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Congressional Immunity: A Criticism of Exisiting Distinctions and a Proposal for a New Definitional Approach

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CONGRESSIONAL IMMUNITY: A CRITICISM OF EXISTING DISTINCTIONS AND A PROPOSAL FOR A NEW DEFINITIONAL APPROACH*

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I. INTRODUCTION

LEGISLATIVE PRIVILEGE or immunity is the constitutional protection afforded Members of Congress by the well-known speech or debate clause of the United States Constitution which provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."[1] This simple phrase has served to ensure the integrity and independence of the Congress throughout its two-hundred year history, just as similar clauses had protected the parliaments of England[2] and our early colonial assemblies.[3]

The early and authoritative Massachusetts case of *Coffin v. Coffin*[4] defined the immunity as covering "everything said or done by . . . a representative in the exercise of the functions of that office."[5] This

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I must also thank my advisor, Professor Phillip Heyman, for directing my writing and for urging me to give more credit to Supreme Court Opinions, so that I would look for the hidden gems in the rough, the valuable insights hidden by the confusing language.

I must additionally thank former Congressman George Meader, for believing in and arguing for the independence of Congress.

Finally, I must thank my law school colleagues for being the ever-patient sounding boards for my ideas.

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1. U.S. CONST. art. I, § 6. Section 6 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.

Id.

2. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120–35 (1973).

3. *Id.* at 1136 n.121.

4. 4 Mass. 9, 4 Tyng 1 (1808).

5. *Id.* at 31, 4 Tyng at 27.

statement itself contains a very controversial notion, since it implies that legislative immunity extends beyond the strict language of the clause to cover conduct as well as speech of a legislator.[6] The ultimate objective of this study is to determine the nature and scope of congressional activities protected by the clause. The analysis is for the most part definitional rather than functional; that is, it deals with the issue at a fairly general level. A more functional analysis utilizing the definitions that I propose[7] would make it easier to resolve fully the existing cases and hypotheticals.

It is important to both an understanding and an appreciation of this freedom from accountability of legislators to bear in mind that legislative immunity is not the personal privilege or perquisite of office of the elected representative. Rather, it is intended to serve the interests of the electors[8] — the people whose votes send a man or woman to Congress for the purpose of representing them, their interests, views, and concerns, upon all national and international legislative issues. The guarantee of that independent representation implicit in the constitutionally established democratic system of government is denied when the elected representative is subject to "prosecution by an unfriendly executive and conviction by a hostile judiciary"[9] for an act undertaken in the discharge of his legislative duties. The speech or debate clause seeks not to spare the legislator the inconvenience of responding to executive or judicial inquiries into his conduct, but to ensure that the legislator is not distracted or deterred from effectively performing his representative function.[10]

There is, however, some measure of accountability for Members of Congress. Misdeeds and indiscretions, prompted by venal or corrupt motives on the part of the legislator, even if protected by the constitutional immunity barring inquiry "in any other Place," are proper subjects of inquiry and action for the congressional colleagues of the offender in the House of which he is a member. The doctrine of legislative immunity carries with it the responsibility that each body of the Congress keep its own house in order. Article I, section 5 of the Constitution established that "[e]ach House may . . . punish its Members for disorderly Behaviour, and, with the concurrence of two thirds, expel a Member."[11]

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6. *See* text accompanying note 39 *infra*.
7. *See* text accompanying notes 250–65 *infra*.
8. Coffin v. Coffin, 4 Mass. 9, 31, 4 Tyng 1, 27 (1808).
9. United States v. Johnson, 383 U.S. 169, 179 (1966).
10. *See* text accompanying note 41 *infra*.
11. U.S. CONST. art. I, § 5.

Recent court decisions have suggested that the apparent lack of will upon the part of Congress to accept and discharge this responsibility encourages disciplinary actions outside the halls of Congress.[12] These decisions have given rise to congressional concern, as expressed by Senator Ervin in the following statement:

> We might resign ourselves to the view that the unbridled expansion of executive privilege and the withering of legislative privilege are part of an inevitable trend of aggrandizement of power in the Presidency evidenced through American history. But if we do so, we profane our oaths to uphold the Constitution and indeed we may preside over the funeral of our system of government.[13]

Three recent decisions of the Supreme Court of the United States have focused upon the constitutional role of the legislative branch, and specifically, how that role should be defined for purposes of the immunity.[14] These decisions interpreting the speech or debate clause and its grant of immunity from judicial proceedings in civil and criminal actions have prompted Senator Metcalf to describe the actions of the High Court as resulting in the "narrowest definition of what constitutes a legislative act that has ever been announced by the Supreme Court in the almost 200 year history of the speech or debate clause,"[15] and Senator Ervin to criticize the decisions as "tinker[ing] with the very heart of the constitutional doctrine of separation of powers."[16] Do these recent decisions in fact represent a substantial narrowing of the scope of the clause as previously defined? and if they do, does that actually affect the vitality of the separation of powers doctrine? These questions, as well as the question of what each of the two branches of government should do to remedy the situation, are central to the present study.

The three decisions referred to above increased from five to eight the number of decisions announced by the Supreme Court involving

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12. *See, e.g.*, United States v. Brewster, 408 U.S. 501, 518 (1972) where Chief Justice Burger stated that Congress was:

> ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process . . . Congress has shown little inclination to exert itself in this area.

Id. at 518–19.

13. *Hearings on Constitutional Immunity of Members of Congress Before the Joint Committee on Congressional Operations,* 93d Cong., 1st Sess. 17 (1973) [hereinafter cited as *1973 Hearings*].

14. Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972).

15. *1973 Hearings, supra* note 13, at 3.

16. *Id.* at 11.

interpretations of the speech or debate clause. The three were handed down in the relatively brief span of 11 months,[17] while the first five had taken nearly 200 years.[18] In this study, these eight Supreme Court decisions will be analyzed in an effort to extract the definitional approaches contained in those decisions. These approaches, as well as another proposed recently by commentators, are criticized and a determination made of their constitutional and logical validity. Subsequently, I propose my own definitional approach and discuss how each of the two concerned branches — the Judiciary and the Congress — should implement that approach.

Throughout the analysis, no distinction is made between conduct by individual legislators as opposed to actions taken by a committee or the full Congress since the immunity applies both to individual legislators and to groups acting in a more "official" fashion: the protection is both personal and institutional.

One should keep in mind, however, that one element of the definitional approach I propose is the determination of how central to the legislative function a particular activity is. Insofar as actions by individual Congressmen[19] outside officially sanctioned proceedings may be considered less central to the functions of the legislature, there may be less justification for extending the scope of the clause to include such actions. However, one must be cautious in making any generalizations upon this point, for legislators function in a very individualized manner much of the time. Indeed, to think of the Congress as a monolithic body is to misunderstand the legislative process. The elected representatives in action resemble more a multilateral tug of war than a column of ordered troops.[20] Their functioning should be studied with that fact in mind.

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17. The period extended from June 29, 1972, through May 29, 1973. The cases decided were Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972).

18. Powell v. McCormack, 395 U.S. 486 (1968) was only the fifth Supreme Court decision interpreting the clause since the beginning of the Republic. The first four, in the order decided, were Kilbourn v. Thompson, 103 U.S. 168 (1881); Tenney v. Brandhove, 341 U.S. 367 (1951); United States v. Johnson; 383 U.S. 169 (1966) and Dombrowski v. Eastland, 387 U.S. 82 (1967).

19. The term "Congressman" and its plural will be used to refer to Senators and Representatives as a general class.

20. *See* text accompanying notes 217–30 *infra* for a discussion of problems associated with a formal definition of the "legislative process." Attempts at formulating such a limited definition, which might be appropriate in describing the judiciary, are inapposite here.

II. THE CASES

A. *The Early Cases*

The first case in which the Supreme Court interpreted the speech or debate clause was *Kilbourn v. Thompson*,[21] decided in 1881. The case arose out of a congressional investigation into the bankruptcy of a firm in debt to the federal government. The plaintiff Kilbourn, who presumably possessed information about the bankrupt firm, refused to comply with a congressional subpoena duces tecum, and accordingly was held in contempt of Congress.[22] The Sergeant at Arms of the House delivered Kilbourn to jail in accordance with a vote of the House of Representatives.[23] Kilbourn brought an action for false imprisonment against the Sergeant at Arms, the Speaker of the House, and four members of a special committee appointed to investigate the bankruptcy.[24]

The Supreme Court held that the congressional investigation was concerned with a case of a "judicial nature,"[25] and thus not within the "jurisdiction" of the House.[26] This conclusion was apparently premised upon a finding that the investigation was really an inquiry into the "personal affairs of individuals" and thus "no valid legislation on the subject" could result from it.[27]

It should be noted that this conclusion did not rest solely upon an abstract examination of the facts presented by the case: practical considerations also entered into the balance. The fact that the case was under consideration by the District Court for the Eastern District of Pennsylvania when Congress initiated the proceeding[28] undoubtedly made it easier to conclude that the Congress had no authority to coerce Kilbourn's disclosure upon this subject matter. Perhaps because of this fact the Court was not compelled to delve more deeply into the conceptual distinction between legislative and judicial acts.

The *Kilbourn* facts indicate that the Congress was concerned with executive conduct — the degree to which the Secretary of the Navy and other public officials were involved in the bankrupt real estate pool.[29] An investigation into a bankruptcy involving public figures and public monies, such as *Kilbourn* presents, cannot easily be cast outside the scope of congressional inquiry. This is true particularly in view of the

21. 103 U.S. 168 (1881).
22. *Id.* at 171–77.
23. *Id.* at 173–75.
24. *Id.* at 170–72.
25. *Id.* at 194.
26. *Id.* at 196.
27. *Id.* at 195.
28. *Id.* at 193.
29. *Id.* at 171, 193.

historically broad nature of the congressional power of inquiry. As research has shown, the British tradition which gave Parliament power to inquire "into every conceivable aspect of executive conduct"[30] was instilled by the Founding Fathers into our own Constitution.[31] The Court, however, chose to ignore this history of legislative inquiry and required a high correlation between the congressional investigation and subsequent enactment of legislation.[32] Since the necessary correlation was lacking in the *Kilbourn* facts, the Court held the investigation to be outside the "jurisdiction" of the House.[33]

It is unfortunate that the Court adopted this analysis to grant relief to Kilbourn when more limited approaches were available.[34] A court undertaking to decide such basic separation of powers questions should do so with extreme care. In my opinion, the careless approach evinced by the Court in *Kilbourn* was a portent of things to come — the generally inadequate treatment of the speech or debate clause by the Court in the few cases it has chosen to decide.

Even though the Court characterized the congressional investigations as nonlegislative, the speech or debate clause was held to protect the Congressmen.[35] However, the agent who executed the order was in no way protected.[36] This dichotomy between a legislator and his agent became an important element of subsequent decisions.[37]

In holding that the Congressmen's activities were immune, *Kilbourn* left an important legacy in Justice Miller's discussion of the scope of legislative activities which were protected by speech or debate immunity:[38]

> 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 be 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.*[39]

30. Berger, The Washington Post, July 24, 1973, at A20, col. 3.
31. *Id.*
32. 103 U.S. at 195–96.
33. *Id.* at 196.
34. The Court could have reached the same result upon the basis that Congress had given jurisdiction of such contempt proceedings to the courts and was acting illegally in imprisoning Kilbourn without judicial sanction. Alternatively, the questioning of Kilbourn, a private citizen, could have been judged insufficiently pertinent to any valid congressional purpose. *See* text accompanying notes 278–81 *infra.*
35. 103 U.S. at 203–05.
36. *Id.* at 205.
37. *See* section IIIA *infra.*
38. 103 U.S. at 201–04.
39. *Id.* at 204 (emphasis added).

Justice Miller's citation of the Massachusetts decision of *Coffin v. Coffin*[40] was indicative of the range of activities he thought the clause protected. He adopted the Massachusetts court's rationale for speech or debate protection and the breadth of construction that flowed therefrom:

> These privileges are thus secured, not with the intention of protecting 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.[41]

The *Kilbourn* court also relied upon the expansive interpretation in *Coffin* that, for purposes of speech or debate protection, a member was not "confined to his place in the House," and that "there are cases in which he is entitled to this privilege when not within the halls of the representative's chamber."[42] Thus, although the facts of *Kilbourn* brought only the vote of a Congressman under the speech or debate immunity, the *Coffin* language used seemed to indicate a broad range of protected activities.

For 70 years after *Kilbourn,* the Supreme Court found no occasion to further interpret the speech or debate clause. Then, in a 1951 decision, *Tenney v. Brandhove,*[43] the Court considered the clause in the context of a suit against state legislators. In *Tenney* the Court held that an immunity much like that explicitly given to Congressmen by the Constitution also existed implicitly for state legislators.[44] Since it applies to state legislators, *Tenney* is not really a case of congressional

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40. 4 Mass. 9, 4 Tyng 1 (1808). In *Coffin,* a representative of the Massachusetts House of Representatives was held liable for slander when he called someone a "convict" and a "bank-robber," notwithstanding the fact that the plaintiff had been acquitted. *Id.* at 9, 4 Tyng at 24–25. The Massachusetts court felt that even though the representative had been within the walls of the House, his speech was not protected when made informally to another representative, and not as a part of his functioning as a representative. *Id.* at 36–7, 4 Tyng at 33–34. Although the Court held against the representative, there was much dicta in the case which manifested a feeling that the privilege should be interpreted liberally. *Id.* at 35–36, 4 Tyng at 32–33.

41. 103 U.S. at 203, *quoting* Coffin v. Coffin, 4 Mass. 9, 31, 4 Tyng 1, 27 (1808).

42. *Id.* at 203–04, *quoting* Coffin v. Coffin, 4 Mass. 9, 31, 4 Tyng 1, 27 (1808).

43. 341 U.S. 367 (1951).

44. *Id.* at 372–75. The Court's doubt that Congress could have "constitutional power to limit the freedom of state legislators acting within their traditional sphere"

immunities in the strict sense; however, it is valuable in that it clarifies to an extent the concept of a protected "sphere of legitimate legislative activity,"[45] wherein legislators are immune.

The case arose out of a suit against members of a committee of the California State Legislature. Brandhove had appeared as a witness before the committee and had subsequently circulated a petition urging the discontinuance of the committee's activities. After being ordered by the committee to reappear for questioning concerning his petition, Brandhove refused to give further testimony and was consequently cited for contempt. In addition, the chairman of the committee read into the record Brandhove's prior testimony, as well as a statement concerning his alleged criminal record and denials of the allegations of his petition.[46] Brandhove's suit against the committee alleged violations of various constitutional rights, including his right to free speech, due process, and equal protection of the laws.[47]

Writing for the Court, Justice Frankfurter found that the California Legislature's investigation in *Tenney* was within the scope of legitimate legislative concerns.[48] In so concluding, Frankfurter established a difficult threshold over which courts must pass before imposing liability upon legislators for their actions in committee: For a court to determine that a legislative committee has exceeded the bounds of its power "it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive."[49]

The Court was even more specific in asserting what was *not* a possible ground for imposing liability upon legislators: the "claim of an unworthy purpose" in the legislators was held not to "destroy the privilege."[50] This was a significant principle, since it limited the scope of a court's license to review the activities of the legislature and insulated the legislator from politically inspired charges of improper motives for

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seemed to extend constitutional dimensions to the immunity of state legislators, concerning which the Constitution itself is silent. *Id.* at 376.

Although California, the jurisdiction involved in *Tenney,* provides for legislative immunity from service of process, it is one of the few states without a state constitutional provision analogous to the speech or debate clause. *Compare* CAL. CONST. art. 4, § 11, *with* MASS. CONST., Pt. First, art. 21. The latter provision was interpreted in *Coffin.* 4 Mass. at 14–15, 4 Tyng at 6–7.

45. 341 U.S. at 376.

46. *Id.* at 370–71.

47. *Id.* at 371.

48. *Id.* at 378–79.

49. *Id.* at 378.

50. *Id.* at 377.

committee activities.[51] Frankfurter concluded that the sole judicial determination was whether a committee's inquiry was within its powers.[52]

The majority opinion, despite its emphatic buttressing of the *Kilbourn-Coffin* rationale for legislative immunity (and the concomitant broad protection for Congressmen),[53] added little in the way of new law to the area of legislative immunity. Rather, it was the concurring opinion of Justice Black which furnished a wholly new insight into this field of the law,[54] for Black began to clarify the *Kilbourn* reasoning, which had held the investigation there to be outside the "jurisdiction"[55] of the House of Representatives because it was of judicial nature[56] and yet exempted the Congressmen from liability for their actions which were related to that same investigation.[57]

The *Tenney* majority did not concern itself with the possible extension of speech or debate immunity to legislative actions which could simultaneously be held illegitimate or unconstitutional. The opinion stated only that the *Tenney* committee members were protected because the committee's inquiry could "fairly be deemed within its province."[58] In terms of the *Kilbourn* language, did this mean that the committee had had "jurisdiction" in that area? If so, it would seem that execution of any order flowing from the investigative necessities of the inquiry would have been protected by speech or debate immunity.[59] Otherwise, a new theory would have to be fashioned to withhold protection from actions executed pursuant to a legitimate congressional investigation.[60] The majority did not attempt to fashion such a theory.

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51. *Id.* Frankfurter stated:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. 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 and distractions of a trial upon the conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Id.

52. *Id.* at 378.

53. *Id.* at 373–76. *See* text accompanying notes 40–42 *supra.*

54. 341 U.S. at 379 (Black, J., concurring). *See* text accompanying notes 62-65 *infra.*

55. Kilbourn v. Thompson, 103 U.S. 168, 196 (1881).

56. *Id.* at 194.

57. *Id.* at 204–05.

58. 341 U.S. at 379.

59. The *Kilbourn* rationale was that the lack of "jurisdiction" to investigate into the affairs of private individuals deprived congressional orders of their legitimacy. 103 U.S. at 196. The implication was that where there is jurisdiction to investigate, actions in furtherance of the investigation and not otherwise illegal are protected.

60. Since no *explicit* dichotomy between legislators and their agents had yet been advanced as a principle of the immunity, there would be no justification for holding agents liable for executing orders of their principals when their principals had acted legitimately in furtherance of their offices.

Justice Black, however, perhaps realized the inconsistency between the *Tenney* formulation and the rationale given in *Kilbourn* for imposing liability upon the executor of congressional orders. As did the majority, he discarded the *Kilbourn* language of "jurisdiction" in the Congress. The majority had stated that the protection extends to the entire "field where legislators traditionally have power to act."[61] Justice Black explained that this immunity did not confer *validity* upon the decisions which it protected, so that the judiciary would have to take a second look at any congressional order whose execution might infringe upon individual rights.[62] The legal validity of congressional decisions, he asserted, is not "coextensive with the personal immunity of legislators."[63] Therefore, the fact that congressional decisions are accorded immunity did not guarantee that they would be given legal sanction through the courts.[64]

This approach, though novel in the area of congressional immunity, was nothing more than the theory of judicial review of congressional legislation.[65] Justice Black simply applied that theory to decisions of the Congress which were antecedent to the passing of the bill.

The next two speech or debate cases to reach the Supreme Court were *United States v. Johnson*[66] and *Dombrowski v. Eastland.*[67] Although *Johnson* was decided a year before *Dombrowski,* the latter decision was factually similar to *Kilbourn* and *Tenney,* and therefore it is appropriate to disregard strict chronological sequence and to discuss that decision first.

The plaintiff in *Dombrowski* was a private citizen attacking the investigative activities of a congressional committee.[68] Like the citizens in *Kilbourn* and *Tenney,* he alleged a deprivation of his constitutional rights by the committee.[69] However, the type of right allegedly infringed differed in each of the three decisions. In *Tenney,* the right

61. 341 U.S. at 379.

62. *Id.* (Black, J., concurring).

63. *Id.*

64. *Id.* Justice Black emphasized that "holding that the chairman and other members of his committee cannot be sued in this case is not a holding that their alleged persecution of Brandhove is legal conduct." *Id.* As an example, Black noted that in contempt proceedings Brandhove would be able to raise the defense that the committee's actions were void. *Id.* at 380.

65. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), established the principle that the courts must only give legal life to legislative enactments which are in accord with the Constitution. *Id.* at 180.

66. 383 U.S. 169 (1966).

67. 387 U.S. 82 (1967) (per curiam).

68. *Id.* at 83. The committee in this case was the Senate Judiciary Committee's Internal Security Subcommittee. *Id.*

69. *Id.*

violated was basically the right to one's good reputation,[70] whereas in *Kilbourn* the citizen plaintiff had been incarcerated for over a month.[71] In *Dombrowski* the private citizen's property and records had been allegedly seized in possible violation of his fourth amendment rights.[72] These differences in the facts of the three cases made it possible for the Court to arrive at a different solution in each without constructing a consistent theory of congressional immunity.

As a basis for the decision in *Dombrowski,* the Court had at its disposal the confusing language of *Kilbourn,*[73] the simple *Tenney* formulation,[74] and the Black theory for invalidating congressional decisions.[75] The Court chose the *Tenney* analysis which protected legislators as long as they were acting "in the sphere of legitimate legislative activity."[76] Clearly, in *Dombrowski,* plaintiff's property and records had been seized without a valid warrant.[77] However, because Senator Eastland himself did not appear to have been involved in the actual seizure of petitioner's property, his actions were within the permissible sphere and the Court dismissed the case as to him.[78] As to Committee Counsel Sourwine, however, the Court decreed continuation of the case, and presumably he could be found liable if it were subsequently found that he personally had exceeded the sphere of legislative activity by his involvement in the seizure of the papers.[79]

The facts in both *Dombrowski* and *Kilbourn* involve physical interferences with individuals and the resolution in each case was similar: the Congressmen were exempted but a further inquiry was ordered into the actions of the Congressmen's agents, carrying with it the possible imposition of liability.[80] However, the complicated *Kilbourn* reasoning and language were avoided in *Dombrowski,* with no discussion of "jurisdiction" in the Congress or unnecessary challenge to its investigative powers being undertaken. How, then, did the Court rationalize its exemption of the Senator but not of the Senator's agent in the matter? The Court seemed to combine the simple *Tenney* formulation with the *Kilbourn* holdings to arrive at a formula by which

70. *See* text accompanying note 47 *supra.* The limit of the legislature's interference with him was to hold him in contempt and publicly censure him since he was never incarcerated for his actions. *Id.* at 371.
71. 103 U.S. at 176–77.
72. 387 U.S. at 83.
73. *See* text accompanying notes 25–27 *supra.*
74. *See* text accompanying note 49 *supra.*
75. *See* text accompanying notes 62–64 *supra.*
76. 387 U.S. at 86, *quoting* Tenney v. Brandhove, 341 U.S. 367, 376 (1951).
77. 387 U.S. at 83.
78. *Id.* at 84.
79. *Id.* at 84–85.
80. *See* text accompanying notes 35 & 36 and 78 & 79 *supra.*

legislative immunity was "less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves."[81] Although the legislator himself was protected under *Tenney* because he had not acted outside the legislative sphere, his agent, Sourwine, apparently had been involved in activity beyond this sphere, and hence the case would have to continue against him. The Court did not discuss the possibility that the agent had acted pursuant to congressional orders and therefore did not consider whether such orders would have been protected,[82] or whether they would have been constitutional or "valid."[83] Thus, while no clear theory emerged whereby a principal's orders would be protected yet his agent's execution thereof could not be, the *Tenney* formulation seemed to gain support and the *Kilbourn* dichotomy between legislator and agent was retained, although it was not possible to determine how crucial either principle was to the result.

Despite the lack of a consistent philosophical approach, *Kilbourn*, *Tenney*, and *Dombrowski* together provided a manageable rule for deciding speech or debate clause cases in which citizens claimed violation of their constitutional rights: If the alleged violation resulted from congressional actions such as giving orders and resolutions, conducting investigations and calling witnesses before them, or inserting statements into the record, the case would have to be dismissed because such activities fell within the traditional sphere of legitimate legislative activities, concerning which legislators were not to be hindered or distracted. However, when the violation alleged a more material and tangible interference with a citizen, such as arrest or seizure of his property, a court was bound to investigate further to see whether such action was legitimate. If declared unconstitutional or invalid, liability could result, as the constitutional clause could not be interpreted to protect such illegitimate action. However, in this event, the court would only impose liability upon the agent who executed the order, and not upon the principal who had ordered the illegal violation of an individual's rights. The "personal immunity of legislators," therefore, was able to outstrip in breadth the validity of their decisions.[84] In appropriate cases the agents of the Congress assumed liability so as to cover the full range of congressional decisions, including those which a court decided

81. 387 U.S. at 85.

82. Presumably, under the *Kilbourn* rationale, the orders would have been protected. *See* text accompanying notes 35 & 36 *supra*.

83. Presumably, they would not have been under the Black approach. *See* text accompanying notes 62-64 *supra*.

84. 341 U.S. at 379 (1951) (Black, J., concurring).

never should have been obeyed. This anomaly, which was the legacy of the early cases, has yet to be fully resolved.[85]

The next speech or debate case, *United States v. Johnson*,[86] involved no violation of a private citizen's rights, but rather alleged criminal activity by a Congressman. Defendant Johnson, a member of the House of Representatives, was accused of having exerted influence upon the Department of Justice in favor of a loan company which faced indictments by that department.[87] The question faced by the Supreme Court was whether Representative Johnson's motivation in giving a speech favorable to the loan company could be the basis of a conviction under the relevant conspiracy statute.[88]

In *Tenney*, the plaintiff had alleged that a committee hearing had not been held for a " 'legislative purpose' but was designed to intimidate and silence him."[89] The Court there had rejected the claim and held that improper motivation could not vitiate speech or debate protection,[90] stating that the privilege "would be of little value" if it did not protect Congressmen from a "judgment against them based upon a jury's speculation as to motives."[91] In contrast to *Tenney*, however, the motivation alleged in *Johnson* derived from a transaction between a Congressman and private interests wholly extrinsic to the legislative activity, the giving of a speech in this case.[92] The government utilized this distinction in argument, asserting that the illegal conduct in *Johnson* had been antecedent to the speech and that "the clause was meant to prevent only prosecutions based upon the 'content' of speech."[93]

The Supreme Court noted that the government had inquired at trial into the "preparation" of the speech, its "precise ingredients," and the "motives for giving it."[94] They held 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."[95] In effect, the Court held that the speech or debate clause precluded questioning of a Con-

85. *See* section IIIA *infra* for a discussion of how later courts have struggled with the problem of the legislator-agent dichotomy.

86. 383 U.S. 169 (1966). There were seven counts alleging violation of a federal conflict of interest statute, 18 U.S.C. § 281 (1970), and one count of conspiracy to defraud the United States in violation of another section of the criminal code, 18 U.S.C. § 371 (1970).

87. 383 U.S. at 171.

88. *Id.* at 172.

89. 341 U.S. at 371.

90. *See* text accompanying note 50 *supra*.

91. 341 U.S. at 377.

92. 383 U.S. at 171–72.

93. *Id.* at 182.

94. *Id.* at 175–76.

95. *Id.* at 177.

gressman concerning antecedent activities such as the preparation for and motivation behind a speech whenever the content of the speech was inevitably connected to those activities.[96] The *Johnson* holding thus implied a rejection of the government's argument that the antecedent activities and the speech itself were separable.[97]

B. *The Recent Cases*

In the cases through *Johnson,* the Supreme Court had taken an expansive approach in its application of the speech or debate immunity. The language of the decisions had emphasized the importance of the immunity to the independence of the legislature, and had evidenced a separation of powers rationale for legislative immunity[98] in proclaiming the speech or debate clause a "manifestation of the 'practical security' "[99] given to the legislature against *both* the Executive and the Judiciary.[100] The *Johnson* decision enlarged the scope of the protection, by including within it activities which were not in themselves part of "speech or debate" but were so closely intertwined with a speech that not including them would weaken the protection afforded by the clause.[101] *Johnson* marked a high point in the Congress' efforts to assert its immunity; for the cases since then have tended to narrow, rather than broaden, the construction of the clause.

Since *Johnson* was decided, there have been four additional Supreme Court decisions involving application of the speech or debate clause. The first of these was *Powell v. McCormack,*[102] decided in 1969. Adam Clayton Powell, although elected to the House of Representatives, was excluded from his seat by a majority vote of the House.[103] Joined by voters from his congressional district, Powell brought an action against five members of the House, the Speaker, Clerk, Sergeant at

96. *Id.* at 175–77. Since the Court did not formulate a standard for the necessary connection between the speech and the antecedent activities, one can only look at their impression of the interconnection that existed in the instant case. *Id.*

97. It should be noted that the Court was very careful to point out that only in this case could the speech not be severed from the conspiracy. *Id.* at 184–85. Thus, the holding and effect of the case was not as broad as some of the language would lead one to believe.

98. For example, the *Johnson* Court stated that "[i]n the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *Id.* at 178–79.

99. *Id.* at 179.

100. *Id.* at 181. The Court stated in *Johnson* that the reason for the introduction of the speech or debate privilege into Parliament "was not only fear of the executive . . . but of the judiciary as well." *Id.*

101. *See* text accompanying notes 94–96 *supra.*

102. 395 U.S. 486 (1969).

103. *Id.* at 489.

Arms, and Doorkeeper of the House, charging that his exclusion by the House had been unconstitutional.[104]

The defendant Congressmen and House officers argued, among other things, that the speech or debate clause precluded judicial review of the Congressmen's decision to exclude Powell.[105] In order to be able to support that claim defendants were forced to distinguish this case from *Kilbourn* and *Dombrowski,* wherein the legislator-agent dichotomy had enabled the Court to hurdle the speech or debate immunity argument in deciding whether to impose liability for execution of a congressional mandate.[106] The defendants attempted to distinguish those cases by contending that those cases "concerned an *affirmative act* performed by the employee outside the House *having a direct effect* upon a private citizen,"[107] whereas the instant case involved actions taken by House employees "solely within the House."[108]

Defendants' argument, however, contained several obvious weaknesses. The alignment of the *Powell* facts with those of *Tenney,* in contrast with those of *Dombrowski* and *Kilbourn* was a tenuous one. The exclusion of Powell from Congress was a rather tangible — conceivably, even "physical" — interference with him,[109] which is more readily compared with the seizure of plaintiff's papers in *Dombrowski* and the arrest and incarceration in *Kilbourn* than with a mere verbal attack such as was present in *Tenney.*

Respondents attempted to cure this deficiency by adding another distinction: the alleged invasion of plaintiffs' rights in *Dombrowski* and *Kilbourn* was said to be "outside the House,"[110] while all the actions in the instant case were admittedly within the House of Representatives. This distinction, which arguably has some validity, was simply not present in the earlier cases. It was therefore rejected by the Court without discussion.[111]

The internal-external distinction which was put forth by the respondents may not have been supportable in terms of the four earlier decisions, as they argued, but it certainly elucidated a unique characteristic of the *Powell* case. *Powell* presented a situation in which the Congress had made a decision concerning *its own proper functioning.* The subject matter of the action was peculiarly within its power; it

104. *Id.* at 493.
105. *Id.* at 495.
106. *See* text accompanying notes 35 & 36 and 78 & 79 *supra.*
107. 395 U.S. at 504 (emphasis added).
108. *Id.*
109. In addition, it had an indirect effect upon the citizens who had elected Powell. The restriction of their right to vote could arguably be labelled a material or tangible interference, if not a "direct" one. *See* text accompanying note 113 *infra.*
110. 395 U.S. at 504.
111. *Id.*

involved a form of self-discipline by the very branch to which was given almost the full power to deal with abuses by government officials of whatever branch.[112] With respect to Powell, at least, the sanction was peculiarly nonjudicial since no right was denied to him other than his right to sit at the 90th Congress. Therefore, it is very difficult to argue that the legislators had in any way "usurped" the functions of either one of the other branches.

On the other hand, the citizens who elected Powell were also hindered in the exercise of a right — their constitutional right to vote — and the courts are generally the protectors of individual rights in our system.[113] One could not argue that the case was concerned solely with the proper functioning of Congress. The Congress' actions had had a dual effect, one basically internal and the other external, and therefore a rather basic separation of powers question was presented by the case. One would have thought that this separation of powers question would be resolved as an aspect of the speech or debate protection. The possible overlap in functions was clearly relevant to the *Tenney* formula invoking protection for Congressmen acting within the "sphere of legitimate legislative activity."[114] Separation of powers, as the Supreme Court had previously stated, was at the heart of the speech or debate clause;[115] it was logically intrinsic to any argument dealing with the scope of legitimate activity of one branch of government.

The Court did acknowledge the *Tenney* formulation[116] but quickly dismissed it, concluding that they found it necessary to treat only the case against the employee respondents.[117] The difficult separation of powers considerations were thus relegated to the argument upon justiciability.[118]

Having excised from the argument the question of whether Congress acted within its sphere of legitimate legislative activity, the Court found it relatively easy to deal with respondent's contention that the speech or debate clause precluded judicial review of the congressional decision to exclude Powell. The Court could review those legislative

112. Congress has the constitutional grant of power to impeach executive and judicial officials. U.S. CONST. art. I, §§ 2, 3. It was also given power to "punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member." *Id.* § 5. The privilege from arrest clause, on the other hand, limits the judicial power to punish Congressmen to "treason, felony, and breach of the peace." *Id.* § 6.

For a discussion of the jurisdiction of Congress to punish its own members, *see* United States v. Brewster, 408 U.S. 501, 520–21 (1972).

113. *See* R. BERGER, CONGRESS V. THE SUPREME COURT 282 (1969).

114. *See* text accompanying notes 45, 48 & 49 *supra.*

115. United States v. Johnson, 383 U.S. 169, 182 (1966).

116. 395 U.S. at 501.

117. *Id.* at 501–02.

118. *Id.* at 516–17.

acts in considering the case against House employees since *Kilbourn* and *Dombrowski* stood for that very proposition.[119] The Court was not troubled by this indirect way of questioning legislators for actions which — they seemed to admit — could be considered "speech or debate." To preclude judicial review was simply not the purpose of the clause.[120] The Court concluded: "Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves."[121]

As in *Dombrowski,* the Court in *Powell,* while endorsing the legislator-agent dichotomy, did not offer an explanation of that theory. However, the Court did suggest a new understanding of the clause by asserting that protecting legislators from having to defend themselves was the paramount purpose of the clause.[122] This implied a *personal* theory of the protection, that is, one which excluded the application of speech or debate so as to render unreviewable certain decisions of the Congress. This principle had not been proclaimed before *Powell,* nor was it clarified further in the *Powell* opinion. Conceivably, the Court was substituting it for the simple legislator-agent distinction as the mode of justifying the imposition of liability upon those executing congressional orders while protecting the Congressmen themselves. Perhaps it was simply a restatement of that distinction. However one construes it, it was clear that the Court had retained the dichotomy between a legislator and his agent as a working principle while avoiding the problems posed by the language of the cases that first established it.

In the summer of 1972 the Court decided two more speech or debate cases, *United States v. Brewster*[123] and *Gravel v. United States.*[124] The facts in *Brewster* were very similar to those of *Johnson;* both were criminal prosecutions of Congressmen accused of taking money in return for some legislative action on behalf of a private interest.[125] In observing the change in the Court's approach since *Johnson,* it is useful to contrast that decision with the resolution of *Brewster.*

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119. 395 U.S. at 504–06.

120. *Id.* at 505.

121. *Id.*

122. *Id.*

123. 408 U.S. 501 (1972).

124. 408 U.S. 606 (1972).

125. The legislative activity in *Brewster* was the use of influence upon the Senator's decision of how to vote upon pending legislation. 408 U.S. at 502–03. The legislative act in *Johnson* was a speech. 383 U.S. at 172 (*see* text accompanying note 88 *supra*). Yet, the two are admittedly protected activities, and the lack of precise similarity did not appear to be of significance in the two decisions.

Former Senator Daniel Brewster was charged with soliciting and accepting a bribe in violation of federal statutes.[126] The indictment charged that Brewster, a member of the Senate Post Office and Civil Service Committee, had been influenced by a bribe in his actions upon legislation proposing changes in postal rates.[127] The facts once again posed the question of whether the speech or debate clause precluded questioning of a Congressman concerning a transaction which allegedly affected his motivation in making a legislative decision. In *Johnson,* the Court had connected a similar bribery transaction to the giving of a speech and had extended protection to the combination of the two activities, despite the government's contention that the two were separable.[128] Nevertheless, in *Brewster* the Court was able to separate the bribery from the legislative activity and to conclude that the speech or debate clause would not shield Brewster from prosecution upon the bribery charges.[129]

The crux of the Court's argument, by which the separation was achieved, is found in its statement that an inquiry into the purpose of a bribe " 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' "[130] One can logically argue, however, that an inquiry into the purpose for a bribe which is allegedly designed to affect certain legislative acts automatically *throws doubt* upon the proper motives of the Congressman who is alleged to have performed them. Therefore, the Court may have

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126. 18 U.S.C. § 201(c) (1970) provides in pertinent part:

> Whoever, being a public official . . . directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act . . . [shall be guilty of an offense].

Id.

18 U.S.C. § 201(g) (1970) provides in pertinent part:

> Whoever, being a public official . . . directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . [shall be guilty of an offense].

Id.

18 U.S.C. § 201(a) (1970) provides:

> For the purposes of this section:
>
> "public officials" means Member of Congress. . . .
>
> . . . .
>
> "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

Id.

127. 408 U.S. at 502–03.

128. *See* text accompanying notes 93–97 *supra.*

129. 408 U.S. at 526, 528.

130. *Id.* at 526, *quoting* United States v. Johnson, 383 U.S. 169, 185 (1966).

defined "drawing in question" to mean merely directly asking one why he performed a particular act.

Even in light of the fine distinction the Court may have drawn in *Brewster,* it is not at all clear whether the decision can be reconciled with *Johnson.* The dissenting opinion of Justice Brennan asserted that *Johnson* had been as much as overruled.[131] Justice White, in his dissent, viewed the *Brewster* facts as presenting the very situation which was specifically left open by *Johnson*:[132]

> [W]hether an otherwise impermissible prosecution conducted pursuant to a statute . . . specifically including congressional conduct and purporting to be an exercise of congressional power to discipline its Members — would be consistent with the Speech or Debate Clause.[133]

However, recognizing that the majority did not view the facts in this way,[134] Justice White interpreted the majority's position as resting upon a distinction "between promise and performance" of a legislative act.[135] Since prosecution under the statutes relied upon by the government required as it did in *Johnson,* that one connect the "promise" and the "performance,"[136] Justice White found that *Johnson* dictated a holding in *Brewster* contrary to that reached by the majority.[137]

In fact, the Court in *Brewster* thought that the crime had been complete upon acceptance of the bribe and thus there need not have been such a close connection between promise and performance of the legislative act. In the majority's view, it was not sufficient, nor would it have been so in *Johnson,* to assert that the subject matter of the

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131. 408 U.S. at 550 (Brennan, J., dissenting). Brennan felt the majority was "turning its back on" *Johnson* and that the Court's holding repudiated "principles of legislative freedom developed over the past century in a line of decisions culminating in *Johnson.*" *Id.* at 532.

132. United States v. Johnson, 383 U.S. 169, 185 (1966).

133. 408 U.S. at 562–63 (White, J., dissenting).

134. The majority did not address the congressional self-regulation argument, *id.* at 529 n.18, despite the fact that this was the principal ground upon which the prosecution justified the statutes and the conviction. *Id.* at 530–31 (Brennan, J., dissenting).

135. *Id.* at 552.

136. *Id.* at 553–55.

137. *Id.* at 553. The Justice stated that in order to prove the crime in *Johnson:*

> [T]he prosecution introduced evidence that money was paid to make a speech, among other things, and that the speech was made. This, the Court held, violated the Speech or Debate Clause, because it called into question the motives and purposes underlying Congressman Johnson's performance of his legislative duties.
>
> The same infirmity inheres in the present indictment . . . .

Id.

Justice White was also concerned with the language of the indictment which charged Brewster with illegality in relation to "'his action, vote and decision on postage rate legislation.'" *Id.* at 553. This is exactly the kind of charge against which White thought the speech or debate clause was designed to protect. *Id.*

inquiry was "related" to the motivation for the legislative act.[138] Many legislative activities are casually or incidentally "related" to the legislative process but the speech or debate clause does not protect such actions.[139] While not making clear how closely related to a valid legislative act an activity had to be in order to come under the protection, the majority held that "inquiry into illegal conduct" was not protected "simply because it has some nexus to legislative functions."[140] Thus the inquiry into the alleged promise to perform certain official acts was characterized as simply having "some nexus" to the actual motives of the officer when he subsequently performed those acts. Perhaps *Johnson* was not thereby overruled, but at the very least it was adroitly ignored.[141]

In any event, the significance of *Brewster* may not lie in its holding upon the specific facts presented, but rather in its general approach to the speech or debate clause which Justice White characterized as a "begrudging interpretation."[142] Various ordinary activities of a legislator were characterized as "political in nature rather than legislative." Among these were "legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'newsletters' to constituents, news releases, and speeches delivered outside the Congress."[143] No one had ever seriously contended, proclaimed the Court, that these "political matters . . . . have the protection afforded by the Speech or Debate Clause."[144] They also formulated a new standard

138. *Id.* at 528.

139. *Id.*

140. *Id.* As an example of related unprotected activity, the Court noted that in *Johnson*, the Congressman could have been retried upon the conspiracy count if evidence concerning his speech were not admitted. The majority felt that upon retrial, Johnson "could not have obtained immunity from prosecution by asserting that the matter being inquired into was related to the motivation for his House Speech." *Id.*

141. The *Brewster* Court attempted to distinguish *Johnson* by saying that it had merely held inadmissible the inquiry into the motivation and performance of the legislative acts themselves, *id.* at 512, which inquiry would also be precluded in *Brewster*. *Id.* at 525. The implication was that the deficiency in *Johnson* was the Government's attempt to prove too much. But this treatment of the *Johnson* holding as a rule of evidentiary law is belied by the language there. In *Johnson* the Court had stated:

> 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.

383 U.S. at 176–77.

142. 408 U.S. at 562 (White, J., dissenting).

143. *Id.* at 512. It is unclear whether the Court was including this list of "political" activities in the category of related legislative acts which were not protected (*see* text accompanying notes 138–40 *supra*), or whether political acts are a category unto themselves which are not immune.

144. *Id.*

for legislative immunity; henceforth only "purely legislative activities" would be protected by the speech or debate clause.[145]

The decision in *United States v. Gravel*[146] added some substance to the new "purity" standard proposed in *Brewster*. Senator Gravel used his chairmanship of the Senate Public Works Subcommittee to read into a committee record various portions of the "Pentagon Papers."[147] Subsequently, he made arrangements for publishing the entire record through a private publishing house in Boston, presumably in order to obtain a more general audience for the information contained in the Papers.[148] The Government, in order to discover the means by which the Senator was able to acquire the Papers,[149] convened a grand jury in Boston and subpoenaed an aide of the Senator for questioning.[150] Senator Gravel intervened and moved to quash the subpoena, claiming that the speech or debate clause protected his aide from any questioning upon the matter.[151] Acting upon this novel set of facts, the Court held that aides and assistants of legislators are entitled to speech or debate protection equal to that given to the legislator himself,[152] so long as the aide acts within the scope of employment; that private republication of material is not a protected legislative act;[153] and that the legislator and his aide could be questioned about sources of information, if such inquiry were relevant to an investigation of possible third-party crime.[154]

With regard to the immunity afforded to the Congressman's aide, it can be argued that the *Gravel* Court rendered an expansive interpretation of the speech or debate clause. Recognizing that the day-to-day work of Congressmen requires them to delegate a great deal of authority to their aides and assistants, the Court included such employees under the immunity whenever they did things "which would have been legislative acts, and therefore privileged," if performed by the Congressmen themselves.[155]

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145. *Id.* at 512, 528.
146. 408 U.S. 606 (1972).
147. *Id.* at 609.
148. *Id.* at 609–10.
149. *Id.* at 608. The government was investigating a variety of possible criminal offenses, including:

> the retention of public property or records with intent to convert, the gathering and transmitting of national defense information, the concealment or removal of public records or documents, and conspiracy to commit such offenses and to defraud the United States.

Id. (citations omitted).
150. *Id.* at 608–09.
151. *Id.*
152. *Id.* at 618, 621–22.
153. *Id.* at 625–27.
154. *Id.* at 628.
155. *Id.* at 616, *quoting* United States v. Doe, 332 F. Supp. 930, 937–38 (D. Mass. 1971).

Interestingly, the Court was compelled to take this view by its own previous stand in the area of official immunity. This immunity, which applies particularly to executive branch officials, had been held to protect not only Cabinet-rank officers, but also officers of lower rank in the *Barr v. Mateo*[156] decision. The legislator-agent dichotomy would have been still more anomalous if it were retained with respect to congressional immunity, which is constitutionally guaranteed, even though no officer-aide dichotomy was admitted with respect to official immunity, which is court-created. The Court may or may not have seen a legislator-aide distinction in *Gravel* as an anomaly. Yet for one reason or another it did away with it, agreeing with the court of appeals that for the purpose of the privilege, a Congressman and his aide should be "treated as one."[157]

Having established the principle that the legislator and his aide were entitled to coextensive immunities, the Court defined the scope of that protection. Justice White, writing for the Court, stated that the privilege precluded "prosecutions that directly impinge upon or threaten the legislative process."[158] This general definition initially appeared consistent with those developed in the earlier cases, since "legislative process" did not sound much different from the "sphere of legitimate legislative activity" protected in *Tenney*.[159] However, the Justice went on to define "legislative process" in an unprecedented manner. The clause, he said, protected "speech or debate in either House"; insofar as it protects other matters,

> [T]hey must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[160]

This formulation of the privilege linked the "deliberate and communicative processes" and other constitutionally prescribed action.[161] By implication, those aspects of the communicative process

156. 360 U.S 564, 572–74 (1959).

157. 408 U.S. at 616, *quoting* United States v. Doe, 455 F.2d 753, 761 (1st Cir. 1972).

158. 408 U.S. at 616.

159. *See* text accompanying notes 45, 48 & 49 *supra*.

160. 408 U.S. at 625.

161. The wording includes under the protection "deliberative and communicative processes" which are part of either (a) "consideration and passage or rejection of proposed legislative" or (b) "other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625.

which were not directly concerned with a piece of legislation or other constitutionally prescribed action were not accorded protection.[162] Similarly, other aspects of the legislative process which were not essentially communicative or deliberate in nature were excluded.[163] This formulation was unquestionably narrower than that of the early cases. Its application to *Gravel* provided further proof of this assertion.

The Court employed this new formula to determine which actions by Gravel and his aide were entitled to protection. The Senator's arrangements for publication were not accorded any protection, since this activity was not considered "part and parcel of the legislative process."[164] Neither would the manner by which the Senator obtained the documents qualify as a legislative act; therefore no protection was extended to anyone concerning his acquisition of materials for the committee meeting, "as long as the questions [did] not implicate legislative action of the Senator."[165] With respect to other aspects of the preparation and implementation of the various legislative acts, the Court held that both the Congressman and his aide could be questioned and declared liable for any acts violating "an otherwise valid criminal law."[166] In effect, the Court limited the speech or debate immunity to that aspect of a Congressman's work which one could characterize as the passing of a bill.[167] The only other protected actions were activities intimately connected to that process, such as communications between Senator and aide "related" to the legislative process, as the Court defined that process.[168] It was obvious that Justice White had applied his own formulation faithfully.

The dissenting justices in *Gravel* were quick to point out that the majority was almost completely ignoring what may be characterized as the informing function of Congress. Justice Douglas saw this case as representing the struggle by the Congress to inform itself, in the face of executive branch efforts to keep secret great amounts of information.[169] In this type of struggle, while he believed the courts had no place,[170] he nonetheless thought that the speech or debate clause *should*

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162. General communications with constituents may be examples of such actions.
163. Acquisition of information from the executive might be one example.
164. 408 U.S. at 626.
165. *Id.* at 628.
166. *Id.* at 626. The Court in referring to an "otherwise valid criminal law" meant a law which did not punish those functions protected by the speech or debate clause, *i.e.*, voting, speech, or other legislative activities. *Id.*
167. *Id.* at 649 (Brennan, J., dissenting).
168. *Id.* at 629.
169. 408 U.S. at 637–46 (Douglas, J., dissenting).
170. *Id.* at 639–40. The Justice stated:

> It is, however, no concern of the courts, as I see it, how a document is stamped in an Executive Department or whether a committee of Congress can obtain

operate to immunize a Congressman insofar as his actions were "normally done by a member 'in relation to the business' " before the Congress.[171] Further, protection of the informing function in this case required that the republication by Senator Gravel be brought under the speech or debate clause, and that the "confidences of the Senator in arranging it not [be] subject to inquiry 'in any other Place' than the Congress."[172]

Justice Brennan, with whom Justices Douglas and Marshall joined in dissent, focused upon the heart of the problem in his discussion of the majority's indifference to the informing function.[173] He stated that the explanation for the Court's "anomalous" treatment of that function, by which "words spoken in debate or written in congressional reports [were] protected" yet the attempt to seek "a wider audience" through republication was not,[174] lay in the Court's restrictive definition of the legislative processes encompassing "only acts necessary to the internal deliberations of Congress concerning proposed legislation."[175] This definition "excludes from the sphere of protected activity" the duty to inform the general public, which duty Brennan believed to be "at the heart of our democratic system."[176]

The broader approach that Brennan proposed also led him to protect from inquiry the source of the documents which Senator Gravel introduced into the record.[177] Brennan justified this by asserting that the "receipt of materials for use in a congressional hearing is an integral part of the preparation for that legislative act."[178] Protected activities such as speeches, hearings, and the casting of votes require research and preparation,[179] and such antecedent undertakings are irrevocably connected to the legislative acts themselves.[180] In Brennan's own words:

> It would accomplish little toward the goal of legislative freedom to exempt an official act from intimidating scrutiny, if other conduct leading up to the act and intimately related to it could be deterred by a similar threat.[181]

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the use of it. The federal courts do not sit as an ombudsman, refereeing the disputes between the other two branches.

Id.

171. *Id.* at 635, *quoting* Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).
172. 408 U.S. at 637.
173. *Id.* at 649–62 (Brennan, J., dissenting).
174. *Id.* at 649.
175. *Id.*
176. *Id.*
177. *Id.* at 663. Justice Brennan felt that if any branch of the government should be empowered to inquire into congressional sources, it should only be Congress itself. *Id.* at 663–64.
178. *Id.* at 662.
179. *Id.* at 662–63.
180. *Id.*
181. *Id.* at 663.

In one sense, the *Gravel* and *Brewster* cases completed a stage which anticipated the drama of conflicting forces represented by *Doe v. McMillan*.[182] *Doe* took the most difficult elements of the entire speech or debate question and combined them into one case. It presented basic separation of powers issues, as well as a classic conflict between the needs of a governmental branch and the rights of innocent individuals.

The plaintiffs in *Doe* were students in the District of Columbia whose names had appeared in a report of the House's District of Columbia Committee. The complaint alleged that the report contained derogatory information about the plaintiff students.[183] Cited as defendants in the suit were the Chairman, members and staff of the Committee, the Superintendent of Documents, the Public Printer, and certain officials of the District's public school system.[184] The question faced by the Supreme Court was formulated by Justice White, who wrote the majority opinion, as being "whether the Speech or Debate Clause affords absolute immunity from private suits to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals."[185] A divided Court answered this question in the negative, holding that the speech or debate clause did not protect the execution of the congressional orders, although those orders were themselves given protection.[186]

Thus the Court thought that the primary actions of the Committee in this case, that is, the authorization of the hearings, the preparation of the report, and the order to publish the report were within the protection of the clause[187] as interpreted by *Gravel*.[188] However, those same protected orders by the Congressmen had been transformed into "non-legislative directives"[189] the moment the Committee ordered publication beyond what Justice White termed "the reasonable bounds of the legislative task."[190] Outside this boundary, the protection did not exempt anyone from liability, just as it had not protected the Sergeant at Arms in his execution of congressional orders which the Court had "subse-

182. 412 U.S. 306 (1973).

183. *Id.* at 308. Specifically, the information was in the form of attendance lists, disciplinary letters and memoranda, test papers, and other school documents. *Id.*

184. *Id.* at 309.

185. *Id.* at 314.

186. *Id.* at 315–16.

187. *Id.* at 313. The primary actions in *Doe* were:

> The acts of authorizing an investigation pursuant to which the subject materials were gathered, holding hearings where the materials were presented, preparing a report where they were reproduced, and authorizing the publication and distribution of that report. . . .

Id.

188. *See* text accompanying note 160 *supra*.

189. 412 U.S. at 315.

190. *Id.*

quently found to be 'without authority' " in *Kilbourn*.[191] The Court considered public distribution "beyond the apparent needs of the 'due functioning of the [legislative] process' " to be separable from the internal distribution to Members of Congress.[192] The general dissemination of the report could thus be reviewed and anyone involved in it held liable, even though the internal distribution was protected by speech or debate.[193]

No new formula was propounded to achieve this particular dichotomy in the normal functioning of the legislature; rather the notion of a "legislative sphere" to which protection would extend was retained.[194] Moreover, the Court admitted that it had "no authority to oversee the judgment of the Committee" within that sphere or to impose liability upon the Congressmen should the Court disagree with the Committee's "legislative judgment."[195] The general publication of a report was simply held to be outside that legislative sphere — to be "nonlegislative" — because the Court believed it to go "beyond the reasonable requirements of the legislative function."[196]

Crucial to the *Doe* holding is the Court's ability to review the reasonableness of a legislative act such as the decision to print a particular number of committee reports.[197] The decision thus furthers the *Powell* notion that the purpose of the speech or debate immunity is not to preclude judicial review of legislative actions,[198] but rather to assure Congressmen that they will not be held personally answerable for certain decisions they make.

Under the *Doe-Gravel* approach, there is no difference between a Congressman and his assistant as long as either one performs the protected legislative actions.[199] It may be presumed, although there are no cases which establish the rule, that a Congressman who undertook personally to execute congressional orders to a point beyond the reason-

191. *Id.*, *quoting* Kilbourn v. Thompson, 103 U.S. 168, 200 (1881).
192. 412 U.S. at 317, *quoting* United States v. Brewster, 408 U.S. 501, 516 (1972).
193. *Id.* at 315–17.
194. *Id.* at 312, *quoting* Gravel v. United States, 408 U.S. 606, 624–25 (1972).
195. *Id.* at 313.
196. *Id.* at 316.
197. *Id.* The dissection of the legislature's functioning according to judicial opinion as to the "reasonable requirements" is troublesome since it forces a doctrine which presumably protects the independence of one branch to depend upon another branch's interpretation of how reasonably it has acted. Arguably, this is no more threatening to the autonomy of the legislative branch than are the determinations the judiciary has made in the past pursuant to its task of determining whether an activity should be held to be a legislative act or to be within the legislative process. However, the requirement of reasonableness, in addition to the necessity of finding a legislative act, seems to allow the Court a wider scope and deeper incursion in its review of acts of legislators.
198. *See* text accompanying notes 120–121 *supra*.
199. *See* text accompanying notes 152–53 *supra*.

able requirements defined in *Doe* could be held liable for his actions.[200] For certain actions, which the Court considers essential to the legislative process, such as the internal deliberations and communications between Congressmen, no one may be held liable, regardless of status or office. For all other acts, anyone can incur liability. In this way the doctrine of congressional immunity has regained the logical consistency of which it had been deprived by the legislator-agent dichotomy of the early cases. However, this gain has been more than offset by a narrowing in scope of the protected activities.[201] It is submitted that this narrow approach by the Court represents a disregard for the Congress' informing function which belies the theory of the separation of powers and its practical guarantee in article I, section 6.

III. A LOOK AT EXISTING APPROACHES

A. *The Legislator-Agent Dichotomy*

In the early cases the notion of a legislator-agent dichotomy in the application of the speech or debate clause was evident in the Court's language, and to a certain extent in the holdings of the cases.[202] This concept received its most explicit endorsement in the *Dombrowski* decision, wherein the Court stated that legislative immunity "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves."[203] Although the recent cases apparently have narrowed the distinction, at least theoretically,[204] the use of the legislator-agent dichotomy in *Kilbourn,*

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200. There is language in *Doe* that expresses this view. The majority stated that:

> A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report.

412 U.S. at 314 (footnote omitted).

201. *See* text accompanying notes 142, 160–64 and 189–93 *supra.*

202. *See* text accompanying notes 35 & 36, 58 & 59, 78 & 79 *supra* for a discussion of the *Kilbourn, Tenney,* and *Dombrowski* decisions where the importance of the legislator-agent distinction in the early cases is discussed.

203. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (per curiam).

204. In *Gravel* it was rejected to the extent that a Congressman and his aide were held indistinguishable for purposes of the immunity. United States v. Gravel, 408 U.S. 606, 616 (1972).

In *Doe* the language of the opinion indicated that the distinction had limited conceptual validity in that liability depends upon the type of activity from which the suit arises, not upon the person who acted. Doe v. McMillan, 412 U.S. 306, 312–16 (1973). Additionally, the Court said:

> Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity" they enjoy no special immunity . . . .

Dombrowski, and *Powell*[205] bears closer scrutiny because the question of liability is very closely related to the important issue of the Congress' accountability to the courts for decisions it makes.

In every speech or debate case there are two very difficult questions posed: First, are the Congressman's actions reviewable by a court? For certain actions, the very existence of the speech or debate clause requires that a reason be given for allowing judicial review since the clause presumably protects those activities of a Congressman from being "questioned in any other Place."[206] Second, are the courts able to impose liability upon someone for the actions under attack once it is decided that no protection is afforded by the clause? The two questions are, of course, interrelated. They may indeed be so interrelated as actually to be elements of the same issue and thus depend upon the same findings and conclusions. What the legislator-agent dichotomy has done is to preclude any clear definition of the relationship between the two questions.

The *Kilbourn* rationale is perhaps the most unclear. At times it seemed that liability resulted from reviewability; that is, since the Congressmen had acted ultra vires their office, the Court could review their actions, find their actions unconstitutional, and impose liability upon their agents.[207] At other times, reviewability seemed to follow a fortiori from the imposition of liability upon the sergeant at arms. In other words, the speech or debate clause did not preclude questioning of Congress' agents; and in order to determine the liability of the agent, one must review the legitimacy of his actions and, hence, the congressional power to order those actions.[208]

The Court in *Kilbourn* found the House's investigation illegitimate because in its view the purpose thereof was non-legislative.[209] The facile manner in which it did this implied that the Court generally could review any congressional activity to determine if its purpose was proper. However, the Court also decided that the congressional orders and resolutions were within the protection of the clause, and this meant that the Congressmen could not be questioned in "any other Place" about their orders' propriety.[210] Fortunately for the Court in that case there

205. In these three cases the holdings have distinguished the Congressmen from the officials who executed their orders. The rationale has not always been clear. *See* text accompanying notes 35 & 36, 81–84, 121 & 122 *supra,* and notes 207–14 *infra.*

206. U.S. CONST. art. I, § 6.

207. Kilbourn v. Thompson, 103 U.S. 168, 190–96 (1881).

208. *Id.* at 196–200.

209. *Id.* at 194–96.

210. *Id.* at 201–03. However, the Court explicitly left open the question of whether "an utter perversion of a [Congressman's] powers to a criminal purpose would be protected from punishment by [the Speech or Debate Clause]." *Id.* at 205.

were others available for questioning concerning those actions. Review of the decisions was, therefore, possible without violating the literal wording of the clause, which clearly proscribed questioning of the Congressmen themselves. The Court's ability to review, which seemed to exist independent of the question of liability, in fact depended upon the circumstance of an agent's being available for questioning and having liability imposed upon him. Therefore, the result was that certain actions were held to be outside the Congress' "jurisdiction" yet within the protection of the immunity, "not to be questioned" and yet reviewable by the courts.

The relationship between reviewability and liability under the clause was approached more courageously in the *Powell* decision. There the Court made the sweeping assertion that the purpose of the speech or debate protection "is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[211] Once again, however, the legislator-agent dichotomy and the availability of the agents obviated the need to question[212] the legislators themselves. Although implying that reviewability was not in issue, the Court felt compelled to state that the justification for reviewability was the liability of the agent.[213]

In arriving at its decision, the *Powell* Court ignored the *Tenney* standard by which Congressmen acting in the "sphere of legitimate legislative activity" were protected by speech or debate immunity.[214] It did not determine whether the House, in its exclusion of Powell, had acted within that sphere. As a consequence, the Court avoided the troublesome problem of precisely distinguishing between reviewable legislative actions and *protected* legislative actions.

As noted above, in the *Gravel* and *Doe* decisions, the Court apparently abolished any distinction based solely upon the status of the individual who executes the congressional order. However, neither the *Gravel* case nor the *Doe* case completely abolished the *Kilbourn* rationale. In *Doe,* for example, the Court held the Congressmen's orders and votes to be immune, but did not "insulate" the agents who executed

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211. Powell v. McCormack, 395 U.S. 486, 505 (1969).

212. The Court cited *Kilbourn* and *Dombrowski,* for the proposition that dismissing a suit against a Member of Congress, because of the restrictions of the speech or debate clause, did not bar review of the "challenged congressional action [where] *congressional employees were also sued.*" *Id.* at 505–06 (emphasis added).

213. *Id.* at 505–06. *See* note 212 *supra.*

214. Tenney v. Brandhove, 341 U.S. 367 (1951). *See* text accompanying notes 45, 48 & 49 *supra.*

those orders.[215] As a justification for the different treatment accorded to the agents, it was explained that *Kilbourn* stood for the proposition that such agents were not protected ipso facto because they had been following a legislative command.[216] It is unfortunate that the Court relied upon *Kilbourn* in any way as a basis for decision in *Doe* and *Gravel,* since this cast a shadow of *Kilbourn* confusion upon the principles to be applied in the speech or debate area.

Viewed within the umbra of *Kilbourn, Doe* and *Gravel* could be interpreted to mean that there is no legislator-agent distinction where the agent is an "aide" of the Congressman, but that more remote, ministerial agents are not equally protected. The Public Printer and Superintendent of Documents in *Doe* could thus be considered to have been remote — and hence, unprotected — agents, while Gravel's legislative aide could consistently be thought of as having shared in the Congressman's protection. This would concord with the imposition of liability in *Kilbourn,* where the agent was not a congressional aide privy to the legislators' process of decisionmaking but an officer with a more ministerial kind of responsibility.

However, it is unlikely that this interpretation is correct, and certainly it is not desirable. *Doe* and *Gravel* can better be explained in terms of the nature of the activities which were challenged, rather than in those of the statuses of the actors. Those cases have defined protected legislative activity as that which is intimately connected with the passage of a bill. This definition of the scope of protected activity necessarily favors the aide, who generally is involved in the enacting of legislation, over the more remote agent who prints reports or otherwise executes congressional orders. To propose, as was implied in the language of *Kilbourn* and *Dombrowski,* that a distinction be made purely upon the basis of the defendant's office leads to a very confusing theory of immunity, as it violates the logic of the agency relationship since it holds the agent responsible for what the principal has ordered, often in situations where neither the agent nor the principal could know in advance that the challenged action would be declared illegitimate.

B. *The Internal-External Distinction*

Apart from the legislator-agent dichotomy, an expedient, if not a principle, used by the Court in the cases, a distinction has also been made between what one might call the "internal" and the "external"

215. 412 U.S. at 315.

216. *Id.*

activities of a legislator.[217] Under the theory of this distinction, protection extends to activities of Congress which are

> part of the deliberative and communicative processes by which Members participate in Committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House,[218]

but not to other actions of the Congressmen.[219]

There are two major problems with this definition. Initially, it seems to preclude protection of activities as crucial to the legislative function as the Congressmen's efforts to inform themselves, the activity *Gravel* seemed to immunize. Narrowing the immunity to allow aides to be questioned about the sources of information necessarily impedes the flow of information to the Congress. It does not help to protect the "deliberative and communicative processes" by which Congressmen enact legislation when there is little information to communicate or deliberate upon, especially at a time when the flow of information from the Executive is being deliberately impeded. Thus, it is imperative that the Congress be protected in its efforts to acquire information.[220]

At the other end of the legislative process, the lack of protection for the continuing flow of information is equally devastating. A Congressman communicates with his constituents in numerous ways, all of which are means of maintaining a close relationship between a representative and those he represents.[221]

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217. *Doe* exemplified the internal-external distinction as distribution of a committee report within the halls of Congress was protected but its dissemination to the public was not. *Id.* at 315–17.

218. United States v. Gravel, 408 U.S. 606, 625 (1972).

219. In dictum, the *Brewster* Court listed some activities that it felt were not within the scope of the protection. United States v. Brewster, 408 U.S. 501, 512 (1972). *See* text accompanying note 143 *supra.*

220. The seriousness of this clog in the pipeline of information which runs from the Executive to the Congress and the people can hardly be overstated. The Congress has a very difficult time obtaining necessary information from the Executive's labyrinths and must often be satisfied with whatever information the Executive wishes to make available. Even when a Member of Congress manages to find out that a certain report exists and that it contains information of vital importance to the legislature and the people, he is often unable to call high-level executive officials for questioning with regard to such a report, as the Congressman will first have to overcome the official's claim of executive privilege. *See* M. J. GREEN, J. FALLOWS & D. SWICK, WHO RUNS CONGRESS? 102–30 (1972).

221. The Court seems to have excised from the legislature most if not all of the existing means of communicating with constituents. Certainly all nonofficial or noninstitutional modes of passing information are excluded by the *Brewster* "purity" standard, which would classify them as "political" rather than "legislative." *See* text accompanying note 143 *supra.* Official reports and the *Congressional Record,* on the other hand, would seem to come within the protection, being "legislative" rather

One aspect of a Congressman's informing function, which we may term the "watchdog" function, is totally separate from his function as a lawmaker. It concerns, for the most part, the discovery of how the executive machinery is functioning and the transmission of that information to the people. Former President Wilson placed this aspect of the informing function upon an equal level with that of the lawmaking function when he said: "Quite as important as legislation is vigilant oversight of administration."[222]

A second aspect of the informing function, however, is a *part* of the legislative function, not an adjunct to it. In this sense, the duty to inform is an integral element of the representative's own role, not a result of his ancillary "watchdog" role. The flow of information from Congressman to constituent is important not only because it keeps the constituent informed of the Executive's implementation of measures decided upon by the Congress, but also because this communication is the soul of the representative process itself. The subject of the communication is not what the Executive is doing but what the Congress is thinking.[223] President Wilson envisioned this aspect of the informing function as a give-and-take of opinions and facts between legislators and their electorates. This he placed upon a *higher* level than the "legislative," lawmaking function itself: "[E]ven more important than legislation," he asserted, "is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion."[224] Viewed

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than "political." But even as to these, the *Doe* decision seemed to restrict both formal and informal modes of communicating with the general public by subjecting them to judicial scrutiny. *See* text accompanying notes 189–93 *supra*.

222. W. WILSON, CONGRESSIONAL GOVERNMENT 195 (1885) (hereinafter cited as WILSON). President Wilson emphasized the importance of this aspect of a Congressman's duties, saying:

> If the people could have, through Congress, daily knowledge of all the more important transactions of the governmental offices, an insight into all that now seems withheld and private, their confidence in the executive now so often shaken, would, I think, be very soon established.

Id. at 196.

223. Like the courts, the Congress analyzes a factual situation and develops a legal solution for the "cases" it decides upon. Judge Landis made use of this judicial analogy in explaining the importance of the communication between a representative and his constituents:

> The electorate demands a presentation of the case; it requires, even though its comprehension be limited by its capacity, the chaos from which its representative has claimed to have evolved the order that betokens progress. *The very fact of representative government thus burdens the legislature with this informing function.*

Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 HARV. L. REV. 153, 205–06 (1926) (emphasis added).

224. WILSON, *supra* note 222, at 195.

in this manner, it is clear that the very nature of representation precludes a simple division of the legislative process into internal and external activities. In a representative system, the process of debate and the exchange of ideas is either both internal and external, or nonexistant. Speech or debate protection achieves nothing if it cannot protect the communications between the Congress and the people. This "representative" aspect of the informing function is contradicted by the internal-external dichotomy as applied in *Doe,* for here the completion of the congressional action of publishing a report is negated, since the distribution of that report is limited to the "internal" needs of the Congress and thus denied to an extent to the general public.[225] The decision to publish a report implies the existence of a desire to communicate with the electorate which would be frustrated by the Court's narrow understanding of the legislative process. In its opinion the Court reasoned that any distribution going "beyond the apparent needs of the 'due functioning of the [legislative] process' " falls outside the scope of speech or debate protection.[226] This betrays an understanding of the legislative process which excludes the participation of the public, and, in my view, renders nugatory the "representative" aspect of the informing function.

Nor is it any justification for the Court's narrow understanding of the legislative function to characterize a host of legislative activities as "political in nature rather than legislative," as was done in *Brewster.*[227] A legislator's function is inherently political. The representation of people by voicing their views and shaping policy accordingly is not susceptible to the kind of distinction which separates "legislative" from "political" activities. Such a distinction is an arbitrary straightjacket,[228] imposed by courts which may not understand the legislative function.[229]

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225. *See* note 221 *supra.*

226. Doe v. McMillan, 412 U.S. 306, 317 (1973).

227. 408 U.S. at 512.

228. The Supreme Judicial Court of Massachusetts seemed to recognize this fact when it wrote in *Coffin* that it would extend protection 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.*" Coffin v. Coffin, 4 Mass. 9, 31, 4 Tyng 1, 27 (1808) (emphasis added).

229. *See generally 1973 Hearings, supra* note 13. Senator Ervin appraised the Gravel formula in this manner:

> [F]ive of the Justices of the Supreme Court, none of whom has spent any time in Congress, have concluded that the acquisition of information for hearings and the communication of the results to the public are not integral parts of the legislative process.
>
> This definition of "legislative activity" reflects a lack of appreciation of the things essential to the legislative process. As we all know, the formulation,

A second, more fundamental objection exists to the internal-external distinction drawn in *Gravel*. Even with respect to the activities which meet *Brewster's* "purity" standard and are considered part of the protected legislative process, the protection actually given is incomplete and ineffective. The definition extends protection to congressional actions such as the giving of a speech, the recording of a vote, or the introduction into the record of remarks by a legislator. However, it does not protect the *completion* of those congressional actions. Is a legislator's speech given freely if the publication of it to the general public is forbidden? In the *Doe* situation, has the Judiciary respected the speech or debate clause by foreclosing questioning of the Congressmen themselves concerning their decisions but allowing those very decisions to be frustrated because their agents cannot execute them?

The internal-external distinction is more of a problem when it is used to separate a protected decision from its execution than when it is used to distinguish among different kinds of activities engaged in by a legislator. In my opinion, it is more crucial that activities which come within the scope of the clause be protected *in toto* than that the scope of protected activities be very broad. Allowing the courts to exercise a prophylactic power of review over the admittedly protected activities of a Congressman seems to be more of a contradiction of the "informing function" than a wholesale exclusion of certain activities from the legislative process to which protection extends.

Despite all the objections expressed, the internal-external distinction has some validity. Undoubtedly, the protection which the Framers extended to any "speech or debate" by a Congressman must be given greater weight the closer the activity is to the essential role of a legislator in our governmental system. It is logical to protect activities related to the role of representative and not to protect a Congressman's illegal efforts to affect executive policy for his own personal gain. However, it is not completely logical to separate a congressional decision from its implementation, when the implementation consists of an attempt to put before the public the decision made and the reasoning therefor. Insofar as the *Brewster-Gravel-Doe* formula is used to break off this link in the representative process, as in the mechanical *Doe* distinction between

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consideration, and passage of legislation involves much much more than the introduction of a bill, a few speeches and a vote.

Id. Part I, at 15.

A contrary view was expressed by Ms. Lawton, Assistant Attorney General, Office of Legal Counsel, Department of Justice. She stated:

[I]t seems to me that the Court does understand the role of Congress, but it is saying the Speech and Debate Clause covers less than that, it covers the functioning of legislating, which is only one function of the Congress. . . .

Id. Part II, at 89.

internal and external distribution of reports, it frustrates the representative process itself.

C. *The Douglas Approach*

The early cases can be interpreted in terms of the type of interference with a citizen which was alleged.[230] Under this approach, where there was alleged a material interference with the plaintiff's person or property, the case fell outside of the clause.[231] On the other hand, when the alleged violation of a citizen's rights resulted from purely legislative processes, the immunity was held to protect such activities.[232]

In his concurring opinion in *Doe,* Justice Douglas adopted this approach as the determinative one in the theory of the immunity, explaining that violations by the Congress of fourth amendment rights of an individual, "like assaults with fists or clubs or guns — are outside the protective ambit of the Speech or Debate Clause."[233] He then reasoned that violations of first amendment rights must also be reviewed by the Court to determine whether or not such violations fell outside speech or debate immunity. To him it was clear that "[v]iolations of the commands of the first amendment are not within the scope of a legitimate legislative purpose."[234]

The determination of the type of right violated by congressional actions is necessarily a part of the resolution of any speech or debate case. For various reasons, it seems logical to curtail the protection in cases where there has been tangible interference with the private citizen. One reason is that the very phrasing of the clause more plausibly includes within its scope words, reports, votes, and so forth than other congressional actions which affect private citizens in a more "physical" or palpable manner.

However, Justice Douglas' approach in *Doe* is subject to criticism insofar as he would have removed protection from a congressional communication which infringes upon possible constitutional rights of the petitioners in that decision. The free exercise by Congressmen of their "representative function" was clearly a very important protection in the view of the writers of the Constitution, and it was not troublesome to them that this exercise might occasionally impinge upon the rights of

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230. *See* text accompanying notes 84 & 109 *supra.*

231. *See, e.g.,* text accompanying notes 23, 35 & 36, 72, 78–80 *supra.*

232. *See, e.g.,* text accompanying notes 46–48 *supra.*

233. 412 U.S. at 327–28 (Douglas, J., concurring).

234. *Id.* at 328 (emphasis omitted). Justice Douglas apparently saw a possibility of first or fourth amendment violations in the inclusions of the plaintiffs' names in the committee report. *Id.* at 328–30.

individuals.[235] By any conceivable interpretation of the scope of the clause, it is clear that the right of individuals to their good name will sometimes be subjugated to the absolute freedom of speech of legislators.[236] However, clear violations of the fourth and first amendments by a Congressman or his agent were, in all probability, not intended to have been protected by the inclusion of the speech or debate clause in the Constitution. The very existence of the clause demands some sort of distinction between cases wherein citizens are libelled by congressional speech and those wherein their persons or possessions are physically disturbed.

There is a further problem with the Douglas approach, even with regard to cases where very tangible constitutional rights are allegedly violated. The approach Douglas would take appears to be based upon a judicial balancing of interest — the citizen's rights against the needs of Congress. In effecting this balance, he would have allowed the Court to investigate the merits of the underlying congressional decision itself. In *Doe* he thus was able to condemn the wisdom of including the names of private citizens in the committee report as "totally irrelevant to the purposes of the study" by the committee.[237] Such judicial oversight tends to do away with the immunity altogether, since it allows questioning of any and all congressional decisions. A "major purpose of [any] immunity — removal of the burden of having to defend one's actions,"[238] would be frustrated by an approach which would make everything depend upon a judicial balancing of Congress' and the citizen's interests.

The degree to which a citizen's constitutional rights are violated is, of course, an important element of any theory of legislative immunities. However, a court which is asked to redress alleged violations of an individual's rights by a congressional action must also take into account the implications of the separation of powers doctrine. It is not sufficient to declare, as Douglas did, that courts "always have recognized 'judicial power to determine the validity of legislative actions impinging on individual rights,' "[239] and then plunge into the merits of the congressional decision. The intended purpose[240] and expressed words of

235. Chief Justice Burger in *Brewster* made this point clear:

> In its narrowest scope, the clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the framers.

408 U.S. at 516 (footnotes omitted).

236. It has never been seriously argued that courts may impose liability for a speech in either House, regardless of how unrelated it was to the legislative process or how much damage it did to a citizen. *See* note 247 and accompanying text *infra*.

237. 412 U.S. at 330.

238. 87 HARV. L. REV. 221, 230–31 (1973).

239. Doe v. McMillan, 412 U.S. 306, 330 (1973).

240. See section III B *supra*, and notes 244–46 and accompanying text *infra*.

the clause preclude accountability of the legislators to the courts or anyone else. In the context of co-equal branches of government, a protection which guarantees independence in certain areas cannot be made to depend upon another branch's judgment of the wisdom of decisions made within the scope of that protected area. "To have such partial protection is to have no meaningful protection at all."[241]

D. *The Civil-Criminal Dichotomy*

A recent article suggested that the speech or debate clause was primarily intended as a protection of Congress from the executive branch.[242] The authors envisioned a civil-criminal distinction based on the argument that in executive motivated suits the privilege serves its historic function of preserving a separation of powers.[243] In this view, private actions do not involve that executive-legislative conflict and do not "generally represent so great an intrusion on legislative functions."[244] The analysis examined the scope of each aspect of the privilege in Parliament, and drew conclusions from the relative importance of one over another at particular times.

One must be careful, when interpreting the history of parliamentary privilege, not to superimpose our own more refined and more specific concepts of speech or debate immunity and privilege from arrest. The oldest formulations of the privilege make it clear that the privilege was not viewed as a conglomeration of piecemeal protections; rather it was a general immunity, an integrated theory by which Parliament asserted the right of its members to be free from outside interference. As such, it was effective as a bar to civil suits — not only those for words spoken but those brought for any reason whatsoever. That there were no citizen's suits challenging the *specific* freedom of speech or debate by Parliament means simply that no one even conceived that it was possible for a private citizen to charge Parliament with libel.[245] At a time

241. 87 HARV. L. REV. 221, 230–31 (1973).

242. Reinstein and Silverglate, *supra* note 2, *passim*. The authors advanced historical evidence for distinguishing between the two situations since it appears that the speech or debate freedom was used by Parliament for the most part as a shield against the Crown. *Id.* at 1123–35.

243. *Id.* at 1171.

244. *Id.* at 1172–73.

245. *See generally* C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1921) (hereinafter referred to as WITTKE). Wittke defined the origins of the privilege in this way:

> Very early in the history of Parliament, it became evident that members, to be of any real service, must be free to attend all sessions, unmolested by threats, insults, attacks, or arrests, whether they originated from the Crown, the courts of law controlled by the Crown, or from private citizens . . . It was regarded as essential that members should be free to deliberate on public questions without concern for their private estates; their minds must be free from their private fortune while they are engaged in the public service. So it became a

when the King himself was less and less able to hold Parliament for its speeches and proceedings, when a Member's *estate and servants* were immune from civil suit no matter how tortious the action against an individual, in or outside of Parliament, the very notion of a private suit challenging a speech or debate in Parliament would have been considered fantastic.[246]

There is little contemporary evidence to show whether or not the framers of the Constitution intended the scope of the speech or debate clause in the federal system to be as wide as that enjoyed by Parliament. However, the Court in *Kilbourn, Tenney,* and *Dombrowski* consistently held that the scope of the clause was effectively coextensive in Executive-initiated and private action cases.[247]

An argument for a civil-criminal distinction founded upon the notion that private actions do not "generally represent so great an intrusion on legislative functions"[248] as executive-initiated suits must be examined upon historical and theoretical grounds. Historically, the "classic" case was one which involved "seditious libel" charges against the Members of Parliament for their utterances. Of necessity, those suits were initiated by the Crown and not private citizens in the classic struggles of parliamentary history. In the present American governmental system, no such Executive-initiated libel suits exist. Whenever the executive branch seeks to charge a Congressman it does so because of its belief that a crime has been committed — not a crime of libel against the Executive but an act against the criminal law to which every citizen is subject. On the other hand, private libel suits against Congress for things uttered or printed are very similar to the "classic" case. A Congressman presently need not fear from the Executive for statements he makes in either House, but he may soon be constrained by the judiciary's willingness to entertain private suits challenging things he says or orders to be printed.

"breach of privilege" to institute actions which might involve members' estates while those members were sitting in Parliament.

Id. at 15–16. This is a general protection of the legislators' persons and possessions. *But see* Reinstein & Silverglate, *supra* note 2, at 1148 n.180.

246. The original use of the privilege was as a protection against civil actions. *See* Reinstein and Silverglate, *supra* note 2, at 1133. After the inception of the privilege, over a century and a half elapsed before it was even asserted against the Crown. *Id.* at 1123–26. Parliament was able to sell the protection of the privilege to "complete outsiders" and thus could "place them beyond the reach of the common law" altogether. *Id.* at 1137 n.127.

247. The early and often-cited case of Coffin v. Coffin, 4 Mass. 9, 4 Tyng 1 (1808), made it clear that no distinction was thought to exist; the Supreme Judicial Court of Massachusetts there asserted that the privilige was secured for a legislator in order 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." *Id.* at 9, 4 Tyng 27.

248. Reinstein & Silverglate, *supra* note 2, at 1172–73.

Moreover, the dictates of separation of powers are as much at issue in civil suits as in criminal cases. The question of who institutes a suit is not the only factor in the bringing about of a separation of powers problem. Perhaps more crucial are the steps taken by the governmental body which ultimately acts. In civil suits, the danger is that courts will interfere with the due functioning of the legislature by questioning Congressmen concerning their legislative communications and utterances. No Executive is needed to bring suit where there is an unlimited number of individuals who will find it in their interests to seek judicial relief against a legislator when their names or causes are maligned. As has been stated often by the Supreme Court, the purpose of the immunity is to protect legislators from both the Executive and the judiciary: "It was not only fear of the executive that caused the concern in Parliament but of the Judiciary as well, for the judges were often lackeys of the Stuart monarchs . . . ."[249] That judges today no longer tend to be lackeys of any one does not diminish the danger that they will interfere with the functioning of Congress of their own accord.

IV. TOWARD A DEFINITION OF THE SCOPE OF CONGRESSIONAL IMMUNITY

Two principles advanced by the Court, the internal-external distinction[250] and the degree-of-personal-interference approach,[251] provide meaningful criteria for decisionmaking if properly understood. In this section I shall develop an approach to the resolution of speech or debate cases which uses those principles as important elements. The analysis is calculated to propound ideas which should help solve, within a constitutional framework, the nice problem presented by legislative actions which infringe the rights of individuals or disturb the peace of society, while maintaining legislative independence and freedom of action. Also considered is the difficult separation of powers issue raised by the doctrine of congressional immunity: Who decides what scope of the protection is to be in specific cases?

A. *The Elements of the Definition*

A crucial distinction exists between cases wherein an individual's name is used in a derogatory fashion by a legislator and those wherein a more tangible or more physical interference with a citizen occurs. This distinction now merits further consideration.

249. United States v. Johnson, 383 U.S. 169, 181 (1966) (footnotes omitted).
250. *See* section IIIB *supra.*
251. *See* text accompanying notes 230-32 *supra.*

As has been stated in earlier discussions, the phrasing used in the Constitution itself makes it unmistakably clear that the protection its drafters envisioned consisted, at a minimum, of words spoken in either House by a Member of Congress. This literal wording is a powerful argument in favor of placing communications and utterances of a Congressman in a special place in the hierarchy of congressional activities covered by the clause. Beyond its literal wording, the clause should be examined in terms of what it means in relation to the "privilege from arrest" clause which precedes it and with which it shares a sentence. For, despite the efforts of some commentators to separate these two protections and view each in isolation,[252] the two combine to represent the totality of protection for our legislature which carried over from the British principle of parliamentary privilege.

The privilege from arrest clause protects legislators from being arrested "during their attendance at the session of their respective houses, and in going to and returning from the same," except in cases of "treason, felony, and breach of the peace."[253] The exceptions have been interpreted by the courts to include all crimes,[254] so that Congressmen appear not to be exempt from liability for ordinary criminal acts.[255] Whether these exceptions are finally interpreted to allow prosecutions for all possible crimes or not, the intention of the Framers is clear: Congressmen are protected from civil arrests in actions for debt or other civil suits, but are not immunized from arrest and prosecution for ordinary actions tending to disrupt society's functioning. Thus the privilege from arrest clause serves to mark out some boundaries to the scope of the speech protection. Whatever kinds of activities are interpreted to be speech or debate, it is clear that breaches of the peace are not protected by it.

This does not solve the problems posed by civil suits such as *Kilbourn* and *Dombrowski*,[256] but it sheds light upon them. In each of those cases, the interference with the private citizen was of a kind which approached the criminal notion of breach of the peace. The incarceration of a private citizen in *Kilbourn* and the seizing of one's papers in *Dombrowski* were acts so removed from "speech or debate"

252. *See* Reinstein and Silverglate, *supra* note 2, at 1139 n.139.

253. U.S. CONST. art. I, § 6.

254. *See, e.g.*, Williamson v. United States, 207 U.S. 425, 445–46 (1908).

255. It is not clear whether the exceptions would include criminal contempt citations. Were criminal contempt to result from a refusal to obey a court challenging an official action of a legislator, a situation could arise wherein the privilege from arrest and speech or debate clauses would merge into one protection. In such a case, there would seem to be a possibility of double coverage.

256. The question of who decides which congressional acts are within the coverage of the clause remains. *See* section IV B *infra*.

and so close to "breach of the peace" that they could be logically excluded from the protection of the clause.

Whether it be the Court or the Congress which ultimately decides the scope of the protection, it appears that there exists some historical and constitutional justification for distinguishing between activities which are nearly "speech or debate" as those words are commonly understood, and more physical kinds of congressional conduct. The extension of a more complete protection to utterances and communications of Congressmen is consistent with the literal phrasing of the Constitution. It accords with judicial interpretation of the exceptions to the privilege from arrest clause, the complement of the speech or debate clause. Further, it places in a duly important position the widely acknowledged informing function of the Congress.

A second principle of some value found in the cases is the notion that an activity merits more protection the more central it is to the function of a legislator. In the earlier discussion herein, I rejected as too narrow the notion which defines centrality in terms of proximity to the activity of the proposing and passing of legislation, since it tends to exclude activities inextricably connected to the ordinary duties of a Congressman.[257] The notion of a "legislative process" is an inherently misleading one, resulting from the Court's attempt to define the core of a legislator's function. This attempt failed, probably because that function is viewed as though it were another kind of judicial decisionmaking. Undoubtedly, analogies to the judicial function are useful,[258] if one views the operations of the Congress as merely another kind of a trial, where the interested parties are before the tribunal. However, a definition of the essential core of that activity could well exclude the majority of the people represented, since they would be outside observers only.

The functions of the Congress cannot be so regarded. The legislative process, if it is anything, is a thing impossible to restrict by simple geographical boundaries or circumscription of the number of participants. Unlike the judicial process, it is not limited to the parties before it, and it is not necessarily directed at a single, clearly definable resolution of the issues being considered. It is as inherently amorphous as the judicial process is formal, and it is universal in application, whereas the judicial resolution may be singularly applicable to the specific parties before it. Thus a better principle is one by which a particular activity is protected if deemed essential to the functions of a representative under our system of government.

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257. *See* section IIB *supra*.

258. *See* note 223 and accompanying text *supra*.

The Court's attempt to define a "legislative process" in terms of the internal-external functions[259] has baffled and concerned many legislators. For good reason, they believe the Court has simply misunderstood their function. At the recent hearings of the Joint Committee on Congressional Operations, Congressmen expressed dismay that anyone would even attempt to define a "formal process of legislating."[260]

These legislators were obviously concerned with what they saw as a judicial attempt to define their role in terms of some formal process, or a neatly demarcated set of activities which could be considered official while the rest are extracurricular.[261] To do this is to equate the legislative function with the judicial one, which is disastrous.

However, the Court's attempt at defining centrality may not be totally off the mark. Some acts now performed by legislators are only peripherally connected to their functions as representatives. The ombudsman function of legislators should be scrutinized and an attempt made to determine what aspects of that role are truly part of a representative's function and what are merely favors done for personal gain. Speeches and other communications by Congressmen outside their respective Houses may or may not be related to their functions as legislators. What is crucial is that the courts not try to restrict the scope of the immunity by artificial notions of the location of the legislative process or by simplistic separations of the political actions of Congressmen from the role they play as makers of legislation.

Before leaving the criterion of centrality to the functions of a representative, it is worthwhile to consider the problems presented by the criminal cases, *Brewster, Johnson,* and *Gravel.* The issue raised by *Brewster* and *Johnson* was not so much what activities should be immune, but what sort of questioning must be barred in order to protect admittedly legislative functions. Those cases were concerned with functional rather than definitional problems of the scope of the speech or debate clause. Since the purpose of this analysis is definitional, it is only necessary to reiterate my previous statement that an expansive and not a narrow approach should be taken by the courts.[262] Such an ap-

259. *See* text accompanying notes 187–91 *supra.*

260. *See 1973 Hearings, supra* note 13, pt. II, at 60. Congressman James C. Cleveland discussing United States v. Brewster, 408 U.S. 501 (1972), mentioned the listing of activities considered "political" and thus not "purely legislative" and condemned it as "an utterly astounding assertion, suggesting that the Court labors in abysmal ignorance of the real process of representative government. *Id.*, pt. I, at 5.

261. *Cf. id.*, pt. I, at 4–7. As Congressman Cleveland put it: "Members of Congress do not inhabit the same circumscribed environment as the chambers of the Justices. The legislative life of the Representative is an inseparable whole." *Id.* at 5.

262. *See* text accompanying notes 252–56 *supra.*

proach is necessary because of the importance of the protection in avoiding executive-initiated and judicially-entertained suits which may destroy a legislator's career although no actual proof of a crime is ever obtained.[263]

The *Gravel* case involves both definitional and functional problems. Insofar as it involves an attempt by the Congressman to inform the general public of Executive actions, the Senator's actions deserve the highest form of protection, since this is an integral part of his function as a representative.[264] Conversely, in acquiring the information he divulged, Senator Gravel may have committed criminal acts which cannot come within the protection of the clause. However, here functional considerations may preclude judicial scrutiny. It may be impossible to question the Senator or his aide about possible criminal acts without questioning the legislative act of preparing for and executing a committee meeting. Or the acquisition of information may itself be held to be a protected legislative act, insofar as it is not criminal. The gathering of data is undoubtedly a crucial part of the function of a representative.[265] As with the civil cases, the crucial definitional question is not what is essential to the formal process of enacting legislation but what is a central part of the function of a representative under our system of government.

B. *Who Defines the Scope of the Clause?*

Underlying the entire discussion of the meaning and scope of the speech or debate clause is the question of who determines the extent to which the freedom protects Congress. The doctrine of separation of powers is at play in the consideration of this question. By its terms, the clause precludes questioning by the courts of certain legislative acts. In order to effectuate the meaning of the prohibition, a certain core of activities must not be scrutinized by the courts at all; otherwise there is no real independence even within the scope of the protection. Yet, can the courts themselves determine the boundary of the protected region without unconstitutionally entering it in making that determination?

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263. For a discussion of the various aspects of the question *see* Reinstein and Silverglate, *supra* note 2 at 1157–63.

264. *See* section III-B *supra.*

265. *See* Reinstein and Silverglate, *supra* note 2 at 1153 where the authors state:
> In order to propose legislation, debate and vote intelligently, and inform the people about the workings of government, Congressmen must first be able to inform themselves.

Id.

1. *The Judicial Approach*

The Judiciary's answer has been to view the speech or debate clause as a protection of congressional prerogatives in a very narrow area whose boundaries can be defined by the courts under their general power of review. Nearly every action of Congress or of individual legislators is open to scrutiny to see if it is in accordance with the Court's interpretation of what is allowable under the Constitution. This power of reviewing almost all congressional conduct is in accordance with the court proclaimed principle that the Supreme Court is the ultimate interpreter of the Constitution.[266] In the Court's view, this approach does no violence to the speech or debate clause since that provision is understood not to bar any judicial review.[267]

The *Powell* decision gives perhaps the strongest indication that at present the Court understands the speech or debate clause as a personal privilege enjoyed by Congressmen because of their status. It eliminates any notion of the clause as a valuable protection of Congress as an institution. Except for a very narrow region (utterances upon the floor of each House) it leaves no conduct unquestioned, no congressional activity unreviewed.

This understanding of the clause also brings with it a legislator-agent dichotomy, not as a theoretical principle upon which to base decisions,[268] but as a practical tool to avoid unnecessary clashes with legislators or the legislature. The courts invoke speech or debate as a personal protection that guarantees the dignity of a representative by dismissing the charges against him but allowing them against the agent. This saves the Court the embarrassment of deciding that a right against a Congressman exists even though the privilege from arrest clause or the speech or debate clause may preclude enforcement against him by compulsory process.[269] Governed by this judicial understanding of the clause, and faced with situations like *Doe,* wherein a defenseless private citizen seeks redress against the power of Congress, the courts can be expected to use what they see as their full discretion to grant some form of relief to the citizen.

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266. *See, e.g.,* Powell v. McCormack, 395 U.S. 486, 521 (1969).

267. In *Powell,* for example, the Court relegated considerations of separation of powers to the question of justiciability. *Id.* at 516-49. *See* text accompanying notes 116-18 *supra.*

268. *See* section IIA *supra.*

269. In *Powell,* for example, the Supreme Court avoided the problem of coercive relief by use of the declaratory judgment device. It thus failed to deal with the contention of the Congressmen that "federal courts cannot issue mandamus or injunctions compelling officers or employees of the House to perform specific official acts." 395 U.S. at 517.

One may readily sympathize with the Court's efforts to grant some sort of remedy to *Doe*-type plaintiffs. Under society's present notions, that right is acquiring equal dignity with other constitutional protections against more "physical" kinds of interference with one's papers or person. In the absence of congressional action to safeguard the citizen's right to his good name from the exigencies of internal congressional operations, the courts see themselves as the last resort the citizen has. These social demands and judicial notions of public policy and fairness will tend to cause an erosion of the speech or debate protection even beyond the *Doe* holding.

2. *The Constitutional Approach*

While a diluted immunity may be consistent with present notions of public policy, it is probably not consistent with the intentions of the Framers, who seemed to consider the speech or debate clause more than a personal privilege of legislators. Speech or debate was a protection which embodied a broad principle of separation of powers, not a description of a narrow region within which legislators' conduct would be unquestioned.[270] Thus James Wilson, one of the major architects of the Constitution wrote:

> In order to enable and encourage a representative of the publick [sic] to discharge his publick [sic] 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 offense.[271]

It is clear that the protection was held in high esteem. Such a regard must have derived from the historical importance that the clause had in British history. As Wittke put it: "No privilege of parliament is more essential than freedom of speech. Parliamentary government has been described as 'government by talking' . . . ."[272] The architects of our own system of government envisioned that speaking, arguing, and debating would also be the essential activities of our legislature, and in this they wanted Congress to have complete independence such as Parliament finally obtained.

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270. From a historical perspective, there is no way to prove conclusively the truth of the above assertion, since the few references to the clause at the Constitutional Convention and in the ratification debates do not address this point. *See* Reinstein and Silverglate, *supra* note 2, at 1136.

271. 1 J. WILSON, WORKS OF JAMES WILSON 421 (McCloskey ed. 1967).

272. 2 C. WITTKE, A HISTORY OF ENGLISH LAW 245 (2d ed. 1953).

However, the argument for congressional independence goes further. I believe the Framers intended that Congress should have complete independence in all its internal proceedings. Since parliamentary government was thought to be a "government by talking," the speech or debate protection would act as the keystone guarantee of the independence of our own legislature. The fact that no explicit constitutional provision was written to shield all possible aspects of congressional operations reflects their belief that speech or debate protection essentially achieved that guarantee, and that, at any rate, there should be no need for a more explicit guarantee of something they all agreed upon. The whole notion of separation of powers was based upon the understanding that no branch would interfere with the internal proceedings of the other two.[273]

To my mind, there is a strong connection between the independence of each branch of our government and the constitutional protection of speech or debate. In this sense, the clause is much more than a personal prerogative to protect the dignity of Congressmen: It is a safeguard for the institution of Congress, an explicit guarantee that its members will not be hindered in the exercise of their legislative functions.[274]

What this means in practical terms is that the Court must realize that its discretion in the area of congressional immunity is very limited. The notion that the clause does not preclude review of at least some congressional conduct which is part of its internal proceedings must be dismissed. Thus, a Court taking the constitutional approach would have to restrain itself from examining the merits of congressional conduct, to refrain from imposing upon the Congress its own notions of what character the Framers intended the internal proceedings of Congress to assume.

The courts must, of course, decide whether challenged congessional action comes under the protection, but in doing so they should consult less their own notions of what constitutes legislative acts and more what Congress thinks them to be. In deciding what comes under the protection, they should take the approach recommended in the *Kilbourn* language — give immunity to "things generally done in a session of the House by one of its members in relation to the business before it."[275]

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273. James Wilson lucidly expressed this when he said:

> The independency of each power consists in this, that its proceedings and the motives, views, and principles which produce those proceedings, should be free from the remotest influence, direct or indirect, of either of the other two [branches.]

1 J. WILSON, *supra* note 271, at 299.

274. *See* United States v. Johnson, 383 U.S. 169, 178 (1966).

275. Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

Moreover, the courts should avoid delving into the merits of the legislator's conduct, as was done in *Doe,* where the Court set the limits of the protection at the point where it thought the "reasonable requirements of the legislative function" ended.[276] The Court should have simply decided that the general area of communicating to the public congressional proceedings was protected by the clause. That the Congress may have done so in a manner distasteful to the Court was irrelevant. Nor was it an issue that some rights of individuals had been abridged. The constitutional interpretations, including those regarding the safeguarding of individual rights, were entrusted to Congress in this area. In addition, a judicial pronouncement that would countermand Congress' directives with respect to publishing reports of its proceedings would have been unthinkable to the Framers of the Constitution.[277]

Cases like *Kilbourn* and *Dombrowski,* however, are not so easily decided. Their resolution depends greatly upon what Congress has done to invoke judicial involvement in the activity of coercing testimony and evidence.[278] If the Congress has given the courts legislation, as existed in *Kilbourn,*[279] calling for judicial resolution of contempt cases, then there are good grounds for holding as was done in those cases. Thus, two relevant grounds for review would exist: first, the fact that Congress itself has defined the limits of its independence by bringing the judiciary into the process of coercing information from witnesses; second, the strong justification for imposing liability when the violation of rights involved is a very tangible one, characterized by a physical interference with the individual's person and/or papers. These two factors outweigh consideration of the centrality of the activity to the representative function.

276. Doe v. McMillan, 412 U.S. 306, 316 (1973).

277. *Id.* at 344 (Rehnquist, J., dissenting).

278. *See* section IVC *infra.*

Theoretically Congress could withdraw jurisdiction from the courts to hear a speech or debate case. U.S. CONST. art. III, § 2; *cf. Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850). In this connection, I should state that I do not think Congress should use the "withdrawal of jurisdiction" weapon as a means to keep the Court from reviewing the proceedings. Aside from the problem of the constitutionality of any such withdrawal, where it tends to abridge clear constitutional rights of plaintiffs, this is simply a negative way to solve a problem and as such it is a non-solution. Legislators should realize the validity of the judicial concern for individual rights and take positive action themselves to guarantee those rights. *See* H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEMS 309–79 (2d ed. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler 1974). For a discussion of the limits of congressional power to withdraw jurisdiction when a case effects the constitutional rights of individuals, *see* R. BERGER, CONGRESS V. THE SUPREME COURT 282–89 (1969).

279. In *Kilbourn,* the Congress took it upon itself to incarcerate the plaintiff, even though it had previously established judicial remedies to deal with witnesses held in contempt of Congress. 103 U.S. at 179.

C. *Recommendations*

In order to make meaningful recommendations upon this issue, one must look at the problem both from the viewpoint of the Congress and from that of the judiciary. Each must change its course if the two are not to drift apart upon this issue to the point that a clash becomes inevitable.

Since neither forum alone is entirely capable of resolving this crucial separation of powers question, the solution requires input from each. The Congress must consider the stature accorded by the judiciary to certain rights of individuals, a consideration it is not accustomed to accounting for in its decisionmaking processes. Similarly, the judiciary must look at congressional conduct in determining the boundaries of its own constitutional power, a task which it has not lately been wont to perform. Each branch must pay close attention to the progress of the other in this issue, seeking a constitutional synthesis with which each can comfortably deal.

With regard to the rights of private citizens whose names have been used in its proceedings, Congress could authorize a form of process by which the citizens could come to the bar of either House, file complaints, and receive expeditious, fair consideration of their grievances. In a case like *Doe,* it should be very simple, and not politically troublesome, to excise the names of the citizen-plaintiffs before any distribution of the report goes out. Furthermore, Congress could establish a procedure similar to a temporary restraining order by which it could, at the instance of such a citizen, withhold outside dissemination of any report or other communication so challenged pending a full hearing of the merits of the question.

With respect to situations like *Dombrowski* and *Kilbourn,* where a committee or Member is in need of certain papers or of the personal appearance of a witness, the Congress should decide how this is to be done by the Members or committees. It can either involve the courts by legislation that calls for judicial enforcement of congressional subpoenas or it can resort to its own enforcing powers by use of the sergeant at arms. My recommendation is that Congress involve the courts in those actions. Potentially, such acts affect clear constitutional rights of citizens, rights the Congress has a duty to uphold. Insofar as a balance between those rights and the needs of Congress need be struck, the courts could well serve to resolve the possible conflicts. They are detached from the issue; and it has traditionally been their function to weigh such competing needs. A congressional decision to involve the courts in this manner furthers the goals of the separation of powers doctrine, by assigning to each branch that which it does best.

Depending upon what Congress does, the courts should act accordingly. Even if the Congress were to make no attempt to safeguard the right of the citizen to a good name from being abridged by its own communications and reports, the courts should check their desire to interfere. For each of the elements of the formulation developed above indicate that this kind of case should fall clearly within the protection of the clause. The printing of a committee report — to use the *Doe* example — is very close to being "speech or debate" as the common man understands those words, and the interference with the citizen is hardly of a "physical" or "direct" kind. Moreover the congressional conduct here is very central to the functions of a representative. One can envision the effect upon Congress' independent functioning which would result from its having committee reports stopped by judicial fiat while the legislation that those reports support becomes effective and must be interpreted by the people and the other branches of government.

If the Congress were to revoke the legislation by virtue of which courts are involved in the process of coercing testimony and evidence needed by committees, there is no clear answer to the question posed by these circumstances. The courts must use their wits to construe conflicting constitutional policies, one calling for protection of individual rights from unreasonable searches and deprivation of their liberty, and another for the independence of Congress in its proceedings. Under these circumstances the courts can hardly be faulted for taking the road that leads to judicial interference with the proceedings of Congress.

Yet in resolving these difficult questions, the courts should be careful not to overstate the scope of their own role in order to review all congressional conduct.[280] However impressive the arguments are in favor of judicial review of congressional legislation, the courts must not forget that this power derives from the nature of their role as interpreters of the law in appropriate cases.[281] The duty to review legislation does not extend to "policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support."[282]

The speech or debate clause is a manifestation of the Framers' intent to entrust an area of conduct to the legislature alone. Within that area, it is the Congress who is the ultimate interpreter of the Constitution. Unfortunately, the notion has been embedded in the minds of many that the courts alone are *always* the "ultimate interpreters" of the

280. *See* text accompanying notes 278 & 279 *supra*.

281. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

282. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

Constitution. Moreover, that notion has been carelessly adopted by the Supreme Court in recent pronouncements.[283] Thomas Jefferson considered such a notion to be "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."[284] I cannot here judge the truth of Jefferson's assertion with respect to the overall functioning of our government. However,I can say that a court laboring under such a misunderstanding of the Framers' intent must inevitably transgress the boundaries of its own constitutional domain and invade the area of absolute independence which was bestowed upon the Congress by the speech or debate clause.

283. *E.g.*, Powell v. McCormack, 395 U.S. 486, 521 (1965), *quoting* Baker v. Carr, 369 U.S. 186, 211 (1962).

284. T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON, *Letter to William C. Jarvis, Sept. 8, 1820* 160 (Ford ed. 1899).