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Hutchinson v. Proxmire: The Vanishing Immunity under the Speech or Debate Clause, 14 J. Marshall L. Rev. 263 (1980)

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HUTCHINSON V. PROXMIRE:* THE VANISHING IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE

"Knowledge will forever govern ignorance. And people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

James Madison**

Our Founding Fathers relied on their capabilities as historians and their knowledge of the English form of government to write the United States Constitution. As a reflection of this background and experience, the Speech or Debate Clause,[1] as it was adopted first in the Articles of Confederation[2] and then in the Constitution, differs only slightly from its ancestor,[3] the English Bill of Rights.[4]

With near unanimity, the delegates to the Constitutional Convention recognized the importance of the legislative free speech privilege.[5] The objections to the adoption of the Speech

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* 443 U.S. 111 (1979).

** 6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906).

1. U.S. CONST. art. I, § 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.* (emphasis added).

2. ARTICLES OF CONFEDERATION, art. 5. *See* note 4 *infra.*

3. "The roots of the speech or debate clause, perhaps more than any other constitutional prohibition, can be traced . . ., to the bitter and prolonged dispute between Crown and Parliament. . . ." Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120 (1973) [hereinafter cited as Reinstein].

4. Bill of Rights, 1688, 1 W. & M. Sess. 2, C.2. 6 HALSBURY'S STATUTES OF ENGLAND 489 (3d ed. 1969) ("That the freedome of speech and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament.").

The wording of the English Bill of Rights was generally adopted but the words "ought not" were changed to the mandatory "shall not." Simmons, *Freedom of Speech in Congress: The History of a Constitutional Clause*, 38 A.B.A.J. 649 (1951). *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 567 (M. Farrand ed. 1911) [hereinafter cited as Farrand].

5. Immunity and privilege will be used interchangeably. They are both defined as a type of "exemption" which is beyond what is available to other citizens. BLACK'S LAW DICTIONARY 885, 1358 (rev. 4th ed. 1968).

or Debate Clause were minimal.[6] Consequently, this lack of discussion leaves a paucity of authority as to what the delegates intended the scope and purpose of this privilege to be. Commentators have suggested several approaches regarding the primary purpose of the Speech or Debate Clause. These suggestions include: (1) to insure free debate in the legislature,[7] (2) to enhance the concept of separation of powers,[8] and (3) to promulgate and perpetuate the representative basis of government by protecting the informing function of the legislators.[9]

It is unclear whether the evolution of the legislative free speech privilege within England's Parliament was a response to interference with an individual legislator by the Crown,[10] or whether the privilege was judicial in its origin and was meant to insulate legislators from private suit.[11] However, interference by the Crown in 1686, brought a response from Parliament. King James II initiated legal proceedings against a member of Parlia-

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6. *See* Farrand, *supra* note 4, at 503.

7. Yankwich, *The Immunity of Congressional Speech: Its Origin, Meaning, and Scope*, 99 U. PA. L. REV. 960, 965 (1951) [hereinafter cited as Yankwich].

8. Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973) [hereinafter cited as Ervin].

9. *Id.*

10. *See, e.g.*, F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 241-43 (1926); C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 23-32 (1970); *see* Yankwich, *supra* note 7; *see also* note 12 *infra*.

11. *See* Reinstein, *supra* note 3, at 1122. Parliament was the highest court of the land in addition to being the legislative organ. It is contended that the origin of Parliament's privilege was that lower courts had no authority to rule on the propriety of actions of a higher court. Initially, any privileges of Parliament could not shield the members from interference by the Crown.

Haxey's Case in 1399 (unreported) is an example of the indefiniteness surrounding the origin of this privilege. As a member of the Commons, Thomas Haxey introduced a bill to curtail the expenditures of King Richard II. At the instigation of the Crown, Haxey was tried, convicted and condemned to death as a traitor. However the sentence was not carried out. Haxey was released when King Henry IV, Richard's successor, granted Haxey's petition for a reversal of the judgment. Some commentators view this as an early assertion of the free speech privilege against the Crown. *See* Yankwich, *supra* note 7, at 962. *Contra*, Reinstein, *supra* note 3, at 1125 n. 58(a) citing NEALE, *The Commons Privilege of Free Speech in Parliament* in 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 147-76 (E. Fryde and E. Miller ed. 1970). Neale showed that the petition was not based on an assertion of privilege against the Crown. Rather, it was founded on procedural irregularities or a question of substantive law concerning the charge of treason; Yankwich, *supra* note 7, at 963. This indicates that the right to immunity for speech has developed from a request by the Speaker of the House of Commons to the King, seeking the right to speak in Parliament with impunity. The granting of this privilege was an act of grace on the part of the King. The first such request was made in 1541, some 142 years after *Haxey's Case*. This request has been repeated at the start of every session since. *See also* 1 W. BLACKSTONE, COMMENTARIES *164 (1765).

ment[12] who published a committee report critical of the King and made it available to persons outside of Parliament.[13] In response to the King's interference with the legislative process, Parliament passed the English Bill of Rights.

Since its adoption from the English Bill of Rights, the Speech or Debate Clause has been addressed only ten times by the United States Supreme Court.[14] *Kilbourn v. Thompson*,[15] the first case, evidenced a broad understanding of the Clause.[16]

12. Rex v. Williams, 89 Eng. Rep. 1048 (K.B. 1688). Sir William Williams was prosecuted by the King for publishing a House committee report alleging misconduct on the part of the King. The King based his case on the arguments that the free speech in Parliament was given as an act of grace and was to be defined narrowly. (This is analogous to the Supreme Court's position in the present case.) Parliament asserted that all ordinary and necessary functions, of which publication of committee reports was one, are covered by the privilege. (This is the equivalent of Senator Proxmire's position. Sir Williams' lawyer used a defense remarkably similar to Senator Proxmire's "informing function" argument.) The lawyer claimed Sir Williams was carrying out his "enquiring function" and it was necessary to publish the report to achieve the proper functioning of the House and the members. Had this defense been accepted, a broad interpretation of the clause might have been specifically incorporated in the Constitution and *Hutchinson v. Proxmire* would never have reached the Supreme Court. However, King James II had a strong desire to be right. He dismissed the judges and replaced them with believers in an absolute monarchy. Winning this case did not solidify the King's hold on power, as he was sent into exile shortly thereafter. The far reaching result of this case was the passage of the English Bill of Rights. Perhaps the true intent behind the passage of the Bill of Rights was indicated by Williams' defense. If so, it should have been explicitly recognized by the founders which would have assured a broad scope of the speech or debate clause. *See* Reinstein, *supra* note 3, at 1130-33.

13. A similar situation is presented in Gravel v. United States, 408 U.S. 606 (1972), where Senator Gravel arranged for a private republication of a committee report containing embarassing information concerning actions of the Executive.

14. Hutchinson v. Proxmire, 443 U.S. 111 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); 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); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1881).

15. Kilbourn v. Thompson, 103 U.S. 168 (1881). Kilbourn was held in contempt of Congress for failing to comply with a subpoena. Arrested by the Sergeant-at-Arms of the House, who was acting in accordance with the House's orders, Kilbourn brought suit for false imprisonment. The Court decided that the investigation which led to the issuance of the subpoena was of a "judicial nature" and Congress had no authority to force Kilbourn's testimony. Nevertheless, the Congressmen were afforded immunity, although the Sergeant-at-Arms was not. The Court's ruling that the subject of Kilbourn's testimony was of a "judicial nature," was influenced by the fact that the same subject was under consideration by the District Court for the Eastern District of Pennsylvania at the time of the subpoena. *Id.* at 193.

16. The definition of a "broad view" of the Speech or Debate Clause is supplied by *The Legislative Role of Congress in Gathering and Disclosing*

Adopting the reasoning from an authoritative state decision,[17] the *Kilbourn* Court rejected a literal reading of the Clause and held that the privilege extends to things generally done in a session of the House by one of its members in relation to the business before it.[18] Later courts recognized that it was the responsibility of Congress[19] and the voters[20] to correct faulty legislative conduct, and afforded the protection of the Clause only if the legislators were "acting in the sphere of legitimate legislative activity."[21] Accordingly, it was beyond the power of the judiciary to inquire into actions within this legislative sphere.[22] Thus, the Court could not delve into the "preparation," "precise ingredients," or "motives for giving" a speech.[23]

Information, Parts I and II; Hearings on the Constitutional Immunity of Members of Congress Before the Joint Committee on Congressional Operations, Mar. 21, 27, 28, and July 19, 1973, 93rd Cong., 1st Sess. (1973) ("Legislative activities are not limited to the activity of legislating as the Court has ruled. Legislative activities are more appropriately, any activities undertaken within the legislative branch fulfilling the role of the Congress in the constitutionally defined government of coordinate and coequal branches.").

17. In reaching their decision, the Court relied on the reasoning in Coffin v. Coffin, 4 Mass. 1 (1808). Giving particular weight to the fact that *Coffin* was decided so soon after the adoption of the Speech or Debate Clause, the Court thought it was the most authoritative case in the country regarding the construction to be placed on the Clause. Chief Justice Parsons who delivered the opinion thought that:

> the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I would extend it . . . to every other act resulting from the nature and in the execution of the office . . . and for everything done by him as a representative, in the exercise of the functions of that office, without inquiring whether it was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representative's chamber.

Id. at 31.

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

19. Tenney v. Brandhove, 341 U.S. 367, 378 (1951). This private citizen suit alleged violations of state constitutional rights by a committee of the California State Legislature. The Court held that immunity, similar to what was explicitly granted to Congress, implicitly exists for state legislators.

20. *Id.* at 378.

21. *Id.* at 376.

22. *Id.* at 377.

23. United States v. Johnson, 383 U.S. 169 (1966). A United States Representative delivered a speech favorable to a company which was being investigated by the Department of Justice. In attempting to prove that this Representative had accepted a bribe to deliver his speech, the Government tried to introduce evidence relating to the factors which motivated the speech. The Court ruled that this was an improper method of proving that a bribe had been accepted. The Court's refusal to allow inquiry into the motivations of a Representative is in line with the necessity to read the privilege broadly. This Court recognized that the *Kilbourn* and *Tenney* decisions called for a broad reading of the Clause so as to effectuate its purposes. *Id.* at 180.

The privilege was meant "to prevent intimidation by the executive and accountability before a possibly hostile judiciary."[24] This broad construction of the Clause,[25] coupled with the judicial desire to operate within the separation of powers framework, would serve to reduce the number of lawsuits filed against legislators. Not only was it intended to protect the legislators against the consequences of litigation, but it was also intended to protect them against the very burden of being involved in litigation as well.[26]

Kilbourn, decided in 1881, and the next three cases to reach the Supreme Court,[27] represent the zenith of judicial recognition of a broad reading of the Clause and the theory that separation of powers requires restraint on the part of the Court. Recent decisions,[28] however, have narrowed its scope.[29] As a result, the Clause's meaning has been muddied, and friction between the legislative and judicial branches has been engendered.[30]

The first real narrowing[31] of the scope of the Clause occurred in the 1972 companion cases of *United States v. Brewster*[32] and *Gravel v. United States*.[33] *Brewster* opened to judicial

24. *Id.* at 181.

25. Suarez, *Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach*, 20 VILL. L. REV. 97, 103 (1974).

26. Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam). Dombrowski's personal records were illegally seized by Louisiana officials. The United States Senate Judiciary Committee, with Senator Eastland as Chairman, issued a subpoena for those records. In a civil suit resulting from this illegal seizure, Senator Eastland claimed Speech or Debate Clause immunity. Immunity was extended to him, but not to the committee counsel because he was not a legislator.

27. Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951). Taken together, these cases hold that a legislator should not be burdened with defending himself for performing legislative activity or doing things generally done in a session of Congress with relation to the business before it. Further, the judiciary is not the proper party to challenge the propriety of legislative conduct. The proper party is either Congress or the people.

28. Hutchinson v. Proxmire, 443 U.S. 111 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); 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); Powell v. McCormack, 395 U.S. 486 (1969).

29. *See* Reinstein, *supra* note 3, at 1148-49.

30. *See* Brief Amici Curiae by the U.S. Senate on behalf of the U.S. Senate, Hutchinson v. Proxmire, 443 U.S. 111 (1979) [hereinafter cited as Senate Brief].

31. As used in this article, a "narrow view" of what is afforded immunity under the Speech or Debate Clause are only those things which are characterized as part of the bill passing function of Congress.

32. United States v. Brewster, 408 U.S. 501 (1972). Senator Brewster claimed that Speech or Debate Clause privileges shielded him from prosecution for accepting a bribe to perform a legislative act. In reaching a con-

and executive inquiry the purpose and motivation of a legislator's conduct. In effect, it overruled *United States v. Johnson*,[34] which had shielded from judicial inquiry the decision-making process of why a legislator votes in a certain way or why a speech was delivered.[35] The *Gravel* Court limited immunity to the bill passing aspects of the legislative role and afforded protection only to those activities necessary to properly carry out the job of legislating. Other than actual speech or debate, acts would be protected only if they were "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 . . . ."[36] The business of Congress is to legislate[37] and the Court may inquire into whether actions of a legislator exceed the "reasonable bounds of the legislative task."[38]

The scope of coverage afforded by the Clause has receded to the point where only speech, debate, or that which is involved in the deliberative and communicative process essential to the

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tradictory result, the Court purported to uphold the ruling in the *Johnson* case, decided only six years earlier. *See* notes 23-24 and accompanying text *supra*. The Court ruled, without explaining how it could be accomplished, that the bribery charge could be prosecuted without necessitating inquiry into legislative acts or motivation.

33. Gravel v. United States, 408 U.S. 606 (1972). Senator Gravel arranged to have the "Pentagon Papers" published. Previously classified, the Senator had read them into the public record of the subcommittee he chaired. The grand jury subpoenaed an aid of Senator Gravel with the hope of learning how the Senator obtained the classified documents. The Senator sought to have the subpoena quashed. The Supreme Court recognized the realities of modern legislatures and extended the Speech or Debate immunity to cover Congressional aides. The Court then proceeded to make this extension almost meaningless when they severely restricted the scope of the Clause by determining that only the process of passing bills is protected. *Id.* at 625.

34. *See* notes 23-24 and accompanying text *supra*.

35. Justices Brennan and Douglas felt that *Johnson* had been overruled and that the Court was rejecting "principles of legislative freedom developed over the past century in a line of decisions culminating in *Johnson*." United States v. Brewster, 408 U.S. at 532 (1972) (Brennan, J., dissenting).

36. 408 U.S. 606, 615 (1972).

37. Doe v. McMillan, 412 U.S. 306 (1973). Representatives were sued because a congressional report on the Washington, D.C. school system included identification of students in a derogatory context. By determining that Congress could distribute the report only to the extent that it serves their legitimate legislative functions, the Court has set itself up as the arbiter of the reasonableness of a supposedly co-equal branch's activities.

38. *Id.* at 315. Although the Court was referring to legislative personnel, aides, or others who "participate in distribution of actionable material . . . ," it necessarily establishes itself as an overseer of the legislature and its decisions. Whether acting under the direction of an individual legislator or the legislature as a whole, it is impossible to tell if an aide has exceeded the reasonable bounds of the legislative task unless the authority under which the aide is acting is first scrutinized.

passage of a bill is protected.[39] In addition, the judiciary may now inquire extensively into whether acts by legislators exceed the requirements of those functions protected by the Clause. Undecided, however, is whether functions inherent in the duties of a legislator, such as informing the citizens by means of press releases and newsletters, are entitled to Speech or Debate Clause immunity. This question hinges on whether the informing function is an integral part of the deliberative or communicative process essential to the enactment of legislation. The Court, in *Hutchinson v. Proxmire*,[40] answered this question.

Hutchinson v. Proxmire also addressed a first amendment[41] freedom of speech question. An aim of the first amendment is to insure debate and discussion on public issues.[42] Problems arise, however, when in the course of such discussion, the reputation of an individual is damaged. Liability for defamation cannot be imposed without fault.[43] It has been held that a higher standard of proof is required when the plaintiff is deemed to be a "public figure."[44] Plaintiff must then prove "actual malice" in order to establish liability.[45] Because of confusion in the lower courts as to how the "public figure" test was to be applied, the *Hutchinson* Court endeavored to clarify the criteria used.

FACTS

To publicize what he viewed as outrageous examples of wasteful government spending, Wisconsin Senator Proxmire created the Golden Fleece Award. On April 18, 1975, the Fleece Award was presented to government agencies for funding research performed by behavioral scientist Dr. Ronald Hutchin-

39. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). The Senate subcommittee on Internal Affairs issued a subpoena to obtain bank records necessary for a study to determine if a specific federal law was being violated. The Court held that the power to issue a subpoena was one of the activities necessary to the enactment of legislation. Once found to be part of the legislative process, it is protected by the Speech or Debate Clause.

40. Hutchinson v. Proxmire, 443 U.S. 111 (1979).

41. U.S. CONST. amend. I states: "Congress shall make no law . . . abridging the freedom of speech."

42. Hutchinson v. Proxmire, 443 U.S. 111, 133-34 (1979).

43. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

44. *Id.* at 351. A person could "achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."

45. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (The plaintiff must prove "that the statement was made with 'actual malice'—that is, with the knowledge that it was false or with reckless disregard of whether it was false or not.").

son.[46] Announcement of the award was made on the Senate floor, and an advance press release of the award[47] was made

46. Hutchinson v. Proxmire, 443 U.S. 111, 114 (1979). The award went to the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research. Proxmire's speech placed the total funding figure at over $500,000, but both parties offered higher estimates in preparing for trial. *Id.* at n.1. Dr. Hutchinson was the director of research at the Kalamazoo State Mental Hospital and was an adjunct professor at Western Michigan University. Most of Dr. Hutchinson's research was devoted to the emotional behavior of certain animals exposed to varying stimuli.

47. Hutchinson v. Proxmire, 431 F. Supp. 1311, 1333 (W.D. Wis. 1977).

APPENDIX C

Office of SENATOR WILLIAM PROXMIRE . . . Wisconsin
FOR RELEASE AFTER 6:30 A.M. FRIDAY, APRIL 18, 1975

Senator William Proxmire (D.-Wis.) announced on Friday, "My choice for the Golden Fleece Award for the biggest waste of taxpayers' money for the month of April goes jointly to the National Science Foundation, National Aeronautics and Space Administration, and the Office of Naval Research for spending almost $500,000 in the last seven years to determine under what conditions rats, monkeys and humans bite and clench their jaws. From the findings of these studies it is clear that the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people."

The Wisconsin Senator said, "This is the second in a series of 'fleece of the month' awards which will climax in a Biggest Waste of the Year Award.

All this money was given to Dr. Roland R. Hutchinson of Kalamazoo State Hospital in Michigan. Last year alone the good doctor spent over $200,000 of which more than $100,000 were federal funds. And what are some of the other results reached by these research projects in the last seven years?

"Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick. NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well-fed monkeys.

The Office of Naval Research appears to have gotten the same type of so-called research as did the NSF and NASA.

It is very interesting to trace the history of these extremely similar and perhaps duplicative projects. In 1967, NSF gave Dr. Hutchinson $44,700 to study 'Environmental and Physiological Causes of Aggression.' For two years, Dr. Hutchison studied the biting reactions of monkeys when they received electric shocks. He also compared their reaction while being given a number of different drugs as alcohol and caffeine. In 1969, the NSF gave Dr. Hutchinson another $26,000 to continue these experiments. He received another grant, this one for $51,200 in 1970 from the NSF.

By this time Dr. Hutchinson was ready to extend his work to human biting and jaw clenching. In 1970, Dr. Hutchinson received a grant which ran for five years from the ONR to continue 'research on subhuman primates to determine the environmental, physiological and biochemical factors responsible for the maintenance of aggressive behavior and systematic replication of results obtained in primates extended to human subjects.' Total funding from the Navy ran to $207,000.

available to the media.[48] Informed of the pending award, Dr. Hutchinson issued a press release to counter the Senator's speech. In May 1975, Senator Proxmire, utilizing his franking privilege,[49] mailed 100,000 newsletters to constituents and others. These newsletters contained the details of the Fleece Award. After the award was presented, Morton Schwartz, Senator Proxmire's legislative assistant who had done the research and investigation upon which the award was based, made a number of telephone calls to the funding agencies.[50] Later in 1975, Senator Proxmire referred to Dr. Hutchinson's research on national television during an interview on the Mike Douglas Show. The final reference to Dr. Hutchinson's work appeared in another newsletter to constituents which claimed that this research had been discontinued.

During this period, Dr. Hutchinson applied for and received a $50,000 grant from NASA to develop measurements of latent anger or aggression in humans by means of jaw-clenching. In addition, Dr. Hutchinson received his fourth NSF grant in 1972 for $51,800 in order to continue his experiments on monkeys and extend the work to human jaw-clenching.

Dr. Hutchinson, who in addition to being Research Director at Kalamazoo State Hospital, is also an Adjunct Professor at Western Michigan University and President of his own non-profit Foundation for Behavior Research, has proposals presently pending before the NSF, the National Institute of Drug Abuse, and the National Institute of Mental Health to continue research on monkeys' drinking, drug and jaw clenching habits. If Dr. Hutchinson is successful in this new grantsmanship attempt he would receive an additional $150,000 of taxpayers' money.

The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw.

Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

It's time for the federal government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it's time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

Proxmire said that the public is urged to write him in Washington with suggestions for the "Golden Fleece of the Month" for May.

48. Hutchinson v. Proxmire, 443 U.S. 111, 117 (1979). Senator Proxmire routinely released items to a list of about 275 national and international media sources.

49. *See* 39 U.S.C. § 3210 (1970). The franking privilege is the privilege of sending certain matters through the public mails without payment of postage.

50. Hutchinson v. Proxmire, 443 U.S. 111, 117 (1979). The purpose of these calls is unclear. Senator Proxmire claims the calls were part of the oversight function which required congressmen to keep watch over the spending of other branches of the government. Dr. Hutchinson claims the calls were to harass and pressure the agencies into dropping the funding of his projects.

Based on these events, Dr. Hutchinson brought suit against Senator Proxmire and Mr. Schwartz[51] for defamation, claiming that he was injured by the continued widespread republications of the alleged defamatory material contained in the Golden Fleece Award.[52] Dr. Hutchinson specifically declared that his complaint was not aimed at Senator Proxmire's speech on the Senate floor but rather, was directed at the republications in press releases, newsletters, radio and television shows.[53]

Senator Proxmire responded that his conduct was essential to the informing function of congressmen. Further, he claimed that since the expenditure of tax dollars is the focal point of congressional business,[54] his conduct was a legitimate legislative activity[55] protected by the Speech or Debate Clause. Additionally, he alleged that Hutchinson was a "public figure" who must meet the "actual malice" burden.[56] Claiming that there was insufficient evidence to show such malice, Senator Proxmire asked that his motion for summary judgment be granted.

LOWER COURT OPINIONS

Though recognizing the current trend toward a restrictive reading of the Speech or Debate Clause,[57] the district court held that issuing a press release was an action entitled to the protection of the Clause.[58] In so holding, the court stated that the informing function is a recognized legislative activity and that a press release is an acceptable method of informing the public.

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51. Schwartz is implicitly included in any discussion concerning Proxmire. The Court in *Gravel* was cognizant of the problems of the modern day Congressman. Proliferation of tasks facing these Congressmen requires acceptance of the critical role played by legislative aides. With regard to the Speech or Debate Clause, these aides must be treated as Congressmen are. Gravel v. United States, 408 U.S. at 616-17 (1972); *see* note 33 *supra*.

52. Hutchinson v. Proxmire, 431 F. Supp. 1311, 1319 (W.D. Wis. 1977). Hutchinson claimed he had suffered a variety of injuries among which were loss of respect in his profession, humiliation, loss of funding from federal agencies, loss of income, and loss of the ability to earn future income. Damages were prayed for in the amount of eight million dollars. *The Proxmire Decision: A Caution to Congress*, 205 SCI 170, 171 (1979). Dr. Hutchinson claimed his income was cut "60 to 70 percent" as a result of the Award and that several agencies which had supported his research, dropped him "like a hot potato."

53. Hutchinson v. Proxmire, 431 F. Supp. 1311, 1320 (W.D. Wis. 1977).

54. *Id.* at 1320. *See* Senate Brief, *supra* note 30, at 12 n. 17.

55. Hutchinson v. Proxmire, 431 F. Supp. 1311, 1319 (W.D. Wis. 1977).

56. *See* notes 43-45 and accompanying text *supra*.

57. Hutchinson v. Proxmire, 431 F. Supp. 1311, 1321 (W.D. Wis. 1977) ("Although the Supreme Court has always insisted that the Clause be read broadly to effectuate its purpose, recent cases appear to adopt a restrictive view of what is legitimate legislative activity.").

58. *Id.* at 1324-25.

In support of its findings, the district court reviewed prior cases involving alleged abuses of the franking privilege and noted that, "[l]ower courts have recognized the legitimacy of the 'informing function' as a legislative activity."[59] Since Congress had specifically included press releases and newsletters[60] as acceptable methods to promote the informing function, the district court reasoned that Senator Proxmire's press release was sanctioned by Congress and recognized by the courts as a legitimate legislative activity and thus protected by the Clause. The court, however, chose to deal with the newsletter in a context different from that of the press release,[61] and limited the Clause's protection to the investigation,[62] the speech itself, and the concurrent press release.

The court of appeals agreed with the result, but not with the reasoning of the district court in its decision to immunize the press release.[63] The court of appeals decided that the release was covered by the Clause because it was a "limited facilitation of press coverage."[64] The effect of the release was merely to call attention to a speech appearing in a public document, the *Congressional Record*.[65] The court drew no distinction between the actual Senate speech and the concurrent press release. Furthermore, the court of appeals expanded the Clause's protection to

59. *Id.*

60. 39 U.S.C. § 3210(3)(B) (1970).

61. While the statute specifically includes newsletters, the court may have considered the time sequence of events to be significant. The fact that the newsletters were mailed months after the Senators speech may have been a decisive factor in the Court's decision not to include them in their statutory analysis. 431 F. Supp. at 1325. The appellate court called the press release a "limited facilitation of press coverage" and seemed to deal with it as a mere extension of a *concurrent*, protected Senate speech. Hutchinson v. Proxmire, 579 F.2d 1027, 1033 (7th Cir. 1978) (emphasis added).

The Supreme Court concluded that because of the district court's "implicit holding that the newsletters were not protected by the Clause," the district court did not base its decision on the "informing function" analogies. Hutchinson v. Proxmire 443 U.S. 111 (1979). This reasoning ignores the fact that the district court devoted a number of pages in its decision to the explanation and application of the "informing function" concept to this case.

62. The investigation itself was held to be protected as it met the *Kilbourn* test of "things generally done in a session by one of its members in relation to the business before it." Hutchinson v. Proxmire, 431 F. Supp. 1311, 1322 (W.D. Wis. 1977); *see* Watkins v. United States, 354 U.S. 178, 187 (1957).

63. Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978).

64. *Id.* at 1033. *Contra*, Brief for Petitioner at 25, Hutchinson v. Proxmire, 443 U.S. 111 (1979) ("Other than skywriting and billboards, the Respondents utilized virtually every conceivable means of communication in their attempt to draw international attention to their statements.").

65. 121 CONG. REC. 10803 (1975).

include the newsletter.[66] It was the court's view that, "if the informing function . . . is to be accorded any absolute immunity, it must be in a case such as this."[67] Looking at Senator Proxmire's duty to oversee public spending, both as an individual Senator and as a member of the Senate Committee on Appropriations, the court decided that to deny "a representative protection for newsletters to his constituents in circumstances such as this would effectively isolate the legislator from the people who elected him."[68]

Regarding the claims not barred by Speech or Debate Clause immunity, both the trial court and the reviewing court agreed that Dr. Hutchinson was a "public figure." A "public figure" must meet a higher burden of proof and must demonstrate "actual malice"[69] on the part of the defendant. Both courts noted that Dr. Hutchinson's voluntary participation and long involvement with publicly funded research, local media coverage of his research, his solicitation of government grants, and the public interest in the spending of public funds all combined to make Dr. Hutchinson a public figure.[70] Consequently, the courts determined that since there was no proof of "actual malice," Dr. Hutchinson could not meet the burden of proof required to establish his claims. Therefore, the district court granted the motion for summary judgment and the court of appeals affirmed. The United States Supreme Court granted certiorari to hear Dr. Hutchinson's claims.

SUPREME COURT DECISION

The Supreme Court rejected the reasoning of the lower courts and determined that although press releases and newsletters are intended to inform the public and serve an important purpose, they are not essential elements in the procedure of enacting legislation. The issuance of the press release and newsletter by Senator Proxmire was therefore held to be outside the protection afforded by the Speech or Debate Clause. While not

66. Hutchinson v. Proxmire, 579 F.2d 1027, 1033 (7th Cir. 1978). The court called particular attention to Proxmire's status and special responsibility as a member of the Appropriations Committee.

67. *Id.* at 1033-34.

68. *Id.* citing Doe v. McMillan, 412 U.S. 306, 333 (1973) (Blackman, J., concurring and dissenting) ("Denying a representative protection for newsletters to his constituents in circumstances such as this, would effectively isolate the legislator from the people who elected him."). With this in mind the court of appeals decided that "if the informing function, . . ., is to be accorded any absolute imunity, it must be in a case such as this."

69. *See* notes 43-45 and accompanying text *supra.*

70. Hutchinson v. Proxmire, 579 F.2d 1027, 1034-35 (7th Cir. 1978); Hutchinson v. Proxmire, 431 F. Supp. 1311, 1327 (W.D. Wis. 1977).

disparaging either the value or importance of these methods of informing the public,[71] the Court was unable to discern any "conscious choice" on the part of the founders to "grant immunity for defamatory statements scattered far and wide by mail, press, and the electronic media."[72] The Court also held that Dr. Hutchinson was not a "public figure." Therefore, the "actual malice" burden of proof was not applicable in this case.

Senator Proxmire contended that, for a number of reasons, his activities were protected by the Speech or Debate Clause. He claimed that the history of the Clause, the representatives' duty to inform the public, and the necessities of the modern day legislator all demand that the protection of the Speech or Debate Clause cover his activities. In rejecting these contentions, the Court followed its trend of narrowly defining the purview of the "sphere of legitimate legislative activities." Informing the public, the Court decided, is simply not a legislative activity to which Speech or Debate Clause immunity attaches.

ANALYSIS

Since its formulation in the *Brewster* and *Gravel* cases,[73] the narrow view of the Speech or Debate Clause, which embraces the idea that only *purely*[74] legislative activities are to be protected by the Clause, has been consistently adhered to by the Supreme Court. To determine if an activity was "purely legislative," the *Brewster* Court allowed judicial inquiry into the decision-making process of legislators. The Court in *Gravel*, defined this new "purity" standard[75] to include only those activities which are essential to the process of enacting legislation. In light of its holding in *Gravel*, the Court, in subsequent cases, continued its close examination into the workings of Congress.

In *Doe v. McMillan*,[76] the Court applied the *Gravel* limitation to a committee report published and distributed at the House's orders. It was held that the report was protected only to the extent that such publication and distribution served a legitimate legislative function. In another case addressing the proximity of Congress's actions to the law making process, the Court

71. Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979).

72. *Id.* at 132.

73. *See* notes 31-33 and accompanying text *supra.*

74. United States v. Brewster, 408 U.S. 501, 512, 528 (1972) (emphasis added).

75. *See* Suarez, *Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach*, 20 VILL. L. REV. 97, 117 (1974).

76. 412 U.S. 306 (1973); *see* note 37 *supra.*

in *United States Servicemen's Fund*[77] ruled that the issuance of a subpoena was a proper use of the Congressional investigative power. Such an investigative power[78] was held to be privileged as a necessary element in enacting legislation.

The issuance of a press release is used to inform the public, a function legislators claim is essential to the passage of bills.[79] Consequently, it should be protected by the Speech and Debate Clause as it is encompassed by the *Gravel* standard. Furthermore, the legislators argue that if the protection of the Clause is not afforded to such an enactment-related function, other activities with a more tenuous connection to the passage of legislation, yet equally vital to the role of a legislator and the existence of a representative form of government, most assuredly would not be protected.[80]

In *Hutchinson v. Proxmire*, the Supreme Court remained consistent with the narrowing trend of previous courts in the application of the Speech or Debate Clause. It inquired into the activities regularly performed by each legislator to decide if these activities were part of the legislation-enactment function.[81] However, the Court narrowed the definition of the enactment procedure even further by deciding that informing the public is not speech, debate, nor an integral part of making law.[82] While this decision may have been proper in light of recent precedent representing a narrow view of the Speech or Debate Clause, it is doubtful[83] whether it is in accord with the actual intent of the Founding Fathers.

The *Hutchinson* Court reasoned that the very purpose of the Constitution was to provide written definitions of the powers and privileges to be established in the new government.[84] Past decisions, supplying a practical interpretation of the Clause, had already exceeded the bounds of a literal reading, which would limit the protection to utterances made within the four walls of either chamber.[85] A practical definition protects committee hearings and reports, as well as speech, but does not alter the objective of protecting only legislative activities.[86]

77. 421 U.S. 491 (1975); *see* note 39 *supra*.
78. *Id.* at 504.
79. *See* Ervin, *supra* note 8, at 185.
80. *See* notes 66-68 and accompanying text *supra*.
81. Hutchinson v. Proxmire, 443 U.S. 111, 130 (1979).
82. *Id.*
83. *See* Ervin, *supra* note 8, at 179-84.
84. Hutchinson v. Proxmire, 443 U.S. 111, 125 (1979).
85. *Id.* at 124. A literal reading would limit the protection to utterances made within the four walls of either Chamber.
86. *Id.* at 125. To support this view the Court cited Thomas Jefferson's

The decision in *Hutchinson* provides a guide as to which activities undertaken by legislators constitute an integral part of this deliberative and communicative legislative process. The Court had previously decided that only activities essential to the bill passing function are entitled to protection. Senator Proxmire's criticism of government funding of Dr. Hutchinson was not essential to this narrow legislative process and is not protected. In reaching this conclusion, the Court reaffirmed

> the caveat expounded in *Brewster* that the clause "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system . . . [T]heir Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy."[87]

The Court acknowledged that the roots of the Clause are found in the struggle between the Crown and Parliament. However, it does not follow that the meaning and purpose which is given to this privilege in England is the meaning to be subscribed to in the United States. The forms of government are different and "our history does not reflect a catalogue of abuses at the hands of the Executive that gave rise to the privilege in England."[88]

In deciding that the Clause should be given a different meaning than its English counterpart, and that the objective of the Clause was to protect only legislative activities, the Court either overlooked history or has rewritten it.[89]

At the time of the adoption of the Bill of Rights, Parliament was extremely weak. Rather than trying to preserve its supremacy, Parliament was striving to insure its existence. In view of this history, it is clear that the free speech privilege was intended to be a shield against executive interference.[90] This problem was not unique to England, but was also experienced in America.

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statement that the Member's privilege is not to "exceed the bounds and limits of his place and duty." The Court employed this statement in an attempt to show that the privilege is a limited one. Since Jefferson did not define what the limits of a legislator's place and duty are, this statement is open to an interpretation which would support the broad view of the privilege. Senator Proxmire claimed that he was performing a duty imposed on him as a representative, that of informing the people.

87. *Id.* at 126 citing United States v. Brewster, 408 U.S. 501, 508 (1973).

88. United States v. Brewster, 408 U.S. 501, 508 (1973).

89. *See* Ervin, *supra* note 8, at 180-81. Senator Ervin characterized the Court which decided *Brewster* and *Gravel* as being "activist." He then defined an activist Court as one which ignores the history or policy or settled case law which has evolved around that portion of the Constitution which is before it.

90. *See* Reinstein, *supra* note 3, at 1123.

In 1797, a Federalist judge supervised a grand jury which charged several anti-Federalist Congressmen, including Congressman Cabell of Virginia, with sedition for sending newsletters to his constituents which were critical of the administration's policy. Outraged by this action, Thomas Jefferson saw it as "an offence against the *privileges* of the legislative house . . . .[I]t is left to that house, entrusted with the preservation of its own *privileges*, to vindicate its immunities against the encroachments and usurpations of a co-ordinate branch . . . ."[91]

Thus, it is evident that some of the "catalogue of abuses" did exist in America. The founders knew of the English experience and recognized the underlying reasons for a free speech privilege. The founding fathers placed extreme emphasis on the importance of informing the people.[92] In addition to this emphasis, Parliament's fear of executive and judicial interference, make it apparent that the Speech or Debate Clause was to serve a function greater than the protection of *only* those activities essential to the passage of a bill.

It is recognized that the Speech or Debate Clause was intended, in part, to maintain the separation of powers.[93] The factors which have spawned the broad historical view have been dismissed by the Court in its quest for a written[94] meaning of the Clause. The only proposal for a change in the Clause before its adoption[95] was made by James Madison. Madison suggested that the clause specifically define the privilege of each House.[96] The *Hutchinson* Court adopted this idea that the scope of the privilege was defined specifically by the language in the Clause.[97] In doing so, it overlooked the fact that Madison's pro-

91. THE COMPLETE JEFFERSON 704 (Padover ed. 1943) (emphasis added).

92. 8 WORKS OF THOMAS JEFFERSON 431-33 (Ford ed. 1904):

> [I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches; Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full and unawed by any; that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested, and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

93. *See* Ervin, *supra* note 8, at 182-83.

94. *See* Reinstein, *supra* note 3, at 1139-40.

95. *See* Farrand, *supra* note 4, at 503.

96. *Id.*

97. Hutchinson v. Proxmire, 443 U.S. 111, 124-25 (1979).

posal was rejected.[98] It may be inferred that the Framers rejected Madison's proposal, being attentive to the warnings of Blackstone.[99] He counseled that such strict, rigid definitions could be counter-productive.[100] However, the Court opted for a static written view of the scope of the Clause, rather than a functional approach designed to evolve as the government changes.[101] From a historical perspective it appears that it was this undefined, dynamically evolving view which the Founders intended the Clause to have.[102]

Consistent with its narrow definition of the Clause, the Court determined that the privilege would not extend to the informing function of Congress.[103] The Court defined two uses of the word "informing." In one sense it is used as the general informing of the public which is not a protected activity. The other use of the term refers to how "Congress informs itself collectively by way of hearings of its committees."[104] The Court stated that it is the second usage of the phrase which is ascribed to W. Wilson's comment that, "The informing function of Congress should be preferred even to its legislative function . . . . [T]he only really self-governing people is that people which discusses and interrogates its administration."[105] It is not clear

98. *See* Farrand, *supra* note 4, at 503.

99. 1 W. BLACKSTONE, COMMENTARIES *164 (1789).

100. *See* Reinstein, *supra* note 3, at 1121.

101. *Id.*

102. Accepting the postulate that the Speech or Debate Clause was adopted for the same reasons as the Bill of Rights and that it was also to be of a dynamic character, it is interesting to note the scope recently given to Article 9 of the Bill of Rights. Canadian Prime Minister Pierre Trudeau and a ministerial colleague issued a press release warning that a proposed transaction would be unacceptable in terms of newly proposed legislation. In an action for wrongful procurement of breach of contract, the Court held that the issuance of the press release was part of the ministers' "essential functions" as members of Parliament and that their actions were "proceedings in Parliament within the meaning of the Bill of Rights." Roman Corp. Ltd. v. Hudson's Bay Oil & Gas. Co., (1971) 2 O.R. 418, 18 D.L.P. (3d) 134 (Ont. High Ct.); (1972) 1 O.R. 444, 23 D.L.R. (3d) 292 (Ont. C.A.), *aff'd on other grounds*, (1973) S.C.R. 820, (1973) 36 D.L.P. (3d) 413 (Sup.Ct.Can.); *see* Mummery, *Freedom of Speech in Parliament*, 94 L.Q. REV. 276, 283 (1978).

103. Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) ("Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process.").

104. *Id.* at 132.

105. *Id.* quoting W. WILSON, CONGRESSIONAL GOVERNMENT 303 (1885). Senator Proxmire used this quote to support his position. Within the body of the full quotation, Wilson also said that "[t]he informing function is to preferred even to its legislative function. . . ." Why the Founders would have intended to provide protection for just the legislative function and not the "preferred" informing function, was not explained by the Court.

that Wilson intended his words to have the meaning which the Court has assigned to them. What is clear is that the Supreme Court has dismissed the function of informing the people as ancillary to the representatives' true function of passing bills.

Again, the Supreme Court has overlooked the historical recognition of how essential the Founders deemed the function of informing the public to be. Commenting on the trial of Representative Cabell,[106] Jefferson said Cabell was exercising his functions as a legislator and "*was in the course of that correspondence* which his *duty* and the will of his constituents imposed on him, [and] *the right of thus communicating with them, deemed sacred* under all the forms in which our government has hitherto existed . . . was openly and directly violated at a Circuit court. . . ."[107] Moreover, the Supreme Court has in the past recognized and adopted an interpretation of the Clause which holds it to be "indispensibly necessary"[108] that a representative enjoy the "fullest liberty of speech"[109] in order to properly and effectively discharge his duties.

According to the *Hutchinson* Court, informing the public and other representatives is not dependant upon the issuance of press releases or newsletters, because the text of Senator Proxmire's speech is available to the public in the *Congressional Record*. The Court's assumption that the public or representatives are informed wholly or even primarily through the *Congressional Record* or committee process ignores the realities and complexities of the modern legislature.[110] The growth of Congressional business has caused a decrease in the amount and importance of actual speech or debate on the floor of Congress.[111] Use of the public forum as a means of informing repre-

106. *See* note 91 and accompanying text *supra*.

107. *See* THE COMPLETE JEFFERSON 704 (Padover ed. 1943). This statement was contained in a letter sent by both Jefferson and Madison to the Virginia Legislature. It indicates the feeling of these Founders that informing the people is an essential basis of our government and a recognition of the theory of separation of powers.

108. In interpreting the clause, the courts hve referred to an interpretative statement by James Wilson:

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

II WORKS OF JAMES WILSON 38 (Andrews ed. 1896), *quoted in* Tenney v. Brandhove, 341 U.S. 367, 373 (1951) (emphasis added).

109. *Id.*

110. Brief for Respondent at 32, Hutchinson v. Proxmire, 443 U.S. 111 (1979).

111. *Id.* at 13.

sentatives and constituents has increased to the point of being indispensible.[112] It is also considered an essential element in the process of developing legislation.[113] If the broad, dynamic view had been given effect, Senator Proxmire's activities would have been protected. Instead, the strict and narrow perspective affords no protection and "reflects a shocking lack of understanding of the essential elements of the legislative process and the representative role of the legislative branch."[114] The Court has failed to adopt a realistic view of the legislative process in its attempt to define what is protected by the Clause. Clearly, the formulation, consideration and passage of legislation involves more than the introduction of a bill, a few speeches and a vote.[115]

Analysis of the "Public Figure" Issue

The standard of what constitutes a "public figure" was enunciated in *Gertz v. Robert Welch, Inc.*[116] A person could "achieve such pervasive fame or notoriety that he becomes a public figure for all purposes in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.[117] Two years after *Gertz*, in *Time, Inc. v. Firestone*,[118] the Court stressed the fact that the plaintiff had not "voluntarily" thrust herself into the public limelight.[119] The Court apparently retreated from the idea in *Gertz*[120] that public figure status could be achieved involuntarily.[121]

The *Hutchinson* Court followed this reasoning and stressed that Hutchinson had not thrust himself into a *particular*[122] controversy. Concern about the general topic of government expenditures is insufficient to make Hutchinson a public figure. While the funding for his project became a matter of specific interest to the public, this interest was a consequence of the Fleece Award and not the result of any volitional act on Hutch-

112. *Id.* at 30.
113. *Id.* at 13.
114. *See* Ervin, *supra* note 8, at 186.
115. *Id.* at 185.
116. 418 U.S. 323 (1974); *see* notes 43-44 and accompanying text *supra.*
117. *Id.* at 351.
118. 424 U.S. 448 (1976).
119. *Id.* at 453-55.
120. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351 (1974).
121. Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 660 (1977).
122. Hutchinson v. Proxmire, 443 U.S. 111, 134-35 (1979) (emphasis added).

inson's part. "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."[123] If the Court allowed people to become public figures[124] simply by public criticism of the expenditures of tax moneys, countless numbers of people who have received or benefitted from such funds would lack adequate safeguards against defamatory falsehoods.[125]

The Court's ruling that Dr. Hutchinson was not a public figure was based on sound reasoning. In opting to give more weight to the rights of Hutchinson, rather than to Senator Proxmire's first amendment privilege, the Court did not deal with Senator Proxmire's special status as a Senator. There are indications that the first amendment free speech privilege is accorded extra weight when dealing with a representative of the people.[126] This may be a situation where the public necessity for the untrammeled freedom of legislative activity outweighs the individual harm.[127] Such a line of reasoning though, would signal a return to the quagmire of opinions as to what constitutes legislative activity.

Effect and Possible Impact of Hutchinson v. Proxmire

The decision in *Hutchinson* represents the last phase in the evolution of the narrow view of the Speech or Debate Clause. The facts dealt with the vital function of informing the people. The information concerned expenditures of tax money, a subject at the very heart of Congressional business. If under these circumstances, the protection of the Speech or Debate Clause is not afforded, then it is improbable that anything outside of speech, debate or activities essential to the enactment of legislation will be protected.[128]

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123. *Id.* A true public figure has regular and continuous access to the media. The Court ruled that Dr. Hutchinson did not have such access. What access he did have was limited to responding to the Golden Fleece Award.

124. *The New York Times* standard of "actual malice" has only been applied to media defendants. The Court ruled that Dr. Hutchinson was not a public figure. This made it unnecessary for the Court to decide whether that standard would also apply to an individual defendant. *Id.* at 133 n. 16.

125. *Id.* at 135.

126. Bond v. Floyd, 385 U.S. 116, 136 (1966). In a case dealing with a state legislator who spoke out against the Vietnam War, the Court stated that, "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."

127. Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

128. Hutchinson v. Proxmire, 579 F.2d 1027, 1033 (7th Cir. 1978).

As a result of *Hutchinson*, the legislative process and the determination of which acts are essential to that process, and thus protected, will require increased judicial review. An increase in litigation follows naturally from the narrowing of any immunity. That effect, in this instance, is in direct conflict with an accepted purpose of the Speech or Debate Clause, namely to protect legislators from being forced into litigation.[129] An increase in the number of lawsuits against legislators could significantly disrupt the law-making process.[130] The frightening prospect of an overzealous judiciary encroaching upon the privileged communications between the representatives and the represented, is best explained by Thomas Jefferson:

> for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties toward each other to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others . . ., is to put the legislative department under the feet of the Judiciary, *is to leave us, indeed, the shadow, but to take away the substance of representation. . . .*[131]

The decision in *Hutchinson* will necessarily reduce the flow of information between the representatives and their constituents. A few citizens may profit from this new avenue of legal redress. In any event, the number of people who will directly benefit from this ruling is, at best, minimal, while the chilling effect that this decision will have on the free flow of information to the public is a wrong inflicted upon every citizen.

Ignoring the criticism of many and incurring the wrath of Congress, this Court has foisted its own definition of the scope of the Speech or Debate Clause[132] upon the country. In so doing, the Court chose to ignore the preponderance of historical documentation which illustrated the importance and value placed upon informing the people as absolutely essential to this country's very form of government.

If informing the people was ever to receive the protection of the Clause, it would have been in a case such as this.[133] By de-

129. *See* text accompanying note 26 *supra*.

130. It is possible that Congress can be intimidated by the Executive Branch if a narrow meaning is given to the Clause. Justice White, dissenting in *Brewster*, gave an example of how a mere hint of Executive Branch inquiry into a legislator's conduct could affect his performance and votes in Congress. United States v. Brewster, 408 U.S. 501, 555 (1972) (White, J., dissenting).

131. *See* THE COMPLETE JEFFERSON 704 (Padover ed. 1943).

132. *See* Ervin, *supra* note 8, at 180.

133. Hutchinson v. Proxmire, 579 F.2d 1027, 1033 (7th Cir. 1978).

nying protection, the *Hutchinson* Court has told the legislators that they must inform the public at their own risk.[134] *Caveat Legislator!*

David M. Sweet

134. Hearing the case on remand from the Supreme Court, the district court ruled that Senator Proxmire had not defamed Dr. Hutchinson. The circuit court decided that Dr. Hutchinson was entitled to a reconsideration of that ruling. Dr. Hutchinson and Senator Proxmire agreed that further litigation is unnecessary. Conceding that certain of the statements contained in the Fleece Award were incorrect, Senator Proxmire agreed to pay Dr. Hutchinson $10,000. Senator Proxmire said his policy "is not, nor will it be, to prejudge or censor any application for a federal grant by Dr. Hutchinson or anyone else." Senator Proxmire continues to make his Golden Fleece Award and still maintains that certain studies should not be federally funded during periods of inflation and budgetary deficits. *See* Chicago Tribune, Mar. 25, 1980, § 2, at 8, col. 1.