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# THE SPEECH OR DEBATE CLAUSE: BASTION OF CONGRESSIONAL INDEPENDENCE OR HAVEN FOR CORRUPTION?

CRAIG M. BRADLEY†

As the popular concern gradually shifts away from the problem of a corrupt presidency to the more familiar problem of the corrupt congressman, it seems appropriate to reconsider the principles of congressional privilege. While the constitutionally guaranteed congressional privileges, such as the freedom of speech or debate, may tend to protect Congress from overreaching by the executive, they may also have the effect of shielding corrupt congressmen from legitimate efforts to investigate and prosecute their transgressions. Indeed, in the investigation of the Korean corruption of the United States Congress the investigative efforts of the Justice Department were frequently impaired and trial preparation hampered because many, if not most, of the "official acts" that must be proven to make a case under the federal bribery statute<sup>1</sup> are also "legislative Acts" under the speech or debate clause of the Constitution.<sup>2</sup> According to the courts, these "acts" cannot be introduced into evidence (or made the subject of a subpoena or grand jury inquiry) despite the express inclusion of congressmen in the coverage of the bribery statute.<sup>3</sup> Further, the clause has been construed to prohibit evidence of the motivations for legislative acts, as well as the acts themselves,<sup>4</sup> and one court has even extended the coverage of the

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1. 18 U.S.C. § 201 (1976) ("Bribery of public officials and witnesses"). Section 201(c) provides:

"Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, . . . receives, or agrees to receive anything of value . . . in return for:

(1) being influenced in his performance of any official act . . . [shall be guilty of an offense]."

2. "[F]or any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 3.

3. See text accompanying notes 125-151 *infra*.

4. *United States v. Johnson*, 383 U.S. 169, 183 (1966).

clause to bar proof of the motivations for "purported" legislative acts.<sup>5</sup>

It is the purpose of this article to examine the historical background of the congressional privilege of free speech and debate and to determine whether the scope given the privilege by the courts has been appropriate in light of that background. Far from having interpreted the clause too narrowly, as some commentators have argued,<sup>6</sup> the courts of the United States have taken too broad a view of the coverage of the clause and, in doing so, have created a serious impediment to the successful investigation and prosecution of congressional corruption.

The concept of congressional privilege finds its roots in five hundred years of struggle between the Crown and Parliaments in England. By the time the American Constitution was ratified in 1789, Parliament had gained the upper hand,<sup>7</sup> and its privileges were not only extensive,<sup>8</sup> but largely unfettered by formal definition.<sup>9</sup> At the Constitutional Convention, the delegates considered a proposal of Mr. Pinckney's to

5. *United States v. Dowdy*, 479 F.2d 213, 224-26 (4th Cir. 1973) (excluding evidence of congressman's contact with executive branch officials because it was "purportedly" a legislative act), discussed in note 150 *infra*.

6. See, e.g., Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1146 (1973). This article is by no means entirely at loggerheads with the excellent exposition offered by Messrs. Reinstein and Silverglate since they recognize, *id.* at 1158, that there are special problems in the area of congressional bribery. See also Note, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335, 348 (1965). Nevertheless, while there are areas of agreement, the basic conclusions of this article on the correct application of the speech or debate clause to prosecutions under the federal bribery statute are contrary to theirs. See also Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK U.L. REV. 1019 (1974); Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973); Kaye, *Congressional Papers, Judicial Subpoenas, and the Constitution*, 24 U.C.L.A. L. REV. 523 (1977).

7. See 2 T. ERSKINE MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 364 (4th ed. 1912) (n.p.n.d.).

8. See text accompanying notes 82-89 *infra*.

9. 1 W. BLACKSTONE, *COMMENTARIES* \*164.

The *privileges* of parliament are likewise very large and indefinite . . . [When a question was put to the courts concerning the scope of the privileges it was declared that] "the justices should [not] in any wise determine the privileges of the high court of parliament. For it is so high and mighty in its nature, that it may make law: and that which is law, it may make no law: and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices." Privilege of parliament was principally established, in order to protect its members, not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown. If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under the pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite.

*Id.* Blackstone went on to point out that one of the more "notorious" of the privileges, the privilege of speech, had been enacted into law. *Id.* (citing An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne, 1 W. & M., sess. 2, c. 22).

make Congress the judge of its own privileges, as in the British system,<sup>10</sup> but the proposal was rejected, apparently because of the strong opposition of Madison, who felt that it was necessary to define the scope of congressional privilege narrowly.<sup>11</sup>

Consequently, what must be thought to be the full extent of the congressional privilege was set forth in three clauses of the Constitution:<sup>12</sup> the publication clause;<sup>13</sup> the immunity from arrest clause;<sup>14</sup> and the speech or debate clause.<sup>15</sup> Of these, only the speech or debate clause ever has been, or could appropriately be, invoked to protect a congressman from criminal prosecution.<sup>16</sup> Accordingly, this article will be limited to the background of the speech or debate clause and the manner in which that clause has been interpreted by the courts.

## I. HISTORY

While the history of the clause has been discussed in some detail in prior articles,<sup>17</sup> there are certain facets of the history that require further elaboration. The most definite aspect of the early development of

10. See note 9 *supra*.

11. The clause in Pinckney's draft declared that "[e]ach House shall be the judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same." 3 THE PAPERS OF JAMES MADISON 1365 (J. & H.G. Langley ed. 1841) (containing Madison's reports on debates of Federal Constitutional Convention). For Madison's objections to this proposal, see *id.* at 1285-86, 1493-94. See note 92 *infra*. See also *Kilbourn v. Thompson*, 103 U.S. 168, 182, 189 (1880) (House of Representatives has authority to punish its own members for disorderly conduct, to decide contested elections, and to determine qualifications of its members, to impeach, to fine or imprison a contumacious witness, but has no *general power* to punish for contempt).

12. *Kilbourn v. Thompson*, 103 U.S. 168, 200-05 (1890). In *Congressional Papers, Judicial Subpoenas, and the Constitution*, *supra* note 6, Professor Kaye presents a thorough discussion of all aspects of constitutionally mandated congressional privileges, including the inappropriateness of a claim under U.S. CONST. art. I, § 5, cl. 2, which pertains to Congress' rulemaking and disciplinary power to resist a judicial subpoena for congressional papers.

13. "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their judgment require secrecy . . ." U.S. CONST. art. I, § 5, cl. 3.

14. "[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . ." *Id.* § 6, cl. 1.

15. "[F]or any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other Place." *Id.* cl. 3.

16. The immunity from arrest clause is, by its terms, inapplicable to cases involving "Treason, Felony and Breach of the Peace," *id.* cl. 1, and any doubt about its inapplicability as a shield from criminal prosecution was resolved by the Supreme Court in *Williamson v. United States*, 207 U.S. 425 (1908).

The publication clause has never been invoked to shield a congressman from a subpoena of congressional papers, and Professor Kaye's conclusion that the clause provides no predicate for congressional resistance to judicial subpoena is certainly correct. Kaye, *supra* note 6, at 536.

17. See Cella, *supra* note 6; Reinstein & Silverglate, *supra* note 6, at 1120-44.

the clause was that its scope was most indefinite.<sup>18</sup> Each definition of the scope of the clause depended not only upon who between the Crown and Parliament was expounding the privilege, but also upon which of those contending parties had the upper hand at that particular time.<sup>19</sup> Thus, no one statement of the scope of the parliamentary privilege of free speech may be taken as authoritative since it more likely reflects the attitude or aspirations of the declarant than it does any settled rule of law or custom.

What is now considered to be Parliament's earliest assertion of the parliamentary privilege of free speech occurred in *Strode's Case* in 1512.<sup>20</sup> Strode, a member of Parliament, was the author of a bill to regulate certain abuses in the tin mines in Cornwall. For this, he was prosecuted, fined and imprisoned by the Stannary Court.<sup>21</sup> On Strode's petition, Parliament passed an act annulling the judgment and providing that any legal proceeding that might be brought against the members of the present or any future Parliament "for any bill, spekyng, reasonyng, or declaryng of any matter or matters concerning the Parliament" shall be utterly void.<sup>22</sup> However, despite the "flood of indignant

18. The scope of the clause remained indefinite well into the nineteenth century. C. WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 127 (1921).

19. For example, in 1451 one Yonge was imprisoned because he proposed to Parliament that the Duke of York should be declared heir to the crown. Fortunately for Yonge, York soon gained control of the government, and Yonge petitioned for his release. He urged that

"by the olde libertie and freedom of the Commyns of this Lande had, enjoyed and prescribed, from the tyme that no mynd is, [all members] ought to have their freedom to speke and sey in the Hous of their assemble, as to theym is thought convenyent or reasonable, withoute eny maner chalange, charge or pnyncion therefore."

Neale, *The Commons Privilege of Free Speech in Parliament*, in *TUDOR STUDIES* 257, 264-65 (R. Seton-Watson ed. 1924) (quoting 5 ROT. PARL. 337a (remarks of Yonge, M.P.)).

As Neale points out, it is hard to say how much more than a personal opinion was Yonge's definition of free speech in Parliament. "Certainly it cannot be taken at its face value; and it would be absurd, considering Yonge's connection with party politics, to urge that the favourable answer of the government was an implicit recognition of his definition." *Id.*

20. *Strode's Case*, discussed in T. PLUCKNETT, *TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY* 247-49 (11th ed. 1960) [hereinafter cited as T. TASWELL-LANGMEAD]. Earlier historians thought the case of Thomas Haxey in 1397 was the first case dealing with this Parliamentary privilege, see, e.g., I W. ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 166-67 (5th ed. 1922), but this view has been rejected by later historians because Haxey, though he made remarks critical of the King in Parliament, was not a member of that body. Furthermore, it appears that the reversal of his conviction may have been attributable to procedural error rather than to any claim of Parliamentary free speech. Consequently, Haxey's arrest by Richard II for remarks made in Parliament and the subsequent nullification of that action by Henry IV have little bearing on the question of Parliamentary privilege. Neale, *supra* note 19, at 259-60. See also C. WITKE, *supra* note 18, at 23-24.

21. "The court for the Stannaries of Cornwall and Devon is a court of special jurisdiction . . . in derogation from the general jurisdiction of the Courts of Common Law, for the local redress of private wrongs." T. TASWELL-LANGMEAD, *supra* note 20, at 248 n.95.

22. 4 Henry VIII, c. 8 (1512), quoted in T. TASWELL-LANGMEAD, *supra* note 20, at 249.

verbiage,"<sup>23</sup> the principle espoused in this case had nothing to do with the parliamentary privilege of free speech vis-à-vis the Crown. It was simply an assertion of the rather obvious principle that "members [of Parliament] were not indictable in petty tribunals for their actions in Parliament."<sup>24</sup>

By 1542<sup>25</sup> the traditional speaker's petition to the King or Queen at the commencement of Parliament included an unelaborated request for freedom of speech.<sup>26</sup> It is one thing, however, to assert a right in general terms and quite another to stand up for that right against an angry sovereign.<sup>27</sup> Indeed, in the cases of Story in the reign of Edward VI (1547 to 1553) and Copley in the reign of Mary (1553 to 1558), both of whom made remarks critical of the Crown, the Commons did not wait for royal wrath to fall on them, but imprisoned the malefactors and then petitioned the Crown for mercy.<sup>28</sup>

By the accession of Elizabeth in 1558, both the power of Parliament and the reformation movement had grown to the point that the divine right of the sovereign could be questioned,<sup>29</sup> and in that year the Commons began to question Elizabeth about the succession.<sup>30</sup> When

23. See T. TASWELL-LANGMEAD, *supra* note 20, at 249. In 1667, after a century and a half of debate over its application, Strode's Act was declared to be a general law protecting all members of Parliament. *Id.* at 378 n.55.

24. *Id.* at 249. Neale expands upon the impact of *Strode's Case*: "I need hardly point out that Strode's case has no concern with the relations of the crown and the commons. The act concerning him asserts the obvious principle that an inferior court cannot punish members of a superior court for their actions in that court." Neale, *supra* note 19, at 270 n.45. See also C. MCLLWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 220-22 (1910).

25. Neale argues that these requests were evident even before 1542. Neale, *supra* note 19, at 267.

26. "Ut in dicendis sententiis quivis libere et impune eloqui posset quid animi haberet et quid consilii." 1 H.L. JOUR. 167, *quoted in* T. TASWELL-LANGMEAD, *supra* note 20, at 247 n.94.

27. In the words of Taswell-Langmead, Parliament had "framed a form of words which embodied a principle . . . [but] it still remained for them to translate that claim into the peaceful enjoyment of a privilege." T. TASWELL LANGMEAD, *supra* note 20, at 247.

As Neale points out in his discussion of Parliamentary privilege during the reign of Henry VIII (1509-1547), "Argument might be a little one-sided in an age familiar with the saying that the wrath of the prince is death and familiar too with its truth." Neale, *supra* note 19, at 269-70. This is probably the reason why there is no evidence of any direct conflict between Parliament and Henry VIII on the issue of free speech. *Id.* at 270. The members presumably preferred watching their tongues to losing their heads.

28. Neale, *supra* note 19, at 272; T. TASWELL-LANGMEAD, *supra* note 20, at 322. Some scholars have considered these cases an assertion by Parliament of its right to "punish members for violations of its rules of order," 2 H. TAYLOR, *THE ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION* 203 (4th ed. 1896). *E.g., id.* While these cases are indeed the root of that power, it seems clear that Parliament's intent at the time was less that of a bold explorer, establishing new beachheads of privilege, than that of a cowardly dog which, having inadvertently bitten its master, cringes at his feet, hoping to avoid the whip.

29. Neale, *supra* note 19, at 276-77.

30. C. WITTKE, *supra* note 18, at 26.

the Queen declined to pronounce between the conflicting claimants to the throne, a joint petition from both houses was presented to her in 1566 urging resolution of the issue, and bold speeches were made in Parliament urging that she either be compelled to marry or that a successor be declared against her will.<sup>31</sup> This "grated hard on the Queen's royal prerogative" and she summoned a number of members before her and delivered "a smart reproof, in which, however, she mixed some sweetness with majesty."<sup>32</sup> One Paul Wentworth, a member of Parliament, questioned whether the Queen's command to stop discussing such matters was not against their liberties and privilege. The House of Commons began to debate this question, and finally, after several days, the Queen gave way and informed the speaker that she revoked the command and inhibition.<sup>33</sup>

The Queen was not defeated, however. She did not call another Parliament for five years,<sup>34</sup> and when she did, the response to the speaker's usual petition was that "her majesty having Experience of late of some disorder, and certain Offences which though they were not punished, yet were they Offences still . . . therefore said, they should do well to meddle with no matters of State, but such as should be pronounced unto them."<sup>35</sup> While such commandments seem to have silenced Paul Wentworth, they spurred his brother Peter on to greater action. In the 1575 session of Parliament, Peter complained that such messages infringed the fundamental rights of the Commons and should be "Buried in Hell."<sup>36</sup> Fearing the Queen's wrath, the Commons stopped him in mid-speech and committed him to the Tower of London where he remained until the Queen informed the Commons that she had "remitted" her displeasure against him.<sup>37</sup>

Twelve years later, the irrepressible Peter Wentworth took the floor again to ask "whether this House be not a place for any member freely and without controlment of any person, or danger of laws, by bill or speech, to alter any of the griefs of the commonwealth whatsoever?"<sup>38</sup> The answer, obviously, was a resounding "No," and he was

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31. T. TASWELL-LANGMEAD, *supra* note 20, at 312; C. WITKE, *supra* note 18, at 26.

32. I W. COBBETT, *PARLIAMENTARY HISTORY OF ENGLAND 715-16* (London 1806).

33. T. TASWELL-LANGMEAD, *supra* note 20, at 313.

34. *Id.*

35. S. D'EWES, *JOURNAL OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELIZABETH 141-42* (London 1682).

36. *Id.* at 236-41.

37. T. TASWELL-LANGMEAD, *supra* note 20, at 315.

38. S. D'EWES, *supra* note 35, at 411.

again packed off to the Tower. Elizabeth's view of the freedom of speech in Parliament was set forth very clearly in the Queen's response to the speaker's petition in 1593: "Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth, or what cometh into his brain to utter that; but your privilege is 'Ay' or 'no.'"<sup>39</sup> Though Elizabeth seems to have had the last word on the matter in her reign, Parliament had at least established a beach-head from which it would gain absolute freedom of speech in less than a century.

The battle was quickly joined. In the November 1606 session of Parliament, James I proposed free trade with Scotland. Sir Christopher Pigott denounced the Scots as "beggars, rebels, and traitors."<sup>40</sup> The King informed the Commons that he was upset with them for not cutting Pigott off before such remarks became public. After duly determining that Pigott could not be called into question elsewhere for his remarks, the House of Commons obligingly expelled and imprisoned him.<sup>41</sup>

Rather than suffer the slings and arrows of Parliament, James was content to get along without appropriations for ten years.<sup>42</sup> In 1621, however, James was compelled by economic necessity to reconvene Parliament. While willing to grant the King a subsidy, Parliament first wanted to take up the proposed marriage of the Prince of Wales and the Infanta of Spain. James looked upon the marriage as a means to collect a handsome dowry (and hence limit his dependence on Parliament for funds), but the Commons saw the marriage as a popish plot to spread the influence of Catholicism. James ordered the Commons to refrain from meddling in the "mysteries of state" and informed them that he felt "very free and able to punish any man's misdemeanors in

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39. *Id.* at 460, quoted in T. TASWELL-LANGMEAD, *supra* note 20, at 316. While Taswell-Langmead purports to have drawn this quote from D'Ewes, the author's version of D'Ewes' *Journal* is different, and Neale, *supra* note 19, quotes a third version of the same statement. All versions convey the same thought, however.

Peter Wentworth was undeterred by the Queen's response and submitted a petition concerning the succession, whereupon he was called before the Privy Council and again committed to the Tower. S. D'EWES, *supra* note 35, at 470, cited in T. TASWELL-LANGMEAD, *supra* note 20, at 316.

40. 2 H. TAYLOR, *supra* note 28, at 227 (citing 1 H.C. JOUR. 333).

41. *Id.* (citing 1 H.C. JOUR. 335).

42. From 1610 to 1614 no Parliament was convened. On April 5, 1614, the so-called "addled Parliament" was convened, but when it failed to pass a single bill during the ensuing two months, it was dissolved. See T. TASWELL-LANGMEAD, *supra* note 20, at 346; 2 H. TAYLOR, *supra* note 28, at 237-38.



parliament, as well during their sitting as after.”<sup>43</sup> The Commons responded with a strong but respectful justification of their conduct and adverted to their “ancient and undoubted right” to freedom of speech.<sup>44</sup> James replied that he had no intention of limiting their freedom of speech, but pointed out that he could not

allow of the style, calling it your ancient and undoubted right [when actually it] were derived from the grace and permission of our ancestors and us [for most of them grow from precedents, which shows rather a toleration than an inheritance] yet we are pleased to give you our royal assurance that as long as you contain yourself within the limits of your duty we will be as careful to maintain and preserve your lawful liberties as any of our predecessors were . . . ; so as your house shall only have need to beware to trench upon the prerogative of the Crown, which would enforce us, or any just king, to retrench them of their privileges.<sup>45</sup>

The Commons could not allow this to go unanswered. On December 18, 1621, they recorded their historic protestation, reasserting that their privileges were their “ancient and undoubted birthright” and

that in the handling and proceeding of those businesses, every member of the House of Parliament hath, and of right ought to have, freedom of speech to propound, treat, reason, and bring to conclusion, the same . . . . And that every member of the said House hath like freedom from all impeachment, imprisonment and molestation (other than by censure of the House itself), for or concerning any speaking, reasoning, or declaring of any matter or matters, touching the parliament, or parliament business.<sup>46</sup>

The King was so outraged by this that he sent for the Common’s Journal, tore out the report, and declared the protestation “invalid, annulled, void, and of no effect.” He then dissolved Parliament and committed the ringleaders to prison or, in some cases, accomplished the same end by appointing them royal commissioners to Ireland.<sup>47</sup> Two years later, when the marriage had fallen through, James found it necessary to reconvene Parliament in order to prosecute a war with Spain. In a spirit of conciliation, he allowed Parliament to examine the details

43. W. COBBETT, *supra* note 32, 1326-27; T. TASWELL-LANGMEAD, *supra* note 20, at 356-57.

44. G. PROTHERO, SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS ILLUSTRATIVE OF THE REIGNS OF ELIZABETH AND JAMES I 311 (1894).

45. *Id.* at 312.

46. 1 H.C. JOUR. 688, *quoted in* T. TASWELL-LANGMEAD, *supra* note 20, at 357-58. This protestation is particularly noteworthy since it is cited by Jefferson in his *Manual* as one of the few references for his understanding of the scope of the speech or debate clause of the Constitution. T. JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 20 (Philadelphia 1853) (n.p.n.d.).

47. C. WITTKE, *supra* note 18, at 29; T. TASWELL-LANGMEAD, *supra* note 20, at 358; 2 H. TAYLOR, *supra* note 28, at 249.

of the negotiations with Spain, and they in turn appropriated the requested funds. James prorogued Parliament on relatively good terms in October 1624, and died the next year.<sup>48</sup>

The advent of Charles I saw new conflicts with the Puritan-controlled Parliament, initially over speeches critical of the royal favorite, the Duke of Buckingham,<sup>49</sup> but soon over more fundamental issues of civil liberties. This latter conflict led to the famous Petition of Right in 1628, which in essence forbade imprisonment without due process of law, taxation without representation, and the billeting of soldiers against the will of householders.<sup>50</sup>

Charles immediately proceeded to violate the spirit, if not the letter, of the Petition by raising customs duties and seizing the goods of merchants who refused to pay. Since one of these merchants (one Rolle) was also a member of Parliament, an issue of parliamentary privilege was raised.<sup>51</sup> The King did not want this issue discussed and ordered the Speaker to adjourn the House. When the Speaker attempted to rise from his chair, however, he was thrust back in it by Messrs. Holles and Valentine while Sir John Eliot delivered a speech critical of the King's policies. The King ordered the three offenders imprisoned, and an information was filed against them in the King's Bench.<sup>52</sup> The accused pleaded to the jurisdiction of the court, declaring that "words spoken in Parliament, which is a superior court, cannot be questioned in this court, which is inferior."<sup>53</sup> This plea was rejected, and the defendants were incarcerated and fined.<sup>54</sup>

48. 2 H. TAYLOR, *supra* note 28, at 250-51.

49. *Id.* at 260.

50. T. TASWELL-LANGMEAD, *supra* note 20, at 367. When Charles convened his third Parliament in 1628 in order to demand funds for the war with Spain, the Commons' response, given by Sir Thomas Wentworth, was that they had come together to vindicate the "ancient laws made by our ancestors." *Id.* They then passed The Petition of Right. 3 Car. 1, c. 1 (1628), *reprinted in* T. TASWELL-LANGMEAD, *supra*, at 370-72. After expressing reservations and attempting to avoid direct approval, Charles was constrained to assent to the Petition. T. TASWELL-LANGMEAD, *supra* at 370.

51. T. TASWELL-LANGMEAD, *supra* note 20, at 373. Parliamentary privilege was held to protect not only the person but the goods of members of Parliament from arrest. *Id.*

52. *Id.* at 377.

53. Proceedings Against Sir John Eliot, 3 How. ST. TR. 293, 296 (1629). A similar statement had been made by the Commons in connection with *Sandy's Case* in 1621. G. PROTHERO, *supra* note 44, at 314.

54. The defendants were charged with conspiracy and riot, and the court held that these offenses must be punishable in the court of King's Bench because otherwise they might go unpunished (since a future Parliament could not take note of what had occurred in a prior Parliament). Proceedings Against Sir John Eliot, 3 How. ST. TR. 293, 307 (1629). The court also held that the freedom of speech did not extend to speaking seditiously or behaving in a disorderly manner. 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 97, 269 (3d ed. 1923).

For the next eleven years Charles did not convene Parliament, and the Commons were, therefore, unable to state their violent opposition to this action. Finally, facing a rebellion in Scotland over certain liturgical questions, Charles was forced to reconvene Parliament on April 13, 1640. Parliament, however, refused to act until redress was given for the breach of privilege in the case of Eliot, Holles and Valentine and, its predecessor, *Rolle's Case*. Consequently, Parliament was dissolved after three weeks.<sup>55</sup> On November 13, 1640, Charles was forced to summon the "Long Parliament," which, before it was adjourned, would forever secure the ascendancy of Parliament and respect for its privileges by executing the King and taking over the government.<sup>56</sup>

Parliament's dominance was thus established, but the bounds of its privileges, including the privilege of free speech, were not yet fixed. On November 12, 1667, the Commons declared Strode's Act a general law affirming the "ancient and necessary rights and privileges of Parliament,"<sup>57</sup> and on November 23, they voided the judgment against Eliot, Holles and Valentine. Subsequently, on a writ of error brought by Holles, the House of Lords reversed the judgment of the King's Bench.<sup>58</sup>

The final victory for parliamentary privilege occurred after the revolution of 1688, during the reign of William and Mary, when Parliament passed the Bill of Rights.<sup>59</sup> In addition to settling various issues of civil liberties that had been in contention with the Stuarts, it declared "that the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."<sup>60</sup> Since this obviously was the precursor of the speech or debate clause in the United States Constitution, it is important to examine carefully any contemporaneous events that may shed light on its meaning. Thus, Reinstein and Silverglate rightly turn to the *Proceedings Against Sir William Williams*<sup>61</sup> since, as they note, the Commons declared that the free speech clause was "put in for the sake of. . . Sir William Williams, who was punished out of Parliament for what he had done in Parliament."<sup>62</sup>

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55. Thus, this Parliament became known as the "Short Parliament." T. TASWELL-LANGMEAD, *supra* note 20, at 391.

56. *Id.* at 413-15.

57. *Id.* at 378 n.55; see 3 How. ST. TR. 314-15 (1809).

58. H.L. JOUR. 223 (1668).

59. 1 W. & M. sess. 2, c. 2 (1689).

60. *Id.*

61. 13 How. ST. TR. 1370 (1686).

62. 9 A. GREY, DEBATES OF THE HOUSE OF COMMONS 81 (1763), *quoted in* Reinstein & Silverglate, *supra* note 6, at 1133.

The case is discussed in detail by Reinstein and Silverglate.<sup>63</sup> Briefly, in 1686 Williams, the Speaker of the House of Commons, was charged with seditious libel for publishing, by order of the Commons, a narrative charging the Duke of York with involvement in a popish plot. Williams pleaded parliamentary privilege as a bar to the jurisdiction of the court. His counsel, Sir Robert Atkyns, argued at length that the case was governed by *lex parliamenti* and not *lex terrae* (the common law) because the greater court, Parliament, which gives law to the other courts in the kingdom, could not in turn be judged by those inferior courts.<sup>64</sup> Atkyns averred that publication of such matters was part of the informing function of Parliament.<sup>65</sup> The court rejected this argument, and Williams was fined £10,000. In July of 1689 the Commons resolved that the judgment was illegal,<sup>66</sup> but the House of Lords declined to reverse it.<sup>67</sup>

Reinstein and Silverglate make much of this case, and certainly its impact on English constitutional law cannot be denied. Yet it must be questioned whether the case had any impact on *American* constitutional law. First, it is significant that the argument of Sir Robert Atkyns was directed to the *jurisdiction* of the court. Atkyns claimed that because Williams' actions occurred in Parliament, they were simply not governed by the law of the land in any way.<sup>68</sup> But because there is nothing comparable in this country to the high court of Parliament, and because the congressional privileges are specifically limited by the Constitution, the jurisdiction of the American courts to determine whether activities in Congress are, or are not, privileged, has never been denied. Thus, most of the impact of Williams' case is lost on American law.<sup>69</sup>

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63. Reinstein & Silverglate, *supra* note 6, at 1127-31.

64. 13 How. ST. TR. at 1384; see C. WITKE, *supra* note 18, at 111.

65. 13 How. ST. TR. at 1418.

66. 10 H.C. JOUR. 21 (1689).

67. See 13 How. ST. TR. at 1434-42. It may be, as Reinstein and Silverglate point out, *supra* note 6, at 1133 n.107, that this decision not to reverse was reached solely because the Lords did not want to reimburse Williams. 13 How. ST. TR. at 1438-39. Holdsworth, however, is of the opinion that Williams, in pleading that the court had no jurisdiction, presented a legally deficient claim. In a case of seditious libel, the court *prima facie* has jurisdiction. The questions were, was Williams' narrative libelous and, if so, was it privileged; these are questions that the court had jurisdiction to decide. Thus Holdsworth, contrary to the comment in Howell, counts the Lords' refusal to reverse as significant. 6 W. HOLDSWORTH, *supra* note 54, at 269-70.

68. C. MCLWAIN, *supra* note 24, at 243.

69. See, e.g., Kilbourn v. Thompson, 103 U.S. 168 (1890). Atkyns' argument was that Parliament is governed by *lex parliamenti* rather than *lex terrae*. But because there is no equivalent to *lex parliamenti* in this country, see Watkins v. United States, 354 U.S. 178 (1957), Atkyns' argument has no application to American law. See generally C. MCLWAIN, *supra* note 24, at 243.

More important is the Bill of Rights provision to which Williams' case gave rise. As noted, the Bill of Rights provides "that the freedom of speech and debates *or proceedings* in Parliament shall not be impeached."<sup>70</sup> Reinstein and Silverglate recognize the significance of this phrase, but they then ignore its *omission* from the American Constitution.<sup>71</sup> British constitutional authorities, on the other hand, consider the term "proceedings" to be the very heart of the privilege in Britain. Thus, *Halsbury's Laws of England* provides that the term "proceedings" includes not only "everything said or done by a member in the exercise of his functions" both in committee and in the Houses of Parliament, but also "matters connected with or ancillary to the formal transaction of business."<sup>72</sup> In the words of the Protestation of 1621,

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Indeed, Holdsworth observes: "As was perhaps to be expected, [Atkyns'] argument unduly magnifies the privileges of Parliament, and it maintains that the courts have no jurisdiction to inquire into their limitations." 6 W. HOLDSWORTH, *supra* note 54, at 515. Thus, despite the broad scope of *lex parliamenti* in England, even the English consider Atkyns' arguments an overstatement.

70. 1 W. & M. sess. 2, c. 2 (1689)(emphasis added).

71. "This provision was not by its terms confined to spoken words and could not have been so intended consistent with the circumstances which led to its creation." Reinstein & Silverglate, *supra* note 6, at 1130. For discussion of why the provision may have been omitted see text accompanying notes 82-95 *infra*.

72. 28 HALSBURY'S LAWS OF ENGLAND 457-58 (3d ed. 1959).

Thus, in contradistinction to the rule in this country established in *United States v. Brewster*, 408 U.S. 501, 512 (1972), a press release by a member of the Canadian Parliament, which was an "extension" of statements made in Parliament, was held to be privileged as a "proceeding" in Parliament under the British speech or debate clause, which is applicable in Canada. *Roman Corp. v. Hudson's Bay Oil & Gas Co.*, 18 D.L.R.3d 134 (Ont. High Ct. of J.), *aff'd*, 23 D.L.R.3d 292 (Ont. Ct. App. 1972), *aff'd on other grounds*, 36 D.L.R.3d 413 (Can. 1973). Similarly, in Britain, one Strauss, a Member of Parliament, wrote a letter to a Minister of the Crown concerning the method of purchasing scrap metal by the London Electricity Board. Strauss had an interest in a company that was involved in the sale of scrap metal. The Board threatened suit against Strauss for libel based upon statements made in the letter. Strauss, however, complained to the Commons, and on October 30, 1957, the Committee of Privilege concluded that Strauss' letter was a "proceeding in Parliament" and that the Board had "acted in breach of the Privilege of Parliament" by threatening to sue. FIFTH REPORT FROM THE COMMITTEE OF PRIVILEGES, H.C. 305, 1956-57 Sess., § 20. Although the full house overruled this conclusion, legislation was passed out of committee in 1977 that brings within the privilege "all things done or written between Members and Ministers of the Crown for the purpose of enabling a Member to carry out his functions." THIRD REPORT OF THE COMMITTEE ON PRIVILEGES, H.C. 417, 1976-77 Sess. This legislation is contrary to the view expressed in *United States v. Johnson*, 383 U.S. 169, 172 (1966).

Similarly, as Erskine May points out:

By insertion of the term "proceedings" in the Bill of Rights, Parliament gave statutory authority to what was implied in previous declarations of the privilege of freedom of speech by the Commons, e.g., in the Protestation of 1621 where it is claimed: "that in the handling and proceeding of those businesses, every member of the House of Parliament hath freedom of speech . . . [and] hath like freedom from all . . . molestation . . . for or concerning any speaking, reasoning, or declaring of any matter or matters touching the parliament, or parliament business."

A general idea of what the term covers is given in the Report of the Select Committee on the Official Secrets Acts in session 1938-39: "It covers both the asking of a question and the giving written notice of such questions, and includes everything said or done by a

“proceedings” include “speaking, reasoning or declaring of any matter or matters touching the Parliament or Parliament business.”<sup>73</sup> Furthermore, it is established in Britain that: “The acceptance by any member of either House of a bribe to influence him in his conduct as such Member or of any fee, compensation or reward in connection with the promotion or opposition to any bill . . . is a breach of privilege.”<sup>74</sup> Accordingly, acceptance of a bribe by a member is punishable only in Parliament, not in the courts.<sup>75</sup>

As the foregoing description of the growth of the free speech privilege in Parliament shows, until the time of the Williams’ case, there had been no claim nor serious expectation that “proceedings” in the House were protected as well as speech.<sup>76</sup> Thus, the inclusion of the term “proceedings” in the Bill of Rights was not merely a reflection of Parliament’s traditional view of its privilege;<sup>77</sup> on the contrary, it was a most notable expansion.<sup>78</sup> It seems unlikely, therefore, that the Framers of the Constitution would simply have overlooked such a key term in the Bill of Rights provision, which otherwise was copied almost verbatim in the Articles of Confederation,<sup>79</sup> and which thereafter was only

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Member in the exercise of his functions as a member in a committee of either House in the transaction of Parliamentary business.”

T. ERSKINE MAY, A TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 142 (19th ed. 1976) (1st ed. London 1844). Erskine May goes on to observe that in *Coffin v. Coffin*, 4 Mass. 1 (1808), discussed in text accompanying notes 105-11, the American court was able to give similar scope to a clause that did not include the “proceedings” phrase, but does not indicate agreement or disagreement with this position. T. ERSKINE MAY, *supra*.

73. 1 H.C. JOUR. 688, quoted in T. TASWELL-LANGMEAD, *supra* note 20, at 357-58.

74. T. ERSKINE MAY, *supra* note 72.

75. *Id.* at 206. This view, of course, is contrary to the practice in the United States. *United States v. Brewster*, 408 U.S. 501, 519 (1972). See also *United States v. Brown*, 381 U.S. 437, 445 (1965).

76. It is true that *Elliott’s Case*, discussed in notes 52-54 and accompanying text *supra*, involved acts in the House of Commons (holding the Speaker to his chair) as well as speech. Yet, as Holdsworth points out, there was no error assigned to the court’s assuming jurisdiction over the charge of laying hands on the Speaker when the case was reversed in the House of Lords. 6 W. HOLDSWORTH, *supra* note 54, at 98 & n.9, 269 n.4. See also *Bradlaugh v. Gossett*, 12 Q.B.D. 271, 284 (1884); T. ERSKINE MAY, *supra* note 72, at 90-91.

Even the Petition of Right states that “in the handling and proceeding of [business] every member of the House of Parliament hath and of right ought to have freedom of speech to propound, treat, reason and bring to conclusion the same.” 3 Car. 1, c. 1 (1628), reprinted in T. TASWELL-LANGMEAD, *supra* note 20, at 370-72. The claim is not that all proceedings are protected but merely that freedom of speech in proceedings is protected—a considerably narrower view of the privilege than was adopted in the Bill of Rights of 1689.

77. See C. MCLWAIN, *supra* note 24, at 242-43.

78. See T. ERSKINE MAY, *supra* note 72.

79. Article V of the Articles of Confederation states: “Freedom of Speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . .” U.S. ART. OF CONFEDERATION art. V (1781). See also *United States v. Johnson*, 383 U.S. 169, 177 (1966). Similarly, a preliminary draft of the Constitution reported by the “Committee of Five”

slightly modified when molded into the current speech or debate clause. Rather, it is more reasonable to assume that the phrase was omitted for the purpose of narrowing the privilege. Since there was no debate on this provision at either the Articles of Confederation convention<sup>80</sup> or the constitutional convention,<sup>81</sup> any argument must necessarily be made by inference. Yet, an examination of the one hundred years of English history between the Bill of Rights of 1689 and the American Constitution of 1789 does shed some light on the subject.

Once its predominance had been established, Parliament proceeded to push its privileges to the extreme. The privilege from arrest was extended to include the servants of members, regardless of what crimes they might commit. Then, the members began issuing "protections," statements under seal declaring that the holder was a "servant" of the member. Thus, anyone who could afford to purchase such a document from a member was free from arrest.<sup>82</sup> Similarly, any trespass upon a member of Parliament, however unrelated to parliamentary business, could result in the offender being hauled before Parliament and forced to satisfy the member or face imprisonment.<sup>83</sup> Nor were the problems of Parliament limited to overreaching. Corruption was rampant. "Votes which were no longer to be controlled by fear, were purchased with gold."<sup>84</sup> Indeed, the practice of direct bribery of members became an organized system in the mid-1700's: members would stop by a pay office, established by the government, and queue up to receive their wages of sin.<sup>85</sup>

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contained the following provision: "Freedom of speech and debate in the Legislature shall not be impeached in any court or place out of the Legislature." J. MADISON, JOURNAL OF THE FEDERAL CONSTITUTION 452 (1893 reprint) (n.p. 1840).

80. See Reinstein & Silverglate, *supra* note 6, at 1136 n.122.

81. See *United States v. Johnson*, 383 U.S. 169, 177 (1966).

The only signer of the Constitution to comment directly upon the speech or debate clause was James Wilson of Pennsylvania, but his remarks, given in lectures at the University of Pennsylvania, do not deal with the intended scope of the clause:

In order to enable and encourage a member of the publick to discharge the publick trust with firmness and success, it is indispensibly necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

2 WORKS OF JAMES WILSON 156 (Philadelphia 1804).

82. C. WITKE, *supra* note 18, at 41-42.

83. L. CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA § 535 (2d ed. 1866)(Boston 1856).

84. T. ERSKINE MAY, *supra* note 7, at 300.

85. "[A] shop was publicly opened at the Pay-office whither the members flocked, and received the wages of their venality in bank-bills, even to so low a sum as two hundred pounds for their votes on the treaty . . . . In a single fortnight a vast majority was purchased to approve the peace . . . [ending the Seven Years' War]."

In 1763 Parliament's abuses of privilege were thrust into the public spotlight by the case of John Wilkes. Wilkes, a member of Parliament, published a pamphlet called the "North Briton No. 45," in which he labelled as false portions of a speech from the throne on the Peace of 1763.<sup>86</sup> The Crown issued a general warrant for the arrest of everyone involved in the publication, but Wilkes claimed his privilege from arrest and was released by the courts. Parliament then declared that the privilege did not extend to the case of writing and publishing seditious libels,<sup>87</sup> and Wilkes was expelled from the House of Commons. When reelected, Wilkes was denied his seat by the Commons, which claimed the sole right to determine the qualifications of its members, notwithstanding the desires of the electorate.<sup>88</sup> Wilkes' case became a *cause célèbre* and was the subject of a great public outcry against parliamentary overreaching.<sup>89</sup>

The American public, eager no doubt to latch on to any issue that cast Parliament in a bad light, made Wilkes a national hero—a champion of free elections, freedom from arbitrary arrest and seizure, and freedom of the press.<sup>90</sup> It was in this atmosphere of great public reaction against legislative corruption that the Framers began to consider what powers would be invested in each of the three branches of government. While it is true that none of the abuses discussed was directly attributable to the free speech privilege, and none of the reservations expressed by the Framers was applicable to that privilege, it is nevertheless clear that a rather narrow view of legislative privileges in general was the order of the day.<sup>91</sup>

Thus, when it was proposed at the Constitutional Convention that

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*Id.* at 254 (quoting H. WALPOLE, MEMOIRS OF THE REIGN OF KING GEORGE THE THIRD 199 (London 1845)).

86. See C. WITTKÉ, *supra* note 18, at 115.

87. *Id.* at 117; T. ERSKINE MAY, *supra* note 7, at 366.

88. C. WITTKÉ, *supra* note 18, at 120.

89. See *Watkins v. United States*, 354 U.S. 178, 191 (1957).

90. *Powell v. McCormack*, 395 U.S. 486, 530 n.59 (1969). "The reaction in America took on significant proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a Martyr to the struggle for liberty. . . . They named towns, counties and even children in his honour." *Id.* at 531 (quoting 11 L. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 222 (1965)).

91. There was, however, a competing trend arising from the struggles of colonial legislatures to be free from the dominance of British governors. The colonial assemblies typically asked for the "usual" privilege afforded Parliament. M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 66 (1971). As in the days of the Tudors and Stuarts in England, however, there were frequent clashes between the assemblies and the governors over how free the legislators might be in their speech. Remarks critical of the governor were considered unacceptable. *Id.* at 94. See also *id.* at 84, 95-96. This clash, however, may reflect more the conflict between the colonies and Great Britain than that between executives and legislatures in general.



Congress should be the judge of its own qualifications, James Madison was quick to offer arguments in opposition to the proposal:

Mr. Madison was opposed to this section as vesting an improper and dangerous power in the legislature. The qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the constitution. If the legislature could regulate those of either, it can by degrees subvert the constitution. . . . Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors and the elected; and the abuse they had made of it was a lesson worthy of our attention.<sup>92</sup>

Madison's view prevailed, and this power was not given to the Congress.<sup>93</sup> Similarly, the freedom from arrest was expressly limited to members of Congress themselves; their servants and family members were excluded.<sup>94</sup>

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92. 3 THE PAPERS OF JAMES MADISON, *supra* note 11, at 1285-86.

Similarly, in 1 THE FEDERALIST NO. 48, at 339-40 (J. Madison) (M. Walter Dunne ed. 1901), Madison observed: "The legislative department is everywhere . . . drawing all power into its impetuous vortex." In the same vein, Jefferson wrote to Madison in 1789 that "[t]he tyranny of the legislature is the most formidable dread at present and will be [so] for long years." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *quoted in* Tenney v. Brandhove, 341 U.S. 367, 375 n.4 (1950), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON 661 (J. Boyd ed. 1958). *See also* note 11 and accompanying text *supra*.

93. Powell v. McCormack, 395 U.S. 486 (1968).

94. U.S. CONST. art. I, § 6. Jefferson, in his *Manual of Parliamentary Practice*, discusses the "continually progressive" nature of the privilege of Parliament and notes that this limitation of the arrest privilege reflects a reaction by the Framers against the "encroaching character of privilege." T. JEFFERSON, *supra* note 46, at 15-16.

As to the speech or debate clause, Jefferson stated: "This is restrained to things done in the House in a Parliamentary course. For he is not to have privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty." *Id.* at 20 (citation omitted) (emphasis added).

While not deciding whether the House could punish someone for contempt in a matter within its jurisdiction, the Supreme Court held in *Kilbourn v. Thompson*, 103 U.S. 168 (1881), that, unlike the House of Commons, which has many judicial functions, the Congress has no general power to punish for contempt and generally lacks the judicatory characteristics of Parliament. *Id.* at 197. In *Marshall v. Gordon*, 243 U.S. 521 (1917), the Court held that the Congress had a limited contempt power based on "the right of self preservation" to

prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel. . . . [T]he power, even when applied to subjects which justified its exercise, is limited to imprisonment [that] may not be extended beyond the session of the body in which the contempt occurred.

*Id.* at 542.

Since in the usual bribery case it could not be said that the members' activities would "inherently obstruct or prevent the discharge of legislative duty," *id.*, it seems fair to conclude that a contempt prosecution in Congress for bribery of a congressman has been ruled out. Indeed, Congress' own view of its punishment power under article I, § 5, is that it is limited to censure and expulsion. RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 663, 94th Cong., 2d Sess. § 63 (1977). Thus, in *United States v. Brewster*, the Court observed that "Congress has shown little inclination to exert itself in this area." 408 U.S. 501, 519 (1972). The Court then

Thus, it is simply unclear whether it was the intention of the Framers to give the same protection to congressional proceedings as is enjoyed in Parliament, or whether the Framers intended to limit the coverage strictly to speech and debate, excluding votes, committee activities, addenda to the congressional record, and related activities. Although the issue is certainly in doubt, the stronger argument would seem to support a narrow view of the clause: 1) the clause by its terms is narrow, covering only speech or debate; 2) a key phrase has been eliminated from the broader British provision that served as the basis for the American clause; 3) the constitutional history does not indicate an intent to render the clause broader than its stated terms; and 4) the general attitude of the Framers was one of suspicion toward broad privileges in the legislative branch.<sup>95</sup> No matter how accurate this argument may be, however, the American tradition for a broader general scope of the clause is now firmly established and will probably remain in effect. Nevertheless, the knowledge that the Framers may well have intended a very limited scope for the free speech privilege should leaven any tendency on the parts of modern courts and commentators to adopt an expansive view of the speech or debate clause.

Even if it is not clear what the scope of the clause is, it is clear that the Framers intended that bribery of a congressman, if it involves privileged behavior, would be punishable in a formal proceeding, presumably, as in England, before the Congress itself. As Jefferson stated:

If an offence be committed by a member in the House, of which the House has cognizance, it is an infringement of their right for any person or court to take notice of it, till the House has punished the offender or referred him to a due course.

. . . [O]ffenses [involving speeches in the House] have been severely punished by calling the person to the bar to make submission, committing him to the Tower, expelling the House &c.<sup>96</sup>

While in the early days of the country there was some inclination by

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went on to discuss at some length why it was fitting to leave such matters to the courts. *Id.* at 519-20. Finally, Congress' enactment of a bribery statute in 1853, Act of Feb. 26, 1853, ch. 81, 10 Stat. 170, would seem to have finalized the issue. In the debates on that statute, it was apparent that Congress felt it had no power to prosecute members of Congress for receiving money in exchange for performing official acts. 30 CONG. GLOBE, 32d Cong., 2d Sess. 288-97 (1853). Accordingly, Congress passed a statute providing for prosecution of such conduct in the federal courts.

95. On the other hand, even Queen Elizabeth was willing to allow free speech in the form of votes. *See* text accompanying note 39 *supra*.

96. T. JEFFERSON, *supra* note 46, at 20-21. *See also* WORKS OF JAMES WILSON, *supra* note 81, at 156; *Kilbourn v. Thompson*, 103 U.S. 168, 189-90 (1880) (indicating that, in certain cases involving disorderly conduct or nonattendance, Congress may imprison its members).

Congress to serve as a tribunal to try breaches of privilege such as bribery (at least for nonmembers who tried to bribe congressmen),<sup>97</sup> that power has by now clearly been ceded to the normal processes of the executive and judicial branches by statute<sup>98</sup> and by Supreme Court decision.<sup>99</sup>

Thus, since the original provisions of the speech or debate clause were based upon the assumption that Congress would be able to try breaches of privilege that, in accordance with British practice, would not be cognizable in the courts,<sup>100</sup> and since the trial and punishment of bribed congressmen has now become the province of the courts, it follows that in a bribery case the evidence of speeches and debates, which would have been admissible in a congressional trial, should be admissible in a judicial trial as well. Since Congress, unlike Parliament, claims no power to try a congressman for bribery, the upshot is that under current law the speech or debate clause has been rewritten to say that "for any speech or debate [or vote, or proceeding or legislative act or motivation concerning any of these] a Congressman shall not be questioned in *any* place."<sup>101</sup> Surely the Framers, leery as they were of legislative corruption, did not intend to provide corrupt congressmen with such a convenient haven from the consequences of their venality.

## II. EARLY CASE LAW

There is no historical authority for the position, which the

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97. In 1795, Robert Randall and Charles Whitney were accused by members of the House of having offered them bribes in connection with a proposed congressional grant of 20 million acres of land in the Great Lakes area. Pursuant to a resolution, the Speaker issued a warrant and sent the Sergeant-at-Arms to arrest the malefactors. The House found Randall guilty of contempt and a breach of privilege and imprisoned him for nine days, after which time he was discharged upon the payment of fees. DIGEST OF DECISIONS AND PRECEDENTS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES RELATING TO THE POWERS AND PRIVILEGES RESPECTING THEIR MEMBERS AND OFFICERS, S. MISC. DOC. NO. 278, 53d Cong., 2d Sess. 3-5 (1894). See *Marshall v. Gordon*, 243 U.S. 521, 543 n.1 (1917), for examples of use of Congress' contempt power.

98. By Act of January 24, 1857, ch. 19, § 1, 11 Stat. 155 (codified at 2 U.S.C. § 192 (1976)), Congress provided for the trial in a court of law of witnesses, called to testify before Congress, whose behavior was contumacious.

99. *In re Chapman*, 166 U.S. 661 (1897).

100. It is still the law in England that it is not a crime, triable in the courts, for a member of Parliament to receive a bribe. Rather, it is a breach of privilege, punishable only in Parliament itself. T. ERSKINE MAY, *supra* note 72, at 142, 201; see Public Bodies Corrupt Practices Act, reprinted in 8 HALSBURY'S STATUTES OF ENGLAND 231, §§ 1, 7 (3d ed. 1968) (setting forth the British counterpart of 18 U.S.C. § 201 (1976)). See also *Watkins v. United States*, 354 U.S. 178, 188 (1957).

101. See generally *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966).

Supreme Court has consistently maintained, that "the privilege should be read broadly . . . to include not only 'words spoken in debate' . . . but anything 'generally done in a session of the House by one of its members in relation to the business before it,'"<sup>102</sup> as well as the motivations for such acts. Furthermore, an examination of the early American case law shows that despite some broad dicta, those cases lend little support to the unduly expansive view of the privilege subsequently taken by the Supreme Court in *United States v. Johnson*<sup>103</sup> and *United States v. Brewster*.<sup>104</sup>

The earliest case dealing with the legislative privilege of free speech and debate is *Coffin v. Coffin*.<sup>105</sup> *Coffin* provided the base upon which all later decisions were constructed.<sup>106</sup> The case involved a slander suit between William Coffin and Micajah Coffin, the latter a member of the Massachusetts House of Representatives.<sup>107</sup> The case arose when William Coffin, plaintiff, asked another house member, one Russell, to introduce certain legislation concerning notaries public for Nantucket. Russell did so, the resolution passed, and the house moved on to other matters.<sup>108</sup> At that point defendant, Micajah Coffin, walked across the house floor and asked Russell from whom he had received the information about Nantucket. Seeing plaintiff in the audience, Russell indicated that it came from him, whereupon defendant exclaimed, "What, that convict?" and went on to assure Russell that though William Coffin had been acquitted of some charge involving a Nantucket bank, "[t]hat did not make him the less guilty."<sup>109</sup> Plaintiff sued and defendant pleaded legislative privilege under article XXI of the Massachusetts Constitution, which provides in part that the state's legislators shall have freedom of "deliberation, speech and debate."<sup>110</sup>

102. *United States v. Johnson*, 383 U.S. 169, 179 (1966) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

103. 383 U.S. 169 (1966).

104. 408 U.S. 501 (1972).

105. 4 Mass. 1 (1808).

106. *Johnson* interpreted *Tenney v. Brandhove*, 341 U.S. 367 (1951), and *Kilbourn v. Thompson*, 103 U.S. 168 (1880), as mandating a broad construction of the speech or debate privilege. 383 U.S. at 180. *Tenney* and *Kilbourn* had relied upon *Coffin*. 341 U.S. at 373-74; 103 U.S. at 203-04. In *Kilbourn*, a unanimous Court declared that *Coffin* was "perhaps, the most authoritative case in this country on the construction of [the speech or debate clause], and being so early after the formation of the Constitution of the United States, is of much weight." *Id.* at 204. See also 408 U.S. at 513.

107. *Coffin*, and its inconsistencies, are discussed in detail in Cella, *supra* note 6, at 18-30.

108. 4 Mass. at 3-4.

109. *Id.* at 4 (emphasis omitted).

110. MASS. CONST. art. XXI, § 22.

When the case came before the Massachusetts Supreme Court, Chief Justice Parsons declared for a unanimous court that

[Article XXI] 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 inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representative's chamber.<sup>111</sup>

In *Kilbourn v. Thompson*,<sup>112</sup> an 1880 case involving the speech or debate clause of the United States Constitution, the Supreme Court relied upon the above passage from the *Coffin* opinion in holding that the speaker and certain other members of the House of Representatives could not be held liable for improperly ordering the arrest of a person for contempt of Congress.<sup>113</sup> The *Kilbourn* Court held:

The reason of the rule [the speech or debate privilege] is as forcible in its application to written reports presented in [the House of Representatives] by its Committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.<sup>114</sup>

The *Kilbourn* Court failed to note, however, that, having thus paid lip service to a broad legislative privilege, the *Coffin* court went on to conclude that Micajah Coffin was not "executing the duties of his office"<sup>115</sup> in uttering the defamatory words, and that, consequently, he could be found liable for his actions, even though the words spoken in the house chamber were pertinent to business then pending before the house.<sup>116</sup> Accordingly, *Coffin* would seem to stand for the proposition that words not spoken in actual speech or debate may be the subject of

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111. 4 Mass. at 27.

112. 103 U.S. 168 (1880).

113. *Id.* at 203-04.

114. *Id.* at 204.

115. 4 Mass. at 30.

116. Although the resolution to appoint a new notary had been passed, the question who it should be was yet to be considered. *Id.* at 4.

legal action if they are defamatory (or, presumably, if they are motivated by a bribe) since such words would never be “uttered in executing [the legislator’s] official duty,”<sup>117</sup> a duty that was construed narrowly by the Massachusetts Supreme Court.<sup>118</sup> On the other hand, the actions of the congressmen in *Kilbourn*, though misguided, were carried out in good faith, pursuant to what the actors no doubt perceived to be their legal duty. Therefore, it was entirely sensible to shield them from liability.

Despite their adoption of the *Coffin* court’s broad interpretation of the legislative privilege, the *Kilbourn* Court did recognize that there may be

things done [in Congress], of an extraordinary character, for which the members who take part in the act may be held legally responsible [such as the activities in the Long Parliament or the French Assembly] . . . [W]e are not prepared to say that such an utter perversion of their powers *to a criminal purpose* would be screened from punishment by the constitutional provision for freedom of debate.<sup>119</sup>

Thus, both *Kilbourn* and *Coffin* draw a distinction between acts done, however wrongheadedly, in the pursuit of legislative duty and wrongful acts done pursuant to some private motivation of the member in perversion of legislative duty. These latter acts, even if covered by the literal terms of the speech or debate clause, are not entitled to protection. Unfortunately, later courts have lost sight of this distinction.

Another eighty years of hibernation went by before the speech or debate issue reemerged in *Tenney v. Brandhove*.<sup>120</sup> *Tenney* involved a suit under a federal civil rights statute against a California state legislator for summoning plaintiff to a hearing that was allegedly “not held for a legislative purpose.”<sup>121</sup> The Court held that the state legislative privilege was on a parity with the federal privilege and that “[t]he claim of an unworthy purpose does not destroy the privilege . . . [because] it [is] not consonant with our scheme of government for a court to inquire into the motives of legislators.”<sup>122</sup> In other words, the Court could “not

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117. *Id.* at 31.

118. *Id.*

119. 103 U.S. at 204-05 (emphasis added).

120. 341 U.S. 367 (1951).

121. *Id.* at 371.

122. *Id.* at 377; see note 131 *infra*.

go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province."<sup>123</sup> The Court concluded by echoing the above quoted language from *Kilbourn* concerning the possibility that a congressman could be held liable for acts of an "extraordinary character."<sup>124</sup> Thus, again the Court was dealing with ordinary legislative functions and not with the situation in which a legislator has been indicted for perverting the legislative process by receiving a bribe for the performance of an official act.

### III. RECENT CASES

*United States v. Johnson* was the first criminal case involving the speech or debate clause to come before the Court. In that case, charges were brought against a Maryland congressman who had given a speech in Congress that was favorable to certain independent savings and loan institutions that, at the time, were under investigation by the Justice Department. Johnson had also asked the Justice Department to "review" the indictments of certain officials connected with these institutions.<sup>125</sup> Johnson received substantial sums of money in exchange for these activities. Subsequently, he was indicted and convicted under 18 U.S.C. § 371<sup>126</sup> (conspiracy to defraud the United States) and former 18 U.S.C. § 281<sup>127</sup> (conflict of interest).

At the trial, Johnson's speech was not admitted into evidence against him. There was, however, "[e]xtensive questioning . . . concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by outsiders representing the loan company."<sup>128</sup> On cross-examination Johnson was asked the reason for the inclusion of certain sentences in the speech. In determining the propriety of this line of questioning, the Court, after reviewing the early history of the speech or debate clause, cited *Fletcher v. Peck*<sup>129</sup> and *Tenney v. Brandhove* for the proposition that "it [is] not consonant with our scheme of government for a court to inquire into the motives of legislators."<sup>130</sup>

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123. 341 U.S. at 378.

124. *Id.* at 378-79.

125. The Court had no trouble finding that the latter activity was "in no wise related to the due functioning of the legislative process." 383 U.S. at 172.

126. 18 U.S.C. § 371 (1976).

127. Act of June 25, 1948, ch. 645, § 281, 62 Stat. 683 (repealed 1962).

128. 383 U.S. at 173.

129. 10 U.S. (6 Cranch) 87, 130 (1810).

130. 383 U.S. at 180 (quoting *Tenney v. Brandhove*, 341 U.S. at 377).

The reference to *Fletcher v. Peck*, however, was inapposite. *Fletcher* stands only for the proposition that, if a statute is duly enacted by a legislature following the proper procedures, the statute cannot be annulled by a court on the grounds that the legislature was improperly motivated. *Fletcher* does not in any way support the Court's assertion that the motives of an individual congressman cannot be considered in a criminal prosecution of that congressman.<sup>131</sup> Having thus improperly introduced the "motive" issue into the case, the Court supported its position by referring to the nineteenth century British case, *Ex parte Wason*.<sup>132</sup> Again, this reliance was misplaced. *Wason* involved an alleged agreement by certain members of Parliament to deceive the House of Lords by "mak[ing] statements which they knew to be untrue."<sup>133</sup> In contradistinction to American law, such misconduct in Parliament is not a crime, even if a bribe has been made. It is a breach of privilege, punishable only by Parliament,<sup>134</sup> and therefore, the statement from *Wason* is hardly surprising. Obviously, one cannot inquire into the motives of Parliament's members in criminal proceedings if the acts to which those motives gave rise cannot be made the subject of a criminal prosecution. Thus, the holding in *Wason* that "the information did only charge an agreement to make statements in the House of Lords and therefore, did not charge an indictable offense"<sup>135</sup> is clearly inapplicable in this country.<sup>136</sup>

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131. The pertinent passage in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), is as follows:

It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

*Id.* at 130.

The reference to *Fletcher v. Peck* in *Tenney*, 341 U.S. at 376, was more to the point because *Tenney* involved a civil challenge to the members of a legislative committee for actions of the committee rather than, as in *Johnson*, a claim that an individual member had acted to pervert the legislative process.

132. L.R. 4 Q.B. 573 (1869), cited in 383 U.S. at 183. The Court in *Johnson* quoted the concurring opinion of Justice Lush who stated 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." 383 U.S. at 183 (quoting L.R. 4 Q.B. at 557 (concurring opinion)).

133. L.R. 4 Q.B. at 575.

134. See note 100 *supra*.

135. L.R. 4 Q.B. at 576.

136. The Supreme Court recognized this fact six years later in *United States v. Brewster*, 408 U.S. at 518. While the Court in *Brewster* declared the "English analogy . . . inapt," it did not make it clear that the exemption of members of Parliament from bribery prosecutions is not due to the British version of the speech or debate clause *per se*, but simply because there is no statute rendering such behavior criminal. Consequently, *Wason* is not a decision on the scope of the free



Thus, while *Johnson* may have reached the correct result because the Court was dealing with a broad statute that was not by its terms applicable to congressmen,<sup>137</sup> it sowed the seeds of later confusion by introducing for the first time, and totally without historical justification, the notion that in the case of an individual congressman the speech or debate clause encompasses not only "anything 'generally done in a session of the House by one of its members in relation to the business before it,'"<sup>138</sup> but also the motivations for such activities. The Court did indicate, however, that the result might be different if the prosecution of the congressman was "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members," even though such a prosecution would entail "inquiring into legislative acts and motivations."<sup>139</sup>

The Government accepted this proposal in *United States v. Brewster*, only to be left standing at the altar by a vacillating Court. Relying upon this dictum in *Johnson*, the Justice Department indicted Senator Brewster under 18 U.S.C. § 201 for taking money in exchange for his "action, vote and decision on postal rate legislation . . . pending before him in his official capacity."<sup>140</sup> The district court dismissed the indictment, holding that the speech or debate clause "constitutionally shields [the Senator] from any prosecution for alleged bribery to perform a legislative act."<sup>141</sup> The Government appealed directly to the Supreme Court pursuant to 18 U.S.C. § 3731.<sup>142</sup> In its brief, the Government argued that 18 U.S.C. § 201 was the type of narrowly drawn statute that the Court had referred to in *Johnson*.<sup>143</sup>

Although it appears from Justice Brennan's dissent that the Court agreed to hear arguments in *United States v. Brewster* for the purpose

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speech privilege, but merely a restatement of the obvious principle that if certain conduct has not been made criminal one cannot be indicted for that conduct.

137. *Johnson* did not deal with the narrower conflict of interest statute. 383 U.S. at 185-86.

138. *Id.* at 179 (quoting *Kilbourn v. Thompson*, 103 U.S. at 204).

139. *Id.* at 185.

"[W]ithout intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members."

*Id.* *Johnson* was a prosecution on the general charge of conspiracy to defraud the United States under 18 U.S.C. § 371 (1976). 383 U.S. at 171.

140. 408 U.S. at 502.

141. *Id.* at 504.

142. Act of June 25, 1948, ch. 645, § 3731, 62 Stat. 683 (formerly codified at 18 U.S.C. § 3731) (amended 1971).

143. Brief for the United States at 10-33, *United States v. Brewster*, 408 U.S. 501 (1972). This was the sole substantive argument made by the Government.

of deciding the issue raised by the Government,<sup>144</sup> a majority of the Court was apparently unwilling to adopt the Government's position. Instead, the Court skirted the issue by holding that the statute, 18 U.S.C. § 201,<sup>145</sup> does not have anything to do with legislative acts. The statute makes criminal the *agreement* to perform an official act in return for money, regardless of whether the act is actually performed or not. Since it would be possible to make out a case under the indictment without proving any actual legislative acts, the Court held that the indictment was improperly dismissed.<sup>146</sup>

In addition to providing what seemed to be a neat loophole in the speech or debate shield, the Court went on to point out that many acts that are "related to the legislative process" are not protected legislative acts. These include, "'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 and speeches delivered outside the Congress."<sup>147</sup> Nevertheless, the Court did hold that "the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties *and into the motivation for those acts.*"<sup>148</sup>

A contradiction is immediately apparent. If a Senator agrees to take a bribe in return for introducing certain legislation, is not the bribe the "motivation" for the legislative act?<sup>149</sup> By accepting the *Johnson* rationale and excluding evidence of the "motivation" for legislative acts as well as evidence of the acts themselves, the Court rendered it virtually impossible to gather the sort of evidence required to prove a case that, necessarily, is frequently based upon fairly subtle shadings of intent rather than on any overt display of criminality. For example,

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144. 408 U.S. at 529. The position taken by the Court after reargument, *see* text accompanying notes 145 & 146 *infra*, was not even suggested by the Government until its Supplemental Memorandum on Reargument, dated March 1972, 10 months after the original Brief for the United States: "Under this statute the crime consists of soliciting or receiving a bribe, with the requisite intent, regardless of whether any official act is in fact thereafter performed. Thus the offense could be committed without any speech or debate at all . . ." Supplemental Memorandum on Reargument for the United States at 4.

145. 18 U.S.C. § 201(c) (1976) provides that a member who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value . . . in return for . . . (1) being influenced in his performance of any official act" is guilty of an offense.

146. 408 U.S. at 525-26.

147. *Id.* at 512.

148. *Id.* (emphasis added).

149. The Supreme Court apparently recognized this contradiction, but its explanation merely dismisses the problem rather than solving it. *Id.* at 528.

there is nothing wrong with a congressman receiving a substantial contribution from the steel lobby, and there is nothing wrong with his speaking and voting to exclude Japanese steel from the United States. However, if he agrees to speak and vote against Japanese imports *in exchange for* the contribution, then he has violated the law. Assuming that the congressman's speeches and votes cannot be used, the minimal evidence necessary to prove the violation would be, in addition to the evidence of payment, some evidence of an agreement. Frequently this evidence would take the form of complicity by the lobbyists in the preparation of the speech. Yet, such evidence, though extremely inculpatory and in every sense evidence of acts destructive to, rather than supportive of, the integrity of Congress, seems to be barred by the *Brewster* decision,<sup>150</sup> since the agreement or the bribe constitutes the motivation for the legislative act. Contrary to the sentiments expressed by Thomas Jefferson, the scope of the speech or debate clause has now been extended to protect acts that are "*contra morem parliamentarium.*"<sup>151</sup>

The Court's solution is fine if the congressman did not in fact perform the legislative act that he had been bribed to perform. Since no legislative act occurred, the problem of what constituted the motivation

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150. In *United States v. Helstoski*, 576 F.2d 511 (3d Cir. 1978), cert. granted, 47 U.S.L.W. 3408 (U.S. Dec. 12, 1978) (No. 78-349), the Court of Appeals, in attempting to abide by the dictates of *Brewster*, held:

Legislative acts may not be shown in evidence for any purpose in this prosecution. Nor may the Government circumvent this clear requirement by introducing correspondence and statements that though, not legislative acts themselves, contain reference to past legislative acts of the defendant. To allow a showing by such secondary evidence would render *Brewster's* absolute prohibition meaningless.

*Id.* at 522.

In *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973), the Fourth Circuit went even further and declared that the Government could not present evidence of Congressman Dowdy's contacts with executive branch officials from whom he received documents relevant to a pending criminal case. Even though Dowdy subsequently turned these documents over to defendant, the court found that he could have received the documents "in preparation for a possible subcommittee investigatory hearing." *Id.* at 224.

The court held that:

The [speech or debate] clause does not simply protect against inquiry into acts which are manifestly legislative. In our view, it also forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact. Once it was determined, as here, that the legislative function . . . was *apparently* being performed, the propriety and the motivation for the action taken, as well as the details of the acts performed, are immune from judicial inquiry.

*Id.* at 226. Thus, the motivation even for "apparent" legislative acts is barred from consideration by the Fourth Circuit. To recall Jefferson's admonition in his *Manual of Parliamentary Practice*, the "encroaching character of privilege," T. JEFFERSON, *supra* note 94, manages to make itself felt even when the courts rather than Congress are the arbiters of its scope.

151. See T. JEFFERSON, *quoted in* note 94 *supra*.

for such an act cannot arise. However, when a legislative act that is motivated by the bribe is performed, then it becomes an impossible task to prove either the bribe, the agreement to perform an official act, or the circumstances surrounding that agreement without also proving the motivations for the legislative act.<sup>152</sup>

Reinstein and Silverglate argue that the clause is an *individual* privilege and that "Congress should not be able to divest any of its members of the privilege by a statute authorizing prosecution in the courts."<sup>153</sup> Although the Supreme Court has not spoken on this point, the history of the clause in Britain makes it clear that exactly the opposite conclusion must be reached: the clause was not designed to allow for the unfettered expression of unpopular or minority viewpoints in Parliament; on the contrary, it was designed to protect the majority, and the constituents it represented, from intimidation by the Crown. Parliament was not interested in encouraging dissenting views within its own ranks.<sup>154</sup> The British courts have always maintained "that the privilege of Parliament is the privilege of Parliament as a whole and not the privilege in any individual member."<sup>155</sup> It is clear that Parliament can, by express language in a statute, "annihilate" the privilege in any given situation.<sup>156</sup>

The intent of the Framers of the United States Constitution was the same. The clause served the basic purpose of protecting the powers of the legislative branch from encroachment by the executive and judiciary.<sup>157</sup> It was not intended to protect the minority in Congress from

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152. On the other hand, those persons who perform the seemingly less damaging acts of attempting to influence the executive branch in exchange for pay may be readily prosecuted. Since all legislative acts are official acts, the broader the interpretation given to the term "legislative acts," the narrower the statute's coverage becomes. Since there is nothing in the statute or its legislative history to indicate that certain "official acts" are not within its ambit, it seems reasonable to take Congress at its word and assume that the statute means what it says—that the receipt of money in exchange for any official act is a violation. This eliminates the serious problem of trying to discern which official acts are and which are not "legislative acts" because in most cases it can be reasonably argued, *see, e.g.*, Reinstein & Silverglate, *supra* note 6, at 1160, that most official acts performed by a legislator can be considered to be legislative acts.

153. *Id.* at 1169-70.

154. For example, consider the case of John Wilkes, *discussed in text* accompanying note 86 *supra*.

155. *Church of Scientology v. Johnson-Smith*, 1 Q.B. 522, 528 (1972).

156. *Duke of Newcastle v. Morris*, 1870 L.R. 4 E. & I. App. 661, 671(1870); *see* Mummery, *The Privilege of Freedom of Speech in Parliament*, 9 LAW Q. REV. 276 (1978). It is interesting to note that Mummery cites *Coffin v. Coffin* for the proposition that the clause is an institutional one. *Id.* at 288 n.72. Reinstein and Silverglate cite *Coffin* for the opposite conclusion. Reinstein & Silverglate, *supra* note 6, at 1170 n.277. While the Reinstein-Silverglate interpretation is probably correct, *Coffin* is an ambiguous precedent at best. *Compare* 4 Mass. at 27 para. 1, *with id.* para. 2.

157. *United States v. Johnson*, 383 U.S. at 178-79.

the majority. Jefferson made it clear that "[t]he privilege of a Member is the privilege of the House. If the Member waive it without leave, it is a ground for punishing him, but cannot in effect waive the privilege of the House."<sup>158</sup> Thus, there is no historical support for the declaration by Reinstein and Silverglate that "the privilege is guaranteed to each member personally, and its constitutional protection is not subject to collective discretion."<sup>159</sup>

Reinstein and Silverglate suggest, however, that vesting such a power in Congress could cause problems since Congress might "pass a law proscribing all floor speeches which in any way criticize the government."<sup>160</sup> In Britain it is probably true that such a statute would not violate the speech or debate clause.<sup>161</sup> If, as its history suggests, the purpose of the clause is to protect the independence of the legislative branch,<sup>162</sup> then it follows that the clause cannot be invoked to overturn duly enacted legislation even if that legislation limits the power of Congress. The remedy for such admittedly unacceptable legislation must be found elsewhere in the Constitution.

Since the speech or debate privilege in this country is constitutional rather than statutory, however, it is not necessarily true that Congress has the same power as Parliament to "annihilate" it.<sup>163</sup> As previously observed, though, the clause was not designed to protect a member who acts "contra morem parliamentarium to exceed the bounds and limits of his place and duty."<sup>164</sup> If Congress were to make it a crime for members to "speak out against any duly declared war," the courts could perhaps find that this activity was appropriate congressional behavior that could not be prohibited and strike down the statute under the speech or debate clause. On the other hand, the making of speeches in exchange for bribes is not appropriate congressional behavior, and consequently, Congress is not giving up any legitimate power of its members by subjecting them to prosecution for such acts. Such conduct has always been considered a breach of privilege and, therefore, prohibited. In Britain, Parliament itself may inquire into allegations of bribery, and a member who is found guilty may be subjected to imprisonment. In this country, the power to punish such behavior has

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158. T. JEFFERSON, *supra* note 46, § 3, at 20.

159. Reinstein & Silverglate, *supra* note 6, at 1169-70.

160. *Id.* at 1170.

161. *See* Duke of Newcastle v. Morris, L.R. 4 E. & I. App. 661 (1870).

162. *See* Powell v. McCormack, 395 U.S. 486, 501-06 (1969).

163. *See* Buckley v. Valeo, 424 U.S. 1, 118-43 (1977).

164. T. JEFFERSON, *supra* note 46, at 136.

been ceded to the executive. The passage of the bribery statute has in no way limited the historic freedom of the legislature. Furthermore, if the legislature is inclined to suppress minority viewpoints,<sup>165</sup> it is much more sensible to subject that inclination to scrutiny by the executive and the courts, rather than to allow the power to exist unfettered in the legislature.

While neither the bribery statute nor its legislative history contains any express waiver of the privilege,<sup>166</sup> the statute does expressly include congressmen within its scope. Furthermore, the debate on the original statute makes clear that Congress did not believe that it had the power to imprison its members for accepting bribes. Congress believed that this power reposed entirely in the executive.<sup>167</sup> Since Congress was inviting the executive to protect Congress against corruption by its members, it does not stand to reason that Congress would then withhold from the executive the right to use the most significant evidence of that corruption—evidence such as speeches, votes and debates, that would unquestionably have been admissible had Congress tried the matter itself.<sup>168</sup>

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165. As, for instance, the British Parliament was in *Wilkes' case*, *discussed in text* accompanying notes 86-90 *supra*.

166. The record is silent and suggests that the issue was never considered. 30 CONG. GLOBE, 32d Cong., 2d Sess. 288-97 (1853). The original statute relating to bribery of Representatives or Senators was § 6 of the Act of Feb. 26, 1853, ch. 81, 10 Stat. 170. This read as follows:

*And be it further enacted*, That if any person or persons shall, directly or indirectly, promise, offer, or give, or cause or procure to be promised, offered, or given, any money, goods, right in action, bribe, present, or reward, . . . to any member of the Senate or House of Representatives of the United States . . . with intent to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity, . . . such person . . . and the member, officer, or person who shall in anywise accept or receive the same, or any part thereof, shall be liable to indictment as for a high crime and misdemeanor in any court of the United States having jurisdiction for the trial of crimes and misdemeanors; and shall, upon conviction thereof, be fined not exceeding three times the amount so offered, promised, or given, and imprisoned in a penitentiary not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such place of trust or profit as aforesaid, shall forfeit his office or place; and any person so convicted under this section shall forever be disqualified to hold any office, honor, or profit, under the United States.

167. 30 CONG. GLOBE, 32d Cong., 2d Sess. 288-97 (1853).

168. *United States v. Johnson* posed a different situation. In *Johnson*, though the congressman had acted against the interests of Congress, he was charged under a general statute. Since the charge of defrauding the United States conceivably could be applied to conduct inimical to the interests of the executive branch, and since Congress has not directly ceded to the executive the power to deal with congressional misbehavior in that statute, the result in *Johnson* must be correct, even though the broad language of the holding was unwarranted.

If, as urged here, the protections of the speech or debate clause do not extend to prosecutions under 18 U.S.C. §§ 201, 203 (1976), what of grand jury investigations that may lead to such prosecutions? See *Gravel v. United States*, 408 U.S. 606, 623 (1971). An argument could be made that

It might be argued that to allow the executive branch to thus question legislative acts in the courts would have a great potential for abuse because the Executive could use the statute to intimidate opposing congressmen. Yet a determined and corrupt Executive could just as easily bring a prosecution under the bribery statute as currently construed. Since this article only advocates expanding the body of evidence admissible in a bribery case and not broadening the definition of bribery, the problem of abuse of prosecutorial discretion, which inheres in every criminal statute, is not increased.

Moreover, no one would argue that congressional bribery should go unpunished. The alternative to allowing the executive branch to investigate and prosecute such matters is to allow Congress to handle them itself. As the so-called "Koreagate" hearings of the House Committee on Standards of Official Conduct illustrate, however, this is an inherently unsatisfactory method for bringing out the truth. That this is so is less a reflection upon the particular members of this Congress than it is upon the system of policing congressional misconduct. It is unrealistic to expect members of a collegial body, who must daily compromise and cooperate with each other, and who were in any case chosen on the basis of political popularity rather than moral uprightness, to suddenly rear up and cast the stone of reprobation at colleagues who have been caught doing what many of their putative inquisitors have themselves been doing for years. It is only common sense to vest this responsibility in a separate organization, be it a special prosecutor or the executive branch.

Two further illustrations will help to reveal the seriousness of the problems created by *Brewster*. Suppose a congressman receives

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a necessary concomitant of the power to prosecute for bribery is the power to investigate those matters that may become the subject of the prosecution. Yet, to give the executive the right to subpoena a congressman before the grand jury and actually interrogate him concerning his legislative acts (or force the assertion of the fifth amendment privilege) seems beyond the authority delegated to the executive by the enactment of these criminal statutes. Most of the evidence in question is a matter of public record and hence readily available for trial without the use of the grand jury process. It is one thing for the executive to be able to make use of such material to prove an indictment returned by a duly constituted grand jury. It is quite another to allow executive questioning of a congressman in a grand jury investigation that may never even lead to indictment. (This reservation would not affect the subpoenaing of an ex-congressman's papers from a library where they are stored, *see note 170 infra*, since such a subpoena is directed to the librarian and consequently does not constitute a "questioning" of the congressman.) *See Kaye, supra note 6, at 549.* Of course, inquiry into motivations should be allowed in grand juries as well as trials provided that the inquiry focuses on *corrupt* motivations rather than on the legitimate, although perhaps ill-advised, reasons that might have caused a congressman to draft, or vote for, a certain bill. *See Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).*

\$20,000 a year from a foreign government in exchange for his promotion of that government's interest in the United States Congress. Periodically, the congressman writes to the president of that country explaining what he has been doing—making favorable speeches, voting for military appropriations, lobbying with his colleagues and encouraging executive branch officials to provide development funds for the country. The Government seeks to use the letters against the congressman. While it is fairly clear that the letters themselves are not legislative acts,<sup>169</sup> the letters discuss votes and speeches that are, and they frequently contain evidence of the congressman's motivations to perform these legislative acts.<sup>170</sup> Yet, the *Brewster* opinion states that "news letters to constituents"<sup>171</sup> are not covered by the privilege. *Brewster* simply does not explain what is to be done if such letters, as they usually do, refer to legislative acts or the motivations therefore.

Another situation that occurred frequently in the Korean investigation was that a congressman, in the pay of the Korean government, would approach another congressman on the House floor to urge him to sign a pro-Korean petition or to vote for military or economic aid to Korea. While such lobbying is undoubtedly a thing "generally done in a session of the House by one of its members in relation to the business before it,"<sup>172</sup> it makes no sense to exclude evidence of this activity in a bribery case since it is the strongest available evidence of the member's efforts to subvert the operations of Congress.<sup>173</sup>

The Supreme Court, however, seems to be leaning toward a narrower view of the clause as the following passage from *Gravel v. United States* illustrates:

169. See *Gravel v. United States*, 408 U.S. 606, 623 (1971); *United States v. Helstoski*, 576 F.2d 511 (3d Cir. 1978), cert. granted, 47 U.S.L.W. 3408 (U.S. Dec. 12, 1978) (No. 78-349).

170. It was on this ground that the district court quashed a subpoena to a library for an ex-congressman's letters in the Korean investigation. (The case is under seal and, therefore, cannot be cited or discussed specifically.) See also *United States v. Helstoski*, 576 F.2d 511 (3d Cir. 1978), cert. granted, 47 U.S.L.W. 3408 (U.S. Dec. 12, 1978) (No. 78-349).

171. 408 U.S. at 512. See also *Kilbourn v. Thompson*, 103 U.S. at 204, cited with approval in *United States v. Brewster*, 408 U.S. at 509, 512, and *United States v. Johnson*, 383 U.S. at 179.

172. 383 U.S. at 179.

173. By imposing speech or debate limitations on the prosecution, *Brewster* seems to have decided that 18 U.S.C. § 201 (1976) is not a "narrowly drawn statute" under which speech or debate considerations may be waived, even though the Court purported to hold this issue open. 408 U.S. at 529 n.18. If, however, § 201 is not such a "narrowly drawn statute," it seems clear that no statute currently on the books would qualify.

The real question is not how narrow or how broad the statute may be (and § 201 is a rather broad statute), but rather what is the statute's intended coverage. By the express inclusion of congressmen in the provisions of § 201 and § 203 and the inclusion of all "official acts," Congress has spoken with sufficient clarity on this issue, and the Court should recognize that fact.



Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."<sup>174</sup>

While the Court is obviously painting with a much narrower brush than in previous years, the application of such formulations to fact situations such as those discussed above is unclear. Certainly, conversations between congressmen on a pending vote are in general an integral part of the deliberative and communicative process. On the other hand, when such a conversation is corruptly motivated and in violation of a statute, it is itself an impairment of the "due functioning of the legislative process."<sup>175</sup> This type of case is readily distinguishable from cases such as *Tenney v. Brandhove* in which the acts challenged were official in nature and carried out pursuant to what the legislators could reasonably have perceived to be their due function.<sup>176</sup> In short, the Court found that the legislators were acting within the "sphere of legitimate legislative activity."<sup>177</sup> Even though it may have the *appearance* of being a normal legislative function, a speech, vote, conversation or letter that is motivated by a bribe can never be within the "sphere of legitimate legislative activity" because Congress itself has declared such conduct illegal.<sup>178</sup>

#### IV. CONCLUSION

The early history of the speech, or debate clause represented a

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174. 408 U.S. 606, 625 (1972) (quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972)). In *Gravel*, the Court allowed a grand jury to subpoena a Senator's aide to testify about the publication of the Pentagon Papers. The Court held that the publication had no connection with the legislative process. See also *United States v. Brewster*, 408 U.S. at 513.

175. *United States v. Johnson*, 383 U.S. at 172, *discussed in* *United States v. Brewster*, 408 U.S. at 513.

176. See also *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 506 (1975). *Eastland* involved a first amendment challenge to a subpoena duces tecum issued by a duly constituted congressional committee. The Court held that the issuance of the subpoena could not be questioned in the courts.

177. 341 U.S. at 376. See also *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 501 (1975).

178. See *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976), *cert. granted*, 434 U.S. 888 (1977) (No. 76-1621).

struggle on the part of the members of Parliament for the right to speak out on the most basic issues affecting the realm without being jailed for incurring the displeasure of the Crown. The practical scope of the parliamentary privilege of free speech depended upon the ebb and flow of power between Parliament and the Crown and not upon any fixed and immutable doctrine. Not until the mid-seventeenth century did it occur to anyone that anything more than actual speech might be covered by the privilege. Finally, in 1689, the Bill of Rights established that "speech and debate or proceedings in Parliament" were protected. The "proceedings" phrase, considered by parliamentary authorities to be the heart of the British privilege, was not, however, incorporated into the American Constitution, perhaps due to disgust on the part of the Framers with the massive abuse of privilege that had occurred in England in the hundred years between the Bill of Rights and the Constitutional Convention. Whatever their specific intent may have been regarding the speech or debate clause, it is beyond cavil that the Framers were fearful of legislative overreaching and sought to limit the privileges of the legislative branch and that the language of the speech or debate clause is, by its terms, narrower than the British version.

Early cases, such as *Coffin v. Coffin*, seemed to recognize that the speech or debate clause did not extend to individual criminal or slanderous conduct even if performed during the course of legislative business. In *United States v. Johnson*, the United States Supreme Court mistakenly relied on inapplicable British precedents and greatly extended the scope of the clause to protect not only criminal conduct performed in relation to the business before the Congress, but also the motivations for this conduct. *United States v. Brewster*, an obvious attempt by the Court to cut back on *Johnson*, in some ways made matters worse. While purporting to allow prosecutions based upon the agreement to perform an official act in exchange for money, the *Brewster* Court reaffirmed the holding in *Johnson* that motivations for legislative acts are protected by the speech or debate clause. This holding created an obvious dilemma because the agreement is the motivation.

In order to resolve this dilemma, the Court should recognize that the enactment of a criminal statute that includes congressmen in its coverage manifests an intent on the part of Congress to delegate to the executive such power as Congress might have had to punish the criminal behavior regulated by the statute. Most important, the Court

should recognize that the enactment of such a statute necessarily implies that Congress has delegated to the executive the right to prosecute congressmen for any of their activities that come within the scope of the statute, whether or not the behavior in question constitutes a legislative act.