In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
Petitioner,	)	
v.	)	No. 78-349
HENRY HELSTOSKI,	)	
Respondent.	)	
and	)	
HENRY HELSTOSKI,	)	
Petitioner,	)	
v.	)	No. 78-546
UNITED STATES OF AMERICA,	)	
Respondent,	)	
HONORABLE H. CURTIS MEANOR,	)	
Nominal Respondent.	)	

Washington, D. C.
March 27, 1979

Pages 1 thru 61

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,	:	
Petitioner,	:	
v.	:	No. 78-349
HENRY HELSTOSKI,	:	
Respondent	:	
and	:	
HENRY HELSTOSKI,	:	
Petitioner,	:	
v.	:	No. 78-546
UNITED STATES OF AMERICA,	:	
Respondent,	:	
HONORABLE H. CURTIS MEANOR,	:	
Nominal Respondent.	:	

Washington, D.C.
Tuesday, March 27, 1979

The above-entitled matter came on for argument at 10:10 o'clock, a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MORTON STAVIS, ESQ., 744 Broad Street, Newark, New Jersey 07102; on behalf of respondent in 349 and petitioner in 546.

STANLEY M. BRAND, General Counsel to the Clerk, U.S. House of Representatives, Washington, D.C. 20515; on behalf of Hon. Thomas P. O'Neill, Jr., Speaker of the House, et al., as amici curiae.

WADE H. McCREE, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the respondent in 546 and the petitioner in 349.

- - -

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 349, the United States against Helstoski, and the consolidated case.

Mr. Stavis, you may proceed whenever you're ready.

ORAL ARGUMENT OF MORTON STAVIS, ESQ.,

ON BEHALF OF THE PETITIONER IN 78-546

AND RESPONDENT IN 78-349

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

The two cases here -- No. 546, our petition, and the 349, the Solicitor General's petition -- the facts in both cases are quite simple.

546, which I will deal with first, involves the jurisdiction of the district court to try this indictment.

The facts there are, obviously, the indictment itself, which charges a member of Congress with taking money and conspiring to take money for introducing bills in Congress, bills which the indictment charges were in fact introduced, and the bills that are specifically identified in the indictment.

It is plain from the face of the indictment the grand jury which found it heard, considered and relied upon proof of a performance of legislative acts.

And while it is not clear from the face of the indictment, it is established in the opinion of Judge Meanor,

and undisputed, that the indicting grand jury -- which is the grand jury which handed down this indictment -- received proofs of the performance of legislative acts from the United States Attorney, not from Mr. Helstoski.

It is also clear and undisputed that while Mr. Helstoski gave legislative materials to earlier grand juries -- not the indicting grand jury -- he had no reason to believe at the time that he gave such materials that he was the target of the grand jury; and in fact, somebody else was thereafter indicted, tried and convicted.

QUESTION: Of course, it wouldn't make any difference to your theory if he had, would it?

MR. STAVIS: If he was a target?

QUESTION: If he was aware that he was --

QUESTION: And knew he was.

MR. STAVIS: To our fundamental theory, it doesn't.

QUESTION: It might have something to do with waiver.

MR. STAVIS: I don't think it has anything to do with waiver, either. But I agree. If our theory is correct, that this is a jurisdictional allocation, then it wouldn't make any difference at all.

QUESTION: Who was the other person under inquiry? Another member of Congress?

MR. STAVIS: No, no, somebody who had been employed by the Congressman some eight years previously, was not then

employed and hadn't been employed for many, many years.

Now, our position in 546 is -- and you put your finger right on it -- that the court had no jurisdiction to try this indictment.

And if the Court agrees with us on that, of course, it doesn't have to reach the evidentiary issues which are involved with 349.

Now, I'm not going to attempt to match the eloquence of this Court in its eight opinions dealing with the Speech and Debate Clause, and review or recount the history of that clause and its meaning in England and the United States.

QUESTION: Mr. Stavis, are you going to get at all to the appealability of Judge Meanor's order by the government? I notice that you attack it in the Third Circuit, but neither party apparently contests it here.

It would seem to me that it is not open and shut that that was an appealable order.

MR. STAVIS: Well, I -- we -- in the Third Circuit, we certainly didn't believe that it was an appealable order. We moved to dismiss before the Third Circuit on those grounds. The Third Circuit denied our motion. I must confess that we did not cross-petition.

It may very well be appropriate to the Court to address that question on its own motion.

QUESTION: Well, we have jurisdiction of the Court of

Appeals' opinion -- judgment -- only if it was properly in the Court of Appeals.

MR. STAVIS: I don't think this matter was properly in the Court of Appeals. Candidly, I don't think the issue which the government presented in its petition are even properly before this Court, because the entire factual foundation for the government's petition in 349 is a series of proposed proffers of proof which they asked the district court to rule on three times; and the district court refused to do so.

So there are no facts before this Court, and 349 is a wholly and entirely supposititious case. And in that respect, I guess I don't have to call to your attention -- the attention of the Court -- the dissenting opinion by Mr. Justice Blackmun concurred in by the Chief Justice only last week, in the Portash case, in which he addressed the question -- the proposition that this Court oughtn't to be handling supposititious cases; that there's enough business handling concrete issues. And while the other seven members of the Court didn't agree that that principle applied to that case, there's no question that this Court ordinarily tries and adjudicates only concrete cases.

QUESTION: Well, that I gather -- that's a case-in-controversy argument, but I understand, Mr. Stavis, you're suggesting that even though you did not cross-petition on the question of the appealability of the order to the Third

Circuit, that it's jurisdictional and therefore that we can reach it in deciding --

MR. STAVIS: I accepted the suggestion of Mr. Justice Rehnquist.

QUESTION: I just wanted to be clear.

That -- now the argument you're now making is really a case-in-controversy argument?

MR. STAVIS: That's correct.

QUESTION: And that's a separate argument?

MR. STAVIS: That's correct.

QUESTION: All right.

MR. STAVIS: May I get back to the issues in 546, which is the jurisdiction of this Court to -- of a district court, of an Article III court -- to try this indictment.

That the Speech and Debate Clause establishes jurisdictional allocation comes all through the decisions of this Court, including its latest; and that is, of course, the Chief Justice's opinion in Eastman against Syracuse.

QUESTION: For the Court.

MR. STAVIS: I'm sorry?

QUESTION: Opinion for the Court.

MR. STAVIS: Of course; the opinion for the Court. And what you addressed there was the fact that the Speech and Debate Clause affects the availability of judicial power.

Now the corollary to approaching this matter from

the point of view of jurisdiction, or the availability of judicial power is that no one says that members of Congress are super-citizens, and that the Speech or Debate Clause gives them free license to take bribes and commit crimes and introduce bills that are paid for.

The only question is: Which is the proper court-house? Is it an Article III court? Or is it the Congress of the United States, under both the Speech and Debate Clause and the punishment clause?

And so that there's no question about it, my client never has, does not now, nor will he, contest the jurisdiction of the Congress of the United States to try the charges which we are involved with here.

He's not exactly looking to be charged by any --

QUESTION: Can they try these charges now?

MR. STAVIS: I believe so.

QUESTION: And what sanction could Congress impose?

MR. STAVIS: As I read Kilbourn v. Thompson, Congress has complete power to impose any sanctions it chooses, including -- if I read Kilbourn v. Thompson correctly -- imprisonment.

That's what you said in Kilbourn.

QUESTION: I suppose under the Constitution it wouldn't be authorized to impose a cruel or unusual punishment?

MR. STAVIS: Oh, I think there are constitutional limitations on the exercise of its power. That's Powell against McCormack.

We expect that if we are tried on this by Congress, we expect to insist on a due process hearing, and a whole panoply of rights that would be applied to any judicial hearing; and that would be a judicial hearings. It's just an exception to Article III jurisdiction.

QUESTION: Are you going to insist on a jury trial?

MR. STAVIS: No, no we don't expect to insist on a jury trial.

QUESTION: Although the constitution guarantees that, doesn't it?

MR. STAVIS: It guarantees it in an Article III trial. I do not believe --

QUESTION: It doesn't say anything about an Article III trial, does it?

MR. STAVIS: Well, I would guess, however, that we would accept the fact that it would not be a jury trial. If we were entitled to a jury trial, we would waive it.

I think the essence of the punishment clause is that the Congress itself has that power.

QUESTION: Subject to what constitutional limitations?

MR. STAVIS: Subject to due process limitations --

QUESTION: But not a jury trial?

MR. STAVIS: That's correct. Subject to cruel and unusual punishment limitations.

QUESTION: Presumption of innocence?

MR. STAVIS: Presumption of innocence.

QUESTION: Necessity of proof beyond a reasonable doubt?

MR. STAVIS: I would believe so. Right of confrontation; right of cross-examination; right of counsel.

QUESTION: Mr. Stavis, is it clear that thatclause applies to a former Congressman?

MR. STAVIS: Congress in the past has so asserted. We do not dispute that.

And besides, as of the time that this indictment was found, Mr. Helstoski was a member of Congress.

QUESTION: Yes, but he's not now, and any punishment by Congress would be from now on.

MR. STAVIS: That is correct. And we do not dispute the jurisdiction of Congress.

But the point that I'm making here --

QUESTION: Well, you don't here, because you don't have to.

MR. STAVIS: That is correct. All we have to dispute here is the jurisdiction of the Article III court.

QUESTION: That the Federal courts don't have any jurisdiction.

MR. STAVIS: And at the time that this indictment was found, Congress clearly had jurisdiction.

QUESTION: Well, what would the -- is there a statute of limitations on that?

MR. STAVIS: I don't know that there is any.

QUESTION: Well, Mr. Stavis, what -- you say Congress has asserted authority to try after his defeat, which I gather is what happened to this Congressman.

MR. STAVIS: That is correct.

QUESTION: Has that ever happened?

MR. STAVIS: Yes, it has.

QUESTION: Against whom?

MR. STAVIS: Well, Mr. Brand speaking for the Speaker, will address that particular question.

QUESTION: Oh, I see.

MR. STAVIS: Historically, it has occurred. I think, in fact, it occurred in the most famous corruption investigation by the Congress in the Credit Mobilier transaction, where Congress Oakes Ames was charged, tried and convicted by the House after he was no longer sitting.

And I think there are a number of other examples of that sort.

QUESTION: Mr. Stavis, would the net result of accepting your theory mean that the Congress could not enact, and the President sign, a law making it a criminal offense for

a Congressman to take a bribe?

MR. STAVIS: Congress has enacted such a law, and such a law is on the books and has been in force and is valid, but not with respect to the performance of legislative acts.

In other words, the Johnson case -- which wasn't in fact tried under that section -- is a perfect example. A Congressman takes a bribe to try to influence the Department of Justice. A normal conflict of interest situation, or to take a bribe for an act which is not a legislative act in nature.

What the Speech and Debate Clause is driving at is, that if you want to try a legislative act -- fraud in connection with a legislative act; if you want to try the legislative process; that belongs in the Congress.

If you want to try just the question of bribery, not implicating the legislative process, that you may do in an Article IIIcourt.

QUESTION: But when -- Mr. Stavis, when the charge is for taking money in exchange for a promise of a future act, hasn't the Court held that it's not necessary to show the legislative act or the legislative activity?

MR. STAVIS: And of course that's your opinion in the Brewster case; that's exactly what the Court held.

And the whole point of the government's taking this case is, that they want to get around that decision. Because in that decision you said at least eight times -- we counted

them -- that under the Brewster indictment, you could not show the actual performance of a legislative act.

QUESTION: Well, how will we know whether the government is going to try to prove that until the case is tried?

MR. STAVIS: Well, that's what we thought, excepting that the government -- and that's why we think you ought not even consider this case -- that the government says, "Please look at our proffers of proof. This is really what we want to prove."

We said, "Those people aren't even going to testify that way; let alone the fact that if they did testify, it wouldn't be true."

But the government is asking you to make -- asking the district court and asking you to make rulings on advance evidentiary proof.

QUESTION: You said -- did I understand you to say you didn't want us to hear this case?

MR. STAVIS: I didn't want you to hear the government's petition.

QUESTION: Oh, I see.

MR. STAVIS: I don't want you to hear the government's petition; I sure want you to hear my petition.

QUESTION: I see.

MR. STAVIS Because my petition --

QUESTION: I just marvel at your fairness.

[Laughter.]

MR. STAVIS: Well, I think it's not only fair, but correct.

But let me get back, Mr. Chief Justice, to your question. Because you said that in Brewster, and you looked at an indictment that did not charge the performance of legislative acts.

Look at this indictment. On its face, it charges the specific performance of designated and named legislative acts.

Now if this case goes to trial, and if you prove -- if the government is permitted to prove the fact as alleged in this indictment -- I'm not talking about what would have happened if they came up with a Brewster indictment -- but if they prove the facts alleged in this indictment, that jury is going to be asked to decide questions as to the functioning of the legislative process, specifically.

QUESTION: What if the trial court excludes any evidence about the legislative acts?

MR. STAVIS: Well, that's what -- that's what Judge Meanor said he was going to do . And that's why the government took this case up; they weren't satisfied with Judge Meanor's decision, which said, "I read the Brewster opinion, and I intend to enforce it and not permit the introduction of legislative acts." And the government took it up.

That's why this case has been going on now for

2-1/2 years without a trial.

Now -- but I want to emphasize that our position is that in the light of this indictment, the issue does not end with the fact that the government would not be permitted to introduce that evidence at trial.

And that's what my position is about. I say that the grand jury, released and found an indictment which on its face is beyond the jurisdiction of this court.

And what the government is saying is, "Well, let's fix up the indictment a little bit. Maybe they shouldn't have charged and alleged these legislative acts which they designate in that indictment. We'll just strike it up. Fix it up and make it like the Brewster-type indictment, and forget that it ever happened."

QUESTION: Mr. Stavis, do you agree that if they strike the allegations of the specific overt acts describing legislative acts, that the indictment would then be comparable to the indictment in the Brewster case?

MR. STAVIS: It's a little bit more than a specific legislative act; it's also the allegations in counts two, three and four of theindictment, which also include allegations of specific legislative acts.

Yet the answer is, if all those words were taken out, then you'd have an indictment that read like the Brewster indictment.

But the trouble about doing that is, that by the issuance of the indictment, the executive branch of the government -- the executive branch of the government -- has implicated -- the executive branch of government and the grand jury -- have implicated and impugned the functioning of Congress.

And the point that we make is when the Speech and Debate Clause set out to protect this delicate tripartite separation of powers --

QUESTION: Well, Mr. Stavis, would you say then that if, before the defendant is put into jeopardy, the government had come in and voluntarily dismissed the indictment -- got permission to dismiss the indictment -- and then re-indicted, leaving out all the references to legislative acts --

MR. STAVIS: No problem about that.

QUESTION: Well, they still would have done what you just said.

MR. STAVIS: No, provided that -- and this is the difference -- provided that it had not presented the legislative acts to the grand jury.

QUESTION: Ah, so that having presented the legislative acts to the grand jury, they have given him permanent immunity?

MR. STAVIS: No, they haven't. There's nothing in the world that says they can't call another grand jury and

present a case to another grand jury. That's exactly what happened in the Lawn case.

In the Lawn case, decided by this Court --

QUESTION: Well, then your position is -- just so I get it -- is that having told a particular grand jury about a legislative act by a Congressman, that grand jury may never return an indictment against that Congressman?

MR. STAVIS: Indictment which charges legislative acts.

QUESTION: Well, I thought you said a moment ago if they dismissed the indictment and brought a new one which didn't make reference, it would still be bad.

MR. STAVIS: I know, what I mean is that they can't -- I mean, obviously, they can indict him for bank robbery. They may be able to indict him.

QUESTION: No, they just excise from the new indictment any reference to the legislative acts, and they merely follow the pattern of the Brewster indictment.

MR. STAVIS: That would be invalid, because the grand jury -- the grand jury has violated the Speech and Debate Clause.

But this is not to say that the government cannot convene another grand jury, present a case which does not involve proof of legislative acts, and come out with a Brewster-type of indictment.

QUESTION: Well, but that's like Calandra.

Once the information has been presented to the grand jury, there's nothing more that can be done to salvage the speech and debate clause.

The question is whether the indictment it returns is constitutional or not. The idea that if you presented different information to another grand jury, somehow you could call it back -- call the earlier proceedings back, isn't possible.

MR. STAVIS: It is not like Calandra. Calandra is a very different kind of a case. In Calandra you decided that under the Fourteenth Amendment, the exclusionary clause, which is your making, that you would allow a grand jury to hear evidence unlawfully seized by somebody else.

QUESTION: And we also said in Calandra that the right of privacy protected by the Fourth Amendment had already been breached, and there was nothing --

MR. STAVIS: I understand that. But here you have an explicit provision of the speech -- of the constitution -- which says that speech or debate -- by which we mean legislative acts -- shall not be questioned in any other place.

And in Gravel you said, that includes a grand jury.

QUESTION: Did it say, he may not be questioned, or he need -- he may not be required to answer?

MR. STAVIS: Says he may not be questioned.

QUESTION: Yeah, and he may not --

MR. STAVIS: I think it says, may not be questioned.

QUESTION: Now, did he have to respond to anything in the grand jury?

MR. STAVIS: I think he did, at the point where he wasn't the target.

As I read Gravel --

QUESTION: Well, a lot of non-target witnesses before a grand jury claim immunity from responding for various reasons, depending --

MR. STAVIS: On the Fifth Amendment grounds.

QUESTION: Yes, but there might be another reason here then, wouldn't there?

MR. STAVIS: Might be, but if I read the Gravel case accurately -- and I think I do -- there is no speech and debate protection from questioning when the grand jury is investigating third party crimes.

QUESTION: Mr. Stavis, am I right that your client voluntarily gave the legislative stuff to the grand jury?

MR. STAVIS: He gave it to them voluntarily --

QUESTION: So is that -- do you take the position that if a Congressman is up for anything, and he voluntarily gives legislative things, he can't be indicted from then on?

MR. STAVIS: He wasn't --

QUESTION: He's immunized forever?

MR. STAVIS: He wasn't up for anything.

QUESTION: Yeah, but he volunteered it, didn't he? He did.

MR. STAVIS: He was subpoened to testify.

QUESTION: Did he or didn't he bring these bills there?

MR. STAVIS: He was subpoened to testify --

QUESTION: And didn't he bring the bills there?

MR. STAVIS: That is correct.

QUESTION: Didn't he bring the legislative matters there.

MR. STAVIS: That is correct.

QUESTION: And now he complains about bringing them there.

MR. STAVIS: Because he --

QUESTION: And now he complains about bringing them there.

MR. STAVIS: He doesn't complain about bringing them there.

QUESTION: What does he complain about?

MR. STAVIS: He was required to bring them there. He doesn't complain about that at all.

What he complains about is some grand jury that he never brought them before. And -- which turned and targeted him --

QUESTION: Sure, he would have been immunized from robbing a bank in the State of Alaska.

MR. STAVIS: Your Honor, I say exactly the contrary.

QUESTION: I'm not too sure you wouldn't go so far as to say he'd be immunized from robbing a bank in Great Britain.

MR. STAVIS: Your Honor, I said exactly the contrary. I said that quite the contrary, he is subject to prosecution in an Article III court by a grand jury which doesn't have this material.

He is subject to prosecution before Congress where this material may properly be the subject of inquiry by the court which has jurisdiction.

So I do not accept the suggestion, Your Honor, because I think I've said exactly the contrary.

May I reserve some of my time?

QUESTION: Does it not sometimes happen, Mr. Stavis, that the prosecution fails to prove all of what is alleged in an indictment, and yet a conviction nevertheless results?

MR. STAVIS: Of course it's -- of course that's what happens. But those are not cases where you're dealing with an express constitutional prescription --

QUESTION: Now this trial judge has indicated that he will -- in advance -- have the advantage of his statement that he will not admit any testimony on that score.

MR. STAVIS: That he intends to comply with Brewster.

But I just -- our position is that the indictment is already a violation of the speech or debate clause.

QUESTION: And therefore he can never be tried under this indictment.

MR. STAVIS: Under this indictment.

QUESTION: And this indictment has to be dismissed, is your view?

MR. STAVIS: That's correct.

QUESTION: And if he's to be indicted, he has to be indicted by a new grand jury which does not hear the evidence that you say violated the --

MR. STAVIS: And that's not any different than what you --

QUESTION: Well, that is your position?

MR. STAVIS: That is correct. That's precisely the position.

QUESTION: What about the statute of limitations?

MR. STAVIS: I'm sorry?

QUESTION: What about the statute of limitations?

MR. STAVIS: I think there's an express provision of the statutes which provides that where an indictment is voided for some reason not having to do with the merits of the offense, that the statute of limitations is tolled.

I think there's an express provision in the United States Code.

QUESTION: Can you give me an idea where it is?

MR. STAVIS: No, but I'll be glad to furnish it.

QUESTION: If you give me an idea, I can find it.

MR. STAVIS: It's in the United States Code.

QUESTION: Good.

[Laughter.]

MR. STAVIS: But there's an express provision -- I looked that up thinking about this case, and I did look it up.

QUESTION: Well, the fact that you didn't remember it makes me think it might not help you too much.

MR. STAVIS: Well, it doesn't help me in the sense that a new indictment can be brought, as I have suggested. In that sense it doesn't help me.

But it also makes clear the suggestion I've made as to the potentialities of a new indictment, is entirely feasible.

And I just want to say, in reference to Mr. Justice Brennan's question, that of course is exactly whatyou do in an immunity case. You forbid the use of immunized testimony. You impose upon the prosecutor an obligation to establish that he didn't use immunized testimony when he got the indictment.

If he can't make it, he can go to another grand jury. He can go to another grand jury and get an indictment without the use of immunized testimony; does that all the time.

QUESTION: Is there any case from this court saying that an indictment returned -- that the government didn't show it was not used based on immunized testimony, isn't valid?

MR. STAVIS: I think Lawn comes close to that. In Lawn what you said was --

QUESTION: Could you answer yes or no?

MR. STAVIS: I'm not sure I could put my fingers on a case at the moment.

May I reserve some time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Stavis.

QUESTION: One question before you do.

You mentioned the jurisdiction over former members would be covered in your colleague's argument. But as I look in his brief, he gives us an example of five former members over whom Congress said they did not have jurisdiction.

Maybe he will cover that, but I would like to be advised on that.

MR. STAVIS: I think he's given an example of cases in which former members of Congress were --

QUESTION: You don't happen to know such a case yourself?

MR. STAVIS: Other than the Oakes Ames case, which I mentioned.

QUESTION: That was back in Grant's time.

QUESTION: Could you give me that again?

MR. STAVIS: Oakes-Ames, Congressman --

QUESTION: Oakes and Ames?

MR. STAVIS -- Ames, involved in the Credit Mobilier controvery. That was around the 1870's, I think.

QUESTION: Thank you.

MR. STAVIS: That was the biggest scandal case in Congress at the time.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Brand.

ORAL ARGUMENT OF STANLEY M. BRAND, ESQ.,

ON BEHALF OF THOMAS P. O'NEILL, SPEAKER,

ET AL., AS AMICI CURIAE

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

I'm here representing the Honorable Thomas P. O'Neill, Speaker; the Honorable Frank Thompson, Chairman; and the Honorable William Dickinson, ranking Minority Member, Committee on House Administration of the U.S. House of Representatives, as amici curiae.

The interests of the Speaker and his colleagues in this case is apparent. It presents serious questions, in our minds, as to the continued viability of the speech and debate clause.

At the outset, I'd like to make one point clear: The

Congress has read Johnson and Brewster, and the Congress accepts Johnson and Brewster.

When we saw the Solicitor's petition, however, and what we viewed as an attempt to re-litigate Brewster, we were concerned. And that's why we are here.

To paraphrase Thomas Jefferson's characterization of the clause, which he wrote shortly after the adoption of the constitution, the clause is intended to protect the substance, rather than the shadow, of representative government; and for that reason, it states, "for any speech or debate, they shall not be questioned in any other place."

We believe that this clause operates as an institutional protection as well as a personalized privilege, and to effect this high principle of an unfettered legislative branch, the framers concluded that a jurisdictional allocation was necessary.

And we read this jurisdictional allocation fromthe Speech or Debate clause, read together with the punishment clause. Like other jurisdictional requirements, the trial of of legislative acts must occur in the proper forum.

It is not subject to waiver. Congressman Helstoski cannot waive himself into an Article III court for the trial of legislative acts.

QUESTION: In other words, even if he had voluntarily submitted all this material --

MR. BRAND: That's our --

QUESTION: -- regarding these legislative --

MR. BRAND: That's our position.

QUESTION: Even that --

QUESTION: Even if he'd made an unequivocal explicit waiver, knowing waiver, voluntarily?

MR. BRAND: Yes, anymore than two --

QUESTION: He was just not empowered to waive it?

MR. BRAND: Anymore than two litigants could present themselves to an Article III court without a case at controversy, and say, "We would like the court, nevertheless, to try this case."

QUESTION: In other words, the Speech or Debate clause doesn't belong to an individual, it belongs to an institution; is that your point?

MR. BRAND: Yes.

QUESTION: Well, if it does, why can't that institution provide for its waiver?

MR. BRAND: Because the clause is a protection for the member as well, even against a hostile Congress.

QUESTION: So it's both?

MR. BRAND: That's correct.

QUESTION: Neither one can --

MR. BRAND: It protects unpopular members as well as popular members, Democrats as well as Republicans.

QUESTION: So Congress cannot, by however narrow a piece of legislation --

MR. BRAND: That's right.

QUESTION: -- provide for the --

MR. BRAND: Any --

QUESTION: -- the executive prosecution of a legislative act?

MR. BRAND: That's right; anymore than we could delegate impeachment, for instance.

QUESTION: Mr. Brand, Congress, I assume, could amend the 201 and the other bribery statute and say, "They do not apply to Congress."

MR. BRAND: They could do that.

Our position would be --

QUESTION: Well, aren't you now doing that?

MR. BRAND: No, sir, we don't believe we are.

QUESTION: Well, aren't you trying to get us to do that?

MR. BRAND: I don't think so.

What we're saying -- as you said in Brewster -- these cases can go forward without impugning legislative acts. And that's all we're saying here.

QUESTION: Do you challenge the indictments, Mr. Brand, or just the evidentiary --

MR. BRAND: We do.

QUESTION: You agree with Mr. Stavis?

MR. BRAND: We do in this case. Although we agree also that there is nothing to prevent the U.S. Attorney from taking the non-legislative material; presenting it to a new grand jury; and indicting and going forward to trial.

QUESTION: Except maybe the statute of limitations?

MR. BRAND: If that, in fact, is a problem.

But --

QUESTION: But you would, in that new indictment, or in those new grand jury proceedings, or in the subsequent trial, the evidence, the government now proposes to use you would say would be unuseable?

MR. BRAND: Correct.

QUESTION: Hasn't Congress -- or didn't Congress take quite a long step in relation to the Speech and Debate Clause when they enacted these provisions?

MR. BRAND: I don't think so, Your Honor.

201, like a plethora of other statutes regulating non-legislative behavior, has been passed by Congress in that context.

We have statutes, for instance, 18 U.S.C. 431, says that a member may not enter into a contract in which the United States is a party. That's not a legislative act. We regulate that by statute.

We regulate campaign financing, because we say that

when a member takes a political contribution, or campaigns for office, he is not engaging in a legislative process. And we regulate that, through the United States Code.

I don't believe you can read 201 in the context of the U.S. Code, and the other ways in which we regulate members' conduct, as the one example where we have attempted to put into Article III courts the trial of legislative acts.

I don't believe that's consistent with the design of the code at this time.

At this point, we come to the question of the indictment. We would say that there having been neither a waiver, nor a delegation under 201, the indictment at issue here, which charges legislative acts, on the basis of what the grand jury, is fatally defective. And we asay this for several reasons.

This is not Calandra and the Fourth Amendment. This is not Costello and the Fifth Amendment.

This is the Speech and Debate Clause, which is part of the constitution which the framers placed in the constitution, to protect questioning, at the earliest possible juncture -- not after indictment -- when the death blow has been dealt, as in this case.

QUESTION: Well, to prevent questioning anywhere, in any other place.

MR. BRAND: Correct.

QUESTION: Well, why wouldn't your interests be served by according a Congressman a right to assert before the grand jury the privilege that you're talking about now?

MR. BRAND: Our position would not deny him that. The grand jury which indicted him --

QUESTION: Why wouldn't it be totally clear, if he chooses not to assert it, then there is form of waiver?

MR. BRAND: Well, if it's never asserted, it never-- never becomes an issue. But in thise case, the grand jury which ultimately indicted him was one which there could be no waiver because he never appeared before that grand jury.

What we're saying on the indictment issue is, that the indictment is defective, because the design of the Speech or Debate Clause is to prevent questioning.

If the questioning has already occurred, and you are willing to say that we will only, at trial, put on some evidentiary prescriptions, then you havenot remedied the potential abuse which exists.

QUESTION: But what was the questioning before the grand jury which violated the Speech and Debate Clause?

MR. BRAND: The legislative acts. It doesn't --

QUESTION: But to whom were the questions addressed?

MR. BRAND: I believe they were directed to the defendant.

QUESTION: Well, but why couldn't he then assert

the Speech and Debate privilege, and fully vindicate it by asserting it at that point, and not having done so, he has waived it?

MR. BRAND: Well, under Mr. Stavis' formulation -- and I think we would agree with most of that -- a member must answer as to third party crime before a grand jury.

QUESTION: But as soon as it reached him, is it not implied in both Johnson and the Brewster case, that he not only -- need not answer, he may assert the proposition that he may not be questioned.

I'll give you an example: If he were sued in a complaint in a civil case for libel, and the complaint alleged that the libel was committed on the floor of the House, could not the member of Congress simply informally tell the court, by letter or any other way, that he was not going to answer, because the Speech and Debate Clause protected him, and that he was not going to appear; and that any judgment entered on the basis of that complaint would be a nullity under the Speech or Debate Clause?

MR. BRAND: Well, as I --

QUESTION: So that he -- it is more than a matter of not being questioned, or not answering. He can't even be questioned; isn't that so?

MR. BRAND: That's correct.

QUESTION: Well, but he then submitted to the

questioning here.

MR. BRAND: Well, wouldn't he be -- wouldn't the same situation occur where he never appeared, and the U.S. Attorney went to the library of Congress, and took the legislative material out of there.

Is that a questioning? He would never have appeared to assert the privilege, yet we would assert that that's prohibited.

QUESTION: Well, indeed, you're --

MR. BRAND: That the grand jury can't hear --

QUESTION: I thought your assertion was that even if he appeared, and answered freely, nevertheless --

MR. BRAND: That's correct. As a claimant in an Article III court, he could come in and claim that he should get a remedy from the court.

QUESTION: Well, Mr. Brand, you certainly don't mean to -- I know you say that the evidence should never even have been presented to the grand jury. But even if -- even if there was -- even if it was properly presented, or even if it could be said that he waived, in some manner, the presentation of the evidence, you still say that he never consented to be indicted; never consented to be threatened with indictment; and that would, of course, solve an awful lot of your problems if you went on that.

MR. BRAND: Well, again, I believe the heart of the

clause is protection of the Congress from a coordinate branch.

QUESTION: And I gathered -- I thought your position was, that so far does that principle go, that nothing that he does before the grand jury can support an indictment?

MR. BRAND: Correct.

QUESTION: Nothing. Isn't that it?

QUESTION: Mr. Brand, he didn't testify before this grand jury, did he?

MR. BRAND: The one that he was indicted by?

QUESTION: Yes. He didn't testify before that grand jury?

MR. BRAND: He did not.

QUESTION: So your position has to be that evidence of legislative acts is inadmissible before the grand jury, even though the man himself --

MR. BRAND: Yes.

QUESTION: But the clause doesn't read that way. It says that the Congressman shall not be questioned in any other place. It doesn't say the evidence of legislative acts shall not be admissible before a grand jury.

MR. BRAND: Well, of course --

QUESTION: In fact you mentioned -- even acknowledge that with third party crime, evidence of legislative acts would be proper.

MR. BRAND: Well, of course, the clause doesn't say either that it is merely that it shall not be presented. We

would read, "shall not be questioned," to include the questioning of his legislative acts, whether he is the author or not.

QUESTION: Well, he wasn't questioned in that grand jury, was he?

MR. BRAND: In the indicting grand jury, he was not.

QUESTION: But at the time a grand jury is conducting its investigations, it presumably doesn't have its mind made up what it's going to do at the end of the inquiry.

Does it have to stop everytime somebody proposes to introduce before it a legislative act, and decide whether or not it can be recieved based upon what it's ultimately going to decide with respect to whom it may indict?

MR. BRAND: But in this case there was a mechanism for culling out the legislative act by presenting -- the U.S. Attorney, by presenting them to the -- by not presenting them to the indicting grand jury.

There was a mechanism, but it wasn't used.

QUESTION: May I ask you one other question?

Is it your view that the Congress retains jurisdiction to punish former members?

MR. BRAND: Yes.

QUESTION: And what is your authority for that?

MR. BRAND: Well, our authority would be the residual --

the inherent power of the body [illegible] contempts committed by its members at the time they were members, for conduct which occurred when they were members.

QUESTION: Has the Congress -- is it not true that your brief recites an example of three members over whom it did not have -- former members over whom it did not have jurisdiction?

MR. BRAND: Well, that report raised doubts as to whether there was jurisdiction. And those cases against those former members were dropped for other reasons.

QUESTION: The military once asserted jurisdiction to punish its former members too, but it got a negative answer from this court, didn't it?

MR. BRAND: I believe it did.

We're talking, again, about what we would say is the inherent power of the body to punish members, not as private citizens, but for conduct which occured in a body when they were --

QUESTION: When they were members.

MR. BRAND: -- when they were members.

QUESTION: That was the military's theory, too.

QUESTION: Mr. Stavis indicated that you were going to tell us about the number of Congressmen -- former Congressmen -- punished by the House, or the Senate.

MR. BRAND: Yes.

The House has doubted its authority, it's true, as this Court cited in Powell v. McCormack, its authority to expel a member for conduct which occurred before he became a member of Congress.

But it has not doubted its power to punish conduct occurring in a prior Congress. As was indicated by Mr. Stavis --

QUESTION: By a man who is no longer a member?

MR. BRAND: No; in that case, he was a member of the 42nd Congress.

QUESTION: So you say that the past Congress doubted its power to punish conduct occurring in a former Congress by a man who is no longer a member?

MR. BRAND: I'm not sure if it's ever expressed any view on that.

Our view of the self-disciplinary process as it is evolving at this stage is that we would have the power --

QUESTION: Well, Mr. Brand, is there any instance of a former Congressman being tried by the Congress, House or Senate, for conduct violating --

MR. BRAND: There is none that I can cite you.

I can cite you none.

QUESTION: Well, what about -- I thought Mr. Stavis indicated there was an instance. Is that right or not?

MR. BRAND: Well, he talked about the Credit Mobilier scandal.

QUESTION: What about that?

MR. BRAND: And that was discipline in the 42nd Congress for what occurred in the 40th.

QUESTION: Are they incumbent Congressmen?

MR. BRAND: Of a sitting member of Congress.

QUESTION: I see.

MR. BRAND: I see that my time is up.

If the Chief Judge would indulge me for one minute, I would simply state thatthe self-disciplinary process is an evolving process. To say that the legislative acts will go unpunished is not correct.

Legislative misbehavior and misconduct is not immunized. The House has taken cognizance of acts committed by its members which impugn the integrity of the process.

It's an evolving process; it is not static. We are currently considering proposals, for instance, to empanel grand juries of members on a random basis. We are proceeding apace with the self-disciplinary process--

QUESTION: Does the record-, Mr. Brand, tell us whether the Congress has given any consideration as to whether any action should be taken against former Congressman Helstoski?

MR. BRAND: No, sir.

And I would leave with this thought, that the Solicitor has indicated in his brief that the Congress can't

do both: They can't discipline appropriately and also legislate. I believe the record is clear that we can discipline with justice through law, that we can do it with due process; that we can do it with a full panoply of protections and shields that apply in a criminal case; witness the material we submitted for the record on that.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Brand.

Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,
SOLICITOR GENERAL OF THE UNITED STATES,
DEPARTMENT OF JUSTICE, ON BEHALF OF
THE RESPONDENT IN 4546 and PETITIONER
IN 349.

GENERAL McCREE: Mr. Chief Justice, and may it please the Court:

In June, 1976, respondent was indicted in the United States District Court for the District of New Jersey on several charges arising out of grand jury investigations into alleged corruption in connection with private immigration legislation.

Count one charged him, as a member of the Congress, with conspiracy to violate the official bribery statute, that's 18 U.S.C. Section 201(c)(1), by acting with Albert DeFalco, his former administrative aide, and others, to

solicit and to receive bribes in return for being influenced to introduce private bills in the House of Representatives.

Thirteen overt acts in furtherance of the conspiracy were alleged, and these overt acts consisted of charges that respondent and his administrative aide met with attorneys who specialized in immigration litigation, and from whom they received cash payments in return for bills for named aliens.

The other three overt acts with which we're concerned here, two three and four, also allege the actual introduction of such bills.

QUESTION: And in your view, Mr. Solicitor General, for the government to sustain its case, need it prove any more than that the money was taken, and the promise to do a future act was made?

GENERAL McCREE: That --

QUESTION: In other words, does it need that the bargain was fulfilled?

GENERAL McCREE: That's precisely the government's position, if the Court please.

The offense was to solicit bribes to perform an official act. And the offense is complete once the bribe is solicited. And it is unnecessary to show that an official act was, in fact, done in response.

QUESTION: Would the crime be consummated if the solicitation were shown but no payment were shown?

GENERAL McCREE: The act --

QUESTION: Or refused to pay?

GENERAL McCREE: If the Court please, it would be, under 201, the Act is, in fact, completed when the solicitation is made for the purpose of being influenced.

QUESTION: But Mr. Solicitor, I gather -- Judge Meanor said you could not use the evidence of those private bills actually being introduced.

GENERAL McCREE: That's exactly --

QUESTION: And you disagree with that?

GENERAL McCREE: I do not -- we do not disagree with Judge Meanor, if a waiver took place. We agree that Judge Meanor is correct that we could not show the introduction of the bills, which is the showing of legislative acts, unless a valid waiver occurred.

But we contend --

QUESTION: Occurred when, and how?

GENERAL McCREE: We submit that a valid waiver occurred when Mr. Helstoski voluntarily presented voluminous correspondence, including copies of the very bills that he introduced, after he was told that he needn't -- that he was not required to do that. And he did it voluntarily, and as Judge Meanor found, he knew of his speech or debate privilege when he did it, although it was not called directly to his attention.

He had raised this privilege in other litigation involving the alleged abuse of the franking privilege, and in fact, in his penultimate appearance before the grand jury, he also invoked the speech or debate privilege.

And so Judge Meanor's finding that he knew it is amply supported. And the U.S. Attorney told him that he did not have to submit these matters.

QUESTION: But just so I get it clear. But absent the waiver, you agree that under Brewster and the relevant cases, and under the clause, you could not introduce the evidence that you propose to introduce?

GENERAL McCREE: We do. We concede that.

As a matter of fact, the -- I'd like to move perhaps right on to the next -- the evidence that is involved here.

We think that this evidence falls into three categories. First, the bills themselves, which I guess respondent -- are clearly legislative acts; evidence of legislative acts. And absent a waiver, we agree that we could not introduce those.

There's a second category of evidence, and this consists of correspondence between Helstoski, DeFalco, some of the attorneys who represented some of the aliens, and some of the aliens themselves.

We submit that this evidence has to be examined by the district court on an item-by-item basis, to see whether

it --

QUESTION: Well, suppose it refers --

GENERAL McCREE: Pardon me?

QUESTION: Suppose it -- as I read some of this, some of this correspondence says, I did this, or I didn't do that, in connection with a given private bill.

Would that be -- was in this category?

GENERAL McCREE: We believe that that is not barred from evidence, because --

QUESTION: Even though it refers to something he did or didn't do, that would be --

GENERAL McCREE: Even though it refers to something he did or didn't do --

QUESTION: Even though what he says he did or didn't do would have been a legislative act.

GENERAL MCCREE: Exactly. But he may not have done it. If there's a letter saying, if you give me a certain sum of money, I will cause a private bill to be introduced for you, this is clearly not a legislative act.

QUESTION: So you say -- you say that under Brewster, it would not require exclusion of a promise to introduce a bill in return for money?

GENERAL McCREE: As I read Brewster, Brewster does not require its exclusion, because --

QUESTION: Well, would it require then, Mr. Solicitor

General, the exclusion: I introduced the private bill on your behalf on such-and-such a date?

GENERAL McCREE: Well, I assume that -- let us assume that that is a false statement, that he did not, in fact, introduce a private bill. But he said this for the purpose of eliciting a payment.

QUESTION: But suppose he did, though. Suppose he had introduced it?

GENERAL McCREE: Well, if it were introduced for the purpose of showing that he did, in fact, introduce the bill, I would agree with the Court.

QUESTION: Well, but we excluded that.

Suppose it was introduced to prove the case, that he took money for a legislative act? Or for an official act?

GENERAL McCREE: We submit that it's admissible; that the Court should find that it's admissible for that purpose, because soliciting a bribe is clearly and concededly not an legislative act. And whatever inducement he may employ for the purpose of soliciting a bribe cannot therefore be a legislative act.

And that is not forbidden by the speech or debate clause.

QUESTION: But Mr. General, it isn't forbidden by the district court order either. If it's the future -- if it's talking about the future.

GENERAL McCREE: If the Court please, that is the way I read that. And we would suggest that the past-future dichotomy is not a valid one.

We submit that the court -- the district court was too restrictive, because under the old Hillman case, for example, a statement of a present intention to do something in the future can be the basis for a finding that it was in fact done.

And so we think logically the Court should have -- should not even have made the past-future dichotomy. It should have said that in both instances, the evidence would be admissible.

QUESTION: But as I understood your comment a moment ago, you said a latter, assume bythe Congressman that he wrote to someone, said, if you give me X dollars, I will introduce such-and-such a bill. And you said that would be reference to a future act that may or may not ever be performed.

GENERAL McCREE: Exactly.

QUESTION: And would therefore be admissible. Should be admissible. And as I understand it, that's admissible under the district court's order.

GENERAL McCREE: It's also my understanding. But the district court said that reference to the past --

QUESTION: Right. Now the question is, could such a letter be admissible if it said, "You will recall that two

months ago you gave me $500 and I introduced such-and-such for that."

Now would that letter be admissible?

GENERAL McCREE: We submit that it would, because that statement might be false. And if he said that for the purpose of eliciting a further payment, and he had not in fact introduced the bill --

QUESTION: I see. You do not offer it for the truth of the matter asserted in the letter?

GENERAL McCREE: Exactly.

QUESTION: General McCree, I suggest to you that my earlier colloquy with Mr. Stavis is not entirely irrelevant to some of the questions that my brethren have been asking you.

This is a very hypothetical situation we're presented with. And I take it you agree that the jurisdiction of this Court exists by virtue of 28 U.S.C. 1254; that the case was in the Court of Appeals, and we therefore had jurisdiction to review it.

GENERAL McCREE: We do, and we concede, however, that unless the Court of Appeals had jurisdiction, that this Court does not have jurisdiction.

QUESTION: And the only way the Court of Appeals had jurisdiction was pursuant to 18 U.S.C. 3731.

GENERAL McCREE: Exactly. And we contend that this is an order suppressing evidence under 3731, and as such, it's

appealable if the appeal were taken before the defendant was placed in jeopardy.

And we submit that the provision itself admonishes us to give it a liberal construction, to effectuate its purposes; and that is, to allow the government to have a ruling before a defendant is placed in jeopardy.

QUESTION: Do you think the government could come in and on its own, without the defendant making any motion, say this is the evidence we're going to present at trial, we'd like the trial court to rule on whether it would be admissible or not; then the trial court divides it into categories, and says this willbe admissible; this isn't; and the government can then appeal, say the court's determination that certain evidence is hearsay, and would therefore be inadmissible?

GENERAL McCREE: That's a difficult question, if the Court please.

?

An order elimine which is really what it is --

QUESTION: Yes.

GENERAL McCREE: -- indicating what evidence might or might not be introduced is admissible under some systems of procedure.

Now whether the Federal rules of Criminal Procedure permit it, I can't direct the Court's attention to a specific provision. But in this case, the Court did, and the Court had the matter properly before it on Mr. Helstoski's motion to dismiss.

And Mr. Helstoski raised several questions about the evidence. And the court, in its ruling -- in fact, in its first ruling, its oral ruling, it said that we would have to redact the indictment.

But in its subsequent written opinion, it indicated that we didn't have to redact the indictment, but as the Court has already pointed out, we could show evidence of promises to perform future legislative acts, but not past ones.

And so we -- the court did, in fact, suppress evidence, and we suggest, that although this Court hasn't decided the question, there are a number of decisions in the Court of Appeals which have done exactly this.

One case that I recall is Batisti v. United States?, in which the Sixth Circuit decided that, and another one in the -- this Court denied certiorari -- that's United States v. Craig from the Seventh Circuit ---

We suggest that the Speech or Debate Clause creates immunity for a Congressman from civil or criminal liability for his legislative acts. And we concede that it shouldn't be construed as narrowly as the speech or debate in the Congress, but that it's the kind of acts that are generally done in furtherance of a legislative process, which certainly doesn't include soliciting a bribe.

And so we say that there is an immunity from prosecution for a legislative act. We further submit that

the Court has developed an evidentiary privilege in implementation of this immunity.

And as the Court has done twith the other privileges, evidentiary privileges, that it has created, that -- we suggest that the shield should not be any broader than is necessary to protect the interests for which it was established.

QUESTION: And all was waivable, I gather?

GENERAL McCREE: I beg your pardon?

OUESTION: All was waivable?

GENERAL McCREE: And we suggest, too, that it is waivable. And in this respect, of course, there isn't any question but that Mr. Helstoski made a gesture before the grand jury of a clean breast of everything: I want the grand jury to know that I have nothing to hide.

And he brought in all of these materials, although he was told that he was not required to do this. And to permit him to do this, and then to assert a privilege, would be to make a mockery out of the privilege, because he would just have it one way; not both ways.

And the Court does not permit that in other matters, and we see no reason why it should in this matter.

We'd also like to suggest that there's another reason why the district -- why this indictment is good, and why the district court's restriction on evidence should be reversed.

We advanced the theory in Brester that was suggested in Johnson that if there were a narrowly -- a statute narrowly drawn to achieve the end of regulating the conduct of a business, that the Congress could then involve the executive branch and the judicial branch in its -- in the discipline of its members.

And we suggest that in section 201, the Congress has done exactly that, in its definition of who is an official for the purpose of Section 201, it specifically provides that a member of the Congress is; and then it specifically sets for the offenses which the defined officials may not -- of which they may be found guilty.

So clearly this is a statute narrowly drawn to achieve the end of regulating the conduct of its members. And we suggest that there's a good reason for it, too.

And my brother who was arguing here a few moments ago suggested -- or stated, in response to a question from the Court, that a jury wouldn't be available if a member of the Congress was called on to trial.

The Congress has decided for this purpose, with the third branch involvement, there will be a jury; there can be confrontation; right of counsel.

QUESTION: Well, not only that there can; there must be.

GENERAL McCREE: There must be -- I thank the Court

for the correction. There must be.

And we submit that Congress has indeed done this with a carefully-drawn statute which distinguishes it from Johnson.

This Court didn't address this question in Brewster, although the government brief did. But we suggest that this is another basis for arriving at the results that we request.

QUESTION: Mr. Solicitor General, may I be sure I understand your argument?

You're suggesting in substance, as I understand it, that Congress can waive the privilege in certain limited areas; is that right?

GENERAL McCREE: We do.

QUESTION: Could they pass a statute that says, members may be questioned about banking legislation? Or members may be questioned about legislation dealing with any other specific subject in which perhaps a minority of the Congress might be vitally interested and the majority might not be interested?

GENERAL McCREE: I think these are clearly legislative acts, and I would have difficulty with that.

QUESTION: Well, if they can't waive them in that situation, how they can waive it here?

GENERAL McCREE: Well, what they are doing is

asserting that members may be tried for non-legislative acts, which is what we have here.

QUESTION: Well, but if you have a non-legislative act, you don't need the waiver, as I understand it.

GENERAL McCREE:I Well, this is really in response to the argument that the Congress has exclusive jurisdiction of the disciplining of its members. And we don't think we have to belabor that, because we think if the Court is to agree with his argument there, it would have to reverse Brewster.

QUESTION: And Johnson.

QUESTION: Well, I thought your position was that with a narrowly drawn statute Congress could authorize the prosecution of Congressman for the performance of legislative acts?

GENERAL McCREE: No. If the Court please, I did not mean to give that impression. If I did, I stand corrected.

QUESTION: Well then, what relevance is your argument in this case, then, on this point?

GENERAL McCREE: Well, this is just a second argument why the Congress, with a narrowly drawn statute, could have involved the executive branch and the judicial branch, in the disciplining of its members.

In addition to the argument that prevailed in Brewster, identifying the act as a non-legislative act, the taking of a bribe --

QUESTION: So you're just saying the Congress -- that

a narrowly drawn statute could authorize the executive to punish Congressman for conduct falling outside the speech and debate clause.

GENERAL McCREE: Exactly.

QUESTION: That's as far as you -- that's as far as the argument goes?

GENERAL McCREE: That's as far as that argument goes.

QUESTION: And this argument -- and it also -- so that first argument doesn't affect whether or not this evidence is admissible?

GENERAL McCREE: Only in this sense: That since this is a non-legislative act, evidence of soliciting a bribe, evidence can be introduced in support of it.

QUESTION: Yes. As long as -- if you're right on that. If you're right on that.

But if the Court thought that this involved evidence or conduct protected by the Speech or Debate Clause, your argument then would fall by the wayside?

GENERAL McCREE: We would have to go to our waiver argument. It would fall by the wayside. And only a waiver would permit a prosecution for that.

QUESTION: And -- so you at least say then that the privilege or the immunity belongs to a member individually?

GENERAL McCREE: On -- with respect to the waiver, we do.

And we suggest that it would be --

QUESTION: Yes, but it's also -- it's something the Congress can't waive for him.

GENERAL McCREE: We suggest that -- the entire Congress?

QUESTION: I just asked you if Congress could, by a narrowly drawn statute, authorize the prosecution for a legislative act; and you said no.

GENERAL McCREE: Yes, that's correct. And I will not retreat from that position. And I'm suggesting --

QUESTION: So that the privilege does belong to the individual?

GENERAL McCREE: It belongs to the individual. And I suggest that to allow an individual to have it both ways is contrary to our whole system of jurisprudence; that if he doesn't claim, if he does express a waiver clearly -- we think he can be prosecuted.

QUESTION: But even in this case I don't -- is there some evidence that he consented to be prosecuted for a legislative act?

GENERAL McCREE: No, he did not expressly waive, but we have --

QUESTION: No, did he ever consent to be prosecuted for a legislative act?

GENERAL McCREE: He did not consent to be prosecuted

for a legislative act.

QUESTION: Do we need to decide in this case whether Congress could, by a very -- statute more narrowly drawn perhaps than Section 201, submit to trial for a legislative acts?

Do we need to decide that?

GENERAL McCREE: We need not; we need not. Because the act here, soliciting a bribe, is clearly and concededly not a legislative act.

QUESTION: So the case could be decided narrowly on the basis of Brewster and Johnson?

GENERAL McCREE: We believe that it can. We believe that --

QUESTION: Either way, apparently, if you listen to the other side.

GENERAL McCREE: Well, we believe, however, that Judge Meanor -- that the Court of Appeals was too restrictive in -- and that Judge Meanor was too restrictive. And this Court should reverse that decision of the Third Circuit.

QUESTION: Well, there's another alternative, isn't there? And that is to let them go their way and see what happens.

GENERAL McCREE: That is another course that's available to the Court too.

We think that the district judge could benefit from

the guidance of this Court in indicating what was referred to in Brewster as acts relating to legislative acts, and not legislative acts themselves.

QUESTION: Well, I gather Mr. Solicitor General, that the government thinks it has a case even without materials that Judge Meanor's order would exclude?

GENERAL McCREE: We believe that --

QUESTION: A case enough to get to the jury.

GENERAL McCREE: We believe the government has such a case, and we filed with the court a sealed appendix that I think contains sufficient evidence to go to the jury. But we would like to take the strongest case we dcan.

My brother didn't speak about his mandamus action in -- or at least that aspect of it that was the basis for the Court of Appeals denial of his petition.

And we think that the Court of Appeals was clearly right there. And unless the Court has any questions about that I would not discuss that in argument.

If the Court please, then, that concludes the argument of the government at this vantage.

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

Do you anything further, Mr. Stavis?

MR. STAVIS: Yes, I do.

MR. CHIEF JUSTICE BURGER: You have about three minutes left.

REBUTTAL ARGUMENT OF MORTON STAVIS, ESQ.,

ON BEHALF OF PETITIONER IN 546 AND

RESPONDENT in 349

MR. STAVIS: Thank you very much.

Picking up the colloquy between Mr. Justice White and the Solicitor General, it seems now to be conceded that the Congress cannot waive into an Article III court trial of a legislative act.

QUESTION: If you understood it that way, I didn't.

MR. STAVIS: I think that was what the Solicitor General --

QUESTION: I thought he said Congress has not done that up to now.

MR. STAVIS: I thought he went further.

QUESTION: I asked him that. Whatever -- you'll have to -- that was my question anyway. What he answer was is another matter.

QUESTION: Do we need to decide what Congress could do in the future?

MR. STAVIS: I understand that. I understand that you don't have to decide this question. But I thought I heard the Solicitor General conceding that.

If I'm wrong, I respectfully request to be excused for this error. But if I am right, then what the Solicitor General is saying is that while the whole body of Congress

can't waive into an Article III court, one member can.

And it just seems to me that that falls of its own weight.

QUESTION: There are many things that Congress could not do to waive your rights or my rights which you or I individually might well do.

MR. STAVIS: But not when the rights relate to the jurisdiction of a court. I can't waive myself into this Court? That's one of the points that Mr. Justice Blackwood suggested. We can't -- by the fact that I may not have even cross-petitioned. I can't waive the objection to the jurisdiction to the Third Circuit.

And if this is jurisdictional, then the waiver argument doesn't apply either with respect to Congress as a whole or acting as individuals.

Now, I would like if I may to --

QUESTION: Well, let's test that, Mr. Stavis. Supposing the Congressman is called before a grand jury. He's alone in the grand jury room, and a bunch of questions are asked of him, all of which pertain to legislative acts.

He could answer those, couldn't he?

MR. STAVIS: He not only could answer them, but if he's not the target, I believe he's required to answer.

QUESTION: Assume he's the target.

MR. STAVIS: Well --

QUESTION: He still could answer them, if he decides, "I think I'll answer these questions."

MR. STAVIS: If he is the target, and if he answers them, he is probably subject to discipline by the House.

QUESTION: For waiving his privilege, he's subject to discipline?

MR. STAVIS: I respectfully suggest to you that if you'll look at Jackson's manual, as recorded in our brief, in which he says, "Yes, he may not waive that privilege of the House of Speech and Debate."

But even if the House should overlook that, and he has waived it, and he has testified -- he has testified -- the next question is, what is the consequence of that testimony? Does that waive him into an Article III court when the constitution says the Article III court has no jurisdiction?

I've never been able to go to a courthouse and say, please, take this case, even though you don't have jurisdiction.

QUESTION: Well, isn't the grand jury in an Article III court?

MR. STAVIS: The grand jury is partially in an Article III court; yes, sir. Partially. This also adds in something else, too. I think it's in honor of the executive.

QUESTION: Well, Mr. Stavis, there's no evidence here -- there's no evidence there that even if the Congressman appeared before the grand jury and freely talked about

legislative acts, made no objection whatsoever, if yhe didn't go on and said, I also waive my immunity from prosecution for legislative acts, he wouldn't have waived his immunity from prosecution.

MR. STAVIS: Of course not. He never even said --

QUESTION: There isn't any evidence like that here?

MR. STAVIS: Not in the slightest. Not in the slightest.

May I have 30 seconds?

MR. CHIEF JUSTICE BURGER: We'll give you 60.

MR. STAVIS: Thank you.

I want to focus on my case for just a moment: and that is, the indictment, and particularly on what may be attractive to some members of the Court, which is, well, let's just fix up this indictment.

I simply want to say that the consequence of that is that you remove the effective operation of the speech and debate clause at the point where it's most important; namely, where it is accusatory.

Now in Kilbourn against Thompson, the meaning of the term "question" was not, Mr. Justice Stevens, in terms of do you ask a question. It is rather, may you make a charge.

I respectfully refer you to Mr. Justice Miller's opinion , in which he equates the Speech or Debate Clause rule

609

term "questions" to the language of the Massachusetts constitution, which refers to accusation.

If you take that concept, and we move over to Justice Rehnquist's question, and say, is there any case where you set aside an indictment because of something that happened in the grand jury? And I say that that's exactly what you do in the immunity type case, where a grand jury heard testimony that was barred; they should have heard. And you say to that prosecutor, "Well, if you did it, we cancel that indictment. If you want to go ahead and not use that prohibited testimony, you're free to do so." And that's all we've ever said here.

And if the prosecutor should decide not to do that, in any event we said that the Congress has jurisdiction.

I'm very grateful to you, Your Honor, for indulging me to that extent.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:24 o'clock, a.m., the case in the above entitled matter was submitted.]