

## D. IMMUNITIES OF MEMBERS AND AIDES

## § 15. Generally; Judicial Review

The Constitution grants to Members of Congress two specific immunities, one from arrest in certain instances and one from being questioned in any other place for speech or debate.<sup>(15)</sup> Viewed in one form, they constitute legal defenses, to be pleaded in court, which act to prohibit or limit court actions or inquiries directed against Members of Congress.<sup>(16)</sup> Since the immunities act as procedural defenses, it has become the role of the courts, both state and federal, to define and clarify their application to ongoing cases and controversies. The courts have even stated on occasion that the scope and application of the immunities is not for Congress but for the judiciary to decide.<sup>(17)</sup>

The immunities exist not only to protect individual legislators, but also to insure the independence and integrity of the legislative branch in relation to the executive and judicial branches.<sup>(18)</sup>

15. U.S. Const. art. I, §6, clause 1.

16. *Smith v Crown Publishers*, 14 F.R.D. 514 (1953).

17. See *Gravel v U.S.*, 408 U.S. 606, 624 and note 15 (1972).

18. "The immunities of the Speech or Debate Clause were not written in

The principle of separation of powers is so essential to the American constitutional framework that the general immunity of Congress, of its components, and of its actions from interference by the other branches of the government, may be said to exist independently of the express constitutional immunities.<sup>(19)</sup>

the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *U.S. v Brewster*, 408 U.S. 501, 507 (1972).

19. In *Tenney v Brandhove*, 341 U.S. 367 (1951), the Supreme Court stated that the constitutional immunities for Members of Congress were a reflection of political principles already firmly established in the states. The Court concluded on the basis of public policy and of common law legislative privilege that state legislatures were protected from civil liability for conducting investigations.

See *Methodist Federation for Social Action v Eastland*, 141 F Supp 729 (D.D.C. 1956), wherein the court relied upon separation of powers in refusing to enjoin the printing of a committee report. The court stated that "nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory

The specific immunities of Congressmen from arrest and for speech and debate are easily confused with various uses of the term “privilege”; that term generally refers to the immunity of governmental officials and agencies for statements and actions performed in the course of official duties. Not only the executive and judicial branches of the federal

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or not, and whether it is or is not made after a fair hearing. 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 *McGovern v Martz*, 182 F Supp 343 (D.D.C. 1960), the court stated that “the immunity [of speech and debate] was believed to be so fundamental that express provisions are found in the Constitution, although scholars have proposed that the privilege exists independently of the constitutional declaration as a necessary principle in free government.”

See for a full discussion Reinstein and Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973), in which the authors contend that the Speech and Debate Clause must encompass all legitimate functions of a legislature in a system which embraces the principle of separation of powers. See also Comment, *The Scope of Immunity for Legislators and Their Employees*, 70 Yale L. Jour. 366 (1967).

government, but also the state legislatures, have been recognized to hold some privilege from suit and inquiry in relation to official acts and duties.<sup>(20)</sup>

Under the procedure of the House, the term “question of privilege” refers to matters raised on the floor, with a high procedural precedence, and divided into matters of personal privilege (affecting the rights, reputation, and conduct of individual Members in their representative capacity) and into matters of the privilege of the House (affecting the collective safety, dignity, and integrity of legislative proceedings).<sup>(1)</sup> Alleged violations of the specific constitutional immunities of Members comprise only a part of the many

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20. See *Doe v McMillan*, 412 U.S. 306 (1973) and *Barr v Mateo*, 360 U.S. 564 (1959) for the common law principle that public officials, including Congressmen, judges, and administrative officials, are immune from liability for damages for statements and actions made in the course of their official duties.

For the privilege of state legislators, see *Tenney v Brandhove*, 341 U.S. 367 (1951); *Eslinger v Thomas*, 340 F Supp 886 (D.S.C. 1972); *Blondes v State*, 294 A.2d 661 (Ct. App. Md. 1972).

1. For definitions of questions of privilege and the manner of raising them, see Rule IX, *House Rules and Manual* § 661 (1973) and Ch. 11, *infra*.

issues which are raised as questions of privilege in the House. Therefore, a distinction must be made between questions of privilege in general and the specific immunities of Members of Congress.<sup>(2)</sup>

When an incident arises in relation to the immunities of Members, the incident may be brought before the House as a question of privilege,<sup>(3)</sup> whereupon the House may investigate the situation and may adopt a resolution stating the consensus of the House on whether immunities have been violated, and ordering such actions as the House or the individual Member(s) may take.<sup>(4)</sup>

Congress held extensive hearings in the 93d Congress on the subject of interference by the judiciary with the legislative process.<sup>(5)</sup>

2. Questions of privilege must be further distinguished from privileged questions, which are certain questions and motions which have precedence in the order of business under House rules (see Ch. 11, *infra*).
3. See §§ 15.1, 15.3, *infra*.
4. See §§ 15.1, 15.2, *infra*.
5. Constitutional Immunity of Members of Congress, hearings before the Joint Committee on Congressional Operations, 93d Cong. 1st and 2d Sess.

### ***House Procedure When Member Subpenaed or Summoned***

**§ 15.1 The House determined that a summons issued to a Member to appear and testify before a grand jury while the House is in session, and not to depart from the court without leave, invades the rights and privileges of the House, as based upon the immunities from arrest and from being questioned for any speech or debate in the House.**

On Nov. 17, 1941, the House authorized by resolution (H. Res. 340) Mr. Hamilton Fish, Jr., of New York, to appear and testify before a grand jury of the United States Court for the District of Columbia at such time as the House was not sitting in session:<sup>(6)</sup>

Whereas Representative Hamilton Fish, a Member of this House from the State of New York, has been summoned to appear as a witness before a grand jury of the United States Court for the District of Columbia to testify: Therefore be it

*Resolved*, That the said Hamilton Fish be, and he is hereby, authorized to appear and testify before the said grand jury at such time as the House is not sitting in session.

6. H. Res. 340, from the Committee on the Judiciary, 87 CONG. REC. 8933, 8934. 77th Cong. 1st Sess.

The authorizing resolution was adopted pursuant to the report of a committee that the service of a summons to a Member to appear and testify before a grand jury while the House is in session does invade the rights and privileges of the House of Representatives, as based on article I, section 6 of the Constitution, providing immunities to Members against arrest and against being questioned for any speech or debate in either House, but that the House could in each case waive its privileges, with or without conditions:<sup>(7)</sup>

MR. [HATTON W.] SUMNERS of Texas: Mr. Speaker, on behalf of the Committee on the Judiciary I submit a privileged report. . . .

The Committee on the Judiciary, having investigated and considered the matter submitted to it by House Resolution 335, submits the following report:

The resolution authorizing the committee to make this investigation is as follows:

“RESOLUTION

“Whereas Hamilton Fish, a Member of this House from the State of New York, has been summoned to appear as a witness before the grand jury of a United States court for the District of Columbia to testify; and

“Whereas the service of such a process upon a Member of this House during his attendance while the Congress is in session might deprive the district which he represents of his voice and vote; and

7. 87 CONG. REC. 8933, 77th Cong. 1st Sess.

“Whereas article I, section 6 of the Constitution of the United States provides:

“They (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 (the Senators and Representatives) shall not be questioned in any other place; and

“Whereas it appears by reason of the action taken by the said grand jury that the rights and privileges of the House of Representatives may be infringed: Therefore be it

“Resolved, That the Committee on the Judiciary of the House of Representatives is authorized and directed to investigate and consider whether the service of a subpoena or any other process by a court or a grand jury purporting to command a Member of this House to appear and testify invades the rights and privileges of the House of Representatives. The committee shall report at any time on the matters herein committed to it and that until the committee shall report Representative Hamilton Fish shall refrain from responding to the summons served upon him.”

The summons referred to is as follows:

“[Grand jury, District Court of the United States for the District of Columbia. The United States v. John Doe. No. —. Grand jury original, criminal docket. (Grand jury sitting in room 312 at Municipal Building, Fourth and E Streets NW., Washington, D. C.)]

“THE PRESIDENT OF THE UNITED STATES TO HAMILTON FISH:

“You are hereby commanded to attend before the grand jury of said

court on Wednesday, the 12th day of November 1941, at 10:30 a.m., to testify on behalf of the United States, and not depart the court without leave of the court or district attorney.

"Witness the honorable Chief Justice of said court the — day of —, 19—.

"CHARLES E. STEWART,  
*Clerk.*

"By M.M. CHESTON,  
*Assistant Clerk.*"

It is the judgment of your committee that the service of this summons does invade the rights and privileges of the House of Representatives.

We respectfully suggest, however, that in each case the House of Representatives may waive its privileges, attaching such conditions to its waiver as it may determine.

The language in the summons "to testify on behalf of the United States, and not depart the court without leave of the court or district attorney" removes any necessity to examine the question as to whether a summons merely to appear and testify is a violation of the privileges of the House of Representatives. This particular summons commands that Representative Hamilton Fish shall not depart the court without leave of the court or district attorney," regardless of his legislative duties as a Member of the House.

It is recognized that this privilege of the House of Representatives referred to is a valuable privilege insuring the opportunity of its Members against outside interference with their attendance upon the discharge of their constitutional duties.

At the same time it is appreciated that there is attached to that privilege the very high duty and responsibility on the part of the House of Representatives to see to it that the privilege is so controlled in its exercise that it not unnecessarily inter-

feres with the discharge of the obligations and responsibilities of the Members of the House as citizens to give testimony before the inquisitorial agencies of government as to facts within their possession.

After the resolution authorizing Mr. Fish to testify was adopted, there ensued debate on the scope of the immunities of Members.<sup>(8)</sup> The wording of the subpoena in question was drawn into issue, since the subpoena stated that once the Member appeared to testify he would not be permitted to depart from the court without leave of the court or of the District Attorney. The House determined by the adoption of the resolution that when the Congress is in session it is the duty of the House to prevent a conflict between the duty of a Member to represent his people at its session and his duty as a citizen to give testimony before a court.<sup>(9)</sup>

*Parliamentarian's Note:* Summons and subpoenas directed to officers, employees, and Members of the House may also involve the doctrine of separation of powers, as for example when calling for documents within the possession and under the control of the House of Representatives or for

8. *Id.* at pp. 8934, 8949-58.

9. H. REPT. NO. 1415, and the remarks of Mr. Emanuel Celler (N.Y.), 87 CONG. REC. 8933, 8935, 8936, 77th Cong. 1st Sess., Nov. 17, 1941.

information obtained in an official capacity.<sup>(10)</sup>

**§ 15.2 The House authorized by resolution the Committee on the Judiciary to file appearances and to provide for the defense of certain Members and employees in legal actions related to their performance of official duties.**

On Aug. 1, 1953,<sup>(11)</sup> the House adopted a resolution authorizing the court appearance of certain Members of the House, named defendants in a private suit alleging damage to plaintiffs by the performance of the defendants' official duties as members of the Committee on Un-American Activities. The resolution also authorized the Committee on the Judiciary to file appearances and to provide counsel and to provide for the defense of those Members and employees. From the contingent fund of the House, travel, subsistence, and legal aid expenses were authorized in connection with that suit.<sup>(12)</sup>

10. See Ch. 11, *infra*, for extensive discussion of questions of privileges of the House as related to summons and subpoenas.
11. 99 CONG. REC. 10949-10950, 83d Cong. 1st Sess.
12. For an occasion where a Member inserted into the Record a letter to the Committee on Accounts, opposing a

**§ 15.3 Where Members and employees of the House were subpoenaed to testify in a private civil suit alleging damage from acts committed in the course of their official duties, the House referred the matter to the Committee on the Judiciary to determine whether the rights of the House were being invaded.**

On Mar. 26, 1953,<sup>(13)</sup> the House was informed of the subpoena of members and employees of the Committee on Un-American Activities in a civil suit contending that acts committed in the course of an investigation by the committee had injured the plaintiffs. The House by resolution referred the matter to the Committee on the Judiciary to investigate whether the rights and privileges of the House were being in-

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request that the House pay an expense incurred by the Chairman of the House Committee on Un-American Activities, in connection with two libel suits brought against the chairman, see 88 CONG. REC. A3035, 77th Cong. 2d Sess., Aug. 6, 1942.

13. 99 CONG. REC. 2356-58, 83d Cong. 1st Sess.

For a more detailed analysis of House procedure when Members, employees, or House papers are subpoenaed, see §18, *infra* (privilege from arrest) and Ch. 11, *infra* (privilege in general).

vaded.<sup>(14)</sup> Mr. Charles A. Halleck, of Indiana, delivered remarks in explanation of the resolution. Referring to the privileges against arrest and against being questioned for speech or debate, he said:

Through the years that language has been construed to mean more than the speech or statement made here within the four walls of the House of Representatives; it has been construed to include the conduct of Members and their statements in connection with their activities as Members of the House of Representatives. As a result, it seems clear to me that under the provisions of the Constitution itself the adoption of the resolution which was presented is certainly in order.

Mr. John W. McCormack, of Massachusetts, also delivered remarks and stated that "for the House to take any other action would be fraught with danger, for otherwise there is nothing to stop any number of suits being filed against enough Members of the House, and in summoning them, to impair the efficiency of the House of Representatives or the Senate to act and function as legislative bodies." He also stated that the fact that the Members and employees subpoenaed were presently in California in the per-

14. H. Res. 190, read into the Record at 99 CONG. REC. 2356, 83d Cong. 1st Sess., and adopted *id.* at p. 2358. See §18.4, *infra*, for the text of the resolution.

formance of their official duties was immaterial, as they were "out there on official business, and committees of this body are the arms of the House of Representatives."<sup>(15)</sup>

## § 16. For Speech and Debate

At article I, section 6, clause 1, the Constitution states that "for any speech or debate in either House, they [Senators and Representatives] shall not be questioned in any other place." That prohibition, approved at the Constitutional Convention with little if any discussion or debate,<sup>(16)</sup> was

15. The discussion above in the House on the subpoena of Members was cited in the case of *Smith v Crown Publishers*, 14 F.R.D. 514 (1953).

16. See 5 Elliott's Debates 406 (1836 ea.) and 2 Records of the Federal Convention 246 (Farrand ed. 1911). See also *U.S. v Johnson*, 383 U.S. 169 (1966) for the history of the incorporation of the privilege into the United States Constitution, and for the history of the constitutional clause in general.

For the views of early constitutional commentators on the origins and scope of the privilege, see Jefferson's Manual, *House Rules and Manual* §§ 287, 288, 301, 302 (1973) and Story, *Commentaries on the Constitution of the United States*, §863, Da Capo Press (N. Y. repute. 1970).