Corruption and Distrust as Leitmotifs of the Strategically Uncertain Judicial Interpretation of Legislative Immunity in the United States

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Abstract

This article analyzes the judicial interpretation of legislative immunity in the United States. The main argument is that judicial interpretation has transformed the Speech or Debate Clause (the Clause) from a tool of protection of popular democratic sovereignty and, to a lesser extent, separation of powers, into a tool for preservation of institutional stability under the watchful eye of the courts. An increase in legislative corruption has lain behind this development, which entrenched the judicial distrust of political – and even democratic – processes as inherently flawed. Courts seized the opportunity, and engaged in strategically uncertain interpretation of the Clause, reducing, on the one hand, legislative immunity by inventing unsustainable distinctions between past and future legislative acts and political acts, while, on the other, increasing procedural protections for legislative immunity by barring executive and judicial inquiry into legislative motivation, and extending evidentiary and disclosure privileges from civil suits into criminal process. This judicial balancing placed courts in a position to simultaneously frustrate and satisfy executive and legislative ambitions and vices. In doing so, to some extent American courts mimicked processes through which English courts passed when assuming the mantle of arbitrators of the contours of parliamentary privileges, and have, in turn, influenced English courts' decisions on legislative corruption.

The article then questions the wisdom of the judicial limitation of legislative immunity as a tool for the prevention of political corruption. The strongest argument in its favor is that it prevents legislators from being 'the judge in their own case' by addressing the social perception

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that legislative immunity is merely a mantle for corruption. However, given the inherent institutional, procedural, and communicative weaknesses of the judiciary and the judicial process, using judicial limitation of legislative immunity to cure political corruption is advisable only when background conditions allow, which effectively means that it is inadvisable for most societies.

Keywords:

Legislative immunity, parliamentary privilege, Speech or Debate Clause, judicial interpretation of constitution

Introduction

Legislative immunity temporarily or permanently protects members of legislative bodies from legal action, investigations, arrests and/or measures of law enforcement in criminal and/or civil matters for acts committed in their capacity as legislators.[2] It is considered an instrument for securing an unhindered legislative and democratic process and protecting legislative independence from other branches of government (executive and judiciary) and political opponents. In spite of its long history, and the fact that, in one form or another, it is entrenched in most constitutions around the world, the exact content and limitations of legislative immunity remain somewhat unclear and have received surprisingly little sustained attention within literature[3].

(2) Despite the long history, there does not exist a universally accepted definition of what exactly legislative immunity entails. A general working definition used for the purposes of this paper is an extension of the definition of parliamentary immunity used by the EU Parliament, see "Parliamentary Immunity in a European Context - Think Tank," 6, accessed June 25, 2016, http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA(2015)536461.

(3) Notable exceptions include Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions, (New Haven: Yale University Press, 2007), and Sascha Hardt, "Parliamentary Immunity : A Comprehensive Study of the Systems of Parliamentary Immunity of the United Kingdom, France, and the Netherlands in a European Context" (PhD thesis, on file with the author, Maastricht University, 2013) .

Increasingly, legislative immunity has come under attack due to the perception that it is a mere umbrella for political corruption[(4)]. In recent years, constitutional and statutory reforms and court decisions around the world have been applied to increasingly limit or advocate limitations to legislative immunity, sometimes even in its most sensitive form, that of non-accountability[(5)]. The first (troubling) aspect of this development is that non-accountability is the core of legislative independence, since it protects – for better or for worse – legislators from adverse legal consequences for speeches, votes, and utterances made inside the legislative body and in the course of legislative process[(6)]. The second is that courts now habitually make decisions on what constitutes non-accountability as a form of legislative immunity[(7)]. The latter practice was previously discouraged due to the constitutional protections of legislative independence and the democratic process, or the separation of powers, or both[(8)].

(4) See Simon Wigley, "Parliamentary Immunity: Protecting Democracy or Protecting Corruption?," Journal of Political Philosophy 11, no. 1 (2003): 23–40, and Tillman Hoppe, "Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe," ICL-Vienna Journal of International Constitutional Law 5, no. 4 (2011): 538–49.

(5) For a comparative overview of current initiatives and the proposals to restrict legislative immunity, see European Commission for Democracy Through Law (Venice Commission), "Report on the Scope and Lifting of Parliamentary Immunities Study No. 714 / 2013" (Council of Europe, 2014); and the European Parliament Office for Promotion of Parliamentary Democracy, "Non-Liable? Inviolable? Untouchable?. The Challenge of Parliamentary Immunities: An Overview" (European Parliament - Office for Promotion of Parliamentary Democracy, 2012).

(6) The second form of legislative immunity, inviolability, implies (limited) immunity of the individual legislator from arrest, detention, prosecution, and other administrative proceedings for acts commited mostly in private capacity outside of the legislative body, without the consent of the legislative body of which they are a member, see European Commission for Democracy Through Law (Venice Commission), "Report on the Scope and Lifting of Parliamentary Immunities Study No. 714 / 2013," 4 paras 10-11. Although inviobility in some cases overlaps with non-accountability, the primary focus of this paper is the limitations of non-accountability.

(7) For an overview of the US and UK cases see Parts 2 and 4 infra. For an overview of cases in the European Court of Human Rights and the European Court of Justice, see "Parliamentary Immunity in a European Context - Think Tank," 9–27.

(8) See Robert J. Reinstein and Harvey A. Silverglate, "Legislative Privilege and the Separation of Powers," Harvard Law Review 86, no. 7 (1973): 1113–82, doi:10.2307/1340064; Michael Seghetti, "Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs of Congressional Immunity," Notre Dame Law Review 60, no. 3 (January 1, 1985): 589; and Wells Harrell, "Restoring the Original Meaning of the Speech or Debate Clause," Virginia Law Review 98 (2012): 385.

This paper analyzes the judicial limitations of legislative immunity in the United States. The choice of the US as the jurisdiction of focus is not random. Well before courts in other countries, the US Supreme Court and lower courts struggled with the problem of how to limit legislative non-accountability so as to prevent political corruption without undermining legislative independence and the will of the voters or violating basic tenets of the separation of powers[9]. Hence, it is a useful launchpad for a more general critical discussion of the promises and limits of judicial interpretation and increasing limitations of legislative immunity.

The main argument advanced in the paper is that from being a tool of protection of popular democratic sovereignty and, to a lesser extent, the separation of powers, the legislative immunity guaranteed by the Speech or Debate Clause became a tool for the preservation of institutional stability under the watchful eye of the courts. Judicial interpretations and interventions regarding legislative immunity transformed the Clause from a right of legislators to express, communicate and legislate as per voters' desires without being hindered by other branches, to a right of legislators to legislate up to a point where the courts find their connections with voters overly corruptive.

The main causes behind this development, however, were understandable. The contemporary increase in incidence and opportunity for political corruption in the legislative process entrenched the judicial distrust of political and even democratic processes as inherently corruptive. It also provided justifications for judicial reinterpretations of legislative immunity in a way that, in important respects, is clearly inconsistent with the original purpose and meaning of the legislative immunity enshrined in the US Constitution. Courts seized the opportunity and strategically created parallel lines of cases with practically casuistic distinctions between past and future legislative acts and political acts, and the evidentiary and disclosure privilege, positioning

(9) See, i.e., Craig Bradley, "The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?," North Carolina Law Review 57 (January 1, 1979): 197; A.J. Green, "United States v. Renzi: Reigning in the Speech or Debate Clause to Fight Corruption in Congress PostRayburn," BYU Law Review 2012, no. 2 (May 1, 2012): 493–508; and Michael Shenkman, "Talking About Speech or Debate: Revisiting Legislative Immunity," Yale Law & Policy Review 32, no. 2 (2013): 351.

themselves as final arbiters of the meaning and limits of legislative immunity, thus simultaneously frustrating and satisfying executive and legislative ambitions and vices. In doing so, American courts to some extent mimicked the process in which English courts assumed the mantle of arbitrators of the contours of parliamentary privileges, and, in turn, influenced the UK courts' attitudes toward legislative corruption[10].

This article then uses the background of the judicial interpretation of the Speech or Debate Clause to engage with less parochial and more general questions. It concedes that judicial limitations of legislative immunity are here to stay, and likely to become even more expansive, in the US and elsewhere. The strongest argument in favor of this phenomenon is that it prevents legislators from being 'judges in their own cases' and, in doing so, improves institutional stability by correcting flaws of periodical political accountability. However, given the inherent institutional, procedural, and communicative weaknesses of the judiciary and the judicial process, employing a judicial limitation of legislative immunity to cure political corruption is advisable only when background conditions allow, which means that it is inadvisable within most societies. Unless conditions are favorable, overuse of the judicial limitation of legislative immunity risks further entrenching political corruption and jeopardizing institutional stability.

Part One of the paper discusses the historical origins of the Speech or Debate Clause in the US Constitution, and early case law. Part Two analyzes post-1972 limitations and expansions of legislative immunity and privilege. In Part Three, political corruption and the judicial distrust of the legislative, political and even democratic processes are presented as causes behind the judicial foray into legislative immunity. Part Four argues that judicial limitation of legislative immunity is a permanent phenomenon, and weighs up the arguments for and against this.

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(10) See R v. Chaytor and others (2010) UKSC 52, paras 38-40. For a further discussion of Chaytor see text in Part 4, infra. Throughout the paper, for simplicity, cases cited for the first time are in full citation form, and every next citation of the same case is in short form, with italicized name of the case followed by a page number.

1. Legislative immunity and privilege in the United States: historical background and the Johnson Doctrine

The parliamentary privilege of freedom of speech or vote afforded by the 1689 English Bill of Rights was influential well beyond the borders of England and left a lasting impact also within United States history.(11) It directly influenced the wording and content of Article V of the Articles of Confederation,(12) and embedded legislative immunity for all members of Congress in a Speech or Debate Clause (the Clause),(13) which was adopted at the Constitutional Convention without opposition or debate(14) Questions frequently raised by later interpreters of the Clause were along the lines of the following: What were the rationales behind the Clause?; What bodies and individuals does it protect?; Which activities can be deemed properly legislative and protected by the Clause?; and Which body was properly authorized to interpret and resolve inevitable disputes? Here, I offer only a few answers most pertinent to this paper.

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(11) *United States v. Johnson* 383 U.S. 169, 178 (1966) ("This formulation of 1689 was the culmination of a long struggle for parliamentary supremacy…Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature."), internal citations omitted.

(12) Ibid., 177 ("The present version of the clause was formulated by the Convention's Committee on Style, but the original vote of approval was of a slightly different formulation which repeated almost verbatim the language of Article V of the Articles of Confederation…The language of that Article, of which the present clause is only a slight modification, is, in turn, almost identical to the English Bill of Rights of 1689…"), internal citations omitted.

(13) See U.S. Const. Art. I, § 6, cl. 1, («[Senators and Representatives] for any Speech or Debate in either House, …shall not be questioned in any other Place.").

(14) See *Johnson*, 177, and further Chafetz, Democracy's Privileged Few, 88. The full extent of the legislative immunity and privilege was set forth in three clauses of the Constitution, the Publication Clause (U.S. Const. Art. I, § 6, cl. 3, "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their judgment require secrecy"); the Arrest Clause, (U.S. Const. Art. I, § 6, cl. 3, "[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same..."); and the Speech or Debate Clause. Only the Speech or Debate Clause is relevant for legislative non-accountability, see Bradley, "The Speech or Debate Clause," 199.

From the moment the Constitution was drafted and ratified, it was clear that the primary rationale behind Clause was not the assertion of legislative supremacy but the protection of legislative independence and popular sovereignty against the encroachment of the executive and judiciary.(15) A proposal to make Congress similar to the British Parliament and a judge of its own privileges was rejected due to the strong opposition of James Madison and other drafters, who detested the unfettered right of the British Parliament to extend parliamentary privilege indefinitely and felt it necessary to define legislative immunity narrowly and to entrench it within the Constitution.(16) Given the mixed republican and democratic leanings of those days, legislative immunity was understood as a privilege of both the legislative body and the legislator as an individual, entrenched in the Constitution so that not even the legislative body could destroy or relinquish it through statutes.(17)

James Wilson, the principal architect behind the wording of the Clause, argued that its inclusion in the Constitution was meant to enable the representatives, in their capacity as bearers of the public trust, to express opinions in communication with their constituents freely and without a fear from anyone, particularly the executive and judiciary(18). The first conflicts over the meaning and scope of the Clause were exactly along these lines. Shortly after the Constitution was enacted, a number of anti-Federalist members of Congress, in the course of public communication with their constituents, criticized then-President John Adams for conducting an undeclared war against France, a purported US ally. Upon the indictment of these representatives by a federal grand jury for sedition and libel that allegedly caused damage to peace, foreign policy and the executive, Thomas Jefferson spoke out strongly against the indictment and trials as manifest violations of the legislative immunity(19).

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(15) See Reinstein and Silverglate, “Legislative Privilege and the Separation of Powers,” 1119.

(16) Bradley, “The Speech or Debate Clause,” 198–99, 212.

(17)This view is also taken by Reinstein and Silverglate, see Reinstein and Silverglate, “Legislative Privilege and the Separation of Powers,” 1169–70. For an opposing view, which is ultimately unconvincing in light of other historical evidence discussed in this section, see Bradley, “The Speech or Debate Clause,” 224.

(18) See Richard Batchelder, “Chastain v. Sunquist: A Narrow Reading of the Doctrine of Legislative Immunity,” Cornell Law Review 85, no. 4 (2000): 386 note 18.

(19) Ibid., 386–87.

Jefferson wrote:[(20)]

For the Judiciary to interpose in the legislative department between the constituent and his representative,... to overawe the free correspondence which exists and ought to exist between them, ... to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation.

The historical evidence presented above shows that the framers of the Constitution intended legislative immunity as a protection for representatives in both houses of Congress in at least three ways, some of which are contradictory to others. Firstly, the Clause protected members of the legislative bodies from the actions of other coordinate (i.e. equal) branches, executive and judicial, both in the course of their activities in Congress and in the course of their communication with constituents, irrespective of the place or medium of communication. Its application was not meant to be restricted solely to the acts of the representative at the floor of Congress or in Congressional offices, so long as the activity of the representatives related to their role as legislators. Secondly, the Clause placed legislative activity largely beyond the reach of the coordinate and coequal executive and judicial branch, as each power was supposed to govern its own affairs. Finally, since the framers of the Constitution explicitly rejected total separation of power,[(21)] and were concerned with preventing any one branch from becoming all too powerful, the Clause was placed in the Constitution to prevent legislative immunity from becoming infinitely undefined and open to expansion or limitation at the whim of the legislative body or other branches of government.

(20)See Thomas Jefferson, Petition to Virginia House of Delegates, in Jefferson, Thomas, The Works of Thomas Jefferson Volume 8 (Best Books, 1904), 325–26. On Jefferson's views see also Josh Chafetz, "Cleaning House: Congressional Commissioners for Standards," Yale Law Journal 117 (October 1, 2007): 166, note 6.

(21)See Mistretta v. *United States*, 488 U.S. 361, 380 (1989) ("...the Framers...indeed rejected the notion that the three Branches must be entirely separate and distinct"), intenal citations ommited.

From the time of creation of the Constitution until well into the 20th century, the courts generally construed legislative immunity very narrowly in criminal matters, and very broadly in civil ones. The Clause did not protect legislators against punishment for criminal acts committed in a private capacity, unrelated to legislative work.[22] In civil suits, however, the legislative immunity was broad, even being expanded over time, with continuous affirmation that decisions regarding its scope and content were beyond judicial control[23].

In 1966, in United States v. Johnson, the first fully fledged case determining the scope of legislative non-accountability in criminal trials, the Supreme Court held that the Clause protects a Member of Congress from criminal prosecution, in spite of evidence that Congressman Johnson conspired to give a speech on the floor of the House of Representatives in return for remuneration from private parties.[24] In

(22) See *Gravel v. United States* 408 U.S. 606, 615 (1972) ("Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons"), citing Thomas Jefferson, Manual of Parliamentary Practice, S.Doc. No. 92-1, 437 (1971). In United States v. Williamson, 207 U.S. 425(1908), drawing on the history of British parliamentary privilege, the Supreme Court concluded that the Arrest Clause protects only against civil arrest. The arrested congressman thought otherwise, arguing that the arrest on criminal charges prevented him from attending sessions of Congress during recess time. However, the Court found that terms 'treason, felony, and breach of the peace' in the Arrest Clause embraced all criminal cases and proceedings whatsoever, see United States v. Williamson, 207 U.S. 425, 435, 445-446 (1908).

(23)See *Coffin v. Coffin 4 Mass.* 1 (1808) (legislative privilege is beyond judicial control and encompasses not only voting but also written reports, as well as speeches that might be contrary to the internal rules of Congress), and *Kilbourn v. Thompson* 103 U.S. 168 (1880) and *Tenney v. Brandhove* 341 U.S. 367 (1951) (affirming Coffin and the broad nature of federal and state legislative privilege and immunity against private civil suits).

(24) *Johnson*, 180 ("However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. The essence of such a 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,") internal citations omitted. For further discussion see Batchelder, "Chastain v. Sunquist," 389.

Johnson, the US Supreme Court created a distinction between the legislative evidentiary privilege applicable in criminal trials, and legislative immunity, which it construed as not only prohibitive of punishments for legislative acts, but also of questioning the motivations behind legislative acts. It did so by holding that since the Clause emerged from the struggle for parliamentary supremacy, it contains a broad legislative privilege designed to protect against prosecution of legislators by a possibly unfriendly executive and a hostile judiciary,25 and by claiming that legislative privilege protecting legislators in civil suits also extends to criminal trials(26).

Johnson rested on at least two consciously mistaken interpretations that transformed the meaning of the Clause. Firstly, the Court extended legislative immunity in Kilbourn and Tenney from the civil to the criminal process and inappropriately applied the British precedent Ex Parte Wason to drive out the conclusion that legislators are not only immune from punishment for legislative acts, but that they also cannot be questioned regarding their motivations for legislative acts(27). Secondly, in extending the legislative privilege from civil suits confirmed in Coffin, Kilbourn and Tenney to criminal trial, the Court disregarded its own precedent, since Kilbourn explicitly stated that legislative privilege in civil suits does not extend to the criminal process(28).

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(25) Ibid., 177-180. For a criticism of the distinction between legislative immunity and privilege as a misunderstanding of the original meaning of the Speech or Debate Clause, see, generally, Harrell, “Restoring the Original Meaning of the Speech or Debate Clause.”

(26) Ibid., 180-182, discussing the application of legislative privilege against private civil suits, as affirmed in Kilbourn and Tenney , to criminal trial in Johnson.

(27) Ibid., 181-185. *In Ex parte Wason*, L. R. 4 Q. B. 573 (1869), the British court held that parliamentary privilege barred it from hearing a matter of alleged agreement and conspiracy by members of the Parliament to deceive the House of Lords by uttering false statements. Such conduct in Parliament was not an ‘ordinary’ crime of uniform application, but a breach of privilege, punishable only by Parliament. Hence, inquiry into the motives of Parliament’s members could not be made the subject of a criminal prosecution in courts. But Wason was not applicable in Johnson, since Johnson was charged with the federal crime of violating the conflict of interest statute and conspiring to defraud the United States, see *Johnson*, 171, and further Bradley, “The Speech or Debate Clause,” 219.

(28) See Kilbourn, 204-205.

If not directly in its wording, implicitly Johnson invented a new legislative evidentiary privilege, with the effect that all documents even tangentially related to legislative acts and legislative process are excluded from being used as evidence of criminal intent (motivation for the act) and act within a trial.(29) This de facto prevented executive and judiciary from prosecuting corrupt legislators, since inquiring into, e.g., bribery as a motivation for legislation, and proving motivation with evidence from the legislative process, violates the Clause.(30) The Supreme Court tried to limit this by stating that Johnson does not apply in cases of statutory crimes unrelated to legislative acts and motivations, and entertained the possibility that punishment for legislative acts and inquiry into motivations would be possible if based on statute enacted by Congress in exercise of its power to regulate conduct of its members.(31)

However, these limitations were of little practical use, since the validity of the congressional limitation of immunities granted by the Constitution is questionable. And separating prosecutions based on legislative motivations and activity from those which are not seems difficult in practice, especially in light of the Supreme Court's broad reading of legislative privilege that barred the use of materials related to legislative process as evidence of motivation, materials that, after all, belong to the individual legislator. Johnson opened a controversy that lasts until the present day, as the cases discussed in Parts 2.1 and 2.2 show.

2.Post-Johnson judicial limitations and expansions of legislative immunity and privilege

2.1. Limiting immunity: Brewster and its progeny

Six years after Johnson, in 1972, the tide began to slowly turn, and legislative immunity became increasingly limited. In a landmark case United States v. Brewster,(32) the Supreme Court substantially limited

(29) Harrell, "Restoring the Original Meaning of the Speech or Debate Clause," 386.
(30) See Bradley, "The Speech or Debate Clause," 229.
(31) *Johnson*, 185.
(32) *United States v. Brewster*, 408 U.S. 501 (1972).

the extent of legislative immunity. Daniel Brewster was a former US Senator charged with the solicitation and acceptance of bribes in return for already-enacted legislation. In the District Court, relying on Johnson, Brewster successfully claimed that the Speech or Debate Clause shielded him from prosecution, and charges were dismissed.(33) After a writ of certiorari was granted, during the oral argument in the Supreme Court on October 18th, 1971, Justice Thurgood Marshall mockingly showed what results the Johnson doctrine of absolute protection of legislative immunity would yield if taken to its extreme:(34)

Question, Justice Marshall: “Suppose a Senator or Congressman accepts $5,000 from A to peak and vote on future legislation, another $5,000 from B to speak against and vote against a piece of legislation, and goes fishing. Is he up for bribery?”

Answer, Norman Ramsey [Counsel for Brewster]: “I would certainly say, sir, that both of those actions of his would be subject to discipline in his house. I am simply addressing myself in this instance to saying that they should not be questioned in any other place. Which is what the speech and debate says.”

Question, Justice Marshall: “What would he be disciplined in the house for, for going fishing?”

In the end, as charges against Senator Brewster were fundamentally related to corruption, the Supreme Court held against him. It did so by drawing a distinction between the legislative acts conducted in Congress as part of the legislative process and therefore protected by the immunity, and ‘political acts’ such as Members of Congress meeting government officials, assisting in obtaining government contracts, giving speeches to constituents outside of Congress, etc. While the legislative immunity protects the legislative acts, the political acts, according to the Supreme Court, fall outside of the protective realm of the Clause.(35) This

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(33) Ibid., 502-504.

(34) Transcript of Oral Argument, United States v. Brewster, 408 U.S. 501 (1972) (No. 70-45) minute 48-50, available at United States v. Brewster, accessed July 11, 2016, https://www.oyez.org/cases/1971/70-45.
For further discussion, see Shenkman, “Talking About Speech or Debate,” 372 note 99.

(35) *Brewster*, 512.

is, the Supreme Court opined, because the Clause protects a nature of the legislative process and not necessarily the individual representative, hence the protection granted by the Clause must be construed in such a way so as to enhance legislative independence. Financial bribes are not legislative acts, do not enhance either legislative independence or process, and are therefore not protected from actions of the executive or judicial branch[36].

Not by chance, on the same day Brewster was decided, the Supreme Court decided Gravel v. United States and again affirmed that legislative acts are not all-encompassing.[37] Gravel was concerned with the question of whether a subpoena for Senator Gravel's aide to testify regarding his role in the Senator's possibly criminal activities involving the disclosure and publication of top secret national defense information (the Pentagon Papers), which the Senator read on the congressional committee meeting and later published outside of the Senate, was covered by legislative evidentiary privilege.

The Supreme Court concluded that the Clause did not protect a representative from criminal investigation for publishing confidential information outside of the Senate, as such publication is beyond the scope of legislative acts, hence the legislative privilege did not bar Senators Gravel's aide from testifying about his and the Senator's involvement in the publication of the confidential materials[38]. The decision was limiting of the legislative privilege established in Johnson, and a concession to the executive branch, since then-President Nixon was concerned that the release of the Pentagon Papers would harm his interests. Ironically, two years later, and after the Watergate Scandal, in Nixon v. United States,[39] Nixon found himself on the receiving side of judicial interpretation of privilege, unsuccessfully claiming the defense of absolute executive privilege (nowhere to be found in the Constitution) against charges leveled upon him.[40]

(36) Ibid., 525-26.

(37) *Gravel*, 625. For a detailed discussion of Gravel, see Kelly M. McGuire, "Limiting the Legislative Privilege: Analyzing the Scope of the Speech," Washington and Lee Law Review 69 (2012): 2130–31.

(38) *Gravel*, 615-616, 625-627.

(39) *United States v. Nixon,* 418 U.S. 683 (1974).

(40) *Josh Chafetz*, "Congress's Constitution," University of Pennsylvania Law Review 160, no. 3 (2012): 751–52, 774.

While Brewster and Gravel were aimed at limiting legislative immunity and privilege, reasons given for decisions were either limited to the case in hand or self-contradictory. Though Gravel seemingly limited the extent of legislative evidentiary privilege, it only aided President Nixon and did not achieve much in terms of easing the evidentiary hurdle for proving legislative corruption, given it was applied in a context different to that of Johnson. A greater problem, however, was that Brewster upheld the Johnson prohibition of executive and judicial inquiry into motivation for legislative acts, and evidence proving it,(41) and then went on to state that legislative immunity applies only to legislative, and not to political, acts.

But there was an obvious contradiction in this approach. If legislator accepts a bribe for legislation, that bribe is a motivation for legislation that cannot be inspected since the Clause prohibits inquiry into motivation and the evidence proving such.(42) Further, the difference between legislative and political acts is contrary to both the commonsense and historical understanding, as described in Part 1, of the essence of legislative work.(43) If legislators do not communicate with voters and engage in political acts, then they are not legislating in a democratic sense of the word, but are rather engaging in administration. Taken to its logical conclusion, the Brewster doctrine yields some perverse results. It might be read as meaning that either all legislative acts are unprotected by immunity, since they are related to, or are a result of, some form of ‘political act’, or that ‘political acts’ are also covered by immunity because they are a usual motivation for legislative acts.

As one would expect, neither Brewster nor Gravel were welcomed by individual Members of Congress.(44) Congress collectively responded by forming the Joint Committee on Congressional Operations,

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(41) *Brewster*, 512.

(42) Bradley, “The Speech or Debate Clause,” 221–22.

(43) Probably for this reason, and in spite of the Brewster holding, most lower courts decisions ignore the distinction between legislative and political acts and hold on to a broader understanding of legislative work. For overview of these decisions see Shenkman, “Talking About Speech or Debate,” 351 and note 107.

(44) See, i.e., Senator Sam Ervin’s strongly worded criticism of Gravel and Brewster in Sam J. Ervin, “The Gravel and Brewster Cases: An Assault on Congressional Independence,” Virginia Law Review 59, no. 2 (1973): 175–95, doi:10.2307/1071992.

tasked with countering the judicial interpretation of legislative immunity. Unsurprisingly, the Committee concluded that the definition of protected legislative activities should include anything a Member of Congress does in their capacity as a representative of a constituency.(45) The Supreme Court remained unimpressed, and in Helstoski v. United States it found that legislative privilege bars use of documents originating directly from the office of the Member of the House as evidence of bribery for past legislative acts, but permits their use as evidence that the representative promised to enact legislation. Legislative immunity and privilege, concluded the Supreme Court, protects past legislative acts but not promises and future legislative acts(46).

The temporal boundary between past and future legislative acts in Helstoski is troubling, both when read independently and in conjunction with Johnson and Brewster. If the legislative immunity does not protect future legislative acts that are meant to be an expression of the aspirations and goals of those who voted for the legislator, there is even less reason why it should protect past legislative acts. This clearly presents a massive opening of space for political pressure on legislature for planned legislation by means of politically motivated criminal proceedings. Moreover, if Johnson and Brewster are seriously prohibiting inquiry into motivation for legislative acts, then such prohibition should also extend to future acts and legislative activity that has not resulted in acts, since deciding not to legislate is a form of negative legislative act, with a motivation of some sort.

2.2.Circuit split and a new round of expansion and destruction of legislative privilege

Parallel and mutually exclusive lines of reasoning regarding the outer limits of the Clause stemming from Johnson, and Brewster and its follow-up cases, opened the possibility for further judicial extensions and limitations of legislative immunity and privilege, causing a split between the D.C. Circuit and the Ninth Circuit Court.

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(45) See Batchelder, “Chastain v. Sunquist,” 390–91 and notes 60-63.

(46) *United States v. Helstoski*, 442 U.S. 477, 478 (1979) (“A promise to deliver a speech, to vote, or to solicit other votes is not “speech or debate” within the meaning of the Clause, nor is a promise to introduce a bill at some future date a legislative act”).

In the first landmark case, Brown & Williamson Tobacco Corp. v. Williams in 1995, the D.C. Circuit Court held that, in civil suits, the Clause grants Members of Congress an absolute nondisclosure privilege, and immunizes them from judicial or executive inquiry into the nature and sources of documents and information they use in the legislative process.(47) It did so after Brown & Williamson, a tobacco firm, sought and received subpoenas from the D.C. District Court, preventing Congressman Waxman from using documents showing that, contrary to its public statements and advertisements, for long Brown & Williamson had been aware that tobacco was addictive and damaging. The subpoena was issued because the documents were acquired in violation of employee duties and attorney-client privilege, and were barred from circulation and use by the temporary injunction granted in another civil suit.

Brown implied that documents and information in possession of Members of Congress, even if obtained in violation of otherwise-applicable laws and court injunctions, are beyond the reach of any other state branch as long as they remain a part of the legislative process. Though the civil context of the case provided justification for such a decision, this conclusion, if applied in a criminal context, potentially legalized criminal acts of legislators, since evidence of illegal activities could be simply proclaimed a part of the legislative process and placed safely beyond the reach of law enforcement and courts.

Twelve years later, this is exactly what happened. As facts of the case United States v. Rayburn House Office Building show,(48) in the period 2005-2006, the Department of Justice ran an investigation of a bribery scheme and, acting on a warrant, the FBI raided Congressman William J. Jefferson's office, seized his documents, and submitted them to the District Court, which was supposed to separate privileged documents that should be excluded from non-privileged documents that could be used within the investigation. As appellate judges noted, this was an unprecedented move, the first ever execution of a search

(47) *Brown & Williamson Tobacco Corp. v. Williams*, 314 U.S.App.D.C. 85, 64 USLW 2124 (D.C. Cir. App. 1995).

(48) *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007). For further discussion of Rayburn, see McGuire, "Limiting the Legislative Privilege: Analyzing the Scope of the Speech," 2141–43.

warrant on the congressional office of a sitting Congressman in the US history.[49] Public opinion demonstrated its feeling toward the allegedly sacred legislative immunity and separation of powers by being overwhelmingly supportive of the raid.[50]

Rep. Jefferson's immediate claims of defense of legislative immunity and privilege for all documents, alongside the separation of powers and Fourth Amendment arguments, were rejected in the first instance. In a strongly worded opinion, the D.C. District Court found that the protection of legislative immunity and privilege does not extend to execution of valid search warrants, arguing that "Congressman Jefferson's interpretation of the Speech or Debate privilege would have the effect of converting every congressional office into a taxpayer-subsidized sanctuary for crime".[51] On appeal, however, the D.C. Circuit Court reversed this decision, extended its reasoning from civil trial in Brown & Williamson Tobacco Corp. v. Williams to criminal trial, and affirmed that the Speech or Debate Clause protects documents belonging to a Member of Congress from being seized by the officers of the executive and used in an investigation.

The appellate judgment contained an important twist. The D.C. Circuit Court majority concluded that "The Speech or Debate Clause protects against the compelled disclosure of privileged documents to agents of the Executive, but not the disclosure of nonprivileged materials".[52] This Solomon-like statement was a step into uncharter waters, largely in order to make some evidence available for investigation and perhaps a trial. For the purposes of the case, it meant that only documents judged by the court to be directly related to the legislative process were protected by the disclosure privilege, while most documents stored on the Congressman's computer turned out not to be protected and were fit for use in both investigations since, despite the event of the 'cyber age', the court found that disclosure privilege protects only

(49) *Rayburn*, 668, (Henderson, J., concurring), and 655-657.

(50) The Washington Times, "Judge Rules FBI Raid on Hill Office Legal," accessed July 28, 2016, http://www.washingtontimes.com/news/2006/jul/10/20060710-115237-9121r/.

(51) *In re Search of the Rayburn House Office Bldg*, 432 F . Supp. 2d 100, 119 (2006), internal citations omitted.

(52) *Rayburn*, 667.

written materials.[53] However, the Supreme Court in Johnson created, if indirectly, evidentiary privilege as a bar to introducing evidence during a criminal trial. But it has not referred, in Johnson or elsewhere, to disclosure privilege, which would act as a protection against the compelled surrender of documents to law enforcement in investigation and pre-trial phase,[54] and which, if recognized as unlimited, could also bar investigations for ordinary crimes that collude with crimes committed in relation to legislative acts.

The holding of the majority was double-edged. On the one hand, it approved the executive inspection of representatives' premises under the umbrella of search for an undefined and potentially infinite number of non-privileged materials, and the later review of the material by the judiciary, which seems suspect from the point of view of separation of powers. On the other, it also extended the possibility for abuse of the legislative privilege. This is because the scope of all documents kept by the legislators and directly or tangentially related to legislative acts is potentially infinite, so theoretically it becomes is possible to conceal the evidence of illegal activities simply by making them formally inseparable from legislative documents. Precisely for this latter reason, Rayburn was criticized as out-of-line with Gravel and Brewster,[55] and

(53) See Akhil Reed Amar and Will Oremus, "Mr. Jefferson, Meet Mr. Jefferson," Slate, May 26, 2006, http://www.slate.com/articles/news_and_politics/jurisprudence/2006/05/mr_jefferson_meet_mr_jefferson.html. Special problems in Rayburn, which are beyond the scope of this paper, were Fourth Amendment protections against search and seizures. On the Fourth Amendment see Akhil Amar, "Fourth Amendment First Principles," Harvard Law Review 107 (1994): 757.

(54) Shenkman, "Talking About Speech or Debate," 415. Shenkman argues that the Supreme Court has not expressly addressed the question of whether the Clause includes any evidentiary or disclosure privileges. But in light of Johnson this seems to be correct only for disclosure privilege. Judge Henderson' opinion, concurring with the Rayburn majority, indirectly suggests this, arguing that the nondisclosure rule did not extend from civil litigation (as in Brown) to criminal investigations. Members of Congress, according to Henderson, have always been subject to criminal prosecution and across the board privilege against the disclosure of documents would "jeopardize law enforcement tools that have never been considered problematic," see Rayburn at 671, internal citations omitted.

(55) John D. Pingel, "Do Congressmen Still Pay Parking Tickets? The D.C. Circuit's Overextension of Legislative Privilege in United States v. Rayburn House Office Building," UC Davis Law Review 42 (2012): 1640 and accompanying footnotes.

disruptive of the coequality of government branches. It potentially positioned legislators beyond the reach of law enforcement or any judicial control even for crimes that they commit in their private capacity and provided opening for clear violations of even the weak version of the separation of powers(56).

A decision contrary to Rayburn was taken in the 2011 Ninth Circuit Court case United States v. Renzi.(57) Rick Renzi, a former Arizona Congressman, was charged with extortion, wire and mail fraud, money laundering, and conspiracy. The common element behind these multiple crimes was Renzi's negotiations over a land purchase with future potential beneficiaries of the purchase, Renzi's debtors and voters, to whom he promised legislative action that would make it easier for them to acquire land and then use it to repay debts they owed to Renzi.(58) After several grand juries heard his case, Renzi filed for interlocutory appeal in the Ninth Circuit Court, requesting an end to further trials and exclusion of evidence acquired in investigations against him. Renzi argued that the Clause bars further trials since land negotiations were legislative acts. Further, relying entirely on Rayburn, Renzi claimed that documents related to land negotiations are covered by legislative evidentiary and nondisclosure privilege.

Strongly disagreeing with Renzi, the Ninth Circuit held that the Clause does not aim to protect only legislators, but also to curb the decline of public confidence that is inevitable once bribery and corruption of legislators occurs. However that may be, the land negotiations, according to the Court, were not legislative acts but promises that, in light of Helstoski, the Clause does not protect.(59) Furthermore, after an extensive discussion of case law, the Ninth Circuit Court found no grounds for absolute nondisclosure privilege in criminal investigation and trial, the type which the D.C. Circuit Court had transferred from a

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(56) See ibid., 1645–47, and Case Comment, "Constitutional Law-Legislative Privilege-D.C. Circuit Holds That FBI Search of Congressional Office Violated Speech or Debate Clause," Harvard Law Review 121 (2008): 915, 918.

(57) *United States v. Renzi* 651 F.3d 1012 (9th Cir. 2011).

(58) Ibid., 1016-1018. For a detailed discussion of facts and procedural history in Renzi, see Green, "United States v. Renzi," 497–99.

(59) *Renzi*, 1034, 1038–39 (citing Helstoski , 487, 490) .

civil context in Brown to apply in a criminal context in Rayburn.[60]

The decision in Renzi is sustainable in light of Helstoski, but more difficult to defend if Helstoski is read together with Johnson and Brewster. In Renzi, Congressman Renzi eventually decided not to create legislation for complex reasons. But these reasons were also motivation for not legislating, and non-legislation is a form of negative legislative act with some legislative motivation for doing so. Hence, if there should be no inquiry into the motivation for legislation (as Johnson and Brewster repeatedly state), then such a prohibition should encompass negative, as well as positive, legislative acts. The same goes for the evidentiary and nondisclosure privilege (if recognized). There is no principled difference between legislative material showing motivation for legislating and not legislating – both are legislative materials.

The Supreme Court denied Renzi's petition for writ of certiorari,[61] leaving questions on the exact scope of legislative privilege open for a debate that is ongoing to the present day. Given the split in legal reasoning and holdings over legislative privilege between circuits, it will probably have to clarify its meaning and scope at some point. As I show in Part 2.3 below, it is unlikely that it will proclaim the end of the era of legislative privilege. For strategic reasons, it is more realistic to expect it to entrench the already won-over privilege of the judiciary to be an ultimate arbiter of the nature of legislative acts and process and the content of the legislative privilege and immunity. The exact shape of judicial delineations of legislative immunity and privilege will be more dependent upon what is at stake in a given case and the court's strategic considerations than upon some consistent principled approach.

2.3. Strategically uncertain interpretation and institutional repositioning of courts

On the level of constitutional and supreme courts, judicial interpreta-

(60) Ibid., 1039 ("In sum, the very fact that the Court has reviewed "legislative act" evidence on countless occasions - and considered cases in which such evidence has been disclosed to the Executive with nary an eyebrow raised as to the disclosure – demonstrates that the Clause does not incorporate a non-disclosure as to any branch."), internal citations omitted.

(61) "Renzi v. United States," SCOTUSblog, accessed July 4, 2016, http://www.scotusblog.com/case-files/cases/renzi-v-united-states/.

tion is often about deciding who will be deciding, with every new decision changing the overall institutional equilibrium.[62] Since the early days, the judicial interpretation of the Constitution was a form a an unwritten, tacit amendment of the constitution, meaning that while constitutional text is rarely changed, in reality very different constitutions exist in different historical periods.[63] In the process of interpretation, by virtue of self-confirmatory bias, courts tend to find or proclaim themselves uniquely well positioned to change their minds and decide, in a new way, matters which they were not supposed to decide in the old way, and vice versa. This not-so-new story is also true for the judicial interpretation of legislative immunity. Notwithstanding that, historically speaking, legislative immunity certainly protected not only speeches and votes in Congress but also communication with voters ('political acts'), and no privilege prevented the executive or judiciary from inspecting legislative documents as evidence in criminal investigation and trials, after some judicial reinterpretation, we have now arrived at a new meaning.

Considering the historical development of the Clause and the cases discussed above, this 'new meaning' came about through a judicial production of at least two sources of strategically uncertain interpretation that produced parallel and contradictory lines of reasoning and outcomes for related questions. The overall result of these strategically uncertain interpretations appears to be a form of judicial balancing calculated toward simultaneously satisfying and frustrating legislative and executive ambitions and vices.[64] The first source of strategically uncertain interpretation dates back to Johnson but was amplified in

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(62)This is an underlying theme of the German Constitutional Court Kompetenz-Kompetenz doctrine, see Luigi Corrias, The Passivity of Law: Competence and Constitution in the European Court of Justice (Springer Science & Business Media, 2011), 23.

(63) See David A. Strauss, The Living Constitution, 1st edition (Oxford; New York: Oxford University Press, 2010), and for a discussion of judicial interpretation and other methods for de facto amending constitutions, see Tom Ginsburg and Rosalind Dixon, Comparative Constitutional Law (Edward Elgar Publishing, 2011), 98–100.

(64) What I refer to as strategically uncertain interpretation can also be described as a strategic adjudicative rhetoric that conceals and justifies ideological and other preferences, see Duncan Kennedy, "Strategizing Strategic Behavior in Legal Interpretation," Utah Law Review 1996 (1996): 785, and Richard A. Posner, How Judges Think (Harvard University Press, 2010), 230–68.

Brewster, Gravel and Helstoski, for several reasons. Firstly, distinctions between legislative and political acts, and between past and future legislative acts, appear arbitrary and contrary to a commonsense understanding of what constitutes the legislative process.(65) Secondly, since the prohibition of inquiring into motivation for legislative acts from Johnson was sustained, legislative and political acts cannot be distinguished between, since motivation for both is usually the same. Finally, in light of a prohibition of inquiry into motivation, the distinction between past and future legislative acts is unsustainable, since motivation cannot be temporally limited and what motivated past legislative acts can frequently turn into, or be inextricably connected to, motivation for future legislative act.

The second source of strategically uncertain interpretation was the extent of the legislative evidentiary and disclosure privilege. It has two problems. First, drawing a line between privileged and non-privileged legislative documents is not possible ex ante. Second, as Harrell shows, the original meaning of the Clause did not recognize the concept of legislative privilege or distinctions between privileged and unprivileged documents in criminal trial. It protected the legislator from being punished for legislative acts and granted a testimonial privilege, but never clearly prohibited the mention and use of legislative documents as evidence during an investigation and a criminal trial of legislators.(66) Harrell's historical account can be contested, just as any historical account can be, but it fits the structure of US Constitution. If the law enforcement and judiciary were to be barred from using legislative documents as evidence in investigation and criminal trials, the American constitutional regime would be refashioned from a system of coordinate branches into a system resembling what was, once upon a time, a system of parliamentary sovereignty in which courts could not take cognizance of the legislative work(67).

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(65) Number of lower courts decisions held that scope of legislative acts is broader than suggested by the Supreme Court. For overview of cases see Shenkman, "Talking About Speech or Debate," 351 and note 107.

(66) Harrell, "Restoring the Original Meaning of the Speech or Debate Clause," 385, 394–404.

(67) Decision in Johnson explicitly drew on parliamentary supremacy as one of the causes behind the Clause, see Johnson, 177-180. But, unlike the English parliamentary privilege, the Clause was meant to preserve legislative independence, not supremacy, see Brewster, 508.

Both lines of strategically uncertain interpretations were contrary to the history of legislative immunity and rested on consciously mistaken interpretation of various precedents. However this might be, it is simplistic to think that the US Supreme Court or lower courts were unaware of the history and scope of the Clause. Hence, an alternative, strategic explanation as to why courts reinterpreted and extended legislative immunity in this way should be entertained. It must be noted that after the Supreme Court invented the legislative evidentiary privilege in criminal trial in Johnson, in Gravel, Brewster and Helstoski, contrary to history of the Clause, it almost 'blank-checked' the (executive) prosecution of legislators and de facto allowed punishment for admittedly corrupt legislative acts using the artificial distinctions of past and future legislative acts and political acts. Johnson and its antecedent Rayburn, in other words, were a concession to legislators, since legislative privilege both prevented expression of executive hostility and potentially barred law enforcement from obtaining evidence crucial to proving corruption. Brewster and its progeny, on the other hand, was a feeble concession to the executive and recognition that legislative corruption is a fact to be reckoned with[(68)].

Such a compromise allows for the making of decisions that are equally frustrating for legislative and executive powers, and equally justified depending on what is at stake. Legislators cannot be punished for legislative acts and underlying motivations, but the evidence on motivation for legislative acts cannot be introduced in trial, since legislative documents are privileged. But that does not prevent prosecution for 'political acts' or future legislative acts, even if both ultimately entail judgment of the motivation for legislation, which has to be proven using non-privileged legislative documents whose separation from privileged documents is to be aided by the judiciary. This strategic uncertainty bordering upon randomness increased the liability of legislators and raised the evidentiary bar for proving that acts of legislators are indeed corrupt. In sum, despite historical coequality with the legislative

(68) For additional evidence that the US Supreme Court strategically adjusts its decisions to cater to both presidential and congressional preferences see Mario Bergara, Barak Richman, and Pablo T. Spiller, "Modeling Supreme Court Strategic Decision Making: The Congressional Constraint," Legislative Studies Quarterly 28, no. 2 (2003): 247–80.

branch, courts seem to have become the absolute arbiter of what 're-ally' constitutes legislative acts, processes and documents.

3. Corruption, judicial distrust and the separation of legislative and political process

Analyzing Johnson, Brewster and a number of later cases, three lines of arguments and one common policy reason for judicial limitations of legislative immunity emerge. Firstly, the Supreme Court drew a largely artificial distinction between past and future legislative and political acts, hence making legislative immunity applicable only within the rather narrow context of work within the Congress. Secondly, unlike in their pre-Brewster case law, the courts mostly found that legislative immunity does not always bar the executive and judicial oversight of the legislative work. On the contrary, it is a measure necessary for the protection of the legislative process against political corruption. Finally, legislators received a protection against potential abuse of charges of corruption in the form of judicial doctrine of legislative privilege applicable in criminal investigations and trials. As shown in Part 2 above, none of the three arguments are really consistent with the original understanding of the Clause or previous cases. As a matter of policy, they are a sign of growing judicial distrust of the political and democratic process as inherently corruptive and in need of separation from the legislative process for the purposes of securing institutional stability.(69)

As noted, although the interpretation of the original intent behind the Clause is surely open to some debate, the historical record favors its understanding as being preventive of any intrusion of the executive and judiciary into the even potentially corrupt business of legislators qua legislators, without extending protection for 'ordinary' crimes legislators might commit when acting in their private capacity. At the same time, it seems fairly certain that the Clause did not include expansive legislative evidentiary and disclosure privilege that prohibits legislative documents from being introduced as evidence in criminal trials or in-

(69) That judicial review is a form of distrust of democracy has been argued in a different context in John Ely, Democracy and Distrust: A Theory of Judicial Review, revised edition (Cambridge: Harvard University Press, 1980).

vestigations, but, given the separation of powers, this did not mean that the judiciary should rush itself into deciding on criminal culpability of legislators for potentially corrupt legislative acts.

The overall fidelity to this original understanding was present in pre-Johnson case law. The judicial restraint in the face of coequality and separation of branches was an expression of implicit trust that legislative immunity, an exception to a general rule of equality before law, would not be abused for purposes of political corruption. Post-Brewster, this trust seems to have been largely diminished. The judicial distrust now extends not only to legislators, but perhaps also to their voters and constituents and even the democratic process at large, which in the eyes of the judiciary seems to be considered as inherently prone to producing political corruption and jeopardizing institutional stability.

This relatively recent judicial distrust of legislative immunity as a mechanism which erodes the legislative and political process is understandable in light of political corruption being the most common example of the abuse of legislative immunity. Tentatively defined, political corruption is an illegitimate and non-transparent use of public powers for private gains.(70) It is theoretically distinguishable from ‘ordinary’ corruption offences (i.e. bribery, trading in influence, illicit enrichment, embezzlement), but, in practice, the two collide.(71) What makes political corruption committed under the cover of legislative immunity troubling is that it is a form of systemic distortion: de facto crime is being committed under the color of law and in purported furtherance of legislative goals. As J. Brandeis noted in Olmstead v. United States “If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”(72)

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(70) See Susan Rose-Ackerman, Corruption and Government: Causes, Consequences, and Reform (New York: Cambridge University Press, 1999), 91.

(71) Hoppe, “Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe,” 546–48.

(72) *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), overruled by *Katz v. United States*, 389 U.S. 347, 353 (1967).

However, preventing political corruption is difficult, for two reasons. The first, classical, reason is that zealous prosecution of political corruption jeopardizes legislative immunity and process. No rational legislator will commit themselves to free debate and voting if constantly aware that their words or votes can constitute a crime, since what constitutes corruption can mean almost anything from a true 'bribe' to lobbying for voters' interests. Under such conditions, the legislative process can be easily stifled. Furthermore, under conditions of increased prosecution of political corruption, different political blocs can take turns in prosecuting each other on charges of political corruption in an attempt to eliminate temporary political opposition, with all sides remaining equally corrupt and the aggregate result being an increase, rather than decrease, in corruption.

The second reason that political corruption is difficult to eradicate is that its recognition largely rests on social perceptions, which, in turn, obscures the causality between the corruption of legislators and the social acceptance and demand for corruption. The question of political corruption, in other words, is not how much of it there is – some level of political corruption probably exists everywhere – but whether a society perceives the level of political corruption as being an exception or a rule of political behavior.(73) As opinion polls show, in the US and almost universally around the world, the public is convinced that corruption is almost absolute in areas related to public works and construction, and believes that legislative immunity from prosecution supports such corruption.(74)

If the public perceives political corruption to be an acceptable behavior committed with impunity rather than an abominable exception, and the legislative immunity to be a shield under which this corruption is committed, the distrust of institutions can become contagious. Ensuing complacency and conformism will eventually corrupt not only legislators but their constituents and voters as well. At some point, it will be impossible to establish whether the immunity made the legislators

(73) Wigley, "Parliamentary Immunity: Protecting Democracy or Protecting Corruption?", 23 and note 1.

(74) See Gallup survey "Research - BPI - Bribe Payers Index 1999," accessed June 22, 2016, http://www.transparency.org/research/bpi/bpi_1999/0/. 3

corrupt or whether political corruption of legislators is present because of a high social demand and support for corruption amongst voters and the public.[75]

Once the corruption becomes systemic and the new ‘corrupt social contract’ is in place, those denied the benefits of corruption or unwilling to participate in it might find the situation intolerable and a cause for advocating systemic change. In times of severe financial and economic distress, perceived political corruption can become a ground for advocacy of overturn of the constitutional system in place, on the premise that the distribution of wealth and resources is unfair and brought about by corrupt means. Ironically, what follows from this analysis, is that the system might be totally corrupt yet durable, just as long as the distribution of corruption is ‘democratic’ (meaning proceeds of corruption are roughly accessible to everyone), and there exists no perception that the system is corrupt or, at least, corrupt in an unfair way (as strange as that might sound). As the aphorism goes, people want either less corruption, or more chance to participate in it.[76]

But hardly any system can sustain such widespread complacency regarding corruption over a long period of time without breaking down at some point. It is along these lines that we can interpret the admittedly artificial separation of legislative and political acts advanced in Brewster and later case law. The perception that the communication and connections between legislators and their constituents is corrosive and leads to political corruption that can threaten institutional stability justified, in the mind of the judiciary, executive and judicial oversight and limitations of legislative immunity, even when this oversight almost obviously violated the historical understanding of legislative immunity. At the same time, the legislative privilege in Johnson,

(75) As Entin, drawing on Emile Durkheim, notes, one reason why corruption cannot be fully routed out is that it has at least one socially useful function, that of building the sense of community of public anger against the corrupt ones, see Jonathan Entin, “Responding to Political Corruption: Some Institutional Considerations,” Loyola University Chicago Law Journal 42, no. 2 (January 1, 2011): 275–76. If that is so, the absence of public anger should be proof that either the community does not exist or that corruption is completely acceptable, or both.

(76) Aphorism by Ashley Brilliant cited in Paul Bowden, Telling It Like It Is (Paul Bowden, 2011), 65.

Brown and Rayburn was a parallel line enabling the judiciary to curb potential executive ambition to use charges of corruption as a tool of political pressure.

4. Capabilities and enabling conditions as limits of judicial limitations of legislative immunity as a cure for political corruption

As elsewhere, legislative immunity in the US was developed against a set of rather unique historical circumstances. Its English predecessor, the 1689 Bill of Rights' Article 9, was meant to protect parliamentarians against the Crown(77) and was, to some extent, an extension of parliamentary sovereignty as the realm in which Parliament governs supreme and therefore has a 'privilege' or immunity against other bodies interfering with its business.(78) Background differences produced different justifications for the same results. In the American example, immunity protected legislators as representatives of voters against the hostility of the executive and judiciary; hence the judicial intrusion into legislative affairs was ill-advised. In the UK, the historically dominant paradigm was the 'Blackstonian' one: parliamentary sovereignty bars courts from deciding on parliamentary affairs even if what occurs in the process of debating or voting in Parliament is corrupt by ordinary standards.(79) Criminal acts or ordinary crimes unrelated to legislative or

(77) William Blackstone, Commentaries on the Laws of England (1765-1769), Book 1, Chapter 2: Of The Parliament, accessed July 7, 2016, http://lonang.com/library/reference/blackstone-commentaries-law- england/bla-102/ ("Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown."), internal citations omitted.

(78) On parliamentary sovereignty, see Albert V. Dicey, Introduction to the Study of the Law of the Constitution, ed. Roger E. Michener, 8th revised edition (Indianapolis: Liberty Fund Inc, 1982), 4, and on the law of parliament see Blackstone, Commentaries on the Laws of England (1765-1769), Book 1, Chapter 2: Of The Parliament, ("...the whole of the law and custom of parliament has its original from this one maxim; that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere."), internal citations omitted.

(79) On the 'Blackstonian' paradigm, see Chafetz, Democracy's Privileged Few, 27 et seq. In Bradlaugh v. Gosset Stephen J. confirmed yet again that "nothing said in Parliament by a Member, as such, can be, treated as an offence by the ordinary court," see Bradlaugh v. Gosset (1884) 12 QBD 283-284.

parliamentary affairs were unprotected in both countries and fell under the jurisdiction of courts.[80]

The strong limitations on court intrusion into legislative immunity are now largely a matter of history. Through a gradual process that has been in place for over two centuries, decisions on what exactly constitutes parliamentary privilege in the UK have now been transferred into the hands of the courts,[81] a process which the US courts seem to have almost mimicked. As I have shown in Part 2 above, Johnson and post-1972 cases like Brewster, Brown, Rayburn and Renzi were not only about legislative immunity but also about who decides on what legislative immunity is and how far it extends. Using the method of strategically uncertain interpretation, the US courts have assumed the position of final arbiters of what constitutes legislative immunity. Under more complicated circumstances, and against a different institutional background, the UK courts have been doing exactly the same in a very careful fashion since early cases like Burdett and Stockdale,[82] establishing themselves as the final arbiters of the meaning of parliamentary privilege in the late 20th and early 21st centuries.[83] The important decision of the UK Supreme Court in 2010, R v. Chaytor and others,[84] could potentially be considered a culmination of this process.

(80) See Gravel, 626, and Bradlaugh, 283-284. After Parliamentary Privilege Act 1770 and during the 19th century, the privilege of freedom from arrest was effectively marginalized on the theory that no parliamentary privilege should be allowed to become a danger to public interest, see Scott P. Boylan and Catherine L. Newcombe, "Parliamentary Immunity: A Comparison Between Established Democracies and Russia: A Crisis of Democratic Legitimacy for Russia," Journal of International Legal Studies 3 (1997): 209–12.

(81) The situation appears more like friendly settlement, since the Parliament does not claim supremacy nor deny the authority of courts to oversee limits of parliamentary privilege, while courts recognize their own limits and respect the core of exclusive parliamentary jurisdiction. See Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 24th ed. (London: LexisNexis, 2011), 281.

(82) For a detailed overview of 19th century cases, see ibid., 287–89, and Burdett v. Abbott (1811) 104 ER 501 and Stockdale v. Hansard (1839) 112 ER 1112.

(83) See overview of cases in May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 291–302.

(84) *R v. Chaytor and others* (2010) UKSC 52. For a detailed discussion of Chaytor see Hardt, "Parliamentary Immunity," 91–92 and accompanying footnotes.

Chaytor was important for two reasons. Firstly, the UK Supreme Court, citing Brewster,[85] held that parliamentary privilege and exclusive cognizance do not bar courts from deciding upon de facto criminal charges related to (administrative) matters of abuse of expenses that parliamentarians are entitled to in the course of their parliamentary work. Secondly, in the course of judicial proceedings, the House of Commons Committee on Privilege only officially confirmed what was a fact for a while, explicitly stating that "The decision as to what constitutes a 'proceeding in Parliament', and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House".[86] Hence, parliamentary sovereignty is formally there, but corrupt parliamentary acts are squarely within the reach of courts. This left some commentators wondering whether Chaytor can be read as the British Marbury v Madison.[87]

This short excursion was meant as an illustration that judicial interpretation of what constitutes legislative immunity has been developing along similar lines in countries that might share a lot in common but have very different constitutional traditions, and that this process has accelerated in the first decades of the 21st century. Parallel trends are noted in other countries.[88] Overall, there are good reasons to think that judicial limitations of legislative immunity are here to stay. The main reason for this, as already argued, is the growing perception that legislative immunity enables political corruption. The critical question then is the following: Is the judiciary really well-situated to prevent po-

(85) *Chaytor*, paras 38-40.

(86) *Chaytor*, para 15.

(87) See Stuart Lakin, "Parliamentary Privilege, Parliamentary Sovereignty, and Constitutional Principle," UK Constitutional Law Association, February 11, 2013, https://ukconstitutionallaw.org/2013/02/11/stuart-lakin-parliamentary-privilege-parliamentary-sovereignty-and-constitutional-principle/ and a discussion of the principle of impartiality in the text infra. Differences between the 'old' UK political constitutionalism and parliamentary sovereignty of Dicey et alia type, and the 'new' legal constitutionalism are not only due to judicial activity but also the Human Rights Act of 1998, Devolution Acts after 1998, and Constitutional Reform Act of 2005, see Erin Delaney, "Judiciary Rising: Constitutional Change in the United Kingdom," Northwestern University Law Review 108, no. 2 (2014): 553–72.

(88) See, generally, European Parliament Office for Promotion of Parliamentary Democracy, "Non-Liable? Inviolable? Untouchable?. The Challenge of Parliamentary Immunities: An Overview."

litical corruption through continuous (re)interpretations of the borders and content of legislative immunity? And, more generally, is expansive judicial interpretation and limitation of legislative immunity such a great idea for everyone? There are no straightforward answers to this question, and the remaining part of this section briefly discusses and balances a number of arguments both for and against.

4.1.In favor of judicial interpretation and limitation of legislative immunity

The first argument in favor of the judiciary deciding on legislative immunity is that it promotes principled impartiality and conveys the impression of equality before the law, for the following reasons: Above, it was suggested that the corrosive effect of political corruption is a substantive reason why legislative immunity should be limited. However, traditionally, it was the legislative bodies that decided upon their own immunity. In countries that recognize parliamentary inviolability, the authorization of parliament is required before parliamentarians may be prosecuted in the courts for non-legislative activity. Members of legislative bodies generally enjoy absolute immunity against prosecution for speeches and votes even when these lead to corrupt legislative acts, unless the immunity is temporally limited or the parliament lifts immunity or disciplines the member.(89)

Because of considerations of parliamentary or popular sovereignty or the separation of powers, the non-accountability and inviolability were deemed acceptable exceptions to the principle of impartiality expressed in a maxim that none should be a judge in their own case (nemo iudex in causa sua).(90) Yet this also placed legislative

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(89) Wigley, “Parliamentary Immunity: Protecting Democracy or Protecting Corruption?”, 575–77.

(90) For an extensive discussion and criticism of the principle of impartiality see Adrian Vermeule, “Contra Nemo Iudex in Sua Causa: The Limits of Impartiality,” Yale Law Journal 122 (2012): 384. The principle was used as an implicit justification for development of constitutional review, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”), and as a theoretical argument in favor of checks and balances by James Madison, see ibid., 414–15, and accompanying notes.

bodies in a position to protect their individual members even against well-founded charges of corruption, or to be more willing to discipline politically-unpopular members or simply turn them over to the courts on false charges of corruption.[91] Whenever this has occurred, the legislative bodies appeared either to be using immunity to favor corruption, or to be using charges of corruption as a tool for destroying political opponents. To prevent this, and to convey an impression that all are equal and none is above the law, it seems useful to transfer decisions upon such matters of legislative immunity from legislative bodies to courts.

The second argument is that, far from thwarting electoral will and a system of periodical political accountability through elections, judicial limitation of legislative immunity is in fact strengthening, promoting institutional stability. General weaknesses of democracies with periodical elections are twofold: In systems with political parties, legislators are unconcerned with the democratic legitimacy and voters in the first place, since their interests and allegiances are with political parties who make appointments.[92] The second problem is that what happens between elections is more important than the elections themselves. As Joseph Schumpeter noted, you cannot fool all of the people all of the time, but you can fool enough people for long enough to do irreversible damage.[93] This is another way of saying that in order to have periodical electoral accountability at the end of the governing period there should be something left to account for and someone doing the accounting. Individual legislators should not be allowed to irreparably destroy public wealth over the course of four years, or longer, unhindered by the prospect of criminal prosecution after their term is over, and without worrying about the opinions of voters who, in the first place, cast their votes for political parties and not the individuals.

(91) Wigley, “Parliamentary Immunity: Protecting Democracy or Protecting Corruption?”, 575–77.

(92) Simon Wigley, “Parliamentary Immunity in Democratizing Countries: The Case of Turkey,” Human Rights Quarterly 31, no. 3 (2009): 587–88, doi:10.1353/hrq.0.0087.

(93) Joseph A. Schumpeter, Capitalism, Socialism and Democracy (New York: Harper & Row, 1950), 264, cited in Stephen Holmes, “Goodbye Future?”, 2012, http://www.eurozine.com/articles/article_2012-11-21-holmes-en.html#footNote4.

To summarize, the judicial limitation of legislative immunity can improve institutional stability and legislative accountability in real time, quite apart from and in addition to periodic elections when allegations of political corruption are not taken seriously, as they are considered a part of the slanderous political battle. Removal of the process of deciding on legislative immunity outside of the legislative body and beyond periodical political accountability promotes principled impartiality and, by extension, equality before the law and institutional stability. Principled impartiality defies social perceptions that legislative immunity is used as a cover for corruption that places legislators beyond the reach of law, a perception that can become widespread when legislative bodies, instead of any other bodies, decide on charges of corruption against their own members. Defying the social perception that corruption is a rule rather than exception, and promoting the impression (and it may be solely that) that legislative immunity is not a cover for corruption, as already argued, is a first step toward the containment of political corruption.

4.2. Against judicial limitation of legislative immunity

Arguments in favor of judicial interpretation and limitation of legislative immunity might be persuasive, but they are largely theoretical and for that reason might be irrelevant. Arguments against it, on the other hand, are largely practical and have more bite. For a long period of time, empirical legal studies, law and economics, and sociology of law found that the influence of courts is very limited, particularly when it comes to contentious social issues.(94) Given how it affects the lives of many and attracts public attention, political or systemic corruption under the guise of legislative immunity is one such contentious social issue. Here I will briefly consider only three interrelated reasons why the influence of courts in such cases might be limited: institutional, procedural decision-making, and communicative.

On an institutional side, courts are generally more constrained than usually recognized, for external (e.g. reliance for budget and enforcement on intermediaries and other branches of government) and inter-

(94) The most famous expression of this skeptical attitude can be found in Gerald N. Rosenberg, The Hollow Hope. Can Courts Bring About Social Change? 2nd edition (Chicago: University Of Chicago Press, 2008).

nal (human resource issues, errors, opportunism, conformism, group thinking, etc.) reasons. As a result, they tend to be invested in the status quo and protect the short-term interests of themselves and those temporarily in power,[95] and are at best marginally important or important only when cooperating with other government bodies.96 The exact positioning of a judicial branch, of course, differs from country to country, but these findings do not give much hope that courts are well enough positioned to prevent high-level political corruption by challenging legislative immunity.

On a procedural decision-making side, things are even more complicated. Courts make decisions one case at a time, and are at times slow to decide cases of political corruption, whereas at other times they seem to be too quick and all too willing to judge.[97] Further, judges, despite vows to impartially apply the law, are human beings with their own ideological and moral biases, functioning within personal and social networks. And since most judicial decisions are, by definition, mostly one-sided (except for those Solomonic judgments that are supposed to equally dissatisfy everyone, and for that precise reason end up being practically irrelevant), any decision will naturally cause some dissatisfaction. These considerations tilt in favor of thinking that under conditions of heated social frictions or widespread social struggle over a perceived unfairness of distribution of resources caused in part by political corruption, court decisions either limiting or extending legislative immunity are more likely to exacerbate than to resolve tensions and improve institutional stability. No wonder in such situations courts seek multiple forms of procedural getaways to avoid deciding on merits.

(95) See Eyal Benvenisti, “Margin of Appreciation, Consensus and Universal Standards,” New York University Journal of International Law & Politics 31, no. 4 (Summer 1999): 851, and Michael McCann, “Law and Social Movements,” in The Blackwell Companion to Law and Society, ed. Austin Sarat (Blackwell, 2004), 507.

(96) Malcolm M. Feeley, “Hollow Hopes, Flypaper, and Metaphors,” Law & Social Inquiry 17 (1992): 745.

(97) Cf. Mark Galanter, “The Radiating Effects of Courts,” in Empirical Theories About Courts, ed. Keith O. Boyum and Lynn Mather, digital edition (New York: Quid Pro Books, 2015), 119, noting that courts resolve only a small fraction of all disputes, and even then at an uneven pace.

Finally, communicative reasons are also relevant. Trials and prosecutions of legislators for political corruption are matters of public communication, since, as mentioned, the acknowledgment and curtailing of political corruption depends on social perceptions. Social perceptions are also relevant for courts, since courts are de facto ‘minority institutions’ whose status and wellbeing, given the scarce resources available to them relative to other branches of government, are more dependent on implicit social approval and a perception that they are, on the whole, neutral and fair. Once legislative immunity becomes open to judicial scrutiny, political opponents can begin to publicly throw (‘communicate’) (un)founded charges of corruption at one another, or even initiate politically-motivated criminal proceedings (fumus persecutionis).[98] Facing this unpleasant situation, courts frequently have trouble in dealing with unwanted public attention and explaining their decisions to their audience and to themselves.[99] Failure to explain important procedural and substantive decisions in a coherent way is the surest way for a court to appear arbitrary or, even worse, biased, and arbitrary reasoning and decision-making breeds resentment and undermines voluntary compliance with courts’ decisions.[100] This is why trials of political corruption (or any trials that capture public attention) frequently end in ‘public relations disasters’, leaving a larger audience believing that the process was a rigged travesty of justice and that courts are mere tools in the political struggle.[101]

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(98) The Council of Europe Parliamentary Assembly considers fumus persecutionis, or politically motivated criminal proceedings (mostly in context of inviolability), as “…the presumption that a judicial action has been brought with the intention of causing the member political damage. There would be suspicions of fumus persecutionis when proceedings are based on anonymous accusations, requests made a long time after the alleged facts or when a case involving a parliamentarian is handled in a different way from how it would have been investigated against an ordinary citizen.” See Liliana Palihovici, “Parliamentary Immunity: Challenges to the Scope of the Privileges and Immunities Enjoyed by Members of the Parliamentary Assembly Doc. 14076” (Council of Europe Parliamentary Assembly, 2016), 17 para 74 et seq, http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=22801&lang=2.

(99) Galanter, “The Radiating Effects of Courts,” 126.

(100) On procedural justice as a condition for voluntary compliance with legal authority, see Tom R. Tyler, Why People Obey the Law, (Princeton, N.J: Princeton University Press, 2006), 3 and 175 et. seq.

(101) Cf. Shenkman, “Talking About Speech or Debate,” 421.

4.3. In absence of enabling conditions, judicial limitation of legislative immunity is ill- advised

When arguments in favor of a certain position or practice are theoretical and arguments against it practical, the safest conclusion is that no universal prescription is possible and that the decision will be dependent upon the context. And so is the case with arguments in favor or against judicial interpretation and limitation of legislative immunity. There are manifold pragmatic considerations against the idea that courts are well positioned to limit legislative immunity without harmful effects. On the other hand, if there are idealistic ambitions and a will to achieve impartiality and improve legislative accountability in real time and prevent the use of legislative immunity as a cover for political corruption, then, theoretically at least, courts can be helpful, although legislators can do the same unaided by anyone. Whether that will happen or not eventually depends on the context, and hinges on social background, needs, values and aspirations. Judging by the worldwide trend in regard to limitations of legislative immunity by various means, including judicial ones, many societies have recognized the need, and the practical question is whether they have the capabilities to rip off the theoretical benefits of judicial interpretations and limitations of legislative immunity.

For judicial interpretations and limitations of legislative immunity to be capable of producing the promised benevolent effects, the presence or creation of at least three enabling conditions seems necessary. The first and second such conditions are technical and infrastructural: In order to deal with sensitive issues such as legislative immunity (and political process), it is necessary to have a well organized and capable judiciary, with secure institutional positioning in terms of not being at odds with either branch of government, and commanding voluntary compliance by being perceived as neutral and trustworthy. This type of judiciary is hardly available everywhere. A second condition is the presence of an acceptance of the concept of judicial interpretations and limitations of legislative immunity within the local institutional and legal system. This is not omnipresent, and where it is not a part of the background, the whole matter is better left as it is until the moment the need for change is identified.

The third condition is more complicated and even perplexing. It is not at all obvious that all societies share aspirations for values of impartiality and accountability promoted by, among other institutions, judiciary engaging in limitations of legislative immunity. This is because the protection of these values rests upon a fundamental institutional and social agreement, unavailable in most societies, that self-constraint and, somewhat paradoxically, actions contrary to self-interest and urge for cheap 'victories' and revenge are necessary for institutions, and the social system as a whole, to survive.(102) Constitutionalism requires losers in the judicial (and by extension, political) battle to suffer losses peacefully and voluntarily, whereas the winners, rather than obliterating their opponents, are required to be prudent in sanctioning and generous enough to compensate overall losers and provide them with a soft landing.(103) Unless the creation and enforcement of judicial decisions is with measure and those on the losing side of such a decision are willing to accept their loss without resorting to rampage, judicial decisions are of little value, and in the end do more harm than good.

The overall presence of these enabling conditions might be the fundamental difference between cases of judicial interpretation and limitations of legislative immunity that I discussed in this paper and similar cases in other parts of the world. To illustrate, when in Chaytor parliamentarians accused of false accounting for parliamentary expenses summoned parliamentary privilege to their defense, the House of Commons did not rush to their aid. Instead, it merely stated that the "decision as to what constitutes a 'proceeding in Parliament', and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House",(104) signaling its continued consent to being limited by a (newly (re)formed) court without engaging in institutional retaliation. Similarly, Congress was not destroyed by Senator Brewster's

(102) That a difference between progressing and stagnating societies is that in the former institutions and individuals exercise self-constraint even when they could profit from rule-breaking and get away with it, is an implicit theme of new institutional economics, see Douglass C. North, Institutions, Institutional Change and Economic Performance, 2nd edition (Cambridge ; New York: Cambridge University Press, 1990), 4.

(103) Cf. Holmes, "Goodbye Future?", arguing that a similar attitude, even if ultimately dissatisfying for those longing for justice and change, is required for a democracy to subsist.

(104) *Chaytor*, para 15.

political party and voters after his prosecution, nor were Congressman Renzi's voters obliterated out of existence. In short, the benevolent effects of judicial limitation of legislative immunity rest on a legislator's explicit or implicit consent and acceptance of limitation. Without this, and other enabling social and institutional conditions, judicial interpretation and limitation of legislative immunity is unlikely to be a cure for political corruption(105).

Conclusion

Through judicial interpretation of the Speech or Debate Clause, legislative immunity evolved from being a tool of popular sovereignty to being a tool for the preservation of institutional stability under control of the courts. The main justification for this was the prevention of political corruption and protection of the 'true nature' of the legislative process, which made the process clearly incongruous to the original purpose behind legislative immunity. Courts seized the opportunity, and strategically created parallel lines of judicial interpretation so as to have a final say on the meaning and limits of legislative immunity, simultaneously frustrating and satisfying the executive and legislative ambitions and vices. And, as shown, there remain grave uncertainties as to the exact limits and content of legislative immunity and legislative evidentiary and disclosure privilege.

The above-described process propelled by US courts was similar to the treatment of parliamentary privilege by the UK courts. In both cases, given relatively favorable background institutional and social conditions and legislators' explicit or implicit consent and acceptance of limitation, the process was largely successful from the point of view of the judiciary. In the absence of these conditions, the judicial limitation of legislative immunity would be a bad medicine for political corruption.

(105) For a similar argument that in the absence of a strong legal system parliamentary immunity in democratizing countries should not be circumscribed and subject to judicial limitations, see Wigley, "Parliamentary Immunity in Democratizing Countries."

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