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The Supreme Court first established an absolute immunity for persons from section 1983 actions in Tenney v. Brandhove.⁸ The plaintiff sought damages under section 1983 against various individuals, including the members of the California Senate Fact-Finding Committee on Un-American Activities. He claimed they had intimidated him in the exercise of his constitutional rights by wrongfully interrogating him and prosecuting him for contempt in the course of their investigation. The Court, per Justice Frankfurter, held that state legislators have an absolute immunity from liability for damages when they act "in a field where legislators traditionally have power to act...."⁹ Characterizing the Committee's investigation as within those bounds,¹⁰ the Court found the Committee's members absolutely immune despite a claim of "unworthy purpose."

The Court's reasoning is worth noting. It interpreted 1983's "person" language against a common law background of absolute legislative immunity from tort liability derived from English law and early American history. The Court also emphasized the policy underlying the Speech or Debate clause of the United States Constitution,¹¹ suggesting that it "was a reflection of political principles already firmly established in the States."¹² Against this background the Court examined the legislative intent behind 1983 and concluded that it would be implausible to infer that Congress intended to overturn the historical tradition of legislative freedom by subjecting legislators to civil liability for acts performed while engaging in legislative activity.¹³ The Court noted: "We cannot believe that Congress-itself a staunch advocate of legislative freedom-would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."¹⁴

Despite the broad language of section 1983 and Justice Douglas' dissent,¹⁵ the result in Tenney is probably justified for its concern with the democratic process and the chilling effect potential litigation might have upon the independence of legislators. Tenney prevents any inquiry into legislative motive, no matter how allegedly corrupt, so long as the legislator is acting in a traditional legislative field. Thus, the remedies for such corruption must be the political process and the criminal laws.¹⁶



While Tenney establishes that legislators are absolutely immune from section 1983 damages liability under appropriate circumstances, it fails to delineate what those circumstances might be and what acts of such an individual are protected. Tenney tells us that a legislative committee's investigation is within the field to which absolute immunity attaches, ¹⁷ but it does not address the question of whether legislative employees or local legislatures such as city councils are within the sphere of absolute immunity. Tenney also gives no real indication of the standards which courts should use in distinguishing between traditional and nontraditional legislative fields. Finally, and more generally, Tenney leaves open the question of which other governmental officials might be absolutely immune because of a similar background of absolute immunity.

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Footnotes

⁸. 341 U.S. 367 (1951).

⁹. *Id.* at 379.

¹⁰. The Court noted:

Investigations, whether by standing or special committees, are an established part of representative government To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation. *Id.* at 377-78.

¹¹. U.S. CONST. art. I, § 6.

¹². Tenney v. Brandhove, 341 U.S. 367, 373 (1951).

¹³. *Id.* at 376.

¹⁴. *Id.*

¹⁵. He argued that "when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends." *Id.* at 383. His argument appears in effect to be for a qualified immunity, although he never used that term.

¹⁶. "[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of



constitutional rights." O'Shea v. Littleton, 414 U.S. 488, 503 (1974). See also Gravel v. United States, 408 U.S. 606, 627 (1972).

¹⁷. Tenney v. Brandhove, 341 U.S. 367, 378 (1951).

