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## Free Speech, Supreme Court, Appellate Division, Third Department: Urbach v. Farrell

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which this country was originally built upon. Although it is important for people to be able to express themselves freely, it is also important to place limits or boundaries upon these rights to ensure protection from abuse. While the freedom of speech was formed to help build a more perfect society, the legal limitations on these rights were created to perform the exact same function.

Urbach v. Farrell<sup>147</sup>  
(decided April 17, 1997)

Petitioner, the Commissioner of Taxation, was given legislative approval in 1995 to enter into a contract to privatize the processing of New York State's income tax returns.<sup>148</sup> In 1996, respondent, the Ways and Means Committee of the State Assembly [hereinafter committee] . . . served the petitioner with a legislative subpoena requesting that he appear at a hearing and produce a copy of the contract, designated PIT 2000, for its review.<sup>149</sup> Petitioner provided an incomplete version of the contract to the committee and further requested that the committee withdraw the legislative subpoena.<sup>150</sup> Since the committee refused to withdraw the subpoena, petitioner instituted a proceeding to have the subpoena modified or quashed.<sup>151</sup> The Supreme Court granted the request to have the subpoena quashed to the extent that the petitioner was not required to appear personally for the hearing.<sup>152</sup> However, the Supreme Court required the petitioner to produce the entire PIT 2000 contract.<sup>153</sup>

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<sup>147</sup> 229 A.D.2d 275, 656 N.Y.S.2d 448 (3d Dep't), *appeal dismissed*, 90 N.Y.2d 888, 684 N.E.2d 282, 661 N.Y.S.2d 832 (1997).

<sup>148</sup> *Id.* at 276, 656 N.Y.S.2d at 449.

<sup>149</sup> *Id.* at 276, 656 N.Y.S.2d at 449-50.

<sup>150</sup> *Id.* at 277, 656 N.Y.S.2d at 450.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Petitioner appealed, arguing, primarily, that the Speech or Debate Clause of the New York Constitution<sup>154</sup> was misapplied by the Supreme Court.<sup>155</sup> He argued that limiting the inquiry to a question of whether the Committee was engaging in a legitimate legislative activity was reversible error.<sup>156</sup> The Appellate Division, Third Department affirmed the Supreme Court's decision, holding that there does in fact exist a threshold question with respect to whether the act was a legitimate legislative activity.<sup>157</sup> Since the Committee's investigation concerned a subject that might require legislation, the act was a legitimate legislative activity, and, as such, the New York State Constitution protects it from judicial review.<sup>158</sup>

In *People v. Ohrenstein*,<sup>159</sup> several state senators were indicated for using the Senate staff for personal political campaigning, particularly during the 1986 election.<sup>160</sup> Specifically, the defendants allegedly had individuals on payroll not actually performing any services.<sup>161</sup> Defendants argued that the prosecution had violated their legislative immunity since it allowed an investigation into the legislator's acts.<sup>162</sup> Upon review of the scope of the immunity granted by the New York State Constitution, the New York Court of Appeals suggested that the immunity granted should be "at least as much protection as the immunity granted by the comparable provision of the Federal Constitution."<sup>163</sup> The Speech or Debate Clause grants immunity

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<sup>154</sup> N.Y. CONST. art. III, § 11. The Speech or Debate Clause states that: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." *Id.*

<sup>155</sup> *Urbach*, 229 A.D.2d at 277, 656 N.Y.S.2d at 450.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 278, 656 N.Y.S.2d at 451.

<sup>158</sup> *Id.*

<sup>159</sup> 77 N.Y.2d 38, 565 N.E.2d 493, 563 N.Y.S.2d 744 (1990).

<sup>160</sup> *Id.* at 44, 565 N.E.2d at 495, 563 N.Y.S.2d at 746.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 53, 565 N.E.2d at 501, 563 N.Y.S.2d at 752.

<sup>163</sup> *Ohrenstein*, 77 N.Y.2d at 53, 565 N.E.2d at 501, 563 N.Y.S.2d at 752. See U.S. CONST. art. I § 6, cl. 1. This section states in pertinent part: "[F]or any Speech or Debate in either House, they shall not be questioned in any other place." *Id.*

to the members of Congress with regard to legislative acts, however, it is not a complete immunity for all acts.<sup>164</sup>

Historically the Speech or Debate Clause serves to preserve the integrity of the Legislature by preventing other branches of the government from interfering with the legislators in the performance of their duties. But no matter how far the immunity may extend under the State Constitution, it cannot be said that it was intended to provide a sanctuary for legislators who would defraud the State by knowingly placing on its payroll employees who were never intended do anything, but receive State moneys.<sup>165</sup>

In *Stranieri v. Silver*,<sup>166</sup> Staten Island residents wished to succeed from the City of New York.<sup>167</sup> A bill was enacted by the Legislature addressing this interest.<sup>168</sup> The City of New York objected to the constitutionality of the bill,<sup>169</sup> arguing that a “home rule message under the State Constitution” would be required.<sup>170</sup> Petitioners instituted a special proceeding to annul respondents’ determination that the home rule message would be required arguing that such a determination was unconstitutional.<sup>171</sup> Respondents sought to dismiss the proceeding on the basis that the Speech or Debate Clause bars such a proceeding.<sup>172</sup> The court

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<sup>164</sup> *Id.* at 54, 565 N.E.2d at 501, 563 N.Y.S.2d 752. *See also* *Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979). While a speech in the Senate would be granted immunity, neither a newsletter nor a press release not “essential to the deliberations of the Senate” and “part of the deliberative process” would be granted immunity. *Id.* *See also* *Gravel v. United States*, 408 U.S. 606, 622 (1972) (stating that the Speech or Debate Clause “provides no protection for the criminal conduct threatening the security of the persons or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction.”).

<sup>165</sup> *Ohrenstein*, 77 N.Y.2d at 54, 565 N.E.2d at 501, 563 N.Y.S.2d at 752.

<sup>166</sup> 218 A.D.2d 80, 637 N.Y.S.2d 982 (3d Dep’t 1996).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 81, 637 N.Y.S.2d at 983.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 81-82, 637 N.Y.S.2d at 984.

<sup>171</sup> *Id.* at 82, 637 N.Y.S.2d at 984

<sup>172</sup> *Id.*

found that the decision to request a home rule message with regard to the succession bill was a part of the overall legislative process.<sup>173</sup> Therefore, pursuant to the Speech or Debate Clause, the respondents were immune from this proceeding.<sup>174</sup> In sum, the court concluded that “once a determination is made that the action is within the purview of the legitimate legislative activity, the court’s review must end.”<sup>175</sup>

The facts of *In re Joint Legislation Committee to Investigate Educational System of the State of New York Appeal of Teachers Union or City of New York*<sup>176</sup> parallel those of *Urbach* in that a legislative committee subpoenaed a reluctant witness to appear before it.<sup>177</sup> The Committee’s subpoena required that documentation, including books and records, be disclosed at a hearing.<sup>178</sup> Charles J. Hendley, President of the Teachers Union, was subpoenaed to appear and furnish certain papers including membership lists.<sup>179</sup> Appellants, Mr. Hendley and the Teachers Union, made an application to vacate the subpoena duces tecum.<sup>180</sup> The court held that it was a rightful exercise of power and decided in favor of the Joint Legislative Committee.<sup>181</sup> “It is

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<sup>173</sup> *Id.* at 84, 637 N.Y.S.2d at 986.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 85, 637 N.Y.S.2d at 986. *See also* *McGrain v. Daugherty*, 273 U.S. 135 (1927). In *McGrain*, five senators were authorized to investigate the failure of Harry M. Daugherty, Attorney General, to prosecute those who violated the Clayton and Sherman Anti-Trust Act. *Id.* at 151. Mr. Daugherty failed twice to respond to a subpoena issued by the committee. *Id.* at 153. As a result, the Senate issued a warrant requiring that Mr. Daugherty be brought into custody. *Id.* After he petitioned the court for a writ of habeas corpus, the District Court of Cincinnati granted the writ as the court held that the detention was unlawful and released the witness. *Id.* The Supreme Court, however, reversed the decision of the District Court holding that the witness was detained for the purpose of procuring information from the testimony for a legislative purpose. *Id.* at 177.

<sup>176</sup> 285 N.Y. 1, 32 N.E.2d 796 (1941).

<sup>177</sup> 285 N.Y. at 7, 32 N.E. 2d at 796.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 7-8, 32 N.E.2d at 796-770.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 10, 32 N.E. 2d at 772.

only when futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.”<sup>182</sup>

In *Eastland v. United States Servicemen's Fund*,<sup>183</sup> the Senate Subcommittee on Internal Security began an investigation into activities of the United States Servicemen's fund [hereinafter “USSF”].<sup>184</sup> The USSF was a nonprofit organization which established coffeehouses near military bases and assisted the publication and distribution of underground newspapers opposed to United States involvement in South East Asia.<sup>185</sup> The subcommittee had a subpoena served on the bank where the USSF had an account, requiring the bank to produce all records with regard to the USSF account.<sup>186</sup> The organization subsequently brought an action to quash the subpoena based on First Amendment grounds.<sup>187</sup>

Holding that the respondent's had failed to show irreparable harm to warrant the requested injunction, the Court concluded that there existed a legitimate legislative purpose for Congress to make the inquiry.<sup>188</sup> Furthermore, the Court concluded that the petitioner Senators were immunized from suit by the Speech or Debate Clause.<sup>189</sup>

The analysis under the Federal Constitution and the New York Constitution is similar to the extent that both require that the court determine if defendant was in fact engaging in a legitimate legislative activity. In *Urbach*, the court utilized the legitimate legislative threshold inquiry by requiring the petitioner to comply

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<sup>182</sup> *Id.* at 9, 32 N.E.2d at 77 (quoting *In re Edge Holding Corp.*, 256 N.Y. 374, 382, 176 N.E. 537, 539 (1931)).

<sup>183</sup> 421 U.S. 491 (1975).

<sup>184</sup> *Id.* at 493.

<sup>185</sup> *Id.* at 493-94.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 495

<sup>188</sup> *Id.* at 496-97. The Court stated that “a valid legislative purpose existed for their inquiry because Congress was pursuing its functions . . . of raising and supporting an army . . . .” *Id.* at 497.

<sup>189</sup> *Id.* at 507. See also *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

with the subpoena since it was concerning a subject that might require legislation.<sup>190</sup>

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<sup>190</sup> Urbach v. Farrell, 229 A.D.2d 275,278, 656 N.Y.S.2d 448, 451 (3d Dep't 1997).