THE LEGISLATOR'S SHIELD: SPEECH OR DEBATE CLAUSE PROTECTION AGAINST STATE INTERROGATION

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The untimely and unexpected death of Congressman William A. Steiger mooted a case in the Supreme Court of Wisconsin which might have established whether a state prosecutor can compel a member of Congress to reveal the names of citizens who supply information received in confidence about legislative business. The Wisconsin Supreme Court had received briefs and heard oral arguments in June of 1978, but no decision had been issued when the congressman died. Had his claim not been upheld by the state supreme court, Congressman Steiger had intended to petition for review in the Supreme Court of the United States. This article, by co-counsel for

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He was a man of extraordinary character and charm. According to James Reston, the "exceptional outpouring of respect and affection for one of the most promising young men in the Congress ... was a reaction to the magic of his personality, [and] the gifts of his energy and intelligence ... ." Reston, N.Y. Times, Dec. 8, 1978, at A29, col. 5. President’s Carter’s tribute is in 14 WEEKLY COMP. OF PRES. DOC., 218F (Dec. 11, 1978).

2. State ex rel. Steiger v. Eich, 86 Wis. 2d 390, 272 N.W.2d 380 (1978). The court reveals its interest by saying that the "case raises an interesting and difficult" issue. It contrasts the speech or debate clauses of the U.S. and Wisconsin Constitutions and implies differing results under each.

3. Three cases before the U.S. Supreme Court present issues under the speech or debate clause. See Davis v. Passman, 571 F.2d 793 (5th Cir.), cert. granted, 99 S. Ct. 308 (1978) (involving the alleged liability of a congressman for sex discrimination); United States v. Helstoski, 576 F.2d 511 (3d Cir.), cert. granted, 99 S. Ct. 719 (1978) (involving the extent to which legislative behavior can be introduced into a criminal
Congressman Steiger, reviews the litigation and offers an analysis of an issue which deserves an authoritative answer.\textsuperscript{4}

On August 24, 1977, the District Attorney of Dane County, Wisconsin, initiated a John Doe proceeding before the Honorable William F. Eich, a county judge. Wisconsin uses such proceedings as an alternative to a grand jury to take testimony under oath to determine whether crimes have been committed.\textsuperscript{5} The only witness subpoenaed was Congressman William A. Steiger, a member of the United States House of Representatives for the Sixth District of Wisconsin. The district attorney sought from Congressman Steiger the names of three students who had told the congressman that they had voted twice in Wisconsin in the preceding 1976 general election. Double voting is a felony in Wisconsin.\textsuperscript{6} The congressman, however, refused to reveal the names. He asserted that this information was privileged, and based his refusal on the speech or debate clause of the Constitution and on the first amendment.

The magistrate declined to rule immediately on the district attorney's motion to compel Congressman Steiger to disclose the names, and instead asked for briefs. The magistrate's nineteen-page opinion rendered on February 10, 1978, rejected the claim of a legislative privilege. The following month he

\textsuperscript{4} Soon after it became apparent that Congressman Steiger's speech or debate clause privilege would not be honored, he consulted with the United States Department of Justice which ordinarily defends members of Congress. The Justice Department, however, eventually decided that the congressman would best be represented by private counsel who would be reimbursed by the Department of Justice. Thereafter Congressman Steiger retained the authors.

\textsuperscript{5} Judge William F. Eich was, until January 1, 1978, a Dane County judge. However, in the April 1977 election he was chosen to take office as a circuit judge in Dane County on January 1, 1978. Hence the curiosity of a proceeding begun in the chambers of a "county judge," and so captioned, and a decision and order rendered by a "circuit judge." However, since both judgeschips entitled the magistrate to hold John Doe proceedings no one contested continuing jurisdiction. Judge Eich, moreover, is a valued and respected magistrate with broad additional experience as a lawyer, advocate and public servant.

The nature and history of John Doe proceedings are reviewed by the court in State v. Washington, 83 Wis. 2d 808, 266 N.W.2d 597 (1978). See also Wis. Stat. § 968.26 (1977).

issued an order requiring the congressman to answer. An origi-
inal action seeking a writ of prohibition was filed in the Wiscon-
sin Supreme Court, thus invoking that court's jurisdiction.7
The court issued an order accepting original jurisdiction on
June 8, 1978.8

I. FACTUAL BACKGROUND

The facts revealed in affidavits and annexes were uncon-

7. The proceedings leading to the Supreme Court of Wisconsin's acceptance of the
case involved the intricacies and confusion of the rules on hearing original actions in
its supreme court. Furthermore, counsel for Congressman Steiger sought to avoid, if
at all possible, the risk of their client being held in contempt of court. Hence counsel
sought rapid review of the magistrate's opinion. Compare United States v. Nixon, 418
U.S. 683, 691-92 (1974), wherein the Court held that President Nixon need not be held
in contempt before litigating a claim of executive privilege, with In re United States
Socialist Workers Party v. Attorney General, 565 F.2d 19 (2d Cir. 1977), cert. denied,
98 S. Ct. 3082 (1978) wherein the Supreme Court declined to hear, before contempt
proceedings, a claim that the attorney general should disclose the names of informants.

8. The court's order states that: "[T]he court will grant petitioner's request that
it take original jurisdiction to consider the merits of his petition for a writ of prohibition
because the case is a matter publici juris." (Citation omitted).

The Supreme Court of Wisconsin recognized 90 years ago that it had authority to
forbid a judge from carrying out a criminal investigation. State ex rel. Long v. Keyes,
75 Wis. 288, 44 N.W. 13 (1889).
Congressman Steiger, like many of his colleagues in the Congress, had long followed an "open door" policy. He encouraged visitors to meet with him without prior appointments, a practice widely regarded as an effective way to obtain information and opinions. After the 95th Congress convened, three students from the University of Wisconsin-Madison visited Congressman Steiger in his Washington office.

They said they knew that the issue of voter registration procedures was on the congressional agenda. They wished to discuss the problem since the federal proposals apparently were similar to those in Wisconsin. They stated they had voted twice in Madison in the presidential election held in November of 1976, but that they had done so as a prank in order to show the shortcomings of Wisconsin's election-day registration procedures.

The students said that they approached Congressman Steiger because they thought he would want to know that more adequate safeguards would be needed in any federal system of election-day registration. The congressman later affirmed that his meeting with the students helped provide a clear demonstration of the possibilities for abuse in an election-day registration system and helped convince him to work for appropriate safeguards should such a system be enacted on the national level.

On March 22, 1977, President Carter announced a proposal for a federal election-day registration law. A reporter from the

9. Dane County District Attorney James Doyle, Jr. stated in affidavits that the enforcement of election laws had high priority in his office; that Congressman Steiger was the only person known by the district attorney to be aware of the identity of double voters; and that voter fraud was an easily deterred crime.

Congressman Steiger's affidavits reviewed his interest and participation in election law revision since his years of service in the Wisconsin legislature; he cited the background for the occasion in which three students came to his Washington office and confessed to their double voting in Madison. Annexed to the affidavits were the correspondence between the district attorney and Congressman Steiger as well as transcripts of the proceedings before the investigating magistrate.

10. The 95th Congress convened on January 4, 1978. Congressman Steiger believed that the students came to his office after January 10, but inasmuch as no written records of this appointment were made he remained uncertain as to the exact date. Congressman Steiger made no written record of the names and therefore any possibility of their being disclosed was foreclosed by his death.

11. The President's program was formally announced at a press briefing by Vice President Mondale on 22 March 1977, and two bills were presented, H.R. 5400 and S. 1072, 95th Cong. 1st Sess. (1977). See also President's Message to the Congress Transmitting Recommendations for Reforms in the Election System, 13 WEEKLY COMP. OF
American Broadcasting Company's news staff interviewed Congressman Steiger immediately thereafter asking about the accuracy of the administration's appraisal of the Wisconsin election-day registration system. Congressman Steiger believed he was selected to be interviewed by the ABC Evening News because he was a member of Congress from Wisconsin and because of his involvement in election law matters. He was, moreover, a Republican who might have been expected to be critical of the administration's proposal. Neither the congressman nor his staff, however, sought the interview. A small portion of the interview was broadcast nationally that evening on the ABC Evening News. Congressman Steiger was shown, responding as follows with respect to abuses of the system:

> It took place. There's no question that there were people who were double voting in Wisconsin. In part I have the impression it was somewhat of a lark, at least to some extent in the Madison campus area. It did not happen so far as we can determine to any large extent in the sixth district and we've looked at that and tried to assess that.¹²

Following the ABC Evening News broadcast, the Dane County District Attorney asked Congressman Steiger to supply evidence regarding the double voting, including the names of his sources. He declined to reveal these names. After considerable correspondence and widespread newspaper comment, the Dane County District Attorney caused a subpoena to be personally served on the congressman on July 10, 1977, requiring an appearance before Judge Eich, sitting as a John Doe magistrate. At this proceeding the speech or debate clause privilege was invoked.

### II. The Speech or Debate Clause

This clause is contained in article I, section 6 of the United States Constitution which provides that:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privi-

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¹² The full text of the March 22 ABC Evening News Story is reproduced as Exhibit A to Congressman Steiger's affidavit.
The speech or debate clause privilege is not confined to speeches or debates on the floor of the Congress. Instead, the central question is whether the activity of the member falls within the “sphere of legitimate legislative activity.” If it does, the member “shall not be questioned in any other place’ about those activities since the prohibitions of the Speech or Debate Clause are absolute.” Moreover, in determining the scope of “legitimate legislative activity,” the Supreme Court has always read the speech or debate clause broadly to effectuate its purposes.

Those purposes are rooted in history. The speech or debate clause has its most immediate origin in the English Bill of Rights of 1689, which was written in large measure to ratify the results of the Glorious Revolution of 1688. The English Bill of Rights strengthened the position of Parliament in relation to the Crown, an end toward which Parliament had been moving

14. Tenney v. Brandhove, 341 U.S. 367, 376 (1951). The case concerned the privileges, if any, of a state legislator in a cause of action arising under federal law. However, the Supreme Court invoked the speech or debate clause to supply guidance on the scope of a general legislative privilege. Similarly, see United States v. Gillock, 587 F.2d 284 (6th Cir. 1978).
17. An excellent history and discussion of the speech or debate clause is found in the leading article, Reinstein & Silvergate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113 (1973). See also Yankwich, The Immunity of Congressional Speech—Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 360 (1951) [hereinafter cited as Yankwich]. The pertinent language of the English Bill of Rights is “[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament . . . .” 341 U.S. 367 at 372. This language was itself derived from Strode’s Act, passed by Parliament in 1512. Strode had been convicted, fined and imprisoned by the Stannary Courts for introducing a bill in Parliament to correct abuses in the Cornwall tin industry, a matter in which he had some interest. Parliament annulled the judgment against Strode and ordered that any future suits against him “for any Bill, speaking or reasoning of any Thing concerning the Parliament to be communed and treated of, [would] be utterly void and of none effect.” C. Wittke, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE, 23 (Di Capo Press ed. 1970).

Blackstone stresses that the statement of parliamentary privilege in the English Bill of Rights was drafted broadly by express intent to avoid suggesting fixed outer limits to the privilege. 1 W. BLACKSTONE, COMMENTARIES 164-65 (4th ed. 1899).
for hundreds of years. The earlier struggles of Parliament to act independently of the English Crown were hard fought, often at the risk of the members’ lives and fortunes. As the Supreme Court pointed out in United States v. Johnson, behind the “simple phrases” of the speech or debate clause “lies a history of conflict . . . during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.”

During the struggle of Parliament against the English Crown, the confidentiality of Parliamentary affairs was one of the sharply contested issues. Sir John Eliot, whom one scholar has called “the first of England’s Parliamentary statesmen,” was charged with seditious speeches in Parliament and contempt against the King in resisting adjournment of the House of Commons. Apparently at the direction of King Charles I, Eliot and his alleged co-conspirators were committed to the Tower of London where Eliot later died from the effects of his imprisonment. In defense of his actions, he wrote the Apologie for Socrates, in which he contended that if he had yielded, “All the secretts of the Senate . . . must be subject to the Judges; the most intimate counsells of that conclave obnoxious to their censure.” Eliot and his fellows opposed the jurisdiction of the court to inquire into their behavior and refused as a matter of principle to plead on the merits. The English court then held against them. Holdsworth later said that “[t]here is no doubt” that the court, was wrong on that issue because the House of Lords reversed the decision on the merits in 1668.

Parliament again opposed interference with its legislative role in December, 1641. Charles I had objected to a bill being considered by Parliament, but the entire body answered by saying that the King “ought not to propound any Condition, Provision, or Limitation, to any Bill, or Act, in debate, or preparation, in either House of Parliament . . . .”

Parliament thus recognized the critical importance not only of its freedom to pass on bills but also of its freedom to investigate and consider the facts pertinent to legislation. These Eng-

18. 383 U.S. at 178.
20. VI Holdsworth, supra note 19, at 98 n.1.
21. VI Holdsworth, supra note 19, at 98.
22. Yankwich, supra note 17, at 964 (emphasis added).
lish struggles with which the founders of the American republic were well familiar, are the historical underpinnings of the clause.\textsuperscript{23} The framers of the Constitution wanted to ensure that "the legislative function the Constitution allocates to Congress may be performed independently."\textsuperscript{24} The clause is thus a critical part of the separation of powers doctrine adopted in the Constitution.

The immunity provided by the Constitution has been pragmatically broadened by the Supreme Court beyond its historical origin, in light "of the manner in which a modern legislative system operates."\textsuperscript{25} Thus, while Parliament based its claim of privilege on its role as the "High Court of Parliament," the American Congress has based its claim on the functional importance of the separation of powers as defined by the Constitution.\textsuperscript{26}

Resort to the speech or debate clause may cause friction in government. The framers, however, recognized that the benefits were worth the price. As Mr. Justice Brandeis put it:

\begin{quote}
The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.\textsuperscript{27}
\end{quote}

The separation of powers concept, designed to create strong branches of government at the national level is, in the Steiger claim, coupled with, and reinforced by, the supremacy clause. When a member of Congress is questioned by an official of a state or local government, a particular need exists to protect federal functions and federal supremacy.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{23} 341 U.S. at 372.
\item \textsuperscript{24} 421 U.S. at 502.
\item \textsuperscript{26} Id. at 15. As the Supreme Court said in United States v. Brewster, 408 U.S. 501 (1972), the clause "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government . . . ." Id. at 508.
\item \textsuperscript{27} Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
\item \textsuperscript{28} The district attorney squarely raised this issue by asserting, during the August 24, 1977, John Doe proceeding that the privilege asserted by the congressman "is not recognized by Wisconsin Law." However, it was Congressman Steiger's claim that the proper allocation of governmental functions in a federal system dictates that the pro-
The speech or debate clause exists not for the personal benefit of individual members of Congress, but to preserve the integrity of the whole political system. This is critical. "[T]he privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." In emphasizing the importance of this insight, the Supreme Court, in Tenney v. Brandhove, quoted approvingly from James Wilson, one of the framers of the Constitution:

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

In the Tenney case the Supreme Court invoked the values underlying the speech or debate clause to protect the legislative prerogatives of state legislators in a suit brought under federal civil rights statutes. State officials do not receive immunity directly from article I of the Constitution, but the Court con-

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29. 383 U.S. at 181.
cluded that their state functions would be critically harmed if they did not possess protection similar to that enjoyed by a member of Congress.

Thus, in extending the immunity of the speech or debate clause to state legislators, the Court recognized that the clause serves as a bulwark of representative government. If elected representatives are timid in their activities, if they are hesitant to exert themselves on behalf of the citizens because of fear of being questioned about their actions by law enforcement officials, then their duties as representatives cannot be fulfilled.

The framers also recognized another practical aspect of the need for legislative independence. They believed that members of Congress “should be protected not only from [adverse verdicts] but also from the burden of defending themselves,” hence the injunction that members “shall not be questioned in any other place.”31 This protection, the Court emphasized, was not intended for the personal benefit of the members, but was designed to avoid creating “a distraction [which] forces Members to divert their time, energy, and attention from their legislative tasks to defend [against] the litigation.”32 The clause therefore provides an absolute immunity because, as a matter of functional necessity, anything less would subject the legislators to the risks of intimidation, harassment and repeated claims that their activities were not protected.

Although the legislator’s privilege is absolute, protection against abuse of the privilege is afforded in two ways. First, members of Congress may be disciplined by their respective houses pursuant to article I, section 5 of the Constitution. The House or Senate may either censure or expel a member. Censure has been used against members who are disorderly in debate, who assault other members, or who engage in corrupt acts. Expulsion on the other hand has been used for treason,


[t]he procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official’s actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

32. 421 U.S. at 503. This case further directed the federal courts that claims arising under the speech or debate clause should “be given the most expeditious treatment” and said that courts “have a duty to see that [such] litigation is swiftly resolved.” Id. at 511 n.17.
high misdemeanors inconsistent with public duty, and for a Senator’s or member’s absence from his or her seat. A recent example of the House disciplining one of its members was in 1976 when the House censured Congressman Robert L. F. Sikes for a conflict of interest. In 1977, the Democratic Caucus stripped Congressman Sikes of his chairmanship of the Subcommittee on Military Construction Appropriations of the House Committee on Appropriations. Second, all members, if they seek re-election, must face the voters; many elected officials have been defeated by the citizens for abusing the privileges of office.

III. THE STEIGER LITIGATION

In the case under consideration the State of Wisconsin and Congressman Steiger joined issue on the specific question of whether Congressman Steiger’s conversations with the alleged double-voting students were part of a “legitimate legislative activity.” The congressman’s claim rested on both the representative’s duty to receive information pursuant to the speech or debate clause and upon the first amendment’s guarantee that citizens be free to petition the government for a redress of grievances. The state, relying principally on Gravel v. United States, responded by urging that the speech or debate clause did not immunize a member of Congress from answering questions about third-party crimes.

The lower court held that the speech or debate clause was inapplicable for three reasons: (1) Congressman Steiger was not a member of a legislative committee or subcommittee in-


Despite newspaper editorials critical of his invoking a privilege Congressman Steiger won his contest for re-election by a wide margin. It is speculative whether the newspaper comments were based on the assumption that a news reporter in a similar setting would not enjoy a privilege under the first amendment. See Branzburg v. Hayes, 408 U.S. 665 (1972).
36. 408 U.S. 606 (1972). The state’s brief argues that Gravel means that “acts performed by a federal legislator . . . cannot be inquired into except if such inquiry proves relevant to investigating possible third party crime or if criminal conduct of the legislator is involved . . . .” See Brief of Respondents at ——, State ex rel. Steiger v. Eich, 86 Wis. 2d 390, 272 N.W.2d 380 (1978).
vestigating elections and voter registration, nor was the information sought by a congressional subpoena; \[37\] (2) no legislation was pending at the time of the congressman’s meeting with the students; (3) the communication was not close enough to some legislative activity. \[38\] In the magistrate’s view, if the facts of the present case had fallen into any one of these three categories, Congressman Steiger’s receipt of this information would have been absolutely privileged. Each of these points is addressed separately.

A. Committee Membership as a Prerequisite for Protection of the Speech or Debate Clause

Congressional fact-finding to acquire information on which

37. Judge Eich’s opinion states:
Mr. Steiger's actions—receiving information from private, non-constituent individuals—would fall outside the scope of the privilege unless they were so closely related to speech or debate that to permit any such inquiry would impair or impugn a legislative act.

On this record, I do not consider that the acts sought to be inquired into in the instant proceedings constitute the type of legislative acts which may be considered speech or debate and thus absolutely privileged. Gravel v. United States. Here the acts do not relate to any valid, ongoing committee investigation as in Eastland v. United Servicemen’s Fund, no Congressional subpoenas are involved, as in Dombrowski v. Eastland, there was no ongoing subcommittee investigation; and, in fact, no legislation had been introduced on the subject.

38. The opinion states:
Under all of the circumstances, then, Mr. Steiger's unsolicited conversation was not, in my opinion, such an "integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration of prepared legislation or other matters . . . within the jurisdiction of (the) House." Gravel v. United States; Doe v. McMillan; Eastland v. United States Servicemen’s Fund. Nor may it be said on these facts that Mr. Steiger's legislative actions will be in any way impaired or impugned by requiring him to divulge the information sought. Cf. Gravel v. United States, supra. In fact, he has already divulged the substance of the conversations (the admissions of criminal conduct) all that is sought here is the identity of the informants.

The nexus between the conversations and the legislative process is Mr. Steiger's general interest in election law issues, the probability that voter registration legislation would be introduced in the then-current session, the fact that the conversation indicated to him that on-site voter registration laws carry with them the possibility of abuse, and thus helped convince him to ‘work for safeguards during any House consideration of such a system’, and, of course, the fact that the students came to see Mr. Steiger in his Washington office. Mr. Steiger does not claim membership on any House committee or sub-committee having to do with elections or voter registration; and no such legislation was pending at the time of the meeting.

(Citations omitted).
to base legislative judgments is of paramount importance to our structure of government. As Dean Landis has said, “Knowledge of the detailed administration of existing laws is not merely permissive to Congress; it is obligatory.”\(^3\) Thus, “where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.”\(^4\) Woodrow Wilson similarly argued that

\[\text{unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.}\]

Moreover, the Court has stated that “[t]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”\(^4\)

The communication received by Congressman Steiger was not an idle or chance bit of gossip. Because of his long-standing involvement in election law issues, and because he represented a district in one of the states explicitly relied upon to buttress President Carter’s Universal Voter Registration bill, the information about defects in Wisconsin’s registration law

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41. W. WILSON, CONGRESSIONAL GOVERNMENT 303 (1885) (quoted in 341 U.S. at 377 n.6) (emphasis added).


42. Barenblatt v. United States, 360 U.S. 109, 111 (1959); Sinclair v. United States, 279 U.S. 263, 291-92 (1929). See, e.g., Hutchinson v. Proxmire, 431 F. Supp. 1311 (W.D. Wis. 1977), where Senator Proxmire’s research and investigation preliminary to announcing one of his “Golden Fleece” awards were held to be privileged and protected by the speech or debate clause, aff’d on other grounds, 579 F.2d 1027 (7th Cir. 1978), cert. granted, 99 S. Ct. 832 (1979).
was both important and timely.\(^43\) It was, in these circum-
stances, not merely permissible for the congressman to inform him-
self about the operations of the Wisconsin statute, it was his
practical duty. His conversation with the students was directly
related to a subject "on which legislation could be had,"\(^44\) and,
indeed, was expected to be had as the prospects were viewed
in early 1977.

No reason exists to believe that the protection afforded by
the speech or debate clause depends on whether a congressman
or Senator is acting as a member of a congressional com-
mittee.\(^45\) Contrary to the trial court's view, *Eastland v. United
States Servicemen's Fund*\(^46\) does not support the converse prop-
osition.

*Eastland* requires no such fragmentation of this important
constitutional privilege. In that case, a Senate subcommittee
began investigating the activities of the United States Service-
men's Fund. In the course of its investigation, the subcommit-
ette issued a subpoena duces tecum to a bank where the Fund
had an account, and the Fund sought to enjoin its effect. The
Supreme Court held that the speech or debate clause barred
the injunction. Quoting from earlier decisions, the Supreme
Court reaffirmed that the power to investigate "is inherent in
the power to make laws" because "'[a] legislative body can-
not legislate wisely or effectively in the absence of information
respecting the conditions which the legislation is intended to
affect or change.' "\(^47\)

English history reveals the recurring theme that an individ-
ual member of Parliament, not a committee or subcommittee,
may invoke the legislative privilege against incursions from the
executive or the judiciary. Moreover, the oldest reported Amer-
ican case on legislative privilege,\(^48\) makes clear that the privi-
lege attaches to each member individually, even if the legisla-
ture itself tries to limit the privilege. In *Coffin*, a decision de-
scribed by Mr. Justice Miller writing for a unanimous Court in
*Kilbourn v. Thompson*, as "perhaps the most authoritative

\(^43\) See note 11 *supra*.
\(^44\) *Eastland v. United Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) (quoting
McGrain v. Daugherty, 273 U.S. 135, 173 (1927)).
\(^45\) See note 37 *supra* for Judge Eich's contrary conclusion.
\(^46\) 421 U.S. 491 (1975).
\(^47\) *Id.* at 504 (quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927)).
\(^48\) Coffin v. Coffin, 4 Mass. 1 (1808).
case in this country on legislative immunity" the Court said:

[The] privilege . . . is not so much the privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution . . . .

Thus, when members act in committees, their speech or debate clause privilege does not derive from the committee. Rather, the privilege attaching to committee work stems from the privilege enjoyed by the members in their individual capacity as legislators.

Although Congress does much of its work through committees and subcommittees, ultimate lawmaking authority rests with a majority of members. Proposed legislation that has been reported favorably to the floor of a house from one of its committees is often defeated or substantially amended by the acting majority. This fact alone demonstrates that individual members cannot be limited, in their fact-gathering powers, by the nature of the committees to which they are assigned.

The view of the trial court also ignored the vital roles played in legislative business by members not on the relevant committees. For instance, Congressman Justin Morrill wrote the Morrill Land-Grant Act which provided public lands to aid the states in establishing colleges of agriculture and mechanical arts. Yet Congressman Morrill served on no committees having to do with education, agriculture or lands. He, like Congressman Steiger, served only on the House Ways and Means Committee. Similarly, the Saltonstall-Kennedy Act governs United States customs duties on imported fishery products. Yet neither Senator Kennedy nor Senator Saltonstall held membership on any committee with jurisdiction over such matters.

Legislation is frequently introduced by (or the opposition to

49. 103 U.S. at 204.
50. 4 Mass. at 27. In a related context, the Supreme Court has stated that the precedential value of cases or legislative acts implementing various provisions of the Constitution "tends to increase in proportion to their proximity to the [Constitutional] Convention in 1787." Powell v. McCormack, 395 U.S. 486, 547 (1969).
proposed legislation led by) members not on the pertinent committees. Members often testify before committees on which they do not serve. Particularly in the field of election law—which by its very nature directly and immediately affects every citizen and legislator—it would seriously impair the legislative process to exclude noncommittee members from the congressional fact-finding process. Membership on a committee is thus immaterial in deciding whether the speech or debate clause applies.

The magistrate described Congressman Steiger's involvement in election law issues as a "general interest." The congressman's "interest," however, was far from the merely casual or academic. Congressman Steiger had authored or cosponsored numerous bills concerning federal regulation of elections, he had engaged in litigation challenging the constitutionality of federal campaign-finance laws, and he had participated vigorously in the congressional debates and hearings concerning a wide variety of election law issues. This record of

53. See note 38 supra.

54. Congressman Steiger was one of the plaintiffs in Buckley v. Valeo, 424 U.S. 1 (1976).


See 121 Cong. Rec. 483, 27498 (1975).


In addition to debate over the FECA, Congressman Steiger spoke numerous times on issues relating to the electoral process. See 113 Cong. Rec. A1612 (daily ed., April
activity marked him as among the more active members of Congress on these issues.

Moreover, even supposing that the congressman's interests were only general, and he had not been an active participant in election law reform, it would nevertheless be improper to determine the scope of his immunity by the quantity and quality of the congressman's expertise. If a court were to measure the quantity and quality of a particular legislator's interest, the very purpose of preventing the intrusion of the judiciary into the affairs of the legislature would be threatened.

B. A Member of Congress Need Not be Proceeding Pursuant to a Subpoena for Protection of the Speech or Debate Clause

The trial court also found important the fact that no congressional subpoena was involved, in contrast to the situation in Dombrowski v. Eastland. This point differs little from the court's reliance on Congressman Steiger not being a member of a congressional committee concerned with election law issues. Individual members cannot issue subpoenas; only duly-authorized committees, subcommittees and the full houses, may do so. To say that Congressman Steiger did not proceed by means of a subpoena merely repeats the statement about his committee memberships.

The court may have been influenced by the fact that all of the Supreme Court cases on the speech or debate clause, as applied to investigations, have involved challenges to the enforcement of committee subpoenas. No case could arise if a citizen refused a request by a member, operating without a subpoena, to voluntarily supply the member with information; the member would have nothing to petition a court to enforce. In any event, the absence of Supreme Court precedents in non-subpoena cases surely does not mean that the clause does not apply unless there is a subpoena.

The decision of the district court in Hutchinson v. Proxmire, supported invocation of the clause despite the fact that Senator Proxmire obtained the information upon which he made his "Golden Fleece" award without a subpoena. Furthermore, the Court of Appeals in the District of Columbia in

5. 387 U.S. 82 (1967).
McSurely v. McClellan stated explicitly that, "We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff is essential to informed deliberation over proposed legislation."\(^{58}\)

If the Wisconsin trial court's opinion is correct, then it is only prudent for a legislator to garner information by first resorting to a subpoena, because only then will the speech or debate clause protection be available. Obviously this is unworkable. It would severely hamper a relationship of trust and confidence which principles of orderly government should foster.

C. Legislation Need Not Be Pending to Invoke the Speech or Debate Clause

The conversation, which gave rise to Congressman Steiger's information, was held in the congressman's Washington, D.C., office, during the business day, when Congress was in regular session. It concerned proposals which were the topics of wide-ranging national debate. The conversation involved here did not concern an allegedly illegal act committed by the congressman.\(^{59}\)

The court ruled, however, that because no relevant legislation was pending at the time of the congressman's discussion with the three students, the information he received was not privileged.\(^{60}\) The facts, however, are not certain on the conclusion. The congressman's discussion with the students took place between the convening date of the 95th Congress, January 4, 1977, and March 22, the date of the President's announcement. Only six days after the convening date, one of the President's chief aides publicly stated that legislation on the


The court in the Steiger case distinguished the district court in Proxmire partly on the ground that Senator Proxmire was on "several subcommittees" which considered the budgets of the federal agencies which were funding the research projects the Senator criticized. The attempted distinction is, however, inadequate.

It is well known that Senator Proxmire gives out "Golden Fleece" awards on a regular basis. The court's rationale would mean that the Senator is not protected when he awards a "Golden Fleece" to a federal project not within the jurisdiction of a committee of which he is a member. Such a plainly arbitrary result demonstrates the error of relying on committee membership as a trigger for speech or debate clause protection.


\(^{60}\) See note 37 supra.
subject was being prepared by the administration. Only eight days after Congress convened, the first piece of legislation concerning uniform federal standards for voters registration in federal elections was introduced. Thus, under the court's theory, if the discussion with the students took place after approximately January 10, he would have been within the protection of the speech or debate clause because his information would have been pertinent to then-pending legislation. If on the other hand, the conversation had occurred before January 10, the clause's protections would not apply. Congressman Steiger was unable to pinpoint the precise date upon which the conversation took place.

The question is, therefore, whether as a matter of law, legislation on a subject must already have been introduced before a speech or debate clause privilege will attach to a member's communication with a citizen about that subject. The Supreme Court has never laid down such a requirement. In fact, the Court stated in Eastland that Congress' power to investigate is as broad as its power to legislate. The Court's opinion reflects a pragmatic view of the legislative process, a view which the trial court implicitly rejected. However, Congress possesses not only the powers expressly granted but also such auxiliary powers necessary and appropriate to make the express powers effective.

Obviously, much preliminary investigative work is often required and undertaken by proponents of legislation, before legislation is introduced, to ascertain whether the subject matter of the possible bill warrants congressional action. It would be foolish indeed to require introduction of legislation before some careful study and analysis has been made. Yet this is the direction in which the opinion of the Wisconsin court points. Under that opinion, only if there is a bill pending can members be sure that the speech or debate clause privilege attaches.

Opponents of prospective legislation would be especially hobbled if their actions were unprotected until a bill was intro-

63. 421 U.S. at 508.
duced. Indeed, the historical roots of the speech or debate clause demonstrate a felt need to protect opponents of the Crown from retribution. To use the pendency of a piece of proposed legislation as the touchstone of the legislative privilege is simply unworkable and runs counter to plain legislative and political reality. Consider especially the member who belongs to a minority party, outnumbered by a two-to-one majority in the House, and with the Executive a member of the majority party. Must that member sit idly by until the administration and its congressional supporters are satisfied with a proposed new statute and perhaps equally satisfied that they have the votes to move it quickly through Congress? If so, then the critical process of legislation could easily be impaired. In fact, as ideas for legislation are proposed ("trial balloons" in the jargon of politics), investigation of those ideas is simultaneously conducted by prospective proponents, opponents and those who are genuinely undecided. The speech or debate clause privilege, if it is to function as intended, must apply in all of these cases.

D. Communication Related to Legislative Activity

The court's third reason for its decision was that Congressman Steiger's meeting with the three students was not closely enough related to some legislative activity to enjoy the privilege. For this proposition, the court relied on *Gravel v. United States.* However, *Gravel* fully supports Congressman Steiger's claimed privilege, not its rejection.

In *Gravel,* federal prosecutors sought to compel the appearance of an assistant to Senator Gravel before a grand jury inquiring into charges that classified national defense information (now known as the "Pentagon Papers") had been unlawfully transmitted to Senator Gravel. Senator Gravel intervened and moved to quash the subpoenas in question, arguing that to compel his assistant to testify would violate the Senator's

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65. For a member of Congress to refrain from seeking information on proposed legislation before a bill is introduced is somewhat analogous to an attorney who believes a client is about to be sued, but who refrains from any preparation to defend the case until the complaint is actually filed naming his client as a defendant. Yet the work-product privilege of Hickman v. Taylor, 329 U.S. 495 (1947), has uniformly been held to protect work done in anticipation of litigation. *Cf.* Fed. R. Civ. P. 26(b)(3). Although the work-product privilege is qualified rather than absolute, it is breached only rarely.

own speech or debate clause privilege. The Papers had, by undisclosed means, come into Senator Gravel's possession, and he had read parts and had introduced the rest of them into the record of a midnight hearing of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee. It was later reported in the press that after the hearing, Senator Gravel and members of his Senate staff had arranged to have the Papers published by an ordinary commercial publisher.

On appeal, the Supreme Court held, first, that a member was not absolutely immune from "testifying at trials or grand jury proceedings involving third party crimes." Next, the Court held that the Senator was privileged to refuse to answer any questions which would "require testimony about or impugn a legislative act." Third, the Court held that the speech or debate clause "does not privilege either Senator or aid to violate an otherwise valid criminal law in preparing for or implementing legislative acts." Thus, if retention of classified national defense information by Senator Gravel were deemed criminal, the speech or debate clause would afford no protection. Finally, the Court held that arranging for a commercial publisher to reprint the classified Pentagon Papers was not protected legislative activity. Questioning before the grand jury even on these two matters, however, was permissible, only "as long as no legislative act is implicated by the question."

67. Senator Gravel asserted that the availability of funds for public buildings had been affected by the costs of the war in Vietnam. 408 U.S. at 610 n.6. The trial court rejected the government's contention that the midnight subcommittee hearing was not for a legitimate legislative purpose and the Supreme Court did not disturb that holding.

It is difficult to imagine a more attenuated relationship between a subcommittee membership (having to do with public buildings) and the activity claimed as privileged (making public the Pentagon Papers). That the Supreme Court let that claim stand is a further demonstration of the circuit court's error in holding that committee membership is a prerequisite to invoking the protection of the speech or debate clause. The plain fact is that Senator Gravel made the Pentagon Papers public because of his well-known opposition to the war in Vietnam. His subcommittee chairmanship was a convenient "cover" for his actions.

The analogy here to Senator Gravel's subcommittee membership would be for Congressman Steiger to have claimed that for financial assistance to the states, and because that might require higher taxes to finance such assistance, his membership on the House Ways and Means Committee afforded him protection under the speech or debate clause.

68. 408 U.S. at 622.
69. Id. at 625.
70. Id. at 625-26.
71. Id. at 628. The Parliamentarian of the House of Representatives in a revised
None of the key elements of *Gravel* was present in the *Steiger* case. First Congressman Steiger never claimed an immunity from testifying at trials or grand jury proceedings, having appeared on August 24, 1977, in response to the subpoena. Moreover, unlike *Gravel*, there was no suggestion whatever that any activity undertaken by the congressman was in any way unlawful; the only fact about which testimony was sought was the identity of other persons with whom Congressman Steiger met and who had revealed their involvement in double voting. Third, and again unlike *Gravel*, there was no effort to question Congressman Steiger about any activity that involved commercial, political or other plainly non-legislative activity.  

Nothing in the *Gravel* holding, therefore, suggests that the speech or debate clause was inapplicable to the Steiger claim. The support for this analysis is demonstrated by the Supreme Court's reliance on *Gravel* in *Eastland v. United States Servicemen's Fund*, where the Court held that gathering "information about a subject on which legislation may be had" was "essential to legislating." Gathering information pertinent to legislation was precisely what Congressman Steiger was doing when he met with the students.

*Gravel* was a 5-4 decision with Justices Stewart, Douglas, Brennan and Marshall dissenting. Whether precedential weight should be accorded *Gravel* is unclear especially in view of Jefferson's Manual and Rules of the House of Representatives, upon which members of the House and their staffs frequently rely, describes the Supreme Court's holding in *Gravel* as "upholding grand jury inquiry into the possession and non-legislative use of classified documents by a Member." Brown, supra note 33, at 40.

72. In *U.S. v. Brewster*, 408 U.S. 501 (1972), the Court distinguished between political (unprotected) and legislative (protected) acts:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.

Id. at 512.

73. Id. at 507.
of the thoughts Justice Powell expressed in a case decided the same day, Branzburg v. Hayes.\textsuperscript{74} Justice Powell was a member of the majority in Gravel; in Branzburg Justice Powell's concurrence created a 5-4 majority denying a newsman's privilege not to reveal sources. His concurrence notes that the holding in Branzburg did not mean that "state and federal authorities are free to annex the news media as 'an investigative arm of government.'"\textsuperscript{75} Justice Powell then stated that privilege issues should be "judged on the facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."\textsuperscript{76}

If Justice Powell's case-by-case approach is proper, and if a balancing test is applied to the particular facts of the Steiger case, the Court would be justified in concluding that the district attorney was mistakenly seeking to "annex" Congressman Steiger as an "investigative arm of government." This claim of "annexation" is supported by an affidavit of the district attorney who admitted that all his efforts to surface vote fraud had been unavailing and that his only remaining source of knowledge was Congressman Steiger.\textsuperscript{77}

\textbf{IV. CONCLUSION}

It is contended that Congressman Steiger's conversations were legitimate legislative activity and thus protected by the speech or debate clause. As the Supreme Court admonished, "To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'"\textsuperscript{78} A "miserly reading" of the clause would thwart one of the most important bases for sound legislation: the obtaining of information necessary to frame legislation in-

\textsuperscript{74} 408 U.S. 665 (1972).
\textsuperscript{75} \textit{Id.} at 709.
\textsuperscript{76} \textit{Id.} at 710.
\textsuperscript{77} After reciting his effort to enforce the election laws, the district attorney stated that "Congressman William A. Steiger is the only person of whom I am aware who knows the identity of any person who has admitted to having committed voter fraud in Dane County." See affidavit of James E. Doyle, Jr. in the record presented to the Wisconsin Supreme Court.
telligently. If Congress and its members are to be denied access to useful information—or, what is essentially the same thing, if the flow of that information is to be dried up because citizens are afraid to provide the information voluntarily and confidentially—then the institutional integrity of the legislative branch of government will be irreparably impaired. Such an impairment would unquestionably be caused if Congressman Steiger had been required to divulge the name of any of the students with whom he spoke. Citizens with sensitive information will be reluctant to come forward if it were held that no protections or guarantees of confidentiality can be afforded to them. This reluctance would apply not only with respect to any information concerning possible violations of federal or state law, but also with respect to any information where an individual fears to have his or her name revealed. The speech or debate clause is designed to prevent the possibility that Congress' ability to function can be impaired by inquiry into legislative acts.

Editor's Note: Hutchinson v. Proxmire was decided by the U.S. Court on June 26, 1979. See 47 U.S.L.W. 4827 (1979), rev'd 579 F.2d 1027 (7th Cir. 1978).