In the

Supreme Court of the United States

MIKE GRAVEL, United States Senator,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

-and-

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Petitioner,

vs.

MIKE GRAVEL, United States Senator,
Resnondnet.

Nos. 71-1017
71-1026

Washington D. C.
April 20 1972

Pages 1 thru 67

SECOND DAY OF ARGUMENT

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Washington, D.C.
Thursday, April 20, 1972

The above-entitled matter was continued from Wednesday, April 19, 1972 and came on for argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
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:

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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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Reinstein, you may continue.

CONTINUED ORAL ARGUMENT OF ROBERT J. REINSTEIN, ESQ.,

ON BEHALF OF SENATOR GRAVEL

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

As your Honors will recall, before the recess yesterday, we were discussing whether or not the publication of a Subcommittee record by Senator Gravel was protected by the Speech or Debate Clause. We then demonstrated that the Clause has always been read broadly to cover all necessary functions of legislators, that the informing function of Congress is precisely just such an essential function of legislators and that the publication of a Subcommittee record is a classic example of the exercise of the informing function. There is much historical evidence for this proposition and -- yes, your Honor?

Q Is it possible to sustain your position by simply dealing with the privilege that you assert as a testimonial privilege without reaching the question of whether there is privilege from criminal prosecution itself apart from the testimonial privilege?

A Yes, your Honor. We are not arguing this case that anyone is unaccountable, except Senator Gravel. We are

not arguing that aides are unaccountable or that printers are unaccountable for what they did. We have, all in all throughout these proceedings, you Honor, treated this as a matter of testimonial privilege.

Our contention is that the Grand Jury cannot inquire into the privileged legislative conduct of Senator Gravel. Now, whether anyone can be indicted or prosecuted is another matter. If that occurs, the Court would then deal with it.

Q Is it necessary to sustain your position to hold that Senator Gravel is immune to criminal prosecution?

A No, your Honor. If Senator Gravel were engaging in privileged conduct, then it necessarily follows that he himself is immune from criminal prosecution as well as inquiry. It does not necessarily follow that anyone else is, but as the Clause has always been construed the privilege for the legislator himself is both with respect to inquiry and with respect to accountability.

Now if, for example, Beacon Press were prosecuted, the Court would then have to face the question -- as English courts have had to -- of whether printers of Parliamentary proceedings who are senators are immune. The English courts have said yes, but that question is not presented in this case.

Q But the privilege you are asserting would be inquiries related to the legislative act?

A That is correct, your Honor.

Q If there were a separate prior act that the Senator had been engaged in, or the aide had been engaged in, that preceded the legislative act but was connected with it, your privilege claim doesn't -- wouldn't reach that, I take it?

A No, your Honor, our privilege is just with respect to activity which are legislative acts. For example, we do not consider stealing to be a legislative act. We do consider the holding of a Subcommittee hearing --

Q A third person could be asked whether an aide or a senator improperly removed something, or stole something.

A Yes, your Honor, he could be asked whether a senator stole something.

Q And --

Q You can't steal anything in the Public Domain, can you?

A Well, whether or not -- it is a difficult question of whether or not it is a crime. I was thinking of something -- stealing, perhaps, a car, for example. When you are talking about stealing government property you do have a difficulty of --

Q That wouldn't be a question of --

Q These are loaded questions. I mean, if you say "yes," then you are stuck with the answer.

A Well, no, your Honor. It is not claimed here

that Senator Gravel or anybody working for him stole the Pentagon Papers.

Q Well, isn't there an issue of the source, of where either the aide or the Senator --

A I don't --

Q -- got them from? Isn't that issue in this case?

A Your Honor, the first time we saw that issue in this case was in the Solicitor General's reply brief.

Q Well, suppose it is. Suppose it is and the inquiry goes that they were improperly obtained before the aide joined the Senator's Subcommittee?

A Before the aide joined the --

Q Before.

A Yes.

Q Would there be any doubt in your mind that that inquiry could go through?

A No, that inquiry could go through.

Q Even though the papers are related to -- or their use at least -- are related to the legislature.

A That is correct. Now, the acquisition of the papers by Senator Gravel would be considered to be -- excuse me - another story, unless he participated in a theft. But when one is talking about the mere receipt of information by a legislator, that would fall within the category of legislative

acts. But we have never said that Dr. Rodberg cannot be inquired into for what he did before he joined Senator Gravel's staff. In fact --

Q Or what he did while he was on the staff that wasn't related to a legislative act.

A That is precisely correct, your Honor. The District Court found as a fact that the purpose of the inquiry Dr. Rodberg was to ask him about the preparation for the Subcommittee hearing, the holding of the hearing, and the publication of the documents for Subcommittee record. That finding was not challenged by the government on appeal and it wasn't for the very simple reason that Senator Gravel possessed the documents many days before he met or even heard of Dr. Leonard Rodberg. Dr. Rodberg was hired specially, well after the material was received.

Q I gather you don't question either, Mr. Reinstein, if we had an act which was not legislative because it was an approach, say, to the Executive Department or someone in the Executive Department, you don't say that that comes within the cover of the Speech or Debate Clause?

A No, your Honor, we do not. That was made clear in the Johnson case. Interceding before Executive agencies is not a legislative act, because the legislator is going outside of his domain and he is interfering into conduct which is vested by law and by the Constitution into coordinate

branches. The Executive and the Judicial branches --

Q Then you would be squarely in the First Amendment field.

A I beg your pardon, your Honor?

Q Then you would be squarely in the First Amendment field.

A There might be some First Amendment cases, but they would not be within the privilege.

Q Well, is your claim that with respect to the questions that may be asked Dr. Rodberg, is your claim that he may not be asked questions, that he himself is immune under the Speech and Debate clause or is it that it is necessary to protect him, to forbid the questions in order to vindicate Senator Gravel's Speech and Debate privilege?

A Mr. Justice White, we do not think that Dr. Rodberg has any independent privilege or anyone else in this case. We think the privilege is Senator Gravel's and in order to forbid inquiry into Senator Gravel's legislative acts, we think it cannot be done through the interrogation of those persons who assisted him in a performance of those legislative acts. It is just like the Attorney-client privilege. That privilege belongs to your client. No one would say it is the attorney's privilege, but it can't be defeated by questioning the attorney. The priest-penitent privilege is exactly the same.

Q How can you determine the scope of the privilege until you know what question is to be put? I am speaking now with reference to assistant, the aide, the staff member.

A Well, as I said, Mr. Chief Justice, there was a finding by Judge Garrity, and Judge Garrity based that finding on some evidence that was introduced by Dr. Rodberg, not allegations, but the fact that they were not denied by the government. Not only that, but the government went ahead and said, we will make these allegations on the basis of our legal assumptions. He refused to deny it.

We did offer the government an opportunity to specify that the inquiry would go into nonlegislative activities. We asked the government to make such a specification. The government declined to do so and, instead, the government just proceeded in that way.

Q Well, the point I was raising to you is this, may it not be that many questions might be put to him that would be concededly beyond the privilege and that he would have no objection to answering.

A Yes, that's why we have asked for protective orders, only prohibiting those questions which are within the privilege.

Q Well, then someone has got to define the privilege, of course.

A Yes, your Honor, that's why we are arguing the

publication.

Q Now, that reference has got to be decided with reference to each question. Is that not true?

A Well, your Honor, a protective order which says that Dr. Rodberg may not be asked questions about preparation for the hearing, and the holding of the hearing, and the publication of the record, would seem to me to be pretty easily enforceable. We did ask for a specification of questions in advance because of the kind of enforcement problems that we have.

Of course, Senator Gravel isn't there, but we were persuaded by the District Court -- by the Court of Appeals -- that a protective order would be adequate. The dilemma, of course, is that it is Senator Gravel's privilege and he must have some mechanism of enforcing it. He can't rely on other people to make a decision to perhaps risk contempt in order to vindicate his own privilege.

Now, the specification technique to which I am alluding has been used by the government before in privileged cases, such as a husband-wife privilege case, and as a matter of fact, there was a very specific specification in the Caldwell case of what kinds of questions were going to be asked Mr. Caldwell. But we think that a general protective order dealing with the acquisition by Senator Gravel in your receipt the preparation for the Subcommittee hearing, the holding, and the publication, is completely sufficient.

Q Mr. Reinstein, I was interested in your comment a little while ago that the Senator apparently had not known Dr. Rodberg until this day. Yesterday, I asked Senator Irwin a little about the acquisition of the doctor on the staff.

Who is he? Is he a Ph.D.?

A Yes, your Honor, he is.

Q Do you feel inclined to expound a little bit on his sudden acquisition into the Gravel staff?

A Well, your Honor, I don't think it would be proper to go into it very deeply. I will say that Dr. Rodberg's credentials are set out in an amicus brief which he has filed. Senator Gravel was interested in finding someone who had a specialty in foreign relations. This is not at all unusual, to hire someone specially. It doesn't make much sense, we don't think, to hire an aide six months before you need him. Senator Gravel looked very hard for someone with Dr. Rodberg's credentials and he hired him at that time. All of this occurred after Senator Gravel obtained the material.

I am very reluctant to go into it any deeper because we are in a very delicate position that apparently the Grand Jury would like to find out this information, and we consider a lot of it privileged.

Now, what the Solicitor General is suggesting --

Q You concede, however, that he is not on the

payroll?

A Your Honor, I -- there is no evidence in the record that Dr. Rodberg is not on the payroll, and I would prefer not to get into the financial arrangements which have been made. There was an affidavit by the Sergeant-at-Arms, the official recordkeeper of the Senate, that Dr. Rodberg is on the staff of Senator Gravel. Senator Gravel's staff, by the way, is not very large. I think he only has six aides.

Q But in his job position, it makes no difference whether he is on the government payroll or not?

A That's right, your Honor. We do not think that the Grand Jury can inquire into the privileged acts of a Congressman through interrogating people who assisted him, whether they happen to be employees of his or not. There is a particular --

Q It doesn't matter whether he is an employee or not? It doesn't matter whether he is paid or not, does it?

A No, your Honor. If a Congressman asks someone for advice in how to vote with pending legislation, the position of the Solicitor General is that this person couldn't be subpoenaed before the Grand Jury and asked, "What advice did you give to the Senator? And what did the Senator tell you?" We think that would be a blatant violation of separation of powers and of the Speech and Debate Clause.

Q Well, you don't need to go that far in this case

because, as I understand it, at least, there is no question but what he was an aide to the Senator.

A That's right, but what --

Q But you don't need to go so far as to say that if he asks the president of a big corporation, "Should I vote on this?" that maybe in connection with the advice, gets $10,000 along with it, that that is under the Speech and Debate clause. You don't need to go that far at all. There is no issue as to whether or not he was an aide, as I understand it. Am I mistaken about that?

A No, your Honor, that is correct. There is no issue on that. However, there is also a proposed interrogation of people who assisted the Senator in printing the record. Those people historically have been considered very important in assisting senators and congressmen in performing this voting function. We don't think they could be interrogated either. Your Honor is quite correct in the hypothetical you pose that that would be very different, but that is because bribes are not protected by the clause. That would be the reason for that.

Your Honor, I see my time is up.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, SOLICITOR GENERAL,

ON BEHALF OF THE UNITED STATES

MR. GRISWOLD: May it please the Court:

First, in supplementing the response to Mr. Justice Blackmun's question, I think it may be said that Dr. Rodberg is a physicist.

In my view, this case does not involve any fair application of the Speech or Debate Clause. The case has now been argued before the Court for nearly an hour and no one has yet referred to the text of the Speech or Debate Clause. It appears at the bottom of page 2 and the top of page 3 of the Government's principal brief here. Of course, I know it is familiar to the Court, although it has been involved in a surprisingly small number of decisions of this Court. But it seems to me relevant and appropriate that before proceeding further with this case, we get back to the bedrock. What does the Constitution say? "The Senators and representatives --" nobody else, "The Senators and Representatives shall receive compensation and they shall in all cases except treason, felony, and breach of the peace --" which covers most everything, "be privileged from arrest during their attendance at the Session of their respective Houses --" more effort to give a sweeping immunity to Congressmen or Senators, "and in going to or returning from the same; and for any speech or debate in either House they shall not be questioned in any other place."

Now, there are three groups of words of limitation in that provision. "The Senators and Representatives," not "The Senators and Representatives and those associated with

them and those who assist them and members of their family and staff and servants," as it used to be in England, and which they were trying to get away from.

"And speech or debate." Now, speech or debate is not everything they say, everything they do.

And, finally, "In either House." It is suggested that our argument here, and I must confess, I have a little feeling like arguing that no law means no law, but it is suggested that our reference to stylistic precision, which is the phrase we use in our brief, this is a case where it seems to me that the language was very carefully written and very carefully intended. It is suggested that this is simply the language of the Committee on Style. They didn't mean any such limitations and that that is evidenced by the language which had been used by the Committee on Detail, which was the only place in the Convention where the matter was considered. There is surprisingly -- there is very little available in the history of the Convention, but let's look at the language which had been used by the Committee on Detail.

This appears at the bottom of page 92of the big red brief, Senator Gravel's main brief. The Committee on Detail, which is what the Convention voted for, wrote: "Freedom of speech and debate in the Legislature...." Well, now, who engages in speech and debate in the Legislature? No one but Senators and Representatives. "Freedom of speech and debate

in the Legislature shall not be impeached or questioned in any court or place out of the Legislature."

And I would suggest that there is no significant difference in meaning between the phraseology of the Committee on Detail and that of the Committee on Style. The Committee on Style did make it a little more elegant, but it did not limit it beyond what had been adopted before.

Now, the significant fact in this case with respect to this language is that Senator Gravel is not being questioned by anybody in any place. The Constitution and the privilege rendered by the Constitution to Senators and Representatives is being fully complied with. There is an analysis of this clause which as far as I know does not appear as yet in any of the opinions of this Court, but which I think clarifies its meaning and application and on the basis of which the privilege itself and the several cases which have been decided about it fall very well into place.

"Questioned" is the key word at the end of this Constitutional provision and "questioned" may be read in two senses. First, as I have just indicated, with respect to questioning Senator Gravel. It is perfectly clear that Senator Gravel cannot be questioned about any speech or debate which he has made. It is not necessary here to determine the limits of speech or debate because Senator Gravel is not being questioned. No subpoena has been issued against Senator Gravel

and there is no suggestion that he is being questioned. But the word "questioned" can also be read in another sense. That is, of being subject to charges in which reliance is put on evidence of speeches or debates by the member.

But Senator Gravel is not being questioned in this sense. He has not been charged with anything. He is not on trial. There is not a question of the use of evidence of other persons with respect to a speech or debate being directed against him. He has not been indicted. He has not been summoned. He is not subject to charges and I would suggest that when those conditions exist the Speech or Debate Clause is fully satisfied.

This case is not like the Johnson case in this Court. The Johnson case was an indictment of a Congressman based upon facts arising out of a speech which he had made in the House of Representatives and the Court held that evidence with respect to that speech could not be introduced in the trial against Johnson without violating the Speech or Debate Clause. It was not merely that he could not be summoned and required to testify, but he could not be required to answer a charge based upon the speech which he had given.

That is not involved in this case. Senator Gravel has not been summoned and required to testify. He is not required to answer a charge based upon the speech. But this case is like the Johnson case in the Court of Appeals for the Fourth

Circuit. Before it got here, you will recall that there were two Congressmen who were indicted and two private individuals and they were all indicted for conspiracy and for engaging in certain acts or in aiding or abetting those acts and it is true that the Court referred -- on page 176 in the Johnson Opinion to the fact that the "Constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissable evidence," and Senator Gravel in his brief says that that is a decision that this evidence is inadmissable and therefore can't be acquired.

Well, we agree that it is inadmissable against Senator Gravel, if there ever should be any sort of a charge against Senator Gravel. But the Johnson case in the Fourth Circuit involved two persons who were not Congressmen and their convictions were sustained in the very able opinion of Chief Judge Sobeloff. I've read it again, a few days ago, and it is a remarkably fine opinion and this is the language which is used with respect to them, at page 193 of 337 Federal Second: "Count one of the indictment is unconstitutional as applied to Defendant Johnson, but as none of the privileges of Article 1 Section 6 pertain to the defendants, who are not members of Congress, their attack on the first count, unlike Johnson, is not sustained." Now, it is true that this Court did not review that decision and expressly left open its propriety in the decision in the Johnson case itself, which

involved only Congressman Johnson, but I submit that the decision reached by the Fourth Circuit Court of Appeals in Chief Judge Sobeloff's opinion is a sound construction.

Q That case involved a conspiracy to give and accept a bribe, didn't it?

A It involved a conspiracy to give and accept a -- Well, it involved both a conspiracy and the substantive offense.

Q Of bribery.

A There were five or six counts of the substantive offense of -- as I recall, Mr. Justice, conflict of interest rather than of --

Q Taking gifts --

A -- bribery.

Q That other statute.

A In appearing before the Executive Branch of the government. As you will recall, the case went back to the file clerk; Congressman Johnson was convicted without the use of the evidence of the speech. That conviction was affirmed by the Fourth Circuit Court of Appeals and this Court denied certiorari.

It is also true that the two other persons in the Johnson case were not aides. They were private citizens, although they were actually aiding Congressman Johnson and I suppose he could have put his finger down someplace and said,

"You are now my aides," and since no payroll provision was involved, they could have been the same, but there is no suggestion that they were. Nevertheless, I repeat my suggestion for the Court's consideration that Article 1 Section 6 does not provide any protection to anyone except Senators and Representatives. It does not provide any protection to aides. I know of no decision of this Court which has held that aides or third persons are entitled to any benefits under the Speech or Debate Clause. It is perfectly plain that Congressmen and Senators are entitled to great benefits under the Speech and Debate Clause and there is nothing in this record which in any way impairs the privilege which is given to Senator Gravel by the Speech or Debate Clause.

He is not being subject to question himself. He is not being required to answer to charges based upon evidence relating to a speech or debate.

Q Now about Executive privilege which, unlike the Article 1 Section 6 is only to be found in the implicit provisions of the Constitution? Surely that protects more than the President and Vice-president, doesn't it?

A In the first place, the limits of the Executive privilege are not easy to state, have as far as I know where they have ever been considered by this Court, and as far as I know, have never -- it has never been suggested that they will prevent the indictment of an executive aide for the commission

of a crime, or that they would prevent his being subjected to inquiry by a grand jury.

Q As to what the aide told the President or the Vice-president?

A There might be some limitation on the nature of the questions that could be asked, but I know of no basis upon which it could be said that he could simply refuse to appear before a grand jury because he was an executive aide.

Q It seems to me that your argument in a way boils down to the proposition that a privilege that is explicitly recognized and protected by the Constitution is a narrower privilege than one that is not, such as executive privilege.

A There is, I think, Mr. Justice, another privilege analagous to the executive privilege, not based on Article 1 Section 6, but simply based on the same principles as those applied by this Court in Barr against Matteo where you will recall that an executive employee, having no direct connection with the President, was held privileged from liability for slanderous remarks which he included in a letter which he wrote in good faith in the course of business and I would have no doubt that aides to Congressmen and Senators are subject to the same kind of privilege with respect to civil liability which was involved in Barr against Matteo. I think there may well be limits as to the extent to which an aide can be questioned with respect to, for example, did you write the

speech? Matters directly related to Speech or Debate. I do not know the extent of those limits and I don't think that they are involved in this case.

Q What do they derive from, Mr. Solicitor? From what do those limitations derive?

A They would have to be on a common law basis of some kind derived out of -- well, either common law or derived out of conceptions of separation of powers, the limits of which are far from clear to me.

Q What you are saying is that the secretary of Congressman Johnson could have testified to all of these things and put him in prison.

A I believe that is involved in some of these cases of prosecutions of Congressmen and Senators and -- I hate to say it has never been suggested, but it has never been held that such evidence is not admissable in a criminal charge against a Congressman or Senator.

Q Well, we said in the Johnson case that any person who dealt with a legislator with respect to speech or debate cannot be inquired of if the object is to attack the legislator's motives in speaking.

A Cannot be required with respect to a charge against the Congressmen or Senator. I don't think that --

Q Well, if you are a prosecutor, it depends on how you make your case. You get the staff of the Senator or the

Congressman and put them on the stand. They know everything that goes on in the office.

A But there is no suggestion here that there is any effort to make a charge against Senator Gravel.

Q Well, we don't know.

A It is perfectly plain --

Q It is still in session, is it not?

A If there is any effort to make a charge against Senator Gravel, he has complete protection under Article 1 Section 6.

Q Even though they get the testomony from --

A Even though they get the testimony --

Q -- the secretary.

A -- anyplace, Senator Gravel cannot be required to -- cannot be questioned in any other place with respect to anything which is fairly a speech or a debate.

Q Well, then, why does this group that he works with have immunity?

A But there may be many other people involved in this. This is an effort through a grand jury.

Q Well, we are just looking at one, now and why isn't he entitled to it?

A Because he is not a Congressman or Senator.

Q But they are trying to get at the --

A Mr. Justice, I suggest that is a pure inference

on which there is no basis. There are many other people involved in this.

Q We heard in the brief from the Senate yesterday that there may be disciplinary actions against the Senator.

A That is entirely up to the Senate.

Q I know, but I mean to say, to say Gravel is a non-actor in this is a very remote possibility, I would think.

A So far as the Executive Branch of the government is concerned, there is -- Senator Gravel is not being required to answer in any other place with respect to a speech or debate. He is not himself subject to questions, which I think is one aspect of the "shall not be questioned in any other place," and he is not himself the subject of charges.

Q Well, Mr. Solicitor General, do you object to the limitation that the Court of Appeals put on the witnesses not to testify? That they could not be forced to testify about the purposes and motives of the Senator?

A Yes, Mr. Justice, we do.

Q You weren't interested in ever moving against the Senator. Then why would anybody ever want to inquire about the Senator's motives and purposes?

A Motives? I don't know. The --

Q I don't know what that word means, what his words mean.

A What I think, Mr. Justice, is that there should not be any limitation on the inquiry which can be made of Dr. Rodberg or of the representatives of the MIT Press and the Beacon Press.

Q But what possible damage would there be to the government if they couldn't ask witnesses about the motives and purposes of Senatorial conduct that the government absolutely concedes is immune?

A Mr. Justice, it could be in a wholly different case that the motive was to get revenge against somebody else. Having found that the motive was to get revenge against somebody else, that might lead to another witness which would provide evidence as to what was being done. The motive may be relevant in the process of investigating a criminal charge.

Q Against somebody else.

A Against somebody else and this is a case where it seems to me -- in fact, there is something rather whimsical about this whole situation. The government is charged that it should keep its own house in order, it should protect the privacy of its papers. If the papers are stolen, they can be printed and nothing can be done about it.

Then the government seeks to undertake a regular, organized, centuries-old proceedings through the grand jury, and the grand jury is made up of citizens, to inquire into the source of what may have been a crime, the receipt of stolen

property, the violation of undertakings of one kind or another. I am not suggesting that Senator Gravel did this. I am suggesting that it is entirely appropriate to inquire into the question whether any of these offenses which Congress has laid down by law have been committed and that there is no reason why Dr. Rodberg or anyone else should have a privilege to refuse to respond to questions relating to those matters which may lead to charges against other persons than Senator Gravel. They might even lead to charges against Dr. Rodberg or against the other people. Of course, Dr. Rodberg has the privilege against self-incrimination which he can exercise at any time he thinks it is appropriate, but I know of no basis upon which it can be said that they cannot even be asked about this because it collaterally relates to something done by a Senator when there is no suggestion that any charge can be brought against the Senator or that he can be required to answer with respect to it in any other place.

Q Mr. Solicitor, am I correct that you wouldn't be able to question the Senator as to where he got the papers from?

A Oh, Mr. Justice, we are not able to question the Senator about anything insofar as it relates to speech or debate.

Q Well, this was related, you agree, to speech

and debate?

A I'm not contending to the contrary. It is a little tenuous, but --

Q That's good enough for me. But you say that you could ask the secretary where he got his --

A Yes, Mr. Justice. Yes.

Q That's your position?

A Yes. Let me take this case. This is an extreme case, but perhaps it tests it. Suppose there is a close debate -- a close vote coming up in the Senate. The best estimates are that it will be 48-47, but you can't be quite sure. And the Senator goes to his aide and he says, "You go out and kidnap Senator X and you treat him kindly and take care of him, but just don't let him come to the Senate vote."

Now, this is obviously a legislative matter, directly related to legislation.

And the aide goes out and conducts the detention of the member whose vote is not wanted. Now, it seems to me inconceivable that it can be said that the aide is not subject to inquiry by a grand jury as to what he did and as to why he did it.

Q I think we have misunderstood each other. I didn't infer any criminal action at all.

A I'm sorry, Mr. Justice?

Q I didn't infer any criminal action at all.

A (Overriding) I know, but I am suggesting a criminal action.

Q Well, kidnaping is criminal, isn't it?

A Yes, I say I am suggesting a criminal action. I am not saying that this is a criminal action but the language makes no differentiation between criminal or any other kinds of actions.

Q Well, then, let me put it this way --

A And if you would --

Q You can't ask a Senator where you got the material you used in your speech.

A Yes, Mr. Justice.

Q You can't.

A Yes.

Q You can't ask a secretary.

A Yes, Mr. Justice. No, no, you can't ask a Senator.

Q That's my point.

A I'm sorry, I didn't -- you can't ask a Senator. The Senator cannot be questioned in any other place, but you could ask his aide where he got the material.

Q The exact same thing.

A That's --

Q You could ask the aide the exact same thing.

A You could ask the aide the exact same question because the privilege of the Speech and Debate Clause does not protect anyone except Senators and Representatives and they shall not be questioned in any other place.

Q Mr. Solicitor General, I think the Executive Branch, over a period of time, as I understand it, has taken the position that there is an Executive privilege for the President's top aides. In order that you may have the benefit of their disinterested advice, they can't be questioned as to advice they give him. Would you concede that Mr. Rodberg, an an aide, would have at least that degree of privilege?

A Mr. Justice, I think he would, but not under Article 1 Section 6.

Q But under some other implication.

A Under some implication arising out of the separation of powers, I would think he would have some kind of privilege there , the limits of which are not clear to me and which, of course, I think would vanish the moment there was a charge of crime with respect to -- and I suspect the same would be true --

Q With respect to what? Now, the moment there was a charge of crime, with respect to what?

A Well, even a speech or debate. If, for example, the question to be put to the aide is, did you deliver $5,000 from X corporation to the Senator for his speech, I think

Q Well, that's different, but how about just a charge of crime against John Smith, the president of the Smith Corporation? Or do you confine it to a charge of crime against the president or the vice-president or the aide himself?

A I would make it crime of any sort.

Q Of any sort by anyone?

A That's right, that is the function --

Q Then the Executive privilege vanishes?

A It is the function of the grand jury to inquire into crime.

Q I think the assertion over the years has been a little broader than that, hasn't it, of Executive privilege?

A I don't know of anywhere it has been asserted to arise against a substantial charge of crime and let me point out that we are not without overtones of crime here. There may well be receipt of stolen property and other charges which it is appropriate for the Executive department, not only appropriate but its duty to inquire into.

The Speech or Debate Clause, I suggest again, has no application to non-members by its terms and it has never been applied to non-members by this Court, never. I think --

Q Then it really amounts to very little because as a practical matter you can prepare the case through the staff of the Senator or Congressman.

A You can't -- but you can't charge the Senator or Congressman, so it amounts to a great deal. The Senator or Congressman is immune from either being himself questioned or from being charged with respect to his speech or debate. That is what this Court decided in the Johnson case and we fully accept that and I don't regard that as of no consequence. The Senators and Representatives are immune from prosecution with respect to their speeches or debates. They are immune from civil liability with respect to their speeches or debates. They can't even be required to respond to questions with respect to their speeches and debates. That is a great and historic privilege which ought to be maintained which I fully support but which does not extend to any other persons than Senators and Representatives.

Q Mr. Solicitor General, under the Johnson case, would it be, theoretically at least, true that if an indictment charged a member of either House with some crime related to making the speech, making the speech for a bribe, for example, that the member could, if he wanted to take the risks, simply refuse to appear, refuse to answer and let the case go against him by default and then stand on the privilege?

A No, Mr. Justice, in Powell and McCormack, there is a footnote in the Opinion of the Court which says that the member is required to answer and to raise the privilege and I should think if I were advising a Congressman or a Senator

that I would suggest that he get counsel and that the proper representations be made to the Court.

Q That is why I put in the term "theoretically," he could even refuse to answer if you take the literal language of the Speech or Debate Clause.

A Yes, if you take the literal language, you could and I suspect that if you had a firm enough, clear enough case, that a Congressman or Senator could be successful in doing that, but I wonder a little why he would want to when all he has to do is to appear in court through counsel and to raise the privilege, citing the Johnson case.

Q At the start of the argument, you suggested that we read the Article 1 Section 6 and following your argument, I am wondering if perhaps you have not forgotten, with all respect, what it provides? Because it doesn't talk about indictment. It says "shall not be questioned."

A I agree, Mr. Justice.

Q It is much broader than --

A And I tried to say there are two ways in which he can be questioned. One is to sit on the witness stand and be asked questions himself. And he can't do that. And the other is that he be required to answer in some way with respect to what he has done. Now, the most natural way for that would be by way of indictment or criminal charge and Article 1 Section 6 protects him from that. But it also

protects him against civil liability for slander or anything else and it would protect him from being required to appear as a witness in somebody else's case to testify as to what he said in a speech or debate. He is himself protected in full against being questioned in any other place. But I see no basis for saying that anyone else is protected by Article 1 Section 6.

Q If you draw the line to say that the staff cannot be summoned, then you are protecting him.

A Then you are protecting -- you are protecting a lot of other people from far beyond --

Q Maybe so.

A -- the requirement of the Constitution. I understand --

Q But part of this is not indictment. A part of this is just obduracy and disgrace and enunciation and --

A And, of course, the Congressman or Senator runs that risk from the press and from constituents who may write libelous things about him. As long as Senator Gravel is not himself required to answer in any place, I think that the privilege is fully vindicated. And let me -- there is a passage in Jefferson's Manual which is the great work in this area, written by man who -- one of the founders, although he was not at the Constitutional Convention -- and the Manual is the foundation of all of the procedure in the House and Senate.

This appears on page 24 of our brief: "It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their care to provide that the laws shall bind equally on all and especially that those who make them shall not exempt themselves from their operation, have only privileged Senators and Representatives themselves from the single act of arrest in all cases except treason, felony, and breach of the peace during their attendance at the Session of their respective Houses and in going to and returning from the same and from being questioned in any other place for any speech or debate in the House."

And I would like to suggest that the decisions of this Court, with surprising consistency, support our position that the Speech or Debate Clause provides no privilege to aides. Perhaps the first case involving this matter is Kilbourn against Thompson, which was a suit against the Speaker of the House and against the Sergeant-at-Arms of the House and the House had by vote decided that Thompson was in contempt and had ordered him to be arrested. And the Speaker issued a warrant directed to the Sergeant-at-Arms to arrest Thompson. Thompson got habeas corpus and he then sued the Speaker and the Sergeant-at-Arms. And this Court held that the suit must be dismissed as to the Speaker. He was protected by the Speech or Debate Clause. And it held that the suit could be maintained against Thompson, although he

was not just an aide to a Congressman or Senator, but was one of the officers of the Senate. He was not protected by Article 1, Section 6 and we know that that resulted in a judgment for $20,000 in favor of the plaintiff, which was eventually paid out of the Senate's funds.

And then we have, more recently, the case of Dombrowski against Eastland, which was a suit against a Senator and against the chief counsel of his committee and the Court held that the suit could not be maintained against the Senator, at least on the facts alleged in that case, but it held that it could be maintained against the chief counsel of the committee and the case went back for trial against the chief counsel.

And, more recently, we have Powell against McCormack, which was Congressman Powell's suit against members of the House of Representatives, the Speaker and other members, and against the Doorkeeper and other officers of the House of Representatives. And the Court held that the Speaker and the other members could not be sued. They were protected by Article 1, Section 6 of the Constitution. But it also held that the officers of the House of Representatives, who were only doing what they were told, were subject to being questioned in the courts and were the basis for a declaratory judgment, at which this Court sent the case back to the lower court to consider and to enter.

Q Well, Mr. Solicitor General, positing that -- or assuming that publication of the documents in a committee hearing would be criminal except for the fact that it was in a committee hearing and that the Senator or Congressman himself couldn't be prosecuted for that act of putting the secret documents in a committee hearing record, you would say that the aide who aided and abetted him and who participated in that act could be prosecuted for that?

A Yes, Mr. Justice.

Q Yes.

A If the Sergeant-at-Arms of the Senate who obeys the Speaker's warrant can be sued; if the Doorkeeper who didn't say "Senator Powell" to Congressman Powell can be sued, I know of no reason why an aide is not subject to the full responsibility of the criminal law and if he --

Q Mr. Solicitor General -- oh, excuse me, go ahead and finish.

A If he commits a crime, I know of no reason why he cannot be prosecuted for it and, in particular, I know of no reason why he cannot be questioned about it, unless he chooses to raise the Fifth Amendment, which is available to anyone.

Q In Dombrowski against Eastland, who was the particular aide that this Court said had no immunity?

A He was the chief counsel of the Subcommittee.

Q The legal advisor to the chairman --

A Yes.

Q -- of the Judiciary Committee and to the entire Judiciary Committee?

A Yes, sir, Mr. Justice.

Q And this Court held he had no immunity, is that right?

A He was the duly appointed, long-time established and properly paid chief counsel of the Committee which was involved in the --

Q It was Mr. Sourwine, wasn't it?

A Mr. Sourwine, that's right.

Q As well as the Internal Security Committee, not the Judiciary.

Q He wasn't being questioned, though, was he? This was a question of an alleged --

Q It was an alleged --

A He was being questioned to the extent of being --

Q Civilly liable.

A Being liable, criminally in the courts of Louisiana and civilly in the federal courts.

Q It involved a constitutional claim on the part of the plaintiffs.

A Yes.

Q Invasion of the plaintiffs or person's

constitutional rights.

A Yes, it did, but I don't know any reason why that rises higher --

Q And so, of course, to thePowell case.

A -- then the duty of the Executive to enforce the law.

Q And when Mr. Sourwine got the trial day in those cases, then he would be required to take the stand and answer questions, would he not?

A Yes.

Q In a civil case.

A Yes. Yes, Mr. Justice.

Q And to pay a judgment, I take it, if there was one recovered against him?

A There wasn't -- we know that there was a recovery in Kilbourn and Thompson. I have tried to find out what happened in Dumbrowski and Eastland and apparently it went back to the lower courts and was finally dismissed for want of prosecution. But I don't think that affects the fact that Mr. Sourwine was held to be liable. If it had been pressed then he would have been required to answer. After all, what's involved here is an effort to inquire into the question whether a crime has been committed. If a crime has been committed by an aide or by a third person, and it may well not be as a result of the investigation that it will be

concluded that the aide committed any crime. It may well be that his evidence will be to someone else who may have committed the crime and that there may be appropriate basis for bringing charges against some third person. And I repeat that there is nothing in the Speech or Debate Clause or in any decision of this Court which prevents the inquiry of aides or third persons as to whether a crime has been committed. If there is evidence that a Senator has committed a crime not committed with Speech or Debate, he can be prosecuted. It was so decided in the Johnson case, and decided here in the Johnson case, because the Court made it plain that the case should go back and that Senator Johnson could be tried for a crime committed while he was a Congressman.

If there is evidence that a Senator has committed a crime which is adequately connected with Speech or Debate, he cannot be prosecuted. He can only be subject to the discipline of the Senate.

Q But I suppose if a Senator, in preparation for a speech or debate, committed a crime such as a wiretap or --

A Well, that's why I said, Mr. Justice, "Which is adequately connected with Speech or debate." I don't know what the limits are. I think they ought to be rather broad. If -- suppose a Senator, by his own hands, goes out and steals material which he then uses in speech or debate. I don't know

whether he would be exempt from prosecution for the theft. It is my position that if he directs his aide to go out and steal material for use in a speech or debate, that the aide is subject to prosecution, that the aide has no privilege under Article 1 Section 6 and that the Senator cannot extend an umbrella over him because the Senator has a privilege.

With respect to the Senator, we make no other contention that he can be subject only to the discipline of the Senate with respect to a matter which is adequately connected with speech or debate. But there is nothing in the speech or debate clause which protects either an aide or a third person from prosecution for any crime he may have committed.

Q I just reread Dombrowski and there is not a word in there, Mr. Solicitor General, that indicates Sourwine could be put on the stand and questioned respecting Senator Eastland's motives or purposes or implications or complications in a project.

A That he could be?

Q There is not a word that indicates he could.

A No, I suggest -- well, no, I don't say that it is.

Q This was a shell of a case and we sent it back for trial.

A The decision, however, is that Mr. Dombrowski can

be sued. I agree there is no decision there as to the extent to which he can be questioned, but --

Q I think this is the first time we've had that.

A I -- as far as I know, this is the first time that we have actually had that question.

As I was saying, we think that there is nothing in the Speech or Debate Clause which protects either an aide or a third person from prosecution for any crime he may have committed.

As I have already said, an aide or a third person is entitled to the privilege against self-incrimination, but such a person, a non-member, is not entitled to any privilege under the Speech or Debate Clause.

Q Tenney against Brandhove was a state case, wasn't it? It came from the state legislature.

A Tenney against Brandhove involved a committee of the California legislature.

Q Therefore was not covered by the Speech and Debate Clause of the Constitution. What do you suppose the constitutional basis of that decision was?

A I don't know that it is a constitutional basis, Mr. Justice. I think that it analytically was a construction of the Civil Rights Act of 1871 under which the suit was brought and it was held that the Civil Rights Act should not be construed to provide for a liability of a member of a state

legislature. Now, I have no doubt that in the background of that question of construction were some constitutional considerations derived out of no particular clause of any constitution, but derived, it seems to me I can say, out of constitutional history. The state legislatures, just like Congress, are the lineal descendants of the British Parliament. There were centuries of controversy in the struggle between Parliament and the Crown with respect to the privileges of the two Houses at various times, particularly in the 18th century, the privileges got really out of hand. The history shows that members held the right to be a servant of a member in order that the servant would not be subject to a suit in civil cases. That was abolished before 1789. That history, I think, is part of the reason why the privilege was limited to Senators and Representatives, but in the Tenney case, the decision was that they could not be subjected to civil liability, and let me point out again that this is a suit against the members, not against anybody else.

Q But it was not, let me point out again if I may, that it could not have been, under the Speech and Debate Clause.

A It was plainly not under the Speech and Debate Clause.

Q All right.

A I recognize that. Nor does it purport to be an interpretation of the California Constitution's

provision, which is similar --

Q No, that would be none of this Court's business.

A And I think you will find, and I read it as carefully as I could with just this in mind, I think you will find that it really boils down to being a construction in the broad sense, not of any particular language, a construction of the Civil Rights Act on which the suit was based and to hold that Congress in passing that statute could not have intended that it provide for suits against members of state legislatures for doing what they regarded as their legislative duty.

Q Mr. Solicitor, what do you say about Senator Ervin's point that when that Article 1 Section 6 was adopted, Senators and Congressmen didn't have any staff, evidently?

A Well, in the first place, Mr. Justice, I doubt if it corresponds with the facts. I suspect that many members of Congress had -- I recall that John Quincy Adams went to Russia with his father John Adams.

Q Well, maybe I wasn't fair. The staff were not as elaborate --

A The staff were not as elaborate as they are now --

Q As I understood his argument, you couldn't argue that they were deliberately excluded.

A Well, Mr. Justice, I think you can, because of this history about the extension of the privilege far

beyond members in Parliament, which came to be recognized as a great abuse and was completely eliminated by Parliament and in the Colonies shortly before 1789. And I doubt very much that the distinguished gentlemen of the First Congress operated entirely on their own. It is perfectly plain they didn't have as many constituents as present members have. They didn't have electronic and other aids available. They didn't have the volume of material pouring in on them with which they had to deal.

Q Mr. Solicitor General, I gather it is not doubted that the purpose of the Speech or Debate Clause was not to protect Senators or Congressmen. That its purpose was to assure the people of the independence and integrity of their legislators, wasn't it?

A Well, I think primarily, Mr. Justice, nevertheless, the history of it --

Q I know, I know, but that's the purpose.

A No, the history of the Speech or Debate Clause is to protect the members, not entirely, but it was the members who were being arrested and put in the Tower and Senator Ervin talked about Congressmen and Senators being intimidated. Now, perhaps one reason we want to protect Congressmen and Senators from being intimidated --

Q Well, may I put it this way? Certainly our cases, our opinions in this area, have said clearly enough, most

recently Johnson, that the purpose of the Clause was not the protection of the Congressmen or Senators, but was, as I have indicated, to guarantee the people, the independence and integrity of their leaders.

A Yes, Mr. Justice.

Q That's what we've said. Now, accepting that for a moment -- accepting that for a moment -- in the present context of the operation of the Congress, it is impossible, I gather, even for the Executive Branch to a degree, I'm sure, to carry on its function without the assistance of aides, isn't it? Can you imagine a Senator today, by himself, performing --

A No, Mr. Justice, but I don't think that it follows that the aide --

Q No, what I want -- what I am trying to get to, if you will accept the premise of the purpose of the clause as I stated it, now then, if the aides don't have the benefit of it, as I take it was argued yesterday --

A Well, I think --

Q The clause becomes --

A -- if you are guided only by that purpose, you would, of course, give a very sweeping application, I can't any construction, a very sweeping application of the Speech or Debate Clause. You would ignore the -- in either House -- you would ignore the Senators or Representatives. I don't

know what else you would ignore, but I find no basis for that. I think the public can be adequately --

Q Well, I suggest that, to the extent that we have put that emphasis on the purpose of the clause, to use your words, it has already been ignored.

A I think that the purpose can be adequately maintained by guarding absolutely against the Senator or Representative being questioned in any other place with respect to any speech or debate and I know of nothing in our history to indicate that Congressmen and Senators have not been fearless or that they have been restrained in their action because they think that the Executive Branch and the Judicial Branch are --

Q Well, no, I expect the real hazard is that their independence and integrity, or at least their independence -- if you are right, and that aides are not also protected, at least close aides -- the hazard is that the pressures of the Executive Department can deny the people the independence, or offers the hazard of denying the independence, which was the purpose of the protection.

A Well, Mr. Justice, I think that is putting it in an unreal and, if I may say so, inappropriate way. I don't know how many aides there are of Congressmen and Senators. There are 535 Congressmen and Senators. If they averaged 20 each, which is probably low, that would be

10,000 people who would be entitled to all of these immunities. I suspect it is closer to 20,000 or 30,000 people, when you include secretaries and other persons. I find it very difficult to think that either the founders intended or that it can fairly be found within that quite precise language of the Speech or Debate Clause that there was to be a large mass of people, not merely in the Capitol, but all over the country because many of these aides are back in the home districts who are protected against being questioned in any place the way it is asserted that Dr. Rodberg and these outsiders should be protected here.

As I have said, no case -- I repeat -- no case has ever given such a privilege to an aide. Moreover, the privilege applies only to speech or debate in either House and many of the questions which might be asked here relate to matters far outside of either House. Senator Ervin referred yesterday to the early Massachusetts case of Coffin against Coffin. It is rather fun to read that case. As you might guess from the name, it arose out of Nantucket. There is nothing to indicate whether the two parties were brothers or otherwise related. They may not have been. It involved action on the floor of the House of Representatives in Massachusetts in Boston where there had been a vote with respect to establishing a new office of Notary Public in Nantucket and question was raised as to who would be named

for the office. The House voted to establish the new office, which was undoubtedly a legislative business and then it developed that, while other legislative matter was raised and still on the floor of the House but at an area aside, over beside the Speaker's bench, the one Representative came to Mr. Coffin and said that they were going to name another Mr. Coffin, and Mr. Coffin said, "What, that criminal? Didn't you know that he was involved in that bank robbery down there?" Now, it is perfectly true that Coffin against Coffin is regarded -- and rightly regarded -- as one of the leading cases in this area. Again, it was written by Theophalus Parsons, the then Chief Justice. All of the other judges were well-known Massachusetts figures. There is a long discussion of Speech or Debate. But the result of the case is that Mr. Coffin was held liable for a judgement of $2,500 which, in 1804, was no inconsiderable amount because the Court held that this matter, happening on the floor of the House, but to the side, and after the vote had actually been taken, did not relate to a speech or debate in either House.

The case is, of course, of great historical significance, but its decision, I think, is on the side which we advance here.

Q Mr. Solicitor General. Do you think Congress could enact a statute giving some kind of limited privilege to its own staff members without running afoul of any --

A Mr. Chief Justice, that is a nice question. I am just running through my mind the arguments on both sides. Perhaps some day this Court will have to answer it. I don't myself feel qualified at this time to answer it. Certainly the Congress should have great power to legislate with respect to its own activities, not merely power to protect, but I think also power to put out. That is, power to say that contempts of Congress shall be tried in the courts, as has been the practice for a long time.

I think, without meaning to argue another case, that Congress can provide that crimes committed by Congressmen can be tried in the courts, so I think that quite an argument can be made that, not because of any express power, but something arising out of Chief Justice Marshall said, it's the Constitution we are expounding, that if Congress did that in sufficiently limited terms, it probably would be well, but it is not here.

Q You suggested earlier, didn't you, Mr. Solicitor General, that there was some kind of common-law privilege, a very, very narrow one, that you thought that even aides might today --

A Yes, and I think Congress might --

Q Well, I suppose if there is, then the Congress --

A Congress might spell that out in more detail

Q Well, certainly, Congress has power to enact

evidentiary rules and laws in federal court to establish privileges or to abolish common-law privileges, as long as they are not constitutionally based.

A Yes.

Q State legislatures have granted such immunities to doctors and lawyers and ministers.

A Yes, and I suspect that Congress, at least in the federal courts -- I don't know whether Congress could enact it with respect to evidence in the state courts. Now, there is one final point here to which very little reference has been made. We have not only aides, but we have third parties here, representatives of the MIT Press and the Beacon Press and I would say that a fortiori, they have no privilege not to testify. It may be that their testimony cannot be used against a Senator, but it can be used against them and it can be used against other non-members. Only a Senator or a Representative is protected by the Speech or Debate Clause and in particular, the Speech or Debate Clause has nothing to do with republication.

In the first place, I don't want to concede that we are really dealing with republication here because, as I understand the situation, most of the 47 volumes of the Pentagon Papers were not read by Senator Gravel. After all, there are seven million words. He read some of them and he then introduced the others into the Record. They were never

published as a part of the Record. Indeed, what is involved here is Senator Gravel's effort to get them published. And they were published by the Beacon Press. But I suggest to you that that may well not be a republication, but may be not protected as the republication of material which has been published as a part of a Congressional activity. In any event, the Speech or Debate Clause --

Q What you are suggesting is that it is an original publication?

A A private publication by Senator Gravel, which is not a publication of the Congressional materials. Here the chairman of the committee refused to authorize the expenditure of the funds for the reporter and they have not been published by the Congress and Senator Gravel has caused them to be published elsewhere, which I suggest is not privileged under my conception of the Speech or Debate Clause.

Q How much if any of them is in the Congressional Record?

A I don't know how much was in the Record. As far as I know, none is in the Congressional Record.

Q How much of the exhibit has been published?

A How much of --

Q How much has been published?

Q By Beacon.

A All but those four volumes, I believe. As far

as I know, the four volumes have never been published.

Q That is the what? Was it 40-odd volumes?

A There were 47 volumes.

Q And 43 have actually --

A And I understand that 43 have been published. Most of the 43 have been published by the Defense Department.

And let me finally close by saying that there is no First Amendment question here. No one is trying to stop publication. It has been done. The material has been published.

Q Punishing publication might be as serious as trying to stop it.

A There were prior efforts to try to stop it, but as far as the Beacon Press is concerned, it has published it and the majority of the court in the New York Times case made it quite plain that though there could be publication, the consequences of that publication remained for consideration and they might be criminal and they might be --

Q That was left open?

A That was left open, and that, Mr. Justice, is what we are trying to explore here to see whether there was any crime committed in connection with the publication of these materials and we are trying to obtain evidence on that subject and I repeat that I do not see that the First Amendment is involved in any way because the material has

been published. The speech has been made. The presses have rolled. The situation now is, what are the consequences of that? And we believe that we are entitled to the evidence of those persons who have been subpoenaed in this case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Fishman.

ORAL ARGUMENT OF CHARLES L. FISHMAN, ESQ.,

ON BEHALF OF SENATOR GRAVEL

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

For a minute, I would like to go right to the heart of the claim of the Solicitor General. As I understand it, that is that an assertion of a possible illegal act, when it (Sic) is for the Justice Department, the power to inquire into a legislative proceeding that, as I understand it, is his argument. The effects of that --

Q Will you define what legislative proceeding you are referring to when you use the term "now"?

A It doesn't seem to make a difference whether it is a committee hearing, a debate on the floor, or an attempt by a member to inform his constituents. He made that distinction, as I understand it. But specifically here we are talking about a committee meeting and publication of the committee transcripts.

Q By whom?

A By Senator Gravel. But I am willing to --

Q Through channels of Congress or elsewhere? I understood the statement was made that the committee of the Congress of the United States and the Senate in particular refused the funds for publication.

A That's not true, your Honor. That is not true. I invite your Honor to the Record where, in the District Court, that assertion was made on the basis of a newspaper article. District Judge Garrity denied the use of that article for the purpose which the government tried to use it. The only purpose was an assertion in that article that Senator Randolph was upset with Senator Gravel and refused to pay for transcript.

Q Well, it must be well-known whether or not the committee has actually published on of the usual reports embracing all this material.

A Well, two things, sir. In the discussion on the floor of the Senate, with respect to that matter, Senator Randolph and Senator Dole both conceded that was not a problem in the subcommittee. And, indeed, as your Honor knows, most committee reports are not printed in the United States Congress. It is the rare report that actually ends up being printed. The appropriations committee meetings almost never never publish, ultimately, by the GPO.

So, really, what we have here is nothing different

than what you have normally and customarily before either House of the Congress, which is, a committee transcript was compiled. It was not printed officially in the sense of the Government Printing Office printing it, but it was printed, rather, by Beacon Press. Now, as we show in our brief in that three-page footnote, that kind of publication is normally and customarily done with respect to committee reports of the United States Congress.

Q Committee reports or transcript of a committee hearing?

A Either, sir. But both are involved there. As you peruse the --

Q Which book now? What page?

A If you will just give me that a moment, your Honor.

Q Just right there, Mr. Colleague.

A Fine. But it is a rather extensive footnote and I might add that we were limited in the time which we had to do it. That was what we got out of the Library of Congress card catalog. There were, we found out, after the brief that we submitted, it's footnote 119 which that's on page 86.

Q Thank you very much.

A and it also covers page 86. It goes on.

Q I have it.

A And on. I have no doubt that since then, Mr. Chief Justice, we have discovered that every available Congressional report is on microfilm in a variety of both private and public sources and anyone who wishes can purchase any single report or an entire proceedings of every single Congress from the First Continental Congress through the last Congress, either privately or, to some extent, through the Library of Congress. So it seems fairly clear from the history of what has happened in this nation, that the fact that Senator Gravel went to Beacon Press as opposed to the Government Printing Office makes no difference. Indeed, the Solicitor General does not argue that it does, either in his brief or here today. His position, I assume, is that had Senator Gravel gone to the GPO and his subcommittee chairman said, "Please publish this report," and the GPO did publish the report, that nonetheless the grand jury could still conduct the exact same inquiry.

Q Well, as I understand the inquiry that the Solicitor General said the government wants to make, is to determine whether any crime was committed in the acquisition of these documents.

A Well, again, your Honor, the District Court made a finding of fact. That finding was that the purpose of the subpoena to Dr. Rodberg was to question Dr. Rodberg with respect to preparation and conduct of the subcommittee meeting.

That finding of fact was not appealed, your Honor and it is not before this Court. In the District Court, when the question came up with respect to the subpoena of Mr. Webber which is the other party which is actually, through superiors, before this Court, that page 128 of the Appendix, the government asserted that the primary purpose for calling Mr. Webber was, if I may quote, "I must in fairness concede that other areas of interest to us are ancillary, so to speak, or originated from a contact made by the Senator's representatives." The basic purpose that they wished to question Dr. Webber, as they stated in the District Court, was about the conversations that Dr. Webber had with Senator Gravel and with his aides with respect to the publication of the subcommittee transcript. It was not with respect to acquisition. Those were the findings of the District Court.

So I don't think that the government, at this late date, can come to this Court and say merely, "We are not interested in the original theft of the documents." That question is now foreclosed. But even if it weren't, sir --

Q Mr. Fishman, for your accomodation, to adjust your argument, we will enlarge your time three minutes.

A Thank you, sir. I appreciate that.

Q So you can plan it accordingly.

A But even if it were, your Honor, we have never

claimed that the privilege applies to anything other than legislative acts. Never. Senator Gravel is subject to subpoena, as is Dr. Rodberg, as is Dr. Webber, as is anyone else with respect to non-legislative acts. The stealing of the papers, we say, is a non-legislative act, and we have no objection, the Senator has no objection, to appear before that grand jury and testifying with respect to his knowledge -- which he has none, incidentally -- about the stealing of those papers. What we maintain and what we have maintained throughout these entire proceedings, what the basis of the dispute has been, is the extent to which the executive may come to this Court and seek its subpoena and contempt powers to inquire into legislative acts and there, as Mr. Justice White has suggested, we have asserted a testimonial privilege to prohibit inquiry of legislative acts, but only legislative acts. All the examples of the Solicitor General did not evolve legislative acts. Certainly, kidnapping is not a legislative act. And we would have no objection to inquiry involving non-legislative acts.

Q Well, I gather, Mr. Fishman, that the limitation against inquiry and the motives and purposes, you feel, does not --

A That's why receipt would be prohibited, your Honor, inquiring into receipt would be prohibited.

Q And therefore, you want a broader protection

than that, don't you?

A I'm not sure I follow you.

Q Well, as I understand it, didn't the Court of Appeals, in the protective order, limit inquiry of Dr. Rodberg or the other witness into anything that bore on motives or purposes?

A That's right, but they went beyond that. They limited the questioning of Dr. Rodberg beyond that, your Honor. What they failed to do was to extend the prohibition against inquiry to those who assisted Senator Gravel in the performance of --

Q Well, are you satisfied with the limitations?

A No, your Honor.

Q I didn't think you were.

A No, your Honor. I think it is unenforceable, because none of us can understand it. That is one of the basic arguments.

Q You mean, don't understand our motives and purposes, or are there other things you don't understand?

A Well, that's one of the problems, certainly. I would like to, in that vein, go to another problem that keeps on popping up, if I may, which is, we have never asserted an immunity from accountability, although the Solicitor General keeps on bringing us back to that. I can't emphasize enough that our position is that if a crime

has been committed, those who committed them are accountable. It's merely a question of where the accountability occurs.

Q Yes, I know, but how about in court?

A In court, if Dr. Rodberg -- if I can use him as an example -- committed a crime and it was a non-legislative act, there would be no problem. He could be tried and convicted in normal process. If there was some question --

Q What if in preparation for a Senatorial speech or a committee hearing, he committed a crime?

A Well, then this Court would have to decide whether or not to follow the --

Q What is your position?

A Well, it is really a case of the ultimate first impression in this line, I suppose. We've struggled with it for some time, your Honor, and it is our position, as we come to it, that this Court should follow the English line of Mason v. Walter and hold that those whose assistance is absolutely necessary could not be held accountable. But of course, this Court could hold --

Q I know, but what is necessary in preparation for a legislative act? I mean, is criminal activity necessary to prepare for a legislative act?

A Well, that's part of the problem with the cases, your Honor; they arose basically out of rival and slander cases which are criminal in England.

Q Yes.

A It's a lot easier to say that that is protected --

Q Yes.

A -- than it would be, say, stealing. Certainly, stealing, the answer is no.

Q Under your theory, would the question of necessity be finally determined by the Senator himself? Would that be subject to any sort of judicial review?

A Oh, I think that this Court ultimately has to determine the scope of the clause. We've never maintained that Senator Gravel himself can determine the scope of the clause. This Court has to determine its context.

Q As to the necessity of a particular act of the performance of a legislative function, is that something that the Senator is the final determiner on?

A Coney -- Coney requires that this Court give a good deal of consideration to the position of a member or indeed, the body, in that situation. But, ultimately, I think, this Court has the responsibility of drawing the line. Ultimately, it must fall to this Court.

Q Let me be sure I got your one statement clear, Mr. Fishman. Do I understand you to say that a grand jury could call an assistant to a Senator and ask where he got particular documents as a foundation to determining whether they were stolen?

A No, your Honor, I said the acquisition is where we have to draw the line simply because when you go into acquisition, you have to go into things like his intent.

Q The fact is that they were acquired by breaking into a building at midnight and stolen out of the safe, which was blown up. You mean they can't inquire into that?

A No, they certainly can, your Honor. Maybe I misunderstood your Honor. What I was suggesting was that at the point where the material reaches the legislative body, acquisition for the legislative body, once it brings it to its bosom, the inquiry must stop. But anything that occurred prior to that time, certainly, the grand jury may inquire into. I meant the acquisition.

Q A step in that inquiry might be to ask someone who has possession, where did you get them? And then go to that source and the one before, tracking it down to the person who actually broke down the door and blew up the safe.

A So long as that is not of the Senator or of the side or of anyone who assisted him in the legislative process, I see no problem with that.

Q Take this case --

A Your Honor, excuse me.

A -- Senator Jones gets up on the floor and reads a top secret document from an executive office and when the executive office checks on it, they find the safe broken into.

How, how do they go back finding out how the Senator got that document?

A Well, they could inquire --

Q Of whom. I'm not talking what. I'm talking whom.

A They could inquire, I suppose, of anyone who was involved at any point up to the point where that material was received by the Senator or his aide.

Q His aide, but, who would you question?

A Why, it would depend on each facts situation. I mean, the situation, I suppose, which person just tucked it under his arm and walked away.

Q No, I mean, under normal circumstances, you'd ask the man who had it how did he get it.

A Um-hum.

Q Wouldn't you?

A Certainly.

Q So you can't ask the Senator how he got it.

A That's correct.

Q So where next do you ask?

A I don't believe you could ask the aide where he got it, either.

Q Well, that would suggest that that's a crime that you can't investigate.

A No, that situation alone was in 1938 England

as you know, in the Sandy's case in which a member of the British Parliament received battle of order plans, we're not talking about historical terms, but battle of order plans, the defense of Britain, the defense of the airs, the antiaircraft defense, and the English Parliament held that Mr. Sands was not inquirable in any other place other than the House of Parliament.

Q Yes, but that is the British Parliament.

A That's correct, sir.

Q It is a matter of Parliamentary supremacy and we have over here a written Constitution in the United States.

A To some extent, that makes our argument stronger, I believe.

Q To some extent, but I don't think it makes that case binding on us, either. In reading your brief, the long brief, when I came to the footnote on page 124, I thought that I had finally got your submission as to the scope of what you are asking, which is just this: "Senator Gravel does not seek to protect any aspect of or actor in the Pentagon Papers case other than his acquisition -- not his source's acquisition -- of them, his staff's preparation of the papers for the subcommittee hearing, and Beacon Press' preparation of the papers for publication and its ultimate publication and distribution of them."

I thought finally I had gotten to a capsulated summary

of what this brief is all about.

A I am sorry it took so long to get there, your Honor.

Q And ironically it is three pages from the end of the brief. It is in a footnote. Would that be about it, in answer to this colloquy that we have had this morning?

A Yes. That question, that is our position. We don't think we have to go beyond it. We don't wish to go beyond it.

Q So you could say to the -- call the aide and say -- say, "Prior to the acquisition of these papers by the Senator's office, did you have any conversations with anybody about them?"

A Prior to what, sir?

Q Prior to the acquisition of these papers, at any period of time prior to the acquisition by the Senator's office of these papers, did you have anything to do with the papers? Or did you have any --

A Independently of the Senator's office, the answer would be yes.

Q Yes. And if there had been a theft on March 1, you could say, "Where were you on March 1? Do you know who stole the papers?"

A Right. I think that would be perfectly inquirable.

(sic) We have no objection to Dr. Rodberg asking that question. There would be no privilege asserted there.

Q That's right.

Q Nor could it.

Q And did you know prior to the acquisition that you were going to acquire them?

A Well, did you know prior to the actual acquisition that the Senator was going to acquire them? I suspect that that would be Broderick. That's where you have touched on the legislative process. That's where you have crossed that very difficult line and you've started into the sphere of the legislative activity.

MR. CHIEF JUSTICE BURGER: Your time is up now, Mr. Fishman.

Thank you, gentlemen, the case is submitted.

(Whereupon, at 11:40 o'clock a.m., the case was submitted.)