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Constitutional Law--Legislative Investigations--the Speech or Debate Clause: Congressional Subpoenas Issued to Third Parties--No Right to Question Their Constitutionality on First Amendment Grounds

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CONSTITUTIONAL LAW–LEGISLATIVE INVESTIGATIONS–THE SPEECH OR DEBATE CLAUSE: CONGRESSIONAL SUBPOENAS ISSUED TO THIRD PARTIES–NO RIGHT TO QUESTION THEIR CONSTITUTIONALITY ON FIRST AMENDMENT GROUNDS

Eastland v. United States Servicemen's Fund[1]

In January 1970 the United States Senate passed a resolution authorizing the Senate Subcommittee on Internal Security to make a study of the administration, operation, and enforcement of the Internal Security Act of 1950.[2] Pursuant to its mandate the subcommittee began an inquiry into various activities of the United States Servicemen's Fund (U.S.S.F.) to determine whether it was potentially harmful to armed service morale.[3] The subcommittee issued a subpoena duces tecum to a New York bank where the organization had an account, ordering the bank to produce all records involving the account. The U.S.S.F. brought an action to enjoin implementation of the subpoena. Because of an earlier decision that jurisdiction and venue lies only in the District of Columbia in actions against congressional committees,[4] suit was filed in Washington, D.C. As a result, the New York bank was not subject to proper service. The only parties before the court were Chairman Eastland, Senate members, and the Chief Counsel of the subcommittee.

The U.S.S.F. alleged that enforcement of the subpoena should be enjoined because: (1) the authorizing resolution and subcommittee action implementing it were not within a "legitimate legislative sphere" and thus the legislators were not immune under the speech or debate clause of the Constitution;[5] and (2) even if the immunity applied, answering the subpoena duces tecum would constitute a violation of its first amendment rights. The U.S.S.F. further claimed that issuing the subpoena to a third party deprived it of the ability to refuse to answer. Such refusal might have led the Congress to institute a contempt action,[6] in which the U.S.S.F. could have raised the first amendment issue.[7]

1. 95 S. Ct. 1813 (1975).

2. S. RES. 341, 91st Cong., 2d Sess., 116 CONG. REC. 1974 (January 30, 1970).

3. The U.S.S.F. is a nonprofit membership corporation supported by contributions. It established coffeehouses near domestic military installations and aided in the publication of an underground paper which communicated its philosophy to armed service personnel concerning United States involvement in Southeast Asia.

4. Liberation News Service v. Eastland, 426 F.2d 1379 (2d Cir. 1970).

5. U.S. CONST. art. I, § 6, cl. 1. The language in question states that "for any Speech or Debate in either House, they [members of Congress] shall not be questioned in any other place."

6. 2 U.S.C. § 192 (1970), provides for punishment of any person who was summoned as a witness to give testimony or to produce papers upon matters under proper inquiry and wilfully makes default or refuses to answer questions upon appearance.

7. Cf. Watkins v. United States, 354 U.S. 178 (1957).

After a hearing on the merits, the district court denied the permanent injunction. The Court of Appeals for the District of Columbia reversed. The Supreme Court reversed, dismissing the complaint. The Court found that issuance of the subpoena was within a "legitimate legislative sphere" and hence the committee was absolutely immune from being questioned. Because the privilege is absolute, first amendment rights play no part in a case where a private citizen attempts to interfere with an ongoing congressional activity.

The speech or debate clause of the Constitution provides legislators and their aides with immunity from judicial review if their actions are within a "legitimate legislative sphere." The purpose of the clause is to provide legislators with immunity for any speech or debate in either House and to protect legislators from being questioned in any other place. The clause enables legislators to function independently, free from "intimidation by the executive and accountability before a possibly hostile judiciary,"[8] and reinforces the separation of powers embodied in the Constitution. However, it is not the purpose of the clause to protect all conduct in which a legislator engages. Although the immunity is broad, it is not unlimited.[9] The term "legitimate legislative sphere" has been adopted to define the limits of the immunity. In order for a congressman's activities to be immune from judicial review, they must be within this sphere. In *Gravel v. United States*[10] the Supreme Court defined "legitimate legislative sphere" as:

> [That range of activity which is] an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to . . . proposed legislation or . . . other matters which the Constitution places within the jurisdiction of either House.[11]

In *United States v. Brewster*[12] the Court referred to the sphere as including "acts that occur in the regular course of the legislative process."[13] Unusual or irregular acts would not be immune from judicial questioning. Both congressional investigations[14] and the issuance of subpoenas[15] have been found to be acts that occur in the regular course of the legislative process.

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8. United States v. Johnson, 383 U.S. 169, 181 (1966).
9. United States v. Brewster, 408 U.S. 501, 515 (1972); Watkins v. United States, 354 U.S. 178, 187 (1957).
10. 408 U.S. 606 (1972).
11. *Id.* at 625.
12. 408 U.S. 501 (1972).
13. *Id.* at 525.
14. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 544-45 (1963); Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daughtery, 273 U.S. 135, 161 (1927).
15. Watkins v. United States, 354 U.S. 178, 201 (1957); 2 U.S.C. § 192 (1970); *see* Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159 (1926).

Watkins v. United States[16] further developed the "legitimate legislative sphere" concept. The Court stated that to be within the protection of the speech or debate clause a congressional investigation "must be related to, and in furtherance of, a legitimate legislative task."[17] A legitimate task is the enactment of valid legislation and appropriations in reference to it. The subject must be one on which legislation or appropriations could be made. It is only then that the investigation is an integral part of the legislative process. A second requirement of *Watkins* is that the committee be instructed as to what it is to do with the power delegated to it.[18] These instructions can be transmitted through the authorizing resolution, the Chairman's statement, or the nature of the proceedings themselves. Through some means the committee's jurisdiction and purpose must be spelled out so that their actions conform with the will of the parent body. A third requirement is that there exist a nexus between the subject matter of inquiry and the individual under investigation—*i.e.*, a demonstrable relationship between the individual's activities and the legitimate legislative task.[19] If these requirements are met, congressional activities are within the "legitimate legislative sphere." The ensuing immunity under the speech or debate clause extends to legislative aides and employees. However, they are immune only insofar as their conduct would be protected if performed by the legislator himself.[20]

The Court in *Eastland* devoted considerable time to the conclusive finding that an investigation and issuance of a subpoena are "an integral part of the deliberative and communicative process. . . ."[21] In contrast, the Court gave only cursory treatment to the requirements set down for congressional investigations in *Watkins*. In two paragraphs the Court determined that all requirements were met. The majority opinion states that the inquiry was related to a legitimate task because the subject was a proper one for legislation,[22] the authorizing resolution was unambiguous,[23] and there was a prima facie case showing the need for investigation of the U.S.S.F.[24] Irrespective of the wisdom of such brevity, the Court was probably correct in finding that the requirements of *Watkins* were met.

The U.S.S.F. alleged that the production of its bank accounts, including the names of contributors, was unconstitutional because such pro-

16. 354 U.S. 178 (1957).
17. *Id.* at 187; *accord,* Barenblatt v. United States, 360 U.S. 109, 111-12 (1959).
18. 354 U.S. at 209.
19. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 546 (1963); United States Servicemen's Fund v. Eastland, 159 U.S. App. D.C. 352, 488 F.2d 1252, 1283 (1973) (dissenting opinion).
20. Gravel v. United States, 408 U.S. 606, 618 (1972).
21. 95 S. Ct. at 1821-22.
22. *Id.* at 1822-23.
23. *Id.* at 1823.
24. *Id.*

duction would force public disclosure of beliefs and associations of private citizens and deter them in their exercise of first amendment rights.[25] It asked the Court to protect these rights by adopting some exception to the immunity of legislators and their aides acting within a "legitimate legislative sphere."

In the past, three exceptions to the broad immunity given Congress by the speech or debate clause have been discussed or applied by the Court. The first applies when the "aggrieved" party is a defendant in a criminal contempt proceeding.[26] In such cases an individual's constitutional rights may be asserted as a defense.[27] The Court justified this "exception" on the grounds that an interference with congressional action has already occurred when the case reaches the judiciary. In addition, in a contempt proceeding Congress is seeking the aid of the courts to enforce its actions;[28] thus, Congress has waived its immunity. This exception did not extend to *Eastland* where the U.S.S.F. sought the aid of the federal courts.[29]

In *Gravel v. United States*[30] and *Powell v. McCormack*[31] the Court discussed a second theory limiting the immunity of the speech or debate clause. Under this theory, whereas legislators *issuing* an unconstitutional order are immune from judicial interference, those parties *executing* that order may be subject to the power of the courts if their acts are "non-essential" to legislating. If the decision is illegal, and the act "non-essential," the aggrieved individual may seek redress from the employee or aide who executed the decision. Acts which have been determined "non-essential" to legislating include the private publication of papers,[32] the barring of a legislator from the floor of Congress,[33] and the imprisonment of one who refused to honor a congressional inquiry.[34] Thus the key term is "non-essential," but no clear definition of the phrase can be found in *Gravel* or in other cases discussing this exception. In all of these situations, however, a planned or completed legislative act was to some extent frustrated. Thus it seems safe to conclude that an act may have a sub-

25. An organization is allowed to sue in behalf of its members so that their rights may be protected. *See* N.A.A.C.P. v. Alabama, 357 U.S. 449, 458-59 (1958).

26. Barenblatt v. United States, 360 U.S. 109 (1959); Flaxner v. United States, 358 U.S. 147 (1958); Quinn v. United States, 349 U.S. 155 (1955).

27. *See* note 6 and accompanying text *supra*.

28. Watkins v. United States, 354 U.S. 178, 216 (1957).

29. Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1824-25 n.16 (1975).

30. 408 U.S. 606 (1972).

31. 395 U.S. 486 (1969).

32. Gravel v. United States, 408 U.S. 606 (1972).

33. Powell v. McCormack, 395 U.S. 486 (1969).

34. Kilbourn v. Thompson, 103 U.S. 168 (1880). Judicial proceedings were not involved in this case. Here the House itself ordered and caused the imprisonment of Kilbourn. By allowing an action to lie against the sergeant at arms, the Court had determined the execution of an act involved in enforcing a congressional subpoena to be "non-essential."

stantial effect upon the underlying purpose of the order and yet be deemed "non-essential."[35]

The majority of the Court in *Eastland* discussed the idea of allowing an action to lie against those individuals who executed the subpoena, but rejected it. The Court declared summarily that although some acts of employees are not "essential to legislating," "quite the contrary is the case with a routine subpoena intended to gather information. . . ."[36] Unfortunately, the Court did not find it necessary to define the term "non-essential" nor distinguish other cases which allowed an action against those executing congressional decisions. The concurring opinion would have applied the *Gravel* exception if the individual who executed the subpoena had been before the Court.[37]

A third theory, suggested in *Kilbourn v. Thompson*[38] and the court of appeals' decision in *Eastland*,[39] is that in "extraordinary situations" direct action may be allowed against the legislators. Although *Kilbourn* first suggested this exception, it offered little description as to what constitutes such a situation. It briefly referred to legislative actions with criminal purposes.

The court of appeals' opinion in *Eastland* expanded this concept to include "unique circumstances . . . which . . . demonstrate that such Member's presence in the litigation is unavoidable if a valid order is to be entered by the court to vindicate rights which would otherwise go unredressed."[40] *Eastland* presented such circumstances. The U.S.S.F. could not force the subcommittee affirmatively to use the courts. In addition, the only parties before the Court were those who caused the subpoena to be issued, whose actions were within a "legitimate legislative sphere," and were immune. Therefore, absent direct action against the legislators, the U.S.S.F. had no remedy.

The Supreme Court rejected the concept that direct action could be allowed in extraordinary situations.[41] The Court accepted the absolute nature of the immunity conferred by the speech or debate clause. Realizing the potential for abuse by unconstitutional acts within a "legitimate legislative sphere," the Court bowed to "the conscious choice of the Framers [of the Constitution] buttressed and justified by history."[42]

The Court thus found no applicable limitation of congressional immunity. The Court deemed it of the utmost importance that legislative proceedings not be delayed by judicial questioning. The subcommittee's inquiry in this case was frustrated for five years by the actions of the

35. Gravel v. United States, 408 U.S. 606, 621 (1972).
36. 95 S. Ct. at 1824.
37. *Id.* at 1828.
38. 103 U.S. 168 (1880).
39. United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (1973).
40. *Id.* at 1270
41. 95 S.Ct. at 1823.
42. United States v. Brewster, 408 U.S. 501, 516 (1972).

U.S.S.F. The Court reacted against that delay.[43] The decision shuts the door completely to individuals who allege that their constitutional rights were violated by an affirmative action of Congress. No leeway is given to accommodate a case where the legislative interest is insignificant, whereas the individual's interest is great. The Court will, however, continue to declare congressional activities unconstitutional and provide remedies when an individual asserts constitutional rights in a criminal contempt proceeding.[44]

In light of the Court's determination that judicial review of legislators' activities is limited in this context to finding that the actvities are or are not within a "legitimate legislative sphere,"[45] a more probing look into the satisfaction of *Watkins'* requirements seems fitting. The cursory examination undertaken by the Court in *Eastland* belittles the impact that judicial review can and should have on congressional investigations through a determination that the activities are within a "legitimate legislative sphere."[46] Ideally, the legislature should realize that its actions are examined extensively to insure compliance with the Constitution.

If the purpose of the speech or debate clause is to insure the integrity of the legislative branch by preventing intimidation by other branches and to free the legislative process from delays initiated by citizens, the majority opinion best accomplished it. The *Gravel* exception, by disallowing the execution of legislative decisions, plays as much havoc with the integrity of the legislature as direct judicial invalidaton of congressional action. However, previous cases have accepted such interference in order to protect an individual's constitutional rights.[47] If the purpose of the clause is to "assure the independence of the legislators and their freedom from vexatious and distracting litigation,"[48] the court of appeals' decision also accomplished that purpose by providing some protection to both the citizens and the legislators.

The anomalous result of the Supreme Court's decision in *Eastland* is that whether an individual can protect his constitutional rights when threatened by a congressional subpoena within a "legitimate legislative sphere" depends upon such factors as: whether the subpoena is directed to the individual or his bank; whether the individual's bank can be served

43. 95 S. Ct. at 1825.
44. *Id.* at 1824 n.16.
45. *Id.* at 1820, 1827.
46. For an extensive examination, see United States v. Rumely, 345 U.S. 41, 42-46 (1953) (the "legitimate legislative sphere"); Watkins v. United States, 354 U.S. 178, 201-06 (1957) (clear understanding of purpose and jurisdiction); United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1271-74 (1973) (dissenting opinion) (the nexus between inquiry and individual).
47. Power v. McCormack, 395 U.S. 486 (1969); Tenny v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880); For an excellent discussion, see Gravel v. United States, 408 U.S. 606 (1972); Reinstein and Silverglate, *Legislative Privilege and the Separtion of Powers,* 86 HARV. L. REV. 1113 (1973); Note, 42 U. Cin. L. Rev. 780 (1973).
48. 95 S. Ct. at 1828.