10-1971

United States v. Brewster

Lewis F. Powell Jr.

For background
1 problem
LBB

No. 70-45 -- U.S. v. Brewster

(WORK DRAFT (29Nov71)

This appeal presents the question whether a Member of Congress may be prosecuted for accepting a bribe in exchange for a promise to perform a certain official legislative act under 18 U.S.C. §§ 201(c)(1), 201(g). Appellee, a former United States Senator, was charged in five counts[1/] of a ten-count indictment, with counts one, three, five, and seven alleging that on four separate occasions, appellee, a member of the Senate Committee on Post Office and Civil Service,

> "directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive [sums] . . . 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

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1/ The remaining five counts charged the alleged bribers with offering and giving bribes in violation of 18 U.S.C. § 201(b).

official capacity . . . in violation of Sections 201(c)(1) and 2, Title 18, United States Code." 2/

Count nine charged that appellee

> "directly and indirectly, asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive [a sum] . . . for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . in violation of Sections 201(g) and 2, Title 18, United States Code." 3/

2/ 18 U.S.C. 201(c)(1) (1970 ed.) provides "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(a) defines "public official" to include "Member of Congress." The same sub-section provides: "'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." 18 U.S.C. § 2 (1970 ed.) is the aiding or abetting statute.

3/ 18 U.S.C. 201(g) (1970 ed.) provides: "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 for or because of any official act performed or to be performed by him . . . [shall be guilty of an offense]."

Appellee moved to dismiss the indictment on the ground of immunity under the Speech or Debate Clause, Article I, Section 6 of the Constitution, which provides:

> "for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place."

After hearing argument, the District Court ruled from the bench:

> "Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.
>
> "It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in Johnson, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.
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> "I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7 and 9, as they apply to Senator Brewster."

No evidence had yet been introduced in this case.

The United States sought a direct appeal to this Court, pursuant to 18 U.S.C. § 3731 (Supp. V 1970).[4/] We postponed consideration of jurisdiction. United States v. Brewster, 401 U.S. 935 (1971).

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I

The United States claims that this Court has jurisdiction under 18 U.S.C. § 3731 (Supp. V 1970) to review the District Court's dismissal of the indictment against appellee. Specifically, the United States claims that the District Court decision was either "a decision or judgment setting aside, or dismissing [an] indictment . . . or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment . . . is founded" or "the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." If the District Court decision is correctly characterized by either of those descriptions, this Court has jurisdiction under the statute to hear the United States' appeal.

In United States v. Knox, 396 U.S. 77 (1969), we considered a direct appeal by the United States from the dismissal of an indictment that charged the appellee in that case with violating 18 U.S.C. § 1001, a general criminal provision punishing fraudulent statements made to any federal agency. The appellee, Knox, had been accused of willfully understating the number of employees accepting wagers on his behalf when he filed a form which persons engaged in the business of accepting wagers were required by law to file. The District Court dismissed the counts charging violations of § 1001 on the ground that the appellee could not be prosecuted for failure to answer the wagering form correctly since his Fifth Amendment privilege against self-incrimination prevented prosecution for failure to file the form in any respect.

We found jurisdiction under § 3731 to hear the appeal in Knox, on the theory that the District Court had held invalid the statute on which the indictment rested. 396 U.S., at 79, n.2. The District Court in that case held that "§ 1001, as applied to this class of cases, is constitutionally invalid."

The counts of the indictment involved in the instant case were based on 18 U.S.C. § 201, a bribery statute. Section 201 applies to "public officials," and that term is defined to explicitly include Members of Congress as well as other employees and officers of the United States. Sections (c)(1) and (g) prohibit the accepting of a bribe in return for being influenced in or performing an official act. The ruling of the District Court here was that all legislative activity of a Member of Congress is protected by the Speech or Debate Clause from prosecution under § 201. Since that section applies only to bribery for the performance of official acts, the District Court's ruling is that as applied to Members of Congress, § 201 is constitutionally invalid. We conclude that under Knox, this Court has jurisdiction to hear the appeal.

Appellee argues that the action of the District Court was not "a decision or judgment setting aside, or dismissing" the indictment, but was instead a summary judgment on the merits. The District Court, according to appellee, did not rule that § 201 could never be constitutionally applied to a Congressman, but that "based on the facts of this case" the statute could not be constitutionally applied. Under United States v. Sisson, 399 U.S. 267 (1970),

an appeal does not lie from a decision that depends, not upon the sufficiency of the indictment alone, but upon extraneous facts. If the indictment is dismissed as a result of a stipulation or the showing of evidentiary facts outside the indictment, which would constitute a defense on the merits at trial, no appeal is available. See United States v. Findley, 439 F. 2d 970 (1st Cir., 1971). Appellee claims that the District Court relied on facts outside the scope of the indictment.

However, an examination of the record discloses that, with the exception of a letter in which the United States briefly outlined its case against appellee, there are no "facts" other than those recited in the indictment. Appellee, citing the language "based on the facts of this case" used by the District Judge in announcing his decision, contends that the District Court must have relied on the government's revelation of the outlines of its case. We read the District Judge's reference to "facts" in context as being related to facts charged and his ruling was that Members of Congress are protected from prosecution for accepting bribes for the performance of official, i.e., legislative, acts by virtue of the Speech or Debate Clause. Under that interpretation, there is no way in which § 201 may be applied to Congressmen who accept bribes. We conclude, therefore, that the District Court was not relying on any facts outside the indictment, and that his ruling was that the statute was unconstitutional as applied to Congressmen.

II

On only one other occasion has the Court faced a direct conflict between the prosecution of an allegedly bribed Congressman and the Speech or Debate Clause. In United States v. Johnson, 383 U.S. 169 (1966), we reviewed the conviction of a former Representative on seven counts of violating the federal conflict of interest statute, 18 U.S.C. § 281 (1964 ed.) and on one count of conspiracy to defraud the United States, 18 U.S.C. § 371 (1964 ed.) There the Court of Appeals set aside the conviction on the conspiracy to defraud count, and Mr. Justice Harlan, speaking for the Court, traced the history of the Speech or Debate Clause of our Constitution from the Parliamentary privilege that culminated a long struggle between the English Parliament and the Crown. Mr. Justice Harlan cited the oft-quoted passage of Mr. Justice Lush in Ex Parte Wason, L.R. 4 Q.B. 573 (1869):

> "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by crimina l proceedings with respect to anything they may do or say in the House." Id., at 577. (Emphasis added)

The Court concluded that the purpose of the privilege in our constitutional scheme was to protect the independence and integrity of the legislature and to reinforce the separation of powers. Nearly a century ago, the Court held, in Kilbourn v. Thompson, 103 U.S. 168 (1881), that the privilege is to be read broadly to include anything "generally done in a session of the House by one of its members in relation to the business before it." 103 U.S., at 204.

Having concluded in Johnson that the privilege protected members from inquiry into the motivation of legislative acts, the Court focused on the specific facts of the Johnson prosecution. The conspiracy to defraud count alleged an agreement among Representative Johnson and his three codefendants to obtain the dismissal of pending indictments against officials of Savings and Loan institutions. For these services, including the speech made in the House, Johnson was allegedly paid in the form of campaign contributions and legal fees. To prove that in making this speech Johnson was, as the government's attorney put it in his summation, doing "a day's work for a day's pay," 383 U.S., at 175, n. 6, the government at trial questioned Johnson extensively concerning the authorship of the speech, the factual basis for certain statements made in the speech, and his motivation for the speech. The Court held that this evidence, in connection with a broad conspiracy statute, was prohibited by the Speech or Debate Clause. The government was, therefore, precluded from prosecuting the conspiracy count, insofar as it depended on inquiries into his speeches, as being offensive to the Speech or Debate privilege.

The Court's actual holding in Johnson, however, was narrow:

> "We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us." 383 U.S., at 84-85.

The opinion thus specifically left open the question of a prosecution, which though possibly entailing some reference to legislative acts or

motivations, is founded upon a "narrowly drawn" statute passed by Congress in the exercise of its power to regulate its Members' conduct. Of more relevance to this case, the Court in Johnson emphasized that its decision did not touch a prosecution which, though founded on a criminal statute of general application, "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." 383 U.S., at 185. The Court did not question the power of the United States to try Johnson on the conflict of interest counts, and authorized a new trial on the conspiracy count, provided that all references to the making of the speech were eliminated. 5/

Since Johnson, the Court has twice construed the Speech or Debate Clause. In Dombrowski v. Eastland, 387 U.S. 82 (1967), the Court indicated that legislators, in the sphere of their legislative activity, should be protected from the burden of defending themselves. The Court affirmed a summary judgment dismissing a civil suit against a Senator alleged to have engaged in a conspiracy to deny certain claimed civil rights in the course of a legislative inquiry. See Powell v. McCormack, 395 U.S. 486 (1969).

5/ The Court ruled, with three members dissenting, that the conviction on the conflict of interest counts was tainted by evidence of the speech, and therefore reversed for a new trial on all counts. 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).

The government, then, may prosecute a Member of Congress under an appropriate statute provided that it does not rely on evidence of legislative acts or motivation for official conduct. If an indictment does not depend on such inadmissible evidence and if evidence of legislative acts or motivation is not introduced, the Speech or Debate Clause is not contravened regardless of whether the statute is narrowly drawn or of general application.

III

An examination of the indictment brought against appellee and the statutes on which it is founded reveals that no inquiry into legislative acts or motivations is necessary in order for the government to make out a prima facie case. Four of the five counts charge that appellee "corruptly asked, solicited, sought, accepted, received, and agreed to receive" money "in return for being influenced . . . 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." This is said to be a violation of 18 U.S.C. § 201(c)(1), which provides that a Member who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value . . . in return for . . . being influenced in his performance of any official act" is guilty of an offense. To prove a violation of this statute under this indictment, it is not necessary to inquire into how appellee spoke, how he debated, or even how he voted. The illegal conduct is taking or agreeing to take money for a promise to vote in a certain way. There is no need for the government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is a violation

of the statute. The offense, in short, is taking the bribe, not the performance of the illegal promise.

Taking a bribe is, obviously, not part of the functioning of the legislative process; ~~In the Johnson case, a Member of Congress was charged with taking a bribe to render various services including use of his influence with the Executive Branch to achieve some objective sought by the briber. Moreover, even if~~ the promise for which the bribe was given was for the performance of a legislative act, ~~it would not~~ matter that the Member defaulted on his illegal bargain. If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a bill and if there were also undisputed evidence that he, in fact, voted against the bill, ~~he has nonetheless taken a bribe as a matter of fact and may be found by the triers to have violated the statute as a matter of law~~. Indeed, he offends the House and the public interest less if he breaches his "contract" than if he performs it.

Another count of the indictment against appellee alleges that he "asked, demanded, exacted, solicited, sought, accepted, received, and agreed to receive" money "for and because of official acts performed by him [6/] in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity." This count is founded on 18 U.S.C. § 201(g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for

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6/ We note that in this count, the indictment addresses itself a bribe for "acts performed" whereas the other counts may be read as charging acceptance of a bribe for acts both performed and to be performed.

himself for or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges actual performance of an official act for which a bribe is later given, it is once again unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee received or agreed to receive money knowing that the donor was paying him compensation for an official act. Inquiry into the act itself is not necessary; only appellee's knowledge of the alleged briber's improper reasons for offering and paying the money must be shown.

The Speech or Debate Clause must be read broadly to effectuate its purpose of affording protection for the independent exercise of the legislative ~~purposes~~ function, but its purposes were never to be a shield for taking bribes. If bribery is made a crime and if it is shown without an inquiry into how a Member actually performed legislative acts or into his motives, it does not impinge on Speech or Debate immunity to hold that a Member can be held to answer for ~~what~~ a specific criminal act in the same manner as other citizens or officials must answer. Members of Congress did not seek to use their Speech and Debate immunity to become super-citizens free from the penalties of bribery any more than from reckless driving. The Speech or Debate Clause sought to protect legislative independence so that legislators could be responsive to their constituents rather than to an over-reaching Executive or Judiciary. A legislator who accepts illegal offers of money, however, is not responding to his constituents nor is he performing an official or legislative act. We hold that Congress may enact legislation designed to punish the acceptance of bribes without contravening the Speech or Debate Clause.

(en route to a session; ~~an act~~ the act of driving a car ~~[illegible]~~ to the Capitol is surely "related" to the legislative process, but for me it carries no immunity from prosecution.

IV

In reversing the District Court's ruling that a Member of Congress may not be constitutionally tried for a violation of the federal bribery statutes, we express no views on the question left open in Johnson as to the legitimacy of an inquiry into legislative acts or motivation if Congress specifically authorizes such in a narrowly drawn statute. Under this statute and this indictment, no such inquiry is necessary to sustain a conviction. Should such an inquiry be made and should a conviction be sustained, then we might face the questions of whether this is a "narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members" and if inquiry into legislative acts and motivation is permissible under such a narrowly drawn statute.

Nor do we face a case in which the defendant Member of Congress alleges that a prosecution, otherwise permissible under the Speech or Debate Clause, is politically motivated and hence an interference with the separation of powers. Such an issue will always be open for consideration when a proper case arises. We hold only that on this statute and this indictment, prosecution of appellee is not prohibited by the Speech or Debate Clause. Accordingly the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

[illegible]

Supreme Court of the United States
Washington, D. C. 20543

Sally - This case to be re-argued open a current file

CHAMBERS OF
THE CHIEF JUSTICE

November 30, 1971

MEMORANDUM TO THE CONFERENCE:

No. 70-45 -- U.S. v. Brewster

I enclose a first draft of my own view of a disposition of this appeal.

It is an important case and a close question that falls within the express reservation John Harlan carefully carved out in Johnson.

I do not propose action on this draft. Rather it is for information. It seems to me too important to dispose of with seven when we are likely weeks or even days from a full Court.

Regards,

WEB

To: ~~Mr. Justice Black~~
Mr. Justice Douglas
~~Mr. Justice Harlan~~
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated: 11/30/71

Recirculated: _____

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(WORK DRAFT (29Nov71)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether a Member of Congress may be prosecuted for accepting a bribe in exchange for a promise to perform a certain official act under 18 U.S.C. §§ 201(c)(1), 201(g). Appellee, a former United States Senator, was charged in five counts [1/] of a ten-count indictment, with counts one, three, five, and seven alleging that on four separate occasions, appellee, a member of the Senate Committee on Post Office and Civil Service,

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1/ The remaining five counts charged the alleged bribers with offering and giving bribes in violation of 18 U.S.C. § 201(b).

> official capacity . . . in violation of Sections 201(c)(1) and 2, Title 18, United States Code." 2/

Count nine charged that appellee

> "directly and indirectly, asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive [a sum] . . . for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . in violation of Sections 201(g) and 2, Title 18, United States Code." 3/

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> "Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.
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> "It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in Johnson, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.
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Ct. has juris.

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II

On only one other occasion has the Court faced a direct conflict between the prosecution of an allegedly bribed Congressman and the Speech or Debate Clause. In United States v. Johnson, 383 U.S. 169 (1966), we reviewed the conviction of a former Representative on seven counts of violating the federal conflict of interest statute, 18 U.S.C. § 281 (1964 ed.) and on one count of conspiracy to defraud the United States, 18 U.S.C. § 371 (1964 ed.) There the Court of Appeals set aside the conviction on the conspiracy to defraud count, and Mr. Justice Harlan, speaking for the Court, traced the history of the Speech or Debate Clause of our Constitution from the Parliamentary privilege that culminated a long struggle between the English Parliament and the Crown. Mr. Justice Harlan cited the oft-quoted passage of Mr. Justice Lush in Ex Parte Wason, L.R. 4 Q.B. 573 (1869):

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The Court concluded that the purpose of the privilege in our constitutional scheme was to protect the independence and integrity of the legislature and to reinforce the separation of powers. Nearly a century ago, the Court held, in Kilbourn v. Thompson, 103 U.S. 168 (1881), that the privilege is to be read broadly to include anything "generally done in a session of the House by one of its members in relation to the business before it." 103 U.S., at 204.

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The Court's actual holding in Johnson, however, was narrow:

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The opinion thus specifically left open the question of a prosecution, which though possibly entailing some reference to legislative acts or

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The government, then, may prosecute a Member of Congress under an appropriate statute provided that it does not rely on evidence of legislative acts or motivation for official conduct. If an indictment does not depend on such inadmissible evidence and if evidence of legislative acts or motivation is not introduced, the Speech or Debate Clause is not contravened regardless of whether the statute is narrowly drawn or of general application.

III

An examination of the indictment brought against appellee and the statutes on which it is founded reveals that no inquiry into legislative acts or motivations is necessary in order for the government to make out a prima facie case. Four of the five counts charge that appellee "corruptly asked, solicited, sought, accepted, received, and agreed to receive" money "in return for being influenced . . . 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." This is said to be a violation of 18 U.S.C. § 201(c)(1), which provides that a Member who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value . . . in return for . . . being influenced in his performance of any official act" is guilty of an offense. To prove a violation of this statute under this indictment, it is not necessary to inquire into how appellee spoke, how he debated, or even how he voted. The illegal conduct is taking or agreeing to take money for a promise to vote in a certain way. There is no need for the government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is a violation

of the statute. The offense, in short, is taking the bribe, not the performance of the illegal promise.

Taking a bribe is, obviously, not part of the functioning of the legislative process. In the Johnson case, a Member of Congress was charged with taking a bribe to render various services including use of his influence with the Executive Branch to achieve some objective sought by the briber. Moreover, even if the promise for which the bribe was given was for the performance of a legislative act, it would not matter that the Member defaulted on his illegal bargain. If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a bill and if there were also undisputed evidence that he, in fact, voted against the bill, he has nonetheless taken a bribe as a matter of fact and may be found by the triers to have violated the statute as a matter of law. Indeed, he offends the House and the public interest less if he breaches his "contract" than if he performs it.

Another count of the indictment against appellee alleges that he "asked, demanded, exacted, solicited, sought, accepted, received, and agreed to receive" money "for and because of official acts performed by him [6/] in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity." This count is founded on 18 U.S.C. § 201(g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for

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6/ We note that in this count, the indictment addresses itself a bribe for "acts performed" whereas the other counts may be read as charging acceptance of a bribe for acts both performed and to be performed.

himself for or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges actual performance of an official act for which a bribe is later given, it is once again unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee received or agreed to receive money knowing that the donor was paying him compensation for an official act. Inquiry into the act itself is not necessary; only appellee's knowledge of the alleged briber's improper reasons for offering and paying the money must be shown.

The Speech or Debate Clause must be read broadly to effectuate its purposes, but its purposes were never to be a shield for taking bribes. If bribery is made a crime and if it is shown without an inquiry into how a Member actually performed legislative acts or into his motives, it does not impinge on Speech or Debate immunity to hold that a Member can be held to answer for what other citizens or officials must answer. Members of Congress did not seek to use their Speech and Debate immunity to become super-citizens. The Speech or Debate Clause sought to protect legislative independence so that legislators could be responsive to their constituents rather than to an over-reaching Executive or Judiciary. A legislator who accepts illegal offers of money, however, is not responding to his constituents nor is he performing an official or legislative act. We hold that Congress may enact legislation designed to punish the acceptance of bribes without contravening the Speech or Debate Clause.

IV

In reversing the District Court's ruling that a Member of Congress may not be constitutionally tried for a violation of the federal bribery statutes, we express no views on the question left open in Johnson as to the legitimacy of an inquiry into legislative acts or motivation if Congress specifically authorizes such in a narrowly drawn statute. Under this statute and this indictment, no such inquiry is necessary to sustain a conviction. Should such an inquiry be made and should a conviction be sustained, then we might face the questions of whether this is a "narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members" and if inquiry into legislative acts and motivation is permissible under such a narrowly drawn statute.

Nor do we face a case in which the defendant Member of Congress alleges that a prosecution, otherwise permissible under the Speech or Debate Clause, is politically motivated and hence an interference with the separation of powers. Such an issue will always be open for consideration when a proper case arises. We hold only that on this statute and this indictment, prosecution of appellee is not prohibited by the Speech or Debate Clause. Accordingly the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 16, 1971

Re: No. 70-45 - United States v. Brewster

Dear Chief:

I would be willing to join an opinion written along the lines of your work draft circulated November 30.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

January 17, 1972

CHAMBERS OF
THE CHIEF JUSTICE

MEMORANDUM TO THE CONFERENCE:

No. 70-45 -- U.S. v. Brewster

I suggest this case should be set for re-argument.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 17, 1972

Dear Chief:

I have your memorandum suggesting reargument in No. 70-5061, Kirby v. Illinois, No. 70-26, Gooding v. Wilson and No. 70-45, United States v. Brewster.

You indicate that you thought the votes in each of these cases was 4 to 3. My record shows that Gooding v. Wilson was 5 to 2 to affirm. The votes to affirm were Thurgood, Byron, Potter, Bill Douglas and I. The votes to reverse were yours and Harry's. I've circulated a proposed opinion for the Court on that premise.

My records do show that the votes in Kirby and Brewster were both 4 to 3. In Kirby I've circulated an opinion which Bill Douglas and Thurgood have joined. Byron has filed a separate opinion concurring in the judgment.

In Brewster, my record indicates that Potter, Thurgood and Harry have joined your opinion and Bill Douglas has joined my dissent. Byron also voted to affirm.

You'll remember that my view on reargument of 4 to 3 cases is that this is a matter for conference discussion. Certainly, as in the case of S & E Contractors, if at least four of seven vote reargument then there should be reargument. I would suppose someone would have to make the motion and then a vote be taken as we did Friday in S & E Contractors. In any event, I see no reason for rearguing Gooding v. Wilson if the five who voted to affirm remain of that view and join my proposed opinion.

W.J.B. Jr.

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 17, 1972

MEMORANDUM TO THE CONFERENCE:

We have now set two cases for reargument and there are others that seem to me should be similarly treated.

The following are my "nominations" for reargument.

No. 70-5061 -- Kirby v. Illinois
No. 70-26 -- Gooding v. Wilson
No. 70-45 -- U.S. v. Brewster

I previously indicated my willingness to have S. & E. Contractors v. U.S., and Lego v. Twomey reargued. The former is now scheduled for reargument and the latter has come down. There may be others, and generally I will vote to reargue any 4-3 case unless it is a "JMH pewee."

To facilitate filing problems, I am sending individual memos on each of the above.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 17, 1972

Dear Chief:

I vote against putting down for reargument the following cases:

No. 70-26 - Gooding v. Wilson

No. 70-45 - U. S. v. Brewster

No. 70-5061 - Kirby v. Illinois

WOD

William O. Douglas

The Chief Justice

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 18, 1972

Dear Chief:

This is in response to your memorandum of January 17 concerning reargurments.

I nominate for reargument the two abortion cases, No. 70-18, Roe v. Wade, and No. 70-40, Doe v. Bolton. It seems to me that the importance of the issues is such that the cases merit full bench treatment.

I think another candidate is No. 70-58, Fein v. Selective Service System.

So far as your nominations are concerned, my reaction is that No. 70-45, United States v. Brewster, because of its fundamental importance and precedent, deserves reargument, and that No. 70-5061, Kirby v. Illinois, should also be reconsidered. Justice White's separate concurrence certainly so indicates.

In summary, I vote to set down for reargument Nos. 70-18 and 70-40, No. 70-45 and No. 70-5061. I shall abide by the Conference's reaction as to No. 70-58.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

2

3/4/72

Tentative View: – Reverse & Remand.

Although strong policy arguments can be made on both sides, I do not think the "Speech or Debate" clause precludes ~~judicial~~ prosecutions for the crime of bribery where the crime is defined so narrowly – as it is here – ~~as~~ that no inquiry need be made into what a Senator said on the floor, how he voted, or even whether he spoke or voted.

The offense is accepting the bribe – not what Senator did or did not do in the Senate.

Members of Congress should be as answerable in the courts for the crime of bribery as members of the Executive or Judicial Branches.

BENCH MEMO

No. 70-45

The threat to legislative independence from potential bribers is at least as great as from a hostile Executive or Judiciary.

United States v. Brewster

Appeal from USDC DC

Senator Brewster was charged in 5 counts of a 10 count indictment with accepting a bribe in returned for being influenced official acts in the performance of his ~~xxxxxxxxxxxxxxx~~ and with accepting a bribe because of official acts ~~x~~ performed. ~~xxxxx~~ He was indicted under 18 U.S.C. §201(c)(1) and (g) which specifically make members of Congress subject to the penalties for bribery. The other 5 counts of the indictment charged Cyrus T. Anderson, a lobbist for Speigel, Inc., with having offered Brewster the bribe in return for various votes on postage rate legislative.

CONTROLLING CASES: U. S. v. Johnson, 383 U.S. 169 (1966); United States v. Knox, 396 U.S. 77 (1969).

Brewster moved to dismiss the counts of the indictment relating to him on the ground that he was sheilded from such a prosecution by the Speech or Debate Clause. No evidence was introduced. Instead, apparently because the indictment indicated that Brewster had accepted bribes in return for votes or promises to vote, Judge Hart dismissed the indictment in a ruling from the bench. No formal opinion was written. The govt made a direct appeal under 18 U.S.C. (Supp. V) §3731 which permits such an appeal from a decision dismissing an indictment because of the invalidty or construction of the statute on which the indictment is founded and from a decision sustaining a motion in bar, when the def has not been put in jeopardy. The Court postponed the jurisdictional question to the hearing of the merits.

Since opinions have been circulated in this case, I shall not go into the arguments at length. None of the opinons argues that the Court does not have jurisdiction over this appeal. Brewster argues that the decision below is a summary judment on the merits, rather than a dismissal of the indictment. Such a summary judgment cannot be appealed under the Courts decision in U.S. v. Sisson, 399 U.S. 267 (1970), The argument that this is a summary judgment turns on a claim that the ruling below was not based on the constitutional invalidity of the statute per se, but was based on the invalidity under these facts. There is some language in the district court's remarks from the bench to support such an interpretation. But it is clear to me that the district court had not examined

the facts of the case to such an extent that his ruling could be properly called a summary judgment. The only facts before him were the indictment itself and a letter from the govt stipulating that all the alleged activities in the indictment were related to Brewster's legislative duties. Thus, Judge Hart's ruling was that the statute could not be constitutionally applied to Brewster if the indictment related to his legislative duties. Since the statute itself only makes bribes received in return for promises to perform "official acts" a crime, it is difficult to see how any indictment under that statute could be constitutionally applied to a Congressman. In short, the ruling was that the statute was invalid, not as in Sisson that the facts put in by the govt did not amount to a violation of the statute.

Given that interpretation of the ruling of Judge Hart, it is clear that the opinion below is appealable as a dismissal of an indictment because of the invalidity of the statute on which it was based. It is true that Judge Hart did not rule that the entire bribery statute was unconstitutional, as Brewster points out, but only that it was unconstitutional when applied to Congressmen, But in U.S. v. Knox, 396 U.S. 77 (1969), the Court recognized, in a footnote, that a direct appeal was permissible if the statute was ruled unconstitutional when applied to a certain class of cases. Knox was indicted for mistatements in his tax forms, a law of broad applicability. The law was held by the district court to be unconstitutional when applied

to wagering tax forms because to require a gambler to fill out these forms violated his right against self-incrimination. But the law against mistating tax forms was not held to be unconstitutional when applied to everyone, just to the class of persons in which Knox fell. The Court nevertheless found jurisdiction to hear a direct appeal. Brewster's only refutation of Knox is a rather weak argument that the ruling was ill-considered because it was in a footnote. It seems to me that the rule makes sense. If instead of passing one statute making it a crime for all kinds of federal employees and officials to accept bribes, the Congress had passed a seperate statute for each class of employee, and if the district court had made the same substantive ruling it made here resulting in a declaration of the unconstitutionality of the statute applying to Congressmen, there would be no question of this Court's jurisdiction. The mere fact that Congress enacted one statute rather than an inefficient dozen, should not alter the jurisdictional result.

Alternatively, the govt argues that this appeal may be made because the ruling below was a plea in bar. No one knows precisely what a plea in bar is; Justices Stewart and Harlan have differed on its meaning in the past. After the briefs were filed in this case, the Court handed down its decision in U.S. v. Marion, No. 70-19, decided Dec. 20, 1971, in which it sustained a direct appeal from a plea in bar. It said that a plea in bar was like

> "a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but

> instead pleads that he cannot be prosecuted because of some extraneous factor, such as the tolling of the statutte of limitations or the denial of a speedy trial."

Under that interpretation of a plea in bar, I do not think that the ruling below fits. Brewster did not admit the act but claim some extraneious factor intervened. Nor did he admit that the act of accepting a bribe by a Congressman is a bribe; he contends that it cannot be a crime. Therefore, I do not think this Court has jurisdiction under the plea in bar rule.

July 5 Issues

Abstract of Johnson

The merits of this case raised the Speech or Debate Clause which the Court has only considered on five occasions. Only one of those opinions, U.S. v. Johnson, is directly relevant to this appeal. Johnson was convicted after trial on 8 counts. Seven of those counts alleged that he had taken a bribe in return for using his influence with the Justice Dept in an attempt to persuade the Dpet to drop various proceedings against Md savings and loan institutions. Those 7 counts were not challenged on appeal. Instead the appeal focused on the eighth count which alleged that Johnson had been bribed to make a speech on the floor of the House in defense of Md savings and loan institutions. To prove this account, the govt focused on the content of the speech and the motivation for it. The Court, speaking through Justice Harlan, reversed the conviction because of the method in which the govt proved this one count, and remanded for a new trial on all counts because the evidence from the one bad count might have tainted the jury in ruling on the other 7. (The dissent focused only on the remand order; Justices Warren, Douglas, and Brennan thought that the other 7 counts had

not been tainted and did not need to be retried. Justices Black and White did not participate.)

The opinion determined that the primary purpose of the Speech or Debate Clause was to preserve the independence of the legislative branch from the power of the executive to bring prosecutions and of the judiciary to try them. It was in this connection, that the Court ruled that under a statute of general application, Congressman could not be prosecuted if the prosecution would inquire into legislative acts, i.e., things generally done or said in a legislature, or into the motivation for legislative acts. The Court, however, necessarily interpreted legislative acts somewhat narrowly since it did not regard attempts to influence the executive branch on behalf of a constituent, an act commonly engaged in by Congressmen, as a legislative act. What it did not permit was proof about Johnson's speech to the House and his reasons for giving it. Moreover, the Court left open a possible exception to its general rule in the case of a narrowly-drawn statute that would serve as a specific delegation to the executive and judiciary by Congress of its powers to discipline its members.

It is on this last exception that the briefs in this case focus. I do not intend to deal with the argument at great length because it is irrelevant to the approach the Court took to this case in the opinions circulated earlier this year. If the issue had to be reached, however, I would agree with Part II of Justice Brennan's opinion that the narrowly-drawn exception--which Harlan avoided ruling on rather than endorsed--is prohibited by the Speech or Debate Clause. The govt's

-7- arguments seem to me to ignore the inter-relationship between Article I, Section 5 which gives Congress the power to discipline its members and Article I. Section 6 which denies anyone but Congress to question Congressmen about legislative acts. Taken together, I think those clauses mean that only Congress can discipline a member for a legislative act. I do not see how a majority of Congress could delegate this power, which is, after all, concerned with the independence and freedom of the minority, to another branch of the government. But as I said, I do not think that this issue need be reached because the indictment is sustainable in another way.

The Chief's opinion expresses the view that it is possible under this indictment to bring a case against Brewster without ever inquiring into a legislative act or the motivation for a legislative act. All that need be shown is that Brewster made a promise in return for money to perform a legislative act or that he was paid by his briber because the briber believed that Brewster had performed a legislative act in a certain way. It is not necessary to prove that Brewster ever voted at all, much less which way and for what reason. Therefore, a narrow reading of Johnson would permit the indictment to be brought in this case.

Critical distinction

The dissenters would read Johnson more broadly to hold that the Speech or Debate Clause covers anthing related to a legislative act. (Incidentally, this related to phrase, quoted by Justice Brennan from Johnson is, I believe,

taken out of context. See 383 U.S. at 172.) This is done primarily on the belief that to further limit the executive's power to bring prosecutions will promote legislative independence. But I suggest that that particular cat was let out of the bag by Johnson. If common acts such as attempting to influence the Justice Dept are not legislative acts and may be subject to prosecution, than I suggest that the executive's power to harass and intimidate legislators will not be increased by the Chief's reading of Johnson. Moreover, it is clear to me that attempting to influence the executive branch would be reated to a legislative act, within the meaning Justice Brennan ascribes to that term, But Johnson ruled such acts could be prosecuted. Finally, as a practical matter, it seems to me that the threat to legislative indpendence from potential bribers is at least as great as from a hostile executve or judiciary.

That is a somewhat sketchy overview of the arguments advanced in the circulated opinions, but since you have those opinions, there is little use for me to cover the same ground. I beleive that there is jurisdiction here and that the case should be reversed and remanded for trial to see if the govt can prove its case without introducing evidence of legislative acts or of motivation for legislative acts. If not, and if a conviction is sustained upon evidence of legislative acts, than the Court can consider the narrowly-drawn exception.

REVERSE

Fox

(3/14/72)

Personal

"Random Thoughts" on No. 70-45 -- U.S. v. Brewster

The dissenting opinions of Mr. Justice Brennan and Mr. Justice White assume that any inquiry into any bribe sought by or given to a Member of Congress by someone who hopes to influence him is an inquiry into the motivation for a "legislative act." They point out that in Johnson we held that such in inquiry into motivation was prohibited by the Speech or Debate Clause. But in Johnson the government's proof was that Johnson had made a speech on the floor of the House in return for a bribe and it was precisely this -- and only this -- which led to a remand to see if the government could make out a case without showing some legislative act. Johnson was retried without evidence of the speech, convicted, and brought no appeal here. In Brewster's case, unlike Johnson, there is no need to prove that Senator Brewster engaged in any legislative act or that he intended to perform any legislative act for the bribe. All that the government need prove is that Senator Brewster solicited, received or was promised a bribe in return for some agreement, regardless of whether or not he performed any act in return. The dissents seem to suggest that if the subject of criminal inquiry might have motivated a legislative act, (had Brewster honorably (?) kept his bargain!), the Speech or Debate Clause applies. I suggest that such a rule would actually require

a substantial inquiry into legislative motivation that is quite out of keeping with the Speech or Debate Clause. A bribe may motivate a Congressman to perform a legislative act or it may motivate him to assert his influence with members of the executive branch -- an activity which we specifically held, in Johnson, may be the basis for a prosecution. Under the dissenting views, an inquiry into whether or not a bribe could have possibly motivated a Member to perform any legislative act would be essential before the prosecution could be brought. Indeed, under such a rule, Johnson would have been able to say that the bribe he accepted not only motivated him to attempt to influence the Justice Department but also motivated him to give a speech in Congress. Since that bribe motivated a legislative act as well as a non-legislative act on the same subject, the executive and judicial branches should not have been allowed to make it the subject of a prosecution. Yet, as long as there was no direct inquiry into a legislative act or into whether the bribe did in fact motivate a legislative act, we held that the government could prosecute.

In fact, the dissenting position assumed that Senator Brewster voted a certain way on postage legislation because he had been paid a bribe. Without such an assumption, his alleged acceptance of a bribe cannot be accurately characterized as legislative motivation. I would agree with the dissent that the Speech or Debate Clause would be contravened -- leaving aside the possibility of a narrowly-drawn statute -- if the government attempted to prove that

Senator Brewster performed a legislative act because he received a bribe. But if the prosecution proves only that he received the bribe, and shows no "speech or debate", or legislative act, we see no constitutional barrier to prosecution. The government does not call on a Congressman to answer for a legislative act simply by testimony that the bribe payer hoped or expected to get something for his money. Brewster could, if he wished, show he voted against the interests of the briber (or cast no vote) but this would be no more than evidence in the scales.

Mr. Justice Brennan suggests that Johnson held that the standard of what is protected from executive or judicial inquiry by the Speech or Debate Clause is whether the conduct looked into is "related to the due functioning of the legislative power." He cites the Johnson opinion, 383 U.S. at 172, for the quoted words. With all respect, the quoted words are taken out of context and do not fairly represent the holding of Johnson. The indictment in Johnson contained eight counts. Only one was challenged as in violation of the Speech or Debate Clause. The other seven counts, involving Johnson's attempts to influence the executive, were not attacked. In that context, Mr. Justice Harlan, speaking for the Court, wrote:

> No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process. It is the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem with which we deal. (emphasis supplied)

Thus, the phrase "related to the due functioning of the legislative process" was used in the negative to fence off those counts of the indictment not involved in the Court's opinion. Justice Harlan was not really saying that a conference by a Congressman with the Executive Branch was not part of the usual activity of a Congressman but merely distinguishing two different activities that were presented on that record. He had no occasion to treat a bribe taker who failed "to deliver."

The Johnson Court did not imply the breadth of activities covered by the Clause which Mr. Justice Brennan and Mr. Justice White would find covered. The Court would be closing its eyes, to borrow Mr. Justice White's phrase, to "[t]he realities of the American political system" if it failed to acknowledge that attempts to influence other branches of the government are one of the activities in which Congressmen engage. Yet the Court specifically held in Johnson that inquiry into such activities was not prohibited and Johnson's conviction followed and was not reviewed. Surely the possibility of executive interference with legislative independence by the prosecution of legislators who attempt to influence other branches of the government in return for alleged bribes is no less than in a case of a prosecution for promising to perform a "legislative act" in return for bribes. There is no substantial increase in the power of the executive and judicial branches over the legislative branch resulting from holding that a bribe for a promise is not

forbidden by the Constitution. If this is wrong, Members of Congress are outside the ambit of federal bribery laws for all purposes bribery laws are written.

Finally, we should note that the specific danger to legislative independence that Mr. Justce White perceives in holding a Congressman for bribery may, on second glance, prove less than threatening. He is concerned that Congressmen may be inhibited in doing legislative favors for constituents who have made substantial campaign contributions. But one man's inhibition is another's circumspection. (People do not bribe Members of Congress to shoot one another, but for other things.) It should be recalled that legislative independence, the admitted policy behind the Speech or Debate Clause, may be threatened far more by corrupt use of financial rewards as well as by executive or judicial coercion. Indeed, examples of the former are numerous and examples of the latter are hard to find. The wrath of voters is a large deterrent to groundless prosecutions of legislators.

The dissents engage in what you have called on various occasions the process of carrying a sound idea beyond the outer limits of its logic. It simply cannot be that the Speech or Debate Clause was intended to cloak Members of Congress with an absolute immunity for conduct that could lead to the criminal conviction of members of the Executive branch or of the Judiciary or of the persons who pay bribes. The Constitution was not conceived in corruption

and independence of legislators does not call for a kind of protection not extended to cabinet officers, judges and other mortals.

Conf. 3/20/72

Court .....
Argued ..March 20....., *19*..72
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 70-45

UNITED STATES

vs.

BREWSTER

Reversed

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Rehnquist, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Powell, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Blackmun, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Marshall, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
White, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Stewart, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Brennan, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Douglas, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Burger, Ch. J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....

UNITED STATES V. BREWSTER No. 70-45 Argued 3/21/72

S/G Griswold:

The even number counts are not before the Court.

"Any speech or debate in either house" - Art I, Sec 6

D.C. held that Johnson case controls & that Brewster is shielded from prosecution.

I Jurisdiction — appeal is appropriate

Two imp. cases not cited in Brief — U.S. v Trentham 365 U.S. / U.S. v Halsey 342 U.S. 277 *

There is not a summary judgment "case" as that type of judgment is not known in criminal procedure.

Nor were there an "acquittal" below - no trial, no empaneling of jury, no waiver of jury. No double

II Merits

Johnson is inapplicable by its own terms
Charge was under a conspiracy statute
whereas this case is under an explicit
statute - with a long history.

In Johnson, the Govt case (50 pages
in transcript) emphasized the
speech made in the Senate.

See the concurring opinion in Johnson
by Douglas + Brennan.

x x x

In this case, there is no speech.

Here B. is charged with receiving
a bribe

The charge mentions "vote" but
this could be stricken & a crime would
still be charge.

If bill had been withdrawn,
crime would have been committed

Mr. Ramsey

This case falls within the "hard core" of speech & debate. See Gov't original brief. *

Trial was conduct on theory that "legislative conduct" was involved.

An act relative to ~~conduct~~ the executive dept (by a Congressman) is not covered by S & D clause. Ramsey says Johnson decided this.

S/G

Art I, Sec 6 does not refer to "legislative acts" – which are not necessarily synonymous with "speech or debate".

Case can be proved, however, without reference to any leg. act.

In Burton Case a Congressman was convicted for misconduct. See also Powell

Offense was committed when bribe was taken – regardless of what thereafter happened. See Manton case in ~~2d~~ 2nd Circuit.

* But see p 24, of Appendix p 25

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1972

Re: No. 70-45 - U. S. v. Brewster

MEMORANDUM TO THE CONFERENCE:

Enclosed is first printed draft (labelled 2nd draft).

Since there are changes throughout, it is not feasible to mark them. No change in substance is made from the preliminary typed draft.

Regards,

WEB

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: MAY 31 1972

No. 70-45

Recirculated: _____

United States, Appellant, v. Daniel B. Brewster.	On Appeal from the United States District Court for the District of Columbia Circuit.

Reviewed 5/5/72

[May —, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This direct appeal from the District Court presents the question whether a Member of Congress may be prosecuted under 18 U. S. C. §§ 201 (c)(1), 201 (g), for accepting a bribe in exchange for a promise relating to an official act. Appellee, a former United States Senator, was charged with five counts of a 10-count indictment.[1] Counts one, three, five, and seven alleged that on four separate occasions, appellee, while he was a Senator and a member of the Senate Committee on Post Office and Civil Service,

> "directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive [sums] . . . 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 . . . in violation of Sections 201 (c)(1) and 2, Title 18, United States Code."[2]

[1] The remaining five counts charged the alleged bribers with offering and giving bribes in violation of 18 U. S. C. § 201 (b).

[2] 18 U. S. C. § 2019 (c)(1) provides "Whoever, being a public official or person selected to be a public official, directly or indirectly corruptly asks, demands, exacts, solicits, seeks, accepts, receives,

Count nine charged that appellee

> "directly and indirectly, asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive [a sum] . . . for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . in violation of Sections 201 (g) and 2, Title 18, United States Code." [3]

Before a trial date was set, the appellee moved to dismiss the indictment on the ground of immunity under the Speech or Debate Clause, Art. I, § 6, of the Constitution, which provides:

> "for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place."

After hearing argument, the District Court ruled from the bench:

> "Gentlemen, based on the facts of this case, it is admitted by the Government that the five

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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 (a) defines "public official" to include "Member of Congress." The same subsection provides: "'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." 18 U. S. C. § 2 is the aiding or abetting statute.

[3] 18 U. S. C. § 201 (g) provides: "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 for or because of any official act performed or to be performed by him . . . [shall be guilty of an offense]."

counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.

"It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in Johnson, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.

"I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7, and 9, as they apply to Senator Brewster."

The United States filed a direct appeal to this Court, pursuant to 18 U. S. C. § 3731 (Supp. V, 1970).[4] We postponed consideration of jurisdiction until hearing the case on the merits. 401 U. S. 935 (1971).

I

The United States asserts that this Court has jurisdiction under 18 U. S. C. § 3731 (Supp. V, 1970) to review the District Court's dismissal of the indictment

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[4] 18 U. S. C. § 3731 (Supp. V, 1970) provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decisions or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The statute has since been amended to eliminate the direct appeal provision on which the United States relies. 84 Stat. 1890 (Jan. 2, 1971). This appeal, however, was perfected under the old statute.

against appellee. Specifically, the United States urges that District Court decision was either "a decision or judgment setting aside, or dismissing [an] indictment . . . or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment . . . is founded" or a "decision or judgment sustaining a motion in bar, 'when the defendant has not been put in jeopardy.'" If the District Court decision is correctly characterized by either of those descriptions, this Court has jurisdiction under the statute to hear the United States' appeal.

In *United States* v. *Knox*, 396 U. S. 77 (1969), we considered a direct appeal by the United States from the dismissal of an indictment that charged the appellee in that case with violating 18 U. S. C. § 1001, a general criminal provision punishing fraudulent statements made to any federal agency. The appellee, Knox, had been accused of willfully understating the number of employees accepting wagers on his behalf when he filed a form which persons engaged in the business of accepting wagers were required by law to file. The District Court dismissed the counts charging violations of § 1001 on the ground that the appellee could not be prosecuted for failure to answer the wagering form correctly since his Fifth Amendment privilege against self-incrimination prevented prosecution for failure to file the form in any respect. We found jurisdiction under § 3731 to hear the appeal in *Knox* on the theory that the District Court had passed on the validity of the statute on which the indictment rested. 396 U. S., at 79 n. 2. The District Court in that case held that "§ 1001, as applied to this class of cases, is constitutionally invalid."

The counts of the indictment involved in the instant case were based on 18 U. S. C. § 201, a bribery statute. Section 201 applies to "public officials," and that term is defined explicitly to include Members of Congress as well as other employees and officers of the United

States. Subsections (c)(1) and (g) prohibit the accepting of a bribe in return for being influenced in or performing an official act. The ruling of the District Court here was that "the Speech or Debate Clause of the Constitution, particularly in view of the interpretation given . . . in *Johnson* shields Senator Brewster . . . from any prosecution for alleged bribery to perform a legislative act." Since § 201 applies only to bribery for the performance of official acts, the District Court's ruling is that, as applied to Members of Congress, § 201 is constitutionally invalid.

Appellee argues that the action of the District Court was not "a decision or judgment setting aside, or dismissing" the indictment, but was instead a summary judgment on the merits. Appellee also argues that the District Court did not rule that § 201 could never be constitutionally applied to a Congressman, but that "based on the facts of this case" the statute could not be constitutionally applied. Under *United States* v. *Sisson*, 399 U. S. 267 (1970), an appeal does not lie from a decision that rests, not upon the sufficiency of the indictment alone, but upon extraneous facts. If an indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the merits at trial, no appeal is available. See *United States* v. *Findley*, 439 F. 2d 970 (CA1 1971). Appellee claims that the District Court relied on factual matter other than facts alleged in the indictment.

An examination of the record, however, discloses that, with the exception of a letter in which the United States briefly outlined the theory of its case against appellee, there were no "facts" on which the District Court could act other than those recited in the indictment. Appellee contends that the statement "based on the facts of this case," used by the District Judge in announcing his decision, shows reliance on the Government's outline

of its case. We read the District Judge's reference to "facts," in context, as a reference to the facts alleged in the indictment and his ruling as holding that Members of Congress are totally immune from prosecution for accepting bribes for the performance of official, *i. e.*, legislative, acts by virtue of the Speech or Debate Clause. Under that interpretation of § 201, it cannot be applied to a Member of Congress who accepts bribes that relate in any way to his office. We conclude, therefore, that the District Court was relying only on facts alleged in the indictment and that the dismissal of the indictment was based on a determination that the statute on which the indictment was drawn was invalid under the Speech or Debate Clause. As a consequence, this Court has jurisdiction to hear the appeal.

II

The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in *United States* v. *Johnson*, 383 U. S. 169 (1969), Mr. Justice Harlan canvassed the history of the Clause and concluded that it

> "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the

independence and integrity of the legislature." *Id.*, at 178. (Footnote omitted.)

Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience and in the context of the American constitutional scheme of government rather than the English parliamentary system. The English system of government differs from ours in that their Parliament is the supreme authority, and not a co-ordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.[8] Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without elevating it in stature above the other two co-equal branches of Government.

It does not undermine the validity of the Framers' concern for the independence of the legislative branch to acknowledge that our system of Government has never produced the sort of executive abuses that gave rise to the privilege. There is nothing in our history, for example, comparable to the imprisonment of a Member of Parliament in the Tower without a hearing and, owing to the subservience of some royal judges to the Seventeenth and Eighteenth Century English Kings, without meaningful recourse to a writ of habeas

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[8] 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 L. Rev. 1, 15 (1968), Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 337–338 (1965).

In Australia and Canada, "where provision for legislative free speech or debate exists but where the legislature may not claim a tradition as the highest court of the realm, courts have held the privilege does not bar the criminal prosecution of legislators for bribery." *Id.*, at 338.

corpus.[8] In fact, on only one previous occasion has this Court ever interpreted the Speech or Debate Clause in the context of a criminal charge against a Member of Congress.

(a) In *United States* v. *Johnson, supra*, the Court reviewed the conviction of a former Representative on seven counts of violating the federal conflict of interest statute, 18 U. S. C. § 281, and on one count of conspiracy to defraud the United States, 18 U. S. C. § 371. The Court of Appeals had set aside the conviction on the count for conspiracy to defraud as violating the Speech or Debate Clause. Mr. Justice Harlan, speaking for the Court, cited the oft-quoted passage of Mr. Justice Lush in *Ex Parte Wason*, 4 Q. B. 573 (1869):

> "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings *with respect to anything they may do or say in the House.*" *Id.*, at 577 (emphasis added).

In *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), the first case in which this Court interpreted the Speech or Debate Clause, we adopted a similar statement of the ambit of the American privilege. There the Court said the Clause is to be read broadly to include anything "generally done in a session of the House by one of its members in relation to the business before it." 103 U. S., at 204. This statement, too, was cited with approval in *Johnson*, 383 U. S., at 179. Our conclusion in *Johnson* was that the privilege protected members from inquiry into legislative acts or the motivation for actual performance of legislative acts. *Id.*, at 185.

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[8] See C. Wittke, The History of English Parliamentary Privilege, 23–32 (1921).

In applying the Speech or Debate Clause, the Court focused on the specific facts of the *Johnson* prosecution. The conspiracy to defraud count alleged an agreement among Representative Johnson and three co-defendants to obtain the dismissal of pending indictments against officials of savings and loan institutions. For these services, which included a speech made by Johnson on the House floor, Johnson was paid money which the Government claimed was a bribe. At trial, the Government questioned Johnson extensively relative to the conspiracy to defraud count concerning the authorship of the speech, the factual basis for certain statements made in the speech, and his motives for giving the speech. The Court held that the use of evidence of a speech to support a count under a broad conspiracy statute was prohibited by the Speech or Debate Clause. The Government was, therefore, precluded from prosecuting the conspiracy count on retrial, insofar as it depended on inquiries into speeches made in the House.

It is important to note the very narrow scope of the Court's holding in *Johnson:*

> "We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us." 383 U. S., at 184–185.

The opinion specifically left open the question of a prosecution, which though possibly entailing some reference to legislative acts, is founded upon a "narrowly drawn" statute passed by Congress in the exercise of its power to regulate its Member's conduct. Of more relevance to this case, the Court in *Johnson* emphasized that its decision did not affect a prosecution which,

though founded on a criminal statute of general application, "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.*, at 185. 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 that all references to the making of the speech were eliminated.[7]

Chief Justice Warren, joined by JUSTICES DOUGLAS and BRENNAN, concurring in part and dissenting in part stated:

> "After reading the record, it is my conclusion that the Court of Appeals erred in determining that the evidence concerning the speech infected the jury's judgment on the [conflict of interest] counts. The evidence amply supports the prosecution's theory and the jury's verdict on these counts—that the respondent received over $20,000 for attempting to have the Justice Department dismiss an indictment against his [present] co-conspirators, without disclosing his role in the enterprise. This is the classic example of a violation of § 281 by a Member of the Congress. See *May* v. *United States*, 175 F. 2d 994, 1006 (C.A.D.C. Cir.); *United States* v. *Booth*, 148 F. 112, 117 (Cir. Ct. D. Ore.). The arguments of government counsel and the court's instructions separating the conspiracy from the substantive counts seem unimpeachable. The speech was a minor part of the prosecution. There was nothing in it to inflame the jury and the respond-

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[7] 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 (CA4 1969), cert. denied, 397 U. S. 1010 (1970).

> ent pointed with pride to it as evidence of his vigilance in protecting the financial institutions of his State. The record further reveals that the trial participants were well aware that a finding of criminality on one count did not authorize similar conclusions as to other counts, and I believe that this salutary principle was conscientiously followed. Therefore, I would affirm the convictions on the substantive counts." [Footnote omitted.]

Johnson thus stands as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts. A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause only prohibits inquiry into those things generally said or done in the House in the performance of official duties and the motivation for those acts.

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never

been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a session of the House by one of its members in relation to the business before it," 103 U. S., at 204, or things "said or done by him as a representative, in the exercise of the functions of that office." 4 Mass., at 27 (quoted with approval in 341 U. S., at 373–374, and 103 U. S., at 203).

(b) Appellee argues, however, that in *Johnson* we expressed a broader test for the coverage of the Speech or Debate Clause. It is urged that we held that the Clause protected from Executive or Judicial inquiry all conduct "related to the due functioning of the legislative process." It is true that the quoted words appear in the *Johnson* opinion, but appellee takes them out of context; in context they reflect a quite different meaning from that now urged. Although the indictment against Johnson contained eight counts, only one count was challenged before this Court as in violation of the Speech or Debate Clause. The other seven counts concerned Johnson's attempts to influence members of the Justice Department to dismiss pending prosecutions. In explaining why those counts were not before the Court, Mr. Justice Harlan wrote:

> "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise *related to the due functioning of the legislative process.* It is the application of this broad conspiracy statute to an

> improperly motivated speech that raises the constitutional problem with which we deal." 383 U. S., at 172. (Emphasis added.)

In stating that those things "in no wise related to the due functioning of the legislative process" were not covered by the privilege, the Court did not in any sense imply that everything that "related" to the office of a member was shielded by the Clause. Quite the contrary, in *Johnson* we held, citing *Kilbourn* v. *Thompson,* that only acts *generally done* in the course of the process of enacting legislation were protected.

Nor can we give *Kilbourn* a more expansive interpretation. In citing with approval the language of Chief Justice Parsons of the Supreme Judicial Court of Massachusetts in *Coffin* v. *Coffin,* 4 Mass. 1 (1808), the *Kilbourn* Court gave no thought to enlarging "legislative acts" to include illicit conduct outside the House. The *Coffin* language is:

> "[T]he [Massachusetts legislative privilege] 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 everything said or done by him as a representative, in the exercise of the functions of that office, without enquiring 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." *Id.*, at 27 (emphasis added).

It is suggested that in citing these words, which were also quoted with approval in *Tenney* v. *Brandhove*, 341 U. S. 367, 373–374 (1951), the Court was interpreting the sweep of the Speech or Debate Clause to be broader than *Johnson* seemed to indicate or than we today hold. Emphasis is placed on the statement that "there are cases in which [a member] is entitled to this privilege when not within the walls of the representatives' chamber." But the context of *Coffin* v. *Coffin* indicates that in this passage Chief Justice Parsons was referring only to legislative acts, such as committee meetings, which take place outside the physical confines of the legislative chamber. In another passage, the meaning is clarified:

> "If a member . . . be out of the chamber, sitting in committee, executing the commission of the House, it appears to me that such member is within the reason of the article and ought to be considered within the privilege. The body of which he is a member is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything 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."[8] 4 Mass., at 28.

~~Thus while *Coffin* expressed a tolerance for violation of the rules of the legislature there is no hint of tolerance or immunity for crimes by Members.~~

[8] It is especially important to note that in *Coffin* v. *Coffin*, the court concluded that the defendant was not executing the duties of his office when he allegedly defamed the plaintiff and was hence not entitled to the claim of privilege.

In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.[9] Appellee's contention for a broaded interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.

(c) We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the

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[9] See *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881) (voting for a resolution); *Tenney* v. *Brandehove*, 341 U. S. 367 (1951) (harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); *United States* v. *Johnson*, 383 U. S. 169 (1966) (subpoenaing records for comittee hearing); *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967) (subpoenaing records for committee hearing); *Powell* v. *McCormack*, 395 U. S. 486 (1969) (voting for a resolution).

In *Coffin* v. *Coffin*, 4 Mass. 1 (1808), the state equivalent of the Speech or Debate Clause was held to be inapplicable to a legislator who was acting outside of his official duties.

Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was conscious choice of the Framers [redacted].[10]

The history of legislative privilege is by no means free from grave abuses by legislators. In one instance, abuses reached such a level in England that Parliament was compelled to enact curative legislation.

> "The practice of granting the privilege of freedom from arrest and molestation to members' servants in time became a serious menace to individual liberty and to public order, and a form of protection by which offenders often tried—and they were often successful—to escape the penalties which their offenses deserved, and which the ordinary courts would not have hesitated to inflict. Indeed the sale of 'protections' at one time proved a source of income to unscrupulous members and those 'parliamentary indulgences' were on several occasions obtainable at a fixed market price." C. Wittke, The History of English Parliamentary Privilege, 39 (1921).

The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the

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[10] "To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted. . . . The injury to the reputation of a private citizen is of less importance to the commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by fear of legal prosecutions." *Coffin* v. *Coffin*, 4 Mass. 1, 32 (1808).

See *Cochran* v. *Couzens*, 42 F. 2d 783 (CADC), cert. denied, 282 U. S. 874 (1930) (defamatory words uttered on Senate floor could not be basis of slander action).

part of Members not tolerated and protected when done by other citizens, but the shield *does not* extend beyond what is necessary to preserve the integrity of the legislative process. Moreover, unlike England with no formal, written constitutional limitations on the monarch, we defined limits on each branch and provided other checks to protect against abuses of the kind experienced in that country.

It is also suggested that even if we interpreted the Clause broadly so as to exempt from inquiry all matters having any relationship to the legislative process, misconduct of Members would not necessarily go unpunished because each House is empowered to discipline its Members. Article I, § 5, does indeed empower each House to "determine the rules of its Proceedings, punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member," but Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process.[11] Indeed, Congress has shown little inclination in this area.[12] Moreover, if Congress

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[11] In this sense the English analogy is inapt. Parliament is itself "The High Court of Parliament"—the highest court in the land—and its judicial tradition better equips it for judicial tasks. "It is by no means an exaggeration to say that [the judicial characteristics of Parliament] colored and influenced some of the great struggles over legislative privilege in and out of Parliament to the very close of the nineteenth century. It is not altogether certain whether they have been entirely forgotten even now. Nowhere has the theory that Parliament is a court—the highest court of the realm, often acting in a judicial capacity and in a judicial manner—persisted longer than in the history of privilege of Parliament." C. Wittke, The History of English Parliamentary Privilege, 14 (1921).

[12] See Thomas, Freedom of Debate: Protector of the People or Haven for the Criminal?, 3 Harv. L. Rev. 77, 80–81 (No. 3, 1965); Note, The Bribed Congressman's Imunity from Prosecution, 75 Yale L. J. 335, 349 n. 84 (1965); Oppenheim, Congressional Free Speech, 8 Loyola L. Rev. 1, 27–28 (1955–1956).

did lay aside its normal activities and take on itself the responsibility to police the myriad activities of its Members related to but not directly a part of the legislative function, the independence of individual Members might actually be impaired.

The process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case. An accused Member is judged by no specifically articulated standards [13] and is at the mercy of an almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge, and jury from whose decision there is no established right of review. It would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment.[14] Strong arguments can be made that trials conducted in a Congress with an entrenched majority from one political party could result in far greater harassment than a conventional criminal trial with the wide range of procedural protections for the accused, including indictment by grand jury, trial by jury under strict standards of proof with fixed rules of evidence, and extensive appellate review.

Finally, the jurisdiction of Congress to punish its Members is not all-embracing. For instance, it is unclear to what extent Congress would have jurisdiction over a case such as this in which the alleged illegal activity occurred outside the chamber, while the appellee

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[13] See, *e. g., In re Chapman*, 166 U. S. 661, 669–670 (1897):

"The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."

[14] See the account of the impeachment of President Andrew Johnson in J. Kennedy, Profiles in Courage, 126–151 (1956).

[15] "English Parliaments have historically reserved to themselves

was a Member, but was undiscovered or not brought before a grand jury until after he left office.[15]

The sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their office. Such claims are inconsistent with the reading this Court has given, not only to the Speech or Debate Clause, but also to the other legislative privileges embodied in Art. I, § 6. The same sentence in which the Speech or Debate Clause appears provides that Members "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Perspective Houses. . . ." In *Williamson* v. *United States*, 207 U. S. 425 (1908), this Court rejected a claim, made by a Member convicted of subornation of perjury in proceedings for the purchase of public lands, that he could not be arrested, convicted or imprisoned for any crime that was not treason, felony, or breach of the peace in the modern sense, *i. e.*, disturbing the peace. Mr. Justice White, writing for the Court, in the 1907 Term, noted that in the 18th Century the term "Breach of the Peace" referred to breaching the King's peace and thus embraced the whole range of crimes at common law. Quoting Lord Mansfield's remarks in *King* v. *Wilkes*, 2 Wils. 151, he noted, with respect to the claim of parliamentary privilege, "The laws of this country allow no place or employment as a sanctuary for crime . . . ." *Id.*, at 439.

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and still retain the sole and exclusive right to punish their members for the acceptance of a bribe in the discharge of their office. No member of Parliament may be tried for such an offense in any court of the land." Celia, 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 L. Rev. 1, 14–15 (1908). That this is obviously not the case in this country is implicit in the remand of Representative Johnson to be retried on bribery charges.

The subsequent case of *Long* v. *Ansell*, 293 U. S. 76 (1934), held that a Member's immunity from arrest in civil cases did not extend to civil process. Mr. Justice Brandeis wrote for the Court:

> "Clause 1 [of Article I, § 6] defines the extent of the immunity. Its language is exact and leaves no room for construction which would extend the privilege beyond the terms of the grant." *Id.*, at 82.

We recognize that the privilege against arrest is not identical with the Speech or Debate privilege, but it is closely related in purpose and origin. It can hardly be thought that the Speech or Debate Clause protects what the sentence preceding it has plainly left open to prosecution, *i. e.*, all criminal acts.

(d) It, is, nevertheless, asserted that permitting the Executive to initiate the prosecution of a Member of Congress for the specific crime of bribery is subject to serious potential abuse that might endanger the independence of the legislatiure—for example, a campaign contribution might be twisted by a ruthless prosecutor into a bribery indictment. But, as we have just noted, the Executive is not alone in possessing power potentially subject to abuse; such possibilities are inherent in a system of government which delegates to each of the three branches separate and independent powers.[16] In the Federalist

[16] The potential for harassment by an unscrupulous member of the Executive Branch may exist, but this country has no tradition of absolute congressional immunity from criminal prosecution. See *United States* v. *Quinn*, 141 F. Supp. 622 (SDNY 1956) (motion for acquittal granted because the defendant Member of Congress was unaware of receipt of fees by his law firm); *Burton* v. *United States*, 202 U. S. 344 (1906) (Senator convicted for accepting compensation to intervene before Post Office Department); *United States* v. *Dietrich*, 126 F. 676 (CCD Neb. 1904) (Senator-elect's accepting payment to procure office for another not covered by statute); *May* v. *United States*, 175 F. 2d 994 (CADC 1949) (Congressman convicted

No. 73, Hamilton expressed concern over the possible hazards that confronted an Executive dependent on Congress for financial support.

> "The legislature, with a discretionary power over the salary and emoluments of the chief magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion, his judgment to their inclinations."

Yet Hamilton's "parade of horribles" finds little real support in history. The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press has not encouraged abuses of power or tolerated them long when they arose. This may be explained

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of receiving compensation for services before an agency); *United States* v. *Bramblett*, 348 U. S. 503 (1955) (Congressman convicted of defrauding government agency). *Bramblett* concerned a Congressman's misuse of office funds via a "kick-back" scheme, which is surely "related" to the legislative office.

A strategically timed indictment could indeed cause serious harm to a Congressman. Representative Johnson, for example, was indicted while campaigning for re-election, and arguably his indictment contributed to his defeat. On the other hand, there is the classic case of Mayor Curley who was re-elected while under indictment. See 4 New Catholic Encyclopedia, at 541 (1967). Moreover, we should not overlook the barriers a prosecutor, attempting to bring such a case, must face. First, he must persuade a grand jury to indict, and we are not prepared to assume that grand juries will act against a Member without solid evidence. Thereafter, he must convince a petit jury beyond a reasonable doubt with the presumption of innocence favoring the accused. A prosecutor who fails to clear one of these hurdles faces serious practical consequences when the defendant is a Congressman. The Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members. Perhaps more important is the omnipresence of the news media whose traditional function and competitive inclination affords no immunities to reckless or irresponsible official misconduct.

in part because the third branch has intervened with neutral authority. See, *e. g., United States* v. *Lovett,* 328 U. S. 303 (1946). The system of divided powers was expressly designed to check the abuses England experienced in the 16th to the 18th century.

Probably of more importance is the public opposition engendered by any attempt of one branch to dominate or harass another. Even lawful political attempts to establish dominance have met with little success owing to contrary popular sentiment. Attempts to "purge" uncooperative legislators, for example, have not been notably successful. We are not cited to any cases in which the bribery statutes, which have been applicable to Members of Congress for over 100 years,[17] have been abused by the Executive Branch. When a powerful Executive sought to make the Judicial Branch more responsive to the combined will of the Executive and Legislative Branches, it was the Congress itself that checked the effort to enlarge the Court. 2 M. Pusey, Charles Evans Hughes, c. 70 (1951).

~~In *Johnson*, the Court specifically held that inquiries into a Congressman's attempts to influence another branch of the Government were not prohibited by the Speech or Debate Clause~~. We would be closing our eyes to the realities of the American political system if we failed to acknowledge that ~~such~~ activities are an established and accepted part of the role of a Member, and are indeed "related" to the legislative process. If the Executive may prosecute a Member's attempt as in *Johnson*, to influence another branch of the Government in return for a bribe, its power to harass is not greatly enhanced if it can prosecute for a promise relating to a legislative act in return for a bribe. We therefore see no

many non-legislative

[17] The first bribery statute applicable to Congressmen was enacted in 1853. Act of Feb. 26, 1853, c. 81, § 6, 10 Stat. 171.

substantial increase in the power of the Executive and Judicial Branches over the Legislative Branch resulting from our holding today. If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century.

We do not discount entirely the possibility that an abuse might occur, but this possibility which we consider remote, must be balanced against the potential danger flowing from either the absence of a bribery statute applicable to Members of Congress or a holding that the statute violates the Constitution. As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses, by way of bribes, as well as Executive power, can undermine legislative integrity and defeat the right of the public to honest representation.[18] Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to ~~result in a net increase of independent legislators who decide issues on their merits rather than for pay~~ enhance legislative independence. Given the disinclination and disability of each House to police these matters, it is understandable that both Houses deliberately delegated this function to the courts, as they did with the power to punish persons committing contempts of Congress. 2 U. S. C. § 192.

~~We therefore conclude~~ It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts which occur

[18] "Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion." Speech of Edmund Burke to the Electors of Bristol, Nov. 3, 1774.

in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, so essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members. We turn next to determine whether the subject of this criminal inquiry is within the scope of the privilege.

III

An examination of the indictment brought against appellee and the statutes on which it is founded reveals that no inquiry into legislative acts or motivation for legislative acts is necessary for the Government to make out a prima facie case. Four of the five counts charge that appellee "corruptly asked, solicited, sought, accepted, received, and agreed to receive" money "in return for being influenced . . . 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." This is said to be a violation of 18 U. S. C. § 201 (c)(1), which provides that a Member who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value . . . in return for . . . being influenced in his performance of any official act" is guilty of an offense.

The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Taking a bribe is, obviously, not part of the legislative process or function; it is not a legislative act. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch. Nor does it matter if the Member defaults on his illegal bargain. To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act. If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a given bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime? We think not.

Another count of the indictment against appellee alleges that he "asked, demanded, exacted, solicited, sought, accepted, received, and agreed to receive" money "for and because of official acts performed by him in respect to his action, vote, and decision on postage rate legislation which had been pending before him in his official capacity." This count is founded on 18 U. S. C. § 201 (g), which provides that a Member of Congress who "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" is guilty of an offense. Although the indictment alleges actual performance of an official act for which a bribe is given, it is once again unnecessary to inquire into the act or its motivation. To-

sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illict reasons for paying the money is sufficient to carry the case to the jury.

It is asserted, however, that inquiry into the alleged bribe is inquiry into the motivation for a legislative act, and it is urged that this very inquiry was condemned as impermissible in *Johnson*. That argument seems to us to misconstrue the concept of motivation for legislative acts. The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions. In *Johnson*, we indicated that on remand, Johnson could be retried on the conspiracy to defraud count—all relating to conduct outside the House—so long as evidence concerning his speech on the House floor was not admitted. The Court's opinion plainly implies that had the Government chosen to retry Johnson on that count, he could not have obtained immunity from prosecution by asserting that the matter being inquired into was related to the motivation for his House speech.

The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities which are casually or accidentally related to legislative affairs but not a part of the legislative process itself, so long as there is no attempt to prove a link with a legislative act. Under this indictment and these statutes no such proof is needed.[19]

[19] In reversing the District Court's ruling that a Member of Congress may not be constitutionally tried for a violation of the federal bribery statutes, we express no views on the question left open in

We hold that under this statute and this indictment, prosecution of appellee is not prohibited by the Speech or Debate Clause. Accordingly the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Johnson as to the constitutionality of an inquiry that probes into legislative acts or the motivation for legislative acts if Congress specifically authorizes such in a narrowly drawn statute. Should such an inqury be made and should a conviction be sustained, then we would face the question whether inquiry into legislative acts and motivation is permissible under such a narrowly drawn statute.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 31, 1972

Re: No. 70-45 - United States v. Brewster

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1972

70-45 - U.S. v. Brewster

Dear Chief,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.
I.

The Chief Justice

Copies to the Conference

6/5/72--LAH

Re: United States v. Brewster, No. 70-45

Judge:

Attached you will find the following: (1) the CJ's suggested majority opinion in this case involving the speech or debate clause; (2) Justice White's dissent; (3) notes from Justices Stewart and Marshall indicating that they join the Chief. The two opinions are not much changed from the pre-reargument drafts. You have indicated an intention to join the CJ.

Phil initially worked on this case both for the Chief and in this office. Since he wrote the draft, we agreed that it would be better if another clerk looked over the opinions to see whether there is any reason why the Chief's opinion should not be joined. I have reviewed the opinions and find in them nothing which should cause you to alter your vote. The Chief's opinion is a quite acceptable product.

JOIN CJ LAH

Sally - Write a Join Note to Chief in Brewster

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 5, 1972

Dear Byron:

In No. 70-45 - U. S. v. Brewster,

please join me in your dissent.

W. O. D.

Mr. Justice White

cc: Conference

June 6, 1972

Re: No. 70-45 United States v. Brewster

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 8, 1972

Dear Bill:

In No. 70-45 - U. S. v. Brewster, please join me in your opinion.

W. O. D.

Mr. Justice Brennan

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 8, 1972

Re: No. 70-45 - U. S. v. Brewster

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1972

Re: No. 70-45 - U.S. v. Brewster

Dear Chief:

Please join me.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1972

RE: No. 70-45 - United States v. Brewster

Dear Byron:

Will you please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
4/3/72		dissent		dissent 6/2/72				
	join BRW 6/5/72		join CJ 6/2/72		join CJ 5/31/72	join CJ 6/9/72	join CJ 6/6/72	join CJ 6/5/72
	join WJB 6/8/72	join BRW 6/14/72						
					70-45 U.S. v. Brewster			