brief, pages 27–28 as follows:

"In the event that the Intervenor or his employee were charged with a civil or criminal offense, appeal could be had from any lower court ruling on their claim of legislative privilege. This would be full and adequate appellate review of his constitutional claim. Any review of claims made previous to such time would be premature and advisory."

The appellant urges upon this Court the conclusion that *United States* v. *Johnson,* 337 F. 2d 180, 191–192 (4th Cir. 1964) disposes of the government's contention adversely:

". . . [T]he process of indictment by a grand jury and inquiry in a court may itself be so devastating that an innocent congressman may well fear it. . . .

"In the case of a congressman, the possibility—even the likelihood—of ultimate vindication in a court proceeding is no substitute for the guarantee held out by the Constitution."

Secondly, the appellant next argued that the republication by Senator Gravel of the record of the Subcommittee meeting was protected by the Speech or Debate Clause. In the consolidated brief the government's reply to appellant's second argument is contained under heading: (See Consolidated Brief of U.S., pp. 21–23.)

"A. 3. Senators and Representatives are Protected by the legislative privilege only in their legislative activities."

The government makes no distinction between grand jury inquiry as to the initial conduct of the Senator in conducting the meeting and the protection of what transpired there on one hand, and subsequent republication on the other. Again the government's position is that the conduct of the meeting and the subsequent republication are not exempt from grand jury inquiry and even if they are in error as to this, any judicial action restraining the grand jury prior to prosecution is premature and advisory.

The government's answer to appellant's final argument, that the protective order issued by the District Court does not adequately protect Senator Gravel's constitutional rights, is contained in the government's consolidated brief at page 28 where the government asserts that:

C—The District Court's "Protective Order" Improperly Limits Grand Jury's Inquiry.

Simply stated the government's position is that since they are correct on the merits there is no need for any protective order. The government makes no effort to address itself to the constitutional claims and issues raised in Senator Gravel's brief either as to remedy or judicial reviewability of constitutional facts.

Appellant respectfully submits that appellees have failed to address themselves in any substantial manner to the claims raised by Senator Gravel in his brief as Intervenor-Appellant.

CONCLUSION

The Framers of our Constitution believed that representative democracy could best be served if Members of Congress were given unlimited freedom in actions within the scope of their legislative activity. They knew that the privilege might be occasionally abused, but they also wisely understood that the risks to democracy in anything less than an absolute privilege, broadly construed and interpreted, were much greater.[9] This perception is as true today as when the Constitution was written. "In the final analysis, no task is likely to be more important to the preservation and ultimate vitality of our governmental system of separation of powers than the widespread popular acceptance of the doctrine of legislative privilege in its most unwavering, pristine and absolute terms." [10] That is the theory of our Republic.

The actions taken by the Executive Branch in this case challenge the most basic and bedrock principles of our constitutional form of government. They cannot withstand analysis under the terms, policies and history of the Speech or Debate Clause and the doctrine of separation of powers. The Court below was clearly correct in holding that the Constitution affords protection to Senator Gravel against these actions. Our dispute with the decision of the Court below, as detailed in our Brief in Nos. 71–1331 and 71–1332, is that it did not go far enough and hold unconstitutional all of the actions which "threaten those consequences which the Framers deeply feared," *School District* v. *Schempp,* 374 U.S. 203, 230, 236 (1963) (Brennan, J., concurring).

Respectfully submitted.

ROBERT J. REINSTEIN,
*Temple University Law School, Philadelphia, Pa.,*
HERBERT O. REID, Sr.,
*Howard University School of Law, Washington, D.C.,*
CHARLES L. FISHMAN,
*Washington, D.C.,*
*Attorneys for Appellant* [11].

FOOTNOTES

[1] In the District Court, the government maintained that it could not only interrogate witnesses about the Subcommittee hearing but prosecute Senator Gravel for it. Government's Memorandum in Opposition

to Motion to Quash (in No. 71–1331), pp. 5–11.

[2] The Court in *Powell* observed that legislators are not distracted from their duties when law enforcement officials who execute their orders are subject to judicial review. Thus suit could be maintained against the Sergeant-at-Arms in the same manner as with respect to any policeman. And see *Dombrowski* v. *Eastland*, *supra*, where Sourwine, the Subcommittee counsel, was given only a limited immunity when he acted like a policeman and engaged in an illegal search and seizure.

These situations of course differ *toto ceolo* from the situation of the instant case, where a secret grand jury with contempt power seeks to interrogate a Senator's personal aides and others in order to investigate directly into his protected legislative activities. The distraction and inhibiting effect of such an interrogation is patent even if the Senator himself is not subpoenaed.

[3] President Jefferson was subpoenaed by Chief Justice Marshall in the trial of Aaron Burr for treason. Jefferson refused to testify about privileged information.

[4] See the *Boston Globe*, September 1, 1971, p. 8, which describes President Nixon's having invoked the privilege to reject the unanimous demand of the Senate Foreign Relations Committee to see a planning report on the military aid program.

[5] Memorandum in Support of Defendant's Opposition to Plaintiff's Motion for Order Compelling Answers and Production of Documents, pp. 7–8.

[6] The ambiguous quotations of the Oxford English Dictionary (Government Brief pp. 13–14) may be compared with the following from Black's Law Dictionary (4th Ed. 1968), p. 1412:

Question. A subject or point of investigation, examination or debate; theme of inquiry; problem; matter to be inquired into; as a delicate or doubtful question . . .

A method of criminal examination heretofore in use in some of the countries of continental Europe, consisting of the application of torture to the supposed criminal, by means of the rack or other engines, in order to extort from him, as the condition of his release from the torture, a confession of his own guilt or the names of his accomplices.

EVIDENCE

An interrogation put to a witness, for the purpose of having him declare the truth of certain facts as far as he knows them.

[7] The following account of Peter Wentworth's case is taken from Cella, "The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts," 2 Suffolk L. Rev. 1, 6–10 (1968) and Taswell-Langmead, *supra* at 490–94.

[8] Cella, *supra* at 8.

[9] Also, "[P]resumably, legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues." *Cochran* v. *Couzens*, 42 F. 2d 783, 784 (D.C. Cir. 1930), *cert. denied* 282 U.S. 874.

[10] Cella, *supra* n. 7, at 43.

[11] Counsel wish to acknowledge the assistance of Ralph Kates, a third-year law student at Temple University Law School, in the preparation of this Brief.

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[U.S. Court of Appeals for the First Circuit, No. 71–1335, No. 71–1331, No. 71–1332]

UNITED STATES OF AMERICA, APPELLANT v. MIKE GRAVEL, U.S. SENATOR, APPELLEE

Appeal from the Final Order of the United States District Court for the District of Massachusetts, Civil Action Nos. E.B.D. 71–172 and E.B.D. 71–209

CERTIFICATE OF SERVICE

I, Harvey A. Silverglate, a Member of the Bar of this Court, hereby certify that I served a copy of "Brief of Intervenor Appellee and Reply Brief of Intervenor Appellant" upon the United States by hand delivering a copy of same by messenger on this day to the Office of the United States Attorney, 1107 U.S. Post Office & Courthouse, Post Office Square, Boston, Massachusetts 02109, to the attention of Warren Reese, Esquire, Attorney for the Department of Justice.

Done on this 9th day of November, 1971.

HARVEY A. SILVERGLATE.

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[U.S. Court of Appeals for the First Circuit, No. 71–1335]

UNITED STATES OF AMERICA, APPELLANT, v. JOHN DOE

Appeal from an order of the U.S. District Court for the District of Massachusetts.

Motion of appellant United States of America for an order that the clerk not file the brief of Leonard Rodberg, or in the alternative that said brief be stricken.

JAMES N. GABRIEL,
*U.S. Attorney.*
DAVID R. NISSEN,
*Assistant U.S. Attorney.*
WARREN P. REESE,
*Assistant U.S. Attorney.*
*Attorneys for the United States.*

MOTION

Appellant, United States of America, hereby moves this court to order the clerk not to file the brief of Leonard Rodberg, or in the alternative to strike said brief on the ground that Leonard Rodberg is not a party to this appeal.

The District Court's Memorandum of Decision and Protective Order denied Leonard Rodberg any of the relief he requested, and he did not appeal therefrom. The "Protective Order" from which the United States appeals was made for the sole benefit of the Intervenor, and no rights accrue to Leonard Rodberg from it. The district court's decision said:

"Therefore, if Senator Gravel's rights under the Speech or Debate Clause are to be fully protected, a protective order will be required limiting the subject matter of the current grand jury's investigation and not merely the questions which may be put to Dr. Rodberg, the witness under subpoena."

The District Court then ordered that: "(1) no witness before the grand jury . . . may be questioned about" certain conduct of the intervenor, and "(2) Dr. Leonard S. Rodberg may not be questioned about" certain of his own actions on June 29, 1971, taken at the Intervenor's direction.

This protective order gave witness Rodberg no more rights than it did any of the other unnamed witnesses to whom it refers. None of them are parties to the government's appeal from the order.

Respectfully submitted,

JAMES N. GABRIEL,
*U.S. Attorney.*
DAVID R. NISSEN,
*Assistant U.S. Attorney.*
WARREN P. REESE,
*Assistant U.S. Attorney.*
*Attorneys for the United States.*

CERTIFICATE OF SERVICE

SUFFOLK, SS.

BOSTON, MASS.,
*November 8, 1971.*

I, William A. Brown, Assistant U.S. Attorney, hereby certify that I have this day sent copies of the within Motion to: Robert J. Reinstein, Temple University Law School, Philadelphia, Pennsylvania, 19122; Charles L. Fishman, 633 East Capital Street, Washington, D.C.; Herbert O. Reid, Sr., Howard University Law School, Washington, D.C.; and James Reif, c/o Center for Constitutional Rights, 588 Ninth Avenue, New York, New York, 10036, by mailing them in franked official envelopes, Air Mail, Special Delivery.

WILLIAM A. BROWN,
*Assistant U.S. Attorney.*

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[U.S. Court of Appeals for the First Circuit, No. 71–1331, No. 71–1332]

UNITED STATES OF AMERICA, v. JOHN DOE, MIKE GRAVEL, UNITED STATES SENATOR, INTERVENOR, APPELLANT; UNITED STATES OF AMERICA, v. JOHN DOE, MIKE GRAVEL, UNITED STATES SENATOR, INTERVENOR, APPELLANT

STIPULATION

(November 5, 1971)

It is hereby stipulated between the parties hereto that the New England Merchants National Bank need not deliver or turn over any documents relating to the so-called "Pentagon Papers" to any representative of the United States of America and in any case shall not deliver or turn over any such documents to any federal grand jury in the District of Massachusetts until the termination of the restraining order entered by the United States Court of Appeals for the First Circuit on October 29, 1971.

*Counsel for Appellants.*
*Counsel for Appellees.*

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[U.S. Court of Appeals for the First Circuit, No. 71–1331; No. 71–1332]

UNITED STATES OF AMERICA, v. JOHN DOE, MIKE GRAVEL, UNITED STATES SENATOR, INTERVENOR, APPELLANT; AND UNITED STATES OF AMERICA, v. JOHN DOE, MIKE GRAVEL, U.S. SENATOR, INTERVENOR, APPELLANT

STIPULATION

It is hereby stipulated between the parties hereto that until the termination of the restraining order entered by the United States Court of Appeals for the First Circuit on October 29, 1971, no representatives of the United States shall seek to obtain documents relating to the so-called "Pentagon Papers" within the District of Massachusetts for their own examination or for the use of a grand jury by the force or use of a subpoena.

———,
*Counsel for Appellants.*

———,
*Counsel for Appellees.*

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[U.S. Court of Appeals for the First Circuit, No. 71–1331; No. 71–1332]

UNITED STATES OF AMERICA v. JOHN DOE, MIKE GRAVEL, UNITED STATES SENATOR, INTERVENOR, APPELLANT; UNITED STATES OF AMERICA, v. JOHN DOE, MIKE GRAVEL, U.S. SENATOR, INTERVENOR, APPELLANT

ORDER OF COURT

It is ordered that appellant's request that the motion for order to show cause and imposition of court sanctions be withdrawn be, and the same hereby is, allowed.

By the Court:

DANA H. GALLUP,
*Clerk.*

[cc: Messrs. Fishman, Reid and Nissen.]

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[U.S. Court of Appeals for the First Circuit, No. 71–1335]

UNITED STATES OF AMERICA, v. JOHN DOE

ORDER OF COURT

On motion of the government,

It is ordered that the brief filed on behalf of Leonard S. Rodberg as purported appellee may be received as and only as brief amicus curiae.

By the Court:

DANA H. GALLUP,
*Clerk.*

[U.S. Court of Appeals for the First Circuit, No. 71-1335]

UNITED STATES OF AMERICA, APELLANT v. JOHN DOE

In the matter of a grand jury subpoena served upon Leonard Rodberg.

Motion for reconsideration of Court's order allowing brief of witness-appellee, Dr. Leonard Rodberg, to be received only as a brief amicus curiae.

Witness-Appellee, Leonard S. Rodberg, by his attorneys, hereby moves this Court for Reconsideration of this Court's Order entered November 9, 1971, which allowed Dr. Rodberg's brief to be received as and only as a brief amicus curiae. In view of the fact that the Government's appeal affects the rights of the Witness-Appelle, Dr. Rodberg, he respectfully asks this Court to enter an order accepting his brief as that of a party-appellee. Dr. Rodberg waives his right to participate in oral argument unless this Court should desire to hear from his attorney. This relief is necessary in order that Dr. Rodberg may have standing before this Court and to pursue further relief before this Court and by further appeal.

Respectfully submitted,

DORIS PETERSON,
JAMES REIF,
MORTON STAVIS,
PETER WEIS,
Attorneys for Leonard Rodberg.

Motion denied.

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[U.S. Court of Appeals for the First Circuit, No. 71-1335]

UNITED STATES OF AMERICA, APPELLANT, V. JOHN DOE

ORDER OF COURT

Upon motion,

It is ordered that motion for reconsideration of court's order allowing brief of witness-appellee, Dr. Leonard Rodberg, to be received only as a brief amicus curiae be, and the same hereby is, denied.

By the Court:

DANA H. GALLUP,
*Clerk.*

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[From the Washington Post, Nov. 17, 1971]

RACE "QUOTA" IN MILITARY DOCUMENTED

(By George C. Wilson)

The Black Caucus of the House of Representatives released secret papers yesterday which document for the first time the official discussions that shaped the policy of restricting the number of black GIs sent to Iceland.

Caucus co-chairman Shirley Chisholm (D-N.Y.) said the secret material shows that "racism has become institutionalized at all levels of the military."

Rep. Ronald V. Dellums (D-Calif.), the other co-chairman, said the caucus has heard that the governments of West Germany, Greece and Turkey demand the same kind of restrictive assignment procedures for black servicemen. Dellums added that the caucus had not obtained the policy paper it is seeking to document the charge.

Defense Secretary Melvin R. Laird, when newsmen asked him about the alleged quota system for Iceland, said he had not had a chance to study the documents, thus declined to comment.

About 3,000 servicemen are stationed in Iceland, the Pentagon said last night, but the number of blacks was not immediately ascertainable. Leave policies in Iceland long have been restrictive for both blacks and whites in hopes of avoiding unpleasant incidents between servicemen and the Icelandic population.

In the Middle East, American commanders in the past have forbidden Jewish officers and men from going on leave in Arab countries for fear of provoking incidents. The political climate in the host country has traditionally influenced Pentagon personnel policies.

The caucus released a letter, classified secret, and two memos classified confidential. The communications indicate that:

Iceland before 1961 objected to any American black servicemen being assigned there, but relented to allow a token number.

The State and Defense Departments decided to clamp a lid of secrecy on the quota system for Iceland.

The Icelandic government said it would not contradict U.S. government assertions that "there are no racial or other restrictions" covering the assignment of servicemen to Iceland.

William C. Burdett, then acting deputy assistant secretary for European affairs, in the "secret" letter dated Aug. 11, 1961, said the Icelandic government had changed its position from no black servicemen allowed in Iceland to "no objections to 'three or four' colored servicemen in the Defense Force . . ."

The same Burdett letter said the following about the Icelandic government's position on public statements about this quota system: "If there are congressional or other inquiries to which the (State) Department must reply, the Icelandic government will not object to a statement to the effect that because of the small population and other special circumstances existing in Iceland, members of the Iceland Defense Command are especially picked, but there are no racial or other restrictions and, in fact, Americans of all races are currently serving with the command in Iceland."

A memo dated Feb. 17, 1969, and signed by Navy Capt. C. B. Stafford said the Icelandic government's ban on blacks "was not part of the bases agreement" but apparently was "a verbal agreement" between Iceland and the State Department.

Stafford's memo also said that former Navy Secretary Fred Korth in June, 1963, ordered that "two married Negro personnel" be sent to Iceland after inquiries by the President's Committee on Equal Opportunity in the Armed Services and findings of discriminatory practices by Rep. Charles C. Diggs Jr. (D.-Mich.), now a member of the Black Caucus.

"The State Department had effected an agreement in 1961 to permit the assignment of 'three or four' Negro servicemen to Iceland," Stafford said. "This number was expanded in 1965 to 15-20 and is currently 39."

Apparently, that increase in numbers was considered large enough to put Iceland out of the special category, because Stafford wrote that race "is not an assignment factor."

Stafford stated in his memo to the executive assistant and naval aide to the assistant secretary of the Navy for manpower and reserve affairs that "with the rise of black power, we are being persuaded to withdraw from a policy which was arrived at after a great deal of effort."

"Some Negro personnel have had good experiences during assignment to Iceland," Stafford said, "and we appear to be making general progress. The subject of assignment of Negro personnel only exacerbates problems associated with the bases' agreement in Iceland. Official communications relative to this subject are classified secret and above."

The third document released by the caucus was a memo for the Bureau of Naval Personnel by Lt. A. E. Norton dated Sept. 9, 1970. Norton said "the source of the guidance" for keeping the number of blacks in Iceland at a "low limit" were two U.S. Navy memos dated Sept. 9 and 10, 1969.

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[In the U.S. District Court, Central District of California, Misc. No. 1821 (WF)]

MEMORANDUM OPINION AND ORDER

(In the matter of: Anthony Russo, Jr. Witnesses Before the Grand Jury)

The issue presented by this proceeding is whether the court has the power to purge a grand jury witness of civil contempt of court upon his promise to testify upon the condition that he be furnished a transcript of his testimony.

The contempt proceedings involving the witness are reported in *Anthony Russo, Jr. v. United States,* —— F.2d —— (No. 71-2046, 9th Cir. August 17, 1971). In summary:

(1) The government began an investigation and presented evidence before a grand jury of this district in regard to possible violations of Title 18 of the United States Code.

(2) As a result of those investigations, Daniel Ellsberg was indicated relative to documents pertaining to the involvement of the United States in Southeast Asia, which documents have been referred to as the Pentagon Papers. *See New York Times Co. v. United States,* 403 U.S. 713 (1971).

(3) On June 23, 1971, Anthony Russo, Jr. was subpoenaed to appear and testify before the grand jury. He refused, claiming the privilege against self-incrimination. The government then filed an application with the court to grant him immunity pursuant to 18 U.S.C. § 2514.

(4) The court granted immunity, but Mr. Russo nevertheless refused to testify. He was then brought before the court and ordered to answer the questions the jury had asked. When he refused, the court adjudged him in civil contempt, and committed him to the custody of the Attorney Ceneral until such time as he purged himself of that contempt.

(5) The order of contempt was affirmed by the Court of Appeals for the Ninth Circuit on August 17, 1971. *Russo v. United States, supra.* He was then committed to custody.

(6) On October 1, 1971, Mr. Russo filed a motion for an order (a) to require the government to record and transcribe all matters occurring before the grand jury while he was before it; (b) to require the government to furnish him with a copy of the transcript of his testimony; and (c) to prohibit the government from taking any action against him on account of any disclosures the witness may make regarding any matters which may occur in his presence before the grand jury.

(7) At the conclusion of the hearing, the court ordered that conditioned upon the government's furnishing Mr. Russo with a copy of his testimony, he will have purged himself of contempt of court if he appeared before the grand jury on October 18, 1971, and answered all questions put to him.

(8) On October 18, 1971, the witness appeared before the grand jury ready to answer questions. However, the attorney for the Department of Justice informed him that the government would not furnish him with a transcript of his testimony.

(9) The parties then appeared before the court and the government moved the court to vacate the condition that a copy of the transcript of the witness' testimony be furnished to him.

The government's request is in effect a motion for a finding that the witness has not purged himself of a civil contempt of court. The motion is denied and the court finds that Mr. Russo has purged himself.

The motion raises two questions. The first is the power and propriety of this court to require that the testimony of Mr. Russo be recorded and transcribed. The second is the power to purge the witness of civil contempt of court by accepting his promise to testify if he is furnished a transcript of his testimony.

In regard to the first question, Rule 6(d) of the Federal Rules of Criminal Procedure states that "for the purpose of taking evidence, a stenographer or operator of a recording device may be present while the grand jury is in session", except while the jury is deliberating or voting. That rule along with Rule 6(e), relating to disclosure of matters occurring before the grand jury, unquestionably empower this court to require all or any part of grand jury proceedings to be recorded and transcribed, with the exception of jury

deliberations and voting. *See United States* v. *Thoresen*, 428 F. 2d 654 (9th Cir. 1970); *Herzog v. United States*, 226 F. 2d 561, 566 (9th Cir. 1955), *cert. denied*, 352 U.S. 844 (1956).

The rule in the Ninth Circuit is that the recording or transcribing of grand jury testimony is permissible, not mandatory. *United States* v. *Thoresen, supra*; *Loux* v. *United States*, 389 F.2d 911, 916(1968). Because the testimony before a grand jury may have a substantial effect upon the rights and interests of those who appear before it and those indicated by it, this rule has come under heavy attack from many courts and commentators who contend that the recording of grand jury proceedings should be made mandatory. *See, e.g.*, ABA Special Committee on Federal Rules of Procedure, 38 F.R.D. 95, 106; 8 J. Moore, *Federal Practice* ¶6.02[2] at 11 (2nd ed. 1970); *United States* v. *Gramolini*, 301 F. Supp. 39 (D.R.I. 1969). While no circuit has yet gone this far, several have held that the better procedure is to record and transcribe grand jury testimony. *United States v. Aloisio*, 440 F.2d 705 708 (7th Cir. 1971) (appeal pending); *United States v. Hensley*, 374 F.2d 341, 352 (6th Cir. 1967), *cert. denied*, 388 U.S. 923, *reh. denied*, 389 U.S. 891; *United States v. Cianchetti*, 315 F.2d 584, 591 (2nd Cir. 1963). This circuit recently observed.

"Where a defendant, anticipating future grand jury proceedings involving himself, gives notice in advance that he will seek a transcript of the proceedings if an indictment is returned and offers to pay the expense of having a reporter in attendance or shows inability to pay, a sound exercise of discretion would ordinarily call for the granting of a motion that a reporter be in attendance." *United States* v. *Thoresen, supra* at 666.

Although *Thoresen* referred to a request by a "defendant" that the grand jury proceedings be recorded, the holding cannot be limited in that regard. In that case, the first indictment returned against the defendants was dismissed when the statute upon which a portion of the indictment was based was held unconstitutional by the Supreme Court. Anticipating further grand jury proceedings, the defendants moved the court for an order compelling the presence of a court reporter at any subsequent grand jury proceedings involving them. The district court's denial of this motion prompted the above-quoted comment in the circuit court.

The defendants in *Thoresen*, therefore, were in the unique situation of being substantially certain that they would be the subject of future grand jury proceedings and that they would be indicted. It was in this sense that the circuit court referred to them as "defendants". In the instant case, Mr. Russo is not a defendant; indeed, he had been granted immunity. Nevertheless, his activities and those of his associates, are under scrutiny by the grand jury. It is impossible at this point in the proceedings to be certain what Mr. Russo's testimony may reveal, what further information this grand jury may discover, or what effect these proceedings may ultimately have upon the rights and interests of Mr. Russo. It would be folly to assume that his substantial rights may not be jeopardized by a subsequent turn of events. The grand jury in question is investigating a wide range of activity, and its inquiries are being coordinated with those of other grand juries around the country. The record suggests that the government has undertaken a very broad investigation without knowing how long it may extend. It is essential, therefore, that the record of the jury be preserved. For these reasons, this court holds that Mr. Russo has as much interest in a recording of his grand jury testimony as did the defendants in *Thoresen*. Although Mr. Russo has not offered to pay the expense of having a reporter in attendance, or to pay for the transcript, the government has not made his ability to pay an issue. If it subsequently becomes as issue, the matter can be resolved in appropriate proceedings.

Therefore, Mr. Russo's motion that a reporter be present when he testifies is entirely proper, and this court hereby reaffirms its prior order granting that motion. Since the government states that it intends to have a reporter present in any case, this order certainly places no additional burden on it.

The government contends that providing a witness with a transcript of his testimony will invade the secrecy of grand jury proceedings and diminish the effectiveness of the grand jury as an institution. In order to assess this argument, it is necessary to examine the history of the grand jury and its traditions of secrecy.

The institution of the grand jury is deeply rooted in English history. Many authorities regard the Assize of Clarendon, issued by Henry II in 1166, as the origin of the modern criminal grand jury. *See, e.g.*, 1 Holdsworth, *A History of English Law* 312–27 (6th ed. 1938); 1 Stephen, *A History of the Criminal Law of England* 184–86, 250–58 (1883). That decree provided for a body of twelve men in each county, to be summoned by the Crown, whose function was to report to the King's officials persons who, according to public knowledge, were suspected of crimes. At its inception, therefore, the grand jury functioned solely to augment the centralized power of the Crown by acting as public prosecutor to ferret out crime in the counties.

As the grand jury became an established institution, it gradually developed independence of action from the Crown. This was accomplished by enclosing its proceedings in a veil of secrecy which the Crown was unable to penetrate. The body adopted the practice of hearing witnesses in private, rather than in open court. Representatives of the Crown were not permitted in the room while the jury examined the witnesses and deliberated. Simultaneously, the custom of the Crown's judges to examine the jurors on their findings was discontinued. *See* Edwards, *The Grand Jury* (1906). The jurors themselves swore on oath of secrecy which contained no reservation in favor of the government. They were enjoined "the king's counsel, your fellows, and your own, you shall keep secret". 8 Wigmore, *Evidence* § 2360, at 728 (McNaughton rev. 1961).

The true independence of the grand jury, made possible by the institution of secrecy, was realized in 1681 in the *Trial of Stephen College*, 8 How. St. Tr. 549, 550 (1681), and the *Earl of Shaftesbury's Trial*, 8 How. St. Tr. 759, 771–74 (1681). Each of these men was accused by the Crown of high treason. At the insistence of the King's counsel, the grand juries were required to hear the witnesses in open court. After doing so, the jury in each case demanded and was granted the opportunity to examine the witnesses again in private and to deliberate in private. In each case the jury then refused to indict. Edwards, *supra* at 28–30. These two cases are celebrated as establishing the grand jury as a bulwark against the oppression and despotism of the Crown.

Thus, it is important to note that the common law concept of grand jury secrecy developed from a need to protect the jurors and the accused from the tyranny of the Crown. Secrecy insulated the jurors from the pressures of the Crown and permitted the grand jury to guard the people against the oppressive power of autocratic government.

The grand jury was brought to this country without significant change. The experience under British rule instilled in the colonists a healthy distrust of the power of centralized government. Consequently, they provided in the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury". This provision was felt necessary to secure the liberties of the citizens against arbitrary encroachment by the government. *Ex parte Bain*, 121 U.S. 1, 12 (1887); *Hurtado v. California*, 110 U.S. 516, 538–58 (1884) (dissenting opinion). Here, too, secrecy was found necessary to this function. The most celebrated example of grand jury independence in this country is the case of *Peter Zenger* in 1734. In that case, two New York grand juries, resisting heavy pressure by the colonial governor, refused to return an indictment of criminal libel for an attack upon the colonial governor. Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590, 590–91 (1961).

Over the years, as fear of the oppressive power of the government has subsided, the government prosecutor has regained substantial influence over the grand jury and, consequently, that institution has lost much of its former independence. *See* 8 J. Moore, *Federal Practice* ¶6.02[1]. The grand jury now relies upon the prosecutor to initiate and prepare criminal cases and investigations which come before it. The government attorney is present while the jury hears testimony; he calls and questions the witnesses and he draws the indictment. The only remnant of secrecy with respect to the government which adheres today is the practice of conducting the actual deliberations and voting of the jury in private. However, the prosecutor's influence may be felt even then. *United States v. Gramolini, supra* at 41.

In addition to permitting the grand jury a measure of independence, the institution of grand jury secrecy serves other purposes which were propounded at least as early as the *Earl of Shaftesbury's Trial, supra*, in 1681. See 8 Wigmore, *Evidence* § 2360, at 729. Formulated at a time when the grand jury was struggling to free itself from domination by the Crown, one may speculate whether these justifications were designed to obscure the real purpose of secrecy. Whatever may have been their original motivation, the following justifications for grand jury secrecy are now generally recognized by the courts:

(1) The grand jurors themselves are to be free from the apprehension that their opinions and votes may be subsequently disclosed by compulsion.

(2) The complainants and the witnesses summoned are to be free from the apprehension that their testimony may be subsequently disclosed by compulsion, and this in order that the state may secure willing witnesses.

(3) The guilty accused is not to be provided with such clues as will enable him to flee from arrest or to suborn false testimony or tamper with witnesses.

(4) The innocent accused, who is charged by complaint before the jury but is exonerated by their refusal to indict, is entitled to be protected from the compulsory disclosure of the fact that he has been groundlessly accused. 8 Wigmore, Evidence § 2360, at 734–35. *See also United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958).

The question then is the extent to which providing a witness with a transcript of his own grand jury testimony would be inconsistent with valid reasons for secrecy. In approaching this question, it must be remembered that the policy of grand jury secrecy should be maintained to the full extent necessary to fulfill the ends of justice, and no further. *Atwell v. United States*, 162 F. 97, 100 (4th Cir. 1908).

Unlike the jurors themselves, witnesses before grand juries were not sworn to secrecy at common law, but were bound to refrain

from disclosure. *Regina v. Hughes* 1 Car. & K. 519, 174 Eng. Rep. 919 (N.P. 1844); 1 J. Chitty, *The Criminal Law* 317 (5th Am. ed. 1847). The rule in this country is not uniform. In 1946, when the Federal Rules of Criminal Procedure were adopted, only two states, Missouri and Texas, required by statute an oath of secrecy of witnesses. Several states required such an oath as a matter of practice, while still others imposed no obligation of secrecy upon witnesses. *Compare People v. Naughton*, 38 How. Prac. 430 (N.Y. 1870) and *State v. Fish*, 90 N.J.L. 17, 100 A. 181 (1917) *rev'd on other grounds*, 91 N.J.L. 228, 102 A. 378 (no obligation of secrecy), with *State v. Kemp*, 124 Conn. 639, 1 A.2d 761 (1938) (requiring oath of secrecy). In the federal courts, no act of Congress imposed an obligation of secrecy on grand jury witnesses and the majority of districts required no oath of secrecy. However, in approximately 33 of the 85 district courts at that time witnesses were required to take such an oath. *See* Federal Rules of Criminal Procedure, Second Preliminary Draft, Note to Rule 6 (1944); *see also Goodman v. United States*, 108 F.2d 516 (9th Cir. 1939).

The Advisory Committee to the Supreme Court, which drafted the Federal Rules of Criminal Procedure, considered the justifications for imposing secrecy upon grand jury witnesses and determined that such secrecy was not necessary. As adopted in 1946, Rule 6(e) read in pertinent part:

"(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The Committee Notes to Rule 6(e) state:

"2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

Witnesses before all federal grand juries, therefore, have been free since 1946 to disclose what transpired during their presence in the grand jury room. *See In the Matter of Petition for Disclosure of Evidence before October, 1959 Grand Jury*, 184 F. Supp. 38 (E.D.Va. 1960); *In the Matter of Hearings before Committee on Banking and Currency of the United States Senate*, 19 F.R.D. 410 (N.D.Ill. 1956), *rev'd on other grounds*, 245 F.2d 667 (7th Cir. 1957). *But see United States* v. *Smyth*, 104 F. Supp. 279, 280 n.5 (N.D. Cal. 1952); *United States v. Owen*, 11 F.R.D. 371, 373 (W.D.Mo. 1951).

There is no evidence that this breach of secrecy has diminished the effectiveness of the grand jury system or adversely affected the ability of the government to investigate crime and bring offenders to justice. Rule 6(e) has been reexamined as recently as 1966. In that year the rule was amended by adding "the operator of a recording device" and "any typist who transcribes recorded testimony" to the list of persons bound by the obligation of secrecy. The fact that it was not felt necessary so to bind witnesses, after twenty years' experience without such an obligation, is further testimony to the success of the rule.

The absence of criticism of Rule 6(e) is easily explained. An examination of the justifications for the policy of grand jury secrecy demonstrates that requiring secrecy of witnesses would serve no purpose. Of the justifications hereinbefore quoted, the first is inapposite. Permitting a witness to disclose his testimony does not interfere with the jurors' ability to deliberate and vote in secrecy. The second justification, that secrecy frees the witness from the apprehension that his testimony may be disclosed and encourages full disclosure by the witness, is most important. Professor Wigmore contends that the nondisclosure of a witness' testimony is a privilege of the witness himself. 8 Wigmore, *Evidence* § 2362. The privilege is not the grand juror's "for he is merely an indifferent mouthpiece of the disclosure" nor is it the government's, for "the state's interest is merely the motive for constituting the privilege". "[T]he *privilege*", he concludes, "must therefore be *that of the witness*, and rests upon his consent." Wigmore, *supra* at 736. Rule 6(e) is entirely consistent with this position. It permits the witness—and only the witness—to disclose the content of his testimony, at least until an indictment has issued or justice otherwise requires disclosure.

The third justification is that secrecy will prevent the guilty accused from fleeing before an indictment has issued, suborning false testimony or tampering with witnesses. Persuasive though this argument may initially appear, it is of little moment within the framework of the issues presented in this proceeding. As a witness may disclose all he knows anyway, furnishing him with an accurate transcript of his testimony cannot possibly affect the justification. The last justification is perhaps hardest to dispel, for the protection of the innocent accused is the cornerstone of our system of criminal justice. However, this court must infer from the absence of criticism of Rule 6(e) over its twenty-five year history that the innocent accused has not suffered under this rule. In large measure, this is undoubtedly attributable to the effectiveness of the government's investigatory process and to the tremendous influence the government prosecutor exerts over the grand jury. In recent history, federal grand juries have seldom, if ever, refused to indict.

A witness before a grand jury, then, is not presently bound to secrecy in any regard. This court can conceive of no reason why furnishing a witness a written transcript of his testimony should interfere with the valid functions of the grand jury any more than does the existing practice.

The provision of a transcript does not weigh differently on the justifications for secrecy than the present rule. In addition, providing a transcript will further the interests of justice and benefit the grand jury and the witness. As the Advisory Committee noted, every witness is entitled to relate the proceedings to his attorney. Indeed, this is essential to safeguard the witness' rights and interests. A written transcript will insure that the attorney is provided an accurate record of the proceedings. Further, the existence of a written transcript would minimize the possibility of the witness' publicizing false information regarding the grand jury proceedings, a possibility which bothered government counsel in this case.

In addition, a review of a written transcript would give the witness and his attorney or associate an opportunity to correct errors in the transcription or inadvertent mistakes in the testimony itself. Any attorney who has ever undertaken the laborious process of deposing witnesses knows how errors and mistakes creep into the reporter's transcript. Any trial judge who has had to determine motions to correct transcripts knows that mistakes are made and how vitally important it is that they be corrected immediately when the testimony is still fresh in the minds of the court, counsel and witnesses. A witness who has been granted immunity is still subject to perjury, and in such a prosecution willingness to correct a misstatement is relevant to the issue of intent. *United States* v. *Lococo*, — F.2d — n. 2( No. 26, 336, 9th Cir. Sept. 27, 1971). The need of a witness for the transcript of his testimony before a grand jury, therefore, is real and founded upon a pragmatic regard for his protection. In short, providing the witness with a written transcript shortly after he testifies will insure an accurate record of the proceedings and will maximize the usefulness of the witness' testimony.

It is important to note that providing a witness a transcript does not force him to divulge the contents of his testimony. Under existing practice, the witness may voluntarily disclose the substance of his testimony to whomever he chooses—his attorney, an associate, the person under investigation, or the news media. On the other hand, he need make no such disclosure if he so prefers. The courts will not require such disclosure absent a showing of "compelling necessity". *Arlington Glass Co.* v. *Pittsburgh Plate Glass Company*, 24 F.R.D. 50, 52 (N.D. Ill. 1959). The availability of a transcript does not affect these options. The witness is free to keep the transcript confidential or reveal it.

It is the conclusion of this court, therefore, that furnishing a grand jury witness a transcript of his testimony shortly after his appearance is not inconsistent with valid reasons for grand jury secrecy and will not diminish the effectiveness of the grand jury system or interfere with governmental efforts to investigate crime.

The government next contends that it is improper for this court to order that a transcript be provided Mr. Russo because the disclosure is not "preliminarily to or in connection with a judicial proceeding," as provided in Rule 6(e). The government has misconstrued the order of the court. The court has not ordered the government to furnish the witness a transcript. The order under consideration merely purged Mr. Russo of civil contempt. Therefore, it is not necessary in the context of this case to determine whether a grand jury witness is involved in a "judicial proceeding."

The government further argues that a grand jury witness must show a "particularized need" to obtain a transcript. The "particularized need" test was formulated by the Supreme Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). In that case the government brought civil suit following a federal grand jury investigation of possible criminal violations of the antitrust laws in which no indictment was returned. The trail court granted a motion by the company for discovery of the entire grand jury transcript. The Supreme Court reversed, holding that the company had not shown sufficient "compelling necessity" or "particularized need" to overcome the "indispensable secrecy of grand jury proceedings." 356 U.S. at 682.

The Court relied heavily upon one justification of the rule of secrecy: "[T]o encourage all witnesses to step forward and testify freely without fear of retaliation." 356 U.S. at 682. As hereinbefore discussed providing a witness a transcript of his own testimony is not inconsistent with this policy. Nor is it inconsistent with other justifications there recognized by the Court. *See United States* v. *Procter & Gamble Co.*, 356 U.S. at 681 n.6. Accordingly, this court finds that a witness need make no showing of "compelling necessity" or "particularized

need" to be entitled to a written transcript of his testimony. He must show only that his testimony was recorded and a transcript can be made.

This position is not inconsistent with Rule 16(a)(3) of the Federal Rules of Criminal Procedure. Under that rule, which went into effect July 1, 1966, a district court "[u]pon motion of a defendant . . . may . . . permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury". Although this rule vests some discretion in the court whether to permit such discovery, it has generally been held that the defendant is entitled as a matter of right to a copy of his own testimony before the grand jury, unless the government affirmatively establishes a substantial reason why it should be withheld. *United States v. Manetti*, 323 F. Supp. 683 (D. Del. 1971); *United States v. Projansky*, 44 F.R.D. 550, 558 (S.D. N.Y. 1968); 8 J. Moore, *Federal Practice* § 16.05[2]; *see also United States v. Cook*, 432 F.2d 1093 (7th Cir. 1970), *Cert. denied*, 401 U.S. 996 (1971).

It cannot be doubted that this court has the power both to hold a witness in contempt for refusing to testify before a grand jury and to purge the witness of contempt when it is satisfied that the dignity of the Court has been restored. The grand jury is subject to substantial supervision and control by the court. As the Supreme Court observed in *Brown v. United States*, 359 U.S. 41, 49 (1959):

"A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so."

Congress has not made refusal to testify a specific offense. Refusal to testify is an affront to the court, and it is for the court to determine the punishment and the cure. The power to punish for contempt is inherent in all courts. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1873). Contempt is punishable because of the necessity of maintaining respect toward the court. The power to punish for contempt is exercised to vindicate the court's dignity for disrespect shown to it or to compel the performance of an order. *See Penfield Co.* v. *Securities & Exchange Commission*, 330 U.S. 585, 593 (1947) *reh. denied*, 331 U.S. 865. The very nature of contempt permits the court the broadest discretion to determine the circumstances in which the interests of the court and the public have been disregarded and to determine what conduct by the condemnor is required to vindicate those interests. As stated by the Supreme Court in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949): "We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief. They may entail the doing of a variety of acts . . . ." *See also Penfield Co.* v. *Securities & Exchange Commission, supra; Gompers v. Bucks S. & R. Co.*, 221 U.S. 418 (1911); *Oriel v. Russell*, 278 U.S. 358, 364–65 (1929).

In the instant case, Mr. Russo was subpoenaed by the court to testify before the grand jury. He refused to testify and was found in civil contempt for refusing to obey the order of court to answer questions. The court's order was that Mr. Russo would be held in custody until such time as he purged himself of contempt. This court now holds that Mr. Russo has purged himself of that contempt by his promise to testify before the grand jury conditioned upon being furnished a written transcript of his testimony within thirty-six hours of his appearance. He is held immune from all penalties by reason of refusing to testify as a witness before a grand jury unless the government agrees that it will furnish him a copy of the transcript of his testimony.

It is further ordered that the clerk this date shall serve copies of this memorandum opinion and order by United States mail upon the attorneys for the parties appearing in this matter.

Dated this 17th day of November, 1971.

WARREN J. FERGUSON,
*U. S. District Judge.*

## CAPTAIN COOK JAYCEES CONDEMN U.N. DECISION ON NATIONALIST CHINA

### HON. NICK BEGICH

OF ALASKA

IN THE HOUSE OF REPRESENTATIVES

*Friday, November 19, 1971*

Mr. BEGICH. Mr. Speaker, the recent action taken by the United Nations regarding the Government of Nationalist China has caused much controversy. Many people have called for reevaluating our role in the United Nations and of the United Nations role in the world.

For us to judge this action properly, it is important that we consider all points of view.

In a resolution I received recently, the Captain Cook Jaycees have expressed their beliefs on this subject. I believe it is important that their views be expressed and examined. I am inserting a copy of this resolution for my colleagues' inspection:

CAPTAIN COOK JAYCEES—RESOLUTION

The Captain Cook JayCees—

Believing that all nations of the world should have a right to be represented at the United Nations, and

Believing that the Nationalist government, is in truth the legal representative of an independent country, therefore

Condemn the recent action of the United Nations General Assembly, with regard to the replacement of the Nationalist government, and

Hereby direct the secretary to forward this resolution to the Secretary General of the United Nations.

JAMES H. HISSONG,
*President.*

## NATIONAL BIBLE WEEK

SPEECH OF

### HON. LES ASPIN

OF WISCONSIN

IN THE HOUSE OF REPRESENTATIVES

*Thursday, November 18, 1971*

Mr. ASPIN. Mr. Speaker, as this week is National Bible Week, it is only fitting to take a few moments to reflect on the profound impact this book has had on all of us.

It has an unending wealth of historical information in the Old Testament and has a constantly fresh message in the New Testament. The Bible has been, and is, a fundamental part of our lives, and I think it is only fitting that we have a week to give special recognition to this great book.

## A PLAINTIVE LAMENT

### HON. LEE METCALF

OF MONTANA

IN THE SENATE OF THE UNITED STATES

*Monday, November 22, 1971*

Mr. METCALF. Mr. President, in all good humor I do not want to attempt to appropriate the mantle of our former colleague Gene McCarthy as poet laureate of the Senate. I do not even present the following as poetry. But it is a plaintive lament that we did not know our good fortune when Ezra Taft Benson was Secretary of Agriculture. Looking backwards to those days the farmers of America are nostalgic. Now that Hardin is leaving and Butz is the new champion there is no place to go but downhill. Therefore I present to the Senate a little rhyme singable too, that does not transgress upon Gene McCarthy's high calling but does voice the exasperation of the dirt farmer with the Nixon farm policy and with the men he chooses to administer it.

I ask unanimous consent that the rhyme be printed in the RECORD.

There being no objection, the rhyme was ordered to be printed in the RECORD, as follows:

EZ BENSON, WON'T YOU PLEASE COME HOME?

(To be sung to the tune of "Bill Bailey, Won't You Please Come Home?")

Won't you come back Ez Benson?
Won't you come home?
This crew is worse than you.
They jigger parity—call it prosperity,
But it's for the favored few.
Farmers are counted out,
Folks leave the farm,
Agribusiness even owns the squeal.
You were a saintly man
Alongside Nixon's flim flam artists.
Benson won't you please come, Ezra won't you please come,
Benson won't you please come home?

## MAN'S INHUMANITY TO MAN—HOW LONG?

### HON. WILLIAM J. SCHERLE

OF IOWA

IN THE HOUSE OF REPRESENTATIVES

*Friday, November 19, 1971*

Mr. SCHERLE. Mr. Speaker, a child asks: "Where is daddy?" A mother asks: "How is my son?" A wife asks: "Is my husband alive or dead?"

Communist North Vietnam is sadistically practicing spiritual and mental genocide on over 1,600 American prisoners of war and their families.

How long?

## REFORMERS GAIN THE UPPER HAND IN THE BIA

### HON. DONALD M. FRASER

OF MINNESOTA

IN THE HOUSE OF REPRESENTATIVES

*Friday, November 19, 1971*

Mr. FRASER. Mr. Speaker, during the past year a dispute has raged within the Bureau of Indian Affairs over the direction of agency policies. Young activists in the agency fought aggressively to give the Indian people a greater role in running BIA programs, while "old line" bureaucrats resisted these changes.

For a time it appeared as if the conservative bureaucrats had the upper hand. Indian groups throughout the country complained loudly that the forces of reaction within the Bureau were blocking efforts to implement the self-determination policies outlined in the President's July 1970 Indian message. President Nixon, himself, admitted recently that the BIA bureaucracy was in need of a "good shakeup."

Now it appears that the reformers have won out—at least for the time being. In the following Minneapolis Tribune article, Frank Wright explains the significance of recent development in the Bureau:

RISKY END RUN BY BRUCE PUTS ACTIVISTS BACK IN SADDLE AT BIA

(By Frank Wright)

WASHINGTON, D.C.—The young activists, aided by a daring bureaucratic end run by Commissioner Louis Bruce, are back in the saddle at the Bureau of Indian affairs (BIA).

They have emerged as the winners in a long and crucial struggle over the personnel shakeup demanded at the agency by President Nixon.

The decisive move came Wednesday when Bruce went to Reno, Nev., and told the annual convention of the National Congress of American Indians, the largest Indian organization in the country, that he was putting several of the activists into key posts in a BIA reorganization and was sidelining several of their more conservative opponents.

The thousand or more Indians at the convention loved it, but it was a risky thing for Bruce to do because he had purposely neglected to seek prior approval of the announcement from his superiors at the Interior Department.

He was acting on his own, a perilous thing for a subordinate government administrator to do.

Bruce's decision to wing it came slowly and in stages.

He had gone to work through channels after the President said in early October that he was dissatisfied with an entrenched bureaucracy that "feeds on itself, defends itself and fights for the status quo and does very little, in my opinion, for progress in the field."

Despite the President's insistence, however, Interior Department officials stalled and delayed, urging further study. They included such people as Undersecretary William Pecora; William Rogers, a deputy assistant secretary who often has dealt with the BIA for Interior Secretary Rogers Morton; Wilma Victor, Morton's special assistant for Indian affairs; and Harrison Loesch, assistant secretary for public land management. Aligned with them was John Crow, BIA deputy commissioner under Bruce.

Bruce, meanwhile, was being pressured by the activists, most of them Indians whom he had recruited more than a year ago to revive the BIA and institute the President's expressed policy of self-determination for the Indian.

With the President publicly on their side, with Indian militancy on the rise and with public awareness of the Indian's depressed plight increasing they felt Bruce should force a breakthrough. They had become increasingly frustrated and restive.

His attempt to go through channels hit a roadblock Nov. 12 when the Interior Department approved a new BIA structure that eliminated the job of associate commissioner. That has been the No. 3 post, and Bruce has planned to elevate to it one of the leading activists, Ernie Stevens, a Wisconsin Oneida who has been director of community services.

The new structure was proposed by Crow, who had been made deputy last summer by Morton and touched off a furor by downgrading several of the activists.

After Nov. 12 Bruce and the activists decided to make their end run as a last alternative.

They agreed to fill the posts in Crow's organizational scheme with their own choices, announce them as quickly as possible, get support from Indian country and hope that officials at the Interior Department would then be afraid to reverse them after the fact.

On Tuesday morning Bruce gave Crow a memorandum instructing him to do the paper work on 15 personnel changes. That afternoon he flew to Reno with Stevens and Alexander McNabb, a Micmac, director of operating services and another leading activist.

The next day Bruce told the convention that:

Stevens was now assistant commissioner for economic development, which includes a $40-a-million-a-year employment assistance program plus defense of tribal and water rights.

Stevens' former deputy and ally, Florie Kelanof, was promoted to assistant commissioner of community services, which includes welfare, housing and other projects.

McNabb was now assistant commissioner of engineering and construction, which includes an upgraded road-building and irrigation program.

His former deputy, Robert Gajdys, was now director of the office of Administrative Services, which oversees a contracting program under which the BIA arranges with tribes to operate many services previously provided by the government.

Harold Cox, who had been associate commissioner for administration, was downgraded to director of a new and small office of management systems.

William Freeman, former director of economic development, and Philip Acker, former head of the employment assistance program, were shunted off to a new Office of Planning. The activists had complained that Freeman was doing nothing to build up reservation economies and that Acker was using the employment assistance program to entice Indians off their land and into dead-end jobs—or no jobs—in the cities.

Calvin Bryce, who had been in charge of the contracting program, was being shipped to Phoenix, Ariz., to become deputy director of the BIA area office there. Activists claimed that he had obstructed tribal efforts in contracting.

Economic development would become top priority at the BIA. As a start, Morton was being urged to decentralize employment assistance by allowing tribes to set up their own job-training programs on the reservations instead of requiring all job-hunters to come to the cities.

Bruce was cheered. The newly elected president of the national congress, Leon Cook, endorsed the commissioner's actions and said he was moving in the right direction. Cook, a Minnesota Chippewa, had been one of the young BIA activists but quit recently because he felt Bruce lacked aggressiveness. Cook has taken a post in the Minneapolis school system.

Bruce returned to Washington Thursday, holding his breath.

Friday morning Morton, reportedly caught by surprise by Bruce's action, issued a terse statement. It endorsed what the commissioner had said about new initiatives in economic development and road construction. But it called the personnel changes "temporary" and said they would be reviewed with the commissioner "in the near future."

The near future apparently came rapidly.

Friday night Bruce called reporters to tell them he had been authorized by officials at the Interior Department to say that he was "very confident" his personnel actions would be approved and had been given "assurances of that."

The commissioner said he was "tickled to death."

## VOLUNTEER FIREMEN

### HON. J. CALEB BOGGS

OF DELAWARE

IN THE SENATE OF THE UNITED STATES

*Monday, November 22, 1971*

Mr. BOGGS. Mr. President, it has been my privilege upon occasion to draw attention to the fine job done by volunteer firemen throughout this country.

There are an estimated 1.8 million volunteer firemen in the United States, compared to only 200,000 paid firemen. The existence of volunteer fire companies guarantees many communities protection from fire and accident at little or no cost to the taxpayer.

We are very much indebted to volunteer firemen, who spend large amounts of their time at public service and who live with great inconvenience and even personal danger in order to serve their communities.

It has been my privilege this year to offer two pieces of legislation which I believe would benefit our volunteer fire companies. One was S. 2040, which would include volunteer firemen training under the provisions of the Vocational Education Act of 1963. This bill was accepted as an amendment to the Higher Education Act passed by the Senate earlier this year and is presently in conference with the House of Representatives.

Another bill, S. 2748, was introduced several weeks ago. It would provide a $50,000 death benefit for survivors of policemen, firemen and correction officers killed in the line of duty. This legislation, I believe, would make entrance to police work, correction work, and fire prevention work more attractive to many more young men.

Mr. President, there are more than 6,000 volunteer firemen in my State, and we are very proud of each of them. Recently, Mr. Phil Milford wrote a two-

part article in the Wilmington Morning News about our volunteer fire operation. I ask unanimous consent that these articles be printed in the RECORD.

There being no objection, the items were ordered to be printed in the RECORD, as follows:

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[From the Wilmington (Del.) Morning News, Nov. 16, 1971]

STATE'S VOLUNTEERS AMONG BEST—NO SLACK SEEN IN FIRE LINES HERE

(By Phil Milford)

Although there are indications that the volunteer fire fighter in America is on the way out, the ranks of Delaware's part-time fire force are growing with few signs of decline.

While State Fire Marshal William R. Favinger admits "a volunteer has got to be an oddball," there are more than 6,000 such fire fighters in the state—and they are increasing in both numbers and professionalism as the state, helped by federal monies, continues to support them.

It was not always so.

Within the past 20 years, Delaware has appointed its first full-time fire marshal, instituted a state fire prevention commission, hired six assistant fire marshals, created the office of fire protection engineer, and documented Fire Prevention Rules and Regulations that conform to the best fire prevention code available.

In addition, fire call-boards—actually emergency communications centers—have been set up in two of the state's three counties, and a third call-board is slowly being planned for Kent County. These radio networks provide instantaneous communications when a fire or accident occurs, with a minimum response time.

Earlier this year, a New York Times article explored the "fading role" of volunteer firemen faced with urban progress. In many of the nation's fast-growing suburbs, reporter Jon Nordheimer wrote, "Volunteer fire departments are becoming unworkable and paid firemen are increasingly picking up the slack."

Among the reasons given were the lessening numbers of men available during the day to answer alarms; the vanishing "social role" of the fire house; and the appearance of industrial and apartment complexes that demand advanced skill to fight fires.

Many of the objections to volunteer community service in time of fire and disaster are valid; but in Delaware at least, hiring full-time, paid fire fighters has not been the solution it has in other parts of America. In fact Wilmington, with its several hundred paid professionals, is still the only organization of its type. The rest are volunteer.

In a community such as Newark—a fast-growing urban complex—it is difficult to get enough men to respond to daytime alarms, according to Favinger, a volunteer fireman for 36 years. But the solution has been the "multiple response" alarm used in New Castle County, where several area companies respond to potentially large fires, thus not depending upon only one company's complement for manpower. In addition, Newark's Aetna Hose, Hook & Ladder Company uses woman ambulance drivers to fill the daytime gap.

As for the dwindling value of the fire house as a social center for Delawareans, one has to enter any fire house during the evening hours, or attend the average wedding reception, or join the throng at the annual Mother's Day Dinner, attend the annual Firemen's Convention or "go to Bingo" to see the enthusiasm and dedication of the men and women auxiliary members.

One volunteer recently compared activity at the fire house to that of church organizations and said some churches have the lesser numbers.

The charge that professionalism is lacking among volunteers may be valid in some areas, but not in Delaware. A deputy state fire marshal, pondering the relative value of paid and volunteer fire fighting forces, noted recently that the difference is great for one reason because the paid men are sitting next to the truck when the alarm sounds, and often have a shorter distance to travel, while the volunteer has to get to the fire house first, before he can get to the fire.

Notwithstanding that fact—a result primarily of the economical unfeasibility of paying everyone in surburban companies—Delaware men, once they arrive at the "fire grounds," are probably among the best trained anywhere.

The state fire school near Dover has been cited as among the finest facilities of its kind, and many of the courses it offers, ranging from basic firemanship to crash-rescue work, are brought to the individual's fire houses by the school's instructors, according to Louis J. Amabili, the director.

Delaware is "well along" compared to the rest of the country in volunteer fire fighting, Favinger said. He said that in some states, not only are the men ill trained, but sometimes require the owner of a burning property to be a regular subscriber to the company. "And if your dues aren't paid, the house burns," one fireman recalled recently.

"Delaware is one of the few states that has every mile covered by a fire company," Favinger said, and if the blaze requires more manpower, other companies cooperate and send whatever is needed.

A recent example of such cooperation for the public good was seen during floods that inundated much of Brandywine Hundred and made Chester, Pa., a temporary swamp.

James Roy, chief of the Cheswold Fire Company and member of the Kent County Volunteer Firemen's Association, said recently that several Kent County companies were asked to go north to help clean up and rescue. He said all the companies worked well together with no complaints—something he said might not be the case in other parts of the country where boundaries lines are often sacred.

In the fiscal year ending June 30, 1971, property in Delaware had a total value of more than $1,776,000,000, according to the annual report of the state Fire Prevention Commission. During that period, a total of $4,021,881 was paid by insurance companies for fire losses in recent years.

In the same period, there were 11,362 fire alarms sounded in Delaware, with 114,000 man-units spending 7,000 hours in service. In all, 24 people lost their lives due to fires in the state.

That the loss was not greater is because these highly trained men, most of whom would be termed "non professionals," donated their time and risked their lives for their fellow man.

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[From the Wilmington (Del.) Morning News, Nov. 18, 1971]

FAVINGER CITES NEED FOR STATEWIDE RADIO NET—MONEY IS FIREFIGHTERS' FOREMOST PROBLEM

(By Phil Milford)

With paid fire fighters in Wilmington and thousands of volunteers in other parts of the state, the public is protected against man's ancient two-faced friend and enemy as never before.

But although the apparent national trend toward all-paid firemen is not manifest to any great extent in Delaware, and most people will continue to receive protection from many dedicated volunteers, there are definite problems.

The foremost, of course, is money.

One of the major needs in Delaware is for a complete fire radio network in all three counties, according to State Fire Marshal William R. Favinger.

At present, both New Castle and Sussex Counties have "call boards," on the air 24 hours a day. Women handle the calls in Sussex. When someone needs fire equipment, they call the fire board, which immediately pushes the correct buttons to activate the necessary fire sirens in the county. Both boards transmit on the same frequency.

In Kent County, however, a citizen reporting a blaze may dial the number of a private home, a store, or a funeral parlor. Sometimes the call goes directly to the local firehouse. But there is no call board in the county—a situation called "antique" by one fire chief and "behind about 10 years" by a deputy fire marshal.

Hopefully, this dangerous situation, which sometimes necessitates several calls before the fire house door is opened, will be corrected soon, according to Chief James Roy of the Cheswold Fire Company.

Roy is chairman of the Kent County Fire Radio Committee, which Tuesday (Oct. 26) presented a proposal to the County Levy Court requesting $90,000 for the radio network's equipment. The court took the request (accompanied by several hours' presentation by firemen) under consideration, noting that the money must come from the General Assembly.

"We hope to get it pretty soon," Roy said, "but it may take 3 or 4 months."

Meanwhile, the old system prevails, with only Dover, highly urbanized and growing rapidly, having a central dispatcher. The Dover Fire Department, a volunteer group also known as the Robbins Hose Company, dispatches a hand full of companies in the area, but cannot handle all 19 companies in the county.

The money problem, too, limits Favinger's office, but he has extensive plans for the future.

The office of the State Fire Marshal has two basic functions—investigation and inspection. During the fiscal year ending June 30, 1971, for example, the office investigated hundreds of fires; 663 complaints; arrested 47 persons of whom 15 were convicted; apprehended 106 juveniles (responsible for most field fires, firemen says); and spent 211 hours in court. In addition, the 6 deputy fire marshals conducted 2,267 inspections of schools, businesses, hospitals, and other institutions and studied blueprints of 95 planned structures to determine fire safety requirements—a function now filled by the newly appointed fire protection engineer, Benjamin Roy Jr., formerly a deputy.

But the problems central to Favinger's organization occur, he says, because inspections take up too much of his deputies' time, who could better use their technical skill on investigation. Within the next 5 years Favinger would like to hire 9 inspectors to deal solely with examining structures. Unlike the present deputies, the inspectors would not carry guns or have police powers. This would leave deputy fire marshals free for other matters.

Another innovation necessary, but now impossible because of the money problem, is a full-time office in Delaware's most heavily populated area—New Castle County. At present, the office has a part-time staff, with the fire marshals often answering the phones.

With a staffed office, Favinger said, his deputies could spend more time answering complaints, conducting investigations of fires, talking to school and other citizen's groups, and enforcing such regulations as those dealing with explosives and fuel transport.

Favinger would also like to send his deputies, who live in various areas of the

state but who are subject to duty anywhere, to more national gatherings of fire marshals, where both training and exchange of ideas on fire fighting are available. "But we're limited by our budget," he said. Favinger also said that in the future he would like competitive examinations for fire marshal deputies to stress investigation more than the present generalities.

Besides the immediate need for a Kent County Fire Board, Favinger is working on various opportunities to obtain federal monies. He said present federal legislation under the Occupational Safety Act may provide dollars for his needs, but added that other funds are available, too.

The Federal Highway Safety Act recently provided money through the state for a vehicle rescue course administered by the State Fire School, directed by Louis J. Amabili of Hockessin. The school offers courses in fire fighting and was subsidized by Washington for an emergency care course for ambulance drivers which is among the first in the country, and a model for other states.

Favinger says there are four independent municipalities in Delaware that govern their own fire departments. But Wilmington, Newark, Dover, and Milford all work with his office and are included in state statistics. Favinger feels that Newark soon may have to pay at least some of their fire fighters—but many company representatives feel that it should be "all or none" due to the human tendency for volunteers to resent paid associates.

But on the whole, Delaware's volunteers are probably here to stay. In a recent survey by mail, more than a third of the 60 volunteer companies returned questionnaires that overwhelmingly rejected the possibility of paid members—at least in the near future.

The companies, composed of men from teen-age to over 60, listed an average age in the early 30's. Their numbers ranged from 25 to about 100, with membership mostly growing but at least remaining stable. Most of the companies were formed in the 1920's.

When asked if they see their roles as volunteers lessening or growing, all but 4 said they are growing. Two of the dissenters cited the lack of interest among service (something contradicted by others) and the negative effect caused by state regulations young people today in the fire—specifically the new licensing law for ambulance attendants.

When asked about a central dispatcher's importance, nearly all companies felt that response time and service to the public would be best served with a radio network. One Kent County company listed the lack of a central dispatcher as its major concern.

Among the gripes listed by the volunteers (questionnaires were sent to company chiefs or presidents) were difficulty in getting manpower in the daytime when needed; money; enlisting business-minded firemen; the misuse of ambulances as taxis; unenforced fire codes; inadequate water supplies; and faulty news media reports. One comment on improving volunteer firefighting in Delaware was that mandatory regular and advanced training should be given annually or semi-annually. Another company suggested that in light of dwindling response by citizens to annual fund drives, a "fire tax" may soon be necessary. One New Castle County chief noted that too much equipment is duplicated among companies, with no coordination as to type of apparatus in an area.

One downstate company responded that young people sometimes feel they are not wanted because of their color. The chief said he is now intentionally selecting people without regard to race, and notes that ingrown prejudices among white firemen are declining—and the more people in the community working together, the better the service, he suggests.

## NATIONAL BIBLE WEEK

### HON. NICK BEGICH

OF ALASKA

IN THE HOUSE OF REPRESENTATIVES

*Thursday, November 18, 1971*

Mr. BEGICH. Mr. Speaker, we are now at a point in time that the decisions we are making affect more and more people. This is a time of unprecedented social change where mores are continually changing. What was socially unacceptable yesterday may very well be a viable part of our society tomorrow. In dealing with these changes we must never lose sight of our moral and ethical background.

It is proper then, at this time, that we make an effort to consider and evaluate our religious beliefs. We must be sure that if we are going to deal with moral changes, we must fully understand our own spiritual feelings. For this reason, Gov. William A. Egan of Alaska has proclaimed the week of November 21, 1971, Bible Week.

I am inserting a copy of the Governor's proclamation for my colleagues' inspection.

PROCLAMATION—BIBLE WEEK

Our system of law and justice has been built upon the foundation of the Ten Commandments. Respect for the sacredness, worth, and dignity of the individual, an essential element in our system, is rooted in Biblical teachings.

It is imperative for modern man, confused and perplexed by rapid technological and social changes, to understand the roots of his moral and spiritual belief-system.

Therefore, I, William A. Egan, Governor of Alaska, do hereby proclaim the week of November 21 through 28, 1971, as Bible Week and urge people of all faiths to observe the week by reading the Scriptures and setting up a plan of regular examination of the Foundation Book of Judeo-Christian heritage.

Dated this fourth day of November, 1971.

## SECTION 503 OF MILITARY PROCUREMENT AUTHORIZATION

### HON. HARRY F. BYRD, JR.

OF VIRGINIA

IN THE SENATE OF THE UNITED STATES

*Monday, November 22, 1971*

Mr. BYRD of Virginia. Mr. President, the President now has signed into law the Military Procurement Authorization for 1972, which includes legislation to end the dependence of the United States upon Russia for the bulk of its chrome ore. This is section 503 of the authorization bill.

I believe that Congress, in voting on this question, analyzed the issue in terms of its significance to the security of this Nation.

Chrome is a vital U.S. defense material, essential for nuclear submarines, jet aircraft, and all stainless steel products.

Because of an executive order by President Johnson in 1967 resulting from a mandate from the United Nations, the United States has been prohibited from importing chrome from Rhodesia. Thus, having no chrome of our own, we have become dependent on Communist Russia for this vital defense material.

On September 23, the Senate of the United States decided to call a halt to such a ridiculous situation; and on November 10, the House of Representatives concurred. The House vote on the direct issue was a smashing 251 to 100.

It was not a regional vote or a party vote.

Analysing these two critical votes, we find that the proposal to remove the embargo on Rhodesian chrome received strong support from members of both political parties—and from Representatives or Senators from 46 of the 50 States.

Leading the list were California, Texas, Pennsylvania, Illinois, New York, Ohio and Michigan.

I ask unanimous consent that there be printed in the extensions of remarks a State-by-State breakdown of the number of Members of the House of Representatives who voted in favor of retaining section 503 of the military procurement bill on November 10.

There being no objection, the list was ordered to be printed in the RECORD, as follows:

California, 21; Texas, 19; Pennsylvania, 17; Illinois, 15; Ohio, 13; New York, 13; and Michigan, 11.

Florida, 9; Georgia, 9; North Carolina, 9; Virginia, 9; Indiana, 7; Missouri, 7; Alabama, 7; Louisiana, 6; and Tennessee, 6.

Kentucky, 5; Kansas, 5; Wisconsin, 5; South Carolina, 5; New Jersey, 4; Iowa, 4; Connecticut, 4; Minnesota, 4; and West Virginia, 3.

Oklahoma, 4; Maryland, 3; Mississippi, 3; Colorado, 3; New Mexico, 2; Nebraska, 2; Montana, 2; Arizona, 2; and Massachusetts, 2.

Idaho, 2; Oregon, 2; Arkansas, 1; South Dakota, 1; Nevada, 1; New Hampshire, 1; Washington, 1; Maine, 1; and North Dakota, 1.

## NEW FORCE IN TEXAS

### HON. J. J. PICKLE

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

*Friday, November 19, 1971*

Mr. PICKLE. Mr. Speaker, in a ringing, stinging speech to the Texas Women's Political Caucus Saturday in Texas, Liz Carpenter laid it on the line with a rallying cry of not just "register and vote" but "file and run."

It is a tight speech and sums up well a vibrant force growing in this country that will be recognized sooner or later—and if the Caucus has its way, it will be clearly sooner. They will be striving for more women delegates to the presidential conventions and more women candidates at all levels.

Mrs. Carpenter points out striving for full equality in politics and elsewhere does not necessitate any loss of femininity.

As she puts it:

The moonlight doesn't seem any dimmer, the candlelight doesn't flicker any less, the bubbles in the bubble bath don't burst any sooner, when your take-home pay is the same as your male counterpart.

She makes a plea for what she calls "peepul"—for dignity and femininity without being stifled under a cloud of protectionism. And she does so in no uncertain terms, praising the House for its passage of the women's rights amendment. Her words sting and bite and make one flinch occasionally—but they get an important point or two across.

The text of that speech follows:

THINKING WOMEN—THE NEW POLITICS IN TEXAS

We gather here today as the political parties begin organizing for the 1972 election. We gather here because we are determined that women have an equal voice in the party structures. We gather here because we are determined *this time* to run that gamut from Texas Precinct to National Convention to see that the two major political parties—(and others which emerge)—live up to their glowing words about party reform.

Larry O'Brien, Robert Dole, Gore Vidal—any others—here we come!

But it is no secret that this year while we talk of party politics and party issues, more and more Americans (and particularly young Americans) are being turned off by any party. They are saying, "A plague on both your houses." There are many who have lost faith in both major political parties because they do not believe these parties speak for the mass of American people or that they will live up to their proposed reforms.

Suddenly last summer a new political movement was born which will help them—the National Women's Political Caucus, composed of women from many political parties, old-line organizations, newly formed groups, and many women who are not a member of anything except the human race—almost.

All of us are moving the women's liberation movement into women's participation for human liberation, for better day care programs, better ecological laws, better education, abortion reform, equal opportunities for people of all color and all sex.

Today in Texas this movement takes hold at the grassroots. You will leave here after our workshops committed and equipped with the know-how to organize your towns and counties and be a vital force in placing women in positions of decision-making at every level which affects our lives:

—That means in Government, where our rallying cry in 1972 will not only be "register and vote", but "file and run". Yes, run for office—Delegate, Tax Assessor, the Legislature, Congress. And if you decide you aren't qualified, then support the qualified candidate who lets you know how she or he stands on the human issues. Ask yourself, does he listen to you, a woman voter, a woman with a family or a business or a job, as much as he listens to others? Does he give *you* equal time?

—That means in the corporation where we will no longer be the unwitting consumers of unimaginative male-run conglomerates that neither represent their major employees or their major consumers on their boards. Lyndon Johnson gave us Title 7 in the Civil Rights Act of 1964. Let's use it. Let's sue.

It means in Labor Unions where we are perfectly willing to trade that phoney mantle of protectionism for some equal pay and equal rights. It is high time that George Meany and the AFL–CIO stop dragging their feet and stalling the Senate on the Equal Rights Amendment. I don't know what has bothered George Meany all these years. Can it be that he is a male chauvinist plumber? Well, most of the labor forces are now wise to it. Well, Congress is getting wise to this. The House passed the Equal Rights Amendment this Fall with only 23 voting against it.

Now it's the Senate's turn. Before we go home today, I hope we will wire the leadership of the Senate and Senators Tower and Bentsen—that we want quick, prompt, overwhelming passage of a right that is long overdue.

So let every party chairman know, let every Governor and every candidate for Governor know now—that today in Texas, women are issuing a declaration of independence. We are tired of making the coffee, licking the stamps, and writing the checks.

We are tired of selling the tickets and being locked out of the ball park.

We mean to be in on the decisions.

So—if we seem a little pushy. If we seem a little noisy—it is because, Roy Orr and George Williford, we shout so you will hear us.

And we are going to be busy and organized and on hand May 6 in every precinct meeting in this state—not just to vote, my friends, but to run for delegate.

The 200th anniversary of our nation is almost here. We will no longer take second place to anyone. We care about this country; we care about this state; we care about our home towns—and we are no longer going to take second place to anyone.

We intend to "rip off" a piece of the political action for ourselves in 1972.

And let me tell you, from years of experience, this is where we will separate the men from the boys.

Those who count women in, can count on women.

Those who count women out, can't count on us at all. We are going to leave you behind at the ballot box nursing your boyhood insecurities.

This is not a battle cry for revenge. It is a rallying cry for simple justice. Any male candidate worth electing knows this. And any political candidate today with any pulse-feeling capabilities at all knows there is a new momentum, there is new action, something has happened to women. As Sarah Hughes put it, "We're tired of studying our status. We have graduated."

"The voice of the people may be soprano," Governor Preston Smith told the Status of Women Commission last year.

And he's right. But the voice of power is bass—and it has been getting "base" and "baser."

We are no longer going to be stuck with the ridiculous statistics. More than half of the voting power of this country—53 percent—is women. But only 12 women are in Congress. None on the Cabinet. None on the Supreme Court.

At the last national conventions, only 13 percent of the delegates to the Democratic convention were women. Only 17 percent of the delegates to the Republican convention were women.

And what about Texas?

Texas sent 120 delegates to the Democratic National Convention. Thirteen were women. Thanks for nothing gentlemen.

The Republicans did a little better and this hurts me as a psalm-singing Democrat. They sent 56 delegates to the convention; 15 were women.

The Texas Senate and House have 181 members. Only two are women and anyone who watches it knows. Barbara Jordan and Frances Farenthold are lonely. Let's send them some company.

Every intelligent person, man or woman, in this country knows there are millions of working women being exploited.

You know it when a woman professor makes $7,000 and a man in the same job makes $9,000. You know it when a woman scientist earns $10,000 a year and her male counterpart takes home $13,000.

You know it when a restaurant owner hires waitresses until 6 P.M. just when the good tips start. He smugly argues it's not safe to keep the girls on the job after dark. But he doesn't bat an eye when he has charwomen coming in at 2 A.M. to clean the place up.

Every parent of a college-educated daughter knows it when they pay more than $10,000 to educate her in the professions and she is met time after time with this question: can you type? Some of our strongest allies today, my friends, are middle-income fathers of bright, remarkable young women.

It does seem strange that considering we are almost at the 200th Anniversary of our Nation's founding, that Black men were given the vote over 100 years ago, and White and Black women won the vote more than 50 years ago, we should—at this late date—still have to be talking about winning equality for women.

Some might think it more lady-like if we just bat our eyes, be demure and settle for the tokenism which has been our lot for fifty years within our country and within our parties. But that is not what thinking women do.

One of the great myths of all time is that being a political activist somehow defeminizes us.

I've worked hard all my life. So have millions of other working women. And let me assure you the moonlight doesn't seem any dimmer, the candlelight doesn't flicker any less, the bubbles in the bubble bath don't burst any sooner, when your take-home pay is the same as your male counterpart. You can be sensuous and still think and vote and run for office.

Yes, women are indeed an admirable sex. Through the centuries, we've been wept upon, stepped upon, and slept upon—and we still find something in men to love.

I've worked for woman-power in politics since I started covering Eleanor Roosevelt's Press Conferences 27 years ago, and I do not plan to abdicate my movement because of a little noise. The words "Right On" do not come trippingly off my tongue. But sometimes I'm learning and I'm enjoying it. If the caucus sometimes comes on a little strong, let's remember—these are strong times. But I assure you that this is no burlesque.

If the Democrats and Republicans mean what they say—and we do what we can do—the next National Conventions will not be peopled by the shopworn henchmen and fat-cats of outmoded party structures. They will represent a broader base of every group in this country.

I believe the political party that is truly committed to inner reform by action—one whose delegates are truly from the people—(and I spell it the Sam Rayburn way)—*"peepul"*—will do more to restore the faith of this country in itself than any other single action.

It's in your hands. And let me say to you—for I have worked in the National Media a long time, on both sides of the pad and pencil—let me recall what a public relations man once said to Moses when Moses was leading the children of Israel out of the wilderness of Egypt. (Perhaps you don't know the history of public relations goes back that far . . . but it does.)

As they approached the Red Sea, the public relations man said, "Moses, what are you going to do when you get to the Red Sea?"

"That's easy," Moses replied, "I will simply raise my hands and the waters will part."

The PR man looked aghast. "Wow! You do that and I'll get you two paragraphs in the Old Testament."

So, my friends, if you write people into the political conventions in Miami and San Diego, I believe I can get you two paragraphs when the historians write what women did in the 1970's to make this a more humane, compassionate country.

I have a lot of faith in the women of this country. They have a way of knowing whether you are for them or against them. They can spot a phoney. Perhaps, because we are so deeply involved in the continuity of life, we are more fundamental in our sense of

values, more committed to bring this unfinished democracy to fruition where we can all enjoy the pursuit of happiness.

We know that, as a Nation, we simply cannot enjoy the questionable luxury of treating any citizen as less than a total person.

This last year I've traveled over 100,000 miles in this country. In fact, I think I've traveled more than Spiro Agnew and Edmund Muskie combined—and had more to say than Martha Mitchell, if that is humanly possible.

And I find a sad sort of loneliness in this land, an emptiness of spirit, an eroding fear that perhaps permeates a zipcode, area-code, punch card society . . . A fear that there will be no human being to answer a cry in the night. But there is also a plaintive yearning to be *someone* who answers the cry in the night.

That is why it is so right at this particular moment in our Nation's history that we not be timidly transfixed as spectators. That we rally to women's *participation* for human liberation.

I'm glad we are a caucus of many viewpoints. How awful if we were stereotyped, crystallized into a single track mind with no room for growth or change!

And let's remember—not to shortchange each other—women are human. We don't have to approve of each other 100 percent on all issues. Seventy percent will do. How many friends do you endorse 100 percent? If all the varied assortment of people in the American Revolution had waited to *like* each other, we'd still be at Bunker Hill.

Each of us has something to bring to the Women's Political Caucus. Surely women in this new, exciting political movement have reached the point of civilization where we can have many voices, because we are of *one* heart. The movement is big enough for all of us. The question is: Are we big enough for the movement. I think we are. I think we must be. For there is work to be done. And together, we can reach out to this Nation and answer its cry in the night.

## COMPREHENSIVE CHILD DEVELOPMENT PROGRAM

### HON. JOHN G. SCHMITZ

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

*Friday, November 19, 1971*

Mr. SCHMITZ. Mr. Speaker, on Monday of this week, November 15, the joint Senate-House conference committee completed its work on S. 2007, the Economic Opportunity Act extension which includes the new comprehensive child development bill. Yet, in a continuation of the most peculiar and objectionable procedures which have marked the handling of this measure from the beginning, no printed report on the conference committee's conclusions has yet appeared, and I am now informed that none is expected until after the Thanksgiving recess.

Not only my own constituents, but concerned parents and citizens from all over the country have been writing to me—and no doubt many of my colleagues have received similar letters—asking for copies of this measure. Except for pages of very fine print in the CONGRESSIONAL RECORD of September 30, the day we passed the bill, we have nothing to send them, since it was passed on that day as an amendment to the Economic Opportunity Act extension, without a printed committee report being available. Those who ask us for a copy of such an important bill, and have to be told that there is none, naturally wonder why. So do I.

Passage of this measure by the Senate and House in September took place with comparatively little advance warning and debate, and very little publicity before or after the fact. But as more and more people have learned of what we did then, a tide of public anger is rising with which sooner or later we shall have to deal. A good time to begin would be when this conference committee report comes to us for approval. It should be sent back to committee with instructions to remove the "child development" portion so that this could be handled in the normal way, on its own merits or demerits, as a separate bill.

The Comprehensive Child Development Act would provide extensive care—mental, physical, social, and psychological—for all American children below school age. It is far more than the simple custodial day care which many supporters of this legislation who have not studied it carefully still think is its primary or sole purpose.

For anyone—especially government—to try to supplant a child's parents in deciding what their child needs is to mount an assault on the family, the foundation of any stable society. There is no better way to raise children than in the close-knit, mutually loving, deeply personal interrelationship of a family. Both human experience and religious faith testify to this truth.

Interference with the family unit is fundamentally contrary to our Judaeo-Christian heritage. This legislation promises to provide just such interference with, and perhaps eventual elimination of, the responsibility of parents for the upbringing of their children. Thinking men, and religious men, are becoming more and more concerned about this "child development" legislation. Examples could be cited from each of the three major divisions of American religious belief—Protestant, Catholic and Jewish—from Dr. Jerzy Hauptmann, editor of the Lutheran Scholar, to Will Herberg, noted Jewish sociologist and student of comparative religions, to last week's editorial in the Catholic Standard, the diocesan newspaper of Washington, D.C. I would like to insert into the RECORD at this point for the benefit of my colleagues this brief, but most thought-provoking editorial.

The editorial follows:

[From the Catholic Standard, Washington, D.C., Nov. 11, 1971]

RECONSIDERATION NEEDED

House and Senate conferees on Capitol Hill are working toward a reconciliation of what they consider relatively minor differences between two versions of the same bill (HR 10351 and S 2007), to be known as the Comprehensive Child Development Act. The Act, if passed, will be an amendment to the Economic Opportunity Act of 1964.

The provisions of the Child Development Act are aimed at giving supportive care to children under the age of six. The Senate has added a highly questionable National Child Advocacy section to the proposed legislation. All of this represents what many think is the opening thrust by government into an area historically reserved to the family. Although the Act purports to guarantee voluntary participation, the step between non-compulsory and compulsory participation can become very tenuous when heavy government funding is involved. The immediate funding to establish the programs would be $100 million with a goal of $2 billion for the next year.

The purposes of this legislation may appear laudatory and indeed many aspects are. But the broader implications are extremely serious. What will result is a "partnership" arrangement between government and parents in an area where rights and responsibilities of parents must be paramount.

We hope that both houses of the Congress will reconsider this legislation. If not, we would expect the President to exercise his veto power with strong recommendations for a reconsideration of the bill.

## THE CASE AGAINST LIMITING EARNINGS FOR SOCIAL SECURITY RECIPIENTS

### HON. ROBERT H. STEELE

OF CONNECTICUT

IN THE HOUSE OF REPRESENTATIVES

*Friday, November 19, 1971*

Mr. STEELE. Mr. Speaker, I include the following article from the AARP news bulletin entitled, "The Case Against Limiting Earnings for SS Recipients," which I thought would be of interest to my colleagues.

The article follows:

THE CASE AGAINST LIMITING EARNINGS FOR SS RECIPIENTS

(The following excerpts are reprinted by courtesy of Barron's National Business and Financial Weekly. The author is Truman D. Weller, a free-lance writer and member of the Association who during his career was affiliated with Cowles newspapers in Des Moines and later Minneapolis, where he was assistant to publisher. When he retired he was northeast division manager for the U.S. Chamber of Commerce.

In truth, Social Security is killing the initiative and incentive of thousands of people. An elderly Indiana farm couple, for example, found themselves hard-pressed because their interest in a small sorghum crop pushed their income over the prescribed limit, cutting Social Security payments.

Much of the unfairness is caused by the stringent, unjust rules governing the Social Security program. Basically, five points cause these difficulties.

(1) Limiting earnings to $1,680 during a calendar year, so as not to affect benefits. As a result, when a Social Security recipient approaches the ceiling, he is inclined to quit working for the remainder of the year.

(2) The inconsistency of a worker obtaining greater total spendable income by earning less. (In a chart which accompanied the magazine story, it was illustrated how a person on Social Security and earning $3,600 would have more disposable income than another Social Security recipient earning $4,800.)

(3) The inequities which arise from the narrow monetary advantage gained by the person who works and forfeits all or part of Social Security benefits, compared with the individual who only collects the benefits. In a typical example, an individual earning $6,000 a year will enjoy an advantage of only $150 a month more than someone with comparable retirement benefits but not working.

(4) The test which limits earnings by salary

or wages in a single month unless benefits are forfeited. The test says those earning over $140 in a month must forfeit benefits for that month. In many instances, total benefits of husband and wife are greater than $140. Consequently, any earnings between $140 and up to the amount of the total benefits would represent a loss for the couple.

(5) Restrictions of the retirement test to the self-employed retiree and the handicaps to the operation of his own business. This part of the guideline deals with the amount of time a person over 65 may engage in his business and still collect benefits.

Here, the amount of profit is not a restricting factor. One man make $2,000 or $20,000 from his business. Instead, time is the criterion and anyone spending more than 45 hours a month in his business is, as a rule, deemed to be rendering "substantial service" and thus prone to forfeiture of benefits.

Social Security was adopted in this country during the Depression of the Thirties. At the time the legislation was being considered, unemployment varied between seven and 11 million, and the great hue and cry was to remove those over 65 from the labor market in order to provide jobs for the younger workers. Unfortunately, that philosophy still remains with the Social Security program. It does not square with the relative economic affluence of our present age, nor with a shortage of technical manpower predicted by the National Industrial Conference Board.

Every working retiree pays at least two taxes on earnings—the federal income and the Social Security levies. In some states, he also pays a state income tax and many metropolitan cities now levy a city wage tax as well.

Retirees with private pensions are required to pay income tax on their benefits, once the contributory part has been exhausted. Today, one out of five retirees pays such a tax and in another 10 years, the number is expected to double. This serves to put earnings of retirees in a higher bracket, since they already are liable for the income from their pension. And the necessity of paying tax on earnings in a higher range serves as another repressive measure to discourage earnings by retirees.

The choice of whether a person over 65 wants to live a quiet life of leisure or continue working should be an individual decision. But those who choose to work should be free to do so. Older persons should not be hampered by arbitrary rules and regulations.

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## DEATH BY THE PINT: THE CRITICAL NEED FOR MORE VOLUNTEER BLOOD DONORS

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### HON. VICTOR V. VEYSEY

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

*Friday, November 19, 1971*

Mr. VEYSEY. Mr. Speaker, on Wednesday, November 17, I introduced H.R. 11828 to establish a Federal program to encourage voluntary blood donation and require that all blood banks be licensed and inspected by the Federal Government. The urgent need for legislation of this type was demonstrated in a recent series of articles in the Chicago Tribune. I am appending the first half of that series to these remarks. I hope my colleagues will join with me on this bill and help end the use of skid-row blood donors and the hepatitis they contribute with their blood.

The first half of the series follows:

"LIFESAVER" IS POTENTIAL KILLER: FIND BLOOD OF PAID DONORS POLLUTED WITH HEPATITIS

Tribune Task Force reporters spent weeks talking to medical experts and traveling in the Skid Row subculture that supplies much of the Chicago area's blood to get the story behind the blood donor dilemma in Chicago. This first report in a series was prepared by Reporters William Jones, Task Force director; Philip Caputo; Pamela Zeikman; and William Currie.

The blood of 26-year-old Robert Irby is a potential killer, but that fact hasn't stopped the unemployed truck driver from selling the precious fluid a dozen times in the last two years to earn spending money.

Irby is considered a professional donor and under the rules of the blood-peddling business, his career should have ended July 22, 1970. On that date, as Irby prepared to collect another $15 for a pint of his blood, technicians at the Mount Sinai Hospital Blood Center discovered hepatitis in his blood.

The discovery meant that Irby must never again give blood because of the grave danger of infecting a recipient. The presence of hepatitis—a debilitating and sometimes fatal disease characterized by yellow skin and extensive liver damage—often tragically reverses successful surgery after the patient receives a transfusion of the tainted blood.

BAD BLOOD POISONS SURGERY

But Irby's blood donor career was not over on that day, and what followed is yet another example of what many medical experts have warned about for years: For every step forward that medical science has taken on the operating table, it all too often falters by pumping poisoned blood back into the patient.

One blood expert estimates that nearly one out of every four persons over the age of 40 who contact hepatitis from blood transfusions will die. And it is the over-40 age group that receives 60 per cent of all blood transfusions.

In Irby's case, his name was stricken forever from the list of potential paid donors at Mount Sinai. A brief form letter was mailed to Irby suggesting that he see his doctor, and that was the end of it. Irby claims he didn't understand why his blood was rejected, and the 26 other blood donor stations in Cook County were never notified.

Since he was never paid for that last pint at Mount Sinai, Irby wasn't about to do business there again even if the center wanted his blood. Instead, he went to the Michael Reese Hospital Blood Center two months later, where the only existing test for hepatitis (an admittedly ineffective process that weeds out only one of four potentially infectious donors) failed to detect the presence of the deadly virus in his blood.

REPORTERS FOLLOW HIS TRAIL

He sold a pint on Sept. 8, 1970, on Nov. 23, 1970, and on Feb. 1, 1971. He again sold blood on April 1.

Task Force reporters were able to document what happened to some of Irby's blood once it was sold and began moving into the medical community.

Three of the four pints were used for research, but a hospital official conceded they could just as well have been used in a transfusion following major surgery. The fourth pint was routed to another hospital, where officials are still attempting to determine how it was used.

According to the American Medical Association, the majority of the nation's blood supply comes from paid donors like Irby—in Chicago they account for as much as 60 per cent of the 250,000 pints drawn annually—and the paid donor is most likely to be an alcoholic or drug addict who needs the money for a bottle of cheap wine or a bag of heroin.

Chicago's four commercial blood operations cater to the blood peddler. They set up their drawing stations in neighborhoods like Uptown and West Madison Street and candidly concede that this is where most of their donors live.

And, health experts say, the thousands of gallons drawn from their veins each year are polluted with hepatitis because most paid donors live in the wretched conditions where the virus thrives.

LIVE IN UNSANITARY CONDITIONS

Dr. J. Garrott Allen, professor of surgery at Stanford University School of Medicine and an authority on blood, puts it this way:

"The paid donor is often a cloistered resident of Skid Row, where he and his colleagues are alleged to enjoy frequently the practice of the communal use of unsterile needles and syringes for the self-administration of drugs. . . . There are also other unsanitary practices that prevail among this kind of population which favor repeated exposures to infectious hepatitis as well. . . . Still another contributing factor is alcoholism, which appears to make such individuals more susceptible to an initial attack of either infectious or serum hepatitis."

And all too frequently, little attention is paid to the blood seller by those who work in commercial blood shops. Task Force reporters posing as drifters discovered they could give blood several times a week if they were willing to run the health risk. After selling a pint at one commercial operation, for example, a reporter was quickly accepted the next day at another location, even tho the scab on his arm was still fresh from the day before. Common medical practice is for donors to wait eight weeks between donations.

HEPATITIS NEAR EPIDEMIC STAGE

"Hepatitis is reaching epidemic proportions in America," notes Dr. Bernard F. Clowdus II, chief of gastroenterology and liver disease at Mount Sinai Hospital.

"The figures from blood bank testing and from the Martin Luther King Health Center indicate that it is reaching epidemic proportions in Chicago. It is presently epidemic among people in Lawndale and of the middle class drug culture."

Clowdus underscored the problem by disclosing that beginning Oct. 1, Mount Sinai will reserve 21 beds for the exclusive use of hepatitis victims.

Dr. Mitchell Spellberg, a gastroenterologist at Michael Reese Hospital, considers blood from paid donors so lethal that in a recent operation he used blood that didn't match that of the patient rather than risk using blood that may have come from a paid donor.

Doctors at Michael Reese now face an added burden in getting blood for transfusions because the facility has banned the use of blood from paid donors.

SEES LESS RISK IN MISMATCH

"I had to give the man blood that didn't quick match. I just decided I had to take the risk, and it just happened to work out okay," Dr. Spellberg said. "It is an added risk, but less of a risk, in my mind, than using paid donor blood, which we can't use at Reese anyway."

Dr. Aaron Josephson, director of the Michael Reese Blood Center, said the ban on paid blood resulted from "overwhelming evidence that the type of paid donor we have in Chicago had a high incidence of hepatitis."

Dr. Josephson and other authorities in blood research note that the hepatitis rate in paid donors is at least 10 times higher than that in volunteers. Other studies show that the ratio in Chicago is 11 to 1.

And when paid donors like Robert Irby and

thousands of others like him continue to sell their blood again and again, the statistics can spiral to nightmare proportions.

Howard Schmid, a 57-year-old La Grange factory worker, underwent successful heart surgery in November and was making plans to return to work when the statistics caught up with him.

3 MONTHS LATER, HEPATITIS

Mrs. Rosebud Schmid described her husband's delicate operation as a "huge success" and said her husband was making plans in February to return to work in June. Then, three months after his release, Schmidt's eyes and skin began turning yellow, he felt weak, and his temperature soared to 101 degrees, Mrs. Schmid recalled.

Medical records show that Schmid received 22 pints of blood costing $750 during surgery in Rush-Presbyterian-St. Luke's Hospital.

Twelve of the pints came from the Interstate Blood Bank, a Tennessee corporation which operates three donor stations in Chicago and sells blood to hospitals.

Schmid was taken to Berwyn's MacNeal Memorial Hospital, where he languished for two weeks before Mrs. Schmid received a call.

"They said I'd better come down there because Howard was dying," she recalled. "He died the next day."

Schmid's death certificate lists serum hepatitis as the cause of death, and Mrs. Schmid has filed a $250,000 suit against Rush-St. Luke's.

DIDN'T KNOW THE RISK, SHE SAYS

"No one ever told us when he was operated on that that was the risk he was going to take. That's the part that hurt us the most. If they had just told us, maybe we could have done something," said Mrs. Schmid. "We could have all gotten together, and we could have had good blood given to him."

Richard M. Titmuss, an internationally known authority on the relationship between blood transfusion and hepatitis, has described the blood recipient as a little more than a guinea pig.

The ultimate test of the quality of a unit of blood is whether the recipient contracts hepatitis, Titmuss said, noting that the patient is "in effect the laboratory for testing the quality of blood."

"Blood, like milk, may be bought and sold," Dr. Allen of Stanford points out. "But unlike milk, not all sources of blood are Grade A. The dairy industry is better regulated and is subject to quality control. Milk is a product that carries an implied warranty."

Allen claims that the least that should be done at this point is to label paid donor blood as "high risk" and other volunteer blood as "low risk" in its relationship to hepatitis.

He points out that the laws of 25 states, including Illinois, define blood as a service, not a product, and therefore blood is not subject to warranty. Many hospitals and physicians favor such a legislative definition because it protects them from lawsuits if a patient contracts hepatitis from blood transfusions.

NOT ENOUGH UNPAID VOLUNTEERS

The obvious answer to the problem, of course, is to obtain all blood from volunteer sources. But under the current operating policies of volunteer blood drives, according to Dr. Richard Sassetti, director of the Rush-Presbyterian-St. Luke's Blood Bank, "the demand would soon outstrip the supply. Right now we're in a situation where if a patient in need of transfusions lives long enough to contract hepatitis, we feel we've done him a favor."

Complicating the hepatitis problem is a lack of reliable statistics, a situation which frequently results from poor reporting of the disease. Last year, for example, Chicago hospitals reported only 758 cases of hepatitis to the Chicago Board of Health.

Edward King, assistant city health commissioner, pointed out that his investigators then discovered an additional 648 cases which had gone unreported.

Tomorrow: The men who sell their blood.

MEET THE MEN SELLING BLOOD TO BUY WINE

(There is a crisis in the quality of blood being used in Chicago and the nation and the Tribune Task Force spent weeks investigating the problem. This second part in a series deals with those who sell their blood and was prepared by William Jones, Task Force director; and reporters Philip Caputo, William Currie and Pamela Zekman.)

Philip D. Testard is a peddler and his product is his blood.

He makes his sales calls at any one of several Chicago commercial blood banks and the $5 he receives in exchange for each pint is enough to keep him in cheap wine for a week. When times are hard, he drinks canned heat by cutting it with water and soft drinks.

"I'm on the wine now and I'll be on the wine till I die," said the 41-year-old Testard, an unshaven, toothless ex-convict.

Testard lives in the city's sink—Skid Row. His home is the street, and he sleeps on benches and in abandoned buildings. His diet consists of food scraps filched from garbage. Mostly, tho, he subsists on wine, going on drinking binges that last as long as five days.

He is one of the thousands of derelicts, drug addicts and alcoholics in Chicago who regularly peddle their blood for a few dollars to spend on the binge or the next supply of drugs. Their product carries no guarantee, no warning that it might be poison, even tho it is 10 times more likely to be teeming with potentially lethal hepatitis virus than the blood from a volunteer, an unpaid donor.

CITES HEPATITIS ODDS

Some day, blood from men like Testard may be in your veins. It is being used right now and is causing medical nightmares for surgeons and public health officials alike.

As much as 60 per cent of the 250,000 pints of blood needed in Chicago every year is drawn from the paid professional donor. Hospital blood bank directors report that 1 out of every 20 patients who receive this blood will contract hepatitis, but only 1 out of every 200 recipients who are given volunteer blood will be infected with the disease.

The possibility that their product might kill or debilitate someone does not concern the blood peddlers. Most are so desperate for money to support their habits that they endanger their own health by selling blood—two, three and as many as four times a month.

Some peddlers, like Testard, do not even know what hepatitis is, altho they must profess they never had the disease to be allowed to trade a pint for a few dollars. And the only medical test ever devised to spot hepatitis in a potential donor is effective in only one out of four cases according to medical experts.

BLOOD HIS LIVELIHOOD

"What is hepatitis, anyway?" Testard asked a reporter as he waited to donate at the Beverly Blood Center, 4420 N. Broadway. He had just been told to return later because the center did not immediately need his blood type. The wait relieved Testard because it would give him time to have a few more drinks to compose himself before donating.

Testard said he was worried about being turned down because a rejection would mean the loss of his only source of income. He employs a number of tricks of the blood peddlers trade to avoid being turned away.

One of the rules of the blood buying business limits donations to once every two months. Nevertheless, Testard is able to donate every two weeks—largely because there is virtually no communication between the various blood centers and hospitals that draw blood.

"Sure I give blood every two weeks," Testard said. "It takes five days to a week to get rid of that needle mark and then I'm good for another blood bank."

Occasionally, Testard sells blood twice within two weeks to the same donor station, skirting the rule by using false identification, he said.

Testard said he maintains his strength thru this gruelling schedule by eating garbage.

"You heard of the National Tea, you heard of the A & P, you heard of the Jewel?" Testard asked. "Well, that's how to eat. They throw out-of-date food into the garbage cans in back of the stores and I pick it up. It's tough, tougher than working, but the food isn't bad. I eat the pies and the cakes and the cold cuts. The meat that needs to be cooked I sell to the pizza joints up here [in Uptown] for a few bucks."

RECALLS PAYOFFS

Such eating habits account for the most common hurdle faced by Testard and most other professional donors. Their diet causes them to suffer from a low blood iron level. To qualify for a donation, the donor's iron count must be 41, but many blood peddlers register counts as low as 35.

Testard also knows his commercial blood banks. Some have tough rules while others will overlook a low iron count, especially if they are behind in their monthly quota. He claims that some technicians will pass a donor with low iron in exchange for a cut of his fee.

"There used to be a nurse over that at [a commercial blood firm] who'd pass you if you gave her a buck," Testard said. "What you'd do is tell her that you needed the money real bad and that you'd give her a buck for passing you. She'd class you and then you'd take your voucher and cash it at the currency exchange. Then you'd go back to the blood bank and drop the dollar in a wastebasket next to her desk."

When bribes fail, the donor simply barters his blood at a station where the rules aren't strictly enforced.

Ray Armour has been a blood peddler for 30 of his 50 years and claims he is frequently rejected for a low iron count. Armour describes himself as a vagabond and drunk. On the day he was interviewed, Armour had just been turned down at the Chicago Blood Donor Center, 2320 N. Clark St., but was not discouraged. He said he planned to make the rounds that day and was certain he would find a station that would buy his blood.

LIKE BUTCHER SHOPS

"Some of 'em are like butcher shops," Armour said. "They don't care, just as long as you walk in breathing."

A companion of Armour, who identified himself only as John, said it is possible to sell blood twice in one day, simply by offering your other arm for the second sale. John has sold blood so many times that scar tissue has formed on both arms. Like Testard, Armour and John make their homes in flophouses and under viaducts, using phony addresses on their donor cards.

The practice of using false identification and addresses makes it virtually impossible to track down paid donors who are hepatitis carriers.

Task Force reporters made this discovery when they attempted to find 10 professional donors whose blood was found to be infected with the disease. None were found and their addresses turned out to be vacant lots, park benches, abandoned buildings and warehouses.

Perhaps one or more of them was the peddler whose blood infected Richard S. with hepatitis. A hemophiliac, he asked that his

real name not be used because he feared he would lose his job if his employers knew of his condition.

To stay alive, a person suffering from hemophelia often must take numerous transfusions each month of blood products drawn from the blood of several donors.

RISK IS ASTRONOMICAL

Considering that the ordinary patient has an 11 to 1 chance of contracting hepatitis from a paid donor, the chances of the disease's striking a hemophiliac are astronomical.

In October, 1970, it struck Richard S., who has to tranfuse blood products from seven different pints every three weeks.

"It was a real blow to me," he recalled. The doctor said it might take me the rest of my life to recover. Hepatitis on top of hemophilia was almost too much. Two chronic illnesses—it just didn't seem fair."

He has words for the Philip Testards and Ray Armours and the other blood peddlers whom he believes to be imperiling his life for a bottle of wine.

"I'd think that people who sell blood should think about it a little more and realize what might happen if they lie about their condition. It doesn't seem at all fair. Why can't they take someone else into consideration instead of that lousy money? I'll give them the money if they need it, but don't put my life on the line for it."

The text of H.R. 11828, which I introduced November 17, 1971, follows:

H.R. 11828

A bill to establish a Federal program to encourage the voluntary donation of pure and safe blood, to require licensing and inspection of all blood banks, and to establish a national registry of blood donors

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SHORT TITLE

SECTION 1. This Act may be cited as the "National Blood Bank Act of 1972."

FINDINGS

SEC. 2. The Congress finds that human blood is necessary for medical treatment and that an adequate supply of pure and safe blood throughout the United States is essential to the welfare of the nation. Congress further finds that interstate shipment of pure and safe whole blood and blood components is necessary for the welfare of the United States; that since human blood is a living tissue which cannot be manufactured, an adequate interstate supply of blood depends upon the willingness of individuals to donate their blood; that since the virus hepatitis is transmitted in human blood and is found significantly more often in the blood of persons who donate for monetary compensation than in the blood of voluntary donors, the purity and safety of the national blood supply is seriously threatened by the inadequate level of voluntary donation and by monetary compensation of blood donors. The Congress therefore finds that the welfare of the United States will be promoted by development of a 100 percent voluntary blood supply as soon as possible, that voluntary donation should therefore be encouraged and promoted, and that certain procedures and standards should be established with respect to the operation of all blood banks in the United States.

ESTABLISHMENT OF PROGRAM; DIRECTOR

SEC. 3. There is established in the Department of Health, Education, and Welfare a National Blood Bank Program to be under the supervision of a Director appointed by the Secretary of Health, Education, and Welfare. The Director of the National Blood Bank Program (hereinafter in this Act referred to as the "Director") shall be appointed subject to the provisions of Title 5, United States Code, governing appointments in the competitive service, and shall be paid in accordance with the provisions of Chapter 51 and Subchapter III of Chapter 53 of such Title relating to classification and General Schedule pay rates.

FUNCTIONS AND DUTIES OF DIRECTOR

SEC. 4. (a) NATIONAL BLOOD BANK SYSTEMS.—Upon the application of any group or organization of blood banks, the Director shall designate such group or organization as a National Blood Bank System under this Act if the group or organization—

(1) includes member blood banks in not less than ten States, which member banks have drawn an aggregate of not less than two million units of blood in the year preceding application;

(2) requires by written contract member blood banks, which are not maintained and operated directly by the group or organization, to adhere and be bound by the rules and regulations of the group or organization;

(3) requires all member blood banks to maintain a program for the recruitment of voluntary blood donors;

(4) adopts rules and regulations for the operation of member blood banks which rules and regulations are approved by the Director and certified to be equal to or more stringent than the Standards for Blook Banks and Transfusion Services of the American Association of Blood Banks and the applicable standards of the American Red Cross;

(5) provides for—

(A) accreditation of member blood banks which operate in conformity with the rules and regulations referred to in paragraph (4);

(B) a program approved by the Director of annual, unannounced inspection of accredited member blood banks to determine adherence to such standards; and

(C) recommend the filing, suspension or termination of accreditation of member blood banks which fail to adhere to such standards;

(6) requires that accredited member blood banks—

(A) designate named individuals in such accredited member blood banks to have express responsibility for recruitment of voluntary blood donors;

(B) be open for business on days and at hours most convenient for voluntary blood donors;

(C) cooperate with other blood banks in the recruitment of voluntary blood donors and in other functions; and

(D) label clearly each unit of blood collected as "low risk" when it is from a voluntary blood donor or "high risk" when it is from a paid blood donor.

(b) PROMOTION OF VOLUNTARY BLOOD DONATION.—In order to assure an adequate supply of pure and safe blood throughout the nation, the Director shall:

(1) develop, by grant or contract, new procedures, materials and techniques to inform the public of the need to voluntarily donate blood;

(2) provide direct assistance to establish an adequate supply of voluntary blood in those parts of the country where it is presently unavailable;

(3) develop a national program to honor and recognize all voluntary donors;

(4) establish yearly goals of voluntary donors for each blood bank;

(5) conduct evaluations of the effectiveness of various recruitment techniques and inform the licensed blood banks of the most effective techniques;

(6) classify blood banks which collect no more than a specified percentage of their blood from paid donors as "Class A Blood Banks" and classify all other blood banks as "Class B Blood Banks";

(7) annually increase the allowable percentage of paid donors to qualify as a "Class A Blood Bank": to the highest level consistent with an adequate national blood supply.

(c) DONOR REGISTRY.—The Director shall maintain a registry of all persons who give blood after July 1, 1972, to a licensed blood bank and shall identify individuals on such registry who may have been implicated in the transmission of hepatitis or who should otherwise be disqualified as blood donors. The Director shall notify all blood banks of such disqualifying information.

LICENSE TO OPERATE AS A BLOOD BANK

SEC. 5. (a) LICENSE REQUIRED.—No person may operate as a blood bank unless such person is licensed under this section.

(b) REQUIREMENTS OF LICENSE.—Upon application therefor the Director shall issue a license to operate as a blood bank to any person if—

(1) such person agrees to require identification of each blood donor and such other information relating to each blood donor as the Director may prescribe; and

(2) such person agrees to transmit to the Director such information (including information indicating that the donor may be infected with hepatitis) as the Director may require; and

(3) the application therefor contains or is accompanied by such information as the Director finds necessary and the applicant agrees and the Director determines that the blood bank will be operated in accordance with standards the Director issues to carry out the purposes of this Act, including standards for purity, potency, and safety of blood, donor selection, allowable percentage of paid donors, regulations covering the management of blood inventories; and a requirement that all blood be tested by the best practical test for the presence of hepatitis; and

(4) such person agrees to clearly label each unit of blood collected as "low risk" when it is from a voluntary donor and "high risk" when it is from a paid donor.

(c) PERIOD OF VALIDITY.—A license issued under this section shall be valid for a period of three years, or such shorter period as the Director may establish for any blood bank or class or classes thereof.

(d) FEES.—The Director may require payment of fees for the issuance and renewal of licenses, but the amount of any such fee shall not exceed $125 per annum.

(e) The Director or his designee shall conduct an annual inspection of each blood bank licensed under this section to determine compliance with standards issued under this Act. The time of such inspections shall not be announced prior to the inspection.

(f) The Director may designate a National Blood Bank System as his inspecting agent for purposes of this section. He may accept accreditation by a National Blood Bank System in lieu of this inspection requirement.

(g) REVOCATION, SUSPENSION, OR LIMITATION; NOTICE AND HEARING: GROUNDS.—A blood bank license may be revoked, suspended, or limited if the Director finds, after reasonable notice and opportunity for hearing to the licensee blood bank, that such licensee or any employee of the blood bank—

(1) has been guilty of misrepresentation in obtaining the license;

(2) has engaged or attempted to engage or represented himself as entitled to perform any procedure or category of procedures not authorized in the license;

(3) has failed to comply with reasonable requests of the Director for any information or materials, or work on materials, he deems necessary to determine the blood bank's continued eligibility for its license hereunder or continued compliance with the Director's standards hereunder;

(4) has refused a request of the Director or any Federal officer or employee duly designated by him for permission to inspect the blood bank and its operations and pertinent records at any reasonable time; or

(5) has violated or aided and abetted in the violation of any provisions of this sec-

tion or of any rule or regulation promulgated thereunder.

(h) LEGAL PROCEDURE; IMMINENT HAZARD TO PUBLIC HEALTH; JURISDICTION OF DISTRICT COURT; TEMPORARY INJUNCTIONS OR RESTRAINING ORDERS; BOND; FINAL ORDERS.—Whenever the Director has reason to believe that continuation of any activity by a blood bank licensed under this section would constitute an imminent hazard to the public health, he may bring suit in the district court for the district in which such blood bank is situated to enjoin continuation of such activity and, upon proper showing, a temporary injunction or restraining order against continuation of such activity pending issuance of a final order under this section shall be granted without bond by such court.

(i) APPEALS; PETITIONS; RECORD; ADDITIONAL EVIDENCE; MODIFIED OR NEW FINDINGS; JURISDICTION OF COURT OF APPEALS; CONCLUSIVENESS OF FINDINGS; REVIEW BY SUPREME COURT.—

(1) Any party aggrieved by any final action taken under subsection (e) of this section may at any time within sixty days after the date of such action file a petition with the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, for judicial review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Director or other officer designated by him for that purpose. The Director thereupon shall file in the court the record on which the action of the Director is based, as provided in section 2112 of title 28.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Director, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Director, and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The Director may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendations, if any, for the modification or setting aside of his original action, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to affirm the action, or to set it aside in whole or in part, temporarily or permanently. The findings of the Director as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such action of the Director shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(j) VIOLATIONS AND PENALTIES.—Any person who willfully violates any provision of this section or any rule or regulation promulgated thereunder shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine.

ADVISORY COUNCIL

SEC. 6. (a) ESTABLISHMENT.—There is established an Advisory Council to be composed of the following nine members appointed by the President:

(1) two representatives from each National Blood Bank System, one of whom shall be a person with not less than five years recent experience in blood bank administration;

(2) three representatives of blood consumer groups including:

(A) one hospital administrator,

(B) one representative of organized labor,

(D) one representative of business management; and

(3) two persons experienced in advertising and public relations neither of whom may be employed or retained during their service on the Council, by any firm or other organization which is engaged in operating a blood bank.

(b) DUTIES OF COUNCIL.—The Advisory Council shall—

(1) make recommendations to the Director with respect to long term policy goals for the National Blood Banks Program established under section 3 of this Act;

(2) make recommendations to the Director with respect to the encouragement of blood donation and the motivation, recruitment, and recognition of blood donors; and

(3) make recommendations to the Director relating to reciprocal transactions between National Blood Bank Systems to the extent that no agreement relating to such transactions exists between such Systems.

(c) TRAVEL EXPENSES; PER DIEM.—While away from their homes or regular places of business in the performance of services for the Council, members of the Council shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5 of the United States Code.

ANTITRUST EXEMPTION

SEC. 7. Notwithstanding any antitrust law, as defined in section 2(a) of the Antitrust Civil Process Act (76 Stat. 548; 15 U.S.C. 1311(a)), a National Blood Bank system may exclude or reject from membership in such System any blood bank which does not qualify for tax exempt status under section 501(c)(3) or 501(c)(4) of the Internal Revenue Code of 1954.

BLOOD ASSURANCE PROGRAMS

SEC. 8. No person other than a blood bank which is classified as a "Class A Blood Bank" may maintain any program in which individuals deposit blood in advance of their need for blood or pledge to give blood upon request.

ADMINISTRATION OF PROGRAM

SEC. 9. No provision of this Act and no part of any program established under this Act shall be administered by or under the supervision of the National Institutes of Health.

PURCHASE OF BLOOD BY FEDERAL GOVERNMENT

SEC. 10. No agency, department, or other instrumentality of the Government of the United States shall contract for or pay for the provision of blood from any person other than a "Class A Blood Bank" and such agency, department, or other instrumentality shall take such measures as may be necessary to insure that such blood has been tested according to the best available test for hepatitis.

DEFINITIONS

SEC. 11. For the purposes of this Act, the term—

(a) "Blood" means human whole blood, or any component thereof.

(b) "Blood Bank" means any person or other entity engaged in the bleeding of individuals and performing two or more of the following functions—

(1) recruitment of blood donors;

(2) processing of blood for transfusions;

(3) storage of blood;

(4) crossmatching of blood;

(5) administration of blood to individuals; or

(6) preparation of blood components for transfusion.

(c) "Blood Donor" means a paid blood donor or a voluntary blood donor.

(d) "Paid blood donor" means an individual who receives monetary compensation or an adjustment in his scheduled period of prison confinement for his donation of blood or any component thereof.

(e) "Voluntary blood donor" means any individual donating his blood other than a paid donor.

(f) "Accredited blood bank" means a blood bank accredited by a National Blood Bank System.

AUTHORIZATION

SEC. 13. There is authorized to be appropriated $10,000,000 for the Fiscal Year 1973, $10,000,000 for the Fiscal Year 1974, and $10,000,000 for the Fiscal Year 1975 to carry out the purposes of this Act.

# SENATE—*Tuesday, November 23, 1971*

The Senate met at 10 a.m. and was called to order by the President pro tempore (Mr. ELLENDER).

## PRAYER

The Chaplain, the Reverend Edward L. R. Elson, D.D., offered the following prayer:

Eternal God, we thank Thee at this festival season for the good world Thou hast made; for things great and small, beautiful and awesome; for seen and unseen splendors.

We thank Thee for human life; for the variety of our skills and interests; for different ways of thinking and speaking.

We thank Thee for work to do; for useful tasks that need careful study and precise judgment; for the comradeship of daily toil; and for exchanges of good humor and encouragement.

We thank Thee for this place and the privilege it affords of service to our fellow citizens. Equip us with awareness of truth and strength of character so that what is done here may enable our Nation to be an instrument of Thy grace and a beacon of freedom to all men. Amen.

## THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Monday, November 22, 1971, be dispensed with.

The PRESIDENT pro tempore. Without objection, it is so ordered.

## THE CALENDAR

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar Nos. 491 and 492.

The PRESIDENT pro tempore. Without objection, it is so ordered.

## RICHARD C. WALKER

The Senate proceeded to consider the bill (H.R. 3749) for the relief of Richard C. Walker, which had been reported from the Committee on the Judiciary with