In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

No. 70-45

Washington, D.C.

March 20, 1972

Pages 1 thru 41

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UNITED STATES OF AMERICA, Appellant,	:	
v.	:	No. 70-45
DANIEL B. BREWSTER, Appellee.	:	

Washington, D. C.,

Monday, March 20, 1972.

The above-entitled matter came on for argument at 11:13 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General, Department of Justice, Washington, D. C. 20530; for the Appellant.

NORMAN P. RAMSEY, ESQ., 10 Light Street, 17th floor, Baltimore, Maryland 21202; for the Appellee.

C O N T E N T S

[Afternoon session - pg. 33]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 70-45, United States against Brewster.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GRISWOLD: May it please the Court:

This case is here on reargument. It is a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on constitutional grounds.

The indictment appears beginning on page 1 of the Appendix, it consists of nine counts, or ten counts, the odd-numbered ones of which relate to the defendant, former Senator Brewster; the even-numbered counts are not before the Court at all. And the first count may be taken, for the purposes of this appeal, as typical of the rest, raising the question which was decided.

The first allegation in the count is that: "At all times hereinafter mentioned in this indictment, Daniel B. Brewster was a public official ... that is, a member of the Senate of the United States from the State of Maryland."

And then over on page 2 of the indictment, the principal allegation of the first count is that: "Daniel B. Brewster being a public official ... acting for and on behalf

thereof ... directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself and for an entity ... in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(c)(1) and 2, Title 18, United States Code."

After the indictment was found, defendant, through his counsel, filed a motion to dismiss the indictment, in fact two motions to dismiss, but the only one that's here is the one which appears on page 8 of the Appendix. And the motion to dismiss the odd-numbered counts of the indictment was on the ground that in each such count the defendant is charged with being influenced in his performance of official acts in his capacity as a United States Senator; and then, finally, the third reason of the motion to dismiss: "Each Count of the Indictment, as charged, against this Defendant violates the provision of Article 1, Section 6 of the United States Constitution." Which is the speech or debate clause, which, it will be remembered, says in rather simple terms that for any speech or debate in either House, Senators or Representatives shall not be questioned in any other place.

The language, the important language here is "any speech or debate in either House".

And then the order of the court from which this appeal is taken appears on page 34 of the Appendix: "Ordered that the defendant's motion be granted, and the indictment and hereby is dismissed as to the defendant Brewster for the reasons stated orally by the Court at the hearing on October 9, 1970."

And those reasons appear on the preceding page, page 33, where the Court said:

"Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States."

Now, I suggest that that's simply a paraphrase of exactly what the indictment says.

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

The question of the jurisdiction of this appeal has been deferred to the hearing of the merits. I find it, myself, somewhat difficult to see that there is doubt as to the jurisdiction of the appeal. This arises under the old version of the Criminal Appeals Act, since the indictment was found

here before January 1971, and it seems to us that this appeal comes under two of the clauses of that statute.

There is a suggestion in Mr. Ramsey's brief that, for some reason, the statute is not applicable because of a reference to a conference memorandum, which was said to be before the judge; it is not in the Appendix. I have never seen it.

I would like to suggest, with respect to it, that there is no procedure for summary judgment in the rules of criminal procedure. I think that there is a sort of a spill-over here because we're familiar with summary judgment in the rules of civil procedure, that this is in some way a decision on a summary judgment.

But I know of no procedure in the rules of criminal procedure for summary judgment.

And then I would like to suggest, Mr. Ramsey says that this was the equivalent of an acquittal, I would like to point out that no jury had been empaneled, no trial had been commenced, and I would like to suggest that,as far as anything I have heard of in the law of criminal procedure so far, there cannot be an acquittal except at a trial. That is, until a jury has been empaneled.

Now, this becomes a little complicated in the case of a trial without jury, but I still suggest that there cannot be an acquittal without a trial. That is, that the commence-ment of a trial without a jury is a rather formal act, like the

empaneling of a jury, and requires, among other things, that the right to trial by jury has been waived. There was no such waiver here, and there was no trial.

There cannot be double jeopardy until there has been jeopardy. Here no jury had been empaneled, and jeopardy had not attached.

I would like, in closing the jurisdictional part of my argument, to refer to two decisions of this Court, which are not cited in my brief, one of them, the first of them, is cited in an early brief of Mr. Ramsey, though for another point. That is the case of United States v. Fruehauf, in 365 U.S., where the situation is almost exactly parallel to that here. There had been memoranda before the District Court. There was a direct appeal to this Court under the Criminal Appeals Act.

If the position taken now by Mr. Ramsey is correct, even assuming that the conference memorandum to which he refers is a part of the record here, that case, that appeal should have been dismissed on the ground that there had been a decision under summary judgment or an acquittal. That decision -- that appeal not only was not dismissed, but the case was sent back to the District Court for trial.

And then another case which is not cited in our brief, but it is so closely parallel that I think it appropriate to mention it here. United States v. Halseth, 342 U.S. 277,

where it appeared that there had been a stipulation in the District Court, and there again if the decision of the court with respect to that stipulation had amounted to an acquittal or a decision on a summary judgment, the appeal should have been dismissed, but the appeal was not dismissed.

Both of these cases are discussed in Mr. Justice Harlan's opinion in United States v. Sisson, in 399 U.S. But I would point out that the Sisson case is clearly inapplicable here, because there there had been a full trial and the judge's decision, which amounted to the entry of a judgment notwithstanding the verdict, was based on facts which appeared at the trial; thus jeopardy had attached and the basis for an appeal was removed, as was held in the Sisson case itself.

Now, turning to the merits here, the case is of course the step beyond the Court's decision in United States v. Johnson, which was decided some six years ago. The appellee relies on the Johnson decision, but I think that it is, by its own terms, inapplicable here.

With the benefit of hindsight, one can say that the Johnson case was an unfortunate case to bring before the Court. The charge there was under the conspiracy statute which is a very general statute; while the charge here is under a bribery statute, one which, with respect to Congressmen and Senators, has a continuous history, going back to 1853, 119 years, during which time Congress has expressly said that when a

Congressman or a Senator accepts a bribe he should be subject to prosecution through the regular procedures of the criminal courts.

But in the Johnson case as well not much concern was given about the speech or debate clause, in initiating the prosecution or in carrying it out. In the case the indictment contained a specific reference to the speech and debate clause, which was quoted at some length in the Court's opinion. This is on page 184, and paragraph 15 of the indictment said it was a part of said conspiracy that the said Thomas F. Johnson should render services for compensation, to wit, the making of a speech defending the operations of Maryland savings and loan associations, and so on.

Q Mr. Solicitor General, do you recall whether in the Johnson case there was a motion in the trial court challenging the indictment on that specific ground?

MR. GRISWOLD: I do not recall, Mr. Chief Justice. I do not believe that it appears anywhere in the opinion of this Court; I have not searched through the record as to what was done in the District Court.

Not only was this in the indictment but at the trial itself, some 50 pages of the transcript related to the speech in the case presented by the government. Andhaving been so opened up by the government, there was much more about the speech in the presentation of the defense.

The government introduced a copy of the speech in evidence and devoted substantial argument to the proposition that the nature of the conspiracy was that the speech should be delivered in order that it could be reprinted and distributed among appropriate persons in Maryland.

Now, too, with respect to the Johnson case, it's very significant that the opinion was narrowly guarded. On page 184 of the opinion, the Court said: Whatever room the Constitution may allow for such factors in the context of a different kind of prosecution -- and this of course is a bribery prosecution not a conspiracy prosecution.

And then on page 185 the Court said: We emphasize that our holding is limited to prosecutions involving circumstances as those presented in the case before us. We expressly leave open for consideration, when the case arises, a prosecution which though possibly entailing inquiry into legislative acts or motivations is founded upon a narrowly drawn statute, passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

Then I think it's not irrelevant to point out three members of the Court, Chief Justice Warren and Justices Douglas and Brennan, concurred only in the limited holding of the Court, that the use of the Congressman's speech during this particular trial, with an examination into its authorship, motivation, and content, was violative of the speech or debate

clause.

Two members of the Court took no part in the case, so that there were only four Justices who concurred in anything broader than the limited holding referred to in Chief Justice Warren's opinion.

Now, there's nothing like this in this case. There is no speech at all. Indeed, as I've indicated, there's no evidence before the Court. There was no examination into the authorship, motivation, and content of any speech. There is a reference in each count to the effect that Senator Brewster is charged with taking a bribe, and I quote, "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation."

Q Mr. Solicitor General, suppose, under this indictment, the case were tried and the defendant established that he voted not at all, absented himself or abstained, or voted contrary to the agreement charged; would that -- if, nevertheless, a bribe had been paid, would that undermine the case, the government's case?

MR. GRISWOLD: I think not, Mr. Chief Justice, if the defendant was the one who brought that out. I am a little concerned about the -- if the prosecution relies on a vote.

Q I'm assuming the defendant would be the one who brought it out.

MR. GRISWOLD: If the defendant brings it out, I

assume he can waive -- well, I don't know. It says, "shall not be questioned"; unless he relies on it, I find it hard to see how he can complain that he is being questioned.

I would think, certainly under the Johnson case, it is clear that the government cannot maintain the prosecution if it relies directly on the giving of a speech. There is some reference in the opinion to tangential use. I don't quite know just what "tangential use" means. I would think that it might perhaps be within that language if it were shown that there was a speech, but if the text of the speech was not relied on, and if the motivation and authorship of the speech were not gone into.

But I would suggest, Mr. Chief Justice, that this indictment, at this stage, can be sustained without answering these questions. I don't know just where the line is. I know that the Constitution says "speech or debate in either House"; and I don't think that that is broad enough or ought to be held to be broad enough to cover things which occur outside of sessions of the House which might be construed to include sessions of committees. A committee may be, for this purpose, something done in the House.

It doesn't say "vote", but I am troubled about "vote", and there are opinions of the Court which have indicated, though I don't think actually decided, that vote may be enough.

But this indictment charges him with receiving a

bribe for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation.

Well, now, suppose we strike out "vote"; suppose we say that that can't be referred to. I don't concede that, but let's strike it out. There is still plenty in this indictment, and the evidence at the trial may show nothing relating to a vote, there is no charge with respect to a speech, which is the only thing to which the Johnson case applies; and unless the Court is prepared to hold that nothing that a Senator does as a Senator can be questioned in any other place, under the speech and debate clause, a result far beyond anything that has ever yet been decided, it seems to me that there is no basis for holding that this indictment, of itself, without any evidence, is in violation of the speech and debate clause.

Our position --

Q Mr. Solicitor General, isn't the difference that there's no speech involved, this is "act"; and wouldn't it be true that if the Senator took the $5,000 and the next day the bill was withdrawn from Congress, he couldn't have voted or done anything on it, but he would still be guilty?

MR. GRISWOLD: Yes, Mr. Justice Marshall, that would be --

Q Because he took the bribe.

MR. GRISWOLD: -- it would be our position that the

crime is committed when the bribe is either solicited or received. He doesn't have to receive it, with the requisite intent, and that it is not necessary to prove that there was in fact any legislative act of any kind.

And I think that becomes quite clear when you consider the solicitation language in the statute: asks, demands, seeks, solicits any bribe. It would not be possible to prosecute the solicitation of a bribe if the other construction of the statute is taken until you waited to see whether he did something.

And, as I have tried to develop in the supplemental brief which we have filed, I think that a prosecution under this statute can be maintained and that the indictment is sufficient without the showing of any speech or debate of any kind, without the showing of any action, if there is evidence which can show that at the time he solicited or received the bribe he intended to take legislative action in accordance with the bribe's request.

MR. CHIEF JUSTICE BURGER: Mr. Ramsey.

ORAL ARGUMENT OF NORMAN P. RAMSEY, ESQ.,

ON BEHALF OF THE APPELLEE

MR. RAMSEY: Mr. Chief Justice, and may it please the Court:

I should like to address myself first to the suggestion made by the Solicitor General in his closing comments.

First, I would request of the Court that attention be given to the fact that this particular subject matter, which is now asserted by the Solicitor General, was never argued below; it was not the textural aspect of the case when it was before the District Judge.

What was before the District Judge was perfectly clearly set forth in connection with the debate and colloquy, and in connection with the record of the case as it there existed.

Government counsel there said that under this indictment, and I'm quoting from page 28 of the record extract, "we are not contending that what is being charged here, that is the activity by Brewster, was anything other than a legislative act; we are not ducking the question, it is squarely presented. They are legislative acts, we are not going to quibble over there."

Now, the important point to this case, as we see it, is this: This case does not test the outer limits of speech or debate. This case falls squarely within the hard core of speech or debate.

In the earlier arguments in the brief of the government which was earlier submitted in this case, the government conceded that while the precise limits of Johnson may be a little vague, quote, "We do not contend that the clause protects only speech."

And then they went back to two former holdings of this Court, in the Powell case and in the Kilbourn case, committee reports, resolutions, and the act of voting are equally covered, as are, quote, "things generally done in a session of the House by one of its Members in relation to the business before it."

That has never been a doubted proposition. It was against the text of that, and this Court's holding as it enclosed it on the speech or debate clause, that District Judge Hart made his decision. Against the background of that, he placed an indictment, which called, as the Solicitor General has candidly conceded to the Court, into question official conduct in the nature of action, vote, and decision.

Now, this illusive memorandum of conferences was known to trial counsel below, and certainly appellate counsel are charged with knowledge of what trial counsel did know. All we put that before the Court for, in the first instance, was to make the Court aware that this case was not decided in a vacuum, that there was justification for the comment by Judge Hart, quote, "based on the facts of this case", close quote, that this was not decided in the abstract.

As one of the Justices --

Q You're saying it was not decided on the indictment?

MR. RAMSEY: It was not decided in the abstract.

Q On the indictment?

MR. RAMSEY: Well, I'm coming to that, sir. One of the Justices, Mr. Chief Justice, inquired before -- I think it was Justice Stewart -- Did not the indictment say "action, vote, or decision"; and it did, sir.

But that was simply clarified, and in that regard our position in that matter is this: Basically, when a Congressman -- using that, of course, in its general phraseology -- when a Congressman is accused of improper conduct, improper motivation, then there must come some point in the proceeding when either, before the grand jury action is brought to stop improper intrusion into areas covered by speech or debate, or if after indictment, when the trial court has occasion to have access to the precise facts upon which the application of speech or debate is made apparent. We say that that is what happened in this particular case. It was not challenged at the grand jury level, as is true in another case currently pending, and as to which I will make no detailed comment; but it was challenged by a 12(b)(1) motion as soon as it could be.

That is to say, we put before the court, and the government cooperated in putting before the court, that what was being questioned in this case was legislative conduct, not the postulated absence of legislative conduct.

Q Well, what phase of legislative conduct is the

taking of a bribe?

MR. RAMSEY: It is -- Mr. Justice Marshall, my answer to that would not be a direct one, it would be this, sir: You would be testing motivation if you say that a give phase of legislative conduct, whether it be vote, whether it be committee discussion, whether it be a report written by a given Congressman, was motivated in one way, or by one set of circumstances, you then fall within the ambit of speech or debate.

Q Well, what has speech and debate got to do with taking a bribe?

MR. RAMSEY: The taking of the bribe is in the concept of an indictment like that before this Court, sir.

Q Well, is speech or debate mentioned in the indictment?

MR. RAMSEY: Oh, no, it is not. You are asking, sir, whether it is said in the indictment that a particular speech was made as --

Q No, the words "speech or debate" or anything closely resembling it in the indictment? Which is the one thing that we have before us.

MR. RAMSEY: No. I would have to answer that directly, sir, that is not in the indictment. There is no word --

Q And that's all we have before us is that he took

a bribe.

MR. RAMSEY: Well, --

Q Even if he never made a speech about anything.

MR. RAMSEY: Well, I respectfully submit, Mr. Justice Marshall, --

Q Well, as I understand your position, when a Member of Congress takes a bribe of any amount of money and then makes a speech, he is in a different category from anybody else in the United States?

MR. RAMSEY: No, he's in the same category as any other Congressman who does the same thing: --

Q Or any other person?

MR. RAMSEY: -- he is subject to penalty in his own House, which has the right to question him; but he is to be questioned "in no other place" in the language of speech or debate, sir.

Q Well, can he raise that if he doesn't make a speech?

MR. RAMSEY: If he does not make a speech, then we are back to the inquiry of the breadth of speech or debate. Are we strictly talking speech or debate? And we say, since Kilbourn in 1881, that has not been so.

Q Well, so far as I'm concerned, my ambit of speech and debate at least stops at the bribe.

[Laughter.]

MR. RAMSEY: Well, let me put it this way, Mr. Justice Marshall --

Q This is like a freedom of speech case. A man has the right of freedom of speech, but that doesn't give him the right to act illegally. And this is an act, solely, the act of taking a bribe. That's the only thing involved in this case. And don't you agree that that point was left open in Johnson?

MR. RAMSEY: No, I say what was left open in Johnson, Mr. Justice Marshall, was the issue of whether there was an outer perimeter where this Court -- or parameter, I should say, where this Court will say that speech or debate does not protect. But in this instant case, speech or debate, as an applicable principle, was conceded before the lower court.

Q Where is that in the record?

MR. RAMSEY: As a practical matter, the issue is posed in this fashion in the lower court: They say, "We say it was legislative activity; he was motivated in his legislative conduct by the acceptance of improper sums of money."

We say, and this was the thrust in the lower court and also in the government's original brief in this Court, "that this however falls out of that heartland of speech or debate and is within the exclusion which this Court reserved when Johnson was decided."

We say, to the contrary, that on that issue, as posed

before the lower court, that what was done in this case, and the facts as alleged in this case fall squarely within what was covered by Johnson, and do not fall within the exclusion. We do not say that it is not possible to postulate a situation which will take it to the outer limit of speech or debate and beyond the outer limit of speech or debate, so that there may be an indictable crime.

But, as was said in the Johnson case, it is our position that speech or debate extends at least so far as; and that is the language of this Court in that opinion. And we say it does clearly extend "so far as" to protect against inquiry as respects legislative acts under the circumstances of this case. And that is the way in which this whole issue came up.

These assumptions, these hypotheses, these hypothetical illustrations were never part of the case when it was before Judge Hart, and there is no doubt in my mind that this Court can and will, on some occasion, take the speech or debate clause, analyze it, and find it without application to certain sets of conduct as, for example, in Burton, and as in Johnson, where the conduct is not related to legislative acts but is related to executive.

We agree that that is the past ruling of this Court, and we --

Q But is it not a routine function of Congressmen

to advocate propositions and to importune officers of the Executive Branch to do one thing or another for their constituents?

MR. RAMSEY: I suggest, sir, that Senator Burton would have loved to have had the Chief Justice express similar opinions back at the time of his case; but I think that's decided, I think the Executive --

Q I'm speaking of the factual matter. Isn't that what --

MR. RAMSEY: But it is not legislative conduct, as such, sir. The legislative process, turning as it does necessarily to the absorption of the representative of his various constituents' wishes and desires, of the need to represent them in connection with subject matters which come before him for political judgment and for judgments as respects policy, he must be free, and he is indeed free; and this is the significant aspect and the significant posture of a Senator or a Congressman in this regard. He must always be open to suggestions, to pressure, he must always be open to the possibility that an executive desiring to penalize someone who has voted against the executive may wish to posture him against his voting record with his list of contributors, with an inference to follow, if an unfriendly grand jury chooses to draw it, that there is a necessary connection between the assemblage of the money necessary to win a campaign and the

favorable vote, be it on fishing, be it on oil, be it on what-may-it-be. But --

Q Now, you spoke, Mr. Ramsey, of some of these hypothetical situations not being before the court, the District Court, which is of course true; but that's because, in part, no evidence was taken, the case never reached that point. Is that not so?

MR. RAMSEY: Well, it is because, if you please, Mr. Chief Justice, it is because the government postured its case before the District Judge and said: We expect to prove this case by proving legislative acts of Senator Brewster.

And the judge took their representation that this was so. It became a concessum of record, and it was a concessum predicated on known facts, known to the judge, known to counsel, and his opinion expressly stated, "based on the facts of this case".

So that it was not simply a case of taking up hypotheticals, the government had not postured either its indictment or its presentation on hypothetical ability to reach outside and find some circumstance which would permit the drawing of a claim that it was outside speech or debate.

It had challenged the lower court, by bringing in an indictment squarely designed to fall within speech or debate, as Johnson defined it, and put the issue to the District Judge to say that this was a narrowly drawn statute. That's exactly

the way they attempted to posture it.

Now, under those circumstances, it was clean and clear that they posed the issue to the trial court: Are you now willing to say that if we take a statute which we deem to be a precise, narrowly drawn statute, that you will say that speech or debate must surrender to it?

And that was the way it was before the court. And the facts were before the court that what was being challenged was legislative conduct of the Senator.

Q Mr. Ramsey, --

MR. RAMSEY: Yes, sir.

Q -- isn't the logical import, both of Judge Hart's ruling below and your argument here, that Congress cannot, under any circumstances, provide for the judicial prosecution of the taking of a bribe by a Member of Congress?

MR. RAMSEY: Mr. Justice Rehnquist, I do not believe that that is a necessary corollary. I think by the reservation which was made by the Court in Johnson, it was indicated that there might be an area where such a bribe could be penalized.

We argue, as you are aware, sir, in our brief that it being a power granted to each of the Houses to inquire into motivation of Members, and not granted to the Houses as Houses of Congress to legislate on generally, that they cannot take away the power which the people gave, or the protection the people gave their representatives.

But, coming past that point, I would say, sir, that in, for example, the bribed Congressman's immunity from prosecution, which is commented on in Harvard Law Review quite extensively, and is one of the leading works dealing with this subject matter, there is a suggestion made that a properly drawn statute might be structured which could permit it.

We are somewhat ambivalent on that, since we argue that there is no constitutional power to delegate that right, the Section 5 right, over to the courts for inquiry. But, basically, I would say yes, there may be a chance, Mr. Justice Rehnquist, where it could be done.

Q What sort of a situation would that be, consistent with your own position?

MR. RAMSEY: Well, as a practical matter, I would think that some of the -- in the first argument in this case we had a series of hypotheticals put to counsel for the appellee, and it was an attempt, really, to move away from the heartland of speech or debate and outward.

Mr. Justice Marshall poses a somewhat similar problem: Are we at the outer limits of speech or debate, where a bribe was accepted and agreed to, where there is no need to introduce any evidence concerning official action taken, any official vote given, any official resolution drafted, any official speech given? Are we going to reach the

point where the Court will now say: You are sufficiently away from inquiry into legislative acts that we should sustain the prosecution?

Q Well, do you mean that it would be permissible for the government to prove an agreement of the nature you've just described, so long as there's no need to inquire whether it was performed or not?

MR. RAMSEY: Well, I would say -- I understood your question to be, sir, if I could postulate a circumstance, I'm not saying that's the only circumstance.

I would suggest this to you, sir, that if the indictment was premised on a set of facts which would permit proof that a given man had agreed to take a given bribe and then he did nothing, that you might possibly be able to sustain the indictment because the agreement itself constituted the bribe. But where you have, on the other end of the echelon, that is to say, that he was alleged to have taken a bribe to be but motivated to vote for and did vote for, then you open up inquiry into the very area of his conduct, which is proscribed by speech or debate.

Q Well, take your first case, where you say he took a bribe and did nothing. Certainly bribes aren't given without some understanding, contractual understanding, of a performance. Even in your first case, where he did nothing, there would have to have been an agreement by him to do

something, or it wouldn't be a bribe, as one commonly understands it.

MR. RAMSEY: Well, this is why the outer limits of the problem, as I say, we focused our attention on them almost wholly by virtue of hypotheticals from various Justices at the last hearing, we think that focuses on the wrong issue in the case. That is not this case, as we conceive. This case is differently postured.

Q No, but we've got to apply some sort of a rational standard that's capable of being applied, not just to this case but to other cases, too, in order to reach a result, don't we?

MR. RAMSEY: I quite agree that the Court is correct in trying to test the outer reach of any decision which it makes. But I remind you, sir, that this case is before the Court under the Criminal Appeals Act on the facts of this case.

Q On the facts of this case. Is there any allegation in the indictment that he did vote that way?

MR. RAMSEY: Well, --

Q No, there's nothing in there that says it.

MR. RAMSEY: There is nothing in the record of this?

Q Am I right?

MR. RAMSEY: Not in the indictment, sir. I have never taken that position.

Q Well, that's what is before us.

MR. RAMSEY: But the --

Q Is that what's -- is the indictment what is before us?

MR. RAMSEY: I'm sorry, sir?

Q The indictment is all we have?

MR. RAMSEY: No, I do not believe that the indictment is all you have, Mr. Justice Marshall. That has been our point. It is -- the indictment clearly does cover action, vote, and decision; in other words, the indictment says --

Q I thought the indictment covered what he said he was going to do; the indictment didn't say he did it.

MR. RAMSEY: The indictment covers his action, vote, and decision --

Q Well, suppose the Senator had taken money, $5,000, from each side; would that -- would be he covered?

MR. RAMSEY: You postulated the same hypothetical to me at the least hearing, and again I would have to give you, Mr. Justice Marshall, the same answer which I gave: It depends on whether this indictment, which is challenged and which is before the Court, would require proof as respects his legislative conduct thereafter. If that be so, then we say it comes under Johnson.

Q Well, it wouldn't be under Johnson, all the government had to prove was that he took the bribe for the

express promise of doing something, and that was the crime. Regardless of what he did thereafter.

MR. RAMSEY: I do not so read Johnson, if Mr. Justice Marshall, you are stating that as the holding of Johnson.

Q No. I said that was left open in Johnson.

MR. RAMSEY: No. I do not believe, sir, that is what was left open in Johnson. What was left open in Johnson was, as this Court put it in the opinion: We leave for another day --

Q Well, what is the crime he's being charged with?

MR. RAMSEY: He is being charged with -- under this indictment?

Q Yes, sir.

MR. RAMSEY: In this case, sir? He's being charged with bribery and with aiding, abetting -- it's under 18(2), which is the aid or abetting provision, and under 201(c) or (g).

Q Well, how about the bribery?

MR. RAMSEY: 201(c), sir.

Q And what did the government have to show other than that he took the money for the purpose of promising to do something? What else does the government have to prove?

MR. RAMSEY: The government alleges, in this indictment, that --

Q What else did the government have to prove?

MR. RAMSEY: I would suggest, sir, that the government

must necessarily prove that it was to influence him in the performance of an official act.

Q It was for that purpose?

MR. RAMSEY: That is correct, and that is the allegation --

Q That's all the government has to prove?

MR. RAMSEY: And that allegation --

Q And the only speech the government has to show is that Senator Jones' speech was: Give me $5,000 and I'll vote the way you want me to vote. That's not the kind of speech I think is covered.

MR. RAMSEY: I am suggesting to you, sir, that what was done in this case was that legislative conduct, as alleged, in his action, vote, and decision are what they intended to prove, and that that is the very area of inquiry which is foreclosed by speech or debate.

Now, I am not suggesting that what is foreclosed by speech or debate is the conversation having to do with whether or not a bribe would or would not be paid. I am saying the government said in this case: "We intend to show the receipt of campaign contributions", because the first count which the Solicitor General selected is typical, and which I will use as typical, if the Court will keep in mind that count nine has a slight varying, in that it refers backward to the receipt of moneys theretofore, as distinct from -- or action taken

theretofore as distinct from anticipated action.

It is alleged in this indictment that the defendant "sought, accepted, received and agreed to receive the sum of $5,000 for himself and for an entity, the D. C. Committee for Maryland Education", a political fund, in other words, is what is alleged to be involved.

Then they go on to say: "And we intend to show that this was in return for being influenced in the performance of his official acts in respect to his action, vote, and decision." And it was to that subject matter that the Assistant United States Attorney addressed himself when asked by the court as to whether the acts which were challenged were legislative in nature; and he said, Yes, sir, they are.

And that was in accord with the understanding of everybody concerned, that they were legislative acts. And that being the case, it is perfectly clear that this was an attempt to precisely stage this case for that decision. It was so decided, and that falls square in Johnson.

Q But we will never know what the government would rest its case on, unless there's a trial, will we?

MR. RAMSEY; Well, I suspect, sir, that very many times, very competent trial judges are perfectly willing and, indeed, need to rely on an open concession, such as was made by the Assistant United States Attorney in this case, that it was legislative conduct which is challenged. And that against

the background of a fully known revelation to the trial judge of precisely what factual data the government intended to prove, which they supplied, as they said, in freehanded fashion to the defendant; but did not put into the record because of the very good chance of pretrial prejudicial publicity, in a case with trial then pending shortly after the hearing date of the motions which were then before the court.

And it is, I suggest to the Court, a perfectly useful, desirable, and necessary proposition. The courts proceed on this particularly in areas where, as the Court said in Powell, the Congressman should be relieved of the obligation to defend himself.

There is, under the decisions of this Court, no constitutional basis for making a crime out of conduct, where you must necessarily go to motivation for legislative conduct in order to prove that a given sum of money was received or had, by the particular man in question, by reason of a specific motivation on his part.

MR. CHIEF JUSTICE BURGER: We will pick up there after lunch.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Ramsey, you may continue.

MR. RAMSEY: Thank you, Mr. Chief Justice; and may it please the Court:

In order to put our position in this case in proper context, I think a return to the basic principles on which we rely may be helpful.

First of all, we premise our argument on the announced concept, as laid down by this Court, that one of the functions of the speech and debate clause is to relieve the Senator from the duties of defending himself. That is announced in several of the recent expositions as respects the meaning of speech or debate.

We further would state to the Court that this imposes a duty on the trier of such cases, or one before whom such case comes, to inquire into the case which is intended to be made by the prosecutor against the defendant, under the particular facts of that case.

Now, keep in mind, if you will, please, that our position is that if there is an interrogation which is violative of speech or debate, and an indictment has already been returned, there has been at least one violation of speech or debate in the very grand jury inquiry which was the under-

lying precidate for the indictment which is returned. Therefore, it behooves the District Judge before whom such a case comes to look to the facts of the case, to look to the indictment, and to see whether what has been done is a set of circumstances which leads to application of speech or debate, and which ought properly to cause him to enter into the case for the purpose of dismissing it because he has an obligation to honor the Senator's right not to be called upon to defend, if the case is violative of speech or debate.

Q Mr. Ramsey.

MR. RAMSEY: Yes, sir.

Q Why couldn't that be treated simply as a matter of privilege, that is, forbid the inquiry if one seeks to make the inquiry during the trial rather than throw out the whole case?

MR. RAMSEY: As a practical matter, Mr. Justice Rehnquist, the way we see it, and what we premise our argument on is a direct quote out of the Johnson case, and in that case this Court said, speaking there of conspiring to give a speech in return for compensation from private sources: However reprehensible, we believe that the speech or debate clause extends at least so far as to prevent it from being made the basis of a criminal charge. Speaking backward to the quality of that as a sufficiently indictable basis, and I think the policy consideration, sir, which is behind that is simply

this:

The clause is designed to prevent harassment of the legislator by either an unfriendly executive or an unfriendly judiciary, if that be the case. But in the first instance, the grand jury investigation, it is to shield him from being hailed in before a grand jury, queried as respects his motives.

Now, if I may postulate a case which is illustrative, I think it would run this way:

Is it not, if the court does not vindicate speech or debate as stopping grand jury inquiry, is it not perfectly possible for an unfriendly prosecutor to hail in any Member of the Congress, put before that grand jury a list of the contributors who contributed to his last campaign, and within the frame or reference of the bribery statute to then put against that testimony that a given Senator and/or Congressman voted in a particular way favorable to the very interests who had contributed so heavily to his campaign funding at the time when he ran?

Now, from that, it would be postulated that you may draw the inference that the vote favorable to whatever interest it may be could be said to be, or an inference could be drawn that it was predicated upon, the earlier contribution of money to his campaign.

It is this peculiar aspect of the elective process, the need of the representative to get himself elected, which

sets apart the legislative from all the balance of government with the exception of, of course, the President and the Vice President, who are in a position where they necessarily are participants in political campaigns in order to become elected representatives of the people.

But, basically, we think the policy is cleanly stated, and we think the policy a wise one, in that the essence of the charge, again as this Court said in Johnson, and speaking there to the Johnson charge, in this context, is that the Congressman's conduct was improperly motivated; and, as will appear, that is precisely what the speech or debate clause generally forecloses from executive and judicial inquiry.

Now, coming back to my original view of the matter, I would say, sir, that we approach it this way: the court owes an obligation because of the prior -- "the court", I am talking now of the court hearing such a case -- owes an obligation to examine the facts. In this case it was conceded by the government and found by the court that a necessary root of the case was inquiry into legislative conduct. And it was at that stage that Judge Hart granted the motion.

Now, the vice of a prosecution of this sort is that it would seek to have a finder of fact, usually a jury, but not necessarily so, to draw inferences between the campaign funds on the one hand, and positions taken politically. Judgment calls by a man who makes policy, a man who does indeed

address himself to considerations which are based upon the well-being of those whom he represents.

Q Now, Mr. Ramsey,the language that you just alluded to, or paraphrased from the Johnson opinion, were in the context of the discussion of an alleged payment for making a speech on the Floor of the House. That has quite a bit to do with it, does it not?

MR. RAMSEY: Well, I would say, sir, that while you are correct, of course, Mr. Chief Justice, they were in a case which dealt with that subject matter.

Q Well, and those particular remarks, I think, were addressed to that general problem, were they not?

MR. RAMSEY: I think -- I purported to be quoting, Your Honor, I may have been paraphrasing; but: However reprehensible, and I had interspersed "conspiring to give a speech in return for payment by private individuals", it may be we believe the speech or debate clause extends at least so far.

That was, of course, in the aspect of the case where they were discussing a speech which was given by Congressman Johnson, and I believe that was the Court's inquiry to me, and the answer is: Yes, sir, that is correct.

Q And this Court did not want to try to make the evaluation, the fact evaluation of whether the speech on the Floor of the House had influenced the verdict as distinguished

from other things that Congressman Johnson had done. Isn't that correct?

MR. RAMSEY: Well, I think, Mr. Chief Justice, this Court sent the case back and said that if it could be purged of elements offensive to the speech or debate, that was no reason why there could not be a proceeding which would go to the other aspects of the case. But the speech was so thoroughly intertwined into the governmental evidence in the original case that it was impossible to sort it out at that point; and it simply went back for a new trial.

Q And he was tried and convicted?

MR. RAMSEY: On substantive counts, which in no way involved the speech, and which frankly spoke only to those aspects of the matter which had to do with his having interceded in connection with executive affairs as distinct from performing legislative functions.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ramsey.

Mr. Solicitor General, you have seven minutes left.

REBUTTAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

It seems to me that Mr. Ramsey unduly treats "legislative act" as synonymous with, and absolutely the

equivalent of, "speech or debate".

There is nothing in the Constitution which refers in any way to legislative acts, and we submit there are many acts which a legislator may do and may properly do as a legislator, which are appropriate for a Congressman or a Senator to do, which are customarily done by Congressmen or Senators, which are not speech or debate and which are not within the protection of the speech or debate clause.

If the Court should reach the conclusion that the speech or debate clause protects a Congressman or Senator with respect to anything that he does after he takes the oath of office, our case would be difficult, although, as Mr. Justice Marshall has suggested, it is very hard to accept the conclusion that taking a bribe is a legislative act even within a very broad definition of that term.

As we see this case, the case can be proved without bringing into question any legislative act -- any speech or debate. The only word in the indictment which gives me any pause at all is the word "vote". If the word "vote" were not there, if we now excise it and make no use of it, I can find nothing in the indictment which is in any way in conflict with the speech or debate clause.

It is suggested, turning to another matter, that the matter of punishing a Senator who takes a bribe is, by the Constitution, committed solely to that House of Congress, and

that Congress as a legislative body has no power to deal with that, I should think that that was adequately disposed of by this Court's decision in the Burton case some 60 years ago, where a Congressman was convicted under a statute for taking fees in connection with appearances before the Executive Branch of the government; and more recently in Powell v. McCormack, where a similar argument was made that the power of Congress, of the House or Senate to exclude was exclusive, and that that prevented the court from giving a declaratory judgment on the matter.

Both of those cases seem to me to dispose of that contention.

Then, finally, as has been suggested in the argument, it seems to me that the -- or our position is here that the offense was committed when the bribe was solicited or taken, with the requisite intent; it is immaterial thereafter whether any action, including even any legislative action short of speech or debate was done. The argument is rather similar to that which was rejected in the case in the Second Circuit involving Judge Manton, where a part of the defense was that it's a different statute, the case is not controlling but the analogy is close. Part of the defense was that though he took the bribe it didn't influence his decisions at all if the cases were decided right.

And a part of the charge which was sought to be

submitted to the jury there was that if the cases were decided right, then he couldn't be convicted.

That was -- that argument was rejected by a Court of Appeals, on which Mr. Justice Sutherland sat, and the decision was that the taking of the bribe completed the offense and it was not necessary to show that the promised action was carried out.

Similarly here the taking of the bribe, at least with the requisite intent, is the essence and the substance of the offense; and, as we see it, it is not necessary to prove certainly any speech or debate in order to maintain the prosecution.

Accordingly, we think the judgment below should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Thank you, Mr. Ramsey.

The case is submitted.

[Whereupon, at 1:14 o'clock, p.m., the case was submitted.]

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