COMMONWEALTH OF MASSCHUSETTS

SUPREME JUDICIAL COURT

Docket No. SJC-13641

Suffolk, ss.

DEAN TRAN

Appellant,

VS.

COMMONWEALTH OF MASSACHUSETTS

Appellee.

Petitioner/Appellant Dean Tran's Brief

February 10, 2025

Respectfully Submitted
Dean Tran
By his Attorney
/S/ Michael Walsh
Michael Walsh
BBO 681001
Walsh & Walsh LLP
PO Box 9
Lynnfield, MA 01940
617-257-5496
Walsh.lynnfield@gmail.com

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Statement of the Issues

The issues of law granted review by the Single Justice, and which the Court has sought Amicus Briefs upon, are:

1. Whether a criminal defendant is entitled to interlocutory review of the denial of a motion to dismiss brought on immunity grounds, including legislative immunity, and if so, by what procedure such review must be sought.
2. Whether the motion judge erred in denying the defendant's motion to dismiss, including (a) whether the defendant was entitled to immunity, and (b) whether a prosecutor's direction to exclude a grand juror on the ground of apparent bias against the defendant, made without judicial approval, impaired the integrity of the grand jury proceedings so as to warrant setting aside the resulting indictments, including whether this conduct constituted structural error

Statement of the Case

Dean Tran is a criminal defendant answering an indictment in Suffolk County. Commonwealth v. Tran, docket no. 2384CR00497

(Suffolk Super. Ct. 2023).[1] He has been held to answer two indictments both alleging violations of the State's Conflict of Interest law, G. L. c. 268A. The indictments were returned on September 28, 2023. Mr. Tran moved to dismiss the charged against him on October 25, 2023. Mr. Tran was arraigned on October 30, 2023 when he was released on his own recognizance. Mr. Tran supplemented his motion to dismiss on November 22, 2023. The Commonwealth opposed the motion on December 15, 2023. The Commonwealth's opposition turned, in part, on grand jury materials, which it filed and also moved to impound, on December 15, 2023.

The Superior Court, (Rayburn, J.) heard the motion to dismiss on December 18, 2023. The Superior Court issued its decision by memorandum on February 26, 2024. A week later, the Defendant, Mr. Tran, petitioned the Single Justice under G. L. c. 211 §3, on March 6, 2024. Commonwealth v. Tran, SJ-2024-0087 (Suffolk SJC 2024). The Single Justice, after impounding the grand jury materials, reserved and reported questions of law to the full bench on July 31, 2024.

Statement of Facts

[1] Mr. Tran is also facing an unrelated case in the Worcester Superior Court. Commonwealth v. Tran, 2285CR00170 (Worcester Super. Ct. 2022).

The parties, because of the grand jury proceedings, have agreed to a separate statement of facts, which is filed under seal with the Court. In broad substance, Mr. Tran is accused of violating the Conflict of Interest law. While a State Senator, 2018-2021, Mr. Tran is accused of using public resources for his 2018 and 2020 reelection campaigns. The resources use allegedly include the use of state printers, of Senate Staff time, and other public resources. The evidence before the grand jury involves a number of Mr. Tran's legislative staffers who testified to the substance of the indictment. During the grand jury proceedings, the prosecutor took issue with one of the Grand Jurors. Apparently in response to some questions offered by the grand juror, the prosecutor felt the grand juror presented a risk of bias. The prosecutor, without judicial intervention, undertook to direct the grand juror not to participate in the case.

Summary of the Argument

Legislative immunity is a critical institutional value which includes a legislative privilege. In this case, the Executive turned Mr. Tran's senate office upside down, taking grand jury testimony from almost all of his aides and subpoenaing a slew of protected communications. Even if the evidentiary privilege had not been

violated, the acts charged here are legislative, and thus immune from scrutiny anywhere but the legislative house. The court system literally does not possess jurisdiction to adjudicate the rightness or propriety of legislative acts.

Out of good motives, the prosecutor screened out a juror fearing political bias and directed a sitting member of the grand jury not to participate or vote in this case. This openly eviscerates the independence of the grand jury when prosecutors can, without judicial supervision, dismiss jurors who disagree with them and affect the vote and outcome. The grand jury, if it is to be independent at all, must have the right to have differing and contrary opinions to the prosecutor.

Argument

I. Pretrial Issues of immunity, where properly raised, must be subject to some kind of appellate scrutiny.

a. An immunity issue must have some kind of pretrial review

An immunity may come in a number of forms: such as a judicial grant of witness immunity, an absolute privilege such as for judicial deliberation, legislative privilege, executive privilege, diplomatic or consular immunity, double jeopardy. Commonwealth v. Jerez, 390 Mass. 456, 460-462 (1983) (consular immunity); Attorney General v.

Colleton, 387 Mass. 790, 800-801 (1982) (state constitution requires, under Article 12, higher level of granted immunity (transactional) than the federal constitutional minimum to overcome the right against self-incrimination); In the Matter of Enforcement of a Subpoena, 463 Mass. 162 (2012) (recognizing narrow but absolute judicial deliberation privilege); Coffin v. Coffin, 4 Mass. 1, 28 (1804) (describing legislative immunity "He ought, therefore, to be protected from civil or criminal prosecutions for every thing said or done by him in the exercise of his functions, as a representative, in committee, either in debating, in assenting to, or in draughting a report."); Nixon v. Fitzgerald, 457 U.S. 731, 759 (1982) (Burger, C.J. concurring) ("a President, like Members of Congress, judges, prosecutors, or congressional aides — all having absolute immunity" for official acts); Trump v. United States 144 S.Ct. 2312 (2024) (president absolutely immune, in criminal proceeding, for all official acts).

An immunity, in a civil or criminal case, is a "right not to be tried." It is useless if not subject to appellate review, in the event of an erroneous trial decision. This court has relied prominently on the existence of such pre-trial review before, in common with many other courts. In Matter of Enforcement of a Subpoena, 463 Mass. 162, 178

n.9 (2012) (“In addition to the ordinary route of appeal in cases, our appellate system provides for prompt discretionary interlocutory appeals to correct errors or abuses as they may be occurring in the trial courts.”). *See Also* Trump, 144 S.Ct. at 2334 (Immunity review required, otherwise “Presidents would be subject to trial on "every allegation that an action was unlawful," depriving immunity of its intended effect.”); *Id.* at 2343 (“If the President is instead immune from prosecution, a district court's denial of immunity would be appealable before trial”). In a recent controversial case about whether the President is immune from criminal prosecution, the Supreme Court ruled against the argument that “robust safeguards” of the pretrial process could protect, instead of pretrial appellate review of immunity claim. Trump, 144 S.Ct. at 2343.

> Questions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding. Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him "unduly cautious in the discharge of his official duties." Fitzgerald, 457 U.S., at 752, n. 32, 102 S.Ct. 2690. Vulnerability "`to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute.'" Id., at 752-753, n. 32, 102 S.Ct. 2690 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (CA2 1949) (Hand, L., C. J.)). The Constitution does not tolerate such impediments to "the

> effective functioning of government." Fitzgerald, 457 U.S., at 751, 102 S.Ct. 2690.

Trump, 144 S.Ct. at 2344. The availability of some appellate review to determine, pretrial, the validity of an immunity claim is essential to the nature of immunity.

Moreover, legislative privilege is an important matter which must be resolved pretrial. See United States v. Rayburn House, Rm 2113, 497 F.3d at 659 ("Letting the district court's decision stand until after the Congressman's trial would, if the Congressman is correct, allow the Executive to review privileged material in violation of the Speech or Debate Clause."). The Federal Courts hold it immediately appealable on a pretrial basis, under the collateral order doctrine. In Re: Grand Jury Subpoenas, 571 F.3d 1200 (D.C. Cir. 2009).

Legislative immunity is a kind of defense which is also a right not to be tried. See United States v. Rostenkowski, 59 F.3d 1291, 1297 (D.C. Cir. 1995) ("Because the Speech or Debate Clause protects a Member of Congress 'not only from the consequences of litigation's results but also from the burden of defending [himself],'…post-trial review of an order denying a claim of immunity under that Clause is insufficient to vindicate the rights that the Clause is meant to protect, see Midland Asphalt Corp., 489 U.S. at 800-01, 109 S.Ct. at 1499

('deprivation of the right not to be tried satisfies the ... requirement of being effectively unreviewable on appeal from a final judgment')."). Mr. Tran has also raised separation of powers immunity, which is also a right not to be tried. United States v. Rose, 28 F.3d 181, 185 (D.C. Cir. 1994) ("Like speech or debate immunity, separation of powers immunity should protect legislators from the burden of litigation and diversion from congressional duties"); Rostenkowski, at 1297 ("an order denying a claim of immunity based upon the separation of powers doctrine is appealable as a collateral order.").

Mr. Tran's case raises important constitutional values materially different from a regular criminal prosecution. Helstoski v. Meanor, 442 U.S. 500, 506 (1979) ("We agree that the guarantees of [the Speech and Debate] Clause are vitally important to our system of government and therefore are entitled to be treated by the courts with the sensitivity that such important values require.").[2]

An immunity from suit requires immediate review. "The right to immunity from suit would be "lost forever" if an order denying it were not appealable until the close of litigation, and, thus, such an order

[2] In Helstoski, the Supreme Court held that it would not allow the use of a pretrial mandamus writ to make a Speech and Debate Clause argument, but it did hold that an appeal of the denial of a motion to dismiss would have been an appropriate appellate avenue.

meets the criteria of the rule of present execution." Brum v. Town of Dartmouth, 428 Mass. 684, 688 (1999).

b. The Court should hold that where an immunity claim is properly raised, there is a right to interlocutory review, after screening by a single justice of the appeals court.

As a matter of the structure of the Massachusetts Judiciary, this court sits atop a hierarchy. With the exception of those convicted of capital murder, no one has a right to demand review by this court. King v. Commonwealth, 442 Mass. 1043 (2004) (review by G. L. c. 211 §3 is discretionary even for double jeopardy claims). *But See* Pfeiffer v. Commonwealth, 466 Mass. 1032 (2013) ("We have recognized a narrow exception [to the non-appealability of a motion to dismiss] in cases where the motion to dismiss raises a double jeopardy claim of substantial merit."); Neverson v. Commonwealth, 406 Mass. 174, 175 (1989) ("A criminal defendant who raises a double jeopardy claim of substantial merit is entitled to review of the claim before he is retried."). This is because G. L. c. 211 §3 is a special and important channel of review, a solemn occasion for litigants, including the Commonwealth,

on important occasions. "The supervisory power of this court is used sparingly." Soja v. T.P. Sampson Co., 373 Mass. 630, 631 (1977).

There are competing policy aims present in cases where there is an immunity claim. There is a strong policy against piecemeal review of cases. There is also a policy against intervention in criminal cases. Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."). On the other hand, a right "not to be tried" can be lost if one judge makes a mistake or misunderstands the issue presented. "One must be careful, however, not to play word games with the concept of a 'right not to be tried.'" Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989) (holding that motion to dismiss for grand jury secrecy violation is not immediately appealable).

The Defendant suggests, as a matter of the structural systems of the Massachusetts judiciary, that all claims to entitlement of immunity, or a "right not to be tried," be addressed in the future to the Appeals Court, after screening by the Single Justice of the Appeals Court. *See* Ventresco v. Commonwealth, 409 Mass. 82 (1991) (discussing right not to be tried in double jeopardy). Such a procedure would also be

consonant with the current practice with motions to suppress. *See Grasso, Suppression Matters Under Massachusetts Law § 2-11[a] (2023)* (*"*Interlocutory review is the only point which a defendant may seek review of an erroneous suppression ruling that otherwise would subject him or her to the hazards and expense of a trial.") *quoting* Commonwealth v. Love, 452 Mass. 498, 507-508 (2008) (procedure for interlocutory review under Mass. R. Crim. Pro. 15).

A baseless claim of immunity could cause the justice system to come crashing to a halt; but the important policy interests which demand immunity also call strongly for some right of interlocutory review. Such a claim must also be based on a constitutional or statutory provision.

> A right not to be tried in the sense relevant to the Cohen exception rests upon an explicit statutory or constitutional guarantee that trial will not occur — as in the Double Jeopardy Clause ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"), see Abney v. United States, supra, or the Speech or Debate Clause ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place"), see Helstoski v. Meanor, supra.

Midland Ashpalt, at 801. The Appeals Court has also endorsed the use of interlocutory review when legislative privilege is at stake. Abuzahra v. City of Cambridge, 101 Mass. App. Ct. 267, 269-270 (2022) ("We

think that the volume of interlocutory appeals raising issues of legislative privilege is likely to be low and is outweighed by the intrinsic harm that might be suffered by legislative bodies, and the public they serve, if they were denied an immediate appeal").

II. The Motion Judge erred in deciding the Legislative privilege argument

The Legislative immunity argument had several critical pieces, some of which the lower court did not address despite their dispositive nature. Because this case, this appeal, turns on a question of law, the Court's review is *de novo*. *See* Commonwealth v. Perkins, 478 Mass. 97, 102 (2017) (Issuance of search warrant "a question of law that we review de novo"); Commonwealth v. Humberto H., 466 Mass. 562, 566 (2013) ("Because it is a question of law, 'we review the motion judge's probable cause determination de novo.'"); Commonwealth v. Clinton, 491 Mass. 756, 765 (2023) ("In considering a judge's decision to dismiss for lack of sufficient evidence to support an indictment, we do not defer to the judge's factual findings or legal conclusions…Rather, our review is de novo.") (cleaned up).

a. Taking testimony from his legislative aides, without prior notice to Mr. Tran, and giving him an

opportunity to assert his legislative privilege was error.

"Legislative privilege is a facet of legislative immunity." Abuzahra, at 272.

> The importance of legislative immunity is such that courts have protected it by recognizing a legislative evidentiary privilege. "Legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes." Equal Employment Opportunity Comm'n v. Washington Suburban Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011) (EEOC). "As specifically noted by a variety of jurisdictions, legislative immunity not only protects state [and local] legislators from civil liability, it also functions as an evidentiary and testimonial privilege" (quotation and citation omitted). Miles-Un-Ltd., Inc. v. New Shoreham, R.I., 917 F. Supp. 91, 98 (D.N.H. 1996). "Legislative privilege clearly falls within the category of accepted evidentiary privileges." EEOC, supra at 180.

Abuzahra, at 273-274. This privilege reflects the facial proscription of our State Constitution. *Article 21 of the Declaration of Rights* ("The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."). Legislative materials, documents, and testimony from legislative aides is prohibited from use by anyone anywhere as evidence.

Legislative privilege clearly extends to legislative aides. The Court must recognize

> that it is literally impossible, in view of the complexities of the modern legislative process, with [the Legislature] almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, United States v. Johnson, 383 U. S. 169, 181 (1966)—will inevitably be diminished and frustrated.

Gravel v. United States, 408 U.S. 606, 616-617 (1972) (holding that legislative privilege covers aide in any circumstance in which legislator would have privilege). Indeed, legislative privilege extends not only to oral testimony, like the grand jury testimony here, but also to legislative documents. Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 420 (D.C. Cir. 1995); United States v. Rayburn House Office Building, Rm 2113, 497 F.3d 654 (D.C. Cir. 2007) (holding that FBI search of legislative offices violated speech and debate clause, and that legislator was entitled to return of legislative materials, as well as opportunity to challenge any search or review of legislatively privileged materials); In Re: Sealed Case, 80 F.4th 355, 371-373 (D.C.

Cir. 2023) (remanding to trial court to hold further hearings on which specific communications were legislatively privileged and which were not).

It was error to take privileged evidence and present it to the grand jury without the opportunity for Mr. Tran, in advance, to assert his privilege. Rayburn House Office Building, 497 F.3d 654, 663 (D.C. Cir. 2007) (the Executive Branch must afford a Congressman an opportunity to assert the Speech or Debate privilege before reviewing materials that likely contain privileged items); *Mass. Guide to Evidence*, §524 ("A claim of privilege is not defeated by disclosure erroneously made without an opportunity to claim the privilege.").

b. Legislative Immunity and Legislative Privilege are absolute

Legislative privilege is absolute.

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney v. Brandhove, 341 U.S. 367, 377 (1951)

> Prior cases have read the Speech or Debate Clause "broadly to effectuate its purposes," United States v. Johnson, 383 U. S., at 180, and have included within its reach anything "generally done in a session of the House by one of its members in relation to the business before it." Kilbourn v. Thompson, 103 U. S., at 204; United States v. Johnson, 383 U. S., at 179. Thus, voting by Members and committee reports are protected; and we recognize today—as the Court has recognized before, Kilbourn v. Thompson, 103 U. S., at 204; Tenney v. Brandhove, 341 U. S., 367, 377-378 (1951)—that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the "sphere of legitimate legislative activity." Id., at 376….But the Clause has not been extended beyond the legislative sphere.

Gravel, 408 U.S. at 624-625 (1972). The privilege is absolute, though narrow, and is fundamental in protecting important institutional interests. In re Search of Rayburn Office Building, 432 F.Supp.2d 100, 111 (D.D.C. 2006) ("The Court recognizes that the Speech or Debate Clause provides Congressman Jefferson with a testimonial privilege, and further that the testimonial privilege is absolute"), *further rev. sub. nom.* US. v. Rayburn House, Room 2112, 497 F.3d 654, 660 (D.C. Cir. 2007) ("Thus, our opinion in Brown & Williamson makes clear that a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of

legislative material, regardless of the use to which the disclosed materials are put.").

The privilege protects legislative process from interference by either the Executive or the Judiciary. Gravel, at 617 (Purpose of Speech and Debate Clause is the "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."). Although not intended to protect individuals, it must function as such in order to serve the higher interests. Coffin, 4 Mass. at 27-28 (Legislative "privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal…He ought, therefore, to be protected from civil or criminal prosecutions for every thing said or done by him in the exercise of his functions, as a representative, in committee, either in debating, in assenting to, or in draughting a report").

c. The important interests protected by the legislative privileges require a liberal reading.

In light of the important purpose behind it, legislative immunity must be read broadly. This is a necessary part of our representative

democracy. Gravel v. United States, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.").

> This Court has reiterated the central importance of the Clause for preventing intrusion by Executive and Judiciary into the legislative sphere.
>
> "[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.
> .....
> "There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause."

United States v. Helstoski, 442 U.S. 477, 491-492 (1979) *quoting* United States v. Johnson, 383 U. S., at 180-181, 182 (1966). The Speech or Debate Clause "will be read broadly to effectuate its purposes." Johnson, 383 U.S. at 179, and 180. To "confine the protections of the

Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view." Gravel, at 617.

> These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that **the article ought not to be construed strictly, but liberally, that the full design of it may be answered**. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

Coffin v. Coffin, 4 Mass. at 27. Indeed the legislative privileges extend to anything "generally done in a session of the House by one of its members in relations to the business before it." Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

d. The acts involved here are quintessential legislative acts

Leaving aside the question of legislative privilege, and whether the Grand Jury properly heard the evidence, the acts involved here are legislative ones. Therefore, legislative immunity attaches to them. Mr. Tran cannot be investigated or questioned or charged for anything to do with them.

There is a small catalog of acts which are unquestionably legislative, such as voting and speaking in the house, drafting reports in committee. However the ultimate touchstone remains the legislative character of the acts in question. Lower federal courts apply a two step test to determine the nature of the acts. In Re: Sealed Case, 80 F.4th at 367-369 (finding that some informal fact-finding is, or can be, legislative in nature and remanding for further fact-finding).

> It is possible that some communications within the informal factfinding category could be privileged, and therefore we disagree with the district court's holding that informal factfinding is *never* a legislative act. But we also reject Representative Perry's proposition that informal factfinding is *always* a legislative act.

In Re: Sealed Case, 80 F.4th at 367.

The most important acts alleged in the indictment is the misuse of legislative aides. However the direction of legislative aides is a fundamental legislative act. Other than voting on the floor, there is no act which is *more* legislative in nature. This is amply demonstrated by

cases commenting on the importance and necessary nature of legislative aides to the efficacy of the modern legislative action. The lines drawn by the legislative privilege cases are not exactly clear:

- Sending newsletters to constituents is not privileged. Hutchinson, 443 U.S. at 130.
- Lobbying executive agencies is not privileged. Gravel, at 625.
- Informal fact-finding may be protected. In Re: Sealed Cases, 80 F.4d at 371.
- Retaining materials within legislative hands, such as by a committee, even if the acquisition of the materials is unlawful. McSurly v. McClellan, 553 F.2d 1277, 1297 (D.C. Cir. 1976)
- Speaking in or writing for a committee or making a legislative report is protected. Coffin v. Coffin, 4 Mass.
- Legislative acts to punish members who do not comply with legislative rules are not judicially reviewable. Massie v. Pelosi, 72 F.4th 319 (D.C. Cir. 2023) (fining Representative's paychecks for those who refused to comply with Covid-19 legislative order to wear masks was protected by legislative independence and Speech and Debate Clause).
- Choice by legislative house to proceed by allowing remote attendance and voting is a purely legislative matter exempt from judicial inquiry. McCarthy v. Pelosi 5 F.4th 34 (D.C. Cir. 2021) (holding that legislature's choice to authorize remote attendance and voting during Covid pandemic was immune from judicial scrutiny).
- Censure, by a house of a member, is unreviewable legislative act. Rangel v. Boehner, 785 F.3d 19, 21 (D.C. Cir. 2015).
- Votes by members are protected. Gravel, at 624.
- Conduct at a committee hearing is protected. Gravel, at 624.
- Listing names of private individuals, including minor children, in a report is privileged—as is a house's choice to punish a member who does so. Doe v. McMillan, 412 US. 306, 313 (1973)
- Private republication of legislative documents is not protected. Gravel, 625-627.

- Correspondence by a constituent with the legislative office of a member is protected and privileged. Rayburn Office Building, Rm 2113, at 658-660
- Communications with other members and staff about legislation, votes, committee assignments and caucus affairs are "squarely" protected legislative acts. In Re: Sealed Cases, 80 F.4th at 371-372.
- Intra-congressional communications about upcoming events, political talking points, news articles of interest, and non-legislative events in and around Congress are not protected. In Re: Sealed Cases, 80 F.4th at 371-371.

A subsidiary concern is the separation of powers. The Executive argued to the Grand Jury that the use of legislative resources was "improper[ly]" deployed. However the cases indicate that the privilege applies even if the legislative act was against the rules of the house. Indeed no other organ of government, except the Legislature, may take cognizance of the legislative actions. *See* McSurely v. McClellan, 553 F.2d 1277, 1297-1298 (D.C. Cir. 1976) ("judicial inquiry on a claim that documents were retained beyond the time needed to determine relevancy to legislative purpose would embroil the courts in the kind of review of legislative performance that is prohibited by the Speech or Debate Clause"). In fact this Court has previously indicated that some actions and decisions are constitutionally and irrevocably committed to the sole discretion of the legislative houses, to punish, supervise, or accede as they will.

Legislative acts are protected and immune. The D.C. Circuit opined about when an act is legislative in nature.

> When evaluating whether something is a "legislative act" within the meaning of Gravel, the Court will often consider whether protection of the privilege is "necessary to preserve the integrity of the legislative process," Brewster, 408 U.S. at 517, 92 S.Ct. 2531; whether the "independence" of the legislature is at stake, Eastland, 421 U.S. at 511, 95 S.Ct. 1813; and whether the actions at issue are things "generally done in the course of the process of enacting legislation," Hutchinson, 443 U.S. at 131, 99 S.Ct. 2675 (citing Kilbourn, 103 U.S. at 204) (cleaned up). These considerations are important for understanding the scope of the Speech or Debate Clause, and they help to flesh out the application of the Gravel criteria to specific facts.

In Re: Sealed Case, 80 F.4th 355, 364 (D.C. Cir. 2023). The question is not whether the act was “official” but whether it was “legislative.” Id., at 365. Likewise the mere fact that an act is “political” will not necessarily deprive of protection as a legislative act. Id., at 372-373. The D.C. Circuit has used language from Gravel to determine that two categories of action are protected by legislative privilege: (1) “the consideration and passage or rejection of proposed legislation” or (2) “other matters which the Constitution places within the jurisdiction of either House.” Massie v. Pelosi, 72 F.4th 319, 322 (D.C. Cir. 2023) *quoting* Gravel, 408 U.S. at 625. “Of particular salience, the [Speech and Debate] Clause applies not just to speech and debate in the literal

sense, but to all 'legislative acts.'" McCarthy v. Pelosi, 4 F4th 34, 39 (D.C. Cir. 2021) *quoting* Doe v. McMillan, 412 U.S. 306, 311-312 (1976).

e. The Legislative Act Evidence was privileged

Even if this case were not tainted per se by invading the legislative sphere, or for accumulating the privileged testimony of legislative aide's before the grand jury without a prior opportunity to interpose objection, the indictment must still is fatally defective. In addition to a privilege against suit, legislators also enjoy an evidentiary privilege. Rayburn House Building, Room 2113, at 618-623. Legislative act evidence may not be used against a legislator. United States v. Brewster, 408 U.S. 501, 527 (1972) (holding that in bribery case against legislator, evidence of legislative acts such as votes, acts on legislation, committee votes and motions, could not be introduced into evidence against legislator); United States v. Johnson, 383 U.S. 169, 179-184 (1966) (indictment that requires speculation about motives of legislator fatally defective); United States v. Helstoski, 442 U.S. 477, 487-490 (1979) (rejecting Government argument that exclusion of legislative evidence would make prosecution of legislator harder). Massachusetts Courts have adopted restrictions, founded on legislative privilege, upon

the presentation of legislative evidence. *See* Abuzahra v. City of Cambridge, 101 Mass. App. Ct. 267, 271-276 (2022) (holding that legislative privilege, as an evidentiary privilege, could be applied to emails and documents about a city council, remanding for specific fact-finding).

Where, as here, legislative act evidence was improperly put before the Grand Jury, the indictment resulting is fatally defective and must be dismissed. United States v. Renzi, 651 F.3d 1013, 1020 (9th Cir. 2011) (finding that if legislative privilege applies three protections extend to congressman (1) government cannot use legislative acts to base any kind of liability upon, (2) government prohibited from compelling legislator or aides from testifying at trials or grand jury about legislative acts and (3) "evidence of those act could not be introduced to any jury, grand or petit.")

f. The Legislative Houses have exclusive jurisdiction to determine propriety of legislative acts, or the scope of their privileges.

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial.

> That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Kilbourn, 103 U.S. at 190-191. There are legislative privileges of which the individual houses of the legislature are the exclusive judges of.

Massachusetts has an even stronger protection for legislative activities, rather than leaving it as matter of constitutional institutional structure it is elevated to be a matter of individual right.

> The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

Article XXI, Declaration of Rights (1780).

> The senate shall choose its own president, appoint its own officers, and determine its own rules of proceedings.

Constitution of the Commonwealth, Pt. 2, c.1, §2, Art.VII (1780).

> Article X
> The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution; shall choose their own speaker; appoint their own officers, and settle the rules and orders of proceeding in their own house: They shall have authority to punish by imprisonment, every person, not a member, who shall be guilty of disrespect to the house…
>
> Article XI.
> The senate shall have the same powers in the like cases…
> And the senate and house of representatives may try, and determine, all cases where their rights and privileges are concerned, and which, by the constitution, they have authority to try and determine, by committees of their own members, or in such other way as they may respectively think best.

Constitution of the Commonwealth, Pt.2, c.1, §3, Art X & XI (1780).

The "rights or privileges" of the chambers of the Legislature are the same as those derived from the *lex parliamentari* which arose over a thousand years of strife between Parliament and the Kings of England.

In the older parlance it was phrased:

> "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere."

Sir William Blackstone, *Commentaries on the Laws of England*, 17th ed (1814), vol 1, Bk 1, chap 2, pp 158-159. "[W]hatever be done within the walls of either assembly must pass without question in any other place." Stockdale v Hansard (1839) 9 Ad & E 1, 114 (Lord Denham, CJ).

> Rather, his insistence is that the Speech or Debate Clause at the very least protects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible. The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We 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.

Gravel v. United States, 408 U.S. 606, 615-616 (1972) (concluding that neither legislator nor aide could be summoned to answer questions before grand jury about Pentagon Papers being read into the Congressional Record). *See also* United States v. Brewster 408 U.S.

501, 527-529 (1972) (concluding that if government wanted to make criminal bribery case against legislator, it must do so without any evidence of legislative acts and rejecting argument that such a privilege would make official-act prosecutions impossible).

The literal text of the Constitution's Pt. 1 Article 10 & 11 has been given faithful reading by the Court in other contexts.

> The House of Representatives are also empowered by the constitution "to settle the rules and orders of proceedings in their own house." (Chap. 1, Sect. 3, Art. 10.) **They alone can judge of those rules and orders, enforce their observance, and punish a member for any violation of them**.

Coffin, 4 Mass. 1, 7 (1808) (emphasis added). Indeed, in commenting upon the related power to pass upon the qualification of its members (stemming from the same two constitutional articles) the Supreme Judicial Court has described the Legislature's powers as "comprehensive," "exclusive," "complete" and incapable of being "disputed or revised by any court or authority whatever." *See* Greenwood v. Board of Registrars of Voters of Fitchburg, 282 Mass. 74, 79 (1933) ("Jurisdiction to pass upon the election and qualification of its own members is thus vested exclusively in the House of Representatives…The House of Representatives is thus made the final

and exclusive judge of all questions, whether of law or of fact, respecting such elections, returns or qualifications, so far as they are involved in the determination of the right of any person to be a member thereof.") (quotation marks and citation omitted); Dinan v. Swig, 223 Mass. 516, 517 (1916) ("The power to pass upon the election and qualification of its own members thus is vested exclusively in each branch of the General Court. No other department of the government has any authority under the Constitution to adjudicate upon that subject. The grant of power is comprehensive, full and complete. It is necessarily exclusive, for the Constitution contains no words permitting either branch of the Legislature to delegate or share that power. It must remain where the sovereign authority of the State has placed it…It is a prerogative belonging to each house, which each alone can exercise. It is not susceptible of being deputed."); Peabody v. School Committee, 115 Mass. 383, 384 (1874) ("It cannot be doubted that either branch of the legislature is thus made the final and exclusive judge of all questions whether of law or of fact, respecting such elections, returns or qualifications, so far as they are involved in the determination of the right of any person to be a member thereof; and that while the Constitution, so far as it contains any provisions which are applicable,

is to be the guide, the decision of either house upon the question whether any person is or is not entitled to a seat therein cannot be disputed or revised by any court or authority whatever.").

Further drawing from Article 21 of the Declaration of Rights (the Massachusetts Speech or Debate Clause), the Supreme Judicial Court has commented comprehensively upon the exclusive power of the legislative houses to address any abuse of their privileges.

> The constitution having thus vested the house with the freedom of deliberation, speech, and debate, in the most absolute and exclusive terms, and having also given them a discretionary control of the manner in which that freedom shall be exercised, it results that they are **the sole judges of the extent of the privilege, and the only tribunal to which the members are responsible for any abuse of it.** This is not a novel doctrine. It is founded on a principle as old as the history of jurisprudence. The decision of either house of parliament, respecting any subject of parliamentary privilege, has for ages been holden to be conclusive upon the courts of law.

Coffin, 4 Mass. at 7-8 (emphasis added). Only to the legislative houses can Mr. Tran be held to any account for his use, or misuse, of his legislative aides or legislative resources.

> I consider the House of Representatives not only as an integral branch of the legislature, and as an essential part of the two houses in

> convention, but also as a court having final and exclusive cognizance of all matters within its jurisdiction, for the purposes for which it was vested with jurisdiction. It has jurisdiction of the election of its members; of the choice of its officers; of its rules of proceeding; and of all contempts against the house, either in its presence, or by violating the constitutional privileges of its members. When the house is proceeding as a court, it has, exclusively, authority to decide whether the matter before it be or be not within its jurisdiction, without the legal control of any other court.

Coffin, at 34-35. This is a consideration which even in the modern era has pervaded the cases and the scholarly commentary. Robert Reinstein & Harvey Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harvard L. Rev. 1113, 1117 (1973) ("Put more in terms of separation of powers, the question is to what extent the speech or debate clause requires Congress alone to discipline its members accused of wayward conduct."). Nor is it insignificant, as Mr. Tran argued below, that the legislative house did hear this matter, and despite having constitutional power to imprison him, gave a definite and defined punishment, which Mr. Tran has already incurred. Massie v. Pelosi, 72 F.4th 319 (D.C. Cir. 2023) (judiciary cannot review house-imposed $500 fine on members for breach of rules); Rangel v. Boehner, 785 F.3d 19, 21 (D.C. Cir. 2015) (censure of member by house is judicially

unreviewable). The Senate is a body which is empowered to criminally punish offenders and it has punished Mr. Tran. *Constitution of the Commonwealth*, Pt.2, c.1, §3, Art. 10-11 (providing legislative houses may punish contempt by 30 days imprisonment and may "try and determine" "all cases where their rights and privileges are concerned.")

In relation to attempts to force the Legislature to consider amendments to the Constitution, in the face of a legislative resolve to dissolve the assembly and adjourn, this Court remarked that it was without power to interfere in legislative affairs.

> The courts should be most hesitant in instructing the General Court when and how to perform its constitutional duties…The reason for this rule rests on separation of powers principles expressed in art. 30 of the Declaration of Rights of the Massachusetts Constitution. Those principles call for the judiciary to refrain from intruding into the power and function of another branch of government

Limits v. President of the Senate, 414 Mass. 31, 35 (1992). "The judiciary is barred from the legislative field just as it is from the executive." Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 246-247 (1946)

The protection of the legislative sphere is absolute, such that not even the popular initiative (the voters at the ballot box) can dictate to

the legislative houses how their internal operations work. Paisner v. Attorney General, 390 Mass. 593, 599 (1983). Or in terms of the indictment, whether a particular use of legislative resources is "warranted."

> The first chapter of Part 2 of the Constitution of the Commonwealth establishes "The Legislative Power" as including prerogatives other than law-making. The first section of that chapter provides that laws may be enacted by bicameral action of the two Houses and presentment to the Governor. However, in addition to these law-making powers, the respective branches of the General Court possess many unicameral powers, most of which are bestowed on them by Part II, c. 1, §§ 2 and 3. The Attorney General fairly summarizes some examples of these powers: "The House alone, for instance, may originate a money bill, Pt. II, c. 1, § 3, Art. 7, or make an impeachment, Pt. II, c. 1, § 3, Art. 6, while the Senate alone may hear and determine those impeachments, Pt. II, c. 1, § 2, Art. 8. The power to `choose its own President, appoint its own officers, and determine its own rules of proceedings' is conferred exclusively on the Senate by Pt. II, c. 1, § 2, Art. 7, while the members of the House of Representatives possess the corollary power to `choose their own Speaker, appoint their own officers, and settle the rules and orders of proceeding in their own House ...' by virtue of Pt. II, c. 1, § 3, Art. 10."

The Supreme Court of the United States has recognized the similar dual power of Congress in its bicameral lawmaking acts and its unicameral acts. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 954-955 (1983). Among the unicameral powers recognized by the Court is the power of each branch to act alone in determining its own rules and other internal matters. Id. at 955 n. 20…

Since the proposal concededly relates to internal legislative procedures, which are within the constitutional unicameral powers of the respective Houses, it can logically be argued that the unicameral/bicameral distinction favors a conclusion that the proposed initiative does not concern a law… First, laws govern conduct external to the legislative body, while rules govern internal procedures. Immigration & Naturalization Serv. v. Chadha, supra at 952. As we have seen, it is clear in this case that the initiative petition is aimed at the internal procedures of the branches of the Legislature, and this indicates that this petition establishes rules rather than laws because its principal purpose is to order the internal operations of the Senate and the House rather than to alter the legal duties of persons outside the Legislature.

Second, a law is binding; a rule is not…Legislative rule-making authority is a continuous power absolute and beyond the challenge of any other tribunal…Even if the proposed initiative were to be enacted, the continuing power of the individual branches to ignore its provisions and to determine their own procedures would render the proposal a

nullity…It cannot be emphasized too strongly that this power over procedures rests, not in the "General Court," but in the separate Houses of the Legislature. Part II, c. 1, §§ 2 and 3, of the Massachusetts Constitution…Thus each branch of each successive Legislature may proceed to make rules without seeking concurrence or approval of the other branch, or of the executive, and without being bound by action taken by an earlier Legislature... The plaintiffs argued before us that if their initiative were enacted, the Houses of the Legislature would not have unicameral power to nullify its content. In this they are mistaken, because such a result would effectively vacate the constitutional authority of the Senate and House to order their own internal procedures. This cannot be brought about by an initiative petition unless that petition, unlike the one before us, seeks and accomplishes a constitutional amendment to that end….

One of the plaintiffs' arguments derives from the undisputed fact that the Commonwealth has statutes which directly relate to the internal proceedings of the two Houses. See G. L.c. 3. As we view their argument, the plaintiffs construct a syllogism: the Legislature has enacted such statutes; the popular initiative is as broad as the Legislature's law-making power; the initiative therefore can encompass the internal proceedings of the Houses of the Legislature.

The flaw in the plaintiffs' argument is in their minor premise. We agree that the popular initiative is coextensive with the

> Legislature's law-making power under Part II, c. 1, § 1, but, as we have seen above, the power to determine their own rules of proceedings is exclusively granted to the Senate and the House respectively by virtue of Pt. II, c. 1, § 2, art. 7, and Pt. II, c. 1, § 3, art. 10. The enactment of statutes relating to internal proceedings was obviously accomplished by the voluntary participation of each of the two Houses. Thus each House was essentially engaged in its rule-making function. It does not follow, from this voluntary exercise by the Houses, that others, through the popular initiative, may introduce rules under the guise of laws. The analogy urged by the plaintiffs is nonexistent. Such procedural statutes are not binding upon the Houses; consequently they are not laws in the sense contemplated in art. 48. Either branch, under its exclusive rule-making constitutional prerogatives, is free to disregard or supersede such statutes by unicameral action.

Paisner, 390 Mass. at 599-602. Puzzlingly, the Government argued below that the passage of the conflict of interest law, G. L. c. 268A changes matters. But it cannot, as Coffin holds, the privilege belongs to the individual member, even against the rules of the house or a vote of the house—some case hold that legislative house may not waive its member's privilege, or that a member cannot waive his own privilege. Nor under the doctrine of parliamentary supremacy, an English doctrine which makes a small part of our constitutional heritage, may one

Legislature bind a succeeding one by waiving its rights or conceding to an unconstitutional arrangement. As Mr. Tran argued below, even if the law says what the government says that it says it may not constitutionally be applied to him in this fashion.

It is clear beyond dispute that the Court, acting under the guise of an indictment or otherwise may not pass upon the propriety or the disposition of legislative resources. Only the legislative houses may do that.

> Each branch of the Legislature may try and determine the question as to violation of the corrupt practices act by a committee of its own members or doubtless by a committee otherwise constituted. But it cannot require the judiciary as a co-ordinate department of government to hold a trial and render a decision which in its nature must be purely tentative or advisory and wholly subject to its own review, revision, retrial or inaction. This would be imposing upon the judicial department of the government the investigation of a matter not resulting in a judgment, not finally fixing the rights of parties and not ultimately determining a state of facts. It would subject a proceeding arising in a court to modification, suspension, annulment or affirmation by a part of the legislative department of government before it would possess any definitive force. Manifestly this is, in contravention of art. 30 of. the Declaration of Rights which marks the entire separation of the legislative and judicial departments of the government

Dinan v. Swig, 223 Mass. at 520 (holding that corrupt practices law allow judiciary to investigate acts of, and election of, members of legislature is unconstitutional). "In this Commonwealth, the privileges of the two Houses do not, as in England, rest merely upon legislative resolves or usages; but they are defined by the written Constitution." Opinion of the Justices, 126 Mass. 557, 565 (1878).

Under either a legislative privilege or a separation of powers immunity, Mr. Tran's indictment is unconstitutional and must be struck. United States v. Rose, 28 F.3d 181, 185 (D.C. Cir. 1994) ("Like speech or debate immunity, separation of powers immunity should protect legislators from the burden of litigation and diversion from congressional duties")

III. The Grand Jury was compromised when a prosecutor removed a juror whose attitude and questions the prosecutor did not like.

One of the grand jurors asked questions about Mr. Tran's political affiliations. Concerned, the prosecutor directed that the jurors should focus only on the allegations at issue. The prosecutor asked the juror about his objectivity. The juror asserted that he could be objective, despite his concerns about the politics. The juror subsequently

interrupted the prosecutor while the prosecutor was trying to tell the grand jury to ignore the politics and look only at the evidence.

The prosecutor asked the juror about his objectivity again. Subsequently, the prosecutor took the juror aside, based on his questions, and asked about the potential bias indicated by the questions the juror had asked a witness. The juror maintained his impartiality and pushed back against the prosecutors suggestion. The prosecutor thereafter "instructed" the juror not to participate in the vote on this case. The prosecutor did this based on the fear that the juror was biased and would not follow directions to disregard politics. The prosecutor instructed the juror not to vote or participate in this case. The prosecutor told the juror to remain in a separate room while the jury voted.

This is in substance the prosecutor usurping the independence of the grand jury. This "is fundamental error which strikes at the very heart of grand jury independence." Commonwealth v. Smith 414 Mass. 437, 438 (1993).

It is the Court which gives skeleton to the assemblage of grand jurors. The Court enforces their subpoenas, answers contemporaneous privilege questions, dismisses or excuses grand jurors, determines challenges to the venire, and the Court's clerk which summons the

grand jurors to begin. Any significant questions of bias, must be taken to the judge. Even the voir dire interrogation of jurors, prophylactically, must be done by the judge not the prosecutor. Otherwise it creates the reality that the grand jury works for the prosecutor rather than being an independent body capable and able of challenging the prosecutor's actions and evidence. The prosecutor demonstrably crossed the line from a supplicant of the grand jury, learned in evidence and the law, to its commander capable of quashing grand jurors asking questions the prosecutor disapproved of, and ultimately dismissing jurors to assure a panel favorable to the prosecutor's aim. This transgresses even the sometimes fictional notion of grand jury independence. Even though apparently done in the Defendant's interest, this is a structural separation of powers issues which casts doubt upon all indictments returned by the grand jury.

The Prosecutor found a Grand Juror who pushed back, like Grand Juries are supposed to. The Grand Juror apparently maintained that he could follow the directions, do his job, and view the case impartially. He was nonetheless excused solely on the Prosecutor's say-so, because she did not like his attitude and felt him disinterested in her case.

Supervision of the Grand Jury is charged to the Court, the judge, not the prosecutor. By arrogating to herself the right to excuse jurors, without judicial approval, the Prosecutor crossed the line into impairing the independence of the Grand Jury.

> We recognize that prosecutorial misconduct during grand jury proceedings would have serious consequences, and that the prosecutor has a duty to refrain from conduct that would produce a wrongful indictment. As we noted in Commonwealth v. Smith, supra, the prosecutor has no right to stay with the grand jury, and must withdraw on their request. Id. at 441. He must remain silent unless his advice or opinion is sought, and cannot participate in deliberations or express opinion on questions of fact. Id. His duty is to present the evidence, and explain the meaning of the law. Id. He may not attempt in any way to influence the outcome of the deliberations. Id.

Commonwealth v. Coleman, 434 Mass. 165, 172 (2001) (emphasis added). It is also true that an alleged bias by the grand juror would not justify excusing him.

> It is always considered that in finding indictments grand jurors may act upon their own knowledge, or upon the knowledge of one or more of their number. It is accordingly held in most jurisdictions that it is no objection to the validity of an indictment, that one or more of the grand jurors, who were otherwise qualified, had formed or expressed an opinion of the guilt of the accused.... The indictment is merely an accusation or charge of crime.... It is not ... necessary that each grand juror ... be free from bias or prejudice, provided he has the general qualifications which are required. Such a test is not implied either from the terms of his oath or from the nature of his duties.

Commonwealth v. Monahan, 349 Mass. 139, 155-156 (1965) *quoting* Commonwealth v. Woodward, 157 Mass. 516, 518-519 (1893). Thus the Prosecutor's assertion, well-intended, does not provide a sufficient or justifiable reason to exclude the grand juror.

Nor can the Prosecutor properly excuse a grand juror from a case. That is the role of the supervising judge. That responsibility, of supervising the grand jury, cannot be vested in the same office which is the grand jury's supplicant, otherwise the grand jury no longer is independent. It becomes possible that that "grand jury were overawed or moved to act other than as the members deemed right." Commonwealth v. Favulli, 352 Mass. 95, 107 (1967). Indeed, the Prosecutor's relation to the grand jury is to be present only as the grand jury wills it.

> Nothing in this record suggests that this grand jury were overawed or moved to act other than as the members deemed right. It appears that the grand jury understood and exercised its independence and its prerogative. There is evidence that they were instructed both by a judge of the Superior Court and the chief prosecutor that the prosecutors were available to give counsel but were in the room only at the grand jury's sufferance. There is also evidence that on October 13, 1964, the prosecutors were requested to leave the room and they all did so for two separate periods of time. This warrants the inference that the grand jurors, at least as to some matter or matters,

> made decisions in the absence of the prosecutors before returning the indictments.

Favulli, at 107. The same inferences drawn by the Favulli court cannot be drawn here. Instead of the Prosecutor being there at the sufferance of the Grand Jury, the Grand Jurors were there at the sufferance of the Prosecutor. There is likewise no reason to assume that the Grand Jury understood its legal independence from the prosecutor's office.

In other words, the prosecutor dominated the grand jury. Quashing lines of grand juror questioning of which she did not approve, the prosecutor was able to foreclose lines of inquiry, dictate the jurors interaction with the witnesses, and dictate the investigation. The prosecutor, in her sole judgment, determined which grand jurors she felt were unable or unwilling to heed her directions, and reserved the right to kick noncompliant jurors off the case, and did so. If such actions are sanctioned there is no longer any independent grand jury.

"While jealously guarding the grand jury's role as an independent investigative body, our courts have exercised a somewhat greater supervisory role over the substance of their proceedings than Federal courts have over those of Federal grand juries." Commonwealth v. Stevenson, 474 Mass. 372, 375 (2016). See Commonwealth v. Coleman, 434 Mass. 165, 172-173 (2001) (Rules of Criminal Procedure

seek "an appropriate balance between the independence of the grand jury and the need of lay grand jurors to have the assistance of the prosecutor's legal expertise."). Only the Judge supervising the grand jury can properly dismiss grand jurors. It would violate the separation of powers if it were otherwise. Commonwealth v. Favulli, at 100-107 (considering whether Special AAG's working with legislative crime commission were authorized to be present in the grand jury room). In interpreting a challenge under Article 12 of the Declaration of Rights, the Supreme Judicial Court ruled "**In presenting cases to the grand jury the prosecutor and his assistants must scrupulously refrain from words or conduct that will invade the province of the grand jury** or tend to induce action other than that which the jurors in their uninfluenced judgment deem warranted on the evidence fairly presented before them." Favulli, at 106 (emphasis added). Here, the Prosecutor adopted a judicial role, found a skeptical grand juror and dismissed them from considering the case. This usurps the Grand Jury's role, completely demolishes their independence and their right to challenge the prosecutor and the prosecutor's case and runs roughshod over the integrity of the indictments produced by the grand jury.

> In practice the greatest threat to grand jury independence comes not from courts but from prosecutors, who normally exercise great control over the proceedings. To promote the grand jury's independence, Massachusetts law restricts the prosecutor's role.

Eric Blumenson et al, Massachusetts Criminal Practice, §5.3 (4th Ed. 2012)

> It is improper for a district attorney before a grand jury to state any facts which have no relevancy to the guilt or innocence of the particular person under inquiry, but which may have a tendency to influence the action of the grand jury on other grounds.
>
> When conduct of the district attorney with the grand jury is plainly outside the sphere of his duty, his counsel is not "the Commonwealth's counsel " as those words are used in the oath of a grand juror, G. L. c. 277, s. 5, and such conduct does not come within the protection of that part of the oath which relates to the secrecy of grand jury proceedings.
>
> It is a perversion of grand jury proceedings for the evidence in a number of cases, varying according to the length of the individual cases, to be presented for the jury's hearing before they vote or act upon any one of them, and then, previous to their taking up the individual cases for voting upon them, for the district attorney or his assistant to give to them an outline of the evidence and to refresh their memory by summarizing briefly the facts in each case.
>
> While a district attorney has no right to stay with the grand jury during their deliberations and must withdraw on their request, nevertheless he may remain by their permission and his presence does not invalidate their proceedings; but he must keep silent unless his advice or opinion on a matter of law is sought, and he should not participate in the deliberations nor express an opinion on a question of fact, even if asked so to do, nor attempt in any way to influence the actions of the grand jurors.

Attorney General v. Pelletier, 240 Mass. 264, 267 (1922). In this case the Prosecutor went so far as to traverse the boundaries of her role. The limits to the prosecutor's role in relation to the Grand Jury preserve its independence and value as a protection of liberty in the Declaration of Rights. Acting contrary to these limits invites institutional disarray. In describing the evils prevented by these limits the SJC commented:

> But he must keep silent unless his advice or opinion on a matter of law is sought. He cannot participate in the deliberations or express opinions on questions of fact or attempt in any way to influence the action. His duty is ended when he has laid before the grand jury the evidence and explained the meaning of the law. The weight and credibility of the evidence is wholly for the grand jury. He should refrain from expressing an opinion on the facts even if asked. The grand jury ought not to delay action upon cases heard by them until their memory has become so misty or blurred as to require a rehearsing of it from any one. For the district attorney to make such statement is to substitute his memory for recollection of the grand jurors and is to that extent to usurp their function. Such conduct on the part of a prosecuting attorney is as reprehensible as to offer direct advice concerning the issues depending for decision by the grand jury. It affords abundant opportunity for craftiness and insidious influence. It is subversive of fundamental principles of the grand jury procedure for the district attorney or his assistants thus to participate in its deliberations and discussions.

Pelletier, 240 Mass. at 310 (concluding District Attorney misconduct so severe and additional corruption justifying removal from office). Moreover, the Grand Juror in this case apparently came to the attention

of the Prosecutor based on nothing other than his questioning of a witness the prior week. The Grand Juror had asked some questions of an immunized witness about his immunity still being in effect, about the segregation between Senate business and campaign business on a phone, about some campaign events supporting the would-be indictment, about the distinction in staff work between Senate business and campaign business, and lastly about a former president of the United States and his supporters.

It is the role of the Courts not the prosecutor to limn the Grand Jury's boundaries, to excuse or disqualify jurors, to enforce subpoenas, to preserve the secrecy, to ensure a diverse venire, to assay questions of bias.

> The grand jurors do not constitute an independent organization or body in our judicial system. They can be organized and empowered to discharge the legal functions imposed upon them only by virtue of the authority they derive as a body of men sworn and empanelled in open court in the manner prescribed by law. G.L. (Ter. Ed.) c. 277, § 5. Like the petit jury, they are an appendage, a branch, an integral part of the court acting under the authority of the court. The bills they find are returned to the court, and when their deliberations are ended, they are dismissed by the court.

Grand Jurors for the Year 1951 v. Commissioner of Corporations & Tax, 329 Mass. 89, 91 (1952). As such "the grand jury members are subject

to the supervision and guidance of the presiding judge…It is the judge's duty to prevent interference with them in the performance of their proper function, to give them appropriate instructions, and to assist them in the performance of their duties…" In Re: Pappas, 358 Mass. 604, 613 (1971). "The grand jury is a constituent part of the court. The grand jury is a branch or appendage of the court. It is organized and empowered to discharge its appropriate functions by virtue of being empanelled and sworn in open court as prescribed by law. It sits and deliberates under the authority of the court. It may at any time apply to the court for instructions and invoke its power for aid and protection in the performance of its duties. These attributes are essential in order to enable it to discharge its obligations and do its work efficiently and without molestation in the protection of the public against crime and of the individual against oppression." Commonwealth v. McNary, 246 Mass. 46, 50 (1923).

Other than assisting the grand jurors in presenting evidence, by questioning witnesses, and giving opinions of law, the prosecutor is the supplicant to the grand jury, not its protector, its commander, or its supervisor. The prosecutor, whatever the motive, had no business dismissing grand jurors from the consideration of Mr. Tran's case.

Moreover, the independence of the grand jury is an institutional concern for the Court. Its independence is "strongly urged [as] the only protection of the innocent against unfounded accusations instituted or nourished by wicked or corrupt prosecuting officers (with disavowal of any reference to the case at bar)" is the interposition of a neutral and independent accusatory body between the prosecutor and the citizen. McNary, at 54. In this case the independence of the grand jury was hopelessly compromised, and the indictments must be dismissed.

Conclusion

Wherefore the indictment against Mr. Tran in the case below must be dismissed.

Respectfully Submitted,

Dean Tran
By his attorney
/S/ Michael Walsh
Michael Walsh
BBO 681001
Walsh & Walsh LLP
PO Box 9
Lynnfield, MA 01940
617-257-5496
Walsh.lynnfield@gmail.com

Certificate of Service

I, Michael Walsh, hereby certify that a copy of this brief was served upon AAG T. Johnston by email and by first class mail on this 10th day of February 2025.

/S/ Michael Walsh

Rule 16(a) Certificate of Compliance

I, Michael Walsh hereby certify that the foregoing complies with the rules of the Court that pertain to the filing of briefs including, but not limited to Rules 16 and 20. The brief was produced in Microsoft Word in 14 point Times New Romam, a proportionally spaced font. The brief contains 11,412 includable words and is within the word limit, as determined by Word's word count feature. The brief complies with the size and type limitation.

/S/ Michael Walsh

Addendum

The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.
Article XXI, Declaration of Rights (1780)

The senate shall choose its own president, appoint its own officers, and determine its own rules of proceedings.
Constitution of the Commonwealth, Pt. 2, c.1, §2, Art.VII (1780)

Article X
The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution; shall choose their own speaker; appoint their own officers, and settle the rules and orders of proceeding in their own house: They shall have authority to punish by imprisonment, every person, not a member, who shall be guilty of disrespect to the house, by any disorderly, or contemptuous behavior, in its presence; or who, in the town where the general court is sitting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members, for any thing said or done in the house; or who shall assault any of them therefor; or who shall assault, or arrest, any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house.
And no member of the house of representatives shall be arrested, or held to bail on mesne process, during his going unto, returning from, or his attending the general assembly.
Constitution of the Commonwealth, Pt.2, c.1, §3, Art X & XI (1780)

Article XI.
The senate shall have the same powers in the like cases; and the governor and council shall have the same authority to punish in like cases. Provided that no imprisonment on the warrant or order of the governor, council, senate, or house of representatives, for either of the above described offences, be for a term exceeding thirty days.
And the senate and house of representatives may try, and determine, all cases where their rights and privileges are concerned, and which, by the constitution, they have authority to try and determine, by committees

of their own members, or in such other way as they may respectively think best

Constitution of the Commonwealth, Pt.2, c.1, §3, Art X & XI (1780)