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The Supreme Court Tramples Gravel

BY LAWRENCE R. VELVEL*

From the standpoint of protecting political and civil freedoms, the cases decided by the Supreme Court during the last few weeks of its 1971 term were a mixed bag at best. It is true that some of the Court's rulings were favorable to those who would protect political freedoms: the cases which struck down governmental wiretapping without a warrant¹ and which protected the right of SDS to official recognition on campus² would be two preeminent examples in this category. But it is equally true that, with the four Nixon justices providing the hard core, in a number of other cases the Court delivered some major blows to important political freedoms. The more prominent cases of this type come tripping quickly from the tongue. The Court allowed shopping centers to stop people from peacefully handing out handbills on vital subjects;³ it did not permit citizens to judicially attack the army's surveillance of dissenters and others;⁴ it held that the government can call newsmen before grand juries;⁵ it ruled that the government can keep Marxist thinker Ernest Mandel out of the country;⁶ and—the focal point of this article—it delivered some highly questionable rulings in the case of Senator Mike Gravel.⁷

As is well known, on June 29, 1971 Senator Gravel called a night meeting of his Senate Subcommittee on Buildings and Grounds. At the meeting he read from the Pentagon Papers and then placed 47 volumes of the Papers in the public record.

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² Healy v. James, 408 U.S. 169 (1972).

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Later on, he arranged for the Papers to be published by Beacon Press.

As part of its war against those who revealed the Pentagon Papers, the government wanted to have a grand jury investigate Gravel's conduct. Gravel's position was that such an investigation was barred by the Constitution's speech and debate clause, which says that "for any Speech or Debate in either House They [Senators and Representatives] shall not be questioned in any other Place." The Court said that neither Gravel nor the aide who helped him could be questioned about his actions at the subcommittee meeting of June 29. But five members of the Court—the Nixon four plus White—ruled that questions could be asked about possibly illegal sources of the classified Papers and about the republication of the Papers. Justices Brennan, Douglas and Marshall would not have permitted any such questions to be asked, and Justice Stewart would not have permitted questions to be asked about the source of the Papers.

The majority's rulings on sources and republication are undoubtedly helpful to Executive branch officials who may have secrets which they wish to keep from Congress and the people. But the rulings patently harm the ability of Congressmen, and ultimately the people, to find out about the misdeeds of the government. Also harmed is the ability of Congressmen to vote with adequate information on government programs, and the ability of citizens to vote with adequate information on their leaders.

In his Congressional Government, no less a student of the subject than Woodrow Wilson proclaimed the vital importance of Congress' function in informing itself and the country about what is going on in government. But Congress can inform neither itself nor the people unless it has access to information. And to get the information they need, legislators often must resort to contacts with Executive branch officials who are willing to tell Congressmen what is going on or to turn over necessary materials. I doubt that there is a competent office on Capitol Hill

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9 W. Wilson, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (15th ed. 1885).
which does not have these contacts. Without them, and without the ability to spread the information received from them, legislators are often reduced to getting much of their information from self-serving Executive handouts, which never seem to break the bad news about Executive duplicity in war, military atrocities, economic mistakes by the administration, racist policies in the bureaucracy, and so on ad nauseam. Without Executive branch contacts and the ability to spread the information received, legislators will often be doomed to make their speeches and cast their votes in partial or total ignorance of important facts and ideas. And, as a corollary, constituents too will be casting their ballots in ignorance.

But the willingness of persons in the Executive branch to give information to legislators can only be lessened by the majority’s decision in Gravel. For now, when previously secret information is made public by a legislator, the government can convene a grand jury to question the legislator or his aides about the source of the information. Even if it is very doubtful that a crime was committed in obtaining and releasing the information, as a basis for the grand jury questioning the government can pretend that it is seeking evidence of crimes that may have occurred. As Justice Stewart said in his dissent:

Under the Court’s ruling, a Congressman may be subpoenaed by a vindictive Executive to testify about informants who have not committed crimes and who have no knowledge of crime. Such compulsion can occur, because the judiciary has traditionally imposed virtually no limitations on the grand jury’s broad investigatory powers; grand jury investigations are not limited to scope to specific criminal acts, and standards of materiality and relevance are greatly relaxed.10

The government’s ability to question legislators about the source of their information will mean that officials who secretly give information to Congress can be subjected to harassment, loss of their jobs, and even prosecutions if there is any reason to believe they may conceivably have violated a criminal statute. Under these circumstances it will be a hardy bureaucrat indeed who is willing to blow the whistle on some important but wrong-

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headed policy which is close to the heart of higher-ups in the Executive branch. Unfortunately, hardihood is not a characteristic for which the bureaucracy has become famous.

In addition to making it a good bit harder for legislators to get information in the first place, the majority has increased a Congressman's difficulty in disseminating information once it is obtained. Most of the time, of course, a Congressman can disseminate information by inserting a speech or exhibit in the Congressional Record or in a committee record which is printed and distributed. But even so, a wider public awareness of the material will be achieved if publication can also be arranged with journalists and publishers. Also, there are situations, evidenced in the Gravel case itself, where publication and distribution in the Congressional Record or in a committee record will not be feasible: it will doubtlessly be blocked by those men, like Senator William Saxbe, whose statements on Gravel's conduct indicate that their view of morality is that revealing the evil deeds recorded in government archives is a greater sin than committing the evil deeds. When publication in Congressional journals is not feasible, arrangements for private reporting and publication by journalists or book publishers is the only way that a legislator can obtain wide dissemination of information.

But just as sources will be less willing to give information if they can be investigated by the grand jury, so publishers will be much less willing to publish information received by a Congressman if they can be investigated by the grand jury, harassed, and subjected to prosecution. And such investigation, harassment and prosecution is abetted by the Gravel Court's ruling that the Senator and his aides can be questioned about republication.

The majority's decision in this case creates yet another bad situation. As the Court itself has pointed out, a prime historical reason which underlies the speech or debate clause is the fear that the Executive, aided by the courts, might intimidate or silence critical or disfavored legislators by vindictively bringing criminal proceedings against them. Yet, by opening the door to grand jury investigations and criminal prosecutions for actions taken by a Congressman in the line of duty, the Court's opinion permits exactly the kind of intimidation which the speech and
debate clause was supposed to prevent. The Nixon Administration would dearly like to silence a man like Senator Gravel. He is critical of it and disfavored by it. The administration probably likes him even less than it liked Charles Goodell.

In view of the undesirable results of the rulings on sources and republication, one may inquire as to what process of logic led the Court to its conclusions. Basically the Court seemed to hold that the speech and debate clause is not intended to protect a legislator from the operation of ordinary criminal laws. Rather, it is intended to protect so-called legislative acts from intimidation by the Executive. Legislative acts are such things as debating, voting, committee sessions and committee reports. Legislative acts do not include contacting the Executive branch or administrative agencies, or private republication through a publisher of statements and exhibits introduced in legislative chambers. Nor does the protection given to legislative acts mean that protection will also be given to illegal actions which are necessary to prepare for a legislative act: thus while securing the Pentagon Papers was a necessary preparation for the protected legislative act of reading the Papers at the subcommittee hearing and putting them in the record, an illegal securing of them would not be protected.

The jackpot question which stems from the Court's logic is why shouldn't the concept of legislative acts protect the securing of the Papers and their republication? Aside from some debatable discussion of the status of republication in merrie olde England, the Court did not address this question directly.11 Nor did it provide a valid indirect answer by saying that the speech and debate clause does not protect a legislator from the ordinary operation of criminal laws. For the whole point of the speech and debate clause, as well as other constitutional rights, is that acts which fall within its protection cannot constitutionally be made a crime by statute. Thus, even if one assumes that securing and republishing the papers violated a criminal statute, this would not answer the question of whether these actions are constitutionally protected legislative acts which cannot validly be made a crime under statute. The fact that a speech on the

11 Id. at 622.
floor of the Senate is illegal under a statute would not strip the
speech of protection under the speech and debate clause, and,
by parity of reasoning, securing and republishing the Papers
cannot be denied protection just because these acts are illegal
under a statute.

Because of the majority opinion's paucity of reasoning as to
why the protection afforded by the speech and debate clause
should be narrowly confined, one must turn to another speech
and debate case which was decided on the same day as Gravel,
in order to gain further insight into the majority's view of the
clause. In United States v. Brewster, the government charged
that ex-senator Daniel Brewster of Maryland had exacted a
bribe in return for his vote on postage rate legislation. Brewster
argued that the speech and debate clause barred a prosecution on
this charge. Six members of the Court—this time it was the Nixon
four plus Stewart and Marshall—rejected Brewster's argument.

As in Gravel, the majority was unwilling to give an expansive
reading to the speech and debate clause. Not everything related
to the legislative process or to the way legislators normally
function is protected by the clause, said the Court. It does not
protect the doing of errands for constituents, or making appoint-
ments with government agencies, or sending news letters to
constituents, or giving news releases, or delivering speeches
outside Congress. If the clause was expansively interpreted
as protecting all conduct relating to the legislative process, then,
since almost everything a legislator does can somehow be related
to the legislative process, legislators would be super-citizens who
would be immune from prosecution for a wide range of crimes
which they could commit with impunity.

Such an expansive reading of the clause would go far beyond
its purpose of protecting legislative independence. Nor is the
reading a practical necessity in order to protect the legislature
from encroachment by the Executive. Unlike English history,
the American experience does not reflect a catalog of abuses by
which the Executive has managed to subordinate the legislature.
Our check and balance system has preserved the power of each

13 Id. at 512.
14 Id. at 516.
branch because the judiciary has intervened when one of the
other branches attempted to abuse its power and, more im-
portantly, because public sentiment has been hostile to attempts
by one branch to dominate or harass another.

While the purpose of the clause is to protect legislative in-
dependence and integrity, bribery leads to a contrary result,
that of gravely undermining the integrity of the legislature. Thus
the Executive must be permitted to investigate and prosecute
for bribery, and the courts must be permitted to punish for it.
It is true, of course, that the Constitution permits each house
itself to punish its members for bribery, "but Congress is ill-
equipped to investigate, try, and punish its Members for a wide
range of behavior that is loosely and incidentally related to the
legislative process." Congress is not a court. Nor has it shown
much inclination to exert itself in this area.

Even if Congress did police and prosecute its members, such
actions might actually impair the independence of individual
Congressmen. There are no specifically articulated standards
under which a member would be judged by his colleagues; the
member would be at the mercy of a body that functions as
prosecutor, judge and jury; the member would not have the
constitutional protections which apply in a criminal case; and
he would be subject to the passions of party and politics.

Finally, although neither a legislative act such as a vote nor
the motive for the act can be inquired into in court, a prosecution
for bribery can be maintained without such an impermissible
inquiry. To prove its case the government need not show how
the legislator voted on the floor or why he voted as he did. All
it need show is that he entered into an agreement to sell his
vote. Whether he carried out the agreement by voting in
accordance with the bribe is irrelevant.

The three dissenters in Brewster denied that a bribery
prosecution could avoid questioning a legislative act like a floor
speech or a vote. They felt that a bribe case inevitably impugns
and calls into question the act and the motive behind the act.
Moreover, permitting bribery prosecutions was said to open the

15 Id.
16 Id. at 529 (dissenting opinion).
door to Executive pressure upon Congressmen. The Executive can warn a legislator that it suspects he has been bribed to speak and vote against it on some matter. The best way for him to then avoid possible prosecution, or to create evidence in favor of acquittal on a bribery charge if he is prosecuted, would be to succumb to the pressure by speaking and voting in favor of the administration.

The possibilities for Executive pressure tactics are enhanced because legislators are constantly acting in the interests of constituents who contribute to their campaigns, and contributions can easily be made to look like bribes. Indeed, given the sometimes thin line between bribes and legitimate contributions by constituents who are served by a legislator, it is not the Executive or courts which are best qualified to punish bribery. Rather it is the legislature, since legislators are most directly in touch with political mores and practices and are thus better equipped to separate legitimate activities from illegitimate ones.

Finally, the fact that the Executive can prosecute legislators for ordinary criminal conduct such as murder, theft or rape does not mean it should be able to prosecute them for bribery. Ordinary crimes and bribery are different in regard to the potential for Executive pressure and to implicating the motive behind legislative acts. The Executive will not often have credible evidence that a legislator committed an ordinary crime like murder or theft. Nor does such a crime usually involve a legislative act or its motive. And the way he casts a ballot would not be instrumental evidence which enables a legislator to win acquittal on a prosecution for ordinary crime. All of this, of course, is different in the bribery situation.

All things considered, the majority's arguments in Brewster should probably prevail. For if this nation is to have a democracy that people can believe in, legislative honesty is a dire necessity. Thus it is desirable to permit the Executive to ferret out and prosecute bribery. This is particularly true because Congress itself is so reluctant to punish its own members for wrongdoing.

But to believe that the majority has taken a properly narrow view of the protection given by the speech and debate clause in the context of bribery does not mean that the arguments it
used can support a narrow view of the clause in the context of the \textit{Gravel} case. For the two contexts present some very different considerations. Bribery strikes at the very heart of the integrity of the democratic process. It neither aids legislative independence nor does it enhance a legislator's ability to perform his duties. Rather, it destroys the honesty of his performance. Accepting bribes cries out for punishment if the legitimacy of government is to be maintained. There is no inherent appeal in saying that it should receive constitutional protection. And even if permitting the Executive to prosecute bribery creates some opportunities for it to put pressure on legislators, this seems to be a tolerable risk in light of the great stake in stamping out bribery and the infrequency with which such pressure seems to have actually occurred.

On the other hand, securing and disseminating information on the workings of government is vital to the effective functioning of the democratic legislative process. If a legislator cannot obtain information, or if he cannot disseminate it, then the ability of Congress and the public to accurately analyze Executive actions and to stop misdeeds will be hampered. Legislative speeches will be made in ignorance and legislative votes will be cast in ignorance, thus undermining the value of the right to speak and vote and the effective working of the legislative process. Rather than being a legislature capable of independent decision making, to a significant extent the Congress will be reduced to being a rubber stamp for Executive policies about which it lacks relevant information. The already dominating power of the Executive branch—which officially hands out only favorable information—will thereby be enhanced.

There is thus much legitimate appeal in giving Constitutional protection to a legislator's acts in securing and disseminating information. Such protection will prevent the kind of prosecutorial pressure which has been brought against Senator Gravel and which could make legislators hesitant to perform their duties in accordance with the best dictates of their conscience.

In my view, the appeal of giving protection to the securing and obtaining of information is not seriously diminished by the fact that these acts may involve a Congressman in violation of statutes concerning the obtaining of government property or the
release of classified information. This country suffers from
elephantine over-classification and secrecy which works to the
detriment of the people. Even if they violate criminal statutes,
actions which puncture the wall of secrecy by revealing govern-
mental misdeeds to the people are eminently desirable, and
it is therefore not difficult to accept the idea or practice of cloaking
such revelatory actions with the protection of the Con-
stitution.

Nor is the appeal of giving speech and debate clause pro-
tection in the Gravel situation lessened by the Court's scare
argument that an expansive reading of the clause would make
Congressmen into super citizens who could commit a wide
range of crimes with impunity.\textsuperscript{17} Legislators are not in the habit
of committing ordinary crimes such as murder, burglary, or
criminal fraud. So as a practical matter, there is not much to
worry about in this regard. And if a legislator does commit an
ordinary crime—let's say negligent homicide by running over
someone with a car—he would not receive speech and debate
clause protection just because the securing and republication of
information receive protection. Instead, the question of whether
his act is protected would depend on its relationship to the
values protected by the clause, values such as maintaining the
independence and integrity of the legislature and enabling its
members to do their job with maximum effectiveness. I find it
very dubious that the values protected by the clause would
provide protection for negligent homicide by automobile or for
a host of other crimes one can think of.

Finally, in the context of bribery it is easy to be troubled
by the fact that Congress might be unwilling to penalize its
members or might be an unsuitable forum to do so, and that
bribery might therefore go unpunished unless the Executive can
bring prosecutions. But in the context of securing and publish-
ing information, this fact is no bother at all. The Congress and
public need to get more information about the Executive rather
than less, and a lack of Congressional punishment would en-
courage the flow of information. And if a legislator ever began
revealing information which truly should be kept secret, such

\textsuperscript{17} Id. at 516.
as the workings of a hydrogen bomb or the plans for a future attack by American forces in an existing war, it is difficult to believe that Congress would encourage or permit this by taking no action against him.

All in all, then, it is hard to validly support the majority's refusal to protect the securing and republication of information in *Gravel*. And it is thus interesting to note that only one Justice joined the Nixon four in connection with both securing and republication. This was Justice White, who is presently one of the Court's two swing men. White wrote the majority opinion in *Gravel*, but he wrote a dissent from the Court's decision in *Brewster*. He was therefore the only Justice in the anomalous if not incredible position of being willing to give an expansive reading to the speech and debate clause in order to protect bribery in *Brewster*, but being wholly unwilling to give the clause an expansive reading in *Gravel* in order to protect actions which helped reveal horrible governmental transgressions to the country.

In his *Brewster* dissent, Justice White wrote a footnote which explained his view of why Senator Gravel could not be protected but Senator Brewster should be:

> In *Gravel v. United States* . . . it is held that the Speech or Debate Clause does not immunize criminal acts performed in preparation for or execution of a legislative act. But the unprotected acts referred to there were criminal in themselves, provable without reference to a legislative act and without putting the defendant member to the task of defending the integrity of his legislative performance. Here, as stated, the crime charged necessarily implicates the Member's legislative duties.\(^{18}\)

But Justice White's explanation just won't wash. Perhaps the acts of securing and republishing the Pentagon Papers "were criminal in themselves." But taking a bribe is also an act which is criminal in itself. Perhaps the acts of securing and republishing the Papers can be proven "without reference to a legislative act" such as reading the Papers at the subcommittee hearing or inserting them in the committee record. But, as the majority

\(^{18}\) *Id.* at 555 (dissenting opinion).
pointed out in Brewster, the act of agreeing to a bribe can also be proven "without reference to a legislative act"\textsuperscript{19} such as making a floor speech or casting a vote in accordance with the bribe. Finally, it is simply wrongheaded to say that a bribe case necessarily implicates a member's legislative duties and forces him to justify his legislative performance, but that these things were not equally true in Gravel. The thrust of Gravel's argument was that, by obtaining the Papers and making sure that they got the widest possible dissemination, he was carrying out his essential legislative duty of providing information to his colleagues and the public. His defense attempted to justify what he and others thought was a vitally important legislative performance.

We have seen that the Court has not provided good reasons for refusing to give an expansive reading to the speech and debate clause in Gravel. We have also seen that, without adequate justification, one of the Court's swing men was willing to protect bribery but not the securing and republication of important information. Given these facts, what shall we make of the decision by the Nixon four plus White in Gravel? It appears that the answer to this question was provided by Justice Douglas in his Gravel dissent. The speech and debate clause, he said, is supposed to protect legislators from "prosecution 'by an unfriendly executive and conviction by a hostile judiciary' . . . . That hostility emanates from every stage of the present proceedings"\textsuperscript{20} (emphasis added).

Indeed, it is not just in the Gravel case that the Justices have shown hostility to those who were connected with the publication of the Pentagon Papers. Last year, when the original Pentagon Papers case was decided by the Court,\textsuperscript{21} the separate dissenting opinions of Chief Justice Burger\textsuperscript{22} and Justice Blackmun\textsuperscript{23} contained a great amount of undisguised hostility toward the New York Times, and Justice White, though he agreed with the majority in that the Times and the Washington Post could not

\textsuperscript{19} Id. at 526.
\textsuperscript{20} Gravel v. United States, 408 U.S. 606, 636 (1972) (dissenting opinion).
\textsuperscript{21} Id. at 748 (dissenting opinion).
\textsuperscript{22} New York Times Co. v. United States, 403 U.S. 713 (1971).
\textsuperscript{23} Id. at 759 (dissenting opinion).
be enjoined from publishing their stories, showed a striking readiness to see criminal punishment visited upon those connected with obtaining and publishing the Papers.\textsuperscript{24}

It thus appears that a majority of the Court is going to look with a most unfriendly eye upon the claims of those who are defending themselves from prosecutions connected with the release of the Papers. This is unfortunate. For, in Justice Douglas' words in \textit{Gravel}, "The story of the Pentagon Papers is a chronicle of suppression of vital decisions to protect the reputations and political hides of men who worked an amazing successful deception on the American people."\textsuperscript{25} Those who blew the whistle on this deception performed an invaluable public service. They should not be prosecuted. They should be rewarded and protected. But they had better not look to the Court for protection.

\textsuperscript{24} \textit{Id.} at 733-40 (concurring opinion).

\textsuperscript{25} \textit{Gravel v. United States}, 408 U.S. 606, 647 (1972) (dissenting opinion).