

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION**

**UNITED STATES OF AMERICA**

**v.**

**ELENA RUTH SASSOWER,**

**Defendant.**

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**Criminal No. M-4113-03  
Judge Holeman  
Misdemeanor Calendar I**

**ORDER**

This matter comes before the Court as Subpoena Respondents' Motion of Senators and Senate Employees to Quash Subpoenas, filed by Senate Legal Counsel on March 26, 2004. Counsel for Subpoena Respondents appear 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. March 23, 2004). On March 30, 2004, this Court ordered that any responses to the instant Motion be filed by April 5, 2004. As of the date of this Order, no responses have been filed.

On March 5, 2004, Defendant served subpoenas for testimony and documents upon the following Senate Members: Senator Saxby Chambliss; Senator Hillary Rodham Clinton; Senator Orrin Hatch; Senator Patrick Leahy and Senator Charles Schumer. Defendant also served identical subpoenas upon the following Senate employees: Joshua Albert, Legislative Correspondent to Senator Clinton; Leccia Eve, Counsel to Senator Clinton; Tamera Luzzatto, Chief of Staff to Senator Clinton and Michael Tobman, Director of Intergovernmental Affairs to Senator Schumer.

The subpoenas command 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 Judiciary Committee Hearing on 5/22/03." See subpoenas (attached to instant Motion, Exhibit D).

The pertinent facts adduced during pretrial discovery are that Defendant opposed the confirmation of Richard C. Wesley, a New York Court of Appeals Judge, nominated by President George W. Bush to the United States Court of Appeals for the Second Circuit. In the weeks preceding May 22, 2003, the date of Judge Wesley's confirmation hearing, two members of Senator Hillary Rodham Clinton's staff had telephone contact with Defendant, Leccia Eve and Josh Albert. During a joint telephone conversation with Ms. Eve and Mr. Albert, Defendant expressed her intention to attend the confirmation hearing. Ms. Eve reported her conversation with Defendant to the United States Capitol Police and to the United States Secret Service.

None of the other subpoenaed respondents are known to have had telephone contact with Defendant, nor are any known to have directed communication to Defendant by any other means.

On May 22, 2003, following efforts to be heard at the confirmation hearing, Defendant was arrested.

Subpoena Respondents move this Court for an order quashing the subpoenas on two grounds: (a) that 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) that no exceptional circumstances justify compelling evidence from the named high government officials.

The Speech or Debate Clause of the United States Constitution provides that "for any speech or debate in either House [Senate and Representatives], they shall not be questioned in any other place." U.S. Const. art. I, §6, cl. 1. The immunity afforded by the Speech or Debate Clause applies equally to Congressional Members and staff. *Eastland v. United States*

*Servicemen's Fund*, 421 U.S. 491, 507 (1975). Further, immunity extends "not only to a Member but also to his or her aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel v. United States*, 408 U.S. 606, 618 (1972); see also *Bardoff v. United States*, 628 A.2d 86 (D. C. App. 1993).

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 the 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. "Whether an act is legislative turns on the nature of the act itself, rather than on the motive or intent of the official performing it." *Bogan v. Scott-Harris*, 523 U.S. 44, 54-55 (1998) (citing *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)).

Subpoena Respondents also argue that the Subpoenas should 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." *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). The District of Columbia Court of Appeals has specifically adopted this doctrine, holding in *Davis v. United States*, 390 A.2d 976,

981 (D.C. App. 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." *See also Bardoff*, 628 A.2d at 93.

As applied to the case at bar, the confirmation hearing itself, as well as any work performed by Subpoenaed Respondents as deliberative and communicative processes outside of the hearing, are protected by the Speech or Debate Clause and interpretive case law. Since there has been no showing that Subpoenaed Respondents who are Senate Members were involved in activities other than the confirmation hearing or deliberative and communicative processes, they are all immune from being compelled to testify or produce documents in the instant case against Defendant.

Further, there has been no demonstration that extraordinary circumstances exist which compel the Senate Members or staff members from testifying at trial. On the facts known to date, Defendant has "failed to proffer any reason why others present who did not hold such high office could not provide the testimony." *Bardoff v. United States*, 628 A.2d 86, 90 (D.C. App. 1993).

Finally, regarding activities of the Subpoenaed Respondents that do not fall within the legislative activity or deliberative and communicative processes attendant to the confirmation hearing of May 22, 2003, Defendant has not established that the testimony of Senate Members Saxby Chambliss, Hillary Rodham Clinton, Orrin Hatch, Patrick Leahy, and Charles Schumer, nor that of Senate staff members Tamera Luzzatto and Michael Tobman, is evidentiary or relevant. *See, e.g., Cooper v. United States*, 353 A.2d 696, 701 (D.C. App. 1975); *United States v. Nixon*, 418 U.S. 683, 699-700 (1974); *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y

1952). However, the testimony of Senate staff members Leccia Eve and Joshua Albert *may* be evidentiary or relevant as to the events leading to Defendant's arrest.

Accordingly, upon Subpoena Respondents' Motion of Senators and Senate Employees to Quash Subpoenas, there being no opposition thereto, it is this 8<sup>th</sup> day of April, 2004 hereby

**ORDERED**, that Subpoena Respondents' Motion as to Senator Saxby Chambliss, Senator Hillary Rodham Clinton, Senator Orrin Hatch, Senator Patrick Leahy, Senator Charles Schumer and as to Senate staff members Tamera Luzzatto and Michael Tobman, is **GRANTED**; and it is further

**ORDERED**, that the subpoenas served upon Senator Saxby Chambliss, Senator Hillary Rodham Clinton, Senator Orrin Hatch, Senator Patrick Leahy, Senator Charles Schumer, and upon Senate staff members Tamera Luzzatto and Michael Tobman are **QUASHED**; and it is further

**ORDERED**, that Subpoena Respondents' Motion pertaining to the testimony of Senate staff members Joshua Albert and Leccia Eve is **DENIED**; and it is further

**ORDERED**, that regarding production of documents by Mr. Albert or Ms. Eve, Subpoena Respondents' Motion is **GRANTED** in part and **DENIED** in part. The Motion is **GRANTED**, and the subpoenas **QUASHED**, with respect to documents already produced, whether by Defendant's own production or by Government's prior production. The Motion is **DENIED** with respect to any documents which have been prepared by Mr. Albert or Ms. Eve pertaining to Defendant and which have not been previously produced. Any such documents shall be produced forthwith.

  
BRIAN F. HOLEMAN  
JUDGE

**COPIES MAILED FROM  
CHAMBERS ON 4-9-04**

**SIGNED IN CHAMBERS**

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