

BRAND, LOWELL & RYAN

A PROFESSIONAL CORPORATION

923 FIFTEENTH STREET, N.W.

WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700

TELECOPIER: (202) 737-7565

January 27, 1998

HAND DELIVERED

The Honorable John McCain
United States Senate
SR-241 Russell Senate Office Building
Washington, D.C. 20510-0303

Dear Senator McCain:

I am writing to amplify the comments that I recently made to the press concerning applicability of the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, to certain CRS products which your bill would, if enacted, make available on the Internet. Juliet Eilperin, *Memo Claims That McCain Legislation to Put CRS Reports Online Could Have Constitutional Problems*, Roll Call, January 15, 1998, p. 8.

First, as General Counsel to the House of Representatives I litigated virtually scores of cases involving the Speech or Debate Clause, including a landmark case before the Supreme Court reaffirming the central function of the clause in protecting the legislative branch from judicial and executive branch interference, United States v. Helstoski; 442 U.S. 477, Helstoski v. Meanor, 442 U.S. 500 (1979); see also, Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983); In Re Grand Jury Investigation, 587 F.2d 589 (3d Cir. 1978); United States v. Eilberg, 507 F. Supp. 267 (E.D. Pa. 1980); Benford v. American Broadcasting Co., 98 F.R.D. 42 (D. Md. 1983), rev'd sub nom. In Re: Guthrie, 735 F.2d 634 (4th Cir. 1984). Many of these cases which I litigated were cited in the CRS memorandum as supporting their conclusion that publication on the Internet would adversely affect the Speech or Debate Clause privilege.

I believe that the concerns expressed in the CRS memorandum are either overstated, or the extent they are not, provide no basis for arguing that protection of CRS works will be weakened by your bill. I also want you to know that I was, and remain, a strong advocate for vigorous assertion and protection of the Speech or

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Debate Clause privilege as a great bulwark of the separation of powers doctrine that protects the Congress from Executive and Judicial branch encroachment.

The CRS memorandum states "extensive involvement by CRS in the informing function might cause the judiciary and administrative agencies to reassess their perception of CRS as playing a substantial role in the legislative process, and thereby might endanger a claim of immunity even in an instance in which CRS was fulfilling its legislative mission."

This fear is simply unfounded. While the courts have consistently relegated the so-called "informing function" to non-constitutionally protected status, they have also steadfastly refused to permit litigants to pierce the privilege for activities that are cognate to the legislative process despite later dissemination outside the Congress. So, for example, in McSurely v. McClellan, 553 F.2d 1277, 1286 n.3 (D.C. Cir. 1976) (en banc), the Court refused to allow a litigant to question Senate aides about acts taken within the Committee, even though acts of dissemination outside the Congress were subject to discovery. Publication of a CRS product on the Internet would no more subject CRS employees to questioning about the basis for their work, consultations with colleagues or the sources of that work, than would be the case if the same CRS product were obtained by means other than the Internet. Indeed, the fact that House and Senate proceedings are televised does not alter the applicability of the clause to floor speeches, committee deliberations, staff consultation, or other legislative activities. Even certain consultations concerning press relations are protected though dissemination to the media is not protected. Mary Jacoby, *Hill Press Releases Protected Speech*, Roll Call, April 17, 1995, p. 1 (the Senate Legal Counsel argued that because a legislative discussion is embedded in a press release doesn't entitle a litigant to question staff about the substance of the legislation); see also Tavoulareas v. Piro, 527 F. Supp. 676, 682 (D.D.C. 1981) (court ordered congressional deponents to merely identify documents disseminated outside of Congress but did not permit questions regarding preparation of the documents, the basis of conclusions contained therein, or the sources who provided evidence relied upon in the documents), Peroff v. Manual, 421 F. Supp. 570, 574 (D.D.C. 1976) (preparation of a Committee witness by a congressional investigator is protected because "facially legislative in character"). Under this line of caselaw, it is difficult to foresee how the mere dissemination of a CRS product could subject any CRS employee to inquiry concerning the preparation of such a product. In short, because "discovery into alleged conduct of [legislative aides] not protected by the Speech or Debate Clause can infringe the [legislative aides'] right to be free from inquiry into legislative acts which are so protected," McSurely v. McClellan, 521 F.2d 1024, 1033 (D.C. Cir. 1975), aff'd en banc by an equally divided court, 553 F.2d 1277 (1976) courts have imposed the Clause as a bar to any inquiry into acts unrelated to dissemination of the congressional reports.

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In Tavoulareas v. Piro, 527 F. Supp. at 682, the court ruled "[t]he fact that the documents were ultimately disseminated outside of Congress does not provide any justification" for piercing the privilege as to the staff's internal use of the document. Accord McSurely v. McClellan, 553 F.2d at 1296-1298 (use and retention of illegally seized documents by Committee not actionable); United States v. Helstoski, 442 U.S. 477, 489 (1979) (clause bars introduction into evidence of even non-contemporaneous discussions and correspondence which merely describe and refer to legislative acts in bribery prosecution of Member); Eastland v. United States Servicemen's Fund, 421 U.S. at 499 n. 13 (subpoena to Senate staff aide for documents and testimony quashed because "received by [the employee] pursuant to his official duties as a staff employee of the Senate" and therefore ". . . within the privilege of the Senate"). See also United States v. Hoffa, 205 F. Supp. 710, 723 (S.D. Fla. 1962), cert. denied sub nom Hoffa v. Lieb, 371 U.S. 892 (wiretap withheld from defendant by "invocation of legislative privilege by the United States Senate").

In the Tavoulareas case, in which I represented the House deponents, part of the theory of plaintiff's case against the Post was that the reporter "laundered" the story through the committee "as a means of lending legitimacy" to the stories and information provided by other sources, Tavoulareas v. Piro, 93 F.R.D. at 18. In pursuance of validating this theory, the plaintiff sought to prove that the committee never formally authorized the investigation, but rather that the staff merely served as a conduit and engaged in no bona fide investigative activity. The court ruled that "although plaintiffs have repeatedly suggested that the subject investigation was not actually aimed at uncovering information of valid legislative interest . . . it is clear that such assertions, even if true, do not pierce the legislative privilege."

As a practical matter, therefore, a litigant suing or seeking to take testimony from a CRS employee based on dissemination of a report alleged to be libelous or actionable may be unable to obtain the collateral evidence needed to prove such a claim – a serious impediment to bringing such a case in the first place.

Even in the case of Doe v. McMillan, 412 U.S. 306 (1973) relied on by the CRS memorandum to support its narrow view of the Clause's protection, the Court of Appeals on remand stated: "Restricting distribution of committee hearings and reports to Members of Congress and the federal agencies would be unthinkable." 566 F.2d 713, 718 (D.C. Cir. 1977). It would be similarly unthinkable to subject CRS to broad ranging discovery simply because its work product was made available on the Internet.

The CRS memorandum raises the specter that litigants might even seek "the files of CRS analysts" in actions challenging the privilege. It is beyond peradventure of doubt, however, that publication of even alleged defamatory or actionable congressional committee reports does not entitle a litigant to legislative files used or created in

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preparing such a report. United States v. Peoples Temple of the Disciples of Christ, 515 F. Supp. 246, 248-49 (D.D.C. 1981) In re: Guthrie, Clerk, U.S. House of Representatives, 773 F.2d 634 (4th Cir. 1984), Eastland v. United States Servicemen's Fund, 421 U.S. at 499, n. 13. Given the foregoing caselaw, I fail to see a realistic threat that CRS employees will be subjected to any increased risk of liability, or discovery of their files. Of course, nothing can prevent litigants from filing frivolous or ill-founded suits, but their successful prosecution or ability to obtain evidence from legislative files seems remote and nothing in your bill would change that.

The CRS memoranda even goes so far as to suggest that claims of speech or debate immunity for CRS products might lead to in camera inspection of material, itself an incursion into legislative branch discretion. Yet in the very case cited to by CRS memo, no court ordered in camera inspection of House documents. In Re: Guthrie, supra, involved no in camera inspection of legislation documents. These cases are typically litigated on the basis of the facial validity of the privilege and few, if any, courts of which I am aware have even gone so far as to order in camera inspection. See United States v. Dowdy, 479 F. 2d 213, 226 (4th Cir. 1973) ("Once it was determined, as here, that the legislative function . . . was apparently being performed, the proprietary and motivation for the action taken as well as the detail of the acts performed, are immune from judicial inquiry"). Under the Clause, courts simply do not routinely resort to in camera review to resolve privilege disputes. Given the now highly developed judicial analysis of the applicability of the Clause to modern legislative practices it rarely occurs. In one recent celebrated case cited to by the CRS, the Court upheld a claim of privilege for tobacco company documents obtained by Congress even though they were alleged to have been stolen, without ever seeking in camera review. Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 417 (D.C. Cir. 1995) ("Once the documents were received by Congress for legislative use – at least so long as congressmen were not involved in the alleged theft – an absolute constitutional ban of privilege drops like a steel curtain to prevent B&W from seeking discovery").

In an abundance of caution, and to address CRS' concerns, you might consider adding the following language to the bill: "Nothing herein shall be deemed or considered to diminish, qualify, condition, waive or otherwise affect applicability of the constitution's Speech or Debate Clause, or any other privilege available to Congress, its agencies or their employees, to any CRS product made available on the Internet under this bill."

I appreciate the CRS sensitivity to subjecting its employees, or their work product, to searching discovery by litigants. Based on the very good caselaw protecting their performance of legislative duties and the strong institutional precedent in both the House and Senate in defending CRS against such intrusions, I do not believe your bill creates any greater exposure to such risks than already exists.

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hope my views are helpful in your deliberations on this issue.

Sincerely,


Stanley M. Brand

SMB:mob

BRAND & FRULLA

A PROFESSIONAL CORPORATION

923 FIFTEENTH STREET, N.W.

WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700

TELECOPIER: (202) 737-7565

February 6, 2001

HAND DELIVERED

The Honorable John McCain, Chairman
United States Senate Committee on Commerce,
Science and Transportation
SR-241 Russell Senate Office Building
Washington, D.C. 20510-0303

Dear Senator McCain:

I am writing to address the provisions of a draft Senate Resolution which I understand you intend to introduce directing the Senate Sergeant-at-Arms to provide Internet access to certain public congressional and Congressional Research Service documents. This resolution is substantially the same as a bill you introduced in 1998 to make certain of the same documents available on the Internet.

By letter dated January 27, 1998, I commented extensively on the impact of this substantially identical legislation upon applicability of the Speech or Debate Clause, U.S. Const., art. I, § 6, cl. 1, to CRS products.

I concluded then, and reaffirm that nothing in the resolution will alter or modify applicability of the Speech or Debate Clause protections to CRS products.

There is one sense in which your revised resolution may actually strengthen the protections of the Clause for CRS products. By lodging responsibility in the Sergeant-at-Arms for providing access, you have retained in a legislative officer, as opposed to the CRS, the power to make determinations concerning accessibility. The Sergeant-at-Arms, is a "[r]anking nonmember" of the Senate and one of the statutory "officers of the Congress," *Buckley v. Valeo*, 424 U.S. 1, 128 (1975) and 2 U.S.C. § 60-1(b) and there can be, therefore, no doubt about the Senate's intent to repose in one of its officers the power to control its privileges.

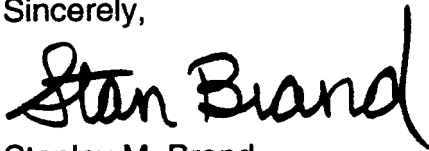
In doing so, you have, as a practical matter as well, given the Senate more direct control over access to CRS matters. See *United States v. Hoffa*, 205 F.Supp. 710, 723

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(S.D.Fla. 1962)(*cert. denied sub nom Hoffa v. Lieb*, 371 U.S. 892 (invocation of legislative privilege by the United States Senate conclusive upon judicial branch). Given that any putative litigant seeking to obtain privileged CRS documents would have to actually serve process upon the Sergeant-at-Arms to obtain documents under the revised resolution, it is even less likely under the revised resolution that a party could obtain disclosure of such documents.

Sincerely,

A handwritten signature in black ink that reads "Stan Brand". The signature is written in a cursive, flowing style.

Stanley M. Brand

SMB:mob