

A Senator's Immunity

Sec. 6. The senators and representatives for their services, to be ascertained by law, except in cases of impeachment, shall not be held liable in any suit or action for any 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.

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By HENRY STEELE COMMAGER

AMHERST, Mass.—The Nixon Administration is at it again. First it tried to intimidate the television networks. In vain. Next it attempted, for the first time in our history, to silence the press by the threat of prior censorship. Again in vain. Now the Justice Department has launched an attack on the constitutional privileges of a co-ordinate branch of the Government—the Congress of the United States and, by implication, every legislature in the United States.

The issue is once again the Pentagon Papers. We might have supposed that with its defeat in The New York Times case the Government would drop this shabby prosecution. Not at all. At the instigation of the internal security division of the Justice Department, a Federal grand jury in Boston has now subpoenaed Dr. Rodberg, legislative assistant to Senator Gravel, to appear before it, and the Government's brief acknowledges that the thrust of the subpoena is to prepare the ground for an inquiry into "acts done by Senator Gravel in reading and inserting into the record the Pentagon Papers."

This may seem like a tempest in a teacup—especially as the Government has by its decision to publish the Pentagon Papers in toto abandoned its argument that their publication would do "irreparable injury" to the "security" of the United States—an argument palpably absurd at the time. But in fact three major principles of our constitutional system are at stake in this new Justice Department caper. First is the hard-won principle of the immunity of any legislator from just this sort of harassment; second is the principle of the separation and the equality of powers of the three departments of government; third is the principle of freedom of speech and of the press.

The Constitution provides (Art. I, sec. 6) that "for any speech or debate in either House, they (Congressmen) shall not be questioned in any other place." Neither the purpose nor the meaning of this clause is obscure. The purpose was to make it forever impossible for any executive authority to punish or intimidate any legislator for what he might say in the legislative chambers.

These interpretations are now challenged by the Government brief which asserts that Congressional immunity from "question or debate" does not cover committee reports, and that it

is wholly personal and cannot be enlarged to embrace legislative staff. The first of these assertions was disposed of as recently as 1969 when Chief Justice Warren reiterated the principle that the speech clause covered committee reports, resolutions, "and such things as are generally done in a session of the House in relation to the business before it." The second assertion raises the larger issue of the separation and equality of powers in our Government. But the principle laid down in Jefferson's Manual of Parliamentary Practice and formally adopted by both houses of Congress, has never been successfully challenged, namely that "Congressmen are at all times exempted from question elsewhere, for anything said in their own House; that during the time of privilege neither a member himself, nor his wife, nor his servants, may be arrested in any civil suit nor impleaded, cited, or subpoenaed in any court."

The logic of these constitutional and legal immunities is obvious. It is not to confer special privileges on legislators—or on judges or Presidents—but to protect them against harassment and intimidation which, as Justice Harlan put it, might "inhibit the fearless, vigorous, and effective administration of policies of Government and dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

The attack on Senator Gravel's immunity is pernicious not only constitutionally and politically, but philosophically. It is part and parcel of what can only be described as a concerted campaign to deny the American people that knowledge about the operation of their Government so essential to the sound functioning of democracy. It is a direct assault on the Constitution and the separation of powers; it is an indirect assault on the principles which the Constitution was designed to preserve and advance, above all the principle of freedom of speech and of the press. In this matter what the father of the Constitution, James Madison, said in 1794, is still relevant: "If we advert to the nature of Republican government, we shall find that the censorial power is in the people over the Government, not in the Government over the people."

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