

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

BILLIE FAYE KEYES, et al.

PLAINTIFFS

V.

CIVIL ACTION NO. 3:16cv228 CWR-LRA

PHILIP GUNN, et al.

DEFENDANTS

ORAL ARGUMENT REQUESTED

**MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM ON THE BASIS OF IMMUNITY**

Pursuant to Fed.R.Civ.P. 12(b)(6), defendants respectfully move this Court to dismiss this action as the House and its Members are protected by legislative immunity and thus cannot be sued under 42 U.S.C. § 1983 for their conduct in resolving the election contest at issue in the complaint filed herein [Dkt. 1], and the complaint therefore fails to state a claim upon which relief may be granted. In support thereof, defendants would show as follows:

1. Five registered Smith County voters have sued five Members of the Mississippi House of Representatives and the House itself under 42 U.S.C. § 1983, alleging that defendants “deprived plaintiffs of their federal constitutional right to vote and to have equal protection of the law.” Complaint ¶ 3. This deprivation allegedly resulted from the disposition of an election contest filed with the House by Mark Tullos to contest the apparent election of Blaine “Bo” Eaton as Representative from District 79. Complaint ¶¶ 5-6. Defendant Speaker Philip Gunn appointed Defendants Mark Baker, Richard Bennett, Charles Jim Beckett, and Bill Denny as members of a Special Committee to consider the contest. Complaint ¶¶ 16-17.¹ That committee adopted a resolution recommending the seating of Representative Tullos and reporting that five ballots had

¹ The fifth member of the Special Committee, Representative Linda Coleman, is no longer a Member of the House, having been appointed by Governor Bryant as a Circuit Judge.

been illegally counted, contrary to the provisions of Miss. Code Ann. § 23-15-13 (Rev. 2015). The full House thereafter voted to seat Representative Tullos.

2. The complaint contains no allegation that any defendant did anything outside of the official functions of the House. As set forth more fully in the brief in support of motion to dismiss for failure to state a claim on the basis of immunity, incorporated fully herein, the five defendant Members of the House, and the House itself, are all entitled to legislative immunity, and this action should thus be dismissed.

3. In adopting the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, Congress did not intend to abrogate the immunity for legislative conduct that had been recognized for centuries, and this immunity protects both the defendant Members as well as the House. *See Tenney v. Brandhove*, 341 U.S. 367 (1951); *Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*, 446 U.S. 719 (1980). Here, defendants did not usurp “functions exclusively vested in the Judiciary or the Executive,” *Tenney*, 341 U.S. at 378, but rather acted in accordance with authority vested exclusively in the House by Art. 4, § 38, of the Mississippi Constitution.

FOR THESE REASONS, as more fully discussed in the supporting brief submitted herewith, defendants respectfully submit that all defendants herein are entitled to legislative immunity, the complaint thus fails to present a claim upon which relief may be granted, and this Court should dismiss the complaint in accordance with Fed.R.Civ.P. 12(b)(6).

This 10th day of May, 2016.

Respectfully submitted,

PHILIP GUNN, et al.

BY: *s/Michael B. Wallace*

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, Michael B. Wallace, hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following:

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This the 10th day of May, 2016.

s/Michael B. Wallace
MICHAEL B. WALLACE