

WHAT PELOSI, ROCKEFELLER & HARMAN COULD HAVE DONE

 There has been an ongoing discussion for the last two weeks or so about the briefings that congressional leaders were allegedly given regarding the Bush/Cheney torture program (See for instance [here](#), [here](#), [here](#), [here](#) and [here](#)) and what Congressmembers like Pelosi, Rockefeller, Harman and Graham could have done to fight the malfeasance of Bush and Cheney. This post will explain what they could have done.

I promised a discussion on the speech and debate clause and what was possible, at least theoretically, for Nancy Pelosi, Jane Harman, Jay Rockefeller, Bob Graham, or any Congressman that had knowledge, to have done about the wrongs of the Bush Cheney Administration, even in relation to national security level topics.

The speech and debate clause is found in Article I, section 6 of the Constitution and reads as follows:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The key wording is the last part "...and for any Speech or Debate in either House, they shall not be questioned in any other Place." The down and dirty is that congressmembers (and in certain cases key staff) cannot be questioned or held to answer in any forum, civil, criminal or otherwise, for speech and/or discussion regarding legitimate interests and business of Congress; such conduct occurring on the floor or in committee is absolutely privileged.

Let's have a look at the history of the Speech and Debate Clause. In *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court stated, "The Framers viewed the speech or debate privilege as fundamental to the system of checks and balances." Indeed, it was framed by the founders as one of the seminal checks and balances against the power and greed of the Executive Branch. You know, exactly what Congress was staring at, and cowering from, with the Bush/Cheney crew. The Congressional privilege has been discussed and upheld in a long and storied line of cases.

Interpretation of this clause has centered on a definition of "legitimate legislative activity." Such activity had been commonly held to extend beyond debate on the floor of the respective chambers to include views expressed in committee deliberations and reports and to encompass the act of voting as well. In *Kilbourn v. Thompson* (1881), the Supreme Court gave this clause its broadest interpretation, defining protected actions as "things generally done in a session of [Congress] by one of its members in relation to the business before it" (p. 204).

During the 1970s the Supreme Court considered several cases aimed at narrowing this reading. In *Doe v. McMillan* (1973), the Court limited protection for the views expressed within congressional reports only to

those documents disseminated within Congress. Allowing a suit against the Government Printing Office for publishing a committee report that allegedly contained defamatory material, the Court ruled somewhat ambiguously that dissemination in normal channels outside Congress was not protected. Under a related subsequent decision, *Hutchinson v. Proxmire* (1979), members became liable for their views as expressed through press releases and newsletters. The Court found that although these means of communication are valuable and desirable, neither forms an integral part of Congress's deliberative process. Here the Court distinguished between the indispensable "informing function," under which Congress informs itself in an effort to produce better legislation, and the less vital "informing function" of reporting its activities to the public.

In *United States v. Brewster* (1972), the Court significantly reduced the Speech or Debate Clause's protection. Former U.S. senator Daniel Brewster had been indicted for allegedly taking a bribe to influence the performance of his official legislative duties. Brewster sought protection under the clause to declare the indictment invalid. In upholding the indictment, the Court ruled that "Taking a bribe is, obviously, no part of the legislative process or function" (p. 526). The clause was read as prohibiting an inquiry into the motivation for performing specific legislative acts, but it provides no restraint against an inquiry into taking a bribe for specific legislative actions. The subject of the inquiry against Senator Brewster was the bribe, rather than the legislative objective the bribe was intended to promote.

Clearly the most notorious case involving the Speech and Debate Clause, and the most pertinent to our discussion, is *United States v. Gravel*, 406 US 606 (1972). Gravel is Senator Mike Gravel of Alaska and this is the infamous "Pentagon Papers Case". *Gravel* arose out of the investigation by a federal grand jury into possible criminal conduct with respect to the release and publication of a classified Defense Department study entitled History of the United States Decision-Making Process on Viet Nam Policy. This document, popularly known as the Pentagon Papers, bore a Defense security classification of Top Secret-Sensitive. The crimes being investigated included the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371).

...the last portion of § 6 affords Members of Congress another vital privilege—they may not be questioned in any other place for any speech or debate in either House. The claim is not that while one part of § 6 generally permits prosecutions for treason, felony, and breach of the peace, another part nevertheless broadly forbids them. Rather, his insistence is that the Speech or Debate Clause at the very least protects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible. The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects

Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting.

...

Prior cases have read the Speech or Debate Clause 'broadly to effectuate its purposes,' *United States v. Johnson*, 383 U.S., at 180, 86 S.Ct. at 755, and have included within its reach anything 'generally done in a session of the House by one of its members in relation to the business before it.' *Kilbourn v. Thompson*, 103 U.S., at 204; *United States v. Johnson*, 383 U.S., at 179, 86 S.Ct. at 755. Thus, voting by Members and committee reports are protected; and we recognize today—as the Court has recognized before, *Kilbourn v. Thompson*, 103 U.S., at 204; *Tenney v. Brandhove*, 341 U.S. 367, 377–378, 71 S.Ct. 783, 788–789, 95 L.Ed. 1019 (1951)—that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.' *Id.*, at 376, 71 S.Ct., at 788.

What this means is that there existed a defined path for Pelosi, Harman, Rockefeller, Graham et. al to address their concerns and whistleblow the wrongs they were witnessing without any threat of prosecution, fines or other retribution. Jello Jay Rockefeller did not have to constrain his outrage to his hoky handwritten letter to Dick Cheney (yeah, like that was going to work). Jane Harman did not have to restrict her claimed

outrage to her weak letter. Nancy Pelosi and Bob Graham didn't have to sit on their hands and effectively do nothing.

The next question you will ask is what about secrecy oaths taken in relation to their Intel Committee positions. In fact, Jane Harman has tried to explain away her lack of action thusly:

When you serve on intelligence committee you sign a second oath – one of secrecy," she said. "I was briefed, but the information was closely held to just the Gang of Four. I was not free to disclose anything.

Indeed such secrecy oaths are administered, for solemn reasons – national security is of prime importance and there truly are a plethora of things that should not be publicly discussed. That said, any such "secrecy oath" for the Intel responsibilities is absolutely subordinate to the primacy of the prophylactic Speech and Debate clause protection in Article 1, Section 6. The decision in *US v. Gravel* is in accord. So, despite the bleating protestations of Harman and the others, they do not get off the hook via "secrecy oaths". They took an oath to defend the Constitution from all perils, that is primary, and they failed it.

As Stan Brand, a former General Counsel to the US House of Representatives and noted Congressional procedure and privilege expert, has said:

Under *Gravel*, Senator Rockefeller (nor any other member of Congress) need not have been either so secretive or reticent to use official channels to question the surveillance program, or for that matter any other subject of national security. Indeed, he could have officially communicated with relevant Executive officials, shared that correspondence with his colleagues on the Committee, or even taken to the

Senate floor to speak about the issue. (Whether such conduct would have been consistent with Senate and Committee rules governing classified information would be a matter only for the Senate and could play no part in any Executive branch examination of his conduct). The "Speech or Debate" clause protection is based on its English antecedent, the product of several centuries struggle by Parliament to attain independence from the Crown. In this country it was adopted without debate at the constitutional convention to provide the same independence to legislators to be free from intimidation by the executive, or accountability before the judiciary.

The Rockefeller episode illustrates how too often legislators are cowed into acquiescence or timid supplications with respect to issues involving classified documents or matters by an aggressive or threatening Executive branch. Of course, over 30 year ago in a case eerily reminiscent of the current controversies, the Supreme Court laid to rest the notion that legislators could be questioned by the Executive branch for doing their job. Every member of Congress needs to read the Gravel decision to appreciate the broad constitutional protection they have been afforded by the Framers to inquire into the Executive's administration of our national security apparatus.

Cowed into timid supplicants pretty much sums up what George Bush and Dick Cheney did to the Congress. In this instance, there were only a handful of Representatives and Senators that could have addressed the ills at hand, and they failed their duty, failed their oath and failed their country. Yes it would have taken a huge "Profile In Courage" for them to have availed themselves of the Speech and Debate privilege

and stood in the wells of Congress to right the matter. If they didn't have the cojones to explain the entire scene, at a minimum they should have made a record that they were being intentionally denied proper Intel Committee briefings, Gang of Eight briefings and Presidential findings; they couldn't even bring themselves to do that.

Courage is what this country was founded on and propagated by, we can ill afford to be in such short supply of it in the most critical moments when the Constitution is being undermined.