

VOL 28 ISS 1 ART 3 | II | STATE LEGISLATORS AND PROTECTED LEGISLATIVE CONDUCT

Once the defendant's status is found to be that of a state legislator, the next issue is whether the challenged act is legislative in nature. The extreme cases are relatively easy to deal with. At one extreme the act of a state legislator in driving negligently and injuring another is not a legislative act and, moreover, it may not even be an act under color of law.¹⁸ At the other extreme is the situation in which the state legislator is sued under section 1983 for enacting certain state legislation. Here it is unquestioned that absolute immunity attaches. Tenney is obviously closer to the latter extreme than to the former. The Court first asked whether investigative hearings were a traditionally legislative function. Then, as a way of determining whether there was a legislative act, it asked whether the specific investigation had exceeded the "bounds of legislative power." The test for such a conclusion was: "it must be obvious that there was a usurpation of function exclusively vested in the Judiciary or Executive."¹⁹ On the merits the Courts had little difficulty in answering these questions in defendant's favor.

Following Tenney, courts in 1983 cases readily applied its reasoning to state legislators who voted for certain legislation²⁰ or housekeeping resolutions.²¹ Legislators' participation in committee work²² and on a statutory commission²³ has also been covered by the Tenney reasoning. These activities are clearly legislative acts and are properly protected. Furthermore, since Tenney, the Supreme Court has elaborated on the attributes of legislative acts under the Speech or Debate Clause upon which Tenney so heavily relied.²⁴ It stated that for purposes of congressional immunity, protected matters under that clause "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."²⁵ Applying this standard to "legislative acts," the Court held in one case that Speech or Debate Clause absolute immunity does not extend to a Senator's alleged private arrangement with a private publisher to publish the Pentagon Papers,²⁶ and indicated in a subsequent case that a congressman who arranges for the public (as distinguished from internal) distribution of committee materials allegedly infringing upon the rights of individuals is similarly not absolutely immune.²⁷ The Court's reasoning in these cases is



that, despite arguments for a legislative "informing function," such acts go beyond the reasonable requirements of the legislative function.

Circuit courts have also been sensitive to those situations in which legislators act officially but not legislatively. Several circuits have held that under those circumstances absolute immunity is inappropriate. In a recent New Jersey district court decision,²⁸ the court concluded that absolute immunity did not protect state legislators who were accused of improperly excluding another legislator from a party caucus. While sufficient state involvement was found for state action purposes, the court merely asserted that this was an area in which legislators traditionally did not act.

Davis v. Passman,²⁹ a better reasoned opinion, involved the official immunity of a congressman sued for damages for sex discrimination against a staff employee. The Fifth Circuit curtly rejected the congressman's defense of absolute immunity. The court first observed that "the constitutional proscription of blatant sex discrimination does not impair [the defendant's] legitimate control over his staff to any extent at all."³⁰ Next, after canvassing the Speech or Debate Clause cases, the court concluded that "legislators are not legislating when they dismiss staff members. For the same reasons that the Speech and Debate clause does not extend to staff dismissals, [the defendant] cannot invoke absolute immunity."³¹

The Fifth Circuit's insistence that "the immunized act must be intimately cognate to the legislative process"³² is similarly appropriate in a 1983 context. As observed, the *Tenney* Court reasoned from both the historical purpose of the Speech or Debate Clause and the concern, in the Fifth Circuit's words, "that the prospect of an unsuccessful but burdensome lawsuit might affect a legislator's performance of his or her legislative duties, thus distorting the democratic process."³³ There is thus a class of cases in which a state legislator acting within his official capacity may be denied an absolute immunity because his act is not legislative in nature. Further, such a result may occur even where the state legislator has acted with a reasonable good faith belief that he has absolute immunity. It is true that this is not discussed in *Davis*, *Tenney*, or any of the Speech or Debate Clause cases (perhaps because it was not raised). Still, these cases appear to use an objective test for the "legislative act" inquiry, with no attention paid to the legislator's state of mind.³⁴ However,



the state of mind of a legislator denied an absolute immunity is certainly relevant to the application to him of a qualified immunity.³⁵

(Copyright © Depaul University Law Review. All rights reserved. Sheldon H. Nahmod.)

Footnotes

¹⁸. Clearly these two inquiries are often factually related. An affirmative finding on state action will tend to lead to a similar finding on official capacity. However, this does not mean that the two inquiries are identical. In regard to state action, see generally A GUIDE TO SECTION 1983 chapter 2, and J. NOVAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 451-75 (1978).

¹⁹. *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

²⁰. *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1256 (5th Cir. 1976); *Johnson v. Reagan*, 524 F.2d 1123, 1124 (9th Cir. 1975).

²¹. *Eslinger V. Thomas*, 476 F.2d 225, 228 (4th Cir. 1973).

²². *Gambocz v. Subcommittee on Claims of Joint Legislative Comm.*, 423 F.2d 674, 675 (3d Cir. 1970).

²³. *Bergman v. Stein*, 404 F. Supp. 287, 299 (S.D.N.Y. 1975).

²⁴. See, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975) (holding that the Speech or Debate Clause protected the actions of the Senate Subcommittee on Internal Security in issuing a subpoena for bank records involving respondent in order to determine whether respondent's coffee houses and underground newspapers were potentially harmful to the morale of the U.S. Armed Forces); *Doe v. McMillan*, 412 U.S. 306, 313, 315 (1973) (holding that the Speech or Debate Clause protected the actions of the members and staff of the House Special Select Subcommittee in the preparation and distribution of a report on the District of Columbia public school system that documented disciplinary problems of named students. The Court found further that the public dissemination of the report by the Superintendent of Documents and Public Printer was not a legislative act and, therefore, not protected by the Speech or Debate Clause); *Gravel v. United States*, 408 U.S. 606, 625 (1972) (holding that a Senator's arrangement for private publication of a report prepared by the Department of Defense is not an act within the legislative sphere and, therefore, not protected by the Speech or Debate Clause).

²⁵. *Id.* at 625.

²⁶. *Id.* at 622.

²⁷. *Doe v. McMillan*, 412 U.S. 306 (1973). The arrangement must go beyond merely voting for it. *Id.* at 315.



²⁸. Ammond v. McGahn, 390 F. Supp. 655 (D. N.J. 1975), rev'd on other grounds, 532 F.2d 325 (3d Cir. 1976).

²⁹. 544 F.2d 865 (5th Cir. 1977), cert. granted, 47 U.S.L.W. 3301 (October 30, 1978).

³⁰. Id. at 870.

³¹. Id. at 881.

³². Id. at 879.

³³. id.

³⁴. See notes 103-05 and accompanying text *infra* regarding "judicial acts."

³⁵. An issue which has apparently not as yet arisen is the possibility of a Fourteenth Amendment action for damages against state legislators, judges and prosecutors who have an absolute immunity under both the common law and section 1983. Cf. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (recognizing a federal cause of action for damages caused by federal agents' violation of the Fourth Amendment). However, it is likely that absolute immunity will survive such a Fourteenth Amendment challenge. Cf. Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972).

