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NOTES

Immunity Under the Speech or Debate Clause for Republication and from Questioning About Sources

Gravel v. United States,1 which arose out of Senator Mike Gravel’s attempt to publicize the Pentagon Papers,2 concerned the scope of the immunity conferred upon a legislator and his aide under article I, section 6, of the United States Constitution.3 This provision, commonly called the “speech or debate clause,” provides that “for any Speech or Debate in either House, [United States Senators or Representatives] shall not be questioned in any other Place.”4 Gravel is one of the few Supreme Court interpretations of this clause.5

On June 29, 1971, the Senator called a late-night meeting of the Subcommittee on Buildings and Grounds of the Senate Public

1. 408 U.S. 606 (1972).
Works Committee, read a summary of the high points of the Papers, and then introduced all forty-seven volumes into the record. Two weeks later, in an effort to publicize the Papers further, Gravel's aide Leonard Rodberg began negotiations with various publishers, one of whom agreed to publish them. As a result of his activities, Rodberg was subpoenaed by a federal grand jury investigating the release and publication of the Papers. In moving to quash the subpoena, Rodberg argued that it violated his immunity under the speech or debate clause. Although Gravel was not himself subpoenaed, he obtained permission to intervene in the proceeding on Rodberg's motion. He then moved to quash the subpoena and to require the government to specify the questions it intended to ask Rodberg.

The district court refused to quash the subpoena, but it did issue a protective order prohibiting the government from asking Rodberg about activities undertaken at the Senator's direction and from asking any witness about Gravel's preparation for or conduct at the subcommittee meeting. It did not hold that private publication of the Papers would be privileged. The court of appeals affirmed, with only slight modification, the decision of the district court.

On appeal, the Supreme Court agreed that Gravel was immune from questioning about his actions at the subcommittee meeting and that Rodberg shared this immunity. However, taking a narrow view of the speech or debate clause, the Court, in an opinion by Justice White, held that private republication was not within its protection and that both Gravel and Rodberg could be questioned about the source of their information (that is, how they obtained the Papers). These last two holdings provoked considerable controversy on the Court and will be the focus of this Note.

8. Rodberg also argued that his first amendment rights were violated because questioning by the grand jury would reduce his ability to gather the confidential information necessary to his multiple roles as writer, lecturer, and adviser to senators and congressmen. The trial court summarily rejected this contention. United States v. Doe, 332 F. Supp. 930, 932 (D. Mass. 1971).
12. 408 U.S. at 615-16.
13. 408 U.S. at 616-22.
14. 408 U.S. at 622-29.
The rationale for the Court's decision on sources was simply that the speech or debate clause does not immunize a senator or his aide "from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about . . . a legislative act."\(^{15}\) With respect to republication, the Court again stressed that the scope of the speech or debate clause was limited to legislative acts\(^{16}\) and concluded that "private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate . . . ."\(^{17}\)

Dissenting Justices Stewart,\(^ {18}\) Douglas,\(^ {19}\) and Brennan,\(^ {20}\) who was joined in his dissent by Marshall and Douglas, all argued that a senator's sources should fall within the immunity conferred by the clause in order to safeguard clearly legislative conduct like speechmaking and voting in Congress. First, it was contended that congressional sources of information would dry up if legislators could give no assurance of anonymity.\(^ {21}\) Second, Justice Brennan felt that preparatory activity should be covered because "[i]t would accomplish little toward the goal of legislative freedom to exempt an official act from intimidating scrutiny, if other conduct leading up to the act and intimately related to it could be deterred by a similar threat."\(^ {22}\) Stewart made a third argument: the majority's ruling would allow the executive to threaten legislative independence, contrary to the basic purpose of the clause. A congressman could be

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15. 408 U.S. at 622. The Court took a narrow view of "legislative acts," noting that the fact that "Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." 408 U.S. at 625. In the Court's view, to receive the protection of the clause an act "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." 408 U.S. at 625.

16. 408 U.S. at 624-25.

17. 408 U.S. at 625. The Court also relied on early English and American cases that, it claimed, showed that republication outside the legislative body was not protected by the speech or debate clause. See notes 125-38 infra and accompanying text.

The Court noted that republication might involve the journal of proceedings clause of article I, section 5 (set out in note 88 infra), if authorized by the Senate itself, but did not indicate how this would affect its decision. See 408 U.S. at 625 n.16. Subsequently, in Doe v. McMillan, 41 U.S.L.W. 4752 (U.S., May 29, 1973), the Court held that the Superintendent of Documents and the Public Printer were not immune from suit where the publication infringed on important personal rights even if the publication was ordered by Congress. The Court focused on the speech or debate clause and the possibility of official immunity, ignoring the journal of proceedings clause.

18. 408 U.S. at 629-33.


20. 408 U.S. at 648-64.

21. 408 U.S. at 630 (Stewart, J.), quoting United States v. Doc, 455 F.2d 753, 758-59 (1st Cir. 1972); 408 U.S. at 663 (Brennan, J).

22. 408 U.S. at 663.
subpoenaed by a vindictive executive to testify about information whether or not the informants had in fact committed crimes or had knowledge of crimes, since no limits have been imposed by the judiciary on the broad investigatory powers of a grand jury. 23

Douglas and Brennan argued that republication should also be protected, because it is essentially legislative conduct even though it occurs outside the halls of Congress. 24 The thrust of Brennan's and Douglas' separate arguments was that the majority, in allowing the grand jury to question Gravel and his aide about their dealings with private publishers, excluded from immunity an activity, central to the democratic system, that Woodrow Wilson called the "informing function." 25 They emphasized that republication educated and informed the citizenry about the workings of the executive and the federal government and fostered "public faith in the responsiveness of Government." 26

I. A Framework for Analysis

Until Gravel it had not been definitely decided whether the immunity of the speech or debate clause covered activity preparatory to conduct within Congress, such as gathering information for a congressional speech, or subsequent activity outside the legislative chambers, such as republication. 27 The basic question cutting across these issues was whether a broad or narrow view was to be taken of the speech or debate clause. Coffin v. Coffin, 28 the classic treatment of the scope of legislative immunity for speech or debate although it involved a state constitutional provision stated that "the article ought not to be construed strictly, but liberally, that the full design of it may be answered." 29 Since Coffin, federal courts have framed the scope of the clause in terms of whether the activity is "legislative" or "nonlegislative." 30

Despite its wording, the clause has never been confined literally

23. 408 U.S. at 631-32.
24. 408 U.S. at 636-37 (Douglas, J.), 649 (Brennan, J).
26. 408 U.S. at 651-52 (Brennan, J.).
27. Cella, supra note 3, at 36, expressed this uncertainty in 1968:

But even where the privilege doctrine is more narrowly phrased in terms of speech and debate, innumerable practical difficulties in the application of the doctrine can readily be foreseen. Does the privilege extend to all of the language and actions of legislators serving on a legislative committee? . . . And what of a legislator, not specifically authorized or directed by any vote of the legislature, who conducts an inquiry of his own to acquire information to enable him to discharge his legislative duties in a proper manner?
28. 4 Mass. 1 (1806). The case is discussed at length in Cella, supra note 3, at 18-30.
29. 4 Mass. at 27.
to "Speech or Debate in either House." Instead, courts have taken into account a variety of factors in delineating its limits. Foremost, of course, are the purposes of the clause. Of these, the most often mentioned is the facilitation of the performance of legislative tasks, a rationale similar to that given for the immunity afforded the officers and employees of the executive branch. The second purpose, and the one most in keeping with the clause's historical origins, is to safeguard the independence of the legislature as a branch of government coequal with the executive and judicial branches.

The doctrine of legislative immunity is also related to the broader legal problem of judicial respect for the separation of powers. There is a historical judicial deference to the power of the legislature to discipline its own members. Justice Stewart, in his dissent in Gravel, relied on this in arguing that Congress, not the courts, should punish legislators for withholding information acquired during their information-gathering activities. Additionally, the general rule against inquiry by other branches into legislative motives was discerned by Justice Frankfurter to be part of the rationale underlying the speech or debate clause.

31. See, e.g., Powell v. McCormack, 395 U.S. 486, 505 (1969): "The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." See also Tenney v. Brandhove, 341 U.S. 367, 377 (1951).


33. See, e.g., United States v. Johnson, 383 U.S. 169, 179 (1965) (Harlan, J): "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for insuring the independence of the legislature." James Wilson, one of the members of the Committee on Detail that was responsible for inserting the clause into the Constitution, also recognized the relationship between the privilege and legislative independence: "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 every one, however powerful, to whom the exercise of that liberty may occasion offence." THE WORKS OF JAMES WILSON 421 (R. McCloskey ed. 1967).


35. To some extent, the association of the speech or debate clause with the separation-of-powers doctrine came about because of the special respect of the English courts for Parliament's plenary power and judicial tradition. "It is by no means an exaggeration to say that these judicial characteristics colored and influenced some of the great struggles over privilege in and out of Parliament to the very close of the nineteenth century. . . . Nowhere has the theory that Parliament is a court . . . persisted longer than in the history of privilege of Parliament . . . ." C. Wirtke, supra note 4, at 14.

36. 408 U.S. at 632.


38. Tenney v. Brandhove, 341 U.S. 367, 377 (1951). However, it can be argued that the reasons against judicial inquiry into legislative motive do not apply to inquiry
Despite frequent statements that the clause should be construed broadly to effect its purposes, countervailing interests have been recognized in historical limitations on the scope of the immunity. Legislators have always been prone to abuse the privilege of their office; unfortunately, the speech or debate clause has protected some legislators from being punished for these abuses. The slanderous remarks made by Senator Joseph McCarthy in the early 1950's constituted such flagrant abuse of the privilege that consideration was given to amending the clause. The continuation of the immunity, even for speech that the speaker knows to be false, is apparently based on the theory, articulated by Judge Prettyman in Barsky v. United States, that the "individual hurt" is overbalanced by "the public necessity for untrammeled freedom of legislative . . . activity." Nonetheless, when individual or public interests have been harmed by the conduct of legislators outside of Congress, the courts have readily enforced criminal and civil sanctions. In addition, the rights of individuals have been vindicated in suits against the employees who implement policies of the legislators outside of Congress, even though the congressmen themselves could not be sued for enacting the policies.

The tendency of the judiciary to confine immunity to "things generally done in a session of the House by one of its members in relation to the business before it" may be more than an effort to stay as close as possible to the language of "Speech and Debate." Delineating the limits of the clause in this manner probably represents a compromise between divergent interests. In balancing these interests the courts have given primary significance to voting and speeches within the legislative chambers. Unfortunately, like the courts before it, the Gravel court contented itself only with broad statements about the clause. It neither detailed specifically the interests to be served by the clause, nor indicated precisely what weight into an individual legislator's motives, potentially at issue in a case like Gravel. See, e.g., Note, 75 Yale L.J. 335, supra note 3, at 340. See also text accompanying note 52 infra.

30. See Comment, 73 Colum. L. Rev. 125, supra note 3, at 126-29.
31. See, e.g., United States v. Bramblett, 348 U.S. 503 (1955); Burton v. United States, 202 U.S. 344 (1906); May v. United States, 175 F.2d 994 (D.C. Cir. 1949); United States v. Dietrich, 126 F. 664 (C.C.D. Neb. 1904). Perhaps in recognition of this problem, Congress has delegated the responsibility for crimes such as bribery to the courts for the past one hundred years. See Note, 75 Yale L.J. 335, supra note 3, at 341.
33. 167 F.2d at 250.
34. See cases cited in note 40 supra.
is to be given to these interests in relation to competing considerations. Furthermore, the Court failed to define clearly the proper role of the judiciary in adjudicating conflicts between different branches of the government and the place that the clause must necessarily have in defining this role. 47

The thesis of this Note is that the Court’s imprecision was more than a missed opportunity to clarify the underlying rationale of the limitations on immunity, for it led the Court to restrict the scope of immunity unwisely in one important respect. The application of the clause to Gravel’s activities at the subcommittee meeting and to his aide, to the extent Rodberg was engaged in legislative conduct, were unexceptionable. Moreover, although the bases for the Court’s limitation could have been discussed more adequately, its refusal to extend the immunity to private republication was not ill-founded, either in terms of the competing interests at stake or in terms of the historical scope of the clause. However, it appears that the majority erred in refusing to apply the immunity to questioning about a legislator’s sources.

II. SHOULD LEGISLATORS AND THEIR AIDES BE IMMUNE FROM QUESTIONING ABOUT THEIR SOURCES?

The majority never made clear the basis for its ruling that congressmen are not immune from questioning about their sources of information. This may have been due to the fact that the issue was not raised in the petitions for certiorari or in the written briefs and was only tangentially discussed at oral arguments. 48 In any case, the majority’s conclusion is not entirely inconsistent with the traditional interpretation of the scope of the immunity. Despite Justice Brennan’s argument to the contrary, 49 the ruling is not inconsistent with United States v. Johnson, 50 in which the Supreme Court held that a

47. United States v. Brewster, 408 U.S. 501 (1972) (prosecution of former senator for solicitation and acceptance of bribes), probably represents the most complete judicial discussion of the various factors relevant to determining the proper limits of the speech or debate clause. In reaching its decision, the Court emphasized that the immunity afforded by the clause was not always a benign force and that it was often subject to abuse. 408 U.S. at 517. But the Court reasoned that the immunity was not applicable to Senator Brewster because no inquiry into legislative acts was "necessary for the government to make out a prima facie case." 408 U.S. at 525. It also downplayed the threat of a substantial increase in the power of the executive and judicial branches over the legislative because it felt that there was very little historical evidence of the existence of the threat and that certain elements of the American system—the free press and the vigilance of the public—would not allow such a state of affairs. 408 U.S. at 523-24. Also, the Court expressed skepticism about the willingness and ability of the legislative branch to punish its own members for misconduct occurring outside Congress. 408 U.S. at 518-20.

48. 408 U.S. at 630 (Stewart, J., dissenting in part).

49. 408 U.S. at 662-63.

congressman who accepted a bribe to make a speech in the Congress was immune from prosecution. According to Brennan, questioning about sources should not be allowed in *Gravel*, just as the bribery prosecution was not allowed in *Johnson*, because close scrutiny of conduct leading up to legislative acts would effectively diminish legislative freedom. However, it could be argued that criminal acts of third parties, which were involved in *Gravel* though not in *Johnson*, can be investigated by a grand jury without investigating the legislative motives of the legislator. The *Johnson* Court did appear to rest its decision on the impropriety of investigating legislative motives, finding that the clause protects them from scrutiny.

Nevertheless, if it is assumed that the purposes of the speech or debate clause are to preserve the balance of power between the three branches of government and to encourage knowledgeable and effective legislative activity, two arguments made by the dissents in *Gravel* deserve serious consideration. First, questioning legislators about their sources of information may directly deter legislative activity. To begin with, the possibility of a subsequent investigation into a legislator's acquisition of information may deter the legislator from using the information in a speech and thereby act as a constraint on his behavior. This would be especially likely if the legislator is unwilling to risk harm to his source. In addition, as Justice Stewart pointed out, this deterrent effect is magnified by the potential for abuse by grand juries that has resulted from the relaxed rules governing their investigations.

Second, questioning legislators about their sources may make sources unwilling to provide the information necessary for the efficient performance of legislative duties. This argument is analogous to that rejected by the Court in *Branzburg v. Hayes*, which held that newsmen have no immunity from questioning about those of their sources who are allegedly involved in criminal activities. In both cases, those who sought immunity argued that it should attach

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51. 408 U.S. at 662-63.
52. 383 U.S. at 177, 180-85.
53. See text accompanying notes 51-53 supra.
54. 408 U.S. at 631-32. See, e.g., Wilson v. United States, 221 U.S. 361 (1911). “In recent years, . . . the federal grand jury has assumed a broad investigative role and a corresponding potential for conduct which may result in embarrassment, infamy, and reprisal to innocent individuals.” Boudin, *The Federal Grand Jury*, 61 Geo. L.J. 1, 2 (1972).

This potential for abuse could be considerably reduced by allowing a legislator to obtain a protective order limiting a grand jury's questioning when it can be shown that the investigation is being conducted in bad faith or for the purpose of disrupting the legislator's activities. The Court has suggested this remedy would be available to a newsmen if he were harassed by a grand jury. *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972).

to constitutionally protected freedoms of expression, and, in both cases, the argument assumed that the access to information necessary to exercise those freedoms would not be available unless the immunity of the sources that supply information could be assured. However, *Branzburg* should not be dispositive, for there is greater justification for the immunity in the case of legislators than in the case of newsmen. Legislators tend to be more responsive to the public interest because they are subject to the control of fellow legislators, through the rules of legislative bodies, and of the public, through its use of the ballot. Selected by the people to be the nation's leaders, they arguably have character attributes that make them likely to use the information for productive ends. Furthermore, although it may be argued that availability of information to all is important for the formation of public policies in a democracy, it is particularly crucial that those who make the actual decisions have access to all necessary information. Finally, the fact that legislators, unlike newsmen, are specifically accorded immunity in the text of the Constitution is of great weight; there is no problem of justifying the granting of immunity to one special group, as there was in *Branzburg*.

Three questions must be addressed in order to evaluate the above two arguments. First, is the type of information provided by covert sources important? second, is there in fact a connection between the immunity and the availability of the needed information? and, third, even if there is such a relationship, should the immunity be denied because of stronger competing interests?

It appears that the kind of information provided by these sources is important if the two goals facilitated by the speech and debate clause are to be adequately served. For Congress to perform its tasks properly, it must have access to all empirical data necessary to chart the wisest legislative courses. As a unanimous Supreme

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56. See Gravel v. United States, 408 U.S. at 615; Branzburg v. Hayes, 408 U.S. at 679-80.
57. See Comment, 73 COLUM. L. REV. 125, supra note 3, at 149.
58. See Yankwich, supra note 3, at 576-77.
59. See Note, 86 HARV. L. REV. 1, supra note 3, at 198 n.46.
60. 408 U.S. at 630 (Stewart, J., dissenting in part). See also 408 U.S. at 663 (Brennan, J., dissenting); Comment, 73 COLUM. L. REV. 125, supra note 3, at 149.
61. In *Branzburg* the Court noted: "Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege .... The informative function asserted by representatives of the organized press ... is also performed by lectures, political pollsters, novelists, academic researchers, and dramatists." 408 U.S. at 704-05. See Comment, 73 COLUM. L. REV. 125, supra note 3, at 149.
62. Because of the widespread practice of classifying information in the executive branch, see *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1200-02 (1972) (hereinafter *Developments—National Security*), disclosure of most of the information that Congressmen are likely to desire
Court recognized in *McGrain v. Daughtery*:

"A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which is not infrequently true—recourse must be had to others who do possess it." The legislature also has the important role, as the watchdog of the executive branch, of ensuring that legislative directives are carried out. As Woodrow Wilson said: "[q]uite as important as legislation is vigilant oversight of administration."

Furthermore, outside information may play an important role in maintaining the balance of power between the branches of government. The executive, as the operational branch of government, has primary knowledge of its own policies and of the manner in which they are being implemented; the legislature, which must oversee and evaluate, has the burden of uncovering the information that the executive does not voluntarily disclose. This is of considerable significance given the tendency of the executive to supply voluntarily only information that reflects favorably on its proposals or operations, and given the recent transfer of many operational functions from the Congress to the executive. The resultant legislative powerlessness will also harm Congress' relative influence with the citizenry; in President Truman's words, "an uninformed Congress surely will forfeit a large portion of the respect and confidence of the people."

If this information is necessary to serve the purposes of the

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and would be unable personally to obtain is likely to be a criminal act. See 18 U.S.C. § 793 (1970).

64. 273 U.S. at 174-75.
67. *See note 33 supra. Even if this information only aids Congress in enacting legislation, it can play an important role in maintaining a balance of power between the executive and the legislative branches. See J. ROBINSON, CONGRESS AND FOREIGN POLICY-MAKING 173 (rev. ed. 1967); S. BAILEY, THE NEW CONGRESS 86-88 (1966).*
68. *See Developments—National Security, supra note 62, at 1210. Because the executive branch presently has a greater ability to bring information together, it will inevitably be the primary congressional source of information. J. ROBINSON, supra note 67, at 178-79.*
70. *See E. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 2 (2d rev. ed. 1956).*
clause, it must next be asked whether immunity for sources is needed to gather information. Arguably, information derived from inside sources is of relatively little importance. Although no empirical data are available, even if the legislative immunity applied, inside sources might be unlikely to supply important data to legislators because of other available outlets. Newsmen, for example, are initially more accessible than legislators and are more interested in inside crime stories that appeal to reader interest. More important, newsmen have a greater opportunity to cultivate networks of sources because of their nonofficial status.

However, in an important group of recent incidents involving the transmittal of information from within the executive, inside sources have provided considerable information to legislators. There have been many instances in which legislators have received tips from lower or middle level executive officials who might have otherwise been deterred by the threat of a grand jury investigation. The information disclosed has been qualitatively, if not quantitatively, significant, for it has aided the Congress in playing its watchdog role and has helped to redress the imbalance of power caused by congressional ignorance about the workings of the rest of the government. Although never empirically proved, it seems that an inside informant would be more likely to divulge information if his anonymity could be unqualifiedly guaranteed.

It may also be argued that immunity from questioning about sources is not essential because Congress has alternative mechanisms for acquiring information. Its most potent means of acquiring information is the legislative investigation. Additionally, through its various powers—over appropriations and over the ratification of treaties, for example—Congress can coerce those who have necessary information. Finally, if necessary, Congress could completely eliminate the criminal laws against the release or receipt of the kind of data that it needs to perform its legislative functions properly.

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73. See 408 U.S. at 630 (Stewart, J., dissenting in part).


75. See Bishop, The Executive’s Right of Privacy: An Unresolved Constitutional Question, 66 Yale L.J. 477, 486 (1956); “Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chances of getting either no legislation or undesired legislation.”

76. See Note, 86 Harv. L. Rev. 1, supra note 3, at 199. See also United States v. Brawner, 408 U.S. 501, 524 (1972): “If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of the federal bribery laws . . . .”
these threats are effective, the importance of encouraging inside informers is considerably lessened.

Upon examination of these alternative means of obtaining information, however, it becomes clear that informers may still play a strong role in ensuring that all important data is available to congressmen. Unless Congress is apprised of certain developments by inside sources, it will not know what questions to ask in investigations or whether the answers it receives are correct and complete.\(^{77}\) For the same reason, dependence upon those whom it is questioning also hinders Congress' ability to obtain information through the coercive use of its powers over appropriations and treaties. Additionally, the effectiveness in uncovering information of even a focused investigation can be considerably diminished by the exercise of executive or fifth amendment privileges.\(^{78}\) Moreover, those who break the old laws are often best qualified to provide information about the ineffectiveness of those laws and the need for reform. A good example is the Pentagon Papers incident itself.\(^{79}\)

Changing the disclosure laws themselves is not a satisfactory alternative, for an effective change would depend upon the cooperation of the majority of the legislators, while the clause, which protects legislators as individuals, guarantees members with a minority viewpoint access to information so that they too can intelligently advocate their views. Their access to sources should be constitutionally, not legislatively, protected.

The third question deals with whether countervailing considerations militate against an immunity for questioning about sources. Both the orderly and efficient administration of justice and the interests protected by the laws violated by the third party would be served by the testimony of the legislator. Since early in the development of English law it has been recognized that the basic interest promoted by the duty to testify at judicial proceedings is the full ascertainment of facts.\(^{80}\) In the *Gravel* context, disclosure of all the facts is important to aid a grand jury to fulfill its dual role of investigating crimes and protecting the accused until the charges are

\(^{77}\) As Senator J. W. Fulbright said in response to the U.S. Ambassador to Laos' failure to mention large-scale bombing missions in Laos: "We do not know enough to ask you these questions unless you are willing to volunteer the information. There is no way for us to ask you questions about things we don't know you are doing." *Senate Comm. on Foreign Relations, 92d Cong., 1st Sess., Security Classification as a Problem in the Congressional Role in Foreign Policy* 30 (Comm. Print 1970).


found to be credible. Because of the existence of other testimony, that of legislators will rarely be determinative in either grand jury proceedings or in civil and criminal trials. But the invocation of the speech or debate immunity for questioning about sources will always result in some damage to the interest in full disclosure.

Moreover, the interests represented by the specific laws in question will always be sacrificed somewhat by extending the immunity. Although the laws involved may be meant to protect interests in life and property, in a case where legislative immunity is invoked the interests will most often be, like those in *Gravel*, designed to protect what one writer has called the executive's right of privacy. Despite all that has been said recently about the "people's right to know," it is almost universally conceded that the executive may have a legitimate need for secrecy with regard to some of its various functions, such as military responsibilities in both war and peace, orderly diplomacy, the promotion of close and efficient working relationships among government personnel, and the maintenance of the confidentiality of governmental files on individuals. This need for secrecy is explicitly recognized in the Constitution and since the founding of the Republic presidents have successfully asserted their right to some executive nondisclosure. A variety of both statutory and informal means have been used to ensure secrecy: the hiring of trustworthy personnel, the use of codes and classifica-

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82. See generally Bishop, supra note 75.
84. Developments—National Security, supra note 62, at 1190-91. This secrecy is particularly necessary in the nuclear age because strategic advantages are often the result of technological information. Id.
85. Bishop, supra note 75, at 478: "[T]he files of the State and Defense Departments are . . . full of records of conversations between the governments of the United States and other countries, the disclosure of which might benefit the political fortunes of the Congressmen who disclosed them in approximate proportion to its adverse effect on relations between the two countries." See also Secretary Rogers' News Conference of July 1: The Duty of the Executive Branch To Protect the National Security, 65 DEPT. STATE BULL. 78, 79-80 (1971).
86. See Bishop, supra note 75, at 487-88; Developments—National Security, supra note 62, at 1192.
87. See Bishop, supra note 75, at 487. Such files often contain derogatory and untrue information. Id.
88. U.S. CONST. art. I, § 5: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their judgment require secrecy . . . ."

The power to conduct foreign relations was given to the executive rather than to Congress, and a part in making treaties was given to the less numerous Senate rather than to the House, in part because of a need for secrecy. Henkin, supra note 83, at 273-74.
tion systems, and the enactment of laws to protect secret information. Thus, there is a recognized interest in preventing the release of information presently concealed by the executive branch, an interest that would be sacrificed to some extent by any impediment to the enforcement of security laws.

But when the recipient of information is a legislator, this countervailing consideration should not be determinative. It can fairly be assumed that there are few national enemies among congressmen. Past experience suggests that Congressmen will seldom publicly reveal highly sensitive information in a way that would compromise any national interest. Furthermore, it is arguable that informants should be encouraged to give their information to legislators, rather than to newspapermen or others likely to disseminate it widely. Finally, legislators need information about the enforcement of enacted laws to see whether these laws are serving their intended purposes. To the extent that the laws represent the public will, they only do so if they are operating in the way that the legislature expected them to operate.

It may be suggested that in each fact situation the judiciary should consider these competing interests before deciding whether to apply the immunity. The courts could simply balance the interests in each case, as suggested by Justice Stewart in Gravel. Or, as advocated by Justice Stewart's dissent in Branzburg, the Court could in each instance require the prosecution to prove both that its interest in having the legislator testify about his sources is a compelling one and that there are no alternative ways to acquire the information.

The two basic reasons given by the Court in Branzburg for rejecting these approaches also apply to Gravel. First, both methods would do little to encourage sources to divulge information to legislators, for an informant would never be certain that his anonym-

90. Henkin, supra note 83, at 275. For a description of the system used to classify secret information, see Developments—National Security, supra note 62, at 1198-205.

91. See Note, 86 HARV. L. REV. 1, supra note 3, at 198 n.46.


Besides Gravel's disclosure of the Pentagon Papers, the most serious case of congressional disclosure was Senator Burton K. Wheeler's revelation in 1941, while the operation was still in progress, that the Navy was occupying Iceland. See Bishop, supra note 75, at 486 n.41.

The House of Representatives apparently has no rules that govern the handling of classified information, but the Senate rules allow expulsion of a Senator who reveals such information. Developments—National Security, supra note 82, at 1209.


94. See generally Note, 86 HARV. L. REV. 1, supra note 3, at 198-201.

95. 408 U.S. at 632.

96. 408 U.S. at 739-40.
ity would be preserved.97 As the Court in Branzburg noted: "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem."98

Second, the judicial balancing approach raises problems concerning the competence of courts to decide these cases.99 Because the facts and interests involved may be varied, and the number of cases decided under the clause is so limited, framing an adequate and comprehensive standard of decision might be difficult.100 Moreover, when classified information is at issue a court may not be able to balance the interests adequately because of the unavailability of necessary data.101 Finally, in balancing the interests involved, courts would be required to decide whether or not to enforce different laws. As the Court in Branzburg said: "[Courts] would be making a value judgment that a legislature had declined to make . . . ."102

Because of the difficulties inherent in a case-by-case approach, the only alternative to shutting off a qualitatively important source of information103 is an absolute immunity from questioning about sources, at least where the legislator is not himself involved in any criminal activity other than the receipt of the information. This approach is doctrinally justified to prevent the "indirect impairment"104 of those activities at the core of the speech or debate clause—voting and speech-making. The immunity should here be ex-

97. 408 U.S. at 702. See also Note, supra note 80, at 340-41.
98. 408 U.S. at 702.
99. 408 U.S. at 705-06. See also Henkin, supra note 85, at 278-79.
100. This problem was described in Baker v. Carr, 369 U.S. 186, 207 (1962) as "a lack of judicially discoverable and manageable standards for resolving" a controversy. But see Scharpf, supra note 34, at 555-58.
102. 408 U.S. at 706.
103. One other possible approach is embodied in S. 2965, 92d Cong., 1st Sess. (1971). This bill would create an expert bipartisan disclosure board that would subpoena upon request documents that an executive agency has refused to supply. The board would balance the interests at stake to determine whether and to what extent the documents should be released. The President would have the power to override the board, but his decision would be appealable to the United States Court of Appeals for the District of Columbia. This proposal was discussed in Note, 86 Harv. L. Rev. 1, supra note 3, at 199-200. The proposal would not adequately solve the problem of congressional unawareness of many documents. See id. at 199 n.5. Also, it gives no recourse to the legislator whose perception of the public interest is out of step with that of the board. Finally, the process could be somewhat slow and cumbersome.
104. "Indirect impairment" of congressional deliberations was the standard used by the court of appeals to determine the scope of the speech or debate clause. United States v. Doe, 455 F.2d 753, 760 (1st Cir. 1972).
tended beyond the literal meaning of the words of the clause for the same reasons that the Court in *Gravel* extended it to cover legislative aides: "The Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view . . . . Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threaten to control his conduct as a legislator." This position is also supported by the relative importance of the competing interests in the contemporary world. As Professor Bernard Schwartz has noted: "The overriding peril of the present century is the superstate with its omnipotent administration, unrestrained by any checks on its all pervasive regulatory activities. . . . If the elected representatives assert the right to lay bare all that goes on within the executive, that danger may be avoided."

The scope of this legislative immunity should not be exaggerated. In spite of the importance of a legislative need for information, the line between protected and unprotected information gathering should be drawn to protect only those instances where the legislator is implicated merely in the receipt of information and not in any other alleged crime. Criminal conduct such as fraud or breaking and entering should not be protected even though the information gained may be relevant to legislative activities. A wider immunity would totally sacrifice the ultimate interests protected by the specific statutes under investigation—privacy, security of person and property, and secrecy. Under an immunity limited to sources, however, these interests can still be protected to some extent, for the informant would still be liable for the original criminal conduct, and the limitations on the immunity would deter the congressman’s participation in the original criminal act. Additionally, Congress’ interest in acquiring information would be adequately secured by encouraging sources to divulge information through a source immunity, without the excessive costs inherent in an immunity for all criminal information gathering acts.

III. SHOULD PRIVATE REPUBLICATION BE IMMUNE?

The Court’s refusal to grant immunity to the efforts of Senator Gravel and his aide to have the Papers privately republished pre-

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105. 408 U.S. at 617-18.


107. Similarly, the immunity should not be extended to include information gathering conduct violating an individual’s constitutional right. A court should be allowed to balance the interests involved in such cases, as it has traditionally done. *Cf. Barenblatt v. United States*, 360 U.S. 109 (1959). See generally Note, 86 HARV. L. REV. 1, supra note 3, at 200 n.58.
sents problems similar to those discussed above. Again, the basic inquiry is whether activity that normally takes place outside Congress should be immune. Although many of the same interests are at stake, there is one important difference between this case and the question of immunity from questioning about sources: At the time of republication, clearly protected conduct, voting and speechmaking, has already taken place. Immunity for republication, then, unlike that for questioning about sources, does not clearly facilitate these purely legislative acts. 108

The first question is whether republication should be considered a protected “legislative act” because it aids in the performance of the “informing function” of Congress. The informing function encompasses four very important interests. The first is the interest in an educated and informed citizenry. 109 Information may be of public concern because it relates to bills pending before Congress or because it acquaints the public with the purposes and ideas of its elected representatives.110 The legislature gathers and presents such information about other branches of the government in its role as “watchdog.”111 Although information conveyed by the legislature in performing this function may be to some extent protected by the first amendment,112 because Congress plays a particularly important role in guiding, shaping, and informing public opinion113 society has a special interest in giving a protection to legislators beyond that accorded by the first amendment.

A second interest to be promoted is the assurance that the legislature will remain an independent center of power. The chief executive and his subordinates presently wield enormous influence in shaping public opinion on current issues and in encouraging public acquiescence in executive action. It should be noted that executive department heads and lower officials are protected by a judicially created immunity in many of their public communications.114 Be-

108. 408 U.S. at 625-26.
109. This aspect of the informing function is discussed at length by Justice Brennan. See 408 U.S. at 649-56.
113. ‘Led and checked by Congress, the prurient and fearless, because anonymous, animadversions of the Press, now so often premature and inconsiderate, might be disciplined into serviceable capacity to interpret and judge. Its energy and sagacity might be tempered by discretion, and strengthened by knowledge. One of our chief constitutional difficulties is that, in opportunities for informing and guiding public opinion, the freedom of the Press is greater than the freedom of Congress.” W. WILSON, supra note 25, at 305-06.
114. See, e.g., Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483
cause of present executive strength, the legislature must also be able to convey its viewpoint in order to build public support for its positions. The release of the Pentagon Papers is instructive in this regard; if the legislature had had access to and been able to disseminate earlier the contents of the Papers, the American involvement in Viet Nam brought about by the executive might have been contained.

The third interest involved in the informing function is described by Justice Brennan as the instillation in the people of confidence in their government.\textsuperscript{115} This sense of security comes in part from the people's awareness of the activities and intentions of their representatives. To some extent it also comes from the people's knowledge that they are not totally powerless to affect either the legislators themselves or, through their legislators, the executive. In general, the dissemination of information by legislators, like all free expression, encourages the stability and consensus necessary for any political democracy.

Fourth, there is a special interest to be served in allowing individual legislators like Gravel to reach a wider audience despite the opposition of most or all of their fellow legislators. Underlying both the first amendment and the informing function is the notion that in a democracy even the lone dissenter's voice is a vital part of any public debate.\textsuperscript{116} To this end the immunity is conferred by the clause on individual legislators;\textsuperscript{117} even a maverick senator represents his constituents. It should also be noted that executive encroachment on Congress is likely to be most often directed at individuals, since it is more difficult and politically risky to attempt to intimidate a numerically large proportion of the legislature.\textsuperscript{118}

The legitimacy of the informing function is recognized in several legal mechanisms. In \textit{Gravel} Justice Brennan pointed to the franking privilege, telephone and telegraph allowances, stationary allotments, and favorable prices on reprints from the \textit{Congressional Record} as examples of instances where Congress has undertaken to perform

\textsuperscript{115} 408 U.S. at 651-52.

\textsuperscript{116} See generally T. Emerson, \textit{supra} note 112, at 4-7.

\textsuperscript{117} United States v. Brewster, 408 U.S. 501, 548-49 (1972) (Brennan, J., dissenting) quoting Coffin v. Massachusetts, 4 Mass. 1, 27 (1804): [I]t appears . . . that the privilege secured by [the clause] 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, which is paramount to the will of either or both branches of the legislature. (emphasis added by Justice Brennan).

\textsuperscript{118} See the discussion of congressional weapons that can be used against the executive in text accompanying notes 74-76 \textit{supra}. 

this function. The most prominent recognition of the function is the journal of proceedings clause of the Constitution.

Congress' ability to inform would be promoted if private republication were immunized. As Justice Brennan suggested, a “wider” audience is reached through republication by private means than by the Congressional Record, which very few citizens read regularly, or the newspapers, which cannot be depended upon to reprint in their entirety bulky, detailed reports like the Pentagon Papers. But even where the informing function has been recognized as a valid legislative task, its protection has been limited by competing interests. For example, in United States v. Rumely, Justice Frankfurter stated:

Although the indispensable “informing function of Congress” is not to be minimized, determination of the “rights” which this function implies illustrates the common juristic situation thus defined for the Court by Mr. Justice Holmes: “all rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.”

There are four problems in extending the immunity granted by the speech or debate clause to republication. First, such an extension would be a serious break with precedent. While the famous English case Stockdale v. Hansard, cited by the Gravel majority, is not itself strong authority, two cases cited in Stockdale unequivocally hold that republication is not within the scope of the English speech or debate clause: The King v. Lord Abingdon, in which Abingdon republished at his own expense a House of Lord's speech that charged a Sherman of Gray's Inn with improper conduct, held that an action would lie for libel, although the words would not be punishable by the courts had they merely been delivered in Parlia-

119. 408 U.S. at 650.
121. 408 U.S. at 649.
122. In fact, the failure of the press to publish the more complete version of the Papers that Gravel had read into the subcommittee record was the factor that motivated him to go to private book publishers. See S. Ungar, supra note 6, at 268.
123. 345 U.S. 41 (1953) (congressional committee had no power under authorizing resolution to compel disclosure of customers by seller of “political” books).
126. 408 U.S. at 622-24.
127. See 408 U.S. at 658-59 (Brennan, J., dissenting); Comment, 73 COLUM. L. REV 125, supra note 3, at 147.
ment, and *The King v. Creevey* held that a member of the House of Commons could be convicted for republishing a libelous speech made in the House of Commons. Justice Story's view of the scope of the speech or debate clause was in accord with this English precedent: "[A]lthough a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere, yet, if he publishes his speech, and it contains libelous matter, he is liable to an action and prosecution therefor as in common cases of libel. And the same principles seem applicable to the privilege of debate and speech in Congress."  

The two lower federal court cases that treated the question of private republication prior to *Gravel* followed these English decisions. In *Long v. Ansell*, the court indicated that the immunity would not be a defense to a claim of libel against a senator who allowed copies of the *Congressional Record* containing allegedly defamatory speech to be circulated in the mails. And in *McGovern v. Martz*, it was held with regard to the defendant's counterclaim for libel that the absolute privilege to inform fellow legislators becomes a qualified privilege for republication by unofficial circulation of the *Congressional Record*; the legislator is privileged only if he does not act maliciously in circulating reprints or copies of the *Record* to congressmen.

These precedents may not be directly relevant to *Gravel* because they involve immunity from libel or slander, rather than from criminal prosecution. It could be argued that an exception should be made for actions like Gravel's because, unlike the slanderous expression in *Long* and *McGovern*, Gravel's conduct was directly related to a purpose of the clause—preserving the balance of power between the executive and legislative branches of the federal government.

However, the reason for the limitations on the immunity found in these precedents is equally applicable to *Gravel*. As Lord Denman indicated in *Stockdale*, that decision was based on the assumption that republication in general, unlike actual debate, was not intended to be immune. In *Long*, the immunity was not applied to republication because the "acts charged have only a remote connection

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131. 69 F.2d 386 (D.C. Cir.), affd., 293 U.S. 76 (1934).  
132. 69 F.2d at 389 (dictum).  
134. 182 F. Supp. at 347. However, the privilege does extend to material inserted by a Congressman into the *Congressional Record* with the consent of the House or Senate, even if the material is not read on the floor. 182 F. Supp. at 347.  
135. 182 F. Supp. at 348.  
with the speech.\textsuperscript{137} And in \textit{McGovern}, it was stated that republication should not be given speech or debate immunity because the "reason for the rule—complete and uninhibited discussion among legislators—is not here served."\textsuperscript{138} Thus, although the speech-making and report-writing clearly protected by the clause do incidentally inform the public, they are protected because they involve communication with other legislators in the process of legislative deliberation, not because they serve the informing function. This process is not served by republication outside the legislature, whether the laws involved protect individual reputations or national security.

In \textit{Doe v. McMillan},\textsuperscript{139} decided after \textit{Gravel}, the Supreme Court, in holding that there is no immunity for the Superintendent of Documents and the Public Printer when they print a subcommittee report ordered to be printed by Congress where the report infringes on important personal rights, found that the performance of the informing function was not essential to the legislative activity meant to be protected by the speech or debate clause.\textsuperscript{140} \textit{Doe} demonstrates a judicial approach to the informing function consistent with that of the cases discussed above.

The second justification for not extending the immunity to republication is that speeches outside the Congress, even those that merely repeat what was said within legislative chambers, are not afforded protection.\textsuperscript{141} Both these speeches and republication involve the communication of views by the legislator outside the halls of Congress and both similarly promote the informing function.

The third problem with extending the immunity to private republication is that important competing interests would be sacrificed. One kind of harm done would be to individual privacy and reputation.\textsuperscript{142} More important, an extension of the clause may seriously impair those interests associated with the activities of the executive branch.\textsuperscript{143} The sacrifice of these interests was acceptable when dealing with an immunity for questioning about sources; however, the sacrifice may become unacceptable for an action not closely related to those activities at the core of the clause—voting and speecchmaking within Congress. Although any argument that the national security was immediately endangered by the disclosure of the Pentagon Papers is doomed to failure,\textsuperscript{144} it is certainly not

\textsuperscript{137} 69 F.2d at 389.
\textsuperscript{138} 182 F. Supp. at 397 (emphasis original).
\textsuperscript{139} 41 U.S.L.W. 4752 (U.S., May 29, 1973).
\textsuperscript{140} 41 U.S.L.W. at 4755.
\textsuperscript{141} 41 U.S.L.W. at 4755.
\textsuperscript{142} See note 87 supra and accompanying text.
\textsuperscript{143} See notes 82-90 supra and accompanying text.
difficult to imagine a case in which the public release of secret information by a legislator would irreparably harm the national interest, especially in time of war.\footnote{145} Even though the absence of legislative immunity does not guarantee that a congressman will not release such information outside Congress, disclosure is deterred because of the risk of criminal sanctions.

Although these interests may be impaired to some extent by protected legislative expression within Congress, the potential for harm would be much greater if the privilege was extended, for republication would lead to wider dissemination. Additionally, the opportunity for control by the legislature itself is much greater if the relevant conduct occurs within Congress or at official legislative functions. To some extent, members prone to misconduct will be discouraged, when within Congress, by informal social pressures and by formal rules from straying too far from the norm of responsible behavior.\footnote{146} But legislators would be less amenable to such controls if activities outside the halls of Congress or its committee rooms were immunized, for Congress is ill-equipped to investigate, try, and punish its members for the wide range of activity that they may engage in outside of Congress.\footnote{147}

The fourth reason for not extending the immunity to republication is that there are other ways in which the dissemination of information to the public can be accomplished. Even if Senator Gravel could not get the newspapers to report fully his version of the Pentagon Papers, news about many of the proceedings of Congress are conveyed to the public through the \textit{Congressional Record}, the newspapers, radio, and television. Moreover, republication would be deterred only in those few cases where there was a threat of criminal or civil liability.

Furthermore, the refusal to extend the absolute immunity of the speech or debate clause to republication does not preclude the application of a judicially fashioned immunity in civil cases similar to that for executive republication.\footnote{148} The scope of this immunity could be defined with regard to the competing interests present in different kinds of cases. Although this approach has not as yet been accepted by the Supreme Court, it has been recognized in several lower court cases in which the speech or debate clause has been interpreted.\footnote{149}

\footnotetext[145]{See note 92 \textit{supra}.}
\footnotetext[146]{An even more important source of control comes from the enforcement of specific rules designed to protect the national security. See, \textit{e.g.}, the congressional rules against disclosing such information at note 92 \textit{supra}. One of the historical assumptions underlying the immunity for speech or debate in the legislature is that the Congress itself would retain the right, within limits, to discipline its members. See \textit{generally} Cella, \textit{supra} note 3, at 37-41.}
\footnotetext[147]{United States v. Brewster, 408 U.S. 501, 518 (1972).}
\footnotetext[148]{See note 114 \textit{supra}.}
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Most importantly, as long as the legislators themselves have access to the information, the values ultimately promoted by the performance of the informing function would not be greatly hindered, even if specific bits of data could not be conveyed to the public. As noted above, society's interest in legislative access to all of the facts is stronger than its interest in total access for the people at large because congressmen are immediately entrusted with the task of lawmaking. Also, if the legislators are fully informed, they can to a considerable extent instruct public opinion as to the import of sensitive data even if they are unable to reveal details.

Unfortunately, the interests of dissident legislators will be sacrificed to some extent by not applying the clause to republication. It is true that such congressmen may be unable to express their views publicly when the immunity is thus limited: They are subject to the regular criminal and civil laws for communication outside Congress, and their opportunity to disseminate some kinds of information within the legislature itself could be constricted by the rules imposed by the majority. But the public expressions of minority legislators will not be totally cut off. To begin with, the criminal or civil laws and the rules of the legislature will deter them in only the few cases where the laws apply. Furthermore, they may still persuade the majority of legislators to change the rules to allow them to present the data within the Congress without penalty. And, even if the laws are not changed, under the first amendment doctrine of prior restraint they will almost always be able to reveal their information publicly if they are willing to risk subsequent conviction. Nonetheless, this cost of limiting the immunity is considerable.

However, in sum, the majority's refusal to apply the immunity to private republication is a justifiable accommodation of strong competing interests in accordance with the historic interpretation of the scope of the speech or debate clause.

Even though both involve some activity outside the halls of Congress, there are several reasons for preferring immunity for questioning about sources over immunity for republication. First, the interest in access to information is greater for legislators than for average citizens. Second, many of the basic values promoted by republication can be served to some extent without immunity as long as the legislature has the information in the first place. Third, the

150. See text accompanying notes 91-93 supra.

acquisition of relevant data is more directly related to the performance of the law-making activity at the core of the speech or debate immunity than is republication. Fourth, the speech or debate clause has historically been interpreted to include immunity for sources and not republication. It should also be noted that the argument favoring immunity for questioning about sources is stronger if there is no immunity for republication, for the data acquired from sources is not as likely to be harmfully disseminated. For these reasons, the Court’s interpretation of the immunity with respect to republication appears to be acceptable, but its failure to find an immunity for questioning about sources appears to be historically and practically unacceptable.