In the

# Supreme Court of the United States

MIKE GRAVEL, United States Senator,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

-and-

UNITED STATES OF AMERICA,

Petitioner,

vs.

MIKE GRAVEL, United States Senator,

Respondent.

No. 71-1017
and
No. 71-1026

Washington, D. C.
April 19, 1972

Pages 1 thru 34





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Washington, D. C.

Wednesday, April 19, 1972

The above-entitled matter came on for argument at 2:13 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justce
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

[Appearances on page following.]

APPEARANCES:

SAM J. ERVIN, JR., ESQ., Attorney for the United States Senate, Washington, D. C. 20510.

WILLIAM B. SAXBE, ESQ., Attorney for the United States Senate, Washington, D. C. 20510.

ROBERT J. REINSTEIN, ESQ., 1715 North Broad Street, Philadelphia, Pennsylvania 19122, for Mike Gravel, United States Senator.

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the United States.

CHARLES LOUIS FISHMAN, ESQ., 633 East Capitol Street, Washington, D. C. 20003, for Mike Gravel, United States Senator.

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C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1017 and 71-1026, Gravel against the United States and the United States against Gravel, consolidated.

Senator Ervin.

ORAL ARGUMENT OF SAM J. ERVIN, JR., ESQ.,

ON BEHALF OF UNITED STATES SENATE

MR. ERVIN: Mr. Chief Justice, and may it please the Court:

The facts out of which this case arises are extremely simple. Senator Gravel is a long-time critic of American involvement in Southeast Asia. On June 29, 1971 he convered a meeting of a subcommittee of the Senate of which he is chairman. After convening the meeting, he made a speech in the meeting in which he quoted extracts from the so-called Pentagon Papers. After so doing, he inserted the Pentagon Papers in their entirety in the record of the committee's hearing.

He was assisted in preparing for this meeting and for these activities by his aide, Dr. Rodberg. Subsequent to the presentation of the Pentagon Papers to the committee, Senator Gravel, acting through Dr. Rodberg, undertook to find a publisher for these papers to give them wider dissemination.

Q Senator, could I ask you, tell me a little bit about Dr. Rodberg. Was he hired that very day by the Senator?

MR. ERVIN: Yes, sir, he was hired that very day the Senator, but the lower courts have found that he was an aide to the Senator.

Q Was he on government payroll or not?

MR. ERVIN: I believe the Senator said in the record that he was employed. His name was entered on the record of the employment, but he was not entered on the records of the financial clerk. There is, however, an oral controversy about his being an aide to Senator Gravel.

Q Was this circumstance arising simply out of the fact that this was a very hasty development?

MR. ERVIN: Yes, it seems to have been done while on the spur of the moment, as a result of the fact there had been some release of the Pentagon Papers and some controversy in other areas about publication of the Pentagon Papers.

In this effort to find a publisher, Dr. Rodberg consulted with the witness Weber, who is mentioned in the record, and also upon behalf of Senator Gravel an agreement with the Beacon Press of Boston to publish the Pentagon Papers which had been released--which had been inserted in the committee records in a book.

The government issued what I call a John Doe grand jury investigation in the District of Massachusetts for the avowed purpose of having the grand jury investigate whether someone had violated criminal statutes which put--makes on

certain conditions of crime for one to retain government records with intent to convert them to his own use, a statute which makes it a crime to gather and disseminate national defense information under certain circumstances, and a statute which makes it a crime to conceal or remove government records and also to tell whether a conspiracy had been formed to violate any of these statutes.

There was a subpoena issued for Dr. Rodberg at the instance of the government. There was a subpoena issued for Weber. A witness who had had some contacts with an unsuccessful effort of Dr. Rodberg to procure the publication for Senator Gravel in the book.

And then there were two subpoenas duces tecum issed to the Beacon Press to require it to produce before the grand jury any documents which Senator Gravel or Rodberg had given them.

There is the controversy between the government, on the one hand, and Senator Gravel on the other. Senator Saxbe and I do not hold a brief of Senator Gravel. We appear here solely in behalf of the United States Senate. The United States Senate takes its position that the speech and debate clause of Section VI of Article I of the Constitution says in effect to the other branches of the government, the executive branch and the judicial branch, you must keep off of this legislative grass. I use this expression because I

was impressed by the greenness of the grass as I came over to the Court this afternoon.

The Senate does not take the position that--it holds not brief for Senator Gravel. It takes the position that everything that Senator Gravel did at least short of the publication was action within the general domain of the legislative branch of the government, and that Senator Gravel is not accountable for the executive branch and that he's not accountable to the judicial branch of the government for any of his legislative activities.

Q Senator, you said short of publication?

MR. ERVIN: I'm going to come to that secondly. I think I'll deal first with the action in the committee and then deal with that as a separate matter.

Q While we have you stopped, Senator Ervin, would the immunity that you have just suggested be broad enough so that no inquiry could be made, judicially or otherwise, into whether the meeting was a valid meeting under the Senate rules?

MR. ERVIN: No, sir. The Court impied and held that in the case of Tenney against Brandhove where the Court quoted at length and with complete approval a decision of the Supreme Judicial Court of Massachusetts in the case of Coffin against Coffin, which was handed down right after 1800, and they held it was immaterial if the man was acting within

what was traditionally the legislative activity; it made no difference whether his activity was regular or irregular under the rules of the legislative body of which he was a member.

Q In other words, that would be the business only of the Senate.

MR. ERVIN: Of the Senate. That's our position.

In other words, that this is something which is beyond as far as anything that transpired within the scope of the speech or debate clause of the Constitution. It is something which the executive branch or the judicial branch have no constitutional power whatsoever.

Q And that inquiry or discipline or both is something exclusively for the Senate.

MR. ERVIN: That's right. In other words, in Section V of Article I, the preceding section to the speech and debate clause, expressly says that each House shall determine the rules of its proceedings. It may punish members for disorderly behavior and, with the concurrence of two-thirds, expel a member. And our position is that whether, even though Senator Gravel may have violated Senate rules and even though he may have acted improperly, that that is a matter for the judgment of the Senate and no other power in our government has a right to make any official pronouncement on that subject other--

Q Senator, both Houses of the Congress enact legislation, which authorizes the judicial branch to make an inquiry; is that statute constitutional?

MR. ERVIN: What?

Q Would that statute be constitutional?

MR. ERVIN: If we authorize an investigation?

Q Yes.

MR. ERVIN: I doubt it very seriously. I doubt the Congress can confer upon the judicial branch of government--I don't think it can confer upon the executive branch the power to prosecute a Senator or a Representative, or upon the judicial branch the power to judge--

Q Or an aide.

MR. ERVIN: Any function of government. In other words, as the Germans would say, it's verboten so far as any branch of the government other than the House of which the party is a member.

Q Senator, I'm not sure it's relevant here, but it may shed some light on it for me. Suppose in the session the Congress held here, an extraordinary kind of meeting, a libel was committed on an individual. Could that individual in a suit for libel or slander, should it be that broad, could he question the validity--

MR. ERVIN: Not if it happens within the domain of the executive branch of the government. That has been

settled in--

Q That would be the question in the case, whether it was within the legislative function.

MR. ERVIN: The decisions are to the effect--and I don't think there is any great controversy between any of us on this point--the decisions are to the effect that anything that happens within the area which is allotted to the legislative branch of the government and which is traditionally done in that branch is subject--to be subject to liability.

Now, there is a distinction made between the immunity of the legislator and the immunity of his aide. The legislator is absolutely immune, even when he engages in an unconstitutional act, such as, for example, voting for an unconstitutional resolution or bill. He is absolutely immune, cannot be summoned to court. They, however, can be answerable in an action for a tort, unless two things concur. They must be acting within the scope of his employment by the legislator, and the activity of the aide must occur within the general domaine of the legislative branch of the government.

If those two things concur, the immunity of the aide is exactly like the immunity of the legislator, and it's held by the court below, I think quite wisely, and it's held in other cases that they're the sole manager.

The government takes a very peculiar position in this case. It takes the position that the speech and debate clause protects a legislator only in three respects. First, that it protects him against criminal prosecution for what transpires within the scope of his legislative action. Second, that it exempts him from civil liability. And, third, that it exempts him from being personally dragged before a grand jury by a subpoena and then personally interrogated by the grand jury. That's the position of the Solicitor General. And he takes a very strict construction; he bases that on the fact that the clause says for any speech or debate in either House, the legislators shall not be questioned in any other place. He says the only people mentioned are the legislators.

That reminds me of the argument that was made in the court in Venice when Shylock demanded his pound of flesh. He said, It's in the bond that I get my pound of flesh. My reply to the arguments listed in the list is the same as Portia made. It's also nominated in the bond that all you get is your pound of flesh; you're going to get a drop of blood. And this bond in this case could not possibly be subjected to the interpretation that the government places upon it without taking the lifeblood of the Constitution, because this clause was placed in the Constitution for a two-fold purpose. The first purpose was derived from my

experience in England and there in England the Tudor and the Stuart Kings had members of the Parliament hailed into court, prosecuted, convicted and sentenced to jail for making speeches in Parliament which were displeasing to the Crown And so within the Bill of Rights of 1688 the provision was incorporated that members of the Parliament should not be called upon to answer in any court or in any other place except the Parliament for their activities as members of the Parliament.

And so that was brought into our Constitution for that reason and as is so well stated by Justice Harlan in the Johnson case for an additional reason. He quotes in his very fine opinion in that case a statement of Madison in the Federalist Papers on the separation of the powers of government. And after pointing out how the powers of government are separated by a written Constitution in this country, Madison says that the next important thing is to have some practical methods by which to enforce the doctrine of the separation of powers and prevent one branch of the government from trespassing upon the domain of the other.

And in the Johnson case, it is said that the speech and debate clause was one of the practical obstacles created by the Constitution to prevent the trespass by the other branches of government upon the domain reserved by the Constitution to the legislative branch.

Now, manifestly if you take--if this Court would place upon this clause of the Constitution the interpretation by which the government contends, it would make the clause virtually worthless because it would allow, even the aides of the Senator, third parties to testify to the Senator's conduct within the scope of his legislative activities.

The purpose of this clause, as the Court held in the Johnson case is to keep legislators from being accountable to the other two branches of the government and to keep them from being intimidated by the other two branches of the government. The Solicitor General suggests having the Senator's conduct testified to by his aides or by third persons as no more a deterrent effect on his legislative action than having him subject to the criticism of his constituents. I submit that's not valid; that is not in accordance with the facts of legislative life. I have spent about six years serving in the legislature of North Carolina. And altogether I have served almost 19 years in the Congress in one House or the other, and I have to testify to this Court that among the most timid creatures I have ever met are legislators. They can cope, in a sense, with isolated criticisms of their constituents who have a right under the Constitution, incidentally, to criticize them, and they can cope with criticism from the press, which has a right to criticize their conduct. But I don't know anything that would

some nearer scaring a poor Senator or poor Representative to death than to have either the executive branch of the government with all of the might, governmental might, which the executive branch possesses or the judicial branch of the government with all the respect which the judicial branch enjoys as an impartial body, holding a Senator or Congressman accountable not for the legislative acts that they have a right to do in the exercise of judicial power to measure their constitutionality but to have the power to pass officially in any way on their conduct as a legislator. That would absolutely destroy the independence of the legislative body and that was precisely the reason I think the Court said in the Johnson case that this was intended to keep legislators from being held accountable to the other branches of the government or intimidated by the other branches of the government.

I expect to submit the question is whether or not Rodberg is exempt, is answerable to the decision of this Court in the Johnson case, where a Representative was prosecuted for conflict of interest, conspiracy, and so on, criminally, and this Court said the language of the speech or debate clause clearly proscribes at least some of the evidence taken during trial. Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by

outsiders representing the loan company. The government attorney asked Johnson specifically about certain sentences in his speech--he has taken his stand there in his own behalf--the reasons for their inclusion, and his personal knowledge of the factual materials supporting those statements.

In closing argument, the thread of the prosecution was dependent upon the writing of the speech; in addition to questioning the malappropriation and the precise ingedients of the speech, the government inquired into the motives for giving it. The constitutional infirmity infecting this prosecution is not merely a matter of introduction of inadmissible evidence. The attention given to the speech or substance and the motivation was not an incidental part of the government's case which might have never bothered by omitting certain lines of questioning or excluding certain evidence.

Then the Court concludes: "We see no escape from the conclusion that 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."

I believe my time has expired.

MR. CHIEF JUSTICE BURGER: Thank you, Senator. I think you have a question over here.

Q Senator, may I ask just for information purposes, is there any limit on the number of aides a Senator or Congressman may have as to the number?

MR. ERVIN: I think there are two practical limits. One is the allowance for compensation of legislative aides and another is the office space he's got. I don't exhaust my allowance, but my office space is so limited I couldn't find another chair for even another aide to sit down.

Q But if as here an aide such as Dr. Rodberg is not on the payroll, the first of those provisions is of no significance. What's to prevent the Senator from having 15 Dr. Rodbergs?

MR. ERVIN: I think it would be impractical. I think that a Senator that would have that many probably ought to be removed for mental incapacity myself. [Laughter]

I think as long as a Senator is getting assistance from the man in the performance of any of his senatorial functions or what he conceives to be senatorial functions, there is no limit.

Q Let's go into that a little bit, Senator. Suppose he calls on a professor of economics at some university, doesn't hire him, doesn't appoint him, just writes him a letter and says, "Will you give me your views about this." Would you regard that person whom he is consulting as within the immunity of the speech or debate

clause?

MR. ERVIN: Frankly I would give an interpretation to do that. I think anyone who assists a Senator in the performance of his legislative functions is exempt--

Q Or a Congressman.

MR. ERVIN: Or a Congressman, yes.

Q Senator, could you say in just a sentence perhaps, What is the Senate's position on the republication question?

MR. ERVIN: The Senators themselves probably, if you left it up to a vote, would be divided on this point. I myself take the position that that would be covered either by the speech or debate clause or by the First Amendment. Mr. Justice Douglas wrote a marvelous opinion in the Rumley (?) case in which Rumley was summoned before the Un-American Activities Committee of the House and was called upon to divulge to the committee the names of all the persons who had bought the books he published in bulk quantities. He refused to produce them and was prosecuted for contempt of the committee.

This Court held that he was protected by the First Amendment. The majority of the Court held the opinion of Mr. Justice Frankfurther that the prosecution was insupportable because the committee was not authorized by the resolution governing its activity to conduct this

investigation. But Mr. Justice Douglas in what I think one of the finest opinions he or any other member of this Court has ever written--he said he met the constitutional problem. Justice Frankfurter said if they placed their interpretation on the resolution that the committee really did have the power to compel the publisher to disclose the names of the purchasers of his books, that it would raise a serious constitutional question.

Mr. Justice Douglas wrote an opinion in which Justice Black concurred in which he says, "Of necessity I come then to the constitutional questions. Respondent represents a segment of the American press. Some may like what he publishes, others may disapprove. These tracts may be the essence of wisdom to some; to others their point of view and philosophy would be anathema. To some their words may be harsh and impulsive; to others they may carry the hope of the future. We have here a person who through books and pamphlets seeks to reach the minds and hearts of the American people. The aim of the historic struggle for a free press was to establish and preserve the right of English people to full information with respect to the doings or misdoings of their government."

That is not cited in the brief. It occurred to me last night. But I think this on that point; Woodrow Wilson said that one of the most important functions of a

Congressman is the employment function. He has the duty to inform his colleagues, the duty to inform his constituents, the duty to inform the general public, about how he thinks the government is being run. They now use not only the Congressional Record and committee reports, but many Senators and Congressmen use the radio and television; they write books on the subject. And I think this speech and debate clause is broad enough to cover any activity where a Senator or a Congressman attempts to inform either his colleagues or his constituents or the general public. And I think he's protected by the speech and debate clause, but I think if he's not protected by the speech and debate clause, that he is protected by the First Amendment, because everybody has a right to comment on government under the First Amendment. And I think that summoning third parties--in the Court here in this case you couldn't summon third parties to testify to the meeting of the committee. But I think if you summon third parties, then if you do not transgress--if the government summons third parties to testify to the action of a Senator or Congressman in the employment, his constituents, that is covered in the speech and debate clause. If it's not covered by that, then it's covered by his right as a citizen under the First Amendment, because if you intimidate a publisher or a publisher acting for a Senator by asking him to divulge the names of the purchasers of his books, it's

equally intimidating having an official inquiry made by the government as to the circumstances under which they agreed to publish the book.

I thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Senator Ervin.

Senator Saxbe, you have ten minutes. We'll charge the extra time to the Court. We'll add that to the Solicitor General's time.

ORAL ARGUMENT OF WILLIAM B. SAXBE, ESQ.,

ON BEHALF OF THE UNITED STATES SENATE

MR. SAXBE: Mr. Chief Justice, and may it please the Court:

I want to join with Senator Ervin in thanking this Court for allowing us to orally argue this case, representing the Senate as amicus. I think it's particularly important to note that this is the first time the Senate has as a body appeared before this Court. It is the gravity of this case and the potential impact of your decision on the doctrine of the separation of powers that brings the importance of this case and the Senate to you today.

The Senate brief is not an ordinary amicus brief, I might add. It's a statement of the Senate's understanding of the meaning of the Constitution. We respectfully hope that our statement will aid the Court in the determination of this case which carries this great weight with regard to the

legislative branch and its ability to serve the people that it represents. Our brief is filed on behalf of congressional privilege. It's not a defense of Senator Gravel or his aide. It's specifically not a defense of their conduct, which established the fact pattern of this litigation. Many Senators, including myself, feel that the Junior Senator from Alaska deeply abused the rules of the Senate. We feel strongly that his actions, while possibly adhering to the letter of the rules, certainly violated the spirit of them. Senator Gravel's actions were reprehensible. I am in agreement with every Senator who thinks that he did an outrageous thing. But I believe it is for the Senate to decide whether he be punished and to inquire as to the conduct which would necessitate punishment.

If the Senate censured him tomorrow, the executive still could not use the subpoena and contempt power of the judiciary to punish him because of the congressional privilege we believe is provided by the Constitution. Any punishment or censure is for the Senate and the Senate alone to mete out.

A grand jury inquiry is barred under Article I, Section 6 of the United States Constitution, commonly known as the speech and debate clause. It's purpose and historical use is not to reward members of the legislative branch with immunity but to allow them to perform their duties and

obligations of elective office. Each member of Congress must decide for himself which issues require ventilation and how he can best inform his constituents. It's not for the executive to challenge nor for the judiciary to judge a member's choice of issues, to publicize or methods of ventilation to his constituents, regardless of whether they may be considered ill advised.

The Senate acts as a whole or in part and may not approve of the exercise of the privilege by Senator Gravel in this case. But I'm here to represent that part of the Senate which violently disagrees with his actions but joins him in the assertion of the congressional privilege. The executive or judicial branch cannot dictate the bounds of congressional privilege if we are to maintain meaningful separation of powers with its necessary bulwark and concept of congressional immunity.

The Constitution provides that members of Congress may not be questioned in any other place, any speech or debate or any actions surrounding the legislative and informing functions. The Constitution does not allow the executive to second guess a member of Congress as to what his legislative duties are, even if the judiciary agrees by testing his congressional privilege by grand jury inquiry.

O Senator, if the Government indicts someone for wiretapping--indicts two people for wiretapping--and one

of them is given immunity and he testifies that he was hired to wiretap by a Senator in order to aid the Senator in his legislative duties to get information to conduct a hearing, would you think his co-defendant may be convicted?

MR. SAXBE: If the Senator--and he's referring to a Senator he's employed by--if the Senator said yes, this man--

Q No, the Senator doesn't say anything. Here are just two men who have been hired, one of them who says we were hired by a Senator to tap a wire contrary to the statutes.

MR. SAXBE: I dont think it can be extended in that manner in any way. It can only be extended by the Senator or by the body itself.

Q If the testimony is that they were hired by the aide of the Senator, could the aide be convicted for wiretapping?

MR. SAXBE: I don't--

Q Or for conspiracy to wiretap?

MR. SAXBE: I don't think you could extend it beyond the first degree at that point. I don't think that it could be extended to a wiretap. I've searched my mind on this and it's a very difficult position. Suppose it's June of 1944 and a Senator discloses to the enemy the D-Day landing dates and plan.

Q I take it the Senate's position is, though, that the Senator could not be convicted for wiretapping.

MR. SAXBE: I think that would follow if it was in performance of what he felt to be his constitutional duties.

Q Nobody questions but what he desired to have information that was very relevant to his legislative duties and he was quite willing to not comply with the wiretap law in securing information. Would you say that he was immune or not?

MR. SAXBE: I would say that he would be immune if he could successfully tie it in to his legislative duties. He can be arrested for running through the traffic light out here in front.

Q I suppose if they caught the Senator and his aide and a third party in the act of breaking into a building somewhere they could arrest all of them.

MR. SAXBE: Absolutely, just as running through this traffic light out here.

Q Even though the information they were going to get out of the files somewhere was going to be introduced in a committee hearing.

MR. SAXBE: That would be a difficult thing to determine, but the Senate and the Congress itself--

Q Let's assume that an aide of a Senator and a third party are caught seizing--one of them is caught in the

act of breaking into a building. The only thing is the other one is already gone with the goods and that gets back to the Senator and he introduces it into a legislative hearing, so there is no question that the material that was stolen is used in a legislative hearing. There is no question about it and it's also relative to the subject matter of the committee. May the aide be convicted? May the third party be convicted? May the Senator be convicted?

MR. SAXBE: I can foresee that there would be certain circumstances primarily in criminal law where the Senate would have to deliver up one of their members and aides because he stepped outside the scope of any reasonable Senate activities, that he would have to be prosecuted.

Q Senator, may there not be in this very case an issue of the source of the Pentagon Papers?

MR. SAXBE: I don't think that they can get to the source of the Pentagon Papers through Senator Gravel. Now, this is the nub of--

Q How about the aide?

MR. SAXBE: I don't think you can strip the aide of Senator Gravel of Senator Gravel's immunity in this particular instance. As to the Senate's responsibility in following through on this, yes, I feel that there is a responsibility.

Q But exclusively for the Senate?

MR. SAXBE: But exclusively with the Senate and with the Senator's aide in this particular instance. Now, I can foresee criminal acts, as Justice White has raised, where the Senate would have to deliver up one of their members to the regular procedures of the courts.

Q When you say deliver up, he's open season, in effect; they don't have to deliver him really. You mean he is not covered by the immunity.

MR. SAXBE: He is not covered by the immunity, and he might appear by saying this is something that I need in my committee; I am breaking into this room to get this. And then, of course, if the Senate rushed to his defense and said this is the very thing that we have great need for and it's important, I can see a weakness in the case, but I don't think that particular thing would happen.

Q What you're saying perhaps is that house-breaking is house-breaking and members of Congress have no immunity to that.

MR. SAXBE: And the members of Congress do have the responsibility of living up to keeping their own house in order, and I hope that they will do the proper job thereby.

Q Senator, suppose somebody steals government records, breaks property in order to get it, and brings it to a member of Congress and tells him what he has done, and the member of Congress puts him on his staff, is he outside?

MR. SAXBE: I think that if the present case is--I can see the--

Q No, my question has no relation to the present case.

MR. SAXBE: I think in the particular instance that he has to be employed at the time, and I was going to say that in the present case the question has arisen in our minds as to whether there was an attempt to clothe Dr. Rodberg with this immunity after the fact. And I think it's something that the Senate could well look into.

But in this man who is stealing and then there is an attempt to clothe him, I think it would fall by its own weight.

Q My point was that this administrative aide--I don't want to rank him in any way--without the consent of the Senate, Senator or Congressman, goes out, breaks a lock, steals property, and brings it in; one, suppose the Senator said, "Look, you shouldn't have done that." Or suppose the Senator said, "Fine." Either way, is that aide protected?

MR. SAXBE: He is not protected for the acts that were performed prior to being clothed by this. And I would think that the Senator would have a responsibility, if he knew that he violated the law, to immediately notify the proper authorities.

Q Senator, at one point during your argument

you adverted to a D-Day situation. Could you elaborate on that at all?

MR. SAXBE: I think this is the worse type of situation I could imagine where a man would disclose information that would compromise the armed forces and actually the future of this country. I think even in that case it would fall upon the Senate to punish and to move against this Senator who has violated his trust. I think that in the worst instance of this nature, where he took his advantage to classified documents and and disclosed them, that he still would be subject to the punishment of the Senate of the United States or the House of Representatives, as the case may be.

Q Of course, that raises the question, Senator, whether everything that has been classified is out from under the First Amendment. That's a very large question.

MR. SAXBE: Yes, and one that has been very carefully avoided.

Q Yes.

MR. SAXBE: The classified nature of the information is not the real issue of this case, I don't think.

MR. CHIEF JUSTICE BURGER: Thank you, Senator Saxbe.

Mr. Solicitor General, would you prefer not to divide? Isn't counsel going to engage only in rebuttal?

Excuse me, Mr. Reinstein. You may proceed. You

want to plan your argument by having in mind that we'll have about seven minutes now and whatever the balance is in the morning.

ORAL ARGUMENT OF ROBERT J. REINSTEIN, ESQ.,
ON BEHALF OF MIKE GRAVEL, UNITED STATES SENATOR

MR. REINSTEIN: Mr. Chief Justice, and may it please the Court:

As Senators Ervin and Saxbe have indicated, there are really two basic issues in this case. One issue is the scope of the speech or debate clause, that is, the kinds of activities of a member of Congress which are privileged under the clause. And the second issue is whether the grand jury can conduct an inquiry into these activities if they're privileged. I'd like to spend the time remaining today to talk about the first issue and in particular on the question of publication.

First of all, it's far too late in the day--indeed, by about 300 years--to argue that the free speech privilege of legislators encompasses only speech and debate in the literal sense. The privilege has never been construed that way in America or in England. On the contrary, it has always been construed broadly to cover all functions of legislators which are necessary to fulfill goals of representative government. And the Court in the Court in the Kilbourn case codified that by saying those customary actions of members

of Congress which are relevant to the legislative process. Obviously house-breaking isn't relevant to the legislative process; it would not fulfill any goal of representative government, even under some kind of claim that the Senator needed the information.

But the standard which we're suggesting is the broad standard of a clause, those activities necessary to fulfill goals of representative government, is we think the only kind of standard which meets the purposes of the clause. And, as Senator Ervin said so well, those purposes are of course to preserve separation of powers and to enable the Representative to discharge his obligation to the electorate without either executive or judicial intrustions.

Q I guess basically it's because there is a value to the people as people, the independence of legislators.

MR. REINSTEIN: That's right, Your Honor, the speech or debate privilege--

Q You can phrase it in separation of powers and other terms, but that's what's at the bottom it is, isn't it?

MR. REINSTEIN: That's right, Your Honor: It's to secure the rights of the people in representative government. It's not an emolument of office. It has nothing to do with the status of the individual. It is to preserve the rights of people.

Q Another way to say it, I suppose, is that it's

to preserve the integrity of an independent legislative body, isn't it?

MR. REINSTEIN: Yes, Your Honor, both the independence and the integrity of an independent legislative body. Therefore, the clause does cover broadly all of those necessary functions. We think it's also a little too late in the day to argue that the informing function of Congress does not fall within that category.

In our system of government, because of the sovereignty of the peopel and because of the necessity of security the rights of the people, Representatives have a duty--they have an obligation--to inform their colleagues and their constituents and the public at large about matters of public importance and specifically, as Woodrow Wilson said in his classic study on Congress, specifically about executive conduct in both domestic and foreign policy.

This obligation does not only derive from the fact that the people must be able to have this information in order to govern themselves intelligently, but it's also from a perception about the very operation of the legislative process. And that is that people must have this information in order to in turn inform their Representatives of their well considered views on pending and potential legislation. What this is is an interplay, and I think, Your Honors, that practically every Congressman from the birth of the Republic

has recognized this, that there must be an interplay between a Representative and the people, and that this interplay is the bedrock, the heart of our system of representative government.

Q Would you think that's broad enough so that a committee of the Congress, for example, could subpoena all of the contingency military and defense plans from the Department of Defense, require the Joint Chiefs of Staff to come over and testify about their contingency plans?

MR. REINSTEIN: The question there, Your Honor, in securing information through the subpoena power of Congress, is whether or not there is an executive privilege implied in Article I to prohibit the scope of the subpoena. This has never really been decided by this Court. There is, of course, in Article I no enumerated executive privilege. It has been implied in the Constitution--at least it has been arguably implied, because many presidents have asserted the privilege, and then we get into a conflict there between two constitutional privileges, one the privilege of Congress to obtain information and the second the privilege of the executive branch to withhold that information from Congress. It's a difficult problem. We don't have any kind of conflict of that sort here. What we have here is a member of Congress who has information critical of executive conduct and foreign policy, making that available to the people of the

United States through the holding of a subcommittee and through the publication of the material. And this is exactly the kind of conduct that has fallen within the mainstream of the hard core purpose of the speech or debate clause. The privilege both in England and America arose in order to allow unrestrained criticism by members of Congress of the Administration. We then have here a civil case where an individual claims that his constitutional rights are being violated wilfully by a member of Congress. Those cases have been before this Court. Nor do we have a case here of a bribed Congressman who argues the separation of powers theory in some attenuated fashion.

What we have here is a situation of a United States Senator who is criticizing the executive about matters of overwhelming public importance. And if this kind of conduct is not protected by the Constitution, then the promise of the speech or debate clause which is, as Mr. Justice Brennan and the Chief Justice said, to preserve the independence and the integrity of the legislature, then that promise is illusory.

I don't want the Court to think that we are making a novel argument here. In fact, the free speech privilege in both England and America, we think that there's overwhelming evidence to support the proposition that these privileges were designed specifically to enable members of Congress to

inform the electorate about executive behavior and specifically through the publication of committee records. The English Bill of Rights resulted from a notorious prosecution of the Speaker of the House of Commons who had privately printed and distributed a committee record accusing the King of malfeasance in office, and that led to the exile of James II and the enactment of the first free speech privilege, and historians are unanimous in concluding that the very purpose of the codification was to bring publication within it.

Q Do you have to go beyond the speech or debate clause for purposes of your case?

MR.REINSTEIN: No, Your Honor, we do not think so. The Court of Appeals felt that there might be a common law privilege akin to the executive privilege. But we think that the speech or debate clause itself is adequate and that no additional privilege need be implied or created out of the common law.

In our own country, Thomas Jefferson and James Madison both articulated the view very eloquently that the free speech privilege covered communications from a member of Congress to his constituents in the form of news letters or anything else. There was a grand jury investigation during the reign of the Alien and Sedition Laws fairly similar to this one; the claim of the executive was that members of Congress were giving aid and comfort to enemies of the United

States. Jefferson condemned that investigation as a blatant violation of the privilege.

MR. CHIEF JUSTICE BURGER: We will resume there in the morning, Mr. Reinstein.

[Whereupon, at 3:00 o'clock p.m. the Honorable Court was adjourned.]

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