

cency, and regularity be preserved in a dignified public body. *2 Hats., 149.*

Whether the House is in order so that a Member may proceed in debate is determined by the Chair (Apr. 23, 2008, p. \_\_). Alleged partiality in making such a determination has been renounced (July 31, 2008, p. \_\_). The comportment of a presiding officer has formed the basis of a question of privilege (Aug. 3, 2007, p. \_\_).

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### SEC. III—PRIVILEGE

The privileges of members of Parliament, from small and obscure beginnings, have been advancing for centuries with a firm and never yielding pace.

§287. Privileges of members of Parliament.

Claims seem to have been brought forward from time to time, and repeated, till some example of their admission enabled them to build law on that example. We can only, therefore, state the points of progression at which they now are. It is now acknowledged, 1st. That they are at all times exempted from question elsewhere, for anything said in their own House; that during the time of privilege, 2d. Neither a member himself, his, *order H. of C. 1663, July 16*, wife, nor his servants (*familiares sui*), for any matter of their own, may be, *Elsynge, 217; 1 Hats., 21; 1 Grey's Deb., 133*, arrested on mesne process, in any civil suit: 3d. Nor be detained under execution, though levied before time of privilege: 4th. Nor impleaded, cited, or subpoenaed in any court: 5th. Nor summoned as a witness or juror: 6th. Nor may their lands or goods be distrained: 7th. Nor their persons assaulted, or characters

traded. And the period of time covered by privilege, before and after the session, with the practice of short prorogations under the connivance of the Crown, amounts in fact to a perpetual protection against the course of justice. In one instance, indeed, it has been relaxed by the 10 G. 3, c. 50, which permits judiciary proceedings to go on against them. That these privileges must be continually progressive, seems to result from their rejecting all definition of them; the doctrine being, that “their dignity and independence are preserved by keeping their privileges indefinite; and that ‘the maxims upon which they proceed, together with the method of proceeding, rest entirely in their own breast, and are not defined and ascertained by any particular stated laws.’” *1 Blackst., 163, 164.*

For a modern discussion of privileges of Members of Parliament, see Report of Joint Committee on Parliamentary Privilege of the House of Commons (H.C. 214–1, Mar. 30, 1999).

It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged “Senators and Representatives” themselves from the single act of “arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective Houses, and in going to and returning from the same, and from being questioned in any other

§ 288. Privilege of  
Members of Congress  
under the  
Constitution.

place for any speech or debate in either House.” *Const. U.S. Art I, Sec. 6*. Under the general authority “to make all laws necessary and proper for carrying into execution the powers given them,” *Const. U.S., Art. II, Sec. 8*, they may provide by law the details which may be necessary for giving full effect to the enjoyment of this privilege. No such law being as yet made, it seems to stand at present on the following ground: 1. The act of arrest is void, *ab initio*. 2 *Stra.*, 989. 2. The member arrested may be discharged on motion, *1 Bl.*, 166; *2 Stra.*, 990; or by habeas corpus under the Federal or State authority, as the case may be; or by a writ of privilege out of the chancery, *2 Stra.*, 989, in those States which have adopted that part of the laws of England. *Orders of the House of Commons, 1550, February 20*. 3. The arrest being unlawful, is a trespass for which the officer and others concerned are liable to action or indictment in the ordinary courts of justice, as in other cases of unauthorized arrest. 4. The court before which the process is returnable is bound to act as in other cases of unauthorized proceeding, and liable, also, as in other similar cases, to have their proceedings stayed or corrected by the superior courts.

The time necessary for going to, and returning from, Congress, not being defined, it will, of course, be judged of in every particular case by those who will have to decide the case. While privilege was understood in England to extend, as it does here, only to ex-

§ 289. Privilege as to going and returning.

emption from arrest, eundo, morando, et redeundo, the House of Commons themselves decided that “a convenient time was to be understood.” (1580,) *1 Hats.*, 99, 100. Nor is the law so strict in point of time as to require the party to set out immediately on his return, but allows him time to settle his private affairs, and to prepare for his journey; and does not even scan his road very nicely, nor forfeit his protection for a little deviation from that which is most direct; some necessity perhaps constraining him to it. *2 Stra.*, 986, 987.

This privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person; as a subpoena ad respondendum, or testificandum, or a summons on a jury; and with reason, because a Member has superior duties to perform in another place. When a Representative is withdrawn from his seat by summons, the 40,000 people whom he represents lose their voice in debate and vote, as they do on his voluntary absence; when a Senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does on his voluntary absence. The enormous disparity of evil admits no comparison.

The House has decided that the summons of a court to Members to attend and testify constituted a breach of privilege, and directed them to disregard the mandate (III, 2661); but in other cases wherein Members informed the House that they had been summoned before the District Court of the United States for the District of Columbia or other courts, the House authorized them to respond (III, 2662; Feb. 23, 1948, p. 1557; Mar. 5, 1948,

§ 290. Privilege of Members as related to rights of courts to summon witnesses and jurors.

§ 291a. Attitude of the House as to demands of the courts.

p. 2224; Apr. 8, 1948, p. 4264; Apr. 12, 1948, p. 4347; Apr. 14, 1948, p. 4461; Apr. 15, 1948, p. 4529; Apr. 28, 1948, p. 5009; May 6, 1948, pp. 5433, 5451; Feb. 2, 1950, p. 1399; Apr. 4, 1951, p. 3320; Apr. 9, 1951, p. 3525; Apr. 12, 1951, pp. 3751, 3752; Apr. 13, 1951, p. 3915; June 4, 1951, p. 6084; June 22, 1951, p. 7001; Sept. 18, 1951, p. 11571; Sept. 27, 1951, p. 12292; Mar. 5, 1953, p. 1658; Mar. 18, 1953, p. 2085; Mar. 11, 1954, p. 3102; July 19, 1954, p. 10904; Apr. 9, 1956, p. 5970; Apr. 10, 1956, p. 5991). The House, however, has declined to make a general rule permitting Members to waive their privilege, preferring that the Member in each case should apply for permission (III, 2660). Also in maintenance of its privilege the House has refused to permit the Clerk or other officers to produce in court, in obedience to a summons, an original paper from the files, but has given the court facilities for making copies (III, 2664, 2666; Apr. 15, 1948, p. 4552; Apr. 29, 1948, pp. 5161, 5162; May 6, 1948, p. 5432; Jan. 18, 1950, p. 565; Feb. 8, 1950, p. 1695; Feb. 13, 1950, p. 1765; Sept. 22, 1950, p. 15636; Apr. 6, 1951, p. 3403; Apr. 12, 1951, p. 3800; Oct. 20, 1951, p. 13777; Jan. 22, 1953, p. 498; May 25, 1953, p. 5523; Jan. 28, 1954, p. 964; Feb. 25, 1954, p. 2281; July 1, 1955, p. 9818; Apr. 12, 1956, p. 6258; Apr. 24, 1958, p. 7262; Apr. 29, 1958, p. 7636; Sept. 16, 1974, p. 31123; Jan. 19, 1977, p. 1728), but on one occasion, in which the circumstances warranted such action, the Clerk was permitted to respond and take with him certified copies of certain documents described in the subpoena (H. Res. 601, Oct. 29, 1969, p. 32005); and on the rare occasions in which the House has permitted the production of an original paper from its files, it has made explicit provision for its return (H. Res. 1022, 1023, Jan. 16, 1968, p. 80; H. Res. 1429, July 27, 1976, p. 24089). No officer or employee, except by authority of the House, should produce before any court a paper from the files of the House, nor furnish a copy of any paper except by authority of the House or a statute (III, 2663; VI, 587; Apr. 15, 1948, p. 4552; Apr. 30, 1948, pp. 5161, 5162; May 6, 1948, p. 5432; Jan. 18, 1950, p. 565; Feb. 8, 1950, p. 1695; Feb. 13, 1950, p. 1765; Sept. 22, 1950, p. 15636; Apr. 6, 1951, p. 3403; Apr. 12, 1951, p. 3800; Oct. 20, 1951, p. 13777; Mar. 10, 1954, p. 3046; Feb. 7, 1955, p. 1215; May 7, 1956, p. 7588; Dec. 18, 1974, p. 40925). In the 98th Congress, the House adopted a resolution denying compliance with a subpoena issued by a Federal Court for the production of records in the possession of the Clerk (documents of a select committee from the prior Congress), where the Speaker and joint leadership had instructed the Clerk in the previous Congress not to produce such records and where the Court refused to stay the subpoena or to allow the select committee to intervene to protect its interest; the resolution directed the Counsel to the Clerk to assert the rights and privileges of the House and to take all steps necessary to protect the rights of the House (Apr. 28, 1983, p. 10417). On appeal from a subsequent district court judgment finding the Clerk in contempt, the Court of Appeals reversed on the ground that a subpoena to depose a nonparty witness under the Federal Rules of Civil Procedure may only be served

in the district (of Maryland) where it was issued. In re Guthrie, 733 F.2d 634 (4th Cir. 1984). If an official of both Houses of Congress is subpoenaed in his official capacity, the concurrence of both Houses by concurrent resolution is required to permit compliance (H. Con. Res. 342, July 16, 1975, pp. 23144–46).

A resolution routinely adopted up to the 95th Congress provided that when the House had recessed or adjourned Members, officers, and employees were authorized to appear in response to subpoenas duces tecum, but prohibited the production of official papers in response thereto; the resolution also provided that when a court found that official papers, other than executive session material, were relevant, the court could obtain copies thereof through the Clerk of the House (see, e.g., H. Res. 12, Jan. 3, 1973, p. 30). In the 95th Congress, the House for the first time by resolution permitted this same type of general response whether or not the House is in session or in adjournment if a court has found that specific documents in possession of the House are material and relevant to judicial proceedings. The House reserved to itself the right to revoke this general permission in any specific case in which the House desires to make a different response (H. Res. 10, Jan. 4, 1977, p. 73; H. Res. 10, Jan. 15, 1979, p. 19). The permission did not apply to executive session material, such as a deposition of a witness in executive session of a committee, which could be released only by a separate resolution passed by the House (H. Res. 296, June 4, 1979, p. 13180). H. Res. 10 of the 96th Congress was clarified and revised later in that Congress by H. Res. 722 (Sept. 17, 1980, pp. 25777–90) and became the basis for rule VIII, added as rule L in the 97th Congress (H. Res. 5, Jan. 5, 1981, pp. 98–113, see § 697, *infra*).

Although the statutes provide that the Department of Justice may represent any officer of the House or Senate in the event of judicial proceedings against such officer in relation to the performance of official duties (see 2 U.S.C. 118), and that the Department of Justice shall generally represent the interests of the United States in Court (28 U.S.C. 517), the House has on occasion authorized special appearances on its own behalf by special counsel when the prerogatives or powers of the House have been questioned in the courts. The House has adopted privileged resolutions authorizing the chair of a subcommittee to intervene in any judicial proceeding concerning subpoenas duces tecum issued by that committee, authorizing the appointment of a special counsel to carry out the purposes of such a resolution, and providing for the payment from the contingent fund (now referred to as “applicable accounts of the House described in clause 1(j)(1) of rule X”) of expenses to employ such special counsel (H. Res. 1420, Aug. 26, 1976, p. 1858; H. Res. 334, May 9, 1977, pp. 13949–52), authorizing the Sergeant at Arms to employ a special counsel to represent him in a pending action in Federal court in which he was named as a defendant, and providing for the payment from the contingent fund of expenses to employ such counsel (H. Res. 1497, Sept. 2, 1976, p. 28937),

§ 291b. Judicial appearances on behalf of House.

and authorizing the chair of the Committee on House Administration to intervene as a party in a pending civil action in the U.S. Court of Claims, to defend on behalf of the House the constitutional authority to make laws necessary and proper for executing its constitutional powers, authorizing the employment of special counsel for such purpose, and providing for the payment from the contingent fund of expenses to employ such counsel (H. Res. 884, Nov. 2, 1977, p. 36661). The House has authorized the Speaker to take any steps considered necessary, including intervention as a party or by submission of briefs *amicus curiae*, in order to protect the interests of the House before the court (H. Res. 49, Jan. 29, 1981, p. 1304). The House also has on occasion adopted privileged resolutions, reported from the Committee on Rules, authorizing standing or select committees to make applications to courts in connection with their investigations (H. Res. 252, Feb. 9, 1977, pp. 3966–75; H. Res. 760, Sept. 28, 1977, pp. 31329–36; H. Res. 67, Mar. 4, 1981, pp. 3529–33), including an unreported resolution (adopted by special rule) regarding initiating or intervening in judicial enforcement of committee subpoenas (Feb. 14, 2008, p. \_\_), which authority was continued and expanded in the next Congress (sec. 4(f), H. Res. 5, Jan. 6, 2009, p. \_\_). For a discussion of the Office of General Counsel, which was established to provide legal assistance and representation to the House without regard to political affiliation and in consultation with the Bipartisan Legal Advisory Group, see clause 8 of rule II, § 670, *infra*.

When either House desires the attendance of a Member of the other to give evidence it is the practice to ask the other House  
 § 292. Attitude of one House as to demands of the other for attendance or papers. that the Member have leave to attend, and the use of a subpoena is of doubtful propriety (III, 1794). However, in one case the Senate did not consider that its privilege forbade the House to summon one of its officers as a witness (III, 1798). But when the Secretary of the Senate was subpoenaed to appear before a committee of the House with certain papers from the files of the Senate, the Senate discussed the question of privilege before empowering him to attend (III, 2665). For discussion of the means by which one House may prefer a complaint against a Member or officer of the other, see § 373, *infra*.

So far there will probably be no difference of opinion as to the privileges of the two Houses of Congress; but in the following cases it is otherwise. In December, 1795, the House of Representatives committed two persons of the name of Randall and Whitney for attempting to corrupt the integrity of certain Members, which they considered  
 § 293. Power of the House to punish for contempts.

as a contempt and breach of the privileges of the House; and the facts being proved, Whitney was detained in confinement a fortnight and Randall three weeks, and was reprimanded by the Speaker. In March, 1796, the House voted a challenge given to a Member of their House to be a breach of the privileges of the House; but satisfactory apologies and acknowledgments being made, no further proceeding was had.

\* \* \*

The cases of Randall and Whitney (II, 1599–1603) were followed in 1818 by the case of John Anderson, a citizen, who for attempted bribery of a Member was arrested, tried, and censured by the House (II, 1606). Anderson appealed to the courts and this procedure finally resulted in a discussion by the Supreme Court of the United States of the right of the House to punish for contempts, and a decision that the House by implication has the power to punish, because “public functionaries must be left at liberty to exercise the powers which the people have intrusted to them,” and “the interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers” (II, 1607; *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226, 227 (1821)). In 1828 an assault on the President’s secretary in the Capitol gave rise to a question of privilege that involved a discussion of the inherent power of the House to punish for contempt (II, 1615). Again in 1832, when the House censured Samuel Houston, a citizen, for assault on a Member for words spoken in debate (II, 1616), there was a discussion by the House of the doctrine of inherent and implied power as opposed to the other doctrine that the House might exercise no authority not expressly conferred on it by the Constitution or the laws of the land (II, 1619). In 1865 the House arrested and censured a citizen for attempted intimidation and assault on a member (II, 1625); in 1866, a citizen who had assaulted the clerk of a committee of the House in the Capitol was arrested by order of the House, but because there was not time to punish in the few remaining days of the session, the Sergeant-at-Arms was directed to turn the prisoner over to the civil authorities of the District of Columbia (II, 1629); and in 1870 Woods, who had assaulted a Member on his way to the House, was arrested on warrant of the Speaker, arraigned at the bar, and imprisoned for a term extending beyond the adjournment of the session, although not beyond the term of the existing House (II, 1626–1628).

§ 294. Decision of the court in Anderson’s case.



In 1876 the arrest and imprisonment by the House of Hallet Kilbourn, a contumacious witness, resulted in a decision by the Supreme Court of the United States that the House had no general power to punish for contempt, as in a case wherein it was proposing to coerce a witness in an inquiry not within the constitutional authority of the House. The Court also discussed the doctrine of inherent power to punish, saying in conclusion, “We are of opinion that the right of the Houses of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation. This latter proposition is one that we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or nonexistence of such a power in aid of the legislative function” (*Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880); II, 1611). In 1894, in the case of Chapman, another contumacious witness, the Supreme Court affirmed the undoubted right of either House of Congress to punish for contempt in cases to which its power properly extends under the expressed terms of the Constitution (II, 1614; *In Re Chapman*, 166 U.S. 661 (1897)). The nature of the punishment that the House may inflict was discussed by the Court in Anderson’s case (II, 1607; *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)).

In the case of *Marshall v. Gordon*, 243 U.S. 521 (1917), the Court addressed the following situation:

Appellant, while United States Attorney for the Southern District of New York, conducted a grand jury investigation that led to the indictment of a Member of the House. Acting on charges of misfeasance and non-feasance made by the Member against appellant in part before the indictment and renewed with additions afterward, the House by resolution directed its Judiciary Committee to make inquiry and report concerning appellant’s liability to impeachment. Such inquiry being in progress through a subcommittee, appellant addressed to the subcommittee’s chair, and gave to the press, a letter, charging the subcommittee with an endeavor to probe into and frustrate the action of the grand jury, and couched in terms calculated to arouse the indignation of the members of that committee and those of the House generally. Thereafter, appellant was arrested in New York by the Sergeant-at-Arms pursuant to a resolution of the House whereby the letter was characterized as defamatory and insulting and as tending to bring that body into public contempt and ridicule, and whereby appellant in writing and publishing such letter was adjudged to be in contempt of

the House in violating its privileges, honor, and dignity. He applied for habeas corpus.

The court held that the proceedings concerning which the alleged contempt was committed were not impeachment proceedings; that, whether they were impeachment proceedings or not, the House was without power by its own action, as distinct from such action as might be taken under criminal laws, to arrest or punish for such acts as were committed by appellant.

No express power to punish for contempt was granted to the House save the power to deal with contempts committed by its own Members (art. I, sec. 5). The possession by Congress of the commingled legislative and judicial authority to punish for contempts that was exerted by the House of Commons is at variance with the view and tendency existing in this country when the Constitution was adopted, as evidenced by the manner in which the subject was treated in many State constitutions, beginning at or about that time and continuing thereafter. Such commingling of powers would be destructive of the basic constitutional distinction between legislative, executive, and judicial power, and repugnant to limitations that the Constitution fixes expressly; hence there is no warrant whatever for implying such a dual power in aid of other powers expressly granted to Congress. The House has implied power to deal directly with contempt so far as is necessary to preserve and exercise the legislative authority expressly granted. Being, however, a power of self-preservation, a means and not an end, the power does not extend to infliction of punishment, as such; it is a power to prevent acts that in and of themselves inherently prevent or obstruct the discharge of legislative duty and to compel the doing of those things that are essential to the performance of the legislative functions. As pointed out in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), this implied power in its exercise is limited to imprisonment during the session of the body affected by the contempt.

The authority does not cease when the act complained of has been committed, but includes the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, *i.e.*, the continued existence of the interference or obstruction to the exercise of legislative power. In such case, unless there be manifest an absolute disregard of discretion, and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference. The power is the same in quantity and quality whether exerted on behalf of the impeachment powers or of the others to which it is ancillary. The legislative power to provide by criminal laws for the prosecution and punishment of wrongful acts is not here involved.

The Senate may invoke its civil contempt statute (2 U.S.C. 288d) to direct the Senate legal counsel to bring an action in Federal court to compel a witness to comply with the subpoena of a committee of the Senate. The House, in contrast, may either certify such a witness to the appropriate

United States Attorney for possible indictment under the criminal contempt statute (2 U.S.C. 192) or exercise its inherent power to commit for contempt by detaining the recalcitrant witness in the custody of the Sergeant-at-Arms.

(See also *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Sinclair v. United States*, 279 U.S. 263 (1929); *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Quinn v. United States*, 349 U.S. 155 (1955); *Groppi v. Leslie*, 404 U.S. 496 (1972).)

\* \* \* The editor of the *Aurora* having, in his paper of February 19, 1800, inserted some paragraphs defamatory of the Senate, and failed in his appearance, he was ordered to be committed. In debating the legality of this order, it was insisted, in support of it, that every man, by the law of nature, and every body of men, possesses the right of self-defense; that all public functionaries are essentially invested with the powers of self-preservation; that they have an inherent right to do all acts necessary to keep themselves in a condition to discharge the trusts confided to them; that whenever authorities are given, the means of carrying them into execution are given by necessary implication; that thus we see the British Parliament exercise the right of punishing contempts; all the State Legislatures exercise the same power, and every court does the same; that, if we have it not, we sit at the mercy of every intruder who may enter our doors or gallery, and, by noise and tumult, render proceeding in business impracticable; that if our tranquillity is to be perpetually disturbed by newspaper defamation, it will not be possible to exercise our functions with the requisite coolness and deliberation; and that we

§ 297. Jefferson's statement of arguments for inherent power to punish for contempt.

must therefore have a power to punish these disturbers of our peace and proceedings. \* \* \*

\* \* \* To this it was answered, that the Parliament and courts of England have cognizance of contempts by the express provisions of their law; that the State Legislatures have equal authority because their powers are plenary; they represent their constituents completely, and possess all their powers, except such as their constitutions have expressly denied them; that the courts of the several States have the same powers by the laws of their States, and those of the Federal Government by the same State laws adopted in each State, by a law of Congress; that none of these bodies, therefore, derive those powers from natural or necessary right, but from express law; that Congress have no such natural or necessary power, nor any powers but such as are given them by the Constitution; that that has given them, directly, exemption from personal arrest, exemption from question elsewhere for what is said in their House, and power over their own members and proceedings; for these no further law is necessary, the Constitution being the law; that, moreover, by that article of the Constitution which authorizes them "to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in them," they may provide by law for an undisturbed exercise of their functions, *e.g.*, for the punishment of contempts, of affrays or tumult in their presence, &c.; but, till the law be made, it does not

§ 298. Statement of arguments against the inherent power to punish for contempts.

exist; and does not exist, from their own neglect; that, in the meantime, however, they are not unprotected, the ordinary magistrates and courts of law being open and competent to punish all unjustifiable disturbances or defamations, and even their own sergeant, who may appoint deputies ad libitum to aid him *3 Grey, 59, 147, 255*, is equal to small disturbances; that in requiring a previous law, the Constitution had regard to the inviolability of the citizen, as well as of the Member; as, should one House, in the regular form of a bill, aim at too broad privileges, it may be checked by the other, and both by the President; and also as, the law being promulgated, the citizen will know how to avoid offense. But if one branch may assume its own privileges without control, if it may do it on the spur of the occasion, conceal the law in its own breast, and, after the fact committed, make its sentence both the law and the judgment on that fact; if the offense is to be kept undefined and to be declared only *ex re nata*, and according to the passions of the moment, and there be no limitation either in the manner or measure of the punishment, the condition of the citizen will be perilous indeed.

\* \* \*

\* \* \* Which of these doctrines is to prevail, time will decide. Where there is no fixed law, the judgment on any particular case is the law of that single case only, and dies with it. When a new and even a similar case arises, the judgment which is to make and at the same time

§ 299. Jefferson's suggestion that a law might define procedure in cases of contempt.

apply to the law, is open to question and consideration, as are all new laws. Perhaps Congress in the mean time, in their care for the safety of the citizen, as well as that for their own protection, may declare by law what is necessary and proper to enable them to carry into execution the powers vested in them, and thereby hang up a rule for the inspection of all, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case.

In 1837 the House declined to proceed with a bill “defining the offense of a contempt of this House, and to provide for the punishment thereof” (II, 1598). Congress has, however, prescribed that a witness summoned to appear before a committee of either House who does not respond or who refuses to answer a question pertinent to the subject of the inquiry shall be deemed guilty of a misdemeanor (2 U.S.C. 192).

A resolution directing the Speaker to certify to the U.S. Attorney the refusal of a witness to respond to a subpoena issued by a House committee involves the privileges of the House and may be offered from the floor as privileged if offered by direction of the committee reporting the resolution (*e.g.*, Oct. 27, 2000, p. 25200). A committee report to accompany such resolution may therefore be presented to the House without regard to the three-day availability requirement for other reports (see clause 4 of rule XIII; July 13, 1971, p. 24720). A resolution with two resolving clauses separately directing the certification of the contemptuous conduct of two individuals is subject to a demand for a division of the question as to each individual (contempt proceedings against Ralph and Joseph Bernstein, Feb. 27, 1986, p. 3061); as is a resolution with one resolving clause certifying contemptuous conduct of several individuals (Oct. 27, 2000, p. 25200; *contrast*, Deschler-Brown, ch. 30, § 49.1). A contempt resolution may be withdrawn as a matter of right before action thereon (Oct. 27, 2000, p. 25200).

In the 97th Congress, the House adopted a resolution directing the Speaker to certify to the United States Attorney the failure of an official of the executive branch (Anne M. Gorsuch, Administrator, Environmental Protection Agency) to submit executive branch documents to a House subcommittee pursuant to a subcommittee subpoena. This was the first occasion on which the House cited an executive official for contempt of Congress (Dec. 16, 1982, p. 31754). In the following Congress, the House adopted (as a question of privilege) a resolution reported from the same committee certifying to the United States Attorney the fact that an agreement had

been entered into between the committee and the executive branch for access by the committee to the documents that Anne Gorsuch had failed to submit and that were the subject of the contempt citation (where the contempt had not yet been prosecuted) (Aug. 3, 1983, p. 22692). In other cases in which compliance had subsequently been attained in the same Congress, the House has adopted privileged resolutions certifying the facts to the United States Attorney to the end that contempt proceedings be discontinued (see Deschler, ch. 15, § 21). In the 98th Congress, the House adopted a privileged resolution directing the Speaker to certify to the United States Attorney the refusal of a former official of the executive branch to obey a subpoena to testify before a subcommittee (H. Res. 200, May 18, 1983, p. 12720). In the 106th Congress the House considered a resolution directing the Speaker to certify to the United States Attorney the refusal of three individuals to obey a subpoena duces tecum and to answer certain questions while appearing under subpoena before a subcommittee, which resolution was withdrawn before action thereon (H. Res. 657, Oct. 27, 2000, p. 25217). In the 110th Congress, the House adopted (by special rule) a resolution directing the Speaker to certify to the United States Attorney the refusal of White House Chief of Staff to produce documents to a committee, and former White House Counsel to appear, testify, and produce documents to a subcommittee, each as directed by subpoena (Feb. 14, 2008, p. \_\_).

A resolution laying on the table a message from the President containing certain averments inveighing disrespect toward Members of Congress was considered as a question of the privileges of the House as a breach of privilege in a formal communication to the House (VI, 330).

**Privilege from arrest takes place by force of the election; and before a return be made a Member elected may be named of a committee, and is to every extent a Member except that he cannot vote until he is sworn, *Memor.*, 107, 108. *D'Ewes*, 642, col. 2; 643, col. 1. *Pet. Miscel. Parl.*, 119. *Lex. Parl.*, c. 23.2 *Hats.*, 22, 62.**

§ 300. Status of Member-elect as to privilege, oath, committee service, etc.

The Constitution of the United States limits the broad Parliamentary privilege to the time of attendance on sessions of Congress, and of going to and returning therefrom. In a case wherein a Member was imprisoned during a recess of Congress, he remained in confinement until the House, on assembling, liberated him (III, 2676).

It is recognized in the practice of the House that a Member may be named to a committee before being sworn, and in some cases Members have not taken the oath until long afterwards (IV, 4483), although in the modern practice Members-elect have been elected to standing committees

effective only when sworn (*e.g.*, H. Res. 26, 27; Jan. 6, 1983, p. 132). In one case, when a Member did not appear to take the oath, the Speaker with the consent of the House appointed another Member to the committee in his place (IV, 4484). The status of a Member-elect under the Constitution undoubtedly differs greatly from the status of a Member-elect under the law of Parliament. In various inquiries by committees of the House this question has been examined, with the conclusions that a Member-elect becomes a Member from the very beginning of the term to which elected (I, 500), that he is as much an officer of the Government before taking the oath as afterwards (I, 185), and that his status is distinguished from that of a Member who has qualified (I, 183, 184). Members-elect may resign or decline before taking the oath (II, 1230–1233, 1235; Jan. 6, 1999, p. 42); they have been excluded (I, 449, 464, 474, 550, 551; VI, 56; Mar. 1, 1967, pp. 4997–5038), and in one case a Member-elect was expelled (I, 476; II, 1262). The names of Members who have not been sworn are not entered on the roll from which the yeas and nays are called for entry on the Journal (V, 6048; VIII, 3122), nor are such Members-elect permitted to vote or introduce bills.

Every man must, at his peril, take notice who are members of either House returned of record. *Lex. Parl.*, 23; 4 *Inst.*, 24.

§ 301. Relations of Members and others to privilege.

On Complaint of a breach of privilege, the party may either be summoned, or sent for in custody of the sergeant. 1 *Grey*, 88, 95.

The privilege of a Member is the privilege of the House. If the Member waive it without leave, it is a ground for punishing him, but cannot in effect waive the privilege of the House. 3 *Grey*, 140, 222.

Although the privilege of Members of the House is limited by the Constitution, these provisions of the Parliamentary law are applicable, and persons who have attempted to bribe Members (II, 1599, 1606), assault them for words spoken in debate (II, 1617, 1625) or interfere with them while on the way to attend the sessions of the House (II, 1626), have been arrested by order of the House by the Sergeant-at-Arms, "Wherever to be found." The House has declined to make a general rule to permit Members to waive their privilege in certain cases, preferring to give or refuse permission in each individual case (III, 2660–2662).

In *United States v. Helstoski*, 442 U.S. 477 (1979), the Supreme Court discussed the ability of either an individual Member or the entire Congress



to waive the protection of the Speech or Debate Clause. The Court found first, that the Member's conduct in testifying before a grand jury and voluntarily producing documentary evidence of legislative acts protected by the Clause did not waive its protection. Assuming, without deciding, that a Member could waive the Clause's protection against being prosecuted for a legislative act, the Court said that such a waiver could only be found after an explicit and unequivocal renunciation of its immunity, which was absent in this case. Second, passage of the official bribery statute, 18 U.S.C. 201, did not amount to an institutional waiver of the Speech or Debate Clause for individual Members. Again assuming without deciding whether Congress could constitutionally waive the Clause for individual Members, such a waiver could be shown only by an explicit and unequivocal expression of legislative intent, and there was no evidence of that in the legislative history of the statute. The Speech or Debate clause is not an impediment to the enforcement within the House of the rule prohibiting personalities in debate (clause 1 of rule XVII, May 25, 1995, p. 14436).

For any speech or debate in either House, they shall not be questioned in any other place. *Const. U.S., I, 6; S. P. protest of the Commons to James I, 1621; 2 Rapin, No. 54, pp. 211, 212. But this is restrained to things done in the House in a parliamentary course. 1 Rush, 663.* For he is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty. *Com. p.*

§ 302. Parliamentary law as to questioning a Member in another place for speech or debate.

If an offense be committed by a member in the House, of which the House has cognizance, it is an infringement of their right for any person or court to take notice of it till the House has punished the offender or referred him to a due course. *Lex. Parl., 63.*

§ 303. Relation of the courts to parliamentary privilege.

Privilege is in the power of the House, and is a restraint to the proceeding of inferior courts, but not of the House itself. *2 Nalson, 450; 2 Grey, 399.* For whatever is spoken in the House

is subject to the censure of the House; and offenses of this kind have been severely punished by calling the person to the bar to make submission, committing him to the tower, expelling the House, &c. *Scob.*, 72; *L. Parl.*, c. 22.

§ 304. Breach of privilege to refuse to put a question which is in order.

It is a breach of order for the Speaker to refuse to put a question which is in order. *1 Hats.*, 175-6; *5 Grey*, 133.

Where the Clerk, presiding during organization of the House, declined to put a question, a Member put the question from the floor (I, 67).

And even in cases of treason, felony, and breach of the peace, to which privilege does not extend as to substance, yet in Parliament a member is privileged as to the mode of proceeding. The case is first to be laid before the House, that it may judge of the fact and of the ground of the accusation, and how far forth the manner of the trial may concern their privilege; otherwise it would be in the power of other branches of the government, and even of every private man, under pretenses of treason, &c., to take any man from his service in the House, and so, as many, one after another, as would make the House what he pleaseth. *Dec'l of the Com. on the King's declaring Sir John Hotham a traitor.* *4 Rushw.*, 586. So, when a member stood indicted for felony, it was adjudged that he ought to remain of the House till conviction; for it may be any man's case, who is guiltless, to be accused and indicted of felony, or the like crime. *23 El.*, 1580; *D'Ewes*, 283, col. 1; *Lex. Parl.*, 133.

§ 305. Parliamentary law of privilege as related to treason, felony, etc.

Where Members of the House have been arrested by the State authorities the cases have not been laid first before the House; but when the House has learned of the proceedings, it has investigated to ascertain if the crime charged was actually within the exceptions of the Constitution (III, 2673), and in one case in which it found a Member imprisoned for an offense not within the exceptions it released him by the hands of its own officer (III, 2676).

The House has not usually taken action in the infrequent instances in which Members have been indicted for felony, and in one or two instances Members under indictment or pending appeal on conviction have been appointed to committees (IV, 4479). The House has, however, adopted a resolution expressing the sense of the House that Members convicted of certain felonies should refrain from participation in committee business and from voting in the House until the presumption of innocence is reinstated or until re-elected to the House (see H. Res. 128, Nov. 14, 1973, p. 36944), and that principle has been incorporated in the Code of Official Conduct (clause 10 of rule XXIII). A Senator after indictment was omitted from committees at his own request (IV, 4479), and a Member who had been convicted in one case did not appear in the House during the Congress (IV, 4484, footnote). A Senator in one case withdrew from the Senate pending his trial (II, 1278). After conviction but before the Senator's resignation, and while an appeal for rehearing was pending, the Senate continued its investigation (II, 1282).

When it is found necessary for the public service to put a Member under arrest, or when, on any public inquiry, matter comes out which may lead to affect the person of a member, it is the practice immediately to acquaint the House, that they may know the reasons for such a proceeding, and take such steps as they think proper. *2 Hats., 259.* Of which see many examples. *Ib., 256, 257, 258.* But the communication is subsequent to the arrest. *1 Blackst., 167.*

It is highly expedient, says Hatsel, for the due preservation of the privileges of the separate branches of the legislature, that neither should encroach on the other, or interfere in any

§ 306. Practice as to Members indicted or convicted.

§ 307. Parliamentary law as to arrest of a Member.

§ 308. A breach of privilege for one House to encroach or interfere as to the other.

matter depending before them, so as to preclude, or even influence, that freedom of debate which is essential to a free council. They are, therefore, not to take notice of any bills or other matters depending, or of votes that have been given, or of speeches which have been held, by the members of either of the other branches of the legislature, until the same have been communicated to them in the usual parliamentary manner. *2 Hats.*, 252; *4 Inst.*, 15; *Seld. Jud.*, 53.

Thus the King's taking notice of the bill for suppressing soldiers, depending before the House; his proposing a provisional clause for a bill before it was presented to him by the two Houses; his expressing displeasure against some persons for matters moved in Parliament during the debate and preparation of a bill, were breaches of privilege, *2 Nalson*, 743; and in 1783, December 17, it was declared a breach of fundamental privileges, &c., to report any opinion or pretended opinion of the King on any bill or proceeding depending in either House of Parliament, with a view to influence the votes of the members, *2 Hats.*, 251, 6.

§ 309. Relations of the Sovereign to the Parliament and its Members.

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#### SEC. VI—QUORUM

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In general the chair is not to be taken till a quorum for business is present; unless, after due waiting, such a quorum be despaired of, when the

§ 310. Necessity of a quorum during business, including debate.