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Recommended Citation

Charney, Leon H. and Selvers, Jerome M. (1975) "Executive Encroachment on Congressional Immunity," *St. John's Law Review*: Vol. 50 : No. 1 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol50/iss1/2>

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EXECUTIVE ENCROACHMENT ON CONGRESSIONAL IMMUNITY

LEON H. CHARNEY* AND JEROME M. SELVERS**

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹

The Constitution of the United States was designed to protect the liberty of this country's citizens. In addition to the safeguards afforded the general population in the Bill of Rights, specific protection was provided for members of each branch of Government. With respect to members of Congress, the Constitution mandates that "[t]hey shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same"²

On January 15, 1973, Vance Hartke, a United States Senator from Indiana, was en route to a duly constituted session of the United States Senate when he was advised that he would be required to undergo a security search of his person and property prior to boarding an Allegheny Airlines flight to Washington, D.C.³ Moreover, Senator Hartke, who had been similarly detained at several other airports, was further advised that he would be prohibited from boarding the aircraft pending the outcome of such a search. Thereafter, Senator Hartke initiated an action⁴ against the

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The authors wish to thank Jerome M. Weinberg, Esq., for his assistance in the preparation of this Article.

¹ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (footnote omitted).

² U.S. CONST. art. I, § 6.

³ 14 C.F.R. § 121.538 (1975) requires an air carrier to establish a screening system "to prevent or deter the carriage aboard its aircraft of any explosive or incendiary device or weapon in carryon baggage or on or about the persons of passengers . . ." See also 14 C.F.R. §§ 107.1-11 (1975) (duty of airport operators). To control the specific antihijacking procedures developed, the FAA requires each air carrier and airport operator to submit its program to the Administrator for approval. 14 C.F.R. § 121.538(g)(1) (1975). This regulation also enables the Administrator to amend any approved security programs.

⁴ *Hartke v. FAA*, 369 F. Supp. 741 (E.D.N.Y. 1973) (mem.), transferred on venue grounds, Civil No. 74-276 (D.D.C., Feb. 13, 1974), *aff'd mem.*, Civil No. 74-1505 (D.C. Cir., June 10, 1975). The Senator sought to have the FAA regulations concerning airport screenings and searches declared unconstitutional as applied to him and also petitioned for injunctive relief. 369 F. Supp. at 742.

Federal Aviation Administration (FAA) and its Administrator, John H. Shaffer, alleging that the detention involved in submitting to the airport's security regulations constituted a violation of the specific mandate of article I, section 6 of the Constitution.

This Article will discuss the opinion of the Court of Appeals for the District of Columbia Circuit in *Hartke v. Federal Aviation Administration (FAA)*.⁵ To understand the implications of this decision, however, a brief examination of the origin and status of airport searches and the historical path which the congressional immunity doctrine has traversed may prove helpful.

AIRPORT SCREENING AND SEARCHES

As the Court of Appeals for the Second Circuit has noted, "[n]othing in the history of the [fourth] Amendment remotely suggests that the framers would have wished to prohibit reasonable measures to prevent the boarding of vessels by passengers intent on piracy"⁶ and "[t]he reasonableness of a warrantless search depends . . . on balancing the need for a search against the offensiveness of the intrusion."⁷ Although the constitutionality of airport

⁵ Civil No. 74-1505 (D.C. Cir., June 10, 1975) (mem.). The action was originally brought in the Eastern District of New York. *Hartke v. FAA*, 369 F. Supp. 741 (E.D.N.Y. 1973) (mem.). The complaint against the FAA *eo nomine*, however, was dismissed for lack of subject matter jurisdiction under the principles of sovereign immunity. *Id.* at 743-45. The court noted that specific statutory authorization for such a suit did not exist, nor did provisions of Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1970), constitute a general waiver of sovereign immunity. 369 F. Supp. at 744-45. Moreover, the court rejected Hartke's contention that, where the acts of the FAA are alleged to be unconstitutional, sovereign immunity is inapplicable. *Id.* at 744.

As to the Administrator, John H. Shaffer, the court found venue to be improper. Since no real property was involved, the cause of action arose in Indiana, and the plaintiff did not reside in New York, the only possible predicate for venue in the Eastern District would have been the defendant's residence therein. *Id.* at 746. See 28 U.S.C. § 1391 (1970). Since the official residence of the Administrator was in Washington, D.C., however, the court transferred the action against Shaffer to the United States District Court for the District of Columbia. 369 F. Supp. at 746.

Mr. Charney, coauthor of this Article, was counsel to Senator Hartke in this matter.

⁶ *United States v. Edwards*, 498 F.2d 496, 498 (2d Cir. 1974). In *Edwards*, the court held that an airport search of carryon luggage did not violate the fourth amendment merely because the search did not fall within "previously recognized categories" of warrantless searches. *Id.* at 498. Reasoning that the first clause of the fourth amendment prohibits only unreasonable warrantless searches, the court stated that a new exception may be recognized whenever it is both necessary and reasonable. *Id.*

⁷ *Id.* at 500. In determining whether screening and search procedures are "reasonable" and thus not violative of the fourth amendment, courts have sought to balance the "individual's privacy against society's interest in the intrusion at the particular moment as perceived from the then known facts." *United States v. Lopez*, 328 F. Supp. 1077, 1094 (E.D.N.Y. 1971) (mem.). Some courts have utilized this balancing approach even though they have differed upon the predicate theory of the warrantless airport procedures. See, e.g., *United States v. Davis*, 482 F.2d 893, 908-11 (9th Cir. 1973) (procedures deemed an administrative search); *United States v. Bell*, 464 F.2d 667, 672-74 (2d Cir. 1972), *cert. denied*,

screenings and searches has survived numerous fourth amendment attacks,⁸ courts have used differing rationales in balancing the need for security procedures against charges of unreasonableness.⁹

The primary rationale behind the approval of airline screenings and searches has been derived from the "stop and frisk" theory, developed by the Supreme Court in *Terry v. Ohio*,¹⁰ pursuant to which a police officer may stop and "pat down" an individual when investigating the possibility that a crime has been or will be committed and when he has "reasonable suspicion" to believe that the safety of himself and others in the area is in danger.¹¹ In *United States v. Lopez*,¹² one district court concluded that a reasonable suspicion is created when a passenger fits within the objective standards designed by the FAA to identify potential skyjackers.¹³ Other courts have determined that a positive reading on the

409 U.S. 991 (1973) (procedures upheld under traditional "reasonableness of search" doctrine).

⁸ Generally, searches conducted without proper judicial warrants are per se unreasonable unless they fall within one of several well-defined exceptions. See *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 178, 193 (1968). Warrantless searches have been sustained in a number of areas, e.g., *Chimel v. California*, 395 U.S. 752, 766 (1969) (dictum) (search incident to arrest); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (search after hot pursuit); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (search to prevent imminent destruction of evidence). See also *Terry v. Ohio*, 392 U.S. 1 (1968).

The various forms of airport searches, although almost always warrantless, have all been held to be constitutional, provided they are reasonable. See, e.g., *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (carryon baggage); *United States v. Albarado*, 495 F.2d 799, 808 (2d Cir. 1974) (dictum) (selective "pat down"); *United States v. Bell*, 464 F.2d 667, 672-74 (2d Cir. 1972), cert. denied, 409 U.S. 991 (1973) (FAA Gate Plan); *United States v. Epperson*, 454 F.2d 769, 770-71 (4th Cir.), cert. denied, 406 U.S. 947 (1972) (magnetometer). See generally *Brodsky, Terry and the Pirates: Constitutionality of Airport Searches and Seizures*, 62 Ky. L.J. 623, 627-29, 651-53 (1974), wherein the author discusses the different screening and search procedures employed at airports.

⁹ Compare *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971) (mem.) with *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). For a discussion of the dissimilar approaches taken by courts upholding airport security procedures, see Comment, *Warrantless Searches Under Anti-Hijacking Program*, 26 BAYLOR L. REV. 604 (1974).

¹⁰ 392 U.S. 1 (1968). In *Terry*, a veteran detective observed two men repeatedly walking up and down a street, continually stopping in front of a particular store to look in the window. Fearing a possible robbery, the detective stopped the men and asked them for identification. When they refused to identify themselves, the detective grabbed Terry and, believing that the men may have been armed, "patted him down." As a result of the "pat down," the detective felt a hard object in Terry's breast pocket and, thinking it was a gun, conducted a complete search of the two men. *Id.* at 5-7.

¹¹ *Id.* at 27.

¹² 328 F. Supp. 1077 (E.D.N.Y. 1971) (mem.).

¹³ *Id.* at 1086-98, 1100-01. In *Lopez*, the FAA Gate Plan was employed. This screening procedure consisted of notices in English and Spanish that all passengers and baggage were subject to a search, use of a profile setting forth the characteristics of possible hijackers, activation of a magnetometer which detected and measured the presence of quantities of ferrous metal, and requests for identification by both airline and law enforcement officials. When the defendant failed to pass the established criteria, he was frisked by the law enforcement official for weapons and explosives. The official detected the presence of a hard object beneath the defendant's outer clothing, which eventually was revealed to be a

magnetometer is sufficient to warrant a *Terry* search.¹⁴ In fact, Judge Friendly, concurring in *United States v. Bell*,¹⁵ went so far as to state that "the danger *alone* meets the test of reasonableness"¹⁶ when the search is done in a good faith effort to prevent skyjacking and the passenger is aware of his option to avoid the search by choosing alternative means of travel.¹⁷

In addition to this lack of unanimity on what constitutes and triggers a reasonable screening and search of airline passengers and their carryon luggage, some courts have begun to abandon the *Terry* doctrine entirely and uphold such security procedures on different grounds. In *United States v. Davis*,¹⁸ the Court of Appeals for the Ninth Circuit held that, since the security program is a general regulatory scheme furthering an administrative purpose rather than a criminal investigation, the procedures are more properly categorized as an administrative search.¹⁹ The court rea-

tightly packed envelope of heroin. Although the indictment itself was dismissed on other grounds, the court, relying upon the exception created by *Terry*, upheld the frisk against a fourth amendment attack.

¹⁴ See *United States v. Epperson*, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972). The Fourth Circuit relied heavily on the fact that the invasion of privacy caused by the magnetometer was minimal. The constitutionality of both the magnetometer search *per se* and the subsequent frisk has also been upheld in *United States v. Slocum*, 464 F.2d 1180 (3d Cir. 1972), and *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). In *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974), however, the Second Circuit held that although the magnetometer search is reasonable, the subsequent frisk is a greater intrusion. According to that court, therefore, the passenger must have an opportunity to remove the metal and go through the magnetometer again. Should the passenger fail the magnetometer test the second time, a frisk would then be considered reasonable. *Id.* at 805-08.

¹⁵ 464 F.2d 667, 674 (2d Cir. 1972) (Friendly, C.J., concurring), *cert. denied*, 409 U.S. 991 (1973).

¹⁶ 464 F.2d at 675 (emphasis in original). The danger that Chief Judge Friendly referred to was the possible loss of hundreds of lives and the destruction of millions of dollars' worth of property which he deemed to be "inherent" in the hijacking of an airplane. *Id.*

¹⁷ *Id.*

¹⁸ 482 F.2d 893 (9th Cir. 1973). In *Davis*, the defendant and a friend were told by an airline employee that they were to be subjected to a routine security check. Upon arriving at the loading gate, the employee reached for Davis' briefcase, opened it, and found a gun. The airline employee gave the gun to federal law enforcement officials, who then escorted Davis away. He was subsequently tried and convicted for attempting to board an aircraft with a concealed weapon in violation of 49 U.S.C. § 1472(1) (1970). On appeal to the Ninth Circuit, the conviction was reversed and the case remanded for a determination as to whether Davis consented to the search. 482 F.2d at 914-15.

¹⁹ The *Davis* court found *Terry* inapplicable since, in *Terry*, to justify the search of an individual "the government must focus on each person and demonstrate that as to that individual there is specific cause to fear the justifying harm." 482 F.2d at 906 (footnote omitted). In *Davis*, however, the screening process was not directed specifically against the defendant; rather, "[t]he search was indiscriminate, and, in view of its object, necessarily so, absent a foolproof means of isolating in advance those few individuals who were genuine hijack risks." *Id.* at 907. The court concluded that the extension of *Terry* to airport situations would entail an interpretation which would justify "the wholesale 'frisking' of the general public in order to locate weapons and prevent future crimes," *id.* at 908, a result the *Terry* Court clearly did not intend. See *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

soned that the program was devised to prevent weapons and explosives from being brought on board and not for the purpose of detecting crime or apprehending criminals.²⁰ Hence, the court found that an administrative search is valid as long as it is reasonably used to promote a valid administrative purpose.²¹ Moreover, the *Davis* court found, as have numerous other courts, that consent is an important element of the airport screening and search and stressed that a passenger impliedly agrees to the procedures when he chooses to travel by plane.²² In short, although reasonable screenings and searches attendant to air travel are constitutional, their constitutionality has been governed by administrative as well as criminal rationales.

PRIVILEGES AND IMMUNITIES

Drawing from the Articles of Confederation,²³ the United States Constitution extends two significant privileges to members of Congress — immunity from arrest and the privilege of speech or

²⁰ 482 F.2d at 908.

²¹ *Id.* at 908-12. See also *United States v. Moore*, 483 F.2d 1361, 1363 (9th Cir. 1973), wherein the court suggested, in dicta, that the airport screening and search of a passenger and his carryon baggage is an administrative search. The Sixth Circuit has also accepted the theory that these screenings and searches may be administrative. In *United States v. Dalpiaz*, 494 F.2d 374, 376 (6th Cir. 1974), the court noted that the airport procedures amounted to an administrative search which could be conducted without a warrant. Such a finding was not central to the holding, however, since the court placed greater emphasis on the fact that a passenger, boarding an airplane in the face of widespread knowledge of skyjackings and with notice of security precautions at the air terminal, consents to this search. Moreover, the court found that the *Terry* doctrine applied in a case such as this where reasonable suspicion arose toward an individual. *Id.*

²² 482 F.2d at 913-14. In *Davis*, the court stated that a prospective passenger has a choice to either submit to a search as a precondition to boarding or decide not to board the plane. Consequently, when the individual chooses to board the plane, it is a "consent" to be searched. *Id.*

Other courts have also discussed the issue of whether or not a passenger consents to a search at the airport. Although they have regarded the consent issue as important, the courts have not been unanimous in their holdings. See, e.g., *United States v. Albarado*, 495 F.2d 799, 806-07 (2d Cir. 1974) (imposing upon passenger choice between right to travel and fourth amendment rights is form of subtle coercion); *United States v. Miner*, 484 F.2d 1075, 1076 (9th Cir. 1973) (passenger may withdraw consent provided he has no intention of boarding plane); *United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973) (one who enters boarding area with proper notice consents to search); *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973) ("consent" causes individual to choose between right to travel and his fourth amendment rights); *United States v. Ruiz-Estrella*, 481 F.2d 723, 728 (2d Cir. 1973) (no free consent when agent searches baggage without warning of right to refuse); *United States v. Lopez*, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971) (mem.) (coercion exists in the consent if conditioned upon giving up one's right to travel).

²³ The ARTICLES OF CONFEDERATION art. V provided in pertinent part:

Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of congress shall be protected in their persons from arrest and imprisonments, during the time of their

debate.²⁴ From the outset, the meaning and scope of the privilege from arrest were the subject of heated litigation. Although the first judicial construction of the federal constitutional privilege occurred in 1798,²⁵ it was not until 1908, in *Williamson v. United States*,²⁶ that the Supreme Court was confronted with defining the scope of article I, section 6.²⁷

going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

At the Constitutional Convention, this language was adopted with minor revisions and little debate. See 5 J. ELLIOT, DEBATES 130, 378, 406, 560 (1937).

The legislative privilege of freedom from arrest can be traced to the English Petition of Right promulgated in 1628. A. SUTHERLAND, CONSTITUTIONALISM IN AMERICA 72 (1965). For a detailed discussion of the English parliamentary privilege of freedom from arrest, see E. MAY, THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 89-107 (18th ed. 1971) [hereinafter cited as MAY].

²⁴ U.S. CONST. art. I, § 6. See generally 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 856-63 (1833) [hereinafter cited as STORY]. Story noted that the congressional privilege from arrest

seems absolutely indispensable for the just exercise of the legislative power in every nation, purporting to possess a free constitution of government; and it cannot be surrendered without endangering the public liberties, as well as the private independence of the members.

Id. § 856 (footnote omitted). Indeed, Story comments that, since the absence of a legislator results in the loss of his constituents' voice in debate and vote, the privilege is not merely the privilege of the legislator, but also that of his constituents. *Id.* § 857.

Many state constitutions contain similar provisions affording their own legislators immunity from arrest. Several states, substantially adopting the language of the Federal Constitution, have extended the privilege to all cases "except treason, felony, and breach of the peace." See, e.g., ARK. CONST. art. 5, § 15; KY. CONST. § 43; LA. CONST. art. III, § 13; ME. CONST. art. IV, pt. 3, § 8; MINN. CONST. art. IV, § 10; OKLA. CONST. art. V, § 22; S.C. CONST. art. III, § 14; TENN. CONST. art. II, § 13.

Other states specifically add to this privilege from arrest a legislative immunity from civil process. See e.g., ARIZ. CONST. art. 4(2), § 6; KAN. CONST. art. 2, § 22; R.I. CONST. art. IV, § 5; Wis. CONST. art. 4, § 15. California limits legislative immunity to civil process, CAL. CONST. art. IV, § 14, since civil arrest has been prohibited in that State. CAL. CIV. PRO. § 478 (West Supp. 1975).

²⁵ *Coxe v. M'Clenachan*, 3 U.S. (3 Dall.) 478 (1798). In *Coxe*, the Supreme Court held that a member of Congress is privileged from arrest in a civil suit while Congress is in session. The Court also stated that if a Congressman were arrested prior to the commencement of a session of Congress, he would have to be released when the session began. *Id.*

Many state and territorial courts have dealt with the scope of the Federal Constitution's congressional immunity clause and have basically followed the federal courts' interpretations. See, e.g., *James v. Powell*, 26 App. Div. 2d 295, 274 N.Y.S.2d 192 (1st Dep't 1965), *aff'd*, 18 N.Y.2d 931, 223 N.E.2d 562, 277 N.Y.S.2d 135 (1966) (no exemption from any civil process short of arrest); *Worth v. Norton*, 56 S.C. 56, 33 S.E. 792 (1899) (Congressman on leave of absence during session of Congress not exempt from service of civil process); *State v. Smalls*, 11 S.C. 262 (1878) (Congressman not immune from being indicted for bribery).

²⁶ 207 U.S. 425 (1908).

²⁷ The Supreme Court was faced with the application and interpretation of article I, § 6 in *Burton v. United States*, 196 U.S. 283 (1905). In *Burton*, the defendant, a Senator from Kansas, was convicted for receiving compensation from a company for obtaining a favorable decision from the "Postoffice Department." *Id.* at 285-86. Counsel for the defendant raised, *inter alia*, the privilege of freedom from arrest. In mentioning the privilege, the Court stated that the "alleged privilege of freedom from arrest as Senator would probably depend upon the question whether the offense charged was in substance a felony, and if so, was that privilege a personal one only, and not given for the purpose of always securing the

Williamson, a member of the House of Representatives, was convicted for conspiracy to suborn perjury in proceedings for the purchase of public land. Upon sentencing, Williamson objected to the imposition of a prison term, alleging that such incarceration would violate his constitutional right to travel to and from, as well as attend, the sessions of Congress.²⁸ After examining the history of the clause in question,²⁹ the Supreme Court dismissed Williamson's objection by deciding that the words "except Treason, Felony and Breach of the Peace" excluded from the privilege arrests and prosecutions for criminal offenses.³⁰ Specifically, the Court declared that "the privilege of freedom from arrest has always been limited to civil causes, and has not been allowed to interfere with the administration of criminal justice."³¹

In *Long v. Ansell*³² the Supreme Court was asked to define the "civil causes" to which the privilege applies. The Senator from Louisiana was served with a summons in a libel action while he was in Washington, D.C. Long appeared in the lower court specially and solely for the purpose of questioning the service of the summons. Since Congress was in session, Long argued, he, as a Senator, was privileged from both service of process and arrest in civil proceedings.³³ In affirming the lower court's denial of Long's motion, the Court refused to equate civil process with arrest³⁴ and declared that "[w]hen the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies."³⁵ More recently, in *Gravel v. United States*,³⁶

representation of a State in the Senate of the United States." *Id.* at 295. Although the Court believed that the issue was not "frivolous" and that the Court possessed the jurisdiction to decide this question, it stated that "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case" and proceeded to dispose of the appeal on other grounds. *Id.*

²⁸ 207 U.S. at 423-33.

²⁹ The Court examined the parliamentary privilege and found no doubt that the words as used in England excluded all crimes from its operation. *Id.* at 438-46. See generally MAY, *supra* note 23, at 89-107. Since the words "treason," "felony," and "breach of the peace," as adopted by the Constitutional Convention, were meant in the same sense as had been established in England, the Court concluded that all criminal offenses are clearly excepted from the operation of the privilege. 207 U.S. at 443-46. See also STORY, *supra* note 24, § 862.

³⁰ 207 U.S. at 446.

³¹ *Id.* at 441 (citation omitted).

³² 293 U.S. 76 (1934).

³³ *Id.* at 81-82.

³⁴ Several state constitutions have explicitly exempted state legislators from civil process. See, e.g., ARIZ. CONST. art. 4(2), § 6; CAL. CONST. art. IV, § 14; KAN. CONST. art. 2, § 22; MICH. CONST. art. 4, § 11; R.I. CONST. art. IV, § 5; WIS. CONST. art. 4, § 15. Notably, one California court, broadly interpreting its immunity from civil process provision, has held that it "applies to civil process generally and cannot be squeezed by interpretation to a restricted class of lawsuits." *Harmer v. Superior Court*, 275 Cal. App. 2d 345, 79 Cal. Rptr. 855, 857 (1969).

³⁵ 293 U.S. at 83 (footnote omitted).

the Court reaffirmed this position on the privilege from arrest. Although the case itself dealt more directly with the speech and debate privilege,³⁷ the *Gravel* Court concluded, after reviewing historical precedent, that “[i]t is . . . sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members.”³⁸ In sum, then, the Supreme Court decisions to date are precise in limiting the privilege to civil arrest or, more significantly, not extending the privilege to a criminal arrest.³⁹

Hartke v. FAA

Following his detention at Dress Memorial Airport in Evansville, Indiana, Senator Hartke commenced a suit seeking a declaratory judgment that members of the Legislature are immune from airport search and screening.⁴⁰ The Senator contended: First, that the promulgation of regulations by the FAA, part of the executive branch of the Government, sanctioning a detention of a member of Congress violated the separation of powers doctrine; and second, that his restraint at the airport was tantamount to an arrest from which he was immune as a member of Congress.⁴¹ Having considered cross-motions for summary judgment, the district court ordered that the FAA’s motion be granted and that the Senator’s motion be denied.⁴² In a one-paragraph opinion, the court held that the Senator,

³⁰ 408 U.S. 606 (1972).

³⁷ In *Gravel*, a United States Senator made certain classified documents, the Pentagon Papers, a matter of public record and arranged for their publication by a private publisher. A grand jury was convened to investigate whether any violations of federal law were involved in the Senator’s actions. The grand jury issued a subpoena to an aide of the Senator, and the Senator, in attempting to quash the subpoena, invoked the speech or debate clause of article I, § 6. *Id.* at 608-10. The Court held that while the clause had traditionally been given a broad interpretation with respect to any acts done in Congress, it did not extend to the private publication involved in the case at bar. *Id.* at 624-25. In addition, the Court held that the clause did not immunize legislators or their aides from testifying about third-party crimes where no testimony pertaining to legislative acts was involved. *Id.* at 622.

³⁸ *Id.* at 616.

³⁹ In the few cases in which state courts have ruled on the scope of the immunity accorded state legislators under state constitutions, the courts have refused to extend the privilege to criminal matters. See, e.g., *Ex parte Emmett*, 120 Cal. App. 349, 7 P.2d 1096 (1932); *Swope v. Commonwealth*, 385 S.W.2d 57 (Ky. 1964); *In re Wilkowski*, 270 Mich. 687, 259 N.W. 658 (1935).

⁴⁰ *Hartke v. FAA*, 369 F. Supp. 741, 742-43 (E.D.N.Y. 1973), transferred on venue grounds, Civil No. 74-276 (D.D.C., Feb. 13, 1974), *aff’d mem.*, Civil No. 74-1505 (D.C. Cir., June 10, 1975).

⁴¹ See *Hartke v. FAA*, Civil No. 74-1505 (D.C. Cir., June 10, 1975) (mem.).

⁴² *Hartke v. FAA*, Civil No. 74-276 (D.D.C., Feb. 13, 1974).

upon being required to submit, as a condition to boarding the flight, to the pre-boarding property search and personal screening provided for in validly promulgated regulations . . . , was never arrested, since the term "Arrest" as used in Article I, Section 6, cl. I of the Constitution refers only to arrests incident to civil suits⁴³

On June 10, 1975, in *Hartke v. FAA*,⁴⁴ the District of Columbia Circuit affirmed the lower court's decision.

With respect to Senator Hartke's contention that the regulations were an unconstitutional encroachment on the doctrine of separation of governmental powers,⁴⁵ the circuit court noted that Congress itself had inaugurated search and screening requirements and that "[t]he Air Transportation Security Act of 1974 . . . subjects 'all passengers and all (carryon) property' to pre-boarding procedures promulgated by the Administrator."⁴⁶ Stating that the regulations apply to an "airline passenger,"⁴⁷ the court declared that legislators should be treated like any other passenger.⁴⁸ It failed to recognize that for the purposes of this suit, however, Hartke was not only a passenger, but also a duly elected United States Senator, delegated by oath to uphold the Constitution and the safeguards provided therein for members of Congress, en route to a duly constituted session of Congress.

Turning to one such safeguard, privilege from arrest, the

⁴³ *Id.* (citations omitted).

⁴⁴ Civil No. 74-1505 (D.C. Cir., June 10, 1975) (mem.).

⁴⁵ The basis for Senator Hartke's separation of powers argument was that it is theoretically possible for the executive branch to prevent a Congressman from fulfilling his duties. Conceivably, the executive agency could deter a Congressman from being at a session of Congress when crucial legislation is at stake. See note 65 and accompanying text *infra*. That an imputation of such base motives to the executive branch was within the contemplation of the framers may be seen from the Supreme Court's examination of the speech or debate privilege of article I, § 6 in *United States v. Johnson*, 383 U.S. 169 (1966). The Court in *Johnson* found the privilege granted by the speech or debate clause applicable in a case where a Congressman was accused of delivering a speech intended to serve only private interests. In discussing the origins of the clause, the Court thought it "apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits . . . , but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *Id.* at 180-81. See also *Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Brewster*, 408 U.S. 501 (1972).

⁴⁶ Civil No. 74-1505 at 3 (D.C. Cir., June 10, 1975) (mem.) (emphasis in original).

⁴⁷ *Id.* (emphasis added).

⁴⁸ *Id.* The court, in stating that legislators ought to be subject to preboarding procedures, relied on *Gravel v. United States*, 408 U.S. 606 (1972), wherein the Supreme Court stated that "legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons." *Id.* at 615. The Court in *Gravel*, however, was not confronted with the issue of privilege from arrest and, more specifically, did not deal with whether security regulations, such as those employed in airports, could be defined as criminal arrests. In making the statement that legislators are bound by the law "as are ordinary persons," the Court was specifically referring to "ordinary criminal laws." *Id.* at 615.

circuit court held that “[a]pplication of the security regulations to an airline passenger does not involve an apprehension by judicial process to answer a demand for judgment against him, and we are not at liberty to expand the constitutional protection beyond that.”⁴⁹ The court refused to determine whether the security detention and invasion of privacy constituted an arrest and was content to note that “it is clear that the practice complained of is beyond the purview of the constitutional provision appellant invokes.”⁵⁰ In short, the circuit court begged the question by affirming the lower court’s decision without first determining whether in fact Senator Hartke was arrested.

The constitutional provision which the Senator sought to invoke is precise. With the exception of treason, felony, and breach of the peace, members of Congress are privileged from arrest during their attendance at or travel to and from the sessions of Congress.⁵¹ There had never been any contention by the Government that Senator Hartke’s actions or conduct involved treason, felony, or breach of the peace. Thus, the authors believe that the Senator was entitled to immunity from arrest, including airport search and screening.

The district and circuit courts were content to rest their decisions on the language of *Williamson*, *Long*, and *Gravel*.⁵² It is submitted, however, that the specific grant of immunity found in article I, section 6 cannot be swept aside by the broad language of three decisions which did not deal directly with the claim advanced by Senator Hartke. *Williamson* had been indicted, tried, convicted, and sentenced for committing an admittedly criminal offense; the court exempted from the operation of the privilege all criminal offenses.⁵³ The specific issue before the Supreme Court in *Long* was whether the conceded immunity from civil arrest should be extended to civil process; the court replied in the negative.⁵⁴ Finally, the *Gravel* case focused on the privilege and immunities surrounding speech and debate;⁵⁵ the Supreme Court did no more than refer to *Williamson* and *Long* in a general discussion, not at all central to their holding, of article I, section 6.⁵⁶ Senator Hartke was

⁴⁹ Civil No. 74-1505 at 2 (D.C. Cir., June 10, 1975) (mem.).

⁵⁰ *Id.*

⁵¹ See U.S. CONST. art. I, § 6.

⁵² *Williamson*, *Long*, and *Gravel* are discussed in notes 26-39 and accompanying text *supra*.

⁵³ *Williamson v. United States*, 207 U.S. 425, 446 (1908).

⁵⁴ *Long v. Ansell*, 293 U.S. 76, 82 (1934).

⁵⁵ See note 37 and accompanying text *supra*.

⁵⁶ *Gravel v. United States*, 408 U.S. 606, 614-15 (1972).

neither indicted, tried, convicted, and sentenced for a criminal offense nor served with process in civil suit. He was detained and searched against his will at Dress Memorial Airport while en route to a duly constituted session of the United States Senate.

There can be little doubt but that Senator Hartke was "arrested" — "taken into custody or restrained of his full liberty,"⁵⁷ "a restriction of the right of locomotion,"⁵⁸ "the seizing of a person and detaining him."⁵⁹ In fact, the circuit court opinion in *Long*, affirmed by the Supreme Court, noted these definitions with approval and concluded "that the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time."⁶⁰ Moreover, were one to concede *arguendo* that the privilege extended only to civil arrests, should not the nature of a security regulation incident to air travel be discussed rather than avoided by steadfastly citing *Long* as controlling? At least one circuit has specifically held that airport searches and screenings relate to administrative, not criminal, functions;⁶¹ and, in the alternative, Senator Hartke was neither specifically suspected nor accused of the commission of a criminal act,⁶² nor could he be said to have consented to the procedure.⁶³ In fact, even the historical precedent behind immunity from arrest, so often cited in *Williamson*, *Long*, *Gravel*, and *Hartke*, warns that an arrest to which the privilege attaches cannot always be neatly categorized as either "criminal" or "civil."⁶⁴ The *Hartke* decision has severely limited the

⁵⁷ *Long v. Ansell*, 69 F.2d 386, 389 (D.C. Cir.), *aff'd*, 293 U.S. 76 (1934).

⁵⁸ *Long v. Ansell*, 69 F.2d 386, 388, *quoting* *Hart v. Flynn's Ex'r*, 38 Ky. (8 Dana) 190, 191 (1839).

⁵⁹ *Long v. Ansell*, 69 F.2d 386, 389 (D.C. Cir., 1934), *quoting* *Baltimore & O.R.R. v. Strube*, 111 Md. 119, 73 A. 696, 700 (1909).

⁶⁰ 69 F.2d at 389. Other courts have defined "arrest" in a similar manner. *See, e.g.*, *Monroe v. Pape*, 221 F. Supp. 635, 642, 648 (N.D. Ill., 1963); *United States v. Scott*, 149 F. Supp. 837, 840 (D.D.C. 1957).

⁶¹ *See* text accompanying note 19 and note 21 *supra*.

⁶² *See* note 19 *supra*.

⁶³ Senator Hartke did not consent to the search. The authors contend that the fact that he boarded the plane does not amount to an implied consent. *See, e.g.*, *United States v. Albarado*, 495 F.2d 799, 806-07 (2d Cir. 1974); *United States v. Lopez*, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971).

Additionally, the argument that had Hartke not wished to be searched he could have utilized an alternative mode of transportation is untenable. The Senator was en route to a session of Congress. Choosing an alternative means of transportation to travel from Indiana to Washington, D.C., would result in an extensive delay, impinging upon the time the Senator has to prepare for the upcoming session, and conceivably could cause him to arrive after the session convenes. As a representative of the people in his State, any unreasonable delay would be tantamount to usurping the Senator's primary responsibility of being the voice of his constituents.

⁶⁴ In his famous treatise on parliamentary practice, Eschine May noted the problem faced

scope of congressional immunity with unknown ramifications. What does article I, section 6 mean when a Senator, having committed neither treason nor felony nor breach of the peace, may be arrested by the executive branch en route to a session of Congress?

CONCLUSION

The privileges and immunities of article I, section 6 of the Constitution were deliberately included by the founding fathers in their final document. They deemed it essential that our legislators be unhampered in their travel to and from legislative sessions and permitted to tend to the business of legislating without abuse by any other branch of Government. It was intended that each branch of Government be truly independent from the other.

The *Hartke* decision is fraught with inconsistencies and illogic that threaten a precise constitutional protection. Of more concern is the court's willingness to reduce a constitutional mandate to the reasonableness and good faith of another branch of Government — a concept so inherently dangerous that it should by its very nature be deemed unconstitutional. Is it not conceivable that a member of Congress could be detained at an airport for a "routine" search, miss a plane, and thereby miss a vote in Congress? The conviction of President Andrew Johnson failed in the Senate by one vote, as did an amendment to establish oil import quotas.⁶⁵ Our system of government and the doctrine of separation of powers was designed to prevent one branch from having to rely on another's good faith. The authors concur with Judge Oakes who

but left unresolved by the *Hartke* court. In commenting upon the history of the English privilege from arrest, May noted:

For the purposes of constitutional theory, the alternatives of civil actions or criminal offences of the kind specified were at first tacitly supposed to exhaust all possible grounds of arrest. But there was later found to be a debatable intermediate region, including cases of commitment for contempt, . . . and preventive detention by order of an executive authority. In order to draw the line between what was privileged and what was not privileged it became necessary for the House or select committees of the House to decide in each particular case of arrest

MAY, *supra* note 23, at 90. Thus, based on English parliamentary practice, the *Hartke* court should have made an individual determination as to whether the privilege applied in the case at bar instead of summarily granting judgment for the FAA.

⁶⁵ H.R. 1211, 81st Cong., 1st Sess., 95 CONG. REC. 12,929 (1949). Congressmen should be unhampered in performing their legislative functions. Quite often, at least in the Senate, bills and resolutions are decided by a single vote. *See, e.g.*, S. 1801, 93d Cong., 1st Sess., 119 CONG. REC. 24,316 (1973) (elimination of environmental impact requirements in construction of Alaskan pipeline); H.R. 9910, 92d Cong., 1st Sess., 117 CONG. REC. 21,307 (1971) (requirement that prisoners be released prior to a military withdrawal in Indochina); S. 50, 82d Cong., 2d Sess., 98 CONG. REC. 1537 (1952) (application for statehood for Alaska sent back to committee); H.R. 4780, 79th Cong., 1st Sess., 91 CONG. REC. 12,325 (1945) (extension of Second War Powers Amendment defeated).

warned: "Today airports, tomorrow some other forms of search, which may be 'applied to everyone' It is all too easy to permit encroachments upon personal liberty whenever there surfaces 'a barbarism hidden behind the superficial amenities of life.'"⁶⁶

⁶⁶ *United States v. Edwards*, 498 F.2d 496, 502 (2d Cir. 1974) (Oakes, J., concurring), quoting R. HEILBRONER, *AN INQUIRY INTO THE HUMAN PROSPECT* 15 (1974).