SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division

UNITED STATES OF AMERICA	)	Criminal No. M-4113-03
	)	
v.	)	Calendar I: Judge Brian Holeman
	)	
ELENA RUTH SASSOWER,	)	Trial Date: April 12, 2004
	)	
Defendant,	)	
	)	
SENATOR SAXBY CHAMBLISS,	)	
SENATOR HILLARY RODHAM CLINTON,	)	
SENATOR ORRIN HATCH,	)	
SENATOR PATRICK LEAHY,	)	
SENATOR CHARLES SCHUMER,	)	
JOSHUA ALBERT, Legislative Correspondent, Senator Clinton,	)	
LEECIA EVE, Counsel, Senator Clinton,	)	
TAMERA LUZZATTO, Chief of Staff, Senator Clinton,	)	
MICHAEL TOBMAN, Director of Intergovernmental Affairs, Senator Schumer,	)	
	)	
Subpoena Respondents.	)	

MOTION OF SENATORS AND SENATE EMPLOYEES TO QUASH SUBPOENAS

Five United States Senators and four Senate employees, above-captioned subpoena respondents, through undersigned counsel, respectfully move this Court for an order quashing the subpoenas issued to them by the defendant for testimony and documents in this action. Under binding authority, these subpoenas should be quashed on two grounds: (a) the Speech or Debate Clause of the Constitution protects Senators and Senate employees from being compelled to testify or provide documents regarding legislative matters; and (b) no exceptional circumstances justify compelling evidence from these high government officials in this case.[1]

[1] Undersigned counsel appear as counsel for subpoena respondents in this case pursuant to 2 U.S.C. §§ 288b(a), 288c(a), and Senate Resolution 323, 108th Cong., 2d Sess. (2004), *reprinted in* 150 Cong. Rec. S3003, 3046-47 (daily ed. Mar. 23, 2004), attached as Exhibit A.

BACKGROUND

The defendant in this action is charged with disrupting, in violation of 10 District of Columbia Code § 503.16(b)(4), the Senate Judiciary Committee's May 22, 2003, confirmation hearing of Richard C. Wesley, a New York Court of Appeals Judge who was nominated by President Bush for a judgeship on the United States Court of Appeals for the Second Circuit. In voluminous letters and faxes to Members of the Senate, and in many phone calls and e-mails to employees on their staff, the defendant opposed Judge Wesley's confirmation and repeatedly requested an opportunity to testify at his May 22, 2003, confirmation hearing.[2] The defendant's request to testify was never granted, consistent with the Committee's normal practice on lower court nominations not to hear in person from non-congressional witnesses other than the nominee.

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[2] Without presuming to articulate its full basis, Ms. Sassower's opposition to Judge Wesley's confirmation apparently relates to the unanimous, *sua sponte* dismissal by the New York Court of Appeals of her 2002 appeal in *Elena R. Sassower v. Commission on Judicial Conduct of the State of New York*, 778 N.E.2d 550 (Sept. 12, 2002). *See* www.judgewatch.org. In that case, Ms. Sassower sought to compel the New York Commission on Judicial Conduct to investigate complaints she filed of alleged judicial misconduct. The trial court denied Ms. Sassower's motion to recuse, dismissed the case, and entered an injunction against her. *See Elena R. Sassower v. Commission on Judicial Conduct of the State of New York*, 734 N.Y.S.2d 68 (Dec. 18, 2001). The intermediate appellate court unanimously affirmed, stating that the injunction "was justified given petitioner's vitriolic ad hominem attacks on the participants in this case, her voluminous correspondence, motion papers and recusal motions in this litigation and her frivolous requests for criminal sanctions." *Id.* The New York Court of Appeals, on which Judge Wesley was sitting at the time, unanimously dismissed, on its own motion, Ms. Sassower's appeal to that court and denied her motions for disqualification and recusal. *Elena R. Sassower v. Commission on Judicial Conduct of the State of New York*, 778 N.E.2d 550 (Sept. 12, 2002).

At the confirmation hearing in issue, the defendant shouted questions to Senator Saxby Chambliss, who was presiding, creating a disturbance that required the U.S. Capitol Police to restore order in the hearing room. Defendant was arrested and charged with the instant offense.[3]

On February 26, 2004, defendant transmitted to undersigned counsel a letter requesting the testimony at trial of five Members of the Senate and four employees on their staff (attached hereto as Exhibit B).[4] The following day, undersigned counsel informed defendant's attorney-advisor that defendant's letter failed to satisfy the preliminary showing – of relevance, need, and unavailability of alternative sources – required in order for the Senate to consider her request for the testimony of its Members or their staff, and that, in any event, the testimony requested was absolutely privileged under the Speech or Debate Clause, art. I, § 6, cl. 1, of the Constitution. *See* Letter from Grant Vinik to Mark Goldstone (attached hereto as Exhibit C).

On March 5, 2004, defendant issued subpoenas for testimony and documents to the five Members and the four staffers identified in her February 26, 2004, letter. The subpoenas, attached hereto as Exhibit D, command the appearance at trial of the subpoena respondents and also require the production at that time of "[a]ll documents and records relating to defendant, the Center for Judicial Accountability, Inc. and Defendant's attempts to testify before Senate

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[3] Two weeks after Judge Wesley's confirmation hearing, the Senate Judiciary Committee reported his nomination favorably to the full Senate, which, on June 11, 2003, unanimously confirmed it by a vote of 96-0. *See* 149 Cong. Rec. S7665 (daily ed. June 11, 2003).

[4] Specifically, the defendant requested the testimony of (i) Senator Saxby Chambliss, who presided at the May 22, 2003, hearing at which defendant was arrested; (ii) Senator Hillary Rodham Clinton, her chief of staff, Tamera Luzzatto, her counsel, Leecia Eve, and one of her legislative correspondents, Joshua Albert; (iii) Senator Orrin Hatch, Chairman of the Senate Judiciary Committee; (iv) Senator Patrick Leahy, Ranking Member of the Senate Judiciary Committee; and (v) Senator Charles Schumer, and his Director of Intergovernmental Affairs, Michael D. Tobman.

Judiciary Committee Hearing on May 22, 2003." *See* Exh. D. As best as can be discerned from the subpoenas and conversations with defendant's attorney-advisor, defendant seeks evidence relating to her communications with Senate offices in support of her contention that her May 2003 arrest was motivated by an alleged bias against her resulting from a June 1996 arrest outside of a Senate Judiciary Committee nominations hearing.

ARGUMENT

The subpoenas to the five Senators and four Senate employees must be quashed because the Senators and Senate employees are protected from being compelled to testify or produce documents regarding legislative activities by the Speech or Debate Clause of the United States Constitution. In addition, the subpoenas should be quashed because the defendant has not demonstrated any exceptional circumstances that would justify compelling testimony from high governmental officials, especially when other witnesses exist who can testify to the relevant facts leading to her being charged in this action.

In *Bardoff v. United States*, 628 A.2d 86 (D.C. 1993), the District of Columbia Court of Appeals affirmed this Court's quashing of subpoenas to Senators and Senate staff on these exact grounds in almost identical circumstances. *Bardoff* involved a prosecution of two individuals who had displayed a banner and called out in loud voices during a joint hearing before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran, commonly referred to as the Iran-Contra hearings. *See id.* at 88. The defendants were charged with engaging in disruptive conduct on United States Capitol grounds in violation of D.C. Code § 9-112(b)(4), and

demonstrating within a Capitol building in violation of D.C. Code § 9-112(b)(7). *See id.*[5] The defendants issued subpoenas for testimony and documents to the Chairman of the Senate Select Committee, who had been chairing the joint hearing on the day when the defendants had disrupted the proceedings, as well as other Senators and Senate and House committee staff. *See id.* at 89. The D.C. Court of Appeals affirmed this Court's quashing of the subpoenas on the grounds that (a) the Senators and staff were protected by the Speech or Debate Clause from being questioned regarding events at a congressional hearing, *see id.* at 91-92, and (b) the Senators and committee staff were high government officials protected from compulsory process seeking their testimony absent exceptional circumstances, which the defendants there had wholly failed to demonstrate, especially in light of the fact that other witnesses in the hearing room could have testified to the events in question, *see id.* at 92-93.

The holding of the D.C. Court of Appeals in *Bardoff* applies with equal force to the factually similar situation at issue here and requires that this Court quash the subpoenas issued to the Senators and Senate employees in this action.

I. The Speech or Debate Clause Protects Senators and Senate Employees From Being Compelled to Testify or Produce Documents in This Action

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Clause ensures that the "legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491,

[5] D.C. Code § 10-503.16, which defendant is charged with violating in this action, was formerly D.C. Code § 9-112.

502 (1975). "Without exception," the Supreme Court has "read the Speech or Debate Clause broadly to effectuate its purposes." *Id.* at 501.

The immunity afforded by the Speech or Debate Clause applies equally to congressional staff. In *Eastland*, the Supreme Court drew "no distinction between the Members and the Chief Counsel," *id.* at 507, and held that both Members and staff were immune from suit under the Speech or Debate Clause for their legislative activities. Likewise, in applying the Clause in *Gravel v. United States*, 408 U.S. 606 (1972), the Supreme Court stated that the immunity extends "not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Id.* at 618; *see also Bardoff*, 628 A.2d at 91 (quashing on Speech or Debate grounds subpoena issued to staff).

The Speech or Debate Clause not only immunizes Members and staff from suit but also provides them with a privilege against being compelled to give testimony or produce documents in a judicial proceeding. Indeed, as the D.C. Circuit explained, the Clause by its text states that Senators "shall not be *questioned* in any other Place." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418, 314 U.S. App. D.C. 85, 95 (D.C. Cir. 1995) (citing U.S. Const. art. I, § 6, cl. 1) (emphasis in original). Accordingly, the Supreme Court in *Gravel* stated that because of the protection of the Speech or Debate Clause, "[w]e have no doubt that Senator Gravel may not be made to answer – either in *terms of questions* or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting." 408 U.S. at 616 (emphasis added); *see also Bardoff*, 628 A.2d at 91 (quashing subpoena for testimony and documents).

Where the Speech or Debate privilege is raised in defense to a subpoena, the only question is whether the matters about which testimony or documents are sought "fall within the

'sphere of legitimate legislative activity.'" *Eastland*, 421 U.S. at 501. The "sphere of legitimate legislative activity" includes all "deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. "Once it is determined that [legislators] are acting within the 'legitimate legislative sphere,' the Speech or Debate Clause is an absolute bar to interference." *Eastland*, 421 U.S. at 503.

The testimony and documents sought by defendant fall squarely with the legislative sphere because they concern the manner in which Senators exercise their constitutional duty to provide "Advice and Consent" to the President with regard to judicial nominations, a "matter[] which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625; *see* U.S. Const. art. II, § 2, cl. 2 (stating that President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" judges of the federal courts); *Schultz v. Sundberg*, 759 F.2d 714, 717 (9th Cir. 1985) (per curiam) (actions by President of Alaska Senate in furtherance of matters related to judicial confirmation are protected by legislative immunity). Because the provision of "Advice and Consent" is a constitutional duty that falls well within the legitimate legislative sphere, Members and staff may not be compelled to testify or provide documents with regard to events at the hearing in issue. *See Bardoff*, 628 A.2d at 92 (holding that it was "beyond debate" that Members and staff could not be compelled to provide evidence regarding conduct at committee hearing).[6]

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[6] Many of the subpoenaed Senators and staff were not even in the hearing room at the time of defendant's disturbance. Nevertheless, to whatever extent any possible actions of these Senators and staff might bear on the conduct and proceedings at that hearing, those actions would be protected from compelled testimony under the Speech or Debate Clause.

Nor may they be so compelled to produce evidence of communications or conduct related to Judge Wesley's confirmation occurring before, or after, the hearing at issue. Because such matters are integral to the "deliberative and communicative processes" by which Members perform their legislative duties, they are absolutely protected by the Speech or Debate Clause. *See id.* at 91 ("[T]he privilege extends not only to pure debate or speeches on the floor of Congress, but also to participation in committee . . . proceedings . . . and other activities integral to lawmaking.") (citing *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984)); *see also Minpeco, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 858, 269 U.S. App. D.C. 238, 240 (D.C. Cir. 1988) (quashing on Speech or Debate grounds subpoena seeking "all correspondence and communications" between individual and congressional subcommittee); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 529-30 (9th Cir. 1983) (quashing on Speech or Debate grounds subpoenas issued for information provided by "[c]onstituents . . . to document their views when urging [a Member of Congress] to initiate or support some legislative action").

The protections afforded by the Clause, moreover, are not lessened by defendant's wholly unsubstantiated claim that her arrest was motivated by an alleged bias against her arising out of an earlier Senate Judiciary Committee nominations hearing. The Supreme Court has made "clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it. . . . '[T]he Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process *and into the motivation for those acts.*'" *Eastland*, 421 U.S. at 508 (citation omitted, emphasis in original). The "claim of an unworthy purpose does not destroy the privilege," because "[t]he privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader . . . ." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

Even if there were, therefore, a basis for defendant's far-fetched claims of bias, and there are not, they would not vitiate the protections of the Clause. *See Bogan v. Scott-Harris,* 523 U.S. 44, 55 (1998) (stating that a legislator "act[s] in a legislative capacity even though he allegedly *singled out* the plaintiff for investigation in order 'to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights'") (citation omitted, emphasis added); *Bardoff,* 628 A.2d at 92 (stating that "the chairman's decision to recess the hearing *and his motives for doing so* clearly fall within the zone of legislative activities protected under the Speech or Debate Clause") (emphasis added). Accordingly, defendant's subpoenas, which seek to compel such testimony and document production, must be quashed.

II. The Subpoenas Should Also Be Quashed Because They Seek to Compel Testimony and Document Production From High Governmental Officials Without Any Exceptional Circumstances

"High ranking government officials have greater duties and time constraints than other witnesses," and thus "'should not, *absent extraordinary circumstances*, be called to testify regarding their reasons for taking official actions.'" *In re United States (Kessler),* 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (quoting *Simplex Time Recorder Co. v. Secretary of Labor,* 766 F.2d 575, 586 (D.C. Cir. 1985)) (emphasis added). The D.C. Court of Appeals has specifically adopted this doctrine, holding in *Davis v. United States,* 390 A.2d 976, 981 (D.C. 1978), "that high government officials should not be called to testify personally unless 'a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it.'" *Bardoff,* 628 A.2d at 93 (quoting *Davis,* 390 A.2d at 981).

In *Bardoff,* the Court of Appeals found no exceptional circumstances existed sufficient to compel Senators or Senate staff to testify at trial on charges of disruption of a Senate committee

hearing. The Court of Appeals stated that the defendants "were unable to demonstrate satisfactorily how the subpoenaed testimony would be more than cumulative of other evidence, or why others in the hearing room that day, who did not hold such high office as those subpoenaed, could not testify to the same events." *Bardoff*, 628 A.2d at 93.

Similarly here, defendant's subpoenas to Members of the Senate, and employees on their staff, should be quashed because defendant has made no showing of exceptional circumstances that could possibly warrant compelling the testimony of these governmental officials. With regard to the relevant events that transpired at the hearing, there is not only a videotape, which has been provided to the defendant, but also witnesses, not from the Senate, who could provide testimony. *See In re United States*, 197 F.3d 310, 313-14 (8th Cir. 1999) ("If other persons can provide the information sought, discovery will not be permitted against such [a high government] official.").

Moreover, the documents that defendant seeks to compel the Senate to produce were provided by her to the Senate and still appear to be in her possession. *See* www.judgewatch.org (defendant's website containing links to her correspondence related to case). There is thus no basis for imposing a burden on any of the subpoenaed Senators or Senate employees to testify or produce documents in this matter.[7]

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[7] The volume of correspondence reproduced on defendant's website suggests that defendant has retained copies of her correspondence with Senate offices. To the extent that defendant has misplaced or lost any particular items of her correspondence and seeks copies to complete her files, upon receipt of a request for such particular items, undersigned counsel will work with the relevant Senate office to determine whether the correspondence sought can be located for provision to the defendant on a voluntary basis, rather than through compelled process, which is barred by both legislative immunity and the interest in sparing governmental officials from undue burden.

Nor is there any basis for believing that these Senators and Senate employees have any non-cumulative evidence material to the matters at issue in this prosecution. This Court has twice rejected, in orders issued December 3, 2003, and February 26, 2004, defendant's efforts to compel production of Members' communications regarding the defendant. As this Court explained in its February 26, 2004, order denying defendant's "request for written adjudication of her discovery rights" concerning, *inter alia*, communications between the office of Senator Clinton and the U.S. Capitol Police (at p. 1):

> The record of this case reflects that Defendant previously filed a Notice of Motion to Enforce Defendant's Discovery Rights and the Prosecution's Discovery Obligations, and Affidavit in Support thereof, on November 6, 2003. At a hearing held on December 3, 2003, Judge Milliken ruled on this Motion, thereby establishing the law of this case with respect to all outstanding discovery obligations on the part of the Government. Judge Milliken determined that the sole outstanding discovery obligation of the Government was the *ex parte in camera* submission of documents relevant to bias cross examination, which was satisfied by way of the Government's submission of responsive documents for this Court's review on January 14, 2004.[8]

This Court's two previous rulings on this subject demonstrate, therefore, that there is no basis for reexamining this issue for the third time.

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[8] The government's *ex parte in camera* submission, which was provided to defendant upon issuance of the Court's February 26, 2004 ruling, specifically addressed, *inter alia*, communications between the defendant and two of the subpoena respondents, Ms. Leecia Eve, counsel to Senator Clinton, and Mr. Joshua Albert, legislative correspondent to Senator Clinton. Government's *Ex Parte In Camera* Submission Regarding Evidence Relevant to Bias Cross-Examination of Government Witnesses ¶ 4.

CONCLUSION

For these reasons, the subpoenas seeking testimony and documents from these five Senators and four Senate employees should be quashed.

Respectfully submitted,

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March 26, 2004

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division

UNITED STATES OF AMERICA v. ELENA RUTH SASSOWER, *Defendant,* SENATOR SAXBY CHAMBLISS, SENATOR HILLARY RODHAM CLINTON, SENATOR ORRIN HATCH, SENATOR PATRICK LEAHY, SENATOR CHARLES SCHUMER, JOSHUA ALBERT, Legislative Correspondent, Senator Clinton, LEECIA EVE, Counsel, Senator Clinton, TAMERA LUZZATTO, Chief of Staff, Senator Clinton, MICHAEL TOBMAN, Director of Intergovernmental Affairs, Senator Schumer, *Subpoena Respondents.*	)	Criminal No. M-4113-03 Calendar I: Judge Brian Holeman Trial Date: April 12, 2004

[PROPOSED] ORDER

Upon consideration of the Motion of Senators and Senate Employees to Quash Subpoenas, it is hereby

ORDERED that the Motion of Senators and Senate Employees to Quash Subpoenas is GRANTED; and it is

FURTHER ORDERED that all subpoenas that Defendant has served on Senators and Senate employees in this action are hereby QUASHED.

SO ORDERED.

Dated this ____day of _____, 2004

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Superior Court Judge