CONSTITUTIONAL LAW—SPEECH OR DEBATE CLAUSE—EVIDENCE OF CONGRESSMAN'S LEGISLATIVE ACTIVITIES INADMISSIBLE AT HIS BRIBERY TRIAL; WAIVER OF PRIVILEGE MUST BE EXPRESS—*United States v. Helstoski*, 576 F.2d 511 (3d Cir. 1978), *cert. granted*, 47 U.S.L.W. 3401 (U.S., Dec. 12, 1978).

In June of 1976, a federal grand jury returned a twelve count indictment against United States Congressman Henry Helstoski on charges of soliciting and receiving bribes in return for the introduction of private immigration bills on the floor of the House of Representatives.[1] Prior to his trial, Helstoski moved in federal district court to strike the first four counts of the indictment.[2] The Con-

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[1] United States v. Helstoski, 576 F.2d 511, 513 (3d Cir. 1978). The indictments were the result of investigations by several federal grand juries in New Jersey examining allegations of political corruption and fraudulent immigration practices. *Id.* At the time of the indictment, as well as during the time covered by the indictment, the defendant was a member of Congress representing New Jersey's Ninth Congressional District. *Id.* The Congressman's introduction of private bills, as distinguished from public statutes affecting the community at large, were limited in operation and effect to particular individuals. For a definition of private bills, see BALLENTINE'S LAW DICTIONARY 991 (3d ed. 1969).

[2] United States v. Helstoski, 576 F.2d 511, 514 (3d Cir. 1978); Brief and Appendix for Petitioner at 9, United States v. Helstoski, 576 F.2d 511 (3d Cir. 1978) [hereinafter cited as Brief for Petitioner]. Prior to Helstoski's motion to dismiss, the trial judge had severed Counts VII through X of the twelve count indictment for later disposition. The severed counts named Helstoski along with several codefendants, whereas the remaining eight counts involved only Helstoski. United States v. Helstoski, No. 76-201, slip op. at 1 n.1 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978). Count I of the indictment charged Helstoski with violation of the conspiracy statute, 18 U.S.C. § 371 (1966), it being alleged that, while a member of Congress, "the defendant conspired to violate the official bribery statute, 18 U.S.C. § 201 (c)(1) (1969), by acting with others to solicit and obtain bribes from resident aliens in return for being influenced in the performance of official acts to benefit those aliens." 576 F.2d at 513 (footnote omitted). The latter statute provides in pertinent part:

> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
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> (1) being influenced in his performance of any official act;
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> or
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> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud . . . on the United States;
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> shall be fined . . . or imprisoned . . . .

18 U.S.C. § 201(c)(1),(2) (1969).

Counts II through IV of the indictment charged Helstoski with substantive bribery offenses. These counts alleged that Helstoski actually sought or accepted bribes in return for his being influenced to introduce private immigration bills. 576 F.2d at 513. Each of Counts I through IV alleged specific names and dates. For example, Count IV charged that:

> "on or about January 11, 1975 . . . the defendant, HENRY HELSTOSKI, . . . corruptly . . . solicited . . . and agreed to receive cash payments from Luis and Maria Echavarria in return for his being influenced in the performance of an official act, to wit: the introduction of a second private bill in the United States House of Rep-

gressman contended that each of the counts in question was based on allegations of specific legislative acts performed by him in his official capacity, thereby violating the speech or debate clause of the United States Constitution.[3] The Government maintained that Helstoski had waived his rights under the clause by voluntarily testifying about his legislative activities before a grand jury[4] and at the trial of his alleged co-conspirator.[5]

In an unpublished opinion upholding the validity of Counts I through IV, United States District Court Judge H. Curtis Meanor rejected Helstoski's initial contention that the indictment warranted dismissal since the grand jurors had heard impermissible evidence concerning the Congressman's legislative acts.[6] Furthermore, Judge Meanor held that reference in the indictment to Helstoski's official activities did not render the indictment invalid since a prima facie showing of culpability could be made without inquiry into the defendant's legislative performance.[7] In rejecting the Government's

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resentatives on behalf of Luis and Maria Echavarria, which private bill was introduced by the defendant, HENRY HELSTOSKI, on January 27, 1975."

Id. (quoting the indictment).

[3] United States v. Helstoski, 576 F.2d 511, 512 (3d Cir. 1978). The Constitution provides that "for any Speech or Debate in either House, they [senators and representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6.

[4] United States v. Helstoski, 576 F.2d 511, 514 (3d Cir. 1978). A number of grand juries, over a period of several years prior to the defendant's indictment, had investigated corruption in immigration matters. As a result of these inquiries, Helstoski's brother, as well as an administrative aide, were convicted of political corruption and fraud. *Id.* at 513. Helstoski cooperated fully during the investigations by testifying freely about the immigration bills he had introduced in the House, and by producing numerous documents relating to the bills. *Id.* at 514. On a May 7th grand jury appearance, after the Congressman was informed that his inquiry regarding whether he was a target of the grand jury's investigation was "inappropriate," Helstoski provided no further documents for the grand jury. Brief for Petitioner, *supra* note 2, at 7. During Helstoski's last grand jury appearance on May 14, 1976, he invoked his speech or debate privilege and refused to answer further questions. 576 F.2d at 513–14.

Before each grand jury appearance, Helstoski was warned of possible self-incrimination and advised of his right to counsel. Though he was not reminded of his speech or debate privilege, the district court found it reasonable to assume that the defendant was aware of his right since he had used it as a defense in a prior suit involving his franking privilege. *Id.* at 514 n.3; *see* Schiaffo v. Helstoski, 492 F.2d 413 (3d Cir. 1974).

[5] United States v. Helstoski, 576 F.2d 511, 514 (3d Cir. 1978). At the trial of his former aide, Albert DeFalco, Helstoski testified and produced documents relating to his own introduction of private immigration bills. *Id.*

[6] United States v. Helstoski, No. 76–201, slip op. at 3, 4 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978). Judge Meanor determined that once a grand jury indictment is obtained "'by a legally constituted and unbiased grand jury,'" a court will not look beyond the face of the indictment to test the validity of the evidence. *Id.* at 4 (quoting Costello v. United States, 350 U.S. 356, 363 (1956)). Were challenges routinely permitted, the result would be a "preliminary trial of the validity of the indictment," causing "impermissible delays in reaching the merits of criminal cases." *Id.*

[7] United States v. Helstoski, No. 76–201, slip op. at 8 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

waiver argument, the court held that a waiver may not be found by implication, but must be express and "for the precise purpose for which the Government seeks to use evidence of legislative acts."[8] The court concluded by barring the Government from using, during its case-in-chief, any evidence of Helstoski's past performance of his legislative activities.[9]

An interlocutory appeal was filed by the Government challenging the district court's exclusion of all evidence referring to prior legislative activities.[10] Helstoski, meanwhile, sought to compel the district court's dismissal of Counts I through IV of the indictment by petitioning for a writ of mandamus.[11] Both cases were consolidated for disposition on the merits.[12]

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[8] United States v. Helstoski, No. 76–201, slip op. at 16 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[9] United States v. Helstoski, No. 76–201, slip op. at 19 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978). Judge Meanor included within his prohibition "evidence, derived from any source and for any purpose." *Id.*

[10] United States v. Helstoski, 576 F.2d 511, 513 (3d Cir. 1978). The Government's appeal was filed pursuant to 18 U.S.C. § 3731 (West Cum. Supp. 1978), which reads in pertinent part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

18 U.S.C. § 3731 (West Cum. Supp. 1978).

At an *in camera* pretrial conference held on February 1, 1977, Judge Meanor informed the parties of his decision to deny the defendant's motion for dismissal of the indictment, but to bar proof of his legislative acts at trial. Additionally, the judge announced that he had rejected the Government's waiver argument. 576 F.2d at 514. At that time, the Government informed the court of its intent to take an interlocutory appeal and requested an oral argument, which was subsequently scheduled for February 14. United States v. Helstoski, No. 76–201, slip op. at 3 n.3 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

At oral argument, the government asked for a determination of the admissibility of twenty-three categories of evidence. The district court refused to rule specifically on each of the categories, but reiterated in a written opinion of February 22 its absolute prohibition of "the introduction into evidence of legislative acts for any purpose." 576 F.2d at 515. An interlocutory appeal was then filed by the Government on March 18, 1977. Brief for Appellant at 3, United States v. Helstoski, 576 F.2d 511 (3d Cir. 1978).

[11] United States v. Helstoski, 576 F.2d 511, 512 (3d Cir. 1978). Helstoski argued that he was entitled to a writ of mandamus pursuant to 28 U.S.C. § 1651 (1966) (All Writs Act). Initially he claimed that since the wording of the first four counts of the indictment mentioned specific legislative acts, the proof of such acts would violate his speech or debate privilege. *Id.* at 516. Secondly, the Congressman alleged that the district court's ban on the Government's introduction of past legislative acts modified the proof of an essential element of the crime, and thus constituted a " 'constructive amendment' " of the indictment. *Id.* at 518. According to the defendant, this modification effectively deprived him of his fifth amendment right to be indicted solely by a grand jury. *Id.* Finally, Helstoski maintained that the district court lacked jurisdiction to try the indictment because the grand jury used evidence which was violative of his legislative privilege. *Id.*

[12] United States v. Helstoski, 576 F.2d 511, 515 (3d Cir. 1978).

In *United States v. Helstoski*,[13] Chief Judge Seitz, writing for the United States Court of Appeals for the Third Circuit, affirmed the district court's findings on all major issues.[14] Although it acknowleged its jurisdiction to issue a writ of mandamus, the court of appeals denied the petition in Helstoski's case, finding that the Congressman had failed to make a "sufficient showing to justify issuance of the writ . . . on Speech or Debate grounds."[15] In upholding the indictment's validity, the court indicated that a prima facie case could be established without any reference to protected legislative acts,[16] and that it would not countenance a challenge to the competency of the evidence presented to a grand jury.[17] Furthermore, the lower court's evidentiary ruling was held not to constitute a " 'constructive amendment' " of the indictment since it did not result in altering the proof of any fundamental elements of the crime.[18]

Upon determining that it had jurisdiction to hear the Government's appeal,[19] the Third Circuit reiterated the district court's unequivocal ban on the introduction of legislative acts, whether through the use of secondary materials such as correspondence and statements, or for the subsidiary purpose of proving motive or intent.[20] Despite the court's refusal to decide whether a legislator may waive his speech or debate privilege, Judge Seitz found that under the facts in this case Helstoski had not *expressly* waived the privilege in compliance with the strict standards required for a criminal prosecution.[21]

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[13] 576 F.2d 511 (3d Cir. 1978).

[14] *Id.* at 524.

[15] *Id.* at 517. For a discussion of the basis of Helstoski's petition for a writ of mandamus, *see* note 11 *supra*.

[16] 576 F.2d at 517.

[17] *Id.* at 519.

[18] *Id.* at 518.

[19] *Id.* at 521. The defendant had challenged the court's jurisdiction to hear the Government's appeal based on his literal reading of 18 U.S.C. § 3731 (West Cum. Supp. 1978). *See* note 10 *supra*. While Helstoski argued that the lower court's order did not actually "suppress or exclude any specific items of evidence," the court of appeals noted jurisdiction, recognizing that the order essentially constituted an evidentiary ruling, and that Congress intended section 3731 be construed broadly. *Id.* at 520–21.

[20] *See* 576 F.2d at 522.

[21] *Id.* at 523–24. To support his upholding of an express waiver standard, Judge Seitz indicated the need for preserving legislative independence. He suggested that any lesser standard would allow for executive and judicial encroachment which would inevitably undermine "'the integrity of the legislative process.' " *Id.* at 523 (quoting United States v. Brewster, 408 U.S. 501, 507 (1972)).

The Government petitioned for a rehearing en banc, but its request was denied. It subsequently took an appeal on the evidentiary ruling to the United States Supreme Court, which resulted in the Court's granting a writ of certiorari. United States v. Helstoski, 47 U.S.L.W. 3401 (1978).

The concept of a legislative speech or debate privilege is based upon the belief that for the effective operation of a representative form of government, a legislator must be able to freely speak out when exercising his governmental functions without fear of punishment or reprisal.[22] The origins of the American privilege can be traced to the passage, in 1689, of the English Bill of Rights containing the speech or debate privilege.[23] This event marked the culmination of a difficult struggle by Parliament for independence and supremacy over the monarchy.[24] The American colonists, cognizant of the English experience, modeled their colonial assemblies after Parliament,[25] and later included speech or debate clauses in most state constitutions,[26] as well as in the Articles of Confederation.[27] By 1789, the unopposed adoption of the speech or debate clause by the

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[22] *See* C. WITTKE, THE HISTORY OF THE ENGLISH PARLIAMENTARY PRIVILEGE 12–32 (1970). The author noted that "[p]arliamentary government has been described as 'government by talking.' " *Id.* at 23.

[23] The relevant portion provides "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M. SESS. 2, c.2 (1688).

[24] *See* C. WITTKE, *supra* note 22, at 23–30. When three members of Parliament were tried by the Court of the Kings Bench for "libellous and seditious" speeches, they challenged that court's jurisdiction, insisting that only Parliament had the right to try and punish them if any offense had, in fact, been committed. The accused maintained that " '[w]ords spoken in Parliament, which is a superior court, cannot be questioned in this court, which is inferior.' " *Id.* at 29 (quoting 3 HOWELL, STATE TRIALS 296). The defendants were imprisoned and fined, but this unpopular decision only served to increase the growing ill-feeling toward Charles I. *Id.* at 30.

[25] M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 14–15 (1943). The former Englishmen, well aware of the powers and privileges of Parliament, patterned their colonial assemblies after the English legislative system. As a result, these assemblies were often referred to as "parliaments." *Id. See also* D. HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 69 (1975). Though more restricted in their powers than Parliament, the colonial assemblies were still mindful of legislative privilege and did manage to exercise this right. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U.L. REV. 1, 3–16 (1968). Actually, these assemblies were more analogous to Parliament than they were to the state legislatures which followed, especially regarding the exercise of judicial authority. *See* M. CLARKE, *supra* at 15–23.

[26] *See* Cella, *supra* note 25, at 14 & n.38. The speech or debate clause in the Massachusetts constitution provided that:

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

MASS. CONST. art. XXI (1780). *See also* N.H. CONST. pt. 1, art. XXX (1784).

[27] The clause extending legislative privilege provides that "[f]reedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress. . . ." ART. OF CONFED., art. V.

framers of the Constitution reflected the firmly rooted tradition of legislative privilege in American law.[28]

Although in both nations the constitutional framers acted "to prevent [a legislator's] intimidation by the executive and accountability before a possibly hostile judiciary,"[29] the historical and political differences between the two countries preclude further analogies.[30] Whereas the English Parliament's tribunal origins enabled it to claim its judicial functions by inheritance, the American Congress was empowered solely with legislative functions, coequal and coordinate with the judicial and executive branches.[31] Consequently, the scope of the American privilege is narrower,[32] thus precluding legislative intrusion upon the judiciary's constitutionally granted sphere of authority,[33] while the English political system is not similarly circumscribed by the doctrine of separation of powers.[34]

Two important issues in the *Helstoski* case—the scope of the protections afforded by the speech or debate clause and whether those protections can be waived—have received infrequent attention by the courts. In 1808, *Coffin v. Coffin*[35] marked the first occasion in this country that a court was required to construe a speech or debate

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[28] *See* United States v. Johnson, 383 U.S. 169, 177 (1966). The absence of any recorded debate prior to the passage of article I, section 6 indicates the lack of resistance to its adoption. II RECORDS OF THE FEDERAL CONVENTION 246 (Farrand ed. 1911).

[29] United States v. Johnson, 383 U.S. 169, 181 (1966). James Wilson, a prominent member of the Constitutional Convention's Committee of Detail and later a United States Supreme Court Justice, stated that the purpose of the speech or debate clause was

> to enable and encourage a representative of the public to discharge his public trust with firmness and success . . . [so] that he should enjoy the fullest liberty of speech, and . . . be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

II THE WORKS OF JAMES WILSON 38 (Andrews ed. 1896); *see* J. STORY, EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES, § 144, at 94 (1878).

[30] C. WITTKE, *supra* note 22, at 12–14. Originally Parliament had exercised executive, legislative and judicial duties simultaneously. Although Parliament's judicial functions have diminished, its present jurisdiction to try and punish a member originated from its historic inherent powers as a body with judicial functions. While much of Parliament's judicial power has been divested by statute and usage, there remain occasions when a member may invoke its judicial origins. *Id.* at 183–87.

[31] *See* United States v. Brewster, 408 U.S. 501, 517–19 (1972); Kilbourn v. Thompson, 103 U.S. 168, 189 (1881); C. WITTKE, *supra* note 22, at 182–83; Cella, *supra* note 25, at 15.

[32] Cella, *supra* note 25, at 15. For example, Parliament may imprison for contempt anyone who has violated its speech or debate privilege, and this decision is not reviewable by any other court. Congress, on the other hand, may only cite an offender for contempt if there has been a serious interference with the legislative process; however, this proceeding is always reviewable by the judiciary. *Id.*

[33] Kilbourn v. Thompson, 103 U.S. 168, 192–93 (1881).

[34] *See* Cella, *supra* note 25, at 15.

[35] 4 Mass. 1 (1808).

clause. The case involved a slander suit brought by William Coffin against a Massachusetts state legislator, Micajah Coffin, for defamatory remarks uttered within the chambers of the state house in the presence of several individuals.[36] On ultimate appeal, the Massachusetts supreme court held that Micajah Coffin's slanderous words were not spoken while "executing the duties of his office,"[37] and thus were not within the protection of the privilege.[38]

The *Coffin* court characterized a communication as privileged if the words were spoken while the legislator was discharging an act of office, but not if he was acting as a private citizen.[39] This privilege has been constitutionally granted by the people to "each individual member" of the state house[40] for the express purpose of providing citizens with independent legislators who could function in office without the threat of prosecution.[41] Since the legislative privilege was not retained by the house as an entity, the court held that a

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[36] *Id.* at 3–4. The event in question occurred after Representative Russell offered a resolution authorizing an additional notary public for Nantucket. *Id.* at 2–3. When asked by the defendant, Representative Micajah Coffin, where he had obtained his facts in support of the resolution, Russell responded that it "came from a respectable gentleman from Nantucket." *Id.* at 4 (emphasis omitted). Russell was in fact referring to William Coffin, who had been earlier accused and acquitted of robbing the Nantucket Bank. *Id.* at 2. After the resolution had passed, Coffin approached Russell in the passage-way of the chamber, and upon learning that the gentleman was William Coffin exclaimed, " 'What, that convict?' " *Id.* (emphasis omitted). When informed of Coffin's acquittal, he remarked, "'That did not make him the less guilty . . . .'" *Id.* at 4 (emphasis omitted).

[37] *Id.* at 29–30. The defendant was found to have engaged in an ordinary conversation which was unrelated to his legislative activities. Additionally, the statements were not intended to serve an informational purpose. *Id.*

[38] *Id.* at 30.

[39] *Id.* The court noted that if malicious or defamatory words were spoken in performance of an official duty, a legislator would be protected by the privilege. *Id.* at 30–31. The court further suggested in dicta that a functional, rather than a mechanical approach be used to determine whether the utterance was related to an official act. In deciding that legislative activities were not necessarily limited to occasions when a member remains at his chair, stands within the house chamber, or acts according to the rules, the court sought to include only those "act[s] resulting from the nature, and in the execution, of the office . . . ." *Id.* at 27. By the same token, however, the court refused to include within the scope of protected activity

> every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, [for that] would . . . extend the privilege farther than was intended by the people . . . .

Id. at 31.

[40] *Id.* at 27. The court declared that "the will of the people, expressed in the constitution . . . is paramount to the will of either or both branches of the legislature." *Id.*

[41] *Id.* The grant of privilege, however, was not so broad that a legislator could invoke it for his own benefit to avoid prosecutions as a private citizen. *Id.*

member's privilege might not be waived or otherwise deprived by that body.[42]

The Massachusetts supreme court's broad interpretation of the scope of legislative activity defined by a speech or debate clause has served as a model in subsequent cases tried in federal courts.[43] Seventy years after the *Coffin* decision, *Kilbourn v. Thompson*[44] arose as a case of first impression for a federal court under the federal constitutional clause. Kilbourn brought an action for false imprisonment against Thompson, sergeant-at-arms of the House of Representatives, and several members of a congressional committee after they had held him in contempt and ordered his imprisonment for refusal to testify before the committee.[45] Although the Supreme Court held that the Constitution does not grant Congress the power to punish for contempt,[46] it found the individual representatives' activities to be protected by legislative privilege and, therefore, not subject to suit.[47] Thus, the permissible scope of legislative activities subject to the privilege included all those "things generally done in a session of the House by one of its members in relation to the business before it."[48]

A seventy year time span again elapsed before another case involving legislative privilege came before the Supreme Court. In *Tenney v. Brandhove*,[49] plaintiff Brandhove sued members of the California Senate Committee on Un-American Activities for damages, alleging that they had deprived him of his civil rights during a committee hearing.[50] The Supreme Court ultimately found that the in-

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[42] *Id.* at 27. The court's position on waiver was apparently dicta since the narrow question before the court was whether Coffin's words were spoken in execution of his official duty. *Id.* at 29.

Following the *Coffin* court's analysis, the issue of waiver was not explored again until quite recently in United States v. Craig, 537 F.2d 957 (7th Cir. 1976). For a discussion of the *Craig* court's concept of waiver, see text accompanying notes 108–12 *infra*. For a statement of the *Helstoski* court's analysis of waiver, see text accompanying notes 140–45 *infra*.

[43] *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 373–74 (1951); Kilbourn v. Thompson, 103 U.S. 168, 203 (1881).

[44] 103 U.S. 168 (1881). The *Kilbourn* Court attached great weight to the *Coffin* opinion, primarily because it was delivered soon after the writing of the Constitution, and due to the absence of any prior federal decisions dealing with the speech or debate clause. *Id.* at 204.

[45] *Id.* at 170–71.

[46] *Id.* at 182.

[47] *Id.* at 204–05.

[48] *Id.* at 204.

[49] 341 U.S. 367 (1951).

[50] *Id.* at 371. Brandhove was summoned before the Tenney Committee in order to resolve inconsistencies between accusations contained in a petition circulated by Tenney among members of the California Legislature, and evidence previously given before the Committee. Al-

vestigation and hearings were within the sphere of legislative activity and, consequently, were immune from suit.[51] While reiterating *Coffin's* broad approach, the Court contributed to the developing case-law by its pronouncement that "[t]he claim of an unworthy purpose does not destroy the privilege."[52] Accordingly, neither a legislator's official actions nor his underlying motivations could be subject to a probe by the courts.[53]

The Supreme Court continued its tradition of liberally interpreting the scope of the speech or debate privilege in *United States v. Johnson*.[54] There the Court confronted the issue of whether a congressman who was accused of criminal conspiracy for accepting a bribe to deliver a speech in the House might have the contents of that speech,[55] as well as his motives for giving it,[56] introduced as evidence at his trial. Congressman Johnson and his three co-defendants were found guilty of having conspired to pressure the Department of Justice to dismiss indictments against a Maryland savings and loan company and its officers.[57] As part of the conspiracy, Johnson was charged with having read a speech on the floor of the House which was favorable to savings and loan institutions.[58] It was alleged that a particular savings bank subsequently had distributed copies of his speech to dispel any suspicions held by potential customers of improper management.[59] The Fourth Circuit reversed the trial court's finding of guilt on the conspiracy charge, dismissed that entire charge, and ordered a new trial on the other counts.[60]

On appeal to the United States Supreme Court, the Court initially noted a lack of precedent for interpreting legislative privilege in

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though Brandhove refused to testify, his earlier testimony was quoted by the chairman, a statement was read regarding his alleged criminal record, and a newspaper article denying the truth of his accusations was entered into the record of the proceeding. As a result of this incident, Brandhove charged that the hearing had served no legitimate legislative purpose, but was only intended to intimidate and deprive him of his right of free speech. *Id.* at 370–71.

[51] *Id.* at 377–78.

[52] *Id.* at 377.

[53] *See id.* at 379.

[54] 383 U.S. 169 (1966).

[55] *Id.* at 173–76. The defendant was questioned extensively at trial about the wording, authorship, and general preparation of the speech. *Id.* & nn.4–5, 7.

[56] *Id.* at 176. In order to prove its conspiracy charge, the Government introduced evidence at trial tending to show that Johnson's purpose in making the speech was to serve his self-interest rather than to fulfill a proper governmental purpose. *Id.* at 177.

[57] *Id.* at 170–71.

[58] *Id.* at 171–72.

[59] *Id.* at 172.

[60] *Id.* at 171. The appellate court found that the entire trial had been "infected" by the admission of unconstitutional evidence under the conspiracy count. *Id.*

the context of a criminal prosecution.[61] The Court indicated, however, that the speech or debate clause had arisen historically, not in the context of private litigation, "but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary,"[62] thus serving as a protection against prosecutions by the English monarchy.[63]

The Court refused to limit the reach of the speech or debate clause to only civil suits.[64] Consequently, it precluded the prosecution in a criminal action from inquiring into "the manner of preparation and the precise ingredients of the speech,"[65] or from delving into the motivations of a congressman for delivering the speech.[66] While upholding the validity of the conspiracy charge, the Court ordered a new trial, purged of all reference to Johnson's legislative acts or motives.[67]

In contrast to a nearly two hundred year time span in which the only three cases involving the speech or debate privilege to reach the Supreme Court[68] were broadly construed,[69] 1972 marked the year that the Burger Court reviewed two speech or debate cases, narrowly interpreting the scope of the clause in both.[70] The first case, *United States v. Brewster*,[71] involved a former senator who was indicted for

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[61] *Id.* at 179–80. The limited number of prior cases involving the speech or debate clause were restricted to civil suits. *See, e.g., Tenney*, 341 U.S. at 369 (suit against state legislator for depriving citizen of his civil rights); *Kilbourn*, 103 U.S. at 170 (several members of Congress sued for false imprisonment).

[62] 383 U.S. at 181.

[63] *Id.* at 180–81.

[64] *Id.* at 184–85.

[65] *Id.* at 175–76.

[66] *Id.* at 177. The Court pointed out that calling into question a congressman's motives for delivering a speech would naturally result in a defense involving close scrutiny of legislative acts, thereby constituting an impermissible infringement of article I, section 6. *Id.*

[67] *Id.* at 185. The Supreme Court reinstated the conspiracy count originally dismissed by the court of appeals, but affirmed that court's ruling which barred all use of the tainted evidence. *Id.*

The *Johnson* Court confined its holding to these facts and specifically refused to rule on whether Congress, through a narrowly drawn statute, may allow for judicial inquiry into a legislator's official acts and motives, thereby leaving open the issue of waiver. *Id.* The question whether an individual congressman or Congress as a body through a narrowly drawn statute may waive the speech or debate privilege has never been resolved by the Supreme Court and remains unanswered by the *Helstoski* court. *See* 576 F.2d at 524.

[68] *See* 383 U.S. at 179. According to Justice Harlan, the dearth of cases involving the clause is explained by the fact that the privilege is "so well established in our polity. . . ." *Id.*

[69] For a discussion of the liberal construction given the speech or debate privilege in the *Coffin*, *Kilbourn* and *Tenney* cases, see notes 43, 48, 52–53 *supra* and accompanying text.

[70] Both United States v. Brewster, 408 U.S. 501 (1972), and Gravel v. United States, 408 U.S. 606 (1972), were decided on June 29, 1972. For discussions of the Court's narrow interpretation of the clause, see notes 76–85, 97–98 & 102–03 *infra* and accompanying text.

[71] 408 U.S. 501 (1972).

taking a bribe in return for his being influenced to vote and act on postal rate legislation while a member of the Senate Committee on Post Office and Civil Service.[72] After the district court dismissed all of the bribery counts in the indictment,[73] the Government took a direct appeal to the Supreme Court.

Although Chief Justice Burger, writing for the majority, cited the *Johnson* Court's opinion barring the introduction at trial of legislative acts or the motivations for those acts,[74] he confined the scope of privileged legislative activities to only those which were "clearly a part of the legislative process."[75] Unprotected by privilege were many legitimate political services that a congressman might normally perform for his constituents,[76] in addition to activities that were only "casually . . . related to legislative affairs but not a part of the legislative process itself."[77] While noting the broad language used by prior courts,[78] the Chief Justice indicated that the holdings themselves were not as extensive as the sweeping language of the opinions.[79] Moreover, "the shield does not extend beyond what is necessary to preserve the integrity of the legislative process,"[80] for even in its most restricted scope the clause has granted an expansive privilege.[81]

After scrutinizing the wording of the bribery statute and the indictment,[82] the majority concluded that the defendant's crime need only consist of acceptance of the bribe in return for a promise to act in a particular way; actual performance of the promised act did not

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[72] *Id.* at 502. The counts at issue charged the defendant with violating 18 U.S.C. § 201(c) (1969). *Id.* For the text of this provision, see note 2 *supra*.

[73] 408 U.S. at 504.

[74] *Id.* at 512.

[75] *Id.* at 516.

[76] *Id.* at 512.

[77] *Id.* at 528. Chief Justice Burger sought to draw a well-defined legislative/political dichotomy. Other examples of activities deemed not purely legislative in nature were the delivery of a speech outside of Congress or the preparation of a newsletter for constituents. *Id.* at 512.

[78] *Id.* at 514. The Court cited sections of the *Coffin* opinion which were quoted with approval in *Kilbourn*, 103 U.S. at 203, and in *Tenney*, 341 U.S. at 373–74, stating that the privilege " 'ought not to be construed strictly, but liberally . . . ' " and that it includes " 'every other act resulting from the nature, and in execution, of the office . . . .' " 341 U.S. at 374.

[79] 408 U.S. at 516.

[80] *Id.* at 517.

[81] *Id.* at 516. The *Burger* opinion characterized the privilege as "broad enough to insure the historic independence of the Legislative Branch, . . . but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." *Id.* at 525.

[82] *Id.* Four of the counts charged that the defendant " 'corruptly . . . solicited . . . and agreed to receive' money 'in return for being influenced . . . in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity.' " *Id.*

have to be proven.[83] Therefore, the Court reasoned that since a bribe could not possibly be regarded as a legislative act, probing the purpose of a bribe was permissible,[84] regardless of whether in the course of the inquiry some activities casually related to legislative actions were examined.[85]

The dissent criticized the majority for not perceiving the issue as waiver of the legislative privilege.[86] Properly under consideration, Justice Brennan argued, was whether Congress could delegate to another branch of government, by a narrowly drawn bribery statute, its exclusive constitutionally-granted authority to try its own members for wrongdoing.[87] Justice Brennan further criticized the majority opinion for attempting to speciously distinguish between an inquiry into the purpose of the illegal agreement, deemed permissible by the Court, and an inquiry into a legislator's motives, which was considered impermissible.[88] Finding "proof of an agreement to be 'influenced' in the performance of legislative acts is by definition an inquiry into their [legislators'] motives," Justice Brennan unequivocally declared that such an examination was unconstitutional.[89]

The Burger Court reinforced its narrow definition of the scope of legislative privilege in *Gravel v. United States*,[90] a case which concerned alleged criminal conduct on the part of Senator Gravel and his aide in acquiring and privately publishing classified information commonly known as the Pentagon Papers.[91] Senator Gravel had con-

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[83] *Id.* at 526. To illustrate, a legislator may enter into a corrupt agreement and then default, not acting in the manner agreed upon; however, proof of the bargain alone will establish a prima facie case. *Id.*

[84] *Id.*

[85] *Id.* at 528.

[86] *Id.* at 531 (Brennan, J., dissenting).

[87] *Id.* The Constitution provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5. Justice White, in a separate dissent, agreed that the singular issue facing the Court was a determination of the proper forum for trial of a congressman. 408 U.S. at 552 (White, J., dissenting). He concluded that permitting Congress, as a body, to waive its privilege would violate the speech or debate clause of the Constitution. *Id.* at 563.

[88] *Id.* at 535–36 (Brennan, J., dissenting).

[89] *Id.* at 536–37. Justice Brennan objected to those counts of the indictment which charged a corrupt promise to vote, since it inevitably would involve some inquiry into motives. For example, count nine charged Senator Brewster with soliciting and receiving a bribe in return for his action and vote on pending postal rate legislation. *Id.* at 503. The Justice found this count clearly violative of the speech or debate clause since it called into question the actual performance of legislative acts, as well as the legislator's reasons for voting. *Id.* at 535–36 (Brennan, J., dissenting).

[90] 408 U.S. 606 (1972).

[91] *Id.* at 608. The classified document contained a study of the decision-making process supporting Viet Nam policy. *Id.*

vened a midnight meeting of his subcommittee at which time he read portions of the Pentagon Papers, placing in the public record all forty seven volumes.[92] Following press reports that the Senator had arranged for the private publication of the Papers,[93] a grand jury investigating the possible commission of federal crimes subpoenaed one of his aides, Dr. Rodberg, as a witness.[94] Although Senator Gravel's motion to quash the subpoena was denied,[95] the appellate court ruled that the aide was shielded from having to testify.[96] On appeal to the Supreme Court, Justice White held that a Senator's aide was entitled to the same legislative privilege as his employer. The scope of protection, however, was found not to extend to the acquisition or private publication of the Pentagon Papers.[97]

Justice White reasoned that if activities beyond actual speech or debate are to be protected, "they must be an integral part of the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation . . . ."[98] Stressing the need for flexibility in applying the clause, particularly in light of the myriad of congressional tasks, the majority suggested that aides be regarded as congressmen's alter egos, thus receiving the protective privilege when performing legislative tasks.[99] In order to determine whether Senator Gravel's aide was required to respond to the subpoena and testify before a grand jury,

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[92] *Id.* at 609.

[93] *Id.* at 609–10. The purported publisher, Beacon Press, a division of the Unitarian Universalist Association, appeared as amicus curiae in support of Senator Gravel's position. *Id.* at 610 n.4.

[94] *Id.* at 608. The crimes under investigation included the

> retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offense and to defraud the United States (18 U.S.C. § 371).

Id.

[95] *Id.* at 610–11. Senator Gravel moved to quash the subpoena as an intervenor in the action against his aide. *Id.* at 608.

[96] *Id.* at 612. The appellate court held that the speech or debate clause served to foreclose any inquiry into legislative acts. Private publication of official proceedings, however, did not come under constitutional protection. The court nevertheless concluded that questioning Senator Gravel or his aide was barred by a common law privilege analogous to the immunity which shielded executive officers from liability for news releases containing libelous materials. *Id.*

[97] *Id.* at 628.

[98] *Id.* at 625.

[99] *Id.* at 616–17. Recognizing that a congressman could not possibly perform all of his legislative tasks, the Court acknowledged the practical need for staff assistants. Hence, any act which would have been protected if performed by the congressman is privileged when executed by his agent. *Id.*

the Court was obliged to ascertain whether his testimony would involve disclosure of privileged legislative activities.[100]

Applying the criterion it had just established,[101] the majority excluded from the scope of protected legislative activities both the acquisition and the private publication of the Pentagon Papers,[102] for inquiry into such matters did not impair the independence of the Senate and were not an "integral" part of the legislative process.[103] In contrast, Justice Douglas' dissenting opinion emphasized the vital role that the congressional informing function played in a representational form of government, since Congress has a duty to act as a watchdog over governmental affairs and to disseminate the information it acquires to the public.[104]

The subject of waiver, although not an issue in *Gravel*, arose when the Court attempted to reassure those who feared a possible repetition of the historical abuses which had permitted members of Parliament to extend their privilege to others, thereby unjustly relieving third parties of civil or criminal liability.[105] Finding this problem unlikely to occur, the Court noted that the alter ego approach would allow use of the privilege only by the senator or by an aide on his behalf, but added that a senator could accordingly waive his aide's immunity.[106] This statement has been subsequently construed to mean that the speech or debate privilege is a personal one, which can only be waived by an individual congressman.[107]

The only case prior to *Helstoski* which fully addressed the issue of waivability of congressional immunity was *United States v.*

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[100] *See id.* at 625–27.

[101] *See* note 98 *supra* and accompanying text.

[102] 408 U.S. at 625, 628.

[103] *Id.* The Court specifically listed voting, delivering committee reports, and conducting legislative hearings as protected legislative acts. *Id.* at 624.

[104] *Id.* at 639 (Douglas, J., dissenting). Justice Douglas noted Woodrow Wilson's belief that " '[t]he informing function of Congress should be preferred even to its legislative function.' " *Id.* Furthermore, a well-informed public would help to foster legislative accountability. *See id.*

[105] *Id.* at 621–22. During the 17th and 18th centuries in England, legislative privilege grew to be grossly abused, since a member's immunity could be expanded to embrace his estate and servants. Consequently, the ordinary man was deprived of his common law remedies, because his suit was tried in Parliament without many of the safeguards of the other courts. C. WITTKE, *supra* note 22, at 16–17.

[106] 408 U.S. at 621–22. Apparently using agency principles, the Court stated that "an aide's claim of privilege can be repudiated and thus waived by the Senator." *Id.* at 622 n.13.

[107] United States v. Helstoski, No. 76–201, slip op. at 11 n.6 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978). Although the Government made this argument in the *Helstoski* case, Judge Meanor maintained that the *Gravel* footnote on the issue of waiver could arguably be interpreted differently. Since the Constitution specifically refers only to legislators, another standard of waiver may apply to aides who have been granted their immunity "by judicial gloss" in order to advance the purpose of the clause. *Id.*

Craig.[108] In *Craig*, a state representative, along with two co-defendants, was indicted and convicted under a federal statute for extorting $1500 to block the enactment of a particular bill.[109] Two members of a three judge appellate panel held that Representative Markert had waived his common law speech or debate privilege by voluntarily testifying about his legislative acts before a federal grand jury.[110] Separating the privilege into a "dual protection" serving both the individual representative and the legislature as a body, the court theorized "that to the extent the inquiry impugns only the personal independence of the legislator and does not call into question the independence of other members of the body, the protection of the speech or debate privilege can be waived."[111] Moreover, the court viewed the personal portion of the immunity, involving only a legislator's own conduct, as an evidentiary-type privilege requiring a modified voluntary standard of waiver.[112]

A concurring opinion was filed in which the judge agreed with the majority's result,[113] but found it unnecessary to reach the waiver issue[114] since he believed there could be no common law speech or debate privilege without first finding an underlying common law official immunity. In the case of a federal criminal prosecution, however, official immunity may not be invoked.[115] On rehearing en banc,[116] the Seventh Circuit summarily affirmed the concurring opinion of the

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[108] 528 F.2d 773 (7th Cir.), *aff'd on rehearing*, 537 F.2d 957 (7th Cir. 1976) (en banc).

[109] *Id.* at 774. The defendants were indicted under the Hobbs Act, 18 U.S.C. § 1951 (1970), for extorting money from an automotive vehicle leasing firm, and for "inducing the payments 'under color of official right . . . .' "

[110] *Id.* at 781. The defendant also had claimed protection under the speech or debate clause of the Illinois Constitution, which states in pertinent part that "[a] member [of the General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house." ILL. CONST. art. 4, § 12. The court rejected this argument, maintaining that state laws or constitutions are not applicable to federal criminal cases. 528 F.2d at 776.

[111] 528 F.2d at 780. The court utilized the *Gravel* footnote on waiver to substantiate its assertion that a senator has the right to waive his legislative privilege. *Id.*; *see Gravel*, 408 U.S. at 622 n.13.

[112] *See* 528 F.2d at 780–81. Whereas the normal voluntary standard of waiver requires a "knowing and intelligent" waiver of one's rights, the court found that a lesser voluntary standard could be applied here. Concluding that a fair trial was not at issue, the court asserted that the legislator's testimony need only be "the 'product of an essentially free and unconstrained choice by its maker.' " *Id.* at 781 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)).

[113] *Id.* at 781 (Tone, J., concurring).

[114] *Id.* at 784.

[115] *Id.* at 782. The concurring judge noted that in addition to supporting official immunity, the federal speech or debate clause was meant to preserve the separation of powers and maintain equality among the branches of government. In a federal-state relationship, no similar purpose would exist. *Id.* at 783.

[116] United States v. Craig, 537 F.2d 957 (7th Cir. 1976) (en banc).

three judge panel.[117] Thus, the practical effect of the full court's decision was to leave unsettled the issue of waiver, subject to a future court's determination.

The *Helstoski* case is unique, inasmuch as both the scope of the legislator's speech or debate privilege, and whether that privilege could be waived, were at issue. In delineating the scope of the legislator's privilege, the United States Court of Appeals for the Third Circuit first addressed the issue of whether legislative acts could be introduced to show Congressman Helstoski's purpose in entering into the alleged criminal agreement.[118] The Government, placing its reliance on *Brewster*, had urged that the private bills in question, as well as "correspondence and conversations" referring to Helstoski's official acts, could be introduced into evidence to prove the purpose of the bribe.[119] The court, however, found that the Government had misconstrued *Brewster*, since that case only allowed the prosecution to show a legislator's purpose for taking a bribe if it could be done without inquiring into the legislator's official actions.[120] Therefore, Judge Seitz declared that Helstoski's "[l]egislative acts may not be shown in evidence for *any* purpose in this prosecution."[121]

A second aspect of the scope issue before the *Helstoski* court required a determination of whether secondary sources, which merely referred to official acts, fell within the range of protected legislative activities.[122] The Government had maintained that conversations and correspondence referring to prior legislative acts could be shown to prove purpose since they did not constitute actual legislative acts.[123] Judge Seitz, however, also rejected this argument and absolutely forbade any reference to Helstoski's official activities through the introduction of secondary materials.[124] Relying upon *Brewster* once again, the *Helstoski* court declared that to permit the introduction of "such secondary evidence could render *Brewster's* absolute prohibi-

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[117] United States v. Craig, 537 F.2d 957, 958 (7th Cir. 1976) (en banc).

[118] 576 F.2d at 521; *see* notes 10 & 19 *supra*.

[119] 576 F.2d at 521. The Government criticized the district court's "sweeping reading of *Brewster*," and observed that "the Supreme Court [had] recognized that a bribery prosecution of a member of Congress would of necessity entail reference to legislative acts both past and present." United States Petition for Rehearing En Banc at 3, United States v. Helstoski, 576 F.2d 511 (3d Cir. 1978).

[120] 576 F.2d at 521–22. Judge Seitz reiterated the *Brewster* guidelines in his opinion. He noted that "'[i]nquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.'" *Id.* at 522 (quoting *Brewster*, 408 U.S. at 527).

[121] *Id.* at 522 (emphasis added).

[122] *Id.* at 521–22.

[123] *Id.* at 521.

[124] *Id.* at 522.

tion meaningless."[125] The court observed that an adaptation of the Government's position would effectively discourage a congressman from informing the public about his legislative activities since his speeches and writings could be used against him should future litigation arise, thus undercutting the protection afforded by article I, section 6.[126]

While the court cited *Brewster*, ostensibly relying on the case's precedential value, it actually construed the privilege in more unqualified terms than had preceding courts by failing to employ the distinction drawn in *Brewster* between the motive for a legislative act and the purpose in taking a bribe.[127] Had the *Helstoski* court actually utilized the *Brewster* analysis, it could have determined that the Government was seeking to prove a criminal agreement rather than a legislative act.[128] Since the taking of a bribe would be deemed a permissible subject of inquiry under a *Brewster* rationale, conduct tending to prove purpose, although casually related to legislative functions, would not be barred. By formulating that initial distinction, the court could have logically concluded that reference to Helstoski's activities, which would otherwise be protected, were admissible as long as the Government claimed that it sought their introduction solely to prove the purpose of the illegal agreement.[129]

The *Helstoski* court attempted no such categorization, but rather unequivocally disallowed any inquiry into a legislator's official acts,

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[125] *Id.* Consequently, the court refused to sanction a loophole which would have facilitated circumvention of the speech or debate clause by permitting the introduction of all "non-privileged evidence" that made reference to any act the Government sought to prove. *See id.*

[126] *Id.*

[127] *Compare* 576 F.2d at 522 *with* 408 U.S. at 526–28.

[128] *See generally* 408 U.S. at 526. The factual situations of the two cases are sufficiently analogous to allow this kind of comparison since both cases involve a United States representative indicted for bribery under 18 U.S.C. § 201(1969). *See* notes 1–2, & 72 *supra* and accompanying text.

[129] *Compare* 408 U.S. at 526–28 *with* 576 F.2d at 521–22. *See also* notes 84–85 *supra* and accompanying text. The bribery statute, as interpreted by the *Brewster* and *Helstoski* courts, requires that the Government merely show "the 'corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act' under §§ 201(c) and (g)." 576 F.2d at 517 (quoting *Brewster*, 408 U.S. at 526) (emphasis in original). For the text of 18 U.S.C. § 201(c)(1969), see note 2 *supra*.

One authority, disagreeing with this interpretation of section 201(c)(1), takes the position that since the statute mentions "performance" rather than "promise," proof of the former is actually necessary in establishing a case of bribery. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1162 n.243 (1973). Most authorities and existing case law, however, seem to assume that only proof of a promise is necessary. *See* 408 U.S. at 526; Note, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335, 346–47 (1965). For a discussion of a possible solution to the problem of a bribery conviction based on intent alone, see Note, *supra* at 347–48.

regardless of whether that action related to the legislative process or to the promise to perform an official act in return for compensation.[130] The court's absolute bar, in effect, signified a return to the pre-*Brewster/Gravel* standard which simply banned any inquiry into legislative acts or the motives for such acts.[131] By its unqualified refusal to delve into any official acts, the court rejected the artificial distinction between one's purpose in taking a bribe and the motivation for performing a legislative act.[132]

Moreover, had the court relied on *Brewster* and *Gravel*, it could have further concluded that Helstoski's letters and conversations served political or informational functions, thereby falling outside of constitutionally protected congressional activities.[133] On this issue as

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[130] 576 F.2d at 522.

[131] *See* 383 U.S. at 184–85.

[132] *See* 408 U.S. at 536 (Brennan, J., dissenting); 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, 1045 (1974); Ervin, *The* Gravel *and* Brewster *Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 189 (1973).

[133] The *Brewster* Court's analysis distinguished legislative from political activities, thereby explicitly excluding speeches made outside of Congress from the speech or debate clause's protection. Similarly, the Court in *Gravel*, by disallowing the congressional informing function, had implicitly deemed outside speeches and privately published copies of legislative speeches to be non-legislative activities. *Compare* 408 U.S. at 512 and 408 U.S. at 625, 628 *with* 576 F.2d at 521–22. *See also* notes 76–77, 101–03 *supra* and accompanying text.

The Supreme Court continued to utilize this narrow approach in subsequent cases when defining the scope of legislative acts. In Doe v. McMillan, 412 U.S. 306 (1973), the Court held that both subcommittee members and their staff were protected from a civil suit for damages arising out of the publication of a subcommittee report describing specific instances of disciplinary problems in the Washington, D.C. public school system. 412 U.S. at 308, 312. The plaintiffs, on behalf of themselves and their children, had alleged that their rights to privacy were violated by the report's inclusion of identifiable students in derogatory contexts. *Id.* at 308 n.1, 309. The Court, however, was unwilling to extend immunity from private suit to either the Public Printer of the Government Printing Office or the Superintendent of Documents for the publication and distribution of the report. *Id.* at 314. Although authorized by Congress, the report could not be considered "an essential part of the legislative process and is not part of that deliberative process 'by which Members participate in committee and House proceedings.' " *Id.* at 315 (quoting *Gravel*, 408 U.S. at 625). Justice Douglas, in his concurring opinion, took exception to the use of the narrow *Gravel* analysis as applied to the printer, since he considered informing the public an essential legislative function which ought to receive the protection of the speech or debate clause. *Id.* at 328 (Douglas, J., concurring).

In Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), the Court determined that a congressional investigation of the respondent organization pursuant to the Internal Security Act of 1950 fell within the scope of protected legislative activity. 421 U.S. at 504–05. In the course of an investigation of subversive activities within the United States, the subcommittee issued a subpoena duces tecum to the bank where the Servicemen's Fund had an account, *id.* at 493–94, whereupon the respondents sought to enjoin implementation of the subpoena as a violation of their first amendment rights, *id.* at 495. Although the Court found that the actions of the subcommittee members and Chief Counsel were within the legislative sphere and thus, were not actionable, *id.* at 501, the Court again utilized the *Gravel* criterion in

well, the *Helstoski* court deviated from *Brewster's* and *Gravel's* narrow distinction between legislative and non-legislative activities by disallowing the use of any secondary materials as evidence. Although Judge Seitz did not enumerate all of the activities embraced by the legislative privilege, he implicitly included the informing function within the scope of protected acts.[134] Fundamentally this pronouncement expressed a more realistic appraisal of a legislator's official responsibilities. As a result, when references are made to legislative acts in a political speech, in a letter to constituents, or in a conversation with a campaign contributor, they will not be labelled mere "political activities."[135] The appellate court's opinion recognizes that a legislator's activities cannot be neatly categorized, but realistically must encompass a full range of duties where political and legislative functions often overlap.[136]

After establishing that the evidence promulgated by the Government constituted legislative activity protected under article I, section 6, the court next had to consider whether the defendant had effectively waived his privilege, thus allowing for the introduction of otherwise non-admissible evidence. The issue consequently raised—whether the speech or debate privilege may be waived as a result of a defendant's prior testimony about his legislative acts[137]—has previously received little judicial analysis.

The Government had urged the court to recognize that the speech or debate clause creates a personal evidentiary privilege which could voluntarily be waived by an individual congressman.[138] While

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inquiring whether the acts were " 'an integral part of the deliberative and communicative processes . . . .' " *Id.* at 504 (quoting *Gravel,* 408 U.S. at 625).

[134] 576 U.S. at 522.

[135] *See* 408 U.S. at 512.

[136] In numerous articles written after the *Brewster* and *Gravel* decisions, commentators deplored the Court's narrow construction of what constituted legislative acts. The writers maintained that the use of a mechanical approach ignored the reality of the modern legislative system, wrongfully excluded the informing function from legislative protection, and demeaned legitimate acts performed by representatives. *See, e.g.*, Cella, *supra* note 132, at 1041–85 (1974); Ervin, *supra* note 132, at 178–91; Reinstein & Silverglate, *supra* note 129, at 1149–54.

[137] Generally, when privileged communications are voluntarily disclosed, as in the case of testimony at a trial, a voluntary waiver is deemed to have occurred, since it is "conduct [that] warrants an inference of the relinquishment of such right." BALLENTINE'S LAW DICTIONARY 1356 (3d ed. 1969). For example, since an attorney-client "privilege is designed to secure the client's confidence in the secrecy of his communications," the privilege would not be violated but simply waived if the client voluntarily makes disclosures. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2327, at 634 (McNaughton rev. 1961).

[138] 576 F.2d at 523. In the district court proceeding, the Government relied on *Craig,* the only prior case to deal with the issue of waivability, in order to buttress its position that a voluntary waiver would suffice and indeed had occurred. United States v. Helstoski, No. 76–

acknowledging that the question of whether a legislator may individually waive his privilege remains unsettled, Judge Seitz indicated that it was unnecessary to decide the issue at this time.[139] With certainty, however, the court went on to hold that there could be no "finding of waiver in the context of a criminal prosecution except where the member *expressly* forfeits his protection under the Clause . . . ."[140] In analyzing the Government's voluntary waiver theory, Judge Seitz demonstrated that the legislative privilege could not be meaningfully analogized to the attorney-client privilege which is designed to protect a client from the disclosure of his private conversations.[141] Similarly, any comparison to the fifth amendment's bar on the use of coerced confessions was rejected since that privilege is

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201, slip op. at 9–10 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978); *see* note 108 *supra* and accompanying text. Noting that the waiver issue in *Craig* had been rendered moot because of a subsequent reversal of the case on other grounds, Judge Meanor nevertheless soundly rejected the three judge panel's equating of the legislative and evidentiary privileges. United States v. Helstoski, No. 76–201, slip op. 11–12 (D.N.J. Feb. 22, 1977 (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978). For a summary of the *Craig* panel's reasoning, *see* notes 140 & 141 *infra* and accompanying text.

[139] 576 F.2d at 523. The district court had also found it unnecessary to decide this issue, but "assum[ed], without so holding, that the Speech or Debate Clause affords certain rights which attach to a congressman, as an individual. . . ." United States v. Helstoski, No. 76–201, slip op. at 11–12 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[140] 576 F.2d at 523 (emphasis added).

[141] *Id.* The lower court had engaged in an extensive examination of the nature of the various privileges on the supposition that an appropriate standard of waiver would follow from a clarification of the character and underlying purpose of a particular privilege. *See* United States v. Helstoski, No. 76–201, slip op. at 12–16 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978). Relying on Professor Wigmore's analysis, Judge Meanor explained that an evidentiary privilege safeguards the privacy of "confidential communications" between such parties as husband and wife or attorney and client, a policy deemed worth furthering even at the expense of the "truth seeking process." *Id.* at 13. Professor Wigmore had recognized the "general liability of every person to give testimony upon all facts inquired of in a court of justice," 8 J. WIGMORE, *supra* note 137, §2285, at 527, but then qualified this statement by establishing four conditions which must be present to create an exception of privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. (emphasis in original). Thus, the district court acknowledged that this type of privilege could be relinquished by a volitional disclosure of the private information to a third party, for this would constitute "conduct inconsistent with the underlying purpose of the privilege." United States v. Helstoski, No. 76–201, slip op. at 14 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

intended to assure reliable testimony.[142] These privileges were found to differ from the legislative privilege since in neither of the preceding cases would a voluntary waiver standard serve to weaken the policies underlying the respective privileges, nor would an express standard tend to advance them.[143]

In articulating the purpose of the speech or debate privilege, Judge Seitz stressed the importance of preserving the independence of the legislative process by prohibiting the introduction of legislative acts into evidence.[144] Only an express waiver standard could effectively obviate "the potential for judicial and executive encroachment . . . ."[145] Fundamental to the court's result was the conviction that the disparate ends served by various other privileges must give rise to dissimilar standards of waiver. Thus, the clause could not logically establish a personal evidentiary privilege compelling a voluntary waiver standard.[146] Based on this finding and on the facts of the case, the court failed to find that Helstoski's prior testimony had met the stringent waiver standard required by the purposes of the speech or debate clause.[147] The court hypothesized that even if a congressman was able to waive his immunity, the waiver could not be effectuated by implication, but "must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member."[148] Applying this analysis, Judge Seitz also re-

[142] 576 F.2d at 523. The district court also recognized that the policy of preserving the rights of a criminal defendant is basic to the fifth amendment and is furthered by disallowing coerced admissions or confessions. United States v. Helstoski, No. 76–201, slip. op. at 14 (D.N.J. Feb. 22, 1977), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[143] 576 F.2d at 523. The district court had also alluded to the inconsistency inherent in both comparisons. Judge Meanor declared that legislative privilege was neither designed to preserve confidentiality, nor intended to promote reliable, uncoerced testimony. In fact, the court observed that the preservation of confidentiality would be wholly inconsistent with the policy of encouraging the free flow of information from a congressman to his constituents—a practice deemed basic to a representative system of goverment. Moreover, since legislative acts are generally an indisputable part of the public record, any contention that the privilege promoted reliability would be unwarranted. The court further noted that it could foresee the absurd situation which would arise if, each time a legislator delivered a speech or sent a newsletter to his constituents, he did so only at the risk of relinquishing his privilege. United States v. Helstoski, No. 76–201, slip op. at 14–15 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[144] 576 F.2d at 523.

[145] *Id.* at 523. Judge Meanor had commented that the clause serves the subsidiary purpose of relieving legislators from the onerous burden of defending themselves in litigation. This benefit, however, is not intended to aid a member in his private capacity, but rather is designed to remove an encumbrance which would distract him from official duties. United States v. Helstoski, No. 76–201, slip op. at 13 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[146] 576 F.2d at 523.

[147] *Id.* at 524.

[148] *Id.* at 523–24.

jected the Government's alternative argument that Helstoski had satisfied an express standard when he voluntarily testified with full knowledge of the potential protection of legislative privilege.[149]

While the court of appeals essentially supported the district court's holding and reasoning,[150] the greater analytical depth of the lower court's exploration of the waiver issue warrants a discussion of that opinion. Judge Meanor's thoughtful and perceptive analysis—allowing the purpose of a privilege dictate its means of waiver—should effectively have disposed of any future confusion between legislative and evidentiary privileges.[151] Less elucidating, however, was the district court's narrow ruling which essentially articulated a negative standard by outlining those circumstances in which a congressman would not be deemed to have waived his privilege.[152] Although Judge Meanor did propose an express waiver standard should the privilege be regarded as belonging to the individual, he never concluded that the right to waive attached solely to a member.[153] Consequently, the criterion advanced by the district court is contingent upon a finding that the privilege can be individually waived; however, should this question be answered in the negative by a future court, the proposed express standard will become irrelevant.

Since the district court chose not to ultimately resolve the issue whether the Congress as a whole or a representative in his individual capacity possesses the speech or debate privilege, it thus left unresolved the related question of who may waive it. Congressman Helstoski had posited that the speech or debate clause, properly construed, creates an institutional privilege incapable of ever being waived by an individual legislator.[154] While Judge Meanor found it unnecessary to rule on the merits of the defendant's contention, he articulated two possible conclusions that might emanate from this institutional interpretation.[155] The privilege, if waivable at all, could

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[149] *Id.* at 524.

[150] *See id.* at 523–24.

[151] United States v. Helstoski, No. 76–201, slip op. at 12–16 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[152] *Id.* at 16.

[153] *Id.* Generally, when confronted with a constitutional issue, a court will rule only as narrowly as the case requires. *See, e.g.*, 383 U.S. at 185; Central Hardware Co. v. N.L.R.B., 407 U.S. 539, 549 (1972). In *Helstoski*, the only issue facing the court was whether a waiver had actually occurred.

[154] United States v. Helstoski, No. 76-201, slip op. at 11 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[155] *Id.* at 11 & n.6.

be surrendered only by Congress as a body, or, alternatively, "could be construed as placing a non-waivable constitutional barrier to a court's receipt of evidence of a [defendant] member's legislative acts . . . ."[156] Although the court did not pursue the issue to any conclusion, dicta from earlier cases may illuminate this unsettled subject area.

The first premise, that Congress pursuant to its power to regulate the conduct of its members could enact a narrowly drawn statute authorizing the court to inquire into legislative acts, was deliberately left unresolved in *Johnson*.[157] Several years later, Justice Brennan, in his dissent, had argued that this was the sole issue then facing the *Brewster* Court.[158] He went on to declare that since the Constitution has provided a legislative forum for inquiry into legislative acts and prohibited questioning "in any other Place,"[159] such a statute, whether general or narrow, contravenes the intent of the framers.[160] Any such assignment to the judiciary of an essentially legislative task could not be reconciled with the separation of powers doctrine.[161] A similar result is reached if one employs a functional analysis which questions whether the purpose of the clause would be promoted by an institutional interpretation of the privilege. In that event, the sanctioning of a congressional transfer of a constitutional prerogative from the legislative to the judicial branch would irretrievably alter the balance of the federal government and adversely affect the independence of a legislator.[162]

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[156] *Id.*

[157] *See* 383 U.S. at 185.

[158] 408 U.S. at 530 (Brennan, J., dissenting). Justice Brennan criticized the majority for evading this issue. *Id.* at 540. He assumed that the indictment required an inquiry, at the very least, into motives for legislative performance, thereby requiring a determination whether 18 U.S.C. § 201 (1969) was constitutional. Bolstering his assumption was the fact that the Government had "not challenge[d] the applicability of the Clause to these charges," but instead had maintained that Congress could legitimately enact a narrowly drawn statute waiving legislative privilege as was done in section 201. *Id.* at 530. Since this issue was not addressed by the majority, the question of whether 18 U.S.C. § 201 (1969) is a narrow statute or a statute of general application remains unresolved. *See* Note, *Speech or Debate Clause Alleged Criminal Conduct of Congressmen Not Within the Scope of Legislative Immunity*. 26 VAND. L. REV. 327, 333 (1973).

[159] U.S. CONST. art. I, § 6.

[160] *See* 408 U.S. at 540–50 (Brennan, J., dissenting); notes 3 & 87 *supra*.

[161] 408 U.S. at 550.

[162] The often subtle distinction between a criminal act and a proper legislative activity militates against authorizing the judicial branch to inquire into allegations of legislative wrongdoing. For example, it is not difficult to envision a situation in which a congressman may accept a campaign contribution from a constitutent while discussing future legislation he plans to introduce in the House that would benefit the people of his district, including the contributing consitutent. These events could be construed by a member of the executive branch as the

The second possible interpretation is to view the privilege as absolutely non-waivable, either by an individual member or by Congress as a body.[163] In articulating this position in his brief, Helstoski believed that the privilege was not only institutional, but that it effectively created a jurisdictional barrier to prosecution comparable to exclusive jurisdiction vested in a particular court.[164] This position, however, is more supportable in its application to the High Court of Parliament, a body with tribunal origins, than it is to Congress, a governmental branch whose functions have always been singularly legislative.[165] Alternatively, Judge Meanor suggested that the clause might be interpreted in the light of its literal wording.[166] The prohibition that a member of Congress " 'shall not be questioned in any other place' " could be viewed as constitutionally precluding a waiver of any kind.[167] Additionally, by employing a functional analysis, a non-waivable privilege appears to furnish a wider protection than the speech or debate clause demands. While permitting Congress as a body to waive its legislative immunity would seriously diminish congressional independence, according an individual member that same right, consistent with the express standard set forth by the court,

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taking of a bribe, resulting in an investigation leading to a criminal indictment of the legislator. Yet the political-legislative mix of a congressman's job may make it difficult to always distinguish between a bribe and a campaign contribution. Recognition of this problem lends support to an interpretation precluding Congress, for example through section 201, from waiving its official immunity. *See id.* at 557–58 (White, J., dissenting); Reinstein & Silverglate, *supra* note 129, at 1160.

[163] United States v. Helstoski, No. 76–201, slip op. at 11 n.6 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[164] Congressman Helstoski, in his brief to the court of appeals, argued that the speech or debate clause "establishes not so much a privilege or even immunity from prosecution as a jurisdictional barrier to calling into question legislative acts in the prohibited forum." Brief for Petitioner, *supra* note 2, at 26–27. He went on to assert

> that such jurisdiction may be no more yielded by an individual Member than the jurisdiction of this Court to try matters of which it is exclusively vested could be transferred to a state court by the will of an individual member of the judiciary.

Id. at 27.

[165] For a discussion of the contrast between the English parliamentary privilege and the American legislative privilege, see notes 29–34 *supra* and accompanying text. Chief Justice Burger, emphasizing the differences between the two privileges, concluded that a much narrower interpretation should be afforded the speech or debate privilege. *See* 408 U.S. at 508, 517–18.

[166] United States v. Helstoski, No. 76–201, slip op. at 11 n.6 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978).

[167] *Id.* Judge Meanor acknowledged that Helstoski's theory was not without constitutional basis. The judge went on to suggest a literal reading of the clause as an alternative to the defendant's institutional theory. *Id.* Acceptance of a literal interpretation would effectively rebut the argument that Congress could waive the privilege through a narrowly drawn statute.

should adequately guarantee that a member's actions will not be induced by fear of a hostile executive or judiciary.[168]

Ultimately, the broad delineation of scope[169] and the high standard of waiver[170] expressed by the *Helstoski* court underscored its devotion to the important principles underlying the speech or debate clause. Cognizant that the purpose of the privilege was to prevent interference from, and accountability to, another branch of government,[171] the *Helstoski* court undertook an essentially functional analysis. The court, therefore, sought to interpret scope and waiver in such a manner as to effectively further the purpose of the clause.[172] Beginning with the premise that a legislator owes a degree of responsiveness solely to his constituents, it becomes evident that the evil which the clause purports to avoid is that a congressman, motivated by fear of a hostile executive, would fashion his behavior to the dictates of the other branches of government. To illustrate, a congressman who frequently and vociferously criticizes the administration

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[168] In addition to protecting a legislator from the results of litigation, legislative privilege also serves to free him from the burden of having to defend his actions in a courtroom. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 511 (1975); Powell v. McCormick, 395 U.S. 486, 505 (1969).

Granting a representative the sole power to expressly waive his privilege would eliminate some of the legislator's legitimate apprehensions, for he could than control which legislative activities could later be used in court against him. The legislator would not have to fear an inadvertent waiver due to a prior speech or writing, nor need he worry that earlier cooperative testimony could later be considered a waiver, albeit unsuspecting, and introduced at his own trial. Thus, the possibility of an unintentional waiver would not be a factor in molding an honest congressman's legislative behavior. In those cases where a legislator has expressly waived his privilege, because of remorse over his improper acts or a recognition that the Government has a strong case against him, his legislative independence would not be compromised or undermined since the waiver would be voluntarily and knowingly made.

While the Court has never had the occasion to expressly hold that an individual member of Congress may waive his privilege, some support for this proposition may be found in dicta in *Coffin*. *See* notes 39–42 *supra* and accompanying text. Additional substantiation may be found in Justice Brennan's dissent in *Brewster* in which he declared that "there is much in the history of the Clause to point the other way, toward a personalized legislative privilege not subject to defeasance even by a specific congressional delegation to the courts." 408 U.S. at 547 (Brennan, J., dissenting). The *Gravel* footnote stating that a senator may waive his aide's privilege has also been cited as support for the personal theory of waiver. *See* United States v. Helstoski, No. 76–201, slip op. at 11 n.6 (D.N.J. Feb. 22, 1977) (unpublished opinion), *aff'd*, 576 F.2d 511 (3d Cir. 1978); notes 106–07 *supra* and accompanying text. Furthermore, a Third Circuit opinion "recognize[d] the existence of a personal privilege which may be asserted by a legislator in a federal criminal case to exclude" legislative acts or their motivations but did not find a similar privilege belonging to "the legislature as an institution . . . ." *In re* Grand Jury Proceedings, 563 F.2d 577, 585 (3d Cir. 1977).

[169] *See* text accompanying notes 130–32 *supra*.

[170] *See* text accompanying note 149 *supra*.

[171] 576 F.2d at 523.

[172] *See id.* at 522, 523.

may have reason to fear a Justice Department inquiry.[173] This "chilling effect" on congressional freedom would encourage "defensive legislating," resulting in decreased representational effectiveness and an unbalanced federal structure.[174]

Frequently unarticulated, yet usually implicit in any speech or debate clause analysis, is a balancing of competing policies and interests.[175] While the *Brewster* Court placed greater emphasis on the effective prosecution of a senator who has misused the powers of his office, the *Helstoski* Court gave more weight to the principle of preserving the separation of powers, even at the cost of an occasional guilty defendant avoiding prosecution.[176] The article I, section 6 protection envisioned by the *Helstoski* court would be similar to that accorded by the fourth, fifth and sixth amendments, which have been interpreted as affording protections so crucial to an accused that their infringement may act as a bar to conviction.[177]

The substantial policy reasons that moved the framers to insert legislative privilege within the body of the Constitution ought to provide meaningful guidelines for today's judges who are faced with defining the privilege's boundaries. Shortly, the Supreme Court will decide if the speech or debate clause bars from use at Helstoski's trial any reference to legislative activity.[178] If the Court affirms the Third Circuit in delineating the controversial evidence as privileged legisla-

[173] Many congressmen, for example, are vulnerable to attack in the area of campaign contributions. It is not impossible to imagine a situation in which a vindictive president, angry at a particular legislator, would use the machinery of the Justice Department to commence a criminal prosecution.

[174] *See* United States v. Johnson, 337 F.2d 180, 191–92 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966) (fear of inquiry by court may result in legislator unduly self-censoring his right of free speech so as to behave in unquestionably safe manner); *Coffin*, 4 Mass. at 27 (immunity exists for benefit of people so that legislators can perform their duties without fear of prosecution); Ervin, *supra* note 132, at 191 (congressional oversight function will suffer unless clause is interpreted liberally to include acquisition and republication of germane material within protected activities); Comment, Brewster, Gravel, *and Legislative Immunity*, 73 COLUM. L. REV. 125, 146–47 (1973) (narrow interpretation of clause will result in undermining congressional watchdog role); Note, *supra* note 158, at 334–35 (inquiry by one branch of government into conduct of members of co-equal branch impliedly questions their competency and equal standing).

[175] *See, e.g.*, 408 U.S. at 525; *In re* Grand Jury Proceedings, 563 F.2d 577, 585 (3d Cir. 1977). *See also Coffin*, 4 Mass. at 28 (balancing of individual's reputation against representative's freedom to exercise his legislative duties in civil suit).

[176] *Compare* 408 U.S. at 526–28 *with* 576 F.2d at 522. The framers were aware of the potential for abuse of the privilege, but believed that the risk was necessary in order to promote legislative independence. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 510–11 (1975).

[177] *See generally* 337 F.2d at 191, *aff'd*, 383 U.S. 169 (1966). Legislative immunity, in contrast to the Bill of Rights, confers a less complete protection since article I, section 5, provides for an alternate forum for trying a defendant-legislator. *Id.* at 191 & n.18. For the text of article I, section 5 of the United States Constitution, see note 89 *supra*.

[178] United States v. Helstoski, 47 U.S.L.W. 3401 (U.S., Dec. 12, 1978) (granting certiorari).

tive activity, it would then be confronted with formulating an appropriate standard of waiver.[179] Without the use of this evidence, the Government's case is considerably weakened, perhaps to the extent that the indictment would have to be dismissed.

While both lower courts employed a broad construction of article I, section 6 in forbidding from use as evidence all reference to legislative acts, the Supreme Court has several options available dependent upon its view of the clause. While *Brewster* may not easily be ignored, strict reliance upon its basic reasoning is likely to result in a reversal of the Third Circuit's holding.[180] Should the Supreme Court elect to affirm without disturbing *Brewster*, it could do so by distinguishing the wording of the *Helstoski* indictment from the language in the *Brewster* charge, although the result would be attained by elevating form over substance.[181] Preferably, the Court will simply affirm by promulgating a forceful statement which embodies a commitment to absolute legislative independence.

Author's Note:

Prior to publication of this Note, the United States Supreme Court issued its opinion in the Helstoski *case,* United States v. Helstoski, *47 U.S.L.W. 4710 (U.S. June 18, 1979), affirming the decision of the Third Circuit.*

Although the Court, in a separate opinion, refused to dismiss the indictment, Helstoski v. Meanor, *47 U.S.L.W. 4708 (U.S. June 18, 1979), it held that the principles underlying the speech or debate clause precluded the introduction of any reference to Helstoski's past legislative acts at this trial,* United States v. Helstoski, *47 U.S.L.W. at 4713. Assuming, without deciding, that an individual congressional member might waive his legislative privilege, Helstoski's actions and words failed to meet the "explicit and unequivocal" requirement set out by the Court. Id. at 4714. Again, assuming that Congress as a body, could waive the protection of the clause by statute, the Court held that § 201 does not amount to "an explicit and unequivocal expression" of legislative intent. Id. at 4715.*

Suzanne Raymond

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[179] If the Court were to hold, however, that the evidence in question does not constitute legislative activity, there would be no need to address the second issue, for non-legislative acts are not privileged.

[180] *Brewster* appears to be the controlling case since it is the most recent decision by the Court in this area. Furthermore, *Brewster* bears a close factual similarity to *Helstoski* since both cases involve bribery indictments under 18 U.S.C. § 201 (1969). *See* note 128 *supra.*

[181] 576 F.2d at 516. In his petition for writ of mandamus, Congressman Helstoski emphasized the differences between the language of the two indictments. Helstoski contended that since the *Brewster* indictment had not alleged specific legislative acts on its face, the focus remained on the agreement. However, because his own indictment had detailed the introduction of particular bills on specific dates for named aliens, the focus had shifted to the acts themselves. *Id.* at 516–17.