# IN THE SUPREME COURT OF GUAM

**GEORGE KENNETH HAMLET**
Plaintiff-Appellee

**vs.**

**MARK C. CHARFAUROS**
**and DOES 1 - 5**
Defendant-Appellant

Supreme Court Case No. **CVA98-025**
Superior Court Case No. **CV2211-98**

## OPINION

**Filed: June 4, 1999**

**Cite as: 1999 Guam 18**

Appeal from the Superior Court of Guam
Argued and submitted on May 14, 1999
Hagåtña, Guam


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BEFORE: BENJAMIN J. F. CRUZ, Chief Justice; PETER C. SIGUENZA, Associate Justice; JOHN A. MANGLONA, Designated Associate Justice.

Per Curiam:

**[1]** Mark C. Charfauros, former senator of the Guam Legislature, appeals the Superior Court's order restraining Charfauros from further broadcasting an audio tape. The tape contained a private telephone conversation and had been played on the legislative floor. The trial court held that the playing of the tape was an act outside the sphere of legitimate legislative activity. The trial court thus decided the immunity provided by the Speech or Debate Clause did not protect Senator Charfauros. We disagree. Although the Senator's actions are disturbing and cause us concern, the broad interpretation of the Speech or Debate Clause, coupled with the specific factual circumstances of this case, lead us to the conclusion that the playing of the tape was a legitimate legislative act protected by the Speech or Debate Clause; therefore, the Senator's actions were privileged.

## PROCEDURAL AND FACTUAL BACKGROUND

**[2]** On September 23, 1998, George Hamlet (Hamlet) initiated a lawsuit naming Senator Mark C. Charfauros (Charfauros) as the defendant. The complaint alleged Charfauros received a telephone call from an anonymous caller advising him of the existence of an audio tape and its location outside Charfauros' office.[1] The tape apparently contained the unauthorized recording of a conversation between Hamlet and another individual, Tyrone Taitano.[2]

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[1] *See* Record, Pg. 4 (Hamlet Complaint).

[2] The exact details of the conversation and how it relates to the debate cannot be ascertained as the tape was never played in court during hearing and, therefore, were not made part of the record.

**[3]** After retrieving the audio tape, Charfauros disclosed its contents during a regular legislative session held on September 22, 1998.[3] Charfauros submits the playing of the tape was in the context of a legislative debate addressing the override of the governor's veto of Bill 22-144 (considering employment limits as to new and temporary positions). In particular, the debate addressed the need for greater control over the governor's spending power and the alleged abuse in spending federal emergency funds obtained as a result of Super Typhoon Paka.

**[4]** The complaint specifically sought to enjoin Charfauros from additional playing of the taped conversation on the legislative floor. Based on allegations of Breach of Fiduciary Duty and Negligence, Hamlet sought the issuance of a temporary restraining order, a preliminary injunction, and a permanent injunction.[4]

**[5]** A hearing was held in the Superior Court on September 23, 1998. At the hearing, Legislative Counsel entered an appearance on behalf of both Charfauros, in his official capacity as a Senator, and the Guam Legislature. The hearing was continued until the next day with the trial court permitting the parties to submit additional briefing for its consideration. At the hearing, the trial court heard additional argument and issued an oral decision granting the temporary restraining order forbidding Charfauros from playing the tape and discussing its contents on the legislative floor. The trial court memorialized the decision in writing on September 29, 1998, *nunc pro tunc* to September 24, 1998.

**[6]** Charfauros filed his appeal with this court on September 29, 1998. On September 30, 1998,

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[3]*See* Excerpts of Record Pg. 4 (Hamlet Complaint).

[4]The complaint also requested monetary damages.

the Legislature filed an Emergency Motion to Stay the trial court's decision. On October 1, 1998, this court heard arguments and lifted the trial court's issuance of the restraining order.

## ANALYSIS

**[7]** The Speech or Debate Clause of the Organic Act of Guam states that "[n]o member of the legislature shall be held to answer before any tribunal other than the legislature itself for any speech or debate in the Legislature." 48 U.S.C. § 1423c(b)(1950). "This provision is similar in both language and underlying policy to the United States Constitution's Speech or Debate Clause (Article I, Section 6)."[5] *Wilkinson v. O'Neil*, DC Civ. App. No 81-0100A, 1983 WL 30230 at *2 (D. Guam App. Div. April 6, 1983). Accordingly, case authority interpreting the Constitution's provision guides us in our interpretation of this particular statute.

**[8]** The Speech or Debate Clause is deeply rooted in the principle of separation of powers between the three co-equal branches of government. In particular, the Clause assures the legislative branch "wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch." *Doe v. McMillan,* 412 U.S. 306, 311, 93 S.Ct. 2018, 2024 (1973)(citation omitted). The Speech or Debate Clause also serves to protect the legislative branch from a possible

[5]The Speech or Debate Clause of the United States Constitution states:

> The Senators and Representaives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They 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; and for any Speech or Debate in either House, they shall not be questioned in any other Place.
> U.S. Const. Art. I, § 6.

hostile judiciary. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 95 S.Ct. 1813, 1821 (1975). The United States Supreme Court, in discussing the history of the Speech or Debate Clause, recognized the danger posed to the legislature by the other branches of government. *United States v. Johnson*, 383 U.S. 169, 178-179, 86 S.Ct. 749, 754 (1966). The Court noted:

> [T]he powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory . . . the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.

*Id.*, 86 S.Ct. at 754 (quoting extensively from Madison, Federalist No. 48). The Court went on to describe the Speech or Debate Clause as a form of that "practical security" which serves to protect the legislature's independence and integrity. *Id.* at 179, 86 S.Ct. at 754.

**[9]** In the Organic Act of Guam , the United States Congress specifically provided that: "[t]he government of Guam shall consist of three branches, executive, legislative, and judicial . . . ." 48 USC § 1421a (1950). "By its very language, therefore, the Organic Act requires application of the constitutional doctrine of separation of powers to government of Guam functions." *Taisipic,* 1996 Guam 9, ¶ 26. This court has zealously protected, through strict adherence, the doctrine of separation of powers. In several instances, we have protected both the legislative and executive branches of government from interference. For example, in *Taisipic,* we reversed an order of a trial court requiring that an individual be placed in a program available for parolees although the individual was not a parolee. 1996 Guam 9. We concluded that the order encroached upon the

power of the Territorial Parole Board, an executive branch agency, to grant or deny parole. *Id.* at ¶ 33. We further held that the trial court's order usurped the power of the Guam Legislature when it vested authority of parole determinations in the executive branch. *Id. See In Re: Request of the 24th Guam Legislature,* 1997 Guam 15, (discussing how this court is steadfast in refusing to allow the Judiciary to intrude upon the functions of other branches); *See also People v. Quenga*, 1997 Guam 6 (acknowledging, implicitly, the separation of powers doctrine by declining to exercise jurisdiction over an interlocutory appeal where the Guam Legislature had shown an intent to permit appeals only after a final judgment); *People v. Lujan*, 1998 Guam 28 (recognizing certain restrictions on jurisdiction based on statutory provisions). *See generally Borja v. Bitanga*, 1998 Guam 29 (declining to utilize the Youth Corrections Act because the Legislature, within their power, had chosen not to fund or implement said act).

**[10]** The Speech or Debate Clause bestows immunity upon lawmakers for speech or debate occurring during session. If found to apply, it serves as an absolute bar to interference. *Eastland*, 421 U.S. at 503, 95 S.Ct. at 1821. Such protection extends not only to the consequences of litigation, but also to the burden of defending a suit. *Id.*, 95 S.Ct. at 1821. The privilege will thus prevent both criminal and civil suits, whether brought by the Executive branch or by private individuals. *Id.* at 502-503, 95 S.Ct. at 1821; *See Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614 (1972) (concluding that a U.S. Senator, in the context of a grand jury investigation, could not be made to answer questions to defend himself from prosecution); *McMillan*, 412 U.S. at 312, 93 S. Ct. at 2024 (holding, in the context of a private civil suit, that placing the names of children into the record by a lawmaker was privileged). This proposition was made especially clear when it was

written that the Speech or Debate Clause immunizes both Congressmen and their aides although "their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *McMillan.* at 312-313, 93 S. Ct. 2025.[6] If the Speech or Debate Clause is found to apply, courts have no authority to oversee the judgment of a lawmaker or impose liability upon him, no matter how disagreeable or repugnant his actions may be.

**[11]** Our task in this appeal is to decide whether the Speech or Debate Clause applies to the facts and circumstances of this case. If it does apply, then Charfauros cannot be held to answer before any tribunal other than the legislature. 48 USC § 1423c(b).

**[12]** The privilege provided by the Speech or Debate Clause clearly applies to words spoken on the legislative floor. *United States v. Johnson*, 383 U.S. 169, 179, 86 S.Ct. 749, 755 (1966). Although the provision addresses speech or debate only, courts have consistently read the provisions of the Clause very broadly in order to effectuate its purposes. *Doe v. McMillan*, 412 U.S. 306, 311, 93 S. Ct. 2018, 2024 (1973)(citations omitted). Accordingly, the privilege has been extended to acts as well. However, as determined by the courts, such actions must first fall into the "sphere of legitimate legislative activity" before the privilege shields a legislator. *Eastland,* 421 U.S. at 501, 95 S.Ct. at 1820.

**[13]** The term "legitimate legislative activity" has never been precisely defined by the United States Supreme Court. Instead, the Court's opinions use several descriptions interchangeably and in conjunction with each other when referring to the term. *See Gravel*, 408 U.S. 624-625, 92 S.Ct.

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[6]The court stated that the immunity would shelter legislative aides if a lawmaker, had he committed the act in question, would be protected under the Clause. *See Gravel*, 408 U.S. at 621, 92 S.Ct. at 2625.

2626-2627; *see also Eastland*, 421 U.S. at 503-504, 95 U.S. at 1821-1822. For example, the term has been defined as "anything generally done in a session of the House by one of its members in relation to the business before it." *McMillan,* 412 U.S. at 311, 93 S.Ct. at 2024 (citations omitted). Likewise, acts that are an integral part of the deliberative and communicative processes by which Members participate in committee and House Proceedings with respect to legislative or other matters before Congress have been deemed privileged. *Gravel*, 408 U.S. at 625, 92 S.Ct. at 2627. Case authority has also characterized a "legitimate legislative activity" in terms of a limitation by noting that the privilege extends beyond pure speech, but only when necessary to prevent indirect impairment of deliberations. *Gravel*, 408 U.S. at 625, 92 S.Ct. at 2627.

**[14]** A number of acts by members of Congress have been held privileged under the above descriptions. In *Gravel*, a United States senator acquired copies of classified, top secret documents known as the Pentagon Papers. 408 U.S. at 609, 92 S.Ct. at 2619. After calling a meeting of a Senate subcommittee, the Senator read aloud portions of the Papers and then placed the entire study into the record. *Id.* at 609, 92 S.Ct. at 2619. As a result, a federal grand jury began a criminal investigation of the release and publication of the documents. *Id.* at 608, 92 S.Ct. at 2618. Subpoenas were issued to an aide of the Senator and to an officer of the private publisher. *Id.* at 608, 92 S.Ct. at 2618. The Senator then intervened in the matter and opposed questions based on privilege. *Id.* at 608, 92 S.Ct. at 2618.

**[15]** The *Gravel* court agreed that the Clause prevented questioning of the senator as to his conduct at hearings, his motives in revealing the contents of the papers, and his communications with his aides. *Id.* at 616, 92 S.Ct. at 2622. In addition, immunity shielded the congressional aides to the

same extent that a lawmaker would be privileged had the lawmaker done the act himself. *Id.* at 622, 92 S.Ct. at 2625.

**[16]** In another case, *Doe v. McMillan,* a subcommittee of the House, pursuant to a congressional resolution, investigated and reported on the District of Columbia governmental units. 412 U.S. at 307, 93 S.Ct. at 2022. A written report was submitted to the entire House of Representatives. *Id.* at 308, 93 S.Ct. at 2023. The report listed school children by name and provided private information and unflattering material about the children including attendance records, grades, test papers, and disciplinary records. *Id.* at 308-309, 93 S.Ct. at 2022. By order of Congress, the report was printed and distributed by the Government Printing Office. *Id.* at 308, 93 S.Ct. at 2022. Several parents consequently brought suit against various lawmakers, legislative employees, D.C. officials, and the Public Printer for violation of their rights to privacy. *Id.* at 309, 93 S.Ct. at 2023.

**[17]** The Court concluded, without discussion, that the sub-committee's lawmakers, staff, consultant, and investigators were immune under the Clause for the following legislative acts: introducing the report, referring it to the House, and distributing it to other members of the House. *Id.* at 312, 93 S.Ct. at 2024.

**[18]** In contrast, however, the court is aware that despite the broad scope of the Speech or Debate Clause, not all acts of a legislator have been deemed within the sphere of legitimate legislative acts. For instance, immunity will not protect a lawmaker attempting to influence the executive branch. *Id.* at 313, 93 S.Ct. at 2025. Neither does the Clause protect a republication of a libel although the original publication was privileged, even if read from an official committee report. *Id.* at 314-315, 93 S.Ct. at 2025-2026. The privilege does not extend to "criminal conduct threatening the security

of the person 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." *Id.* at 315, 93 S.Ct. at 2026.

**[19]** Some acts, although common to legislative practice, are not privileged under the Speech or Debate Clause. In *Gravel,* despite holding that a senator or his staff could not be questioned as to conduct surrounding a committee hearing, the Court did not extend immunity to questions surrounding the senator's source of the information used at that hearing. 408 U.S. at 628-629, 92 S.Ct. at 2629. The Court concluded as such because such questions were nonessential to the deliberations or internal communications of the Senate. *Id.* The grand jury could thus pose questions as long as the inquiries did not go to the Senator's (or his aides') conduct, motives, or communications surrounding the hearings. *Id.*

**[20]** In another case, the Court concluded that immunity would not protect those who print and publicly distribute actionable material, even at the request of Congress. *McMillan*, 412 U.S. at 316-317, 93 S.Ct. at 2026-2027. Although informing the public is a common act done under the guise of creating laws, the distribution and publishing of actionable material went beyond the apparent needs of the legislative process. *Id.*, 93 S.Ct. at 2027.

**[21]** Based on the foregoing, we conclude that the playing of the taped telephone conversation by Charfauros was an act within the sphere of legitimate legislative activity. The taped conversation was played on the floor of the Legislature during an ongoing session. It is undisputed that the tape was played during and as part of a general discussion surrounding the override of a bill vetoed by the Governor. Part of the debate centered upon the alleged abuse in spending of federal emergency

funds obtained as a result of Super Typhoon Paka.[7] Under these circumstances, the actions of Senator Charfauros cannot be distinguished from the speech and debate occurring on the session floor. His actions are not merely incidental or casually related to legislating. Instead, playing the tape in this instance can only be deemed to be an integral part of the legislative process.

**[22]** The Superior Court, in making its decision, relied heavily on the following language from *Gravel:* "[O]n the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen." 408 U.S. at 621, 92 S. Ct. at 2625.

**[23]** At first blush, this language appears to be at odds with the broad reading of the Clause preventing criminal or civil actions. However, in a later case, it was explained that the former phrase "referred to actions which were not essential to legislating." *Eastman*, 421 U.S. at 508, 95 S.Ct. at 1824. This language indicates that the Court went through the process of determining whether the acts in question were within the sphere of legitimate legislative activity. A determination as to the nature of the act, whether legitimate or not, must first be made before the privilege is found to apply. As we previously stated, the act complained of in this matter, the playing of the tape, was an integral part of the legislative process. It occurred on the floor as part of the debate by members of the Legislature. The Separation of Powers doctrine prevents the judiciary from interfering with this type of discourse. Accordingly, the Senator's act is privileged pursuant to the Speech or Debate provision of the Organic Act.

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[7] At oral argument, Hamlet's counsel concedes a nexus exists between the contents of the tape and the discussion taking place on the floor of the Legislature.

## CONCLUSION

**[24]** We hereby REVERSE and REMAND this matter back to the Superior Court for proceedings consistent with this opinion.

PETER C. SIGUENZA
Associate Justice

JOHN MANGLONA
Designated Associate Justice

BENJAMIN J. F. CRUZ
Chief Justice