1965

(Case Note) "Constitutional Law - Legislative Freedom of Speech - Constitutional Privilege Available to Congressman Charged with Bribery

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defendant, although doing business in Colorado, was not domiciled in that state.[40] After considering other factors, the court decided that Colorado had no significant interest which conflicted with Pennsylvania's and, therefore, the apparent conflict would be resolved in favor of the state having sole interest in the outcome of the litigation. However, it could be argued that Colorado had a legitimate, albeit minimal, interest in limiting recovery against the defendant airline due to the benefits which its continued operation bestowed upon that state.[41] On this basis, it is possible that the court should have provided a solution which, rather than discarding Colorado's interest, decided the case as one involving a true conflict.[42] Had this been done, a precedent could have been rationally articulated for future Pennsylvania cases which may involve similar fact situations but in which the defendant's closer connection with a foreign jurisdiction enhances that jurisdiction's interest in the outcome of the litigation.[43] For example, the foreign state may be the principal place of business or the domicile of the defendant. Therefore, by disregarding Colorado's interest, however small, the court failed to provide a useful precedent for future cases involving foreign interests which may be greater than were those of Colorado in the instant case.

Nevertheless, the instant case is a welcome addition to the body of law dealing with the solution of conflict problems. It is representative of an approach which, although not as simple in application as the old rule and in need of further development by the courts,[44] promises to yield more rational and just determinations of suits involving conflicting laws.

Constitutional Law—Legislative Freedom of Speech—Constitutional Privilege Available to Congressman Charged With Bribery.—The defendant, a congressman, was indicted with another congressman

[40] *Ibid.*

[41] *Cf.* Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection,* 28 U. CHI. L. REV. 1, 47 (1960); Weintraub, *A Method for Solving Conflict Problems—Torts,* 48 CORNELL L.Q. 215, 245 (1963); 74 HARV. L. REV. 1652, 1654 (1961).

[42] For a proposed solution to the resolution of a true conflict, *i.e.,* where two or more states have legitimate interests in the outcome of the litigation, see Weintraub, *A Method for Solving Conflict Problems—Torts,* 48 CORNELL L.Q. 215 (1963).

[43] It is interesting to note that, at the time the instant case was argued before the court, there were cases pending in the United States District Court for the Eastern District of Pennsylvania which appear to be quite similar to the instant case. See 203 A.2d at 798 n.2. In these cases it is possible that the airline there involved had a greater connection with the foreign state, thereby increasing that state's interest. It is questionable whether the instant case will provide the federal court with a sufficient basis for decisions in these cases, since no significant extraterritorial interest was recognized by the court in the instant case.

[44] The court's language under these circumstances seems particularly apt: "We are at the beginning of the development of a workable, fair and flexible approach to choice of law which will become more certain as it is tested and further refined when applied to specific cases before our courts." 203 A.2d at 806.

and two other men for conspiracy to defraud the United States and for violation of conflict-of-interest statutes. The substantive acts constituting the conspiracy were payments received by the congressmen from their co-defendants for making certain speeches on the floor of the House of Representatives. The congressman moved to dismiss the conspiracy count of the indictment on the ground that it was barred by article I, section 6 of the United States Constitution because it called for inquiry into a speech in Congress. After this motion had been denied by the trial court,[1] the jury returned guilty verdicts against all defendants. The second congressman did not appeal. On appeal to the United States Court of Appeals for the Fourth Circuit, *held,* judgment against the congressman vacated and case remanded on conflict-of-interest counts. The constitutional privilege of a congressman not to be questioned in any other place for a speech made in Congress bars a criminal charge founded upon such a speech. *United States v. Johnson,* 337 F.2d 180 (4th Cir. 1964).

Although the privilege of the legislator not to answer for his speeches outside the chamber of which he is a member may be said to have emerged in the sixteenth century, it is actually of far greater antiquity.[2] After a member of the House of Commons had been prosecuted in the miners' court for offering legislation in Parliament to regulate tin mining, an act was passed in 1512 declaring that prosecutions arising out of proceedings in Parliament were void.[3] Another aspect of the privilege appeared in 1541 when freedom of speech for members of Parliament was included in the petition of Commons to the King.[4] The disagreement between Parliament and the monarch as to the extent of the privilege granted was illustrated in 1593 when Elizabeth I warned Commons that their duty was to accept or reject the proposals set before them, not to "meddle with reforming the Church and transforming the Commonwealth . . . ."[5] Nevertheless, her

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[1] United States v. Johnson, 215 F. Supp. 300 (D. Md. 1963). The constitutional privilege upon which the defendant relied 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 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. U.S. CONST. art. I, § 6.

[2] See MAY, THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 48-49 (16th ed. 1957) [hereinafter cited as MAY]; WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 23-25 (Ohio State University Studies No. 6, 1921) [hereinafter cited as WITTKE]; Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings,* 10 COLUM. L. REV. 131, 132 (1910) [hereinafter cited as Veeder]; Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope,* 99 U. PA. L. REV. 960, 962 (1951) [hereinafter cited as Yankwich].

[3] Privilege of Parliament Act, 1512, 4 Hen. 8, c. 8. For further discussion of the landmark case which prompted this act, see MAY 49-50; TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 247-49 (11th ed. 1960) [hereinafter cited as TASWELL-LANGMEAD].

[4] See MAY 45, 50; Veeder 132; Yankwich 963. Also see TASWELL-LANGMEAD 246-47.

[5] PROTHERO, SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS 124-25 (4th ed. 1913). Also see *id.* at 119, 125-26.

reign was marked by a number of instances in which she was forced to yield to assertions of the privilege.[6] Several years later the protestations of Commons delivered to James I went to the extent of insisting that the privileges of Parliament arose by inheritance from ancient times and not by the toleration of the sovereign.[7] The final chapter in the struggle between the monarch and Parliament began with the arrest and conviction in 1629 of Sir John Elliot and two others for their conduct in Parliament.[8] The judgment against them in the King's Bench was reversed in 1668 when the House of Lords concluded that the conviction was illegal and that only Parliament could deal with words spoken therein.[9] Thus, by the middle of the seventeenth century Parliament's privilege vis-à-vis the Crown was clearly established. In 1688, Parliament adopted the Bill of Rights, which included an article providing that "the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."[10] At this point, a new era in the history of the privilege commenced, for since that time the privilege has normally been asserted to protect the legislator from his fellow citizen rather than from the ruler.

The privilege thus established by Parliament was claimed by the earliest colonial assemblies in this country.[11] Later, the United States Constitution guaranteed legislators freedom of speech by providing that "for any Speech or Debate in either House, they shall not be questioned in any other Place."[12] Similar provisions are today found in many state constitutions.[13] Although generally limited by terms

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[6] See TASWELL-LANGMEAD 313; WITTKE 26-27.

[7] PROTHERO, *op. cit. supra* note 5, at 311-12, 313-14. Also see MAY 50-51.

[8] Proceedings Against Sir John Elliot, 3 State Tr. 294 (1629). The privilege was denied on the basis that the Privilege of Parliament Act, 1512, 4 Hen. 8, c. 8, was only a private act. *Id.* at 309-10. Compare note 3 *supra* and accompanying text. In 1641 the conviction was declared by the House of Commons to be against the law and privilege of Parliament. Proceedings Against Sir John Elliot, 3 State Tr. 294, 310-13 (1641). The significance of this famous case has been widely discussed. See MAY 51; TASWELL-LANGMEAD 376-78, 390; WITTKE 29-30. See also Tenney v. Brandhove, 341 U.S. 367, 372 (1951).

[9] Proceedings Against Sir John Elliot, 3 State Tr. 294, 391 (1668); 9 H.C. JOUR. 19, 25 (1667-1687); 12 H.L. JOUR. 166, 223 (1666-1675).

[10] 1 W. & M. sess. 2, c. 2, art. 9 (1688).

[11] See CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 61 *passim* (Yale Historical Publications No. 44, 1943); Yankwich 965.

[12] U.S. CONST. art. I, § 6; see note 1 *supra*.

[13] See ALA. CONST. art. IV, § 56; ALASKA CONST. art. II, § 6; ARIZ. CONST. art. IV, pt. 2, § 7; ARK. CONST. art. V, § 15; COLO. CONST. art. V, § 16; CONN. CONST. art. III, § 13; DEL. CONST. art. II, § 13; GA. CONST. art. III, § VII, para. III; HAWAII CONST. art. III, § 8; IDAHO CONST. art. III, § 7; ILL. CONST. art. IV, § 14; IND. CONST. art. 4, § 8; KAN. CONST. art. 2, § 22; KY. CONST. § 43; LA. CONST. art. III, § 13; ME. CONST. art. IV, pt. 3, § 8; MD. CONST., Declaration of Rights art. 10; MD. CONST. art. III, § 18; MASS. CONST. pt. I, art. XXI; MICH. CONST. art. IV, § 11; MINN. CONST. art. IV, § 8; MO. CONST. art. III, § 19; MONT. CONST. art. V, § 15; NEB. CONST. art. III, § 26; N.H. CONST. pt. I, art. 30; N.J. CONST. art. IV, § IV, para. 9; N.M. CONST. art. IV, § 13; N.Y. CONST. art III, § 11; N.D. CONST. art. II, § 42; OHIO CONST. art. II, § 12;

to "speeches" and "debates," the privilege has been extended to various civil actions arising from committee proceedings,[14] voting,[15] publication of legislative documents,[16] and the proceedings of local legislative bodies.[17] This extension has been pursuant to a policy of rather

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OKLA. CONST. art. V, § 22; ORE. CONST. art. IV, § 9; PA. CONST. art. II, § 15; R.I. CONST. art. IV, § 5; S.D. CONST. art. III, § 11; TENN. CONST. art. II, § 13; TEX. CONST. art. III, § 21; UTAH CONST. art. 6, § 8; VT. CONST. ch. I, art. 14; VA. CONST. art. IV, § 48; WASH. CONST. art. II, § 17; W. VA. CONST. art. VI, § 17; WIS. CONST. art. IV, § 16; WYO. CONST. art. III, § 16. Differences in phraseology among the constitutional privisions are apparently without significance. See Veeder 135. Statutory provisions guaranteeing legislators freedom of speech are also found in a number of states. See, *e.g.*, IOWA CODE § 2.23 (1962); LA. REV. STAT. ANN. § 14:50(1) (1950); N.C. GEN. STAT. § 120-9 (1964).

Judicial and executive officers are also protected by common-law privilege from liability for acts in their official capacities. See, *e.g.*, Barr v. Matteo, 360 U.S. 564 (1959) (libel action against Acting Director of the Office of Rent Stabilization); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) (action by attorney against judge for removal from practice); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955) (action under civil rights statutes against justice of the peace); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949) (action against immigration officers). These privileges are not overcome by allegations of maliciousness so long as the official is acting in "matters committed by law to his control or supervision." Barr v. Matteo, *supra* at 572-74; Spalding v. Vilas, 161 U.S. 483, 498 (1896). Also see Simons v. O'Connor, 187 F. Supp. 702 (S.D.N.Y. 1960); Oppenheimer v. Ashburn, 173 Cal. App. 2d 624, 343 P.2d 931 (1st Dist. 1959); Bottomley v. Brougham, [1908] 1 K.B. 584. For an example of the ambiguous position taken on this matter by the Supreme Court of Iowa, see Ryan v. Wilson, 231 Iowa 33, 51, 300 N.W. 707, 716 (1941).

[14] See Tenney v. Brandhove, 341 U.S. 367 (1951); Barsky v. United States, 167 F.2d 241, 250 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948); Allen v. Superior Court, 171 Cal. App. 2d 444, 340 P.2d 1030 (4th Dist. 1959); Van Riper v. Tumulty, 26 N.J. Misc. 37, 56 A.2d 611 (Sup. Ct. 1948).

[15] See Kilbourn v. Thompson, 103 U.S. 168, 201-05 (1880); Canfield v. Gresham, 82 Tex. 10, 17 S.W. 390 (1891).

[16] See Methodist Fed'n for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956). See also Williams v. Anti-Defamation League of B'nai B'rith, 185 F.2d 1005 (D.C. Cir. 1950), where the plaintiff alleged that the defendant congressman had inserted defamatory matter as an extension of his remarks in the Appendix of the *Congressional Record*. The trial court dismissed on the ground that the matter was privileged. The Court of Appeals for the District of Columbia Circuit affirmed, however, on the ground that the matter was not defamatory. On this basis the court stated there was no need to consider the plea of privilege. *Id.* at 1007.

[17] See Martelli v. Pollock, 162 Cal. App. 2d 655, 328 P.2d 795 (1st Dist. 1958) (city council members immune from liability for passing illegal ordinance); McGaw v. Hamilton, 184 Pa. 108, 39 Atl. 4 (1898) (conditional privilege to borough council members for libelous statement); Wasserman v. City of Kenosha, 217 Wis. 223, 258 N.W. 857 (1935); *cf.* Stahm v. Klein, 179 Cal. App. 2d 512, 4 Cal. Rptr. 137 (4th Dist. 1960) (court may not presume improper motives on part of city council). The *Restatement* provides that proceedings before a legislative body other than Congress or a state legislature are subject to only a qualified privilege in defamation actions. RESTATEMENT, TORTS § 590, comment c (1938); *id.* at § 599.

liberal interpretation of the privilege.[18] Similarly, the privilege has been sustained in a wide variety of types of civil actions, including actions for defamation,[19] false imprisonment,[20] unlawful arrest,[21] and assault,[22] as well as suits under the civil rights statutes.[23]

In spite of this broad application there has been no authoritative exposition of the full extent to which legislative speech is privileged. The term "absolutely privileged,"[24] which has applied to legislative speech, has not yet been fully defined except to indicate that the privilege is a complete bar to civil liability. The Supreme Court has not been enlightening in the two leading cases in which the privilege was asserted before it. The first, *Kilbourn v. Thompson*,[25] involved an action for false imprisonment against some congressmen and the sergeant-at-arms of the House of Representatives arising out of the arrest and imprisonment of the plaintiff for contempt of the House. The Court held that the action of the House was illegal because Congress had exceeded its power to punish for contempt. The demurrer

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[18] The statement considered by the Supreme Court of the United States to be authoritative on this point, see Kilbourn v. Thompson, 103 U.S. 168, 203-04 (1880), and the one frequently referred to in the cases, was made by Chief Justice Parsons in Coffin v. Coffin, 4 Mass. 1, 27 (1808):

> 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 every thing 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.

However, the court held that defamatory words uttered by a legislator in the chamber were not protected because he was not acting as a legislator. *Id.* at 29-31.

[19] See Cochran v. Couzens, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930); Van Riper v. Tumulty, 26 N.J. Misc. 37, 56 A.2d 611 (Sup. Ct. 1948); Dillon v. Balfour, 20 L.R. Ir. 600 (Ex. Div. 1887).

[20] See Kilbourn v. Thompson, 103 U.S. 168, 201 (1880).

[21] See Canfield v. Gresham, 82 Tex. 10, 17 S.W. 390 (1891).

[22] See Allen v. Superior Court, 171 Cal. App. 2d 444, 340 P.2d 1030 (4th Dist. 1959).

[23] See Tenney v. Brandhove, 341 U.S. 367 (1951). See also Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1st Dist. 1958) (action for alleged interference with employment contract); State *ex rel.* Oklahoma Bar Ass'n v. Nix, 295 P.2d 286 (Okla. 1956) (proceedings to suspend attorney who was state senator).

[24] See Williams v. Anti-Defamation League of B'nai B'rith, 185 F.2d 1005, 1006 (D.C. Cir. 1950) (quoting lower court decision); Cochran v. Couzens, 42 F.2d 783, 784 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930); State v. Haskins, 109 Iowa 656, 658, 80 N.W. at 1063 (1899) (dictum). Also see Barsky v. United States, 167 F.2d 241, 250 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948) ("absolute immunity"); Stockdale v. Hansard, 9 Ad. & E. 1, 113-14, 112 Eng. Rep. 1112, 1156 (Q.B. 1839) ("complete impunity").

[25] 103 U.S. 168 (1880).

urged by the congressmen was sustained, however, on the ground that the legislators came within the immunity given by the privilege since they had done nothing more than vote for the contempt motion.[26] Over seventy years later the legislator's privilege was also urged in *Tenney v. Brandhove*,[27] an action under the civil rights statutes resulting from an investigation conducted by a committee of the California legislature. The Court there held that so long as the committee was acting in the sphere of legitimate legislative duties in examining the plaintiff, the courts could not inquire into that legislative activity.[28] After indicating the rather broad effect of the privilege in each of these cases, however, the Court carefully appended caveats to the effect that their decisions were not to be interpreted as denying the possibility that there might be extraordinary things done in Congress for which the members involved might be held legally responsible;[29] but the nature of those contingencies was not clearly defined. Thus, the court in the instant case was faced with an issue of first impression in determining whether the constitutional privilege against inquiry into congressional speeches applies in criminal, as well as civil, actions. Its decision is significant because it more clearly establishes the boundaries of the privilege by articulating the policies behind it.

Two somewhat related justifications have been urged by courts applying the privilege. First, the privilege is a concomitant of separation of powers principles.[30] That is to say, inquiry by the judiciary into the motive behind legislative proceedings would indicate a questioning of the good faith, competence, or integrity of the latter body, which

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[26] *Id.* at 200-05.

[27] 341 U.S. 367 (1951).

[28] *Id.* at 378-79. The concurring opinion by Mr. Justice Black emphasizes that the validity of legislative action is not coextensive with the personal immunity of legislators. Although the legislative action in question was valid so as to support the claim of privilege in this action, Justice Black recognized that it would not necessarily be valid as a basis for a prosecution of the plaintiff for failure to obey a subpoena or a similar charge. *Id.* at 379-80. Compare Barsky v. United States, 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

[29] Tenney v. Brandhove, 341 U.S. 367, 378-79 (1951); Kilbourn v. Thompson, 103 U.S. 168, 204-05 (1880). The Court in *Kilbourn* suggested that judicial inquiry might be appropriate in the following situation:

> If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. *Ibid.*

Compare Regina v. Bunting, 7 Ont. 524, 563 (1885) (dissent).

[30] See Hearst v. Black, 87 F.2d 68, 71-72 (D.C. Cir. 1936); Methodist Fed'n for Social Action v. Eastland, 141 F. Supp. 729, 731 (D.D.C. 1956); Hancock v. Burns, 158 Cal. App. 2d 785, 792, 323 P.2d 456, 460-61 (1st Dist. 1958); *cf.* Fischler v. McCarthy, 117 F. Supp. 643 (S.D.N.Y. 1954) (violation of doctrine for court to enjoin enforcement of an order of legislative investigating committee).

is inappropriate between coordinate and coequal branches.[31] Such inquiry is clearly contrary to the general rule that the judiciary may not interfere with legislative discretion when exercised in discharge of constitutional functions.[32] Second, the privilege is intended for "the public good."[33] As such, the argument may be made that when the speech does nothing to advance the public purposes the immunity no longer applies.[34] This thesis, which was rejected in the instant case,[35] results from a misconstruction of the basic premise. The public benefit which the privilege is designed to advance is not that resulting from a particular speech, but that which is believed to result from the deliberations of a legislature uninhibited by fear of legal harassment.[36] In applying the true principle, there can be no distinction made between criminal and civil cases, for, as the court in the instant case pointed out, fear of criminal prosecution may be even more inhibiting to proper legislative functioning than fear of civil sanctions.[37] Therefore, the public benefit to be derived from unrestrained legislative discussion can be achieved only by completely insulating the legislature's deliberations from the purview of the courts, regardless of the nature of the action.[38] This conclusion is

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[31] In a number of cases involving governmental power to perform certain functions, the courts have recognized that a judicial inquiry into the motives of the legislators is not permitted. See, *e.g.*, Arizona v. California, 283 U.S. 423, 455 (1931) (power of United States to construct dam); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 210 (1921) (Government's power to create banks and issue bonds); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 131 (1810) (state's power to sell and dispose of lands). However, the purpose for which the legislation was enacted is a proper subject for judicial inquiry. See NAACP v. Patty, 159 F. Supp. 503, 515 n.6 (E.D. Va. 1958).

[32] See Fischler v. McCarthy, 117 F. Supp. 643, 649 (S.D.N.Y. 1954); Lanza v. New York State Joint Legislative Comm. on Gov't Operations, 3 N.Y.2d 92, 99-100, 164 N.Y.S.2d 9, 15, 143 N.E.2d 772, 776 (1957); Incorporated Village of Hicksville v. Blakeslee, 103 Ohio St. 508, 518-19, 134 N.E. 445, 448 (1921).

[33] Lincoln Bldg. Associates v. Barr, 1 Misc. 2d 511, 515, 147 N.Y.S.2d 178, 182 (Munic. Ct. 1955), *dismissed per curiam*, 355 U.S. 12 (1957).

[34] The Government in the instant case presented this argument effectively in the trial court. 337 F.2d at 189. Also see Lincoln Bldg. Associates v. Barr, *supra* note 33, at 515, 147 N.Y.S.2d at 182. Those arguing in favor of conditional privilege for legislators have used the "public good" analysis. See Field, *The Constitutional Privileges of Legislators*, 9 MINN. L. REV. 442, 445-46 (1925); Yankwich 970-76.

[35] 337 F.2d at 189-90. Also see Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

[36] See Coffin v. Coffin, 4 Mass. 1, 27 (1808) (dictum); Veeder 131; Yankwich 966; *cf.* Bottomley v. Brougham, [1908] 1 K.B. 584 (absolute privilege for judicial officers, advocates, and witnesses).

[37] 337 F.2d at 190.

[38] The basic justification for granting an absolute privilege to public officials was pointed out by Judge Learned Hand as he considered a complaint for false arrest against immigration officers:

> It does indeed go without saying that an official, who is in fact guilty of using his powers . . . for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery . . . . In this instance it has

consistent with the English cases[39] which have considered the privilege in relation to a criminal charge, as well as the view expressed in the texts[40] and American cases.[41]

Although even criminal misconduct will not outweigh the public interest in legislative freedom of speech, it would appear from the caveats in *Kilbourn* and *Tenney* that the Supreme Court is extremely hesitant about extending the immunity without limit. The court in the instant case also recognized that the immunity might not apply when the legislative action being questioned was "so extreme that the Congress as a whole, because of its total involvement in the corruption, *was incapable of taking appropriate disciplinary action against individual members.*"[42] In other words, the courts will allow the privilege to be absolute so long as there are some other controls which may be applied to protect other interests.[43] Assuming the validity of this "alternative control" standard,[44] the question arises as to whether the particular control suggested is an appropriate limit for legislative freedom of speech. Congressional discipline for misconduct in the chamber has been rare,[45] and many of those instances have related

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been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

An analogy may be drawn to the protections given by the Supreme Court against restrictions of first amendment freedoms which force the affected parties to "steer far wider of the unlawful zone" than is consistent with those freedoms. See Speiser v. Randall, 357 U.S. 513, 526 (1958). *Accord,* Baggett v. Bullitt, 84 Sup. Ct. 1316, 1323 (1964); New York Times Co. v. Sullivan, 84 Sup. Ct. 710 (1964), 50 IOWA L. REV. 170.

[39] Proceedings Against Sir John Elliot, 3 State Tr. 294 (1629); *Ex parte* Wason, L.R. 4 Q.B. 573 (1869).

[40] See CUSHING, LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES 243 (2d ed. 1866); MAY 65.

[41] See, *e.g.,* State v. Haskins, 109 Iowa 656, 658, 80 N.W. at 1063 (1899) (dictum); Coffin v. Coffin, 4 Mass. 1, 27 (1808) (dictum); Van Riper v. Tumulty, 26 N.J. Misc. 37, 44-45, 56 A.2d 611, 615-16 (Sup. Ct. 1948) (dictum).

[42] 337 F.2d at 191. (Emphasis added.) The constitutional provision which the court considered in this connection states: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5, cl. 2.

[43] Although a majority of the members participated in the improper act in *Kilbourn,* that case is distinguishable from the one hypothesized because it must be assumed that the voting for punishment for contempt was done with a bona fide belief in its legality and with no taint of corruption. Thus, there was not an abeyance in the congressional disciplinary power, but at best a mistake of law by a majority of the House.

[44] The Supreme Court has considered the congressional disciplinary power in evaluating the validity of the legislator's privilege. See Tenney v. Brandhove, 341 U.S. 367, 378-79 (1951). Also see Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949); Mills v. Denney, 245 Iowa 584, 588, 63 N.W.2d 222, 225 (1954).

[45] From 1789 to 1935 Congress censured only twenty of its members and expelled only eighteen. See 2 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES

solely to the integrity of the house.[46] Thus, as a practical matter, congressional discipline cannot be relied upon to vindicate those injured by congressional malfeasance.[47] Nevertheless, there is an alternative to judicial policing of legislative speech: the ballot box.[48] As the ultimate expression of the people's will, it serves as the final guardian of legislative propriety. Not dependent upon the purity of the legislature, it should be available even in the situation envisioned in *Kilbourn*. In the event that it is not, there would be far more serious dangers to the stability of the republic than unrestrained legislative speech. Thus, in the final analysis, the safeguards for the public against improper use of the privilege accorded legislators are placed by the Constitution in the hands of the electorate. So long as this remedy remains available, the privilege of the legislator not to answer in any civil or criminal action for a speech in Congress should continue to protect legislators in the proper discharge of their duties.

Eminent Domain—Compensability of Liens Based on Uncollected Drainage District Assessments.—The state highway commission brought two separate actions, involving different parcels of land against a drainage district to determine whether the district, by virtue of its lien based on a special improvements assessment,[1] was entitled to compensation separate from that awarded to the landowner. In

795-860 (1907); 6 CANNON, *id.* at 402-10 (1935). The most notable censure motion adopted since was that condemning Senator Joseph McCarthy for abusing the subcommittee investigating his conduct as a senator. S. Res. 301, 83d Cong., 2d Sess., 100 CONG. REC. 16392 (1954).

[46] Two members of Congress were censured for taking bribes for appointments to the service academies. See 2 HINDS, *op. cit. supra* note 45, at 796, 832-33. Two were censured for their involvement in the Credit Mobilier scandal. See *id.* at 852-57. Representative Thomas Blanton of Texas was censured in 1921 for inserting indecent and vile remarks in the *Congressional Record;* an expulsion motion failed. See 6 CANNON, *id.* at 402-05 (1935). In 1929 Senator Hiram Bingham of Connecticut was censured for bringing an interested party into confidential committee proceedings as his clerk. See *id.* at 408-10. Expulsion or censure was ordered for a number of members of Congress accused of treasonable conduct, especially during the Civil War. See 2 HINDS, *id.* at 803-05, 812-27 (1907). The remaining censure proceedings were for words insulting to the House or another member. See *id.* at 798-802, 810-12.

[47] See Yankwich 971-73.

[48] See Tenney v. Brandhove, 341 U.S. 367, 378 (1951); United States v. Johnson, 337 F.2d 180, 191 (1964); Barsky v. United States, 167 F.2d 241, 250 (D.C. Cir.), *cert. denied,* 334 U.S. 843 (1948).

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[1] When the district was organized, the lands within it were assessed in proportion to the benefits accruing from improvements to that land. The district had financed the construction of such improvements by the issuance and sale of bonds. The bonds were secured by liens representing the value of assessed benefits on each parcel of land within the district. In order to liquidate the bonds, taxes were levied in annual installments pursuant to these liens.