

The Burger Court Opinion Writing Database

Gravel v. United States

408 U.S. 606 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



B M
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1972

Re: No. 71-1017) - Gravel v. U. S.
No. 71-1026) - U. S. v. Gravel

Dear Byron:

Please join me.

Regards,

Wm B

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Circulated: 6-3

Recirculated: _____

Mike Gravel, United States
Senator,

71-1017 *v.*

United States.

United States, Petitioner,
71-1026 *v.*

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

I would construe the Speed and Debate Clause¹ to insulate Senator Gravel and his aides from inquiry concerning the Pentagon Papers, and Beacon Press from inquiry concerning publication of them, for that publication was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the conception and pursuit of the so-called "war" in Vietnam. Alternatively, I would hold that Beacon Press is protected by the First Amendment from prosecution or investigations for publishing or undertaking to publish the Pentagon Papers.

Gravel, Senator from Alaska, was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He convened a meeting of the Subcommittee and read

¹ The Speech and Debate Clause included in Art. I, § 6, Cl. 1, of the Constitution provides as respects Senators and Representatives that "for any Speech or Debate in either House, they shall not be questioned in any other Place."

3 M through
short

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

SUPREME COURT OF THE UNITED STATES
From: Douglas, J.

Nos. 71-1017 AND 71-1026

Circulate: *6/7/72*

Mike Gravel, United States
Senator,
71-1017 *v.*
United States.
United States, Petitioner,
71-1026 *v.*
Mike Gravel, United States
Senator.

Recirculated: *6/7/72*

On Writs of Certiorari to
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[May —, 1972]

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6, 8, 9, 14

To: The Chief Justice
Mr. Justice Marshall
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Circulated:

Recirculated: 6-12

Mike Gravel, United States
Senator,

71-1017 *v.*

United States.

United States, Petitioner,
71-1026 *v.*

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[May —, 1972]

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B
8/11/14

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

Mr. Justice Douglas; J.

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Argued: 6/13/72

Mike Gravel, United States
Senator,

71-1017 *v.*

United States.

United States, Petitioner,
71-1026 *v.*

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[May —, 1972]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1972

MEMORANDUM TO THE CONFERENCE

RE: No. A-746 - Gravel v. United States

On October 4, 1971 the District Court in Boston denied Senator Gravel an injunction against Grand Jury inquiry into the Senator's acquisition and proposed republication through Beacon Press of the 47 volumes of the Pentagon Papers. Because the inquiry would in the Court's view offend the Speech and Debate Clause unless restricted, the court entered a protective order (1) forbidding interrogation of any witness about the Senator's conduct of a subcommittee meeting conducted on June 29, 1971, or about things done by the Senator in preparation for and intimately related to the meeting (2) and forbidding interrogation of a member of the Senator's staff about that member's actions taken at or in preparation for the meeting at the Senator's direction.

Both the United States and Senator Gravel appealed. The Court of Appeals for the First Circuit, on October 29, 1971, issued a broad restraint, pending decision of the appeals against the pursuit of the Grand Jury inquiry. This was modified on November 29, 1971 to permit pursuit of any inquiry not related to Senator Gravel's acquisition, use, publication or republication of the Pentagon Papers.

On January 7, 1972 the Court of Appeals filed an opinion agreeing with the District Court that republication was not protected by the Speech and Debate Clause as related to the legislative process but modifying the Protective Order to forbid (1) interrogation of any witness called "if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides

regarding the activities of the Senator or with his aides during the period of their employment, in preparation for and related to said meeting" (2) and questioning of a Gravel aide, Dr. Rodberg "about his own actions" as a member of the staff. Senator Gravel filed petitions for reconsideration and clarification. On January 18, 1972 the Court of Appeals issued an order explaining that "actions" was meant "in the broadest sense, including observations and communications, oral or written by or to him [Rodberg] or coming to his attention." This order also provided that "the broad stay granted on October 29, 1971, as modified, is hereby revoked and there is substituted the order contained in the judgment of January 7, 1972 as clarified", but that the order of revocation and substitution "is stayed until January 26, 1972."

Senator Gravel applied to me on Friday last, January 21, for, in effect, reinstatement of the broad restraint of October 29, 1971 pending filing of a petition for certiorari. I have today granted an extension of the Court of Appeals stay after January 26, provided a petition for certiorari is filed by February 10. I have allowed until February 16 for the filing of a response and excused the parties from printing their papers.

A copy of my order is attached to the various papers that have been filed in the application to me. The order is purposely phrased to cover a petition or cross-petition of the Government if one is filed. My thought is to have the matter in shape for disposition at our February 18 conference. The motive issue is not unlike that involved in Brewster which we are having reargued, and the republication question is one of first impression, although several English cases, with confusing and inconsistent results, have addressed it.

W.J.B. Jr.

SUPREME COURT OF THE UNITED STATES

Mike Gravel, United States Senator,

71-1017 v.

United States

United States, Petitioner,

71-1026

v.

Mike Gravel, United States Senator

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: 6/10/72

Recirculated: _____

On Writs of Certiorari to the
United States Court of Appeals
for the First Circuit.

[June 1, 1972]

✓ Ch
✓ P
✓ D
✓ J
✓ W
✓ B
✓ M
✓ H

MR. JUSTICE BRENNAN, dissenting.

The facts of this case, which are detailed by the Court, and the objections to over-classification of documents by the Executive, detailed by my Brother Douglas, need not be repeated here. My concern is with the narrow scope accorded the Speech and Debate Clause by Today's decision. I fully agree with the Court that a Congressman's immunity under the Clause must be extended to his aides if it is to be at all effective. The complexities and press of Congressional business make it impossible for a member to function without the close cooperation of his legislative assistants. Their role as his agents in the performance of official duties requires that they share his immunity for those acts. The scope of that immunity, however, is as important as the persons to whom it extends. In my view today's decision so restricts the privilege of Speech or Debate

Page 13, 15

Printed
1st DRAFT

To: The Chief Justice
 ✓Mr. Justice Black
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Circulated

Recirculated 6-22-72

Mike Gravel, United States
 Senator,
 71-1017 *v.*
 United States.
 United States, Petitioner,
 71-1026 *v.*
 Mike Gravel, United States
 Senator.

On Writs of Certiorari to
 the United States Court
 of Appeals for the First
 Circuit.

[June —, 1972]

MR. JUSTICE BRENNAN, dissenting.

The facts of this case, which are detailed by the Court, and the objections to over-classification of documents by the Executive, detailed by my Brother DOUGLAS, need not be repeated here. My concern is with the narrow scope accorded the Speech and Debate Clause by today's decision. I fully agree with the Court that a Congressman's immunity under the Clause must also be extended to his aides if it is to be at all effective. The complexities and press of congressional business make it impossible for a member to function without the close cooperation of his legislative assistants. Their role as his agents in the performance of official duties requires that they share his immunity for those acts. The scope of that immunity, however, is as important as the persons to whom it extends. In my view, today's decision so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system.

Wm. Douglas
 6/22/72

1,9-13, & tech
changes

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice S^tearns
Mr. Justice ^Williams
Mr. Justice ^William ^Wright
Mr. Justice ^William ^Wright
Mr. Justice ^Williams
Mr. Justice ^Williams

2nd DRAFT

From: [Redacted]

SUPREME COURT OF THE UNITED STATES
Circulated

Nos. 71-1017 AND 71-1026

Recirculated 6-26-72

Mike Gravel, United States
Senator,
71-1017 *v.*
 United States.
 United States, Petitioner,
71-1026 *v.*
Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[June —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL, join, dissenting.

The facts of this case, which are detailed by the Court, and the objections to over-classification of documents by the Executive, detailed by my Brother DOUGLAS, need not be repeated here. My concern is with the narrow scope accorded the Speech or Debate Clause by today's decision. I fully agree with the Court that a Congressman's immunity under the Clause must also be extended to his aides if it is to be at all effective. The complexities and press of congressional business make it impossible for a member to function without the close cooperation of his legislative assistants. Their role as his agents in the performance of official duties requires that they share his immunity for those acts. The scope of that immunity, however, is as important as the persons to whom it extends. In my view, today's decision so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 and 71-1026

From: Stewart, J.

Circulated: JUN 23 1972

Mike Gravel, United States) Recirculated: _____
 Senator,)
71-1017 v.) On Writs of Certiorari to
 United States.) the United States Court
) of Appeals for the First
 United States, Petitioner,) Circuit.
71-1026 v.)
Mike Gravel, United States)
 Senator.)

[June ___, 1972]

MR. JUSTICE STEWART, dissenting in part.

The Court today holds that the Speech or Debate Clause does not protect a Congressman or his aides from being forced to testify before a grand jury about sources of information used in preparation for legislative acts. This critical question was not embraced in the petitions for certiorari. It was not dealt with in the written briefs. It was addressed only tangentially during the oral arguments. Yet it is a question with profound implications for the effective functioning of the legislative process. I cannot join in the Court's summary resolution of this so vitally important constitutional issue.

In preparing for legislative hearings, debates and roll calls, a member of Congress obviously needs the broadest range of information possible. Valuable information may often come from sources in the

1st DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES
Mr. Stewart, J.

Nos. 71-1017 AND 71-1026

Circulated: JUN 23 1972

Recirculated: _____

Mike Gravel, United States
Senator,

71-1017 *v.*

United States.

United States, Petitioner,
71-1026 *v.*

Mike Gravel, United States
Senator.

On Writs of Certiorari to
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In preparing for legislative hearings, debates and roll calls, a member of Congress obviously needs the broadest range of information possible. Valuable information may often come from sources in the Executive Branch or from citizens in private life. And informants such as these may be willing to relate information to a Congressman only in confidence, fearing that disclosure of their identities might cause loss of their jobs or harassment by their colleagues or employers. In fact, I should sup-

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

1st DRAFT

Circulated: 6-2-72

Recirculated: _____

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
Senator,
71-1017 *v.*
 United States.
United States, Petitioner,
71-1026 *v.*
Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[June —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

These cases arise out of the investigation by a federal grand jury into possible criminal conduct with respect to the release and publication of a classified Defense Department study entitled "History of the United States Decision-Making Process on Viet Nam Policy." This document, popularly known as the "Pentagon Papers," bore a Defense security classification of Top Secret-Sensitive. The crimes being investigated included the retention of public property or records with intent to convert (18 U. S. C. § 641) the gathering and transmitting of national defense information (18 U. S. C. § 793), the concealment or removal of public records or documents (18 U. S. C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U. S. C. § 371).

Among the witnesses subpoenaed were Leonard S. Rodberg, an assistant to Senator Mike Gravel of Alaska

STYLISTIC CHANGES THROUGHOUT.

SEE PAGE

and pp 18-21

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

ATES circulated:

Nos. 71-1017 AND 71-1026

Recirculated: 6-12-72

Mike Gravel, United States
Senator,
71-1017 *v.*
 United States.

United States, Petitioner,
71-1026 *v.*
Mike Gravel, United States
Senator.

On Writs of Certiorari to
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Among the witnesses subpoenaed were Leonard S. Rodberg, an assistant to Senator Mike Gravel of Alaska.

PP 16-17, 22

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: White, J.

Circulated:

Recirculated: JUN 22 1972

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
Senator,

71-1017 *v.*
United States.

United States, Petitioner,
71-1026 *v.*

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
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[June —, 1972]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 27, 1972

MEMORANDUM TO THE CONFERENCE

I am adding the attached footnote 18 to
the Gravel opinion.

B.R.W.

Gravel

18. The Court of Appeals held that the Speech or Debate Clause protects aides as well as senators and that while third parties may be questioned about the source of a senator's information, neither aide nor senator need answer such inquiries. The Government's position is that the aide has no protection under the Speech or Debate Clause and may be questioned about even legislative acts. A contrary ruling, the Government fears, would invite great abuse.

On the other hand, Gravel contends that the Court of Appeals insufficiently protected the senator both with respect to the matter of re-publication and with respect to the scope of inquiry permitted the grand jury in questioning third party witnesses with whom the senator dealt. Hence, we are of the view that both the question of the aide's immunity and the question of the extent of that immunity

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 22, 1972

Re: Nos. 71-1017 and 71-1026 - Gravel v. U.S., etc.

Dear Potter:

file
Please join me in your dissent.

Sincerely,

T.M.
T.M.

Mr. Justice *Brennan*
Stewart

cc: Conference

Bo MA
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 5, 1972

Re: No. 71-1017 - Gravel v. U.S.
No. 71-1026 - U.S. v. Gravel

Dear Byron:

You have prepared a very careful opinion
for these cases, and I am glad to join.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

June 18, 1972

Re: No. 71-1017 and No. 71-1026 Gravel
v. U. S.

Dear Byron:

There is one point in the opinion which possibly you may want to take a second look at. It relates to the "third party" crime problem and whether there is any real danger of a member of Congress (or his aide) being harassed as to his sources on the pretext that such a crime had been committed.

I enclose a draft rider for your subparagraph 4, page 21, which you might consider. It suggests that there must be probable cause to believe a third party crime has been committed before a member of the Congress or his aide may be interrogated.

It might also be desirable to require a showing that the testimony is reasonably necessary to a proper investigation of the crime.

I am fully in accord with your basic proposition that the privilege should ~~not~~ prevent a bona fide investigation of a third party crime, provided no legislative act is implicated.

If you can include a clarification along these lines, I think it might be helpful. Your opinion, on a difficult and delicate subject, is an excellent one and I am happy to join you - as I am doing in a separate note to the Conference.

Sincerely,

Mr. Justice White

bc: Phil

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 18, 1972

Re: No. 71-1017 and No. 71-1026 - Gravel

Dear Byron:

Please join me.

Sincerely,

Lewis

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

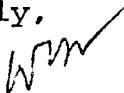
June 8, 1972

Re: No. 71-1017) - Gravel v. U. S.
No. 71-1026) - U. S. v. Gravel

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference