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The Court and Congress (II)

In the Gravel case, as we have noted, the Supreme Court drew the boundaries of the speech and debate clause at the doorways of congressional chambers and hearing rooms, suggesting that business transacted inside those doorways is protected from executive or judicial scrutiny and business outside is not. In the case involving former Senator Daniel B. Brewster, the Court had an opportunity to decide how sweeping an immunity Members of Congress enjoy within the legislative sphere—in this instance, whether the Justice Department could prosecute Mr. Brewster for allegedly accepting a bribe to influence certain votes and actions on postal rate legislation. Instead of dealing with that general question, however, the Court embarked on a skewed line of reasoning which leads to a vast realm of new problems for congressmen and their constituents.

When the matter of congressional immunity from criminal prosecution was posed in the case involving Rep. Thomas F. Johnson in 1966, the Court held that the speech and debate clause "generally forecloses" executive or judicial inquiries into a congressman's legislative actions, including floor speeches and votes, or the motivations behind such conduct. At that time, however, the Court expressly "left open for consideration" the constitutionality of a prosecution which, although it might involve legislative acts, was "founded upon a narrowly drawn statute" enacted by Congress to regulate its members' conduct.

We—and almost everyone else—had thought the Brewster case raised that question squarely, but the present Court avoided it in dazzling display of something which passes for logic. The Court managed to decide in favor of prosecution not by extending the legal arm into the legislative arena, but by plucking the bribery out. "The illegal conduct," Chief Justice Burger wrote for the majority of the Court, "is taking or agreeing to take money for a promise to act in a certain way. . . . It does not matter whether the promise . . . was for the performance of a legislative act," because the act itself became irrelevant.

This overly clever distinction between promise and performance raises enormous, unnecessary dif-

ficulties. As Justice White wrote in a strong dissent, the decision will not promote the goal of legislative freedom from intimidation: "It will be small comfort for a congressman to know that he cannot be prosecuted for his vote, whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain."

More broadly, the zeroing in on "promises" offers politically energized prosecutors lush new fields in which to fling about aspersions on the conduct of congressmen. Has a representative promised to vote for certain tax preferences? Has a senator pledged to follow a union's (or a business group's) line? Find a related campaign contribution (readily located, if it exists; under the new disclosure law) and seek an indictment. By the time the evidence or lack of it has been explored, the damage to the legislator's reputation will have been achieved—regardless of what he actually did.

The possibility of such slanderous sport is not likely to promote honesty on Capitol Hill, but instead to drive venality further underground. As Justice White suggested in a dissent excerpted *For the Record* elsewhere on this page, it is likely to inhibit the legitimate, if often mysterious, interplay of pressures and promises which fuels and drives the real workings of Congress. It is also likely to generate new public mistrust of a political system which is already ethically gray and suspect enough.

Through these decisions, then, the Court has created a setting in which congressmen are insulated from prosecutions only when they are isolated from the people—a Congress which is only protected when it talks to itself. By this peculiar reading of the speech and debate clause, the Court has inhibited candid speech and vigorous public debate, precisely those qualities that clause was designed to protect because those are the most vital attributes of a truly representative legislature. It should not take Members of Congress very long, regardless of their personal feelings about Senator Gravel or Mr. Brewster, to recognize the far-reaching institutional challenges which the Court has flung across the street.