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RECENT DEVELOPMENTS

Speech or Dehate Clause—Alleged Criminal Conduct of Congressmen Not Withiu the Scope of Legislative Immunity

I. Introduction

Article I of the United States Constitution provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other place."[1] Although the necessity for the existence of immunity for legislators[2] has not been questioned since the 17th century, the scope of the privilege has never been authoritatively determined.[3] A literal reading of the speech or debate clause suggests that legislative immunity is limited to oral statements by congressmen on the floor of either the House or Senate. The Suprcme Court, however, consistently has construed the provision broadly, to embrace not only verbal expression but also those "things generally done in a session of the House by one of its members in relation to the business before it."[4] Furthermore, the Court has afforded federal legislators immunity from executive or judicial inquiry into the motives for particular legislative acts in the context of both criminal and civil actions.[5] Recently, however, in *United States v. Brewster*[6] and *Gravel v.*

1. U.S. CONST. art. I, § 6.

2. Judicial and executive officers are protected by a common-law privilege from liability for acts in their official capacities. *See, e.g.*, Barr v. Mateo, 360 U.S. 564 (1959) (a libel action against Acting Director of the Office of Rent Stabilization in which the executive officer was given absolute immunity for libel contained in news release); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) (action by attorney against judge for removal from practice); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955) (action under civil rights statutes against justice of the peace). These privileges are not overcome by allegations of maliciousness as long as the official is acting in "matters commited by law to his control or supervision." Barr v. Mateo, 360 U.S. 564, 572-74 (1959). The absolute immunity from civil liability resulting from the statements of federal judicial and executive officials does not insulate them from criminal liability. *See* United States v. Manton, 107 F.2d 834 (2d Cir. 1939) (defendant was the Senior Circuit Judge of the United States Court of Appeals for the Second Circuit); Fall v. United States, 49 F.2d 506 (D.C. Cir.), *cert. denied*, 283 U.S. 867 (1931) (defendant was Secretary of the Interior).

3. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U.L. REV. 1, 3-5 (1968).

4. Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

5. *See, e.g.*, United States v. Johnson, 383 U.S. 169 (1966).

6. 408 U.S. 501 (1972).

United States[7] the Court found that neither an indictment based in part on legislative acts performed pursuant to a bribe nor an investigation into a private publication of classified documents that were involved in a Senate investigation constituted an inquiry into legislative acts or the motivations for such acts. Consequently, the Court refused to grant immunity. The two decisions may result in significant curtailment of the protection afforded by the speech or debate clause and thus may jeopardize the independence necessary for Congress to fulfill its role as a coordinate branch of government.[8]

II. HISTORICAL DEVELOPMENT

The doctrine of legislative immunity[9] had its origin in Parliament's struggle for supremacy over the King of England during the 16th and 17th centuries.[10] In 1512, Parliament had sought to protect its independence and to enlarge its sphere of influence through passage of the Privilege of Parliament Act,[11] which annulled the prosecution of a member for activities engaged in during the proceedings of Parliament.[12] Sec-

7. 408 U.S. 606 (1972).

8. *See* 408 U.S. at 531-32 (Brennan, J., dissenting).

9. *See generally* T. MAY, THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT (16th ed. 1957); C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (Ohio State University Bulletin, Contributions in History & Political Science, No. 6, 1921); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960 (1951).

10. Writers have sought early precedents for the assertion of this right and many refer to *Haxey's Case*, which took place in the time of Richard II (1396-1397). Haxey, a member of the House of Commons, had displeased the king by offering a bill to reduce the excessive charge of the royal household and was condemned in Parliament as a traitor. On the accession of Henry IV, however, Haxey exhibited a petition to the King in Parliament to reverse that judgment, as being "against the law and custom which had been before in Parliament. . . ." The judgment was reversed and annulled by the King with the assent of the House of Lords. T. MAY, *supra* note 9, at 48. The Crown, in particular, was greatly disturbed by the increasing assertions of greater parliamentary power, especially Parliament's intrusions into the once sacrosanct and reserved areas of royal succession and religion. Cella, *supra* note 3, at 3-5.

11. The special act stated, *inter alia*: "That all suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, grants, charges, and impositions, put or had, or hereafter to be put or had unto or upon the said Richard, and to every other of the person or persons afore specified, that now be of this present parliament, or that of any parliament hereafter shall be, for any bill, speaking, reasoning, or declaring of any matter or matters, concerning the parliament to be communed and treated of, be utterly void and of none effect." Privilege of Parliament Act, 4 Hen. 8, c. 8 (1512). *See* C. WITTKE, *supra* note 9, at 25 n.16.

12. Richard Strode, a member of Commons, had authored and introduced legislation regulating certain abuses in the Cornwall tin industry that appeared to have been motivated by considerations of personal interest. He was brought to court and charged with violating a local ordinance against the obstruction of tin mining. Strode was found guilty, fined heavily, and imprisoned. The case, one of the earliest and most significant involving the doctrine of legislative privilege, was brought to the attention of the House of Commons, which passed a special bill resulting in Strode's

ondly, in 1541 Parliament for the first time included a provision for the freedom of speech for members of Parliament in the petition of the House of Commons to the King.[13] During the reign of Charles I, however, a royally dominated court denied immunity to members by declaring that the Privilege of Parliament Act was a private act. The court then found several members of Parliament guilty of delivering libelous and seditious speeches in the House.[14] Subsequently, however, the convictions were reversed by the House of Lords after both Houses of Parliament formally resolved that the Act was a general law. The House of Lords concluded that only Parliament could deal with words spoken therein.[15] Legislative immunity thus began as a protection against executive interference with the conduct of individual legislators and later expanded to become an absolute shield against outside interference with the entire legislative process.[16] By the middle of the 17th century the privilege of freedom of speech and debate for members of Parliament had been firmly established and it was never again seriously questioned.[17]

Legislative immunity was established early in America when a privilege similar to that granted to the members of Parliament was incorporated into the laws of the American colonies.[18] As a result, when the

release. T. MAY, *supra* note 9, at 49-50; C. WITTKE, *supra* note 9, at 25; *see* note 11 *supra* and accompanying text.

13. Since the earliest part of the reign of Henry VIII, the practice had developed and become generally accepted that the Speaker of the House of Commons would at the very outset of a new legislative session present a petition to the King claiming and reasserting the ancient rights and privileges of the House of Commons. Historical records indicate that in 1541 the privilege of freedom of speech in Parliament was included for the first time in the Speaker's petition. C. WITTKE, *supra* note 9, at 23.

14. Proceedings Against Sir John Elliot, 3 State Tr. 294 (1629).

15. Proceedings Against Sir John Elliot, 3 State Tr. 294, 391 (1668). For further discussion of the significance of this case see T. MAY, *supra* note 9, at 51; C. WITTKE, *supra* note 9, at 29-30. *See also* Tenney v. Brandhove, 341 U.S. 367, 372 (1951).

16. 78 HARV. L. REV. 1463, 1473 (1965).

17. *See* C. WITTKE, *supra* note 9, at 30. Although the existence of the parliamentary privilege of freedom of speech and debate was never again seriously questioned in England, its proper scope and application was still at issue in numerous cases that followed. Two of the most important of these cases, decided in the 19th century, were *Ex parte* Wason, L.R. 4 Q.B. 573 (1869), and Stockdale v. Hansard, 112 Eng. Rep. 1112 (Q.B. 1839). In *Wason* it was held that courts, in either civil or criminal proceedings, were powerless to question the motives and intentions of members of Parliament when they were speaking or debating in Parliament. In *Stockdale*, members of Parliament were given immunity for "whatever [was] done within the halls of [the] assembly . . . ." Stockdale further held that the parliamentary immunity did not extend to the private printer of the debates in order to protect him in a libel suit brought for words of a member; however, this part of the decision was overturned subsequently by statute. 3 & 4 Vict., c. 9 (1840).

18. Yankwich, *supra* note 9, at 965. Typical of the broad scope that the immunity took is Article XXI of the Declaration of Rights of the Constitution of Massachusetts of 1780: "The freedom of deliberation, speech and debate, in either House of the Legislature, is so essential to

United States declared its independence, a privilege of congressional immunity for speech or debate was included in the Constitution and nearly identical provisions were drafted thereafter into most state constitutions.[19] Federal and state courts have accorded these federal and state legislative immunity provisions a broad interpretation. Legislative immunity has been employed to shield legislators from civil actions arising from voting,[20] from activities in committee proceedings,[21] from court injunctions attempting to prevent official publication of legislative documents,[22] and from conduct in proceedings of local legislative bodies.[23] Similarly, the privilege has been held to bar a wide variety of civil actions.[24] Despite the broad application of the privilege, however, the

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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." MASS. CONST. art. XXI (1780). The Articles of Confederation of 1777, Article VIII of the Maryland Declaration of Rights of 1776, Article XXI of the Constitution of the State of Massachusetts of 1780, and Article XXX of the Constitution of New Hampshire of 1784, all predating the United States Constitution of 1789, gave explicit recognition to the legislative privilege.

19. *See, e.g.*, ALA. CONST. art. IV, § 56; N.Y. CONST. art. III, § 11; TENN. CONST. art II, § 13. In reference to the state governments, the right probably would be recognized even if distinct constitutional or statutory authority were absent. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 866 (5th ed. 1891).

20. *See* Kilbourn v. Thompson, 103 U.S. 168, 201-05 (1881); Canfield v. Gresham, 82 Tex. 10, 17 S.W. 390 (1891) (action against 56 members of Texas House of Representatives and its sergeant-at-arms).

21. *See* Dombrowski v. Eastland, 387 U.S. 82 (1967) (Senator Eastland, as member of investigation committee, held to be within the scope of "legislative activity" defined in *Tenney*); Tenney v. Brandhove, 341 U.S. 367 (1951); Barsky v. United States, 167 F.2d 241, 250 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948) (remedy for unseemly conduct, if any, by committee of Congress is for Congress, or for the people, not the judiciary); Van Riper v. Tumulty, 26 N.J. Misc. 37, 56 A.2d 611 (1948) (constitutional provision applicable to a meeting of a duly constituted judiciary committee of the General Assembly).

22. *See* McGovern v. Martz, 182 F. Supp. 343 (D.D.C. 1960) (privilege extended to include the Congressional Record appendix); Methodist Fed'n for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956) (court had no power to prevent publication of Senate Document by Public Printer pursuant to congressional resolution, even if pamphlet falsely declared that certain religious social organization was a communist front).

23. *See* Martelli v. Pollock, 162 Cal. App. 2d 655, 328 P.2d 795 (1958) (city council members immune from liability for passing illegal ordinance); McGaw v. Hamilton, 184 Pa. 108, 39 A. 4 (1898) (conditional privilege to borough council member for slanderous statement). The *Restatement of Torts* states that proceedings before a legislative body other than Congress or a state legislature are subject only to a qualified privilege in defamation actions. RESTATEMENT OF TORTS § 590, comment *c* (1938).

24. *See* Tenney v. Brandhove, 341 U.S. 367 (1951) (suit under a civil rights statute); Kilbourn v. Thompson, 103 U.S. 168, 201-05 (1880) (false imprisonment); Cochran v. Couzens, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930) (senator given absolute immunity in slander action upon a showing that his words were uttered in the course of a speech in the Senate, even though the words were in no way related to any business before the Senate); Allen v. Superior Court, 171 Cal. App. 2d 444, 340 P.2d 1030 (1959) (action for assault against chairman of interim committee

courts have not formulated the precise parameters of legislative immunity. In *Coffin v. Coffin*,[25] for example, the Massachusetts Supreme Judicial Court, in dictum, stated that the speech or debate clause must be construed to include voting and "every other act resulting from the nature, and in the execution, of the office . . . without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules."[26] In 1880, in *Kilbuorn v. Thompson*,[27] the United States Supreme Court relied on *Coffin*[28] to hold that the purpose of the "speech or debate" privilege would be best effectuated by a liberal judicial construction.[29] Over seventy years later, in *Tenney v. Brandhove*,[30] plaintiff, who was summoned as a witness before a state legislative committee, brought suit for damages against the members of the committee, charging that the defendants were conducting the hearing to harass plaintiff and to deprive him of his freedom of speech in violation of the Civil Rights Statutes.[31] The Court explained that if a member's conduct is within the "sphere of legitimate legislative activity," it can not be made the basis of a civil or criminal judgment against him. Furthermore, the Court held that courts may not properly question the motive behind a legislator's act[32] and that "the claim of an unworthy purpose does not destroy the privilege."[33] Turning to the situation at bar, the Court found that the committee had acted within the sphere of legitimate lcgislative duties by examining the plaintiff, and that therefore the committee members could not be held liable for the legislative activity.[34] In both *Kilbourn* and *Tenney*, however, the Court warned

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of legislature dismissed); Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958) (action for alleged interference with employment contract); Canfield v. Gresham, 82 Tex. 10, 17 S.W. 390 (1891) (unlawful arrest).

25. 4 Mass. 1 (1808).

26. *Id.* at 27.

27. 103 U.S. 168 (1880).

28. The Court in *Kilbourn* found *Coffin* to be "the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies . . . ." *Id.* at 204.

29. *Id.* at 201-05. The case involved an action for false imprisonment against some congressmen and the sergeant-at-arms of the House of Representatives arising out of the arrest and imprisonment of plaintiff for contempt of the House. The Court held that the action of the House was illegal because Congress had exceeded its power to punish for contempt. The demurrer urged by the congressmen was sustained, however, on the ground that the legislators came within the immunity accorded by the privilege because they had done nothing more than vote for the contempt motion. *Id.*

30. 341 U.S. 367 (1951).

31. 42 U.S.C. §§ 1983, 1985(3) (1970), *cited in Tenney v. Brandhove as* 8 U.S.C. §§ 43 & 47(3).

32. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810).

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

34. *Id.* at 376-79.

that the decisions should not be interpreted as precluding the possibility of imposing criminal responsibility for legislative acts that could pervert the spirit of the privilege and betray a legislator's position of trust.[35] In 1966, the Supreme Court, in *United States v. Johnson*,[36] addressed for the first time the issue whether the constitutional privilege against inquiry into congressional activities applies in criminal as well as civil actions. Defendant was charged with violating the federal conflict-of-interest statute[37] and with conspiring to defraud the United States[38] because he allegedly had accepted a bribe in return for an agreement to seek a dismissal of federal indictments that were pending against officers of several savings and loan companies. Part of the evidence relied on to establish the conspiracy charge was a speech delivered by defendant on the floor of the House that was favorable to loan companies generally. The Government questioned Johnson extensively at trial about the contents, authorship, and reasons for delivery of the speech. The Court held that the speech or debate clause precludes judicial inquiry into the motivation for a congressman's speech, notwithstanding allegations of bribery, and therefore that the clause prevents use of the speech to substantiate a criminal conspiracy charge.[39] The *Johnson* Court specifically declined to address the constitutional validity of executive and judicial inquiry into legislative acts or the motivation for legislative acts in those instances in which Congress, through a narrowly drawn statute passed in the exercise of its legislative power to regulate the conduct of its own members, authorizes such inquiry by delegating to the executive and judicial branches the right to try a member for conduct otherwise protected by the speech or debate clause.[40]

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35. Tenney v. Brandhove, 341 U.S. 367, 378-79 (1951); Kilbourn v. Thompson, 103 U.S. 168, 204-05 (1880). In *Kilbourn* the Court stated that "[i]f we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation . . . we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." 103 U.S. at 204.

36. 383 U.S. 169 (1966).

37. Act of June 25, 1948, ch. 645, § 281, 62 Stat. 697, *as amended*, Act of May 24, 1949, ch. 139, § 6, 63 Stat. 90.

38. 18 U.S.C. § 371 (1970).

39. United States v. Johnson, 383 U.S. 169, 180 (1966). The Court did not question the power of the United States to try Johnson on the conflict-of-interest counts, and it authorized a new trial on the conspiracy count, provided all references to the speech were eliminated. On remand, the district court dismissed the conspiracy count without objection from the Government. Johnson was then found guilty on the remaining counts, and his conviction was affirmed. United States v. Johnson, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).

40. 383 U.S. at 185.

III. Brewster and Gravel

In the recent case of *United States v. Brewster*,[41] the Supreme Court again was confronted with the problem of interpreting the speech or debate clause in relation to a criminal charge against a member of Congress. Former Senator Daniel Brewster had been indicted[42] under 18 U.S.C. §§ 201(c)(1), (g),[43] a narrowly drawn statute under the terms of which members of Congress are held criminally responsible for the solicitation and acceptance of bribes. The Supreme Court found that the indictment, though it charged receipt of a bribe in exchange for the performance of legislative acts, entailed "no inquiry into legislative acts or motivation for legislative acts" and therefore was not within the ambit of the speech or debate clause.[44] The Court reasoned that one who takes or agrees to take money in exchange for a mere promise to perform a legislative act is in violation of the statute and that the Government need not show that the alleged illegal bargain in fact was performed.[45] The Court explained that during a bribery trial the trial court would be inquiring into activities that are merely "casually or incidentally related to legislative affairs, but not a part of the legislative process itself." Therefore the Court concluded that the prosecution of Senator Brewster under the instant statute was not prohibited by the speech or debate clause.[46]

In *Gravel v. United States*,[47] the Supreme Court considered a chal-

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41. 408 U.S. 501 (1972).

42. Counts 1, 3, 5, and 7 of the indictment charged Senator Brewster with receiving $19,000 " 'in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation, which might at any time be pending before him in his official capacity [as a member of the Senate Post Office Committee].' " Count 9 charged Brewster with receipt of another $5,000 for acts already performed by him with respect to his " 'action, vote, and decision' " on that legislation.

43. Section 201(c)(1) provides in part: "Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for: (1) being influenced in his performance of any official act . . . [shall be guilty of an offense]." 18 U.S.C. § 201(c)(1) (1970). Section 201(a) defines "public official" to include a "Member of Congress" and defines "official act" in sweeping terms as "any decision or action on any question . . . which may . . . be brought before any public official, in his official capacity, or in his place of trust. . . ." 18 U.S.C. § 201(a) (1970). Section 201(g) provides in part: "Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or because of any official act performed or to be performed by him . . . [shall be guilty of an offense]." 18 U.S.C. § 201(g) (1970).

44. 408 U.S. at 525.

45. *Id.* at 526.

46. *Id.* at 528-29. Justices Brennan, Douglas and White dissented in this 6-3 decision.

47. 408 U.S. 606 (1972).

lenge to the validity of an investigation by a federal grand jury into the possible criminal conduct of a United States Senator in connection with the release and publication of the classified "Pentagon Papers."[48] During a meeting of the Senate Subcommittee on Building and Grounds of the Senate Public Works Committee, Senator Gravel read extensively from a copy of the Pentagon Papers and then placed the entire study on the public record. Subsequently, the press reported that the Senator had arranged for private publication of the material. In its investigation of possible criminal violations, the grand jury subpoenaed an aid to the Senator, but Gravel moved to quash the subpoena, contending that parts of the aide's testimony would violate the speech or debate clause. Initially, the Supreme Court explained that under the constitutional privilege of legislative immunity a member of Congress and his aide are to be "treated as one."[49] The Court then determined that when the record of a subcommittee's hearings and its report are availble to Congress, but no publication is authorized, private publication by a Senator is not essential to the deliberations of the House and is not even an element of the overall legislative process. Inquiry into the plans for private publication thus does not pose a threat to the integrity or independence of the Senate through exposure of its deliberations to executive influence. The Court therefore concluded that the immunity of the speech or debate clause did not extend to testimony before the grand jury by the Senator's aide about the arrangement between Gravel and the private publisher or about the aide's own participation, if any, in the alleged transaction, as long as legislative acts of the Senator were not challenged.[50]

IV. ANALYSIS AND IMPLICATIONS OF BREWSTER AND GRAVEL

A broad construction of the privilege of legislative immunity has been advocated by courts and commentators, primarily for two policy-oriented reasons. First, the privilege is a concomitant of separation of powers principles. The courts in construing the doctrine of legislative

48. The document popularly known as the "Pentagon Papers" is entitled "History of the United States Decision-Making Process on Viet Nam Policy" and bore a Defense Security classification of "Top Secret-Sensitive." The possible crimes that were investigated by the grand jury included the retention of public property or records with intent to convert, 18 U.S.C. § 641 (1970), the gathering and transmitting of national defense information, 18 U.S.C. § 793 (1970), the concealment or removal of public records or documents, 18 U.S.C. § 2071 (1970), and conspiracy to commit such offenses and to defraud the United States, 18 U.S.C. § 371 (1970). 408 U.S. at 608.

49. 408 U.S. at 616. *See also* United States v. Doe, 455 F.2d 753, 761 (1st Cir. 1972).

50. 408 U.S. at 626, 627. Justices Douglas, Brennan and Marshall dissented in this 5-4 decision. Justice Stewart dissented in part.

immunity and in defining its scope must reconcile control of aberrant conduct by individual legislators or staff members with the appropriate measure of respect that should be accorded a coordinate branch of the government.[51] Inquiry by the judiciary into the motives underlying legislative proceedings would manifest an uncertainty about the good faith, competence, or integrity of the legislature that does not comport with the coordinate and co-equal status of the three branches of government.[52] Moreover, such inquiry contravenes the general rule that the judiciary may not interfere with legislative discretion exercised within the scope of the legislature's constitutional powers,[53] and also tends to impair the stability of statutory law because the good or bad intentions of individual legislators could become a criterion for determining the applicable scope of legislation. Therefore, to implement these separation of powers principles, the legislative process should be shielded from debilitative motivational analysis by the judiciary.[54] Secondly, the privilege of legislative immunity is intended to promote public good.[55] Although the privilege is of a personal nature, it is not intended to protect legislators against prosecutions for their own individual advantage as much as it is to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of either civil or criminal prosecutions. Hence, the public benefit is not necessarily furthered by a particular speech or legislative act, but is promoted by the deliberations of a legislature that is uninhibited by fear of executive or judicial harassment.[56]

In light of these policy arguments and the Supreme Court's own

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51. Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L.J. 366, 385-86 (1967).

52. The courts have recognized that a judicial inquiry into the motives of the legislators is not permitted in numerous cases involving governmental power to perform certain functions. *See, e.g.*, Arizona v. California, 283 U.S. 423, 455 (1931) (power of the United States to construct dam); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 210 (1921) (Government's power to create banks and issue bonds); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 131 (1810) (state's power to sell and dispose of lands).

53. *See, e.g.*, Fischler v. McCarthy, 117 F. Supp. 643, 649 (S.D.N.Y. 1954) (prior restraint must be imposed upon the defendant by Congress and not by the courts).

54. Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 340 (1965).

55. In *Tenney v. Brandhove* the Court explained that immunity, which protects legislators "from deterrents to the uninhibited discharge of their legislative duty", is designed not for the legislators' "private indulgence but for the public good." 341 U.S. at 377.

56. Coffin v. Coffin, 4 Mass. 1, 27 (1808). The court in *Coffin* maintained that in applying the privilege, no distinction should be drawn between criminal and civil cases because the fear of criminal prosecution is as likely, if not more likely, to inhibit proper legislative functioning as the fear of civil sanctions. *Id. See also* Field, *The Constitutional Privileges of Legislators*, 9 MINN. L. REV. 442, 443-46 (1925).

prior interpretations of the speech or debate clause, the rationale of the Court in *Brewster* and *Gravel* is not persuasive. The Court in *Brewster* maintained that it has never construed the clause to protect all conduct relating to the legislative process,[57] despite the statement in Kilbourn that the privilege of immunity embraced those acts done in Congress "in relation to the business before it."[58] Moreover, the *Brewster* Court's conclusion that the only reasonable reading of the clause "consistent with its history and purpose" is that it will not prohibit inquiry into activities that are "casually or incidentally related to legislative affairs"[59] introduces a new standard by which to gauge the scope of the clause—a standard that limits the concept of "legislative acts" protected by the clause and thus conflicts with the policy of liberal construction that has been developed by the courts over the past century.[60] Mr. Justice White, who dissented in *Brewster*, asserted that prosecution of a congressman for agreeing to accept money in exchange for a promise to perform a legislative act constitutes an inherent implication of legislative conduct. The majority's distinction between promise and performance, according to Justice White, is clearly inconsistent with the protection of legislative independence that forms the core of the speech or debate clause.[61] Mr. Justice Brennan, who also dissented, maintained that Brewster was not only charged with conduct that was "related to the legislative process," but with a crime the proof of which necessarily questioned the very motives for his legislative acts.[62]

In the *Gravel* case, the Court denied legislative immunity when Senator Gravel, seeking a wider audience, attempted privately to publish classified documents that were being considered in an investigation by his Senate Subcommittee. Consequently, Gravel was exposed to a grand jury investigation and possible prosecution for the publication.[63] One legislative function that is within the sphere of the class of things "generally done" by members of Congress "in relation to the business before it" is that of informing the public about matters affecting the administration of government.[64] In *Gravel*, however, the Court adopted

57. 408 U.S. at 515.
58. Kilbourn v. Thompson, 103 U.S.168, 204 (1880).
59. United States v. Brewster, 408 U.S. 501, 528 (1972).
60. *See* 408 U.S. at 531-32. (Brennan, J., dissenting).
61. 408 U.S. at 561. (White, J., dissenting).
62. 408 U.S. at 531.
63. 408 U.S. at 649. (Brennan, J., dissenting).
64. Watkins v. United States, 345 U.S. 178 (1957). In considering the "power of Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of Government," the Supreme Court has stated that since "the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.* at 200 n.33.

a narrower view of this legislative function than would comport with full public disclosure.[65] Consequently, the Court may have restricted the privilege of "speech or debate" to the extent that the effective performance of a legislative task that is vital to the workings of our democratic system has been endangered or at least rendered more difficult.[66]

Because the *Brewster* Court concluded that the Senator's conduct was not a protected activity under the speech or debate clause, it did not address the issue that was not resolved by the *Johnson* Court, namely, whether Congress constitutionally may delegate to the executive and judicial branches, through a narrowly drawn statute, the power to try a member for conduct that is admittedly protected by the speech or debate clause.[67] On the basis of the foregoing discussion, however, the issue should have been confronted. The social value of criminal penalties for certain conduct of legislators may well outweigh the public interest in legislative freedom of speech and activity.[68] In the case of an alleged bribe of one or more legislators, the deterrent force of criminal prosecution can best ensure a high standard of conduct by public officials. Moreover, for more than 100 years Congress has delegated to the courts the responsibility for trying legislators accused of accepting bribes.[69] In other words, by virtue of its constitutional power to regulate

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65. 408 U.S. at 661-62. (Brennan, J., dissenting).

66. The essence of our form of government was at the heart of Justice Black's reminder in the "Pentagon Papers Case" that "the press was protected so that it could have the secrets of government and inform the people." New York Times Co. v. United States, 403 U.S. 713, 717 (1971). Justice Brennan, dissenting in *Gravel*, maintained that if in the course of the continuing dialogue between elected representatives and the public, information is revealed that is embarrassing to other branches of government or violates their determinations of necessary secrecy, the right to inform and be informed should take precedence. 408 U.S. at 661-62.

67. 408 U.S. at 529 n.18.

68. Note, *supra* note 54, at 340-41. *See also* C. BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 4-5 (rev. ed. 1970).

69. A statute passed in 1853 declared a member "liable to indictment as for high crime and misdemeanor in any court of the United States," for accepting compensation intended to influence a "vote or decision on any question brought before him in his official capacity." Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171. Congress, sparked by the procurement frauds of the Civil War, enacted 2 other statutes that dealt with the bribery of members. An 1862 statute, Act of July 16, 1862, ch. 180, 12 Stat. 577, which remained substantially unchanged until 1962, 18 U.S.C. § 205 (1958) [now 18 U.S.C. § 201 (1970)], also delegated to the courts the power to punish congressmen. Senator Roscoe Conkling commented in floor discussion that the measure was intended to penalize legislators who received "pay for votes or influence in any matter pending before Congress." CONG. GLOBE, 37th Cong., 2d Sess. 3260 (1862). An 1864 conflict of interest statute barred congressmen from receiving compensation for their services before any agency. Act of June 11, 1864, ch. 119, 13 Stat. 123 [now 18 U.S.C. § 203 (1970)]. In the 1962 revision of the conflict of interest statutes, Congress broadened and reaffirmed this delegation of authority to the courts. 18 U.S.C. §§ 201-18 (1970). For the text of §§ 201(a), (c)(1), (g) see note 43 *supra*.

the conduct of its members,[70] Congress has dictated that judicial abstention from inquiry into the functioning of the legislature, pursuant to separation of powers principles, does not justify similar respect for the motives of individual legislators in bribery cases. If in delegating this jurisdiction to the courts, however, Congress fails to define the offense with requisite specificity, application of the privilege of immunity seems warranted.[71] Sections 201(c)(1) and 201(g) of the present statute authorize conviction for an agreement to receive compensation without proof that the bribed service has been performed or even that consideration has passed.[72] The statute thus permits the jury to convict on the basis of evidence of intent alone. Because of the uncertainty that pervades standards of proof for intent and the discretion in defining the offense afforded to prosecutors by a vague statute, a congressman might reasonably fear that honest conduct could be misinterpreted or that he might be subject to politically motivated prosecution.[73] Furthermore, the majority opinion in *Brewster* indicates that the judiciary will allow inquiry into legislative motivation whenever bribery is alleged by the executive.[74] The indispensability of campaign funds and the "favors" requested by constituents may combine to blur the distinction between legitimate and illegitimate action.[75] Because it lacks a precise definition of bribery, the statute grants to the executive more investigatory power over legislative acts and motives than is necessary to effectuate the statutory purpose and consequently may have a "chilling" effect on the work of the legislature.[76] Therefore, except as otherwise provided by Congress in a precisely drawn statute, the legislature's deliberations should be insulated from the purview of the courts and influence by the executive in order to preserve for the public the benefits of open legislative functioning.[77]

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70. Article I, § 5 of the United States Constitution provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and with the Concurrence of two thirds expel a Member."

71. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). "Vaugeness is not an extraneous ploy or judicial *deus ex machina* but rather has very intimate connections both with the substance of individual freedom from arbitrary and discriminatory governmental action and with the federal institutional processes established to protect that freedom." *Id.* at 88.

72. For the text of §§ 201(c)(1) and 201(g) see note 43 *supra*.

73. *See* Note, *supra* note 71, at 88.

74. *See* United States v. Brewster, 408 U.S. 501, 531 (1972).

75. The problem has not escaped congressional concern. *See Hearings Before the Special Comm. to Investigate Political Activities, Lobbying and Campaign Contributions*, 84th Cong., 2d Sess., 980-82 (1956-57).

76. Note, *supra* note 54, at 347.

77. *Cf.* United States v. Johnson, 383 U.S. 169, 181 (1966).

V. Conclusion

The institution of criminal charges against critical or disfavored legislators by the King of England was the prime factor prompting the long struggle for parliamentary privilege and, in the context of the American system of separation of powers, is the predominant thrust of the speech or debate clause.[78] If the privilege of legislative immunity is to perform its traditional function of permitting legislators to carry out their legislative functions without fear of prosecution or harrassment from the executive and judicial branches, it should be applied broadly to effectuate its intended purpose of preserving the independence of the legislature and public good that such independence fosters.[79] To hold, however, that the privilege of legislative immunity is a bar to a legislator's criminal prosecution in a given case does not mean necessarily that he will not be punished for his transgressions, because Congress has the power to reprimand or expel misbehaving members.[80] The power to punish members is broad in scope, extending to all cases in which the offense is, in the judgment of the House or Senate, inconsistent with the trust and duty of a member.[81] Congressional discipline for misconduct, however, has been rare and, as a practical mattcr, cannot be relied upon with certainty to vindicate those injured by congressional malfeasance.[82] Nevertheless, safeguards for the public against improper use of the privilege accorded legislators are placed by the Constitution in the hands of the electorate, because the electorate can refuse to return a dishonest legislator to office. The combination of the congressional corrective and the possibility of public disgrace should deter legislators from criminal conduct as effectively as criminal penalties.[83]*

78. *Id.* at 182.

79. *Id.* at 180-81.

80. U.S. Const. art. I, § 5.

81. *In re* Chapman, 166 U.S. 661, 669-70 (1897) (Senate investigation of charges that Senate members had speculated in stocks of companies interested in a pending tariff bill).

82. *See generally* Pound, *Justice According to Law*, 14 Colum. L. Rev. 1 (1914).

83. *See* 78 Harv. L. Rev. 1463, 1475 (1965).

* On November 18, 1972, a Federal District Court jury of the District of Columbia convicted Brewster on 3 counts of the 10-count indictment which could bring a total of 6 years in prison and $30,000 in fines. Attorney's for Brewster announced that they would file motions for a new trial, and if necessary, for an appeal. N.Y. Times, Nov. 18, 1972, at 1, col. 1.